

SERVICE DATE – DECEMBER 15, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35110

FLORIDA DEPARTMENT OF TRANSPORTATION—ACQUISITION EXEMPTION—  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

Digest:<sup>1</sup> The Florida Department of Transportation does not need Board authorization to acquire the real estate and rail tracks of a rail line in Poinciana, Volusia, Seminole, Orange, and Osceola Counties, Fla. Although FDOT is acquiring the physical assets of the rail line, FDOT will not acquire the legal obligation to provide freight rail service to customers located on the line. The seller, CSX Transportation, Inc., will retain the legal obligation to provide freight service and FDOT will not be able to unreasonably interfere with that service. Therefore, FDOT will not be considered a rail carrier under Federal law.

Decided: December 15, 2010

In this decision, the Board grants the motion of the Florida Department of Transportation (FDOT) to dismiss the notice of exemption in this proceeding. We find that 49 U.S.C. § 10901 does not apply to this sale of the physical assets of a rail line to a state agency because the selling rail carrier will retain an exclusive, perpetual easement to provide freight rail service on the rail line together with the common carrier obligation, and the purchaser cannot unduly interfere with the freight rail service.

BACKGROUND

On April 3, 2009, FDOT filed a notice of exemption under 49 C.F.R. § 1150.31 to acquire from CSX Transportation, Inc. (CSXT) certain physical assets and the associated right-of-way of an approximately 61.5-mile rail line segment, extending through Orlando, Fla., of CSXT's A-Line, extending from milepost A-749.7 in DeLand to milepost A-814.1, in Poinciana, Volusia, Seminole, Orange, and Osceola Counties, Fla. (Orlando Line).<sup>2</sup> FDOT states that it is

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<sup>1</sup> 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).

<sup>2</sup> FDOT will also obtain an option to acquire the portion of CSXT's Aloma Spur, extending from a connection with the Orlando Line at milepost AU-766.0 in Sanford to milepost AU-771.8 near Airport Boulevard and the Orlando-Sanford International Airport, a distance of  
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acquiring the physical assets of the Orlando Line to develop a commuter rail passenger service in the Orlando metropolitan area while also maintaining freight rail service and the intercity rail passenger service of the National Railroad Passenger Corporation (Amtrak). FDOT explains that CSXT will retain an exclusive, perpetual freight rail easement (freight easement) by which it will continue to have the duties, and will continue to enjoy the rights, of a rail common carrier on the Orlando Line (and in the Aloma Spur and DeLand Spur, should FDOT exercise its option to acquire those spurs). FDOT points out that CSXT also will retain the obligation to make the Orlando Line available to Amtrak for intercity rail passenger service.

FDOT has filed a motion to dismiss the notice of exemption, asserting that, under Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835 (1991) (State of Maine), the transaction is not subject to the Board's jurisdiction<sup>3</sup> because FDOT will not become a common carrier as a result of the transaction. The Brotherhood of Railroad Signalmen (BRS) and Amtrak filed separate comments opposing the motion to dismiss, and Amtrak's comments included a petition to revoke FDOT's exemption. BRS challenges the lawfulness of the State of Maine line of cases under the Interstate Commerce Act (the Act). BRS also claims that FDOT structured its agreements with CSXT to avoid the use of unionized rail workers and application of Federal laws pertaining to unionized rail workers. Amtrak, on December 9, 2010, withdrew its opposition and petition to revoke the exemption. Amtrak will be permitted to withdraw its opposition and petition to revoke.

#### PRELIMINARY MATTER

BRS seeks leave to file a supplement to the record in response to statements in FDOT's reply. FDOT opposes BRS's filing on the ground that the supplement is a reply to a reply in violation of the Board's rules at 49 C.F.R. § 1104.13. BRS responds that the supplement is only a declaration to answer allegations of fact that were first asserted in FDOT's reply and that it does not respond to legal arguments advanced by FDOT. BRS limits its response to allegations of fact raised for the first time in FDOT's reply, and we will grant leave to file the BRS

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approximately 5.8 miles, and the CSXT DeLand Spur, extending from a connection with the Orlando Line at milepost ASE-750.3 (DeLand Junction) to milepost ASE-753.3 near downtown DeLand, a distance of approximately 3.0 miles.

<sup>3</sup> While FDOT uses the term "jurisdiction," as have the Interstate Commerce Commission (ICC) and the Board from time to time in the past, in fact FDOT may only seek a finding that the transaction as currently structured does not require Board authorization. The Board will continue to have jurisdiction over the rail property, even though it concludes in this decision that the proposed transaction does not require Board approval. See Friends of the Aquifer, FD 33966, slip op. at 4 (STB served Aug. 15, 2001). The Brotherhood of Railroad Signalmen likewise in its pleadings mistakenly conflates regulatory authority over the transaction and jurisdiction over the property for purposes of common carrier freight rail service.

supplement. The BRS supplement and letters filed by BRS and FDOT regarding admissibility of the document are made part of the record.

### THE TRANSACTION

FDOT will acquire the Orlando Line in cooperation with the Central Florida Commuter Rail Commission (CFCRC) to develop the "SunRail" commuter rail passenger system, which FDOT states is a \$615 million project that will provide commuter rail passenger service at 17 stations in Florida on the Orlando Line, from as far north as DeLand, through downtown Orlando, to as far south as Kissimmee/Poinciana. FDOT states that it will initiate commuter rail passenger operations in 2 phases, with Phase One initial service from Orlando to DeBary, expected to be operational by 2011. Phase Two will extend service north from DeBary to Deland and also south of Orlando to Poinciana by 2013. FDOT has also filed an application for Federal funding indicating that the acquisition is part of a larger project to provide intercity and high-speed rail passenger transportation between Orlando and Jacksonville, Fla.

CSXT currently uses the Orlando Line for local and through-train freight service, operating approximately 14-18 trains per day in or through Orlando. Amtrak operates 2 intercity rail passenger trains per day in each direction (the "Silver Star" and "Silver Meteor") over the Orlando Line, and Amtrak's "Auto-Train" service utilizes the Orlando Line to reach its southern terminus just north of Orlando. In addition, Florida Central Railroad Company, Inc. (FCEN), a Class III rail carrier, operates on a portion of the Orlando Line to conduct interchange operations with CSXT.

CSXT also owns a rail line, known as the S-Line, which runs from Jacksonville to Auburndale/Lakeland, Fla., parallel and to the west of the Orlando Line. No passenger trains operate on this route. CSXT views the S-Line as its primary freight route into Florida. CSXT plans to upgrade the S-Line and complete a new terminal facility in Winter Haven, Fla.

FDOT states that, after the acquisition, it will upgrade the Orlando Line to a double-track corridor along nearly the entire line, with crossovers approximately every 5 miles or less, and will replace and upgrade the signal system. CSXT plans to divert approximately 8-9 trains per day from the Orlando Line to the S-Line. To facilitate this acquisition, FDOT and CSXT have entered into 3 agreements relating to the Orlando Line: (1) the Contract for Sale and Purchase (Sale Contract), which provides the terms for the acquisition of the land, real property, rights-of-way, and associated property of the Orlando Line; (2) the Central Florida Operating and Management Agreement (CFOMA), which is intended to govern the shared use of the Orlando Line by FDOT and CSXT (including CSXT's tenants, Amtrak and FCEN); and (3) the Transition Agreement, which governs CSXT's use of the Orlando Line after FDOT acquires the line but before SunRail commuter rail passenger operations begin.

By a series of decisions, the Board held this proceeding in abeyance in order for the Florida legislature to pass necessary enabling legislation. The legislation was passed on

December 8, 2009, and signed into law on December 16, 2009. By Board decision served April 26, 2010, a new procedural schedule was established and the Board resumed consideration of the motion to dismiss. FDOT states that, to implement the legislation, FDOT and CSXT entered into amendments to the Sale Contract and Transition Agreement and re-executed a revised version of CFOMA. The amended Sale Contract revises the milepost limits of the Orlando Line.<sup>4</sup> The amended Transition Agreement includes technical dispatching refinements and provides that CSXT will create a Central Florida Dispatcher Desk within approximately 1 month of closing. The amended CFOMA makes revisions to the sections pertaining to liability and indemnity.<sup>5</sup>

FDOT states that the current transaction is similar to an earlier transaction (the South Florida transaction) involving FDOT and CSXT that led to the formation of a commuter rail passenger system in Dade, Broward, and Palm Beach Counties, currently operated as the South Florida Regional Transportation Authority (SFRTA). In 1988, several years before the State of Maine decision was issued, FDOT purchased approximately 67.5 miles of track from CSXT running parallel to Interstate 95 between Miami International Airport and West Palm Beach, Fla. CSXT retained a permanent, exclusive freight rail easement in the property. The South Florida transaction was not filed with the ICC for review.<sup>6</sup> The National Mediation Board and the Railroad Retirement Board reviewed the transaction and the operation of the SFRTA, and determined that SFRTA is not a rail carrier for purposes of the railway labor laws.<sup>7</sup>

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<sup>4</sup> The northern limit of the line has been amended from milepost A-749.7 to milepost A-749.57. The southern limit has been amended from milepost A-814.1 to milepost A-813.82. This lengthens the northern end of the line.

<sup>5</sup> Citations to specific provisions of the CFOMA reference the amended CFOMA.

<sup>6</sup> Failure to obtain an agency determination regarding whether the Board's authority is required does not itself mean that the buyer of the railroad assets becomes a carrier. However, in the absence of a formal determination from the Board, the buyer runs the risk that it will be found to have violated the Act.

<sup>7</sup> UTDC Transit Serv. Inc., 17 NMB 343 (1990); Bhd. of Locomotive Eng'rs, 17 NMB 321 (1990); Tri-County Commuter Rail Org., Notice No. 89-35 (RRB Apr. 19, 1989); Herzog Transit Serv. Inc., B.C.D. 94-109 (RRB Dec. 5, 1994); Tri-County Rail Org., B.C.D. 09-02 (RRB Jan. 20, 2009), reh'g denied sub nom. Trinity Ry. Express-Train Dispatching, B.C.D. 09-53 (RRB Oct. 28, 2009).

## DISCUSSION AND CONCLUSIONS

I. Legality of the State of Maine Precedent

In this case, BRS asks the Board to reexamine the decision of the Interstate Commerce Commission (ICC) in State of Maine, which the ICC and the Board have followed for almost 20 years. State of Maine and its progeny 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 49 U.S.C. § 10901, if certain conditions are met.<sup>8</sup> The required conditions are that the selling carrier must retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation on the line, and that the terms of the sale must protect the carrier from undue interference with the provision of common carrier freight rail service.

BRS maintains that the Board's interpretation of § 10901 is wrong for 3 reasons. First, it argues that the physical assets of a rail line cannot be separated from the freight rail operating rights and common carrier obligation. Second, it argues that the sale to a noncarrier of the track, track bed, and other physical assets used to provide rail service is a sale of the line under § 10901 that requires either Board approval or an exemption (under 49 U.S.C. § 10502) whenever the purchaser is responsible for maintaining and dispatching the line. Third, it argues that State of Maine is contrary to precedent, particularly Staten Island Rapid Transit Operating Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983) (SIRTOA). BRS also alleges that FDOT was primarily motivated to structure the transaction under State of Maine to avoid the use of Railway Labor Act (RLA) unionized rail workers.

We recently addressed nearly identical legal arguments made by BRS and other rail labor unions in Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010) (MassDOT), pet'n for review pending, Bhd. of R.R. Signalmen v. STB, No. 10-1138 (D.C. Cir. filed June 18, 2010). The Board concluded in MassDOT that: (1) the Board's longstanding interpretation of § 10901 reflected in State of Maine is permissible as a matter of law; (2) the opponents of the motion to dismiss the exemption application had not submitted evidence that contradicted the Board's view that the State of Maine precedent helps to preserve freight rail service and jobs, while promoting the development of commuter rail passenger transportation on rail lines; and (3) the record did not contain sufficient support for countervailing policy considerations that would cause the Board to consider other permissible readings of § 10901. In this case, BRS has not convinced us that our

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<sup>8</sup> The Board has under certain unique circumstances applied the State of Maine doctrine to the sale of physical assets in a rail line to a private entity. See, e.g., Midtown TDR Ventures LLC—Acquis. Exemption—Am. Premier Underwriters, Inc., The Owasco River Ry., and Am. Fin. Group, Inc., FD 34953 (STB served Feb. 12, 2008); Mo. River Bridge Co.—Acquis. Exemption—Certain Assets of Chicago, Cent. & Pac. R.R., FD 32384 (ICC served Mar. 3, 1994).

holdings in MassDOT are wrong. We will not reconsider State of Maine in whole or in part as a matter of public policy where, as here, FDOT has adequately addressed BRS' concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen.

A. The Board's Interpretation of § 10901 and Separation of Physical Assets. Section 10901(a)(4) requires a "person other than a rail carrier" to obtain an agency certificate authorizing the person to "acquire a railroad line." Nearly 20 years ago, in State of Maine, the ICC held that the Maine Department of Transportation's acquisition of the physical assets of a rail line owned by a common carrier railroad was not the sale of a railroad line, and thus, did not require approval under § 10901, where the existing carrier retained a permanent and unconditional easement to conduct common carrier freight rail operations and the right to maintain, operate and improve the line. By virtue of the rail carrier retaining the full right and necessary access to maintain, renew, and operate the line, the rail carrier retained its common carrier status on the line at issue, and the State avoided common carrier status. 8 I.C.C.2d at 836-37. Since 1991, the ICC and the Board have followed State of Maine in more than 60 cases, mostly involving acquisition of the physical assets of rail lines for commuter rail passenger transportation, and regional, state, and local agencies responsible for commuter rail passenger transportation have come to rely on this precedent.<sup>9</sup>

BRS argues that State of Maine and its progeny are not good law. BRS points out that the underlying principle — that the right and obligation to provide common carrier freight rail service on a rail line can be separated from the physical assets of the line under § 10901(a)(4) — has not been challenged before the agency or in court.<sup>10</sup> The ICC and the Board have articulated the reasoning behind the State of Maine principle and its evolution over time. See Md. Transit Admin.—Pet'n for Declaratory Order, FD 34975 (STB served Sept. 19, 2008) (Md. Transit). State of Maine and its progeny are the precedent of this agency, and BRS has the burden of convincing us that a departure from our longstanding precedent is warranted in an individual case as a matter of law or policy.<sup>11</sup> The Board finds that BRS has not met that burden in this case.

The Board has general jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1). A "rail carrier" is defined in 49 U.S.C. § 10102(5) as "a person providing

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<sup>9</sup> See MassDOT, slip op. at 6.

<sup>10</sup> As noted earlier, BRS and other unions recently raised the same arguments in MassDOT, and those issues are being litigated in court.

<sup>11</sup> See generally Nat'l Telecomm. & Cable Ass'n v. FCC, 567 F.3d 659, 667 (D.C. Cir. 2009) (agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent to show that its prior policies and standards are not casually ignored).

common carrier railroad transportation for compensation.”<sup>12</sup> Ordinarily, the Board exercises its regulatory authority under § 10901(a)(4) where a noncarrier acquires a railroad line.<sup>13</sup>

Regulatory approval is required because the noncarrier is acquiring the rail line in order 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. In contrast, in the State of Maine situation, the parties’ intent and the purpose of the sale are the opposite of the typical § 10901(a)(4) sale. The seller does not relinquish its rights and obligations with respect to providing freight rail transportation. It retains the exclusive right and common carrier obligation to provide freight rail service by retaining a freight rail operating easement. Likewise, the noncarrier that purchases the physical assets of the rail line does not thereby assume any common carrier obligation. Thus, we have ruled that the noncarrier is not a rail carrier providing transportation, and State of Maine permissibly interprets § 10901(a) as not applying to the transaction.

BRS characterizes the freight rail easement as a “made-up relationship” that is without “any basis in the Act or in precedent” and argues that it is a device that permits purchasers of rail lines such as FDOT to evade the Act.<sup>14</sup> We rejected much the same argument recently in Mass. Coastal R.R. LLC—Acquisition—CSX Transp. Inc., FD 35314 (served Mar. 29, 2010) (MassCoastal). There, we found that a freight rail easement is a bona fide property interest, recognized at law and frequently utilized in the railroad industry, which gives the holder the right to conduct railroad operations on the specified railroad tracks for the purpose of providing common carrier freight rail service to all freight customers.<sup>15</sup> Here, CSXT is retaining an exclusive, perpetual freight rail operating easement in the Orlando Line so that it can conduct its freight rail operations over the line and carry out its common carrier obligation. FDOT cannot provide freight rail service on the Orlando Line and will not hold itself out as a common carrier of freight on the line.

As the Board observed in State of Maine and subsequent decisions applying the precedent, there are sound policy reasons for allowing the selling rail carrier to retain a

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<sup>12</sup> Am. Orient Express Ry. v. STB, 484 F.3d 554, 556 (D.C. Cir. 2007).

<sup>13</sup> Section 10901(a)(4) provides: “A person may—in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under [49 U.S.C. § 10901(c)].” See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

<sup>14</sup> See BRS Comment at 1, 2, 11, 22, 24.

<sup>15</sup> Mass Coastal, slip op. at 4-5. Freight rail easements were an established part of rail line ownership arrangements many years before State of Maine. The State of Maine decision expressly clarified the Board’s control over asset sale/retained easement arrangements by announcing that arrangements that had not been brought to the Board for review could be found in violation of the Act. Id.

permanent freight rail easement over a rail line while permitting a state to purchase the physical assets of the line. Here, the main reason is to facilitate the development of mass transportation as an alternative to private automobile usage to reduce the nation's dependence on foreign oil and improve air quality.<sup>16</sup>

B. SIRTOA. BRS argues that State of Maine conflicts with the 1983 decision of the United States Court of Appeals for the Second Circuit in SIRTOA. We conclude that SIRTOA is factually distinguishable. SIRTOA addressed whether a New York City (NYC) municipal corporation, the Metropolitan Transportation Authority (MTA) became a rail common carrier under the Act in 1970 when it acquired a rail line that was used primarily for intrastate passenger rail service, but also for freight rail service. At that time, the ICC had authorized a transaction under which: (1) MTA, under a predecessor of § 10901, acquired the entire property interests in the rail line; (2) MTA granted trackage rights over the line back to the selling carrier so that the selling carrier could continue to provide common carrier freight rail service; and (3) MTA agreed to maintain the line. See Bhd. of Locomotive Eng'rs v. Staten Island Rapid Transit Operating Auth., 360 I.C.C. 464, 472 (1979) (BLE) (discussing in general the 1970 transaction).

That arrangement was unchallenged until a dispute arose in 1976 over whether MTA's maintenance employees, who were considered NYC workers, were covered by NYC laws (which did not permit strikes) or the RLA (which allowed strikes). The matter returned to the ICC for a determination as to whether MTA was a rail carrier under the Act, which would make it subject to the RLA.

In BLE, the ICC found that because NYC had filed an application to take over and operate the freight and passenger rail services on the line, with no qualifications, it did indeed become a regulated carrier. The ICC pointed out that the give-back of freight rail trackage rights from MTA to the freight rail operator meant that MTA then held what is now known as a residual common carrier obligation (one that engages only if the primary freight rail carrier fails to perform). Because parties with a residual common carrier obligation are deemed to be rail

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<sup>16</sup> BRS would prefer to see the rail carrier sell an entire rail line (including all operating rights and obligations) to the public entity as a § 10901 transaction and then have the public entity grant the rail carrier trackage rights subject to Board approval under § 11323. BRS' preferred arrangement, however, would place a residual common carrier obligation on the State to provide freight rail service, which could become an active obligation, if the trackage rights grantee ceases its service (with our approval or otherwise). In that event, the State would violate § 11101(a) of the Act if it did not provide freight rail service upon a shipper's reasonable request. A state entity, however, may not wish to have even a residual common carrier obligation. Indeed, some states have laws that prohibit them from operating rail lines. See, e.g., State of Maine, 8 I.C.C.2d at 837 n.5. When a state acquires only the physical assets of a rail line and the selling carrier retains a permanent freight rail easement, the issue of a state obtaining a residual common carrier obligation is eliminated.

common carriers, the ICC found that MTA was a regulated carrier subject to the Act, and thus that the RLA would apply.

In SIRTOA, the Second Circuit upheld the ICC’s finding in BLE that MTA was a rail carrier subject to the Act. The court found that, even though MTA was primarily engaged in intrastate passenger rail carriage, its maintenance responsibilities and its residual common carrier obligation to carry freight (which the court called a “latent duty”) sufficed to make it a carrier subject to the Act. Thus, the court held, the RLA applied to the exclusion of the NYC laws governing other public workers.

In contrast with the situation in SIRTOA, FDOT will not acquire any common carrier duty — either latent or patent — to furnish freight rail service on any of the lines at issue because it is not buying all of CSXT’s property interests in the Orlando Line. Rather, FDOT is acquiring the line’s physical assets only; CSXT is retaining a permanent freight rail easement and, with it, the full duty to provide common carrier freight rail service on the lines. Consequently, although FDOT will assume responsibility for maintaining the lines at a standard that would permit both freight and passenger rail service, FDOT would not have any duty to furnish the freight rail service. For that reason, the SIRTOA case is distinguishable, and the ICC’s and Board’s interpretation of the Act in State of Maine has been consistent with it.<sup>17</sup>

We need not determine in this proceeding whether the Board’s State of Maine doctrine is the only permissible reading of § 10901. BRS has not persuaded us that the only permissible conclusion in this type of transaction is that the state entity (here, FDOT) must become a rail carrier under § 10901.<sup>18</sup> For that reason, and because an abrupt change in our statutory interpretation found in the State of Maine line of cases could have widespread impacts on

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<sup>17</sup> The Board has previously determined that the party acquiring the right-of-way and track may negotiate terms and conditions with the freight rail carrier necessary to provide reliable commuter rail passenger service or protect its investment, consistent with the State of Maine doctrine, so long as such terms and conditions do not unreasonably interfere with freight rail service. This includes assuming responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight rail service. See Md. Transit, slip op. at 4-5.

<sup>18</sup> BRS argues that State of Maine creates breaks in the interstate rail network by removing the rail properties acquired in the transaction from Board jurisdiction and subjecting them to State law. This argument is based on a misunderstanding of the consequences of the transaction. See fn. 3, supra. The rail properties continue to be part of the interstate rail network through the operating easement retained by the selling carrier. The selling carrier continues to have the common carrier obligation to provide freight rail service, and the acquiring entity cannot exercise its ownership rights in a way that interferes with the provision of freight rail service.

transportation planning throughout the country, a rulemaking proceeding would provide the Board with a more comprehensive record on which to assess State of Maine.

C. Labor Concerns. In this case, the dual requirements of State of Maine are met. CSXT will retain an exclusive, perpetual easement to provide freight rail service. And there is no evidence that FDOT will be able to unduly interfere with the ability of CSXT to carry out its statutory obligations. Nonetheless, BRS alleges that the State of Maine transaction structure is being used here to replace RLA unionized workers covered by CSXT's collective bargaining agreements with non-union, non-rail workers. We take such allegations seriously. We do not intend for the State of Maine transaction structure to be used for the primary purpose of circumventing the railway labor laws.

In this case, the Board is satisfied that the parties are not seeking to use State of Maine as a device to circumvent railway labor laws, for 2 reasons. First, the Board has considered the fact that, in this case, FDOT plans to take on some maintenance and operation roles that have been held by the selling carrier in other State of Maine transactions. Here, there is a logical and legitimate business justification for placing the maintenance and dispatching of the line in the hands of FDOT. FDOT will be providing time-sensitive commuter rail passenger service into a congested urban city. It will need assurances that the significant public resources it is spending on this project will result in reliable and efficient commuter rail passenger operations for its citizens, and is in the best position to coordinate the execution of that mission. In those circumstances, it is entirely reasonable for the parties to place dispatching and maintenance responsibilities on FDOT rather than CSXT. This will not, as discussed below, undermine the retention by CSXT of its common carrier capabilities under the retained freight rail easement.

Second, this transaction will have no material adverse effect on employees of either CSXT or FDOT. CSXT offered New York Dock-type labor protection<sup>19</sup> to all potentially affected employees on the Orlando Line, and all but 2 of CSXT's unions accepted the offer.<sup>20</sup> With respect to BRS, which did not accept the offer of labor protection, FDOT has represented that it will: (1) remove the signal work from the scope of the SunRail design-build-maintain contract; (2) bid the signal work separately; and (3) require that bidders for the signal work be "rail employers" under applicable Federal law such that the signalmen would be afforded Federal rail labor law protections.<sup>21</sup>

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<sup>19</sup> See New York Dock Ry.—Control—Brooklyn E. Dist., 360 I.C.C. 60 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). This labor protective arrangement offers up to 6 years of wages and benefits to unionized railroad employees who are adversely affected by certain transactions approved by the Board, such as mergers and acquisitions involving large carriers.

<sup>20</sup> See FDOT Reply at 19.

<sup>21</sup> See FDOT Reply at 20.

Under these circumstances, we are satisfied that the interests of rail labor have been adequately addressed.

## II. Application of State of Maine in this Proceeding

Under State of Maine, the key question is whether the terms and conditions governing FDOT's acquisition of the Orlando Line assets and CSXT's reservation of a freight rail easement meet the Board's requirements for assuring that common carrier freight rail service can continue to be provided on these rail assets without interference. We find that they do. BRS has not questioned CSXT's ability to continue providing common carrier freight rail service. Moreover, none of the shippers served by CSXT from the Orlando Line has expressed any reservation to the Board.<sup>22</sup> And, as stated above, the Board is satisfied that the parties are not seeking to use State of Maine as a device to circumvent railway labor laws.

CSXT is not transferring its common carrier rights or obligations to FDOT, and FDOT will not hold itself out as a common carrier performing freight rail service. The agreements between FDOT and CSXT are designed so that FDOT will acquire only the railroad right-of-way and track assets. Moreover, we are satisfied that the freight rail easement retained by CSXT is permanent because, under the controlling agreement, freight rail service can be terminated only through obtaining Board authority either to discontinue service over, or to abandon, the freight rail easement.

CFOMA and the Transition Agreement set forth operating windows during which priority will be given to freight or commuter rail passenger service according to the time of day. During the period in which the Orlando Line is being double-tracked for future commuter rail passenger service, CSXT will continue to dispatch the line. Specific limits are placed on work curfews, and the agreements include an extensive program of coordination and notification among CSXT, FDOT, Amtrak, and FCEN. The Board has found that agreements that restrict freight rail operations to specific times in order to accommodate reliable commuter rail passenger service are permissible.<sup>23</sup> Here, CSXT has the ability to divert freight traffic to its S-Line, which will become its primary freight corridor in Florida. We find the restrictions in the agreements to be reasonable.

CFOMA provides that FDOT will be responsible for track maintenance on the Orlando Line after FDOT acquires the line from CSXT. FDOT is required to maintain the mainline tracks of the Orlando Line to FRA Class 4 standards, and to maintain all tracks, bridges, signals,

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<sup>22</sup> FDOT states that a copy of its notice of exemption and motion to dismiss (with the operative documents) were served on all 57 known shippers on the Orlando Line.

<sup>23</sup> See Md. Transit, slip op. at 5 (STB served Oct. 9, 2007); Utah Trans. Auth.—Aquis. Exemp.—Union Pac. R.R. Co., FD 35008 (STB served July 23, 2007).

and right-of-way in accordance with CSXT's geometry standards. Train speeds on the Orlando Line cannot be lowered without CSXT's consent. CSXT has the right to inspect the Orlando Line to ensure FDOT's compliance with CFOMA maintenance obligations and to require that FDOT perform any necessary repairs. In the unlikely event FDOT fails to fulfill its maintenance obligations, CSXT may do so at FDOT's expense. The responsibility for track maintenance here does not constitute acquisition of a railroad line requiring Board authorization.<sup>24</sup>

Under CFOMA, FDOT will be responsible for dispatching all trains on the Orlando Line. FDOT will initially contract with CSXT to perform this function on FDOT's behalf; upon initiation of SunRail commuter rail passenger service, after upgrades to the Orlando Line are completed, FDOT will have its own dispatching center. In both phases, trains will be dispatched "without prejudice or partiality to any party and in such manner, as will afford the economical and efficient manner of movement of all trains." See CFOMA, section 3(i). Specific dispatching protocols for train movements during the mixed passenger/freight rail operating window will be mutually agreed to by the parties. As mentioned above, FDOT's planned future dispatching control over these lines is permissible under State of Maine and its progeny.

We find that this transaction, as structured, does not require Board regulatory authorization. This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BRS' request to supplement the record, as described above, is granted.
2. FDOT's motion to dismiss the verified notice of exemption in this proceeding is granted.
3. Amtrak's withdrawal of its opposition and related petition to revoke is granted.
4. The proceeding is dismissed.
5. This decision is effective on its service date.

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

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<sup>24</sup> See Utah, slip op. at 6; N. M. Dep't of Transp.—Acquis. Exemption—Certain Assets of BNSF Ry., FD 34793 (STB served Feb. 6, 2006).