

SERVICE DATE – JULY 27, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36676

NEW JERSEY TRANSIT CORPORATION—ACQUISITION EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY IN THE COUNTIES OF MORRIS AND WARREN, N.J.

Digest:¹ The Board finds that the New Jersey Transit Corporation (NJ Transit) does not need Board authority to acquire certain rail assets owned by Norfolk Southern Railway Company. The Board therefore grants NJ Transit's motion to dismiss its notice seeking such authority.

Decided: July 26, 2023

In this decision, the Board grants the motion of the New Jersey Transit Corporation (NJ Transit) to dismiss its verified notice of exemption to acquire from Norfolk Southern Railway Company (NSR) an approximately 9.15-mile portion of a line of railroad. 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 because NSR would be selling only the physical assets of the rail line. Additionally, NSR would hold a permanent and exclusive freight rail operating easement, and another carrier, Dover and Delaware River Railroad (DDRR), would continue to serve as the operator pursuant to an existing trackage rights agreement. NJ Transit would also not be able to unduly interfere with NSR's and DDRR's ability to provide freight rail service pursuant to the agreements among NJ Transit, NSR, and DDRR. Therefore, the proposed transaction does not require Board authority.

BACKGROUND

On May 30, 2023, NJ Transit filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from NSR an approximately 9.15-mile portion of the property commonly known as the Washington Secondary Track, currently owned by NSR and leased by NJ Transit, in Morris and Warren Counties, N.J., from milepost 48.1 to milepost 57.25 (the Line).²

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).

² Notice of the exemption was served and published in the Federal Register on June 15, 2023 (88 Fed. Reg. 39,324).

Concurrently, NJ Transit filed a motion to dismiss the notice, contending that the proposed transaction does not require Board authority under the agency's State of Maine precedent. The motion is unopposed.

According to NJ Transit, operations over the Line have been governed since 1984 by a trackage rights agreement (1984 Trackage Rights Agreement) between itself and NSR's predecessor, Consolidated Rail Corporation (Conrail). (Mot. to Dismiss 3.) NSR succeeded to Conrail's rights and interests in the 1984 Trackage Rights Agreement when NSR acquired Conrail's operations in New Jersey. (*Id.* (citing CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., 3 S.T.B. 196 (1998))).³

On March 1, 2019, NJ Transit entered into an agreement with NSR and DDDR granting DDDR certain trackage rights to provide freight service over the Line (2019 Trackage Rights Agreement). (Mot. to Dismiss 5.) According to NJ Transit, the 2019 Trackage Rights Agreement allowed DDDR to operate in lieu of NSR but did not replace NSR's common carrier obligations to provide service over the Line. (*Id.*) The Board granted authority for DDDR to operate in Dover & Delaware River Railroad, LLC—Lease with Interchange Commitment & Trackage Rights Exemption—Norfolk Southern Railway Co., FD 36258 (STB served Feb. 15, 2019).⁴

According to NJ Transit, it has negotiated a purchase and sale agreement that will ensure NJ Transit's continued access to the Line for its commuter rail operations. (Mot. to Dismiss 4.) NJ Transit states that, concurrent with the purchase and sale agreement, NSR will tender a deed transferring its interests in the tracks, land, and other rail property of the Line to NJ Transit, except that NSR will reserve "exclusive, perpetual, transferable, assignable and irrevocable retained rail freight rights" on the Line. (*Id.*) In addition, NJ Transit states that it and NSR will execute the "First Operating Agreement for the Washington Secondary Track" (Operating Agreement), which makes clear that operations on the Line will be subject to the 1984 Trackage

³ In a prior proceeding, DDDR stated that NJ Transit owned the Line and that NSR held a residual freight easement and trackage rights. See Dover & Del. River R.R., LLC—Lease with Interchange Commitment & Trackage Rights Exemption—Norfolk S. Ry., FD 36258 (STB served Dec. 20, 2018). It appears that statement was made in error. The purchase and sale agreement submitted in the current proceeding provides that NSR and NJ Transit have operated rail service on the Line pursuant to a May 1, 1994 second supplemental agreement to the 1984 Trackage Rights Agreement. (*See* Mot. to Dismiss, Ex. 4 at 1.) In that second supplemental agreement, the Line is described as "a portion of Conrail's Washington Secondary Track." (*Id.*, Ex. 3, Second Supplemental Agreement 1.)

⁴ As noted above, *supra* note 3, in that proceeding, DDDR mistakenly referred to NJ Transit as the owner of the Line. The Board finds such error was immaterial, as both NSR and NJ Transit consented to grant DDDR trackage rights over the Line.

Rights Agreement.⁵ (*Id.* at 4-5.) NJ Transit also states that it will not disturb DDRR's trackage rights to provide freight services in lieu of NSR on the Line.⁶ (Mot. to Dismiss 8.)

NJ Transit argues that its acquisition does not involve a transfer of any common carrier obligation and is not subject to the Board's jurisdiction. (*Id.*) It asserts that the perpetual, exclusive easement to conduct rail freight operations on the Line that NSR will retain will not terminate unless and until NSR obtains and exercises abandonment authority from the Board. (*Id.*) NJ Transit also states that it is not acquiring rights to use the Line for freight rail operations and that it will not acquire any rights and obligations that will allow it to limit or interfere with the provision of freight services on the Line. (*Id.* at 6.) NJ Transit argues that the fact that freight rail service will not be impaired is evidenced by the fact that the 1984 Trackage Rights Agreement has, to date, facilitated the successful joint use of the Line. (*Id.* at 10.) NJ Transit states that it will assume the dispatching rights and maintenance obligations for the Line, but those rights will not interfere with the provision of freight common carrier service because of the specific prohibition in the 1984 Trackage Rights Agreement that NJ Transit cannot dispatch, use, or control the Line "in a manner which would unreasonably interfere with [NSR's] Trackage Rights." (*See id.*)

On June 21, 2023, NJ Transit filed a motion for expedited consideration, stating that the parties cannot consummate the proposed transaction without approval of NJ Transit's motion to dismiss. (Mot. to Expedite 3.)

DISCUSSION AND CONCLUSIONS

The question here is whether the Board's authority is required for NJ Transit to acquire the rail assets of the Line under the proposed transaction. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. When a carrier selling rail line assets retains both (1) an exclusive permanent easement to provide common carrier freight service and (2) sufficient control over the line to carry out its common carrier obligation, the Board typically has found its authorization is not required, and that regulatory "ownership" of the line remains with the selling carrier for purposes of § 10901(a)(4). *State of Maine*, 8 I.C.C.2d at 836-37; *see Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry.*, FD 35606, slip op. at 3 (STB served May 8, 2012); *Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, FD 35312, slip op. at 6 (STB served May 3, 2010), *aff'd sub nom. Bhd. of R.R. Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011); *see also Cent. Puget Sound Reg'l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cnty., Wash.*, FD 35812 (STB served Feb. 5, 2015) (holding

⁵ NJ Transit included with its motion to dismiss a copy of the quitclaim deed, (*see* Mot. to Dismiss, Ex. 2); excerpts from the 1984 Trackage Rights Agreement and a supplement, (*see* Mot. to Dismiss, Ex. 3); a draft of the purchase and sale agreement, (*see* Mot. to Dismiss, Ex. 4); the new Operating Agreement between NJ Transit and NSR, (*see* Mot. to Dismiss, Ex. 5); and the 2019 Trackage Rights Agreement and an amendment, (*see* Mot. to Dismiss, Exs. 6-7).

⁶ *See Dover & Del. River R.R., LLC—Lease Containing Interchange Commitment & Trackage Rights Exemption—Norfolk S. Ry. & N.J. Transit Corp.*, FD 36703 (STB served June 16, 2023).

that ownership of “the line” can refer to a permanent, exclusive freight rail easement plus sufficient control over its operation to carry out the common carrier obligation without undue interference, rather than ownership of the physical railroad property itself). For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference with its common carrier freight rail service by the purchaser or third-party designee.

The Board concludes that it is appropriate to grant NJ Transit’s State of Maine motion to dismiss. Under the quitclaim deed and the purchase and sale agreement, NSR will convey its interest in the Line to NJ Transit but retain a permanent and exclusive freight railroad operating easement over the Line. (Mot. to Dismiss, Ex. 2 at 1-2, Ex. 4 art. 5.) The new Operating Agreement also provides that DDRR will continue to have the ability to serve as the freight operator pursuant to the 2019 Trackage Rights Agreement. (*Id.*, Ex. 5 at 1.)⁷ NJ Transit will not obtain any right to operate freight service on the Line, and the quitclaim deed and purchase and sale agreement include language specifically stating that NJ Transit has no right to serve present or future shippers. (Mot. to Dismiss, Ex. 2 at 2; Ex. 4 art. 5 (requiring that the deed state that “[NJ Transit] acknowledges [NSR’s] retained right, and [NJ Transit] neither has nor will have any right to serve present and future shippers”).) The first element of the State of Maine inquiry—that the selling carrier retains an exclusive, permanent easement to provide common carrier freight service—is therefore satisfied.

Under the State of Maine precedent, the Board must also determine if NJ Transit’s ownership of the rail assets of the Line would allow it to unduly interfere with common carrier freight service. The Board has considered the relevant agreements governing the transaction,⁸ and concludes that they do not allow NJ Transit to unduly interfere with common carrier freight rail service on the Line.⁹ NJ Transit states that it will assume maintenance and dispatching

⁷ 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).

⁸ The Operating Agreement incorporates, except as otherwise provided, “all terms, covenants[,] and conditions of the [1984] Trackage Rights Agreement, as amended.” (*See* Mot. to Dismiss, Ex. 5 at 2.) The 2019 Trackage Rights Agreement superseded certain terms of the 1984 Trackage Rights Agreement and governs DDRR’s ability to provide freight service on the Line. Accordingly, to determine if there could be interference, the Board has reviewed the terms of both the 1984 Trackage Rights Agreement and the 2019 Trackage Rights Agreement.

⁹ The Operating Agreement states that NSR and NJ Transit “recognize that the provisions of the [1984] Trackage Rights Agreement need to be further supplemented in order to accommodate NJ TRANSIT’s purchase of the [Line]” and that NJ Transit, NSR, and DDRR “will amend the 2019 [Trackage Rights] Agreement to acknowledge NJ TRANSIT’s purchase of

obligations for the Line, but those responsibilities will not interfere with NSR's or DDDR's ability to provide freight service. (Mot. to Dismiss 9.) The Board has found that 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). As to dispatching, the Board has observed 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—Pet. for Exemption—Acquis. from Union Pac. R.R., FD 32374 et al., slip op. at 4 (STB served July 23, 1996) (explaining that, if the operating agreement considered as a whole, together with other applicable agreements "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 also Commonwealth of Va., FD 36441, slip op. at 6; Mass. Dep't of Transp., FD 35312, slip op. at 10. Here, although NJ Transit will control maintenance and dispatching over the Line, the 1984 Trackage Rights Agreement expressly states that NJ Transit's "management and operational control" shall not be exercised in a manner that would unreasonably interfere with NSR's freight rights. (Mot. to Dismiss, Ex. 3 art. 3.01(a).)¹⁰

DDRR's existing trackage rights to provide freight rail service pursuant to the 2019 Trackage Rights Agreement, which the Board has previously authorized, will also remain in effect and unimpacted by the new agreements. The 2019 Trackage Rights Agreement provides that NJ Transit may not unreasonably interfere with DDDR's trackage rights. (Mot. to Dismiss, Ex. 6 art. 1.3.)¹¹ And freight rail service could only be discontinued by DDDR after first obtaining Board authority to do so, in any event. (Id., Ex. 6 art. 9.2(e).)¹² Therefore,

the [Line]." (Mot. to Dismiss, Ex. 5 at 1-2.) Material changes to the terms of the documents submitted in this proceeding could result in the Board finding that the alterations constitute a new transaction subject to State of Maine review. See Mass. Dep't. of Transp., FD 35312, slip op. at 15. NJ Transit will be directed to submit final versions of the revised 1984 Trackage Rights Agreement, revised 2019 Trackage Rights Agreement, revised purchase and sale agreement, and revised Operating Agreement. The Board's conclusion that the proposed transaction does not require Board authorization under 49 U.S.C. § 10901 will remain in effect unless the Board issues an order to the contrary.

¹⁰ The Board has previously found that, with regard to other rail lines, the maintenance and dispatching responsibilities under the 1984 Trackage Rights Agreement would not unreasonably interfere with freight service. See N.J. Transit Corp.—Acquis. Exemption—Consol. Rail Corp. in the Cnty. of Middlesex, N.J., FD 36195, slip op. at 4 (STB served Aug. 30, 2018); N.J. Transit Corp.—Acquis. Exemption—Norfolk S. Ry., FD 35638, slip op. at 4 (STB served Mar. 27, 2013).

¹¹ The 2019 Trackage Rights Agreement further provides that "[NJ Transit's] grant of the above Trackage Rights to DDDR is in addition to and does not replace NSR's common carrier obligations under the 1984 Agreement to provide freight service." (Mot. to Dismiss, Ex. 6 art. 1.1.)

¹² See Wis. Dep't of Transp.—Pet. for Declaratory Order—Rail Lines in Janesville, Rock Cnty., Wis., FD 35301, slip op. at 4 n.7 (STB served Dec. 11, 2009) (noting that the

notwithstanding Article 9.3—which states that, “upon Termination of this 2019 Agreement, DDDR shall immediately surrender use and occupancy of the Subject Trackage and NSR shall immediately resume the exercise of its freight common carrier obligations”—neither NJ Transit nor NSR may require DDDR to surrender use and occupancy of the Line until the Board authorizes DDDR’s discontinuance of service. (*Id.*, Ex. 6 art. 9.3; see also *id.* Ex. 6 art. 9.7.) The 2019 Trackage Rights Agreement further provides that in no case will NJ Transit assume or be subject to a freight common carrier obligation. (*Id.*, Ex. 6 art. 9.3.) Moreover, if DDDR were to stop providing service and NSR were to resume operations, NSR must seek abandonment authority before terminating service. (*Id.*, Ex. 6 art. 9.7; see also *id.*, Ex. 5 at 2 (stating that the operating agreement “shall continue until NS abandons all freight operations on the Rail Property”).)

Based on this record and the documents submitted, the Board finds that the proposed transaction is consistent with State of Maine and that NJ Transit’s acquisition of the rail assets of the Line is not the acquisition of a rail line under 49 U.S.C. § 10901(a)(4). NSR will retain an exclusive, permanent freight rail easement over the Line, and DDDR’s existing trackage rights to provide service over the Line will not be impacted by NJ Transit’s purchase and ownership. Additionally, the terms of the relevant agreements will protect NSR and DDDR against undue interference with their common carrier freight rail obligations. Accordingly, acquisition of the rail assets of the Line by NJ Transit will not cause it to become a rail carrier on the Line, and the proposed transaction does not require Board authorization under 49 U.S.C. § 10901. Accordingly, the Board will grant NJ Transit’s motion to dismiss the notice of exemption and dismiss this proceeding.

It is ordered:

1. NJ Transit’s motion to dismiss the notice of exemption is granted, and the proceeding is dismissed.
2. NJ Transit is directed to file final versions of the revised 1984 Trackage Rights Agreement, revised 2019 Trackage Rights Agreement, revised purchase and sale agreement, and revised Operating Agreement.
3. This decision is effective on its service date.

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

acquiring entity and the carrier retaining the easement for freight service may not extinguish another carrier’s existing trackage rights through their private agreements, as those rights could only be terminated pursuant to appropriate Board authority).