

25559
EB

SERVICE DATE - DECEMBER 8, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32717

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

Decided: November 25, 1997

The Wisconsin Department of Transportation (WisDOT)² and East Wisconsin Counties Rail Consortium (EWCRC)³ (collectively, petitioners) filed a petition for a declaratory order to remove uncertainty over whether WisDOT and EWCRC became rail common carriers subject to the jurisdiction of the ICC and later the Board because of their acquisition of five rail lines in Wisconsin formerly operated by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (MILW).⁴

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 721. Therefore, this decision applies the law in effect prior to the ICCTA.

² WisDOT is the designated state agency for rail matters in Wisconsin. Under Wisconsin state law, WisDOT may acquire rail lines for the purpose of preserving freight rail service or improving the efficiency of freight rail service if the public interest requires acquisition of the property, and it may enter into contracts with local transit commissions to restore freight rail service in the state.

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The alleged uncertainty arises from a U.S. Court of Appeals holding that the lines were abandoned at the time WisDOT acquired them,⁵ and subsequent ICC decisions indicating that they were not.⁶ According to petitioners, the ICC's interpretation, that the lines were active at the time they were acquired, conferred a common carrier obligation on petitioners, a result that was inconsistent with the constitution of the State of Wisconsin as it existed at the time of the acquisition. Petitioners submit that neither WisDOT nor EWCRC is equipped to be a common carrier and neither holds itself out as a common carrier. Accordingly, they seek a Board determination that neither WisDOT nor EWCRC acquired a common carrier obligation when they acquired the lines. Because the law is clear on this issue, the petition for a declaratory order will be denied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 721 and 5 U.S.C. 554(e), we may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority--Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). Here there is no controversy or uncertainty that needs to be resolved. Notwithstanding ICC decisions to the contrary, the court of appeals clearly settled the issue in Matter of Chicago.

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Section 5 of the Milwaukee Railroad Restructuring Act (MRRA)⁷ transferred jurisdiction over MILW abandonment and transfer proposals from the ICC to the reorganization court, leaving the ICC with only an advisory role regarding any proposals submitted. See Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Abandonment Near Sparta and Viroqua, in Monroe and Vernon Counties, Wisconsin, Docket No. AB-7 (Sub-No. 37) et al. (ICC served Dec. 6, 1979).

Section 5(a) of the MRRA applied to court-approved abandonments of MILW lines; section 5(b) applied to the sale or transfer of MILW lines to be used in continued rail operations, subject to ICC approval. Neither subsection specifically mentions abandonments followed by acquisitions by a noncarrier that intends to operate or to arrange for eventual operation of the lines.

In the decision approving the acquisition of the lines at issue here, the ICC stated that WisDOT's application had been filed under section 5(b)(2) of the MRRA. Wisconsin--Acquisition, slip op. at 1. Later, in a decision involving a request for a notice of interim trail use on the Tomahawk line, which was also acquired by WisDOT in Wisconsin--Acquisition, but is not at issue here, the ICC noted the discrepancy in the way WisDOT styled its application in Wisconsin--Acquisition, "Application for Acquisition of Certain Lines of the Milwaukee Road if Abandonment is Authorized by the Bankruptcy Court," and the section it chose to file the application under, section 5(b)(2), which applied to line sales. The ICC opined that the discrepancy reflected some of the confusion that existed at the time. See Tomahawk, decision served July 12, 1991, slip op. at 2 n.4. The ICC stated, in dicta, that it did not agree with the court decisions that characterized the Tomahawk line and a number of other lines transferred to WisDOT as having been abandoned, because the lines were never subjected to the abandonment process under 11 U.S.C. 1170(b) and the ICC had approved the transfers in Wisconsin--Acquisition under section 5(b)(2) of the MRRA, which governs the sale of active rail lines. See Tomahawk, decision served July 12, 1991, slip op. at 3 n.7.

Regardless of this and other statements by the ICC in decisions issued after the court of appeals decision in Matter of Chicago, we conclude that what is essentially the law of the case here is clear.⁸ The court recognized that there was a statutory void in that neither section 5(a) nor section 5(b) of the MRRA specifically mentions abandonments followed by acquisitions by noncarriers that intend to operate, to arrange for eventual operation, or to serve as the liaison to the trustee and the ICC. The court agreed with the trustee and interveners-appellees in that case that section 5(a) should govern the statutory void and held that the abandonments and related acquisitions at issue were properly completed under section 5(a). Thus, under the court's holding, petitioners acquired

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abandoned property and do not have a common carrier obligation. Any ICC statements to the contrary are expressly overruled.

We have exercised our discretion not to issue a declaratory order because the application of the law in these circumstances is clear. In addition, although our decision differs from the position taken by the ICC in decisions involving these lines, it is unlikely that this issue will reoccur. Shortly after WisDOT acquired the lines at issue here, the ICC exempted a state from the need to obtain ICC approval for a state's acquisition of lines approved for abandonment by the ICC or a bankruptcy court when the abandonment had not yet been consummated. The ICC also concluded that, in these circumstances, a state would become a common carrier only if it operated the line it was acquiring. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135-38 (1980).

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

It is ordered:

1. The petition for declaratory order is denied.
2. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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