

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35110

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

BROTHERHOOD OF RAILROAD SIGNALMEN'S
OPPOSITION TO MOTION TO DISMISS NOTICE OF EXEMPTION

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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 (“CSXT”), opposes the motion filed by the Florida Department of Transportation (“FDOT”) for dismissal of FDOT’s notice of exemption for its acquisition of a segment of CSXT line north and south of Orlando, Florida (from DeLand to Poinciana). This transaction involves FDOT’s acquisition of an active rail line that is part of the interstate rail system and that will still be used by CSXT and by Amtrak 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.

FDOT argues that the Board should nonetheless dismiss the notice of exemption because CSXT will “retain” a so-called “operating easement” for freight transportation on the line conveyed. It is asserted that even though the State will own and control the acquired line segment that will continue to be used in interstate commerce, there is no transaction for the Board to approve or exempt since CSXT will continue to serve the freight shippers located on the line and on branch and feeder segments that CSXT will still own that join the line. FDOT contends that although it will be acquiring a rail line that is part of the interstate system, a transaction that is otherwise within the STB’s jurisdiction and subject to its approval, the device of CSXT’s retention of an “operating easement” for serving shippers on the line negates the clear requirements of the ICA. In making this argument, FDOT has relied on the decision in *State of Maine-Acq. and Op. Exemption*, 3 ICC 2d 835 (1991), and subsequent decisions which followed *State of Maine*.

FDOT’s motion should be denied because it is contrary to the ICA. To the extent that FDOT has relied on the *State of Maine* line of cases, BRS respectfully submits that those cases were wrongly decided and should not be followed. 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 rail transportation without STB approval or exemption is fundamentally at odds with the Act. The Act gives the STB exclusive jurisdiction over transactions involving rail lines used in interstate commerce; and it also comprehensively lists numerous types of transactions involving rail lines. The Act was broadly drawn, has been expansively construed, and been repeatedly 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 by use of a contractual arrangement that was created for the purposes of evading STB jurisdiction. And the Board should not allow use of a contractual device to permit the owner of a line used in interstate rail transportation to escape classification as a rail carrier and coverage of other Federal railroad laws applicable to rail carriers that rely on the ICA's definition of rail carrier—like the Railway Labor Act, Railroad Retirement Act, Railroad Unemployment Act and Federal Employer's Liability Act.

BRS recognizes that, starting with *State of Maine*, the ICC, and then the STB, 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 the Board has permitted ever larger sales, and sales of very active lines through this extra-statutory device. But the Union notes 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* line of cases, 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. The State of New Mexico acquired over 300 miles of active

interstate rail lines through this device. Now, the State of Florida seeks to evade STB jurisdiction, the requirements of the ICA and rail carrier status under the Federal railroad laws in acquiring a very active piece of a CSXT main line that will continue to have both overhead and local freight movements and multiple daily Amtrak trains, where CSXT will continue to own branch and feeder lines off the conveyed line and will continue to gather freight from shippers on those branch and feeder lines. In none of the *State of Maine* line of cases was there briefing as to whether the agency can allow use of a contractual “operating easement” to defeat Congress’ jurisdictional mandate for the Agency; in none of those cases was the legitimacy of the *State of Maine* approach litigated. And none of those cases has been appealed; so the doctrine relied on by FDOT has not been sanctioned by any court of appeals. This is especially significant because this line of cases conflicts with appellate precedent on point: *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533 (2nd Cir. 1983). 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.

As will be shown below, this is a particularly appropriate case for the Board to reexamine its decisions in this area. That is because it exemplifies the problems with allowing states to acquire rail lines without STB approval and permitting the evasion of ICA jurisdiction and application of the Federal railroad laws to the acquired lines and the people who work on those lines. Documents obtained during the State of Florida’s consideration of enabling legislation for the acquisition reveal that from the outset of planning through the final structuring of the enabling legislation, a major goal of FDOT, and a significant motivation for the structure of the transaction as an attempted non-carrier/non-ICA acquisition, was avoidance of unionized rail workers and even evasion of the Federal railroad laws.

Because the proposed acquisition is subject to the Board’s jurisdiction, FDOT’s arguments

for dismissal are contrary to the language of the Act and applicable decisional precedent. FDOT's plan is simply a scheme to evade application of the Federal railroad laws on a line of railroad that will still be used in interstate rail transportation, FDOT's motion for dismissal should be denied.

FACTS

By the proposed transaction FDOT would acquire from CSXT a segment of the CSXT line between Deland and Poinciana, through a transaction by which FDOT would acquire the line segment, but would ultimately convey it to a collection of local governments that would assume responsibility for the line and for operation of planned commuter rail service on that line. FDOT Motion at 2-3.¹

Although CSXT would sell the line to the State, CSXT would continue to operate overhead trains on the line, and would still own branch and feeder lines off the conveyed line segment (about as many miles of trackage as the main line segment to be conveyed); and CSXT would continue to serve and obtain traffic from shippers on the branch and feeder lines. Amtrak trains would also continue to operate over the conveyed line segment. *Id.* at 3-5, 7-8. As part of the plan, the DeLand-Poinciana line segment would be "double-tracked" and its signal system would be substantially upgraded. *Id.* at 4, 9-12.

Under FDOT's plan, all signal, maintenance of way and dispatching work would become the responsibility of FDOT and later the local governments. *Id.* at 8-9. This would occur even though

¹ However, in filings with the Federal Railroad Administration for a Federal High Speed Rail/Inter-City Passenger Rail grant for use on this line, FDOT described its grant request as one for funding for acquisition and improvement of 61 miles of a CSX Transportation rail line north and south of Orlando (Deland to Poinciana) that would be for intercity passenger rail operations between Orlando and Jacksonville. Declaration of Gus Demott ¶14 and Demott Ex. 4. Thus, in seeking to evade STB jurisdiction, FDOT has described the plan for the line as one for commuter rail operations; but in seeking money from the FRA, FDOT has described the plan for the line as one for Inter-City Passenger Rail operations. In other words, FDOT's description of the nature of the plan varies with the forum and the advantages to be gained by differing descriptions.

CSXT would continue overhead and local train movements on the line, pursuant to the d “operating easement”, and even though the BRS-CSXT collective bargaining agreement reserves signal work on that line to BRS-represented Signalmen. FDOT plans to engage a non-rail contractor for the signal upgrade work, and non-rail contractors for the signal maintenance, maintenance of way, dispatching, train movement and maintenance of equipment work for the commuter rail operation. If FDOT and/or its signal contractor are not rail carriers, then employees on the line will not only lose union representation under the Railway Labor Act, and coverage under a railroad industry collective bargaining agreement, they will also not be covered by the Railroad Retirement Act. Demott Dec. ¶¶5-7. ²

As the Florida legislature considered enabling legislation necessary for the line acquisition, BRS suggested amendments that would insure that FDOT and/or an operator and/or a signal contractor for the line segment would be rail carriers, and that the work would be railroad workers. However, such efforts were repeatedly rebuffed by FDOT. Accordingly, under the FDOT plan and enabling legislation, as a result of the sale and transfer of responsibility for Signal work, approximately 8 Signalmen would be displaced and would have to move in order to continue working; 50-75 signal construction jobs necessitated by the upgrade work, otherwise reserved to CSXT signalmen under the BRS-CSXT agreement, would be filled by other persons; and 10-15 regular Signal Maintainer jobs on the upgraded line, otherwise reserved to CSXT signalmen under the BRS-CSXT agreement, would be held by persons other than BRS-represented Signalmen. And because the employers of the workers who do signal work would not be carriers, their employees

² Under the definitional/scope provisions of the Railway Labor Act, Railroad Retirement Act and Railroad Unemployment Act, employers are covered by those laws if they are rail carriers under the ICA/ICCTA, and workers are employees covered by those laws if they are employed by rail carriers. 45 U.S.C. §151 First, 45 U.S.C. §231(a)(1), 45 U.S.C. §351 (b). So workers who might perform signal or maintenance of way work for non-rail entities will not be covered by the Federal Railroad laws and not covered by RLA collective bargaining agreements.

would not be covered by the Federal Railroad laws, or RLA collective bargaining agreements. Demott Dec. ¶¶5-8.³

During the course of debate on enabling legislation for the line acquisition, BRS learned that FDOT is not merely resistant to efforts to insure that railroad work on the line would be done by railroad workers, FDOT has been openly hostile unionized railroad workers and was affirmatively planning to avoid railroad workers and to use non-rail/non-union contractors. BRS obtained notes of the FDOT Secretary's meeting with CSXT regarding plans for this transaction which stated: "Ideally, the FDOT proposal would provide the freedom to undertake the operations and maintenance of the corridor using non-union contract labor, which would be the most cost effective and efficient approach". See Demott Dec. ¶11 and Ex. 2. Additionally, FDOT recently held seminars and training for entities that contract with FDOT that included a lecture, training and supporting materials on "union avoidance" by a consultant who specializes in combating unions. See training schedule and powerpoint presentation, Demott Dec. ¶12 and Ex. 2. Additionally, in a belated response to a public records information request, FDOT produced copies of some 8,000 FDOT e-mails dealing with this transaction that were inexplicably sent under headings of "pancakes", "french toast" and waffles". Some of those e-mails addressed whether workers on the line would be covered by the Federal Railroad laws. For example, there were e-mails that were communications between FDOT and CSXT and FDOT and its consultants regarding proposed amendment of the enabling legislation to provide some form of a potential priority of employment or consideration for employment (albeit weak) for existing rail workers. Even the limited proposals under discussion

³ Coincident with passage of the Florida enabling legislation, FDOT wrote to the President of the Florida Senate stating that the signal work on the line would be done by Railroad Signalmen. While FDOT has subsequently talked about assigning signal maintenance work to Railroad Signalmen, FDOT has not followed-through with its commitment to date, and FDOT has said nothing about the performance of signal construction work by railroad workers. Demott Dec. ¶16.

were rejected by Florida, but the discussions about the proposal are revealing. Especially telling is an e-mail exchange about the financial advantages of avoiding State and contractor coverage under the Federal Railroad laws and the rights and benefits they provide to railroad workers that are not available to non-railroad workers. The e-mails explained that avoidance of carrier status would mean a 12% savings in labor costs simply by evasion of the Federal Railroad laws. Also telling is a memo to FDOT's counsel asserting that if FDOT became a rail carrier it would be in breach of its agreement with CSXT. *See* Demott Dec. ¶18 and Demott Ex. 7.⁴

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

A. The Language of the Act Confers on the Board Jurisdiction over Sales of Rail Lines That Are Used for Interstate Rail Transportation; and Precedent Concerning Acquisitions of Parts of the Interstate System Holds That the Board Has Jurisdiction over Such Transactions

The Board has exclusive jurisdiction over transportation by rail carrier over a line of railroad

⁴ In some forums, FDOT and its representatives have asserted that it is not truly opposed to having work on the acquired line performed by union rail workers, that the notes of the meeting between FDOT's Secretary and CSXT were of a meeting involving the predecessor to the current Secretary, and that work on the line will be assigned by a supposedly fair competitive bid process. However, the plan has not been altered with the change at the top of FDOT. Furthermore, FDOT's recent sponsorship of "union avoidance" training at a State sponsored educational seminar for contractors reveals that hostility to union workers is current and culturally embedded at FDOT. And any doubt in this regard is certainly shown by Florida's rejection of even very limited priority consideration for current workers on the line and the express acknowledgment in the e-mails that the transaction was structured with the goal of avoidance of the Federal Railroad laws to obtain a 12% reduction in costs. The memo regarding structuring of the transaction to avoid the Federal Railroad laws also undermines the assertion that FDOT contemplates an open and fair competitive bid process for carriers and non-carriers, because rail carriers and rail workers would be at an immediate 12% cost disadvantage against non-rail carriers and non-rail workers solely because rail carriers comply with the Federal Railroad laws whereas other bidders would avoid compliance with Federal laws covering railroad workers as a result of the manner in which FDOT structured the transaction.

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).⁵ 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).⁶ Thus, if 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.⁷

⁵ 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)

⁶ Section 10102 provides

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

⁷ *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.

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.⁸ *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. 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.

⁸ 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).

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”.

Section 10501(c) does remove from the Board jurisdiction over mass transportation provided by a local government authority. This limited exemption of state and local governments from STB jurisdiction has been cited by some as a basis for STB rejection of jurisdiction over line sales to states that are coupled with contractual operating easements for the selling railroad. But ICA 10501(c) does not exempt the non-mass transportation rail activities of local government authorities from the Board’s jurisdiction (*e.g.* provision of intercity rail transportation, freight service and ownership of rail lines used in interstate rail transportation). The exemption of intrastate, mass transportation activities of State and local governments from STB jurisdiction does not support denial of Board jurisdiction over a State’s acquisition of a rail line still to be used for interstate rail transportation just because the State/local government’s own use of the line is intended to be for commuter rail service. By its plain terms, this provision only removes the mass transportation operations of States and local governments 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 still to be used in interstate rail transportation; only mass transportation operations have been placed outside the Board’s jurisdiction. Thus, purely intrastate mass transportation activities of State and local governments or their contractors over lines that are owned by rail carriers (like the Class I carriers and Amtrak) are not subject to STB jurisdiction; but the Board still has jurisdiction when a State or local governments seek to buy a line that will continue to be used for interstate rail transportation.

The limited nature of the Section 10501(c) exemption also shows that State and local

governments and their contractors do not have to become rail carriers merely by providing intra-state commuter rail service if all they do is provide that service. As is the case in many commuter rail operations, a State or local government authority can enter a trackage rights arrangement where commuter rail service is provided on lines still owned by a rail carrier that will continue to be responsible for maintenance, repair and upgrading of the lines and the signal system. In that event, the mass transportation exemption applies, and there is no other grounds for STB jurisdiction. But when a State or local government seeks to buy a line that will continue to be used for interstate rail transportation, Section 10901 applies and the exemption for purely mass transportation activities does not apply. In that circumstance, the Board would not be regulating the mass transportation activities of the State or local government; rather, the Board would be exercising its jurisdiction over sales of rail lines that are part of the interstate rail system. The key point here is that a State or local government can make a choice; it can legitimately avoid Board jurisdiction (and carrier status) by entering a trackage rights arrangement; but if it chooses to buy a line that is part of the interstate system, then it chooses to subject itself to Board jurisdiction. So by eschewing a trackage rights arrangement and utilizing the sale/operating easement device, the State foregoes the legitimate Section 10501(c) exemption from STB jurisdiction and instead uses an extra-legal scheme to avoid jurisdiction. The availability of a legitimate method for a state or local government authority to initiate commuter rail service without common carrier status provides additional support for rejection of the sale/operating easement device as a method to avoid Board jurisdiction.

B. Precedent Concerning State/Local Government Acquisitions of Rail Lines Still Used for Interstate Rail Transportation Holds That the Board Has Jurisdiction over Such Transactions

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 instead it engaged an operator that would perform all the rail functions would “assume[] the entire burden of operating the line”,and would have full common carrier obligations. *Id at 137. 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 an active of 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. The Commission noted that by acquiring an active line, the City assumed a common carrier obligation and would retain that obligation even if it contracted with someone else for operation of the line. 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 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”.

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 City 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 (2nd 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 FDOT-CSXT transaction are not distinguishable from the SIRTOA case in any meaningful way.⁹ Just as in the SIRTOA cases, in the instant case a State entity would own a line still used for interstate freight transportation, but the State entity's own operations would be intrastate commuter service; and in the instant case as in the SIRTOA cases, a carrier would continue to provide interstate freight service on the line (in SIRTOA by trackage rights, here by an operating easement): and, as in the SIRTOA cases, FDOT's ownership of a piece of the interstate rail system means that it is "engaged in such transportation by

⁹ It has been asserted by some that the SIRTOA cases are distinguishable from the *State of Maine* line of cases because the ICC and court noted that SIRTOA had a public convenience and necessity certificate. But this argument begs the question here. SIRTOA had a certificate of public convenience and necessity because it was a rail carrier and the ICC had jurisdiction over it. The existence of the certificate was a result of the decision on carrier status. That there were no certificates in the *State of Maine* line of cases only reflects the erroneous holding of lack of jurisdiction and the mistaken conclusion that carrier status did not attach to ownership of a part of the interstate rail system.

railroad subject to the Interstate Commerce Act”.

C. ICCTA Amendments and Other Agency Precedent Concerning the Scope of the Board’s Jurisdiction Support Assertion of Jurisdiction in this Case

FDOT’s argument for a restrictive reading of the Board’s jurisdiction is also at odds with 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 (5th 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 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. FDOT may say that these cases only concerned attempts by state and local governments to assert authority over small segments of track and ancillary rail services, but if the Board has exclusive jurisdiction over removal of crossings or removal of a switch, the Board surely has exclusive jurisdiction over the sale of a rail line that is an active part of the interstate rail system.

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 FDOT-CSXT TRANSACTION IS SUBJECT TO THE BOARD'S JURISDICTION AND MUST BE APPROVED OR EXEMPTED FROM APPROVAL BY THE BOARD

BRS submits that, under the language of the Act, and the precedent discussed above, the FDOT-CSXT transaction is subject to the Board's jurisdiction and must be approved by the Board, or exempted from such approval. FDOT would own a line of railroad that is within a state but is part of the interstate rail network and is used for the provision of interstate rail transportation for shippers on the line; FDOT will be providing railroad transportation for compensation to any potential passengers on lines that are part of the interstate rail system; the line will still be used for interstate railroad transportation; and not only will the FDOT own the line, it will be responsible for maintenance of the line and signal system, and for dispatching. This transaction is a conveyance of a line that will continue to be used for interstate rail 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.

Furthermore, FDOT 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. FDOT Motion at 13. But FDOT 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. FDOT Motion at 13-15. Thus, FDOT 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 Maine's acquisition of 15 miles of line within the State 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 without STB approval or exemption 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. Under the Act: 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.¹⁰

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 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. It is simply specious to say that a contract to operate or trackage rights arrangement on part of the interstate system requires Board approval, but sale of part of that system does not. Furthermore, in *Massachusetts Coastal Railroad LLC-Acquisition-CSX Transportation Inc.*, F.D. No. 5314 (3/29/10) , the Board held that conveyance of an operating easement constituted conveyance of rail property that cannot occur without Board approval or exemption. *Id. at 3.* If a right to serve shippers on a line cannot be transferred without Board approval or exemption, then an actual rail line which carries interstate rail traffic cannot be transferred without Board approval or exemption. Thus, the assertions that the Board lacks

¹⁰ 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 retention of an operating easement does not change the fact that the underlying arrangement is one whereby a non-carrier acquires an active 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. As owner of the line, Maine DOT like the City of Austin had an underlying common carrier obligation regardless of whether Maine DOT contracted with Maine Central to serve shippers on the line by operating easement.

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 notion that there is a newly discovered exception from STB jurisdiction for sale of rail lines when a sale is coupled with freight operating easements is not only without support in the Act, and contrary to its plain terms, it is also contrary to the history of the Act and its predecessors. The 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. Thus, there was no statutory basis for the fundamental predicate of the *State of Maine* decision.

The characterization of these transactions as mere sales of property, and the use of the “operating easement device” does not change anything. Proponents of the *State of Maine* line of cases argue that a rail line is not a singular thing but rather a bundle of rights that can be parsed out among various entities without involvement of the Board so long as the duty to provide freight service to customers does not change hands. They assert that because the right/duty to transport freight is retained by the selling freight railroad, there is no transaction for the Board to approve or exempt. They claim that the Board only has jurisdiction over conveyance of the right/duty to serve

shippers, not conveyance of the line itself. But there is no statutory basis for differentiating between acquisition of a line, and acquisition of the land that is the right of way, and the rails, ties, ballast and signal system that together constitute the line over which rail service is provided. And 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. Nor does the freight railroad's retention of the right/duty to serve shippers on the line remove the sale of the line on which such service is provided from the Board's jurisdiction. Physical existence of the line is necessary for provision of common carrier service, so ownership of the line is integral to that service such that ownership of the line cannot be conveyed without Board approval or exemption from approval.

Similarly, the Board's assertion of jurisdiction over conveyance of an operating easement (or continued jurisdiction over a carrier that retains freight service rights on a line conveyed) does not somehow divest the Board of jurisdiction over conveyance of the rail line on which freight service will be provided. Even if an operating easement for the freight railroad to serve shippers on the line is deemed a contractual arrangement that excuses the State from having to serve those shippers (so long as the selling carrier serves those shippers), the sale of a line subject to a retained operating easement for freight work is still a transaction within the Board's jurisdiction that may be effected only by STB approval or exemption under Section 10901 because there is still a sale of a rail line used for interstate rail transportation. Ownership of the line and the obligations to maintain the line and its signal system are fundamental to the ability for anyone to provide service on the line because it is the physical line that actually enables rail service. Saying that the State is not acquiring the line for the purpose of engaging interstate rail transportation does not mean that the transaction is outside STB jurisdiction because the freight railroad needs the line to serve the shippers. Ownership of the

line therefore carries obligations under the ICA and transfer of ownership therefore requires STB approval or exemption from approval. That is why the Commission and Second Circuit in the SIRTOA cases held that SIRTOA had a residual common carrier obligation even though the selling carrier had contractually retained the right and duty to serve shippers on that line. And the fact that the ability of the freight railroad to continue to provide service in that case was by retained trackage rights whereas here the mechanism would be a retained operating easement is without significance because those mechanisms are just two different methods of providing service over a line owned by someone else and in each case the freight railroad's ability to continue to provide service is subject to State ownership of the line. The sale of railroad property used for interstate railroad transportation is simply not a transaction that exists outside the comprehensive and exclusive jurisdiction of the STB.

FDOT and proponents of the sale/"operating easement" scheme tell the Board that it should not worry about the disappearance of the line from the Board's jurisdiction 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.* FDOT Motion to Dismiss at 7-10,16,22. 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 same principle applies here; the Board cannot forfeit its statutory jurisdiction because FDOT and CSXT have entered a contract that they believe renders STB jurisdiction and oversight unnecessary.

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 the Southeast, the parts of its former main lines on which to do so could become subject to multiple State owners (*e.g.*, North Carolina, South Carolina, Georgia and Florida) 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 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, and the competence and professionalism of their respective contractors. Each state could impose different operating windows and dispatching practices. While CSXT would remain committed to providing for shipment of goods between Norfolk and Miami, 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.

By continuing to follow the *State of Maine* line of cases, the Board would be encouraging 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 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 FDOT 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 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*, FDOT would own a line of railroad that is connected to the interstate rail network, and is used for interstate rail transportation; FDOT 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. In the *SIRTOA* cases the freight railroad continued freight service by trackage rights; here the freight railroad would continue service by operating easement. While a different arrangement for continuing freight service would be used here, there is no meaningful difference in the responsibilities of the State entities and the freight railroads in the two cases. As was held in the *SIRTOA* cases-- a state agency that owns a line that is part of the interstate rail system that is used for interstate rail transportation has a "latent" common carrier obligation; it is required to maintain the line, and it has 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. *See also City of Austin* - City "will retain this common carrier obligation regardless of whether it operates the line itself or arranges by contract for someone else to operate it". 1986 WL 1166762 *1.

That FDOT and CSXT have agreed that CSXT will have all the freight transportation responsibilities does not matter. FDOT and CSXT cannot by agreement limit the scope of FDOT's statutory responsibilities; they cannot contract away FDOT's obligations as owner of the line; they cannot relieve FDOT 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.¹¹

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 would “assume[] the entire burden of operating the line”, and would have full common carrier obligations. 363 ICC at 137-138.

Under the holding in *Common Carrier Status of States*, the Board’s rejection of FDOT’s motion to dismiss, and assertion of jurisdiction over the line sales would not necessarily mean that the FDOT or any of its agencies would have to become a rail carrier. FDOT could contract with a rail carrier or rail carriers for them to perform 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). Under *Common Carrier Status of States*, if FDOT merely owned the line but contracted with a rail carrier(s) for the performance of all of the rail carrier functions for the line, neither FDOT nor the local governments would have to be considered rail carriers because a rail carrier or rail carriers would have full responsibility for the line. The 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(s) that would perform all the rail functions and would have full common carrier

¹¹ 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*.

obligations, then the State would not be considered a carrier. On the other hand, if the State assumed responsibility for such functions, it would have to be treated as rail carrier. So, if FDOT contracts with a rail carrier(s) for them to perform all the railroad functions on the lines it owns, under *Common Carrier Status of States*, FDOT need not be deemed a rail carrier. But here, FDOT explicitly does not plan to contract with a carrier or carriers; under the FDOT plan, it does not intend to be a carrier and does not intend that its contractor or contractors will be carriers. The exemption from carrier status and agency jurisdiction in *Common Carrier Status of States* is therefore inapplicable to FDOT.

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.

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 FDOT'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. FDOT'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

FDOT has noted (Motion to Dismiss at 13-17, 21-23) 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*; 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).¹² BRS respectfully submits that decisions that merely restated the decision in *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, and dismissing significance of prior decision describing Riffin as a carrier, noting that in the 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 concluding that the sale/ “operating easement” device negated application of Section 10901, or for the exclusion of such transactions from ICC/STB

¹² 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.

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 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.

The instant case is clearly one in which the Board should make a break from the *State of Maine* line of cases. This case not only allows the Board to recognize the lack of legal foundation for those decisions, this case also exemplifies the problems with the use of the sale/“operating easement” device, and it illustrates the unsavory motivations behind use of that device. Here the Board can see the expansive effects of what was once seen as a method to allow a State to preserve freight service on a potentially abandonable line where there was only the suggestion that commuter rail service might begin some day, and the selling freight railroad continued to be responsible for all rail functions for the line. Now, in the Central Florida transaction, the line in question is a very active

line that could not possibly have been abandoned; the selling carrier will continue to run overhead traffic on the line, it will also continue to have substantial local movements on the line and will continue to own the branch and feeder lines that appear to collectively amount to about as much track mileage as the line to be conveyed. The transaction proposed here is many, many steps removed from the one sanctioned in *State of Maine*. For its part, CSXT will have significant continued use of the line, plus the benefit of an upgrade in line quality, but will no longer be obliged to maintain the line and its signal system. As result, although CSXT has a collective bargaining agreement with BRS that reserves signal work on the line to Signalmen, and although CSXT will continue use of the line, the sale/“operating easement” device will allow CSXT to escape that agreement for this track segment without compliance with Railway Labor Act processes.

The actions and goals of FDOT in this transaction are also telling. FDOT went into this transaction planning to replace unionized rail workers with non-union, non-rail workers; the FDOT Secretary’s notes make this clear. Demott Dec. ¶11 and Demott Ex.2. And, as is shown by the FDOT sponsored “union-avoidance” seminar, the Secretary’s notes are not mere isolated musings of a former Secretary, but a matter of basic policy for FDOT. Demott Dec. ¶12 and Demott Ex. 3. Additionally, the memorandum of FDOT’s counsel regarding proposals to use railroad workers on the line (Demott Dec. ¶18 and Demott Ex. 7) shows that FDOT resisted carrier status for it and its contractors, and rejected continued use of rail workers, because of an analysis that there would be a 12% advantage in labor costs by use of non-rail contractors with non-rail workers through avoidance of the Federal Railroad laws that cover railroad workers. This memorandum demonstrates that a prime motivation (if not the prime motivation) for the motion for dismissal is so that FDOT can purchase a line that is part of the interstate rail system in a way that FDOT and its contractors can escape coverage under laws that otherwise apply to workers on rail lines that are used for interstate rail transportation. Of course, FDOT and its contractors would not be covered by the

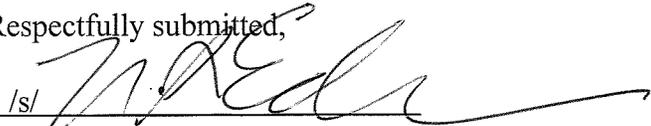
Federal Railroad laws if the commuter rail service merely obtained operating rights on CSXT's track, or if FDOT bought a line that would no longer be used for interstate rail transportation. But FDOT wants it both ways; it wants to own a line that is still used for interstate rail transportation, but it wants the State/local governments and their contractors to be free of the statutes that apply to owners/operators of interstate rail lines. This in turn highlights the problem that has developed under the *State of Maine* line of cases. The Board's jurisdiction and processes are being manipulated by artificial constructs that are contrary to the ICA for the purpose of evasion of the Federal Railroad laws. The Board should put a stop to that practice in its decision in this case.

CONCLUSION

BRS respectfully submits 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. FDOT's motion for dismissal must therefore be denied.

Respectfully submitted,

/s/


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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served copies of the foregoing Opposition to Motion to Dismiss Notice of Exemption with supporting declaration by overnight delivery, to the offices of the following:

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April 29, 2010


/s/ _____
Richard S. Edelman

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35110

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

DECLARATION OF R.G. DEMOTT

I, R. G. Demott, declare under penalty of perjury that the following is true and correct and based on personal knowledge.

1. I am the General Chairman of the Southeast General Committee 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 Signalman, 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. BRS and CSXT are parties to a collective bargaining agreement covering Signalmen employed by CSXT.

2. The Southeast General Committee is responsible for administering and enforcing the collective bargaining agreement between BRS and CSXT. The Southeast General Committee is generally responsible for providing representation for CSXT Signal employees represented by BRS who work on CSXT's rail lines in Florida, including the line between Miami and Jacksonville, which includes a line segment north and south of Orlando between DeLand and Poinciana, Florida.

3. In 2006, BRS became aware that CSXT was planning to sell the line segment between Deland and Poinciana to the State of Florida, through a transaction by which the Florida

Department of Transportation (“FDOT”) would acquire that line segment for operation of planned commuter rail service on that line, but the line would ultimately be conveyed to a collection of local governments that would assume responsibility for the line.

4. Inquiry and investigation into the planned transaction revealed that although CSXT would sell the line to the State, CSXT would continue to operate overhead trains on the line, and would still own rail yards and branch and feeder lines off the conveyed line segment and would continue to serve and obtain traffic from shippers on the branch and feeder lines. BRS also learned that Amtrak trains would continue to operate over the conveyed line segment. As part of that plan, the Deland-Poinciana line segment would be “double-tracked” and its signal system would be substantially upgraded.

5. BRS made inquiries into the CSXT and FDOT plans regarding signal construction and upgrade work and the signal maintenance work on the line segment to be conveyed. We learned that CSXT would not be retaining the signal work, and that all signal, maintenance of way and dispatching work would become the responsibility of FDOT and later the local governments. This would occur even though CSXT would continue overhead and local train movements on the line, pursuant to a so-called “operating easement”, and even though the BRS-CSXT collective bargaining agreement reserves signal work on that line to BRS-represented Signalmen. As a result of the sale and transfer of responsibility for Signal work, approximately 8 Signalmen would be displaced and would possibly have to move in order to continue working; 50-75 signal construction jobs necessitated by the upgrade work, otherwise reserved to CSXT signalmen under the BRS-CSXT agreement, would be filled by other persons; and 10-15 permanent Signal Maintainer jobs on the upgraded line, otherwise reserved to CSXT signalmen under the BRS-CSXT agreement, would be held by persons other than BRS-represented Signalmen.

6. After learning of the FDOT/CSXT plans, BRS made numerous efforts to meet with FDOT officials regarding plans for signal work on the Deland-Poinciana line segment; but for months our efforts were ignored or rebuffed by FDOT. We were surprised by FDOT's resistance to using Railroad Signalmen for the construction, upgrade and maintenance work on the central Florida line because hundreds of BRS Signalmen had worked on construction and upgrade of the south Florida commuter rail line and BRS Signalmen continue to perform the routine maintenance, repair and FRA inspections for that successful and very safe operation.

7. By the time we finally met with FDOT, we learned that FDOT planned to engage a non-rail contractor for the signal upgrade work, and that the signal maintenance, maintenance of way, dispatching, train movement and maintenance of equipment work for the commuter rail operation would be separately contracted-out. We also learned that FDOT planned to avoid classification as a rail carrier, that STB assertion of jurisdiction over the transaction and over FDOT would render the deal voidable; and that the FDOT contractors would not be rail carriers. This is similar to what has happened in other recent transactions where states have acquired rail lines; rather than engage railroad entities and railroad workers to perform railroad work, states have parsed out various integral railroad functions to multiple contractors who assert that they are not railroad entities.

8. The "rail carrier" status of FDOT and/or its contractors is critical to the continued and future employment of Railroad Signalmen on the DeLand-Poinciana line segment. If FDOT and its signal contractor are not rail carriers, then employees on the line will not only lose union representation under the Railway Labor Act, and coverage under a railroad industry collective bargaining agreement, they will also not be covered by the Railroad Retirement Act. This means that even if a CSXT Signalman were willing to leave CSXT to continue working on this line

segment, the employee would lose rights and benefits under the RRRA. In particular, a CSXT employee who went to work for a non-rail signal contractor would lose a “current connection” to the rail industry, and would not only no longer be covered by the Railroad Retirement Act, the employee would lose vested benefits under the RRRA.

9. Enabling legislation necessary for the line acquisition was progressed through the Florida legislature in 2008. BRS made repeated efforts to insure that FDOT and/or an operator and/or a signal contractor for the line segment would be rail carriers, and that the work would be performed by qualified and professional railroad workers covered by the Federal railroad laws. But FDOT ferociously opposed all such efforts. The proposed enabling legislation failed in 2008. Proponents of the plan renewed their efforts in 2009, but failed again in the Spring of 2009. The Florida legislature subsequently called a special session to consider new enabling legislation with modified terms in December of 2009.

10. Each time proposed enabling legislation was offered BRS sought amendments that would insure that FDOT and/or an operator and/or a signal contractor for the line segment would be rail carriers, and that the work would be performed by qualified and professional railroad workers. However, BRS was repeatedly rebuffed by FDOT. During the Special Session the Senate President proposed an amendment that could have potentially addressed BRS’ concerns, but FDOT and its allies were unrelenting in their resistance to use of unionized railroad workers on the line. The Florida House also rejected any possible amendment in the Special Session to require that signal and track work on the line be performed by rail carriers and railroad workers covered by the Federal railroad laws. *See* news articles reproduced as Demott Ex. 1.

11. During the course of debate on enabling legislation for the line acquisition, BRS learned that FDOT was not merely resistant to efforts to insure that railroad work on the line

would be done by railroad workers, FDOT was openly hostile to using unionized railroad workers and was affirmatively planning to avoid unionized workers and railroad workers and sought instead to use non-rail/non-union contractors. BRS obtained notes of the FDOT Secretary's meeting with CSXT regarding plans for this transaction which stated: "Ideally, the FDOT proposal would provide the freedom to undertake the operations and maintenance of the corridor using non-union contract labor, which would be the most cost effective and efficient approach". *See* Demott Ex. 2.

12. BRS's concern that FDOT was actively planning to avoid a unionized rail work force was heightened when we learned that FDOT recently held seminars and training for entities that contract with FDOT that included a lecture, training and supporting materials on union avoidance by a consultant who specializes in combating unions. *See* training schedule and excerpts of PowerPoint presentation, Demott Ex. 3.

13. BRS has continued to try to insure that railroad work would be done by trained, professional railroad workers, but FDOT remains hostile to those efforts and has continued to pursue a strategy to wholly exclude railroad and union workers.

14. In its filings with this Board, FDOT has said that the line it plans to acquire will be used for commuter rail operations. However, in subsequent filings with the Federal Railroad Administration for a Federal High Speed Rail/Inter-City Rail, FDOT described its grant request as one for funding for acquisition and improvement of 61 miles of CSX Transportation rail line north and south of Orlando (Deland to Poinciana) that the FRA filing said would be for intercity passenger rail operations between Orlando and Jacksonville. Excerpts, Demott Ex. 4.

15. In the December, 2009 Special Session, the Florida legislature passed enabling legislation that would allow the proposed CSXT-FDOT transaction to go forward. That

legislation was signed by Governor Crist on December 16, 2009.

16. Under the FDOT plan, if FDOT and CSXT proceed with the transaction, and the STB accepts the scheme to avoid STB jurisdiction and rail carrier status for FDOT and its contractors, 8 CSXT Signalmen would have their jobs abolished and would have to move, perhaps out of the State, in order to continue working as railroad workers, and all signal construction/upgrade jobs will be filled by persons other than Railroad Signalmen. At the time the Florida legislature passed enabling legislation for this transaction FDOT wrote to the President of the Florida Senate stating that it would work on a method for Signal work on the line to be done by Railroad Signalmen. Assuming that FDOT follows-through with that commitment, the railroad signal maintainers on the line will not be replaced, and the maintainer work would be done by railroad Signalmen. However, BRS has received no information since December affirming that commitment, and no part of the supplemental filing with the Board and no correspondence from FDOT notes that change. And, even if the maintenance work is assigned to Signalmen, that still leaves the question of who will do the construction and upgrade work, which will involve a substantial number of jobs. Will that Signal work be done by Signalmen, or persons other than Signalmen? Although we have met with FDOT regarding performance of the Signal work for the line, we have heard nothing from them about that and FDOT had previously strongly resisted use of Railroad Signalmen for the Signal construction and upgrade work.

17. To BRS and its members, this deal is a deliberately structured artifice designed to replace good union jobs that have reasonable benefits and protections under various railroad laws with a work force that does not have such rights and benefits. This will be done through the device of the motion before the Board to declare that FDOT will not be rail carrier even though it will be acquiring a line still actively used in interstate commerce by a carrier that has a collective

bargaining agreement with BRS. BRS recognizes that if there was an outright sale of the line with it to be taken out of the interstate rail system and CSXT abandonment of operations on the line, that would present a different situation. But CSXT is staying on the line, just potentially reducing the number of trains it operates daily on the line and/or rescheduling that times at which its trains operate; and Amtrak will continue to operate as it does now. The arrangement presented to the Board is nothing but a sham and a shameful scheme to exploit STB processes in order to evade existing collective bargaining agreements and unionized railroad workers.

18. Some time after the Florida legislature passed the enabling legislation for this transaction, FDOT belatedly responded to a pre-special session public information request regarding this transaction. According to newspaper reports about FDOT's response to the information request, some 8,000 e-mails concerning this transaction were sent under the subject lines "pancakes", "waffles" or "French toast". *See* Demott Exhibit 5. Opponents of the transaction, including the State Senator who made the public information request asserted that the strange use of breakfast items as the subject lines for these e-mails was a code and a deliberate effort to disguise the actual subjects of the communications and to avoid their disclosure in response to a public information request. FDOT responded by claiming that the use of breakfast items in the subject lines was actually an innocent way of flagging certain communications to the FDOT Secretary who was supposedly so besieged by e-mails that this device was used to bring certain e-mails to her attention. *See* Exhibit 6. Included among those e-mails were communications between FDOT and CSXT regarding the language of the legislation generally and effects of the Central Florida transaction on rail workers in particular. For example, there were e-mails that were communications between FDOT and CSXT regarding potential legislative language concerning a potential priority of employment or consideration for

employment for the commuter rail operation for existing rail workers that was ultimately rejected, analyses of the financial advantages of avoiding State and contractor coverage under the Federal railroad laws and the rights and benefits they provide to railroad workers that are not available to non-railroad workers, and a memo to FDOT's counsel asserting that if FDOT became a rail carrier it would be in breach of its agreement with CSXT. Copies of these e-mails are attached to this declaration as Demott Ex. 7.

19. BRS does not oppose expansion of commuter rail in Florida and does not necessarily oppose the sale of CSXT's line north and south of Orlando to FDOT. But, BRS does oppose the structure of the transaction as presented to the Board. If there is to be a sale, it should be pursuant to Board approval or exemption from approval under Section 10901 of the Act so that the persons who perform signal construction work and maintenance on the line will be railroad workers covered by the Federal Railroad laws and Railway Labor Act collective bargaining agreements. BRS opposes a sale based on the Board's denial of jurisdiction and a determination that FDOT will not be a rail carrier, even though it will own a rail line that will still be actively used for interstate rail transportation.

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

April 23, 2010



R. G. Demott

**DECLARATION OF R.G.
DEMOTT**

Exhibit 1

Angry Atwater pushed to make rail deal

By Steve Bousquet <<http://www.tampabay.com/writers/steve-bousquet>> and Marc Caputo <<http://www.tampabay.com/writers/marc-caputo>> , Times/Herald Tallahassee Bureau

Published Wednesday, December 9, 2009

TALLAHASSEE — Inside his spacious Capitol office, Senate President Jeff Atwater lost his cool as he worked feverishly to save major rail projects and keep a special legislative session from becoming a political disaster.

Running out of time as he bargained separately with fellow Republicans, Democrats and the state AFL-CIO, Atwater made a move Tuesday to secure the necessary 21 votes. He wanted a written guarantee from Gov. Charlie Crist's administration that the state is willing to try to protect the jobs of eight unionized railroad signalmen's jobs on the CSX freight corridor in Central Florida as part of the state's purchase of the track for the new SunRail commuter line.

The union guarantee couldn't be added to the bill without setting up a showdown with the House, which refused to legislate union protections. Atwater wanted a side agreement to save the jobs — in the hope it would placate the state AFL-CIO enough to win over a few Senate Democrats.

One of the most even-tempered people in the Legislature, Atwater "lashed out" in a tense phone conversation with state Transportation Secretary Stephanie Kapelousos — according to Senate Democratic Leader Al Lawson, who was in Atwater's office at the time. Kapelousos herself was weary of endless negotiations, and her cell phone mailbox was full and couldn't accept Atwater's frantic messages.

"You will do this!" Atwater told Kapelousos, according to Lawson's recollection. "What are you trying to do? I've given everything I had on this. Day and night, I haven't been sleeping, and you are screwing me around. ... If you don't do something, I'm going to lose this whole deal."

Kapelousos did write a letter to Atwater, released Wednesday, in which DOT commits in writing to "(1) eliminate the signal work from the scope of the current contract, (2) separately procure the signal work and (3) require that the bidders for the signal work be 'rail employers' under the Federal Railroad Retirement Tax Act."

Kapelousos declined to comment on her conversation with Atwater, but confirmed she wrote the letter at his request. Earlier Wednesday she said: "The Senate was working to get the votes. There were a lot of conversations."

With the letter — and what the AFL-CIO says are much larger verbal assurances from DOT on union jobs on South Florida's Tri-Rail system — the union withdrew its opposition to the rail legislation Tuesday afternoon. That freed a number of pro-union Democratic senators to vote yes.

With Atwater's intervention, the logjam was broken, resulting in a surprisingly one-sided 27-10 vote for the rail bill. It also boosts funding for Tri-Rail, sets up a new rail "enterprise" at FDOT and was passed in the hopes of improving Florida's chance to win \$2.5 billion in federal bullet train money.

Atwater, a Republican candidate for chief financial officer, could not be reached. His spokeswoman, Jaryn Emhof, said the Senate president was working to "keep the dialogue going" to bring the special session to a successful conclusion. During such moments, "you might get a little intense," Emhof said.

The result reflected a rare instance of organized labor, a bulwark of the Democratic Party, seeking a measure of relevance in a strongly Republican legislature, as it pushed a two-prong message of worker protections and rider safety.

"We've all been under a lot of pressure to try to reach a compromise," AFL-CIO President Mike Williams said. "All we've been asking for is to keep rider safety in place and protect current and future jobs on Tri-Rail and SunRail."

Like the Republicans who have long advocated the new rail projects, Williams, too, is now touting the "thousands" of new jobs SunRail will create. Doubling of the rail line will mean those jobs will be eligible for union protections.

In addition, Williams said, the leadership of the South Florida Regional Transportation Authority, which operates Tri-Rail, has agreed at its meeting Friday to keep existing protections in place for more than 100 signal and maintenance workers pending new negotiations for those jobs.

Two weeks earlier Williams accused the transportation department of "union-busting" activities for hosting a seminar for contractors seeking to keep their workplaces non-union.

An electrician by trade, Williams said he was under no illusion that labor "had that big stick" with senators over rail legislation.

"At this time, the house of labor in the state of Florida will never singularly guide and direct how legislation ends up and travels through that Capitol over there," Williams said from his office, a few blocks from the Capitol. "But coupled with allies, we can make the difference."

He gratefully acknowledged Atwater for making "every effort," along with Lawson and the bill's sponsor, Sen. Jeremy Ring, D-Margate, to get the bill passed.

Times/Herald staff writer Shannon Colavecchio contributed to this report. Steve Bousquet can be reached at bousquet@sptimes.com or (850) 224-7263.

LABOR PAINS THREATEN TO SIDETRACK RAIL DEAL

By KEITH LAING
THE NEWS SERVICE OF FLORIDA

THE CAPITAL, TALLAHASSEE, Dec. 2, 2009.....House leaders on Wednesday appeared unwilling to address concerns about passenger rail legislation raised by a major union, even as they acknowledged that labor's concerns could fracture the tenuous coalition supporting the train deal before the special session leaves the station.

The 500,000 member AFL-CIO has labeled the special session "a union-busting" effort and vowed to block attempts to approve the 61-mile central Florida commuter rail known as SunRail.

But speaking with reporters Wednesday in advance of the special session slated to start Thursday, House Speaker Larry Cretul said that he did not know if the labor tiff would tip the vote balance against the rail bill in the Senate, a chamber that narrowly voted down the plan last year.

"Certainly there have been some issues raised by labor," Cretul said after being asked if the Senate would again derail the SunRail bill if labor's concerns are ignored. "I don't know. That's a Senate issue. We're working the House side."

Supporters of the SunRail bill have always counted on some of the 14 Senate Democrats signing onto the plan to compensate for staunch fiscal conservatives in the 26 member Republican caucus who will not get on board. But several Democrats have long appeared hesitant without union approval.

Lawmakers are hoping approving a rail bill will convince federal officials to approve the state's \$2.5 billion application for the first leg of the long proposed Tampa-Orlando-Miami bullet train. The proposal on the special session agenda allows for the development of central Florida's SunRail, provides funding for south Florida's Tri-Rail and creates a statewide rail panel.

The state also has separate stimulus applications in for \$70 million for Atlantic Coast Amtrak passenger service between Jacksonville and Miami and \$432 million for buying tracks for SunRail from CSX Corp., all of which would come with strings attached protecting labor unions.

But the House sponsor the bill that will be taken up Thursday appeared to be taking a hard line on the labor issue.

"We're talking about one particular union – the Brotherhood of Railroad Signalmen," Rep. Gary Aubuchon said. "They state there are six to eight workers in central Florida whose job as signalmen would be at risk. If the agreement goes through and FDOT is responsible for operating the commuter rail portion, the responsibility for signalmen would be put out for competitive bid, as we competitively bid everything."

Aubuchon, R-Cape Coral, said that the union members would be given the choice to take other Florida jobs with CSX Corp., which owns the tracks that SunRail would run on. If they chose not to transfer to other jobs, he added, they would be given six years severance pay and if they accept jobs with other

companies, they could return to CSX within a year and not lose their seniority.

"In this environment, with over a million Floridians out of work, how many got that opportunity?" he said. "Nothing prohibits union workers and union companies from bidding. What this does is it doesn't guarantee. In this environment, I still find it remarkable...that somebody would want a guarantee that they would keep their job in perpetuity."

Aubuchon would not say the union protection language was a deal breaker, though there were newspaper reports Wednesday that several Senate Democrats who had pledged to support the plan indicated it might be.

"I'm not going to pre-suppose whether something is a deal breaker or not," he said. "We'll have to see how this thing shakes out ... the next three days. We'll have to see how that whole situation evolves. Last year that was a condition that caused problems in the Senate, and ultimately it didn't pass. I can't speak for where the Senate is today. The House has been where the House has been for the last two years on that issue."

A spokesman for the House Democratic Caucus said that its members had been hearing from the AFL-CIO that significantly higher numbers of jobs could be affected by the rail bill – the union said nearly 1,000 could be impacted earlier this week – and the Democrats were listening.

"A goodly number of our caucus members are going to be very sensitive to those arguments," Florida House Democratic spokesman Mark Hollis told the News Service. "I fully expect amendments, if they're not able to be offered in committee, to be offered on the floor. Several of our members have indicated that they're meeting with labor about appropriate amendments to be filed."

But Hollis said it was unlikely, in the House at least, that the Democrats will put the brakes on the rail legislation en masse.

"No one has postured themselves to be completely against this," he said. "It is unlikely to be a caucus-type position. This is one of those things that goes far beyond any type of partisanship."

With their hard-line stance on the labor issue, Cretul and Aubuchon appeared Wednesday at least to be counting on Democrats in the House and Senate taking the long view on the rail legislation and not getting too bogged down in the details to reach the end of the line.

"I don't know if any of you have had the opportunity to ride a high speed rail anywhere," Cretul said. "I had the opportunity once and let me tell you, it's good. The opportunity in the future whether its high speed, whether its commuter, whether its connecting the northern Florida to the southern part of Florida or the east or the west coast, the time is probably the best its ever been."

-END-

HOUSE DEMS FAIL TO AMEND RAIL BILL
SUBSCRIBERS: RE-SENDING to correct typo in Hasner quote

By KEITH LAING
THE NEWS SERVICE OF FLORIDA

THE CAPITAL, TALLAHASSEE, Dec. 4, 2009.....House Democrats tried unsuccessfully Friday to amend passenger rail legislation to limit workers on the project to Florida residents and companies.

On the second day of a special session meant to boost passenger rail in Florida, a catch-all bill on the issue (HB 1B) moved to the floor for questions and amendments after unanimously clearing its only committee on Thursday.

On the floor, Democrats sought to add contracting requirements to make the measure more worker-friendly, but the minority failed on a series of party line votes.

Rep. Adam Fetterman, D-Port St. Lucie, introduced an amendment that would require that at least 85 percent of all workers, subcontractors, and contractors hired to work on rail contracts be residents of Florida for six months before the contract is awarded.

"We've heard a great deal of conversation ... relating to jobs," Fetterman said. "This is one of the rare occasions that we can all stand together to represent Florida's employees and Florida's businesses at the same time."

Rep. Scott Randolph, D-Orlando, spoke in favor of the amendment because of the state's high unemployment rate. Randolph argued that when lawmakers return in the spring, they should require all state contracts to go to Florida residents.

"We need to show our constituents that we're very concerned about Florida unemployment," Randolph said. "I think it's inappropriate to go back home and say we approved a ... multi-billion dollar project and we didn't put the protections in for Florida taxpayers and Florida workers."

But Rep. Gary Aubuchon, R-Cape Coral, who is shepherding the rail bill through the House, urged his colleagues to reject the amendments, trying to keep the House proposal in line with what leadership has portrayed as an agreed-on framework for getting the rail measure passed.

Rep. Martin Kiar, D-Davie, introduced another amendment aimed at giving Florida companies and companies with certain apprenticeship programs preference in bidding, though his measure met the same fate as Fetterman's, failing on a party line vote.

"There's been a lot of debate...that there may be 130 (to) 180 Florida workers who might lose their jobs," Kiar said. "The response that was given...was they may lose their jobs, but this will create thousands of new jobs. I want to see those thousands of new jobs to be Floridians. I don't want to lose those 130 Florida jobs just to give Georgians or New Yorkers thousands of jobs."

Other amendments offered by Democrats to require that the Legislature approve any lease, purchase or sale of rail corridors before closing and require federal money before the SunRail project in Central Florida could go forward were also voted down.

Aubuchon called the unfriendly amendments a "gut check," saying, "You're either for SunRail or not."

After the Democratic amendments were defeated, the bill was rolled to third reading, setting up a floor vote that could come as early as Monday.

A major union that has pledged to work to derail the special session legislation unless lawmakers protect about 100 rail jobs in central and south Florida said Friday that while it agreed with some of defeated amendments, none of measures would have been enough to bring it back on board the rail push.

"Some of them made sense for taxpayers, but none were drafted by us or addressed the issue of the workforce protections," AFL-CIO communications director Rich Templin told the News Service.

"Everybody is still working and we're hoping the leadership will come to the table to negotiate, but we still have the same fundamental concerns about what this means to the workforce and we're working to address those."

However, a key member of the House leadership signaled the chamber is still seemingly inflexible on the union issues.

"I think it's wrong to focus on this as a union issue," House Majority Leader Adam Hasner told reporters after the House adjourned. "This is about creating jobs in the state of Florida. This should not be about being held captive by labor unions in the state of Florida who are more concerned about protecting their own members than the economic benefits for the people of Florida."

Hasner, R-Delray Beach, said he did not think lawmakers should try to appease labor leaders to win wavering votes, which appears likely to be more necessary in the Senate than it will be in his chamber.

"This should not be about buying off votes by catering to the unions," he said. "This should be about passing the policy that's in the best interest of our objectives."

But when talk turned to the Senate, where leaders appear likely to need the votes of a few union-friendly Democrats to squeeze the train bill through, Hasner demurred a bit.

"Talk to President Atwater," he said about the Senate's political calculus.

-END-

**DECLARATION OF R.G.
DEMOTT**

Exhibit 2

Secretary's Meeting with CSXT

Key Points

Corridor Acquisition versus Access Rights

FDOT's proposal to CSXT represents a different deal structure than done in the past. FDOT proposes to commit to a long term investment program to the CSXT system (statewide) in exchange for exclusive passenger use and control of the "A"-Line based on time of day (5:00 AM - Midnight).

CSXT's preference ^{operation for the} is for FDOT to purchase the "A"-Line with a "leaseback" to CSXT, giving them operational control of the corridor through the lease terms. This is the Southeast Florida Rail corridor deal by a different name.

Operational and maintenance control of the corridor is more important than ownership.

Railway Labor Issue

Ideally, the FDOT proposal would provide the freedom to undertake the operations and maintenance of the corridor using non-union contract labor, which would be the most cost effective and efficient approach. However, this approach would displace CSXT's union labor triggering labor protection liabilities. CSXT's response is for FDOT to contractually agree to accept this liability.

The FDOT team will assess measures to mitigate the labor protection issue. One potential mitigating measure is to contract to a third party contractor which utilizes union labor.

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Economic Analysis

As it relates to ownership versus control, FDOT will be analyzing:

- Capital Cost of Use of the Corridor
 - Estimated Cost of Acquiring the Corridor
 - Estimated Cost of CSX System Improvements (*Note: CSXT needs to provide a complete accounting/costs of proposed system improvements*)
 - Estimated Cost of Track Access/Usage Fees

As it relates to the labor protection issue, FDOT will be analyzing:

- Cost of Operational Agreements (Maintenance, Dispatch, Operations)
 - Use 3rd Party Non-Union Labor/Maximum Exposure (*Note: CSXT needs to identify potentially affected employees*)
 - Use CSX Union Labor Under FDOT Management/Mitigates Exposure
 - Use Union Labor through FDOT 3rd Party Contract/Mitigates Exposure

**DECLARATION OF R.G.
DEMOTT**

Exhibit 3

Florida Department Of Transportation



FDOT Search:

Go

Contact Us | Site Map

Home | Business Partners | Employment | Programs | Projects | Related Links | Research/Statistics | Travel Information

December 22, 2009

The WALK signal means it is your turn to cross the street. Look left, right and left again to ensure it is safe before crossing. [Learn more.](#)

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David A. Sadler, P.E.
Director, Office of Construction

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FDOT Facilities



Office of Construction
2009 Construction Conference

Conference Presentations Available for Viewing

The files below are the Presentations that were used at the Construction Conference in February 2009. Most of the presentations are available in PowerPoint format. The presentation may function better by downloading the PowerPoint files to your hard drive

[View the Conference Agenda](#)

[Download the PDH Certificate \(MS Word File\)](#)

[List of Attendees](#)

Tuesday February 24, 2009

Session/Time	Presentation Download
--------------	-----------------------

Asphalt

1:30pm - 3:00pm

[Introduction of Adjustable Manhole](#)

[Construction of the Adjustable Manhole](#)

[Recycled Projects - Contractors View](#)

[Reclaimed Asphalt Pavement!](#)

[Sustainable Transportation System for Florida](#)

Concrete Paving*

1:30pm - 3:00pm

[Grinding for Smooth & Quiet Pavement](#)

[I-4 Weigh In Motion Stations](#)

[Precast, Prestressed Concrete Pavement](#)

Labor

1:30pm - 3:00pm

[Staying Union-Free in a Pro-Union World](#)

[Union-Free Handout](#)

Performance Contracting

1:30pm - 3:00pm

[Michigan DOT - Highways For Life, Performance Based Contracting](#)

[Performance Contracting for Construction](#)

Pipe Repair & Videoing

1:30pm - 3:00pm

[Pipe Inspection & Repair](#)

[Pipe Deflectometer](#)

Geotech

3:30pm - 5:00pm

[MSE Panel Wall Installation](#)

[Pile Driving & Drilled Shafts - Highlights of Changes to 455 Specification](#)

[Thermal Integrity Testing](#)

Special Provisions vs Specifications

3:30pm - 5:00pm

[Specifications 101](#)

Grass Roots Public Involvement

3:30pm - 5:00pm

[Mobilizing for Federal Transportation Dollars](#)

Wednesday February 25, 2009

Session/Time	Presentation Download
--------------	-----------------------

AMG Presentation

8:00am - 9:45am

[Automated Machine Guidance](#)

Grass Roots Public Involvement

8:00am - 9:45am

[Mobilizing for Federal Transportation Dollars](#)

Staying Union-free in a Pro-union World:

A Special Management Briefing for FTBA Contractors

Phillip B. Russell

*Labor and Employment Lawyer
for Businesses*

February 24, 2009

FTBA/FDOT Construction Conference



**Florida Transportation
Builders' Association**

Education Is The Best Form Of Preventive Maintenance SM

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2/25/2009

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BROOKS & SMITH, LLP

The Employers' Law Firm. Since 1946.

Staying Union-free in a Pro-Union World

*A Strategic Approach to Labor Relations
and Union Avoidance*

Education Is The Best Form Of Preventive Maintenance SM

2009 © Constangy, Brooks & Smith, LLP

2/25/2009

4 Steps

1. Review and Analyze Key Policies, Procedures and Practices

- Statement on Unions
- Open Door Policy
- No Solicitation / No Distribution
- Employment at Will
- Progressive Discipline

Education Is The Best Form Of Preventive Maintenance SM

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2/25/2009

4 Steps

2. Education and Training

a) Supervisors and Managers

- Labor Relations in the Modern Workplace
- Causes and Signs of Union Organizing Activity
- Responding to Organizing Activity
- Leadership and Communication Skills

b) Employees

- Unions in the Modern Workplace
- Meaning of Union Cards
- Reasons to Remain Union-free
- Key Policies Review and Discussion – *Assess Weaknesses!*

4 Steps

3. Response Team / Material Creation

- Issue Assessment
- Supervisor Guides
- Response Preparation

4. Union Activity Response

- Unit Evaluation Consultation
- Hearing Representation (mini-trial)
- Management Refresher Training
- Campaign Planning and Execution

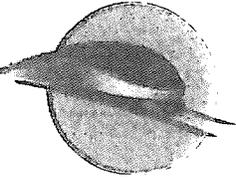
**DECLARATION OF R.G.
DEMOTT**

Exhibit 4

Project Name: Central Florida Rail Passenger Corridor Date of Submission: 08/24/09 Version Number:

High-Speed Intercity Passenger Rail (HSIPR) Program

Application Form



Track 1a–Final Design (FD)/Construction

& Track 4–FY 2009 Appropriations Projects

Welcome to the Track 1a Final Design (FD)/Construction and Track 4 Application for the Federal Railroad Administration’s High-Speed Intercity Passenger Rail (HSIPR) Program. Applicants for Track 1a FD/Construction and/or Track 4 are required to submit this Application Form and Supporting Materials (forms and documents) as outlined in Section G of this application and in the HSIPR Guidance.

We appreciate your interest in the program and look forward to reviewing your application. If you have questions about the HSIPR program or this application, please contact us at HSIPR@dot.gov.

Instructions:

- Please complete the HSIPR Application electronically. See Section G for a complete list of the required application materials.
- In the space provided at the top of each section, please indicate the project name, date of submission (mm/dd/yy) and the application version number. The distinct Track 1a and/or Track 4 project name should be less than 40 characters and follow the following format: State abbreviation-route or corridor name-project title (e.g., HI-Fast Corridor-Track Work IV).
- For each question, enter the appropriate information in the designated gray box. If a question is not applicable to your FD/Construction Project, please indicate “N/A.”
- Narrative questions should be answered concisely within the limitations indicated.
- Applicants must upload this completed application and all other application materials to www.GrantSolutions.gov by August 24, 2009 at 11:59pm EDT.
- Fiscal Year (FY) refers to the Federal Government’s fiscal year (Oct. 1- Sept. 30).
- Please direct questions to: HSIPR@dot.gov

A. Point of Contact and Applicant Information

(1) Application Point of Contact (POC) Name: Noranne B. Downs		POC Title: Florida Department of Transportation District 5 Secretary		
Street Address: 719 S. Woodland Blvd.	City: DeLand	State: FL	Zip Code: 32720	Telephone Number: (386) 943-5475
Fax: (386) 740-2675		Email: noranne.downs@dot.state.fl.us		

(2) Name of lead State or organization applying (only States may apply for Track 4): Florida Department of Transportation (FDOT)

(3) Name(s) of additional States and/or organizations applying in this group (if applicable):

(4) Is this project for which you are applying for HSIPR funding related or linked to additional applications for HSIPR funding that may be submitted in this or subsequent rounds of funding? Yes No Maybe
 If “yes” or “maybe,” provide the following information:

Program/Project Name	Lead Applicant	Track	Total HSIPR Funding Proposed (if known)	Status of Application
Florida East Coast Amtrak Service	FDOT	Track 2	\$70 M	Will Apply
Florida High Speed Rail Program	FDOT	Track 1b - PE/NEPA	\$30 M	Will Apply
Florida High Speed Rail Program	FDOT	Track 2	\$2,500 M	Will Apply
		Track 1a - FD/Construction	\$	Applied
		Track 1a - FD/Construction	\$	Applied
		Track 1a - FD/Construction	\$	Applied
		Track 1a - FD/Construction	\$	Applied
		Track 1a - FD/Construction	\$	Applied

Project Name: Central Florida Rail Passenger Corridor Date of Submission: 08/24/09 Version Number:

B. Project Overview

<p>(1) FD/Construction Project Name: Central Florida Rail Passenger Corridor</p>
<p>(2) Indicate the Track under which you are applying: Track 1a - FD/Construction <i>Please note if you are applying for Track 1a–FD/Construction and Track 4 <u>concurrently</u>, you must submit two separate versions of this application into www.GrantSolutions.gov (one for Track 1a –FD/Construction and one for Track 4–FY 2009 Appropriations Projects).</i></p>
<p>(3) Indicate the activity(ies) for which you are applying (check both if applicable):</p> <p style="text-align: center;"> <input checked="" type="checkbox"/> Final Design <input checked="" type="checkbox"/> Construction </p>
<p>(4) What are the anticipated start and end dates for the FD/Construction Project? (mm/yyyy) Start Date: 12/2009 End Date: 12/2011</p>
<p>(5) Total Cost of the FD/Construction Project (year of expenditure (YOE) Dollars*): \$ 728 Million</p> <p>Please provide proposed inflation assumptions and methodology, if applicable in the space below. Please limit response to 1,000 characters.</p> <p>Over the past two years, three separate risk assessments have been conducted with Federal agencies. Each one focused on project scope, schedule and capital cost. Annual escalation of capital costs was discussed during each workshop using data from Engineering News Record (CCI national 20 - city average) to determine appropriate escalation for YOE capital costs. The latest risk analyses (March 2009) recommended a 3.5% annual escalation for the period from 2009 to 2012. Refer to Attachment F - Table 1 for further details.</p> <p>Of the total cost of the FD/Construction Project, how much would come from the FRA HSIPR Program: (YOE Dollars**) \$ 270 Million</p> <p>Indicate percentage of total cost to be covered by <u>matching funds</u> 63 % <i>Applications submitted under Track 4 require at least a 50 percent non-Federal match to be eligible for HSIPR funding.</i></p> <p><small>* Year-of-Expenditure (YOE) dollars are inflated from the base year. ** This is the amount for which the applicant is applying.</small></p>
<p>(6) Project Overview Narrative. Please limit response to 5,000 characters.</p> <p>Provide an overview of the main features and characteristics of the FD/Construction Project, including:</p> <ul style="list-style-type: none"> • The location of the project including name of rail line(s), State(s), and relevant jurisdiction(s) (include map if available in supporting documentation). • Identification of service(s) that would benefit from the project, the stations that would be served, and the State(s) where the service operates. • How the project was identified through a planning process and how the project is consistent with an overall plan for developing High-Speed Rail/Intercity Passenger Rail service. • How the project will fulfill a specific purpose and need in a cost-effective manner. • The project's independent utility. • The specific improvements contemplated. • Any use of railroad assets or rights-of-way, and potential use of public lands and property. • Other rail services, such as commuter rail and freight rail that will make use of, or otherwise be affected by, the project.

LOCATION: The Central Florida Rail Passenger Corridor (CFRPC) is a 61-mile four county rail corridor that will be used for multiple rail technologies including Intercity Rail, High Speed Rail, Commuter Rail, and Light Rail. The 61-mile corridor is located on CSXT's A-Line which extends from Callahan, north of Jacksonville, FL to Tampa, FL (Attachment G - Map 1).

SERVICE: The first phase of project development is a 61-mile CFRPC planned to serve the Orlando Metropolitan Region. The first 32-miles of commuter rail is "shovel-ready" with construction slated to begin the winter of 2009/2010. The commuter rail service is a 17-station system with four existing Amtrak stations that include DeLand, Winter Park, Orlando and Kissimmee, FL. At full build, commuter service will be 15-minute peak headways with one hour off-peak. The second phase is enhancement of Intercity Rail Service between Jacksonville and Orlando, FL. Currently, there are four daily Intercity Rail trains (two northbound and two southbound) that serve the Orlando and Jacksonville markets. This service will be enhanced by four additional trains (two southbound and two northbound) between Jacksonville and Orlando, FL. Markets served with existing and enhanced service include the Jacksonville, Palatka, DeLand, Sanford, Winter Park and Orlando Amtrak stations.

PLANNING PROCESS: The enhanced connection between the Jacksonville and Orlando markets has been included within the State of Florida's "Intercity Passenger Rail Vision Plan" for decades, the most current being the August 2006 revision (<http://www.dot.state.fl.us/rail/Publications/Plans/06VisionPlan/ExecReportFinal.pdf>). In addition, the commuter rail service within the corridor is the number one transportation priority for the MetroPlan Orlando (Seminole, Orange, and Osceola counties MPO) and the Volusia County MPO region (<http://www.metroplanorlando.com/site/plans/lrtp.asp> and http://volusiacountympo.com/documents/documents_lrtp_new.html).

PURPOSE/NEED and COST EFFECTIVENESS: Acquisition of the CFRPC is the first step in fulfilling Florida's Intercity Passenger Rail Vision Plan and Amtrak's strategic plans by providing enhanced service between two heavily traveled metropolitan regions. The acquisition will enable the provision of alternative modes of transportation between Orlando and Jacksonville to employment and activity centers within the Orlando Metropolitan area; provide high capacity, fast, convenient and reliable rail service in the congested I-4/I-95 corridors, thereby minimizing travel time and developing an integrated regional and Intercity Rail system; assist in the implementation of state, regional, and local growth management plans through more intense land uses and Transit Oriented Development (TOD) practices at the activity center station locations; implementation of a cost-effective multi-modal transportation system that includes Intercity Rail, Commuter Rail, High Speed Rail, and Light Rail; and protect and preserve the environment and improve the quality of life within the metropolitan areas.

INDEPENDENT UTILITY: The acquisition of CFRPC does not depend on the construction of any rail systems. The JAX-ORL Intercity Rail service has independent utility as stated in Florida's Intercity Passenger Rail Vision Plan.

IMPROVEMENTS: Improvements to the CFRPC include the construction of 39 miles of new track, 13 miles of track upgrades, 6.5 miles of track realignment, 21 turnouts, 34 crossovers, a new signalization system, upgrades to highway and pedestrian crossings, and the addition of an Operations Center. These improvements will facilitate the enhanced Intercity Rail service between Jacksonville and Orlando, improve the on-time performance of the existing Intercity Rail service through the corridor, and enable the development of other rail modes within the corridor, including Commuter Rail, High Speed Rail, and Light Rail service.

INFRASTRUCTURE UTILIZED: The CFRPC is within CSXT's A-Line right of way. The A-Line, formerly known as the Atlantic Coast Line, extends from Callahan, north of Jacksonville to Tampa for approximately 230 miles (Attachment G - Map 2). A majority of the line is single-track with sidings and double-track in limited locations. The right of way width along the entire corridor ranges from 30 feet to 100 feet. The line is dispatched out of CSXT's Dufford Center in Jacksonville and there is an existing wayside signalization system.

OTHER RAIL SERVICES: Acquisition of the CFRPC will enable the construction of a 61-mile commuter rail system through the heart of the Orlando Metropolitan Region. Commuter Rail initially will connect to the Florida High Speed Rail corridor at OIA utilizing rubber tire transit service and will eventually connect utilizing Light Rail or a direct Commuter Rail station. Freight services on the line will be maintained and on-time performance should be increased with additional capacity on the corridor.

(7) Status of Activities: Are any FD or Construction activities that are part of this planned investment underway or completed?

Yes (Final Design) Yes (Construction) No

If “Yes,” please describe the activities that are underway or completed in the table below.¹ If more than three activities, please detail in Section F of this application.

Activity	Description	Completed? (If yes, check box)	Actual Initiation Date (mm/yyyy)	Actual or Anticipated Completion Date (mm/yyyy)
Permitting	Rail Corridor Water Management District	<input checked="" type="checkbox"/>	11/2007	10/2008
Survey	Boundary Survey	<input checked="" type="checkbox"/>	10/2006	08/2009
Utility Coordination	Utility Agency Owners Contacted	<input checked="" type="checkbox"/>	08/2008	06/2009

(8) Describe the project service objectives (check all that apply):

- Additional Service Frequencies
- Improved Service Quality
- Improved On-Time Performance on Existing Route
- Increased Average Speeds/Shorter Trip Times
- Other (Please Describe): Connectivity to High Speed Rail, Intercity Rail and Commuter Rail

(9) Types of capital investments contemplated (check all that apply):

- Structures (bridges, tunnels, etc.)
- Track Rehabilitation
- New or restored sidings/passing tracks
- Major Interlockings
- Station(s)
- Communication, Signaling and Control
- Rolling Stock Refurbishments
- Rolling Stock Acquisition
- Support Facilities (Yards, Shops, Admin. Buildings)
- Grade Crossing Improvements
- Electric Traction
- Other (Please Describe): Corridor right of way ownership

(10) Right-of-Way-Ownership. Provide information for all railroad right-of-way owners in the FD/Construction Project area. Where railroads currently share ownership, identify the primary owner. If more than three owners, please detail in Section F of this application.

Type of Railroad	Railroad Right-of-Way Owner	Route Miles	Track Miles	Status of Agreements to Implement Projects
Class 1 Freight	CSX Transportation	61.4	119.8	Master Agreement in Place
Class 1 Freight	CSX Transportation	101.8	119.3	Host Railroad Consulted, but S
Amtrak				Master Agreement in Place

¹ Please note: (a) requests for reimbursement of costs incurred prior to enactment of the relevant appropriations will not be considered and (b) supporting documentation for activities may also be required as noted in Appendix 2 of the HSIPR Guidance.

Project Name: Central Florida Rail Passenger Corridor Date of Submission: 08/24/09 Version Number:

D. Public Return on Investment

(1) **1A. Transportation Benefits.** See HSIPR Guidance Section 5.1.1.1. Please limit response to 8,000 characters:

How is the project anticipated to improve Intercity Passenger Rail (IPR) service? Describe the overall transportation benefits, including information on the following (please provide a level of detail appropriate to the type of investment):

- IPR network development: Describe improvements to intermodal connections and access to stations as well as actual and potential expansions to the IPR network that may result from the project (including opportunities for interoperability with other services).
- IPR service performance improvements (also provide specific metrics in table 1B below): Please describe service performance improvements directly related to the project, as well as a comparison with the existing service (without project). Describe relevant reliability improvements (e.g., increases in on-time performance, reduction in operating delays), reduced schedule trip times, increases in frequencies, aggregate travel time savings (resulting from reductions to both schedule time and delays, expressed in passenger-minutes), and other relevant performance improvements.
- IPR service results (also provide specific metrics in table 1B below): Describe relevant outcomes of the service improvement such as increases in ridership, passenger-miles, and other results in comparison with the existing service (without project).
- Suggested supplementary information (only when applicable):
 - Transportation Safety: Describe overall safety improvements that are anticipated to result from the FD/Construction Project, including railroad and highway-rail grade crossing safety benefits, and benefits resulting from the shifting of travel from other modes to safer IPR service.
 - Cross-modal benefits from the FD/Construction Project, including benefits to:
 - ✓ Commuter Rail Services – Service improvements and results (applying the same approach as for IPR above).
 - ✓ Freight Rail Services – Service performance improvements (e.g., increases in reliability and capacity), results (e.g. increases in ton-miles or car-miles of the benefiting freight services), and/or other congestion, capacity or safety benefits.
 - ✓ Congestion Reduction/Alleviation in Other Modes; Delay or Avoidance of Planned Investments – Aviation and highway congestion reduction/alleviation, and/or other capacity or safety benefits. Describe any planned investments in other modes of transportation that may be avoided or delayed due to the improvement to IPR service that will result from the project.

NETWORK DEVELOPMENT: Acquisition of the CFRPC will greatly enhance existing intermodal connections within the corridor and promote the development of additional intermodal connections in the future. The existing Intercity Stations within the corridor include DeLand, Winter Park, Orlando, and Kissimmee Amtrak stations (Attachment G - Map 1). The existing Amtrak stations are currently served by bus connections through VoTran in Volusia County and LYNX in Orange and Osceola Counties. The enhanced Intercity Rail service development between Jacksonville and Orlando will serve the existing Jacksonville and Palatka Amtrak stations, as well as the Amtrak stations within the CFRPC (Attachment G - Map 1). With the increased service frequency, bus connections will be enhanced to ensure passenger connectivity. Acquisition of the CFRPC also will enable construction of the 61-mile commuter rail system through the Orlando region. This commuter system will share the same Amtrak stations as the enhanced Intercity Rail component, provide enhanced rubber tire bus circulation at each of the 17-stations, link to the future High Speed Rail Tampa-Orlando corridor at OIA initially utilizing rubber tire service, and eventually utilizing a locally approved Light Rail route between the Orange County Convention Center and Orlando International Airport; and provide future connectivity to the proposed Florida East Coast Intercity Rail service utilizing the planned SR 528 rail corridor. Attachment G - Map 3 presents statewide

and regional multi-modal connectivity provided by acquisition of the CFRPC.

PERFORMANCE IMPROVEMENTS: Existing Intercity Passenger Service within the CFRPC consists of four Intercity Rail Trains (two northbound and two southbound). These trains provide roundtrip service between Miami and New York. The long distance trains have been scheduled from Miami to New York to meet market demand or stay clear of congested commuter operations over the Northeast Corridor, and adjusting the schedules of these trains to provide improved Florida corridor schedules would be difficult. The current long distance trains do not easily permit the opportunity to travel along the corridor and make business or recreational trips. Even with an overnight stay, useful meeting/work times at major destinations may not be achieved. The on-time performance of these long distance trains often is impacted by limited capacity within the congested CFRPC. Trains often are delayed between 30-minutes to one-hour due to existing rail traffic on single track infrastructure. Improvements to the CFRPC include a new signal system, double tracking, crossovers every 4-miles, and upgrades to grade crossings. These improvements will enable better on-time performance and reliability within the CFRPC for existing long distance trains and enable development of the new enhanced corridor service between Jacksonville and Orlando.

SERVICE RESULTS: Development of the Jacksonville-Orlando corridor service will provide commuters with reliable Intercity travel between two heavily congested metropolitan areas. As Florida's 2006 Intercity Vision Plan states, there are more than 3.5 million person trips between Orlando and Jacksonville. These trips are expected to increase to more than 7 million in 2020 and more than 12 million by 2040. The size of these increases will put pressure on existing transportation facilities and require development of substantial new infrastructure to meet the demand. Without acquisition of the CFRPC and related improvements, existing Intercity service will remain constrained without any viable way to increase ridership and passenger-miles; thus development of new corridor service would not be feasible.

TRANSPORTATION SAFETY

Wayside Signal System - The existing wayside signal system in the corridor is more than 50 years old. CSXT has made many small improvements to improve reliability and extend the life of the existing system. The CFRPC wayside signal system will be replaced and the new block layout will be upgraded to operate trains at 15 minute bi-directional headways under current maximum speeds for Class IV track (except where a lower Maximum Authorized Speed is designated). The new signal system will use a three-block four-aspect signal system replacing the current two-block three-aspect signal system. The wayside signal system will include all new wayside signals, microprocessor-based control points, electronic coded track and electric locks in addition to interfacing with the existing CSXT signal system outside the CFRPC corridor limits. The entire system being installed will facilitate the installation of a PTC system required prior to the 2015 date as defined in the Rail Safety Improvement Act of 2008. Control points will use ATCS communication protocol between control points and the Operations Control Center via radio-based systems and a new fiber optic network. See Attachment F - Exhibit 1.

Highway & Pedestrian Grade Crossings - There are 126 highway-rail grade crossings within the CFRPC. All grade crossings are currently FRA compliant. Grade crossing work will include the relocation/reuse of existing equipment, where possible, in lieu of total replacement. Upgrades to the crossing warning systems include new houses and crossing warning devices, as well as relocating existing warning devices and wiring new equipment into existing houses. The grade crossing signal system will incorporate motion sensors or constant warning time devices. Pedestrian gates will be installed at crossings where traffic warrants installation. Selected grade crossings will be tied into Control Points to prevent unnecessary activation of the warning systems and/or the existing vehicular traffic signals.

Traffic Signals - Pre-emption circuits will be added or maintained.

Operations Control Center - The CFRPC will be managed by a contract operator and, as such, an Operations Control Center separate and distinct from the existing CSXT Jacksonville Control Center is required. The proposed Operations Control Center will be designed to control rail operations based on existing CSXT single and double track configuration with additional second track, crossovers and turnouts using a new wayside signaling system installed throughout the entire alignment.

CROSS-MODAL BENEFITS: The acquisition of CFRPC will generate a multitude of cross-modal benefits. The development of a Commuter Rail system within the CFRPC will provide faster, convenient and reliable peak hour service in this congested corridor. Commuter traffic must travel on congested roadways, and has a far worse

travel time than passenger rail. Projected travel time on the express bus from Volusia County to downtown Orlando is approximately 90 minutes, compared to 47 minutes on a rail system. Comparable highway travel time for the same trip is 73 minutes. In the south, projected travel from Poinciana to downtown is 151 minutes by bus, 108 minutes by car and 35 minutes by passenger rail. Riders boarding the passenger rail system are projected to save an average of 2.2 million hours of travel annually. Finally, due to the physical location of the rail line, connections to the local bus network for commuters will be better than current conditions, and even better than what is in the current long range regional bus plan.

Improvements to the CFRPC will allow freight to move through the corridor in a more efficient manner. The delay currently experienced at grade crossings will be significantly reduced by the improvements. Currently, approximately 20 freight trains travel through the CFRPC. CSXT's strategic business plan relocates the majority of the through freight trains (8–9 trains/day) from the A-Line to the S-Line (Attachment G - Map 2). The time of day separation will require that remaining freight trains operate only between the hours of 12 am to 5 am (with limited mid-day mixed traffic), which will be beneficial to regional traffic circulation.

1B. Operational and Ridership Benefits Metrics: In the table(s) below, provide information on the transportation benefits and ridership changes projected to result from the project. Please do not list changes that would occur even if the project is not implemented (for example, as a result of population growth factors).

Project/Program Metric	Actual— FY 2008 levels	Projected Totals by Year (Actual Levels Plus Project-Caused Changes Only)		“X” If N/A or Unsure
		First Full Year After Project Completion	Fifth Full Year After Project Completion	
Annual passenger-trips	70,474	Commuter 1,247,000	Intercity 365,000 * Commuter 2,162,530	<input checked="" type="checkbox"/>
Annual passenger-miles (millions)	10.4	Commuter 16.9	Intercity 51.1 Commuter 32.5	<input checked="" type="checkbox"/>
Annual IPR seat-miles offered (millions)	18.4	Commuter 73.5	Intercity 73.6 Commuter 140.8	<input checked="" type="checkbox"/>
Average number of daily round train trip operations (typical weekday)	2** (Att. F - Table 2)	Commuter 16	2 dedicated intercity* (Att. F - Table 2) Commuter 16	<input checked="" type="checkbox"/>
On-time performance (OTP) ³ – percent of trains on time at endpoint terminals	60%** (Att. F - Table 2)	95%	95%	<input checked="" type="checkbox"/>
Average train operating delays: minutes of en-route delays per 10,000 train-miles ⁴	1662** (Att. F - Table 2)	150	130	<input checked="" type="checkbox"/>
Top operating speed (mph)	79 mph	79 mph	79 mph	<input checked="" type="checkbox"/>
Average scheduled operating speed (mph) (between endpoint terminals)	42 mph	Commuter 33 mph	Intercity 46 mph Commuter 39 mph	<input checked="" type="checkbox"/>

(2) 2A. Economic Recovery Benefits. This section is required for Track 1a, and optional for Track 4. Please limit response to 4,000 characters. For more information, see Section 5.1.1.2 of the HSIPR Guidance.

Describe the contribution the FD/Construction Project is intended to make towards economic recovery and reinvestment, including information on the following:

- How the project will result in the creation and preservation of jobs, including number of onsite and other direct jobs (on a 2,080 work-hour per year, full-time equivalent basis), and timeline for achieving the anticipated job creation.
- How the different phases of the project will affect job creation (consider the construction period vs. operating period)

³ As calculated and reported by Amtrak according to its existing procedures and definitions. An example can be found at page E-7 of the May 2009 Monthly Performance Report at <http://www.amtrak.com/pdf/0905monthly.pdf>. ‘On-time’ is defined as within the distance-based thresholds originally issued by the Interstate Commerce Commission, which are: 0 to 250 miles and all Acela trains—10 minutes; 251 to 350 miles—15 minutes; 351 to 450 miles—20 minutes; 451 to 550 miles—25 minutes; and 551 or more miles—30 minutes.

⁴ As calculated by Amtrak according to its existing procedures and definitions. Useful background can be found at pages E-1 through E-6 of Amtrak’s May, 2009 Monthly Performance Report at <http://www.amtrak.com/pdf/0905monthly.pdf>

of such waiver petitions.)

- YES- If yes, explain and provide a timeline for obtaining the waivers
 NO

Please limit response to 1,500 characters.

1D. Provide a preliminary self-assessment of project uncertainties and mitigation strategies (consider funding risk, schedule and budget risk and stakeholder risk). Describe any areas in which the applicant could use technical assistance, best practices, advice or support from others, including FRA. Please limit response to 2,000 characters.

Improvements to the CFRPC have been reviewed through the risk assessment process to determine any project uncertainties and develop mitigation measures. Through the course of project development, the proposed improvements were the subject of three risk assessments. All project uncertainties were ranked and a Project Execution and Risk Management Plan was developed and reviewed through the federal process. The Project Execution and Risk Management Plan is a comprehensive approach to address uncertainty from a variety of sources. The approach is based on several major processes, including identification of, planning for, analysis of, response to, and monitoring and control of risks to minimize the probability and impact of adverse risk events. The risks, and especially their impacts and likelihood, will continue to change as the improvements are constructed and new information is obtained. Hence, the risks will be monitored, and the Risk Register will be updated, periodically, especially at major Project milestones, when the risk analysis is likely to be updated also.

The last project uncertainty yet to be resolved is the passage of liability legislation through the Florida Legislature. Project proponents are working through the process and expect resolution before the end of the 2009 calendar year.

(2) Stakeholder Agreements Narratives. Additional information on Stakeholder Agreements is provided in Section 5.1.2.2 of the HSIPR Guidance.

Under each of the following categories, describe the applicant's progress in developing requisite agreements with key stakeholders. In addition to describing the current status of any such agreements, address the applicant's experience in framing and implementing similar agreements, as well as the specific topics pertaining to each category.

2A. Ownership Agreements – Describe how agreements will be finalized with railroad infrastructure owners listed in the "Right-of-Way Ownership" and "Service Description" tables in Section B. If appropriate, "owner(s)" may also include operator(s) under trackage rights or lease agreements. Describe how the parties will agree on project design and scope, project benefits, project implementation, use of project property, project maintenance, scheduling, dispatching and operating slots, project ownership and disposition, statutory conditions and other essential topics. Summarize the status and substance of any ongoing or completed agreements. Please limit response to 2,000 characters.

On November 30, 2007, FDOT and CSXT executed the following three contracts (www.sunrail.com/documents.asp), whereby FDOT will own, operate, maintain and dispatch all rail service on the 61-mile A-Line CSXT right-of-way between Milepost A749.7 near DeLand, and Milepost A814.1 near Poinciana. The acquisition primarily includes the existing and active Class 4 freight CSXT A-Line railway right-of-way for rail operations and property adjacent to the ROW for stations, parking and bus circulation, with future purchase options for additional parcels.

- The Central Florida Operation and Management Agreement (CFOMA) details freight usage payments by CSXT to FDOT; operating windows for freight and passenger rail service, including exclusive use of tracks for commuter rail operations during peak periods; FDOT operations and maintenance agreements for tracks, signals, bridges, communications and rights-of-way; FDOT dispatch of all trains along the corridor (including freight and Amtrak); future property use; future construction and lease parameters; payment schedules; dispute resolution; liability and insurance.
- The Transition Agreement details established O&M windows during two years of planned track and signal upgrades; dispatch and orientation services; third-party operator agreements; train diversions; communications; procurement, design, engineering and construction.
- The Contract for Sale and Purchase details required due diligence activities; contingencies and land conveyances; options to purchase additional rights-of-way; purchase price conditions and agreements; closing documents; inspections; environmental cost apportionment; and utility issues.

Per CSXT, the original June 30, 2009 closing date for purchase of the corridor has been extended six

2B. Operating Agreements – Describe the status and contents of agreements with the intended operator(s) listed in “Services” table in the Project Overview section above. Address project benefits, operation and financial conditions, statutory conditions, and other relevant topics. *Please limit response to 2,000 characters.*

A MOU between FDOT and Amtrak was executed on July 17, 2008 (www.sunrail.com/documents.asp). The MOU addresses the provision of bus bridge service for passengers in the event Amtrak’s intercity rail service is disrupted due to CFRPC construction. Further, FDOT agrees to provide compensation for any service interruption to the AutoTrain and train service to and from all Amtrak stations between Jacksonville and Tampa and Jacksonville and Miami caused by construction activities. Prior to the start of construction, FDOT will provide a proposed work schedule for Amtrak’s review so that a bus bridge plan can be implemented.

An agreement was reached regarding the modification of platforms at jointly shared Intercity Amtrak stations at Winter Park and Orlando initially, and DeLand and Kissimmee in the future. The MOU also focuses on the negotiation of a Contractual Services Agreement for which commuter rail vehicles would be serviced and maintained at the Amtrak AutoTrain facility and negotiations of an Operating Agreement for Amtrak service operating over FDOT property.

An initial draft of the Operating Agreement between FDOT and Amtrak was developed to begin a dialogue between both parties.

Question 2A above, provides a summary of the Transition Agreement (www.sunrail.com/documents.asp) entered into between FDOT and CSXT on November 30, 2007.

2C. Selection of Operator – This question applies to Track 1a only. If the proposed operator railroad was not selected competitively, please provide a justification for its selection, including why the selected operator is most qualified, taking into account cost and other quantitative and qualitative factors, and why the selection of the proposed operator will not needlessly increase the cost of the project or of the operations that it enables or improves. *Please limit response to 1,000 characters.*

To ensure quality and cost-effectiveness, FDOT intends to competitively bid an operations and maintenance contractor for commuter rail service on the 61.5-mile corridor between DeLand and Poinciana. Procurement documents are currently under development and review by FDOT, which will oversee the selection process in accordance with state statute and established guidelines. The Department expects to award the contract in 2011, about one year prior to the start of commuter rail service.

The Department also signed an MOU with Amtrak on July 17, 2008, which facilitates negotiation of a Contractual Services Agreement for servicing and maintaining commuter rail vehicles at the Amtrak AutoTrain facility in Sanford, and negotiation of an Operating Agreement for enhanced Amtrak service operating over FDOT property. For further information, refer to www.sunrail.com/documents.asp.

2D. Other Stakeholder Agreements – Provide relevant information on other stakeholder agreements including State and local governments. *Please limit response to 2,000 characters.*

In July 2007, local governments in Volusia, Seminole, Orange and Osceola counties, and the City of Orlando, unanimously approved three interlocal agreements with FDOT. The purpose of the agreements and amendments (www.sunrail.com/documents.asp) is to establish an ownership and management structure for Commuter Rail operations within the four counties, and to set the foundation for a permanent ownership and management structure. With state and federal assistance, the signatory agencies have agreed to plan, develop, finance and implement a Commuter Rail transit system for Central Florida.

- **INTERLOCAL GOVERNANCE AGREEMENT:** Establishes the Central Florida Commuter Rail Commission (CFCRC) to act as an advisory board to FDOT for the first 7 years of CRT operation, when FDOT is responsible for all O&M costs and asset management (the CFCRC assumes those responsibilities from FDOT in year 8 of operations); creates CFCRC advisory boards; details agreements for operating support based on peak boardings in each jurisdiction, and for capital costs, based on track miles.

- **INTERLOCAL OPERATING AGREEMENT:** Details include FDOT’s responsibilities to build the commuter rail

**DECLARATION OF R.G.
DEMOTT**

Exhibit 5

Lakeland Ledger Blog

I'll Have Crow With That Pancake

by Bill Rufty

<http://polkpolitics.blogs.theledger.com/10363/ill-have-crow-with-that-pancake/>

Ever since an aide for state Sen. Paula Dockery, R-Lakeland, told The Ledger last Friday about discovering strange references to breakfast foods in e-mails about the plans to push through SunRail in the special session, the blogosphere has been filled with outrage and political expediency.

Today, Doug Guetzloe, president of Axe The Tax, called for the immediate resignations “of any and all FDOT officials who participated.”

He even has a name for it: “Waffle-Gate.”

Earlier, the anticipated Democratic nominee for governor, Chief Financial Officer Alex Sink, said the DOT officials should resign if the code scandal is real.

Dockery, who is running against Attorney General Bill McCollum for the Republican nomination for governor, sent out a press release detailing the use of the code words to hide the true meaning of the SunRail e-mails. She also had a word for Sink, who could be her general election opponent if she defeats McCollum in the primary: “Welcome to the fight to protect taxpayers from an out of control state agency.”

When Dockery asked for all department e-mails having to do with SunRail over the previous eight months, she got 121. When she complained to the Governor’s Office of Open Government, she received another 8,037. DOT officials said it was an honest mistake made when putting the query into the computer to get the information.

Those thousands of e-mails arrived the day after the Senate approved funding for SunRail. Dockery staff still are reading through all the e-mails to determine what was going on in the months before the hurriedly called special session. Several of the e-mails on SunRail contain references to pancakes, bacon and French toast, they said.

Palm Beach Post Blog

DOT Secretary says pancakes got her attention

by Dara Kam | December 14th, 2009

<http://www.postonpolitics.com/2009/12/dot-secretary-says-pancakes-got-her-attention/>

Florida Department of Transportation Secretary Stephanie Kopelousos said that the word “pancake” in the subject line of an e-mail from her deputy Kevin Thibault was just a way for the message to stand out from the hundreds she receives daily.

The code words were not a way to circumvent public records laws, Kopelousos insisted.

“I get hundreds of e-mails in a day and Kevin was trying to get me to look at something,” Kopelousos said. “There was nothing more, nothing less than just that. He wanted to get my attention so I would read the email he was forwarding.”

Kopelousos said her department e-mail searches include not only the subject line but the attachments as well.

The e-mails were obtained by Sen. Paula Dockery, an ardent opponent of a deal between the state and CSX Inc. in which Kopelousos has agreed to pay the freight operator at least \$432 million for 61 miles of track near Orlando for a Central Florida commuter line called “SunRail.”

Dockery’s public records request of the agency included the search terms “rail,” “CSX” and “liability.”

But according to Kopelousos’ definition of how the searches are performed, the attachments to the e-mails slugged “pancake,” “pancakes” and “French toast” would not have shown up anyway.

They attachments were entitled “House questions” and “Providing a dedicated funding source.”

Dockery made her request before the special session started and she submitted another one last week for the messages exchanged during the session.

She amended the search terms this time.

“Additionally, please provide me with an electronic copy of all messages containing breakfast food related words, including but not limited to: pancake, french toast, bacon, egg, cereal, waffle, grits, and sausage, sent to or from the state or personal email addresses or electronic devices of yourself, Kevin Thibault and Alexis Yarbrough beginning on March 1, 2009,” Dockery, R-Lakeland, requested.

Kopelousos and Thibault exchanged three e-mails over two days with the breakfast items as the subjects.

The messages weren't about breakfast. The rail mails had attachments dealing with the rail proposal lawmakers approved last week, prompting Chief Financial Officer Alex Sink to demand that Kopelousos and Thibault resign.

**DECLARATION OF R.G.
DEMOTT**

Exhibit 6

The Tampa Tribune

Published: December 23, 2009

Officials with the state Department of Transportation spent months negotiating in secret with CSX Railroad to cut the deal that would eventually become SunRail - the \$495 million purchase of 61 miles of track for commuter rail near Orlando.

The DOT negotiators even signed confidentiality agreements to keep the public out of the know.

And now it appears that maybe, just maybe, they've tried to skirt the state's public records law by sending e-mails relating to the rail legislation that passed earlier this month with words like "pancake" and "French toast" in the subject line.

If DOT Secretary Stephanie Kopelousos and aide Kevin Thibault used the breakfast terms in an effort to trick people such as state Sen. Paula Dockery, the leading critic of the CSX deal, and Chief Financial Officer Alex Sink, a sometime critic - both gubernatorial candidates - they should resign.

Dockery discovered the messages after the department belatedly responded to a public records request for thousands of e-mails. She wanted them before the special session but didn't get them until afterwards. When she found three of the more than 8,000 e-mails provocatively labeled she called them "code words" used to throw off anyone interested in the substance of the message.

Sink, meanwhile, called for an investigation of the incident, insisting "this is not the way the people's business should be done." Gov. Charlie Crist complied, and an internal review, dubbed "Wafflegate," is under way.

Kopelousos insists the e-mails weren't meant to confuse anyone. She said it was Thibault's way of trying to get her attention. That explanation may make more sense than the nefarious interpretations, especially since Dockery got the e-mails she wanted. Still, she has every right to be angry that she didn't receive them in a timely manner and was told they didn't exist.

The state Legislature funded the CSX deal over Dockery's objections earlier this month. We thought the revised deal an improvement and justified legislation that would give rail-transit and the economy a boost. But Dockery has been a thoughtful critic and deserved more respectful treatment.

Dockery and Sink are both principled advocates for good government. "Wafflegate" may turn out to be little more than batter and syrup. But they and the people of Florida deserve an explanation.

Sarasota Herald Tribune Editorial

E-mails out of the public eye

State DOT's secret codes send the wrong message

<http://www.heraldtribune.com/article/20091222/OPINION/912221031/-1/NEWSITEMAP>

Published: Tuesday, December 22, 2009 at 1:00 a.m.

Last Modified: Monday, December 21, 2009 at 8:15 p.m.

Did state Department of Transportation officials try to evade Florida's public records laws by mislabeling thousands of e-mails concerning an expensive commuter rail proposal?

The governor has ordered an investigation to answer that question -- an appropriate step.

Agencies that act on the public's behalf need to do so in a transparent manner. The rail proposal, after all -- approved recently in a special legislative session -- involves hundreds of millions in taxpayer dollars, to be paid to rail-track owner CSX.

The e-mails -- between top DOT officials and CSX -- were unearthed following a public-records request by Sen. Paula Dockery, a Lakeland legislator who opposed the rail deal. Marked with "code" words such as "pancakes" and "French toast," the e-mails had at first not shown up in a search. A data-entry error was blamed. Eventually, the e-mails were located, but not until the Legislature already had voted on the rail issue.

DOT chief Stephanie Kopelousos defended the odd labels. "We were not trying to circumvent any public records request. It was just a mere eye-catcher so I would look at the e-mail," she was quoted as saying by the Palm Beach Post.

Nevertheless, the case is troubling. Intentionally or not, the documents -- which, according to the Post, contained attachments indicating that CSX played an active role in crafting the rail legislation -- were not provided in a timely fashion.

Investigators should get to the bottom of the mystery, which highlights the need for government at all levels to operate in the open.

Here in Southwest Florida, the small municipal government of Venice was forced to pay big fines for running afoul of the state's e-mail record requirements. State government, including high-ranking staff, should not be held to a lesser standard.

Sunshine is particularly needed in Tallahassee, where Florida lawmakers make decisions of statewide impact.

As Rep. Keith Fitzgerald of Sarasota noted in a September guest column for the Herald-Tribune, the Legislature's annual budget process "allows a few people to meet in secret to allocate millions of dollars, which can then be hidden in a nearly indecipherable budget document that even other legislators cannot easily follow..."

He and Sen. Dan Gelber have proposed a constitutional amendment that would reform the budget process.

That sounds like a ray of sunshine -- one the capital could definitely use.



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WEEKLY ROUNDUP – BREAKFAST CLUB

(Recap and analysis of the week in state government)

By KEITH LAING

THE NEWS SERVICE OF FLORIDA

THE CAPITAL, TALLAHASSEE, Dec. 18, 2009.....There were fewer fireworks than expected in passing the sweeping special session rail package, but the honeymoon for supporters was scrambled a bit this week by allegations that high-ranking state transportation officials used a breakfast-theme code for E-mails about the bill.

Responding to newspaper reports that Department of Transportation officials titled E-mails about the legislation that lawmakers approved during the special session with words like "pancake" and "French toast," Chief Financial Officer Alex Sink said Transportation Secretary Stephanie Kopelousos and her deputies should be the ones pancaked for violating the spirit of the state's Sunshine laws.

The E-mail breakfast club, a story rail opponents quickly christened "WaffleGate," can be traced back prior to the start of the special session when Sen. Paula Dockery, R-Lakeland, filed a public records request for E-mails about the rail bill. Asking for messages sent between March and mid-November, she was given 121 responses. Dockery, herself a Republican gubernatorial candidate, questioned the low number of results, which transportation officials attributed to a data entry error.

After the rail bill passed over Dockery's objection during the special session, her office was given more than 8,000 E-mails, some of which contained just attachments and had subjects such as "pancakes" and "French toast," which seemed to reveal a coding system that had opponents not liking their green eggs and ham.

Chief among the critics whose anger boiled over this week was Dockery, who said Gov. Charlie Crist

should delay signing the rail bill or veto it altogether. But the governor, who vocally supported the rail plan, didn't waffle.

Instead, he signed the bill in Tallahassee - and signed it again in Tampa, Orlando and a final time in Fort Lauderdale, making more stops on his tour than will be made by the trains the plan will allow.

Crist said he was signing the rail bill quickly because he did not think the breakfast E-mail controversy had much sizzle – at least not enough to fry the bill. But he did respond quickly to Sink's request for an investigation, ordering a probe by Chief Inspector General Melinda Miguel.

Absent from Crist's bill signing ceremony was Kopelousos, who had been a staple when the governor earlier had talked about the sunny upside of investing in trains in Florida.

He was asked if Kopelousos missed the early morning Tallahassee signing ceremony because she had a late breakfast, but the governor wasn't laughing, pivoting instead to what he says will be a positive economic impact from the rail bill and the possibility of drawing down federal money for high speed rail as a result of signing it.

For her part, Kopelousos said that the WaffleGaters hadn't fully cracked the story: the E-mails were not attempts to get around state Sunshine laws, she said. They were simply an effort to get her attention when she skimmed her crowded inbox.

Kopelousos said the attachments were all appropriately labeled, which she said allowed for full-compliance with state open records laws. She also said the discrepancy between the small response to Dockery's initial public records request, which fueled the allegations of a cover-up, was an "honest mistake."

Government watchdogs did not appear to be buying the syrup Kopelousos was selling, however. One, First Amendment Foundation president Barbara Petersen, said Kopelousos' explanation "doesn't pass the sniff test."

"The fact is that she is the secretary of a very important state agency," Petersen told the News Service. "It shouldn't be that hard for her assistant secretary or general counsel to get her attention, to the point of using nonsensical subjects."

Palm Beach Post - Sunday

CSX directed rail legislation to its benefit

By Dara Kam <<http://www.palmbeachpost.com/services/staff/dara-kam-the-palm-beach-post-17161.html>>

Palm Beach Post Staff Writer

Posted: 12:08 a.m. Sunday, Dec. 13, 2009

Thousands of e-mails from state transportation officials show that the transportation giant that stands to get at least \$432 million from taxpayers in a deal to build a Central Florida commuter rail line played a major role in crafting the legislation.

In the deal passed last week, the state is paying Jacksonville-based CSX Inc. \$432 million for 61 miles of track for the "SunRail" commuter line between Deland and Poinciana. The freight operator will pay the state about \$3.2 million a year to share the rails with the commuter line.

The e-mails from Florida Department of Transportation Secretary Stephanie Kopelousos, Deputy Secretary Kevin Thibault and general counsel Alexis Yarborough also reveal a keen interest in privatizing future rail projects — including high-speed rail proposals the state is hoping to get \$2.6 billion in federal stimulus money to help build.

And they show that the DOT officials — the chief negotiators of the SunRail/CSX deal — used code words like "waffles" and "pancakes" in the subject line of e-mails, perhaps to avoid being captured by public records requests.

Sen. Paula Dockery, an ardent SunRail opponent who helped kill a bill approving the deal in May, requested the e-mails shortly before the beginning of the special session that ended Tuesday.

The agency initially told her that Kopelousos, Thibault and Yarborough did not exchange any e-mails with the words "rail," "SunRail" or "CSX" in them for the past eight months.

When she questioned them about that, department officials said that a data entry error was responsible for the mistake. The three officials had sent or received more than 8,000 e-mails with those terms since March.

On Nov. 24, the day before Senate President Jeff Atwater, R-North Palm Beach, hinted that a special session would be called, Yarborough and Atwater aide Paul Whitfield sought input from a CSX lobbyist and Vice President Bob O'Malley to craft one of the most contentious components of the legislation — allowing DOT to reclassify certain railroad workers on current and future projects in a manner that

would do away with union protections guaranteed under federal law.

Yarborough did not sign off on the labor language in the bill until O'Malley approved it.

Whitfield sent Yarborough, O'Malley and a private attorney hired by the DOT an e-mail asking them to "review the attached and comment as soon as you are able" the morning of Nov. 24.

O'Malley forwarded the message to others, including CSX senior attorney David Hoffman, who made changes to the document and returned it to O'Malley, who then forwarded it to Yarborough.

"Please see attached document with our suggested edits. We wanted to share with you first," he wrote.

Yarborough responded: "This is more consistent with the prior targeted group. Will you let Paul know we talked and this is preferable?"

That exchange is typical of the chains of e-mails provided through Nov. 25, the date when Dockery, R-Lakeland, made the request. In some cases, Whitfield, Yarborough or other DOT staff included O'Malley directly on draft language, seeking his input.

In October, Thibault sent a message to his boss Kopelousos with the subject "Pancakes."

Attached to the e-mail was a proposal creating a \$2 surcharge on rental cars in Palm Beach, Miami-Dade and Broward counties to help fund Tri-Rail.

Kopelousos sent Thibault a message on Nov. 12 with the subject "pancake" that had an attachment of questions posed by House members.

The same day, Thibault sent Kopelousos an e-mail with the subject "French toast."

The messages had nothing to do with breakfast.

Find this article at:

<http://www.palmbeachpost.com/news/state/csx-directed-rail-legislation-to-its-benefit-118002.html>

**DECLARATION OF R.G.
DEMOTT**

Exhibit 7

From: Yarbrough, Alexis M.
Sent: Tuesday, November 24, 2009 2:35 PM
To: 'Bob_O'Malley@csx.com'
Subject: Re: labor draft; expedited review

This is more consistent with the prior targeted group. Will you let Paul know we talked and this is preferable?

From: O'Malley, Bob Jr.
To: Yarbrough, Alexis M.
Sent: Tue Nov 24 14:27:44 2009
Subject: Fw: labor draft; expedited review

Alexis,

Please see attached document with our suggested edits. We wanted to share with you first.

Bob

--

Bob O'Malley
CSX Transportation
(407) 803-3969

From: Hoffman, David
To: O'Malley, Bob Jr.; O'Malley, Michael (State Gov't); Renjel, Louis Jr.; Shultz, Peter; Crable, Steve
Cc: Yovanovic, Nick
Sent: Tue Nov 24 13:45:09 2009
Subject: RE: labor draft; expedited review
Attached are our suggested changes. Please let us know if you have any questions or concerns.

Thanks,

David

David A. Hoffman*
Senior Counsel
CSX Transportation, Inc.
500 Water Street, J150
Jacksonville, FL 32202

Phone: (904) 359-7522
Fax: (904) 359-1248
email: David_Hoffman2@csx.com

*Admitted in Georgia. Not admitted in Florida.
Florida Authorized House Counsel

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From: O'Malley, Bob Jr.
Sent: Tuesday, November 24, 2009 10:44 AM
To: O'Malley, Michael (State Gov't); Renjel, Louis Jr.; Shudtz, Peter; Crable, Steve; Yovanovic, Nick; Hoffman, David
Cc: 'Jthompson@ausley.com'; 'Bo Bohannon'; 'Marty Fiorentino'
Subject: FW: labor draft; expedited review
Importance: High

Please see the email below and the attached document and provide feedback as soon as possible. Thank you.

Bob

--
Bob O'Malley
Resident Vice President, Florida
State Government and Community Affairs
CSX Transportation
283 Cranes Roost Boulevard, Suite 111
Altamonte Springs, FL 32701
(407) 803-3969
Bob_O'Malley@CSX.com

From: WHITFIELD.PAUL [mailto:WHITFIELD.PAUL@flsenate.gov]
Sent: Tuesday, November 24, 2009 10:41 AM
To: 'Charles A. Spitulnik'; 'Yarbrough, Alexis M.'; O'Malley, Bob Jr.
Subject: labor draft; expedited review
Importance: High

Please review the attached and comment as soon as you are able.

Thanks,
Paul

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From: WHITFIELD.PAUL [WHITFIELD.PAUL@flsenate.gov]
Sent: Tuesday, November 24, 2009 10:41 AM
To: 'Charles A. Spitulnik'; Yarbrough, Alexis M.; 'O'Malley, Bob Jr.'
Subject: labor draft; expedited review
Attachments: Labor Draft 112409.docx

Importance: High

Please review the attached and comment as soon as you are able.

Thanks,
Paul

Employment

The Legislature recognizes the need to hire well qualified rail workers to provide a safe rail transportation system. While the state has recognized that federal law preempts certain state law in the area of rail safety regulation, the state also recognizes that the federal government has historically been, and will likely be, a funding partner in any future rail development in Florida. Therefore, the Florida legislature recognizes that the federal government may impose additional rail operational standards as a condition for obtaining federal funding.

It is the intent of the Legislature that transit system operators hire qualified, safety-sensitive employees.

It is the intent of the Legislature that, to the extent practicable, when a when the State or one of its agencies or political subdivisions acquires a line of railroad or any other railroad facility from a rail carrier, the transit system operator should consider for employment employees of the previous owner who a) meet the job-related qualifications established by the new owner or its contractor; (b) were working on the rail facility on the date that it is conveyed to the acquiring entity or were furloughed as a result of the acquisition; and (c) previously worked on the particular task for which the new owner or its contractor is seeking employees.

From: Yarbrough, Alexis M.
Sent: Thursday, November 19, 2009 7:26 AM
To: 'bsmith@appersoncrump.com'; 'wsippel@fletcher-sippel.com'; Brand, Adam L.
Cc: Franks, Ginger
Subject: Fw: labor language
Attachments: ~8670966 (2).doc

Importance: High

Pls read and be prepared to respond. Ginger pls set up call for 9:15 am.

From: O'Malley, Bob Jr.
To: Yarbrough, Alexis M.
Sent: Thu Nov 19 07:04:30 2009
Subject: FW: labor language
Alexis,

You may have already seen this but I want to make sure we share everything with you. The Senate President's staff sent us draft language related to unions and asked for our input. The attached document includes our suggested edits. Is there anything in here that is offensive to FDOT?

Thank you.

Bob

--
Bob O'Malley
Resident Vice President, Florida
State Government and Community Affairs
CSX Transportation
283 Cranes Roost Boulevard, Suite 111
Altamonte Springs, FL 32701
(407) 803-3969
Bob_O'Malley@CSX.com

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The obligations established in this section apply when the State or one of its agencies or political subdivisions acquires a line of railroad or any other railroad facility from a rail carrier (a "Rail Facility"). The acquiring entity or any contractor it may hire to operate commuter rail passenger service on the Rail Facility, to dispatch operations on the Rail Facility, or to maintain the right-of-way or signals, or provide any other service with respect to such Rail Facility shall ~~grant~~ give priority hiring consideration in employment to any employees of the previous owner of such Rail Facility in the circumstances described in the following sentence. The priority hiring consideration ~~priority in employment~~ shall be available to any employee of the previous owner who: (a) was working on the Rail Facility on the date that it is conveyed to the acquiring entity; (b) is either furloughed as a result of the acquisition or is required to relocate his residence 50 miles or more to hold a position on the previous owner and agrees to resign his employment with that owner if he obtains a job with the new owner or its contractor; (c) meets the job-related qualifications established by the new owner or its contractor; and (be d) previously worked on the particular task for which the new owner or its contractor is seeking employees.

From: William C. Sippel [wsippel@fletcher-sippel.com]
Sent: Thursday, November 05, 2009 1:55 PM
To: Burdick, Robert; Brand, Adam L.
Cc: Yarbrough, Alexis M.; bsmith@apersoncrump.com
Subject: Revised
Attachments: Proposed Labor Provision.doc

Attached is revised draft with 12% inserted.

William C. Sippel
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
Phone: (312) 252-1505
Fax: (312) 252-2400
E-mail: wsippel@fletcher-sippel.com

Proposed Provisions Pertaining to “Covered Railroad Employees”

Option 1 Provisions:

- Seeks to have state law mandate that FDOT, the Rail Commission and the operator in any State-owned rail corridor be deemed a “rail carrier” pursuant to all of the federal laws applicable to rail workers.
 - Reworded version of what rail labor has sought to have included in Sunrail legislation in 2 prior sessions.
- Congress and federal rail regulators have defined who is and is not a “rail carrier.” State law cannot mandate the interpretation of that term nor limit what it means.
- Extensive case law on when an “operator” is and is not a “rail carrier” under federal law. Proposed provision seeks to ignore and preempt standards interpreted by federal agencies and courts over many years.
- Could result in many or most of the major commuter contract operators not bidding for commuter rail work. Most are not currently “rail carriers” subject to federal laws regarding labor relations and employee retirement benefits.
- Would substantially raise costs of commuter rail operator: higher payroll taxes, worker liability costs and administration costs which would be passed on to the State in form of higher fees.
 - Higher payroll taxes: Railroad Retirement Act results in payroll taxes paid by the employer approximately 12 % higher than under Social Security.
 - Higher liability costs: Federal Employers Liability Act is a negligence-based workers compensation system.
 - Higher legal costs.
 - No cap on damages.
 - Would pre-empt Florida workers compensation laws.
 - Raises questions as to whether it would operate to waive State’s sovereign immunity as it relates to these specific types of torts.

- Higher administration costs: Additional costs of administering compliance with Railroad Retirement Act, Federal Unemployment Insurance Act, Railway Labor Act
- The definition of “any and all operators” so broad that it would apply to all freight and passenger operators on a State-owned rail corridor. Labor relations of freight carriers governed by federal law. Any state law attempt to impose such requirements on a freight railroad would be preempted by federal law.
- No statute called the “Federal Railroad Act.”
- The State cannot simply thrust itself upon the jurisdiction of the Surface Transportation Board nor can it dictate who is subject to federal Surface Transportation Board jurisdiction and who is not. “Rail carrier” status could cause STB to determine that FDOT subject to STB jurisdiction generally.
 - The federal government, not the State, would prescribe accounting and reporting requirements that would have to be complied with.
 - The federal STB could require prior STB approval of any additional rail line acquisitions or dispositions, including the transfer of ownership of such lines to a commuter commission or authority.

From: Thibault, Kevin
Sent: Tuesday, March 03, 2009 8:07 AM
To: Hunt, Debbie
Subject: Document2
Attachments: Doc2.doc

Why would the department negotiate a deal that is the most costly purchase ever for a rail line?

In reality, the actual purchase price is very comparable considering the urban environment that most of the alignment is in. Obviously, property values vary throughout the nation and even in our state, but two independent appraisals have determined the value of the 61.5 miles of property to be worth between \$430 million and \$438 million. The department will pay CSX \$432 million for the property, which equates to approx. \$7 million a mile. When you look at some of the other purchases, including the purchase of the Tri-Rail track in 1988, this cost per mile comparison is reasonable and consistent.

How can you say the estimate of \$2.66 billion is accurate when the estimates for the construction came in high?

All department project estimates typically contain contingency amounts to cover cost overruns, slightly higher bids or unforeseen conditions. Depending on the project's development, these contingency amounts can range in percentage from 5% (this is usually the case when all engineering is done and project quantities are complete) to 25% (this is usually at the planning level/conceptual level of a project and when design parameters are not complete and only broad estimates are developed). In the case of this project, a 15% contingency factor was used. So, we are still within our total budget estimates even with the construction bids coming in slightly higher.

Why can't the department help out with providing opportunities for those employees who will be without a job when the property is purchased from CSX?

The department is committed to provide a fair and open procurement to all for those classification of workers who will work in the corridor for the department. Whether they be signalman, maintenance workers, or dispatchers, all qualified proposers will be given full consideration during the procurement process.

This project is costing the state over \$2.6 billion – in today's tough economic conditions; those funds could be used for more appropriate purposes, could it not?

In actuality, the \$2.6 billion estimate assumes the maintenance and operation cost of the project over 30 years, as well as the debt service payments for the Fixed Guideway bonds over that same duration. A highway project that looks to widen and add capacity never contemplates the maintenance and operation budget when it is developed – only the initial capital costs are presented. Considering that for this 61.5 mile project that will move 14,000 people and the state actually only has to contribute just over \$700 million (with the rest coming from local and federal sources), it is truly a good deal in efficiently and effectively moving people through the corridor.

From: William C. Sippel [wsippel@fletcher-sippel.com]
Sent: Monday, December 07, 2009 11:41 PM
To: Yarbrough, Alexis M.
Subject: Labor part two

For FDOT to agree to become a "rail carrier" under the Interstate Commerce Act by purchasing the line from CSXT would breach the agreement with CSXT under which CSXT by retaining a freight easement on the line retains the sole common carrier rights on the line. Also, if FDOT or its contractor were to become a "rail carrier" under ICA, then all of the employees on the line would be covered by the federal railroad laws not just the signalmen.