

SURFACE TRANSPORTATION BOARD

DECISION

WISCONSIN DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY  
ORDER—RAIL LINE IN SHEBOYGAN COUNTY, WI

STB Finance Docket No. 35195

Decided: April 20, 2009

On February 13, 2009, the Wisconsin Department of Transportation (WisDOT) filed a petition for declaratory order asking us to determine that we do not have “jurisdiction” over the sale of a segment of a rail line known as the Kohler Industrial Lead by the Union Pacific Railroad Company (UP) to WisDOT because the parties have structured the transaction to 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).<sup>1</sup> Exercising our discretionary authority under 49 U.S.C. 721 and 5 U.S.C. 554(e), we will issue a declaratory order to remove uncertainty in this matter. As discussed below, we find that WisDOT’s acquisition of the physical assets of the line segment will not cause WisDOT to become a rail carrier and does not require our authorization under 49 U.S.C. 10901.

BACKGROUND

The segment of the Kohler Industrial Lead that is the subject of this transaction extends from milepost 4.0 near Kohler, WI, to milepost 14.95 at Plymouth, WI, and is currently owned by UP. UP has not provided service over this line segment for many years, and it now desires to sell it. WisDOT intends to acquire the approximately 10.95-mile segment subject to the grant by UP to the Wisconsin & Southern Railroad Company (WSOR) of a permanent exclusive freight rail operating easement. WSOR will use this easement to provide common carrier freight rail service to industries interested in shipping by rail.

WisDOT and UP have agreed to execute a contract whereby UP agrees to sell and WisDOT agrees to purchase the approximately 10.95-mile segment. Closing of the sale is

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<sup>1</sup> While WisDOT uses the term “jurisdiction,” in fact it may only seek a finding that the Board does not have regulatory authority over the proposed transaction. The Board will continue to have jurisdiction over rail property even if it concludes, as discussed below, that it does not have regulatory authority over a proposed transaction. See Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, Railroad and Clearcuts Campaign, STB Finance Docket No. 33966, slip op. at 4 (STB served Aug. 15, 2001).

contingent upon a ruling from the Board that it does not have regulatory authority over the proposed acquisition.

To protect WisDOT from being deemed to have assumed a common carrier obligation, which it may not do under its State Constitution, WSOR has negotiated with UP directly to acquire the freight rail common carrier obligation, and, concurrently with the instant petition, WSOR has filed for authority to acquire and operate the easement in Wisconsin & Southern Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35144,<sup>2</sup> which the Board has granted by decision served today. WisDOT states that it has entered into an Operating Agreement and Land Use Agreement with the East Wisconsin Counties Railroad Consortium (Commission),<sup>3</sup> pursuant to which the Commission shall contract with an operator to provide freight rail service over the segment and receive financial assistance from WisDOT. Consistent with that agreement, the Commission has entered into an Operating Agreement with WSOR under which WSOR will conduct all rail operations on the segment.

WisDOT has attached to its declaratory order petition its line sale contract with UP, the operating agreement between it and the Commission, and the operating agreement between the Commission and WSOR. By filing on March 2, 2009, WSOR has also submitted a copy of the instrument that will convey UP's freight easement to WSOR.

WisDOT argues that, pursuant to these various agreements, it shall acquire the segment without acquiring the common carrier authority. WisDOT claims that WSOR has been granted the exclusive right and license to use the line for the purpose of providing freight rail service and all purposes necessary to that end. And to ensure that its ownership of the underlying property will not interfere with WSOR's ability to conduct that freight service, WisDOT asserts that it has intentionally and specifically structured the transaction to comport with the terms and conditions of State of Maine and its progeny. As a result, WisDOT claims, the conveyance of the segment does not constitute the acquisition of a railroad line within the intent and meaning of 49 U.S.C. 10901; thus, the transaction does not require the Board's regulatory authorization.

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<sup>2</sup> WSOR also has sought Board authority to acquire and operate approximately 1,000 feet of UP spur track, constituting the lead to the site of the former Cargill Malt Plant at Kohler, WI. To reach this line that serves the Cargill Malt Plant and to interchange with UP in Sheboygan, WI, WSOR has obtained Board authority to acquire overhead trackage rights on the UP line between milepost 4.0 near Kohler and milepost 1.2 at Kohler Junction in Wisconsin & Southern Railroad Co.—Trackage Rights Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35191 (STB served Feb. 27, 2009).

<sup>3</sup> According to WisDOT, the Commission is a public entity and consortium of interested Wisconsin counties created under Wisconsin law, in part, to oversee the preservation of rail service on certain rail lines acquired by the State of Wisconsin. The Commission was created to undertake rail preservation activities for the State, because the State was, prior to an April 1992 amendment, constitutionally prohibited from the acquisition, improvement or construction of railways or other railway facilities (or to be a party to any such works) and from borrowing money to invest in rail line improvements and rehabilitation.

## DISCUSSION AND CONCLUSIONS

The question here is whether WisDOT would become a common carrier by acquiring the segment, which, if so, would require the Board's regulatory approval of the transaction. 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, even if the acquiring entity is a noncarrier, including 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). Our authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred to the purchaser. See State of Maine, 8 I.C.C.2d at 836-37. The Board examines in each case whether, once the transaction takes effect, the entity retaining or obtaining the freight carrier obligation will have sufficient access to conduct existing and reasonably foreseeable freight operations so that it can satisfy the common carrier obligation.<sup>4</sup> A transaction will not result in a common carrier obligation being imposed on a noncarrier if the transaction does not unduly impair the carrier's ability to provide service.

We find that this transaction is consistent with State of Maine and its progeny. This arrangement resembles the transaction that the Board examined in The Port of Seattle—Acquisition Exemption—Certain Assets of BNSF Railway Company, STB Finance Docket No. 35128 (STB served Oct. 27, 2008), where BNSF Railway Company transferred the physical assets of a rail line to one party and the common carrier rights and obligations to another. Here, WisDOT will acquire the physical assets that comprise the rail line, but not the freight easement. UP's quitclaim deed specifically excludes from UP's and WisDOT's line sale contract "a permanent, exclusive easement upon, over, under and across the Property, for purposes of conducting freight rail operations and otherwise to fulfill Grantor's rights and obligation as a common carrier railroad...."<sup>5</sup> And the record contains the agreements and deed under which WSOR will acquire this easement.<sup>6</sup>

Neither the agreement between WisDOT and the Commission nor the agreement between the Commission and WSOR unduly interferes with WSOR's ability to provide common carrier service on the line. Both agreements provide that the operator, rather than WisDOT or the Commission, will have the exclusive right to operate as a common carrier providing originating and terminating freight rail service on the line.<sup>7</sup> The agreements also provide that the operator

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<sup>4</sup> See Washington County, OR—Acquisition Exemption—Certain Assets of the Union Pacific Railroad Company, STB Finance Docket No. 34810 et al., slip op. at 2 (STB served Apr. 11, 2007).

<sup>5</sup> See WisDOT's petition for declaratory order at Attachment 1, Exhibit B.

<sup>6</sup> See WisDOT's March 2, 2009 filing at Exhibit C and attached materials.

<sup>7</sup> See WisDOT's petition for declaratory order, Attachment 3 at Agreement Section 5.1(b) and Attachment 4 at Agreement Section 5.1(b).

has “the power and authority to exclusively control, manage, staff and plan for the provision of freight rail service on the line.”<sup>8</sup>

Both agreements provide in Section 2.2 that WisDOT can sell or lease certain sections of land not needed for continuation of freight rail service<sup>9</sup> and that the Commission can contract for passenger service on the line but that joint use shall not unreasonably restrict the use of the facility by WSOR.<sup>10</sup> As written, these rights do not undermine WSOR’s operating authority. And the exercise of these rights and other actions under Section 2.2 of the respective agreements require that WSOR be informed and involved. Moreover, the reservations found in the respective Section 2.2 provisions are functionally equivalent to those that the Board ultimately found satisfactory, following revisions and clarifications by WisDOT, in a similar State of Maine transaction involving WisDOT.<sup>11</sup> Additionally, neither of the instant operating agreements involving WisDOT or the Commission includes any service windows limiting WSOR’s operations.<sup>12</sup> WisDOT and the Commission also do not have the means or the desire to provide common carrier service and will not hold themselves out to do so.

Section 2.1(a) of the Commission’s operating agreement with WSOR, however, does differ from the equivalent provision, as amended, in the operating agreement between the intermediary lessor and WSOR in WisDOT I. The section before us here reads:

Commission hereby leases to Operator the Improved Property and grants to Operator an exclusive right and license to use the Land for purpose of providing freight rail service and for all other purposes necessary to the foregoing, subject, however, to the uses and reservations identified in Section 2.2 hereafter and subject to the uses and reservations set forth in the governing Land Use and Grant Agreements. Operator agrees to cooperate with Commission to allow supplemental freight rail service to be provided by Commission on Principal Line Segments identified in subsections 1(q)(1)-(7) of this Agreement in situations where Operator cannot justify and is unable to provide a desired level of freight rail service, provided that Commission indemnifies Operator in all respects under this Agreement and that Commission and WisDOT release in writing Operator from any obligation or liability which would be incurred if Operator were

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<sup>8</sup> See id.

<sup>9</sup> See id. at Agreements’ Section 2.2(a).

<sup>10</sup> See id. at Agreements’ Section 2.2(g).

<sup>11</sup> See Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34767 (STB served Dec. 2, 2005, Feb. 6, 2006, and Mar. 13, 2006) (WisDOT I).

<sup>12</sup> See, e.g., Utah Transit Authority—Acquisition Exempt.—Union Pacific Railroad Company, STB Finance Docket No. 35008 et al. (STB served July 23, 2007) (addressing whether operating window established for freight operations, so as not to avoid interfering with commuter service, was sufficient for freight railroad to fulfill its common carrier obligations).

performing the service provided by Commission. The written release shall specify the terms and conditions under which the release is issued. This provision does not apply to the Principal Line Segments between Saukville, Milepost 114.8 to Kiel, Milepost 151.8 identified in subsection 1(q)(8) and between Kohler, Milepost 4.0 to Plymouth, Milepost 14.95 identified in subsection 1(q)(9).

In WisDOT I, to address Board concerns,<sup>13</sup> the parties amended the agreement by deleting all but what now appears as the first sentence in Section 2.1(a), set forth above. Section 2.1(a) retains language similar to that deleted in WisDOT I, but the parties have included other language specifically excluding the trackage involved here from all but the first sentence, effectively limiting WisDOT's and the Commission's power over WSOR. We predicate our conclusion that this transaction comports with State of Maine upon this interpretation of Section 2.1(a).

Based on this record, we find that the proposed transaction is consistent with State of Maine. Because WisDOT will acquire only the physical assets of the line segment, it will not as a result of the transaction become a rail carrier. Thus, WisDOT's purchase of the line does not require our authorization under 49 U.S.C. 10901.

This decision 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 granted as discussed in this decision.
2. This decision will be effective on its service date.

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

Anne K. Quinlan  
Acting Secretary

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<sup>13</sup> The Board expressed concern that the provision appeared to vest WisDOT and its intermediary lessor with the ability not only to affect WSOR's operations by determining the desired level of service, but also to provide freight service itself.