

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34495

BUCKINGHAM BRANCH RAILROAD CO.
–Lease–
CSX TRANSPORTATION, INC.

**COMMENTS OF THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

Pursuant to the Board’s Decision No. 2 in this proceeding, the Brotherhood of Maintenance of Way Employees (“BMWE”) submits these comments regarding the application filed by CSX Transportation (“CSXT”) and Buckingham Branch RR.(“BB”), for STB authorization of their plan for BB to “lease” certain lines of CSXT between Richmond, VA and Clifton Forge, VA.

I. INTRODUCTION

BMWE opposes the transaction, and urges the Board to deny the Application because it conflicts with several of the National Rail Transportation Policies. BB is not fit or qualified to be responsible for subject lines because it has no experience or capability to adequately maintain these 200 miles of lines that are more heavily and densely traveled than the current BB 17 mile operation; and which are used for hazardous materials transportation and Amtrak passenger operations. BMWE does not question BB’s capabilities with respect to its current 17 miles of track with light freight operations and occasional excursion trains. But the operational and maintenance needs of the CSXT line from Richmond to Clifton Forge are entirely different from

the needs of BB's current line. Furthermore, CSXT is trying to use this "lease" as a device to evade its obligations with respect to maintaining the lines involved.

Additionally, the proposed transaction is not a legitimate lease under 49 U.S.C. §§11323 and 11324, but a sham transaction which is designed to invoke STB procedures to temporarily relieve CSXT from its common carrier obligations, and its duty to maintain the lines for a short period, while CSXT retains ownership of the lines, continues significant operations over the lines and derives substantial benefits from the lines. CSXT is seeking to temporarily remove itself from common carrier obligations for the lines, and to avoid responsibility for major repairs and renewals that are required for the lines, while retaining ownership of the lines so that they can be reclaimed at a later date. Indeed, it appears that CSXT is seeking to avoid a flow of U.S. Department of Transportation Federal Railroad Administration findings of defects and violations by taking the lines out of the CSXT inventory while CSXT retains the benefits of major continued operations over the lines and full ownership of the lines.

II. FACTS

A. THE LINES TO BE LEASED

CSXT and BB have asked the Board to approve a "lease" of 199 miles of CSXT's lines running between Richmond, VA and Clifton Forge, VA, and related lines ("Richmond-Clifton Forge Line", sometimes referred to herein as "Lines to Be Leased"). The Application states that CSXT is retaining limited overhead trackage rights and limited local trackage rights. Application ("App.") at 1. But, as is shown below, the retained rights of CSXT will constitute a majority of the operations over the Lines to Be Leased. Indeed the largest volume of traffic on these Lines if the Application is approved will be CSXT overhead movements of empty hopper cars as part of a coordinated CSXT

movement of traffic on the James River Subdivision (Clifton Forge to Galdstone, VA) and the Rivanna Subdivision (Gladstone Richmond, VA) (referred to herein as the “James River Line”). Full hoppers move east over the James River Line to Richmond, and empties return on the Lines to Be Leased. Among the local movements over the Richmond-Clifton Forge Line are revenue and non-revenue aggregate shipments (with revenue shipments retained by CSXT), hazardous materials including propane, liquified petroleum gas and caustic sodium (Doc. #656, BMW Ex.1). Additionally, there are Amtrak passenger trains that operate three times per week in each direction.

The Lines and right of way are currently inspected, maintained and repaired by 13 local BMW-represented CSXT maintenance of way employees (Answer to BMW Interrogatory #15, BMW Ex. 2) though BMW believes that this number is inadequate¹. Major repairs renewals and upgrades can be done by CSXT large production gangs that are heavily mechanized and used by CSXT for capital projects such as major rail and tie replacements; however, CSXT has not assigned such gangs to work on the Lines to be Leased in recent years; and it apparently had no plans to deploy such gangs in the near future.

In recent years, CSXT has allowed the Lines to be Leased to deteriorate, and has deferred maintenance and renewal work such that the Lines are now in appallingly bad condition. BMW submits that there can be no dispute that the lines are in very poor condition. This is shown not only be the declaration of BMW officials based on their own inspections of the Lines (Declaration of Randell Brassell and Roy Griffith, BMW Exhibit 3), but also by [redacted confidential material].

¹The CSXT and BB responses to BMW’s discovery request are at Exhibit 2 of BMW’s exhibits. When cited herein, Applicants answer to discovery requests will be cited as “Int.#___” or “Doc. Req.#___”; Documents produced will be cited by their documents number as Doc.#___ and will be produced as exhibits.

CSXT has done only minimal work on these lines, mostly to make repairs in response to FRA inspections and/or findings of violations. Brassell/Griffith Declaration ¶4. Indeed in January of 2002, a CSXT GRMS Car (a Gauge Restraint Measurement Car) being used to inspect the track, particularly to assess gauge width (the distance between rails to insure that equipment stays on the tracks) derailed while doing an inspection. The GRMS car rolled over and a number of CSXT employees were injured. Brassell/Griffith Declaration ¶5 and Exhibit A. BMW officials wrote to the FRA Deputy Regional Administrator after the accident about both the general condition of the Lines and the derailment of the GRMS Car. Brassell/Griffith Declaration ¶6 and Exhibit A

On February 25, 2002, the FRA responded to BMW's letter, noting that it shared BMW's concerns, that inspections had shown numerous defects (mostly insufficient joint ties, and less than the required bolts in joints due to loose, missing or broken bolts), that CSXT corrected the cited defects but the same defects were generally found at other locations, and that "Conditions of the Piedmont Subdivision are in fact marginal in regard to compliance with the FRA Track Safety Standards". The FRA stated that CSXT had said that "Ties will be replaced, the track will be resurfaced to combat the surface bent rail at joints and a bolt tightening machine will be operated across the subdivision. We are pressing CSX to adhere to this plan, which we hope can be completed during the current production season". Brassell/Griffith Declaration ¶7 and Exhibit A. On April 1, 2002, the FRA advised BMW that a second inspection had found numerous violations, including many citations for violations "for excessive track gauge under load associated with the poor crosstie conditions", that "Crosstie conditions on the Piedmont Subdivision are deteriorating faster than the local forces can deal with them, and that CSXT's 2002 system production schedule shows no production work for the Piedmont Subdivision. Brassell/Griffith Declaration ¶8 and Exhibit A.

BMW E's assessment of the condition of the Lines to be Leased is fully supported by the FRA findings

[redacted confidential material]

[redacted confidential material]

[redacted confidential material]

[redacted confidential material]

[redacted confidential material]

[redacted confidential material]. The lines between Richmond and Clifton Forge have continued to deteriorate, and CSXT has done nothing more than to fix defects that have been identified by the FRA. Brassell/Griffith Declaration ¶9 and Exhibit A. A recent inspection of the lines between Richmond and Clifton Forge by BMWF officers again showed numerous and serious defects. Among other things, there were defective ties, subsidence of the right of way, fouled and missing ballast, missing and broken bolts, defective joints, excessive (wide) gauge and overgrown vegetation. There were defective bridge timbers; crossties were generally in terrible condition (particularly between mile posts 118.8 and 160.4) and there were numerous violations and tie plate problems between mile posts 207.8 and 276.1 (which is territory over which Amtrak trains operate). *See* Brassell/Griffith Declaration ¶10; *see also* Exhibit B thereto which contains pictures and an index of FRA violations on the lines over which Amtrak operates, and Exhibit C thereto which shows defects and violations on all three subdivisions.

B. THE CURRENT BUCKINGHAM BRANCH RAILROAD CO.

The current BB line is only 17 miles, handling only 2400 car loads in its best year (Operating plan, Lease Ex. 15); whereas the Lines to be Leased are 199 miles, handling about local 10,000 car loads per year, plus CSXT overhead movements and Amtrak trains three days a week each way. *Id.* This 17 miles of track is currently rated at FRA level Class 1, the lowest level above excepted track. (Int.# 33). BB has 7 employees who perform maintenance of way work (Int.# 38, 40), but they also perform duties other than maintenance of way work. (Int.# 42). BB plans to hire another 8 employees to work on these lines who will also perform other duties. Int. # 48. By contrast, CSXT has 13 maintenance of way employees assigned to the Lines to be Leased (Int.# 15), plus available system forces. BB does not currently handle hazardous

materials or have passenger rail operations other than occasional excursion trains. A BMW officer who is a track inspector inspected parts of the current BB line and found that even as an FRA Class 1 track, the current BB was below FRA Class 1 standards despite its low traffic tonnage. Brassell/Griffith Declaration ¶¶11-12. BB has received an average of about \$400,000 per year from the state of Virginia in recent years for capital improvements . Int.# 37.

C. TERMS OF THE LEASE

The Lease provides that “except as otherwise provided herein” BB will have the exclusive right to conduct rail freight operations on the Lines to be Leased. Lease §1(b). However, the Lease expressly reserves to CSXT the right to use the Lines for westbound movements of empty hopper cars, to serve one major local shipper (the Martin Marietta aggregate shipping out of Verdon) and to use the Lines “in case of emergency or maintenance” on the James River Line. Lease §25; Application at 12. In their Application, BB and CSXT state that “BB will assume the common carrier obligation on the line and provide for all local service.” App at 12. The Application further states that CSXT, “will retain limited overhead trackage right to mover certain westbound empty trains, retain local trackage rights to move aggregate trains about 29.5 miles from Martin Marietta at Verdon, VA, and will enter into a detour agreement with BB to detour loaded eastbound coal trains over the Line in case of an emergency or maintenance on CSXT’s parallel line”. Application at 12. Additionally, Amtrak will continue to operate its “Cardinal” trains over the Lines twice a day on Sunday, Wednesday and Friday; CSXT will continue to receive compensation for Amtrak operations over the Lines under terms still be worked-out between CSXT and BB. Lease §26(a) and Int #65.

The Lease is structured for a 20 year period, but the financial terms are subject to renewal

at the end of 10 years; if the parties cannot agree on new terms, either party can end the Lease after 10 years. Lease §4(a). As a practical matter, the Lease is terminable at will by either party at the end of 10 years. Moreover, CSXT can amend the Lease unilaterally at any time to exclude any portion of the Land so long as that does not interfere with BB's operations. Lease § 25(a) (vii). The Lease provides that BB is to be solely responsible for maintaining the line "in good working order", "in the condition necessary to permit railroad freight operations comparable to those existing as of the Commencement Date as established by [CSXT'] Railroad Timetable as modified by train orders in effect at that time" and at least at the "FRA track class standards existing as of the Commencement Date". Lease §10(a). *See also* Application at 10—BB plans to maintain the Line at the present FRA track class standards. Additionally, BB will petition the FRA and Amtrak to eliminate the current automated signal system on the North Mountain and Washington Subdivisions, the Train Control System ("TCS") and operate that territory (over which Amtrak runs) as "dark territory". Lease §10(b) and Application at 16. This means there will be no signal communications to Amtrak trains on the Line with respect to conditions on the line or other traffic on the line.

C. PLANNED OPERATIONS

As is noted above, the Lease states that BB will operate the Lines to be Leased, assume the common carrier obligation and be responsible for maintaining the Lines at their current (poor) level of quality. However, CSXT will continue to have a significant, indeed dominant, operating presence on the Lines. BB plans to increase local service to four round trip trains per day five days per week; it anticipates that it will handle about 11,700 carloads per year. Of those carloads 4,500 carloads will actually be CSXT non-revenue carloads, as opposed to independent carloads.

CSXT plans to move 156,000 westbound empty hoppers per year on 4 westbound trains per day using its retained overhead trackage rights, and it plans to use its retained local service rights to move about 7,900 revenue rock carloads from the Martin Marietta facility at Verdon. Application at 15-16, 96-97; Int #8. Other operations on the Lines will include the Amtrak Cardinal: two trains per day on Sundays, Wednesdays and Fridays. Application at 15. BB will handle the dispatching which will involve 3 carriers running on these deteriorated lines, as opposed to the present 2 carriers. Int.# 10, Lease¶ 10(b) and Lease Ex. F Art. 4 A and 12. And BB hopes to coordinate these movements without a Train Control System.

BB will hire only 8 additional employees who will perform maintenance of way work on the Lines to be Leased, along with other non-maintenance of way responsibilities. (Int.# 48); it will thus have the essentially the same number of employees for the Richmond-Clifton Forge line as it has for the current BB line, even though the Richmond-Clifton Forge line is much longer, with higher density, heavier and more sensitive traffic (including hazardous materials and passengers). BB will have 5 fewer maintenance of way employees than CSXT on the Lines To Be Leased, where the CSXT employees do only maintenance of way work, and can be assisted by system production gangs. BB does not plan to have a geometry car, a gauge restraint measurement system, or automated rail flaw detection equipment. Int.#13. These pieces of equipment are typical and important maintenance of way equipment today; and they are particularly necessary when a track and right of way is in as bad condition as are the lines between Richmond and Clifton Forge. Brassell/Griffith Declaration ¶13.

III. APPLICABLE STANDARDS

Section 10101 of the Interstate Commerce Act, as amended, establishes the Rail

Transportation Policy of the United States, declaring:

In regulating the railroad industry, it is the policy of the United States Government-

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

Section 11324 of the sets out specific standards concerning transactions such as leases involving two carriers. Among other things, Section 11324 provides:

(a) The Board may begin a proceeding to approve and authorize a transaction referred to in section 11323 of this title on application of the person seeking that authority....

(c) The Board shall approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest. . . .

(d) In the proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that-

(1) as a result of this transaction, there is likely to be substantial lessening of competition, creation of monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Board shall, with respect to any application that is part of a plan or proposal developed under section 333 (a)-(d) of this title, accord substantial weight to any recommendations of the Attorney General.

Applicants have filed their application under 49 U.S.C. §11324, and they assert that this

is a so-called “minor transaction” under 49 C.F.R. §1180.2(c), a transaction not involving two Class I carriers. They assert that the transaction will not have anti-competitive effects, so it should be approved by the Board. Application at 4, 15. Applicants will argue that the Application must be granted because there is not likely to be substantial lessening of competition, and that consideration of other factors is not permissible. However, BMW submits that the Board is ultimately governed by the declared Rail Transportation Policies of the United States as set forth in Section 10101, and that the Board cannot approve a transaction that is contrary to those declared policies.

In seeking approval of the Application and in responding to BMW’s arguments against approval, Applicants will presumably rely on cases such as *People of the State of Illinois v. ICC*, 687 F. 2d 1047;1051-1055 (7th Cir. 1982); *Village of Palestine v. ICC*, 936 F. 2d 1335, 1339-1340 (D.C. Cir. 1991); and *Canadian Pacific Ltd, et al—Control Davenport, Rock Island and North Western Ry. Co.*, F.D. No.32579 (February 10, 1995). In those cases, it was held that applications under the predecessor to Section 11324(d) turn on assessment of anti-competitive effects, and that the general requirement expressed in Section 11324(c), that a transaction should be approved if it is “consistent with the public interest”, does not apply in Section 11324(d) transactions.

However, BMW submits that there is an inherent and necessary requirement that in considering Section 11323/11324 transactions, the Board cannot approve a transaction that conflicts with the overarching National Rail Transportation Policies. While it has been held that approval of a Section 11324(d) transaction is not contingent on a finding that the transaction is consistent with the public interest generally under Section 11324(c), that is different from

approving a transaction that does not affect competition, but is nonetheless contrary to key elements of the National Rail Transportation Policies. It is one thing to require an affirmative finding that a transaction is actually consistent with the public interest; it is something entirely different to hold that a transaction may be approved even though it conflicts with policies expressed in Section 10101. For example, the Board surely has the authority to deny an application under Section 11324(d) for the lease or acquisition of a line that extends to a nuclear power plant despite the absence of anti-competitive effects, if the applicant is a known Al Qaeda front or a Timothy McVeigh/Terry Nichols- style Aryan nations militia group. And the Board surely has authority to reject a lease or acquisition of a line by a party with a history of unsafe operations, or a party with established plans to degrade service and allow the line to deteriorate in order to abandon the line and use the real estate for purposes deemed more profitable than rail service. Indeed, the Board rejected an applicant's ability to acquire a line under Section 10904 when it was clear that the applicant did not intend to operate the line, but would move quickly to abandon it. *Redmond-Issaquah Railroad Preservation Ass'n. v. STB*, 223 F. 3d 1057 (9th Cir. 2000). *See also SP&L Ry. , Inc. –Acquisition and Operation Exemption–Toledo Peoria and Western Ry. Corp.*, F.D. 33996 and AB 448 (served October 17, 2002 and January 31, 2003) revoking an acquisition based on a determination that the acquiring entity actually intended to abandon and salvage the line.

BMWE also notes that the decisions in *People of the State of Illinois, Village of Palestine and Canadian Pacific Ltd* all pre-dated the Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) , in which the Court made it clear that, in interpreting a statute, one cannot apply "a particular statutory provision in

isolation”; that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”; and that a statute must be interpreted “as a symmetrical and coherent regulatory scheme”. *Id.* at 1300-1301, citations and internal quotations omitted. In *Kulmer v. STB*, 236 F. 3d 1255 (10th Cir. 2001), the Tenth Circuit upheld an STB decision rejecting an Offer of Financial Assistance under Section 10904 because the offeror provided insufficient assurances that it would be able to continue rail freight service-the basic purpose of the OFA provision. The Court rejected the offerer’s argument based on the “plain language” of Section 10904(d) which, it was asserted, expressed clear Congressional intent “to make financial responsibility the sole qualification for OFA approval”. *Id.* at 1256-1257. In that holding, the Court relied on the passages from the Supreme Court’s decision in *Brown & Williamson* that are discussed above, and a finding that the totality of Section 10904 supported the Board’s view that, despite the wording of Section 10904(d), financial responsibility was not the only consideration, and that continuation of freight service was an additional consideration. *Id.* See also *Redmond-Issaquah, supra.*, similarly relying on a contextual reading of the Statute. 223 F. 3d at 1061-1062. Thus, Section 11324(d) cannot be read in isolation from the rest of the Statute. While the sort of consistency with the public interest inquiry mandated by Section 11324(c) is not applied in Section 11324(d) cases, the Board cannot authorize a transaction that conflicts with the overarching National Rail Transportation Policies. As is described above, BMWWE submits that *People of the State of Illinois*, *Village of Palestine* and *Canadian Pacific Ltd.* merely hold that the Board may not require that a proposed transaction be affirmatively consistent with the public interest generally, and they do not preclude consideration of whether approval of a transaction would conflict with National Rail Transportation Policies. But, if they are construed as requiring

the Board to approve a transaction that actually conflicts with the express policies in Section 10101 because the transaction would not affect competition, then those decisions are contrary to *Brown & Williamson* and should not be followed.

In considering whether to approve the Buckingham Branch transaction, the Board must also assure itself that the transaction is a legitimate lease, that the transaction is not a sham, and that the Board's processes are not being abused for other purposes. It is well-established that the Board can, and should, reject an application that is presented as a covered transaction in form, but in substance is not a real transaction-- rather an attempt to invoke STB approval for other purposes.

In *County of Marin v. United States*, 336 U.S. 412 (1958), the Supreme Court vacated ICC approval of a transfer of operating authority from a motor carrier to its subsidiary in return for stock in the subsidiary. The effect of the transaction would have been to defeat State agency jurisdiction. The Supreme Court held that the Commission lacked jurisdiction of the supposed transaction, noting that the transfer was little more than a "paper transaction" between the two commonly-owned corporations for the purpose of avoiding State regulation and was not an acquisition under the Act. *Id.* at 418 -419. In *Gilbertville Trucking Co. v. United States.*, 371 U.S. 115 (1962), the Court affirmed an ICC order rejecting a proposed merger of two carriers because they had already been the subject of unauthorized de facto common control. *Id.* at 122 - 25. And in *Burlington Northern Railroad Company v. United Transportation Union et al.*, 862 F. 2d 1266 (7th Cir. 1988), the Seventh Circuit enjoined changes in working conditions under a purported trackage rights transaction between a parent corporation and defunct subsidiary and rejected arguments that the changes were permissible under an ICC trackage rights arrangement. ICC

Finance Docket No. 31163. The court found that there was not a legitimate trackage rights arrangement, and the arrangement was merely a device to evade a collective bargaining agreement.

The ICC and STB have also rejected or modified transactions when they were found to be “shams” or mis-identified by the parties. In *Sagamore National Corporation Acquisition and Operation Exemption - - Lines of Indiana Hi-Rail Corporation*, F.D. No. 32582 (served September 20, 1994, and October 28, 1994), involving a purported acquisition of a rail line, the ICC held that no “transaction cognizable under the Interstate Commerce Act actually took place”, because of a substantial interrelationship between the two parties. In *Hi-Tech Trans, LLC –Petition for Declaratory Order–Newark, NJ*, F.D. No. 34192(Sub-No. 1)(served November 20, 2003 and August 14, 2003), the Board rejected a company’s petition for a declaratory order that its operation of a truck-to-rail transloading facility was subject to STB jurisdiction, concluding that Hi-Tech was not a rail carrier, and that the purpose of the petition appeared to be to seek pre-emption of State and Local regulations of the facility. The Board also noted (*id.n.12*) that if Hi-Tech followed formal Board procedures to become a rail carrier, “the Board will not approve rail carrier authority that is a sham or intended solely to avoid local regulations”. In *SP&L Ry. , Inc. –Acquisition and Operation Exemption–Toledo Peoria and Western Ry. Corp.*, F.D. 33996 and AB 448 (served October 17, 2002 and January 31, 2003), the Board revoked an acquisition based on a determination that the acquiring entity actually intended to abandon and salvage the line. In its decision, the Board cited decisions holding that the Board has authority to act to protect the integrity of its processes and that the Board may “revoke sham transactions”; *e.g. Railroad Ventures v. STB*, 299 F. 3d 523, 563-64(6th Cir. 2002); *Land Conservancy-Acq.*

And Oper. –Burlington Northern, 2 STB 673 (1997); *Track Tec, Inc.–Abandonment-in Adair and Union Counties, IA*, AB-493 (Sub -No. 7x)(served November 1, 1999) and *Minnesota Comm. Ry., Inc. Trackage Exempt–Burlington Northern R.R. Co.*, 8 ICC 2d 31 (1991). And in *Delaware and Hudson Ry. Co.–Lease & Trackage Rights Exemption–Springfield Terminal Ry.*, 4 ICC 2d 322 (1988), the ICC concluded that a series of purported individual intra-corporate lease transactions were more akin to a merger or control transaction; but, rather than revoke the exemptions, it imposed the sort of employee protections that would be applied in a merger or control transaction. *See also Portland & Western R.R.–Trackage Rights Exemption–Burlington Northern R.R. Co.*, (F.D. No. 32766)(Served March 11, 1997)--evidence that a lease was not bona fide would be considered to support a petition for revocation of an exemption; *InterCarolinas Motor Bus.*, 28 MCC 665, 669 (1941) - - “We are not bound by the name which the parties applied to the arrangement which they entered into”; and *Fast Interstate Express, Inc.*, 127 M.C.C. 279, 282 (1976) - - acquisition of truck line by employee of carrier held to involve acquisition of control of the truck line by the employer carrier due to the realities of employer-employee relationship.

Thus, the Board can and should consider evidence that a transaction is illegitimate and must reject sham transactions. This is so not only because of the cited precedent, but it is necessary because Board approval carries immunity from anti-trust laws and other laws. Section 11321(a). If the CSXT-BB arrangement is not truly a lease under Sections 11323/11324, then the Application should be denied.

III. ARGUMENT

A. Approval of the Proposed “Lease” Is Contrary To Several National Rail Policies

BMWE respectfully submits that approval of the proposed “lease” would be contrary to the National Rail Policies for promotion of a safe and efficient rail transportation system; development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; operation of transportation facilities and equipment without detriment to the public health and safety; and encouragement of honest and efficient management of railroads. In essence, Buckingham Branch is not qualified to be operator of the Richmond-Clifton Forge Line. Again, BMWE does not question BB’s capabilities with respect to its current line, and does not impugn its current operation. BMWE merely asserts that BB cannot effectively assume responsibility for the Richmond-Clifton Forge Line.

The most important aspect of the Lines to be Leased is that they are in abysmal condition and in dire need of renewal and major repairs. CSXT has allowed these Lines to deteriorate. CSXT represented to the FRA in 2002 that it would do major renewal work on the Line, but it never did such work. Brassell/Griffith Declaration ¶ 7 and Ex. A, B and C. [redacted confidential material] BB is in no position to deal with this most salient aspect of these Lines. Yet these Lines are used to transport hazardous materials such as propane, liquified petroleum gas and caustic sodium (Doc. No.656), and passengers on Amtrak trains (Lease §2, Int.# 7). The condition of the Lines to be Leased and the nature of the traffic on the Lines requires a major, experienced, well-capitalized operator, not a small operator that carries some freight, runs excursion trains and relies heavily on State grants for its infra-structure needs. BB cannot satisfy

the cited Transportation Policies in operating these Lines

The current BB line is only 17 miles, handling only 2400 car loads in its best year. (Operating plan, Lease Ex. 15). By contrast, the Lines to be Leased are 199 miles, averaging over 10,000 local car loads per year, plus CSXT's overhead transport of 156,000 empty hoppers per year, plus Amtrak service three days a week each way. The current BB line is Class 1 track, the lowest level above excepted track (Int.# 33), and it has only 7 employees involved in maintenance of way work (Int.# 38, 40), and they apparently perform other duties in addition to maintenance of way work. (Int.# 42). And the current BB line still has maintenance problems for its low traffic tonnage. Brassell/Griffith Declaration ¶¶11-12.

Moreover, BB states that it will hire only 8 additional employees who will perform maintenance of way work on the Lines to Be Leased, along with other responsibilities. (Int.# 48). Thus, BB plans to have essentially the same number of maintenance of way employees for 199 miles of track that is in very poor condition and used for transport of hazardous materials and passengers and large numbers of empty hoppers as BB currently has for its 17 miles of lightly used line whose traffic differs greatly from that of the Lines to be Leased. And BB plans to have 8 employees do maintenance of way work for these lines when CSXT has 13 employees assigned to the Lines who are dedicated only to maintenance of way work, and they could not keep these Lines in adequate condition. There is no alchemy by which BB can properly maintain these lines with at least a 30% reduction of the maintenance of way work force.

Additionally, BMW notes that the current BB supervisor for maintenance of way lacks qualifications to be responsible for a line of this size, nature of traffic and condition of the track and right - of - way. Int.# 44-current BB maintenance of way supervisor experience is basically as

a trackman and an assistant foreman. And BB does not plan to have a geometry car, a gauge restraint measurement system, or automated rail flaw detection equipment (Int.# 13, 39)-- typical maintenance of way equipment today; and equipment that is necessary when a track and right of way is in bad condition as are the lines between Richmond and Clifton Forge. Brassell/Griffith Dec. ¶13. And BB's other equipment is generally about 30 years old and inadequate for the work required for the Richmond-Clifton Forge Line. Brassell/Griffith Dec. ¶14. Oddly, in spite of the condition of the Lines, and BB's limited capabilities, apparently to avoid paying Signalmen, BB plans to eliminate the TCS system and operate Lines as dark territory with Hazmats and passenger traffic, hoping that careful scheduling will prevent a disaster (Int.# 8, Lease § 10 (b)). Moreover, BB will become responsible for a complicated dispatching arrangement with 3 carriers running on deteriorated track and road bed (and potentially without TCS) when BB currently dispatches only its own few trains on its 17 miles of track. These facts all show that BB is not qualified to become operator and repository for the common carrier duty for the Richmond-Clifton Forge Lines.

BMWE also notes that the Lease expressly provides that the only maintenance of way requirement for BB is that it keep the Lines at their current and plainly unacceptable level. Lease §10(a). But what is actually required is major repairs and a substantial renewal of the track and right-of-way across the territory. [redacted confidential]. BB has neither the manpower, the expertise, the capital or the access to capital necessary to do what needs to be done for these Lines.² Moreover, even if BB had the manpower, expertise, capital and access to capital that is

² BB expressly refused to answer an interrogatory regarding its own capital investments in its current line, but did acknowledge that it averaged \$400,000 per year from the Commonwealth of Virginia over the last 3 years (Int.#36, 37), and that it will also seek public

required, BB would have no incentive to make the investment because the Lease is only for 20 years and is subject to unilateral termination after 10 years (based on the requirement for mutual agreement on new financial terms after 10 years, Lease §4(a)); and the Lease only requires that BB keep the Lines at their current unacceptable condition (Lease § 10 (a)).

Perhaps some may contend that since CSXT has done such a poor job of taking care of the Lines, they should be operated by someone else. But such an argument ignores two key points. First, proper upkeep of the Lines is an obligation of CSXT as a common carrier and owner of these Lines, and under the Federal railroad safety laws and FRA regulations. CSXT has shirked its responsibilities for these Lines and deliberately deferred and withdrawn proper maintenance of these Lines. [redacted confidential material]. It should not be given license by the STB to further evade its responsibilities by transferring responsibility for the Lines for 10 years to an entity that is both unable to, and without incentive to, do what needs to be done for these Lines. Second, CSXT plans to retain substantial operations over the Lines to be Leased, and indeed will remain the dominant presence on the Lines by virtue of its retained overhead trackage rights, and its retention of the most valuable local traffic on these lines. CSXT brazen attempt to retain its current operations while renouncing its obligations by the device of the proposed transaction must be rejected.

BMWE submits that these facts all demonstrate that approval of the Lease would be contrary to the National Rail Transportation policies for promotion of a safe and efficient rail transportation system; development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public

funds for the Lines to be Leased (Int.# 19).

and the national defense; operation of transportation facilities and equipment without detriment to the public health and safety; and encouragement of honest and efficient management of railroads. The Application should therefore be denied.

B. THE PROPOSED TRANSACTION IS NOT A LEGITIMATE LEASE UNDER SECTIONS 11323 AND 11324, BUT IS A SHAM TRANSACTION TO USE BOARD PROCESSES FOR IMPROPER PURPOSES AND IT SHOULD THEREFORE BE REJECTED

Although the Application describes the transaction as a “lease”, and asserts that the common carrier obligation for the Lines will be vested in BB, BMWWE respectfully submits that the evidence adduced in this proceeding demonstrates that the Application does not involve a legitimate lease under Sections 11323 and 11324, or a legitimate conveyance of the common carrier obligation. CSXT is not truly relinquishing these Lines, it is retaining a major part of traffic, both overhead and local traffic; and it retains the right to come back in 10 years.

The record shows that CSXT will retain overhead trackage rights for a substantial amount of movements on the Lines. Lease §25(a) and Ex. F Art.3. The Application states that CSXT will run 156,000 empty hopper cars over the Lines to be Leased. Furthermore, CSXT will continue to serve a major customer on the line - Martin Marrietta Aggregate (Lease §25(a) and Ex. F Art.3); it is expected that CSXT will annually run 7900 carloadings of .Martin Marrietta Aggregate. Application Ex. 15. By contrast, BB expects about 11,700 carloadings, and 4,500 of them are actually CSXT materials. Application at 15. Additionally, BB hopes to increase local service to 4 trains a day 5 days a week, but CSXT expects to operate four trains a day every day for the empty hopper movements (156,000 cars annually) based on current traffic, and then there are the 7900 Martin Marrietta Aggregate local carloadings for CSXT. Additionally, Amtrak will operate two trains each way three days of each week, and CSXT will retain part of revenue from those

operations., Answer to Int.#65 and Doc. Req. #16. Thus, BB will not have close to a majority of the operations on the Lines to be Leased; CSXT will remain the dominant operator on the Lines. Additionally, CSXT will continue to receive some of the revenues generated by Amtrak operations over the Lines under terms to be negotiated by the parties.

Furthermore, the Lease is stated be for only 20 years, but it really is only a 10 year lease because it provides for negotiation of new economic terms after 10 years; and either party can terminate the lease at will after 10 years. Lease §4; Int.# 18, 20.

BMW submits that these facts show that the transaction does not have the characteristics of a lease with conveyance of the common carrier obligation. Rather, this transaction is effectively a grant of local trackage rights for BB to serve some, but not all local shippers. CSXT retains ownership of the Lines; it has conveyed rights to BB for only 10 years, with only an option to negotiate to extend those rights, CSXT has retained the ability to serve the major local customer, and CSXT's total operations on the Lines will exceed those of BB.

The proposed transaction is a sham, a device to use STB approval for other purposes. BMW has shown that the proposed transaction does not have the characteristics of a lease. So the question remaining is: What is the other, non-lease purpose? BMW submits that the record shows that CSXT desires to remove the Richmond-Clifton Forge lines from its inventory, to cease being responsible for the Lines, for their maintenance, for liability in case of a derailment and for the FRA citations for a period of 10 years, while still retaining ownership, control, and operations over the Lines and revenue from local traffic on the Lines.

It is important to recognize that CSXT is not selling the Lines and is not leasing them for 99 years or some lesser, but still long, duration indicative of a bona fide lease. And CSXT will

continue most of its operations over the Lines except for a limited amount of local traffic. CSXT will not relinquish ownership or real control over the Lines because they are necessary to CSXT's operations and produce revenue for CSXT. CSXT needs to retain the Lines and its overhead operations because it needs them for the reverse flow movement of empty hopper cars, so it can have an uninterrupted flow of eastbound full coal hopper cars on the James River Line. As Mr. Griffith has explained, in the absence of westbound movements on the Richmond-Clifton Forge Line, empty hoppers would go back up on the James River Line which means that there would be head-to-head meetings of eastbound full hoppers and westbound empties. In that event, trains would have to wait on sidings, slowing the movements in both directions and consuming the allowable work hours for the trains crews; it could become necessary for CSXT to replace train crews due to the increased transit times. Brassell/Griffith Declaration ¶15.

Additionally, CSXT needs the Clifton Forge-Richmond Line as alternative route when the James River floods the James River Line. [redacted confidential material] Mr. Griffith, who states that CSXT has used the Clifton Forge-Richmond Line when there has been flooding or necessary maintenance and repair work on the James River Line. Mr. Griffith has stated (Brassell/Griffith Declaration ¶16):

...there is a substantial risk of flooding of the James River Line. There were major floods in 1969, 1972, 1985 and twice in 1987. I was working on the James River Line in 1985 when the flooding was so serious that the Rivanna Subdivision was closed for two months—there were washouts of ballast and movements of track in various locations. The line was opened but with speed restrictions after two months, and the line was not returned to normal until a year later. I was also working on the line in 1987 when the two floods also closed the line. There have also been instances when the flooding was not severe enough to seriously damage the track or roadbed, but the water was high enough to make it dangerous to operate trains. I also note that there are often occasions in the Spring and Summer when the James River Line is closed or curfewed for repairs or maintenance. In instances of flooding and repairs causing closures of the James River Line, CSXT

has re-routed traffic over the Clifton Forge-Richmond Line.

BMW submits that it is clear that CSXT will not give up the Lines, it will not even relinquish the amount of control that accompanies a legitimate lease. But CSXT does seek to temporarily end its responsibility for the Lines. The entire point of this transaction is for CSXT to keep the Lines but be relieved of responsibility for them for a period of 10 years.

CSXT has actually acknowledged that its goals in this transaction are to avoid maintenance of way costs and the capital investment that would be necessary [redacted confidential material] if CSXT continued as the owner, operator and common carrier on these Lines. Int.# 27, 29. Those goals are not improper if they were to be accomplished by a sale or a real lease. But that is not what CSXT has done.

CSXT had several options for these Lines. It could have attempted to abandon them, but CSXT does not want to abandon them; it needs them to continue the directional routing of coal cars, and as an alternative route when the James River Line is closed due to floods or maintenance. CSXT could have sold the Lines, or leased them for a term like 99 years, but again CSXT wants the ability to continue its operations over the Lines as it desires, under terms acceptable to it; it wants to retain the ability to service the desirable Martin Marietta shipments, it wants to retain control and acceptable terms for its own non-revenue rock movements off the Lines and it wants the ability to take the lines back in 10 years. If CSXT merely wanted to relinquish the duty to serve some local shippers and allow them to be served by a local carrier that might be more responsive to their needs, it could have granted the local carrier limited local trackage rights, but that would not have relieved CSXT of responsibility to maintain, repair and renew the right of way, roadbed and track; and that would not have relieved CSXT of

responsibility for FRA violations or for a derailment or other incident that occurs on this track and roadbed that it has knowingly allowed to deteriorate. CSXT chose none of those options because the advantages of each came with drawbacks and none of them satisfied all of CSXT's goals. So CSXT constructed a transaction which, on paper, looks like a lease, and which will have the effect of a lease with regard to CSXT's responsibility for the lines if the Board ignores the reality of this transaction, but which is not really a lease.

CSXT will probably protest that BMW is impugning its character and motives. But CSXT cannot deny or refute the facts that are set forth by BMW, or the necessary implications of those facts. BMW respectfully urges the Board to look to the reality of this transaction, and to reject CSXT's attempt to abuse the Statute, its own common carrier obligation as longstanding owner of these Lines, and the Board's processes.

CONCLUSION

Because the probed transaction is contrary to several major National Rail Transportation Policies, and because the purported lease is a sham, BMW urges the Board to deny the Application.

Respectfully submitted,

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Dated: August 24, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused redacted copies of the foregoing Comments of the Brotherhood of Maintenance of Way Employes and Declaration of E. Randall Brassell and Roy D. Griffith with exhibits to be served by First Class Mail on all parties of record indicated on the attached service list.

Date

Richard S. Edelman

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