

October 11, 2002

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington DC 20423-0001

Dear Mr. Williams:

This refers to STB Finance Docket No. 34258, North Carolina State Ports Authority-Acquisition Exemption-North Carolina Ports Railway Commission, and to the Motion to Dismiss Verified Notice of Exemption From 49 U.S.C. &10901 filed by the North Carolina State Ports Authority on October 1, 2002.

We as the former Chairman of the North Carolina Ports Railway Commission, the current Vice-Chairman of the North Carolina Ports Railway Commission, current Vice-Chairman of the Beaufort & Morehead Railway, Inc. and as taxpaying citizens of the State of North Carolina are opposed to the Motion to Dismiss and urge the Board to deny it. We are not lawyers and do not pretend to be knowledgeable about the laws administered by the Board. We however, have consulted with counsel and have been advised that the Motion to Dismiss is flawed.

It well may be, as the Motion to Dismiss maintains, that the North Carolina legislature intended that the Authority not become a railroad, subject to this Board's jurisdiction, but the legislature's desire alone is not determinative. This Board consistently has deemed states or their subdivisions when acting as railroads to be subject to the agency's jurisdiction. Southern Pac. Transp. Co.-Aban.-L.A. County, CA, 9 I.C.C.2d 385 (1993); Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980).

In its Motion to Dismiss, the Authority relies primarily upon the State of Vermont and South Orient cases in contending that it can retain the realty and improvements of the railroad lines in Wilmington and Beaufort while granting the common carrier rights to the Wilmington Terminal Railroad, L.P., and Carolina Rail Service, L.L.P. respectively. In STB Finance Docket No. 33830, State of Vermont-Acquisition Exemption-Certain Assets of Boston and Maine Corporation, served June 8, 2000, and in Finance Docket No. 31971, South Orient Railroad Company, Ltd.-Acquisition and Operation Exemption-Line of the Atchison, Topeka and Santa Fe Railway Company, served September 2,

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1992, however, the railroad in question held a permanent, unconditional easement to fulfill its common carrier obligation. Indeed, in Maine DOT-Acq. Exemption, Me. Central R. Co., 8 I.C.C. 2d 835 (1991) and the many Board decisions which have followed it the critical agency finding was that the railroad retained a permanent, unconditional easement enabling it to conduct its operations. The agency's actions are consistent with the time-honored concept that certificates of public convenience and necessity remain effective indefinitely. In sharp contrast, Section 5 (a) of the easement and operating agreements between the Authority and Wilmington Terminal Railroad, L.P., and Carolina Rail Service, LLP, grant the railroad only five-year easements. Indeed, their franchises may be even more abbreviated, if the Authority concluded the railroad is in default, as, for example, by being late in its payment of the Authority's share of the railroad's gross revenue.

To be sure, Section 16(a) of the easement and operating agreements allows either party six months before the expiration of the five-year term of the easement grant to renegotiate the extension of the agreements. Obviously, this gives the Authority a measure of control that is inconsistent with the notion that the Wilmington Terminal Railroad, L.P., and Carolina Rail Service, LLP, are autonomous. The operating railroads will understand that if they fail to observe the Authority's instruction, they will be replaced when their five-year terms are up.

At the expiration of the five-year easement and operating agreements or in the event of a default of either of the operating railroads, the Wilmington and Beaufort railroad properties are to be transferred and conveyed to a successor to be designated by the Authority, referred to in the agreements as the "Designated Operator". The term "Designated Operator" has a fixed connotation under the Board's regulations, and while Section 5 (b) of the agreements between the Authority and Wilmington Terminal Railroad, L.P., and Carolina Rail Service, LLP, says that the transfer and conveyance shall be subject to "required regulatory approvals," compliance with the Designated Operator provisions of 49 C.F.R. 1150.11 surely will not suffice.

Finally, pursuant to section 22 of the easement agreement, the operating railroads are prohibited from transferring or assigning any of their rights, interest or obligations under the agreements "without obtaining the prior consent of [the Authority] in its reasonable discretion." This restriction hardly squares with the concept of a permanent, unconditional easement grant to operate as a common carrier railroad over the State owned lines.

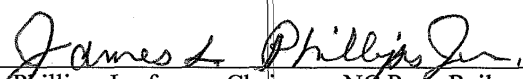
For the foregoing reasons, the Authority's Motion to Dismiss should be denied and the Authority should be found to have a "residual common carrier obligation," as the North Carolina Ports Railway Commission earlier was found to have. Finance Docket No. 32345, North Carolina Ports Railway Commission-Purchase and Operation Exemption-

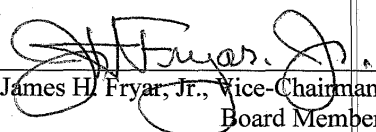
CSX Transportation, Inc., Line in North Carolina, decided November 5, 1993; Finance Docket No. 31248, North Carolina Ports Railway Commission-Petition for Declaratory Order of Prospective Abandonment Exemption, Decided September 21, 1988.

Ten copies of this letter are enclosed to permit your circulation of it. An additional copy is enclosed for you to stamp to acknowledge your receipt of it and to return to us in the enclosed stamped and self-addressed envelope.

By copy of this letter, sent by prepaid first-class mail, service is being effected upon counsel for the Authority.

Sincerely yours,


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