

**Before the
Surface Transportation Board**

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Finance Docket No. 36195

**NEW JERSEY TRANSIT CORPORATION
– ACQUISITION EXEMPTION –
CONSOLIDATED RAIL CORPORATION
IN THE COUNTY OF MIDDLESEX, NEW JERSEY**

**MOTION OF
NEW JERSEY TRANSIT CORPORATION
TO DISMISS THE NOTICE OF EXEMPTION**

Dated: May 21, 2018

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**NEW JERSEY TRANSIT CORPORATION
– ACQUISITION EXEMPTION –
CONSOLIDATED RAIL CORPORATION
IN THE COUNTY OF MIDDLESEX, NEW JERSEY**

**VERIFIED MOTION OF
NEW JERSEY TRANSIT CORPORATION
TO DISMISS THE NOTICE OF EXEMPTION**

The New Jersey Transit Corporation (“NJ Transit”) intends to acquire from Consolidated Rail Corporation (“Conrail”) a 3.3 mile portion of the line of railroad commonly known as the “Delco Industrial Lead” located in Middlesex County, New Jersey, while reserving to Conrail an exclusive freight easement to permit continued freight service on the line. NJ Transit and Conrail have completed negotiations for the terms and conditions of the transfer. NJ Transit will acquire the real property underlying the Delco Industrial Lead from M.P. 33.10 to M.P. 36.4 (the “Line”). NJ Transit is today filing a Notice of Exemption (“NOE”) in this proceeding with respect to that proposed transaction. Conrail will retain the exclusive freight rights and obligations over the Line, *see* Quitclaim Deed, a copy of which is attached to the NOE as **Exhibit 4**. Conrail will have the ability to continue to fulfill any rail freight needs that exist.

Because NJ Transit will not acquire any rights or obligations that limit Conrail’s ability to fulfill its existing freight common carrier operations over the property covered by the NOE, the transaction between NJ Transit and Conrail is not subject to the jurisdiction of the Board. NJ Transit’s ownership of the Line will not interfere with or in any way impair Conrail’s ability to

provide freight rail service on the Line. NJ Transit therefore seeks a determination pursuant to *State of Maine, DOT – Acquisition and Operation Exemption – Maine Central R.R. Co.*, 8 I.C.C. 2d 835 (1991) (“*State of Maine*”) and related Board decisions that NJ Transit’s acquisition of the physical assets of a portion of the Delco Industrial Track, including fee title subject to the reservation of a freight easement in Conrail, does not require Board authorization under 49 U.S.C. § 10901. Accordingly, NJ Transit’s NOE in this proceeding should be dismissed.

I. FACTS

NJ Transit is an instrumentality of the State of New Jersey that provides passenger mass transportation services throughout New Jersey, including service on a number of light rail and commuter rail lines. New Jersey Statutes Annotated 27:25-1 *et seq.* NJ Transit and Conrail have completed negotiation of the agreements related to NJT’s acquisition of the Delco Industrial Lead, along with other agreements related to ancillary properties that are not the subject of this proceeding. Conrail will transfer the Line to NJ Transit for NJ Transit’s use in its commuter operations, and Conrail will retain an exclusive freight easement on the Line. A map of the Line is shown on **Exhibit 1** to the NOE.

Conrail will also issue a Quitclaim Deed to NJ Transit transferring to NJ Transit Conrail’s interests in the tracks, land and other rail property of the Line, *except that* Conrail will retain an “exclusive, perpetual, transferable, assignable and irrevocable retained rail freight rights” on the Line, as set forth in the Quitclaim Deed. The Quitclaim Deed further provides that

[NJ] Transit acknowledges [Conrail’s] retained rights, and [Grants] Transit neither has nor will have any right to serve present or future shippers, and will make no attempt to construct additional sidings to serve such shippers for its own account or to circumvent this Deed by other means, directly or indirectly.

Accordingly, Conrail’s current rail freight rights will not be affected by the transfer and NJ Transit is not acquiring any such rights or obligations. A copy of the Quitclaim Deed is attached

to the NOE as **Exhibit 5**. The Quitclaim Deed and related transaction documents have been placed in escrow pending the conclusion of the exempt notice proceeding.

Conrail and NJ Transit will also execute the Ninth Supplemental Agreement to the Trackage Rights Agreement, a copy of which is attached to the NOE as **Exhibit 3**. The Ninth Supplemental Agreement makes clear that operations on the Line will be subject to the Trackage Rights Agreement entered into between Consolidated Rail Corporation and NJ Transit, effective as of October 1, 1984.¹

NJ Transit has acquired no right to operate freight service on the Line, will acquire none, and is prevented from using any portion of the trackage for freight rail purposes pursuant to the terms and conditions of its agreements with Conrail. Furthermore, NJ Transit is authorized by statute to operate mass transportation services only and cannot lawfully conduct freight operations. The Quitclaim Deed specifically provides that Conrail will retain an exclusive easement over the Delco Industrial Lead for the purpose of fulfilling its rights as a common carrier freight railroad.

II. DISCUSSION

The agreements attached to the NOE confirm that NJ Transit is acquiring none of the rights and obligations to provide freight service on the Delco Industrial Lead. Conrail will retain the sole right to provide that service, and NJ Transit will not be able to interfere with Conrail'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 jurisdiction.

¹ The Trackage Rights Agreement delineated the operating rights of NJ Transit and Conrail on each other's tracks. Conrail retained an easement for its freight operations on certain NJ Transit owned tracks. "Category NF Rail Properties" are owned by NJ Transit and used for freight operations only and are not used for passenger operations. "Category NFP Properties" are owned by NJ transit and used for both passenger and freight operations. See Exhibits 2 and 3 to the NOE.

A. Application of *State of Maine*

This Board has consistently determined that it need not authorize a transaction involving the sale of a line of railroad when the buyer has no intention or ability to assume freight operations 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).

The Board addressed how *State of Maine* and its progeny have been applied in the context of shared freight and commuter use, where a state agency acquires a rail line from a freight railroad and the line will be used for both continuing freight service and for new commuter or passenger rail service:

To balance the development of mass transit with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the

Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably interfere with freight rail service. Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers. Likewise, the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.

Maryland Transit Administration – Petition for Declaratory Order, STB Finance Docket No.

34975, slip op. at 4-5 (Service Date Sept. 19, 2008) (internal citations omitted). *Accord*,

Wisconsin Dept. of Transp. – Petition for Declaratory Order – Rail Line in Sheboygan Cty., WI,

STB Finance Docket No. 35195 (Service Date April 20, 2009) (holding that WisDOT's

acquisition of physical assets comprising a rail line but not the freight easement was consistent

with the transaction described in *State of Maine* and therefore did not require Board authorization

under 49 U.S.C. § 10901); *Utah Transit Authority – Acquisition Exemption – Union Pacific*

Railroad Company, STB Finance Docket No. 35008 (Service Date July 23, 2007) (UTA's

acquisition of physical railroad line but not the freight easement did not require Board

authorization because UPRR's ability to provide freight service would not be impaired).

Applying these principles, the Board has previously determined that acquisitions of rail property by NJ Transit, including the authority to maintain a line and dispatch on that line, does not warrant the exercise of Board jurisdiction because the transaction as structured prevented NJ Transit from impairing the freight rail obligations of the rail carrier that retained the freight carriage easement. *New Jersey Transit– Acquisition Exemption – Certain Assets of Conrail*,

4 S.T.B. 512, 514 (2000). As in the earlier *New Jersey Transit* decision and the *Utah Transit Authority* decision, the Board should conclude that NJ Transit's acquisition of the Line, the 3.3-mile Delco Industrial Lead, does not involve the transfer of common carrier obligations and, therefore, the Board's oversight authority does not apply.

B. General Provisions

Conrail will retain a permanent, perpetual, exclusive and irrevocable easement to conduct rail freight operations on the Line will not terminate unless and until Conrail obtains and exercises abandonment authority from the Board. *See* Quitclaim Deed (NOE **Exhibit 4**). NJ Transit has no right to use any portion of the Delco Industrial Lead for freight rail operations. *Id.* NJ Transit will not hold itself out as a freight common carrier and because it will have neither the right nor the ability to provide freight service on the Delco Industrial Lead, its acquisition of the Line does not involve a transfer of any common carrier obligation and is not subject to the Board's jurisdiction. *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).

C. Operations, Maintenance and Dispatching

As discussed above, use of the Delco Industrial Lead will be governed by the 1984 Trackage Rights Agreement (excerpted at NOE **Exhibit 2**), which has successfully allowed for joint usage of tracks by NJ Transit and Conrail for freight and passenger rail service for over 25 years. Pursuant to the Ninth Supplemental Agreement for the (NOE **Exhibit 3**), the Line will be classified as "Category NFP Rail Property" (shared freight and passenger use, over which Conrail has retained an easement for its freight operations) under the Trackage Rights Agreement. Under the Trackage Rights Agreement, NJ Transit will therefore assume the

dispatching rights and maintenance obligations for the Line but will not interfere with Conrail's ability to provide freight common carrier service.

With respect to dispatching, this Board's precedent confirms that the critical factor under *State of Maine* is not *who* holds the authority to dispatch and maintain the tracks, but whether the agreements specifying the terms of use of the tracks assure that freight operations will not be impaired. As the Board has explained:

Dispatching control has less importance in its own right than it has as a means of enforcing the service priorities accorded under the operating agreement. If the operating agreement considered as a whole and the circumstances surrounding it are not likely to impair freight service, the passenger operator's control over dispatching will not by itself create such an obstacle, because the latter merely implements the former.

Los Angeles Cty. Transp. Comm'n – Petition for Exemption – Acquisition from Union Pacific R.R. Co., STB Finance Docket No. 34374, slip op. at 3 (Service Date July 23, 1996). *See also Utah Transit Authority, supra.*

Similarly, a public agency's acquisition of maintenance obligations while a freight railroad continues operating on a line does not place that agency within the Board's jurisdiction. *Maryland Transit Administration*, slip op. at 4-5. As noted above, the Board has concluded that NJ Transit's acquisition of a rail line, including the authority to maintain the line and dispatch on the line, does not make the transaction subject to Board jurisdiction because the transaction includes measures to assure the movement of freight rail service. *New Jersey Transit*, 4 S.T.B. at 514.

Here, it is clear that NJ Transit's acquisition of the Line, a 3.76 mile line segment, will not impair Conrail's ability to provide freight rail services. First, the 1984 Trackage Rights Agreement (NOE **Exhibit 2**) has allowed for the successful joint use of tracks by NJ Transit Conrail in New Jersey for over 25 years. The Delco Industrial Lead will now be treated as

“Category NFP Rail Property” under the Trackage Rights Agreement, which specifically provides that NJ Transit’s management, use and control of Category NFP Property, including the right to dispatch, “shall not be exercised in a manner which would unreasonably interfere with Conrail’s Trackage Rights.” Trackage Rights Agreement, Sec. 3.01. Because the parties have provided a mutually acceptable manner for Conrail to utilize the Delco Industrial Lead as needed, Conrail will continue to be able to provide adequate freight service to its customers. NJ Transit’s control over dispatching and maintaining the Line will not interfere with Conrail’s freight operations.

NJ Transit’s ability to remove turnouts on the line does not compel a different conclusion. The Ninth Supplemental Agreement confirms that NJ Transit may remove inactive turnouts “...that Conrail has not used to provide service for many years...” Ninth Supplemental agreement (**Exhibit 3** to the NOE), 8th Whereas Clause at 2. However, that agreement also requires NJ Transit to install any such turnouts that Conrail may require “to maintain freight service to Conrail’s active customers.” Id. at 9th Whereas Clause. This applies to replacement or new turnouts for future customers. Id. at 3 paragraph 4.C. NJ Transit’s rights on the Line are specifically directed at confirming that it will not limit Conrail’s ability to fulfill its common carrier obligation. The Board should grant this Motion to Dismiss.

III. CONCLUSION

Consistent with prior Board rulings, NJ Transit is acquiring sufficient interests to permit it to conduct and implement light rail operations but insufficient interests to allow it to conduct freight operations on its own or to impede Conrail’s ability to fulfill its common carrier obligations on the Line. As a result, the Board does not need to authorize the transaction and should dismiss the Notice of Exemption.

WHEREFORE, and in view of all of the foregoing, NJ Transit respectfully requests that the Board dismiss NJ Transit's concurrently filed Notice of Exemption in this proceeding

Respectfully submitted,



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Counsel for the New Jersey Transit Corporation

Dated: May 21, 2018

Exhibit A

**Verified Statement of Jonathan M. Broder, Vice President and Chief Legal Officer,
Consolidated Rail Corporation**

[attached hereto]

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**NEW JERSEY TRANSIT CORPORATION
– ACQUISITION EXEMPTION –
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IN THE COUNTY OF MIDDLESEX, NEW JERSEY**

**VERIFIED STATEMENT OF JONATHAN M. BRODER,
CONSOLIDATED RAIL CORPORATION**

1. I am Jonathan M. Broder, Vice President of Corporate Development and Chief Legal Officer at Consolidated Rail Corporation (“Conrail”). I have been employed with Conrail since 1988, and have served in various capacities within the company.
2. I have overall supervision of the transaction regarding the line segment that is relevant to this proceeding, and I am familiar with the Trackage Rights Agreement and the Ninth Supplemental Agreement that will govern the operation of Conrail trains over the Delco Industrial Lead, attached as Exhibits 2 and 3 to the Notice of Exemption of New Jersey Transit (“NJT”) in this proceeding. The Ninth Supplemental Agreement for the Delco Industrial Lead preserves Conrail’s existing freight operations without interference from NJT’s use of a portion of the track upon terms that are acceptable to Conrail.
3. Conrail will retain an exclusive, perpetual and irrevocable easement permitting it to exercise its existing rail freight rights and obligations over the Delco Industrial Lead between Milepost 33.10 to Milepost 36.4. The Ninth Supplemental Agreement will remain in effect

until Conrail formally abandons its common carrier rights and obligations over the Delco Industrial Lead.

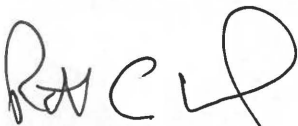
4. NJ Transit will operate rail service over the track that is the subject of this proceeding. The Ninth Supplemental Agreement permits NJ Transit to have access to the Delco Industrial Lead for the purpose of providing passenger rail service.
5. Conrail operates its trains, including locomotives, switching movements, and other on-track equipment on the Delco Industrial Lead. Pursuant to the Ninth Supplemental Agreement, Conrail shall have the right to continue to have access to and use the Delco Industrial Lead.

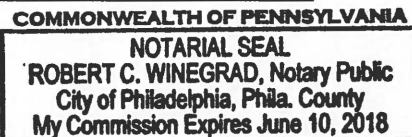
DATED this 16th day of May, 2018


Jonathan M. Broder
Vice President and Chief Legal Officer
Consolidated Rail Corporation

SUBSCRIBED AND SWORN to before me this 16th day of May, 2018

My commission expires _____.





Notary Public

Certificate of Service

I hereby certify that I have this day caused a copy of the foregoing Motion to Dismiss of the New Jersey Transit Corporation to be served by first class mail, properly addressed and with postage prepaid, upon the following parties of record to this proceeding:

Jonathan M. Broder
Vice President and Chief Legal Officer
Consolidated Rail Corporation
1717 Arch Street, Suite 1310
Philadelphia, PA 19103



Charles A. Spitulnik

Dated: May 21, 2018