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BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35225
SAN BENITO RAILROAD LLC
- ACQUISITION EXEMPTION -
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY

SAN BENITO RAILROAD LLC
REPLY TO OPPOSITION
TO MOTION TO DISMISS NOTICE OF EXEMPTION

I. INTRODUCTION

On March 27, 2009, San Benito Railroad LLC ("San Benito") filed in this docket a Verified Notice of Exemption ("Notice") pursuant to 49 C.F.R. § 1150.31, et. seq., with respect to certain rail line and right-of-way (the "Subject Line")¹ that is the subject of an Option Agreement with Union Pacific Railroad Company ("UP"). Under the terms of the Option Agreement, upon consummation UP would retain an exclusive and perpetual freight rail operating easement over the Subject Line. Simultaneously, San Benito moved to dismiss the Notice. San Benito submitted that because of the nature and terms of the acquisition of the Subject Line from UP as described in the Notice and the Motion to Dismiss (and its Exhibits), the acquisition would not be subject to Surface Transportation Board ("Board" or "STB") jurisdiction and consummation would not make San Benito a rail carrier.

¹ The Subject Line consists of UP's right, title and interest in the right-of-way, trackage and other physical assets associated with the line of railroad extending between approximately milepost 0.07 and approximately milepost 12.50 in the County of San Benito, California.

On May 8, 2009, the Brotherhood of Maintenance of Way Employees Division/IBT (“BMWED”) and the Brotherhood of Railroad Signalmen (“BRS”) (referred to collectively as “Unions”) filed a pleading entitled “Opposition to Motion to Dismiss Notice of Exemption” (“Opposition”). San Benito hereby files this Reply to the Unions’ Opposition.

II. SUMMARY OF ARGUMENT

State of Maine² and its progeny stand for the proposition that in certain acquisitions, where no common carrier obligation is being transferred and the rail carrier still retains sufficient control to meet its common carrier duties, the Board does not have jurisdiction over the transaction. In such cases, there is a transfer of physical assets, but no transfer of a “railroad line” under 49 U.S.C. §10901.³ So long as the involved freight railroad is able to continue fulfilling its common carrier obligation without control by the acquiror, the transaction does not trigger STB jurisdiction. This is the exact situation before the Board in the subject proceeding. The instant transaction will not give San Benito control over UP such that UP cannot fulfill its common carrier obligations on the Subject Line.

The State of Maine line of cases are consistent with the expansion of STB jurisdiction enacted in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). Notwithstanding the Unions’ assertions, the State of Maine line of cases were not: “ex parte, with no challenge to the basic principal involved;” “uncritically accepted;” or “pro forma decisions.” Opposition at 3. To the contrary, they are cases in which the ICC/STB always scrutinized and often rejected the acquirors’ filings, and consistently admonished parties to

² State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Co., 8 I.C.C.2d 835 (May 20, 1991).

³ The same rationale could apply in a §10902 transaction as well.

submit such cases in advance for a jurisdictional determination. The cases cited in the Opposition purporting to contradict State of Maine are either distinguishable or irrelevant.

The Unions conflate their discussion of the STB's jurisdiction over San Benito's acquisition of the Subject Line with San Benito's planned operations of passenger service over the Subject Line in an effort to establish STB jurisdiction where none exists. The nature of San Benito's planned operations is not relevant to the State of Maine analysis of the acquisition. In any case, San Benito's planned passenger service will be wholly intrastate service and the fact that it will occur on an interstate freight rail line is not relevant to the Board.

For the reasons set forth herein, San Benito respectfully requests that the Board grant its Motion to Dismiss the Verified Notice of Exemption for lack of jurisdiction.

III. ARGUMENT

A. The Rationale Of The State Of Maine Case

In State of Maine, the State through the Maine Department of Transportation ("MDOT"), sought to acquire 15.66 miles of rail line owned by the Maine Central Railroad Company ("MEC") and operated by the Springfield Terminal Railroad Company ("ST"). MDOT purchased only the physical assets (real property assets including track structure). MDOT planned to explore the possibility of developing a mass transit system using these physical assets and another line. MEC retained the property rights needed to conduct common carrier operations with ST. Even though ST would lease the railroad assets from MEC and conduct the actual common carrier operations, MEC would retain a residual common carrier obligation. The ICC confirmed that it had exclusive jurisdiction over the acquisition of a railroad line by a noncarrier where the common carrier rights and obligations were also to be transferred, in whole or in part. State of Maine, 8 I.C.C.2d at 836-37. However, the ICC concluded that no common carrier rights or obligations were being transferred. Id. at 837. Rather, MEC would retain the

common carrier obligation and it could not cease to offer service on the line without first obtaining ICC abandonment authority. Id. The ICC further noted that nothing in the transfer of underlying assets would disenable MEC from meeting its common carrier obligation. Id. Persuaded that there would be no alteration of any common carrier obligations and that MEC had done nothing that would impair its ability to fulfill its continuing common carrier rights and obligations, the ICC held that there was no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation. Id. In essence, there was a transfer of physical assets, but not a “railroad line” under 49 U.S.C. §10901.

Thus, the touchstone of the State of Maine line of cases is the element of control – whether as a result of the transaction the freight railroad would retain an adequate amount of control which would allow it to fulfill its common carrier obligations; and conversely, whether the acquiring entity would gain undue control over the freight railroad which would impede it from meeting its common carrier duties. The ICC cautioned that it intended “to examine these transactions closely and will make a determination based on the facts and circumstances of each case.” Id. at 838.

In the eighteen years since State of Maine, the ICC/STB has scrutinized the retained freight easements and the contractual provisions governing similar transactions in order to evaluate whether the involved freight railroads would retain sufficient control to meet their common carrier obligations. The ICC/STB has looked at the permanence of the easement; freight and passenger operating windows; provisions governing abandonment, rights to make capital improvements; maintenance terms; and dispatching terms. See, e.g., Los Angeles County Transportation Commission – Petition for Exemption – Acquisition from Union Pacific Railroad Co., STB Fin. Docket No 32374, Los Angeles County Transportation Commission – Trackage

Rights Exemption – Union Pacific Railroad Company, STB Fin. Docket No. 32375 (STB served Jul. 23, 1996)(“LACTC”); Southwest Ohio Regional Transit Authority – Acquisition Exemption – Certain Assets of the Indiana & Ohio Railway Co., STB Fin. Docket No. 33524 (STB served Déc. 24, 1997); Maryland Transit Administration – Petition for Declaratory Order, STB Fin. Docket No. 34975 (STB served Oct. 9, 2007); The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Co., STB Fin. Docket No. 35128 (STB served Oct. 27, 2008). Even the Unions cite Board cases analyzing and applying the State of Maine rationale. Opposition at 13. These Board decisions do scrutinize the underlying transactions and the control retained by the freight operator⁴ and are based upon the prior body of State of Maine cases, which together provide a fulsome analysis of the State of Maine rationale. Moreover, the cited cases are fully consistent with State of Maine.

B. The Unions Ignore The Rationale Of State Of Maine And Numerous Cases Showing Its Careful Application

The Unions ignore the rationale of State of Maine and its progeny (summarized above) and instead condemn the ICC/STB for what they assert are “largely pro forma decisions” characterized by “virtually automatic dismissal of notices of exemption[s].” Opposition at 3. They claim that “virtually all” of the subsequent decisions following State of Maine were “ex parte, with no challenge to the basic principal involved.” *Id.* at 13.⁵ But even a cursory review of several State of Maine cases disproves the Unions’ hyperbolic criticism. The ICC/STB have

⁴ See, e.g., New Jersey Transit Corp. – Acquisition Exemption – Certain Assets of Consolidated Rail Corp., STB Fin. Docket No. 33786 (STB served Feb. 15, 2000)(analyzing freight operating window); State of Wisconsin Dept. of Transp. – Petition for Declaratory Order, STB Fin. Docket No. 34181 (STB served Aug. 1, 2002)(analyzing commuter passenger use provision language).

⁵ The Unions apparently misunderstand the term *ex parte*. The dockets in these proceedings are available to the public to view in person or (in the last several years) online. In fact, many of the State of Maine decisions are the result of notices or petitions filed with the STB (or ICC) and the regulations require that a public notice be published in the Federal Register.

scrutinized the State of Maine line of cases that have come before them and, over the years, have carefully and deliberately established a body of case law defining when the freight railroad has retained sufficient control versus when the acquiror has obtained undue control.

In Wisconsin Dept. of Transportation – Petition for Declaratory Order, STB Fin. Docket No. 34764 (STB served Mar. 13, 2006), the Wisconsin Department of Transportation (“WDOT”) was asked twice to provide additional information and to revise language in the operating agreement so that the STB could evaluate whether the transaction would interfere with the freight operator’s ability to provide freight service. Similarly, in Washington County, Or. – Acquisition Exemption – Certain Assets of the Union Pac. RR. Co., STB Fin. Docket No. 34810 and Tri-County Metropolitan Transportation District of Oregon – Acquisition Exemption – Certain Assets of Washington County, Or., STB Fin. Docket No. 34791 (STB served Apr. 11, 2007), the STB served a decision requiring additional information in order to make a determination as to whether the freight railroad would maintain control of the line and continue to be able to fulfill its common carrier obligation.

In Public Service Co. of Colorado – Acquisition Exemption – Line of the Colorado & Wyoming Railway Co., ICC Docket No. 32264 (ICC served Nov. 10, 1993)(“C&W Railway”), the two unions jointly petitioned to revoke the notice of exemption filed by the acquiror. The ICC, finding that the freight railroad’s rights under the agreement were “too circumscribed and tenuous to permit it fully to carry out its common carrier obligation” denied the motion to dismiss the notice and held that the transaction was subject to its jurisdiction. Finally, in Orange County Transp. Authority, Riverside County Transp. Commission, San Bernardino Assoc. Govts., San Diego Metro. Transit Development Bd., North San Diego County Transit Development Board – Acquisition Exemption – the Atchison, Topeka and Santa Fe Railway Co.,

10 I.C.C.2d 78 (ICC served Apr. 7, 1994), the ICC, rather than wait for a motion to dismiss from the county agencies, began an investigation in to jurisdiction of the acquisition on its own motion. The ICC ultimately held that the five counties had gained undue control over the freight railroad and concluded that it had jurisdiction over the acquisition.

C. State Of Maine Is Good Law

1. The Unions Rely On Several Distinguishable Or Irrelevant Cases

The Unions spend much time discussing SIRTOA,⁶ a case wholly distinguishable from the facts presented here. In SIRTOA, a case that predates State of Maine, SIRTOA not only operated a local passenger service, but also, as pointed out by the Unions, inherited a “*latent duty...to furnish that freight service*” over the line. Opposition at 9 (emphasis added). This point alone completely distinguishes SIRTOA from the proposed acquisition contemplated here and the State of Maine line of cases. San Benito will not acquire any freight common carrier obligation – latent, residual, or otherwise – as a result of the acquisition. UP will retain a permanent and exclusive freight operating easement which means that UP, and only UP, will have the duty to provide freight rail service over the Subject Line. Indeed, once SIRTOA abandoned the latent freight duty it held, the ICC determined and the D.C. Circuit affirmed, that SIRTOA was no longer a carrier. The Unions acknowledge this (Opposition at 9), but do not appreciate that this means SIRTOA supports State of Maine and the present case.

Similarly, the Unions reliance on American Orient Express Railway Co. v. STB, 484 F.3d 554 (D.C. Cir. 2007)(“American Orient”) and DesertXpress Enterprises, LLC – Petition for Declaratory Order, STB Fin. Docket No. 34914 (STB served Jun. 27, 2007) (“DesertXpress”) is

⁶ Staten Island Rapid Transit Operating Authority v. I.C.C., 718 F.2d 533 (2nd Cir. 1983)(“SIRTOA”).

misguided. American Orient dealt with clearly interstate service and turns on the definition of “common carrier,” a definition that is not at issue in the instant case. The Unions’ reliance on DesertXpress is similarly misplaced as the issue there involved construction of interstate rail lines.

2. State Of Maine Is Consistent With ICCTA

The Unions contend that San Benito’s Motion to Dismiss should be denied because State of Maine is contrary to ICCTA. ICCTA expanded the Board’s jurisdiction, but it did not change the workings of §10901 acquisitions nor did it change the meaning of a “railroad line.” The State of Maine line of cases fall outside the Board’s jurisdiction because the assets being purchased in those cases are insufficient to constitute a “railroad line.” The Unions mistakenly rely on cases discussing federal preemption and railroad construction in a tortured attempt to suggest that the instant transaction would be subject to STB jurisdiction. None of the cited cases, however, are relevant or applicable to the issue here. For instance, whether a city’s zoning ordinance and land-use permitting requirements regarding a proposed intermodal facility⁷ are expressly preempted by ICCTA has no bearing on the meaning of a “railroad line” as used in §10901, and is irrelevant to the instant proceeding.

3. State Of Maine Is Not Limited To States And State Entities

Contrary to the Unions’ unsupported claim, the State of Maine line of cases were not ever limited to state entities. See C&W Railway. In fact, the ICC/STB have determined that the State of Maine rationale can apply to acquisitions involving private entities such as San Benito. See, e.g., Midtown TDR Ventures LLC – Acquisition Exemption – American Premier Underwriters, Inc., The Owasco River Railway, Inc. and American Financial Group, Inc., STB Fin. Docket No.

⁷ See Opposition at 7 citing Norfolk Southern Railway v. City of Austell, Georgia, 1997 WL 1113647 (N.D. Ga. 1997).

34953 (STB served Feb. 12, 2008); Missouri River Bridge Co. – Acquisition Exemption – Certain Assets of Chicago, Central & Pacific Railroad Co., ICC Fin. Docket No. 32384 (ICC served Mar. 3, 1994)(citing C&W Railway). Although the acquiring entity was the state (through MDOT) in State of Maine, the rationale of State of Maine is not dependent on the fact that the buyer there was the state.

D. San Benito Will Not Control UP's Freight Operations And The Transaction Is Consistent With The State Of Maine Line Of Cases

The Unions, without analysis or support, claim that the transaction will allow San Benito to “control the acquired line segment.” Opposition at 1. As discussed in detail in San Benito’s Motion to Dismiss, this simply is not the case. In fact, UP would retain sufficient control to meet its common carrier obligations over the Subject Line, including, among other things, the exclusive right to provide or permit freight rail service; the right to operate freight trains; the right to make capital improvements; the right to require maintenance to the standard UP previously maintained; the ability to step in to perform maintenance if San Benito failed in its obligation; and the right to receive train and equipment movement reports from San Benito. Motion at 7-8. Nowhere in the Opposition do the Unions evaluate the actual provisions of the Usage Agreement or explain how these provisions stray from the State of Maine line of cases. In fact, the Usage Agreement is consistent with the concept that the freight operator will retain sufficient control in order to meet its common carrier obligation. See, e.g., LACTC (acquiring entity to provide dispatching and maintenance); Sacramento-Placerville Transp. Corridor Joint Powers Authority – Acquisition Exemption – Certain Assets of Southern Pac. Transp. Co., STB Fin. Docket No. 33046 (STB served Oct. 28, 1996)(although acquiring entity will control maintenance and dispatching, it is unlikely that freight service on the line will be unduly affected); Southwest Ohio Regional Transit Authority – Acquisition Exemption – Certain Assets

of the Indiana & Ohio Railway Co., STB Fin. Docket No. 33524 (STB served Dec. 24, 1997)(acquiring entity will be responsible for maintenance and dispatch and authority to construct new track; however, the parties have negotiated other terms designed to ensure that freight operations will not be impaired).

E. San Benito's Planned Intrastate Passenger Service Is Not Relevant To The Question Before The Board And Is Not Subject To STB Jurisdiction

The question before the STB is whether the acquisition of the Subject Line is subject to STB jurisdiction. This is distinct from the issue of operation of passenger service over the Subject Line. The nature of the planned passenger service of San Benito is not relevant to whether the acquisition of the Subject Line is subject to Board jurisdiction. Even so, the San Benito passenger service will be intrastate passenger service, not subject to STB jurisdiction.

The Unions ignore statutory language requiring that operations must be "part of the interstate rail network" for STB jurisdiction to attach. 49 U.S.C. § 10501(a)(2)(A). Even if the STB were to entertain the Union's protestations that State of Maine aside, San Benito's planned passenger service somehow brings the transaction under STB jurisdiction, the STB would have to conclude that precedent clearly states that wholly intrastate passenger service even when operated on an interstate freight rail line is not within STB purview.

San Benito has stated that if it exercises its option to acquire the Subject Line, it would use it for the purpose of providing (through a designated third-party operator) intrastate passenger rail service primarily for a planned community that would be designed and constructed by an affiliate of San Benito. See Motion at 2. San Benito would obtain passenger operating rights on UP's line from the northern endpoint of the Subject Line to Gilroy, California. The Board would not have jurisdiction over these rights because the passenger service would be wholly intrastate passenger service. See *Magner O'Hara Scenic Railway v. I.C.C.*, 692 F.2d 441

(6th Cir. 1982)(upheld ICC determination that a 262-mile intrastate passenger service using tracks owned by an interstate freight carrier was not service over which the ICC had jurisdiction). Similarly, in LACTC, the STB found that LACTC's commuter operation over UP's track was wholly intrastate and "is thus not subject to our jurisdiction absent some showing that the grant of trackage rights will interfere with transportation which is subject to our jurisdiction. LACTC at 4.

In Fun Trains, Inc. – Operation Exemption – Lines of CSX Transportation, Inc. and Florida Dept. of Transportation, STB Fin. Docket No. 33472 (STB served Mar. 5, 1998), the STB determined that "one-way and round trip entertainment service between Hollywood and the Poinciana, FL area [with] deluxe coach accommodations, food and beverage service, and on board entertainment for tourists traveling between the Orlando Walt Disney World area and southeastern Florida" was not part of the interstate rail network and therefore not subject to its jurisdiction. The STB noted, however, that it has jurisdiction over railroads providing wholly intrastate rail service if the railroad participates in the movement of passengers from one state to another under common arrangements with connecting carriers (i.e., by means of through ticketing). Despite the fact that the majority of potential riders would be tourists, the STB concluded that Fun Trains would not be sufficiently linked to the interstate system because it would not connect with or participate in through ticketing arrangements with Amtrak, an interstate rail carrier. In Napa Valley Wine Train, Inc. – Petition for Declaratory Order, 7 I.C.C.2d 954 (1991), the ICC considered the jurisdictional status of a similar type of one-way and round-trip intrastate excursion service to Napa Valley wineries. The ICC noted that it might have jurisdiction over "intrastate operations by interstate carriers when those operations are sufficiently linked to, and part of, the interstate system to be deemed 'interstate commerce'

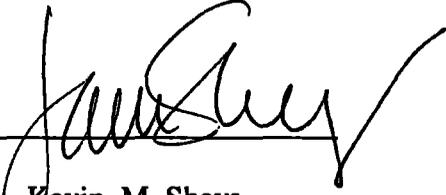
within the meaning of the commerce and supremacy clauses.” Although the Wine Train operated over a piece of track on which interstate freight rail operations also were conducted, the ICC concluded that the Wine Train service was “essentially local” and therefore not sufficiently part of the interstate system to vest the ICC with jurisdiction over the excursion service.

San Benito’s planned passenger service almost certainly would be intrastate in nature. Passengers of the intrastate service could ride Cal Train from Gilroy to San Jose and then access the Amtrak Coast Starlight service that runs between Seattle and Los Angeles. Opposition at 5. The key, however, is that San Benito has no plans to enter into arrangements with Cal Train, Amtrak or any other system for through-ticketing. Only if San Benito agreed to a through-ticketing arrangement with Amtrak would the service become interstate in nature. At that point, the San Benito service would be subject to STB jurisdiction and would require operating authority from the Board.

IV. CONCLUSION

San Benito’s acquisition of the underlying physical assets of the Subject Line will not constitute an acquisition of a railroad line subject to STB jurisdiction. San Benito’s ownership interest in those assets will not make it a common carrier subject to STB jurisdiction. San Benito will not conduct freight rail operations on the Subject Line and will not hold itself out as willing or able to do so. For the reasons set forth herein, San Benito respectfully requests that the STB grant its Motion to Dismiss the Verified Notice of Exemption for lack of jurisdiction.

Respectfully submitted,

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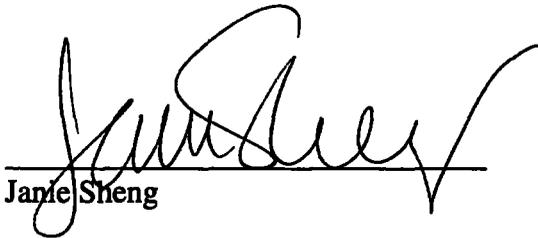
**ATTORNEYS FOR SAN BENITO
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May 28, 2009

CERTIFICATE OF SERVICE

I hereby certify this 28th day of May, 2009, that I have caused the foregoing **San Benito Railroad LLC Reply to Opposition to Motion to Dismiss the Notice of Exemption** to be served by overnight delivery on the following counsel of record for the parties:

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