

UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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 IN THE MATTER OF: :  
 :  
 SAN BENITO RAILROAD LLC, :  
 ACQUISITION EXEMPTION, :  
 CERTAIN ASSETS OF UNION :  
 PACIFIC RAILROAD COMPANY :  
 :  
 MOVANT, : Finance  
 : Docket  
 - V. - : 35225  
 :  
 BROTHERHOOD OF MWE/IBT & BRS :  
 ("UNIONS"), :  
 :  
 RESPONDENT. :  
 :  
 -----X

Tuesday,

January 26, 2010

Surface Transportation Board  
Hearing Room  
395 E Street, S.W.  
Washington, D.C.

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

DANIEL ELLIOTT, III Chairman  
 FRANCIS MULVEY Vice Chairman  
 CHARLES NOTTINGHAM Member

APPEARANCES:

On Behalf of San Benito Railroad LLC,

Movant:

KEVIN M. SHEYS, ESQ.

JANIE SHENG, ESQ.

of: K&L Gates, LLP

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On Behalf of the Brotherhood of MWE/IBT

& BRS, Respondent:

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of: O'Donnell, Schwartz

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I-N-D-E-X

ORAL ARGUMENTS

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P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

CHAIRMAN ELLIOTT: Welcome.

Today, we will hear two arguments, oral arguments in two proceedings currently pending here at the Board, San Benito Railroad, LLC, Acquisition Exemption, Certain Assets of Union Pacific Railroad Company, Finance Docket Number 35225, and Allegheny Valley Railroad Company, Petition For Declaratory Order, Finance Docket Number 35239.

In an effort to move things along, the Board members will not be making opening remarks this morning, but I wanted to cover a few procedural matters before we begin.

We have asked each party to make a short statement of their arguments, but Counsel should be prepared to answer questions from the Board at any time during your allotted time. I assure you that we have read all your pleadings and there is no reason to repeat every argument.

1                   Speakers, please, note that the  
2                   timing lights are in front of me. You will  
3                   see a yellow light when you have one minute  
4                   remaining and a red light when your time has  
5                   expired. The yellow, one-minute light will be  
6                   accompanied by a single chime, and the red  
7                   light signifying that your time has expired  
8                   will be accompanied by two chimes.

9                   Please, keep to the time you have  
10                  been allotted. When you see the red light and  
11                  hear the double chime, please, finish your  
12                  thought and take a seat.

13                  Additionally, just a reminder to  
14                  everyone, please, turn off your cell phones.

15                  The first argument will be in the  
16                  San Benito case. Counsel for San Benito  
17                  Railroad, you have been allotted 20 minutes.  
18                  Please, step up to the podium, introduce  
19                  yourself and indicate if you have reserved any  
20                  time for rebuttal, and then begin.

21                  MR. SHEYS: Good morning, Chairman  
22                  Elliott, Vice Chairman Mulvey, and Member

1 Nottingham. My name is Kevin Sheys. I'm  
2 counsel for San Benito Railroad.

3 With me, today, is Janie Sheng, my  
4 colleague, who has joined me on the papers for  
5 San Benito, and watching on the live feed are  
6 the management of San Benito, who are very  
7 interested in the outcome of this case.

8 We have reserved five minutes for  
9 rebuttal.

10 San Benito filed a verified notice  
11 of exemption and a motion to dismiss that  
12 notice to obtain from the Board a  
13 jurisdictional determination that the  
14 acquisition of the line in this case was not  
15 subject to the Board's jurisdiction and that  
16 after the acquisition San Benito would not be  
17 subject to the Board's jurisdiction.

18 What I'd like to do this morning  
19 is spend a few minutes talking about the State  
20 of Maine line of cases and the conceptual  
21 framework of State of Maine, and then a few  
22 more minutes talking about how the framework

1 of State of Maine fits squarely with the San  
2 Benito transaction.

3 CHAIRMAN ELLIOTT: Mr. Sheys?

4 MR. SHEYS: Yes.

5 CHAIRMAN ELLIOTT: Before you get  
6 into that, could you kind of get into a little  
7 bit about the status of this project. We  
8 understand that there is some litigation going  
9 on in District Court and we do have some  
10 concerns about whether or not the actual rail  
11 project will go forward. So we just wanted to  
12 address if you foresee a proceeding.

13 MR. SHEYS: Well, the only  
14 proceeding that's going to happen before this  
15 Board is this proceeding because the San  
16 Benito Railroad operation is an intrastate  
17 operation that will not be subject to Surface  
18 Transportation Board jurisdiction.

19 I don't know, Mr. Elliott, what  
20 litigation you're referring to. I can give  
21 you a summary of the status of the project if  
22 that would be helpful.

1                   CHAIRMAN ELLIOTT: That would be  
2                   great.

3                   MR. SHEYS: The San Benito  
4                   Railroad's affiliate is developing a  
5                   residential community, a whole town from a  
6                   green field at a point north of Hollister,  
7                   California. This line would provide passenger  
8                   rail service from that new community to the  
9                   northern end of the acquired line at  
10                  Cardanero, and then, from that point,  
11                  Cardanero to Gilroy on trackage rights on the  
12                  UP Coast Mainline, at which point there is an  
13                  existing Caltrain commuter rail service that  
14                  runs to San Jose and then to San Francisco.

15                  The project is still in permitting  
16                  with San Benito County and the State of  
17                  California. There's no construction going on  
18                  at this point.

19                  CHAIRMAN ELLIOTT: Okay. We saw  
20                  that there was some litigation in the Northern  
21                  District of California. Are you aware of  
22                  anything like that?



1 MR. SHEYS: I'm not aware of any  
2 jurisdiction related to the railroad  
3 construction or the planned passenger rail  
4 service.

5 VICE CHAIRMAN MULVEY: But what  
6 about with regard to the entire project? We  
7 understand that one of the managing partners  
8 has withdrawn and that compromises the  
9 financing for the entire project. Could you  
10 speak to that at all?

11 MR. SHEYS: There is a dispute  
12 between the owners and members of the LLC.  
13 The litigation, if there is litigation going  
14 on in the Northern District, with you saying  
15 there is, I'm sure there is, it doesn't  
16 pertain to the rail line. And, moreover, the  
17 rail line is an intrastate operation.

18 We are seeking a determination  
19 that this acquisition of rail line would not  
20 be subject to the Board's jurisdiction.

21 VICE CHAIRMAN MULVEY: We  
22 understand that. It's just that there's no

1 project and there'll be no rail line, and the  
2 Board's time is valuable. We don't want to be  
3 spending our time on a project which is not  
4 going to go forward or just making a  
5 determination on our jurisdiction over a line  
6 that may not ever be built. So you understand  
7 our concern.

8 MR. SHEYS: I understand your  
9 concern. I would submit that the parties have  
10 gone to a great deal of expense to negotiate  
11 the transaction and that we are seeking a  
12 determination that is not hypothetical because  
13 it would be speculative to conclude at this  
14 point in time that the transaction will not  
15 take place.

16 CHAIRMAN ELLIOTT: Have you  
17 devised an operating plan for this railroad or  
18 this operation?

19 MR. SHEYS: Other than the plan  
20 being to contract for passenger rail service,  
21 there's no operating plan because the  
22 operation is quite a few years into the

1 future.

2 CHAIRMAN ELLIOTT: Okay. That's  
3 fine. Proceed.

4 MR. SHEYS: Thank you.

5 As to the State of Maine doctrine,  
6 I think it's useful to think about  
7 hypotheticals to get a handle on a conceptual  
8 framework. So suppose a buyer is buying an  
9 extra parcel of land adjacent to a railroad  
10 right of way, suppose it's going to be used to  
11 develop some kind of a grain elevator or some  
12 facility for rail service.

13 I think we would all agree that a  
14 railroad selling an extra width parcel like  
15 that would not need to come to the STB to get  
16 approval to do that because the sale of an  
17 extra width parcel, absent bizarre facts,  
18 would not interfere with the railroad's  
19 continuing common carrier obligation on the  
20 adjacent track.

21 If you move closer and think about  
22 a hypothetical where a buyer is acquiring a

1 right to put in like a municipality to put in  
2 a water pipe underneath the right of way, or  
3 somebody is getting authority to cross a  
4 railroad right of way, again, I think we would  
5 all agree that that kind of a transaction  
6 would not require Board approval for the very  
7 same reason, the rights retained by the  
8 seller, the railroad, would clearly allow it  
9 to continue to meet its common carrier  
10 obligation.

11 What I would submit to you that  
12 the State of Maine case, a concept in the  
13 State of Maine case is exactly the same. The  
14 idea is that the acquisition is just the stuff  
15 needed for the buyer's purposes and does not  
16 include the stuff, if you will, that's needed  
17 to continue the freight rail operation.

18 So by a purchase, it is subject to  
19 a retained freight easement that the seller  
20 keeps and a contract between the parties that  
21 governs the shared use of the right of way,  
22 the parties achieve the very same thing that

1 is achieved in the hypothetical involving the  
2 extra width parcel or the hypothetical  
3 involving the underground pipe or the  
4 crossing.

5 That's the conceptual framework  
6 for State of Maine.

7 MEMBER NOTTINGHAM: Mr. Sheys, if  
8 I could, is your point that what we commonly  
9 refer to as railroad right of way can, in many  
10 cases, really refer to a bundle of property  
11 rights ranging from air rights to mineral  
12 rights to surface rights, and, also, in some  
13 cases, to actual rights to take on the common  
14 carrier obligation to provide rail service for  
15 revenue?

16 MR. SHEYS: Yes, that's correct.  
17 There are all kinds of uses of a railroad  
18 right of way. The Board obviously cares most  
19 about the common carrier usage in making sure  
20 that any transactions that could affect the  
21 common carrier usage come before the Board for  
22 an advance jurisdictional determination.

1                   And if you look at the State of  
2                   Maine case, the very last important point made  
3                   by the ICC in that case is bring these  
4                   transactions to us, they are fact specific,  
5                   they need to be scrutinized and analyzed, and  
6                   that's what people do, they bring these  
7                   transactions in.

8                   I want to switch over to talk a  
9                   little bit about this transaction. I've  
10                  already explained that it's an acquisition  
11                  from Carnadero to Hollister. I've explained  
12                  that Union Pacific will retain a freight  
13                  easement for continued freight use for its  
14                  continued common carrier obligation.

15                  The separate piece of a  
16                  transaction that relates to the San Benito's  
17                  future passenger rail operations is from  
18                  Carnadero to Gilroy and it's a contract  
19                  between Union Pacific and San Benito that  
20                  essentially allows San Benito, when it starts  
21                  its passenger rail service, to use whatever  
22                  operator is already operating on that line for

1 the Caltrain service or to have its own  
2 contract, which has to be approved by UP, to  
3 run the trains on this property between  
4 Carnadero and Gilroy.

5 So the overall effect of the  
6 transaction is to allow San Benito to  
7 establish this passenger rail service from the  
8 community in the Hollister, north to  
9 Carnadero, then onto the UP mainline via  
10 contract to Gilroy where there's an existing  
11 passenger rail service run by Caltrain.

12 VICE CHAIRMAN MULVEY: Excuse me.  
13 Does that require that without having the  
14 common carrier obligation it is not subject,  
15 therefore, to the RLA, and, therefore, the  
16 people operating the trains contract the  
17 contractor or the people who maintain the  
18 right of way do not have to be people who have  
19 negotiated the contract, for example, with  
20 Union Pacific for that line, is that correct?  
21 In other words, it could be non-union workers  
22 could work the trains.

1                   MR. SHEYS: That's correct. The  
2 service will be intrastate. It will not be  
3 subject to STB jurisdiction; therefore, it  
4 will not be triggered as a carrier under the  
5 RLA or an employer under the RRA. The  
6 employees of the contractor will be free to  
7 negotiate collective bargaining agreements,  
8 but those agreements will not be subject to  
9 the RLA.

10                   VICE CHAIRMAN MULVEY: Thank you.

11                   CHAIRMAN ELLIOTT: Once the train  
12 gets to Gilroy, will there be any setup  
13 connection with Caltrain; will there be a  
14 transfer between your railroad and Caltrain  
15 where they can actually get a transfer from  
16 your railroad and use it on the Caltrain line?

17                   MR. SHEYS: There will be no  
18 transfers. This is going to be a service  
19 where you go across the platform and you catch  
20 a train to San Francisco, you catch a train to  
21 points south.

22                   And, to the point of law, you can



1 use this service to get to Gilroy, cross the  
2 platform and get on an Amtrak train that takes  
3 you outside of the State of California.

4 That's not what the bulk of these people,  
5 these passengers are going to be doing.

6 The fact that you can do it does  
7 not establish this as an interstate rail  
8 service. Napa Valley Wine Train, Magner-  
9 O'Hara fun trains, all the cases in our  
10 papers, clearly demonstrate that the fact that  
11 you can link everything doesn't trigger the  
12 jurisdiction of the Board.

13 VICE CHAIRMAN MULVEY: I'm a  
14 little concerned though. When I go back to my  
15 days with the bus industry, for example, when  
16 buses were deregulated, many of the bus  
17 operations were intrastate -- those relatively  
18 short-distance bus operations.

19 But the rulings and the decision  
20 by the Congress was that all of these, because  
21 they connect with other buses that could  
22 provide intrastate service were, therefore,

1 part of the overall national network of bus  
2 services, and, therefore, were tied to the  
3 interstate network.

4 Here, your train goes to Gilroy  
5 where it can, as you said, meet up with  
6 Caltrans or Amtrak, et cetera, which brings  
7 you into the overall interstate network.

8 So how do you carve this out as  
9 mostly a purely intrastate or purely local  
10 rail service. These are very often industrial  
11 tracks that are in plants or mass transit  
12 rather than this kind of service which clearly  
13 does connect passengers, even if it's not a  
14 majority of them, to interstate network.

15 MR. SHEYS: Well, in the rail  
16 space, the case law is very clear. Napa  
17 Valley Wine Train, the Fun Trains case in  
18 particular, that the fact that you can link  
19 everything together is not sufficient if you  
20 don't have an arrangement that allows for  
21 interstate transportation.

22 So, for example, if San Benito was

1 going to have a through-ticketing arrangement  
2 with Amtrak that would take people outside of  
3 the State of California, that would bring  
4 their future passenger rail service to the  
5 jurisdiction of the Board. I don't know how  
6 it compares on the bus side, Vice Chairman  
7 Mulvey.

8 I do know that the Supreme Court  
9 Yellow Cab case is informative on this same  
10 issue in the context of cabs, which is, I  
11 think, what you see the ICC relying upon in  
12 these intrastate passenger cases that I've  
13 mentioned.

14 VICE CHAIRMAN MULVEY: These are  
15 mostly what you would call intraurban cases,  
16 that is within a metropolitan area of some  
17 sort rather than intrastate. You could be  
18 intercity, especially in a place like  
19 California, San Diego to Los Angeles or L.A.  
20 to San Francisco, it's intercity service, but  
21 it's still intrastate.

22 Yellow Cab service, of course,

1       refers more to intraurban movements.    So  
2       there's a distinction there I think.

3                   MEMBER NOTTINGHAM:   Mr. Sheys, if  
4       I could, how would you distinguish the case  
5       you're presenting today with one that had a  
6       slightly different fact pattern, which was  
7       that San Benito, perhaps under my scenario,  
8       was not proposing to move people but was  
9       proposing to move stone from a quarry facility  
10      to a manufacturing site where the stone would  
11      be used for an end product and that would move  
12      by rail, but it would basically strictly be a  
13      intrastate movement over the same lines that  
14      you propose, would your case be any different?  
15      Is there anything that would distinguish the  
16      two scenarios in your view?

17                   MR. SHEYS:   Well, you're talking  
18      about a freight move that is physically in one  
19      state, is that right?

20                   I think it brings you into a whole  
21      separate set of case law and that, generally,  
22      the case law pulls the freight service in one

1 state within the Board's jurisdiction more  
2 readily because of other facts that relates to  
3 the commerce that's going on.

4 We, of course, have no right to  
5 run freight trains at all on this line. We,  
6 in addition to UP, dealt with suspenders. In  
7 addition to UP retaining an exclusive right,  
8 we disclaim any obligation or any right to run  
9 freight trains.

10 MEMBER NOTTINGHAM: And just a  
11 follow-up question: Would there be, and I  
12 think I'd like to hear you address the  
13 statute, the definition of rail carrier in the  
14 Interstate Commerce Act, which is in Section  
15 10102, Subsection 5, rail carrier means, "a  
16 person providing common carrier railroad  
17 transportation for compensation," will there  
18 be, in fact, somebody providing common carrier  
19 rail transportation for compensation, namely  
20 the commuter rail service proposed from San  
21 Benito, and, if so, who would that entity be?

22 MR. SHEYS: The entity will be, in

1 all likelihood, a contractor of San Benito.  
2 San Benito has the right to form in itself an  
3 operator on the line that it's going to  
4 purchase, but it has no right itself to drive  
5 trains on the connecting UP track. And so the  
6 practical matter, it's probably going to be a  
7 contractor on the whole service.

8 That service, either San Benito or  
9 the contractor will hold itself out to provide  
10 the passenger rail service from the Hollister  
11 area to Gilroy via these trackage rights, and,  
12 in the definition section, the definition of  
13 rail carrier, a person providing common  
14 carrier railroad transportation for  
15 compensation. This operator will be that.

16 MEMBER NOTTINGHAM: So there will  
17 be a rail carrier. It's just a question of  
18 who that rail carrier will be. It would  
19 either be San Benito or its contracted-out  
20 entity, or both?

21 MR. SHEYS: There will be a rail  
22 carrier under this definition. It will be

1       either San Benito itself or, more likely, a  
2       contractor. But when you look at the Board's  
3       jurisdiction, you need to look at Section  
4       10501, and there it says that in order for an  
5       entity to be subject to the Board's  
6       jurisdiction, it has to be a rail carrier  
7       providing transportation as part of the  
8       interstate rail network.

9               So the fact, Member Nottingham,  
10       that we will be a rail carrier is not  
11       sufficient to trigger jurisdiction because of  
12       the additional requirements of 10501.

13               CHAIRMAN ELLIOTT: Mr. Sheys, a  
14       quick question regarding policy: My  
15       understanding of the State of Maine line of  
16       cases is that the policy that it was supposed  
17       to promote was to assist in the development of  
18       mass transit on lightly used lines. Can you  
19       explain exactly how you see that happening in  
20       this case?

21               MR. SHEYS: Well, it is true that  
22       in this case the establishment of this

1 passenger rail service will help the passenger  
2 rail network in California. But the premise  
3 of your question is that the State of Maine  
4 case was designed only or specifically or even  
5 primarily for that purpose and I don't think  
6 that's what the cases demonstrate.

7 The cases demonstrate a broader  
8 notion that you can use railroad rights of way  
9 for purposes other than common carrier rail  
10 service as long as you don't interrupt or  
11 interfere with that common carrier service

12 The original State of Maine case  
13 was for exactly the purpose that you  
14 identified, and the ICC, in fact, explained  
15 that part of the reason for granting that  
16 specific transaction was that it would foster  
17 the ICC's policy to help states preserve  
18 rights of way for mass transit, and they refer  
19 to Bush Universal and the common carrier  
20 status of states' decisions that explain that.

21 But there's nothing inherently  
22 limiting in the State of Maine as long as the



1 freight common carrier service is essentially  
2 protected. There's no reason that the same  
3 policy can't be used to provide other public  
4 benefits, better utilization of railroad  
5 assets, other public uses besides passenger  
6 rail.

7 There are all kinds of uses that  
8 could be made of railroad rights of way as  
9 long as the core common carrier is not  
10 interfered with.

11 VICE CHAIRMAN MULVEY: But hasn't  
12 the State of Maine been primarily used for the  
13 public provision of transit services and  
14 giving the State of Maine an exemption to a  
15 private operator would be different from past  
16 Board policies?

17 I know that one of the exceptions  
18 that's normally cited is Midtown Ventures with  
19 Grand Central Station. But in that case the  
20 Metropolitan Transit Agency, a public agency,  
21 was also involved. So that differs from your  
22 situation here.

1                   But are there other cases where  
2                   the Board has conferred the State of Maine  
3                   exemption on private operators?

4                   MR. SHEYS: Yes. There are only a  
5                   few, but there are a few. The one that comes  
6                   to mind that's in our papers is the Missouri  
7                   River Bridge case which involved no public  
8                   agencies and no passenger rail motivations.

9                   Incidentally, there are a lot of  
10                  these cases, Vice Chairman Mulvey, that deal  
11                  with an earlier question. If you look at a  
12                  lot of these State of Maine cases, they  
13                  explain that the passenger rail service going  
14                  on in those cases is intrastate. Not related  
15                  to your question, but it popped into my mind.

16                  And then you also mentioned  
17                  Midtown, which I believe is another case  
18                  that's not a public agency and not a passenger  
19                  use. But, again, the fact that the first case  
20                  and that most of the cases deal with passenger  
21                  rail service I submit shouldn't be the core of  
22                  your concern.

1                   It seems to me the core of the  
2 Board's concern is the freight, preservation  
3 of the common carrier freight use and getting  
4 into why the transactions, if that is handled,  
5 getting into why the transaction is going on  
6 is getting into the knitting of the business  
7 that's making the application.

8                   It's a different set of  
9 considerations I would submit for you to get  
10 into the knitting of the business if you've  
11 established that the freight railroad isn't  
12 going to be interfered with.

13                   MEMBER NOTTINGHAM: Mr. Sheys, if  
14 I could ask I think is a natural follow along  
15 to Vice Chairman Mulvey's question, the simple  
16 fact is that most of the quote/unquote, "State  
17 of Maine," cases involve some public entity,  
18 some local government or regional government  
19 or state agency or entity that's interested in  
20 promoting typically a passenger rail service  
21 or commuter service, but is that any reason to  
22 think that private entities or non-public

1 entities somehow should be excluded from State  
2 of Maine jurisprudence? In other words, is  
3 there any precedent in property law that would  
4 say that a government entity is uniquely  
5 qualified to be recognized as owning one of  
6 those strands or some of those strands within  
7 the bundle of property rights that I  
8 referenced earlier and a private entity is  
9 disqualified from being recognized as being  
10 the owner of one or more of those strands?

11 MR. SHEYS: I am not aware of any  
12 such stipulation and I think it goes back to  
13 the point of what's the Board's role in these  
14 transactions. Property law, owners of the  
15 lines, Union Pacific has the right, I believe,  
16 to develop its assets as it sees fit as long  
17 as it complies with the Interstate Commerce  
18 Act, ICC Termination Act.

19 I think that's the basic answer to  
20 your question, Member Nottingham.

21 I see that I am in my last minute.  
22 The rest of my points relate to the Union's

1 concerns about the transaction, so I'll hold  
2 that for rebuttal. Thank you.

3 CHAIRMAN ELLIOTT: Thank you very  
4 much. Counsel for Brotherhood of Maintenance  
5 Way Employees Division of the IBT and  
6 Brotherhood of Railroad Signalmen, you have  
7 been allowed 20 minutes for your argument.  
8 Please, step up to the podium, introduce  
9 yourself for the record, and begin.

10 And, Mr. Edelman, if you could  
11 kind of follow up on where we were, just there  
12 with policy, that would be very helpful, just  
13 how you perceive the State of Maine policy  
14 that I was talking about earlier assisting in  
15 the development of mass transit on lightly  
16 used rail lines, how that comes into play in  
17 these cases?

18 MR. EDELMAN: Sure. I think that  
19 was clearly an animating feature of the State  
20 of Maine case and the ones that follow.  
21 That's what they're talking about and there is  
22 an explicit reference in there to wanting to

1 facilitate public transportation and that goes  
2 back to the common carrier status of State's  
3 case.

4 On the other hand, you know, my  
5 primary argument here is not whether or not  
6 they are a public entity, therefore, they get  
7 to use State of Maine. My argument is State  
8 of Maine is wrong and State of Maine is  
9 contrary to the statute.

10 And one of the things I think  
11 we've lost already in the discussion here is  
12 let's look at the basic thing that's going on  
13 here is San Benito proposes to buy a line of  
14 railroad that will still be used in interstate  
15 commerce by Union Pacific, interstate freight  
16 trains will be moving over that track and San  
17 Benito will own it and be responsible for  
18 maintaining it and dispatching on the line.

19 That's the transaction that is  
20 subject to the Interstate Commerce Act. I  
21 think the fact that they go into the station  
22 at Gilroy and passengers can get on interstate

1 through the traffic rights is also significant  
2 and it undercuts their argument that it's a  
3 purely intrastate operation that the Board  
4 shouldn't be concerned with.

5 But the fundamental fact is they  
6 are buying a line of railroad that will still  
7 be used in interstate transportation by Union  
8 Pacific. It's not like Union Pacific is  
9 abandoning this line and they are going back  
10 and the only travel on this line is back and  
11 forth between Hollister and Gilroy just for  
12 them.

13 That's not what's going on here.  
14 They are buying a line of railroad and their  
15 position is contrary to language of the Act,  
16 contrary to precedent concerning non-carrier  
17 acquisitions of rail lines, contrary to  
18 precedent concerning the status of entities  
19 that acquire intrastate lines that are used in  
20 interstate commerce, and they are contrary to  
21 precedent concerning the expansion of the  
22 Board's jurisdiction in the ICCTA to the

1 extent they rely on State of Maine. As we  
2 say, it's wrong.

3 Now, let's look at the language of  
4 the Act. Commissioner Nottingham, you asked  
5 about that first. The Act provides the Board  
6 with exclusive jurisdiction of transportation  
7 by rail carrier over a line of railroad  
8 between a state and a place in the same state  
9 as part of the intrastate rail network.

10 The Act defines rail carriers: An  
11 entity that provides common carrier railroad  
12 transportation for compensation but not the  
13 inter urban's electric railway. Railroad is  
14 defined as a road used by a rail carrier, as  
15 well as track, bridges, spurs, et cetera, used  
16 to move people or freight.

17 So if one provides common carrier  
18 transportation using equipment for moving  
19 passengers by rail over tracks that part of  
20 the interstate system, one is a rail carrier  
21 under the Act.

22 But beyond that, and I've had



1 plenty of experience with Section 10901, not  
2 all of it my most favorable, 10901 precedent  
3 says under that provision: A person that is  
4 not a carrier, that may construct or acquire  
5 a line of railroad only by Board authorization  
6 under Section 10901 is an overwhelming body of  
7 precedent that says the Act regulates all line  
8 transfers either under 10901 or 11343, and  
9 that a non-carrier may acquire a line of  
10 railroad only if the Board authorizes it or  
11 exempts it under 10901.

12 I submit the hypotheticals you've  
13 heard are completely in apposite, you know,  
14 we're not talking about buying a parcel of  
15 lane on the side of the road here or a water  
16 pipe going underneath. We're talking about  
17 buying the rails on which the trains run.  
18 That's what this Board is responsible for  
19 overseeing.

20 Let's look at the precedent about  
21 the status of lines within a state that's used  
22 in interstate rail transport. The Staten

1       Island Railroad case, the ICC held, the Second  
2       Circuit affirmed, that SIRTOA, a state  
3       authority, that operated a line wholly within  
4       the State of New York, that was still used in  
5       interstate commerce for freight movements, was  
6       a carrier even though SIRTOA itself operated  
7       only intrastate.

8                 SIRTOA had an obligation to  
9       maintain the line for interstate freight  
10       transport, had a latent duty to furnish  
11       freight service that was provided on the line  
12       in case the freight railroad didn't, and this  
13       was because the line connected with the  
14       interstate freight system and was used for  
15       service over that system.

16                CHAIRMAN ELLIOTT:  Wouldn't that  
17       latent duty to carry freight distinguish the  
18       facts from the case at hand?

19                MR. EDELMAN:  I think not because  
20       I think there's a tautology in their argument.  
21       They say, look, we don't have an obligation to  
22       carry the freight, so we don't have a latent

1 duty to carry the freight.

2 But the point is, as owner of the  
3 line, under SIRTOA, they do have a latent duty  
4 to carry the freight if the freight railroad  
5 doesn't. That was part of the point in  
6 SIRTOA.

7 And the court, in SIRTOA,  
8 specifically rejected an argument similar to  
9 that offered here that would distinguish the  
10 physical railway line from the railroad  
11 itself. The court said it was sufficient for  
12 carrier status that SIRTOA was responsible for  
13 maintaining the line and dispatching on the  
14 line.

15 The point was that owning the line  
16 that's used in interstate commerce needed a  
17 carrier. That's the point. Common carrier  
18 status of states, the ITC held that when a  
19 non-carrier state entity acquires a line of  
20 railroad that has not been abandoned, the  
21 transfer of the line is subject to the ICC's  
22 jurisdiction, but they are exempt from prior

1 approval.

2 MEMBER NOTTINGHAM: Mr. Edelman,  
3 if I could ask?

4 MR. EDELMAN: Yes.

5 MEMBER NOTTINGHAM: Putting aside  
6 just for the moment the specific facts of the  
7 case here, I know it's hard to do because  
8 we're having a hearing on this case, but if  
9 this were just a scenario where an investor,  
10 for whatever bonafide reason, perhaps he or  
11 she was interested in how the line of railroad  
12 and its underlying property and air rights and  
13 the whole bundle of property rights might  
14 impact neighboring land that the investor  
15 owned, perhaps the investor had a vision to  
16 put in fiber optic cable on the rail right of  
17 way, but, can that investor carefully  
18 structure a transaction where they disclaim  
19 any rail operating interest, leave that to an  
20 incumbent provider or someone else to handle,  
21 but they do assume most or all the other  
22 components of that bundle of property rights?

1 MR. EDELMAN: I think if they  
2 acquire the line of railroad, they have that  
3 responsibility, they own the line, they have  
4 carrier obligations, and they have to come to  
5 you to acquire the line. They could acquire  
6 the fiber optic rights without being a carrier  
7 I assume.

8 San Benito could require trackage  
9 rights from Union Pacific to run their train  
10 from Hollister to Gilroy. They're buying the  
11 line. It is a piece of railroad in interstate  
12 commerce.

13 I recognize that owning the line  
14 might come with ancillary property interests  
15 that might be sold, but they're buying the  
16 line and I think that's the fundamental point  
17 here.

18 MEMBER NOTTINGHAM: Just to dig in  
19 this a little further, suppose they bought the  
20 whole bundle of property rights and then  
21 actually sold, pursuant to a very clear  
22 contract, the rail line, the track itself, and

1 the common carrier obligation to another  
2 provider of rail service for compensation.  
3 Would there then be two holders of the common  
4 carrier obligation under your view or only  
5 one?

6 MR. EDELMAN: I'm not quite sure I  
7 follow the specifics of your hypothetical.  
8 But if they've sold the whole thing, then  
9 they're not. When they own the line, it's  
10 subject to the Board's jurisdiction. If they  
11 sell the line to somebody, then they're not.  
12 That's the point. Ownership of the line  
13 brings those responsibilities with it.

14 Also, for example, I'll go into  
15 the ICCTA for a minute, the courts and the  
16 Board have held that this dramatically  
17 expanded the Board's jurisdiction over purely  
18 intrastate goings on. Spur tracks, you know,  
19 a switching in a yard that was disconnected  
20 from the interstate system, you know, that's  
21 the whole point.

22 The Board has jurisdiction over

1 track that is used in interstate commerce and  
2 that can't be put away.

3 If we go to State of Maine, so  
4 what happened there? They file a notice of  
5 exemption, then a motion to dismiss. I think  
6 it's important nobody participated in that  
7 case other than the parties.

8 There was a half page analysis of  
9 this. The Board said it would appear to have  
10 jurisdiction over this, but it would let it go  
11 because of the freight retaining the common  
12 carrier obligation.

13 They didn't identify in the Act  
14 any basis for an operating easement or for the  
15 notion that retention of operating easement  
16 could be utilized to defeat the ICC's  
17 jurisdiction. They just concluded the  
18 arrangement was sufficient to divest it of  
19 jurisdiction and that's contrary to the Act as  
20 I've explained.

21 They're buying a line of railroad  
22 used in interstate commerce. The Act doesn't

1 provide that you can acquire a line of  
2 railroad that is part of the interstate system  
3 and still used for interstate transportation  
4 without STB approval just by agreeing with the  
5 rail carrier that you're selling the line that  
6 it will continue to serve shippers on the  
7 line.

8 That's basically what they're  
9 saying. In calling this an operating easement  
10 doesn't change anything. There's no statutory  
11 basis for differentiating between acquisition  
12 of the line and acquisition of the land and  
13 rails and ties and ballast that are the line,  
14 and SIRTOA specifically rejected  
15 differentiating the physical line from the  
16 railroad itself.

17 The Act comprehensively lists  
18 numerous transactions involving conveyance of  
19 rail lines, you know, construction,  
20 acquisition, extension, consolidation, lease,  
21 acquisition of control, trackage rights,  
22 contract to operate, joint use, pooling, all



1 of them are subject to the STB's jurisdiction.

2 It's kind of funny, you know.

3 This statute got designed to basically  
4 regulate the behavior of robber barons. It  
5 extensively addressed them.

6 VICE CHAIRMAN MULVEY: We have  
7 much about the issue of property rights and  
8 that when you buy a railroad, there's a bundle  
9 of rights that you have.

10 But, is there a common carrier  
11 right? It always strikes me, I always hear  
12 the term common carrier obligation. Now,  
13 rights have with them often obligations, and  
14 we're talking here about obligations.

15 You can't sell an obligation. I  
16 suppose you can sell a right, but it's very,  
17 very different. When we talk about State of  
18 Maine, we are talking about the common carrier  
19 obligation and that being suspended and that  
20 being exempted from that.

21 So is there a difference here  
22 between the obligation and the rights as

1 discussed in a bundle of property rights?

2 MR. EDELMAN: I don't think so. I  
3 mean, you know, interestingly, the Act sort of  
4 relies on common law definitions of what's  
5 common carrier probably back to stagecoach  
6 days, but I think the point is with the right  
7 to serve comes the obligation to serve and I  
8 think that's the case.

9 And that's part of the fact of  
10 ownership of the line and the obligation that  
11 comes with it because if you have to maintain  
12 the line and take care of the line and give  
13 fair access to shippers on the line, this  
14 Board is supposed to be able to enforce that  
15 obligation.

16 VICE CHAIRMAN MULVEY: We're  
17 enforcing an obligation. We're not enforcing  
18 a right.

19 MR. EDELMAN: They have the right,  
20 right. But I mean so the point is, what's  
21 going on here some way is this notion that  
22 they're going to say, look, Board, you don't

1 have to worry about this; we by contract have  
2 arranged with Union Pacific that they'll take  
3 care of the things that you're supposed to be  
4 concerned about, that the line will be kept up  
5 in sufficient order for interstate transport  
6 to take place, that the shippers on the line  
7 will be serviced, and we've arranged that by  
8 contract.

9 But they can't contract out that  
10 obligation and they can't contract away the  
11 Board's jurisdiction and responsibility. What  
12 happens if you say we have no jurisdiction?

13 And then there's a shipper on the  
14 line says I'm not getting service or they're  
15 not maintaining it well enough to provide  
16 adequate service. The Board has relinquished  
17 jurisdiction.

18 What happens if they go, well,  
19 that's okay; we'll go to state court? Well,  
20 the only parties to this contract are the  
21 buyer and the seller. What about the shipper?  
22 What about the other people that are involved?

1                   VICE CHAIRMAN MULVEY:  Doesn't  
2           Union Pacific have an obligation to maintain  
3           the rights of way, for example, if, indeed,  
4           San Benito is not part of the agreement?

5                   MR. EDELMAN:  And that would have  
6           to be enforced by Union Pacific suing them.  
7           I guess Union Pacific would come in and say,  
8           oh, we'll do it and then we'll bill you, or  
9           whatever, but that's all involved with  
10          contractual arrangements they want to  
11          substitute for the Board's jurisdiction.  This  
12          is the Board's statutory responsibility.

13                   VICE CHAIRMAN MULVEY:  One other  
14          question on the State of Maine issue:  your  
15          view is that the State of Maine was wrongly  
16          decided?

17                   MR. EDELMAN:  Yes.

18                   VICE CHAIRMAN MULVEY:  But the  
19          Board has decided a number of cases following  
20          the State of Maine principle.  How would you  
21          have us handle transactions that we've already  
22          exempted under the State of Maine if we,

1 indeed, followed your direction and overturned  
2 it?

3 MR. EDELMAN: I'm not going to ask  
4 the Board to reopen the ones that have  
5 occurred, you know, and I guess those people  
6 have an interest in their status. I would say  
7 that you look at, and I think I put this in my  
8 brief, if you look at all those decisions that  
9 follow, none of them really engage the issue  
10 at all.

11 This is like an echo chamber of  
12 one decision that had no statutory or  
13 decisional authority cited and it's half a  
14 page long, and all of the subsequent cases  
15 basically repeat exactly the same thing and  
16 most of them, again, were ex parte.

17 Nobody got involved in litigation.  
18 None of this has gone to a court of appeals.  
19 It's just rolling over and over, and,  
20 basically, this line of law is perpetuated  
21 because nobody got involved.

22 Nobody says, hey, wait a minute,

1 and we're saying, hey, wait a minute, this is  
2 wrong now. You know, look, in recent times,  
3 we had New Mexico ride 300 miles of line in  
4 doing this, 300 miles of line that extends to  
5 the Colorado border using this.

6 It's like, you know, they start  
7 out with the State of Maine, 13 miles of line,  
8 kind of abandonable line, they want to save  
9 the service. And an important thing in State  
10 of Maine by the way is that the freight  
11 railroad was going to continue to be  
12 responsible for maintaining the line and  
13 dispatching the line.

14 That's factually different, but,  
15 again, the larger point of the analysis is  
16 that there is no basis for State of Maine in  
17 the statute.

18 MEMBER NOTTINGHAM: Mr. Edelman,  
19 if I could ask a question?

20 MR. EDELMAN: Yes.

21 MEMBER NOTTINGHAM: Let's assume  
22 that this Board agrees with most of your

1 points. Let's say we agree that this case  
2 presents a situation where we're talking about  
3 interstate commerce, that this track connects  
4 into -- any way you slice it -- currently  
5 serves interstate freight commerce and would  
6 connect into interstate passenger under your  
7 theory.

8 And so following that, there is,  
9 of course, a rail carrier that will be present  
10 and the Rail Labor Act will apply. Let's say  
11 for argument's sake that's a given.

12 Why shouldn't a State of Maine,  
13 for example, which in their case was legally  
14 prohibited by state law, I'm informed, from  
15 operating a rail line, or, let's say a private  
16 investor who for insurance reasons or reasons  
17 of corporate policy does not ever want to ever  
18 run and operate and be liable and responsible  
19 for the operation of a rail line and they can  
20 either structure something through some kind  
21 of creative insurance policy or have a  
22 designated contractor ready to step in to take

1 on that so-called latent common carrier duty,  
2 do you see any flexibility in the law that  
3 would allow an owner, recognizing RLA applies  
4 under that scenario, it's just some owners  
5 have very real reasons, such as State of  
6 Maine, for not being able or wanting to  
7 actually have that and assume that  
8 responsibility they have no interest in  
9 assuming, but they are willing to guarantee  
10 that nobody gets left hanging high and dry  
11 without rail service and that there always is  
12 somebody there as that backstop emergency  
13 provider?

14 MR. EDELMAN: I have two answers  
15 to that. I'm a little leery of extremely  
16 creative legal devices to move around  
17 regulation. I think we've all seen the bad  
18 results of that in the last couple of years,  
19 and I think that, you know, you basically sort  
20 of you're buying a line of railroad, there's  
21 something that comes with that.

22 You can operate on a rail line,



1 but if the State of Maine wanted to do that,  
2 you can get trackage rights. I fail to  
3 understand what the problem is with this.  
4 Railroads operate on trackage rights all the  
5 time.

6 And if you don't own the line, and  
7 all San Benito is doing is operating on  
8 trackage rights between Hollister and Gilroy,  
9 different scenario, but they're buying the  
10 line.

11 Second, I would note that in  
12 Common Carrier Status of States the ICC said  
13 that if you gave the entirety of the rail  
14 operation to a carrier, then they would let  
15 the state not be a carrier and that's what  
16 they did in Common Carrier Status of States.

17 Now, when you asked Mr. Sheys a  
18 question about the third-party operator, his  
19 observation was going to be the third-party  
20 operator was not going to be a rail carrier  
21 under all the other laws because they're  
22 saying it's intrastate.

1                   So, you know, this is a lot of  
2                   slicing a lot of the bologna extremely thin so  
3                   there's no there there. So I think if you  
4                   posit a situation where, you know, somebody  
5                   buys the line in its entirety and then says  
6                   the entire railroad operation, you know,  
7                   running the trains, maintaining the track and  
8                   signal system, taking care of the equipment  
9                   that's going to run on it, everything goes to  
10                  somebody who is a carrier, that's a different  
11                  scenario.

12                  That's discussed in Common Carrier  
13                  Status of States, but that's not what you have  
14                  here and that's not what you have in any of  
15                  the other cases. So I think that that's the  
16                  point.

17                  I do want to go back to SIRTOA  
18                  because I think if you overlay the facts of  
19                  this case on that one you've got the same  
20                  thing. They're going to own a line of  
21                  railroad connected to the interstate network.  
22                  It's used for interstate transportation, it's

1 responsible for maintaining the line and the  
2 signal system used for interstate movements  
3 and will control the dispatching in the state  
4 trains. So that all runs together.

5 My last point is just to say with  
6 the ICCTA, if you say you have no  
7 jurisdiction, but the ICCTA and the cases  
8 under the ICCTA say states no longer have any  
9 jurisdiction over purely interstate things,  
10 then nobody has jurisdiction over this and I  
11 think that's inconsistent with the Act.

12 Thank you very much.

13 CHAIRMAN ELLIOTT: Thank you, Mr.  
14 Edelman. Mr. Sheys, you have five minutes for  
15 rebuttal.

16 MR. SHEYS: Correct.

17 A couple of things, let's start  
18 with SIRTOA right off the bat. There are two  
19 reasons why SIRTOA doesn't help the Union's  
20 argument in this case. First, let's talk  
21 about what SIRTOA had.

22 SIRTOA had a residual common

1 carrier obligation and an obligation to  
2 maintain the track in question and dispatch  
3 all traffic on the track in question, and, of  
4 course, there was a short line operator called  
5 SIRT, S-I-R-T, that operated on the line.

6 This started out as a 1979 ICC  
7 case and it went to the Second Circuit where  
8 the Second Circuit said that the Board's  
9 decision that SIRTOA was a covered entity,  
10 that it was a carrier, was not unreasonable.  
11 That's all it said. That's all it said.

12 Then after, SIRTOA abandoned its  
13 latent common carrier obligation and SIRT, a  
14 short line, abandoned its freight operation.  
15 The D.C. Circuit said that the Board was  
16 correct that SIRTOA was not -- sorry. The ICC  
17 was correct that SIRTOA was no longer a  
18 carrier.

19 Neither of the appeals courts ever  
20 had the question before it, what do you do  
21 with an entity that has no latent common  
22 carrier obligation but still maintains the

1 track, so you can't get much from SIRTOA, you  
2 really can't.

3 And as a separate, kind of  
4 practical point, 1979 SIRTOA ICC case, the  
5 1991 State of Maine ICC case, there's at least  
6 a generic legal argument that we can presume  
7 that your predecessors in 1991 understood  
8 their own prior decisions.

9 But you don't even have to rely on  
10 that because if you look at the pleadings  
11 filed by counsel in the State of Maine case,  
12 you'll see that they fully discuss the SIRTOA  
13 case, they fully discuss and distinguish the  
14 case. So you can be sure that in 1991 when  
15 the ICC issued the State of Maine case, they  
16 had the SIRTOA case at the top of their mind.

17 As to some of the other arguments  
18 made by the Unions, 10501 and this notion of  
19 being part of the interstate rail network was  
20 not changed in ICCTA. ICCTA, obviously, made  
21 a lot of changes, but it didn't change this  
22 concept. The fact, therefore, that the Board

1 has broader preemption powers today is not  
2 relevant.

3 In terms of 10901 and the fact  
4 that the statute says rail line, the Unions  
5 argued in their papers and essentially argued  
6 today that that terms is unambiguous, that it  
7 means a certain thing, that it means the  
8 tracks, it means the right of way, and that's  
9 not what that concept is.

10 We're not talking about a  
11 definition of a physical asset. We're talking  
12 about a definition of what you have to have to  
13 be a common carrier and a question of whether  
14 a transaction has taken away too much from the  
15 seller as common carrier.

16 I submit to you that the term  
17 railroad line, or "line of railroad" as it  
18 sometime appears in the cases, is not  
19 unambiguous, that that is exactly what the  
20 Board does when it interprets a set of facts  
21 that comes in under a State of Maine request.

22 And this notion that these

1 transactions are ex parte or that there aren't  
2 appellate cases that have a somehow ratified  
3 or blessed concept is beside the point.

4 And since I have a minute left,  
5 I'll just offer one more thing. The contract  
6 clearly protects Union Pacific from a failure  
7 to perform on the part of the San Benito.  
8 There is express self-help provision if there  
9 is a failure of maintenance and there is an  
10 expedited arbitration provision for any other  
11 breaches of that contract.

12 So if there is a problem, if the  
13 shippers come to the Board, if the shippers  
14 sue UP, if UP has a problem that's within the  
15 bounds of the Board's jurisdiction, they have  
16 plenty of contractual rights to assert and  
17 defend their operation. Thank you.

18 CHAIRMAN ELLIOTT: Thank you, Mr.  
19 Sheys. Thank you, Mr. Edelman.

20 (Whereupon, the above-entitled  
21 matter, United States of America Surface  
22 Transportation Board, Oral Argument in the

1 Matter of San Benito Railroad LLC et al v.  
2 Brotherhood of MWE/IBT & BRS et al, Finance  
3 Docket 35225, was concluded at 10:23 a.m.)  
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