

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35675

233107
ENTERED
Office of Proceedings
October 4, 2012
Part of
Public Record

NATIONAL RAILROAD PASSENGER CORPORATION AND
CSX TRANSPORTATION, INC.– PETITION FOR DECLARATORY ORDER

RESPONSE OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION/IBT AND BROTHERHOOD OF RAILROAD SIGNALMEN TO
PETITION FOR DECLARATORY ORDER

The Brotherhood of Maintenance of Way Employees Division/IBT (“BMWED”), the union that represents track, bridge and structures workers nationally, and on all of the Class I rail carriers, including CSX Transportation (“CSXT”) and the National Railroad Passenger Corp. (“Amtrak”), and the Brotherhood of Railroad Signalmen (“BRS”), the union that represents railroad signal workers nationally, and on all of the Class I rail carriers, including CSXT and Amtrak (jointly referred to as “Unions”), submit this response to the petition filed by CSXT and Amtrak seeking a declaratory order from the Board that the Board does not have “regulatory authority” over Amtrak’s lease of the “Hudson Line” from CSXT that is the subject of the Petition.

The Unions do not oppose the outcome sought by Amtrak and CSXT. They recognize that, pursuant to 49 U.S.C. §24301(c), the Board does not have authority over leases of railroad lines to Amtrak. However, the Unions do oppose a declaration that the Board lacks regulatory authority over the lease transaction under *State of Maine-Acq. and Op. Exemption*, 8 ICC 2d 835 (1991) and subsequent notices and decisions that followed *State of Maine*, including *Massachusetts Department of Transportation –Acquisition Exemption–Certain Assets of CSX*

Transp., Inc., FD 35312 (Served May 3, 2010).

Amtrak and CSXT state that “the Board’s jurisdiction over Amtrak is limited by Section 24301(c)” [which provides that Subtitle IV is generally inapplicable to Amtrak except for certain specified provisions], and they note that the exceptions in Section 24301(c) do not provide for STB jurisdiction over leases involving Amtrak (Petition at 14). Absent Section 24301(c), a lease agreement between CSXT and Amtrak would be subject to Section 11323, not Section 10901 or Section 10902 as Amtrak and CSXT suggest (Petition at 14). But all of those provisions are part of Subtitle IV, and they are not within the exceptions identified in Section 24301(c), so the proper categorization of the transaction does not matter here with regard to the effect of Section 24301(c). The Board can therefore grant the declaration of lack of regulatory authority sought by CSXT and Amtrak without addressing the *State of Maine* issue.

As the Board knows, the Unions contend that the *State of Maine* doctrine is fundamentally wrong and contrary to the Act. The Unions maintain this position even though the D.C. Circuit concluded in the *Massachusetts DOT* case that, notwithstanding the Act’s definition of a railroad as the physical assets of a railroad, it was appropriate to defer to the Board’s decision that the sale of a line of railroad (that is a part of a railroad) is not an acquisition of a “railroad line” under Section 10901 since a “railroad line” could implicitly include operating rights on the physical line (according to the the Oxford English Dictionary). While the Board is free to revisit this issue at any time, and certainly should, the Unions will not ask the Board to do so here. And it is not necessary for the Board to do so here, since the Board can grant CSXT and Amtrak the declaratory order they seek under Section 24301(c). Indeed operation of Section 24301(c) would effectively preclude issuance of a the declaratory order they seek under *State of*

Maine; if the Board lacks jurisdiction over the underlying transaction, there is no basis for it to issue a decision as to the scope of its regulatory authority over that transaction.

The Unions submit that it would be particularly inappropriate and unnecessary for the Board to decide whether the instant lease transaction is subject to the Board's regulatory authority under the *State of Maine* doctrine because it is a lease of a line, not a so-called sale of assets. CSXT and Amtrak acknowledge that the *State of Maine* doctrine applies when a railroad is "selling its assets" (Petition at 7), and that this transaction is not a sale but a lease of a line (Petition at 6). They argue that this does not matter because they claim that the transaction is "analogous, but not identical, to a typical *State of Maine* proceeding" (Petition at 9). But the fact is that the instant transaction is not the type of transaction to which the Board has applied the *State of Maine* doctrine. Furthermore, the *State of Maine* doctrine has only been applied to transactions involving "non-carriers" that would otherwise be subject to approval or exemption under Section 10901. A lease between CSXT and Amtrak would certainly not be a Section 10901 non-carrier transaction. Additionally, Amtrak and CSXT fail to acknowledge that the Board based its *State of Maine* decisions on the policies of promoting commuter rail service and preserving freight service on lines that might have been abandoned. Neither of those policy considerations applies here. Given the differences between the East Hudson transaction and the typical the *State of Maine* transaction, and the absence of any necessity for deciding whether the rationale in *State of Maine* can and should be applied to a transaction like the East Hudson transaction, the Board should refrain from reaching that question in response to the Petition.

CONCLUSION

For the foregoing reasons, BRS and BMWED respectfully submit that while it would be appropriate for the Board to grant the declaratory order sought by CSXT and Amtrak based on application of 49 U.S.C. §24301(c), the Board should not issue such an order under the *State of Maine* doctrine.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Edelman', is written over a horizontal line. The signature is fluid and cursive.

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CERTIFICATE OF SERVICE

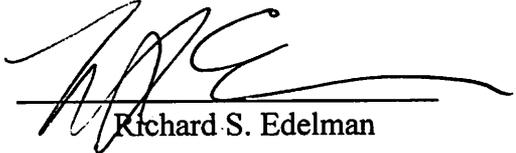
I hereby certify that I have this day caused copies of the foregoing Response to Petition for Declaratory Order to be served by First Class Mail upon the following:

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