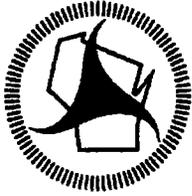


225995



Wisconsin Department of Transportation
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Jim Doyle
Governor

Frank J. Busalacchi
Secretary

Office of General Counsel
4802 Sheboygan Ave., Rm. 115B
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E-mail: ogc.exec@dot.state.wi.us

November 13, 2009

Surface Transportation Board
Acting Secretary Anne K. Quinlan
395 E Street, SW
Washington D.C., 20423-0001

For Electronic Filing

Re: Wisconsin Department of Transportation – Petition for Declaratory Order – Rail Line in Sheboygan County, WI
STB Finance Docket No. 35301

Dear Ms. Quinlan,

The Wisconsin Department of Transportation filed the above-entitled petition with the Board on October 28, 2009. Due to an oversight, Attachment 5, the Operating Agreement between Wisconsin & Southern Railroad and the Wisconsin Department of Transportation, did not include two relevant amendments that address the important issue of control under Maine DOT¹ and its progeny.

Attached, and submitted for filing are Amendments Two and Three to Attachment 5 – the Operating Agreement and Amendment Five – to the Department’s original Petition.

All parties have been served electronically.

Very truly yours,

Kathleen Chung
Kathleen Chung
Assistant General Counsel
(608) 266-8752
kathleen.chung@dot.wi.gov

ENTERED
Office of Proceedings

NOV 13 2009

Part of
Public Record

¹ Maine DOT – Acquisition Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991).

Amendment Two
To
Operating Agreement
Agreement No. 0490-40-48(d)

This Amendment Two to Agreement No. 0490-40-48(d) dated September 1, 1997, is made and entered into this 21st day of December, 2005, by and between the Wisconsin River Transit Commission, d/b/a Wisconsin River Rail Transit Commission, a municipal corporation established in accordance with Sec. 66.30 Wis. Stats., (now Section 66.0301 Wis. Stats.) ("Commission") and Wisconsin & Southern Railroad Company ("WSOR"), a railroad company organized and existing under the laws of the State of Wisconsin and fully empowered to act as a railroad company in Wisconsin.

WITNESSETH

WHEREAS, Section 12.6 of Agreement allows for amendment, and

WHEREAS, under an Option to Purchase Agreement dated November 7, 2003 by and between WSOR and WisDOT, WisDOT acquired an option to acquire the Madison to Watertown, Wisconsin line at a later date, and

WHEREAS, as part of that agreement, WisDOT required WSOR to enter into an Operating Agreement requiring WSOR to operate said line in like manner to other lines operated under agreement between the Commission and WSOR, and

WHEREAS by an Amendment dated December 6, 2002 to Agreement No. 0490-40-48(d) dated September 1, 1997 Commission and WSOR added the Madison to Watertown line segment to said agreement, and

WHEREAS, WisDOT now plans to exercise the option to acquire said rail line and will take title to the property, and

WHEREAS, by amendment dated September 9, 2005 WisDOT and Commission have agreed to amend Grant Agreement No. 0490-40-48(b) by and between the WisDOT and Commission to include the Madison to Watertown rail line, as one of the line segments covered under that agreement, and

WHEREAS, by petition filed with the Surface Transportation Board (Board) on November 4, 2005 WisDOT requested a declaratory order stating that the Board does not have jurisdiction over its planned purchase of the Madison to Watertown line, and

WHEREAS, by order dated December 2, 2005 the Board requested additional information or possible changes to the Operating Agreement between the WSOR and Commission before it could make such a determination, and

WHEREAS, the WSOR and Commission have agreed to certain contract changes in an effort to address the Board's concerns, and

WHEREAS, by action taken at its December 9, 2005 meeting, the Executive Committee of Commission authorized its officers to execute this amendment to the Operating Agreement.

NOW THEREFORE, the parties hereto agree as follows:

1. Section 2.1(a) shall be amended to read as follows:

(a) Commission hereby leases to Operator the Improved Property and grants to Operator an exclusive right and license to use the Land for the purpose of providing rail service and for all other purposes necessary to the foregoing, subject, however to the uses and reservations identified in Section 2.2 and Section 4.5 hereafter and subject to the uses and reservations set forth in the governing land use and grant agreements.

2. Section 2.1(c) shall be amended to read as follows:

(c) Operator shall have the right to renew this Agreement for successive additional ten (10) year periods. Each option to renew shall be for a period of ten (10) years and shall be exercised at least one (1) year but not more than two (2) years prior to the expiration of the then current term, said renewal notice to be exercised in writing to the Commission with a copy of the notice to WisDOT. All terms and conditions of this Agreement shall apply to the renewal periods unless amended by mutual agreement.

3. Section 2.2(c) shall be amended to read as follows:

(c) Commission retains the right to retake or retain possession of any of the rail line under lease to third parties for itself or for WisDOT, subject to the right of the Operator to provide service. In the Land Use Agreement, WisDOT presently retains the right to approve all leasing of Improved Property and to conduct all the leasing of Land. If there presently are sidetracks on any of the Land leased to third parties, Commission shall provide Operator with the right of continued use of the sidetrack and Land 16.5 feet from the center line on each side of the side track.

4. Section 2.2(h) shall be amended to have the following sentence added to the end. The rest of Section 2.2(h) shall remain as written.

No change shall interfere with Operator's duty to provide service unless such change is agreed to by Operator and Commission.

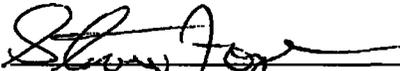
5. This Amendment will take effect following a determination by the Surface Transportation Board that WisDOT will not assume the responsibilities of a common carrier railroad operator by acquiring this property, and following the execution and recording of all necessary documents transferring ownership and title to the Madison to Watertown rail line property to WisDOT.

All other sections of Agreement No. 0490-40-48(d) shall remain as written.

IN WITNESS WHEREOF, the parties hereto have caused this amendment to be executed by their duly authorized officers on the date and year written above.

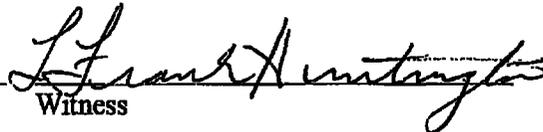
Wisconsin River Rail Transit Commission

Wisconsin & Southern Railroad Company


Steven Foye, Chair


William Gardner, President


William Agnew, Secretary


Witness

Amendment Three
To
Operating Agreement
Agreement No. 0490-40-48(d)

This Amendment Three to Agreement No. 0490-40-48(d) dated September 1, 1997, is made and entered into this 14th day of February, 2006, by and between the Wisconsin River Transit Commission, d/b/a Wisconsin River Rail Transit Commission, a municipal corporation established in accordance with Sec. 66.30 Wis. Stats., (now Section 66.0301 Wis. Stats.) ("Commission") and Wisconsin & Southern Railroad Company ("WSOR"), a railroad company organized and existing under the laws of the State of Wisconsin and fully empowered to act as a railroad company in Wisconsin.

WITNESSETH

WHEREAS, Section 12.6 of Agreement allows for amendment, and

WHEREAS, under an Option to Purchase Agreement dated November 7, 2003 by and between WSOR and WisDOT, WisDOT acquired an option to acquire the Madison to Watertown, Wisconsin line at a later date, and

WHEREAS, as part of that agreement, WisDOT required WSOR to enter into an Operating Agreement requiring WSOR to operate said line in like manner to other lines operated under agreement between the Commission and WSOR, and

WHEREAS by an Amendment dated December 6, 2002 to Agreement No. 0490-40-48(d) dated September 1, 1997 Commission and WSOR added the Madison to Watertown line segment to said agreement, and

WHEREAS, WisDOT now plans to exercise the option to acquire said rail line and will take title to the property, and

WHEREAS, by amendment dated September 9, 2005 WisDOT and Commission have agreed to amend Grant Agreement No. 0490-40-48(b) by and between the WisDOT and Commission to include the Madison to Watertown rail line, as one of the line segments covered under that agreement, and

WHEREAS, by petition filed with the Surface Transportation Board (Board) on November 4, 2005 WisDOT requested a declaratory order stating that the Board does not have jurisdiction over its planned purchase of the Madison to Watertown line, and

WHEREAS, by order dated December 2, 2005 the Board requested additional information or possible changes to the Operating Agreement between the WSOR and Commission before it could make such a determination, and

WHEREAS, by decision issued February 2, 2006 the Board has requested additional modifications to Section 2.2(k) of the Operating Agreement, and

WHEREAS, by action taken at its December 9, 2005 meeting, the Executive Committee of Commission authorized its officers to execute amendments to the Operating Agreement necessary to address the Boards concerns.

NOW THEREFORE, the parties hereto agree as follows:

1. Section 2.2(k) shall be amended to read as follows:

(k)The purpose of this section is to merely require Wisconsin & Southern Railroad Company to receive a written permit from WisDOT before Wisconsin & Southern Railroad Company itself provides passenger rail service. This section does not limit Wisconsin & Southern Railroad Company's ability to provide freight services.

If Operator 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, Operator shall first apply for and receive a written permit from WisDOT for the passenger operations on the Rail Line. WisDOT in consultation with Commission may grant or deny a permit based solely upon any of the following: adequacy of liability insurance coverage, terms and amount as set forth in Section 6.2 below; trackage condition; proposed speed of operation; preparations for crowd control, parking and clean-up; and sufficiency of consumer protection assurances associated with each use by Operator of any portion of the Rail Line subject to this Agreement to be operated over by Operator or by an affiliate, subcontractor or lessee of Operator. The permit may be denied if not requested in writing a minimum of ten days prior to the proposed use date, or if a fully executed copy of an acceptable certificate of binding insurance is not submitted for Commission and WisDOT review ten days prior to the proposed use date, if insurance coverage is inadequate or flawed in the reasonable judgment of Commission or WisDOT, or if a prior fee remains unpaid in whole or in part.

2. This Amendment will take effect following a determination by the Surface Transportation Board that WisDOT will not assume the responsibilities of a common carrier railroad operator by acquiring this property, and following the execution and recording of all necessary documents transferring ownership and title to the Madison to Watertown rail line property to WisDOT.

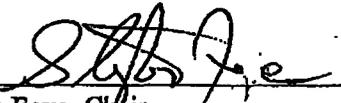
All other sections of Agreement No. 0490-40-48(d) shall remain as written.

IN WITNESS WHEREOF, the parties hereto have caused this amendment to be executed by their duly authorized officers on the date and year written above.

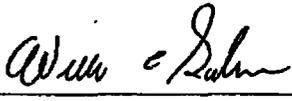
Wisconsin River Rail Transit Commission Wisconsin & Southern Railroad Company

Wisconsin River Rail Transit Commission

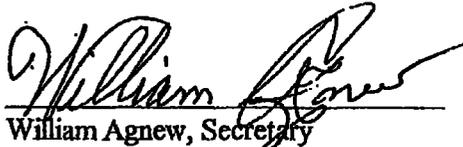
Wisconsin & Southern Railroad Company



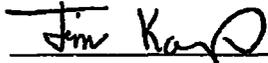
Steven Foye, Chair



William Gardner, President



William Agnew, Secretary

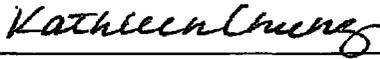


Witness for WSOR

1707

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Cover Letter, and Amendment Two and Amendment Three to Attachment 5 – Operating Agreement between Wisconsin & Southern Railroad and the Wisconsin Department of Transportation – of the Petition for Declaratory Order, in regards to **Finance Docket No. 35301**, by electronic mail, pursuant to 49 C.F.R. §1104.12, this 13th day of November 2009, on all parties of record on the service list.



Kathleen Chung, Attorney
State Bar no. 1032802
Wisconsin Department of Transportation
Office of General Counsel