

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34181

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION
– PETITION FOR DECLARATORY ORDER

Decided: July 30, 2002

In a petition filed on May 30, 2002, the State of Wisconsin Department of Transportation (WisDOT) requests a declaratory order determining whether the Board has jurisdiction over its acquisition of certain specified real estate and improvements from the Wisconsin and Southern Railroad Company (WSOR).¹ The property consists of two segments of the WSOR right-of-way between milepost 138.58 and milepost 146.72, and between milepost 167.53 and milepost 168.00. Both segments are located in Dane County, WI. WisDOT states that it will acquire only the real estate and improvements, but will not assume the common carrier obligation to operate the rail line, which will remain with WSOR by means of a perpetual easement from WisDOT. Exercising our discretionary authority under 5 U.S.C. 554(e), we will issue a declaratory order to remove uncertainty in this matter.

BACKGROUND

In 1995, WSOR entered into an operating agreement with WRRTC, a municipal entity and consortium of interested Wisconsin counties dedicated to preserving rail service in the state.² No regulatory approval for the agreement was sought by the parties at that time. The agreement, *inter alia*, allows WRRTC to contract for commuter passenger service on the line, provided such service does not unreasonably interfere with WSOR's common carrier service. See Agreement Section 2.3(b).

¹ Attached to the petition were the following transaction documents: (a) a quitclaim deed from WSOR to WisDOT, dated February 19, 2002; (b) an easement from WisDOT to WSOR; and (c) an operating agreement between the Wisconsin River Rail Transit Commission (WRRTC) and WSOR, dated September 22, 1995.

² WRRTC was created to undertake rail preservation activities because the Wisconsin state constitution prohibited such activities by the state prior to a 1992 amendment.

Pursuant to the agreement, WisDOT, a noncarrier, currently has an option to purchase the rail assets from WSOR. The option includes the ability to acquire both real estate and any improvements thereon, including the tracks, but does not include the acquisition of the common carrier authority to provide freight service on the line. WisDOT now seeks to exercise that option, provided that it does not become a common carrier subject to our regulation. WisDOT states that it will only record the transaction agreement documents and exercise its option if we issue a declaratory order or other appropriate written notification finding that we do not have jurisdiction over this transaction.³ Citing Maine, DOT – Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine) and Brotherhood of Maintenance of Way Employees v. CP Rail Systems, STB Finance Docket No. 32835 (STB served June 10, 1997) (BME), WisDOT asks us to determine that its acquisition is not subject to Board jurisdiction and that consummation of the acquisition will not make WisDOT a common carrier.

DISCUSSION AND CONCLUSIONS

The primary issue here is whether Board approval is required for the proposed transfer of certain rail assets from WSOR to WisDOT, a noncarrier. It is well established that when a noncarrier, including a state, acquires a freight rail line that has not been abandoned, it must seek our approval under 49 U.S.C. 10901. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). In the typical sale of a non-abandoned rail line, the new owner is presumed to succeed the former owner in assuming the obligation to ensure that freight rail service continues over the line. Our authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

In State of Maine, the ICC observed that jurisdictional determinations of this sort are based on the specific facts of a transaction and cautioned that “any similar transactions should likewise be submitted . . . in advance, together with a copy of the agreement between the railroad and the entity acquiring its right-of-way, for a jurisdictional determination.” State of Maine, 8 I.C.C.2d at 838. Upon reviewing the documents submitted by the parties and the relevant facts, we conclude that Board approval is unnecessary here.

The record indicates that no common carrier rights or obligations are being transferred, and that WisDOT will not hold itself out as a common carrier performing rail freight service. Rather, WisDOT will acquire only the railroad right-of-way and certain related improvements in order to preserve service. WSOR will retain all common carrier rights and obligations, and WisDOT will grant it a perpetual easement to allow WSOR to continue to conduct rail freight operations on the property.

³ Conversely, if we find jurisdiction here, WisDOT states that it will not record the documents and its option shall be deemed unexercised.

There is also no evidence before us indicating that either WisDOT or WRRTC will be in a position to prevent WSOR from fulfilling its common carrier obligation. As to WRRTC, the 1995 operating agreement between it and WSOR does not, on its face, impair WSOR's ability to meet that obligation. See State of Vermont – Acquisition Exemption – Certain Assets of Boston and Maine Corporation, STB Finance Docket No. 33830 (STB served June 8, 2000). Although Section 2.3(b) of the agreement allows for use of the property for commuter passenger service, subsequent language in that section makes it clear that such use must not unreasonably interfere with WSOR's ability to meet its common carrier obligation. Moreover, a finding that such shared use will not impair a common carrier obligation is consistent with our precedent. See, e.g., BME; Los Angeles County Transportation Commission – Petition for Exemption – Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 (STB served July 23, 1996); Sacramento - Placerville Transportation Corridor Joint Powers Authority – Acquisition Exemption – Certain Lines of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996).

In short, the record demonstrates that there will be no alteration of any common carrier rights or obligations here, and that the transaction will not impede WSOR's ability to continue to provide rail freight service. We see no basis for finding that our approval is required or that WisDOT would become a rail carrier subject to our jurisdiction as a result of this transaction. Accordingly, we decline to assert jurisdiction in this matter.

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

We find:

The above-described acquisition does not require our regulatory approval and will not result in WisDOT becoming a rail common carrier subject to our jurisdiction.

It is ordered:

1. WisDOT's petition is granted.

2. This decision will be effective 30 days after its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary