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SERVICE DATE - LATE RELEASE JULY 30, 2004

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Finance Docket No. 34464

#### WISCONSIN & SOUTHERN RAILROAD CO.—ACQUISITION EXEMPTION—IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Decided: July 30, 2004

This decision addresses the petition of Wisconsin & Southern Railroad Co. (WSOR) for reconsideration of that portion of a Board decision denying a waiver of the requirement of 49 CFR 1121.4(h) that 60 days' notice be given to employees who may be affected by WSOR's planned acquisition of an Iowa, Chicago & Eastern Railroad Corporation (IC&E) rail line in Janesville, Rock County, WI. Upon reconsideration, based upon the additional information presented, we will grant WSOR's requested waiver of 49 CFR 1121.4(h).

### BACKGROUND

The trackage that is the subject of the acquisition includes approximately 6.48 miles of track WSOR currently leases and over which it already operates, plus .85 miles of connecting track, as follows: (1) between the division of ownership at milepost 94.49 on Buyer's line to Fox Lake, IL, and the division of ownership at milepost 11.02 on Buyer's line to Monroe, WI; (2) between milepost 98.27 and milepost 46.75 on Buyer's line to Milton Jct., WI; (3) between milepost 9.96 and milepost 46.08, consisting generally of the north leg of the wye track at Janesville; and (4) the connecting track between milepost 45.23 and the connection with the leased premises at milepost 46.08. By petition filed on January 30, 2004, WSOR sought an exemption pursuant to 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10902 to acquire this line of railroad from IC&E. On June 9, 2004, WSOR filed a request for waiver of the Board's regulations at 49 CFR 1121.4(h) so that the transaction could be consummated by June 30, 2004. On June 30, 2004, the Board granted the exemption, subject to labor protective conditions and to the condition that the transaction could not be consummated until 60 days after WSOR certified full compliance with the notice requirements at 49 CFR 1121.4(h). In imposing the notice condition, the Board denied the waiver request, finding that WSOR had not provided adequate notice of the transaction to all affected employees.

On July 12, 2004, WSOR filed a petition for reconsideration of the Board's June 30 decision on grounds of material error or new evidence, insofar as the Board had denied WSOR's

request for waiver of the Board's regulations at 49 CFR 1121.4(h).<sup>1</sup> In support of reconsideration, WSOR attached to its petition a verified statement prepared by Steven O. Scharnweber, Vice President and Chief Engineer of IC&E.<sup>2</sup>

In his verified statement, Mr. Scharnweber states that the only two IC&E employees who might possibly be affected by this transaction are one signal maintainer and one track inspector/maintainer, both of whom work on the .85-mile connecting track between WSOR and IC&E. He further explains that neither job will be abolished after the sale, and that the work of these two employees on this .85-mile segment represents less than one half of one percent of their total workload encompassing more than 100 route miles of track. Mr. Scharnweber also states that IC&E employees in the affected territory were informed about the proposed transaction prior to the parties' asset purchase agreement at a regularly held meeting, and that the transaction was discussed in the written minutes of a June 18, 2004 employee committee meeting, a copy of which was mailed to all IC&E employees.<sup>3</sup>

WSOR argues that the two employees discussed above will be essentially unaffected by the proposed transaction and that waiver of 49 CFR 1121.4(h) is therefore appropriate. WSOR also maintains that, because neither of these two employees is represented by a labor organization, providing notice to the national labor unions is unnecessary. Finally, WSOR asks the Board to issue a decision expeditiously because its agreement with IC&E will terminate if the acquisition is not consummated by July 31, 2004.

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<sup>1</sup> Section 1121.4(h) states that acquisition and operation exemptions may not become effective until 60 days after applicant certifies to the Board that it has posted at the workplace of the employees on the affected line(s) and served a notice of the transaction on the national offices of the labor unions with employees on the affected line(s).

<sup>2</sup> WSOR requests that the Scharnweber statement be received and be made part of the record on grounds that no one will be prejudiced thereby and consideration of the statement will not unnecessarily prolong the ultimate disposition of this proceeding. WSOR maintains that it did not and could not have offered Mr. Scharnweber's testimony previously because Mr. Scharnweber is not an officer or employee of WSOR, and that it was only after the Board's June 30 decision that IC&E determined to offer this testimony. Under 49 CFR 1115.3(c), evidence submitted in a petition for reconsideration must not be cumulative, and the party seeking to submit it must explain why it was not previously submitted. None of the information appears to be cumulative, and we accept WSOR's explanation as to why it was not previously submitted. Consequently, the statement will be accepted and considered.

<sup>3</sup> Additionally, by pleading filed on July 22, 2004, WSOR certified to the Board that, as of July 21, it posted notice of the proposed transaction at the workplaces of the IC&E employees on the affected line.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration of a decision of the entire Board will be granted only if the petitioner shows that: (1) the prior action will be “affected materially” because of “new evidence or changed circumstances” or (2) the prior action involves “material error.” WSOR maintains that the Board’s denial of its waiver request involved material error or, alternatively, that new evidence in the form of Mr. Scharnweber’s statement will materially affect the Board’s determination of this issue. Because WSOR has shown that the Board’s decision would be affected materially by the new evidence petitioner has submitted, the petition for reconsideration of our June 30 decision will be granted on that basis.

The purpose of our notice requirements at 49 CFR 1121.4(h) 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.<sup>4</sup> While we do not ordinarily grant waivers of the employee advance notice requirement, we find that it is reasonable to do so here as a result of the new evidence submitted by WSOR. That evidence demonstrates that the two potentially affected IC&E employees have received notice of this transaction, albeit less than the required 60 days. Most significantly, that evidence establishes that the effect on the two employees’ jobs will be very minimal, as their work on the track at issue here constitutes only a very small portion of their workload. These employees will continue to work for IC&E and their work on the line being sold is so minimal that they will be unaffected by this transaction. For these reasons, the requested waiver will be granted to allow WSOR to consummate the acquisition by July 31, 2004.

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

It is ordered:

1. The petition for reconsideration is granted.
2. WSOR’s requested waiver of Board regulations at 49 CFR 1121.4(h) is granted to the extent necessary to permit the transaction to go forward by July 31, 2004.

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<sup>4</sup> See Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice, 2 S.T.B. 592 (1997).

3. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary