

BEFORE THE
SURFACE TRANSPORTATION BOARD

26545

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

MOTION OF THE BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT
AND AMERICAN TRAIN DISPATCHERS ASSOCIATION
FOR LEAVE TO FILE REPLY TO
CSX TRANSPORTATION RESPONSE TO COMMENTS OF BRS AND BMWED

The Brotherhood of Railroad Signalmen (“BRS”), the Brotherhood of Maintenance of Way Employees Division/IBT (“BMWED”), and the American Train Dispatchers Association (“ATDA”) (collectively “the Unions”) respectfully seek leave to file a memorandum in reply to the response of CSX Transportation (“CSX”) to the Unions’ comments and opposition to the Massachusetts Department of Transportation (“MassDOT”) motion 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”). The Unions submit that they should be granted leave to file their reply because CSXT’s response to the comments and opposition of the Unions contained new arguments advanced by CSXT that were inconsistent with the position of MassDOT in its motion, and because CSXT either misunderstood or mischaracterized the Unions’ position regarding potential application of the ICC’s decision in *Common Carrier Status of States*, 363 I.C.C. 132 (1980) to the Commonwealth if the acquisition transaction is approved by the Board or exempted from Board approval.

As is explained more fully in the Unions’ reply, CSXT’s response presented an argument that the Commonwealth would not actually be acquiring rail lines when it acquired CSXT’s Boston Main Line segments and South Coast lines, but rather would be acquiring “CSXT

Property” and “specific assets” (CSXT Response at 6, 8); a claim that is at odds with MassDOT’s own filings and the precedent relied on by MassDOT in its motion to dismiss. CSXT’s response also advanced an argument not made by MassDOT—that because the ICCTA ended STB jurisdiction over “mass transportation provided by a local government authority,” the Board has no jurisdiction over a State’s acquisition of a line still used for interstate freight and passenger transportation (Response at 8-9). Additionally, CSXT argued that Unions undercut their main argument when they noted that, under *Common Carrier Status of States*, MassDOT need not be deemed a carrier if, consistent with its prior practice, it engaged an operator that would perform all the rail functions and would have full common carrier obligations. CSXT says that the Unions contended that if a commuter operator does not contract out any of its work, the commuter authority is not a carrier; but if the operator subcontracts any of the work, the commuter authority is a carrier, and that the Unions are trying to import collective bargaining issues into the carrier status determination. Response at 9-10. But CSXT has either misunderstood or mischaracterized the point made by the Unions. In their reply, the Unions show that they did not even discuss subcontracting by a contract operator or CBA restrictions on contracting. The Unions merely noted the distinction drawn by the agency in *Common Carrier Status of States* between a state entity that acquires a rail line and assumes responsibility for railroad work on the line, and a state entity that acquires a rail line and contracts with a rail carrier(s) for performance of the railroad functions on the line.

The Unions respectfully submit that it is appropriate and fair process to allow the Unions to submit a reply to CSXT response for the purpose of answering CSXT’s new arguments and for making sure that the record is clear regarding the Union’s observations about potential

application of *Common Carrier Status of States* if the proposed acquisition is approved or exempted from approval. Such a reply is being submitted along with this motion.

Respectfully submitted,

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Dated March 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Motion for Leave to File Reply was served upon the following parties of record by electronic mail (by consent) and by First Class Mail, this 5th day of March 2010:

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