

225013

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC-
PETITION FOR DECLARATORY ORDER

**RESPONSE OF THE IBT RAIL CONFERENCE TO
JOINT PETITION TO INTERVENE AND REOPEN**

The International Brotherhood of Teamsters Rail Conference and its affiliated organizations, the Brotherhood of Locomotive Engineers and Trainmen Division/IBT, and the Brotherhood of Maintenance of Way Employees Division/IBT, ("Rail Conference") submit these comments in response to the recently filed joint petition to intervene and reopen this case which was decided almost two years ago.¹

The putative interveners, California -Nevada Super Speed Train Commission ("CNSSTC") and American Magline Group ("Magline") ask that the Board permit them to

¹ As was explained in the Rail Conference's earlier filing. BMWED represents the workers who perform work on the track, right of way and related structures and buildings of the major railroads, and most other railroads. BLET represents engineers and trainmen who work on the major railroads and most other railroads. Both organizations are affiliated with the Rail Conference. BLET and BMWED represent their members for purposes of collective bargaining, and represent their interests before Congress and administrative agencies. Both organizations seek to protect the work of their crafts, secure adequate compensation and benefits and safe and healthy working conditions for their members, preserve and expand statutory and regulatory protections for rail workers and to extend the benefits of union representation to currently unrepresented employees. The Rail Conference and its affiliates have a strong interest in ensuring that rail transactions are properly classified under the Interstate Commerce Act, or ICC Termination Act ("ICA") and that entities that are involved in railroad operations are properly classified as rail carriers under the ICA and other statutes that cover rail carriers or utilize the ICA definition of rail carrier.

intervene in this case, that the Board reopen its prior decision and that the Board reverse its prior decision because CNSSTC and Magline claim that it was wrongly decided. It seems that Magline is a potential competitor to DesertXpress. Despite being aware of the DesertXpress decision one month after its issuance, Magline and CNSSTC have suddenly become motivated to take a position on the status of DesertXpress because recent Congressional action elevated Magline from a gleam in someone's eye to a wish that might become reality, some day. But Magline and CNSSTC apparently perceive themselves to be at a potential competitive disadvantage against DesertXpress by reason of the Board's prior determination that DesertXpress is a rail carrier. Rather than seeking a determination that the operation that they intend to run would also be rail carrier, or a declaration as to the status of whatever operations they intend, Magline and CNSSTC want to reopen the DesertXpress ruling and obtain a declaration that DesertXpress would not be a rail carrier, regardless of whether they ever move from wish to reality, and regardless of whether they ever file for a determination as to the status of their planned operation.

The Rail Conference respectfully submits that the requests of CNSSTC and Magline should be denied. There is no basis for this extremely late intervention; there are no grounds for reopening this proceeding and the substance of the joint petition is fundamentally erroneous. DesertXpress will be providing interstate railroad transportation as a common carrier, it will not be a trolley, a subway, or even a commuter railroad. DesertXpress accurately described itself as a rail carrier and subject to the STB's jurisdiction.

CNSSTC and Magline say that there will be a California-Nevada Interstate Maglev Project ("CNIMP") but do say who or what their planned operation will be other than that it will be a passenger-only railroad operating between Southern California and Nevada (whatever

this will be, at present it seems to be more a collection of acronyms and hypothetical plans than a proposed operating entity). But based on the description that has been provided, it appears that CNIMP will also be a rail carrier providing interstate railroad common carrier passenger service.

If the goal of the joint petitioners is to avoid a different classification than DesertXpress and a competitive disadvantage as a result of the classification difference, the backers of CNIMP can attain equal footing with DesertXpress by seeking a declaration that it too would be a rail carrier. But, in reality, CNSSTC and Magline do not seek equality with DesertXpress because, if they did they would also seek a declaration that CNIMP will be a rail carrier. Rather, the CNIMP backers want the ability to operate interstate train service free of STB oversight and regulation. The joint petition should be rejected not only because there is no basis for the intervention and no basis for reopening, but also because the underlying premise is just wrong.

I. THERE IS NO JUSTIFICATION FOR THE LATE ATTEMPT TO INTERVENE IN THIS PROCEEDING

This proceeding began in July of 2006 and continued for eleven months through June of 2007. But CNSSTC and Magline did not seek to intervene until almost two years after the Board issued its decision. CNSSTC and Magline assert that they should be excused from having to intervene in this case in a timely manner because they say they and those in common interest with them were unaware of the case when it was actually pending. This is a specious argument that is refuted by the actual facts; it should be rejected.

CNSSTC and Magline state that CNSSTC was formed in 1988, that Magline was selected as potential contractor in 1991, and that each has been working toward developing a rail connection between Southern California and Las Vegas. Joint Petition at 8. But they

apparently made no effort to monitor STB proceedings that might have had an impact on their plans. Nor did they make any effort to inform themselves of events that could affect their plans. By contrast, BMWED, BLET and two New Jersey agencies that certainly have less specific interests in proceedings dealing with rail transportation between Southern California and Las Vegas became aware of, and participated in, the DesertXpress proceedings. There is no reason why CNSSTC and Magline could not have learned of this case some time during the eleven month period it was pending.

Furthermore, CNSSTC and Magline had reason to know of these proceedings when they were pending and had actual knowledge of the decision a week after it was issued. One of the Magline principals attended an FRA "scoping session" for the DesertXpress plan in July of 2006 (at the time the petition was filed in this case), spoke to an STB representative about the DesertXpress plan and specifically raised the common carrier by rail issue at that time. Joint Petition at 12-13. Yet CNSSTC and Magline assert that they were unaware of the DesertXpress STB filing despite this knowledge; and they made no effort to find out, even after they received information about the DesertXpress plan at the scoping session. *Id.* CNSSTC and Magline also admit that they learned about the DesertXpress decision on July 3, 2007, a mere week after it was issued (*id.* at 13); but still they did nothing. It seems that rather than engage issues that they now claim are crucial to them, CNSSTC and Magline chose to engage in a lobbying battle with DesertXpress, because in the absence of favorable Congressional action they would just not be that interested. *Id.* at 15-16. The Rail Conference submits that all of these obviously frivolous excuses for inaction in the face of actual knowledge of the activities of DesertXpress and Board proceedings undercut and negate any claim by CNSSTC and Magline that they just did not know and sprung to action once they knew. In actuality, CNSSTC and Magline would not stir

themselves until they obtained some favorable action from Congress; that was a choice, but it as one made with the possibility that inaction would mean an adverse result; and it is not a choice that the Board has any reason to respect in considering whether to allow intervention in a case that was finished two years ago.

Furthermore, CNSSTC and Magline have failed to demonstrate any cognizable interest in this proceeding. CNSSTC and Magline don't really seem to care about the proper classification of, and operational status of, DesertXpress, in fact they hope that DesertXpress does not go forward at all. Instead CNSSTC and Magline seek to intervene to have the Board eliminate what they believe to be a competitive advantage for DesertXpress. In other contexts the Board has made it clear that does not act to level the playing field among competitors; it should not do so here. CNSSTC and Magline claim that they did not previously "have a stake in the outcome of the proceeding because funding for the CNIMP had not been secured". Joint Petition at 20. But they also claim to have been organized and trying to advance this project since 1988 and 1991 respectively; and they attended FRA scoping sessions and managed to move themselves to lobby Congress. CNSSTC and Magline have no more interest in this proceeding now than they did two years ago. It is not that the funding increased their interest, it is that the funding apparently tipped the cost-benefit analysis for them so they now feel it worth the effort and expenditure of money to contest the status of DesertXpress.

CNSSTC and Magline also attempt to justify their intervention at this extremely late time by analogizing their petition to a challenge to subject matter jurisdiction in the Federal courts, noting that such a challenge may be raised at any time. Joint Petition at 17, *citing Central States Co-ops v Watson Bros. Transp. Co.*, 165 F. 2d 392 (7th Cir. 1948). This is a baseless analogy. To begin with, Federal courts allow challenges to subject matter jurisdiction

at any time during a case because they are courts of limited jurisdiction under Article III of the Constitution; and judicial decisions have res judicata and collateral estoppel effects, and precedent can be binding. The Board does not have the same constraints, and it can and has decided similar cases differently over time. Furthermore, it must be noted that the party that challenged subject matter jurisdiction in *Central States* did so while the case was on appeal, while there were still live proceedings. And the issue there was raised by a party to the case. Even with the requirements of Article III, a Federal court would not allow a non-party to intervene and reopen a case years after a final decision was rendered.

Thus, there are no grounds for the joint petitioners to intervene in this case; their motion should therefore be denied.

II. THERE IS NO BASIS FOR REOPENING OF THE BOARD'S DECISION

CNSSTC and Magline assert that this proceeding should be reopened because they allege that there was a material error in the decision, that there is relevant evidence not previously brought before the Board and that there are changed circumstances. Joint Petition at 14-17. None of these arguments have merit. In the next section of this brief the Rail Conference will show that there was no material error. But the Conference further submits that a non-party's assertion of material error two years after a decision was issued is not, standing alone, a basis for reopening. So, even if CNSSTC and Magline were correct in their assertions of material error, that would not by itself be a basis for reopening. The Rail Conference further submits that the Joint Petition has failed to demonstrate that there is relevant evidence not previously brought to the Board's attention that would affect the decision on its merits, or that there are substantially changed circumstances.

CNSSTC and Magline have not identified any relevant new evidence that would justify

reopening. They have failed to show that there was relevant evidence that was hidden or not brought forward at the time that the Board considered the DesertXpress petition. Nor have they demonstrated that there is any new evidence that could affect the Board's decision. The facts about DesertXpress remain the same as they were in 2006-2007. Nothing has changed for DesertXpress, and there is nothing new about the DesertXpress plan that suggests that something is different about DesertXpress than was the case when the Board rendered its decision. There simply are no new or overlooked facts concerning the matter before the Board in this proceeding: the petition and status of DesertXpress. CNSSTC and Magline assert that there are changed facts and circumstances about them and the CNIMP, but that is not the pertinent inquiry with respect to reopening this case. The pertinent inquiry is whether there have been new or overlooked facts about DesertXpress since that is the subject matter of this proceeding, the Joint Petition has not made such a showing.

Similarly, the Joint Petition has not shown any changed circumstances that concern DesertXpress. Indeed the only changes circumstances cited in the Joint Petition are that CNSSTC and Magline feel more secure about obtaining funding, and they rather grandly believe that Congress has endorsed the CNIMP. That the CNIMP proponents feel more secure about funding is absolutely irrelevant to the issue in this proceeding-whether DesertXpress will be a rail carrier. Additionally, even if recent Congressional enactments can be seen as endorsements of the CNIMP, a debatable point, it too is irrelevant to the issue in this proceeding. That there may be Congressional support for the CNSSTC/Magline plans says nothing about the status of DesertXpress, which is the actual subject matter of this proceeding. CNSSTC and Magline somehow think this proceeding is all about them. It is not. It is about DesertXpress; and DesertXpress, has not changed and its circumstances have not changed, so

the Joint Petition provides no basis for reopening this proceeding.

III. THERE IS NO BASIS FOR REVERSAL OF THE BOARD'S DECISION

The Joint Petition not only requests leave to intervene and reopening of the Board's decision, it also challenges the Board's decision on the merits. CNSSTC and Magline say that even though DesertXpress will be an interstate railroad operation carrying passengers for compensation, it will not be a rail carrier because it is intended to be a passenger-dedicated line, and there will be no connection with what they call the interstate freight system or interstate steam freight system. CNSSTC and Magline argue that under the ICCTA, only freight railroads and Amtrak are rail carriers; not interstate passenger-only operations. They further assert that the interstate system really means the interstate "steam" system referred to by the Interstate Commerce Act in 1920 (citing decisions that refer to the steam system). Finally, they argue that the Board's decision was inconsistent with the Board's decisions regarding line acquisitions by State agencies where freight railroads would continue to hold exclusive operating easements for freight service (*State of Maine-Acq. and Op. Exemption*, 3 ICC 2d 835 (1991) and cases which rely on that decision). Since the Board has not reopened this proceeding there is no basis for reconsideration of the Board's decision on the merits, and the effort of CNSSTC and Magline to re-argue the merits is out of order. If the Board is willing to reconsider its ruling despite the absence of grounds for CNSSTC/Magline intervention and the absence of a basis for reopening, the Board will presumably provide for detailed briefing on this issue and the opportunity for other interested parties to participate.² However, since the Joint Petition devotes so much effort

² For example other rail unions would presumably seek to participate in a reopened proceeding if the Board were to consider the radical notion that an interstate railroad is not a rail carrier subject to the Board's jurisdiction. Other unions and perhaps other parties might have decided not to intervene in this case because they viewed the declaration sought by

to the argument on the merits as way of attempting to leverage an improper petition to intervene and reopen, the Rail Conference will briefly respond to the arguments on the merits.

The CNSSTC and Magline argument is at odds with the language of the Act. The Board generally has jurisdiction over transportation by rail carrier over a line of railroad between two States. 49 U.S.C. §10501(a)(1) and (2). The Act defines “rail carrier” as an entity that provides “common carrier railroad transportation for compensation”, but not “street, suburban, or interurban electric railways not operated as part of the general system of rail transportation”. Section 10102(5). “Railroad” includes a road used by a rail carrier as well as track, bridges, switches, spurs, terminals, and yards used or necessary for transportation; and “transportation” includes locomotives, cars and equipment “related to movement of passengers or property or both by rail”, as well as services related to that movement. Section 10102(6) and (9). Furthermore, a person may construct or extend a rail line, provide transportation by rail or acquire a railroad only pursuant to Board authorization. Section 10901.

As described by in its petition, DesertXpress will construct rail lines including track and related structures and facilities for new railroad operations to provide common carrier rail transportation for compensation, moving passengers by rail between points in two States: California and Nevada. This work and the planned operations plainly describe a rail carrier under the Act, and DesertXpress will require STB authorization for construction of its line and authorization to operate the new line.

Contrary to the assertions of CNSSTC and Magline, the Act does not restrict the

DesertXpress as obvious. If the Board were to consider the position advanced by CNSSTC and Magline on the merits, then those unions and others might seek to respond to the proposition advanced by CNSSTC and magline.

definition of rail carrier and/or the Board's jurisdiction to freight railroads. The Act defines rail carrier as a person providing common carrier railroad transportation for compensation; it does not define rail carrier as a person providing common carrier freight transportation for compensation. To the extent that "street, suburban, or interurban electric railways not operated as part of the general system of rail transportation" are excepted, that is not a general exception for passenger railroads involved in interstate transportation. Indeed, by its terms, this language appears to apply to trolleys and subways-not interstate passenger railroads. CNSSTC and Magline suggest that because this language was new to the definition of rail carrier in the ICCTA, it meant a new exclusion of passenger entities. But they also acknowledge that this same language was in former Section 1(22). There was always this exclusion and it did not apply to interstate passenger railroads which were rail carriers under the ICA .

Moreover, the CNSSTC/Magline argument ignores the fact that the Act still defines railroad transportation as including use of locomotives, cars, equipment facilities etc. for the movement of passengers. Section 10102(9). CNSSTC/Magline also ignore the fact that there is a specific exemption from STB jurisdiction of mass transportation provided by local governments and their operators (although they remain subject to safety, representation and retirement laws that use the ICCTA definition of rail carrier). Section 10501 (c). If purely passenger operations were excepted from the definition of rail carrier, the separate commuter rail exception would not have been necessary (and those operations are still subject to the Federal Railroad Safety Act, the Railway Labor Act and the Railroad Retirement Act). DesertXpress will be an entity that provides interstate common carrier railroad transportation for compensation, and it will therefore be a rail carrier.

CNSSTC and Magline have focused on the issue of whether DesertXpress will connect

with the general system of rail transportation. Aside for the absence of any basis for the gloss they would put on that language-that general system of rail transportation means freight-the argument is irrelevant because it only pertains to “street, suburban, or interurban electric railways” . An entity that provides common carrier interstate railroad transportation for compensation is a rail carrier regardless of whether it connects to the rest of the rail system. The question of connection pertains to “street, suburban, or interurban electric railways”; DesertXpress will not be any of those things, it will be an interstate railroad.

The CNSSTC/Magline attempt to bootstrap their argument by reference to the 1920 Act and its reference to steam transportation is entirely without force. The 1920 Act referred to steam transportation because at that time there was no other form of railroad transportation. Diesel power was not yet in use, and it would not be used for decades. Indeed, review of former Section 1(22), the original source of this language of exclusion, indicates that the point of the reference to steam transportation was to distinguish railroads from trolleys and subways. It should also be noted that interstate passenger railroads operated by steam motive power until diesels came along. The cases cited by CNSSTC/Magline that refer to the steam system do not advance their argument on this point. Two of those decisions, *Piedmont Northern Ry v. ICC*, 286 U.S. 299 (1932), and *Texas Electric Ry*, 25 F Supp 825 (N.D. Tex 1938), were issued in the 1930s, when there were only steam locomotives; the references to steam system were based on the statute as written at the time and the form of motive power that existed at that time. Those decisions do not suggest that steam system equals freight which means today’s reference to the general system of rail transportation refers to freight transportation only. And, again, that exception is only pertinent to “street, suburban, or interurban electric railways” not to interstate passenger railroads. CNSSTC has also misconstrued *Ry. Labor Exec.s Ass’n v ICC*, 859 F. 2d

996 (D.C. Cir. 1988). The Court did not refer to the general steam railroad system because it was construing the ICA, but did so because it was construing Section 151 First of the RLA which contained the original definition of "carrier" as it was in 1926. *Id.* at 998. Furthermore, in that case the entity that owned the line (SIRTOA) was an intrastate railroad and a subsidiary of the New York MTA, so it would not have been a rail carrier under the ICA unless there was interstate service on the line. Connection to the interstate system and the interstate service was significant in that case because SIRTOA's own activities did not make it an interstate carrier. The court looked to the interstate freight service because that was the interstate activity on the line, and SIRTOA was obliged to support and ultimately be responsible for that service. SIRTOA was originally found to be a rail carrier; the decision cited by CNSSTC and Magline upheld a ruling that it no longer was a rail carrier because the interstate service had stopped and the ICC had authorized SIRTOA's abandonment of its obligation to provide and support that service. It was the end of the interstate service that mattered. In fact there was no severing of the line from the interstate system, just a cessation of interstate service. *Id.* The Rail Conference submits that from review of the decision, it is clear that the nature of the interstate service as freight service was not significant. If the interstate service had been passenger service it would not have affected the outcome; as an intrastate railroad SIRTOA would have been a rail carrier so long as there was interstate service and underlying duty to support and if necessary provide that service, whether the service was freight or passenger. Thus, the reference to steam transportation and the fact of connection for freight service were not the determinative elements in the D.C. Circuit's decision.

The final argument of CNSSTC and Magline is that the DesertXpress decision supposedly conflicts with *State of Maine* and its progeny. DesertXpress is of course readily

distinguishable from *State of Maine* which involved the State's acquisition 15 miles of line within Maine where the selling carrier would continue to provide freight service on the line and would retain a so-called "operating easement" for all freight service, the State would not actually provide service on that line, and the selling carrier would remain responsible maintaining the line and its signal system. CNSSTC and Magline assert that *State of Maine* and the cases that followed it are apposite because they held that the State entities that acquired lines did not acquire the responsibility for freight service on those lines and thus did not become rail carriers. It is argued that the same is true for DesertXpress since it will not have freight service. But CNSSTC and Magline ignore two key points: the acquiring entities in those cases were States or State agencies, many of which were statutorily precluded from becoming rail carriers; and the lines themselves were only intrastate, so the public entities would not own interstate lines or operate interstate service. By contrast, DesertXpress is a private entity that will own lines that cross state boundaries and will operate interstate service. So the analogy to the *State of Maine* line of cases is not appropriate, those cases are inapposite to this case.

Finally in this regard, the Rail Conference respectfully submits that the *State of Maine* line of cases were wrongly decided, and the error should not be compounded by spreading it to a case involving interstate passenger service. Simply put, the acquisition of a line of railroad that is used in interstate commerce is a transaction subject to STB jurisdiction. The notion of a conveyance of a line used in interstate commerce without the common carrier obligation and without rail carrier status has no basis in the Act. The concept of an "operating easement" for freight only is a fabrication and it is without support in the language of the Act or prior precedent under the Act; indeed it is contrary to the SIRTOA case. The Act comprehensively lists numerous types of transactions involving rail lines, but it does not identify "operating

casements". It seems that this new category was created to allow certain transactions involving State governments to proceed, perhaps because they were perceived to be in some public interest. But the decisions are contrary to the Act. And now *State of Maine* has metastasized from something applied to 15 miles of little used potentially abandonable track within one state where the selling carrier remained responsible for the line and its signal system and their maintenance, to a device where a State can acquire 300+ miles of line, or acquire a line with continuing active freight and Amtrak service in the middle of the selling carrier's system. And now private entities are seeking to utilize this device. The Rail Conference believes the Board must put a stop to this. There will soon be the opportunities for the Board to do so, but it certainly should not extend this doctrine that conflicts with the Act to an interstate railroad operation like DesertXpress. But the Board need not address this issue in the instant proceeding since there are so many other bases for denying the Joint Petition.

CONCLUSION

For the foregoing reasons, the Joint Petition should be denied.

Respectfully submitted,

/s/

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Dated: April 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Opposition to Joint Petition to Intervene and Reopen on Behalf of California-Nevada Super Speed Train Commission and American Magline Group to be served on the following by overnight delivery on this 29th day of April.

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