

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34764

WISCONSIN DEPARTMENT OF TRANSPORTATION—
PETITION FOR DECLARATORY ORDER

Decided: December 2, 2005

By petition filed on November 4, 2005, the Wisconsin Department of Transportation (WisDOT) requests a declaratory order stating that the Board does not have jurisdiction over its planned purchase of the Waterloo Spur. The Spur runs 32.5 miles between milepost 132.11 at Watertown, WI, and milepost 164.61 in Madison, WI. WisDOT seeks to buy the Spur from Wisconsin & Southern Railroad Co. (WSOR).

BACKGROUND

WSOR was granted authority to lease and operate the Spur in 1998,¹ and it purchased the line pursuant to a notice of exemption in 2003.² According to WisDOT, on November 7, 2003, WSOR granted it an option to purchase the rail line (real estate, tracks, other improvements), but not the common carrier authority to provide freight rail service. WisDOT states that it will not exercise this option without a ruling from the Board that the Board does not have jurisdiction over the proposed acquisition.

In support of its petition, WisDOT submitted drafts of (1) a deed from WSOR to WisDOT, (2) an easement from WisDOT to WSOR, (3) a grant agreement between WisDOT and the Wisconsin River Rail Transit Commission (WRRTC), and (4) an operating agreement between WSOR and WRRTC (operating agreement). WRRTC is a municipal entity and consortium of interested Wisconsin counties dedicated to preserving rail service on certain rail lines acquired by the State of Wisconsin.

In its petition, WisDOT states that it has structured this transaction to ensure that it would not assume any common carrier liability. Petitioner has endeavored to do so by providing that

¹ Wisconsin & Southern Railroad Co.—Lease and Operation Exemption—Soo Line Railroad Company D/B/A Canadian Pacific Railway, STB Finance Docket No. 33571 (STB served May 27, 1998).

² Wisconsin & Southern Railroad Co.—Acquisition Exemption—Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 34285 (STB served Jan. 17, 2003).

WSOR would continue to operate the railroad on the line pursuant to a perpetual easement from WisDOT and pursuant to an existing operating agreement between WSOR and WRRTC. WisDOT argues that this transaction would comport with the terms and conditions of 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, et al. v. CP Rail Systems, et al., STB Finance Docket No. 32835 (STB served June 10, 1997), would not involve the acquisition of a “railroad line” under 49 U.S.C. 10901, and would therefore be outside the Board’s jurisdiction. WisDOT adds that neither it nor WRRTC would provide, or be equipped to provide, common carrier “for-hire” rail freight service.

DISCUSSION AND CONCLUSIONS

The acquisition of an active rail line and the common carrier obligation that goes 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, even if the acquiring entity is a state. 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). The Board’s authorization is not required, however, when 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 prior decisions, the agency has addressed the issue of whether rights acquired by a state agency were so extensive that the agency had acquired control of the rail line—and therefore the obligations and rights of a common carrier. See, e.g., Southern Pacific Transp. Co.—Abandonment, 8 I.C.C.2d 495 (1992), reconsidered and clarified 9 I.C.C.2d 385 (1993); Orange County Transp.—Exempt.—Atchison, T. & SF Ry. Co., 10 I.C.C.2d 78 (1994). Here, while WisDOT states that it would acquire merely the real estate and improvements on the line, and that WSOR would retain a “perpetual easement to operate the line,” several provisions of the draft operating agreement would appear to convey control over rail service on the line to WisDOT and WRRTC.

First, Section 2.1(a) provides that “[WSOR] agrees to cooperate with [WRRTC] to allow supplemental freight rail service to be provided by [WRRTC] in situations where [WSOR] cannot justify and is unable to provide a desired level of freight service. . . .” This provision would appear to vest WRRTC with the ability not only to affect WSOR’s operations by determining the desired level of service, but also to provide freight service itself.

Second, Section 2.1(c) provides that “[WSOR] shall have the right to renew this Agreement for successive additional ten (10) year periods.” This appears inconsistent with the “perpetual easement to operate the line” that WisDOT describes in its petition and which the agency cited in State of Maine as a predicate to assuring that control over rail operations vests in the operator, not the owner of the right-of-way.

Third, in Section 2.2(c), WisDOT would retain the right to review WSOR's continued use of sidetracks ". . . and Land 16.5 feet from the center line on each side of the sidetrack." It is unclear what this right of review would entail and what limits it might impose on WSOR's operations.

Fourth, Section 2.2(h) provides that "[a]s to the planning operations. . . , [WRRTC] reserves to WisDOT, itself and the governmental entities along the Rail Line the right to do such planning and to provide for relocation of facilities, including Improved Property and the elimination of certain trackage, buildings and other facilities, in order to carry out the determinations arrived at from such planning." It is unclear what these planning operations would entail, and to what extent the ability to relocate facilities and eliminate trackage, buildings and other facilities might affect rail operations.

Fifth, Section 2.2(k) states, "if [WSOR] proposes to operate or allow the operation of any train over any portion of the Rail Line which is to carry any person paying a fee for carriage, [WSOR] shall first apply for and receive a written permit from WisDOT." This provision would appear to limit, or potentially eliminate, WSOR's ability to provide freight service over portions of the line that WisDOT may use for passenger services.

Additional information is needed before the Board can reach a determination on WisDOT's request for a declaratory order. Accordingly, WisDOT is directed either to explain why the above provisions would not conflict with the agency's State of Maine precedent or to revise the operating agreement. WisDOT's submission will be due 20 days from the service date of this decision.

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

It is ordered:

1. WisDOT is directed to submit additional information or a revised operating agreement by December 22, 2005.
2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary