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April 23, 2018

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April 23, 2018
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By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36157, *City and County of Denver -- Acquisition Exemption*
-- *Western Stock Show Association in the City and County of Denver, Colorado*

Dear Ms. Brown:

Hereby transmitted are Comments On Issues Raised In Decision Served March 23, 2018
for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Denver Rock
Island Railroad

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cc: Charles A. Spitulnik, *cspitulnik@kaplankirsch.com*
Allison I. Fultz, *afultz@kaplankirsch.com*

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY AND COUNTY OF DENVER --)
ACQUISITION EXEMPTION --) FINANCE DOCKET
WESTERN STOCK SHOW) NO. 36157
ASSOCIATION IN THE CITY AND)
COUNTY OF DENVER, COLORADO)

**COMMENTS ON ISSUES RAISED IN
DECISION SERVED MARCH 23, 2018**

DENVER ROCK ISLAND RAILROAD
3400 East 56th Avenue
Commerce City, CO 80022

Commentor

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DUE DATE: April 23, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY AND COUNTY OF DENVER --	)	
ACQUISITION EXEMPTION --	)	FINANCE DOCKET
WESTERN STOCK SHOW	)	NO. 36157
ASSOCIATION IN THE CITY AND	)	
COUNTY OF DENVER, COLORADO	)	

**COMMENTS ON ISSUES RAISED IN
DECISION SERVED MARCH 23, 2018**

Pursuant to the Board's decision in this proceeding served March 23, 2018 at 2, first ordering paragraph, DENVER ROCK ISLAND RAILROAD (DRIR), a Class III rail carrier subject to jurisdiction of the Board, hereby files Comments on the issues raised by the Board at page 2 of that decision, i.e.:

1) As detailed above, WSSA unsuccessfully filed for abandonment authority in 1995 and in 1997 transferred an easement while specifically reserving its rights to use the tracks "to satisfy common carrier obligations." On this record, how is WSSA not a common carrier? Under the proposed transaction, how is there no transfer of a common carrier obligation from WSSA to the City?

2) Under the State of Maine line of cases, the sale of physical rail assets does not constitute the sale of a 'railroad line' within the meaning of § 10901 when, among other things, the selling carrier retains a permanent, 'exclusive' freight rail operating easement giving the right and common carrier obligation to provide freight rail service on the line. Here, following the proposed transaction, DRIR would continue to possess only a 'non-exclusive' freight rail operating easement. What was the intent, and the legal effect, of the 'non-exclusive' easement provision? Does the non-exclusive easement permit the easement-holder to unreasonably interfere with DRIR's operations?

BACKGROUND

On November 28, 2017, the City and County of Denver, Colorado (the City), a noncarrier, filed a Notice of Exemption to acquire from the Western Stock Show Association (WSSA) the real property underlying two lines of railroad totaling approximately 1.2 miles in the Denver Stockyards (the Lines). The Lines consist of two corridors, i.e., (1) the National Western Drive Corridor (NWD Corridor), which is adjacent to National Western Drive; and (2) the River Corridor (River Corridor), which is adjacent to the east bank of the South Platte River. That notice became effective on December 28, 2017.

Simultaneously, the City filed a Motion to Dismiss that Notice of Exemption on the ground that under the principle of the Board's decision in *Maine Department of Transportation -- Acquisition and Operation Exemption -- Maine Central Railroad*, 8 I.C.C. 2d 835 (1991), (*State of Maine*), the sale of real property by WSSA to the City is not subject to the Board's regulatory jurisdiction. Under *State of Maine*, when a rail carrier selling a rail line retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service, and has sufficient control over the line to carry out its common carrier obligations, the Board has found that Board authorization is not required because the transaction does not amount to a sale of the rail line under 49 U.S.C. § 10901.

DRIR owns the track materials in the Lines. DRIR operates over the Lines pursuant to its existing common carrier freight operating easement, *which is not exclusive*.

The City contends that it will acquire no right nor obligation to provide freight rail service over the Lines and that DRIR's common carrier right to provide freight service would not be

affected by sale of the real property to the City. On those predicates, the City contends that the sale of real property would not amount to sale of a rail line under *State of Maine*.

In the decision served March 23, 2018, the Board found that it did not have sufficient information to determine whether the City's Motion to Dismiss under *State of Maine* should be granted. The Board reasoned as follows (at 1-2):

...Specifically, there are questions raised by the record relating to WSSA's status vis-a-vis the Lines and the nature of the easement. In July 1997, WSSA agreed to convey to DRIR a 'non-exclusive' easement for rail purposes. (Notice, Attachment 2 at 1.) The easement states that DRIR's rights shall terminate on the effective date of a Board order authorizing DRIR to discontinue service over the lines located on the easement. (Notice, Attachment 2 at 6.) The bill of sale for the non-real property physical assets of the Lines is incorporated by reference to the easement, and states that WSSA 'reserves all rights to use the existing tracks. . .to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the Surface Transportation Board.' (Notice, Attachment 2, Appendix 3 at 1.) It further states that DRIR 'accepts the Tracks subject to the obligations of other entities to provide common carrier services; and agrees not to remove the Tracks. . .prior to final abandonment authority being obtained from the [Board].' (*Id.*) The record also references several proceedings from 1996, (Mot. to Dismiss at 7 n.1), which also involved the River Corridor and the NWD Corridor at issue in this proceeding. In 1996, the Board, among things, denied a petition for abandonment filed by WSSA for the Lines. See W. Stock Show Ass'n -- Aban. Exemption -- in Denver, Colo., 1 S.T.B. 113, 113-14 (1996).

COMMENTS

DRIR has the following comments on the issues raised by the Board:

1. Issue 1 - How Is WSSA Not A Common Carrier?

WSSA clearly is a common carrier of freight by rail. WSSA has a residual common carrier obligation to provide common carrier freight rail service over the Lines, or to arrange for the provision of such service by another, in the event that DRIR were to discontinue its provision of rail service over the Lines, unless and until WSSA lawfully abandons that obligation or lawfully conveys such obligation to another.

That finding is clearly warranted on the basis of the Board's reasoning quoted above.

See, also, *Western Stock Show Assn. -- Aban. Exemption -- in Denver, CO*, 1 STB 113 (1996) at 145, where the Board said:

...WSSA then sought adverse discontinuance of DTRC's service on the lines located on its property. In addition, as WSSA assertedly was unable to find another operator for the lines, it concurrently filed a petition seeking an exemption to abandon the lines.

Those actions are unmistakable hallmarks of an entity that recognizes that it has a residual common carrier obligation to provide rail freight service. WSSA dealt first with the entity that has the primary common carrier obligation (by adverse discontinuance). WSSA then sought to replace that primary operator. Lastly, WSSA attempted to deal with its own residual common carrier obligation by means of abandonment.

2. Under The Proposed Transaction, How Is There No Transfer Of A Common Carrier Obligation From WSSA To The City?

DRIR recently made an offer to the City whereby DRIR would accept a conveyance of the residual common carrier rights and obligations from WSSA, whereupon those rights and obligations would merge into DRIR's existing common carrier rights and obligations, in exchange for a grant by WSSA to DRIR of an exclusive permanent easement to operate over the Lines that would replace DRIR's existing non-exclusive easement.

In response to that offer, the City indicated that although WSSA would probably accept that offer, WSSA is not able to grant such an exclusive easement because BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) have trackage rights to operate over most of the Lines. Neither BNSF nor UP actually operates over the Lines at present.

The City indicated that in furtherance of DRIR's offer, the City would attempt to obtain an agreement by BNSF and UP to voluntarily discontinue their trackage rights over the Lines.

DRIR has not been advised of the status of the City's attempt in that respect.

3. What Was The Intent And The Legal Effect Of The Non-Exclusive Easement Provision?

The Non-Exclusive nature of DRIR's easement was intended to retain the ability of WSSA, as holder of a residual common carrier obligation, and BNSF and UP as trackage rights holders, to operate over the Lines as might be required.

4. Does The Non-Exclusive Easement Permit The Easement-Holder To Unreasonably Interfere With DRIR's Operations?

There is nothing in the rights reserved by WSSA to operate over the Lines that precludes WSSA from interfering with DRIR's common carrier rail operations. Thus, WSSA's operating rights are open-ended in the Bill of Sale that is Appendix 3 of the Easement Deed dated July 10, 1997, viz:

... (T)he sale and conveyance hereunder of the Tracks is expressly subject to, and Seller (WSSA) specifically reserves all rights to use existing tracks or replacement tracks to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the Surface Transportation Board, and Buyer (DRIR) accepts the Tracks subject to the obligation of other entities to provide common carrier services; and agrees not to remove the Tracks or replacement tracks prior to final abandonment authority being obtained from the Surface Transportation Board. . .

5. Additional Comments

The City's Motion to Dismiss grounded on *State of Maine* should be denied. The decision in that case requires retention of an *exclusive* permanent easement to permit continuance of common carrier freight service. DRIR's retained easement is non-exclusive (decision served March 23, 2018 at 1, note 1).

In addition, under *State of Maine*, sufficient control must be retained to permit common carrier obligations to be carried out. The record does not reflect that required control in DRIR.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the City's Motion to Dismiss should be denied.

Respectfully submitted,

DENVER ROCK ISLAND RAILROAD
3400 East 56th Avenue
Commerce City, CO 80022

Commentor

A handwritten signature in cursive script that reads "Thomas F. McFarland".

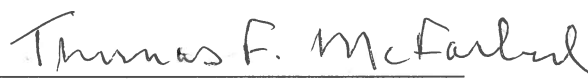
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Attorney for Commentor

DUE DATE: April 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018 I served a copy of the foregoing Comments On Issues Raised In Decision Served March 23, 2018 on Charles A. Spitulnik, Kaplan Kirsch & Rockwell LLP, 1001 Connecticut Avenue, N.W., Suite 800, Washington, DC 20036, by e-mail to cspitulnik@kaplankirsch.com, and on Allison I. Fultz, Kaplan Kirsch & Rockwell LLP, 1001 Connecticut Avenue, N.W., Suite 800, Washington, DC 20036, by e-mail to afultz@kaplankirsch.com.



Thomas F. McFarland