

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35110

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

Digest:¹ The Board denies a request to reopen one of its decisions. In a prior decision, the agency determined that the Florida Department of Transportation (FDOT) did not need Board authorization to acquire the physical assets of a rail line owned by CSX Transportation, Inc., because the seller would retain the legal right and obligation to provide freight service and FDOT would not be able to unreasonably interfere with that service. A labor union filed a petition to reopen that decision and argued that, because FDOT had reneged on an agreement regarding unionized labor on the line, the Board should reverse its prior ruling. The labor union has not met the standard for a petition to reopen because it has not presented new evidence or substantially changed circumstances.

Decided: June 20, 2011

In this decision, the Board denies the petition of the Brotherhood of Railroad Signalmen (BRS) to reopen this proceeding. In a prior decision, the Board granted the motion of the Florida Department of Transportation (FDOT) to dismiss a notice of exemption on the ground that 49 U.S.C. § 10901 did not apply to this sale of the physical assets of a rail line to a state agency because: (1) the selling freight rail carrier will retain a perpetual, exclusive easement to provide freight rail service on the rail line together with the common carrier obligation; and (2) under the terms of the sale, the purchaser cannot unduly interfere with the provision of common carrier freight rail service. The petition fails to provide new evidence or materially changed circumstances that would warrant reexamining the Board's prior decision.

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, passing through Orlando, Fla., of

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).

CSXT's A-Line, extending from milepost A-749.7 in DeLand to milepost A-814.1, in Polk, Volusia, Seminole, Orange, and Osceola Counties, Fla. (Orlando Line).² FDOT stated that it was acquiring the physical assets of the Orlando Line to develop a commuter rail passenger service (SunRail) in the Orlando metropolitan area, while also maintaining freight rail service and the intercity rail passenger service of the National Railroad Passenger Corporation (Amtrak). Under the terms of the purchase agreement, CSXT retained an exclusive, perpetual freight rail easement on the Orlando Line and retained the obligation to make the Orlando Line available to Amtrak for intercity rail passenger service. FDOT 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 did not require Board authorization because FDOT would not become a common carrier as a result of the transaction. By a decision served on December 15, 2010 (December 2010 decision), the Board granted the motion to dismiss the notice of exemption.

In its opposition to FDOT's motion to dismiss the notice of exemption, BRS challenged the lawfulness of the State of Maine line of cases under the Interstate Commerce Act and claimed that FDOT structured its State of Maine transaction to replace Railway Labor Act (RLA) unionized workers covered by CSXT's collective bargaining agreements with non-union, non-rail workers. In the December 2010 decision, the Board rejected the arguments made against the legality of State of Maine and determined that the dual requirements of State of Maine were met under the terms of the proposed transaction between CSXT and FDOT: (1) CSXT retained an exclusive, perpetual easement to provide freight rail service; and (2) there was no evidence that FDOT would be able to unduly interfere with the ability of CSXT to carry out its statutory obligations.³ Subsequent to the December 2010 decision, the legality of the State of Maine doctrine was upheld in Bhd. of R.R. Signalmen v. STB, No. 10-1138 (D.C. Cir. Mar. 29, 2011).

The Board also stated in the December 2010 decision that it was satisfied that the parties were not seeking to use State of Maine as a device to circumvent railway labor laws for 2 reasons. First, the Board concluded that there was a logical and legitimate business justification for FDOT's plan to take on some maintenance and dispatching of the line.⁴ Second, the Board reasoned that the transaction would not have a material adverse effect on BRS-affiliated employees of CSXT. The Board noted that CSXT had offered New York Dock-type labor

² FDOT also obtained 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 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.

³ December 2010 decision, slip op at 5-10.

⁴ Id. at 10.

protection⁵ to all potentially affected employees on the Orlando Line, and that all but 2 of CSXT's unions (one of which was BRS) accepted the offer.⁶ FDOT, after meeting with Florida legislative leaders on the issue of further accommodations for the CSXT signalmen, subsequently represented in a letter to the legislative leadership, discussed further below, that it would: (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.⁷

On January 4, 2011, BRS filed a petition to reopen the proceeding based on events that it claims occurred after the Board's December 2010 decision. BRS states that FDOT altered its position from the representations it made to BRS and the Board in seeking dismissal of the notice of exemption. In particular, BRS alleges that FDOT reneged on pledges to separately bid all signal work for the Orlando Line. Rather, BRS states that FDOT now proposes to remove and bid separately only signal maintenance work and only require that signal maintenance work be performed by unionized employees.⁸ BRS argues that this proposal is inadequate because it does not conform to FDOT's commitment to the Board that it would separately bid signal work generally, without limitation as to the type of work. BRS maintains that the latest FDOT proposal is new evidence and represents changed circumstances material to the December 2010 decision.

On January 24, 2011, FDOT filed a reply in opposition to the petition to reopen. FDOT maintains that the argument raised by BRS in its petition constitutes neither "new evidence" nor "changed circumstances," and, therefore, that BRS has failed to meet the burden for granting a petition to reopen. FDOT states that the concession offered to BRS, and presented to the Board, regarding signal work was strictly an accommodation to the 8 BRS-represented CSXT signalmen, all of whom currently perform signal maintenance work on the Orlando Line.⁹ FDOT states that the evidence shows that FDOT's proposal to remove only signal maintenance work from the design-build-maintain contract was already part of the record before the Board

⁵ See N.Y. Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979), aff'd sub nom. N.Y. 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.

⁶ See FDOT Reply to BRS Opposition at 19.

⁷ Id. at 20. FDOT made this offer after discussions with Florida legislative leaders regarding further accommodations for the CSXT signalmen.

⁸ See BRS Petition at 2-3.

⁹ See FDOT Reply to Petition to Reopen at 3.

prior to its December 2010 decision, and does not constitute new evidence. FDOT further argues that the lack of any agreement or understanding between itself and BRS concerning whether the proposal extended beyond signal maintenance work to include signal construction work was also evident in the record prior to the December 2010 decision, and that FDOT's representations to the Board did not include a promise to separately bid the design and construction signal work. FDOT argues that, because the dispute regarding signal maintenance work was part of the record the Board relied upon to issue the December 2010 decision, BRS's arguments do not meet the standard for new evidence or changed circumstances needed for a successful petition to reopen.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c), a petition to reopen a Board decision will be granted only upon a showing that the prior decision involved material error or would be affected materially because of new evidence or changed circumstances. To warrant reopening for new evidence, the evidence must be newly available, and not just newly presented.¹⁰ Similarly, to warrant reopening for changed circumstances, there must be a changed circumstance that could materially affect the prior decision.¹¹

BRS contends that new evidence and changed circumstances warrant reopening the December 2010 decision. According to BRS, FDOT's proposal to separately bid only the signal *maintenance* work represents a distinct change in FDOT's position prior to the Board's ruling in the December 2010 decision. BRS contends that, at the time of the December 2010 decision, the Board relied on FDOT's commitment in a December 2009 letter to the Florida legislature that it would separately bid all signal work, including the existing maintenance work and the new construction work for SunRail. BRS states that subsequent to the December 2010 decision, FDOT modified its offer to cover only signal maintenance work.

The "new" evidence that FDOT intends to separately bid only the signal maintenance provides no reason to reopen and reconsider our prior decision for 2 reasons. First, FDOT never

¹⁰ See Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989) ("*newly raised* evidence is not the same as *new* evidence" for purposes of reopening an administratively final decision) (emphasis in original); Canadian Nat'l Ry.—Control—Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002) ("'new evidence' is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding").

¹¹ See, e.g., Pioneer Indus. Ry.—Alternative Rail Serv.—Cent. Ill. R.R., FD 34917, slip op. at 8 (STB served Jan. 12, 2007) (reopening granted after the only shipper on a rail line changed position and opposed the discontinuance of rail service, which could materially affect the Board's analysis); DesertXpress Enters.—Pet. for Dec. Order, FD 34914, slip op. at 6 (STB served May 7, 2010) (reopening denied where petitioner argued that provision of congressional funding for an altogether separate passenger service project using the same corridor affected the Board's decision).

represented to the Board that it would separately bid other signal work. Rather, to accommodate the interests of the 8 BRS-represented CSXT signalmen who currently perform signal maintenance work on the Orlando Line, FDOT committed that such signal work would be removed from the current SunRail design-build-maintenance contract and bid only to contractors that were "rail employers" under applicable federal law, such that the affected signalmen would be afforded "the federal protections they seek in the SunRail corridor." In contrast to BRS's claim of "new" evidence, FDOT and BRS had made it clear to the Board before the December 2010 decision that they had not agreed whether the offer to separately bid signal work on the Orlando Line under the design-build-maintain contract included the signal upgrade construction work.¹²

Moreover, it is immaterial to our prior decision that FDOT's commitment does not embrace one-time signal construction work that will be performed in connection with SunRail-related upgrades to the Orlando Line because we did not rely on that fact. Rather, in our December 2010 decision, after reviewing the proposal to separately bid the signal maintenance work and the dispute regarding the signal upgrade work – we were "satisfied that the interests of rail labor [had] been adequately addressed."¹³ We were concerned primarily about the 8 signalmen currently employed by CSXT on the Orlando Line. FDOT's offer to separately bid the signal maintenance work on the Orlando Line to a "rail employer" within the meaning of the Federal law adequately protected the interests of these affected freight rail employees and supported our finding that this transaction was not a subterfuge to circumvent the rail labor laws.¹⁴ The dispute evident from the record regarding signal upgrade work did not impact our decision because it was not part of the representation made by FDOT.¹⁵

¹² FDOT Reply to Comments of National Railroad Passenger Corporation, filed May 17, 2010, at 20-21 (stating that FDOT and BRS were engaged in discussions regarding BRS's desire for a separate-bid commitment for signal upgrade work in addition to the 8 existing CSXT signalmen performing maintenance work); and BRS Opposition to Motion to Dismiss Notice of Exemption, filed April 29, 2010, at 6, n.3 (referencing BRS discussions with FDOT about assigning signal maintenance work to BRS-represented workers, but also stating that FDOT had said nothing to them regarding the performance of signal construction work by unionized railroad workers).

¹³ December 2010 decision, slip op. at 11.

¹⁴ Our use of the term "signal work" in the December 2010 decision in support of our finding was a reference to the signal-related work that FDOT had represented it would bid separately. See December 2010 decision, slip op. at 10.

¹⁵ BRS Motion for Leave to Supplement the Record, Second Declaration of R.G. Demott, filed June 2, 2010, ¶¶ 9, 15 (stating that FDOT explicitly planned to assign signal upgrade work to non-union entities and that FDOT had ignored the interests of BRS in the signal upgrade and construction work).

In our December 2010 decision, we found that there was a legitimate business justification for placing dispatching and maintenance in the hands of FDOT and that this transaction was not a subterfuge to circumvent the rail labor laws. Because BRS has provided no basis for modifying those conclusions, we find that the proposed transaction continues to satisfy the requirements of State of Maine. Accordingly, the Board properly granted FDOT's motion to dismiss, and BRS's petition to reopen will be denied.

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

It is ordered:

1. BRS's petition to reopen this proceeding is denied.
2. This decision is effective on its service date.

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