

SURFACE TRANSPORTATION BOARD

DECISION

WISCONSIN DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY  
ORDER—RAIL LINES IN JANESVILLE, ROCK COUNTY, WI

STB Finance Docket No. 35301

Decided: December 10, 2009

On October 28, 2009, the Wisconsin Department of Transportation (WisDOT) filed a petition for declaratory order asking us to determine that we do not have “jurisdiction” over its purchase of various rail segments totaling 7.33 miles owned by the Wisconsin & Southern Railroad Co. (WSOR or Seller) in and near the City of Janesville, Rock County, WI, because the parties have structured the transaction to comport with the terms and conditions of Maine, DOT—Acq. Exemption, ME Central R.Co., 8 I.C.C. 2d 835 (1991) (State of Maine).<sup>1</sup> WisDOT also asks the Board to issue an expedited decision so that it may spend the funds appropriated for this transaction by the end of the calendar year. 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 find that WisDOT’s acquisition of the assets of the lines will not cause WisDOT to become a rail carrier and does not require our authorization under 49 U.S.C. 10901.

BACKGROUND

The lines that WisDOT intends to purchase are within and near the City of Janesville, Rock County, WI, and are currently owned by WSOR. They consist of four track segments of approximately 7.33 miles in total distance as follows: (1) between the division of ownership at milepost 94.49 on Seller’s line to Fox Lake, IL, and the division of ownership at milepost 11.02 on Seller’s line to Monroe, WI; (2) between milepost 98.27 and milepost 46.75 on Seller’s line to Milton Jct., WI; (3) between milepost 9.96 and milepost 46.08, consisting generally of the north leg of the wye track at Janesville; and (4) the connecting track between milepost 45.23 and the connection with the leased premises at milepost 46.08.

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<sup>1</sup> While WisDOT uses the term “jurisdiction,” in fact it may only seek a finding that the Board does not have regulatory authority over the proposed transaction. The Board will continue to have jurisdiction over rail property even if it concludes, as discussed below, that it does not have regulatory authority over a proposed transaction. See Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, Railroad and Clearcuts Campaign, STB Finance Docket No. 33966, slip op. at 4 (STB served Aug. 15, 2001).

According to the petitioner, WSOR or its predecessor, the Wisconsin & Calumet Railroad (WICT),<sup>2</sup> has been operating over the lines for approximately 23 years. WSOR eventually purchased the lines in 2004 from the Iowa, Chicago & Eastern Railroad Corporation (IC&E)<sup>3</sup> and continues to operate over the segments.<sup>4</sup>

In the transaction before us, WisDOT states that it intends to acquire the lines subject to the grant to WSOR of an operating easement. WSOR will use this easement to continue to provide common carrier rail freight service over the lines.

WisDOT and WSOR have agreed to execute an asset purchase agreement whereby WSOR agrees to sell and WisDOT agrees to purchase the lines. Closing of the sale is contingent upon a ruling from the Board that it does not have regulatory authority over the proposed acquisition.

WisDOT also has entered into a land use agreement and a grant agreement with the Wisconsin River Rail Transit Commission (WRRTC).<sup>5</sup> Pursuant to these agreements, WRRTC will contract with WSOR to provide common carrier freight rail service over the lines and receive financial assistance from WisDOT. Consistent with the grant agreement and the land use agreement, WRRTC has entered into an operating agreement with WSOR under which WSOR will conduct all rail operations on the lines.

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<sup>2</sup> WICT was merged into WSOR in Wisconsin & Southern Railroad Co. – Corporate Family Transaction Exemption – Wisconsin and Calumet Railroad Company, STB Finance Docket No. 33450 (STB served Sept. 5, 1997).

<sup>3</sup> Wisconsin & Southern Railroad Co.–Acquisition Exemption–Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34464 (STB served June 30, 2004).

<sup>4</sup> As part of the 2004 sale, IC&E retained local and overhead trackage rights over the lines. The Dakota Minnesota & Eastern Railroad Corporation (DM&E), which has acquired control of IC&E and merged that carrier into itself, filed a letter on November 17, 2009, announcing that it continues to possess these trackage rights. On December 4, 2009, DM&E filed a submission stating that it does not oppose WisDOT’s petition for declaratory order, subject to the disclaimer that DM&E does not consider itself to be bound by any of the restrictions or conditions that the agreement between WisDOT and WSOR “might be read” to impose on WSOR. As noted below in note 7, DM&E’s rights are fully protected by Board authority.

<sup>5</sup> According to WisDOT, WRRTC 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. The WRRTC was created to undertake rail preservation activities for the State, because the State of Wisconsin was, prior to an April 1992 amendment, constitutionally prohibited from the acquisition, improvement or construction of railways or other railway facilities (or to be a party to any such works) and from borrowing money to invest in rail line improvements and rehabilitation.

WisDOT has attached to its petition the asset purchase agreement with WSOR, a quitclaim deed, the land use agreement, the grant agreement, and the operating agreement between WRRTC and WSOR. On November 13, 2009, WisDOT filed two sets of amendments to the operating agreement.

WisDOT argues that, pursuant to these various agreements, it shall acquire the lines without acquiring the common carrier authority. WisDOT states that it has entered into its agreements with WRRTC so that WRRTC shall contract with WSOR to operate over the lines. WisDOT explains that WSOR has been granted the exclusive right to operate over the lines as a common carrier railroad, providing all originating and terminating rail service. 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 a result, it claims, the conveyance of the lines does not constitute the acquisition of a railroad line within the intent and meaning of 49 U.S.C. 10901; thus, the transaction does not require the Board's regulatory authorization.

### DISCUSSION AND CONCLUSIONS

The question here is whether WisDOT would become a common carrier by acquiring the lines, which, if so, would require the Board's regulatory approval of the transaction. The acquisition of an active rail line, and the common carrier obligation that goes with it, ordinarily 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, once the transaction takes effect, the entity retaining or obtaining the freight carrier obligation will have sufficient access to conduct existing and reasonably foreseeable freight operations so that it can satisfy the common carrier obligation.<sup>6</sup> A transaction will not result in a common carrier obligation being imposed on a noncarrier if the transaction does not unduly impair the carrier's ability to provide service.

We find that this transaction is consistent with State of Maine and its progeny. This arrangement resembles the transaction that the Board examined in Wisconsin Department of Transportation – Petition for Declaratory Order, STB Finance Docket No. 34764 (STB served Dec. 2, 2005, Feb. 6, 2006, and Mar. 13, 2006) (WisDOT I), where WSOR transferred the physical assets of a rail line to WisDOT and retained the common carrier rights and obligations for itself. Here, WisDOT will acquire the physical assets that comprise the lines, subject to WSOR's operating easement. WSOR's quitclaim deed specifically states that WSOR will retain “. . . an easement, for the benefit of itself and authorized third parties to use the lines for the

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<sup>6</sup> See Washington County, OR-Acquisition Exemption-Certain Assets of the Union Pacific Railroad Company, STB Finance Docket No. 34810 et al., slip op. at 2 (STB served Apr. 11, 2007).

operation of its trains, engines and cars, including track inspection cars and work or wreck equipment, for any and all purposes . . . ”<sup>7</sup> Furthermore, the asset purchase agreement provides that WSOR, rather than WisDOT or WRRTC, will have the right to use the lines for the operation of its trains, engines and cars for any and all purposes.<sup>8</sup>

The operating agreement between WSOR and WRRTC recognizes the easement reserved for WSOR’s operations. The operating agreement provides that WSOR, rather than WisDOT or WRRTC, will have the right to operate as a common carrier providing exclusive originating and terminating freight rail service on the line.<sup>9</sup> The operating agreement also provides that the operator has “the power and authority to exclusively control, manage, staff and plan for the provision of freight rail service on the line.”<sup>10</sup> Additionally, neither the land use agreement nor the grant agreement unduly interferes with WSOR’s ability to provide common carrier service on the lines.

The operating agreement provides in Section 2.2 that WisDOT can sell or lease certain sections of land not needed for continuation of freight rail service<sup>11</sup> and that WRRTC can contract for passenger service on the line but that joint use shall not unreasonably restrict the use of the facility by WSOR.<sup>12</sup> As written, these rights do not undermine WSOR’s operating authority. And the exercise of these rights and other actions under Section 2.2 of the operating agreement require that WSOR be informed and involved. Moreover, the reservations found in Section 2.1 and Section 2.2, as modified by the amendments submitted by WisDOT on November 13, 2009, are functionally equivalent to those that the Board ultimately found satisfactory in a similar State of Maine transaction involving WisDOT.<sup>13</sup> Additionally, none of the instant agreements includes any service windows limiting WSOR’s operations.<sup>14</sup> WisDOT

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<sup>7</sup> See WisDOT’s Petition for Declaratory Order at Attachment 2, Exhibit B. This language is broad enough to allow IC&E to exercise whatever trackage rights it has retained. Furthermore, WisDOT and WSOR agree in Section 3 of the asset purchase agreement that the sale is subject to any trackage rights retained by IC&E. WisDOT, WRRTC, and WSOR may not extinguish those rights through their private agreements. Rather, these rights may only be terminated pursuant to appropriate Board authority.

<sup>8</sup> See id., Attachment 2, at Agreement Section 4.

<sup>9</sup> See id., Attachment 5, at Agreement Section 5.1.

<sup>10</sup> See id.

<sup>11</sup> See id., Attachment 5, at Agreement Section 2.2(a).

<sup>12</sup> See id., Attachment 5, at Agreement Section 2.2(g).

<sup>13</sup> See WisDOT I.

<sup>14</sup> See, e.g., Utah Transit Authority-Acquisition Exempt.-Union Pacific Railroad Company, STB Finance Docket No. 35008 et al. (STB served July 23, 2007) (addressing whether operating window established for freight operations, so as to avoid interfering with commuter service, was sufficient for freight railroad to fulfill its common carrier obligations).

and WRRTC also do not have the means or the desire to provide common carrier service and will not hold themselves out to do so.

Based on this record, we find that the proposed transaction is consistent with State of Maine. Because WisDOT will acquire only the physical assets of the lines, it will not as a result of the transaction become a rail carrier. Thus, WisDOT's purchase of the lines does not require our authorization under 49 U.S.C. 10901.

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 for declaratory order is granted as discussed above.
2. This decision will be effective on its service date.

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