

SERVICE DATE – MAY 31, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36588

VIRGINIA PASSENGER RAIL AUTHORITY—
ACQUISITION AND OPERATION OF CERTAIN ASSETS OF NORFOLK SOUTHERN
RAILWAY COMPANY IN MONTGOMERY AND ROANOKE COUNTIES,
AND THE CITIES OF SALEM AND ROANOKE, VIRGINIA

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, equipment, fixtures, and 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: May 31, 2022

In this decision, the Board dismisses a petition for exemption filed by the Commonwealth of Virginia, a noncarrier acting by and through its Virginia Passenger Rail Authority (VPRA), to acquire certain real property, equipment, fixtures, and improvements owned by Norfolk Southern Railway Company (NSR) and to obtain a passenger rail easement on an 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 physical assets of an NSR rail 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 separate passenger rail easement does not require Board approval under § 10901. Therefore, the transaction does not require Board authority.

BACKGROUND

On February 16, 2022, 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) certain real property, equipment, fixtures, and improvements on a rail line located between a point near the

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).

Salem Crossovers at or about MP V-250.9304 in the City of Salem, and MP V-279.0 in Merrimac (Christiansburg), all in the Commonwealth of Virginia (the Line); and (2) an easement for passenger rail purposes between the passenger platform in the City of Roanoke and a connection with the Line in the City of Salem (Passenger Rail Easement Area). Concurrently, 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 Comprehensive Rail Agreement (CRA) attached as Exhibit A to the motion,² VPRA's acquisition of real property, equipment, fixtures, and improvements on the Line would occur by quitclaim deed. (Mot. to Dismiss, Ex. A art. 5.3.) The terms of the acquisition, hereinafter referred to as the "V-Line Sale,"³ would reserve for NSR an "exclusive, perpetual, irrevocable, assignable, divisible, licensable and transferable" easement to provide freight railroad service on the Line. (*Id.*) NSR would have the right to provide freight service on the Line at levels it deems to be appropriate, (*id.* at 4, Ex. A art. 8.3(c)), and VPRA would only provide passenger service on the Line at frequencies that do not unreasonably interfere with NSR's freight common carrier obligations, (*id.* at 3-4, Ex. A art. 8.1(a)(iii)).⁴ The CRA also gives 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 art. 8.3(d).) VPRA states that NSR would continue to dispatch the Line⁵ and would give preference to passenger rail service, subject to the limitation that passenger rail service may not unreasonably interfere with freight rail service. (*Id.* at 5.)

VPRA states that, between the effective date of the CRA and the commencement of passenger rail service on the Line (Transition Period), NSR would perform maintenance on the Line but VPRA would have the option to hire a third party to perform maintenance. (*Id.*) VPRA would approve maintenance plans and pay for maintenance costs, but VPRA could not withhold approval if NSR were to determine that maintenance is required to fulfill its common carrier obligations or to ensure that the Line meets Federal Railroad Administration (FRA) track classification approved by VPRA. (*Id.*, Ex. A art. 12.1(c)-(d).) After the Transition 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. (*Id.*, Ex. A art. 12.2(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 art. 14.1.) Additionally, VPRA and NSR

² VPRA filed an unredacted version of the CRA under seal.

³ The CRA refers to the acquisition as "Conveyance of Purchased V-Line." (Mot. to Dismiss, Ex. A art. 5.3.) VPRA states that the "Purchased V-Line" identified in the CRA is equivalent to the Line described in VPRA's motion and petition. (*Id.* at 4 n.7.)

⁴ The CRA allows VPRA to operate "any passenger rail service" over the Line, including "Intercity Passenger Rail Service, Excursion Passenger Rail Service, and Commuter Rail Service." (Mot. to Dismiss, Ex. A. art 8.1(a)(iii); see also id., Ex. A at A-3, A-5, A-7 (defining those terms).)

⁵ VPRA states that NSR would dispatch the Line unless or until the Line is sold or removed from service, whereupon "a replacement party will be mutually agreed upon." (Mot. to Dismiss 5.)

would form a “Performance Managers Committee,” comprising at least two representatives from each party, which “will meet quarterly to discuss and resolve issues.” (*Id.* at 6.)

In a separate deed of easement, NSR would grant VPRA a passenger rail easement over the Passenger Rail Easement Area.⁶ (*Id.*, Ex. A art. 5.2.) The deed of easement would not transfer any rights other than a non-exclusive right to perform passenger rail operations, which may be performed by VPRA, parties providing passenger rail service under an agreement with VPRA, and the National Railroad Passenger Corporation (Amtrak). (*Id.* at 6-7.) Such passenger rail service would be subject to NSR operating rules. (*Id.* at 7, Ex. A art. 8.1(a)(ii).) NSR “will continue to own, control, dispatch and maintain the Passenger Rail Easement Area.” (*Id.* at 7.) Although passenger rail service would receive dispatching preference, VPRA states that “dispatching issues may be raised by the Performance Managers Committee.” (*Id.*)

VPRA seeks expedited consideration and requests that the Board grant the motion to dismiss in a decision effective on or before May 31, 2022, to allow the parties to close on the proposed transaction on June 30, 2022. (*Id.* at 11.)

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 the passenger rail easement under the proposed transaction. The Board finds that the transaction as proposed does not require Board approval.⁷

⁶ The CRA refers to the Passenger Rail Easement Area as the “Roanoke Easement Area.” (Mot. to Dismiss, Ex. A art. 5.2.)

⁷ The Board notes that although we find 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.—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.

V-Line Sale. 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.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 4-5.

Here, the Board finds that, under State of Maine, the proposed V-Line Sale transaction 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. (Mot. to Dismiss, Ex. A art. 5.3(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 art. 27.1 (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 art. 5.4; see also id., Ex. A arts. 8.1(a)(iii), 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 Mass. Dep’t of Transp., 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. (Mot. to Dismiss, Ex. A art. 8.1(a)(iii).) The CRA also states that NSR shall have the right to perform freight rail service at a level that NSR deems to be appropriate, (id., Ex. A art. 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 art. 8.3(d)).

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).

In addition, NSR would continue to perform maintenance during the Transition Period. Although maintenance plans would be subject to VPRA's approval and paid for by VPRA, VPRA cannot 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 art. 12.1(c)-(d).) After the Transition Period, VPRA would be responsible for maintenance of the Line. However, this responsibility, by itself, does not result in a transfer of common carrier rights or obligations to VPRA. *See 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 rerailling or wrecking service. (Mot. to Dismiss 10, Ex. A arts. 12.2(b)-(c), 14.1.) Through the Performance Managers Committee, NSR would also be able to discuss with VPRA any issues relating to operations on the Line. (*Id.* at 6, Ex. A art. 19.1.) These CRA provisions will ensure that the Line is maintained to standards required for NSR to fulfill its common carrier freight obligation. *See 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”).

As to dispatching, the Board has stated that “[d]ispatching control has less importance in its own right than it has as a means of enforcing the service priorities” agreed upon by the parties. *Id.* at 4 (explaining that, if the operating agreement 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 Commonwealth of Va.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, FD 36441, slip op. at 4 (STB served Dec. 14, 2020). Under the CRA, NSR would continue to dispatch the Line, but it would give preference to passenger rail service. (Mot. to Dismiss 5, Ex. A art. 11.1.) This dispatching preference “is subject to the limitation that passenger rail service may not unreasonably interfere with freight service.” (*Id.*, Ex. A art. 8.1(a)(iii).) These arrangements show that VPRA would not be able to unduly interfere with common carrier freight service on the Line.

Based on the record,⁸ the Board finds that the proposed V-Line Sale 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

⁸ Along with the CRA, VPRA submitted several draft documents, including a quitclaim deed for the V-Line Sale and a deed of easement for the Passenger Rail Easement Area. (Mot. to Dismiss, Ex. C.) 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.*, FD 35312, slip op. at 15. VPRA will be directed to submit final versions of these documents once they are executed. *See id.*

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. Accordingly, as to the V-Line Sale, the Board will grant VPRA's motion to dismiss the petition for exemption.

Passenger Rail Easement Area. In the Passenger Rail Easement Area, NSR would transfer to VPRA only "the non-exclusive right to perform passenger rail operations,"⁹ subject to NSR operating rules. (Mot. to Dismiss 6-7.) NSR would continue to "own, control, dispatch and maintain the Passenger Rail Easement Area." (*Id.* at 7.)

VPRA references State of Maine in support of its argument that grant of the passenger rail easement to VPRA also will not require Board authorization. (*Id.* at 10-11.) However, State of Maine does not apply to this aspect of the transaction. As explained above, that doctrine applies where a state or other public entity seeks to acquire "the physical assets of a rail line." Mass. Dep't of Transp., FD 35312, slip op. at 5-6; see State of Maine, 8 I.C.C.2d at 836-37. Because VPRA would not be acquiring an ownership interest in the physical assets of a rail line in the Passenger Rail Easement Area, this aspect of the proposed transaction is distinguishable from the cases analyzed under State of Maine.

Nonetheless, the principles underlying the original State of Maine decision support the Board's finding that VPRA's proposed acquisition of a passenger rail easement in the Passenger Rail Easement Area does not require Board approval. In this case, just as in State of Maine, "no common carrier rights or obligations are being transferred." State of Maine, 8 I.C.C.2d at 837. Rather, under the proposed transaction, NSR would retain its rights and obligations as to rail freight transportation, and the CRA shows that VPRA would not conduct freight operations. (Mot. to Dismiss 6, Ex. A art. 5.2); see Mass. Dep't of Transp., FD 35312, slip op. at 7. The CRA also protects NSR against unreasonable interference with its common carrier freight service. (See Mot. to Dismiss 7, Ex. A art. 8.1(a)(ii).) NSR "will continue to own, control,

⁹ Specifically, VPRA states that the rail line in the Passenger Rail Easement Area would accommodate "Extended First Frequency" and "Extended Second Frequency," which are defined in the CRA as "the extension of the Baseline First Frequency west of Roanoke, Virginia to the station to be constructed in New River Valley of Virginia," and "the extension of the Baseline Second Frequency west of Roanoke, Virginia to the station to be constructed in the New River Valley of Virginia," respectively. (Mot. to Dismiss 7, Ex. A at A-6.) The CRA defines the "Baseline First Frequency" as the "daily passenger rail round trip operated by Amtrak, already in operation . . . between Alexandria, Virginia and the passenger platform at Roanoke, Virginia," and the "Baseline Second Frequency" as "a daily passenger rail round trip between Alexandria, Virginia and the passenger platform at Roanoke, Virginia, which round trip is in addition to, and not in the place of, the Baseline First Frequency." (Mot. to Dismiss, Ex. A at A-1, A-2.) The CRA provides that excursion service and the "Third Frequency" are permitted in the Passenger Rail Easement Area if NSR and VPRA agree that they do not interfere with NSR's common carrier service. (*Id.*, Ex. A at A-14 (defining "Third Frequency" as "a daily passenger rail round trip between the passenger platform in Roanoke, Virginia and the station to be constructed in the vicinity of Christiansburg, Virginia, which is in addition to the Extended First Frequency and the Extended Second Frequency").)

dispatch and maintain the Passenger Rail Easement Area,” and passenger rail service would be subject to NSR operating rules. (*Id.* at 7.) And although passenger rail service would receive dispatching preference, VPRA states that “dispatching issues may be raised by the Performance Managers Committee.” (*Id.*) Thus, the proposed transaction would not impair NSR’s ability to fulfill its continuing common carrier obligation. *See State of Maine*, 8 I.C.C.2d at 837; *see also Bhd. of R.R. Signalmen*, 638 F.3d at 813 (affirming the Board’s interpretation of “railroad line” as “including the right to operate as a common carrier”). This result serves a policy goal identified in *State of Maine*: facilitating future passenger and intrastate commuter operations without disrupting freight service to shippers. *See State of Maine*, 8 I.C.C.2d at 837 n.6.

The Board will accordingly apply the principles of *State of Maine* to circumstances, like these, where a noncarrier acquires a passenger rail easement in an active line of railroad (such as that acquired in the instant case), but where the selling freight rail carrier retains the common carrier obligation and the terms of the transaction protect the freight rail carrier from undue interference with the provision of common carrier service. Under such circumstances, the proposed acquisition does not require Board authorization under 49 U.S.C. § 10901. Therefore, the Board will dismiss the petition for exemption as to the Passenger Rail Easement portion of the transaction.

However, as noted above, if, in the future, VPRA or another party desires to operate rail service that is subject to the Board’s jurisdiction, including within the Passenger Rail Easement Area or the V-Line Sale area, VPRA or the operator would need to obtain Board authority for those operations.¹⁰

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

It is ordered:

1. VPRA’s petition for exemption is dismissed, as addressed above.
2. VPRA is directed to file final versions of the quitclaim deed and the deed of easement once they are executed.

¹⁰ The Board acknowledges that in *Massachusetts Department of Transportation—Acquisition Exemption—Certain Assets of Housatonic Railroad*, it required a state entity (MassDOT) to obtain Board approval for its acquisition of passenger rights, even though MassDOT had no intention of exercising those rights until some future date. FD 35866, slip op. at 4 (STB served May 22, 2015). In that case, however, there was little question that the passenger service MassDOT contemplated would be subject to the Board’s jurisdiction under § 10501. *Id.* at 3-4. By contrast, it is far less certain whether any passenger service to be operated by VPRA within the Passenger Rail Easement Area or over the Line would be subject to the Board’s jurisdiction, and accordingly it would be premature to require that VPRA seek Board approval of any such operations now.

3. This decision is effective on its service date.

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