

SERVICE DATE – FEBRUARY 5, 2015
SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35812

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF CITY OF TACOMA IN PIERCE COUNTY, WASH.

Digest:¹ The Central Puget Sound Regional Transit Authority (Sound Transit) has asked the Board to issue a correction to the decision it served in this proceeding on October 27, 2014, granting Sound Transit’s motion to dismiss its notice of exemption to acquire certain assets from the City of Tacoma, d/b/a Tacoma Rail. The request will be denied.

Decided: February 3, 2015

This decision denies the request of the Central Puget Sound Regional Transit Authority (Sound Transit) that the Board “correct” a prior decision, but clarifies the phrase “ownership of the line remains with the selling carrier for purposes of § 10901(a)(4)” included in the October 27, 2014 decision served in this proceeding (October 27 Decision) and other decisions involving the Board’s State of Maine precedent.

BACKGROUND

On April 15, 2014, Sound Transit filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from the City of Tacoma (City) the physical assets of the Tacoma Dome Segment, an approximately one-mile segment of the Mountain Division, located between milepost 1.0, at the BNSF Railway Company mainline near the Port of Tacoma, and milepost 1.99, at East D Street in the City of Tacoma, Pierce County, Wash.² Simultaneously, Sound Transit filed a motion to dismiss the notice, stating that the transaction was not subject to the Board’s jurisdiction³ because Sound Transit would not become a common carrier as a result of the transaction.⁴

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 Decisions, EP 696 (STB served Sept. 2, 2010).

² Notice of the exemption was served and published in the Federal Register on May 1, 2014 (79 Fed. Reg. 24,811).

³ While Sound Transit used the term “jurisdiction,” as have the Interstate Commerce Commission and the Board from time to time in the past, in fact Sound Transit could only seek a
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The Board, in its October 27 Decision, granted Sound Transit’s motion to dismiss. The Board ruled that Tacoma Rail would continue to have sufficient access to the Tacoma Dome Segment to conduct its freight operations and would be able to continue to fulfill its common carrier obligation once the Purchase and Sale Agreement and Joint Use Agreement between Sound Transit and the City became effective. The Board also ruled that these agreements were consistent with the Board’s State of Maine precedent and, therefore, no Board authorization for Sound Transit’s purchase of the right-of-way and trackage of the Tacoma Dome Segment was required. See Me. Dep’t of Transp.—Acquis. & Operating Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C. 2d 835 (1991).

On October 30, 2014, Sound Transit filed a letter asking the Board to issue a correction to the October 27 Decision. Sound Transit states that the Board’s reference to the City’s “ownership of the line,” even in the context of applying 49 U.S.C. § 10901(a)(4), implies that the City would retain some possessory interest in the Tacoma Dome Segment’s real property. Sound Transit, therefore, asks the Board to specify that the City would retain the common carrier obligation and would obtain an exclusive, permanent freight easement to allow it to fulfill its duties and exercise its rights as a common carrier, but that Sound Transit would be the owner of the real property interests associated with the Tacoma Dome Segment. For the reasons discussed below, there is no need to correct the October 27 Decision, and the Board will therefore deny the request.

DISCUSSION AND CONCLUSIONS

The question is whether the Board’s statement “ownership of the line remains with the selling carrier for purposes of [49 U.S.C.] § 10901(a)(4)” implies that the City would retain a possessory interest in the Tacoma Dome Segment’s real property. This reference to “ownership of the line” is found in the October 27 Decision’s general discussion of State of Maine as it relates to 49 U.S.C. § 10901. As explained below, the statement in the decision is correct. It refers to the Board’s interpretation of the ownership of the railroad line, *not* to ownership of the physical railroad property. If Sound Transit had acquired ownership of the railroad line, *including the right to operate*, as part of the transaction, it would be a rail carrier and would require a license under § 10901 or an exemption under 49 U.S.C. § 10502.

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finding that the transaction as structured did not require Board authorization. The Board continues to have jurisdiction over the rail property even though it concluded that it did not need to exercise regulatory authority over the proposed transaction.

⁴ On August 4, 2014, the Board served a decision requesting supplemental information from Sound Transit and Tacoma Rail, a Class III rail carrier owned and operated by the City. Sound Transit filed a supplemental statement on August 21, 2014.

State of Maine and related cases hold that the sale of physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a railroad line within the meaning of § 10901 when the selling carrier: (1) retains a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) has sufficient control over the line to carry out its common carrier operations. Mich. Dep’t of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012). When the seller retains the common carrier obligation and control over freight rail service, the Board has determined that ownership of the railroad line remains with the selling carrier *for purposes of § 10901(a)(4)*. 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 or third-party designee in the provisioning of common carrier freight rail service.

Under State of Maine precedent, “railroad line” includes the regulatory right to operate as a common carrier and the property right to provide freight rail service. See Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010) *aff’d sub nom. Bhd. of R.R. Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011). In 2011, the U.S. Court of Appeals for the District of Columbia Circuit upheld this interpretation of “railroad line.” Bhd. of R.R. Signalmen, 638 F.3d at 812-13. The Court stated that in State of Maine situations “railroad line” includes “not only [(1)] physical railroad property but also [(2)] the interstate freight transportation authority attached to the physical property.” The Court reasoned that this interpretation of “railroad line” was “consistent with common usage” and led “to a logical application of section 10901’s authorization requirement.”

In applying the Board’s State of Maine precedent the key inquiry is whether the selling carrier would retain the common carrier obligation to provide service, as well as the means to do so—namely, a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference. The October 27 Decision’s reference to ownership of “the line” accordingly refers to those elements, not to ownership of the physical railroad property itself. As we explained (October 27 Decision at 2), when a selling carrier “retains an exclusive, permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board . . . typically has found that authorization is not required, and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4)” —in other words, under those circumstances, the property that the selling carrier is selling does not amount to a “railroad line” within the meaning of § 10901(a)(4), so no Board authority is needed. As we found in the October 27 Decision, that is the case here: Sound Transit is acquiring from the City the physical assets of the line, including the City’s interest in the right-of-way; but the City is retaining the common carrier obligation and an exclusive, perpetual freight rail operating easement to fulfill that obligation, and Sound Transit cannot unduly interfere with freight rail service, so State of Maine applies. No correction to the October 27 Decision is needed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request to issue a corrected decision is denied.
2. This decision will be effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.