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SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35110

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

FILED
JAN 4 - 2011
SURFACE
TRANSPORTATION BOARD

PETITION TO REOPEN

Pursuant to Board rule 1115.4, 49 C.F.R. §1115.4, the Brotherhood of Railroad

Signalmen ("BRS") hereby requests that the Board reopen its decision issued on December 15, 2010 that granted the motion of the Florida Department of Transportation ("FDOT") for dismissal of its notice of exemption for acquisition of a rail line in this proceeding. This petition to reopen is based on events that occurred after the Board issued its decision which constitute both new evidence and substantially changed circumstances.

In communications between BRS and FDOT after the decision issued FDOT took a position at odds with representations that it made to the Board in seeking dismissal of its notice and in response to BRS' opposition to the motion for dismissal. FDOT represented to the Board that it would separately bid the "signal work" for the line that FDOT plans to acquire from CSX Transportation, and that it would seek bidders for the "design-build-maintain" signal work who would be covered by the Federal railroad laws. The Board expressly relied on those representations. But FDOT has now indicated that it will only separately bid signal maintenance work and will not require that bidders for signal construction work be railroad employers under the Federal railroad laws. BRS respectfully submits that FDOT's new position regarding the signal construction work at odds with its representations to the Board requires reopening the Board's December 15 decision.

FACTS

In its December 15 decision, the Board described BRS's arguments against dismissal of FDOT's petition. The Board noted that BRS had alleged that FDOT had structured the planned acquisition to avoid use of railroad workers covered by the Federal railroad laws including the Railway Labor Act and that BRS asserted that the "State of Maine" line of precedent is wrong and should not be followed by the Board in its consideration of FDOT's motion. Decision at 5.¹

The Board responded that it had rejected similar arguments in the recent decision in Massachusetts Departments of Transp. –Acquisition Exempt. –Certain Assets of CSX Transp., FD 35312 (May 3, 2010), and that the agency would not reconsider the interpretation of the Act set forth in the State of Maine and line of cases where "FDOT has adequately addressed BRS' concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen". Decision at 6. The Board stated that it took BRS' allegations seriously and did "not intend for the State of Maine transaction structure to be used for the primary purpose of circumventing the railway labor laws". *Id.* at 10. But the Board noted that various unions had entered agreements concerning the sale of the Orlando area line and that, with respect to the signal work: "FDOT has represented that it will: (1) remove the signal work from the scope of the SunRail design-build-maintain contract: (2) bid the signal work separately and (3) require that bidders for the signal work be 'rail employers' under the applicable Federal law such that the signalmen would be afforded Federal rail labor law protections"; so "[u]nder these circumstances, we are satisfied that the interests of rail labor have been adequately addressed". *Id.* at 11. Consequently, the Board did not reconsider State of

¹ In fact, BRS had submitted specific documentary evidence showing that FDOT had schemed to evade the use of railroad workers covered by the Federal railroad laws. First Demott Declaration ¶¶ 2, 3, 7, and Exhibit 2, 3, 7.

Maine and it granted FDOT's motion for dismissal.

Shortly after the Board issued its decision FDOT contacted BRS officers with a proposal that purported to fulfill the representations FDOT made to the Board, and to the Florida legislature regarding performance of the signal work for the acquired line by a contractor and signal workers who were covered by the Federal railroad laws. Third Declaration of R.G. Demott ¶4. However, FDOT's proposal was not to "remove the signal work from the scope of the SunRail design-build-maintain contract", "bid the signal work separately" and require that bidders for the signal work be 'rail employers' under the applicable Federal law" as the Board described FDOT's representations. Instead FDOT only proposed to remove and bid signal maintenance work separately and only require that bidders for the signal maintenance work be rail employers. The FDOT proposal excluded signal construction work. *Id.* BRS responded that FDOT's proposal was inadequate because FDOT had committed to the Florida legislature and represented to the Board that the Department would separately bid the signal work generally, without limitation as to the type of signal work, that signal construction work is signal work and work traditionally performed by Signalmen, and that signal construction work is certainly included in the "build" part of the design-build-maintain work. Demott Declaration ¶5.

On December 21, 2010 FDOT provided BRS a proposed letter agreement under which signal maintenance work would be separately bid with a requirement that the bidders be rail employers under the Federal railroad laws, but FDOT excluded signal construction work from the signal work that would be separately bid with a requirement that the bidders for signal maintenance work be rail employers under the Federal railroad laws. The proposal stated that FDOT would "carve out the signal maintenance work from the Department's pending design/build/maintain contract". Demott Declaration ¶6 and Exhibit A.

On December 23, 2010, BRS responded to FDOT's proposal. BRS noted that it had repeatedly said that FDOT's commitment was to separately bid the "signal work" generally, and require that bidders for the "signal work" be rail carriers and thus rail employers under the Federal railroad laws. BRS also noted that the Board recognized that and stated that it would not reconsider its State of Maine policy in the FDOT case where "FDOT has adequately addressed BRS' concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen". BRS therefore advised FDOT that the Agreement between BRS and FDOT must encompass both signal maintenance work and signal construction work; and BRS attached a counterproposal that covered both types of signal work. BRS further requested that FDOT advise the union if FDOT was no longer taking the position that signal construction work traditionally performed by Signalmen will be performed by RLA covered employers and employees on the acquired CSXT line; and that FDOT respond immediately if it had changed its position so that BRS could review the new position and bring it to the attention of the STB before January 4, 2011 if necessary. Demott Declaration ¶7 and Exhibit B.

As of January 4, 2011 BRS had received no response from FDOT to its letter of December 23, 2010. Demott Declaration ¶8.

ARGUMENT

BRS respectfully submits that, based on the facts adduced in this petition, the Board should reopen its December 15 decision and address BRS's arguments against dismissal of FDOT's notice of exemption. The Board's decision was quite clear that it did not address BRS's arguments against application of the State of Maine line of precedent (or BRS's evidence of deliberate structuring of anti-union motivation and planning) because "FDOT has adequately

addressed BRS' concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen". Decision at 6. The Board further stated that it would not allow use of the "State of Maine transaction structure to be used for the primary purpose of circumventing the railway labor laws", but that FDOT had represented that it would remove the signal work generally from the scope of the SunRail design-build-maintain contract, bid the signal work separately and (3) require that bidders for the signal work be 'rail employers'" under Federal railroad laws. *Id.* at 10. It was based on those representations, "[u]nder these circumstances" that the Board concluded that "the interests of rail labor have been adequately addressed" such that the Board need not address the facts and arguments advanced by BRS. *Id.* at 11.

The Board clearly understood that FDOT's representations regarding the signal work included signal work generally, "work traditionally performed by signalmen", not just one type of signal work. And to the extent that there may have been some question or differences about the commitment that was made in FDOT's letter to the Florida legislature, FDOT's representations to the Board, that were relied on by the Board, were in terms of Signal work generally without limitation or restriction. But now, FDOT appears to be following through on its representations only with respect to signal maintenance work. BRS respectfully submits that now that FDOT has refused actually act in a manner consistent with its representations to the Board when the time came for it to do so, the Board should reopen this proceeding and address BRS's evidence and arguments. Certainly, the communications between BRS and FDOT constitute both new evidence and changed circumstances under 49 C.F.R. §1115.4 providing a basis for reopening under the Board's rules. Furthermore, the new evidence and changed circumstances are material to the Board's decision because the Board expressly relied on FDOT's representations as a key

basis for not addressing BRS's evidence and argument, and the Board said that it took the Union's allegations seriously and would not allow the *State of Maine* transaction structure to be used for the primary purpose of evading the Federal railroad laws including the RLA.

For all these reasons, BRS' motion should be granted, the Board should reopen its decision of December 15, 2010 and it should address the evidence and arguments advanced by BRS in opposition to FDOT's motion for dismissal.

Respectfully submitted,

/s/ 

Richard S. Edelman
O'Donnell, Schwartz & Anderson
1300 L Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 898-1707
(202)-682-9276
REdelman@odsalaw.com

January 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served copies of the foregoing Petition to Reopen and Third Declaration of R.G. Demott to the offices of the following:

William C. Sippel
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(electronically and by First Class Mail)

Florida Department of Transportation
District 5
719 South Woodland Boulevard
DeLand, FL 32720
(by First Class Mail)

January 4, 2011

/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.

THIRD 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 on 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. I previously submitted two declarations in this proceeding. I am submitting this third declaration to advise the Board of recent actions of the Florida Department of Transportation ("FDOT") at odds with representations made by FDOT in support of its motion for dismissal of its notice for exemption of its acquisition of CSXT's lines north and south of Orlando (Central Florida line) from Board approval under Section 10901 that were relied on by the Board in its decision issued December 15, 2010; and to support BRS's petition for reopening of that proceeding.

3. In response to arguments against the motion for dismissal advanced by BRS, the

Board's decision stated that the agency would not reconsider the interpretation of the Act set forth in the State of Maine line of cases where 'FDOT has adequately addressed BRS' concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen'. The Board also said that other unions had entered agreements concerning the sale of the Orlando area line and that 'FDOT has represented that it will: (1) remove the signal work from the scope of the SunRail design-build-maintain contract (2) bid the signal work separately and (3) require that bidders for the signal work be 'rail employers' under the applicable Federal law such that the signalmen would be afforded Federal rail labor law protections'; so '[u]nder these circumstances, we are satisfied that the interests of rail labor have been adequately addressed'.

4. Shortly after the Board issued its decision I was contacted by representatives of FDOT with a proposal that purported to fulfill the representations FDOT made to the Board and to the Florida legislature. However, the proposal was not to 'remove the signal work from the scope of the SunRail design-build-maintain contract', 'bid the signal work separately' and require that bidders for the signal work be 'rail employers' under the applicable Federal law' as the Board described FDOT's representations. Instead FDOT only proposed to remove and bid signal maintenance work separately and only require that bidders for the signal maintenance work be rail employers. The FDOT proposal excluded signal construction work.

5. We responded that the proposal to separately bid the signal maintenance work was inadequate because FDOT had committed to the Florida legislature and represented to the Board that the Department would separately bid the signal work generally, without limitation as to the type of signal work, that signal construction work is signal work and work traditionally performed by Signalmen, and that signal construction work is certainly included in the "build" part

of the design-build-maintain work.

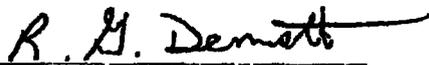
6. On December 21, 2010 FDOT forwarded to us a proposed letter agreement that excluded signal construction work from the signal work that would be separately bid with a requirement that the bidders for signal maintenance work be rail employers under the Federal railroad laws; in fact the proposal stated that FDOT would "carve out the signal maintenance work from the Department's pending design/build/maintain contract". Attached to this declaration as Exhibit A is a copy of the proposal sent to me by FDOT.

7. On December 23, 2010, BRS responded to FDOT's proposal. We noted that we had repeatedly said that FDOT's commitment was to separately bid the "signal work" generally, and require that bidders for the "signal work" be rail carriers and thus rail employers under the Federal railroad laws. We also noted that the Board recognized that and stated that it would not reconsider its State of Maine policy in this case where "FDOT has adequately addressed BRS concerns regarding the employment of RLA unions for maintenance and construction work on the Orlando Line traditionally performed by signalmen". We therefore advised FDOT that the Agreement between BRS and FDOT must encompass both signal maintenance work and signal construction work and we attached a counterproposal that covered both types of signal work. We further requested that FDOT advise us if, after obtaining a favorable decision on its motion to dismiss it was, post-decision, no longer taking the position that signal construction work traditionally performed by Signalmen will be performed by RLA covered employers and employees. We requested an immediate response if FDOT was now taking the position that its commitments applied only to signal maintenance work so that we could review that position and bring it to the attention of the STB before January 4, 2011 if necessary. Attached to this declaration as Exhibit B is a copy of our December 23 letter and the proposal we sent to FDOT.

8. As of the date of this declaration we have received no response from FDOT to our letter of December 23, 2010.

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

January 4, 2011



R. G. Demott

DEMOTT EXHIBIT A

From: Kevin.Thibault@dot.state.fl.us
To: fmason486@aol.com, brsgc74@mindspring.com
CC: Todd.Hammerle@dot.state.fl.us
Sent: 12/21/2010 7:15:41 A.M. Eastern Standard Time
Subj: Letter

Floyd/Gus,

Attached find a draft letter as we discussed. Please let me know your thoughts at your earliest convenience.

Kevin J. Thibault, P.E.

Executive Director, Florida Rail Enterprise

Florida Department of Transportation

605 Suwannee Street, M.S. 57

Tallahassee, FL 32399-0450

850-414-5210

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December 20, 2010

Mr. R. G. Demott, General Chairman
Brotherhood of Railroad Signalmen
Post Office Box 88
Clinton, South Carolina 29325

Mr. Floyd Mason, International VP
Brotherhood of Railroad Signalmen
2511 Smith Harbour Drive
Denver, NC 28037

Re: Florida SunRail Project, Central Florida Rail Corridor
Proposal to Carve-out Signal Maintenance Work

Dear _____,

This is to follow up on our most recent discussions, and the Department's continuing engagement with the Brotherhood of Railroad Signalmen in furtherance of Secretary Kopelousos' letter of December 8, 2009, in like regard.

This will confirm the Department's offer to:

1. carve-out the signal maintenance work from the Department's pending SunRail design/build/maintain contract and separately advertise procurement for that scope of signal maintenance work in January 2011; and
- 2.) also carve-out the signal maintenance work from the Department's initial long-term operations and maintenance contract for the SunRail corridor and likewise separately advertise procurement for that scope of signal maintenance work. The long-term signal maintenance procurement is currently anticipated for advertisement in February or March 2012.

If the Brotherhood of Railroad Signalmen agrees to accept such terms, kindly acknowledge your acceptance by affixing your signature and date of signature in the space provided below for such purpose; and return the original of this letter to me in due course.

Sincerely,

Kevin J. Thibault, P.E.
Executive Director
Florida Rail Enterprise

DEMOTT EXHIBIT B

Richard Edelman

From: FMason486@aol.com
Sent: Thursday, December 23, 2010 5:10 PM
To: Kevin.Thibault@dot.state.fl.us; todd.hammerle@dot.state.fl.us
Cc: brsgc74@mindspring.com
Subject: Re: Letter
Attachments: BRS FDOT 12-23-2010.pdf; BRS FDOT letter 12-23-2010.docx

Kevin/Todd,

Attached find a revised draft and cover letter.

Floyd Mason

cc: Gus Demott

Floyd E. Mason | Int. Vice President | BRS | 2511 Smith Harbour | Denver, NC 28037 | 704-483-1655(PH) | 704-483-1153 (FAX)
fem@brs.org

In a message dated 12/21/2010 7:15:41 A.M. Eastern Standard Time, Kevin.Thibault@dot.state.fl.us writes:

Floyd/Gus,

Attached find a draft letter as we discussed. Please let me know your thoughts at your earliest convenience.

Kevin J. Thibault, P.E.

Executive Director, Florida Rail Enterprise

Florida Department of Transportation

605 Suwannee Street, M.S. 57

Tallahassee, FL 32399-0450

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Brotherhood of Railroad Signalmen

2511 Smith Harbor Drive
Denver, NC 28037

Floyd E. Mason
International Vice President

(704) 483-1655
Fax: (704) 483-1153

December 23, 2010

Kevin J. Thibault, P.E.
Executive Director, Florida Rail Enterprise
Florida Department of Transportation
605 Suwannee Street, M.S. 57
Tallahassee, FL 32399-0450

Dear Mr. Thibault,

This is in response to the proposal that you sent to the Brotherhood of Railroad Signalmen on December 22, 2010 regarding a proposed agreement concerning the performance of Signal work for the SunRail corridor. FDOT's proposal contains two items; both of them address only "signal maintenance work". However, as we have frequently noted, FDOT's commitment was to separately bid the "signal work" generally, and require that bidders for the "signal work" be rail carriers and thus rail employers under the Federal railroad laws. This was expressly recognized by the Surface Transportation Board in its recent decision granting FDOT's motion. The Board stated that it would not reconsider the State of Maine policy in this case where "FDOT has adequately addressed BRS' concerns regarding the employment of RIA unions for maintenance and construction work on the Orlando Line *traditionally performed by signalmen*" (Decision page 6, emphasis added). We therefore believe, as we always have, that the Agreement between BRS and FDOT must encompass both signal maintenance work and signal construction work. Attached is a counterproposal that covers both types of signal work during all Phases of the project.

We look forward to finalizing an agreement that covers both types of work consistent with our discussions at the end of the 2009 legislative session and with the STB's recent decision.

If FDOT now takes the position that it will not agree that signal construction work traditionally performed by Signalmen will be performed by RIA covered employers and employees, please advise us immediately so that we may review that position for timely petition to the STB by January 4, 2011, if needed.

cc: R.G. Demott, General Chairman
Todd S. Hammerle, P.E., SunRail Project Manager

December 20, 2010

Mr. R. G. Demott, General Chairman
Brotherhood of Railroad Signalmen
Post Office Box 88
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Mr. Floyd Mason, International-VP
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Re: Florida SunRail Project, Central Florida Rail Corridor
Proposal to Carve-out Signal Maintenance Work

Dear _____,

This is to follow up on our most recent discussions, and the Department's continuing engagement with the Brotherhood of Railroad Signalmen in furtherance of Secretary Kopelousos' letter of December 8, 2009, in like regard.

This will confirm the Department's offer to:

1. carve-out the signal work from the Department's pending SunRail design/build/maintain contract and separately advertise procurement for signal maintenance work, with a requirement that the successful contractor shall be a rail carrier under federal railroad laws, in January 2011; and
- 2.) carve-out the signal work from the Department's initial long-term operations and maintenance contract for the SunRail corridor and likewise separately advertise procurement for signal maintenance work, with a requirement that the successful contractor shall be a rail carrier under federal railroad laws. The long-term signal maintenance procurement is currently anticipated for advertisement in February or March 2012; and,
3. separately advertise procurement for Phase I Signal Construction from the Department's pending design/build/maintain contract in January 2011, with a requirement that the successful contractor shall be a rail carrier under federal railroad laws; and,
4. likewise separately advertise procurement for Phase II signal construction work with a requirement that the successful contractor shall be a rail carrier under federal railroad laws. The Phase II signal construction procurement is currently anticipated for advertisement in February or March 2012.

If the Brotherhood of Railroad Signalmen agrees to accept such terms, kindly acknowledge your acceptance by affixing your signature and date of signature in the space provided below for such purpose, and return the original of this letter to me in due course.

Sincerely,

Kevin J. Thibault, P.E.
Executive Director
Florida Rail Enterprise

December 20, 2010

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- 2.) carve-out the signal work from the Department's initial long-term operations and maintenance contract for the SunRail corridor and likewise separately advertise procurement for signal maintenance work, with a requirement that the successful contractor shall be a rail carrier under federal railroad laws. The long-term signal maintenance procurement is currently anticipated for advertisement in February or March 2012; and,
3. separately advertise procurement for Phase I Signal Construction from the Department's pending design/build/maintain contract in January 2011, with a requirement that the successful contractor shall be a rail carrier under federal railroad laws; and,
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If the Brotherhood of Railroad Signalmen agrees to accept such terms, kindly acknowledge your acceptance by affixing your signature and date of signature in the space provided below for such purpose, and return the original of this letter to me in due course.

Sincerely,

Kevin J. Thibault, P.E.
Executive Director
Florida Rail Enterprise