

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35848

WISCONSIN & SOUTHERN RAILROAD, L.L.C.—ACQUISITION AND OPERATION
EXEMPTION—UNION PACIFIC RAILROAD COMPANY

Digest:¹ This decision permits a rail carrier that is currently leasing and operating three railroad line segments to acquire a freight rail operating easement over those segments and continue operating them, subject to standard employee protective conditions.

Decided: November 6, 2014

By petition filed on August 8, 2014, Wisconsin & Southern Railroad, L.L.C. (WSOR) seeks an exemption pursuant to 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10902 for authority to acquire from Union Pacific Railroad Company (UP) and operate a permanent exclusive freight rail operating easement over approximately 69.62 miles of rail line (the Line) in the State of Wisconsin. The Line that WSOR would acquire and is already operating 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. By separate petition also filed on August 8, 2014, WSOR seeks a waiver of the 60-day employee notice requirement of 49 C.F.R. § 1121.4(h).

Comments opposing the transaction were filed on September 15, 2014, by William P. Breitsprecher for “Friends for Responsible Rail Development” (FRRD) and on October 22, 2014, by Jay Roelof. On October 10, 2014, WSOR filed a Motion to Reject and Reply to FRRD’s comment.

For the reasons discussed below, we will grant the petition for exemption and the petition for waiver of the employee notice requirement.

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

WSOR is a Class II rail carrier and has been the exclusive operator over the Line since 1996 pursuant to a lease with UP.² WSOR states that the Wisconsin Department of Transportation (WisDOT) has agreed to purchase the right-of-way and railroad assets comprising the Line from UP but does not wish to assume any obligation to provide common carrier service on the Line.³ 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. Included among those rights and responsibilities, the Commission will have access to the land for the purpose of working with a common carrier to provide freight rail service over the Line. In addition, the Commission and WSOR have negotiated an Operating Agreement, which provides for WSOR to conduct freight rail operations on the Line.⁴

In the proceeding before us, WSOR seeks an exemption to acquire the freight rail easement over the Line and the associated common carrier obligation directly from UP. Concurrent with this petition WSOR has also filed a petition seeking a waiver of the employee notice requirements of 49 C.F.R. § 1121.4(h), which provide that the exemption may not become effective until 60 days after the carrier certifies to the Board that it has posted at the workplace of the affected employees and served on their unions a notice regarding the jobs expected to be available, the terms of employment and principles of employee selection, and the lines to be transferred.

² See Wis. & S.R.R.—Lease & Operation Exemption—Union Pac. R.R., FD 33139 (STB served Oct. 30, 1996).

³ WisDOT has concurrently filed a petition for declaratory order in Wisconsin Department of Transportation—Petition for Declaratory Order—Reedsburg Line near Madison, Wisconsin (WisDOT—Reedsburg Line), Docket No. FD 35854. There, WisDOT has sought a finding that its acquisition of the right-of-way and railroad assets of the Line would not render it a rail common carrier. The sale is contingent upon a favorable Board ruling. In a decision served today in that proceeding, the Board finds that WisDOT's proposed acquisition of the assets of the Line does not require Board authorization under 49 U.S.C. § 10901 because the transaction comports with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991).

⁴ A separate pair of petitions, one for a State of Maine declaratory order and one for an acquisition and operation exemption, have been filed with respect to 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. & S.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.

In support of this request, WSOR argues that the purpose of this notice requirement is to ensure that rail labor unions and employees working on a line being transferred are given adequate notice of the transaction. WSOR claims that this purpose would not be served by requiring notice here because no UP or WSOR employees will be affected by the transaction. WSOR states that its acquisition of UP's easement would simply convert WSOR's current lease of the Line to an ownership interest in the easement, and that WSOR would continue to provide the same service and perform the same maintenance it has provided since 1996.

In his September 15 comment, Mr. Breitsprecher argues that the Board should not approve the petition for exemption because he intends to petition the Board for revocation of the 2011 exemption by which Watco Holdings, Inc. and Watco Transportation Services, L.L.C. (collectively, Watco) acquired WSOR.⁵ Mr. Breitsprecher also argues that the petition for exemption misrepresents the expected future level of traffic on the Line by not accounting for the potential of silica sand traffic along the Line. Mr. Roelof cites similar concerns in his October 22 comment.

PRELIMINARY MATTER

On October 10, 2014, WSOR filed a Motion to Reject and Reply to Mr. Breitsprecher's comment on the ground that he is not entitled to practice before the Board because he is not an attorney or a qualified practitioner under 49 C.F.R. § 1103. WSOR further claims that Mr. Breitsprecher is using the Board's processes to disparage the entities and individuals associated with this proposed transaction. WSOR also argues that Watco followed the Board's procedures in obtaining control of WSOR, that the Board properly granted Watco's exemption, and that no material facts were withheld from the Board in that proceeding. WSOR states that it does not transport silica sand over the Line and does not anticipate doing so in the future.

WSOR's Motion to Reject Mr. Breitsprecher's comment 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 WSOR's petition.⁶ To the extent that WSOR has replied to claims in Mr. Breitsprecher's comments on the merits, those issues will be addressed below as part of our decision on the merits of WSOR's petition.

⁵ See Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & S.R.R., FD 35573 (STB served Dec. 15, 2011) (notice of exemption); Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & S.R.R., FD 35573 (STB served March 22, 2012) (denying request to reopen and revoke the exemption). Mr. Breitsprecher's allegations concerning why the acquisition by Watco should be revoked are irrelevant to our determination here. The Board will consider the issues raised by Mr. Breitsprecher if and when he files a petition to revoke approval for that transaction.

⁶ 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."

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10902, a rail line acquisition by a Class II carrier would require an application for Board authorization. Under 49 U.S.C. § 10502, the Board must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Here, we find that an exemption from the prior approval requirements of 49 U.S.C. § 10902 is warranted under the § 10502 standards. Detailed scrutiny of this transaction is not necessary to carry out the RTP. An exemption from the application process would minimize the need for Federal regulatory control by minimizing the administrative expense of the Federal consideration of the proposed exemption.⁷ An exemption would also help promote a safe and efficient rail transportation system, ensure a sound rail transportation system with effective competition between carriers, and foster sound economic conditions in transportation, by allowing WSOR to efficiently convert its interest in the line from a lease to a freight railroad operating easement.⁸ WSOR will thus be able to continue its operations over the Line, which have been ongoing since 1996. In addition, by reducing the Federal oversight of the proposal, an exemption will eliminate unnecessary procedures and reduce regulatory barriers to entry into and exit from the rail industry.⁹ This conversion of WSOR's lease interest to an operating easement over the Line will also encourage efficient management of the line, see 49 U.S.C. § 10101(9), by giving WSOR greater control over its operations. Other aspects of the RTP will not be adversely affected.

Moreover, regulation of this transaction is not needed to protect shippers from the abuse of market power. WSOR is already the operator of the Line, and thus the freight rail operator carrying out the common carrier obligation on the Line would not change as a result of this transaction. WSOR's acquisition also would not affect the access of shippers to transportation services and would have no impact on competition. In addition, no shipper has objected to this transaction.¹⁰ The Board has granted exemptions in similar circumstances. See, e.g., Mass. Coastal R.R.—Acquis.—CSX Transp. Inc., FD 35314 (STB served Mar. 29, 2010). We see no reason not to do so here.

The comments submitted in opposition to the transaction fail to persuade us that an exemption should not be granted. It does not appear that WSOR has filed any false or misleading information in this proceeding. We accept WSOR's statement (made under oath) that it does not move silica sand over the Line and does not anticipate doing so, and therefore we find that Mr. Breitsprecher's claims regarding a misrepresentation of expected traffic on the Line are

⁷ See 49 U.S.C. § 10101(2).

⁸ See 49 U.S.C. § 10101(3), (4) and (5).

⁹ See 49 U.S.C. § 10101(7)

¹⁰ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

unfounded. In addition, because WSOR is currently the operator of the Line, there is no reason to believe that changing WSOR's status from leaseholder to holder of a freight rail operating easement would affect the traffic on the Line.

Employee protection. Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees. Section 10902(d) provides for labor protection in line acquisitions by Class II rail carriers. As a condition to this exemption, any employees affected by the acquisition will be protected as required by 49 U.S.C. § 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad, 2 S.T.B. 218 (1997), *aff'd in relevant part sub nom. Association of American Railroads v. STB*, 162 F.3d 101 (D.C. Cir. 1998).

Waiver of 49 C.F.R. § 1121.4(h). As noted, WSOR has petitioned for waiver of the 60-day labor notification requirement under 49 C.F.R. § 1121.4(h). The purpose of that requirement 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.¹¹ The Board takes seriously the requirements of the rule, but it does not appear that the purpose behind the notice requirement would be thwarted by the requested waiver.

While the Board does not ordinarily waive the employee advance notice requirement, it is very unlikely that any railroad employees would be adversely affected by waiver of the requirement here. No UP employees should be affected because no UP employees have worked on any part of the Line in more than 17 years. No WSOR employees should be affected because WSOR's status as the sole carrier on the Line since its 1996 lease would continue. The planned transaction would merely change WSOR's current interest in the Line from leaseholder with the exclusive right to operate over the Line to holder of a freight rail operating easement. As noted, this change in property rights should not have any impact on the operations of UP or WSOR and, therefore, should not affect rail service or the employees involved. Accordingly, there is no need for advance notice here, and the requested waiver will be granted.¹²

Environmental and Historic review. This transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in a significant change in carrier operations.¹³ Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(1) because there are no plans to alter railroad properties 50 years old or older, and further Board approval is required to abandon the Line.

¹¹ See Acquis. of Rail Lines Under 49 U.S.C. 10901 & 10902—Advance Notice of Proposed Transactions, 2 S.T.B. 592, 597 (1997).

¹² See, e.g., Wheeling & Lake Erie Ry.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 34341 (STB served Sept. 2, 2003) (finding advance notice not required where no railroad employees will be affected by the proposed transaction).

¹³ As discussed above, we are not persuaded that WSOR's statements regarding the expected level of rail traffic over the Line are incorrect.

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

It is ordered:

1. Under 49 U.S.C. § 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. § 10902, subject to the employee protective conditions implementing 49 U.S.C. § 10902(d) as provided in this decision.

2. WSOR's request for a waiver of the employee notice requirement under 49 C.F.R. § 1121.4(h) is granted.

3. Notice will be published in the Federal Register.

4. The exemption will become effective on December 6, 2014.

5. Petitions to stay must be filed by November 17, 2014. Petitions for reconsideration must be filed by November 26, 2014.

6. WSOR's Motion to Reject Mr. Breitsprecher's comment is denied.

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