

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35843

WISCONSIN RIVER RAIL TRANSIT COMMISSION—PETITION FOR DECLARATORY  
ORDER—IN DANE, GREEN, & ROCK CNTYS., WIS.

Digest:<sup>1</sup> This decision finds that the Wisconsin River Rail Transit Commission (WRRTC) does not need Board authorization to acquire the physical assets of 15 miles of rail line in Dane, Green, and Rock Counties, Wis. Although WRRTC is acquiring the physical assets, it will not acquire the right or legal obligation to provide freight rail service; instead, that legal right and obligation will be transferred from the City of Fitchburg and the Village of Oregon, Wis., to Wisconsin & Southern Railroad Company (WSOR). Furthermore, WRRTC will not be in a position to interfere unduly with WSOR's freight operations.

Decided: November 17, 2014

On September 2, 2014, the Wisconsin River Rail Transit Commission (WRRTC)<sup>2</sup> filed a petition for declaratory order asking the Board to find that no authorization is required for WRRTC's proposed acquisition of the physical assets of 15 miles of rail line (the Line) owned by the City of Fitchburg and the Village of Oregon, Wis. (the Municipalities). WRRTC states that the acquisition does not require Board approval 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).

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. Based on our review of the transaction documents, we find that the proposed transaction would come within the purview of the Board's 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 WRRTC to become a rail carrier under the Interstate Commerce Act.

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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> WRRTC states that it is a governmental entity representing a consortium of nine counties and is authorized under Wisconsin law to acquire transportation systems, including freight rail systems, and to lease or otherwise contract for the operation of such systems.

## BACKGROUND

WRRTC seeks to purchase the physical assets of the Line from the Municipalities, municipal corporations located in Dane Cnty., Wis. The Line extends between railroad milepost 119.0, near Evansville, Wis., and railroad milepost 134.0, near Madison, Wis.<sup>3</sup> WRRTC claims that the proposed acquisition does not require Board approval under 49 U.S.C. § 10901(a)(4) because the Municipalities intend to transfer the common carrier obligation to the Wisconsin & Southern Railroad Company (WSOR), a Class II railroad, by granting WSOR a permanent, exclusive freight rail operating easement.<sup>4</sup> The closing of the sale is contingent upon the Board ruling that it does not have regulatory authority over the proposed acquisition.

WRRTC plans to purchase the Line from the Municipalities through a Line Sale Contract that it included with its petition. This agreement includes, among other attachments, a Quitclaim Deed, which reserves the permanent, exclusive easement for WSOR, and a Freight Easement Deed and Agreement, which transfers that easement from the Municipalities to WSOR. Simultaneously, WRRTC plans to enter into an Operating Agreement with WSOR under which WSOR would provide common carrier rail freight service and conduct all rail operation on the Line. WRRTC also plans to enter into a Grant Agreement with the Wisconsin Department of Transportation (WisDOT) for the purpose of assuming the rights and obligations of the Municipalities under the agreement currently in force between WisDOT and the Municipalities.<sup>5</sup>

WRRTC asserts that the transaction documents—the Line Sale Contract, Operating Agreement, and Grant Agreement (the Agreements)—comply with our State of Maine line of precedent, including Wisconsin Department of Transportation—Petition for Declaratory Order (WisDOT-Barron County 2011), FD 35455 (STB served Nov. 10, 2011) and Wisconsin Department of Transportation—Petition for Declaratory Order (WisDOT-Gibson Line), FD 35401 (STB served Aug. 15, 2012). As a result, WRRTC claims that the conveyance of the physical assets of the Line would not constitute the acquisition of a rail line within the scope of 49 U.S.C. § 10901 and that the transaction does not require Board authorization.

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<sup>3</sup> 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 69.62 miles of rail line in Wisconsin known as the Reedsburg Line. See Wis. Dep't. of Transp.—Pet. for Declaratory Order—Reedsburg Line Near Madison, Wis., FD 35854; Wis. & S.R.R.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35848. It appears that the Reedsburg Line extends and connects to the Line at issue here at railroad milepost 134.0, near Madison, Wis. The Board issued decisions in these dockets on November 6, 2014.

<sup>4</sup> On August 22, 2014, WSOR filed a petition for exemption requesting Board approval to acquire the common carrier obligation and provide freight rail service over the Line. Wis. & S.R.R.—Acquis. & Operation Exemption—City of Fitchburg & Vill. of Oregon, Wis., FD 35838.

<sup>5</sup> Among other things, the Grant Agreement provides that WRRTC will receive financial assistance from WisDOT and will contract with an operator to provide freight rail service over the Line.

## 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 WRRTC would become a rail carrier if the transaction were completed, the Board considers whether WSOR would obtain 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 proposed here comports with our State of Maine line of precedent and does not require Board authority. First, the Agreements provide that the Municipalities would transfer the common carrier obligation to WSOR, thereby allowing WSOR to hold a permanent, exclusive freight rail operating easement over the Line to permit it to carry out the common carrier obligation.<sup>6</sup> The Municipalities would not be transferring the common carrier obligation to WRRTC or WisDOT, and neither WRRTC nor WisDOT would be able to hold itself out as a common carrier performing common carrier freight rail service on the Line.

Second, we conclude that the Agreements, taken as a whole, are not impediments to the resumption of freight rail service by the new operator (WSOR) and would not give WRRTC or WisDOT the ability to interfere unduly with that service. The Operating Agreement expressly recognizes that “termination of [WSOR’s] lease and common carrier obligation w[ould] require STB approval before termination is effective,”<sup>7</sup> and provides that, upon termination for default, WSOR “may not terminate service until it obtains authority from the STB to discontinue service

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<sup>6</sup> Petition, Ex. F, Freight Easement Deed and Agreement.

<sup>7</sup> Petition, Ex. F, Operating Agreement § 7.5.

or WisDOT or the [WRRTC] obtains authority from the STB for the adverse discontinuance of [WSOR's] service.”<sup>8</sup>

In some previous cases, including cases involving WisDOT, the Board has found that transactions do not comport with State of Maine 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 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 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 non-defaulting party 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.<sup>9</sup> Further, if WRRTC 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[.]”<sup>10</sup>

The Operating Agreement additionally states that it is to terminate if WRRTC were to lose its right to the property.<sup>11</sup> Also, in the event WSOR fails to provide freight rail service as defined in the Operating Agreement, section 7.10 of the Operating Agreement gives WisDOT the choice of requiring WRRTC either to return ownership of any line segment on which WSOR has failed to provide service to WisDOT or to pay a fee to WisDOT.

In light of WSOR's permanent, exclusive freight rail operating easement—as manifested in the Operating Agreement and Freight Easement Deed and Agreement—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, and

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<sup>8</sup> Id. § 7.2.

<sup>9</sup> Id. §§ 7.1-7.3.

<sup>10</sup> Id. § 7.4.

<sup>11</sup> Id. § 13.12(a).

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 segment 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 very similar provisions to those discussed above.<sup>12</sup> 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).

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 WRRTC would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause WRRTC 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. WRRTC'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 Miller, and Commissioner Begeman.

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<sup>12</sup> See WisDOT Pet., Attachment 4, §§ 2.1, 7.1-7.4, 7.10(c), 7.11, 13.12(a), WisDOT-Barron County 2011 & WisDOT Amended Pet., Ex. E, §§ 2.1, 7.1-7.4, 7.10(c), 7.11, 13.12(a), WisDOT-Gibson Line.