

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34871

WYOMING DAKOTA RAILROAD PROPERTIES, INC.
ACQUISITION AND OPERATION EXEMPTION
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

PETITION TO REVOKE EXEMPTION OF
CITY OF ROCHESTER

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Dated: June 15, 2006

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Pursuant to 49 C.F.R. § 1150.35(f) and 49 U.S.C. § 10502(d), the City of Rochester, Minnesota (“Rochester”) files its petition to revoke in the above-captioned proceeding. For the reasons stated herein, Rochester requests the Surface Transportation Board (“Board” or “STB”) to find that Wyoming Dakota Railroad Properties, Inc. (“WDRPI”) should be required to file an application pursuant to 49 U.S.C. § 10901 in order to effectuate the transaction contemplated by its Verified Notice of Exemption filed May 30, 2006 (“WDRPI Notice”). Application of 49 U.S.C. § 10901 is necessary to carry out the transportation policy of 49 U.S.C. § 10101.

I. BACKGROUND FACTS

Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) filed its application in Finance Docket No. 33407 on February 20, 1998. DM&E projected a construction cost of approximately \$532 million to allow it to reach Wyoming’s Power River Basin (“PRB”) coal mines. DM&E also projected a cost of approximately \$876 million to rebuild 598 miles of its lines in Minnesota and South Dakota to transport PRB

coal.¹ The rebuild portion of DM&E’s project, which a DM&E’s witness described as “essential,”² includes its line through Rochester.

In keeping with its responsibilities under 49 U.S.C. 10901(c), the Board found that, in order to rule favorably on DM&E’s application, it must find that “the applicant is financially fit to undertake the construction and provide service.”³ Accordingly, the Board gave extensive consideration to DM&E’s “financial fitness.”⁴ Notably, that consideration considered the entirety of DM&E’s estimated \$1.46 billion construction costs⁵ and the entirety of DM&E’s estimated revenues and expenses.⁶

II. WDRPI’S NOTICE OF EXEMPTION

WDRPI’s Notice of Exemption proposes a fundamental change to DM&E’s 1998 application. In lieu of one railroad, DM&E, constructing an extension and rebuilding its lines, WDRPI proposes to bifurcate the transaction. WDRPI proposes to construct and operate the extension of DM&E’s lines, *i.e.* the portion of the project originally estimated to cost \$532 million. It proposes to leave the “essential” \$876 million cost of rebuilding DM&E’s lines to DM&E. “WDRPI will not be involved in the rehabilitation of DM&E’s existing east-west main line between Wall, South Dakota and Winona, Minnesota.”⁷

WDRPI asserts that substituting it for DM&E “will facilitate financing of the [extension] project.”⁸ It provides no information as to the financing of the DM&E

¹ *Dakota, Minn. & E.R.R. Corp. Constr. Into the Powder River Basin*, 3 S.T.B. 847, 849 (1998).

² *Id.* at 855, n.13.

³ *Id.* at 863.

⁴ *Id.* at 866-892.

⁵ *Id.* at 888.

⁶ *Id.* at 890.

⁷ WDRPI Notice at 5.

⁸ *Id.* at 1. *See also, id.* at 4-5.

rebuild other than to suggest that such financing may be more difficult to obtain than the financing WDRPI contemplates for the extension project.⁹

WDRPI provides no information as to its proposed revenues, other than to state that it will be within the range for Class II rail carriers.¹⁰ Neither does WDRPI provide any information as to (1) WDRPI's estimated expenses, (2) DM&E's estimated revenues, or (3) DM&E's estimated expenses.

III. THE WDRPI EXEMPTION MUST BE REVOKED.

As noted above, the Board has determined that, in Section 10901 proceedings, it must find that the applicant is financially fit. This Board determination is fully consistent with, indeed mandated by, the Section 10101 transportation policy referenced by Section 10502(d). By way of example, Section 10101(3) states that the policy of the United States Government is “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues....” Here, WDRPI admits that it has reached no agreement with DM&E.¹¹ Thus, the Board cannot determine that either WDRPI or DM&E will have the “adequate revenues” necessary for safety. Of principal concern to Rochester, WDRPI's assertion that it is proposing to bifurcate the original DM&E transaction in order to “facilitate financing” for the extension project calls into question DM&E's ability to secure financing for the rebuild portion of its original project and whether DM&E's revenues, after it reaches a divisions arrangement with WDRPI, will be adequate to ensure safety.

In this regard, it must be recalled that the rebuild portion of DM&E's original project reflected the majority of its proposed construction expenditures. As noted above,

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 2.

the rebuild portion of the project was estimated by DM&E to cost approximately \$876 million, fully 60% of the total project construction cost. DM&E has described the rebuild project as “essential” and Rochester whole-heartedly agrees. Without that rebuild, operating unit trains of coal through Rochester would be a risky proposition at best.

The Board’s concerns with DM&E’s financial fitness reflect other Section 10101 transportation policies as well. Section 10101(4) and (5) speak in terms of “a sound rail transportation system” and “sound economic conditions.” Neither of these policy objectives can be met if the Board permits the bifurcation of DM&E’s proposal without any information as to the financial fitness of DM&E after the extension project is removed from its original proposal.

Section 10101(6) also is implicated directly by the WDRPI proposal. That section states that is the policy of the United States Government to have “rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.” A logical conclusion from WDRPI’s notice is that WDRPI and DM&E ultimately will divide the revenues that otherwise would have gone to DM&E alone. And, it is clear that the WDRPI divisions must be adequate from the viewpoint of the financing sources. What divisions will be left to DM&E? And will those revenues be adequate to secure the financing necessary for the 60% of total expenditures reflected by the rebuild component of DM&E’s original proposal? Of course, WDRPI and DM&E will respond to this petition by answering those questions in the affirmative. However, absent any agreement between the two and absent any evidence as to the financial fitness of both entities, the Board cannot fulfill its mandate under Section 10901 or Section 10101.

Section 10101(8) also mandates revocation under Section 10502. It is the policy of the United States Government to “operate transportation facilities and equipment without detriment to the public health and safety.” DM&E’s original proposal was described by the United States Environmental Protection Agency as “a nuisance to public health and safety.” The Secretary of Health and Human Services described that proposal as a “threat to the ability of [the Mayo Clinic, located in Rochester] to function.” Clearly, without any evidence as to the financial fitness of DM&E after the PRB extension has been removed from its project, the Board cannot address these concerns. And, since the Board considers safety to be of “paramount” importance, a refusal to consider the safety implications of the WDRPI proposal would be contrary to precedent.

Section 10101(11) states that the policy of the United States Government is to encourage “suitable working conditions in the railroad industry.” This policy also is directly implicated by DM&E’s financial fitness. If DM&E is not financially fit after removal of the PRB extension revenues, it cannot undertake either the “essential” rebuild of its lines or the equally essential maintenance of those lines. Its failure to do either would prevent it from establishing suitable working conditions.

Section 10101(13) states that the policy of the United States Government is “to ensure the availability of accurate cost information in regulatory proceedings.” This policy mandated the Board’s consideration of DM&E’s financial fitness in its Section 10901 proceeding. It also mandates consideration of the financial fitness of DM&E and WDRPI in this WDRPI Section 10901 proceeding.

While WDRPI cites to two prior cases in support of its request for exemption from the requirements of Section 10901, Rochester asks the Board to join Rochester in its

rejection of WDRPI's assertion that those cases involved "nearly identical circumstances."¹² Neither of the cases cited by WDRPI involved the bifurcation of a Board-approved project, let alone "the largest and most challenging rail construction proposal ever to come before" it, and neither of those cases left a gaping hole in the record, *i.e.*, the financial fitness of an entity which must secure what it estimated to be \$876 million in order to move forward with the project.

In contrast, Finance Docket No. 32607, *WFEC Railroad Company – Construction and Operation Exemption – Choctaw and McCurtain Counties, OK*, (served September 1, 1995) makes it clear that the Board has revoked an exemption "when the promoters... failed to demonstrate how they would raise [the funds] necessary to build the line."

Neither would this be the first time that the Board has required additional information in an exemption proceeding. In Finance Docket No. 32765, *Portland & Western Railroad, Inc. – Trackage Rights Exemption – Burlington Northern Railroad Company* (served March 11, 1997), the Board required the applicant to provide additional information, including revenues and expenses. *See also*, Finance Docket No. 30911, *Chicago, Missouri & Western Railway Company – Exemption Acquisition and Operation – Illinois Central Gulf Railroad Company* (decided May 25, 1989). Absent such information here, the Board cannot carry out the transportation policy of 49 U.S.C. § 10101.

¹² *Id.* at 5.

CONCLUSION

For the reasons stated herein, the Board is requested to (1) find that application of 49 U.S.C. § 10901 is necessary to carry out the transportation policy of 49 U.S.C. § 10101 and (2) revoke the WDRPI exemption.

Respectfully submitted,

City of Rochester

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Its Attorney

Dated: June 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of June, 2006, served a copy of the forgoing upon William C. Sippel, Esq. and Thomas J. Litwiler, Esq. Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832 and all other parties of record by first class mail, postage prepaid.

Steven J. Kalish

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