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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.

REPLY OF THE BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT,
AND AMERICAN TRAIN DISPATCHERS ASSOCIATION
TO CSX TRANSPORTATION RESPONSE TO UNIONS' COMMENTS

The Brotherhood of Railroad Signalmen ("BRS"), the Brotherhood of Maintenance of Way Employes Division/IBT ("BMWED"), and the American Train Dispatchers Association ("ATDA") (collectively "the Unions") submit this memorandum in reply to the response of CSX Transportation ("CSXT") 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"). CSXT did not join in MassDOT's motion to dismiss or submit a filing in support of that motion; rather CSXT filed a response to the Unions' Comments and Opposition. This memorandum will respond to new arguments advanced by CSXT, and CSXT's mischaracterization of the Unions' position regarding potential application of the ICC's decision in *Common Carrier Status of States*, 363 I.C.C. 132 (1980) in this situation.

A. The Commonwealth Seeks To Acquire Rail Lines

1. CSXT asserts that the Commonwealth is not acquiring a rail lines, rather MassDOT is acquiring "CSXT Property" and "specific assets". CSXT Response at 6, 8. But calling rail lines "property" or "specific assets", instead of "rail lines" cannot determine the Board's jurisdiction over the sale of the right of way, tracks and related appurtenances used by railroads and traversed by

locomotives and rail cars in interstate transportation. Beyond the emptiness of “labeling” as a legal argument, CSXT’s claim is inconsistent with MassDOT’s own filings and the language of the Definitive Agreement, is inconsistent with the precedent relied on by MassDOT in its motion to dismiss, and is without basis in the Act.

CSXT’s Response states (at 6, 8) that MassDOT “is not acquiring a rail line.” But MassDOT’s motion recognizes that it *would be* acquiring rail lines. On the first page of the motion to dismiss (at 3) MassDOT states that it “proposes to acquire the real property and physical assets of certain CSXT-owned and operated rail lines in Massachusetts”. Elsewhere (*e.g.* at 4, 6) MassDOT says it will acquire the railroad assets but CSXT would be allowed to continue to serve shippers over those assets. MassDOT then (at 6-9) lists the assets as including rail lines--the Boston Main Line-West (BML-West), Boston Main Line -East (BML -East), the New Bedford Secondary (also known as the Watuppa Branch) and the Fall River Secondary. The motion continues to refer to the BML East and West –which again are parts of the Boston Main Line. The motion (at 18) also refers to division of “Joint Usage Rail Properties.”

Additionally, at the start of the discussion section of its motion, MassDOT begins by noting that “[o]rdinarily, the acquisition of an active rail line by a non-carrier, including a state or state entity like MassDOT, requires Board approval under 49 U.S.C. §10901.” In arguing (at 34) that the MassDOT transaction fits the *State of Maine-Acq. and Op. Exemption*, 8 ICC 2d 835 (1991), exception to agency jurisdiction, MassDOT discusses the “operating windows negotiated with CSXT on the “Boston Main Line” and states that “[p]referential operating windows are commonplace on rail lines that host shared freight and passenger rail operations.” Next, in discussing track and signal maintenance on the Boston Main Line, MassDOT states (at 36) that MBTA “will assume the maintenance obligations for that line”; and MassDOT states (at 37-38) that MBTA will assume

dispatching obligations for the lines.

Thus, in asserting that its transaction falls under the *State of Maine* exception, MassDOT's motion clearly refers to the rail lines it would acquire; and MassDOT describes the rights and duties of the owner of rail lines, not the rights and duties of an owner of non-rail "property."

Additionally, the Definitive Agreement between CSXT and MassDOT refers to MassDOT's use of the Railroad Lines it is acquiring (paragraph 1.1), and defines the assets being conveyed (including the Boston Main Line, Grand Junction Branch, South Coast Lines and Boston Terminal Running Track as "the 'Railroad Lines'" (paragraph 1.1.1). The Railroad Lines being acquired are said to be those described in Exhibit A and shown on Exhibit A-1 (*id*). Exhibit A is titled "The Railroad Lines" and then lists various lines. Exhibit A-1 is titled "Railroad Line Plans". And paragraph 11.2.9 of the Definitive Agreement represents that "none of the Railroad Lines has been abandoned or discontinued..." Furthermore, the Definitive Agreement provides that the Commonwealth could 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). The Commonwealth has to be acquiring rail lines if it can determine who can provide freight service on the lines.

Thus, besides being divorced from reality with regard to transfer of ownership of right way, track, ties, rails and related appurtenances over which trains move, CSXT's assertion that MassDOT is not acquiring rail lines is directly contrary to the position of MassDOT in the motion CSXT says it is supporting; and CSXT's argument is contrary to the characterization of the transaction in the Definitive Agreement between the parties.

2. CSXT's assertion that the Commonwealth is not acquiring rail lines is also at odds with MassDOT's reliance on the *State of Maine* line of cases. In launching into its argument, MassDOT

states (at 23-24) that its motion is predicated on the *State of Maine* line of cases. But the first sentence of the *State of Maine* decision said that the State sought to “acquire approximately 15.66 miles of rail line...”. Similarly, in *Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, F.D. No. 35128 (STB served October 27, 2008), which MassDOT said is a transaction comparable to this one (Motion at 32), the Board stated that the Port sought to “acquire from BNSF Railway Company (BNSF) approximately 14.45 miles of rail line...” And in *Maryland Transit Administration – Petition for Declaratory Order*, F.D. No. 34975 (STB served September 19, 2008), which MassDOT describes (at 25 n. 43) as summarizing the principles in the *State of Maine* line of cases, the Board described the transaction there as acquisition of “a 14.22- mile line of railroad...” Thus, CSXT’s argument is contrary to the very authority on which MassDOT relies in seeking dismissal of its notice of exemption.

3. CSXT also argues that “[a] rail line consists of land, track, ties, other track materials and a certificate (or certificate equivalent) from the Board authorizing the common carrier operation”; and since CSXT has reserved the right and duty to serve shippers on the lines conveyed, it has not sold the certificate or equivalent so there has been no sale of a rail line. Response at 6. There is no statutory or precedential basis for the proposition that the decision of parties involved in a line sale to circumscribe the buyer’s operating rights on the line renders the sale of land, track, ties and related appurtenances not a rail line sale subject to STB jurisdiction. CSXT cited *Nicholson v. ICC*, 711 F. 2d 364, 367 (D.C. Cir. 1983), but *Nicholson* did not hold that there is no conveyance of a rail line if the land, track, ties and related appurtenances are sold but the “certificate or certificate equivalent” is not sold. *Nicholson* did say that determination of whether a track segment is a railroad line or a spur, team, switching or side track depended on its intended use; but that does not support CSXT’s assertion that there is no sale of a line unless there is sale of the “certificate or certificate equivalent.”

Furthermore, in the instant case, the Commonwealth would acquire track that would continue to be used for interstate freight movements and track that would continue to be used for interstate passenger movements. This is not a situation where a State is buying a line that will no longer be used for interstate rail transportation and the State's only use is commuter rail transportation. Thus, not only does *Nicholson* fail to support the argument for which it was cited, it provides no support at all for the motion to dismiss.

Furthermore, CSXT's argument again ignores the facts that CSXT had to obtain the Commonwealth's permission to "transfer" the right to serve shippers on the South Coast Lines, that the Commonwealth had a right to accept or reject Mass Coastal as provider of freight service on the South Coast lines, that absent the arrangement for CSXT to continue to serve shippers on the BML-east and BML-west lines it would not be able to serve those shippers on those lines once they were sold, and that the Commonwealth 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). Clearly the Commonwealth would be acquiring ownership and control of the rail lines it would acquire if it could approve or reject freight service providers on those lines. This plainly refutes CSXT's assertion that the Commonwealth is not acquiring rail lines.

B. That the Commonwealth Plans to Use the Acquired Lines for Commuter Rail Operations Does Not Affect the Board's Jurisdiction over the Commonwealth's Acquisition of Those Lines When They Will Still Be Part of the Interstate System and Used for Interstate Rail Transportation

CSXT makes much of the fact that the Commonwealth intends that its own operations on the lines to be acquired will be commuter rail operations. CSXT offers the new argument 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, citing Section 10501(c)(2) and the legislative

history of the ICCTA. While MassDOT alluded to Section 10501(c)(2) in asserting that the Board lacks jurisdiction over the Commonwealth's mass transportation activities (Motion at 29), MassDOT, did not argue that Section 10501(c)(2) stripped the Board of jurisdiction over a state's acquisition of a rail line. Rather, MassDOT recognized that its argument for dismissal depended on the CSXT easement and the *State of Maine* line of cases.

CSXT's argument based on Section 10501(c)(2) fails because the issue in this case is not whether the Board is regulating the Commonwealth's commuter rail service. The issue here is whether the Commonwealth can buy rail lines that will still be used in interstate rail transportation without obtaining STB approval or exemption from approval under Section 10901.

Nothing in the language of the ICCTA, or the legislative history of the ICCTA that is cited by CSXT, supports the contention that the Board has been deprived of jurisdiction over sales of rail lines when the purchasers are States. Section 10501(c)(2) merely states that the Board will no longer have jurisdiction over "mass transportation provided by a local government authority"; that does not mean that the Board lacks jurisdiction over other activities of States such as acquisition of lines that will still be used for interstate rail transportation. Similarly, the legislative history cited by CSXT refers to curtailment of regulation of passenger transportation by public authorities. Here, the issue is not MassDOT's commuter rail operations, but the line acquisitions. The Unions are not asserting that the Board must approve MassDOT's expansion of its commuter rail operations over the newly acquired lines; the Unions assert that the Board must approve or exempt the Commonwealth's acquisition of those lines. CSXT's focus on MassDOT's plan to use the newly acquired lines for

commuter rail is therefore beside the point.¹

C. There Is No Inconsistency in the Unions' Argument and Their Recognition of the Holding in *Common Carrier Status of States*.

CSXT argues that the Unions undercut their argument when they noted that MassDOT need not be a carrier if it engaged an operator that would perform all the rail functions and would have full common carrier obligations. Response at 9-10. But CSXT has either misunderstood or mischaracterized the point made by the Unions.

According to CSXT, the Unions argued that if the 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. Having set up its straw man, CSXT proceeds to pull it apart. CSXT accuses the Unions of trying to graft collective bargaining agreement requirements into the common carrier determination, and argues that nothing in the Act supports the notion that a public agency is not a carrier if its operator performs all the rail work with its own employees, but is a carrier if the operator contracts-out (subcontracts) some of that work. CSXT Response at 9-10. CSXT has responded to an argument that the Unions did not make and has ignored the argument the Unions did make.

In actuality the Unions merely acknowledged the ICC's statement in *Common Carrier Status*

¹ The Unions also note that after Section 10501(c)(2) was added to the Act in 1995, a number of State acquisitions of rail lines were effected using the *State of Maine* approach. And those cases generally noted the Board's jurisdiction over all line acquisitions, including line acquisitions by States, citing *Common Carrier Status of States*. It would have been entirely unnecessary for the Board to hold that it lacked jurisdiction over such acquisitions despite *Common Carrier Status of States* based on the operating easement arrangements by which the freight railroads continue to serve shippers on the lines they once owned, if the ICCTA actually negated Board jurisdiction over all rail transportation related activities of States. Clearly, other parties and the Board recognized that the removal of jurisdiction over mass transportation activities of public authorities did not negate the Board's jurisdiction over State agency acquisition of active rail lines used in interstate commerce.

of States that although a State's acquisition of a rail line is subject to agency jurisdiction, the State itself would not be considered a rail carrier if it did not actually operate the line and engaged an operator that would perform all the rail functions and would have full common carrier obligations, but "will be considered a common carrier if it operates a rail line itself". 363 ICC at 132. The Unions stated:

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.

BMWED/BRS comments at 28-29. Thus, the Unions merely acknowledged the holding in *Common Carrier Status of States* and discussed its potential application to MassDOT and MBTA if they continued the Massachusetts practice of contracting all the rail work to a carrier or carriers.

The Unions did not even discuss sub-contracting by a contract operator, or collective bargaining agreements relating to contracting-out of work; they certainly did not argue that MassDOT/MBTA would not be a carrier if they contracted all the rail work to an operator that did

all the work, but would be a carrier if the operator sub-contracted any of the work. The Unions merely noted the distinction made by the ICC between the State operating a rail line itself and a State retaining a carrier to operate the line; whether the contractor operator was used only its own employees was not mentioned or alluded-to in the ICC's decision or the Union's brief. The point was that *Common Carrier Status of States* said that if a state entity that acquires a line does none of the rail work itself, and instead uses a carrier or carriers to do the work, then the State would not be deemed a carrier, whereas it would be a carrier if the State assumed responsibility for the line. This observation by the Unions was not contrary to the rest of their argument, and the observation is consistent with agency precedent. CSXT's refutation of an argument that the Unions did not make does nothing to support MassDOT's motion for dismissal.

Respectfully submitted,

/s/ Richard S. Edelman


Richard S. Edelman
O'Donnell, Schwartz & Anderson
1300 L Street, N.W. Suite 1200
Washington, D.C. 20005
Phone: (202) 898-1707, Fax: (202)-682-9276
Email: REdelman@odsalaw.com
Attorney for BRS/BMWE

/s/ Michael S. Wolly

Michael S. Wolly
ZWERDLING, PAUL, KAHN & WOLLY P.C.
1025 Connecticut Avenue, NW Suite 712
Washington, D.C. 20036
Phone: (202) 857-5000, Fax: (202) 223-8417
Email: mwolly@zwerdling.com
Attorney for ATDA

Date: March 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached 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:

John H. Broadley,
John H. Broadley & Associates, PC
1054 Thirty-First Street, N.W., Suite 200
Washington, DC 20007

Louis E. Gitomer, Law
Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204

Keith G. O'Brien
Baker & Miller, PLLC
2401 Pennsylvania Avenue, N.W. Suite 300
Washington, DC 20037

James E. Howard
Attorney at Law
1 Thompson Sq., Suite 201
Charlestown, MA 02129

Date: March 5, 2010



Richard S. Edelman