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SERVICE DATE – SEPTEMBER 23, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35366

WISCONSIN DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY ORDER—RAIL LINES IN ALMENA, CAMERON, AND RICE LAKE, BARRON COUNTY, WIS.

Decided: September 21, 2010

Digest: The Board finds that the Wisconsin Department of Transportation would become a rail carrier if it acquires parts of a rail line in Barron County, Wisconsin, as proposed in its filing. Therefore, if the petitioner seeks to go forward with the proposed transaction, it would have to obtain Board approval before it could acquire the rail line.<sup>1</sup>

On April 2, 2010, the Wisconsin Department of Transportation (WisDOT) filed a petition for a declaratory order asking us to determine that we do not have regulatory authority<sup>2</sup> over its proposed acquisition of two line segments owned by Progressive Rail, Inc. (PGR), d/b/a Wisconsin Northern Railroad, in Wisconsin. According to WisDOT, we lack authority over the acquisition, because the parties have structured the transaction to comport with the terms and conditions of State of Maine, Department of Transportation—Acquisition and Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991) (State of Maine). Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will issue a declaratory order to remove uncertainty in this matter. As discussed below, we will deny WisDOT's request that we declare that the transaction would not cause WisDOT to become a rail carrier and would not require our authorization under 49 U.S.C. § 10901 (or an exemption under 49 U.S.C. § 10502). Rather, we find that this transaction is subject to the Board's authority and does not come within the purview of our State of Maine line of precedents.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> WisDOT seeks a determination that the Board lacks “jurisdiction” over the proposed transaction, as well as a determination that we lack “regulatory authority” over it. The two terms are not synonymous. This agency would continue to have jurisdiction over the rail property, even if we were to conclude that we would not exercise regulatory authority over it. See Friends of the Aquifer, FD 33966, slip op. at 4 (STB served Aug. 15, 2001).

## BACKGROUND

In the proposed transaction, WisDOT plans to purchase two segments of a rail line from PGR, a Class III railroad, through a Purchase and Sale Agreement and a Quitclaim Deed. The two segments of rail line total 23.97 miles in length and are located in Barron County, Wis. The first track segment is located between milepost 80.88 near Almena and milepost 97.80 near Cameron. The second track segment runs between milepost 49.0 near Cameron and milepost 56.05 near Rice Lake. Closing of the sale is contingent upon a ruling from the Board that we do not have regulatory authority over the proposed acquisition.

In WisDOT's original filing on April 2, 2010, the Quitclaim Deed did not include an easement reserving a right for PGR to provide common carrier service. Subsequently, WisDOT filed, on April 15, 2010, an amended Quitclaim Deed with an easement stating that PGR shall retain an "exclusive easement, for the benefit of itself and authorized third parties, as long as the Grantor [i.e., PGR] and authorized third parties have the ability and authority to meet their common carrier obligation." WisDOT did not, however, amend the Purchase and Sale Agreement or any of the accompanying agreements to reflect the easement interest.

In addition, as part of the proposed transaction, WisDOT would enter into a Land Use Agreement and also a "Grant Agreement for the Rail Service Continuation" (the Grant Agreement) with the Wisconsin West Rail Transit Authority (WWRTA). Pursuant to those two agreements, WisDOT would transfer certain rights to the property to WWRTA.<sup>3</sup> The Land Use Agreement states that WWRTA "shall establish, construct, develop, maintain and operate a railroad on, over and across these properties for railroad purposes, and should have use and access to the property."<sup>4</sup> Under the Grant Agreement, WisDOT would also grant WWRTA use of the property and also the right to enter into an agreement with PGR for PGR to provide freight rail service. The Grant Agreement states that WWRTA will "grant [PGR] the right to operate over [the lines] under [WWRTA] jurisdiction as a common carrier railroad providing exclusive originating and terminating freight rail service....In such operation, [PGR] shall have the power and authority to exclusively control, manage, staff and plan for the provision of freight rail service."<sup>5</sup> The Grant Agreement also states that WWRTA "agrees to provide, through contractual agreement with [PGR], freight rail service."<sup>6</sup>

Through another contractual arrangement termed the Operating Agreement, WWRTA would lease the property to PGR and would grant PGR the exclusive right and license to use the land for the purpose of providing freight rail service. In return, PGR would provide common

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<sup>3</sup> According to WisDOT, WWRTA is a public entity and consortium of interested Wisconsin counties created under Wisconsin law, in part, to oversee the preservation of rail service on certain rail lines acquired by the State of Wisconsin.

<sup>4</sup> Land Use Agreement, p. 2.

<sup>5</sup> Grant Agreement, Article 5.0, Section 5.1(b), p. 8-9.

<sup>6</sup> Grant Agreement, Article 5.0, Section 5.2, p. 9.

carrier service and pay rent to WWRТА. The chart attached as Appendix 1 to this decision illustrates the transaction.

WisDOT argues that, pursuant to these various agreements, it would acquire the lines without acquiring the common carrier obligation or authority. WisDOT states that it has entered into its agreements with WWRТА so that WWRТА can contract with PGR to operate exclusively as a common carrier railroad over the lines. WisDOT asserts that it has intentionally and specifically structured the transaction to comport with the terms and conditions of State of Maine and its progeny, as neither it nor WWRТА desires or is equipped to provide common carrier rail service. As a result, WisDOT claims, the conveyance of the lines does not constitute the acquisition of a railroad line within the scope of 49 U.S.C. § 10901; thus, the transaction does not require the Board’s regulatory authorization.

### DISCUSSION AND CONCLUSIONS

The acquisition of an active rail line, and the common carrier obligation that goes with it, requires Board approval under 49 U.S.C. § 10901, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Our authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred to the purchaser. See State of Maine, 8 I.C.C.2d at 836-37. The Board examines in each case whether the entity retaining or obtaining the freight carrier obligation will have sufficient access and rights to conduct existing and reasonably foreseeable rail freight operations so that it can satisfy the common carrier obligation.<sup>7</sup> A transaction will not result in the common carrier obligation being imposed on a noncarrier if the transaction does not unduly impair the carrier’s ability to provide service.<sup>8</sup> Thus, if the carrier conveying the physical assets retains a permanent, exclusive easement interest to permit it to provide common carrier service, and the other transaction documents demonstrate that the new owner of the rail assets cannot unreasonably interfere with the carrier’s ability to operate, the State of Maine precedents hold that such a transaction is not subject to the Board’s regulatory authority.<sup>9</sup>

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<sup>7</sup> See Washington County, Or.—Acquis. Exemption—Certain Assets of the Union Pacific R.R., FD 34810 et al., slip op. at 2 (STB served Apr. 11, 2007).

<sup>8</sup> See Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010) appeal docketed sub nom. Bhd. of R.R. Signalmen v. STB, No. 10-1138 (D.C. Cir. June 18, 2010).

<sup>9</sup> The granting of a permanent, exclusive easement by a state where the carrier reserves the right and obligation to provide common carrier service distinguishes a State of Maine transaction from a transaction in which a state acquires full ownership of the line, including the common carrier obligation. State of Maine, 8 I.C.C.2d at 838 n.6. In a transaction where a state plans to contract with a rail carrier to provide common carrier service without reserving an easement for the carrier, the state does not avoid a common carrier obligation. Id.

WisDOT has not proposed a transaction that would unambiguously allow PGR to retain the rights and ability to carry out its common carrier obligation. Although the Quitclaim Deed purports to reserve the common carrier obligation for PGR, the other agreements seemingly transfer rights related to the common carrier obligation from WisDOT to WWRTA to PGR. The result is an ambiguous and contradictory transaction that does not allow us to make the requisite State of Maine findings.

Pursuant to the easement, PGR retains its right to operate as a carrier. At the same time, however, pursuant to the Operating Agreement with WWRTA, PGR also acquires the right to provide rail service from WWRTA. If, however, the easement actually does what it purports to do, WWRTA could not acquire the right to provide rail service in the first place and could not then transfer to PGR. Similarly, pursuant to the Land Use Agreement, WisDOT purports to grant WWRTA the right to operate a railroad, a right that, pursuant to the terms of the easement, WisDOT could not acquire. For the same reason, WisDOT does not have the right to empower and direct WWRTA in the Grant Agreement to give PGR the right to provide freight rail service. Finally, PGR's warranty in the Purchase and Sale Agreement that the property "is sufficient to enable [WisDOT] or its assigns to conduct rail operations thereon substantially in the same manner that [PGR] conducts operations on the [property]" contravenes the terms of the Quitclaim Deed containing PGR's easement.

In addition, the easement itself contains ambiguous language that may limit the railroad's right to provide common carrier service. The easement is effective as long as PGR has "the ability and authority to meet [its] common carrier obligation." Thus, unspecified but clearly envisioned limitations could restrict PGR's ability and authority to provide common carrier service and thereby limit the easement. This is not the permanent, exclusive easement language that State of Maine requires.

Based on this record, we find that the proposed transaction is not consistent with State of Maine. If WisDOT wants to acquire the lines without acquiring a common carrier obligation, it may file a new proposal that corrects the deficiencies identified in this decision. Such a proposal should include an easement for PGR that is clearly worded to indicate its rights and obligations as a common carrier, and any accompanying agreements should be consistent with that easement. The Board's Office of Public Assistance, Governmental Affairs, and Compliance is available to assist WisDOT with any new proposal. If, on the other hand, WisDOT wants to structure its transaction pursuant to the agreements it has already submitted, it must seek Board authority for the acquisition of a rail line by WisDOT and by WWRTA.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WisDOT's petition that we institute a declaratory order proceeding is granted, although its request that we find this transaction covered by State of Maine is denied, as discussed above.
2. This decision will be effective on its service date.

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

Appendix 1

