

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34293

METRO-NORTH COMMUTER RAILROAD COMPANY—ACQUISITION AND  
OPERATION EXEMPTION—LINE OF NORFOLK SOUTHERN RAILWAY COMPANY AND  
PENNSYLVANIA LINES LLC

Decided: May 9, 2003

On February 21, 2003, Metro-North Commuter Railroad Company (Metro-North), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire through a sublease from Norfolk Southern Railway Company (NSR) and operate a rail line owned by Pennsylvania Lines LLC (PRR) and leased and operated by NSR: (1) between approximately milepost JS-31.3 at Suffern, NY, and approximately milepost JS-76.6 at CP-Howells, NY; and (2) between approximately milepost SR-68.7 (equals JS-76.6) at CP-Howells, NY, and approximately milepost SR-89.9 at Port Jervis, NY.<sup>1</sup> Subsequently, on March 5, 2003, Metro-North filed a motion to dismiss the notice, asserting that the transaction should not be subject to Board jurisdiction because Metro-North will not become a common carrier as a result of the transaction. There is no opposition to the motion. We will grant the motion to dismiss.

BACKGROUND

Metro-North is a public benefit corporation of the State of New York. Metro-North was founded in 1983, at the time Metropolitan Transportation Authority (MTA) assumed control of Consolidated Rail Corporation (Conrail) rail passenger operations in New York and Connecticut. Metro-North provides mass transportation for commuters in seven counties in New York as well as in two counties in Connecticut. Since implementation of the Northeast Rail Service Act, and prior to the consummation of the sublease, Metro-North provided rail passenger service over the subject line under a trackage rights agreement among, *inter alia*, Metro-North, MTA, and Conrail, dated January 1, 1983 (1983 Agreement).<sup>2</sup> The 1983 Agreement would have expired by

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<sup>1</sup> Notice was served and published in the Federal Register on March 31, 2003 (68 FR 15554), indicating that the parties intended to consummate the transaction on February 28, 2003.

<sup>2</sup> Norfolk Southern Corporation (NSC) and its rail subsidiary, NSR, entered into the Conrail Transaction Agreement with CSX Corporation (CSX) and its rail subsidiary, CSX Transportation, Inc. (CSXT), Conrail Inc. (CRR) and its rail subsidiary, Conrail, and CRR Holdings LLC, pursuant to which CSX and NSC indirectly acquired all the outstanding capital  
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its terms on December 31, 1997, but was extended under two renewal agreements. That agreement has now been replaced by a Sublease Agreement and an Operations Agreement.<sup>3</sup>

Metro-North states that it will be subleasing the subject line from NSR. Metro-North argues, however, that various provisions in the Sublease and Operations Agreements require a finding that the transaction will not result in its becoming a rail common carrier and, therefore, that the transaction is not subject to the Board's jurisdiction. In support, Metro-North points out that NSR will retain the exclusive, irrevocable, and perpetual right to provide or permit rail freight service on the line. Metro-North further notes that, although it acquired the right to continue to operate rail passenger service on the line, it did not acquire the right to operate (or authorize any third party to operate) rail freight service of any kind on the line. Metro-North adds that its dispatching responsibility for the line under the 1983 Agreement will continue under the Operations Agreement, but it points out that NSR has contractual remedies if freight trains are not dispatched in accordance with that agreement.

Metro-North also points out that, pursuant to the Operations Agreement, its rail passenger operations on the subject line must not materially interfere with NSR's rail freight operations and its access to shippers and receivers. Metro-North notes that its passenger trains will have priority over NSR freight trains during the morning and evening "peak" operating periods for rail passenger service, but stresses that NSR has the right to run freight trains during those periods, subject to Metro-North's operating priority. Metro-North also indicates that its maintenance and other activities on the subject line during off-peak periods must not materially interfere with NSR's rail freight operations.

Metro-North also indicates that, under the Operations Agreement, it will be responsible for all maintenance on the subject line, but notes that NSR has contractual rights to ensure that the line is properly maintained. Metro-North adds that it will be responsible for all inspections of the subject line, including inspections of all connecting tracks maintained by Metro-North. It points out, however, that it must provide NSR with a copy of all track and inspection reports and that NSR will retain the right to enter the subject line to conduct inspections of the line for any business purpose. Moreover, Metro-North avers that it will be responsible for constructing capital improvements on the line, but notes that it must coordinate the planning and design of

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<sup>2</sup>(...continued)

stock of CRR. CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196 (1998). Pursuant to the Conrail Transaction Agreement, certain Conrail assets, including the subject line, were allocated to PRR, a wholly owned subsidiary of Conrail. These Conrail assets are leased and operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR, effective June 1, 1999.

<sup>3</sup> Metro-North submitted copies of the Sublease and Operations Agreements.

such improvements with NSR to ensure that the improvements comply with clearance requirements and other applicable standards.

In sum, Metro-North asserts that the Sublease and the Operations Agreements will allow it to continue operating rail passenger service on the subject line, but that NSR will retain the property and contract rights it requires to continue operating rail freight service on the line. Although Metro-North will be responsible for dispatching, maintenance, and constructing capital improvements, it will not have sufficient property or contract rights to materially interfere with NSR's freight operations or NSR's ability to continue to meet its rail common carrier obligations. Metro-North is also expressly prohibited from conducting or authorizing any third party to conduct rail freight operations on the subject line, and it will not hold itself out as willing or able to do so.

In support of its position that this transaction is outside the Board's jurisdiction, Metro-North cites the following cases: Sacramento-Placerville Transportation Corridor Joint Powers Authority-Acquisition Exemption-Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996); Los Angeles County Transportation Commission-Petition for Exemption-Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 (STB served July 23, 1996); Utah Transit Authority-Acquisition Exemption-Line of Union Pacific Railroad Company, Finance Docket No. 32186 (ICC served Dec. 31, 1992); and Maine, DOT-Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

## DISCUSSION AND CONCLUSIONS

The question here is whether our regulatory approval is required for Metro-North to acquire and operate the subject line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v ICC, 697 F.2d 326 (D.C. Cir. 1982). Our authorization is not required, however, when the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

The record shows that NSR is not transferring common carrier rights or obligations and that Metro-North will not hold itself out as a common carrier performing rail freight service. The agreements between Metro-North and NSR show that Metro-North will provide passenger, but not freight, service over the line, NSR and PRR will retain all common carrier rights and obligations with respect to freight operations, and Metro-North will not have sufficient rights to materially interfere with NSR's freight operations. As such, Metro-North will not become a rail carrier subject to our jurisdiction as a result of the transaction. Under these circumstances, this transaction does not require Board action, and we will not exercise jurisdiction over it.

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

It is ordered:

1. Metro-North's motion to dismiss its notice of exemption is granted.
2. The proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams  
Secretary