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SERVICE DATE – NOVEMBER 10, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35455

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

Digest:<sup>1</sup> The Wisconsin Department of Transportation (WisDOT) does not need Board authorization to acquire two segments of rail line in Barron County, Wis. Although WisDOT is acquiring the physical assets, it will not acquire the right and legal obligation to provide freight rail service, which will remain with the seller, nor will WisDOT be in a position to interfere unduly with freight operations.

Decided: November 9, 2011

On December 14, 2010, the Wisconsin Department of Transportation (WisDOT) filed a petition for a declaratory order asking the Board to determine that it does not have regulatory authority over WisDOT's proposed acquisition of two line segments owned by Progressive Rail, Inc. (PGR), d/b/a Wisconsin Northern Railroad, in Wisconsin. This is WisDOT's second petition regarding these line segments. The Board previously issued a declaratory order concerning the same line segments and found that if WisDOT acquired the segments as proposed, it would become a rail carrier subject to the Board's authority. Wis. Dep't of Transp.—Petition for Declaratory Order—Rail Lines In Almena, Cameron, and Rice Lake, Barron Cnty., Wis. (September 2010 Decision), FD 35366 (STB served Sept. 23, 2010). Following the September 2010 Decision, WisDOT revised its transaction documents. WisDOT states that the acquisition does not require Board approval because the parties have restructured the transaction to comport with the terms and conditions of Maine, Department of Transportation—Acquisition and Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991).<sup>2</sup>

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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> On August 9, 2011, Wisconsin Governor Scott Walker submitted a letter in support of WisDOT's petition, explaining the economic benefits of the acquisition. On August 31, 2011, Wisconsin State Senator Bob Jauch also submitted a letter supporting the petition.

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 grant WisDOT's request for a Board declaration 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). Based on our interpretation of the transaction documents, we find that this transaction would come within the purview of our State of Maine line of precedent and would therefore not be subject to the Board's authority.

## BACKGROUND

WisDOT proposes to purchase two segments of rail line from PGR, a Class III railroad, but states that the acquisition would not require Board approval under 49 U.S.C. § 10901(a)(4) because the common carrier obligation would remain with PGR. The two segments, which total 23.97 miles in length, are located in Barron County, Wis. The first line segment is located between milepost 80.88 (near Almena) and milepost 97.80 (near Cameron). The second line 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 it does not have regulatory authority over the proposed acquisition.

In the transaction considered in the September 2010 Decision, WisDOT planned to purchase the property from PGR through a Purchase and Sale Agreement and a Quitclaim Deed. In addition, WisDOT planned simultaneously to enter into a Land Use Agreement and a Grant Agreement for Rail Service Continuation with the Wisconsin West Rail Transit Authority (WWRTA).<sup>3</sup> Pursuant to those two agreements, WisDOT planned to transfer certain rights to the property to WWRTA. Through an operating agreement, WWRTA planned to contract with PGR for PGR to provide freight rail service and to grant PGR the right to provide such service.

In the September 2010 Decision, the Board found that, while the Quitclaim Deed purported to reserve for PGR the common carrier obligation and a freight rail operating easement in the line segments giving PGR the exclusive right to provide common carrier freight rail service on the segments, the other agreements treated PGR's easement as nonexistent or inconsequential. The Board also found that the language of the easement was ambiguous and could restrict PGR's ability to provide common carrier service and thereby limit the easement. The Board concluded that these two aspects of the transaction were not consistent with State of Maine.

Subsequent to the September 2010 Decision, WisDOT filed a second petition for a declaratory order, which is the subject of this proceeding. Under WisDOT's modified transaction, WisDOT would, as in the previously proposed transaction, purchase the property from PGR through a Purchase and Sale Agreement and a Quitclaim Deed, which would reserve an easement for PGR to provide common carrier service. Also as in the previous transaction,

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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.

WisDOT would enter into a Land Use Agreement and a Grant Agreement for Rail Service Continuation with WWRTA.<sup>4</sup> Under an operating agreement (Operating Agreement), WWRTA would contract with PGR for PGR to provide service. However, the language in the agreements and the easement has been revised in response to the September 2010 Decision.

WisDOT argues that the easement and the agreements, as revised, comply with the September 2010 Decision and with the terms and conditions of State of Maine and its progeny, including previous cases involving WisDOT's acquisition of rail lines. As a result, WisDOT claims, the conveyance of the line segments would not constitute the acquisition of a railroad line within the scope of 49 U.S.C. § 10901, and, thus, the transaction would 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 ordinarily require Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901. However, 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 constitute the sale of a railroad line within the meaning of § 10901 when the selling carrier: (1) retains a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) has sufficient control over the line to carry out its common carrier operations. When the seller retains the common carrier obligation and control over freight rail service, our precedent holds that ownership of the railroad line remains with the selling carrier for purposes of § 10901(a)(4). For a transaction to fall within that precedent, however, the terms of the sale must protect the selling carrier from undue interference by the purchaser with the provision of common carrier freight rail service. Mass. Dep't. of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., FD 35312, slip op. at 5 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). Therefore, in determining whether WisDOT would become a rail carrier if the transaction were completed, the Board will look to whether PGR would obtain a permanent, exclusive freight easement and would have sufficient interest in and control over the line to permit it to carry out its common carrier obligation.

In the September 2010 Decision, the Board expressed concerns that the transaction proposed there was deficient in two respects: (1) the easement retained by PGR was ambiguous and did not contain the permanent, exclusive freight rail operating easement language that State of Maine requires; and (2) the accompanying transaction agreements failed to demonstrate that WisDOT and WWRTA would not be able to unreasonably interfere with PGR's ability to operate.

The revised agreements and easement submitted by the parties address the Board's concerns. The parties' agreements now provide that PGR will retain a permanent, exclusive

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<sup>4</sup> The Purchase and Sale Agreement, Land Use Agreement, Operating Agreement, and Grant Agreement for Rail Service Continuation are collectively referred to as "the agreements."

freight rail operating easement over the line segments in order to carry out its common carrier obligation. The parties have removed the easement language that the Board found to be ambiguous in the September 2010 Decision. PGR would not transfer its common carrier obligation to WisDOT or WWRТА, and neither WisDOT nor WWRТА would hold itself out as a common carrier performing freight rail service. We also find that the agreements, as revised, would not give WisDOT or WWRТА the ability to interfere unduly with PGR’s ability to carry out its common carrier obligation. The Operating Agreement now expressly recognizes that PGR “may not terminate service until it obtains authority from the STB.”<sup>5</sup> The parties have modified the Operating Agreement to state that upon termination for default, PGR “shall immediately seek authorization from the [Board] to discontinue service.”<sup>6</sup> In addition, the Operating Agreement now states that Board approval *will* be required before termination can be effective,<sup>7</sup> as opposed to the operating agreement considered in the September 2010 Decision, which merely stated that Board approval *may* be required for termination to be effective.<sup>8</sup>

The agreements, taken as a whole, are not impediments to the continuation of common carrier service by the operator. We conclude that the transaction comports with State of Maine and its progeny because those agreements do not unduly interfere with PGR’s ability to control its freight operations. That said, certain provisions of the parties’ revised Operating Agreement could be construed, in isolation, as inconsistent with the permanent, exclusive freight rail operating easement.<sup>9</sup> We identify these individual provisions below to ensure that they are not interpreted at some point in the future in a manner inconsistent with this decision.

The Operating Agreement has a number of provisions that appear to limit its term. It contains an initial 20-year term<sup>10</sup> that may be renewed for successive 20-year terms.<sup>11</sup> In addition, article 7 sets forth the grounds for termination of the Operating Agreement for default. The breach of any material provision of the Operating Agreement becomes an event of default if not cured after reasonable notice.<sup>12</sup> If a non-defaulting party declares that the other party is in default, the non-defaulting party may terminate the Operating Agreement.<sup>13</sup> If WWRТА were to

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<sup>5</sup> WisDOT Pet., Attach. 4, § 7.1(a).

<sup>6</sup> WisDOT Pet., Attach. 4, § 7.8.

<sup>7</sup> WisDOT Pet., Attach. 4, § 7.5.

<sup>8</sup> The Board will consider the public interest in any discontinuance proceeding, not just the parties’ agreements.

<sup>9</sup> See, e.g., Mass. Coastal R.R.—Acquisition—CSX Transp., FD 35314, slip op. at 3-4 (STB served Mar. 29, 2010).

<sup>10</sup> WisDOT Pet., Attach. 4, § 2.1(b).

<sup>11</sup> WisDOT Pet., Attach. 4, § 2.1(c).

<sup>12</sup> WisDOT Pet., Attach. 4, §§ 7.1, 7.3

<sup>13</sup> WisDOT Pet., Attach. 4, § 7.2.

terminate the Operating Agreement for an alleged default by PGR, then PGR's "rights as a lessee . . . and its lease and license to use the Land and Improved Property shall cease."<sup>14</sup>

The Operating Agreement also states that it would terminate if WWRTA were to lose its right to the property:

The right of [WWRTA] to the continued use of the Land and Improved Property is subject to termination in the event of default or certain happenings with a final termination at the end of the term of the Land Use Agreement and Grant Agreement between WisDOT and [WWRTA]. It is a condition of this Agreement, that in the event [WWRTA] loses its right to possession or use of any of the Land or Improved Property because of conditions imposed by WisDOT or because of future failures or inability of [WWRTA] to meet all the requirements for holding and retaining the Land and Improved Property, then this Agreement terminates and ceases, and no liability attaches to [WWRTA] for such termination, provided that [WWRTA] has fulfilled its obligation herein to offer Operator an opportunity to cure any such default.<sup>15</sup>

The Operating Agreement also contains a section addressing PGR's obligations if it fails to provide freight service as defined in the Operating Agreement. That section requires PGR to return possession of any line segment or section of any line segment on which PGR has failed to provide service to WWRTA.<sup>16</sup> Finally, the Operating Agreement provides that the parties agree to submit to final and conclusive arbitration of disputes regarding the agreement and the parties' performance under the agreement.<sup>17</sup>

We find that in light of PRG's permanent freight easement, these default, term, termination, transfer, and arbitration provisions cannot be interpreted or enforced in a way that would affect PGR's common carrier service. The easement preserves PGR's common carrier rights and obligations as to the line segments unless and until the Board approves a transfer of the easement to another carrier or approves discontinuance of PGR's service. Thus, for example, if the Operating Agreement were to terminate because PGR were found to be in default, service by PGR could not end until another carrier is put into place with Board approval or until abandonment or discontinuance authorization is obtained.

Based on this finding and the record in this case, we find that nothing in the transaction would affect the continuing validity of PGR's permanent, exclusive freight easement, as provided in the deed, or would otherwise unduly interfere with PGR's ability to fulfill its common carrier obligation. Therefore, the proposed transaction is consistent with State of Maine and the proposed acquisition of the two line segments by WisDOT would not constitute the

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<sup>14</sup> WisDOT Pet., Attach. 4, § 7.4.

<sup>15</sup> WisDOT Pet., Attach. 4, § 13.12(a).

<sup>16</sup> WisDOT Pet., Attach. 4, § 7.10(c).

<sup>17</sup> WisDOT Pet., Attach. 4, § 13.14.

acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause WisDOT to become a rail carrier. Under these circumstances, we declare that the proposed transaction does not require Board authorization under 49 U.S.C. § 10901.

This action 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 Begeman, and Commissioner Mulvey.