

**Before the
Surface Transportation Board**

ENTERED
Office of Proceedings
November 28, 2017
Part of
Public Record

Docket No. FD 36157

**CITY AND COUNTY OF DENVER
– ACQUISITION EXEMPTION –
WESTERN STOCK SHOW ASSOCIATION
IN THE CITY AND COUNTY OF DENVER, COLORADO**

**MOTION OF
THE CITY AND COUNTY OF DENVER
TO DISMISS THE NOTICE OF EXEMPTION**

Dated: November 28, 2017

Communications with respect to this
document should be addressed to:

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for the City and County of Denver

**Before the
Surface Transportation Board**

Docket No. FD 36157

**CITY AND COUNTY OF DENVER
– ACQUISITION EXEMPTION –
WESTERN STOCK SHOW ASSOCIATION
IN THE CITY AND COUNTY OF DENVER, COLORADO**

**MOTION OF
THE CITY AND COUNTY OF DENVER
TO DISMISS THE NOTICE OF EXEMPTION**

The City and County of Denver (the “City”), a political subdivision of the State of Colorado, hereby files this Motion to Dismiss the Verified Notice of Exemption (“NOE”) filed simultaneously in this proceeding with respect to the City’s proposed acquisition of the real property underlying the lines of railroad known as the “River Corridor” and “National Western Drive Corridor” (the “Lines”) in the City and County of Denver, Colorado. The exemption will become effective on December 28, 2018. The City has negotiated a Real Property Conveyance Agreement (“Conveyance Agreement”) with the Western Stock Show Association (“WSSA”) setting the terms and conditions for the City’s acquisition of the real property interests underlying the Lines, as described below, which is anticipated to occur in the second quarter of 2018. A copy of the Conveyance Agreement is attached to the NOE as Attachment 4.

The Lines are a total length of approximately 1.2 miles and consist of:

- The “National Western Drive Corridor”: a section of line adjacent to National Western Drive, from the south right-of-way line of East 47th Ave., extending northeast and then north to the northeastern right-of-way line of Race Court; and

- The “River Corridor”: a section of line adjacent to the east bank of the South Platte River, from the intersection of the line with the National Western Drive Corridor at a point just north of the south endpoint of the National Western Drive Corridor, extending north and then northeast to an intersection with the National Western Drive Corridor just south of Race Court.

The rails, ties, and ballast associated with the Lines are owned and operated by the Denver Rock Island Railroad (“DRIR”), which will continue its operations following the City’s acquisition of the underlying real property. The City submits that the transaction described in the NOE will not result in the transfer of any rights or obligations to the City that will prevent the incumbent railroad, DRIR, from fulfilling its existing freight common carrier obligations on this line. As a result, the NOE should be dismissed.

The City’s purpose in acquiring the Lines is to consolidate ownership and control of the 250-acre property, including the Denver Stockyards and some additional parcels, to be redeveloped as the National Western Center, an agricultural innovation, education, event, and tourism center. A description of the redevelopment, planning and public outreach for which began in 2014, is available at <https://nationalwesterncenter.com/about/the-redevelopment-process/master-plan/>.

The Denver Stockyards were developed over 100 years ago by WSSA’s predecessor in interest, the Denver Union Stockyard Company, which built an extensive network of tracks on the property, most of which no longer exists, over which it granted operating rights to various railroads. The Stockyards and Denver’s rail industry grew symbiotically through the early 20th Century, and from the 1890s through the 1960s the Stockyards housed livestock holding pens, processing plants, and related businesses, many of which were directly served by rail. From the

1970s through the present, many of the buildings and associated private tracks have been demolished as ongoing livestock handling has disappeared from the site. Other industries have occupied parts of the site, the Denver Coliseum continues to be a venue for large-scale events, and extensive livestock pens remain to serve the annual National Western Stock Show and Rodeo (the “Stock Show”). The Stock Show began in 1906 and has continued as a significant annual event in Denver, even as the region’s economy has grown and diversified, and is the activity now most strongly associated with the Stockyards. WSSA hosts the Stock Show each year for two weeks in January, reflecting the site’s historical importance as the rail-served central holding and distribution stockyards for a large portion of the Rocky Mountain western region. In addition to the Stock Show, the existing National Western Complex hosts over 250 other events annually. See <https://nationalwesterncenter.com/about/history-about-the-site/> for a detailed history of the National Western Center site.

In order to promote economic development and leverage the proximity of the Stock Yards to downtown Denver, the City has embarked on a comprehensive redevelopment of the former stock yards to accommodate a variety of mixed uses and public open space, while also accommodating the continued operation of the existing freight rail service through the site. No rail customers are located within the footprint of the redevelopment site. DRIR conducts switching operations between BNSF to the south of the site and Union Pacific to the north for shippers located north of the National Western Center site. The redevelopment will establish the National Western Center campus and will provide improved facilities for Denver’s annual Stock Show; an extensive equine sports medicine facility and stock animal research complex to be developed in conjunction with Colorado State University (CSU); additional mixed use facilities

to attract agricultural and science-oriented investments; and a public park along the restored South Platte River waterfront.

The National Western Center redevelopment includes the proposed consolidation of rail operations on a single corridor. The improvements associated with the relocation of rail operations onto the consolidated corridor include the construction of a triple-track line and associated signal improvements. The City will coordinate with DRIR on the design and construction of the improved rail facilities. These proposed improvements will also significantly improve the safety of rail operations on the site, which is currently characterized by a lack of differentiation between the rail corridor and the large areas of the site that accommodate vehicular and pedestrian circulation, both formal and uncontrolled. The new configuration will include plantings and landscaping to separate the rail corridor from adjacent uses, and a defined at-grade roadway-rail crossing, a grade-separated crossing, and a pedestrian bridge over the consolidated right-of-way. DRIR will retain its existing non-exclusive freight easement over the consolidated and improved rail corridor, and will continue to operate its common carrier rail freight service. DRIR's use of the corridor may include overhead movements, car storage, and switching, but there are no shippers being served on the property that comprises the redevelopment site.

Because the City will not acquire any rights or obligations that implicate the existing freight common carrier operations that remain attached to the property covered by the NOE, the transaction is not subject to the regulatory authority of the Board. The City therefore seeks a determination pursuant to *State of Maine, DOT – Acquisition and Operation Exemption – Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991) (“*State of Maine*”) and related case law that the City's acquisition of the real property underlying the Lines, particularly given the fact that the physical

operating assets of the Lines remain under the ownership, control, and operation of DRIR, is not a transaction subject to the Board's regulatory authority under 49 U.S.C. § 10901. Accordingly, the City's NOE in this proceeding should be dismissed.

I. FACTS

The City is a political subdivision of the State of Colorado and intends to purchase from WSSA the real property underlying the tracks that are currently owned and operated by DRIR. The Lines currently existing on the Denver Stock Yards site will be consolidated as part of the comprehensive redevelopment to replace the two existing single tracks with triple-tracked corridor along most of the reconfigured line. A map of the existing Lines is shown on Attachment 1 to the NOE.

The City is purchasing the land underlying the Lines in conjunction with the acquisition of extensive non-rail property to assemble the National Western Center site. The finalized form of the Real Property Conveyance Agreement between the City and WSSA ("Conveyance Agreement") governing all of the proposed real property transfers, including those for the Lines, is attached to the NOE as Attachment 4, including, *inter alia*: Exhibit B thereto, the form of special warranty deed to be used for the transfer of the real property underlying the Lines. The City's acquisition of the Lines is reflected among the Second Transfer Properties on the map labeled "National Western Center Campus Proposed WSSA Transfer Properties", attached as part of Exhibit A to the Conveyance Agreement, which is attached to the NOE as Attachment 4. DRIR's existing easement, attached to the NOE as Attachment 2, will permit the railroad to continue providing freight service on the Lines. DRIR's common carrier right will not be affected by this transaction. Accordingly, pursuant to the terms and conditions of the railroad

easement, DRIR will retain all of its present and inchoate rights to provide freight rail service over the line.¹

The City has acquired no right to operate freight service on the line, will acquire none, and is in fact prevented from using any portion of the trackage for freight rail purposes pursuant to the terms and conditions of its agreements with DRIR. Furthermore, the City is authorized by statute to operate mass transportation services only and cannot lawfully conduct freight operations.

DRIR serves no shippers on the Lines within the footprint of the National Western Center. The Lines provide access to shippers located north of the National Western Center site and to connections to BNSF and UP. The City is in ongoing consultation with DRIR with respect to the design and construction of the proposed improvements to the rail facilities, which the City will construct and transfer to DRIR, thereby preserving the status quo as to the division of ownership of the real property and rail facilities on the redeveloped National Western Center campus.

II. DISCUSSION

The Conveyance Agreement, Deed and existing DRIR Easement confirm that the City is acquiring none of the rights and obligations that are essential to provide freight service on the

¹ Over time, a number of railroads have operated on the Denver Stockyards, including the predecessors of Union Pacific Railroad Company (“UP”) and the Burlington Northern Railroad Company (“BN”). In *Denver Terminal R.R. Co. – Adverse Discontinuance – In Denver, CO*, Docket No. AB-446 (Sub-No. 2), this Board’s predecessor agency, the ICC, granted the request of WSSA to discontinue UP’s and BN’s rights on the Lines. In subsequent decisions, the ICC authorized both UP and BN to discontinue service on the Lines. *Union Pacific R.R. Co. – Adverse Discontinuance – In Denver, CO*, STB Docket No. AB-33 (Sub-No. 92) (Service Date July 22, 1996); *Burlington Northern R.R. Co. – Adverse Discontinuance – In Denver, CO*, STB Docket No. AB-6 (Sub-No. 374) (Service Date July 22, 1996). The City has researched the history of rail operations on the site through the dockets of the ICC and STB, and through review of agreements between the Denver Union Stockyard Company and Denver Union Corp., WSSA’s predecessors, and various operators. It has not been possible to confirm that all prior operators have either merged into UP, BNSF, or DRIR, or have abandoned their common carrier obligations. The City will pursue further proceedings as appropriate to resolve the status of any lingering previously-granted common carrier interests. Nevertheless, for the past two decades, DRIR has been the only freight rail operator on the Lines. DRIR is operating and will continue to operate under its existing exemption.

Lines. DRIR retains the right to provide that service and even owns the track, ties and roadbed, and the City will not acquire the latitude to interfere with DRIR's ability to fulfill its common carrier obligations on the line. The NOE should be dismissed because the transaction does not involve the transfer of any rights that would implicate this Board's regulatory authority.

A. Application of *State of Maine*

This Board has consistently determined that it need not assert jurisdiction over a transaction involving a line of railroad when the buyer has no intention or ability to assume freight operation and is not acquiring assets or rights that would "disenable . . . [the seller] from meeting its common carrier obligation." *State of Maine*, 8 I.C.C. 2d at 837. Citing *State of Maine*, this Board has reiterated that "[o]ur authorization is not required . . . when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred." *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co.*, STB Finance Docket No. 34170, slip op. at 2 (Service Date May 22, 2002). A basic requirement of such cases is that the selling freight railroad retain a permanent easement that permits it to continue to provide common carrier freight service. *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128, slip op. at 3 (Service Date Oct. 27, 2008). Beyond that, the relevant inquiry is whether the freight railroad has sufficient property and contract rights to conduct freight operations, and whether the line's new owner has the right or ability to materially or unreasonably interfere with the railroad's freight operations. See, e.g., *Metro Regional Transit Auth. – Acquisition Exemption – CSX Transportation, Inc.*, STB Finance Docket No. 33838, slip op. at 4 (Service Date Oct. 10, 2003); *New Jersey Transit – Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512, 514 (2000). Here, the seller, WSSA, has already transferred the

physical rail facilities to the incumbent railroad, DRIR. Accordingly, the transfer of real property interests underlying the Lines to the City will not disturb DRIR's existing interests or common carrier rights.

The Board should conclude that this transaction, which implicates the incumbent railroad's interests to a lesser degree than in the transactions described in the cases cited above, does not involve the transfer of common carrier obligations and hence, Board regulatory authority does not apply.

B. General Provisions

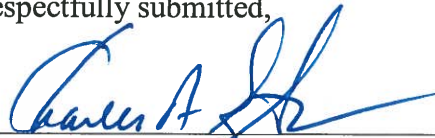
DRIR will retain an easement to conduct rail freight operations on the Lines, and this easement will not terminate unless and until DRIR obtains and exercises abandonment authority from the Board. The City has no right to use any portion of the Lines for freight rail operations. Because the City will not hold itself out as a common carrier and because it will have neither the right nor the ability to provide freight service on the Lines, its acquisition of the real estate interests underlying the Lines does not involve a transfer of any common carrier obligation and is not subject to the Board's regulatory authority. *Central Puget Sound Regional Transit Auth. – Acquisition Exemption – BNSF Railway Co.*, STB Finance Docket No. 34747, slip op. at 2 (Service Date Nov. 18, 2005).

III. CONCLUSION

Consistent with prior Board rulings, the City is acquiring insufficient interests to allow it to conduct freight operations on its own or to impede the freight railroad's ability to fulfill its common carrier obligations. As a result, the Board should conclude that it need not assert its regulatory authority over the transaction. Accordingly, this Motion to Dismiss should be granted.

WHEREFORE, and in view of all of the foregoing, the City respectfully requests that the Board dismiss the City's concurrently filed Notice of Exemption in this proceeding because it does not describe a transaction within the Board's regulatory authority.

Respectfully submitted,



Charles A. Spitulnik

Allison I. Fultz

Kaplan Kirsch & Rockwell LLP

1001 Connecticut Avenue, N.W.

Suite 800

Washington, DC 20036

(202) 955-5600

Counsel for the City and County of Denver

Dated: November 28, 2017

Certificate of Service

I hereby certify that I have this day caused a copy of the foregoing Motion to Dismiss of the City and County of Denver to be served by first class mail, properly addressed and with postage prepaid, upon the following:

Counsel for WSSA:

Lewis Roca Rothgerber Christie LLP
1200 17th Street, Suite 3000
Denver, CO 80202

Otten Johnson Robinson Neff and Ragonetti
PC
950 17th Street, Suite 1600
Denver, CO 80202
Attention: Thomas J. Ragonetti

Counsel for DRIR:

Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
Attention: Thomas F. McFarland



Charles A. Spitulnik

Dated: November 28, 2017