

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35854

WISCONSIN DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY
ORDER—REEDSBURG LINE NEAR MADISON, WIS.

Digest:¹ This decision finds that the Wisconsin Department of Transportation (WisDOT) does not need Board authorization to acquire the physical assets of 69.62 miles of rail line between the cities of Reedsburg, Wis., and Madison, Wis. Although WisDOT is acquiring the physical assets, it will not acquire the right or legal obligation to provide freight rail service. Nor will WisDOT be in a position to interfere unduly with freight operations.

Decided: November 6, 2014

On August 7, 2014, the Wisconsin Department of Transportation (WisDOT) filed a petition for a declaratory order asking the Board to declare that WisDOT's proposed acquisition of the physical assets of 69.62 miles of rail line (the Line) owned by Union Pacific Railway Company (UP) and operated by Wisconsin & Southern Railroad, L.L.C. (WSOR) does not require Board authorization under 49 U.S.C. § 10901. WisDOT argues that the acquisition does not require such authorization and will not cause WisDOT to become a rail carrier within the meaning of 49 U.S.C. § 10102(5) because the proposed transaction comports with the line of cases beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991).²

William P. Breitsprecher, representing “Friends for Responsible Rail Development” (FRRD), filed two comments (on August 12 and September 15, 2014) opposing the transaction. WisDOT replied on October 14, 2014.

¹ 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).

² As discussed further below, on August 8, 2014, WSOR submitted a petition for exemption regarding WSOR's proposed acquisition and operation of UP's easement in Wisconsin & Southern Railroad—Acquisition & Operation Exemption—Union Pacific Railroad, Docket No. FD 35848. In a decision served today in that docket, the Board is granting that exemption.

Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will grant WisDOT's request for a declaratory order in order to remove uncertainty in this matter. Based on the Board's review of the transaction documents, we find that the proposed transaction comes within the purview of our State of Maine line of precedent. Accordingly, the transaction would not be the acquisition of a railroad line that requires Board authorization under 49 U.S.C. § 10901, as it would not cause WisDOT to become a rail carrier under the Interstate Commerce Act.

BACKGROUND

WisDOT filed its petition in this proceeding on August 8, 2014. WisDOT states that it seeks to purchase the physical assets of the Line from UP, a Class I railroad, but argues that the proposed acquisition does not require Board approval under 49 U.S.C. § 10901(a)(4) because UP would retain a permanent, exclusive freight rail operating easement, and the common carrier obligation. The Line is currently operated by WSOR under lease from UP.³ It includes: (a) the Reedsburg Line, between milepost 134.0 and milepost 191.90 near Reedsburg; (b) the Central Soya Industrial Lead, between milepost 83.78 and milepost 85.5 in Madison; and (c) the Cottage Grove Industrial Lead, between milepost 81.00 and milepost 71.00.⁴ The Line traverses 17 zip codes in Columbia, Dane, and Sauk Counties, Wis. The closing of the sale is contingent upon the Board ruling that it does not have regulatory authority over the proposed acquisition.

WisDOT plans to purchase the physical assets of the Line from UP through a Line Sale Contract, which would reserve a permanent, exclusive freight rail operating easement for UP to provide common carrier service.⁵ Upon STB authorization and concurrent closing of the Line Sale Contract, UP would transfer this easement to WSOR.⁶ Simultaneously, WisDOT plans to enter into a Land Use Agreement and a Grant Agreement with the Wisconsin River Rail Transit Commission (Commission) to transfer to the Commission certain identified rights and responsibilities with respect to administration of the physical assets of the Line.⁷ Included

³ See Wis. & So. R.R.—Lease & Operation Exemption—Union Pac. R.R., FD 33139 (STB served Oct. 30, 1996).

⁴ The petition refers to the latter two line segments as “the Central Soya Spur” and “the Madison to Cottage Grove Line.” For consistency, we refer to them by the names used in the petition for exemption in Docket No. FD 35848 and in the Line Sale Contract submitted in this docket. See WisDOT Pet., Ex. B.

⁵ This Line Sale Contract includes, among other attachments, a Quitclaim Deed (which reserves the permanent, exclusive easement for UP) and a Freight Easement Deed (which transfers that easement from UP to WSOR).

⁶ WisDOT Pet., Ex. B, § 4(h). See *supra* note 2.

⁷ According to WisDOT, the Commission is a governmental entity consisting of interested Wisconsin counties and was created under Wisconsin law for the purpose of overseeing the preservation of rail service on certain rail lines acquired by the State of Wisconsin.

among those rights and responsibilities, the Commission would have access to the land for the purpose of working with a common carrier to provide freight rail service over the Line.⁸ In addition, the Commission and WSOR have negotiated an Operating Agreement, which provides for WSOR to conduct freight rail operations on the Line.⁹ The Agreements would be executed or closed upon favorable rulings from the Board.

WisDOT asserts that the Agreements comply with the requirements set out in the State of Maine line of precedent, including Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron County, Wisconsin, FD 35366 (STB served Sept. 23, 2010), Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron County, Wisconsin (WisDOT-Barron County 2011), FD 35455 (STB served Nov. 10, 2011), and Wisconsin Department of Transportation—Petition for Declaratory Order—Gibson Line in Milwaukee, Wisconsin (WisDOT-Gibson Line), FD 35401 (STB served August 15, 2012). As a result, WisDOT claims that the conveyance of the physical assets of the Line would not constitute the acquisition of a rail line within the meaning of 49 U.S.C. § 10901 and that the transaction therefore does not require Board authorization.¹⁰

In his August 12 comment, Mr. Breitsprecher argues that the Board cannot grant the petition, because, in his view, the Board’s decision allowing Watco Holdings, Inc. and Watco Transportation Services, L.L.C., to acquire WSOR¹¹ was not valid. In his September 15 comment, Mr. Breitsprecher also asserts that the petition for declaratory order misrepresents the expected future level of traffic on the Line.

⁸ WisDOT Pet. 6 & n.10.

⁹ The Line Sale Contract, Land Use Agreement, Grant Agreement, and Operating Agreement are collectively referred to as “the Agreements.”

¹⁰ A separate pair of petitions, one for a State of Maine declaratory order and one for an acquisition and operation exemption, have been filed for a similarly-structured transaction involving 15 miles of rail line in Wisconsin known as the Evansville Line, also to be operated by WSOR. See Wis. River Rail Transit Comm’n—Pet. for Declaratory Order—Rail Line in Dane, Green & Rock Cntys. Wis., Docket No. FD 35843; Wis. & So. R.R.—Acquis. & Operation Exemption—City of Fitchburg & Vill. of Oregon, Docket No. FD 35838. The Evansville Line appears to connect to the Line at issue here at milepost 134.00 near Madison, Wis. The Board will issue separate decisions in each docket.

¹¹ See Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & So. R.R., FD 35573 (STB served Dec. 15, 2011) (notice of exemption); Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & So. R.R., FD 35573 (STB served Mar. 22, 2012) (denying request to reopen and revoke the exemption).

PRELIMINARY MATTER

On October 14, 2014, WisDOT filed a Motion to Reject or Strike and Reply to Mr. Breitsprecher's comments. WisDOT argues that the Board should reject or strike the comments on grounds that Mr. Breitsprecher is not entitled to practice before the Board because he is not an attorney or qualified practitioner under 49 C.F.R. § 1103.3, the comments are not signed, and the comments violate the Board's rules under 49 C.F.R. § 1103.25 dealing with treatment of litigants and other counsel. WisDOT further argues that the comments should be stricken because they do not address the case law, facts, and issues that are relevant here. WisDOT also replies to Mr. Breitsprecher's comments on the merits, disputing several of his allegations, including allegations that WisDOT has refused to cooperate with his public records' requests and that WisDOT is improperly subsidizing Watco.¹²

WisDOT's Motion to Reject or Strike Mr. Breitsprecher's comments will be denied. Mr. Breitsprecher is not a practitioner under 49 C.F.R. § 1103, but he is entitled to submit a comment in response to WisDOT's petition.¹³ To the extent that WisDOT claims that Mr. Breitsprecher's comments do not address the case law, facts, and issues in this proceeding, those issues will be addressed below as part of our decision on the merits of WisDOT's petition.

DISCUSSION AND CONCLUSIONS

The acquisition of an active rail line and the common carrier obligation associated with it ordinarily requires Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901. However, the State of Maine line of precedent holds 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 rail line within the meaning of § 10901 when the selling carrier retains: (1) 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) sufficient control over the line to carry out common carrier operations. WisDOT-Barron County 2011, slip op. at 3; Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 5 (STB served Dec. 15, 2010). When the seller retains the common carrier obligation and control over freight rail service, Board precedent holds that the purchaser of only the physical assets of a line does not become a carrier for purposes of § 10901(a)(4). For a transaction to fall within that precedent, however, the terms of the sale must ensure that the selling carrier can continue to provide common carrier freight rail service without undue interference by the purchaser. Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., 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 looks to

¹² WisDOT notes that WSOR had filed a reply to similar comments filed by Mr. Breitsprecher in Docket No. FD 35848, and WisDOT therefore declines to "address the same factual allegations that WSOR has already refuted."

¹³ Under 49 C.F.R. § 1121.4(a), "the Board may consider during its deliberation any public comments filed in response to a petition for exemption."

whether UP would retain a permanent, exclusive freight rail operating easement and would have sufficient interest in and control over the Line to permit it to carry out its common carrier obligation.

We find that the transaction before us here comports with our State of Maine line of precedent and does not require Board authority. First, the Agreements provide that UP would retain a permanent, exclusive freight rail operating easement over the Line,¹⁴ which, along with the accompanying common carrier obligation, would then be transferred by UP to WSOR to permit WSOR to carry out the common carrier obligation.¹⁵ UP would not transfer its common carrier obligation to WisDOT or the Commission, and neither WisDOT nor the Commission would be able to hold itself out as a common carrier performing common carrier freight rail service on the Line¹⁶

Second, we conclude that the Agreements, taken as a whole, are not impediments to the continuation of freight rail service by the operator (WSOR), and would not give WisDOT or the Commission the ability to interfere unduly with that service. The Operating Agreement expressly recognizes that the line operator (WSOR) “may not terminate service until it obtains authority from the [Board]”¹⁷ and provides that upon termination for default, WSOR “shall immediately seek authorization from the [Board] to discontinue service,”¹⁸ and that Board approval would be required “before termination [can be] effective.”¹⁹

In some previous cases, including cases involving WisDOT, the Board has found that transactions do not comport with the State of Maine line of precedent because the acquiring public entity could unduly interfere with or restrict the operator’s ability to carry out its common carrier obligation. E.g., Wis. Dep’t of Transp.—Pet. for Declaratory Order—Rail Lines in Almena, Cameron & Rice Lake, Barron Cnty., Wis., FD 35366 (STB served Sept. 23, 2010). More recently, the Board has addressed ambiguities in material provisions of WisDOT’s proposed State of Maine transactions by allowing the transaction to proceed but interpreting the transaction documents to require that WisDOT must obtain prior Board approval before taking any action that would materially affect the ability of the rail carrier holding the freight rail

¹⁴ E.g., WisDOT Pet., Ex. B, § 1.

¹⁵ WSOR currently operates the Line as a common carrier pursuant to Board authority, subject to a lease agreement between UP and WSOR. WisDOT Pet., Ex. B, ¶ 5.

¹⁶ The Freight Easement Deed from UP to WSOR states that WSOR, as Grantee, agrees to “exclusively perform the obligations as a common carrier by freight railroad under applicable federal laws and regulations . . . and to so perform the obligations of Grantee under the Operating Agreement between Grantee and the Wisconsin River Rail Transit Commission, its successors and assigns.” WisDOT Pet., Ex. B, sub-ex. E, § 4.

¹⁷ WisDOT Pet., Ex. E § 7.1(a).

¹⁸ Id. § 7.8.

¹⁹ Id. § 7.5. The Board will consider the public interest in any discontinuance proceeding, not just the parties’ agreements.

operating easement to provide common carrier service. See WisDOT-Gibson Line. Here, the Board is again concerned about the same or very similar provisions in the Operating Agreement. Specifically, certain provisions of the parties' Operating Agreement, in isolation, could be construed to be inconsistent with the grant of the permanent, exclusive freight rail operating easement to WSOR. Therefore, as discussed below, we will interpret the terms of the transaction documents in the same manner as in WisDOT-Gibson Line.

The Operating Agreement in section 2.1(b) provides for an initial 33-year term that, under section 2.1(c), may be renewed by the operator for successive 10-year terms. In addition, the Operating Agreement states that the breach of any material provision of the Operating Agreement is considered a default, and the Commission is given the right to terminate the Operating Agreement if the breach is not cured after notice is given and the prescribed period of time for curing the breach has expired.²⁰ Further, if the Commission were to terminate the Operating Agreement for an alleged default by WSOR, the Operating Agreement provides that WSOR's "rights as a lessee . . . and its lease and license to use the Land and Improved Property shall cease."²¹

The Operating Agreement also states that it is to terminate if the Commission were to lose its right to the property.²² Also, in the event WSOR were to fail to provide freight rail service as defined in the Operating Agreement, section 7.10 of the Operating Agreement gives WisDOT the choice of requiring the Commission either to return control of any line segment on which WSOR has failed to provide service to WisDOT or to pay a fee to WisDOT. Finally, section 7.11 of the Operating Agreement provides the Commission, WisDOT, or the Wisconsin Division of State Patrol the ability to order the Operator to suspend rail operations in certain circumstances.

In light of WSOR's permanent, exclusive freight rail operating easement—as manifested in the Quitclaim Deed—we find that this transaction comports with State of Maine only to the extent that these provisions of the Operating Agreement pertaining to default, term and renewal of the agreement, termination, transfer, and suspension of operations are not interpreted or enforced in a way that would affect WSOR's ability to provide common carrier freight rail service. The permanent easement takes precedence and preserves WSOR's common carrier rights and obligations as to the line segments unless and until the Board approves either a transfer of the easement to another carrier or a discontinuance of WSOR's service. Thus, for example, if the Operating Agreement were to terminate because WSOR was found to be in default, service by WSOR could not end until another carrier is put into place with Board approval or until discontinuance authority is obtained.

Our decision here is consistent with past State of Maine precedent. The transaction documents in WisDOT-Barron County 2011 and in WisDOT-Gibson Line contained identical or

²⁰ Id. §§ 7.1-7.4.

²¹ Id. § 7.4.

²² Id. § 13.12(a).

very similar provisions to those discussed above.²³ In both of those cases, the Board expressed the same concerns we express here, but ultimately found that the proposed transactions were consistent with State of Maine and would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4).

The comments submitted by Mr. Breitsprecher do not provide a basis for denying the petition. Mr. Breitsprecher argues that the Board's decision allowing Watco Holdings, Inc. and Watco Transportation Services, L.L.C., to acquire WSOR was not valid. This issue is not before the Board in this proceeding.²⁴ In addition, it does not appear that WisDOT has filed any false or misleading information in this proceeding, and we have no reason to believe this transaction would affect the level of traffic on the Line.

Based on the record in this case and the Board's interpretation of the transaction documents discussed above, we find that the proposed transaction is consistent with the State of Maine line of precedent, and the proposed acquisition by WisDOT would not constitute the 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 find that the proposed transaction does not require Board authorization under § 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. WisDOT's Motion to Reject or Strike Mr. Breitsprecher's comments is denied.
3. This decision will be effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

²³ See WisDOT Pet., Attach. 4, §§ 2.1, 7.1-7.4, 7.10(c), 7.11, 13.12(a), WisDOT-Barron County 2011 and WisDOT Amend. Pet., Ex. E, §§ 2.1, 7.1-7.4, 7.10(c), 7.11, 13.12(a), WisDOT-Gibson Line.

²⁴ See supra, note 11. Mr. Breitsprecher notes in his comments in Docket No. FD 35848 that he intends to file a petition to revoke the 2011 exemption by which Watco Holdings, Inc. and Watco Transportation Services, LLC acquired WSOR. The Board will consider the issues raised by Mr. Breitsprecher if and when he files a petition to revoke approval for that transaction.