

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35783  
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FLORIDA DEPARTMENT OF TRANSPORTATION  
--PETITION FOR DECLARATORY ORDER --  
RAIL LINE OF CSX TRANSPORTATION, INC.  
BETWEEN RIVIERA BEACH AND MIAMI FLORIDA  
  
\_\_\_\_\_

236103

ENTERED  
Office of Proceedings  
May 27, 2014  
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Public Record

**COMMENTS OF THE BROTHERHOOD OF RAILROAD SIGNALMEN**

The Brotherhood of Railroad Signalmen (“BRS”), the union that represents railroad signal workers nationally, and on all of the Class I rail carriers, including CSX Transportation (“CSXT”), submits these comments in response to the petition filed the Florida Department of Transportation (“FDOT”) for a declaratory order that its “continued ownership of, and assumption of dispatching and maintenance responsibility over, rail trackage between Riveiera and Miami, Florida (the “South Florida Line”) on which CSX Transportation, Inc. (“CSXT”) holds a perpetual, exclusive freight easement does not render FDOT a rail common carrier under the Interstate Commerce Act or otherwise implicate a need for Surface Transportation Board authorization under 49 U.S.C. §10901.”

1. In support of its petition FDOT has relied on the ICC’s decision in *State of Maine-Acq. and Op. Exemption*, 3 ICC 2d 835 (1991), and subsequent STB decisions which followed *State of Maine* including the decisions in *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation Inc.*, F.D. 35312 (served may 3, 2010) (“*MasssDOT*”)(*aff’d sub. nom. Bhd/ of R.R. Signalmen v. STB*, 638 F. 2d 807 (D.C. Cir. 2011); and *Florida Department of Transportation–Acquisition Exemption–Certain Assets of CSX*

*Transportation Inc.*, F.D. 35110 (served December 15, 2010)(“*FDOT/Orlando*”).

BRS continues to maintain that the *State of Maine* line of cases were wrongly decided and should not be followed because that line of decisions is odds with the language of the Act and because transfer of ownership of, and responsibility for, a line of railroad that is still going to be used in interstate commerce is a transaction that should be approved by the STB or permitted by exemption. However, BRS will not oppose the instant petition because the lines in question were acquired by FDOT many years ago without approval or exemption under Section 10901, and they have been operated by and for the South Florida Regional Transportation Authority (SFRTA”) and its predecessor Tri-Rail for many years without FDOT, Tri-Rail or SFRTA being deemed a rail carrier; and because all of those entities are parties to, successors to, or otherwise bound by a “13( c) Agreement” that will protect the rights and interests of BRS-represented CSXT Signalmen who work on the South Florida line, including their retirement under the Railroad Retirement Act. Nonetheless, because BRS believes that the *State of Maine* line of decisions is at odds with the Act, and that the Board’s evolving precedent in this area is bad policy and hopelessly confused; and because some parties and the agency have on occasion characterized the absence of union response to exemptions and ex parte petitions as acceptance of, or acquiescence in, the results of the decisions or exemptions, BRS submits these comments to express its continuing opposition to the *State of Maine* and post-*State Maine* decisions.

2. The Board has exclusive jurisdiction over transportation by rail carrier over a line of railroad between a State and a place in the same state as part of the interstate rail network. 49 U.S.C. §10501(a)(1) and (2) and (b). Section 10901 provides that a person that is not a rail carrier may acquire a “railroad line” only if the Board authorizes the acquisition under Section 10901(Section 10901(a)(4)). Under Section 10102(6) (B) and ( c), “railroad” is defined as

including the road used by a rail carrier that is owned by it or operated under an agreement, as well as switches, spurs, bridges and tracks used or necessary for transportation; and under Section 10102(9), “transportation” includes property, facilities, instrumentalities, or equipment of any kind related to the movement of passengers or property by rail, regardless of ownership or an agreement concerning use. Thus, a non-carrier’s acquisition of railroad tracks, right of way etc. that is part of the interstate rail system and used for interstate railroad transportation can be accomplished only by approval or exemption under Section 10901. In *Brotherhood of Locomotive Engineers and Trainmen, IBT v. STB*, 457 F. 3d 24, 25 (D.C. Cir. 2006) the Board stated, “ Under the Interstate Commerce Act, as amended, a non-carrier may ‘acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing’ the action”. See also *Railway Labor Executives’ Ass’n. v. ICC*, 914 F. 2d 276, 277 (D.C. Cir. 1990)—“Section 10901 of the Interstate Commerce Act has been held to require the ICC’s approval of the acquisition or operation of a rail line by an entity that is not a rail carrier”. Thus, under the plain language of the statute, the acquisition of a railroad line by any entity not previously a rail carrier is subject to approval or exemption under Section 10901. However, over the years the ICC and STB have struggled with application of the statute when the acquiring entities are State or local governments or agencies for commuter rail service, particularly when the government or agency will not itself provide service on the line, and when State law bars the State or local government from being a carrier.

In *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), the ICC held that when a state acquires a line of railroad that has not been abandoned, “the transfer of the line is subject to our jurisdiction”, but such transactions would be exempted from the requirement of prior ICC approval under Section 10901. The ICC further held that although the line acquisition is subject

to agency jurisdiction, the State itself would not be considered a rail carrier if it did not actually operate the line and instead it engaged an operator that would perform all the rail functions would “assume[ ] the entire burden of operating the line”, and would have full common carrier obligations. *Id at 137. Aff’d, Simmons v ICC*, 697 F 2d 326 (D.C. Cir. 1982). That was the status of the law in this area until the decision in *State of Maine*.

In *State of Maine*, the State acquired 15 miles of abandonable line where the selling carrier would continue to provide freight service on the line and retain a so-called “operating easement” for all freight service, the State would not actually provide service on that line, and (unlike later cases) the selling freight railroad would remain responsible for maintaining the line and its signal system in addition to controlling traffic. The State filed a notice of exemption and then a motion for a determination that the ICC lacked jurisdiction over the transaction. No other party participated in that case. The ICC twice noted that the selling carrier would still “maintain, operate and renew the line”. 8 ICC 2d at 835, 837. After a one-half page analysis of the State’s request, the Commission concluded that it lacked jurisdiction “based on the facts of this particular transaction”. The ICC said that it had exclusive jurisdiction over acquisition of a rail line by a non-carrier, but held that the “operating easement” device negated that jurisdiction because the freight railroad would retain the common carrier obligation for freight and could not cease operations without Commission approval. *See also Sacramento-Placerville Transportation Corridor Joint Powers Authority–Acquisition Exemption–Certain Assets of the Southern Pacific Transportation Company*, F.D. 33046 (served October 28, 1996).

In the late 1990s and 2000s the *State of Maine* precedent was applied to more and more acquisitions, except without the element that the selling railroad that retained the freight operating easement would continue to do the signal and maintenance of way work and

dispatching. Almost all of the transactions were accomplished through notices of exemption and unopposed motions for declarations that the Board lacked jurisdiction; and there were no cases where the propriety of the *State of Maine* rationale was actually litigated. The precedent was also applied to larger transactions (New Mexico acquired 300 miles of line this way) and to sales of more heavily trafficked lines that certainly were not abandonable (*FDOT/Orlando*).

As the precedent developed, the agency struggled with explanation of its interpretation of the Act. In *State of Maine, Sacramento -Placerville* and other early cases, the ICC held that it lacked jurisdiction over the transactions. But in the *MassDOT* decision (at 3 n.4) and *FDOT/Orlando* decision (at 2 n.3), the Board said that while it may have said in past cases that these transactions were not subject to the Board's jurisdiction, it actually still had jurisdiction over the transactions; it was just not exercising regulatory authority over the transactions (without explaining how it has jurisdiction over a non-carrier acquiring entity, or an acquired line, without a petition or exemption under Section 10901). More recently, in *State of Michigan Department of Transportation-Acquisition Exemption- Certain Assets of Norfolk Southern Ry. Co.*, F.D. 35606 (served May 8, 2012), the Board extended the *State of Maine* rationale to acquisitions of lines to be used for inter-city passenger service and provided a new explanation: "When the seller retains the common carrier obligation and control over the freight rail service, the Board has determined that ownership of the railroad line remains with the selling carrier for purposes of Section 10901(a)(4)". *Id.* at 3, (without explaining how the selling carrier remains the owner when it has sold the line, or the legal implications of calling a party that has sold a line the owner of the line).

Several rail unions challenged the *State of Maine* rationale in the *MassDOT* decision. The Board affirmed its handling of these types of cases (albeit with the new explanation that it

retained jurisdiction but was not exercising regulatory authority). The Board concluded that since “railroad line” is not defined in the Act, and CSXT kept the right to provide freight service, no sale of a “railroad line” under Section 10901(a)(4) occurred because CSXT had not sold its entire interest in the lines. MassDOT at 1, 4-7, 11. BRS and other rail unions sought review of the Board’s decision by the D.C. Circuit. Among other things, they argued that since the plain language of Section 10901 provides that a non-carrier cannot acquire a railroad line without Board approval under that Section, the Act defines “railroad” as the physical assets of a railroad used for rail transportation, and a railroad line is simply a portion of a railroad, a “railroad line” is necessarily comprised of the physical assets that constitute the line so acquisition of those assets is subject to approval or exemption under Section 10901.<sup>1</sup>

However, the Court of Appeals decided that the meaning of “railroad line” in Section 10901 is ambiguous and it therefore deferred to the STB’s interpretation. The Court acknowledged that the statute defines “railroad” as including the physical assets of a railroad, but rejected the Unions’ argument that a “railroad line” is necessarily a portion of a “railroad”. The Court stated (638 F. 3d at 812) that the “operative term here is ‘railroad line’” which is not

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<sup>1</sup>The Unions also relied on the ICC and the Second Circuit decisions concerning the Staten Island Rapid Transit Operating Authority (“SIRTOA”) which owned a line still used for interstate freight transportation but SIRTOA only provided intrastate passenger rail service. The ICC held that as owner of the line, SIRTOA assumed the obligation to maintain the line and transportation facilities; and that if SIRTOA was not deemed a carrier, “members of the shipping public would have no direct recourse before this Commission in the event of track inadequacy, resulting in deterioration of freight train service”. *Brotherhood of Locomotive Engineers et al. v. Staten Island Rapid Transit Operating Authority*, 360 ICC 464, 473-474 (1979). The Court of Appeals affirmed because the line was part of the interstate system and was still used in interstate freight movements; and SIRTOA had a “latent duty to furnish that freight service. *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533, 539-540 (2<sup>nd</sup> Cir. 1983). The court found unpersuasive SIRTOA’s attempt to distinguish between the physical railway line and the railway itself (*id.* at 541- 542).

defined. Although the court did not suggest why Congress should have found it necessary to define “railroad line” after defining “railroad” such that the absence of an additional definition left the meaning of “railroad line” to the agency’s discretion, since Congress does not typically define every term it uses in a statute. In finding “railroad line” to be an ambiguous term, the Court looked to the *Oxford English Dictionary* and at the website <http://wordnetweb.princeton.edu>. *Id.* There are three elements of the *Oxford English Dictionary* definition of “line” in reference to railroading. The first two elements [(a) and (b)- a single track of rail, a part of a rail system] are consistent with the notion that a “railroad line” is a portion of a “railroad”. *Id.* The third element [( c)] says sometimes a railroad “line” may refer to an entire railroad.<sup>2</sup> *Wordnetweb* (<http://wordnetweb.princeton.edu>) defines “railroad line” as “line that is the commercial organization responsible for operating a system of transportation for trains that pull passengers or freight”. The court concluded that the two dictionary definitions of “line” suggested that Congress could have intended “railroad line” to mean something other than a portion of a railroad, so the STB had discretion to reasonably interpret the term, and the agency’s interpretation was reasonable and entitled to deference. 638 F. 3d at 812-813.

BRS continues to believe the Board’s decisions in the *State of Maine* line of cases are contrary to the language and obvious intent of the Act. BRS submits that it is irrational to conclude that “railroad” means the physical assets used for movement of passengers or property by rail, but “railroad line” means those assets plus the right to provide freight service. A portion of something cannot be greater than the thing itself; and a piece of a railroad does not become

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<sup>2</sup> That definition is: “In railway lang. variously applied (a) to a single track of rail as in *the up line, the down line*; (b) to a railway forming one of the parts of the system, as in *main line, branch line, loop line*; (c) sometimes to an entire system of railways under one management, as in *the Midland line....*”. *Oxford English Dictionary* 2d edition VII at 978 def. 26 b (italics in original).

more than the whole railroad by adding the word *line* after railroad. Furthermore, other subsections of Section 10901(a)(4) that refer to “railroad line” are concerned with construction and extension of existing railroad lines, construction of additional railroad lines, and provision of transportation over an extended or additional railroad line; all of which address the actual physical line of railroad.

Additionally, the very dictionary definitions cited by the D.C. Circuit Court do not support the conclusion that “railroad line” is an ambiguous term. That “railroad line” might sometimes refer to an entire railroad does not support the notion that “railroad line” may be defined qualitatively differently than “railroad”. And the possibility that “railroad line” might in some situations refer to an entire railroad does not suggest that “railroad” means the physical assets, but “railroad line” is the physical assets plus operating rights. Citation to the *OED* is also problematic because there are many differences in railroading terminology in the United Kingdom and the United States; for example, as noted in the *OED* itself, in the United States one refers to a “railroad”, the British term is “railway” (*see e.g. OED* vol. XIII pp. 127, 129).<sup>3</sup> Given those differences, the *Oxford English Dictionary* does not shed light on the meaning of railroad

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<sup>3</sup> Dictionary comparisons reveal many other instances where the *OED* uses words to describe railroad industry terms differently from terms commonly used in the U.S. to define the same things. [Citations for U.S. terms are to *Websters 3<sup>rd</sup> New International Dictionary* (2002)); citations for U.K. terms are to the *Oxford English Dictionary* 2d. ed. (1989)]: Device holding wheels on rail cars: U.S. - truck (*Websters* p. 2954 def. 4b), U.K. - bogie (*OED* I p. 360); control room for signaling U.S. - tower (*Websters* p. 2418 def. 2a), U.K. - box (*OED* I p. 462 def. 136); car for rear braking: U.S. - caboose (*Websters* p. 310), U.K. - brake van (*OED* I p. 483 def.3); equipment for carrying freight or passengers: U.S. -car (*Websters* p. 334 def. C), U.K. - carriage (*OED* II p.915 def. 25); operating employee responsible for supervising the train and taking tickets on passenger trains: U.S. - conductor (*Websters* p. 474 def. 2c), U.K. - railguard (*OED* VI p.913 def. 7b); moving track section used to divert train from one track to another: U.S. -switch (*Websters* p. 2313 def. 4a), U.K. - point (*OED* XI p.1129 def. 3f); wood or concrete beams holding rails in place and at proper gauge: U.S. - tie (*Websters* p.2391 def. 1(b)(2)), U.K. - sleeper (*OED* XV p.681 def.10b). For additional comparisons of American and British railroading terminology, *see* <http://www.railway-technical.com/newglos.shtml>.

terms in this country and is not a good basis for determining what the U.S. Congress meant when it used the term “railroad line”. By contrast *Webster’s Third New International Dictionary* (at 1314 def (f)), an American dictionary, defines “line” (in reference to a railroad) as “(1): the track and roadbed of a railway (2): condition of a track as to uniformity of direction on the tangents or variation on curves”; a definition that is fully consistent with the definition of railroad in Section 10102 (6).<sup>4</sup>

*Wordnetweb* (<http://wordnetweb.princeton.edu>) does define “railroad line” as “line that is the commercial organization responsible for operating a system of transportation for trains that pull passengers or freight”. But it also defines “railroad” the same way (*id.*); a definition that is inconsistent with the ICA’s definition of railroad as the physical assets. Accordingly, the *Wordnetweb* definition of railroad does not support defining “railroad” and “railroad line” differently. More importantly, that definition of “railroad” is inconsistent with the explicit definition of “railroad” in the statute so it should not be used at all to determine the meaning of other related terms in the Act.

BRS submits that the foregoing demonstrates that the *State of Maine* line of cases, as modified in the late 1990s, as revised in the *MassDOT* and *FDOT/Orlando* decisions, and as “explained” in the *State of Michigan* decision is contrary to the Act. It is also hopelessly confused (does the Board have jurisdiction over these transactions? what does it mean if the Board has jurisdiction but does not exercise regulatory authority? what are the legal consequences of that? and what does it mean to say that a carrier that sold a line is still owner of the line?). For these reasons, BRS also believes that D.C. Circuit erred in deferring to the

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<sup>4</sup> See also the *Encarta World English Dictionary* which defines “line” (in reference to a railroad) as “15. RAIL TRACK the track on which a railroad train runs 16. RAIL FIXED RAILROAD ROUTE a particular part of a railroad network.”

Board's interpretation in the State of Maine rationale as revised in the *MassDOT* decision.

3. BRS nonetheless does not oppose the petition filed by FDOT in the instant case. BRS recognizes that FDOT acquired the South Florida Line decades ago and it has not been deemed a carrier; nor has SFRTA, its predecessor Tri-Rail or their contract operators. Additionally, as is noted above, FDOT, Tri-Rail and SFRTA are parties to, successors to, or otherwise bound by a "13( c) Agreement" that will protect the rights and interests of BRS-represented CSXT Signalmen who work on the South Florida line, including their retirement under the Railroad Retirement Act.

When there is a change in a contractor for work on the South Florida lines, the 13( c) Agreement requires (among other things) that SFRTA ensure that affected employees will be able to follow their work; retain their current bargaining representatives; retain their current rates of pay, rules and working conditions under the existing collective bargaining agreements; and retain all their rights, privileges and benefits (including pension rights and benefits such as Railroad Retirement coverage). Additionally the 13( c) Agreement is binding on the successors and assigns of Tri-Rail/SFRTA, any contract operator for Tri-Rail/SFRTA must be bound by the Agreement, and any dispute must be arbitrated.

Given all these circumstances, BRS does not oppose the petition filed by FDOT.

Respectfully submitted,

/s/

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May 26, 2014

## CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served copies of the foregoing Comments of the Brotherhood of Railroad Signalmen by overnight delivery, to the offices of the following representatives of parties in this proceeding:

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Thomas J. Litwiler  
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BRS was not served with a copy of the petition for declaratory order so the only represented party or party of record BRS is aware of is FDOT. BRS has not served copies of these comments on shippers who received copies of the petition without exhibits a week after the petition was filed. If it is necessary to serve those shippers BRS will arrange to do so.

May 27, 2014

/s/ \_\_\_\_\_  
Richard S. Edelman