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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36784

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June 6, 2024
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**VIRGINIA PASSENGER RAIL AUTHORITY – ACQUISITION AND OPERATION
OF CERTAIN ASSETS OF NORFOLK SOUTHERN RAILWAY COMPANY
IN FAIRFAX AND PRINCE WILLIAM COUNTIES, AND THE CITIES OF
MANASSAS PARK, MANASSAS AND ALEXANDRIA, VIRGINIA**

MOTION TO DISMISS PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

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Dated: June 6, 2024

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MOTION TO DISMISS PETITION FOR EXEMPTION

The Virginia Passenger Rail Authority (“VPRA”), a political subdivision of the Commonwealth of Virginia, hereby requests that the Petition for Exemption (the “Petition”) concurrently filed in the above-referenced docket be dismissed because the transaction described in the Petition, VPRA’s acquisition of certain real property, track, other improvements and a passenger rail service easement from Norfolk Southern Railway Company (“Norfolk Southern”), does not require Surface Transportation Board (“STB” or “Board”) authorization under 49 U.S.C. § 10901. *See, e.g., Virginia Passenger Rail Authority – Acq. Exemption – Norfolk S. Railway Co., FD 36588* (STB served May 31, 2022)(“VPRA-2022”), citing *Maine, DOT – Acq. Exemption – ME Central R. Co., (“State of Maine”)* 8 I.C.C. 2d 835 (1991).

I. Statement of Facts

A. Overview

VPRA is a political subdivision of the Commonwealth of Virginia and a non-carrier. Norfolk Southern is a Virginia corporation and a Class I common carrier by rail that owns

the real property, track, and other improvements that are the subject of the Petition and this Motion to Dismiss.

As explained in the Petition and as relevant to the Board's jurisdiction,¹ VPRA and Norfolk Southern have reached an agreement pursuant to which VPRA will acquire from Norfolk Southern the land, tracks, and other improvements between (1) approximately MP 10.76 and MP 32.75 (the “Manassas Line”) and (2) approximately MP 9.25 and MP 10.76 (the “Seminary Passage”).² (The Manassas Line and the Seminary Passage are collectively referred to herein as the “Subject Property.”) Norfolk Southern will retain an easement on the Subject Property to fulfill its common carrier obligation and other freight rail services pursuant to transportation agreements under 49 U.S.C. 10709 or other rights and responsibilities under the ICC Termination Act of 1995.³

VPRA also will acquire a passenger rail operating easement on the lines between approximately MP 32.75 and MP 33.6 (the “Manassas Segment”).⁴

¹ The transaction described in the Petition will be governed by several agreements and conveyance documents, including a Comprehensive Rail Agreement (the “CRA”). A public, redacted version of the draft CRA is attached as Exhibit A to the Petition and filed in the public docket. A confidential, unredacted version of the draft CRA is concurrently filed under seal pursuant to an accompanying Motion for Protective Order. Public and confidential versions of the final CRA and other governing agreements and conveyance documents, all of which will be in accord with the draft CRA in all respects pertaining to STB jurisdiction, will be filed with the Board promptly after they are finalized and executed.

² See CRA §§ 2.1(b)(i)-(vii). See also Maps Exhibit to the Petition. The Manassas Line and Seminary Passage are contiguous corridors and could be combined as a single conveyed territory. However, they are treated separately because the Seminary Passage acquisition is contingent on availability of funding and might be preceded by a passenger rail operations easement on the same property, which easement would be for passenger rail purposes only and VPRA’s use of the easement would not unreasonably interfere with Norfolk Southern operations, including operations under the Freight Easement. See CRA §§ 9.1 and 9.2.

Section 9.1 also includes the possibility that VPRA would assign its right to acquire the Seminary Passage to Virginia Railway Express. See CRA §§ 9.1. This Motion does not seek a jurisdictional determination with respect to acquisition of the Seminary Passage by Virginia Railway Express.

³ See CRA §§ 5.3(e) and 5.4(e).

⁴ See CRA § 2.1(a). See also Maps Exhibit to the Petition.

The purpose of the above-described transaction is to facilitate expanded interstate passenger and commuter operations without disrupting freight service to shippers.

B. Pertinent Terms Governing Conveyance of Subject Property and the Manassas Segment Easement

Retained Freight Easement on Conveyance of the Subject Property. As noted above, in the deeds conveying the Subject Property, Norfolk Southern will reserve a freight easement for Norfolk Southern’s continued performance of its common carrier obligations and other freight rail services pursuant to transportation agreements under 49 U.S.C. 10709 or other rights and responsibilities under the ICC Termination Act of 1995 (the “Freight Easement”).⁵ The retained easement will be exclusive, perpetual, irrevocable, assignable, divisible, licensable, and transferable and covers the full array of Norfolk Southern’s current and future freight service and operations.⁶ VPRA may install new tracks or other railroad infrastructure on the Subject Property, provided that any such infrastructure (and its construction and use) does not unreasonably interfere with operation under the Freight Easement. VPRA may relocate the Freight Easement provided that any such relocation does not unreasonably interfere with freight operations.⁷

Scope of the Manassas Segment Passenger Rail Operating Easement. The Manassas Segment easement connects with the Manassas Line and permits passenger trains to traverse Norfolk Southern’s Manassas Yard. The easement is for passenger rail purposes only and

⁵ See CRA §§ 5.3(e) and 5.4(e).

⁶ Id. Norfolk Southern has unfettered and broad freight rights under the Freight Easement and the CRA, including the right to expand, modify, discontinue or abandon freight service to respond to market demands and conditions. See CRA §§ 8.3 and 30.1.

⁷ See CRA §§ 5.3(e) and 5.4(e). Form of Quitclaim Deed, Exhibit N-1 at 4-5. The Freight Easement and the CRA broadly apply a detailed definition of “Unreasonably Interfere with Freight Rail Operations.” See CRA Exhibit A (Definitions).

VPRA's use of the easement may not unreasonably interfere with Norfolk Southern operations, including operations under the Freight Easement.⁸

C. Pertinent Contractual Terms Between the Parties

Construction and Use of Other Acquired Land, Track and Improvements. VPRA also will acquire other land, track and improvements, including (1) a continuous strip of land defined in the CRA as the Broad Run Corridor, adjacent to the Norfolk Southern line of railroad between approximately MP 33.6 and MP 36.23,⁹ (2) land, tracks, and other improvements defined in the CRA as the NRV Station Parcel adjacent to the Norfolk Southern line of railroad between approximately MP N289.86 and MP N290.20,¹⁰ and (3) land, tracks, and other improvements at or near MP NB300.0 in Radford, VA.¹¹ Unlike the Subject Property, all of this other land to be acquired by VPRA either does not include track and improvements or the included track and improvements constitute spur or side tracks within the meaning of 49 U.S.C. § 10906. Thus, the acquisition of this land, track and improvements does not require Board exemption or approval under 49 U.S.C. § 10901. However, as pertinent to this Motion, the parties have agreed that any construction activities and use of this other acquired land, track and improvements will not unreasonably interfere with Norfolk Southern operations, including operations under the Freight Easement.¹²

Contractual Passenger Rail Operating Rights. VPRA also will have contractual passenger rail operating rights, including: (1) additional intercity passenger rail frequencies

⁸ See CRA § 2.1(a).

⁹ See CRA §§ 2.1(b)(viii)-(x).

¹⁰ See CRA §§ 2.1(b)(xi)-(xiii).

¹¹ See CRA §§ 2.1(b)(xiv)-(xvi).

¹² See CRA §§ 2.1(b)(vii), (x) and (xiii).

on Norfolk Southern lines between Alexandria and Roanoke, later extended to a new station (the NRV Station) in Radford, VA;¹³ (2) operating rights on the line between approximately MP N257.5 (Roanoke Station) and either MP N289.86 (to a station parcel in Christiansburg, VA)¹⁴ or MP NB300.0 (to a parcel in Radford, VA)¹⁵ for a passenger trail layover facility; and (3) operating rights on the lines between approximately MP 33.6 and MP 36.0 for temporary access to Broad Run Station while a new access track is constructed.¹⁶ The acquisition of these passenger rail operating rights does not require Board exemption or approval under 49 U.S.C. § 10901. However, as pertinent to this Motion, all the new passenger rail contract operating rights will be subject to Norfolk Southern operating rules and the terms of the CRA, including that Norfolk Southern's use of the lines covered by the contractual passenger rail operating rights shall not be diminished by the CRA, and may not unreasonably interfere with freight rail operations¹⁷

Dispatching. VPRA will have the right to take over dispatching on the Subject Property.¹⁸ The CRA provides that the Subject Property will be dispatched in accordance with sound dispatching principles, with the dispatcher giving due regard to the needs of freight and passenger carriers and their respective customers and a dispatching preference

¹³ See CRA §§ 8.1(a)(i)-(ii).

¹⁴This parcel is defined in the CRA as the NRV Station Parcel and will be depicted in Exhibit D to the final CRA. See CRA Recitals.

¹⁵This parcel is defined in the CRA as the Radford Layover Parcel and will be depicted in Exhibit D to the final CRA. See CRA Recitals. See CRA § 8.1(a)(v).

¹⁶ See CRA § 8.1(a)(v).

¹⁷ See CRA §§ 8.1(a) and (d). These provisions are overarching. There are additional provisions addressing VPRA excursion service (CRA § 8.1(a)(iii)), Virginia Railway Express commuter service (CRA §§ 3.6(f), 4.3(e), 8.1(a)(iv) and 8.5(b)) and the tracks used for temporary access to Broad Run Station (CRA § 8.1(a)(v)).

¹⁸ See CRA § 14.1.

for intercity passenger trains on the Subject Property and the Roanoke Easement Area¹⁹ VPRA dispatching will be subject to these dispatching criteria. In addition, the parties will establish a performance managers committee to address any topic relevant to the rights and obligations of the parties under the CRA, including VPRA dispatching performance.²⁰ Thus, VPRA’s dispatching rights on the Subject Property will not impair freight service. See, e.g., Los Angeles County Transportation Commission— Petition for Exemption—Acquisition from Union Pacific Railroad Company, FD 32374, slip op. at 3 (STB served Jul. 23, 1996).

Maintenance. For at least a two-year period after closing, Norfolk Southern will continue to perform maintenance on the Subject Property at VPRA expense. VPRA will review and approve budgets for this maintenance, but Norfolk Southern can perform maintenance without VPRA approval or above the approved budget amounts (at VPRA’s expense) if necessary to fulfill its common carrier obligation or to meet Federal Railroad Administration track standards.²¹ After the transition period, VPRA will take over maintenance on the Subject Property.²² Norfolk Southern will retain step-in rights to provide maintenance on the Subject Property if it deems it reasonable or necessary for the provision of freight rail service.²³ The managers committee also will serve as a forum to discuss any

¹⁹*Id.*. The dispatching preference does not diminish Norfolk Southern’s right to use the Subject Property. See CRA § 8.3(d). The Roanoke Easement Area is located west of the passenger station platform at Roanoke, VA and VPRA’s easement interest would allow passenger trains to traverse the rail yard in the area. VPRA’s easement interest was acquired in 2022 under the Board’s decision in VPRA-2022.

²⁰ See CRA § 22.1.

²¹ See CRA § 15.1(b)(ii).

²² See CRA § 15.2(b).

²³ See CRA § 15.2(c).

maintenance issues, including VPRA's performance of its maintenance obligations.²⁴ Thus, VPRA's maintenance of the Subject Property will not impair freight service.²⁵

II. Discussion

A. State of Maine Doctrine

State of Maine and its progeny hold that when a carrier sells the physical assets of a rail line to a non-carrier, but the selling carrier retains a permanent and exclusive freight rail operating easement as necessary for the selling railroad to continue to fulfill its common carrier obligation on the subject rail line, and the other terms of the sale protect the selling carrier from unreasonable interference with the provision of common carrier freight rail service, the sale does not constitute the sale of a railroad line within the meaning of 49 U.S.C. § 10901. State of Maine, 8 I.C.C. 2d 835 (1991). Since 1991, the former Interstate Commerce Commission and the Board have followed the State of Maine precedent in more than 60 cases, and most of those decisions have involved acquisition of the physical assets of rail lines by public agencies for passenger rail transportation.²⁶

In a State of Maine transaction, the parties' intent is very different than in the typical sale from a carrier to a non-carrier. Ordinarily where a non-carrier acquires a railroad line, the non-carrier is acquiring the rail line to become a rail carrier and provide the transportation in place of the selling carrier, which typically relinquishes some or all of its right to use the line. The Board exercises its regulatory authority under 49 U.S.C. § 10901 in those circumstances. In contrast, in

²⁴ See CRA § 22.1

²⁵ In addition, Norfolk Southern retains the right to clear the Subject Property of derailed or disabled trains to ensure its continued freight use. See CRA § 17.

²⁶ The Board also has held that the principles underlying the State of Maine decision can support a finding that no common carrier rights or obligations are being transferred in a grant of a passenger rail easement. VPRA-2022, FD 36588, slip op. at 6-7; Mass. Dep't of Transp. – Acquis. Exemption – Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 7 (STB served May 3, 2010).

a State of Maine transaction, the parties’ intent is that the seller will not relinquish its common carrier rights and obligations with respect to providing freight rail transportation, and the buyer will not assume those rights and obligations or provide freight service. The seller retains the exclusive right and common carrier obligation to provide freight rail service by retaining a permanent and exclusive freight railroad operating easement. Likewise, the non-carrier that purchases the physical assets of the rail line does not have the right or intent to assume any common carrier obligation or freight rail services within the jurisdiction of the STB.

As the Board observed in State of Maine and subsequent decisions applying the precedent, there are sound policy reasons for permitting a non-carrier (especially a public agency such as VPRA) to purchase the physical assets of the line without becoming a rail carrier subject to STB jurisdiction, provided that the selling rail carrier retains a permanent and exclusive freight rail easement over a rail line to continue to provide rail carrier service to existing and future shippers. The State of Maine precedent facilitates expanded interstate passenger and commuter operations without disrupting freight service to shippers.²⁷

Allocation of duties such as dispatching or maintenance to the purchasing non-carrier does not prevent the applicability of the State of Maine doctrine to a transaction. Rather, the Board has held that operating agreements should be “considered as a whole” with “the circumstances surrounding [the agreements]” to analyze whether an operating agreement is likely to impair freight service. See, e.g., Los Angeles County Transportation Commission— Petition for

²⁷ State of Maine, 8 I.C.C. 2d 835, 837 n. 6 (1991); VPRA-2022, FD 36588, slip op. at 7.

Exemption—Acquisition from Union Pacific Railroad Company, FD 32374, slip op. at 3 (STB served Jul. 23, 1996).²⁸

B. The Transaction Described in the Petition and the Draft Comprehensive Rail Agreement and Summarized in this Motion Meets the State of Maine Criteria

The transaction described in the Petition and the CRA meets the criteria set forth in State of Maine and its progeny.

First, Norfolk Southern will reserve the Freight Easement in the deeds conveying the Subject Property. The Freight Easement is exclusive and perpetual for Norfolk Southern's continued performance of its common carrier obligation and other freight rail services pursuant to transportation agreements under 49 U.S.C. § 10709 or other rights and responsibilities under the ICC Termination Act of 1995. VPRA's construction and passenger use rights on the Subject Property may not unreasonably interfere with operations under the Freight Easement. The Manassas Segment easement is for passenger rail purposes only and VPRA use of the easement may not unreasonably interfere with Norfolk Southern operations, including operations under the Freight Easement.

Second, VPRA construction and use of other acquired land, track and improvements (not itself subject to Board regulation under 49 U.S.C. § 10901) will not unreasonably interfere with Norfolk Southern operations, including operations under the Freight Easement.

²⁸ See also Va. Port Auth.- Aquis. Exemption – Norfolk & Portsmouth Belt R.R., FD 35532, slip op. at 4 (STB served August 1, 2011) (as to maintenance); Commonwealth of Va. - Aquis. Exemption – Certain Assets of CSX Transp., Inc., FD 36441, slip op. at 4 (STB served Dec. 14, 2020) (as to dispatching).

Third, VPRA's contractual passenger train operating rights will be subject to Norfolk Southern operating rules and will not diminish Norfolk Southern's use of the covered lines.

Finally, if VPRA takes over dispatching, it will be bound by the same dispatching criteria in place during Norfolk Southern dispatching tenure and therefore will not impair Norfolk Southern's freight service and VPRA's maintenance on the Subject Property is subject to Norfolk Southern's step-in rights.

Accordingly, the transaction described in the Petition and the draft CRA and summarized in this Motion fully aligns with the State of Maine doctrine and does not require Board authorization.

III. Request for Expedited Consideration

VPRA respectfully requests that the Board issue a decision granting VPRA's Motion to Dismiss in a decision effective on or before August 16, 2024, so the parties may have reasonable time to prepare for closing on the mutually-binding date of September 5, 2024. Expedited Board consideration of the present Motion to Dismiss is requested to facilitate an orderly transfer of the Subject Property consistent with the tax, budgeting, and planning expectations of both VPRA and Norfolk Southern. To facilitate an orderly sale, it is the intention of the parties to close by September 5, 2024.

A Board decision granting VPRA's Motion to Dismiss effective on or before August 16, 2024, would benefit Norfolk Southern and VPRA and (by extension) the public and no party will be prejudiced by expedited consideration and an expedited decision by the Board.

IV. Conclusion

For the reasons stated above, VPRA respectfully requests that the Board dismiss VPRA’s concurrently filed Petition for Exemption in this docket.

Respectfully submitted,

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