

SERVICE DATE – APRIL 22, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35144

WISCONSIN & SOUTHERN RAILROAD COMPANY—
ACQUISITION AND OPERATION EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

Decided: April 20, 2009

By petition filed on February 13, 2009, Wisconsin & Southern Railroad Company (WSOR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10902 to acquire and operate a permanent exclusive freight rail operating easement over approximately 10.95 miles of railroad known as the Kohler Industrial Lead that is currently owned by the Union Pacific Railroad Company (UP) and to acquire and operate approximately 1,000 feet of UP spur track. The easement extends eastward from a connection with WSOR's north-south Kiel-to-Saukville line at milepost 14.95 at Plymouth, WI, to milepost 4.0 near Kohler, WI. The UP spur track constitutes the lead to the site of the former Cargill Malt Plant at Kohler. We will grant the petition for exemption, subject to labor protective conditions.

BACKGROUND

WSOR is a Class II rail carrier that operates over 700 miles of rail lines in the State of Wisconsin and in the adjacent northern Illinois area. According to petitioner, the 10.95-mile Kohler Industrial Lead line has been out of service for several years. WSOR states that the State of Wisconsin Department of Transportation (WisDot) has agreed to purchase the right-of-way and railroad assets comprising the line from UP and will contract with the East Wisconsin Counties Railroad Consortium (EWRCCR) to provide service on the line.¹ The EWRCCR has, in turn, selected WSOR to provide that service as its contract operator.

¹ WisDot has concurrently filed a petition for declaratory order in Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Line in Sheboygan County, WI, STB Finance Docket No. 35195. In that proceeding, WisDot has sought a finding that its acquisition of the right-of-way and railroad assets of the line would not render it a rail common carrier. Closing of the sale is contingent upon a favorable Board ruling. In a decision served today in that proceeding, the Board has found that WisDOT's proposed acquisition of the assets of the line does not require Board authorization under 49 U.S.C. 10901 because the transaction

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In the proceeding before us, WSOR seeks an exemption to acquire the freight rail easement and associated common carrier obligation directly from UP. WSOR states that it plans to rehabilitate and restore service on the line and will market the line to former and new customers. As noted, the line will connect at Plymouth with WSOR's north-south Kiel-to-Saukville line. In its exemption petition, WSOR also seeks Board authority to acquire and operate the 1,000 feet of UP spur track constituting the lead to the site of the former Cargill Malt Plant at Kohler.²

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10902, the purchase of a rail line or easement by a Class II carrier would require an application to, and authorization by, the Board. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the prior approval requirements of 49 U.S.C. 10902 is consistent with the standards of 49 U.S.C. 10502. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption from the application process will minimize the need for Federal regulatory control [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], reduce regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. At this time, there are no active shippers on the easement line or on the UP spur track. Rather, the transaction will enable WSOR to restore and provide service to a line that has been out of service for several years and to provide service to a dormant manufacturing facility.

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comports with Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C. 2d 835 (1991) and its progeny.

² WSOR has concurrently filed a verified notice of exemption to acquire from UP and operate 2.8 miles of overhead trackage rights over UP's line between UP milepost 4.0 in Kohler and UP milepost 1.2 at Kohler Junction to gain access to the approximately 1,000 feet of UP spur track that would allow WSOR to provide service to the site of the former Cargill Malt Plant and to interchange with UP in Sheboygan. See Wisconsin & Southern Railroad Co.—Trackage Rights Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35191 (STB served Feb. 27, 2009). WSOR also concurrently filed a motion for protective order which was granted by decision served on March 20, 2009.

WSOR will be in a better position to develop business on these lines as a locally based carrier, as it has done for other vacant industrial sites in the past. And WSOR will also be able to coordinate local service to shippers with its overhead service, connecting to multiple Class I rail carriers, all to the benefit of the shipping public. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees. Section 10902(d) provides for labor protection in line acquisitions by Class II rail carriers. As a condition to this exemption, any employees affected by the acquisition will be protected as required by section 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd.–Acquisition Exem.–Union Pac. RR, 2 S.T.B. 218 (1997), aff'd in relevant part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998).

This transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in a significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 CFR 1105.8(b)(1) because there are no plans to alter railroad properties 50 years old or older, and further Board approval is required to abandon any service.

In this proceeding, WSOR has requested expedited handling of its petition to enable it to perform rehabilitation to the track during the warm weather months of late spring and summer. Pursuant to 49 CFR 1121.4(h), however, this exemption may not become effective until 60 days after WSOR has certified to the Board that it has complied with our labor notification requirements. By letter filed on March 9, 2009, WSOR has completed its certification. Thus, we will make the exemption effective on May 8, 2009, which is 60 days from WSOR's date of final certification.

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

It is ordered:

1. Under 49 U.S.C. 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. 10902, subject to the employee protective conditions implementing 49 U.S.C. 10902(d) as provided in this decision.
2. Notice will be published in the Federal Register on April 24, 2009.
3. The exemption will become effective on May 8, 2009.

4. Petitions to stay must be filed by May 4, 2009. Petitions for reconsideration must be filed by May 14, 2009.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary