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SERVICE DATE – LATE RELEASE AUGUST 23, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36178

METROPOLITAN COUNCIL—PETITION FOR DECLARATORY ORDER

Docket No. FD 36177

HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY—
ACQUISITION EXEMPTION—IN HENNEPIN COUNTY, MINN.

Docket No. FD 32816

HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY—
EXEMPTION—FROM 49 U.S.C. SUBTITLE IV

Digest:¹ This decision finds that the Metropolitan Council will not become a common carrier upon acquiring the rail assets of the Kenilworth Corridor and Bass Lake Spur and that it does not need Board authorization for these transactions. The decision also authorizes, through exemption, Hennepin County Regional Railroad Authority's (HCRRA's) request to acquire a permanent operating easement over the Bass Line Spur. Finally, the decision revokes HCRRA's Subtitle IV exemption with respect to the Kenilworth Corridor.

Decided: August 22, 2018

On April 4, 2018, the Metropolitan Council (the Council), a political subdivision of the State of Minnesota, filed a petition for a declaratory order concerning its acquisition of rail assets in the Twin Cities metropolitan area. The Council asks the Board to declare that the Council's acquisitions of the rail assets of (1) the Kenilworth Corridor from Hennepin County Regional Railroad Authority (HCRRA) and (2) the Bass Line Spur from Soo Line Railroad Company d/b/a Canadian Pacific Railway Company (CP) do not require Board authorization under 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), and that they will not result in the Council becoming a rail common carrier.

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 Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

The Board will exercise its discretionary authority under 49 U.S.C. § 1321 and 5 U.S.C. § 554(e) and grant the Council's request for a declaratory order to remove uncertainty in these matters. Based on a review of the transactions documents, the Board finds that the proposed transactions come within the purview of the Board's State of Maine line of precedent. Accordingly, the proposed transactions would not result in the acquisition of railroad lines requiring Board authorization under 49 U.S.C. § 10901. Furthermore, for the reasons discussed below, the Board will, in this decision, make effective HCRRA's exemption to acquire a permanent, operating easement over the Bass Line Spur in Docket No. FD 36177² and will revoke HCRRA's Subtitle IV exemption over the Kenilworth Corridor in Docket No. FD 32816.³

BACKGROUND

In its petition, the Council states that it is managing the planning and future construction of the Southwest Light Rail Transit (SWLRT) project, which, when completed, will provide light rail transit service in the cities of Minneapolis, St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. (Council Pet. 1-2.) According to the Council, to accomplish this, it will need to acquire the Kenilworth Corridor, a 2.6-mile segment of rail line and rail right-of-way owned by HCRRA, and the Bass Lake Spur, a 6.7-mile-long track and rail right-of-way owned by CP. (*Id.* at 2.) The Council adds that, although a portion of the SWLRT will be constructed and operated adjacent to these lines, the SWLRT will leave sufficient room in the rights-of-way to support segregated freight rail operations. (*Id.*)

The Council asserts that it does not intend to become a rail carrier. It proposes, based on the State of Maine line of cases, to acquire only the physical assets of these properties, while HCRRA would retain a permanent freight easement to provide common carrier service over the Kenilworth Corridor and HCRRA would obtain from CP a permanent freight easement to provide common carrier service over the Bass Lake Spur. (Council Pet. 2.)

² On April 5, 2018, HCRRA filed, in Docket No. FD 36177, a verified notice of exemption to acquire from CP a permanent, exclusive rail freight operating easement over the Bass Lake Spur. On April 24, 2018, Twin Cities & Western Railroad Company (TCW) filed a petition to reject or stay that notice of exemption, and HCRRA replied in opposition on May 2, 2018. By decision served on May 3, 2018, the Acting Director of the Office of Proceedings postponed the effectiveness of the exemption until further order of the Board.

³ In December 1995, the ICC, sua sponte, relieved HCRRA of its common carrier obligation over the Kenilworth Corridor by exempting it, to the extent possible, from obligations under Subtitle IV of Title 49 of the United States Code with respect to the corridor. Chi. & N.W. Transp. Co. Aban. & Discontinuance of Serv. Exemption in Hennepin Cty., Minn., AB 1 (Sub-No. 252X), slip op. at 2-3 (ICC served Dec. 20, 1995).

On April 24, 2018, TCW, which operates over the Kenilworth Corridor and the Bass Lake Spur pursuant to overhead trackage rights, submitted initial comments on the Council's declaratory order petition. TCW objected to the petition on various grounds and asked that, if the Board did not dismiss the petition outright, the agency hold the docket in abeyance pending the outcome of a proceeding that TCW initiated on the same day before the U.S. District Court of the District of Minnesota. (TCW Initial Comments 1-2; id. at Ex. A.) TCW also asked that the Board institute a proceeding, adopt a procedural schedule, and provide for discovery and public comment. (See id. at 1-3.)⁴ More than 30 shippers, municipalities, and other stakeholders filed letters concerning the proposed transactions and describing the importance of rail service provided by TCW. Additionally, U.S. Representatives Collin C. Peterson and Jason Lewis, both of Minnesota, submitted letters requesting a public comment period and careful consideration of the issues by the Board. On May 2, 2018, the Council filed a reply to the letters and TCW's initial comments.

In a decision served on May 22, 2018, the Board denied TCW's request to dismiss the petition outright. Instead the Board instituted a proceeding, solicited public comment, and sought an operating and maintenance agreement between HCRRA and the Council. The Board also asked that the parties address various other issues. Additional filings were submitted in June, including pleadings from TCW and the Council responding to the Board's May 22 questions.

While the record developed, the Board also sponsored mediation among the parties.⁵ The Council notified the Board on July 16, 2018, that it, HCRRA, and TCW had reached a settlement concerning all the unresolved matters in Docket Nos. FD 36178 and FD 36177. The Council and HCRRA then submitted to the Board a settlement agreement among the Council, HCRRA, CP,⁶ and TCW (Settlement Letter, Ex. 1, Settlement Agreement), a construction agreement between the Council and TCW (Settlement Letter, Ex. 2, Construction Agreement), and a co-location agreement between the Council and TCW (Settlement Letter, Ex. 3, Co-Location Agreement). These agreements provide, among other things, that TCW intends to build replacement siding track for siding track removed due to the light rail project, (see Settlement Letter, Ex. 1 at Recitals), that TCW would provide continuous operations outside planned interruptions, (see Settlement Letter, Ex. 2 at § 2.1), and that a coordination committee consisting of representatives of the Council, HCRRA, and TCW will be created to address issues that may arise between the parties, (see Settlement Letter, Ex. 3 at § 6). HCRRA also notified the Board that it does not

⁴ On May 17, 2018, TCW submitted rebuttal comments reiterating and elaborating on several of these points.

⁵ See Met. Council—Pet. for Declaratory Order, FD 36178 (STB served June 1, 2018) (initiating mediation).

⁶ The Council's July 20 letter clarifies that CP is a party to the final settlement agreement. (Settlement Letter 1, n.1.)

object to the Board revoking its Subtitle IV exemption over the Kenilworth Corridor effective on the date the Council acquires the Kenilworth Corridor rail assets. (Settlement Letter 2.) HCRRA further added in a subsequent letter that it and the Council can provide notice to the Board seven days in advance of the Council closing on its acquisition. (HCRRA Letter 1, August 7, 2018.)

On July 19, 2018, TCW moved to withdraw its opposition to the petition for declaratory order and HCRRA's verified notice of exemption that would authorize HCRRA's operating easement over the Bass Line Spur.⁷ TCW states that it is satisfied, based on the various agreements between the parties, that the interests of TCW, its shippers, and its customers will be protected. TCW shared its satisfaction with its shippers, and a shipper coalition led by the Southern Minnesota Beet Sugar Cooperative (TCW Shippers' Coalition) subsequently moved to withdraw its request for conditions sought in its June 29, 2018 letter. (TCW Shippers' Coalition Comments, July 19, 2018.)

DISCUSSION AND CONCLUSIONS

Through the proposed transactions (1) the Council would acquire rail assets on the Kenilworth Corridor from HCRRA, while HCRRA would retain a rail freight operating easement and (2) the Council would acquire rail assets on the Bass Lake Spur from CP, and HCRRA would acquire a rail freight operating easement from CP. As explained below, the Board finds that, under the State of Maine line of precedent, neither of these acquisitions requires Board authority.

Kenilworth Corridor

As a general matter, the acquisition of an active rail line and the common carrier obligation that goes with it requires Board approval. However, when the carrier selling the physical assets of a rail line retains an exclusive permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligation, the Board typically has found that authorization is not required. See State of Maine, 8 I.C.C.2d at 836-37, and its extensive line of precedent. For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference by the purchaser with the carrier's common carrier freight rail service. See Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Pan Am S. LLC, FD 35943, slip op. at 3 (STB served Dec. 4, 2015).

⁷ TCW adds that it has agreed to dismiss its federal district court action. As a result, it asserts that that litigation should not impede the Board from ruling on the Council's petition. (TCW Letter 2, July 19, 2018.)

The Board finds that the Council's acquisition of the assets of the Kenilworth Corridor comports with the Board's State of Maine line of precedent and does not require Board authorization. A transaction can satisfy the State of Maine inquiry even when another entity holds overhead trackage rights on the line, as TCW does here.⁸ Under the property transfer agreement HCRRA "reserves and creates for itself a permanent, irrevocable, exclusive, transferable, and assignable HCRRA Freight Rail Operating Easement over and across the Easement Area and the Kenilworth Corridor Trackage for the provision of service as a rail carrier as that term is defined in 49 U.S.C. § 10102(5), subject to . . . [TCW's trackage rights agreement]." (Council Pet., Ex. 4, § 2.1.1.)

Furthermore, the Council cannot unreasonably interfere with HCRRA's easement, which provides that

[t]he Council's use of the Easement Area for the construction, operation and maintenance of the [SWLRT Green Line] is subject to the condition that the Council will not unreasonably interfere with the ability of HCRRA to operate as a rail carrier and fulfill its common carrier obligation along the Kenilworth Corridor Trackage or unreasonably interfere with freight rail operations under the [TCW trackage rights agreement.]

(Council Pet., Ex. 4, § 2.2.2.)

Neither the operating and maintenance agreement (OMA) submitted per the Board's May 22 decision⁹ nor the joint and cooperating exercise of powers agreement (JPA), both between HCRRA and the Council, permits the Council to unduly interfere with HCRRA's common carrier obligations on the Kenilworth Corridor. For example, the OMA provides that the Council will "exercise its rights and obligations in such manner as to avoid unreasonable interference with Local Freight Rail Service or Overhead Freight Rail Service" (Council Supplement, OMA, § 2.2(c).)

The JPA does allow the Council to administer HCRRA's carrier responsibilities by hiring a third party to provide local freight service, if the need arises. (See Council Pet., Ex. 4c, JPA, §§ 1(a)(2) & 5(a).) However, the Council may only do so on behalf of HCRRA and only if

⁸ See Wis. Dep't of Transp.—Pet. for Declaratory Order—Rail Lines in Janesville, Rock Cty., Wis., FD 35301 (STB served Dec. 11, 2009); Cent. Puget Sound Reg'l Transit Auth.—Acquis. Exemption—BNSF Ry., FD 34747 (STB served Nov. 18, 2005); and Dallas Area Rapid Transit—Acquis. Exemption—Certain Assets of Reg'l Rail Right of Way Co., FD 34346 (STB served Nov. 12, 2003); see also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012).

⁹ The Council and TCW agree to adopt the OMA in the co-location agreement submitted as part of the settlement. (Settlement Letter, Ex. 3, § 3.1(b).)

HCRRA asks for assistance. The Council would also only take such action in furtherance of HCRRA's responsibilities. (See Council Reply 19-20, June 27, 2018.) Similarly, although the Council can engage in additional actions pursuant to the OMA, such as perform maintenance on the Kenilworth Corridor, (see Council Supplement, OMA, §§ 2.2(b) & 3.1(b)), it may only do so "at the request and on behalf of HCRRA . . .", (see id. at § 3.1(b)). The Council would therefore not be a carrier, but merely an instrument of HCRRA. Thus, the Board concludes that under the proposed transaction, HCRRA would retain an exclusive permanent easement to provide common carrier freight service and sufficient control over the line to carry out its common carrier obligation.

For these reasons, the Board finds that the Council's acquisition of the Kenilworth Corridor rail assets would comport with State of Maine and would not constitute an acquisition of a railroad line under 49 U.S.C. § 10901 or confer common carrier status on the Council as to the corridor. Under these circumstances, the proposed transaction does not require Board authorization, either through an application under 49 U.S.C. § 10901 or an exemption under 49 U.S.C. § 10502.

The next issue concerns HCRRA's Subtitle IV exemption over the line. In 1995, the Interstate Commerce Commission (ICC), granted HCRRA an exemption from Subtitle IV on the Kenilworth Corridor, which permitted HCRRA to acquire the line, while relieving it from any common carrier obligation it would incur upon consummation of the acquisition. Chi. & N.W. Transp. Co., AB 1 (Sub-No. 252X) et al., slip op. at 2. Shippers now argue that if service were disrupted on that segment, the Subtitle IV exemption could leave a regulatory gap preventing shippers from seeking regulatory relief. (TCW Shippers' Coalition Comments 17-18, June 27, 2018.) HCRRA has stated that it does not object to the revocation of its Subtitle IV exemption on the Kenilworth Corridor. (Settlement Letter 2.)

Given the shipper concerns that were not present when the ICC granted the exemption in 1995, and HCRRA's acquiescence, the Board will, on its own motion under 49 U.S.C. § 10502(d), revoke HCRRA's Subtitle IV exemption for the Kenilworth Corridor so that HCRRA can assume the responsibilities of a non-exempt carrier subject to the Board's regulatory authority on the Kenilworth Corridor once the Council acquires the rail assets on the corridor.¹⁰ As suggested by HCRRA, it and the Council will be directed to submit notice to the Board seven days before the Council closes on its acquisition.

¹⁰ The Board may revoke an exemption, in whole or in part, if the agency finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Here, by safeguarding service on the Kenilworth Corridor, revocation will support several elements of the RTP.

Bass Lake Spur

As to the Bass Lake Spur transaction, the Council's acquisition of the rail assets also comports with the Board's State of Maine line of precedent and does not require Board authorization. An exhibit to the property transfer agreement, the Bass Lake Spur easement, provides that HCRRA will acquire from CP "a permanent, irrevocable, exclusive, transferable and assignable rail freight operating easement upon and across the Property and the Bass Lake Spur Trackage" (Council Pet., Ex. 4b, at ¶ 5.0.) As with the Kenilworth Corridor, the Council cannot unduly interfere with HCRRA's easement. The agreement provides that "[t]he Council . . . agrees that its construction and operation of the Southwest LRT will not unreasonably interfere with the ability of HCRRA to continuously operate as a rail carrier and fulfill its common carrier obligations along the Bass Lake Spur Trackage or unreasonably interfere with TCW's overhead operations" (Council Pet., Ex. 4b, at ¶7.2.)

And, while the Council possesses the same JPA and OMA rights on the Bass Lake Spur when interacting with HCRRA, as discussed above, the Board does not find these provisions warrant a finding that the Council would become a carrier under State of Maine.

Finally, as discussed earlier, the May 3 order suspended the effectiveness of the exemption under which HCRRA sought to acquire the Bass Lake Spur in Docket No. FD 36177. Much of the controversy involved TCW's concerns that it would be harmed and that the Council's acquisitions would not come within the State of Maine line of precedent. In light of the Board's findings above and the fact that TCW has withdrawn its petition seeking to reject HCRRA's verified notice of exemption, it is appropriate to allow the exemption to take effect.

It is ordered:

1. The Council's petition for declaratory order is granted, as discussed above.
2. The exemption sought in Docket No. FD 36177 is effective.
3. The Subtitle IV exemption granted in Docket No. FD 32816 is revoked on the date when the Council acquires the Kenilworth Corridor assets. The Council and HCRRA are directed to submit notice to the Board seven days before the Council closes on its acquisition.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.