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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35312

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION  
-ACQUISITION EXEMPTION-  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

ENTERED  
Office of Proceedings

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Part of  
Public Record

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

**INTRODUCTION AND SUMMARY OF POSITION**

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 ("CSX"), 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, including CSXT (jointly referred to as "Unions"), oppose the motion filed by the Massachusetts Department of Transportation ("MassDOT") for dismissal of MassDOT's Notice of Exemption for the acquisition of portions of CSXT's lines in eastern Massachusetts by the Commonwealth of Massachusetts ("Commonwealth"). This transaction involves the Commonwealth's proposed acquisition of active rail lines that are part of the interstate rail system that will still be used for interstate train movements. Accordingly, this transaction is within the jurisdiction of the Board, and cannot be effected without approval or exemption from approval by the Board.

MassDOT argues that the Board should nonetheless dismiss the notice of exemption because there is no transaction for the Board to approve or exempt since CSXT will "retain" a so-called "operating easement" for provision of freight transportation on the lines conveyed. The

Commonwealth asserts that even though it will be acquiring rail lines that are part of the interstate system and will continue to be used for interstate rail transportation, a transaction that is otherwise within the STB's jurisdiction and subject to its approval, the device of CSXT's retention of an exclusive "operating easement" for serving shippers on the lines (and subsequent conveyance of the "operating easement" on some line segments to another rail carrier, Massachusetts Coastal Railroad LLC ("Mass Coastal")) negates the clear requirements of the Interstate Commerce Act ("ICA"). In making this argument, MassDOT has relied on the decision in *State of Maine-Acq. and Op. Exemption*, 8 ICC 2d 835 (1991) and subsequent decisions which followed *State of Maine*.

The Unions submit that MassDOT's motion to dismiss should be denied because it is contrary to the ICA. To the extent that MassDOT has relied on the *State of Maine* line of cases, the Unions respectfully submit that those cases were wrongly decided and should not be followed. By contrast, the Unions take no position on the actual acquisition of the lines by the Commonwealth by use of the Verified Notice of Exemption under 49 C.F.R. 1150.31 for exemption of the acquisition from approval under 49 U.S.C. 10901. Line acquisitions by non-carriers can be effected by use of the class exemption. But, use of the class exemption means that the transaction is within the Board's jurisdiction and, as owner of the lines, the Commonwealth will have the common carrier obligations that come with ownership of the lines, including the responsibility for adequate maintenance of the lines, signal system and right of way and structures, even though CSXT or Mass Coastal will have the exclusive rights to serve shippers on the acquired lines.<sup>1</sup>

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<sup>1</sup> The Commonwealth currently owns rail lines used for commuter rail operations that are part of the interstate rail system and are still used for interstate rail transportation; and neither the Commonwealth nor any of its agencies responsible for those lines such as MassDOT and/or the

The acquisition of a line of railroad that is used in interstate commerce is a transaction subject to STB jurisdiction. The notion that a person (State or other) can acquire a line used in interstate commerce without STB approval or exemption is fundamentally at odds with the Act. The device of an “operating easement” for freight traffic only has no basis in the Act—it is a fabricated concept without basis in law. The Act gives the Board broad and exclusive jurisdiction over transactions involving rail lines used in interstate commerce; and it also comprehensively lists numerous types of transactions involving rail lines. “Operating easement” is not a transaction or arrangement identified in, or described in the Act— a statute which covers all sorts of conveyances, acquisitions of control, operating arrangements and shared use agreements involving rail lines. The Act was broadly drawn, has been expansively construed, and has been described as comprehensive legislation governing dispositions of rail lines. The Board should not permit evasion of the unambiguous statutory mandate for Board approval or exemption of acquisitions of segments of the interstate rail system via a concocted device that has no basis in

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Massachusetts Bay Transportation Authority (“MBTA”) have been considered a rail carrier. But, that is because the Commonwealth (through its agencies), has always contracted all rail carrier functions (including, but not limited to, train movements; maintenance of the right of way, track and signal system; maintenance of equipment; dispatching; and related clerical work) to rail carriers. So rail carriers subject to the Board’s jurisdiction, that employ workers covered by the Federal railroad laws (such as the Railway Labor Act and Railroad Retirement Act), have had full responsibility for the railroad functions that necessarily attach to ownership of rail lines used in interstate commerce. Currently Massachusetts Bay Commuter Railroad is responsible for the commuter service on the lines owned by the Commonwealth, and MBTA performs all the rail functions for those lines. If the Commonwealth were to cease contracting with rail carriers for such functions on the lines it currently owns, it would have to be treated as rail carrier. Moreover, as owner of the lines, the Commonwealth has a latent common carrier obligation, a residual duty under the ICA, regardless of its arrangements with CSXT and Mass Coastal, such that if shippers *on the lines are not being served, or if the lines and signal system are not being adequately maintained*, the Commonwealth as owner would have the obligation to provide that service and perform such maintenance. As is discussed more fully below, the Commonwealth can acquire the lines at issue in this proceeding by use of the class exemption from Section 10901 and not become a rail carrier if the rail carrier functions are contracted to a rail carrier or rail carriers as is done with the lines the Commonwealth currently owns.

the Act.

The Unions recognize that, starting with *State of Maine*, the ICC, and then the Board, began to allow conveyances of small, lightly trafficked lines to be sold to States without agency approval or exemption; and that this practice has escalated so that ever larger sales, and sales of very active lines have been accomplished through this extra-statutory device. But the Unions note that virtually all of those decisions were ex parte, with no challenge to the basic principle involved. To the extent that any issues were litigated in those cases, the issues involved factual disputes relating to application of the *State of Maine* rationale, not challenges to the legitimacy of that precedent. The *State of Maine* approach has developed and been uncritically accepted and applied through a proliferation of largely pro forma decisions that have allowed this fabricated exception to defeat clear statutory directives. Recently, the State of New Mexico acquired over 300 miles of active interstate rail lines through this device; and now the Commonwealth of Massachusetts seeks to evade STB jurisdiction and the requirements of the ICA in acquiring CSXT lines that will continue to have both overhead and local freight movements; and one of the line segments will have both interstate freight movements and Amtrak interstate passenger trains. In none of the *State of Maine* cases was there briefing as to whether the agency can allow creation of an “operating easement” to defeat Congress’ jurisdictional mandate for the Agency; in no case has the legitimacy of the *State of Maine* approach been litigated. And none of those cases has been appealed; so the doctrine relied on by MassDOT has not been sanctioned by any court of appeals. This is especially significant because this line of cases conflicts with ICC and appellate precedent on point. *Brotherhood of Locomotive Engineers et al. v. Staten Island Rapid Transit Operating Authority*, 360 ICC 464 (1979), and *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533, 539 (2<sup>nd</sup> Cir. 1983)-holding that a State entity that provided

intra-state passenger service on a line it owned that was connected to the interstate system and was used for interstate freight transportation had a duty to maintain the line and a “latent duty” ensure provision of interstate service and was a rail carrier under the ICA.

It is time for the Board to restore the law; it should hold that the acquisition of a line of railroad that is used in interstate commerce is a transaction subject to STB jurisdiction, and MassDOT’s motion for dismissal should therefore be denied.

### **FACTS**

By the proposed transaction, the Commonwealth would acquire from CSXT line segments in eastern Massachusetts including 1) lines between Framingham and Worcester (“BML-west”) and from the outskirts of Boston to Newton (“BML-east”); and 2) lines in and near Fall River and New Bedford (“South Coast Lines”). Verified Notice of Exemption at 4-5. Although CSXT would sell the lines to the Commonwealth, CSXT would continue to own and operate branch and feeder lines off the BML-west and east lines and would retain an exclusive easement to provide freight service on the lines, Amtrak would continue to operate on the BML west and east lines, CSXT would continue to serve and obtain traffic from shippers on the BML west and east lines; and, by the transaction described in Finance Docket 35314, Mass Coastal would “acquire” the operating easement from CSXT for the South Coast Lines and would provide freight service on those lines. *Id.* at 7, 10; Motion to Dismiss at 4, 6, 11-12; Definitive Agreement at 2, 9-10. Under MassDOT’s plan, all signal, maintenance of way and dispatching work would become the responsibility of MBTA, immediately for the BML west and east lines, and later for the South Coast Lines; Mass Coastal would be responsible for maintenance on those lines unless and until MBTA commences commuter rail service on those lines. Motion to

Dismiss at 17, 19, 36-38.<sup>2</sup>

The Commonwealth currently owns certain railroad lines that are used for its commuter rail service. MBTA has contracted with rail carriers to provide that service and to perform all railroad functions related to that service; currently, MBTA contracts with MBCR for the commuter rail service. Motion to Dismiss at 4 and n. 2, 6

BRS represents CSXT Signalmen who do maintenance, repair, rehabilitation and construction work on signal systems and communication systems and equipment, on CSXT's lines in Massachusetts that the Commonwealth proposes to purchase from CSXT. BMWED represents CSXT Maintenance of Way workers who construct, inspect, repair and maintain the track, right of way and structures on CSXT's lines in Massachusetts that the Commonwealth proposes to purchase from CSXT. BRS and CSXT, and BMWED and CSXT, are respectively parties to collective bargaining agreements that govern the performance of Signal work and Maintenance of Way work on the lines in Massachusetts that the Commonwealth proposes to purchase from CSXT. The seniority rights and the other rights of CSXT Signalmen and Maintenance of Way to perform work on the lines that the Commonwealth proposes to purchase from CSXT are derived from those collective bargaining agreements; if the lines are sold, those agreements will no longer apply on those lines, absent agreements to continue them. Declarations of Floyd Mason and Bradley Winter (Attachments A and B to these comments).

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<sup>2</sup> Filings in this Finance Docket and in the related Finance Docket 35314 state that CSXT's conveyance of its "operating easement" on the South Coast Lines to Mass Coastal was subject to the approval of MassDOT. Notice of Exemption in F.D. 35312 at 10; Application in F.D. 35314 at 5.

## ARGUMENT

### **I. THE BOARD HAS EXCLUSIVE JURISDICTION OVER SALES OF RAIL LINES THAT ARE PART OF THE INTERSTATE RAIL SYSTEM; NO PERSON CAN ACQUIRE A RAIL LINE THAT IS PART OF THE INTERSTATE SYSTEM WITHOUT STB APPROVAL OF THE ACQUISITION OR EXEMPTION FROM STB APPROVAL; A PERSON THAT ACQUIRES A LINE BY APPROVAL OR EXEMPTION IS A RAIL CARRIER**

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).<sup>3</sup> The Act defines “rail carrier” as an entity that provides “common carrier railroad transportation for compensation”, but not a “street, suburban, or interurban electric railway not operated as part of the general system of rail transportation”. Section 10102(5). “Railroad” is defined as 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).<sup>4</sup> Thus, if

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<sup>3</sup> ICCTA Section 10501 (a) provides:

(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is -(A) only by railroad...

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in -(A) a State and a place in the same or another State as part of the interstate rail network... (emphasis added)

<sup>4</sup> Section 10102 provide:s

(6)“railroad “ includes - (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad; (B)the road used by a rail carrier and owned by it or operated under an agreement; and ( C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

(9)“transportation includes-(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt,

one provides common carrier transportation for compensation using equipment for moving passengers by rail over right of way, tracks etc. that are part of the general system of rail transportation, one is a rail carrier under the Act.<sup>5</sup>

Furthermore, under Section 10901 and precedent under that provision, a person that is not a carrier may construct or acquire a railroad or railroad line only pursuant to Board authorization.<sup>6</sup> *See e.g. Redden v. ICC*, 956 F. 2d 302, 304 (D.C. Cir. 1992)–“the Act regulates all line transfers under either 49 U.S.C. §10901 or 49 U.S.C. §11343....By regulation, the Commission has determined that Section 10901 governs a line transfer if either the transferor or transferee is a non-carrier”; *Railway Labor Executives' Ass'n. v. ICC*, 999 F. 2d 574, 575, (D.C. Cir 1993)–“under the Interstate Commerce Act.... any entity that provides railroad transportation for compensation is a rail carrier”, “A rail carrier may abandon a rail line or transfer a rail line to a non-carrier only if the Interstate Commerce Commission (ICC) finds that present or future public convenience or necessity require or permit the change. *See* 49 U.S.C. §10901 (regulating acquisitions of rail lines by non-carriers) ”; *CMC Real Estate v. ICC*, 807 F. 2d 1025, 1036 (D.C.

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delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property

<sup>5</sup> *American Orient Express Railway Company* STB Finance Docket No. 34502 (Dec. 27, 2005)---- there is no statutory definition for “common carrier”, but the Board applies the following common law concept: An entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation is a common carrier.

<sup>6</sup> Section 10901 provides:

(a) A person may -(1)construct an extension to any of its railroad lines; (2) construct and additional railroad line; (3)provide transportation over, or by means of, an extended or additional railroad line; or (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection ( c).

Cir. 1986)– “It is well-settled that the acquisition of a railroad, even an active line, by a non-carrier, including a newly formed entity organized for the purpose of providing interstate common carrier service, is governed by the requirements of 49 U.S.C. §10901 and not by 49 U.S.C. §11343....Section 10901 and its predecessor are directed at the transportation-oriented activities of a single carrier or a non-carrier applicants where there is little danger of any adverse competitive consequences”; *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”; *Brotherhood of Locomotive Engineers and Trainmen, IBT v. STB*, 457 F. 3d 24, 25 (D.C. Cir. 2006)–“ 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”.

While the Act provides that the Board does not have jurisdiction over mass transportation provided by a local government authority, it expressly states that such entities are nonetheless covered by statutes concerning rail safety (Federal Railroad Safety Act), representation (Railway Labor Act) and employment benefits (*e.g.* Railroad Retirement Act) that adopt the ICA definition of rail carrier in determining their own scope of application. Section 10501(c) . ICA Section 10501( c) does not exempt the non-mass transportation rail activities of local government authorities (*e.g.* provision of intercity rail transportation, freight service and ownership of rail lines used in interstate rail transportation) from the Board’s jurisdiction.<sup>7</sup>

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<sup>7</sup> By its plain terms, this provision only removes the mass transportation operations of States from the Board’s jurisdiction, it does not affect the Board’s jurisdiction over intercity or interstate passenger and freight operations of states. Nor does this provision affect the Board’s jurisdiction over a state’s acquisition of a line that is part of the interstate system that is used in interstate commerce; only mass transportation operations have been placed outside the Board’s

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 it engaged an operator that would perform all the rail functions and would have full common carrier obligations. *Aff’d, Simmons v ICC*, 697 F 2d 326 (D.C. Cir. 1982). This decision, and the exemption applied to states that acquire rail lines but would not operate on the line, would have been completely unnecessary if the acquisition of a rail line by a state agency that would not have any role in the operation and maintenance of the line was actually outside the Commission’s jurisdiction in the first place. Subsequently, in *City of Austin, TX – Acquisition – Southern Pacific Transportation Company*, 1986 WL 1166762 (ICC) the ICC denied a motion of the City of Austin for dismissal of a notice exemption concerning the City’s planned acquisition of approximately 162 miles of rail line from the Southern Pacific Transportation Company because the City was acquiring an operating lien fo railroad from a rail carrier. The fact that the City intended to contract with another carrier to operate the line was irrelevant to the question of the ICC’s jurisdiction. Thus, the Commission stated: “[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

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jurisdiction. This also means that the Board’s jurisdiction over a state’s acquisition of a line that is part of the interstate system does not mean that the Board would have jurisdiction over purely mass transportation operations on that line.

Commission's jurisdiction.” *Id.* at 1. The Commission also referred to the rule promulgated in *Common Carrier Status of States*, and noted (n. 3) that it did not “stand for the proposition that the acquisition by a State or political subdivision of an active rail line is outside our jurisdiction”.

Furthermore, the ICC and the Second Circuit Court of Appeals specifically dealt with the Board’s jurisdiction and rail carrier status of a state agency when the agency owns a rail line located entirely within a state that is used for intrastate passenger operations, but is also used for interstate freight transportation. The Commission held, and the Second Circuit affirmed its holding, that Staten Island Rapid Transit Operating Authority (“SIRTOA”), a division of the New York Metropolitan Transportation Authority that operated a 14.5 mile strip of electric railroad line wholly within Staten Island, New York was a rail carrier and was subject to the ICC’s jurisdiction. *See Brotherhood of Locomotive Engineers et al. v. Staten Island Rapid Transit Operating Authority*, 360 ICC 464 (1979); *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533 (2<sup>nd</sup> Cir. 1983).

In its decision, the ICC concluded that when the city acquired the line, it assumed “the obligation to furnish and maintain adequate transportation and transportation facilities, including rail, ties and equipment for the movement of property in interstate commerce”, that the freight railroad’s trackage rights for freight service only relieved SIRTOA of the duty to provide such service for so long as the trackage rights arrangement remained in effect, and that the arrangement required SIRTOA to “maintain, repair and renew the trackage facilities and maintain them in a reasonable good condition for the operation of freight trains”. 360 ICC at 472-473. The Commission further noted 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”. *Id.* at 473. The ICC concluded that

while SIRTOA's "primary function is to effect and carry out local passenger service on the line which is otherwise exempt from Commission regulation", "it is also currently responsible for maintaining the line adequately to permit common carrier freight service. As such, it is a 'person' inextricably engaged in 'transportation' by 'railroad' within the meaning of former section 1(3)(a) of the Interstate Commerce Act. This maintenance obligation, coupled with the implicit duty under the certificate of furnishing adequate freight service in interstate commerce (which duty lies latent so long as substitute freight service is being fulfilled by SIRT [prior owner of the line] under a trackage rights arrangement) is sufficient to establish that it is now engaged in such transportation as a carrier by railroad subject to the Interstate Commerce Act". *Id.* at 474, footnote omitted.

The Court of Appeals for the Second Circuit held that the ICC had properly concluded that SIRTOA was a carrier because the line was part of the interstate system and was still used in interstate commerce for freight movements by a freight railroad; even though SIRTOA's "primary function" was to operate a local (intrastate) passenger service. The Court also noted that SIRTOA had maintenance responsibilities for the line and had an express obligation to maintain the line for interstate freight transport which was sufficient for carrier status; the Court further observed that SIRTOA had a "latent duty under the current certification of public convenience and necessity to furnish that freight service which is provided by SIRT under the Trackage Rights Agreement"; additionally SIRTOA's dispatchers controlled the flow of interstate traffic on the line. *Id.* at 539-540. SIRTOA did not fall within the electric railway exception--which applies only to lines not otherwise used directly or indirectly in the movement of freight and passengers associated with the general system of transport-- because the line connected with the general system for rail transportation and was used to effect service over that system. *Id.* The court

found unpersuasive SIRTOA's attempt to distinguish between the physical railway line and the railway itself (*id.* at 541), noting that the line is used regularly for interstate commerce. *Id.* at 542.

The point was that as owner of a line used for interstate railroad transportation, SIRTOA was subject to the ICA, and was a carrier even though it was a state agency, the line was entirely in one state, its own operations were intrastate only, and the interstate train movements were by another entity that was already a rail carrier. Subsequently, after freight service ceased and the ICC authorized SIRTOA's abandonment of its obligation to allow freight carriage on its line, the ICC then determined that SIRTOA was no longer a "carrier". In *Railway Labor Executives' Association v. Interstate Commerce Commission*, 859 F.2d 996 (D.C. Cir. 1988), the D.C. Circuit affirmed that decision because the interstate operations on the line had stopped and the duty to provide such service had been extinguished; the Court distinguished the changed circumstances of SIRTOA from other cases that found carrier status where interstate traffic still moved on the lines in question. 859 F. 2d at 999. The critical factor was that interstate operations on the line had ceased and the ICC had formally relieved SIRTOA of its latent common carrier obligation. The SIRTOA decisions are fully "on point" here; the facts of the MassDOT-CSXT transaction are not distinguishable from the SIRTOA case in any meaningful way.

Also of significance here are provisions of the ICCTA that increased the Board's jurisdiction over intrastate lines, and several recent decisions concerning the scope of the STB's jurisdiction over lines wholly within individual states that have construed the statutory definitions broadly and applied the STB's jurisdiction expansively. In *CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1573 (N.D. Ga 1996), the Court stated that the STB has exclusive jurisdiction over transportation by rail carriers and the acquisition of tracks, even

“wholly intrastate railroad tracks” (*id.* at 1584), that “transportation”, “is defined very expansively in the Act” (*id.* at 1582)..., and that railroad agencies within States are covered by the definition of transportation by rail carriers as well as by the definition of services of railroads over which the STB has exclusive jurisdiction (*id.* at 1581-1582). Accordingly, State regulation of railroad agencies within Georgia was preempted. In this regard, the Court noted that the ICCTA removed from the States jurisdiction over wholly intrastate railroad tracks giving the STB “complete jurisdiction, to the exclusion of the states over the regulation of railroad operations”. *Id.* at 1584.

Similarly, in *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp 1288 (D. MT 1997), the Court observed that, in the ICCTA, “Congress granted the newly established Surface Transportation Board jurisdiction over railroad transportation in both interstate and intrastate commerce 49 U.S.C. §10501” (*id.* at 1294), the grant of jurisdiction over “transportation by rail carriers” covers railroad agencies such that state regulation as to agencies is preempted. *Id.* In *Franks Investment Co. v. Union Pacific R.R.* 534 F. 3d 443, 445-446 (5<sup>th</sup> Cir. 2008), the Court of Appeals for the Fifth Circuit held that railroad crossings fit within the purview of “transportation by rail carriers” so a state law action to stop a railroad’s removal of crossings was preempted by the ICCTA. *See also Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 (N.D. Ga. 1997) —ICCTA grants the STB “exclusive jurisdiction over the majority of all matters of rail regulation” ; and the ICCTA defines “transportation”, “very broadly”, and defines “railroads in an expansive fashion” (*id.* \*6), so local zoning laws are preempted with respect to a rail carrier’s plan to construct an intermodal facility. The recent Board decision, in *Joseph R. Fox-Petition for Declaratory Order*, F.D. 35161 (served May 18, 2009) is also on point. There an intrastate yard track disconnected from the interstate system by removal of switch was held to be

still within the STB's jurisdiction. Among other things, the Board noted that the Union Pacific might sell the track to someone who would use it for traffic that would move in interstate commerce and that the switch could be restored.

While these decisions arose in the context of application of state or local laws, the holdings describe the general jurisdiction of the Board and do so very expansively to the extent that state law is preempted. Moreover, nothing in the Act suggests that Board jurisdiction over intrastate lines applies only to preempt state regulation and does not constitute general jurisdiction over such lines.

Thus, under the Act, the Board has authority and exclusive jurisdiction over acquisition, construction, and operation (including as to adequate maintenance and renewal) of rail lines that are part of the interstate rail network and used for interstate transportation, even if the lines involved are only in one state and the owner's operations are only intrastate. Consequently, rail lines, both interstate and intrastate that are part of the interstate rail network, may be acquired only pursuant to STB approval or exemption from approval; and operation of those lines is subject to STB jurisdiction.

Other decisions dealing with ICC/STB jurisdiction and common carrier status have also construed the Agency's jurisdiction broadly and have held that entities that asserted they were not carriers were in fact rail carriers.

In *American Orient Express Railway Company* STB Finance Docket No. 34502 (Dec. 27, 2005), the Board held that American Orient was a rail carrier under Section 10501(a)(1) even though it did not own the tracks on which it operated, or provide its own motive power. Although American Orient argued that "the transportation" was provided by Amtrak, the Board noted that American Orient provided the rail cars and services to passengers that were related to the

passenger movements, so it provided transportation. In response to American Orient's argument that it did not engage in railroad transportation because it did not own the equipment, road, or facilities listed in the statutory definition of "railroad", the Board concluded that American Orient was a railroad because "railroad" embraces roads operated under an agreement such as that between American Orient and Amtrak. Next, the Board asked whether American Orient was a common carrier. The Board noted that there is no statutory definition for "common carrier", but that the Board applies the following common law concept: An entity that holds itself out to the general public as engaged in the business of transporting persons or property (not just freight) from place to place for compensation is a common carrier. American Orient argued that it did not cater to the general public, as it did not transport children under eight, or persons with disabilities incompatible with rail travel. But the Board found that this did not preclude a finding that American Orient was a common carrier because a common carrier may establish a business niche.

The Court of Appeals for the D.C. Circuit affirmed the Board's decision. *American Orient Express Railway Co. v. Surface Transportation Board*, 484 F.3d 554 (D.C. Cir. 2007). The Court rejected American Orient's assertion that it was not a railroad because it did not own tracks, noting that a rail carrier may use tracks owned by another entity and operate under an agreement. *Id.* at 556. The Court also rejected American Orient's assertion that it was not a common carrier because it did not provide a service meeting a specific and provable public need. *Id.* at 557. The court emphasized that to be a common carrier, "a company need only, in practice, serve the public indiscriminately and not 'make individualized decisions, in particular cases, whether and on what terms to deal'"; "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total

population.” *Id.* (citing *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)). The fact that Amtrak is carrier and was providing common carrier service on the line, even as part of the same train movements, did not mean that American Orient could avoid carrier status.

In *DesertXpress Enterprises, LLC–Petition for Declaratory Order*, F.D. No. 34914 (June 27, 2007) (2007 WL 1833521 (S.T.B.)), the Board concluded that an entity that would build a rail line that crossed state lines, but would only provide passenger service, would be rail carrier and subject to the Board’s jurisdiction. The Board noted that its jurisdiction over “transportation by rail carriers over any track that is part of the interstate rail network ‘is exclusive’”, and that the Board has jurisdiction over persons “providing common carrier railroad transportation for compensation”. Since DesertXpress would carry passengers by rail for compensation in interstate transportation as a common carrier, it would be a rail carrier, subject to the Board’s exclusive jurisdiction. *Id.* at \*3.

Thus, the ICA unambiguously provides that the Board has jurisdiction over an entity that provides common carrier transportation for compensation over a line of railroad that is within a state, but is part of the interstate rail network; and that a person must obtain STB approval or exemption of a plan to acquire a line of railroad that is part of the interstate system. Consequently, acquisitions of segments of rail lines that are part of the interstate rail network that will continue to be used for interstate transportation are necessarily subject to STB jurisdiction and approval or exemption. While it is clear that the Board may exempt these transactions from the approval process, it is equally clear that they fall within the Agency’s jurisdiction.

**II. THE COMMONWEALTH-CSXT TRANSACTION IS SUBJECT TO THE BOARD’S JURISDICTION AND MUST BE APPROVED OR EXEMPTED FROM APPROVAL BY THE BOARD**

BMWED and BRS submit that, under the language of the Act, and the precedent discussed above, the Commonwealth-CSXT transaction is subject to the Board's jurisdiction and must be approved by the Board, or exempted from such approval. The Commonwealth will be acquiring lines of railroad that are within a state but are part of the interstate rail network; the Commonwealth will be providing railroad transportation for compensation to any potential passengers on lines that are part of the interstate rail system; the lines will still be used for interstate railroad transportation; and not only will the Commonwealth own the lines, it will be responsible for maintenance of the lines and signal system, and for dispatching. This transaction is a conveyance of lines that will continue to be used for rail transportation and for interstate transportation and thus is clearly subject to the Board's jurisdiction and may be effected only pursuant to Board approval or exemption from approval under Section 10901.

Additionally, the fact that the Commonwealth had a right to accept or reject Mass Coastal as provider of freight service on the South Coast lines, and can approve or reject a change in provider of freight service on the BML-east and BML-west lines (Definitive Agreement Sections 2.4.1 and 19.4) demonstrates that the Commonwealth would be acquiring a true ownership interest and practical control of those lines. If the Commonwealth can decide who will provide freight service to shippers on the lines, the Board must have regulatory authority over the acquisition because the Commonwealth's authority constitutes control of the lines under the Act. Control has always been broadly construed under the ICA. In *United States v. Marshall Transport*, 322 U.S. 31 (1944), the Supreme Court rejected a narrow reading of control and said that former Section 5(2) and former Section 5(4) "embraced every type of control in fact", and that it covers control "however such result is attained, whether directly or indirectly, by use of common directors, officers or stockholders...or in any manner whatsoever. §5(4)". *Id.* at 38,

ellipsis in original. In *Allegheny Corp. v. Breswick*, 353 U.S. 151, 163 (1957), the Court said that the determination of control depends on “the realities of the situation”, and that it had “rejected artificial tests for ‘control’ and left its determination in a particular case as a practical concept to the agency charged with enforcement”. The Commonwealth’s control over the entity that would replace CSXT for provision of freight service on the South Coast Lines, control over any replacement of Mass Coastal, and control over any change in provision of freight service on the BML-east and BML-west lines demonstrates that the Commonwealth would control the lines, and that is another reason why STB approval or exemption of the acquisition is necessary under the Act.

Furthermore, MassDOT actually acknowledges that, under the language of the Act and ICC/STB precedent, it could not acquire CSXT’s line without STB approval of the transaction or exemption of the transaction from the requirement of STB approval under Section 10901. (MassDOT Motion at 23), but MassDOT contends that such approval or exemption is not necessary under the *State of Maine* line of decisions regarding line acquisitions by State agencies where freight railroads would continue to hold exclusive operating easements for freight service. MassDOT Motion at 23-25, 31-38. Thus, MassDOT recognizes that, absent the *State of Maine* line of cases, its acquisition of CSXT’s line would be subject to STB jurisdiction and would have to be approved or exempted from approval by the Board.

Below, the Unions will demonstrate that the *State of Maine* line of cases should not be followed here because they were wrongly decided; they are contrary to the language of the Act concerning the nature of rail carriers and the need for STB authorization of acquisitions of rail lines in interstate commerce; and they are contrary to provisions of the ICA concerning STB jurisdiction over intrastate rail lines.

**III. STATE OF MAINE AND ITS PROGENY WERE WRONGLY DECIDED; THE REASONING BEHIND THOSE DECISIONS IS CONTRARY TO THE LANGUAGE OF THE ACT AND PRECEDENT CONCERNING ACQUISITIONS OF RAIL LINES IN INTERSTATE COMMERCE AND CONCERNING STB JURISDICTION OVER INTRASTATE RAIL LINES.**

**A. The Decisions in the *State of Maine* Line of Cases Are Contrary to the Statute**

*State of Maine* involved the State's acquisition of 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 (unlike the instant case) the selling freight railroad would remain responsible for maintaining the line and its signal system in addition to controlling traffic while continuing its freight service. 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 Commission referred to its "long-held policy 'to remove obstacles which might inhibit States from acquiring lines so that service might be continued'" (fn. 7). 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. In so holding, the ICC did not identify in the Act, or in precedent, any basis for an "operating easement", or for the notion that retention of an "operating easement" for freight transportation could be utilized to eliminate the necessity for ICC approval or exemption of an acquisition of a rail line that is part of the interstate rail system. The Commission just summarily concluded that the arrangement presented

was sufficient to divest it of jurisdiction over the sale of a rail line that would still be used in interstate commerce. The ICC distinguished *City of Austin* on the basis that in that case there was nothing like Maine Central's retention of the operating easement along with the guaranteed access rights. *Id.* n. 6

There is no statutory support for the reasoning in *State of Maine*. The Act provides for exemptions from STB approval, but it does not provide that a party can acquire a line of railroad that is part of the interstate rail network and used for interstate transportation just by agreeing with the rail carrier selling the line that the rail carrier will continue to serve the shippers on the line. As the Unions have shown, under the plain language of the Act, the Board has general jurisdiction over transportation by a rail carrier over a line of railroad between a State and a place in the same state as part of the interstate rail network. In line with that jurisdiction, the following are irrefutable: a "rail carrier" is 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"); a common carrier holds itself out to the general public for transportation for compensation (not just freight transportation); "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"; and the Board's jurisdiction over "transportation by rail carriers", "is exclusive". Furthermore, under Section 10901 and precedent applying that provision, a person may construct or acquire a railroad line only pursuant to Board authorization. Thus, the assertions that the Board lacks jurisdiction over the sale of a rail line that is part of the interstate rail network and is used for interstate rail transportation, and that a person can acquire such a line without STB approval or exemption are contrary to the language of the

Act.

The characterization of these transactions as mere sales of property, and the use of the “operating easement device” does not change anything. There is no statutory basis for differentiating between acquisition of a line, and acquisition of the land that is the right of way, rails, ties and ballast that together constitute the line. Moreover, the Act comprehensively lists numerous types of transactions involving conveyance and use of rail lines (e.g. construction, acquisition, extension, consolidation, lease, acquisition of control, trackage rights, contract to operate, joint use, pooling), and makes clear that all of them are subject to the STB’s jurisdiction. The Act also comprehensively identifies all sorts of track, track segments, equipment, structures, facilities and buildings used by railroads in interstate transportation as parts of rail carriers subject to STB jurisdiction. And the Act does not refer to “operating easements”. The sale of railroad property used for interstate railroad transportation is not a transaction that exists outside the comprehensive and exclusive jurisdiction of the STB; and the re-characterization of transactions by use of new names is not a basis for taking them outside the Act. Thus, there was no statutory basis for the fundamental predicate of the *State of Maine* decision.<sup>8</sup>

The notion that there is a newly discovered exception from STB jurisdiction for sale of rail lines coupled with freight operating easements is not only without support in the Act, and contrary to its plain terms, it is contrary to the history of the Act and its predecessors. The

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<sup>8</sup> Nor was there any validity to *State of Maine’s* attempt (n. 6) to distinguish that case from *City of Austin* on the ground that there was no retained operating easement in *City of Austin*. The assertion at n.6 is a mere tautology: i.e. -this case is different from *City of Austin* because Maine Central retained an operating easement. But the Commission failed to justify or explain why that difference mattered. Since an operating easement is a fabricated device that does not exist under the Act, and does not alter the underlying arrangement, which is one whereby a non-carrier acquires a rail line that will still be used in interstate commerce, the fact that there was an easement in one case and not in the other should not have led to a different result as to the Agency’s jurisdiction.

statutory scheme evolved as necessary to cover a changing set of transactions and various schemes to evade ICC/STB jurisdiction. The consistent intent of Congress has been that the agency possess exclusive jurisdiction over railroad transactions involving the interstate rail system (albeit with less regulation and certain exemptions since 1980). The construct accepted in *State of Maine* is not only contrary to the language of the Act, it is contrary to the whole development of the Act. The Board has statutory jurisdiction over, and statutory responsibility to either approve or exempt from approval (but retain jurisdiction over), sales of rail lines that are used for interstate rail transportation. The Board should not, and cannot, relinquish either the jurisdiction, or responsibilities vested in it by Congress, because of some made-up arrangement between the buyer and seller of a line.

MassDOT and proponents of the “operating easement” scheme tell the Board that it should not worry about these arrangements because of various terms of these contracts. It is asserted that because the freight railroad has committed by contract to continue to serve shippers on the line, the state entity has committed to adequately maintain the line and the contract between the state entity and the freight railroad provides that the freight railroad has a first right to buy the line if the state entity later wants to sell it, there are no important Federal transportation interests affected by these arrangements. *E.g.* MassDOT Motion to Dismiss at 14, 21-24, 27, 30-32, 36-37. It is claimed that there is no need for STB jurisdiction over these transactions because the agreements between the parties have already dealt with the sorts of issues the Board might be concerned with. But Congress expressly mandated that the Board oversee such transactions and either approve them or exempt them from approval based on statutory guidelines. The fact that parties have attempted to address by contract some of the types of concerns covered by the Act does not mean that the Board can ignore its statutory role. *Cf.* the

recent decision of the Supreme Court in *Union Pacific v. Brotherhood of Locomotive Engineers and Trainmen* \_\_\_ U.S. \_\_\_, 130 S Ct. 584, 590 (2009)(citations omitted) holding that another agency dealing with rail issues could not refuse to exercise jurisdiction provided under its enabling statute-- “We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given’....The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies”; “Congress authorized the [NRAB] to prescribe rules for the presentation and processing of claims, §153 First(v), but Congress alone controls the [NRAB’s] jurisdiction”; and *id.* at 596 (citations omitted)--“ ”Subject-matter jurisdiction properly comprehended... refers to a tribunal’s ‘power to hear a case’ a matter that ‘can never be forfeited or waived’”.

The Board must also consider the consequences of continuing to permit these acquisition/operating easement transactions to occur outside the Board’s jurisdiction. Sales of lines used in interstate rail transportation without STB approval or exemption and the resultant excision of such lines from the interstate rail system will proliferate. This is especially likely as substantial new rail transportation grants to the States become available from the Federal government. The result will be breaks in the interstate system. For example, while CSXT might continue to provide freight service in New England, the parts of its former main lines on which to do so will become subject to multiple State owners (*e.g.*, New York, Connecticut, Rhode Island, and Massachusetts) motivated by parochial concerns, and each separate set of lines governed by different laws. None of those acquired line segments would remain part of the interstate system subject to the Board’s jurisdiction and oversight. Each state entity could, and likely would, engage different non-carrier entities to perform track and signal maintenance and train dispatching on the lines traversed by CSXT. Standards and performance of maintenance could

fluctuate depending on the financial wherewithal of the individual State owners. Each state could impose different operating windows and dispatching practices. While CSXT would remain committed to providing for shipment of goods from western New York to Connecticut to Massachusetts, its ability to honor that commitment would become subject to the vagaries of how the different states and their respective non-rail entity contractors maintain the lines and signal systems and control their own train movements on their own sections of track before, after and between CSXT's own lines. Plainly, this will undermine the "seamless" transportation system that the ICCTA was enacted to promote. What the Board will be encouraging is the same sort of incoherent, patchwork rail system that existed before World War I and that gave rise to the transformation of the ICA into the statute it is today. *See Schwabacher v. United States*, 334 U.S. 182, 191(1948)—“The basic railroad facilities of the United States were constructed under state authorization and restrictions by corporations whose powers and limitations were prescribed by state legislatures, or resulted from limitations on the states themselves...the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created. The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the *Transportation Act of 1920*.”

And with respect to the individual line segments, suppose the state does not adequately maintain the line and signal system (due to, *e.g.*, financial shortfalls, intrastate political disputes, indifference, etc.), or does not give the freight railroad a right of refusal before selling the line to some other entity, and a state court or arbitrator does not enforce the contract provisions on

maintenance and re-sale, what happens to the Federal mandates in the Act? Having relinquished its jurisdiction what could the Board do to enforce those mandates? The Board is not free to allow the parties to contract-out its job and privatize enforcement of the Act.

Thus, the reasoning in the *State of Maine* line of cases is contrary to the Act; and the policy arguments of MassDOT and other and proponents of the “operating easement” scheme are specious, irrelevant to the issues before the Board, and should be ignored.

**B. The Decisions in the *State of Maine* Line of Cases Are Contrary to Appellate Precedent and ICC/STB Precedent Regarding the Board’s Jurisdiction over Rail Lines Owned by State Entities but Used for Interstate Rail Transportation and Regarding When An Entity is a Rail Carrier**

*State of Maine* is in direct conflict with the *SIRTOA* decisions. As the Unions have shown, the ICC expressly held that an entity that only owns a rail line within a state, and only provides service within the state, is still a rail carrier if its line connects with the interstate system and is used for interstate transportation. The Second Circuit Court affirmed the ICC’s decision that *SIRTOA* was a carrier, noting that, as owner of the line, *SIRTOA* had an express obligation to maintain the line for interstate freight transport and a latent duty to furnish the freight service that the freight railroad was providing, that *SIRTOA*’s dispatchers controlled movement of interstate traffic on the line, and that the line connected with the general rail system and was used to effect service over that system. 718 F. 2d 539-540. Moreover, the court specifically rejected *SIRTOA*’s argument that the physical line of railroad that was connected to the interstate system should be distinguished from *SIRTOA*’s own operations that were purely intrastate. The Court held that the ICC’s focus on the physical railway line was proper, and noted that “as a practical matter, the line and the railway are integrally related”. *Id.* at 541-542. Subsequently, in *RLEA v. ICC*, it was held that *SIRTOA* was no longer a rail carrier and subject to the ICC’s jurisdiction because the agency had authorized both the freight railroad and *SIRTOA* to end provision of

interstate service on the line. 859 F. 2d at 998.

When the facts of this case are overlaid on the facts of the *SIRTOA* cases, it is readily apparent that the motion to dismiss should be denied. Like *SIRTOA*, MassDOT would own a line of railroad that is connected to the interstate rail network, and is used for interstate rail transportation; MassDOT will be responsible for maintaining the line and signal system used for interstate train movements and will control dispatching of interstate trains; and there has been no authorization of cessation of interstate transportation. That MassDOT and CSXT have agreed that CSXT and Mass Coastal will have all the freight transportation responsibilities does not matter. MassDOT and CSXT cannot by agreement limit the scope of MassDOT's statutory responsibilities; they cannot contract away MassDOT's obligations as owner of the line; they cannot relieve MassDOT of its latent duty as owner of the line to ensure that service is provided to shippers on the line, and that the line is capable of permitting adequate service to shippers. The Board should reach the same result in this case as was reached in the original *SIRTOA* case.<sup>9</sup>

Additionally, as is noted above, in *Common Carrier Status of States, supra.*, 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", though exempt from approval under Section 10901. Although the line acquisition is subject to agency jurisdiction, the State itself will not be considered a rail carrier if it engages an operator that would perform all the rail functions and would have full common carrier obligations. As is also noted above, numerous ICC and appellate decisions in the

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<sup>9</sup> While *State of Maine* was issued after the *SIRTOA* cases, *State of Maine* did not overrule, distinguish or even discuss the *SIRTOA* cases. The *State of Maine* decision just summarily concluded that the Commission lacked jurisdiction, without the sort of analysis of the statute that was done in the *SIRTOA* cases; and the ICC's approach in the *SIRTOA* cases was ratified by two courts of appeals. The *SIRTOA* cases are plainly better reasoned and stronger authority than *State of Maine*.

1980s held that non-carrier acquisitions of rail lines are subject to the Agency's jurisdiction under Section 10901.

The *State of Maine* approach is similarly at odds with the recent decisions in *American Orient* and *DesertXpress*. In *American Orient*, an operator that did not own track or its own motive power was deemed a rail carrier and subject to STB jurisdiction when another carrier owned the tracks used, and American Orient was part of Amtrak's train movements. And in *DesertXpress*, an entity that was building a new line that might or might not connect with the interstate system, but would itself operate across state lines was deemed a rail carrier and subject to STB jurisdiction. If those two entities are carriers subject to STB jurisdiction, then an entity that actually owns a rail line that is an integral part of the interstate rail network and is actually used for interstate rail transportation for shippers on or connected to the line must be a rail carrier subject to STB jurisdiction.

Consistent with the holding in *Common Carrier Status of States*, the Board's rejection of MassDOT's motion to dismiss, and assertion of jurisdiction over the line sales would not necessarily mean that the Commonwealth or any of its agencies would become a rail carrier when they are not currently carriers. As is noted above, the Commonwealth has always contracted with rail carriers for performance of the railroad functions necessary for railroad operations (including, but not limited to, train movements, maintenance of the right of way, track and signal system, dispatching, maintenance of equipment, dispatching, and related clerical work). By continuing this practice on the BML-west and BML-east and South Coast lines, neither the Commonwealth nor its agencies would have to be considered rail carriers. For example, if MBTA extended its contract with MBCR to the newly acquired lines, and/or by having Mass Coastal be responsible for all those functions on the South Coast Lines, then carrier status would not attach to the

Commonwealth and its agencies under *Common Carrier Status of States*. The whole premise of that decision was that while states might acquire rail lines to preserve service or for other reasons, such transactions are subject to the Agency's jurisdiction; but if a state merely acquires a line but does not actually operate the line and contracts with a rail carrier that would perform all the rail functions and would have full common carrier obligations, then the state would not be considered a carrier. But, if the state assumed responsibility for such functions, it would have to be treated as rail carrier. So, if the Commonwealth continues its historic practices by contracting with a rail carrier(s) for the railroad functions on the lines it owns, the Commonwealth need not be deemed a rail carrier. *SIRTOA*-- state agency has a "latent" common carrier obligation to maintain the line and a residual duty to shipper on the lines to ensure that common carrier service is provided and that the lines are maintained so such service can be provided.

**C. The Reasoning in the *State of Maine* Line of Cases is at Odds with the Act as Amended by the ICCTA, and is Inconsistent with Precedent Regarding the Scope of the Board's Jurisdiction Over Rail Lines and Facilities after the ICCTA**

The *State of Maine* reasoning is at odds with the ICCTA's post-*State of Maine* expansion of STB jurisdiction over purely intra-state lines. Judicial decisions after the ICCTA held that the grant of jurisdiction to the STB over railroad transportation in both interstate and intrastate commerce represented a change from the ICA with respect to federal authority over intrastate rail matters. The Courts found that Congress had increased the Board's jurisdiction regarding intrastate matters that affect the interstate rail system, and made that jurisdiction exclusive. They held that the ICCTA defines "transportation", "very broadly", and defines "railroads in an expansive fashion" (*Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 \*6); that the Board has exclusive jurisdiction over transportation by rail carriers and the acquisition of tracks even "wholly intrastate railroad tracks"; and that "transportation" and "transportation by

rail carriers” are defined so expansively that railroad agencies and railroad crossings within states are covered by those terms . *CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1581-4; *Franks Investment Co. v. Union Pacific* 534 F. 3d 443 at 445-446.

In *CSXT v. Georgia Public Service Comm.* the court noted that the ICCTA repealed ICA provisions regarding state certification of intrastate rates and practices, and deleted as unnecessary a policy statement about regulatory cooperation between the federal and state governments. 944 F. Supp at 1583-1584. The Court further stated that “Perhaps the most significant change... is the ICC Termination Act’s express removal from the states of jurisdiction over wholly intrastate railroad tracks”, and that “[w]ith the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations”. *Id* at 1584. The Court also cited the ICCTA’s new provision adding to the Board’s exclusive jurisdiction “transportation between a place in a state and a place in the same state as part of the interstate rail network”. *Id.*, citing Section 10501(b).

Similarly, the Court in *BNSF v. Anderson* stated that “Congress granted the newly established Surface Transportation Board jurisdiction over railroad transportation in both interstate and intrastate commerce”. 959 F. Supp at 1294. This meant that state regulation of railroad agencies was preempted (*CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1581-1584; *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp at 1294); that local zoning laws were preempted (with respect to rail carrier’s plan to construct intermodal facility) (*Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 \*6); and that a state law action to stop railroad’s removal of crossings was preempted. *Franks Investment Co. v. Union*

*Pacific R.R.* 534 F. 3d at 445-446. Furthermore, in its own Order, *Ex Parte No. 388 State Intrastate Rail Rate Authority-Pub. L. No. 96-448* (1996)(1996 WL 148557), the Board noted that the ICCTA (Section 10501(b)) expanded the STB's jurisdiction to "transportation between a place in a State and a place in the same State as part of the interstate rail network".

Thus, because the Board now has exclusive jurisdiction over all intrastate rail lines and intrastate rail operations on parts of the interstate rail network, regardless of the original merit or lack of merit of the *State of Maine* reasoning, the rule in that case is no longer tenable. The notion that, while the Board has jurisdiction over actions involving purely intra-state railroad agencies, intermodal terminals, crossings and yard tracks that have been disconnected from the interstate system that might be reconnected, it somehow lacks jurisdiction over the sale of a line within a state but that is part of the interstate system and is actively used for interstate transportation is patently illogical and contrary to the Act. Perpetuation of the *State of Maine* rule would mean that no entity (state or federal) would have jurisdiction over intrastate rail lines because State authority in that area was preempted by the ICCTA, and dismissal of MassDOT's notice of exemption would mean that the Board would not have jurisdiction. Such an outcome is at odds with the language, purpose and history of the Act.

**D. MassDOT's Position Is Not Advanced by its Reliance on Decisions Rendered after State of Maine That Repeated the Agency's Rationale in Subsequent Cases Involving Acquisitions of Rail Lines by States**

MassDOT has noted ( Motion to Dismiss at 23-25, 31-35) that, after the *State of Maine* decision, there were other cases where the exception was applied to acquisitions of lines by state agencies planning to commence commuter rail service while the selling carriers continued interstate freight service on the lines. However, generally, these were *ex parte* proceedings and the decisions typically had limited discussions of the legal issues; the *State of Maine* holding was

repeated without elaboration or explanation in those cases. In the following post- *State of Maine* decisions there were no oppositions to the motions to dismiss, no participation by any other party, no additional analysis by the ICC/STB, and the ICC/STB merely repeated the *State of Maine* holding in discussions of the issue limited to ½ page to 1 page: *Sacramento-Placerville Transportation Corridor Joint Powers Authority – Acquisition Exemption – Certain Assets of Southern Pacific Transportation Company*, F.D. No. 33046 (STB served October 28, 1996); *New Jersey Transit – Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512 (2000); *State of Wisconsin Department of Transportation*, STB Finance Docket No. 34181, (July 30, 2002); *Metro Regional Transit Authority – Acquisition Exemption – CSX Transportation, Inc.*, F.D. No. 33838 (STB served October 10, 2003); *Central Puget Sound Regional Transit Authority – Acquisition Exemption – BNSF Railway Company*, F.D. No. 34747 (STB served November 18, 2005); *New Mexico Department of Transportation*, STB Finance Docket 34793 (February 3, 2006); *Washington County, OR – Acquisition Exemption – Certain Assets of Union Pacific Railroad Company*, F.D. No. 34810 (STB served April 11, 2007). In certain cases, the motions for dismissal were opposed, but the opponents did not challenge the rationale of *State of Maine*; rather, the only oppositions were as to whether the specific terms of particular agreements were unduly restrictive as to freight operators so as to preclude dismissal of the case under the *State of Maine* line of decisions. *E.g. Southern Pacific Transportation Company*, 9 I.C.C. 2d 385, 1993 WL 54669 (I.C.C.); *Southern Pacific Transportation Co.*, Docket No. AB-12 et al. (1995); *Utah Transit Authority*, 1993 WL 112128 (I.C.C.); *Maryland Transit Administration – Petition for Declaratory Order*, F.D. No. 34975 (STB served October 9, 2007); *Maryland Transit Administration – Petition for Declaratory Order*, F.D. No. 34975 (STB served September 19, 2008); *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*,

F.D. No. 35128 (STB served October 27, 2008); *Wisconsin Department of Transportation – Petition for Declaratory Order – Rail Line In Sheboygan County, WI*, F.D. No. 35195 (April 20, 2009).<sup>10</sup> Decisions that merely echo *State of Maine* without any discussion of legal principles because there was no challenge to the *State of Maine* argument, do not add any force to the reasoning in *State of Maine*. Cf. *James Riffin- Petition for Declaratory Order*, F.D. 35245 (September 15, 2009) at 4 n. 7—holding that Riffin was not a carrier, noting that in a prior case the Board characterized Riffin as a carrier “because his assertion of carrier status was not questioned by parties in that case”.

Thus, although the *State of Maine* decision has been invoked a number of times in decisions that have reached the same result the underlying issues were never actually litigated. What has been characterized as a well-established, well-vetted line of precedent is merely the continuous echo of a decision that was without foundation. Neither *State of Maine*, nor any subsequent decision in that line cited a statutory or a decisional basis for the “operating easement” device, or for the exclusion of such transactions from ICC/STB jurisdiction based on that device. None of the decisions rationalized this approach with the *SIRTOA* cases; and, unlike the *SIRTOA* cases, none of them was ratified by a court of appeals.

Furthermore, even though the Commission cautioned that its determination in *State of Maine* was specific to that case and should not be blindly applied to other transactions, the

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<sup>10</sup> In *Utah Transit Authority*, 1993 WL 112128 (I.C.C.); *New Jersey Transit – Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512 (2000); *State of Wisconsin Department of Transportation-Petition for Declaratory Order*, STB Finance Docket No. 34181, (July 30, 2002)(2002 WL 176404(STB)); *New Mexico Department of Transportation*, STB Finance Docket 34793 (February 3, 2006)(2006WL 308726 (STB))– the challenges concerned whether restricting freight service to certain hours of the day was unduly restrictive. In *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, F.D. No. 35128 (STB served October 27, 2008) there was additional analysis because the operator was yet determined.

Commission and then the Board have acted as if that warning never existed, applying that approach in different situations that did not resemble the *State of Maine* transaction; as if State of Maine was a broad pronouncement, rather than a narrow exception. Indeed, as this line of cases progressed, the element of the selling carrier continuing to maintain and renew the line, and the stated purpose of preserving endangered rail service have fallen by the wayside. Those factors seem to no longer be part of the formula. An approach that was originally applied to very short segments of little used track has now been applied to acquisitions of hundreds of miles of trackage (New Mexico) and to lines with active freight and Amtrak service. More recently there has been virtually automatic dismissal of notices of exemption based on unopposed motions to dismiss that assert that part of the deal involves an operating easement for the selling carrier where it will be responsible for all freight shipping on the line without any effort to justify such decisions under the Act and its precedent. The Board should no longer continue down this path; it should reject further reliance on the *State of Maine* rationale.

### **CONCLUSION**

BRS and BMWED respectfully submit that the *State of Maine* line of cases were wrongly decided, and should not be applied here. The acquisition of a line of railroad that is part of the interstate rail system is a transaction subject to STB jurisdiction; and such a transaction cannot occur without Board approval, or exemption from Board approval. The concept that the sale of a rail line that is part of the interstate rail system that is still to be used for interstate common carrier rail transportation is not subject to STB jurisdiction and may be effected without STB approval or exemption because of the selling freight railroad's "retention" of an "operating easement" for freight service is simply without support in the language of the Act or prior precedent under the Act. Indeed, the approach in the *State of Maine* line of cases is actually

contrary to the requirements of the Act, the Congressional mandate regarding the Board's jurisdiction and judicial and ICC/STB precedent concerning the Agency's jurisdiction. MassDOT's motion for dismissal must therefore be denied.

Respectfully submitted,

/s/ 

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Dated: February 3, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served one copy of the foregoing Comments and Opposition to Motion to Dismiss Notice of Exemption by First Class Mail, to the offices of the following:

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Date: February 3, 2010



Richard S. Edelman

# **ATTACHMENT A**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35312

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION  
-ACQUISITION EXEMPTION-  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

**DECLARATION OF FLOYD MASON**

1. Floyd Mason, declare under penalty of perjury that the following is true and correct and based on personal knowledge.

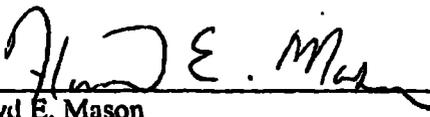
1. I am a Vice President of the Brotherhood of Railroad Signalmen ("BRS"). BRS is the collective bargaining representative under the Railway Labor Act ("RLA"). 45 U.S.C. §151 *et seq.*, of persons employed by rail carriers in the craft or class of Railroad Signalmen, primarily employees who do maintenance, repair, rehabilitation and construction work on signal systems; and construction, maintenance and repair of communication systems and equipment, including employees of CSX Transportation, Inc. ("CSXT") who perform such work on CSXT's lines in Massachusetts that the Commonwealth of Massachusetts proposes to purchase from CSXT.

2. BRS and CSXT are parties to a collective bargaining agreement that governs the performance of Signal work on the lines in Massachusetts that the Commonwealth proposes to purchase from CSXT. The seniority rights and the other rights of CSXT Signalmen to perform work on the lines that the Commonwealth proposes to purchase from CSXT are derived from the BRS-CSXT collective bargaining agreement; if the lines are sold to the Commonwealth, the collective bargaining agreement will no longer apply on those lines (absent agreement to continue to apply that collective bargaining agreement on those lines).

3. As is explained in the BRS/BMWED Comments and brief in this Finance Docket, BRS takes no position on the actual acquisition of the lines by the Commonwealth by use of the Verified Notice of Exemption under 49 C.F.R. 1150.31 for exemption of the acquisition from approval under 49 U.S.C. 10901. But BRS contends that the Commonwealth's motion to dismiss that Notice for lack of jurisdiction should be denied because it is contrary to the Interstate Commerce Act.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

February 1, 2010

  
Floyd E. Mason

# **ATTACHMENT B**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35312

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION  
-ACQUISITION EXEMPTION-  
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

**DECLARATION OF BRADLEY A. WINTER**

I, BRADLEY A. WINTER, declare under penalty of perjury that the following is true and correct and based upon personal knowledge:

1. I am the General Chairman of the Consolidated Rail System Federation ("Federation"), of the Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED"). BMWED is the collective bargaining representative under the Railway Labor Act of persons employed by rail carriers in the craft or class of maintenance of way employee; including, but not limited to, employees who do maintenance, repair, rehabilitation and construction work on railroad rights of way, roadbeds, tracks, track and roadbed maintenance equipment, and bridges and buildings, including employees of CSX Transportation, Inc. ("CSXT") who perform such work on CSXT's lines in Massachusetts that the Commonwealth of Massachusetts proposes to purchase from CSXT.

2. BMWED and CSXT are parties to a collective bargaining agreement that governs the performance of Maintenance of Way work on the lines in Massachusetts that the Commonwealth proposes to purchase from CSXT. The seniority rights and the other rights of CSXT Maintenance of Way employees to perform work on the lines that the Commonwealth proposes to purchase

from CSXT are derived from the BMWED-CSXT collective bargaining agreement; if the lines are sold to the Commonwealth, the collective bargaining agreement will no longer apply on those lines (absent agreement to continue to apply that collective bargaining agreement on those lines).

3. As is explained in the BMWED/BRS Comments and brief in this Finance Docket, BMWED takes no position on the actual acquisition of the lines by the Commonwealth by use of the Verified Notice of Exemption under 49 C.F.R. 1150.31 for exemption of the acquisition from approval under 49 U.S.C. 10901. But BMWED contends that the Commonwealth's motion to dismiss that Notice for lack of jurisdiction should be denied because it is contrary to the Interstate Commerce Act.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

February 3, 2010

/s/  
Bradley A Winter\*

\*signature authorized by Mr. Winter, signed copy will be provided later