40677 SERVICE DATE – LATE RELEASE MAY 3, 2010
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35312

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

Decided: May 3, 2010

In this decision, the Board grants the motion of the Massachusetts Department of Transportation (MassDOT) to dismiss the notice of exemption in this proceeding. We find that 49 U.S.C. § 10901 does not apply to this sale of the physical assets in rail lines to a state agency, because the selling rail carrier retains an exclusive, perpetual rail freight easement in the rail lines together with the common carrier obligation, and the purchaser cannot unduly interfere with the provision of freight rail service on the lines.

On November 24, 2009, MassDOT, an instrumentality of the Commonwealth of Massachusetts and also a noncarrier, filed a verified notice of exemption under 49 C.F.R § 1150.31 to acquire from CSX Transportation, Inc. (CSXT) the following physical assets of railroad lines in Massachusetts:

- portions of the Grand Junction Branch, extending 4.87 miles between milepost QBG 0.00 and milepost QBG 2.70, and between milepost QBG 5.70 and milepost QBG 7.87;[1]
- the Boston Terminal Running Track, extending 1.10 miles between milepost QBB 0.00 and milepost QBB 1.10;
- the New Bedford Secondary, extending 18.48 miles between milepost QN 13.40 (at Cotley Junction) and milepost QN 31.80 (at New Bedford), including
    (a) CSXT's property interests in the right-of-way and track assets of the North Dartmouth Industrial Track (also known as the Watuppa Branch) between milepost QND 0.0 and milepost QND 0.08; and

[1] CSXT does not have any ownership interest to convey in the intervening section of this branch between milepost QBG 2.70 and milepost QBG 5.70.

(b) CSXT's property interests in the right-of-way, but not the track assets, between milepost QND 0.08 and milepost QND 6.0;[2]

• the Fall River Secondary, extending 14.20 miles between milepost QNF 0.00 (at Myricks) and milepost QNF 14.2 (at Fall River, Massachusetts – Rhode Island state line);
• the Framingham to Worcester segment of the Boston Main Line (BML-West), extending approximately 22.92 miles between milepost QB 21.38 (at Framingham) and milepost QB 44.30 (at Worcester); and
• the track assets, but not the underlying real estate, constituting the 9.71-mile rail line between milepost QB 1.12 (at CP Cove) and milepost QB 10.83 (at Newton/Riverside) (BML-East).[3]

These properties will be referred to collectively as "the Railroad Assets."

MassDOT states that it is acquiring the Railroad Assets to help expand commuter rail passenger service while also allowing for continued rail freight service and for the intercity passenger service of the National Railroad Passenger Corporation (Amtrak). CSXT will retain an exclusive, perpetual rail freight easement (freight easement) by which it will continue to have the duties, and will continue to enjoy the rights, of a rail common carrier on these lines.

MassDOT has filed a motion to dismiss the notice of exemption, asserting that, under Me.—Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835

[2] CSXT previously sold the track and material, and leased the underlying real estate, on the Watuppa Branch between mileposts QND 0.08 and QND 6.0 to the Bay Colony Railroad Corporation (BCLR). See Bay Colony R.R. Corp.—Acquis. and Operation Exemption—CSX Transp., Inc., as Operator for N. Y. Cent. Lines, LLC, FD 34446 (STB served Jan. 16, 2004). According to MassDOT, CSXT will convey the full scope of its ownership interest in the Watuppa Branch to MassDOT, subject to BCLR's rights and interests and CSXT's retained easement over the first 0.08 miles of the branch. Pursuant to an agreement between CSXT and MassDOT, CSXT will assign its interest in the BCLR lease to MassDOT, BCLR will continue to provide common carrier service over the 5.92 miles of the Watuppa Branch west of milepost QND 0.08, and MassDOT will acquire only the real estate underlying this section of the branch. Because of BCLR's interest in 5.92 miles of the Watuppa Branch, those 5.92 miles have been excluded here from the mileage total for the New Bedford Secondary.

[3] A CSXT predecessor conveyed the real estate underlying the BML-East to the Massachusetts Turnpike Authority in 1962. Massachusetts Bay Transportation Authority (a political subdivision of the Commonwealth of Massachusetts) acquired the portion of the Boston Main Line between BML-East and BML-West in 1973 through a transaction with the trustees of the bankrupt Penn Central Transportation Company, predecessors in interest of CSXT. The trustees retained a freight common carrier easement on the intervening portion.

(1991) (State of Maine), the transaction is not subject to the Board's jurisdiction[4] because MassDOT will not become a common carrier as a result of the transaction.

The Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employes Division/IBT (collectively, the IBT Unions) jointly filed a comment opposing the motion to dismiss, and American Train Dispatchers Association (ATDA) separately filed a comment in opposition to the motion. The IBT Unions and ATDA (which we will refer to collectively as "the Unions") challenge the lawfulness of the State of Maine line of cases under the Interstate Commerce Act (the Act). MassDOT and CSXT separately replied to the comments. In addition, the Unions sought leave to file a reply to CSXT's reply. CSXT states that it does not object to the Unions' request for leave to file a reply. In addition, CSXT filed a response to the Unions' reply. In the absence of opposition, and because the Unions' reply to CSXT is the first opportunity for the Unions to address CSXT's arguments, we will grant leave to file the Unions' reply and also accept CSXT's response to it. Both of these documents are made part of the record.

BACKGROUND

MassDOT plans to acquire these Railroad Assets in two phases, pursuant to two separate closings. There are also two related transactions, as explained below.

First Closing. In the first closing, to occur on May 14, 2010, MassDOT expects to acquire the assets that constitute the Grand Junction Branch and the Boston Terminal Running Track, the New Bedford Secondary Track (including CSXT's interests in the Watuppa Branch), and the Fall River Secondary, all subject to CSXT's retained freight easement. For ease of discussion, the assets in the Grand Junction Branch and Boston Terminal Running Track will be referred to collectively as the "BPY Assets." The assets in the two Secondary tracks will be referred to as the "South Coast Assets."

Related Transactions. At the same time as the first closing, CSXT expects to consummate two related transactions. First, CSXT would sell its retained freight easement over the South Coast Assets to a Class III carrier, Massachusetts Coastal Railroad, LLC (Mass Coastal). The Board has approved Mass Coastal's application, under 49 U.S.C. §§ 11323-24, to acquire CSXT's freight easement over the South Coast Lines, in a separate decision in Massachusetts Coastal Railroad—Acquisition—CSX Transportation Inc., FD 35314 (STB served Mar. 29, 2010) (Mass

[4] While MassDOT uses the term "jurisdiction," as have the ICC and the Board from time to time in the past, in fact MassDOT may only seek a finding that the transaction as currently structured does not require Board authorization. The Board will continue to have jurisdiction over the rail property, even if it concludes, as discussed below, that it need not exercise regulatory authority over a proposed transaction. See Friends of the Aquifer, FD 33966, slip op. at 4 (STB served Aug. 15, 2001).

Coastal).[5] Upon consummation of the sale, Mass Coastal would replace CSXT as the sole carrier providing freight service on the South Coast Lines.

In a second related transaction, CSXT would grant Mass Coastal trackage rights over approximately 8.9 miles of CSXT's rail line so that Mass Coastal can connect the South Coast Lines to its existing lines. A notice of exemption authorizing these trackage rights took effect on December 24, 2009.[6]

Second Closing. In the second closing, slated to occur on or before September 15, 2012, MassDOT would acquire the assets in BML-West and BML-East. Upon this closing, Massachusetts Bay Transportation Authority (MBTA) would assume basic oversight, management, maintenance, and dispatching over these lines, which currently are maintained and dispatched by CSXT.

Agreements Concerning Operations on the Railroad Assets. In 2008, CSXT and a predecessor of MassDOT entered into a "Definitive Agreement" (Mot. Ex. A) pertaining to the sale and purchase of these lines, as amended (Mot. Ex. B). At Section 1.1, the Definitive Agreement provides that the Railroad Assets to be sold to MassDOT do not include CSXT's freight easement. In turn, the freight easement: (1) incorporates by reference a 2009 Operating Agreement between MBTA and CSXT (Motion, Exh. G); (2) gives CSXT the exclusive right to provide freight rail service; (3) gives MBTA the right to operate additional commuter trains; and (4) allows Amtrak to continue to operate on the Boston Main Line.

Prior to the first closing, MBTA and Mass Coastal will execute: (1) an interchange agreement governing their exchange of traffic; and (2) an operating agreement governing Mass Coastal's liability and maintenance responsibilities for operations on the South Coast Assets.

DISCUSSION AND CONCLUSIONS

I. Legality of State of Maine Precedent

In this case, the Unions ask us to reexamine the decision of the Interstate Commerce Commission (ICC), our predecessor agency, in State of Maine, which the ICC and the Board have consistently followed for almost 20 years. State of Maine and its progeny hold that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not

[5] The South Coast Lines consist of: (1) the New Bedford Secondary, including (a) CSXT's property interests in the right-of-way and track assets of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 0.08 and (b) CSXT's property interests in the right-of-way, but not the track assets, between milepost QND 0.08 and milepost QND 6.0; and (2) the Fall River Secondary.

[6] Mass. Coastal R.R.—Trackage Rights Exemption—CSX Transp., FD 35314 (Sub-No. 1X) (served Dec. 10, 2009).

constitute the sale of a railroad line within the meaning of 49 U.S.C. 10901, if certain conditions are met.[7] The required conditions are that the selling carrier must retain a permanent, exclusive freight operating easement, together with the common carrier obligation on the line, and that the terms of the sale must protect the carrier from undue interference with the provision of common carrier freight rail service.

The Unions maintain that the Board's interpretation of section 10901 is wrong for three reasons. First, they argue that the physical assets of a rail line cannot be separated from the freight rail operating rights and common carrier obligation.[8] Second, they argue that the sale to a noncarrier of the track, track bed and other physical assets used to provide rail service is a sale of the line under section 10901 and requires either Board approval or an exemption (under 49 U.S.C. § 10502), whenever the purchaser is responsible for maintaining and dispatching the line. Third, they argue that State of Maine is contrary to precedent, particularly Staten Island Rapid Transit Operating Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983) (SIRTOA).

The Unions' arguments here do not convince us that the agency's longstanding interpretation of section 10901 as reflected in State of Maine is impermissible. The Board has long viewed the State of Maine precedent as helping to preserve freight service and jobs, while promoting the development of commuter transportation on rail lines. The Unions have not submitted evidence or argument that undermines this belief. Nor have the Unions offered sufficient policy considerations here to cause the Board to consider other permissible readings of section 10901.

The Board's Interpretation of Section 10901. Section 10901(a)(4) requires a "person other than a rail carrier" to obtain an agency certificate authorizing the person to "acquire a railroad line." Although "railroad" is defined in the Act, at 49 U.S.C. § 10102(6), the term "line" is not defined. Thus, it fell to the ICC, as the agency then charged with administering the Act, to

[7] The Board has occasionally permitted the sale of physical assets in a rail line to a private entity without obtaining its regulatory authorization, albeit on unusual facts. See e.g., Midtown TDR Ventures LLC–Acquisition Exemption–Am. Premier Underwriters, Inc., The Owasco River Ry., and Am. Fin. Group, Inc., STB Docket No. 34953 (STB served Feb. 12, 2008); Mo. River Bridge Co.—Acquis. Exemption—Certain Assets of Chicago, Cent. & Pac. R.R., FD 32384 (ICC served Mar. 3, 1994).

[8] As the IBT Unions see it (Comment 3): "The device of an 'operating easement' for freight traffic has no basis in the Act—it is a fabricated concept without basis in law."

define the phrase "railroad line."[9] Nearly 20 years ago, in State of Maine, the ICC held that the Maine Department of Transportation's acquisition of the physical assets of a rail line owned by a common carrier railroad was not the sale of a railroad line and thus did not require approval under section 10901, where the existing carrier retained a permanent and unconditional easement to conduct common carrier freight operations and the right to maintain, operate and improve the line. By virtue of the rail carrier retaining the full right and necessary access to maintain, renew, and operate the line, the rail carrier retained its common carrier status on the line at issue, and the State avoided common carrier status. 8 I.C.C. 2d at 836-37.

State of Maine is the seminal case in which the ICC held that a state agency may work out an arrangement with a freight railroad to acquire rail property on which a rail carrier is providing common carrier freight service for potential use for commuter transportation, without itself becoming a freight carrier under the Act. Since 1991, the ICC and the Board have followed State of Maine in more than 60 cases, mostly involving acquisition of the physical assets of rail lines for commuter transportation, and regional, state and local agencies responsible for commuter transportation have come to rely on this precedent.[10]

Separation of Physical Assets. The Unions argue that State of Maine and its progeny are not good law. They point out that the underlying principle—that the right to provide common carrier freight rail service together with the common carrier obligation on a rail line can be separated from the physical assets of the line under section 10901(a)(4)—has not heretofore been challenged before the agency or in court.[11] Nonetheless, the ICC and the Board have articulated the reasoning behind the State of Maine principle and its evolution over time. See Md. Transit Admin.—Pet'n for Declaratory Order, FD 34975 (Md. Transit) (STB served Sept. 19, 2008). State of Maine and its progeny are the precedent of this agency, and the Unions have the burden of convincing us that a departure from our longstanding precedent is warranted in an individual case as a matter of law or policy.[12] The Board finds that the Unions have not met that burden in this case.

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[9] Congress included relatively few definitions in the Act, leaving it to the agency's "informed judgment" to fill in the interstices. See W. Coal Traffic League v. STB, 216 F.3d 1168, 1177 (2000), quoting Nat'l Motor Freight Traffic Ass'n v. ICC, 590 F.2d 1180, 1185 (D.C. Cir. 1978).

[10] See MassDOT Reply Comments at 7-8 (MassDOT states that it went to "considerable effort and expense" in developing the terms of this transaction to ensure that they are consistent with the agency's State of Maine line of cases).

[11] The IBT Unions' challenge to the State of Maine precedent currently is pending before the Board in San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225.

[12] See generally Nat'l Telecomm. & Cable Ass'n v. FCC, 567 F.3d 659, 667 (D.C. Cir. 2009) (Agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent to show that its prior policies and standards are not casually ignored).

The Board has general jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), and a "rail carrier" is defined in 49 U.S.C. § 10102(5) as "a person providing common carrier railroad transportation for compensation.[13] Also, ordinarily, the Board exercises its regulatory authority under section 10901(a)(4) where a noncarrier becomes a carrier by acquiring a railroad line.[14] That is because typically the noncarrier is acquiring the rail line in order to become a carrier and provide the transportation in place of the selling carrier, which typically relinquishes some or all of its right to use the line. In contrast, in the State of Maine situation, the parties' intent and the purpose of the sale is the opposite of the typical section 10901(a)(4) sale. The seller does not relinquish its rights and obligations with respect to providing rail freight transportation. Likewise, the noncarrier that purchases the physical assets of a rail line does not thereby assume any common carrier obligation. Thus, we have ruled that the noncarrier is not a rail carrier providing transportation, and State of Maine permissibly interprets section 10901(a) as not applying to the transaction.

The IBT Unions argue that State of Maine permits purchasers of rail lines such as MassDOT to evade the Act through the use of operating easements.[15] As the Board observed in State of Maine, however, there are important policy reasons for allowing the selling rail carrier to retain a permanent freight easement over a rail line, while permitting a state to purchase the physical assets of the line. The main reason is "to remove obstacles which might inhibit States from acquiring lines so that service can be continued." 8 I.C.C.2d at 837 n.7, quoting Common Carrier Status of States, 363 I.C.C. at 135 (1980.). This arrangement serves to ensure long term freight service to shippers. An added benefit is that the arrangement also facilitates intrastate commuter operations. Id.

In this case, MassDOT cites similar reasons for acquiring the physical assets of CSXT's rail lines: assuring adequate provision of rail freight service and Amtrak's intercity passenger service, while also allowing the expansion of commuter rail passenger service in Massachusetts.[16] Moreover, in the related Mass Coastal transaction, the parties cite as an additional reason avoiding abandonment of freight service on the South Coast Lines.[17]

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[13] Am. Orient Express Ry. v. STB, 484 F.3d 554, 556 (D.C. Cir. 2007).

[14] Section 10901(a)(4) provides: "A person may—in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under [49 U.S.C. 10901(c)]." See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[15] IBT Unions' Comment at 3.

[16] Motion to Dismiss at 1-2.

[17] Mass Coastal Application 17 ("the Commonwealth can ensure that the South Coast Lines are not eliminated") & Ex. 2 (Purchase & Sale Agreement of Permanent Freight Easement) at 2 (citing CSXT's goal to "reduce its capital needs").

We need not determine in this proceeding whether the Board's State of Maine doctrine is the only permissible reading of section 10901. The Unions have not persuaded us that the only permissible conclusion in this type of transaction is that the state entity (here, MassDOT) must become a rail carrier under § 10901. Further, we note that the longstanding principle is supported by policy considerations.[18]

In any event, because an abrupt change in our statutory interpretation found in the State of Maine line of cases could have widespread impacts on transportation planning throughout the country, a rulemaking proceeding would provide the Board with a more comprehensive record on which to assess State of Maine.

Maintenance, Dispatching, and Other Potential Interference. Even where the seller retains a freight easement together with the common carrier obligation, the sale of railroad assets could be considered the sale of a railroad line under section 10901, if the rights acquired by the noncarrier are so extensive that the noncarrier has acquired control of the rail line.[19] As states and other commuter transportation agencies have negotiated joint use arrangements with freight carriers, the ICC and the Board have addressed how much power over freight operations by a state or commuter transportation agency constitutes control. The ICC and the Board have answered this question on a case-by-case basis by carefully examining the terms of the easement and the related shared-use agreement and identifying relevant factors. In each case, the agency exercised its judgment to balance the interests of freight rail and commuter transportation and the interests of other stakeholders. Through this process, the boundaries of State of Maine have been delineated.

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[18] The Unions would prefer to see the rail carrier sell an entire rail line (including all operating rights and obligations) to the public entity as a section 10901 transaction and then have the public entity grant the rail carrier trackage rights subject to Board approval under section 11323. The Unions' preferred arrangement, however, would place a residual common carrier obligation on the state to provide freight service, which could become an active obligation, if the trackage rights grantee ceases its service (with our approval or otherwise). In that event, the state would violate section 11101(a) of the Act if it did not provide freight service upon a shipper's reasonable request. A state entity may not wish to have even a residual common carrier obligation. Moreover, some states have laws that prohibit them from operating a rail line. See, e.g., State of Maine, 8 I.C.C.2d at 837 n.5. When a state acquires only the physical assets of a rail line and the selling carrier retains a permanent freight easement, the issue of a state obtaining a residual common carrier obligation is eliminated.

[19] Me.–Acquis. Exemption–Certain Assets of St. Lawrence & Atl. R.R., FD 35018 (St. Lawrence) (STB served June 20, 2007); Orange County Transp. Auth.—Acquis. Exemption—Atchison, Topeka & Santa Fe. Ry., 10 I.C.C.2d 78, 83 (1994); S. Pac. Transp. Co.–Aban. Exemption—Los Angeles County, Cal., 8 I.C.C.2d 495 (1992), recons. denied, 9 I.C.C.2d 385 (1993) (Southern Pacific).

Early on, the ICC applied a relatively strict standard, requiring the carrier to retain an "unconditional" easement that allowed the freight carrier to operate without interference from the acquirer of the physical assets. Those decisions were issued in the context of agreements that clearly overreached and could have prevented the Board from enforcing the common carrier obligation.[20] In later cases, the Board determined that reasonable restrictions on freight operations are acceptable if necessary to permit commuter operations and the freight carrier has sufficient access to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.[21]

Thus, while a permanent easement to provide freight service is still required, the Board has held that: (1) the public agency that owns the right-of-way and track may have some role in approving the transfer of the easement to another carrier, because Board approval is required for such a transfer;[22] (2) the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy freight shippers' service needs;[23] and (3) the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable

[20] For example, in Southern Pacific, the purchaser (a county transportation agency) could have effectively forced the carrier to curtail its freight service as passenger service expanded, and the freight carrier did not have the right or the obligation to make repairs to ensure that freight service would not deteriorate. Moreover, the freight carrier could not use the lines to move overhead traffic, and its local trackage rights were subject at all times to the directives and control of the county transportation agency. 9 I.C.C.2d at 388. Similarly, in Public Service Co. of Colo.—Acquis. Exemption—Line of the Colo. & Wyo. Ry., FD 32264 (ICC served Nov. 10, 1993) (Colorado & Wyoming), the noncarrier purchaser (a private company) reserved the right to grant easements to other carriers and had the right to require the carrier to transfer its common carrier operating rights at any time. In both cases, the ICC found that the purchaser would be a carrier.

[21] See Washington County, Or.—Acquis. Exemption—Certain Assets of the Union Pac. R.R., FD 34810 et al., slip op at 2 (STB served Apr. 11, 2007).

[22] See Metro Reg'l Transit Auth.—Acquis. Exemption—CSX Transp., Inc., FD 33838, slip op. at 2-3 (STB served Oct. 10, 2003) (Metro); N. C. State Ports Auth.—Acquis. Exemption—N. C. Ports Ry. Comm'n, FD 34258, slip op. 3, (STB served Oct. 31, 2002); Sacramento-Placerville Transp. Corridor Joint Powers Auth.—Acquis. Exemption—Certain Assets of S. Pac. Transp. Co., FD 33046 (STB served Oct. 28, 1996) (Sacramento-Placerville); Los Angeles County Transp. Comm'n—Pet. for Exemption–Acquis. from Union Pac. R.R., FD 32374 et al. (STB served July 23, 1996) (LACTC).

[23] Metro, slip op. at 2; Utah, slip op. at 2-4 (STB served July 23, 2007); St. Lawrence (STB served Sept. 13, 2007).

and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.[24]

ATDA argues (Comment 6-9) that the facts of this case are similar to Southern Pacific and Colorado & Wyoming, in which the ICC found that the transaction documents gave the purchasers so much power to restrict freight operations that they effectively controlled the railroad lines at issue. We disagree. Unlike the restrictions in those cases, MassDOT cannot limit CSXT to local traffic or force it to convey its easement to another carrier. Here, MassDOT and CSXT have negotiated operating windows and minimum levels of freight rail service on the lines at issue that CSXT believes will permit it to satisfy its common carrier freight obligations fully.[25] Moreover, prior to the sale of Boston Main Line rail assets, MassDOT and CSXT have agreed to jointly undertake projects to raise clearances under bridges and undercut tunnels so that the line will accommodate higher train counts, facilitate double-stack intermodal train service, and generally provide for more efficient operations for CSXT, MBTA and Amtrak.[26]

While MBTA will assume the maintenance obligation on lines used jointly by MBTA and CSXT, it must meet or exceed standards of the Federal Railroad Administration (FRA) for the designated class of track and must conduct its activities in a manner that does not unreasonably interfere with train operations. In contrast to the situation in Southern Pacific, CSXT has the right to enforce these standards.

The Unions also cite as evidence of undue control over freight operations that MBTA will assume dispatching responsibilities for the joint use assets. As the Board has observed, however, dispatching control has less importance in its own right than it has as a means of enforcing the service priorities in the operating agreement. If the operating agreement considered as a whole is not likely to impair freight service, the passenger operator's control over dispatching will not by itself create such an obstacle, because the latter merely implements the former. See, e.g., Metro, slip op at 2; LACTC, slip op at 3.

The Board examines each State of Maine transaction on the specific facts of the transaction. The Unions have not identified any facts that would lead the Board to apply a stricter standard in this case on the level of involvement in the operations of the railroad assets

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[24] Metro, slip op. at 2; Utah, slip op. at 4; Sacramento-Placerville, slip op. at 2; LACTC, slip op. at 2.

[25] Mot. to Dismiss, Verified Statement of Steven Potter, Assistant Vice-President, CSXT 6. Moreover, operating limitations on the lines at issue are not new. In this transaction, BML-East and BML-West are already jointly used for commuter service by MBTA and passenger service by Amtrak in addition to CSXT's freight service, so the parties have experience accommodating each other's operations. In any event, CSXT would be liable for failing to respond to a reasonable request for service.

[26] Mot. to Dismiss 28 & n.45.

that MassDOT may assume without becoming a rail carrier. We find that the terms and conditions of CSXT's sale of railroad assets here to MassDOT are well within the mainstream of arrangements that the ICC and the Board have found do not require approval under section 10901.

SIRTOA. The Unions argue that State of Maine conflicts with the 1983 decision of the United States Court of Appeals for the Second Circuit in SIRTOA, 718 F.2d 533. We conclude that SIRTOA is factually distinguishable. SIRTOA addressed whether a New York City municipal corporation (MTA) became a rail common carrier under the Act in 1970 when it acquired a rail line that was used primarily for intrastate passenger service, but also for freight service. At that time, the ICC had authorized a transaction under which (1) MTA, under a predecessor of section 10901, acquired the entire property interests in the rail line; (2) MTA granted trackage rights over the line back to the selling carrier so that the selling carrier could continue to provide common carrier freight service; and (3) MTA agreed to maintain the line. See Bd. of Locomotive Eng'rs v. Staten Island Rapid Transit Operating Auth., 360 I.C.C. 464, 472 (1979) (discussing in general the 1970 transaction).

That arrangement was unchallenged until a dispute arose in 1976 over whether MTA's maintenance employees, who were considered New York City workers, were covered by City laws (which did not permit strikes) or the Railway Labor Act (RLA) (which allowed strikes). The matter returned to the ICC for a determination as to whether MTA was a rail carrier under the Act, which would make it subject to the RLA.

In its 1979 BLE decision, the ICC found that, because the City had filed an application to take over and operate the freight and passenger services on the line, with no qualifications, it did indeed become a regulated carrier. The ICC pointed out that the give-back of freight trackage rights from MTA to the freight operator meant that MTA then held what is now known as a residual common carrier obligation (one that engages only if the primary freight carrier fails to perform). Because parties with a residual common carrier obligation are deemed to be rail common carriers, the ICC found that MTA was a regulated carrier subject to the Act, and thus that RLA would apply.

In SIRTOA, the Second Circuit upheld the ICC's finding in BLE that MTA was a rail carrier subject to the Act. The court found that even though MTA was primarily engaged in intrastate passenger carriage, its maintenance responsibilities and its residual common carrier obligation to carry freight (which the court called a "latent duty") sufficed to make it a carrier subject to the Act. Thus, the court held, the RLA applied to the exclusion of the City law governing other public workers.

In contrast with the situation in SIRTOA, MassDOT will not acquire any common carrier duty—either latent or patent—to furnish freight service on any of the lines at issue, because it is not buying all of CSXT's property interests in the lines. Rather, MassDOT is acquiring the line's physical assets only; CSXT is retaining a permanent rail freight easement and with it, the full duty to provide common carrier freight service on the lines. Consequently, although MassDOT

will assume responsibility for maintaining the lines at a standard that would permit both freight and passenger service, MassDOT would not have any duty to furnish the freight service. For that reason, the SIRTOA case is distinguishable, and the ICC's and Board's interpretation of the Act in State of Maine has been consistent.

II. Application of State of Maine

This Acquisition of Rail Assets. Under State of Maine, the key question here is whether the transactions governing MassDOT's acquisition of the Railroad Assets and CSXT's reservation of a freight easement meet the Board's requirements for assuring that common carrier freight service can continue to be provided on these rail assets without interference.

CSXT is not transferring its common carrier rights or obligations to MassDOT, and MassDOT will not hold itself out as a common carrier performing freight rail service. The agreements between MassDOT and CSXT are designed so that MassDOT will acquire only the railroad right-of-way and track assets Consequently, we will examine the relevant agreements to determine whether there are any impediments to the continuation of common carrier freight service on the Railroad Assets being transferred to MassDOT.

Easement Permanence. We are satisfied that the freight easement retained by CSXT on the BYP Assets, BML-East and BML-West is permanent because, under the controlling agreement, freight service can be terminated only through obtaining Board authority either to discontinue service over, or to abandon, the freight easement. For the South Coast Assets, the relevant parties have not yet reached a final operating agreement governing use of these assets after CSXT transfers its rail freight easement to Mass Coastal. Instead, the record contains what the parties call a "term sheet" (Mot. Ex. K) outlining the terms that will govern MBTA's and Mass Coastal's rights and responsibilities for the use and operation of these lines under a future operating agreement. The term sheet likewise provides that Mass Coastal would have to obtain Board authority to discontinue service over, or to abandon, the freight easement on the South Coast Lines.

Ability to Provide Freight Service. For the BPY Assets, BML-East, and BML-West, the relevant agreement provides that CSXT shall have access to all of its freight service locations at all times and CSXT's assent is required for any construction that would infringe on specified track clearances. The same agreement sets forth operating windows during which priority will be given to freight or commuter passenger rail service according to the time of day. The Board has found that agreements that restrict freight operations to specific times in order to accommodate reliable commuter service are permissible. Md. Transit, slip op. at 5 (served Oct. 9, 2007); Utah,, slip op. at 5 (STB served July 28, 2007). We find the restrictions in the agreement to be reasonable.

For the South Coast Assets, CSXT would be transferring the physical assets in the South Coast Lines to MassDOT at the same time that it would transfer the reserved freight easement on those lines to Mass Coastal, and Mass Coastal will stand in the shoes of CSXT.

The term sheet concerning the South Coast Lines states that the future operating agreement, which will have a term of 30 years,[27] will allow Mass Coastal (and its successors and assigns) to perform freight rail services on these lines and to assure that neither the sale of the assets in these lines to MassDOT nor the future use of these lines by MBTA will materially interfere with Mass Coastal's ability to meet its common carrier obligation on these lines. The future operating agreement will organize the parties' rights and obligations on the South Coast Lines into three categories: (1) freight-only rail properties (from the time of transfer of the freight easement to Mass Coastal until commencement of construction of the South Coast Rail Project); (2) freight-only properties with MBTA right to perform activities in connection with construction and maintenance (during construction of South Coast Rail Project); and (3) joint usage rail properties (upon MBTA commencing passenger services on the reconstructed lines). During the latter period, MBTA's usage is not to interfere unreasonably with Mass Coastal's right to provide common carrier freight service "to the extent required by State of Maine."

The term sheet does not include any windows restricting the easement holder's ability to provide rail freight service on the South Coast Lines, but rather states that the parties are to agree on operating windows or other scheduling mechanisms that accommodate both MBTA commuter rail passenger service and Mass Coastal freight service.

The absence of already agreed operating windows does not preclude dismissal under State of Maine. See, e.g., The Port of Seattle--Acquis.Exemption—Certain Assets of BNSF Ry., FD 35128, slip op. at 5 (STB served Oct. 27, 2008) (Port of Seattle). The South Coast future agreement, as reflected in the term sheet, is permissible under State of Maine.

Management, Maintenance, and Dispatching. For the BPY Assets, BML-East, and BML-West, MBTA will have the control and management of these lines, including dispatching of all trains, provided that such control shall be exercised in a manner that does not violate CSXT's rights to use these lines. MBTA will be in charge of maintenance of the lines, using its best efforts to schedule maintenance services between 7 a.m. and 7 p.m., thus avoiding the late night hours in which CSXT freight trains will have priority on these lines. MBTA will maintain these lines to its standards, which will always meet or exceed the FRA standards for the designated class of track. Should CSXT request that the track be maintained at a higher standard than FRA requires, CSXT will pay for the incremental costs of meeting the higher standard. The responsibility for track maintenance here does not constitute acquisition of a railroad line

[27] Mass Coastal's operations lawfully may not cease absent Board authorization under § 10903, and there is no indication in the record that the future operating agreement could not be renewed after 30 years.

requiring Board authorization. Utah, slip op. at 6; N. M. Dep't of Transp.—Acquis. Exemption—Certain Assets of BNSF Ry., FD 34793 (STB served Feb. 6, 2006).

Concerning the South Coast Lines, the term sheet states that, prior to commencement of the South Coast Rail Project, Mass Coastal shall dispatch these lines and maintain them in a manner that meets or exceeds the applicable FRA standard to handle Mass Coastal's traffic and service level. Further, as of the date MBTA commences the South Coast Rail Project, MBTA shall maintain these lines in compliance with standards to be set by MBTA, which shall be appropriate for Mass Coastal's freight operations and, after commencement of passenger service, shall be appropriate for both passenger and freight rail operations and shall always meet the applicable FRA standard for, at a minimum, Class I track.[28] Although the term sheet does not specify it, we assume that MBTA will have responsibility for dispatching these lines upon the commencement of any future MBTA commuter service over them.[29] As mentioned above, MBTA's planned, future dispatching control over these lines is permissible under State of Maine and its progeny.

Transfer of the Freight Easement. For the BPY, BML-East and BML-West Assets, CSXT may transfer its freight easement on the lines to an entity unrelated to CSXT only if that entity meets "transferee standards" to be developed jointly by CSXT and MBTA.[30] To ensure that MBTA will not be able to impede the future transfer of the freight easement, we will require the parties to file the transferee standards at the Board within 15 days of agreeing to those standards.

For the South Coast Assets (Mot. Ex. D to Ex. I), the freight easement may not be transferred absent the consent of MassDOT, which consent may not unreasonably be withheld, conditioned, or delayed, and which must be given if the proposed transferee meets certain future "transferee standards" to be established. MassDOT already has consented to the transfer of the freight easement to Mass Coastal.

While Mass Coastal may not transfer the freight easement without obtaining MassDOT's consent, MassDOT may not unreasonably withhold its consent. It is not uncommon for a public

[28] Under an FRA regulation governing speed on various classes of track, 49 CFR 213.9, freight trains may operate at up to 10 mph and passenger trains at up to 15 mph on track designated as Class I.

[29] MassDOT states (Mot. 17) that Mass Coastal will dispatch operations over the South Coast Lines while these assets remain freight-only rail properties. In turn, according to the term sheet, these lines will cease to be freight only-rail properties when MBTA commences commuter operations on them.

[30] Section 18 of the 2009 Operating Agreement refers to section 2.4.1 of the Definitive Agreement (Mot. Ex. A), which, in turn, refers to transferee standards to be agreed upon by the parties (CSXT and MBTA).

entity such as MassDOT, which seeks to acquire the physical assets of a rail line to preserve for freight and for commuter service, to play a role in the subsequent assignment of the freight easement or to limit the term during which the rail carrier will operate the line.[31] Nothing in the record suggests that these provisions, which are intended to ensure the proper operation of the South Coast Lines, will enable MassDOT to interfere unreasonably with the ability of Mass Coastal (or a future transferee) to fulfill the common carrier obligation on these lines. To further ensure that there would not be an undue restriction on the future ability to provide common carrier service, we will require the parties to file at the Board any document adopting standards that will pertain to the future transfer of the South Coast Lines within 15 days of agreeing to any such standards.

Taken together, these provisions are adequate to demonstrate that Mass Coastal (or a future transferee) will be able to fulfill the common carrier obligation on the South Coast Lines. See Port of Seattle.

Draft Deeds and Operating Terms Cannot Be Materially Altered Without Notice. MassDOT and CSXT state that the draft deeds' easement terms and conditions concerning the provision of freight service on these lines are unlikely to be changed materially and pledge that, if any of the final deeds are materially altered, MassDOT will promptly advise the Board and supply final versions of the deeds. Material alteration may result in the Board finding that the alterations constitute a new transaction that is subject to State of Maine review.

As further assurance for the continued provision of freight service, we will require the parties to provide to the Board, within 15 days of the first and second closings, respectively, the copies of the deeds transferring these Railroad Assets to MassDOT (whether or not materially different from the draft deeds), and an executed final copy of the future Mass Coastal – MBTA Operating Agreement. Any future operating agreement or any subsequent agreement that expands MassDOT's power or control over any of these lines in a way that would hamper the ability of the holder of the rail freight easement to fulfill the common carrier obligation would trigger the need for MassDOT to obtain acquisition authority from the Board at that time.

Under these circumstances and with this conditional requirement, we find that this transaction as currently structured does not require Board regulatory authorization. This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MassDOT's motion to dismiss the verified notice of exemption in this proceeding is granted.

[31] See Port of Seattle, slip op. at 4 & n.4.

2. CSXT or MassDOT shall provide to the Board, within 15 days after the first and the second closings, copies of the deeds transferring these Railroad Assets to MassDOT (whether or not materially different from the draft deeds) and a copy of the final Mass Coastal – MBTA Operating Agreement. Further, CSXT or MassDOT shall provide to the Board the "transferee standards" adopted pursuant to the 2009 Operating Agreement, within 15 days after those parties agree to the transferee standards, and any document adopting standards governing the transfer of the freight easement on the South Coast Lines, within 15 days after the execution of any such document.

3. The proceeding is dismissed.

4. This decision will be effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.