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March 22, 2010

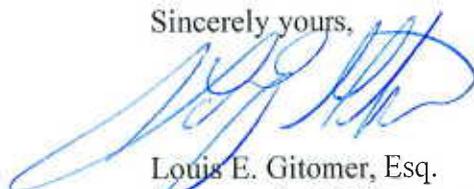
Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

RE: Finance Docket No. 35312, *Massachusetts Department of Transportation-
Acquisition Exemption-Certain Assets of CSX Transportation, Inc.*

Dear Ms. Brown:

Enclosed for e-filing is the Response of CSX Transportation, Inc. to the Reply.
Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer, Esq.
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35312

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

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

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Counsel for CSX Transportation, Inc.

Dated: March 22, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35312

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

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DIVISION/IBT, AND AMERICAN TRAIN DISPATCHERS ASSOCIATION

CSX Transportation, Inc. (“CSXT”) responds to the Reply of the Brotherhood of Railroad Signalmen, Brotherhood of Maintenance of Way Employees Division/IBT, and the American Train Dispatchers Association (jointly referred to as “Labor”) filed on March 5, 2010 (the “Reply”). The Reply has been filed to the “Response” filed by CSXT on February 24, 2010.

In *Maine, DOT-Acq. Exemption, Me. Central R. Co.*, 8 I.C.C.2d 835, 836-837 (1991) (“*State of Maine*”), the Interstate Commerce Commission (the “ICC”) concluded:

Under § 10901, we have exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a State) where the common carrier rights and obligations are also to be transferred, in whole or in part. *See Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 135 (1980), *aff’d*, *Simmons v. I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982) (*Common Carrier Status of States*). Here, however, no common carrier rights or obligations are being transferred. Rather, both parties agree that MEC retains the common carrier obligation and that it could not cease to offer service on the line without ICC permission.

(footnote omitted). Shortly after *State of Maine*, the ICC addressed the question of whether an entity was a rail carrier in *Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut*, 8

I.C.C.2d 280 (1992) (“*P&C Dock*”). The ICC decided to apply two tests to determine whether a rail carrier was involved: “(1) does the defendant conduct rail operations; and (2) does it “hold out” that service to the public.” *Id.* at 290. In compliance with the *P&C Dock* precedent, for the acquisition of the assets from CSXT by the Massachusetts Department of Transportation (“MassDOT”) proposed in this proceeding as identified in previous pleadings to be subject to the jurisdiction of the Surface Transportation Board (the “Board”) under 49 U.S.C. §10901, the Board must conclude that MassDOT does conduct rail operations and does hold out that service to the public. MassDOT is specifically precluded by the agreements that it has entered with CSXT from conducting rail freight operations and from holding itself out to the public to conduct rail freight operations. MassDOT will not become a rail carrier and therefore its acquisition from CSXT does not fall within the jurisdiction of the Board under section 10901.

A. MassDOT is not acquiring the right or obligation to provide freight service.

1. CSXT agrees with Labor that the “labeling” of assets being acquired does not determine the Board’s jurisdiction. Instead, as Labor argues, the Board should focus on the property being acquired by MassDOT and the property being retained by CSXT. The property being acquired by MassDOT will not permit MassDOT to conduct common carrier freight operations. Instead, CSXT is retaining all of the property rights necessary to conduct regulated common carrier freight operations. See the Definitive Agreement at Section 1.1, page 2, which states that “Not included in the Railroad Assets are [CSXT]’s reserved, retained, perpetual, easement to provide rail freight service and for such other rights over the Railroad Lines as may be mutually agreed to....” The assets being transferred to MassDOT do not include the right to conduct rail freight operations, nor the right for MassDOT to hold itself out as providing

common carrier freight service to the public.

2. CSXT's Response was not contrary to *State of Maine*. Labor has used the "labeling" argument it disdained in section A.1. of the Reply to disparage CSXT's Response as being contradictory to MassDOT's Motion to Dismiss. Labor is wrong. CSXT is in complete agreement with MassDOT as to the regulatory and jurisdictional treatment that should be accorded the proposed transaction.

Regardless of the characterization of the assets being sold from CSXT to MassDOT, CSXT is not selling and MassDOT is not acquiring the essence of a railroad regulated by the Board, the right to provide common carrier freight service and the right to hold out the provision of that service to the public.

3. Labor argues that there is no precedent for the proposition that the Board lacks jurisdiction over the transfer of certain assets by a railroad to a public entity, where the railroad retains certain other assets, including the right and obligation to provide common carrier freight service. However, to be a carrier, an entity must be engaged in transportation, including the common law concept of "holding out" to transport the property or person of anyone who might elect to use the service. *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 (1927). "This is an objective test and depends not upon the corporate charter or declared purposes, but rather on what the company does. *United States v. California*, 297 U.S. 175 and *Status of Bush Universal, Inc.*, 342 I.C.C. 550." *United Transp. Union v. Bessemer & L. E. R. Co. & Pac.*, 342 I.C.C. 849, 855 (1974). MassDOT does not desire to, and cannot hold itself out to transport property pursuant to the terms of the Definitive Agreement, and "the Board does not have jurisdiction under this part over mass transportation provided by a local government authority." 49 U.S.C.

10502(c)(2).¹

Precedent does support the position of MassDOT and CSXT, and underlies the rationale in *State of Maine*.

4. Labor also argues that because CSXT must obtain consent from MassDOT to transfer its right to serve shippers to the Massachusetts Coastal Railroad, LLC (“Mass Coastal”) and any other freight railroads, that MassDOT could approve freight service providers on the lines it is acquiring and that therefore, MassDOT is acquiring rail lines. Again, Labor is using labels when it believes it is in its best interests. However, as CSXT and Labor agree, the issue before the Board is not the label, but the underlying analysis.

As a general proposition, the owner of property has the right to approve a successor user of that property. However, consent to the assignment of the use of property is not freight operation and is not holding itself out to the public as a freight provider, the indicia of a rail carrier. With regard to Mass Coastal, MassDOT has approved the assignment of CSXT’s retained permanent freight easement as part of the overall transaction. CSXT and Mass Coastal will continue to provide common carrier freight service until either assigns its rights to a third party or abandons the property. If MassDOT does not consent to the assignment, CSXT or Mass Coastal, respectively, will have the option of continuing to provide common carrier freight service, finding an acceptable assignee, or ceasing to provide common carrier freight service upon obtaining abandonment authority from the Board. Were MassDOT to seek to provide the common carrier freight service, it would need to obtain the requisite authority from the Board

¹ The term “under this part” identifies 49 U.S.C. Part A, which includes 49 U.S.C. §10901. Hence, Labor’s argument that section 10502(c)(2) does not apply to section 10901 is contradicted by the specific language of the statute.

and the Definitive Agreement would have to be amended. As the transaction has been structured ownership of the assets by MassDOT does not give MassDOT the ability to provide common carrier freight service and does not indicate that MassDOT is holding itself out to provide common carrier freight service.

B. The Board does not have jurisdiction over mass transportation provided by a local government.

Labor does not address all of the specific language in section 10502(c)(2), which provides that “the Board does not have jurisdiction under this part over mass transportation provided by a local government authority.” Subtitle IV of title 49 of the United State Code is divided into Parts A, B, and C. Part A governs the regulation of railroads. Section 10901 is within Part A of subtitle IV of tile 49. Section 10502(c)(2) denies the Board jurisdiction “under this part” over “mass transportation provided by a local government authority.” The language of section 10502(c)(2) is clear that the Board does not have jurisdiction under section 10901 over the acquisition of a “railroad line” when it involves “mass transportation provided by a local government authority.”

Labor argues that because CSXT and Mass Coastal will continue to operate the lines, that the exception of section 10502(c)(2) does not apply. However, MassDOT is only acquiring the right to provide “mass transportation.”² MassDOT is not acquiring the right to be engaged in the transportation of property, or the common law concept of “holding out” to transport property.

C. Common Carrier Status of States and State of Maine are consistent.

² MassDOT already provides mass transportation on some of the properties being acquired from CSXT. The assets being acquired on those properties are to further MassDOT’s existing mass transportation, and the exception applies to those assets as well.

In *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132 (1980) (“*Common Carrier Status of States*”), the ICC was faced with the issue of States trying to preserve rail freight service over lines that had been abandoned or authorized for abandonment. *Id.* at 132. At page 138-139, the ICC concluded that

When a State has not held itself out to be the operator of a line and thus has not incurred a duty to the public, the common carrier duty to provide and maintain service should be only on the operator.

State of Maine adopted the logic of *Common Carrier of States* when it concluded that “however, no common carrier rights or obligations are being transferred.” As in *State of Maine*, CSXT is not transferring common carrier rights or obligations to MassDOT. CSXT has “retained, perpetual, easement to provide rail freight service and for such other rights over the Railroad Lines.” Definitive Agreement at Section 1.1, page 2.

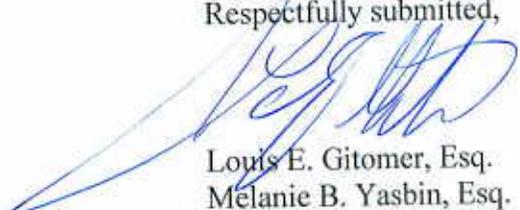
Labor’s contention that *Common Carrier Status of States* is inconsistent with the conclusion of *State of Maine* is wrong. The two decisions are entirely consistent, and CSXT and MassDOT have followed the precedent established to structure their transaction. MassDOT is not providing common carrier freight service and is not holding out to provide service to the public. CSXT has retained these obligations in the Definitive Agreement.

CONCLUSION

CSXT respectfully requests the Board to grant the Motion to Dismiss filed by MassDOT. MassDOT will not become a common carrier by railroad as the result of its acquisition of the CSXT Property through the proposed transaction. Through the permanent freight easement, CSXT will retain property rights, including the common carrier obligation, which will leave CSXT as the common carrier on the CSXT Property while MassDOT remains a public mass transportation provider, not subject to the jurisdiction of the Board.

Respectfully submitted,

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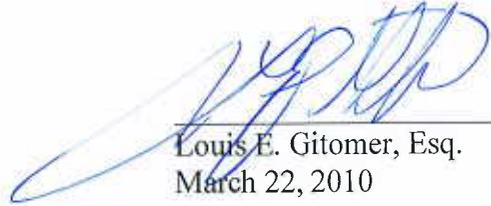
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Counsel for CSX Transportation, Inc.

Dated: March 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically or by first class mail, postage pre-paid on the parties of record to this proceeding.



Louis E. Gitomer, Esq.
March 22, 2010