

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35401

WISCONSIN DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY
ORDER—GIBSON LINE IN MILWAUKEE, WIS.

Digest:¹ The Wisconsin Department of Transportation (WisDOT) does not need Board authorization to acquire the physical assets of 4.05 miles of rail line in Milwaukee, Wis. Although WisDOT is acquiring the physical assets, it will not acquire the right or legal obligation to provide freight rail service, which will remain with the seller, nor will WisDOT be in a position to interfere unduly with freight operations.

Decided: August 13, 2012

On May 4, 2012, the Wisconsin Department of Transportation (WisDOT) filed an amended petition for a declaratory order asking the Board to find that it does not have regulatory authority over WisDOT's proposed acquisition of the physical assets of 4.05 miles of rail line owned by Wisconsin & Southern Railroad, L.L.C. (WSOR).² WisDOT states that the acquisition does not require Board approval because the proposed transaction comports with the terms and conditions set out in Maine, Department of Transportation—Acquisition and 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. As discussed below, we will grant WisDOT's request for a declaratory order and find that the proposed transaction would not cause WisDOT to become a rail common carrier and, as a consequence, does not require Board authorization under 49 U.S.C. § 10901 or an exemption under 49 U.S.C. § 10502. Based on our interpretation of the transaction documents, we find that the proposed transaction would come

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 When the initial petition was filed on September 17, 2010, WSOR was a corporation known as Wisconsin & Southern Railroad Company. WSOR's corporate status has since changed; it is now a limited liability company known as the Wisconsin & Southern Railroad, L.L.C. Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & S. R.R., FD 35573, slip op. at 1 (STB served Dec. 15, 2011).

within the purview of our State of Maine line of precedent and would therefore not be subject to our authority.

BACKGROUND

WisDOT filed its initial petition in this proceeding on September 17, 2010. Shortly thereafter, WisDOT requested that the Board delay ruling on the petition until WisDOT could review the proposed transaction in light of a Board decision addressing a similar State of Maine transaction proposed by WisDOT in Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron County, Wis. (WisDOT-Barron County 2010), FD 35366 (STB served Sept. 23, 2010). In the WisDOT-Barron County 2010 decision, the Board denied WisDOT’s request that the Board find that it would not have regulatory authority over the proposed acquisition. After WisDOT revised the transaction and filed a second petition for a declaratory order, the Board issued a decision finding that the transaction, as revised, would not cause WisDOT to become a rail common carrier. Wis. Dep’t of Transp.—Petition for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron Cnty., Wis. (WisDOT-Barron Cnty. 2011), FD 35455 (STB served Nov. 10, 2011). WisDOT then revised the transaction documents it had filed in this proceeding and on May 4, 2012, filed the amended petition for a declaratory order.

WisDOT seeks to purchase the physical assets of 4.05 miles of rail line (the Line) from WSOR, a Class II railroad, but claims that the proposed acquisition does not require Board approval under 49 U.S.C. § 10901(a)(4) because WSOR would retain a permanent, exclusive freight rail operating easement, and the common carrier obligation. The Line is composed of four segments, all located in the City of Milwaukee, in Milwaukee County, Wis.: (1) the Horicon Line from milepost 93.72, at the division of ownership with the State of Wisconsin, to milepost 93.20, near Glendale Yard; (2) the Canco Line from milepost 93.20 to milepost 95.18, at the division of ownership with Canadian National Railway; (3) the Nut Line from milepost 93.20 to milepost 94.35; and (4) a short spur extending from the switch on the Canco Line at milepost 93.46 to the switch on the Nut Line at milepost 93.86. Also included in the purchase is additional track WisDOT refers to as the “North Milwaukee yard.” 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 Line from WSOR through an Asset Purchase Agreement and a Quitclaim Deed, both of which would reserve a permanent, exclusive freight rail operating easement for WSOR to provide common carrier service. Simultaneously, WisDOT plans to enter into a Land Use Agreement and a Grant Agreement with the East Wisconsin Counties Railroad Consortium (EWCRC)³ and an Operating Agreement with EWCRC and WSOR.

³ According to WisDOT, EWCRC is a public entity and a consortium of interested Wisconsin counties created under Wisconsin law, in part, to oversee the preservation of rail service on certain rail lines acquired by the State of Wisconsin.

WSOR, in turn, will lease the property from EWCRC and continue to provide common carrier freight rail service.⁴

WisDOT asserts that the easement and the Agreements, as revised, comply with the terms and conditions set out in the State of Maine line of precedent, including WisDOT-Barron County 2010 and WisDOT-Barron County 2011. 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 scope of 49 U.S.C. § 10901, and that the transaction, as a consequence, does not require Board authorization.

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 Cnty. 2011, slip op. at 3. 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 will look to 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.

The transaction, as revised, does not require Board approval. The Agreements provide that WSOR would retain a permanent, exclusive freight rail operating easement over the Line to permit it to carry out its common carrier obligation.⁵ WSOR would not be transferring its common carrier obligation to WisDOT or EWCRC, and neither WisDOT nor EWCRC would be able to hold itself out as a common carrier performing common carrier freight rail service on the Line. We also find that the Agreements, as revised, would not give WisDOT or EWCRC the ability to interfere unduly with WSOR's ability to carry out its common carrier obligation. The Operating Agreement expressly recognizes that WSOR “may not terminate service until it

⁴ The Asset Purchase Agreement, Quitclaim Deed, Land Use Agreement, Grant Agreement, and Operating Agreement are collectively referred to as “the Agreements.”

⁵ E.g., WisDOT Amended Petition, Ex. B, § 2 and Ex. E, § 5.1(b).

obtains authority from the [Board]”⁶ and provides that upon termination for default, WSOR “shall immediately seek authorization from the [Board] to discontinue service,”⁷ and that Board approval will be required “before termination [can be] effective.”⁸

The Agreements, taken as a whole, are not impediments to the continuation of common carrier freight rail service by the operator. We conclude that the transaction comports with the State of Maine line of precedent because the Agreements do not unduly interfere with WSOR’s ability to control its freight rail operations. In isolation, however, certain provisions of the parties’ revised Operating Agreement could be construed to be inconsistent with the grant of the permanent, exclusive freight rail operating easement. We identify these individual provisions below to ensure that they are not interpreted at some point in the future in a manner inconsistent with this decision.

The Operating Agreement in section 2.1(b) provides for an initial 35-year term that, under section 2.1(c), may be renewed by the operator for successive 10-year terms. In addition, the breach of any material provision of the Operating Agreement is considered a default, and EWCRC 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.⁹ And if EWCRC 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.”¹⁰

The Operating Agreement states that it is to terminate if EWCRC were to lose its right to the property.¹¹ 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 EWCRC 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. Finally, section 13.14 of the Operating Agreement provides that the parties agree to submit to final and conclusive arbitration of disputes regarding the Operating Agreement and the parties’ performance under that agreement.

In light of WSOR’s permanent, exclusive rail freight easement—as manifested in the Quitclaim Deed—we find that these default, term, termination, transfer, and arbitration provisions in the Operating Agreement cannot be interpreted or enforced in a way that would affect WSOR’s ability to provide common carrier freight rail service. The easement takes precedence and preserves WSOR’s common carrier rights and obligations as to the line segments

⁶ WisDOT Amended Petition, Ex. E § 7.1(a).

⁷ Id. § 7.8.

⁸ Id. § 7.5. The Board will consider the public interest in any discontinuance proceeding, not just the parties’ agreements.

⁹ Id. §§ 7.1-7.4.

¹⁰ Id. § 7.4.

¹¹ Id. § 13.12(a).

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 abandonment or discontinuance authority is obtained.

Based on this finding and the record in this case, we find nothing in the transaction that would affect the continuing validity of WSOR's permanent, exclusive freight rail operating easement, as provided in the Agreements, or would otherwise unduly interfere with WSOR's ability to fulfill its common carrier obligation. Therefore, 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. This decision will be effective on its service date.

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