

16 MR. EDELMAN: Thanks very much. Good
17 morning, Chairman Nober, Vice Chairman Mulvey and
18 Commissioner Buttrey. I'm Richard Edelman. I'm
19 counsel for the BMW. On behalf of the BMW, we want
20 to thank the Board for holding this hearing this
21 morning in this important case.

22 I want to begin by highlighting several

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1 factual matters. The BMWWE has characterized the
2 Richmond-to-Clifton Forge line as in abysmal
3 condition. Applicants dispute this, saying that the
4 line is in good condition and that BMWWE's story here
5 is two years old. Frankly, this is a stunning
6 assertion unsupported by any actual evidence such as
7 a declaration, or a verified statement, and it likely
8 ignores all of the evidence provided by BMWWE.

9 Like Vice Chairman Mulvey pointed out,
10 they say there haven't been any reportable derailments
11 in two years. Well, that's setting a low threshold
12 for yourself and their overall rate of violations
13 isn't really pertinent to this particular line, which
14 has its own specific history that we've documented for
15 you. BMWWE has shown that conditions on many parts of
16 this line are so bad that a gauge measurement car
17 derailed during an inspection. That was in 2002.

18 BMWWE provided several FRA reports to you
19 well past 2002 showing extremely poor track conditions
20 on this line, especially on the Piedmont subdivision.
21 We have also provided you with a declaration of Roy
22 Griffith, former track inspector on this very line,

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1 and his recent inspection demonstrated there are
2 numerous defects all over this line.

3 CSXT responded that the line is in good
4 condition. There were just problems at mileposts 160,
5 180 to 184 and 189. That's at page 15 of their reply.
6 We have demonstrated there are many serious problems
7 in many locations. This is shown by the Brassell and
8 Griffith declaration, paragraph 10, Exhibit B and C
9 which include observation from mileposts 118, 160,
10 207, 276. We give you pictures from all three
11 subdivisions and you can see serious problems all over
12 the place.

13 We submit the evidence is clear that CSX
14 has essentially just fixed whatever violations it's
15 been cited for by the FRA. When they are cited, they
16 fix that and they move on and they scrap the supposed
17 plans that they talked about coming in and doing major
18 renewal work on this line. Their brief would leave
19 with you the impression that everything is fixed, as
20 if they ran a tie and surfacing gang over this line
21 since 2002. But their characterization of this line
22 is unsupported by any evidence at all, much less

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1 competent evidence. It is just not so.

2 They refer to the track charts and you may
3 hear about track chart that they provided and
4 suggested BMW didn't provide enough evidence. There
5 are track charts, but the track charts don't show
6 wide gauge, washed out ballast, broken joints, frayed
7 ties, broken tie bolts. That's not what they show.
8 They basically show the record of production type work
9 when they've done surfacing, when they've put new ties
10 in, physical characteristics of the right of way such
11 as grade and curve.

12 CSX produced no declarants to talk about
13 the actual track charts, what they say, and no
14 declarant would even attempt to refute BMW's evidence
15 on the condition of the track and right of way. The
16 actual record evidence supports our description of the
17 condition of those lines.

18 Next I want to talk about the terms of the
19 lease. CSXT will be the dominant operator on this
20 line. Applicants dispute this assertion, but they say
21 that they anticipate BB will have 11,700 carloads:
22 6,200 of them local traffic, 1,000 from NS, 4500 of

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1 them are CSX non-revenues. CSX will have 7,900 local
2 carloads from a shipper on this line that it is
3 supposedly leasing to someone else, and 156,000 empty
4 cars for reverse load movements coordinated with the
5 James River movements and Amtrak will have two trains
6 per day three times per week.

7 This shows that BB will be a minority
8 operator on this line and that CSXT will be the
9 dominant operator. Even if you count the 4,500 CSX
10 non-revenue carloadings so that BB's carloadings
11 exceed CSX's, the Applicant ignored the movement of
12 156,000 empty cars. But ignoring them doesn't make
13 them go away.

14 Certain financial aspects of this
15 arrangement are also significant. BB will pay CSX
16 \$140,000 per year. CSXT will pay BB \$2 million a year
17 for trackage rights to continue its reverse-flow
18 movement. In effect, CSXT is paying BB \$1.86 million
19 a year to take the lines off its hands while CSXT
20 continues to use the lines. That's what the financial
21 terms net out to.

22 Or you can look at it this way. BB says

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1 they're going to spend about \$1.8 to \$2.2 million to
2 maintain the lines for the current, not particularly
3 satisfactory condition. One could look at this as
4 CSXT is paying BB just to keep the line in its current
5 poor condition while CSXT continues to use the line
6 but is not responsible for the track and the right-of-
7 way.

8 With respect to the duration of the lease,
9 we submit the only certain duration is ten years
10 because the financial terms are subject to renewal
11 after ten years. If the parties cannot agree, it's
12 terminable at will. Now the Applicants deny the
13 significance of this fact. They talk about the
14 renegotiation provision as prudent and difficult, but
15 the fact is the lease is terminable at will after ten
16 years.

17 There was nothing like an arbitration
18 provision here to set the terms. If CSXT wants to
19 dramatically increase the lease payments and/or
20 dramatically reduce the trackage rights payment after
21 ten years, it could do so and effectively terminate
22 the lease.

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1 We submit that the Board can and must take
2 these facts, and our arguments based on these facts,
3 and the National Rail Transportation Policy into
4 account when considering this application. We also
5 submit that, independent of the Rail Transportation
6 Policy, the Board should consider that this
7 transaction is not a legitimate lease and I will
8 address that a little bit later.

9 Now just because this is the Section
10 11324(d) transaction does not mean that the Rail
11 Transportation Policies are irrelevant. The Rail
12 Transportation Policies express basic policies of this
13 Act and we have cited to you Supreme Court and
14 appellate decisions since 2000 that make it clear that
15 a statute must be interpreted and applied as in an
16 entire statutory scheme.

17 This agency cannot then ignore the Rail
18 Transportation Policy. We have cited other cases
19 where the Board has rejected facially compliant
20 transactions, things that appeared to comply with
21 specific provisions of the statute, but that
22 conflicted with basic policies of the act that were

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1 shunned for improper purposes.

2 Now our position is not in conflict with
3 11324(d) and would not overwhelm 11324(d). We are not
4 saying in these cases that Applicants must
5 affirmatively show a transaction that satisfies all of
6 the criteria of the RTP, but that the Board can and
7 should consider the RTP. And when a transaction is
8 plainly inconsistent with important transportation
9 policy, it should be rejected.

10 It seems like here this morning the
11 Applicants acknowledged that the Board may consider
12 the transportation policies and we submit it should
13 consider the transportation policies.

14 Chairman Nober, you asked a question about
15 safety issues. The third item under Rail
16 Transportation Policy, "(3) to promote a safe and
17 efficient rail transportation system by allowing rail
18 carriers to earn adequate revenues, as determined by
19 The Board (8) to operate transportation facilities and
20 equipment without detriment to the public health and
21 safety and (9) to encourage honest and efficient
22 management of railroads." I think you certainly can

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1 say safety concerns come into account. The FRA has
2 its role and its function but so do you. In
3 particular, safety becomes relevant to an arrangement
4 that has its own problems and its own odd structures
5 that don't make sense. It makes sense to me that
6 safety is a relevant consideration for you.

7 We have cited situations where the Board
8 surely would consider the RTP in its 11324
9 transactions. Applicants say we cite extreme and
10 hypothetical cases, but they demonstrate they can and
11 should be considered. The position that the Board must
12 approve a transaction unless it finds competitive harm
13 is extreme in itself. The transportation policy must
14 inform the decision of this Board.

15 We submit that approval of this proposed
16 lease would be contrary to several of the Rail
17 Transportation Policies as described in our comment
18 because BB is not in a position to be the operator of
19 this line, given its current conditions and BB's
20 experience and abilities.

21 Just briefly, we rely on factors relating
22 to development and continuation of sound rail

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1 transportation; meeting the needs of the public and
2 national defense; operation of facilities and
3 equipment without detriment to public health and
4 safety; and encouragement of honest and efficient
5 management of railroads. Contrary to the argument of
6 the Applicants, we have shown this line in fact is in
7 very poor condition in many places. We demonstrated
8 this by FRA reports, our recent observations, our
9 photos. This line needs major renewal and overhauls.
10 It really needs a production type of T&S gang, which
11 CSXT has, but will not commit to this line. It is not
12 a task that BB is up to.

13 We do not see the big line of workers that
14 exist with respect to their current line, but even if
15 it increases maintenance-of-way way forces from the
16 eight that they refer to as multi-function employees
17 to 12 as it now says, that is not sufficient. This
18 line is not in adequate condition now while being
19 maintained by CSX's 13 assigned full maintenance-of-
20 way employees and BB plainly doesn't have the
21 equipment required for maintaining those lines. The
22 FRA has observed, and I believe that the State of

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1 Virginia believes, major work is required on this
2 line. A production gang is needed, that is not going
3 and to happen if this lease is approved.

4 Also, this is not just like putting
5 together four separate short lines as Mr. Bryant
6 suggested. Not only are there the serious remedial
7 problems with respect to the track and the right-of-
8 way, we're talking about a line now that is going to
9 have CSX, BB and Amtrak all operating on it. It's
10 going to have HazMats operating on it. It's going to
11 have passengers operating on it. This is a far, far
12 more complicated operation than what they're doing now
13 on their 17 miles of track a couple days a week. or
14 saying as if you're doing that four times over this
15 segment of track.

16 This is not, as Applicants have said, in
17 fact a Class III acquisition. It is a critique of a
18 particular carrier acquiring a particular line with
19 its difficulties to three and other circumstances
20 surrounding this. It's a critique of this particular
21 transaction. In fact as I said, there are only
22 limited requirements in this lease for BB's

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1 maintenance of the line. It just has to keep it so
2 that it doesn't get any worse. That's basically what
3 you heard this morning.

4 We submit, the cost for this is likely to
5 be thrown to the state. BB has relied on state
6 support for capital work on its current line. We
7 think it's likely with this line, with a significant
8 event like a derailment or a big crossing problem,
9 because they don't have the resources to handle what
10 is needed there. That is likely.

11 By the way, we did ask in an interrogatory
12 about their capital investment in the current line.
13 They declined to answer. This morning, you were told
14 they reinvested. We don't know what it was. This is
15 CSXT's line and it will continue to be a major user
16 on the line and has the responsibility for making the
17 repairs.

18 Now, separate and apart from the Rail
19 Transportation Policy, we have argued and demonstrated
20 that this is not a legitimate lease. We have relied
21 on a number of factors. CSX will continue to be the
22 dominant operator on the line. CSX will continue

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1 heavy use of this line, but will not have the
2 responsibility for anything that will happen on it for
3 a while. The lease is effectively for ten years. The
4 financial term is that CSX is effectively paying BB
5 a net \$1.86 million to take the line out of its
6 inventory and CSXT is guaranteeing a certain minimum
7 of revenue support.

8 The Applicants defend the lease in their
9 reply comments and what you heard this morning by
10 noting an inherent characteristic of a lease is that
11 ownership is retained, that many short line sales and
12 leases have been approved, that leases with retained
13 trackage rights had been approved, that short duration
14 leases have been approved, and that CSX's continued
15 service to the Martin Marietta rock facility makes
16 operational sense. That's another aspect of the
17 leasing or just good economic sense, good operation.

18 What they've done is basically sliced and
19 diced this transaction into separate components so
20 that each appears separately innocuous. But it is the
21 combination of these factors that makes this
22 transaction, as a whole, not a legitimate lease.

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1 Again, they are asking the Board to approve a lease
2 and sanction a transfer of the common carrier
3 obligation, but CSX will continue to serve the largest
4 local shipper. CSX will move 156,000 empties and 7,900
5 carloads while there are only 11,700 carloads for BB.

6 If you take out the non-revenue CSX move,
7 CSX will handle more local carloading than BB. The
8 only certain term is ten years. They can take this
9 line out of their inventory and not be responsible for
10 it but get it back in a relatively short period and
11 instead of receiving net income from the lease, they
12 will be paying \$1.86 million plus more for the non-
13 revenue movements for CSX.

14 As to the rationale that BB will better
15 serve local shippers, this looks more like a grant of
16 local trackage rights from CSXT to BB. It's not a
17 lease. The fact that you could have a legitimate
18 transaction, either as a sale or something like a
19 local trackage rights arrangement, doesn't make this
20 transaction a legitimate lease.

21 The key is that those other sorts of
22 transactions would not have served CSXT's interest

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1 because it wanted relief from its obligations on this
2 line on taking care of this line while retaining
3 control and heavy use of the line without remaining
4 responsible for it. That's the ultimate point. CSXT,
5 it is their line. It must responsible for the line,
6 but it refuses to do the work that needs to be done.
7 It keeps getting cited by the FRA but it will not and
8 indeed cannot give up this track.

9 All of the factors cited by BMWWE taken
10 together show that this is not a legitimate lease.
11 This transaction has been structured the way it has to
12 relieve CSXT of its responsibilities for the line for
13 a short time while it's retaining all of the benefits
14 in heavy use and control of the line, with the ability
15 to take the line back. We submit the CSXT should not
16 be able to use this fact and this agency to obtain
17 approval of this sham transaction that would allow it
18 to evade its obligations to provide safe and efficient
19 service.

20 While we have urged you to reject this
21 application. We do agree with VDOT that if it is
22 approved, the Board should impose a condition. But

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1 fundamentally, it's important to look at what this
2 transaction is and how it's structured and why it's
3 structured, and we submit it should not be approved.
4 We have shown that this proposed transaction conflicts
5 with several national rail transportation policies, BB
6 is not fit or qualified to be responsible for these
7 lines, and the lease purportedly is a sham. We
8 respectfully urge the Board to look at the reality of
9 this transaction and reject the CSX attempt to defeat
10 the statute. Thank you very much.

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