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Before the
Surface Transportation Board



Finance Docket No. 34747

**CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY - -
ACQUISITION EXEMPTION - -
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
IN PIERCE COUNTY, WASHINGTON**

ENTERED
Office of Proceedings

AUG 29 2005

Part of
Public Record

**MOTION OF
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY
TO DISMISS THE
NOTICE OF EXEMPTION**

The Central Puget Sound Regional Transportation Authority ("Sound Transit"), a public agency existing under the authority of the laws of the state of Washington, hereby moves this Board for dismissal of a Verified Notice of Exemption filed today. Because Sound Transit has not acquired either rights or obligations that implicate in any way the freight common carrier operations that remain attached to both line segments and thus has not become a rail carrier providing transportation subject to the jurisdiction of the Board, hereby respectfully requests the Board to dismiss the Notice of Exemption.

I. FACTS

Sound Transit has agreed to acquire two line segments from The Burlington Northern Santa Fe Railway Company. These are (a) a line of railroad acquired on September 28, 2004, between Milepost 2.15 in Tacoma and Milepost 8.9 in Lakeview, on the Lakeview Subdivision located in Pierce County, Washington (the "Lakeview North Segment"), and (b) a line of railroad it will acquire on September 28, 2005 between Milepost 8.9 in Lakeview and Milepost 24.5 in

Nisqually, also on the Lakeview Subdivision (the “Lakeview South Segment”) also located in Pierce County, Washington. Copies of the Purchase and Sale Agreements, as amended, are attached to the Notice of Exemption filed today in this proceeding (the “NOE”) as Exhibits A (Lakeview North Segment Purchase and Sale Agreement, dated December 17, 2003, as amended on September 28, 2004 and November 23, 2004) and B (Lakeview South Segment Purchase and Sale Agreement, dated December 17, 2003, as amended on November 23, 2004). Sound Transit is acquiring the two line segments for the purpose of providing wholly intrastate commuter rail passenger operations.

BNSF initially retained an exclusive freight easement over both line segments in order to fulfill its common carrier freight obligations on both, and Sound Transit acquired no right to operate freight service on the segments. Sound Transit’s and BNSF’s rights and obligations with respect to continued use of the line are set forth in a Joint Use Agreement dated December 17, 2003, a copy of which is attached to the NOE as Exhibit C. That agreement describes the parties’ respective use of the line. BNSF retained “the exclusive right and obligation, with the ability to contract or otherwise assign or sell that right and obligation, to provide freight service to all existing customers and any new customers.” Joint Use Agreement, §2.1.A.1 at 3. BNSF retained responsibility for dispatching the commuter operations on the line. *Id.* at §2.1.A.2. The parties are required to advise each other of their schedules. BNSF’s General Code of Operating Rules, as well as any applicable federal, state and local rules and regulations, govern the operation on the line. *Id.* at §2.3A. Sound Transit is responsible for all maintenance activities initially, although BNSF agreed to perform the work at the outset and Sound Transit has the right to begin providing that work at its discretion and at times specified in the Joint Use Agreement. *Id.* at §2.4.A. and B., at 4-5.

BNSF also specifically retained the right to transfer or assign its rights to conduct freight operations to a third party. *Id.* at §10.9 at 28. Since the execution of both Purchase and Sale Agreements, BNSF has in fact implemented such a transfer. BNSF has transferred its freight common carrier easement, with respect to both segments, subject to certain retained trackage rights, to the City of Tacoma, Washington, d/b/a Tacoma Rail. *See* STB F.D. No. 34555, *City of Tacoma, Department of Public Utilities, Beltline Division, d/b/a Tacoma Rail or Tacoma Municipal Beltline or TMBL–Acquisition and Operation Exemption–Lakeview Subdivision, Quadlok-St. Clair and Belmore-Olympia Rail Lines in Pierce and Thurston Counties, WA* (Service Date Oct. 19, 2004).

II. SOUND TRANSIT HAS NOT ACQUIRED RIGHTS AND OBLIGATIONS THAT WOULD CONSTITUTE ASSUMPTION OF A COMMON CARRIER OBLIGATION, AND THE NOTICE OF EXEMPTION SHOULD BE DISMISSED.

The transaction documents confirm that BNSF initially retained all of the rights and obligations that are essential to provide freight service on the line, and that it had the sole right to provide that service. The City of Tacoma has now acquired that obligation, subject to BNSF's retention of trackage rights on a segment of the line. Sound Transit, on the other hand, acquired no such rights or obligations with respect to freight service, although it did acquire the right to maintain the lines. The Notice of Exemption should be dismissed because the transaction did not involve the transfer of any rights that would implicate this Board's jurisdiction.

This Board, like the ICC before it, has continued to rule 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, DOT – Acquisition and Operation Exemption – Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991). Citing *State of Maine*,

this Board has reiterated that “[o]ur authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred.” STB F.D. No. 34170, *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co.*, slip op., Service Date May 22, 2002 (“*UTA Acquisition*”).

More recently, the Board reviewed a transaction between Metro North Commuter Railroad Company and the Norfolk Southern Corporation. STB F. D. No. 34293, *Metro-North Commuter R. Co. – Acquisition and Operation Exemption – Line of Norfolk Southern Ry. Co. and Pennsylvania Lines LLC*, slip op., 2003 STB Lexis 245 (Service Date May 13, 2003). There, following the transaction, Metro North had responsibility for dispatching, maintenance, and constructing capital improvements, but Norfolk Southern would continue to be fully and solely responsible for fulfilling its obligations as a freight common carrier. *Id.* at *5-*6. The Board concluded that Norfolk Southern was “not transferring common carrier rights or obligations and that Metro-North will not hold itself out as a common carrier performing rail freight service.... As such, Metro-North will not become a rail carrier subject to ... [the Board’s] jurisdiction as a result of the transaction.” *Id.* at *7. *Accord*, STB F. D. No. 33046, *Sacramento-Placerville Trans. Corridor J.P.A. – Acquisition Exemption – Certain Assets of Southern Pacific Trans. Co.*, 1996 STB Lexis 275 (Service Date October 28, 1996); STB F. D. Nos. 32374 and 32375, *Los Angeles Co. Trans. Comm’n – Petition for Exemption – Acquisition from Union Pacific R. Co.*; *Los Angeles Co. Trans. Comm’n – Trackage Rights Exemption – Union Pacific R. Co.*, 1996 STB Lexis 205 (Service Date July 23, 1996).

The Board should conclude that this transaction, like the transactions described in *Metro-North*, *UTA Acquisition*, *Sacramento – Placerville*, and *Los Angeles Co. Trans. Comm.*, does not

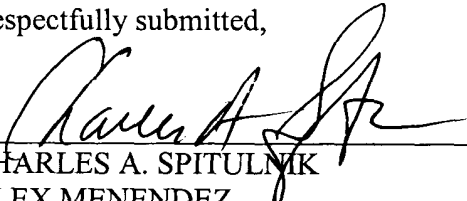
involve the transfer of common carrier obligations. Following this transaction, BNSF's transferee Tacoma Rail (as well as BNSF, to a limited extent on a segment of the line transferred to Tacoma Rail) will continue to hold the obligation to provide freight common carrier service. Sound Transit has specifically acquired no rights that would permit it to engage in such operation. There is nothing here to trigger jurisdiction because Sound Transit will be acquiring no control over the freight operations on the line. Sound Transit will provide, or arrange for the provision of, commuter rail service, but will not hold itself out as a freight carrier and will have no freight service responsibilities. Sound Transit will be conducting maintenance but has no ability to require the freight operator to change any aspect of its service, or to in any way impede that carrier's ability to provide that service.

Consistent with prior Board rulings where an agency is acquiring sufficient interests to permit it to conduct and implement commuter transit operations, but 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, the Board should conclude that it need not assert jurisdiction over the two transactions. Accordingly, the Motion to Dismiss should be granted.

WHEREFORE, and in view of all of the foregoing, Sound Transit respectfully requests the Board to dismiss the Notice of Exemption in this proceeding.

Dated: August 29, 2005

Respectfully submitted,



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