

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36178

METROPOLITAN COUNCIL—PETITION FOR DECLARATORY ORDER

Decided: June 1, 2018

On April 4, 2018, the Metropolitan Council (the Council), a political subdivision of the State of Minnesota, filed a petition for a declaratory order asking the Board to declare that certain transactions among the Council, Hennepin County Regional Railroad Authority (HCRRA), and Soo Line Railroad Company d/b/a Canadian Pacific Railway Company (CP) involving the transfer of railroad track and right-of-way do not require Board authorization under the line of precedent beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991), and will not result in the Council becoming a rail common carrier. (Pet. for Declaratory Order 1.)¹

On April 24, 2018, Twin Cities & Western Railroad Company (TCW), which operates over the track at issue pursuant to overhead trackage rights, submitted initial comments opposing the petition. More than 30 shippers, municipalities, and other stakeholders also filed letters expressing concerns about the proposed transactions and describing the importance of service provided by TCW.

A decision served on May 22, 2018, instituted a declaratory order proceeding, which opened the proceeding to public comment and asked the parties to address several specific issues raised by the pleadings. In describing the first issue to be addressed by the parties—regarding the protection of TCW’s interests—the decision asked if there are changes that could bring the parties to common ground and suggested that the parties consider mediation. TCW submitted a letter agreeing to mediation; the Council, speaking for itself and for HCRRA, also agreed, albeit with certain suggested pre-conditions.

Within 10 days of the service date of this decision, the Chairman will appoint one or more mediator(s). Once appointed, the mediator or mediators will contact the parties to discuss the time and location of any meetings, and other matters. At least one principal of each party,

¹ On April 5, 2018, HCRRA filed, in Docket No. FD 36177, a verified notice of exemption to acquire from CP a permanent, exclusive rail freight operating easement over the track at issue. At TCW’s request, by decision served on May 3, 2018, the effectiveness of the exemption was postponed until further Board order.

who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The Board may extend mediation pursuant to mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.²

The Board will not hold the proceeding in abeyance at this time. When all parties consent to mediation, it is within the Board's discretion to hold a proceeding in abeyance while mediation procedures are pursued. 49 C.F.R. § 1109.3(e). Here, while all parties have consented to mediation, the Council requests that the Board not toll the procedural schedule.

It is ordered:

1. Mediation will be initiated as discussed above.
2. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

² In its letter consenting to mediation, the Council states that it would like the mediation to terminate, at the option of either party, by June 21, 2018; that it would like the mediation to address all matters at issue between the parties, including some pending court litigation; that it would like to engage only in "shuttle diplomacy" with limited or no joint sessions; and that it would like the procedural schedule in this matter to remain intact. It also states that it "needs" a final merits decision by July 12, 2018. On May 30, 2018, TCW filed a response in which, among other things, it supports a "shuttle diplomacy" approach but suggests that the mediators should be free to structure the mediation as they see fit. TCW also notes that it "agreed to [the] Council's request to conduct the mediation on or before June 21, 2018" and that, although it agrees to mediate on all issues before the Board and the district court, failure to agree on district court matters should not preclude settlement on Board matters.

Although the exact format of mediation will not be determined at this time, the mediator will seek to effectuate the wishes of the parties to the extent appropriate. And while the parties are encouraged to work out as many issues as possible, the scope of the mediation will not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.