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SERVICE DATE – DECEMBER 23, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34623

WISCONSIN DEPARTMENT OF TRANSPORTATION–
PETITION FOR DECLARATORY ORDER

Decided: December 22, 2004

On December 1, 2004, the Wisconsin Department of Transportation (WisDOT) filed a petition for declaratory order, asking us to determine that it and the Eastern Wisconsin Counties Rail Consortium (EWCRC)¹ will not become rail common carriers as a result of purchasing a 37-mile line of railroad, known as the Plymouth Line, extending from milepost 114.8 near Saukville to milepost 151.8 near Kiel in Ozaukee, Sheboygan and Manitowoc Counties, WI. 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.

BACKGROUND

We granted the Wisconsin Central Ltd. (WCL) authority under 49 U.S.C. 10903 to abandon the Plymouth Line by decision served on October 18, 2004. On October 27, 2004, WisDOT and the Wisconsin & Southern Railroad Co. (WSOR) jointly filed an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27 for WisDOT to purchase the assets of, and for WSOR to operate, the entire 37-mile Plymouth Line. By decision served on November 1, 2004, the effective date of the decision authorizing the abandonment was postponed to permit the OFA process to proceed.

On December 1, 2004, WCL, WSOR and WisDOT advised us that they have reached agreement on the terms and conditions for purchase and operation of the Plymouth Line. WisDOT simultaneously filed the petition in this proceeding, indicating that the sale transaction is contingent upon a favorable Board ruling on its petition. WisDOT indicates that WSOR and WCL support the instant petition. In a decision served on December 3, 2004, under 49 U.S.C. 10904, WisDOT was authorized to purchase and WSOR was authorized to operate the Plymouth Line.

¹ EWCRC is a governmental entity established on behalf of interested Wisconsin Counties to help preserve rail service on certain lines acquired by the State of Wisconsin.

With its petition for declaratory order, WisDOT has submitted copies of several documents relating to the transaction. These include: (1) a deed transferring the real estate, right-of-way, and improvements from WCL to WisDOT; (2) an exclusive perpetual freight easement, transferring the common carrier obligation to provide rail service on the line from WCL to WSOR; (3) a land use agreement between WisDOT and EWCRC, requiring that EWCRC partially purchase the rail property and allowing it to occupy the land corridor and the rail property; and (4) a land use agreement between EWCRC and WSOR, protecting WSOR's occupancy of the land corridor and ensuring WSOR's ability to provide freight service under the exclusive perpetual freight easement. According to WisDOT, the transaction documents are structured to ensure that WisDOT does not assume any common carrier obligation, and that WSOR has complete and exclusive control to operate the Plymouth Line as a common carrier unfettered by WisDOT and EWCRC. WisDOT indicates that it is seeking to preserve rail service on the line without incurring a common carrier obligation.

Given how the transaction is structured, WisDOT asserts that it and EWCRC will not become common carriers after acquiring the line, 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 and Soo Line System Division, Brotherhood of Maintenance of Way Employees v. CP Rail System d/b/a/ Soo Line Railroad Company and Plaza-Makoti Equity Elevator, Finance Docket No. 32835 (STB served June 10, 1997). It notes further that the Board has reviewed a similarly structured transaction involving WisDOT, another county consortium, and WSOR and determined that WisDOT and the county consortium did not become common carriers as a result of the transaction. State of Wisconsin Department of Transportation–Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002). See also Wisconsin Department of Transportation and East Wisconsin Counties Rail Consortium–Petition for Declaratory Order–Common Carrier Status of Certain Operations in the State of Wisconsin, Finance Docket No. 32717 (STB served Dec. 8, 1997).

DISCUSSION AND CONCLUSIONS

The issue here is whether WisDOT and EWCRC will become common carriers by acquiring the physical assets of the Plymouth Line. The usual rule is that a person, including a state agency, who acquires an active rail line, assumes a common carrier obligation at least to assure that service continues on the line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, or, as in this case, approval under the OFA procedures in 49 U.S.C. 10904.² 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). Our authorization is not required, however, when the physical assets are being transferred to one entity and

² Under the OFA rules, Board approval under section 10901 is not required for a party to consummate the purchase and institute service. 49 CFR 1152.27(f)(2).

the freight easement and common carrier obligation are being transferred to another entity. See State of Vermont–Acquisition Exemption–Certain Assets of Boston & Maine Corporation, STB Finance Docket No. 33830 (STB served June 8, 2000), and State of Maine, 8 I.C.C.2d at 836-37.

The Board finds that this transaction is consistent with State of Maine and its progeny, in which the state entity acquired the property but the common carrier obligation resided with another entity. Indeed, it is particularly similar to the transaction at issue in State of Wisconsin Department of Transportation–Petition for Declaratory Order, STB Finance Docket No. 34181. The agreements between the parties show that WisDOT is acquiring WCL’s real estate and improvements on the line, and that WSOR is acquiring all of WCL’s common carrier rights and obligations and contractual rights necessary to conduct rail service on the line. The record also shows that WisDOT and EWCRC are not acquiring WCL’s common carrier rights or obligations and will not hold themselves out as common carriers performing rail service. And the record shows that neither WisDOT nor EWCRC will be in a position to prevent or impede WSOR from fulfilling the common carrier obligation it is acquiring. Therefore, we conclude that WisDOT and EWCRC will not become rail carriers subject to our jurisdiction as a result of this transaction.

Finally, WisDOT has requested expedited consideration of its petition so that the transaction could be closed before the end of this calendar year. To accommodate this request, our decision will be made effective on its service date.

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 is granted as discussed in this decision.
2. This decision will be effective on its service date.

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

Vernon A. Williams
Secretary