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SERVICE DATE — SEPTEMBER 15, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36043

BOSTON SURFACE RAILROAD COMPANY, INC.—PETITION FOR PARTIAL EXEMPTION FROM 49 U.S.C. SUBTITLE IV

Digest:<sup>1</sup> The Board finds that it has jurisdiction over a company seeking to provide passenger rail service on an existing route between Worcester, Mass., and Providence, R.I., but exempts that company from most of the Board's regulations.

Decided: September 13, 2016

On June 22, 2016, Boston Surface Railroad Company, Inc. (BSRC) filed a petition for exemption under 49 U.S.C. § 10502 from Subtitle IV of Title 49 of the United States Code (Subtitle IV). BSRC requests Board authorization to provide rail passenger service between Worcester, Mass., and Providence, R.I., pending entry into a final agreement with Providence and Worcester Railroad (PWRR), which would host and operate BSRC equipment along the 44-mile route. BSRC concurrently requests an exemption from all common carrier obligations in Subtitle IV.

Five comments were filed, which largely support the petition for exemption,<sup>2</sup> and no comments in opposition to the petition for exemption were filed. The Board finds that BSRC's proposed passenger rail service would be subject to Board jurisdiction. However, given the

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<sup>1</sup> 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The Board received support statements from United States Representative James P. McGovern; Rhode Island Senator Marc A. Cote; Massachusetts Senator Harriette L. Chandler; Massachusetts Representative James J. O'Day; Woonsocket, R.I., Mayor Lisa Baldelli-Hunt; the City of Worcester, Mass.; the Blackstone Valley Tourism Council; and the National Association of Railroad Passengers. Comments were also submitted by Blackstone Heritage Corridor, Inc., which supports certain aspects of BSRC's plan, urges BSRC to work actively with local communities, and expresses concern regarding the possibility that an exemption would shield BSRC from local review even if it pursues an expansion of the service market.

factual circumstances here, it is reasonable to exempt BSRC from Subtitle IV, except for those provisions specifically precluded from exemption by statute.<sup>3</sup>

## BACKGROUND

BSRC states that it is a privately funded and closely held company, established to address the growing demand for quality alternatives to driving for commuters between metropolitan markets. (See Pet. 2.) BSRC explains that it has selected Worcester, Mass., and Providence, R.I., as the first city pair for its pilot passenger rail program, with plans to initiate scheduled service between the two cities in late 2017 or early 2018. (Id.) BSRC states it is in the process of acquiring equipment, including locomotives and rail cars that are suitable for an intercity and interstate railroad passenger service and that meet the operating requirements of the National Railroad Passenger Corporation (Amtrak). (Id. at 2.) BSRC plans to offer “through-ticketing” for passengers of Amtrak. (Id. at 1.)

According to BSRC, it is negotiating with PWRR to host and operate BSRC’s proposed service, using BSRC equipment on the 44-mile route from Worcester to Providence, the majority of which is PWRR main line. (Id. at 2.) BSRC states that PWRR is a freight railroad that also operates seasonal passenger excursions. (Id.) BSRC further states that the route would begin in Worcester (MP 43.38 from Providence), make a single stop in Woonsocket (MP 16.1), and continue to Providence via the “Boston Switch” (MP 4.9), where it would enter a non-corridor track (known as AMTRAK – Track 7) for the remaining 4.9 miles to Providence Station (PWD – MP 0.0). (Id. at 2.)<sup>4</sup>

BSRC projects four trains per day, with two morning trips from Worcester to Providence and two return trips from Providence to Worcester in the evening. (Id.) All trains would make one intermediate stop in Woonsocket, R.I. (Id.) BSRC would provide ticketing services via the internet and on-site kiosks. (Id.)

Based on the performance of the Worcester-Providence pilot program, BSRC states that it might seek both to expand service on this route and to connect to other appropriate metropolitan markets in the New England region based on feasibility and market demand. (Id.)

## DISCUSSION AND CONCLUSIONS

Under § 10501(a), the Board has jurisdiction over “transportation” by “rail carrier” as part of the interstate rail network. BSRC’s operations meet this definition.

<sup>3</sup> The Board is statutorily precluded from exempting BSRC’s operations from certain aspects of Subtitle IV, such as labor protection and some damage liability issues. See 49 U.S.C. § 10502(e) & (g).

<sup>4</sup> BSRC states that AMTRAK – Track 7 is not a “corridor track” and that this proposed service would not interfere with Northeast Corridor traffic. (Pet. 2.) BSRC also states that it would subcontract responsibility for maintenance and repairs of its equipment to PWRR and/or other third parties. (Id.)

“Transportation” is defined, among other things, as services related to the movement of passengers, property, or both by rail. 49 U.S.C. § 10102(9). The service that BSRC plans to offer includes the interstate transportation of passengers by rail between Worcester, Mass., and Providence, R.I.

Further, BSRC would be a rail carrier—“a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). The transportation BSRC intends to offer is railroad transportation, because the term “railroad” embraces not only road owned and operated directly, but also road operated under an agreement. 49 U.S.C. § 10102(6)(B). BSRC’s pending arrangement with PWRR is such an agreement. Additionally, BSRC would hold itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation and therefore would be a common carrier. See Am. Orient Express Ry. v. STB (American Orient Express II), 484 F.3d 554, 557 (D.C. Cir. 2007).<sup>5</sup> The Board has previously found that it had jurisdiction over a company providing sleeping car service and dining and lounge facilities in rail cars attached to Amtrak trains pulled by Amtrak locomotives. See Pullman Sleeping Car Co.—Pet. for Exemption from 49 U.S.C. Subtitle IV (Pullman), FD 35738 (STB served Feb. 5, 2015). BSRC’s proposed service is similar to Pullman, except that BSRC’s trains would be freestanding and pulled by its own locomotives using PWRR train crews. Likewise, in Great Canadian Railtour Co.—Petition for Exemption from 49 U.S.C. Subtitle IV (Great Canadian), FD 35851, slip op. at 4 (STB served June 2, 2015), the Board found that it had jurisdiction over a company providing rail passenger service between Vancouver, B.C., and Seattle, Wash., pursuant to a contract with Amtrak. Consistent with these cases, we find that the service BSRC would provide is “transportation” by “rail carrier” and thus subject to our jurisdiction under 49 U.S.C. § 10501.

Having found that BSRC is a rail carrier subject to our jurisdiction under 49 U.S.C. § 10501, the Board must now determine whether and to what extent BSRC should be exempt from Board regulation. Under 49 U.S.C. § 10502, the Board will exempt a transaction or service from regulation when: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP); and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. In support of its request for an exemption from Subtitle IV, BSRC cites American Orient Express Railway—Petition for Declaratory Order (American Orient Express I), FD 34502 (STB served Dec. 29, 2005), aff’d American Orient Express II, where the Board exempted a common carrier from the licensing requirements under 49 U.S.C. § 10901, and Pullman, where the Board granted a broad exemption from the provisions of 49 U.S.C. Subtitle IV to a passenger excursion service.

We find that regulation by the Board here is not necessary to carry out the RTP. An exemption from Subtitle IV would be consistent with 49 U.S.C. § 10101(2) by minimizing the need for regulatory control over transportation for which such control is unnecessary. Consistent

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<sup>5</sup> In American Orient Express II, the court affirmed the Board’s finding that it had jurisdiction over the operations of a passenger rail company that marketed and sold vacations aboard railcars attached to Amtrak train consists.

with 49 U.S.C. §§ 10101(5), (7) & (9), an exemption would also foster sound economic conditions in transportation and encourage efficient management by allowing BSRC to enter and exit passenger routes without the need for regulatory approval. Specifically, BSRC states that it may add new routes in the future that are comparable to its proposed Worcester-Providence service based on market potential and that part of its business plan is to replicate such service in comparable paired cities. An exemption from the requirement to seek Board authority in each instance would allow BSRC more flexibility in meeting demand if the need for such service is identified. See, e.g., Pullman, FD 35738, slip op at 4. Requiring BSRC to come to the Board for authority each time it proposes a new route would be an unnecessary burden. American Orient Express I, slip op. at 7. Additionally, an exemption would be consistent with 49 U.S.C. §10101(14), because it could encourage those who currently travel by car between Worcester and Providence to use BSRC's service, promoting energy conservation. Other aspects of the rail transportation policy would not be adversely affected.

Also, regulation is not needed to protect rail passengers from an abuse of market power. BSRC states that potential customers would have many other transportation options available to them (i.e., air, bus, or personal vehicle), and no party has raised comments opposing this argument.

Accordingly, BSRC's request for exemption from Subtitle IV for the operations as described in its petition will be granted, with the exception of those specifically precluded from exemption by statute. The exemption granted by this decision, however, applies only to operations of the same nature and scope as those described in BSRC's petition, and does not extend to new activities, or new types of operations or services, that BSRC may offer in the future or to any service offered in conjunction with any carrier other than PWRR.<sup>6</sup> This exemption is consistent with the exemptions granted in Pullman and Great Canadian and with the findings there that requiring Board approval is an unnecessary burden for this specific type of service. The Board's exemption gives BSRC the right to provide its passenger service on any rail line where the host carrier (PWRR) will allow BSRC's service.

It is ordered:

1. BSRC's operations, as described in its petition, are exempted from 49 U.S.C. Subtitle IV, except for those provisions statutorily precluded from exemption.
2. The exemption granted to BSRC here shall also apply to any future passenger rail operations and services BSRC may undertake, so long as the operations and services are of the same nature and scope as those described by BSRC in its petition.
3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

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<sup>6</sup> BSRC would need to seek prior Board approval in such situations.