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SERVICE DATE – LATE RELEASE FEBRUARY 6, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34764

WISCONSIN DEPARTMENT OF TRANSPORTATION—
PETITION FOR DECLARATORY ORDER

Decided: February 2, 2006

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).

Because of Board concerns with several provisions of the draft operating agreement between WSOR and Wisconsin River Rail Transit Commission (WRRTC),¹ by decision served December 2, 2005, WisDOT was directed either to explain why the provisions would not conflict with our precedent in Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), or to revise the draft operating agreement. WisDOT responded on December 22, 2005, and, with one exception addressed below, has satisfactorily resolved the issues identified by the Board. Therefore, we will conditionally grant WisDOT's request for a declaratory order stating that Board approval is not required for its planned purchase of the Spur.

¹ 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.

BACKGROUND

WSOR was granted authority to lease and operate the Spur in 1998,² and it purchased the line pursuant to a notice of exemption in 2003.³ 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 it 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 WRRTC, and (4) an operating agreement, subsequently amended, between WSOR and WRRTC.

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 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 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

WisDOT seeks a declaratory order that the Board does not have jurisdiction over its planned acquisition of the Waterloo Spur. Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to

² 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).

³ 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).

the subject matter jurisdiction of the Board. The Board has broad discretion to determine 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 (1989). In this decision, we will issue a declaratory order and conditionally grant WisDOT's request for a determination that no Board authorization is required for this proposed acquisition, as discussed below.

As a general rule, a person, including a state agency, that acquires an active rail line assumes a common carrier obligation over that line. This is to ensure that service will continue on a rail line despite a change in ownership. 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. 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.

As previously indicated, in our prior decision we voiced concerns that several provisions of the draft operating agreement appeared to convey control over rail service on the line to WisDOT and WRRTC, in conflict with State of Maine. In its response, WisDOT states that Section 2.1(a) of the operating agreement has been revised to delete the last two sentences, removing any inference that WRRTC would have any ability to interfere with WSOR's freight rail operations or to provide freight rail service itself. Second, WisDOT states that Section 2.1(c) has been amended to remove any reference to WSOR's default, and WisDOT further explains that the agreement would continue until 2047, and then only WSOR would have the right to renew the agreement for successive 10-year periods. Third, WisDOT states that Section 2.2(c) has been amended to remove WisDOT's right to review WSOR's continued use of sidetracks and to revise the provision to make it clear that WSOR would have the right to provide service. Fourth, WisDOT states that the reference to planning operations at Section 2.2(h) has been amended to provide that no change would interfere with WSOR's duty to provide service unless such change was agreed to by WSOR and WRRTC. We conclude that the above amendments to Sections 2.1(a) and (c) and 2.2(c) and (h) resolve the Board's concerns with these provisions as previously drafted.

As to Section 2.2(k), WisDOT explains that the permit requirement in that section is intended to apply to WSOR, which is also providing freight rail service. According to WisDOT, WSOR would know whether it could provide passenger service without interfering with its freight service obligation and adds that, because the line is currently lightly used, it could be used for passenger service without detriment to the freight service. Despite WisDOT's explanation, this provision can still be read to require WSOR to apply for and receive a written permit from WisDOT before it could operate freight service on any portion of the line over which there is passenger service. This would appear to limit, or potentially eliminate, WSOR's ability to

provide freight service, especially if WisDOT, WRRTC, or another operator was providing passenger service.

If WisDOT intends this section merely to require WSOR to receive a written permit from WisDOT before WSOR itself could provide passenger service, it should clarify the language of this section to explicitly so state. In these circumstances, our issuance of a declaratory order in this proceeding will be conditioned upon WisDOT revising this section in such a way that it is clear that the permitting requirement would not interfere with WSOR's ability to provide freight service.

Subject to the exception discussed above, 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. The revised draft agreement between the parties shows that WisDOT is acquiring the real estate and improvements on the line, and that WSOR is retaining all common carrier rights and obligations. The record also shows that WisDOT and WRRTC are not acquiring any common carrier rights or obligations and will not hold themselves out as common carriers performing rail service. And if the draft operating agreement is revised in accordance with this decision, all of our concerns will have been met because neither WisDOT nor WRRTC will be in a position to prevent or impede WSOR from fulfilling the common carrier obligation it is acquiring.

Therefore, WisDOT's request for a declaratory order finding that no Board authorization for its planned purchase of the Waterloo Spur is required will now be granted, although this decision will not be made effective until our approval in a subsequent decision of WisDOT's amendment to Section 2.2(k) of the draft operating agreement. WisDOT is directed to revise the language of this section in the manner discussed above within 10 days of 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's petition for declaratory order is conditionally granted, as discussed above.
2. WisDOT is directed to submit to the Board a revised Section 2.2(k) of the operating agreement by February 16, 2006.

3. Upon our approval in a subsequent decision of WisDOT's amendment to Section 2.2(k) of the operating agreement, this decision will be made effective.

By the Board, Chairman Buttrey and Commissioner Mulvey.

Vernon A. Williams
Secretary