

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, D.C.**

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Massachusetts Coastal Railroad, LLC-Acquisition- )  
CSX Transportation )  
\_\_\_\_\_)

Finance Docket No. 35314

**REPLY OF MASSACHUSETTS COASTAL RAILROAD  
TO THE COMMENTS OF THE BROTHERHOOD OF RAILROAD  
SIGNALMEN AND BROTHERHOOD OF MAINTENANCE WAY  
EMPLOYEES DIVISION/IBT**

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Dated: February 12, 2010

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Massachusetts Coastal Railroad LLC (“Mass Coastal”) filed jointly with CSX Transportation, Inc. (“CSXT”) an application to acquire CSXT’s rights over two rail lines in southeastern Massachusetts. The geographic span of the lines was described in detail in the application and will not be repeated here. The lines are referred to by the parties as the “South Coast Lines.” The Brotherhood of Railroad Signalmen (“BRS”) and the Brotherhood of Maintenance of Way Employees Division/IBT (“BMWE”) (collectively the “Unions”) have filed comments on the application as permitted by the regulations and the Board’s scheduling order.

1. The Unions do not oppose the transaction on substantive grounds

This is a minor transaction and the substantive rule of decision the Board must apply in deciding whether or not to approve it is set forth in 49 U.S.C. 11324(d). That standard requires the Board to approve the transaction unless:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Not surprisingly, the Unions do not contend that the proposed transaction falls afoul of this standard. Accordingly, there is no need to address the substantive standard further.

2. The Unions' complaint goes to the character of the interest Mass Coastal is acquiring in the South Coast Lines.

The Unions complain that the interest Mass Coastal is acquiring is not one contemplated by the Interstate Commerce Act, or, if it is, it is in the nature of a trackage right or a leasehold interest. CSXT contends that in its transaction with MassDOT it will retain a permanent, easement that permits it the exclusive right to provide common carrier rail freight service on the South Coast Lines, and that the transaction with MassDOT will not transfer to MassDOT any interest or rights that would either (i) confer on MassDOT a residual common carrier obligation over the South Coast Lines, or (ii) impede CSXT's right and ability to perform the common carrier obligation on the South Coast Lines.

The Unions, on the other hand, argue that CSXT's transaction with MassDOT will transfer to MassDOT rights over, or an interest in, the South Coast Lines that will have the effect of (i) conferring on MassDOT a residual common carrier obligation over the South Coast Lines, and (ii) reducing CSXT's interest in the South Coast Lines to one in the nature of trackage rights, a lease, or operating rights—something less than a permanent, exclusive right to perform freight service on the South Coast Lines.

This dispute is before the Board in Finance Docket 35312, *Massachusetts Department of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc.(MassDOT Acquisition)* which raises the question whether MassDOT's acquisition of property from CSXT falls within the jurisdiction of the Board and requires approval under 49 U.S.C. 10901. MassDOT contends that it does not. The outcome of that case is irrelevant to the issue before the Board in this proceeding. Regardless of the Board's decision on the issue before it in *MassDOT*

*Acquisition*, CSXT has clearly retained an interest in the South Coast Lines which permits it to conduct common carrier rail freight service on the lines. Mass Coastal's acquisition of that retained interest is a transaction that requires Board approval under 49 U.S.C. 11323 as we will show below.

3. Mass Coastal's acquisition of CSXT's interest in the South Coast Lines requires approval under 49 U.S.C. 11323.

In its transaction with MassDOT, CSXT has retained an *interest* in the South Coast Lines which CSXT characterizes as an "exclusive freight easement" and which the Unions characterize as an "operating easement." That interest *by its terms* allows CSXT to perform common carrier rail freight service on the lines. The Unions' complaint is variously that the interest CSXT has retained is not one that falls within the ambit of 49 U.S.C. 11323 at all, or is in the nature of a trackage rights agreement. The Unions do not appreciate the import of their argument.

If CSXT and MassDOT have created an interest that permits CSXT to perform common carrier rail freight service on the South Coast Lines, and whose purchase by a rail carrier does not fall within the ambit of 49 U.S.C. 11323, as the Unions appear to contend, then its acquisition by Mass Coastal does not require the approval of the Board. 49 U.S.C. 11323 requires Board approval of certain enumerated transactions. If Mass Coastal's acquisition of CSXT's interest in the South Coast Lines is not one of the enumerated transactions requiring approval, the consequence is not that CSXT cannot transfer it to Mass Coastal (the Interstate Commerce Act is not a property code determining which interests are transferrable) but that Mass Coastal is free to acquire that interest without the prior approval of the Board under 49 U.S.C. 11323. Mass Coastal does not contend this is an unregulated transaction.

The Unions also appear to contend that the nature of the interest Mass Coastal is acquiring is more accurately characterized as a trackage rights, leasehold, or operating rights

interest. Under the plain language of the statute, however, the character of the interest Mass Coastal is purchasing is irrelevant to the Board's jurisdiction so long as it is *property* of another rail carrier and confers on Mass Coastal the right to perform common carrier rail freight service on the South Coast Lines subject to the Board's jurisdiction. The statute provides (49 U.S.C. 11323):

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

\* \* \*

(2) A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.

Whatever the precise nature of the interest that Mass Coastal is acquiring from CSXT, it is plainly "property" of CSXT, a rail carrier, and it carries with it the right to provide common carrier rail freight transportation. The quoted section of the statute does not require that Mass Coastal must obtain the approval of the Board only when it acquires "real property" from another rail carrier, it uses the term "property" which includes both real property (fee interests, easement interests, and leasehold interests), and personal property (contractual interests, including trackage rights). So long as the interest that Mass Coastal is acquiring from CSXT is "property" and carries with it the right to provide rail transportation subject to the jurisdiction of the Board, Mass Coastal cannot acquire the property without the Board's approval under 49 U.S.C. 11323.

The Unions err in failing to recognize that paragraph (2) of sub-section 11323(a) applies to three different transactions: the purchase of property, the lease of property, and a contract to operate property. Mass Coastal is not leasing property from CSXT nor is it entering into a contract to operate property of CSXT, nor is it entering into a trackage rights agreement with CSXT subject to paragraph 6 of sub-section 11323(a); it is purchasing property from CSXT, a

property interest that CSXT has retained in its transaction with MassDOT. Mass Coastal's purchase of property from CSXT is a transaction within the plain language of the statute. Indeed, as previously noted, if the interest Mass Coastal is acquiring from CSXT is not "property" within the meaning of the statute, Mass Coastal would not require approval under 49 U.S.C. 11323 to acquire it. Whatever may be the desirability of creating an interest that eludes regulation under 49 USC 11323, the broad sweep of the statute captures the purchase of every form of interest that can be characterized as "property," and the interest in the South Coast Lines CSXT retains falls within the statutory net. An alternative reading would not only be inconsistent with the language of the statute, it would be inconsistent with the history of the Interstate Commerce Act where Congress clearly intended to subject transactions whereby rail carriers acquired rights to extend the geographical reach of their common carrier services to prior Board approval. Where Congress has carved out exceptions to this general rule it has done so explicitly. *See e.g.* 49 U.S.C. 10906.

Regardless of whether CSXT's retained interest in the South Coast Lines is properly characterized as an exclusive freight easement, an operating freight easement, a leasehold interest, a trackage rights agreement, an operating agreement, or a "banana," it is "property" which confers on Mass Coastal the right to provide common carrier rail service on the South Coast Lines. As such, Mass Coastal's acquisition of that property from CSXT falls squarely within the prior approval jurisdiction of the Board under 49 U.S.C. 11323.

4. Mass Coastal is acquiring its interest in the South Coast Lines from CSXT and MassDOT is not a necessary party to this proceeding

The Unions contend that the transaction before the Board involves a transfer of the South Coast Lines to MassDOT followed by a lease, joint use, trackage rights, or contract to operate between MassDOT and Mass Coastal. This contention is plainly at odds with the structure of the

transaction set forth in the Purchase and Sale Agreement between Mass Coastal and CSXT, and is also at odds with the structure of the transaction between CSXT and MassDOT described in *MassDOT Acquisition*. Under the CSXT—MassDOT agreements, CSXT *retains* its interest, the nature of which is spelled out in detail in the agreements between CSXT and MassDOT. It is that *retained* interest that Mass Coastal has agreed to purchase. If the proposed sale of CSXT’s interest to Mass Coastal is not consummated, CSXT will retain its interest and the common carrier obligations that go with it.

The Board typically has accepted transactions as the parties have structured them. Indeed, in *Minnesota Northern Railroad, Inc.—Exemption—Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company*, STB Finance Docket Nos. 33315, *et al.* (STB served Aug. 14, 1997) the Board expressly rejected a union attempt to “restructure” the transaction:

UTU-GCA also argues that BNSF improperly retained trackage rights here through an exemption in violation of 49 CFR 1150.31(a)(4). According to UTU-GCA, BNSF should instead have been required to convey the entire line to MNR, including all operations, and then MNR should have been required to seek Board approval in a separate transaction to grant trackage rights back to BNSF. We see nothing improper in the parties’ approach here. The parties could have structured their agreement in the manner suggested by UTU-GCA but chose not to do so. BNSF has simply transferred less than its entire interest in the line to MNR, retaining certain overhead trackage rights for itself. BNSF had every right to do this. In this context, we do not view the trackage rights retained by BNSF as incidental trackage rights under section 1150.31(a)(4). Finally, we find that there has been no transfer here of any trackage rights from MNR to BNSF, incidental or otherwise, that would require Board approval.

The Board equally has held the parties to a transaction to the structure they have adopted. See *e.g. The Burlington Northern and Santa Fe Railway Company—Trackage Right*

*Exemption—The Portland & Western Railroad, Inc.*, STB Finance Docket No. 34304 (STB served Feb. 3, 2003):

This transaction is significantly different from the one in Minnesota Northern. The lease agreement in Minnesota Northern specifically stated that BNSF reserved overhead trackage rights. In this case, by contract, we have examined the lease. . . and found nothing to indicate a reservation of trackage rights by BNSF.

CSXT and MassDOT structured their transaction in a manner comparable to that in *Minnesota Northern* where BNSF's interest was *retained*. Mass Coastal is acquiring CSXT's retained interest; it is not acquiring an interest from MassDOT. This, even if CSXT's retained interest is characterized as a "trackage rights" or "leasehold" interest, MassDOT is not a necessary party to this proceeding. Where trackage rights agreements or leasehold agreements are assigned in a transaction subject to Board approval under 49 U.S.C. 11323, neither the Board's practice nor the Board's regulations require that the grantor of the trackage rights agreement or the lessor of a line be a party to the Board proceeding. *See The Indiana Rail Road Company—Acquisition—Soo Line Railroad Company*, STB Finance Docket No. 34783 (STB served Apr. 11, 2006) (assignment of over 243 miles of main line trackage rights), and 49 CFR 1180.3 defining "Applicant" as "the parties initiating a transaction."

## CONCLUSION

For the reasons set forth above it is clear that:

1. Mass Coastal is seeking approval for the acquisition of an interest in the South Coast Lines from CSXT that constitutes "property" within the meaning of 49 U.S.C. 11323(a)(2);
2. The property interest Mass Coastal is acquiring gives Mass Coastal the right to provide common carrier rail freight transportation subject to the jurisdiction of the Board on the South Coast Lines;

3. All necessary parties are applicants in the proceeding; and

4. There is no contention that Mass Coastal's acquisition of that interest from CSXT requires Board disapproval under 49 U.S.C. 11324(d);

Accordingly, the Board should approve Mass Coastal's acquisition as requested in the application.

Respectfully submitted,

MASSACHUSETTS COASTAL RAILROAD, LLC

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Dated: February 12, 2010

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<sup>1</sup> Document filed electronically

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of February 2010 I caused a copy of the foregoing REPLY OF MASSACHUSETTS COASTAL RAILROAD TO THE COMMENTS OF THE BROTHERHOOD OF RAILROAD SIGNALMEN AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT to be served on counsel for all parties of record by depositing copies thereof, postage prepaid, in the United States mail addressed to counsel listed below:

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