

SERVICE DATE - JUNE 30, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34464

WISCONSIN & SOUTHERN RAILROAD CO.– ACQUISITION
EXEMPTION–IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Decided: June 29, 2004

By petition filed on January 30, 2004, Wisconsin & Southern Railroad Co. (WSOR) seeks an exemption pursuant to 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10902 to acquire 7.33 miles of railroad in Janesville, Rock County, WI, owned by Iowa, Chicago & Eastern Railroad Corporation (IC&E).¹ WSOR indicates that the subject trackage includes approximately 6.48 miles of track it currently leases and over which it already operates, plus .85 miles of connecting track, and consists, as described by petitioner, of the following track segments: (1) between the division of ownership at milepost 94.49 on Buyer's line to Fox Lake, IL, and the division of ownership at milepost 11.02 on Buyer's line to Monroe, WI; (2) between milepost 98.27 and milepost 46.75 on Buyer's line to Milton Jct., WI; (3) between milepost 9.96 and milepost 46.08, consisting generally of the north leg of the wye track at Janesville; and (4) the connecting track between milepost 45.23 and the connection with the leased premises at milepost 46.08. The Board will grant the exemption, subject to notice to employees and labor protective conditions.

BACKGROUND

WSOR is a Class II rail carrier that operates over 600 miles of rail line in Wisconsin and northern Illinois.² According to WSOR, it (or its predecessors) has held operating rights

¹ According to WSOR, IC&E is a Class II regional railroad that began operations in 2002 when it acquired substantially all of the rail assets of the former I&M Rail Link, LLC (IMRL). Controlled by the Dakota, Minnesota & Eastern Railroad Corporation, it operates approximately 1,400 miles of track in six upper midwest states stretching from Chicago, IL, to Minnesota, Iowa, and Kansas City, MO. IC&E owns a stub-ended branch line extending from a connection with this Chicago-to-Kansas City main line at Davis Junction, IL, northward to a connection with the WSOR at Janesville.

² WSOR states that in 1992 its owner acquired control of another Class III railroad, the Wisconsin & Calumet Railroad (WICT). In 1996, WSOR merged WICT's operations and properties into WSOR. See Wisconsin & Southern Railroad Co.–Corporate Family Transaction

allowing it to use the subject trackage for approximately 18 years.³ WSOR states that it is currently the primary user of the line and, as noted, it already leases and operates over 6.48 miles of the trackage.

WSOR states that it has negotiated an agreement to purchase the subject line and related assets⁴ from IC&E and that the parties intend to consummate the transaction as soon as the exemption sought here becomes effective. It states that this transaction will have no impact on either the competitive situation at Janesville or the employees that work on the line. IC&E will retain local and overhead trackage rights over the subject line and so will continue to have direct access to all current and future shippers and interchanges on the line. WSOR states that the line currently serves only one shipper, but that it intends to develop new local freight business along the line.

WAIVER REQUEST

On June 9, 2004, WSOR filed a request for waiver of the Board's regulations at 49 CFR 1121.4(h), which require that acquisition and operation exemptions may not become effective until 60 days after applicant certifies to the Board that it has posted at the workplace of the employees on the affected line(s) and served a notice of the transaction on the national offices of the labor unions with employees on the affected line(s). WSOR states that it does not anticipate that this transaction will have any adverse impact on any railroad employees, and asks the Board to waive the requirements of this regulation so that the transaction may be consummated by June 30, 2004.

We find no justification for such a waiver because WSOR has not demonstrated the required degree of diligence in providing notice to all affected employees. The petitioner states that IC&E employees perform maintenance work on the line and that this work will be lost to them as a result of this transaction. WSOR's statement that the positions of IC&E employees who maintain the line will not be abolished, and that they will continue to perform work elsewhere on the IC&E system, falls short of an assertion that those employees will not be

Exemption–Wisconsin and Calumet Railroad Company, STB Finance Docket No. 33450 (STB served Sept. 5, 1997). WSOR also acquired trackage rights from other railroads to connect these lines. Early in 2003, WSOR's revenues increased such that it acquired Class II status.

³ At the time WSOR acquired trackage rights over the subject line, the line was owned by the Soo Line Railroad Company (Soo). Subsequently, IMRL acquired Soo's lines leading to Iowa and Kansas City, including the subject line at Janesville. In 2002, IC&E acquired the line when it acquired substantially all of IMRL's rail assets.

⁴ WSOR states that it has historically used and continues to need the yard and engine facilities at Janesville.

adversely affected. It is not clear that the notice that WSOR posted at Janesville on June 7 (a posting it certified on June 9, 2004) would even reach the affected employees.

WSOR's primary reason for seeking the requested waiver appears to be to avoid a \$50,000 penalty it will incur if it does not close the transaction by June 30, 2004. Because this financial penalty was created by WSOR's own agreement with IC&E, we find no overriding public benefit to granting this waiver. The Board has been entrusted to provide labor protection to the employees affected by this type of transaction, and both WSOR and IC&E employees are entitled to the full benefit of this protection. The requested waiver will be denied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10902, a Class II carrier providing transportation subject to the jurisdiction of the Board may not acquire an additional rail line without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued 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 of limited scope, or (b) regulation is not necessary 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 transportation 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. As WSOR states in its petition, this agreement will have no impact on the competitive situation over the subject line. As already indicated, IC&E intends to retain local and overhead trackage rights over the line and so will continue to have direct access to all current and future shippers and interchanges on the line. Given this market power finding, it is not necessary to determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of adversely affected 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), rev'd in part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998).⁵

WSOR states that this transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) and that an historic report is not required under 49 CFR 1105.8(b)(1). The Board's Section of Environmental Analysis has reviewed the transaction and has concluded that this transaction is exempt from the environmental and historic reporting requirements.

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 WSOR's compliance with Board regulations at 49 CFR 1121.4(h) and the employee protective conditions implementing 49 U.S.C. 10902(d) as provided in this decision.
2. WSOR's requested waiver of Board regulations at 49 CFR 1121.4(h) is denied.
3. Notice will be published in the Federal Register on July 6, 2004.
4. The exemption will become effective 60 days after WSOR certifies to the Board that it has fully complied with the Board's regulations at 49 CFR 1121.4(h).
5. Petitions to stay must be filed by July 12, 2004. Petitions to reopen must be filed by July 20, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

⁵ Although it maintains that no employees will be adversely affected by the transaction, WSOR indicates that it agrees to these labor protective conditions.