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SERVICE DATE – LATE RELEASE AUGUST 14, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34871

WYOMING DAKOTA RAILROAD PROPERTIES, INC.—ACQUISITION
AND OPERATION EXEMPTION—DAKOTA, MINNESOTA &
EASTERN RAILROAD CORPORATION

STB Finance Docket No. 34872

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION AND
CEDAR AMERICAN RAIL HOLDINGS, INC.—INTRA-CORPORATE
FAMILY TRANSACTION EXEMPTION—WYOMING DAKOTA
RAILROAD PROPERTIES, INC.¹

Decided: August 14, 2006

This decision lifts the housekeeping stay imposed in these proceedings and denies petitions to reject or revoke the exemption in STB Finance Docket No. 34871. The decision also waives the labor notice requirements at 49 CFR 1150.32(e).² Because the parties' replies to the housekeeping stay have satisfied the concerns about these transactions, it is appropriate to now allow the exemptions in both titled cases to become effective 10 days from the effective date of this decision.

¹ These proceedings have not been consolidated and are being dealt with here in one decision solely for administrative convenience.

² 49 CFR 1150.32(e) provides:

If the projected annual revenue of the carrier to be created by a transaction under this exemption exceeds \$5 million, applicant must, at least 60 days before the exemption becomes effective, post a notice of intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.

BACKGROUND

These proceedings involve the proposed transfer of the authority the Board issued to Dakota, Minnesota & Eastern Railroad Corporation (DM&E) to construct and operate some 280 miles of rail line³ to a newly created DM&E subsidiary, Wyoming, Dakota Railroad Properties, Inc. (WDR). WDR is a subsidiary of Cedar American Railroad Holdings, Inc. (CAHR), which is a subsidiary of DM&E. CAHR controls Iowa, Chicago, & Eastern Railroad Corporation, a Class II carrier. WDR claims that utilizing a separate subsidiary to build and operate the new rail line will facilitate financing of the construction project and also insulate DM&E's shareholders from the risks associated with the project.

To accomplish the proposed transfer of authority, WDR has filed a verified notice of exemption in STB Finance Docket No. 34871. Concurrently, DM&E and CAHR jointly filed a verified notice of exemption in STB Finance Docket No. 34872, seeking authority to continue in control of WDR once it becomes a rail carrier. Separately, WDR filed a petition asking the Board to waive the labor notice requirements of 49 CFR 1150.32(e) in STB Finance Docket No. 34871.

On June 8, 2006, Mayo Clinic Rochester (Mayo) filed a petition to reject the attempted use of the class exemption in STB Finance Docket No. 34871 or revoke the exemption as to this proposal. Mayo argues, among other things, that the notice of exemption should be rejected based on concerns about the implementation of the environmental mitigation conditions we imposed on DM&E in our 2006 decision in STB Finance Docket No. 33407. In particular, Mayo maintains that the instant transaction would raise questions about the responsibility for and enforceability of the environmental conditions we imposed with respect to DM&E's existing lines in South Dakota and Minnesota.

On June 15, 2006, the City of Rochester, MN (Rochester), also filed a petition to revoke the exemption. Rochester expresses similar concern that the proposed transaction would radically alter the financial fitness analysis the Board conducted when evaluating the DM&E project. It notes that WDR has not submitted evidence to demonstrate its financial fitness, and it contends that DM&E will not be financially fit to conduct the proposed rehabilitation of its existing line in South Dakota and Minnesota. Accordingly, Rochester asks the Board to require WDR to file an application under 49 U.S.C. 10901 to acquire the construction authority at issue.

Additionally, on June 19, 2006, Olmsted County, MN (Olmsted County), filed a petition to reject or revoke the exemption sought by WDR in STB Finance Docket No. 34871. Olmsted County raises issues similar to those raised by Mayo and Rochester.

³ See Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), pet. for judicial review pending sub nom. Mayo Foundation et al. v. STB, Nos. 06-2031 et al. (8th Cir. filed Apr. 14, 2006).

To allow sufficient time to fully consider the issues raised by the parties in opposition to the exemptions, the Chairman issued a housekeeping stay on June 19, 2006. The Chairman noted that WDR's proposed acquisition of DM&E's authority raises questions as to the entity that would be responsible for implementing the previously imposed environmental mitigation conditions on DM&E's existing line. Also, the Chairman noted that the prior grant of authority was in part premised on the fact that construction of the new line would generate the funds needed to completely upgrade DM&E's existing system, thereby ensuring the continuation and improvement of service to existing DM&E shippers. The Chairman suggested that the proposed transaction and possible separation of responsibilities for rehabilitating DM&E's existing line could call into question that rationale. The Chairman asked WDR to address these matters in its reply.

On June 29, 2006, WDR filed a reply, including a letter, clarifying that DM&E will remain responsible for and subject to all environmental mitigation and oversight conditions imposed on the Board's 2006 decision in the original construction case. It also included a verified statement from Kurt V. Feaster, the Senior Vice President Finance and Chief Financial Officer for DM&E and WDR, clarifying that DM&E will rehabilitate its existing lines and continue to be responsible for implementing the environmental mitigation conditions imposed on the lines. Mr. Feaster states that WDR will be responsible for constructing the new line and for implementing the conditions imposed upon the new segment.

WDR claims that the substitution of WDR for DM&E as the constructing and operating party will have no detrimental effect on the financial fitness analysis the Board conducted when approving DM&E's application. WDR explains that the substitution will not affect the project itself, and asserts that it and DM&E will each have access to sufficient funds to accomplish their tasks. WDR also states that the two will share revenues based on the work they perform in conducting operations over the lines, and that these revenues will remain sufficient to service debt.

Also on June 29, 2006, the City of Dubuque (Dubuque) submitted a letter voicing concerns about the implementation of environmental conditions. Dubuque also asks the Board to prepare an environmental review studying the effect of increased traffic running through its community as a result of the construction and operation of the new line. WDR filed a reply to this submission on July 17, 2006. On July 20, 2006, Dubuque Metropolitan Transportation Study Area submitted a letter similar to the one filed by Dubuque.

DISCUSSION AND CONCLUSIONS

The Request to Revoke the Exemption

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that regulation of a transaction is necessary to carry out the Rail Transportation Policy (RTP) of 49 U.S.C. 10101. To justify revocation, petitioners must demonstrate reasonable, specific concerns addressing the need for regulation. Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota Comm. Ry. Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991); I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).

WDR has provided a satisfactory response to the concerns expressed about the responsibility for and implementation of the environmental mitigation conditions we imposed on DM&E's existing lines in the DM&E rail construction case. WDR's reply makes it clear that DM&E will remain responsible for those environmental conditions. Also, WDR states that it will comply with the conditions if DM&E cannot do so, and acknowledges that the construction and operation authority is contingent upon the satisfaction of the Board-imposed environmental conditions. Moreover, because of the railroads' close, intra-corporate relationship, we are confident that the division of responsibility for the environmental conditions will not undermine our mitigation measures. In any event, we retain the authority to ensure compliance during the environmental oversight period in the rail construction case.

Similarly, the parties have addressed our concerns that the proposed division of responsibility for the project's construction and rehabilitation might affect DM&E's financial viability. WDR states that the railroads will divide their revenues so that each has sufficient funds to cover its costs and debt. WDR also states that DM&E will be provided with sufficient funds to complete the rehabilitation of the existing lines. In his verified statement, Mr. Feaster further explains that, because the construction of the extension and the rehabilitation of the existing lines are both necessary to make the project viable, a division of funds that would sabotage the rehabilitation work would be self-defeating. We see no reason to question these assertions because, if the railroads created a division of revenues that provided one party with insufficient funds, they would not be able to obtain financing. Indeed, the proposed substitution will likely make the project more viable by reducing the cost of its debt. For these same reasons, there is also no need for additional financial information about WDR.

The record demonstrates that the exemption sought in STB Finance Docket No. 34871 involves only the substitution of WDR for DM&E as the entity holding the construction and operation authority into the Powder River Basin, and will not affect in any way the environmental mitigation conditions we previously imposed. It is also likely to make the project more viable. The lack of harm coupled with the limited effect of the

transaction lead us to conclude that regulation is not needed to carry out the RTP, and that the petitions for revocation should be denied, the housekeeping stay lifted, and the exemptions allowed to become effective.

The Request to Waive Labor Notice Requirements

As noted above, WDR requests that we waive the pertinent labor notice requirements, 49 CFR 1150.32(e). Under our regulations, an acquisition and operation exemption can only become effective if a person gives 60 days' advance notice to affected parties and provides proper certification.

In its waiver request, WDR argues that the notice requirements can not be complied with here because the rail line has not been built and, consequently, there are no employees to notify. WDR further claims that the purpose behind the notice requirements—to provide sufficient notice to those on the affected line before a transaction occurs—will not be undermined because the line will not be constructed or operated for several more years.

The purpose of 49 CFR 1150.32(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation. We take seriously the requirements of this regulation. While we ordinarily do not grant waivers of the employee notice requirement, the record here reflects that the purpose behind the regulation will not be thwarted if the waiver is granted because there are no current employees that could be affected. Indeed, the new line in question will not be constructed and service provided for several years. Accordingly, we will grant the waiver request, and waive the 60-day notice requirements under 49 CFR 1150.32(e) with respect to this transaction. Granting the waiver request will have the effect of making the exemption for WDR's acquisition of DM&E's construction and operation authority effective on the date of service of this decision.

The Request for Further Environmental Review

The Board will not conduct a new environmental review in the DM&E construction proceeding. An extensive environmental review has already been completed in the DM&E construction case. As discussed above, the carrier proposals before us here would not significantly alter what the Board approved there and thus do not require a further environmental review.

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

It is ordered:

1. The stay imposed in the June 19, 2006 decision served in these proceedings is lifted.
2. The petitions to revoke the exemption sought in STB Finance Docket No. 34871 are denied.
3. WDR's waiver request is granted.
4. This decision is effective on August 24, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary