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BEFORE THE SURFACE TRANSPORTATION BOARD Part of  
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**In the Matter of:****STB Finance Docket No. 35312****MASSACHUSETTS DEPARTMENT OF TRANSPORTATION -  
ACQUISITION EXEMPTION - CERTAIN ASSETS OF  
CSX TRANSPORTATION, INC.**

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**COMMENTS OF  
AMERICAN TRAIN DISPATCHERS ASSOCIATION  
AND OPPOSITION TO MOTION TO DISMISS**

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The American Train Dispatchers Association (“ATDA”)<sup>1</sup> concurs in the Comments filed by the Brotherhood of Railroad Signalmen and the Brotherhood of Maintenance of Way Employees (collectively “BRS/BMWE”). Through the device of a retained “operating easement,” CSX Transportation, Inc. (“CSXT”) and the Massachusetts Department of Transportation (“MassDOT” or “the State”) hope to convince this Board that it lacks jurisdiction over CSXT’s sale of Massachusetts mainline, lock, stock, and barrel to MassDOT. As pointed out by BRS/BMWE, there is convincing, long-established Board and federal court precedent, as well as policy reasons, that support rejection of this dubious proposition. We offer this additional analysis:

**The Proposed Acquisition**

The facts necessary to understand the nature of the transaction that purportedly is beyond the Board’s jurisdiction are simple. As MassDOT explains in its Motion to Dismiss (“Motion”), the State’s purpose in acquiring the CSXT lines is to use the lines for future commuter rail operations. After the acquisition, the State, acting through the Massachusetts Bay Transportation Authority (“MBTA”), will be responsible for maintaining the lines and signal systems and

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<sup>1</sup> ATDA represents CSXT’s train dispatchers who currently control the movement of all rail traffic on all of CSXT’s rail lines in Massachusetts.

controlling all rail traffic (i.e., dispatching) over the major part of the lines.<sup>2</sup> (Motion, p. 10, 22). There will be a shared use agreement providing CSXT with limited windows during which it can operate its freight service. (Motion p. 24). Essentially, the “operating easement” that CSXT will retain is little more than a glorified trackage rights arrangement, as CSXT will have no responsibility for train dispatching or keeping the tracks and signals in working order.<sup>3</sup> Finally, in the unlikely event there is a continuous three-year period of freight rail inactivity on the lines (i.e., CSXT would stop serving customers in Massachusetts), MassDOT or MBTA would have the right to seek regulatory authority to terminate CSXT’s easement. (Motion, p. 30).

***State of Maine Was Wrongly Decided and Otherwise is Inapplicable.***

The State argues that the Board should divest itself of jurisdiction based on the Interstate Commerce Commission’s decision in *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Co.*, 8 I.C.C.2d 835 (1991) (“*Maine*”), and the lines of cases that follow it. BRS/BMWE have provided the Board with an extensive analysis of why that argument should be rejected and *Maine* should be overruled. We agree.

In 1980, the ICC issued *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 135 (1980), *aff’d*, *Simmons v. I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982) (“*Common Carrier*”), in which it promulgated rules to address situations where a State or agency of a State proposed to acquire a line that otherwise would be abandoned in order to ensure that service be continued on

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<sup>2</sup> The only exception is that part of the lines (the South Coast Lines) over which the Massachusetts Coastal Railroad will run, pursuant to CSXT’s conveyance of part of the rights it will retain when it sells the lines to the State. Initially, Mass Coastal will be responsible for track and signal maintenance. The State will assume that responsibility when it initiates commuter rail operations over those lines as well. Application at 5, 13, 16.

<sup>3</sup> The same operational concerns connected to the new “operating easement,” including track and signal maintenance and train dispatching, are addressed in the 1985 trackage rights agreement pursuant to which CSXT currently operates over the Boston Main Line East property (Exhibit C to the Motion to Dismiss, p. 14-39) and the 1994 trackage rights agreement governing operations on the Boston Main Line West which is being replaced as part of the proposed transaction. See Motion p. 7, fn. 8, 10, p. 11.

the line. Summarizing its action, the Commission explained:

We are exempting the acquisition by a State of rail lines approved for abandonment, when the abandonment has not been consummated. Further, we are exempting from our regulation the start up and termination of operations over lines abandoned or approved for abandonment, which have been acquired by a State. We are also adopting rules for a modified certificate of public convenience and necessity for these operations. This will assure that our regulations do not prevent a State or political subdivision from initiating programs to continue rail service, and will encourage operators to provide service over State acquired lines.

This determination to “encourage] rail continuation programs [and] remove regulatory constraints which might discourage new operators from initiating service over marginal lines” stemmed from the bankruptcies of the Chicago, Rock Island and Pacific Railroad Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company that resulted in the threatened loss of rail service to businesses in the states where those carriers operated. The Commission decided that in circumstances like that – “a narrow class of transactions” – exemption from otherwise applicable regulatory requirements was warranted. *Id.* at 135. “The purpose of this proceeding is to facilitate the acquisition and operation of lines for which service by the current carrier will in all likelihood not be continued.” *Id.* at 136. Several States asked the Commission to rule that they would not become common carriers if they undertook such transactions because, “where the operator has assumed the entire burden of operating the line, no purpose is served by requiring a State to become a common carrier.” *Id.* at 137. The Commission agreed that merely owning a rail line would not result in a State being deemed a common carrier.

Our mandate to promote transportation is best served by following the policy that mere ownership of a rail line by a State does not create common carrier status. When a State has not held itself out to be the operator of a line and thus has not incurred a duty to the public, the common carrier duty to provide and maintain service should be only on the operator. Therefore, ... we will not require the State to file jointly with the operator of a notice for a modified certificate. [fn 3] A State will be considered a common carrier if it operates a rail line itself. *United States v. California* [297 U.S. 175 (1936)].

*Id.* at 137-138.

The Commission did require that “[t]he operators, whether a State or its contractor...file a notice for a modified certificate of public convenience and necessity...providing the Commission

with essential information concerning the financial condition of the operator, liability insurance coverage, and the nature of the operations.” *Id.* at 138. “The operators,” the Commission stated, “incur full common carrier obligations.” *Id.* The Commission confirmed these requirements in the ensuing regulations, which remain in effect today without significant change. See 49 CFR 1120A (*Id.* at 140-142) [now 49 CFR 1150 Subpart C].

Since *Common Carrier* in 1980, no similar rules have been promulgated to apply to a State’s acquisition of a rail line that is *not* fully abandoned or approved for abandonment.

In *Maine* (at 836-837), the Commission pointed to *Common Carrier* as authority for its decision. It acknowledged that it possessed “exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a State) where the common carrier rights and obligations are also to be transferred, in whole or in part” but determined that in that instance, no “common carrier rights or obligations are being transferred” in the transaction. *Id.* at 837. Because MEC would be retaining all common carrier rights and obligations – the ICC noted that MEC’s easement would require that it “maintain, operate and renew the line” – the Commission found that MEC had “both the intent and unconditional ability” to continue to fulfill its common carrier obligations. *Id.* at 837. Relying on *Common Carrier*, it therefore held that the “innovative arrangement” under which all the State was doing was “acquiring the physical assets” and assuming no other obligations took the case outside its jurisdiction. *Id.* at 838, n. 7 (quoting *Common Carrier* at 137).<sup>4</sup>

That is not what is happening here. First of all, these are not lines whose continued existence is in jeopardy. Unlike *Common Carrier* situations, there is no suggestion that abandonment of the lines is in the offing or that service otherwise would be discontinued but for the State stepping in and acquiring the lines. Second, the State proposes not only to purchase the physical assets, but also to assume many functions that otherwise would be provided by an

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<sup>4</sup> The Commission offered no explanation for expanding the application of *Common Carrier* beyond the “narrow” abandonment setting it explicitly announced that ruling was intended to address.

acknowledged carrier: maintaining the tracks and way, maintaining the signals, dispatching all trains and controlling all traffic. MassDOT's statement (Motion p. 4-5) that "neither [it] nor MBTA (which will monitor operations over the Railroad Assets) will acquire the right or ability to provide or control freight service over the Railroad Assets" is belied by the facts. There can be no question that the State is acquiring both the right and the ability to control freight service over the lines to be acquired. Later in its Motion (p. 19), MassDOT admits that "[t]he 2009 Operating Agreement provides that MBTA (or a contractor or other third party designated by MBTA) will exercise 'the performance of the management, regulatory and *operational control of any and all rail service over [the JURP] including, without limitation, dispatching control of all trains....*' Yes, the Agreement sets standards for the exercise of that control and the provision of "*all maintenance services*" (*Id.*), but the right and ability to control cannot seriously be denied. As BRS/BMWE point out, if the State assured the Board that it would be contracting with a carrier (such as MBCR) to perform all those controlling and maintenance functions, then consistent with *Common Carrier*, the Board could decide that the State would not be deemed a rail carrier -- but its acquisition of the lines would still be subject to the Board's jurisdiction.

There are other cases where States have acquired active freight lines like what Massachusetts proposes where the Commission did not relinquish its jurisdiction. For example, in *City of Austin, TX – Acquisition – Southern Pacific Transportation Company*, 1986 WL 1166762 (ICC) ("*Austin*"), the City of Austin ("City") filed a notice exemption, along with a motion for dismissal of said notice, with respect to its proposed acquisition of approximately 162 miles of rail track from the Southern Pacific Transportation Company ("SPT"). *Id.* at 1. The Commission found that the City did not intend to operate any trains on the railroad. *Id.* Rather, the City intended to enter into an agreement with the Austin Railroad Company ("ARC") for that rail carrier to operate the line. *Id.* at 2, n. 2. The City and ARC were in the process of negotiating a 10 year agreement with 3 options to renew. *Id.*

Nevertheless, the Commission denied the motion to dismiss holding that it had

jurisdiction over the transaction. The ICC found unpersuasive the City's argument that it was merely a "conduit to the eventual operation of the line" by ARC:

[B]y purchasing an active line of railroad, [the] City not only will assume from SPT the common carrier obligation to ensure service over the line, but also will retain this common carrier obligation regardless of whether it operates the line itself or arranges by contract for someone else to operate it. Therefore, at consummation of the acquisition of the SPT line, [the] City will become a rail common carrier subject to the Commission's jurisdiction.

*Id.* at 1. (Internal citations omitted).<sup>5</sup>

In one of the first decisions after *Maine*, the ICC was asked to determine, *inter alia*, whether a transfer of physical assets from Southern Pacific Transportation Company ("SP") to a Los Angeles public agency was subject to its jurisdiction. In *Southern Pacific Transportation Company - Abandonment Exemption - Los Angeles County, CA*, 8 I.C.C.2d 495 (1992), the Los Angeles County Transportation Commission ("LACTC"), a non-carrier, acquired approximately 10 miles of rail track from the SP. 8 I.C.C.2d at 495-496. In determining not to relinquish jurisdiction, the Commission looked to both *Maine* and *Austin* for guidance. *Id.* at 503-505.

It noted that in *Austin* it had "found that a city's acquisition of an active railroad line necessarily makes it a common carrier, even though the City of Austin did not intend to operate the line." *Id.* at 504. Even more clearly, it stated

[T]his agency has made it clear that any party that acquires an active line of railroad acquires the common carrier obligation to provide service over it, even if the purchaser disavows that duty and another party, by agreement with the purchaser, obligates itself to provide service by operating trains on the line.

*Id.* at 505. The Commission then looked to its more recent decision in *Maine*, noting in that transaction the non-carrier public agency did not obtain anything in the transfer of assets that

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<sup>5</sup> *Maine* distinguished *Austin* because of the difference in responsibilities that the freight carrier providing service over the line would be retaining. In *Austin*, the Commission explained, "the city assumed a common carrier obligation (even though it did not intend to operate the line itself), because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator." 8 I.C.C.2d at 837, n. 6. By contrast, in *Maine* the Maine Central Railroad was taking on responsibility for *all* operating functions.

would “disable [the rail carrier] from meeting its common carrier obligation, since the permanent and unconditional easement which it would retain ensured [the rail carrier] (and its successors and assigns) both the full right and necessary access to maintain, operate, and renew the line.” *Id.* at 507. Furthermore, the ICC recalled that in *Maine*, it had “applied our policy ‘to remove obstacles which might inhibit States from acquiring lines so that service can be continued.’” *Id.* (quoting *Common Carrier*). As such, under the circumstances, it had found “no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation.” *Id.* (quoting *Maine*).

In *Southern Pacific*, the ICC scrutinized the specific facts involved in the transfer of assets from SP to LACTC, including the assertions of the parties and any written agreements between them. *Id.* at 508. Ultimately, it found that the transaction was more akin to that in *Austin* than that in *Maine*. Under the agreement between the parties, LACTC retained the option to acquire the line outright from SP under certain conditions. Moreover, the Commission found that after a period of time, LACTC would have the right to more control over SP’s provision of freight service. “Specifically, the ‘movement of trains, cars and locomotives over and along the [tracks] shall at all times, but subject to the direction and control of LACTC’s superintendent, train dispatchers and other authorized agents[.] . . .’” *Id.* It thus concluded

[t]he Agreements place so many restrictions on SP’s right to continue to provide freight service over the Burbank Branch, the Santa Monica Branch, and the Baldwin Branch that SP’s rights under the Agreement cannot be characterized as “unconditional and permanent”. The Agreements substantially reduce SP’s ability to carry out its common carrier obligation.

*Id.* Accordingly, the ICC held that the transaction was subject to its jurisdiction.

Later, on reconsideration, the ICC clarified and reiterated its holding:

In this case, LACTC is acquiring substantial power over the lines, and SP is retaining very little power. We are particularly impressed with two significant differences with *State of Maine, supra*. First, LACTC can effectively force SP to curtail its freight service as passenger service expands, and freight shippers would have no recourse against LACTC if LACTC were found not to acquire a common carrier obligation. Second, SP has neither the right nor the obligation to make

repairs so that freight service will not deteriorate, in contrast to the easement retained and the obligation to make repairs in *State of Maine*.

*Southern Pacific Transportation Company - Abandonment Exemption - Los Angeles County, CA*, 9 IC.C.2d 385, 388 (1993).

In *Public Service Company of Colorado - Acquisition Exemption - Line of the Colorado & Wyoming Railway Company*, 1993 WL 460833, No. 32264 (I.C.C.), the Public Service Company of Colorado (“PSC”), a non-carrier (but not a public agency) sought to acquire approximately 5 miles of rail track from the Colorado & Wyoming Railway Company (“C&W”). Pursuant to the procedure established in *Maine*, PSC filed a notice of exemption, as well as a motion to dismiss the notice, with respect to the transaction. Preliminarily, the ICC pointed out that PSC was not a “state or a state entity.” *Id.* at 3. The ICC noted that although the acquiring entity in *Maine* was a public agency, it did not have to decide whether to that should preclude the application of *Maine* because the transaction would be subject to its jurisdiction even if *Maine* did apply. Reviewing the agreements between the parties, the Commission found that PSC had reserved “the right to grant access to other railroads,” and if PSC desired to grant such access, that C&W was obligated to cooperate. *Id.* In addition, PSC was obligated to provide all of the maintenance for the rail line and there was a condition in the agreement giving preference to the movement of coal unit-trains. So, the ICC concluded that while PSC did not operate the line day to day, the foregoing provisions gave it the ability to control the operations should it desire to do so. These rights reserved to PSC were “consistent with those of a common carrier” and the rights retained by C&W were “too circumscribed and tenuous to permit it to fully carry out its common carrier obligation.” *Id.* PSC’s motion to dismiss for lack of jurisdiction was denied.<sup>6</sup>

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<sup>6</sup> MassDOT points to other *Maine* progeny to support its position. Several of the cases it cites are readily distinguishable because they involved an assumption by the State of lesser obligations than MassDOT is assuming here. See *Port of Seattle - Acquisition Exemption - Certain Assets of BNSF Railway Company*, 2008 WL 4718447 (STB Finance Docket No. 35128, served Oct. 27, 2008) (responsibility for maintenance, constructing improvements, and managing, directing and controlling activities on the line fell to a third party carrier); *Metro Regional Transit Authority - Acquisition Exemption - CSX Transportation, Inc.*, 2003 WL (continued...)

### **MassDOT's Motion Should Be Denied**

The similarity between the facts here and those presented in these earlier decisions is convincing proof why the State's reliance on *Maine*, even assuming it remains good authority, should be rejected. When a line owner possesses the ability and obligation to (a) control movements (i.e. dispatch all trains and protect all road workers) on the line, (b) give priority to other traffic and service personnel, (c) repair and maintain the track and appurtenances, and (d) operate, repair and maintain the signals, it is incomprehensible that one could argue that carriers traversing the line are not being subject to substantial restrictions that could affect their ability to operate over the line. But that is the position that MassDOT is maintaining to support its argument that the Board lacks jurisdiction over its application. At least MassDOT doesn't wince at calling *Maine* what it is - a "construct" for avoiding otherwise applicable federal regulation. We submit, in agreement with BRS/BMWE, that allowing MassDOT to proceed outside the Board's jurisdiction in these circumstances is wholly improper.

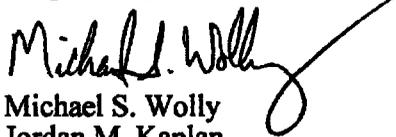
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<sup>6</sup>(...continued)

22322034 (STB Finance Docket No. 33838, served Oct. 10, 2003) (third party carrier responsible for maintenance over parts of the line and for dispatching its own trains during its window of service); *Central Puget Sound Regional Transit Authority - Acquisition Exemption - BNSF Railway Company*, 2005 WL 3090144 (STB Finance Docket No. 34747, served Nov. 18, 2005) (rail carrier remained responsible for all dispatching duties on the lines; public agency only took on track maintenance responsibilities). *See also Washington County, OR - Acquisition Exemption - Certain Assets of the Union Pacific Railroad Company*, 2007 WL 1063846 (STB Finance Docket No. 34810, served Apr. 11, 2007) (no discussion of State-assumed maintenance or dispatching obligations; private carrier retained ownership of "track, ties, signaling and road crossing protection equipment, ballast, buildings and other improvements needed for rail service on portion of the line on which State owned the right-of-way); *State of Georgia, Department of Transportation - Acquisition Exemption - South Carolina Central Railroad, Inc.*, 2002 WL 820167 (STB Finance Docket No. 34057, served April 30, 2002) (no discussion of any State assumption of any maintenance or rail traffic control responsibility).

Insofar as the Board has held it lacked jurisdiction in other cases cited by MassDOT where both maintenance and dispatching functions were assumed by a public agency, we submit that those decisions were built on the defective legal foundation of *Maine* and hence should not be followed.

Respectfully submitted,

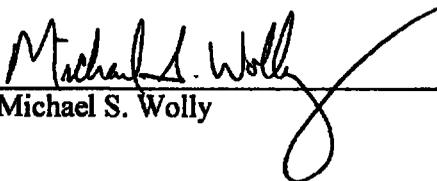


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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the attached Comments of ATDA was served upon all known parties of record by electronic mail (by consent) or first class mail, postage prepaid, this 3rd day of February 2010.

  
Michael S. Wolly