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SERVICE DATE – SEPTEMBER 7, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35653

SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION—PETITION
FOR DECLARATORY ORDER

Digest:¹ Santa Cruz County Regional Transportation Commission does not need Board authorization to acquire the physical assets of the Santa Cruz Branch line in Santa Cruz County, Cal. Although Santa Cruz is acquiring the physical assets of the line, it will not acquire the right and legal obligation to provide freight rail service, which will be retained by the seller and then transferred to a third-party easement owner/operator. Nor will Santa Cruz be in a position to interfere unduly with freight rail operations.

Decided: September 6, 2012

On July 24, 2012, Santa Cruz County Regional Transportation Commission (Santa Cruz or Petitioner), a noncarrier, filed a petition for declaratory order asking the Board to determine that the agency does not have regulatory authority over Santa Cruz's proposed acquisition of the physical assets of the Santa Cruz Branch line (the Line). The Line, which is owned by Union Pacific Railroad (UP), is 30.957 miles long. It runs between milepost 0.433 and milepost 31.39 in Santa Cruz County, Cal. In its petition, Santa Cruz argues that the acquisition of the Line does not require Board approval because the transaction complies with the Board's precedent set forth in Maine Department of Transportation—Acquisition and Operation Exemption—Maine Central Railroad, 8 I.C.C. 2d 835 (1991) (State of Maine).

Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will issue a declaratory order to remove uncertainty in this matter. As discussed below, we will grant Petitioner's request for a Board declaration that the transaction, as proposed, would not cause Santa Cruz to become a common carrier by rail and would not require our authorization under 49 U.S.C. § 10901. Based on our interpretation of the transaction documents, we find that this transaction would not be subject to the Board's authority and would come within the purview of our State of Maine line of precedent.

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

BACKGROUND

Santa Cruz, a public agency created under the laws of the State of California, is not and does not wish to become a rail carrier. Nevertheless, Santa Cruz proposes to acquire the physical assets of the Line in order to preserve freight rail service and to allow the operation of tourist excursions and the development of other public uses. To that end, Petitioner states that under Step One of the proposed transaction, it would acquire only the physical assets of the Line, while UP would retain a permanent, exclusive freight easement and the common carrier obligation. Under Step Two, UP would then transfer its retained easement² to the Santa Cruz and Monterey Bay Railway Company (SCMB),³ which would replace UP as the common carrier with the right and obligation to conduct freight rail operations on the Line, if SCMB successfully obtains operating authority from the Board.⁴ Petitioner states that a condition precedent to its closing on the purchase are Board findings that the transaction does not conflict with State of Maine, and that Santa Cruz will not become a carrier as a consequence of the transaction.⁵

The Board's decision in the present case follows two earlier decisions in which Santa Cruz sought a declaratory order prior to purchasing the assets of the Line. In a decision served on August 22, 2011, the Board concluded that Santa Cruz's petition failed to satisfy the standard set forth in State of Maine, but permitted Santa Cruz to submit modified transaction documents.⁶ Santa Cruz did so and, in a decision served on December 15, 2011, the Board considered Santa Cruz's petition a second time.⁷ In that decision, the Board found that Santa Cruz had made the necessary revisions to the transaction documents to satisfy the requirements imposed by State of Maine, and therefore granted the petition for declaratory order. One week after that decision, however, the proposed operator withdrew from the transaction and filed a petition to withdraw

² The parties describe the property reserved by UP more fully in the proposed Quitclaim Deed, and refer to it as "the Freight Easement." Santa Cruz Pet., Attach. 3, Ex. D, pp.1-2.

³ SCMB is a subsidiary of short line holding company Iowa Pacific Holdings, L.L.C. and Permian Basin Railways.

⁴ To obtain Board authority for the operation of the Line, which is necessary before SCMB may begin service, SCMB and/or its parent companies have filed the following related notices of exemption: Iowa Pac. Holdings, L.L.C. and Permian Basin Ry. – Continuance in Control Exemption – Santa Cruz and Monterey Bay Ry., FD 35632 (STB served Aug. 17, 2012); Santa Cruz and Monterey Bay Ry. – Assignment of Lease Exemption – Union Pac. R.R. and Sierra N. Ry., FD 35633 (STB served Aug. 17, 2012); and Santa Cruz and Monterey Bay Ry. – Acquis. and Operation Exemption – Union Pac. R.R., FD 35659 (STB served Aug. 17, 2012).

⁵ Santa Cruz Pet. at 3.

⁶ Santa Cruz Reg'l Transp. Comm'n – Pet. for Declaratory Order – Union Pac. R.R., FD 35491 (STB served Aug. 22, 2011).

⁷ Santa Cruz Reg'l Transp. Comm'n – Pet. for Declaratory Order – Union Pac. R.R., FD 35491 (STB served Dec. 15, 2011) (December 2011 Decision).

its verified notice of exemption to operate the Line. The Board approved that request⁸ and Santa Cruz re-solicited the contract for proposals and chose SCMB as the new operator.⁹

In the present petition,¹⁰ Santa Cruz would acquire the physical assets of the Line pursuant to a Quitclaim Deed with UP.¹¹ The Quitclaim Deed reserves for UP and its assigns a permanent, exclusive freight easement for the purpose of conducting freight rail operations on the Line.¹² The Quitclaim Deed contemplates that UP would transfer its freight easement to SCMB through an Assignment of Freight Easement.¹³ Santa Cruz and SCMB would enter into an Administration, Coordination, and License Agreement (ACL Agreement) that would govern their relationship.¹⁴

Santa Cruz now asks the Board to declare that the proposed transaction, if consummated pursuant to the transaction documents submitted here, would not be subject to the Board's regulatory authority under the Board's State of Maine precedent. Santa Cruz states that it must soon submit requests for public funding to the California Transportation Commission to purchase and rehabilitate the acquired assets. According to Petitioner, there are no changes contemplated to the language of the Quitclaim Deed and only minor changes to the ACL Agreement submitted in the prior proceeding, (FD 35491) – transaction documents approved by the Board there.¹⁵

DISCUSSION AND CONCLUSIONS

The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901. State of Maine and its progeny, however, hold that the sale of the 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

⁸ Sierra N. Ry. – Acquis. and Operation Exemption – Union Pac. R.R., FD 35490 (STB served Feb. 16, 2012).

⁹ Santa Cruz Pet. at 4.

¹⁰ Santa Cruz submitted copies of the transaction documents to the Board as attachments to the petition.

¹¹ Santa Cruz Pet., Attach. 3, Ex. D.

¹² Id. at 1

¹³ Id. at 2.

¹⁴ Santa Cruz Pet., Attach. 1.

¹⁵ Santa Cruz Pet. at 5. Importantly, the ACL Agreement contains a “No Material Interference” provision at section 2.3 very similar in language to a provision in the ACL Agreement approved by the Board in FD 35491. This provision recognizes that Santa Cruz may not exercise its rights under the ACL Agreement in a manner that may materially interfere with SCMB's operation of the freight easement.

carrier obligation to provide freight rail service on the line, and (2) retains sufficient control over the line to carry out its common carrier operations. When the seller retains the common carrier obligation and control over freight rail service, Board precedent holds that the purchaser of only the physical assets of the line does not become a carrier for purposes of § 10901(a)(4).

For a transaction to fall within that precedent, however, the terms of the sale must protect the seller from undue interference by the purchaser in the provision of common carrier freight rail service. Mass. Dept. of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 5 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). The seller may transfer its freight rail operating easement and the related common carrier obligation to a third-party easement owner/operator, as long as the transaction transfers sufficient contractual rights to the new owner/operator to carry out the common carrier obligation it has acquired. Mass. Coastal R.R.—Acquis.—CSX Transp., Inc., FD 35314, slip op. at 3-5 (STB served Mar. 29, 2010). Therefore, in determining whether Santa Cruz would become a rail carrier if the transaction were completed, the Board will look to whether, as part of the transaction, SCMB, as the third-party easement owner/operator, would obtain a permanent, exclusive freight rail operating easement and would have sufficient interest in and control over the Line to permit it to carry out its common carrier obligation.

The proposed Quitclaim Deed and ACL Agreement are substantially the same as those the Board addressed in the December 2011 Decision. Collectively, as more fully discussed in that decision, they comport with the State of Maine requirements: that the seller retain a permanent, exclusive freight rail operating easement and that the subsequent third-party easement owner/operator maintain sufficient control over the Line to carry out its common carrier operations. Therefore, the proposed transaction is consistent with State of Maine, and the proposed acquisition of the assets of the Line by Santa Cruz would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause Petitioner to become a rail carrier. Under these circumstances, we declare that the transaction, as proposed, does not require Board authorization under 49 U.S.C. § 10901.

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

It is ordered:

1. Santa Cruz's petition for declaratory order is granted as discussed above.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.