

BEFORE THE  
SURFACE TRANSPORTATION BOARD

235581

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Finance Docket No. 35724 (Sub- No. 1)  
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CALIFORNIA HIGH SPEED RAIL AUTHORITY  
-CONSTRUCTION EXEMPTION-  
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CA

## **COMMENTS AND REPLY TO PETITION FOR EXEMPTION**

### **INTRODUCTION AND SUMMARY OF POSITION**

The Brotherhood of Maintenance of Way Employees Division/IBT, the Brotherhood of Railroad Signalmen, International Association Sheet Metal, Air, Rail, and Transportation Union/Mechanical Division, the unions that represent railroad maintenance of way employees, signal workers, and mechanical shop sheet metal workers (“Unions”) submit these comments and reply to the California High-Speed Rail Authority’s (“Authority”) petition for an exemption under 49 U.S.C. §10502 from the prior approval requirements of 49 U.S.C. §10901 for the Authority to construct a second section the planned California high speed passenger rail system, a segment that will run from Fresno to Bakersfield.

The Unions support California’s plan to add to the Nation’s passenger rail network by constructing new high speed passenger rail lines; they reiterate their view that the Board properly held that it has jurisdiction over the construction of these new railroad lines, and they agree with the Authority that, under the standards of 49 U.S.C. §10502, the project may and should be exempted from the prior approval requirements of Section 10901.

## ARGUMENT

Section 10502(a) of the Act states that the Board “shall”, “to the maximum extent consistent with” the statute, grant an exemption whenever the Board finds that the application of the statute or a provision of the statute:

- (1) is not necessary to carry out the transportation policy of section 10101 of this title;
- and
- (2) either—
  - (A) the transaction or service is of limited scope; or
  - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. §10502(a). This provision does not merely permit exemptions, it actually directs the granting of exemptions “to the maximum extent consistent with” the statute. And, for about 30 years the ICC and STB have interpreted and applied this provision as mandating the grant of an exemption when one of the criteria in subsection (2) applies, unless it is shown that granting an exemption would be contrary to the national rail transportation policy.

In the instant case there is no question that application of Section 10901 is not needed to protect shippers from the abuse of market power, so the exemption should be granted unless an exemption would be contrary to the national rail transportation policy. The Unions submit that there is nothing in that policy that militates against granting the exemption sought by the Authority.

Most of the aspects of the national rail transportation policy are irrelevant to a proposal to create a new dedicated passenger rail line that will add on to the interstate system and increase the availability of passenger rail transportation. Various elements of the policy concern minimizing regulation; promoting revenue adequacy of carriers; preventing restraints against market power, predatory pricing and discriminatory rates; ensuring accurate cost information for regulatory proceedings and general protection of shippers. None of those elements of the policy

are implicated by the plans of the Authority to build a new high speed rail line. However the project is consistent with elements of the policy concerning maximizing competition among carriers, maximizing competition among modes of transportation, introduction of new entrants that will provide new service and promotion of energy conservation. The creation of the new high speed rail line will offer a new carrier to provide rail transportation, provide new competition for other modes of transportation (highway and aviation), offer a new form of transportation and save energy and reduce pollution.

Sixty years after the reduction of passenger service began and accelerated, decades after the abandonment of many rail lines, and eighty years after the state and federal government began to promote motor vehicle transportation by a massive highway construction program, and to promote aviation by building airports and providing other infrastructure supports for aviation, California (with federal support) is planning to offer new rail service that will increase transportation options in the state, increase competition with other modes of transportation and relieve congestion on those other modes. It is especially significant that California would be the first state to substantially expand passenger rail transportation with a new and high speed service because California effectively doomed passenger rail transportation in the State by its heavy support for highway construction. See Gregory Lee Thompson, *The Passenger Train in the Motor Age, California's Rail and Bus Industries 1910-1941*, Ohio University Press, 1993.

Thus, to the extent that the national rail transportation policy is a factor here, the project is consistent with that policy and issuance of the exemption is entirely appropriate. Ultimately the California High Speed Rail project will improve rail transportation in California, provide impetus for rejuvenation of passenger rail transportation nationally, and provide new transportation options for many who would otherwise travel by car or airplane. And the project

will have no adverse effects on the current interstate rail system.

By contrast, opponents of the project have failed to demonstrate that the project conflicts with the national rail transportation policy such that the exemption should be denied; they certainly have not shown that the project is so at odds with those elements of the policy that the exemption should be denied.

Certain opponents have cited complaints about the route chosen by the Authority, expressed concerns about optimal network design, advanced objections to federal spending for this project and complained about the potential impact of the project on the agricultural interests. But none of those concerns or issues is a basis for the Board to deny the exemption sought by the Authority, given the mandate of Section 10205(A) and the actual elements of the national rail transportation policy.

Some of those who oppose the petition for exemption have argued that the Board should deny the exemption based on their objections to the whole California High Speed rail project. They disagree with the disagree with investment in high speed rail, don't like the route selection or the order in which the segments are being constructed, oppose public financing for such enterprises, dispute the benefits of the project and/or question the financial soundness of the plan and the actual availability of funds for the project. But, as is shown above, none of those arguments is a basis for denial of the exemption under Section 10502(a).

Furthermore, neither the Board nor the Commission has previously found such arguments to be grounds for denial of an exemption. In particular, the agency has not concerned itself with the wisdom of a State's plans, the policy choices of States or public authorities, or the financial soundness of a public project when States have bought rail lines for commuter rail service. In none of those cases did the Board or Commission ask whether the transactions were a wise use

of public funds. Nor did the agency refuse to allow purchase of a line when acquisition of trackage rights was a much less expensive alternative. The agency did not stand in the way when commenters asserted that forecasts for the planned service were unrealistic or that the potential number of passengers would not justify the cost of those acquisitions. When States asserted that they were acquiring rail lines because they wanted to control dispatching, the agency did not ask them to explain why they did not just negotiate better dispatching agreements instead of buying the rail lines. After 2009 when the State and Federal budgets were stressed, the Board did not second guess the judgments of various States when they sought to buy rail lines in the face of severe budgetary shortfalls and uncertainty about the availability of Federal Transit Act grants.

Two recent examples illustrate the Board's refusal to second guess, or even inquire into, the transportation policy and investment decisions of the States. In *New Mexico Department of Transportation –Acquisition Exemption– Certain Assets of BNSF Railway Co.*, F.D. 34793 (February 6, 2006), the Board was not at all troubled by, and found no need to assess, a transaction where the State of New Mexico planned to acquire 297.1 miles of rail line extending from Albuquerque across the Colorado border (more than half the length of the Northeast Corridor) so that New Mexico could start an Albuquerque local commuter rail operation. In *Florida Department of Transportation –Acquisition Exemption– Certain Assets of CSX Transportation, Inc.* F.D. 35110 (December 15, 2010), the Board decided it had no need to exercise its regulatory authority over Florida's acquisition of 61.5 miles of CSXT line--a transaction that was the highest cost per mile rail line acquisition ever, and a project that received the Federal Transit Administration's lowest quality rating-- for a commuter rail service north and south of Orlando that would run a handful of trains a day in each direction. In these and similar transactions the Board simply applied its standard tests for exemptions and its declared

deregulatory mandate and allowed the transactions to proceed without seeking or assessing the merits of the projects, or the State's reasons and justifications for the acquisitions.

The objections raised in this proceeding have simply not been a factor in ICC and STB decisions and there is no basis for the Board to suddenly change course because different people are raising the objections this time around.

### CONCLUSION

For the foregoing reasons, the Unions respectfully submit that the the petition for exemption sought by the Authority should be granted.



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