

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35863

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
–ACQUISITION EXEMPTION–
CERTAIN ASSETS OF PAN AM SOUTHERN LLC

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**COMMENTS OF THE BROTHERHOOD OF RAILROAD SIGNALMEN AND
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT IN
RESPONSE TO MOTION TO DISMISS NOTICE OF EXEMPTION**

The Brotherhood of Railroad Signalmen (“BRS”), the union that represents railroad signal workers nationally, and on all of the Class I rail carriers, as well as on Pan Am Southern LLC (PAS), and 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 (“Union’s”), as well as on PAS, submit these comments in response to the petition filed the Massachusetts Department of Transportation (“MassDOT”) for dismissal of the notice of exemption from Board approval filed by MassDOT in connection with its acquisition of the “right-of-way, track and related railroad physical plant” [collectively properly referred to as a “line of railroad”] of PAS known as the Connecticut River Main Line. In support of its petition MassDOT has relied on the decision in *State of Maine-Acq. and Op. Exemption*, 3 ICC 2d 835 (1991), and subsequent decisions which followed *State of Maine*, including the decision in *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation Inc.*, F.D. 35312 (served may 3, 2010)(, aff’d sub. nom. *Bhd. of R.R. Signalmen v. STB*, 638 F. 2d 807 (D.C. Cir. 2011).

BMWED and BRS continue to maintain that the so-called *State of Maine* doctrine is at

odds with the language of the Act, and that transfer of ownership of, and responsibility for, railroad line that is still going to be used in interstate commerce is a transaction that should be approved by the STB or permitted by exemption. The Unions also note that unlike the transaction in *State of Maine*, and subsequent notices of exemption and decisions that relied on the *State of Maine* rationale, the transaction at issue in the instant MassDOT filing does not involve acquisition of a line for use for commuter rail operations.¹ Rather, MassDOT expressly states that it is acquiring the line for Amtrak's Vermonter service, possible higher speed intercity rail service, and possible other intercity rail service. Petition at 4-5. That the purpose of the acquisition is for intercity rail service, not commuter rail service, renders the transaction significantly different from the typical *State of Maine* transaction.²

However, the Unions do not oppose the instant transaction or the motion to dismiss because PAS will continue to be responsible for maintenance of way, signal and dispatch work for the line conveyed. This is actually consistent with the original *State of Maine* transaction. There too, the selling carrier retained responsibility for the maintaining the right of way, track

¹ The petition offers the rote recitation of the alleged possibility of future commuter rail service on the line. But there is no description of such a plan; and there is no credible basis for a presumed commuter rail operation in the greater Springfield, Massachusetts area.

² The Unions recognize that the Board did apply the *State of Maine* doctrine in *State of Michigan Department of Transportation –Acquisition Exemption–Certain Assets of Norfolk Southern Ry. Co.*, F.D. 35606, served May 8, 2012. But in that decision the Board made the following confusing statement that is inconsistent with the concept of an acquisition: “When the seller retains the common carrier obligation and control over freight service, the Board has determined that ownership of the railroad line remains with the selling carrier for purposes of §10901(a)(4)”. *Id* at 3. This raises a number of questions. How there can be an acquisition if the purported seller of an asset is still the owner of the asset? By this reasoning, is the acquired line still a railroad line under Section 10901? And is this still a right-of-way owned by a railroad? Does the selling carrier still think that it owns the line?

and signal system and for dispatching the line; a principal reason why the Unions did not oppose the motion to dismiss in the matter that originated the *State of Maine* doctrine. Subsequent notices and decisions went awry by relying on the *State of Maine* decision in connection with transactions where the selling railroad did not retain responsibility for signal, maintenance of way and dispatch work, even though the selling railroad's retention of that work was prominently cited by the Commission in the explanation of its decision in *State of Maine*. But here, PAS will retain responsibility for that work. Additionally, the petition notes that the planned upgrading of the line is being financed by an FRA American Recovery and Reinvestment Act/Passenger Rail Investment and Improvement Act grant which is subject to the so-called "4R Act" employee protections (45 U.S.C. §836) in accordance with 45 U.S.C. §24405(c). So the Unions do not oppose the transaction or the motion to dismiss.

However, the Unions submit these comments to make several points.

In the past, State petitions for dismissal of notices of exemption that have invoked the *State of Maine* doctrine, and Board decisions, have cited the lack of opposition to various *State of Maine* notices of exemption, and the large number of such decisions, as evidence of the alleged soundness of the doctrine, its acceptance, and its establishment as precedent (even though almost all the decisions were the result of ex parte proceedings). BMWED and BRS wish to make it clear that their determination not to oppose the petition in the instant proceeding is not because they accept the arguments proffered in its support, but because the selling carrier will continue to be responsible for the maintenance of way and signal work and the potential for application of ARRA/PRIIA employee protections.

As is described above, the Commission's decision in *State of Maine*, which was in part expressly premised on the selling carrier's retention of responsibility for the maintenance of way,

signal and dispatch work, later metamorphosed into a doctrine authorizing different transactions where the selling carrier did not retain responsibility for maintenance of way, signal and dispatch work. But the Commission never explained why it reached the same result in later cases that differed from the *State of Maine* transaction with respect to key facts cited in the *State of Maine* decision. The Unions respectfully urge the Board to be circumspect in the language it uses in responding to the MassDOT petition so the Board does not inadvertently lay the groundwork for dismissal of notices of exemption in subsequent transactions where the selling carrier does not retain responsibility for maintenance of way, signal and dispatch work and the line continues to be used for intercity passenger service and interstate freight service.

Finally the Unions note that the strong desire to facilitate new commuter rail operations has led the Commission and the Board to provide inconsistent and confusing statements of the nature of its decisions in *State of Maine* cases. In many cases the Commission and Board stated that they lacked jurisdiction over such transactions; other times the agency was not clear about the effect of its decision. When parties pointed out that the Board's holdings that it lacked jurisdiction over such transactions meant that the Board no longer had jurisdiction over lines of railroad still used for interstate freight and intercity passenger rail service, the Board acknowledged in *Massachusetts Department of Transportation supra*, at 3 n. 4; and *Florida Department of Transportation–Acquisition Exemption– Certain Assets of CSX Transportation Inc.*, F.D. 35110 (served December 15, 2010) at 2 n.3, that it had been inconsistent and less than clear regarding the effects of granting a motion to dismiss in a *State of Maine* case, and that actually it had jurisdiction over the transactions and lines, but it was just not exercising regulatory authority over the transactions. Then, as is described above, in *State of Michigan*, the Board said that the selling carrier remains the owner of the line under Section 10901. Given this

history, the Unions also respectfully suggest that in responding to the petition, the Board should be careful to write a very limited decision specifically tailored to this particular case.

Respectfully submitted,

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Date: November 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Comments of the Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division/IBT in Response to Motion to Dismiss Notice of Exemption by First Class Mail, to the following:

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Date: November 7, 2014

/s/Richard S. Edelman
Richard S. Edelman