

SERVICE DATE – MARCH 29, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36669

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

Digest:¹ The Board finds that the Massachusetts Bay Transportation Authority (MBTA) does not need Board authority to acquire certain rail assets owned by CSX Transportation, Inc. The Board therefore grants MBTA's motion to dismiss its notice seeking such authority.

Decided: March 29, 2023

In this decision, the Board grants the motion of the Massachusetts Bay Transportation Authority² (MBTA) to dismiss its notice of exemption to acquire certain rail assets owned by CSX Transportation, Inc. (CSXT). The Board finds that 49 U.S.C. § 10902 does not apply to the proposed acquisition, because CSXT is selling only the physical assets of the rail lines at issue. CSXT and another rail carrier, Grafton & Upton Railroad Company (G&U), would hold permanent and exclusive freight rail operating easements to fulfill the freight rail common carrier obligation on the lines.³ As a result, the purchaser, MBTA, would not be able to unduly interfere with CSXT's and G&U's ability to provide freight rail service, and no authority for the acquisition is required from the Board.

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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² In its verified notice, MBTA, a department of the Commonwealth of Massachusetts, states that it is a common carrier by virtue of its ownership of lines of railroad not directly involved in this proceeding. (Notice 1 n.1; see, e.g., Boston & Me. Corp.—Discontinuance of Service Exemption—in Middlesex Cnty., Mass., AB 32 (Sub-No. 56X) (STB served Feb. 10, 1994).) MBTA states, however, that it does not provide freight common carrier service and does not hold itself out to do so. (Mot. to Dismiss 3 n.8.)

³ MBTA states that, contemporaneously with its acquisition, CSXT intends to assign a portion of its easement to G&U, a Class III rail carrier. (Mot. to Dismiss 2 n.3.) In Grafton & Upton Railroad—Acquisition & Operation Exemption—CSX Transportation, Inc., Docket No. FD 36670, G&U filed a verified notice of exemption for operation over a portion of CSXT's proposed easement, pursuant to 49 C.F.R. part 1150.

BACKGROUND

On February 13, 2023, MBTA filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire from CSXT approximately 8.86 miles of track, which includes: (1) an 8.4-mile segment of railroad track between milepost QVG 0.0, at Franklin, Norfolk County, Mass., and milepost QVG 8.4, at Milford, Worcester County, Mass., generally known as the Milford Secondary Line; and (2) a roughly 0.46-mile segment of the Franklin Industrial Track, contiguous with the Milford Secondary Line, extending between valuation station 1456+00 and valuation station 1480+40 within Franklin, Norfolk County, Mass. (collectively, the Assets).⁴ Concurrently, MBTA filed a motion to dismiss the notice, contending that the proposed transaction does not require Board authorization under Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991). The motion is unopposed.

MBTA states that, on April 11, 2022, it reached an agreement with CSXT, pursuant to which CSXT would convey to MBTA the right-of-way of the Assets, including all “fixtures” (tracks, rails, ties, switches, and ballast, etc.), other “personal property,” and certain permits along the Milford Secondary Line and the Franklin Industrial Track. (Mot. to Dismiss 6; *id.*, Ex. E at 3.) MBTA states that the objective of the proposed transaction is to extend its passenger service footprint and further integrate the lines of MBTA’s existing commuter operations. (Mot. to Dismiss 5.) Specifically, MBTA states, among other things, that through its purchase, MBTA would secure ownership of strategic assets critical to its Franklin/Foxborough, Mass., passenger service. (*Id.*) MBTA further asserts that the proposed transaction would allow MBTA greater latitude in planning and implementing infrastructure and service improvements throughout its network, in the joint interest of freight and commuter rail service. (*Id.*)

According to MBTA, the parties’ proposed transaction would allow CSXT to sell to MBTA its interests in the Assets, while allowing CSXT to retain a perpetual freight rail easement over the track segments. (Mot. to Dismiss 2.) Contemporaneously with MBTA’s acquisition of the Assets, MBTA states that CSXT would retain its easement over the Franklin Industrial Track, but would assign the portion of the easement over the Milford Secondary Line (Milford Freight Easement) to G&U.⁵ (*Id.*) MBTA asserts that G&U currently holds an easement for the Milford Secondary Line pursuant to a transaction authorized in Grafton & Upton Railroad—Acquisition & Operation Exemption—CSX Transportation, Inc., FD 36444 (STB served Sept. 28, 2020). (Mot. to Dismiss 2 n.3.) According to MBTA, that easement is set to terminate upon the closing of the present transaction. (*Id.*) Thus, MBTA maintains that, upon assignment of the easement over the Milford Secondary Line,⁶ G&U would provide freight common carrier service over the

⁴ Notice of the exemption was served and published in the Federal Register on March 1, 2023 (88 Fed. Reg. 13,005).

⁵ Along with its motion to dismiss, and included as Exhibit B, MBTA submitted a draft Release Deed for the Milford Secondary Line and the Franklin Industrial Track, which, among other things, details the nature and extent of the easements for CSXT and G&U.

⁶ According to MBTA, CSXT has agreed to assign the retained Milford Freight Easement to G&U for a term of years, contemplating that at some future date CSXT may

Milford Secondary Line pursuant to the easement and an operating agreement with MBTA (herein referred to as the Milford Operating Agreement).⁷ (*Id.* at 2.)

The Milford Secondary Line

MBTA states that the Milford Operating Agreement provides a single standard to govern MBTA stewardship over the Milford Secondary Line. (Mot. to Dismiss 16-17.) According to MBTA, in all cases, MBTA may not unreasonably interfere with G&U's operating rights. (*Id.*; see also *id.*, Ex. C art. 1(A).) Further, MBTA asserts that the Milford Operating Agreement specifically accounts for G&U's ongoing operations and provides equitable standards for dispatching by MBTA. (See *id.*, Ex. C art. 10(H) (requiring dispatching of trains without prejudice against or partiality for users of the line).) Additionally, the agreement requires MBTA to adequately maintain the Milford Secondary Line to, at a minimum, Federal Railroad Administration (FRA) Class 1 track standards. (See *id.*, Ex. C art. 7(A) (MBTA must provide for infrastructure improvements designed to maintain track conditions to FRA Class 1 standards).) MBTA also notes that it has long maintained the tracks that comprise the Assets, and that it also currently handles dispatching duties, all under lease terms with CSXT. (Mot. to Dismiss 18.) As such, MBTA states that the proposed transaction would not disrupt the maintenance and dispatching status quo on the Milford Secondary Line. (*Id.*) Finally, MBTA argues that the Milford Operating Agreement contains robust procedures governing the "highly unlikely situation" in which MBTA were to fail to perform its maintenance obligations, entitling G&U to conduct necessary and required maintenance to protect its own operations on the track segment. (*Id.*; see also *id.*, Ex. C art. 7(C).)

The Franklin Industrial Track

With respect to post-transaction operations over the Franklin Industrial Track, MBTA states that its operations, and those of CSXT, would be governed by the terms of the 1985 Agreement. (Mot. to Dismiss 2-3.) According to MBTA, this agreement and its amendments provide that MBTA will perform equitable dispatching, and also require MBTA to adequately maintain the track to, at a minimum, FRA Class 1 track standards. (*Id.* at 24; see also *id.*, Ex. B at 3.) MBTA also asserts that the 1985 Agreement provides that MBTA oversight of the

reacquire the easement pursuant to appropriate Board authorization processes. (Mot. to Dismiss 7, 27-28.) MBTA states that, should such an easement transfer occur, CSXT's common carrier operations over that rail segment would be governed by the terms of a 1985 agreement originally entered between MBTA and Consolidated Rail Corporation (herein referred to as the 1985 Agreement). (*Id.* at 27-28.) MBTA therefore requests a prospective Board finding that MBTA need not return to the Board for a supplemental State of Maine determination should CSXT, through appropriate Board advance authorization procedures, reacquire the Milford Freight Easement, provided that CSXT's operations on that track segment are governed by the terms of the 1985 Agreement. The Board declines to act on MBTA's request at this time, as the Board would need to review the relevant documentation concerning any such easement transfer. The Board will do so if, and when, CSXT seeks to reacquire the Milford Freight Easement.

⁷ A draft Milford Operating Agreement is included as Exhibit C to MBTA's motion to dismiss.

Franklin Industrial Track (as with other MBTA-owned railroad assets) “shall be exercised in a manner which does not interfere unreasonably with the exercise by [CSXT] of its access rights . . . under this Agreement.” (Mot. to Dismiss 26-27; see also id., Ex. D at 14.)

MBTA seeks expedited consideration and requests that the Board issue a decision granting the motion to dismiss on or before March 31, 2023, to allow the parties to close on the proposed transaction date of April 11, 2023. (Mot. to Dismiss 3-4.)

DISCUSSION AND CONCLUSIONS

The question at issue here is whether the Board’s authority is required for MBTA to acquire the Assets under the proposed transaction. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. When a carrier selling rail line assets 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, and that regulatory “ownership” of the line remains with the selling carrier for purposes of § 10901(a)(4). State of Maine, 8 I.C.C.2d at 836-37; see Mich. Dep’t of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); 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); see also Cent. Puget Sound Reg’l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cnty., Wash., FD 35812 (STB served Feb. 5, 2015) (holding that ownership of “the line” can refer to a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference, not to ownership of the physical railroad property itself). For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference with the carrier’s common carrier freight rail service by the purchaser or third-party designee.

As a preliminary matter, however, the Board must address whether MBTA, having previously obtained common carrier authority, may acquire an additional line under the State of Maine doctrine. State of Maine cases typically involve state or local government organizations that are not rail carriers. However, the Board has applied the doctrine to transactions where an acquiring state entity already had the status of a rail carrier on another railroad line. See, e.g., Cayuga Cnty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al., slip op. at 5-6 (STB served July 14, 2016) (granting State of Maine motion to dismiss).

The Board concludes that it is appropriate to grant MBTA’s State of Maine motion to dismiss. MBTA, a state entity, does not provide freight common carrier service and its status on other lines is incidental to its governmental functions. Under the circumstances, the Board finds that MBTA’s status as a common carrier does not preclude application of State of Maine. Thus, the Board finds that the transaction as proposed does not require Board approval. Under the April 11, 2022 agreement between MBTA and CSXT, CSXT will convey its interest in the Assets but retain a permanent and exclusive freight railroad operating easement over the track segments. Simultaneously with the closing of this proposed transaction, CSXT intends to retain the portion of its freight rail operating easement over the Franklin Industrial Track, while

assigning to G&U the portion of its easement with respect to the Milford Secondary Line. (Mot. to Dismiss 2 n.3; see also id., Ex. B.) Under the controlling agreements, freight rail services can only be terminated by obtaining Board authority to discontinue service over or abandon the freight easement. (Mot. to Dismiss 25; Ex. B, Art. 20; Ex. C at 63.) MBTA will not obtain any rights to provide freight rail service over the Assets. (Mot. to Dismiss 3.) Furthermore, the relevant agreements do not allow MBTA to unduly interfere with CSXT's and G&U's continuation of common carrier freight rail service. After MBTA acquires the Assets, CSXT will continue to have the right to operate on the Franklin Industrial Track, G&U will operate on the Milford Secondary Line (Mot. to Dismiss 5; see also id., Ex. B), and the terms of the parties' agreements stipulate that MBTA may not unreasonably interfere with CSXT's or G&U's provision of freight common carrier service on both rail lines. (See id., Ex. C art. 1(A); see also id., Ex. D at 14.)

As to maintenance, the Board has found that responsibility for track maintenance, by itself, does not constitute an acquisition of a rail line requiring Board authorization. See Va. Port Auth.—Acquis. Exemption—Norfolk & Portsmouth Belt Line R.R., FD 35532, slip op. at 4 (STB served Aug. 1, 2011). Under the parties' agreements, MBTA will be responsible for inspecting and maintaining the track segments to (at minimum) FRA Class 1 track standards, and CSXT and G&U are granted rights to undertake necessary repairs if MBTA fails to do so. (See Mot. to Dismiss 18-19, 25.) Thus, the agreements ensure that the Assets will be maintained to the standards necessary for CSXT and G&U to fulfill their common carrier freight obligations. Like maintenance, the Board has also noted that placing dispatching control in the hands of the acquiring entity may be allowed when there is a legitimate business justification. See Fla. Dep't of Transp.—Pet. for Declaratory Order—Rail Line of CSX Transp., Inc. Between Riviera Beach & Miami, Fla., FD 35783, slip op. at 8 (STB served Oct. 1, 2014); San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225, slip op. at 4 (STB served June 23, 2011); see also Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp. Inc., FD 35312, slip op. at 12, 14 (STB served May 3, 2009) (finding MBTA's planned dispatching control where it provided priority to passenger trains in some instances was reasonable and did not discriminate against freight service). The planned implementation of infrastructure and service improvements throughout MBTA's network is a legitimate business justification for MBTA's control over dispatching here. Furthermore, prior to its acquisition of the Assets, MBTA already had dispatching control and there is no indication that such control has ever interfered with freight common carriage.

Based on this record and the documents submitted,⁸ the Board finds that the proposed transaction is consistent with State of Maine and that MBTA's acquisition of the Assets is not the acquisition of a rail line under 49 U.S.C. § 10902. Because CSXT and G&U will retain

⁸ As noted, see supra notes 5 & 7, MBTA has submitted draft versions of the Release Deed and the Milford Operating Agreement. Material changes to the terms of these documents could result in the Board finding that the alterations constitute a new transaction subject to State of Maine review. See Mass. Dep't of Transp., FD 35312, slip op. at 15. MBTA will be directed to submit final versions of these documents. See id. The Board's conclusion that the proposed transaction does not require Board authorization under 49 U.S.C. § 10902 will remain in effect, however, unless and until the Board issues an order to the contrary.