

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36186

TEXAS RAILWAY EXCHANGE LLC—CONSTRUCTION AND OPERATION
EXEMPTION—GALVESTON COUNTY, TEX.

Docket No. FD 36186 (Sub-No. 1)¹

PETITION OF TEXAS RAILWAY EXCHANGE LLC FOR ISSUANCE OF A CROSSING
ORDER PURSUANT TO 49 U.S.C. § 10901(D)

Digest:² This decision grants the petition for exemption filed by Texas Railway Exchange LLC (TREX) to construct and operate a new one-half mile rail line in Galveston County, Tex., subject to environmental mitigation conditions. This decision also grants the unopposed petition filed by TREX for issuance of a crossing order to allow the new rail line to cross tracks owned by Union Pacific Railroad Company.

Decided: January 16, 2020

On November 21, 2018, Texas Railway Exchange LLC (TREX) filed a petition for an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately one-half mile of rail line in Galveston County, Tex. (the Line), to provide Texas International Terminals Ltd. (TI Terminals) with a connection to BNSF Railway Company (BNSF) (Petition for Exemption). TREX also requested that the Board conditionally grant its petition within 90 days, subject to the issuance of a final Board decision on the proposed construction after completion of the environmental review.

By decision served on February 15, 2019, the Board instituted a proceeding under 49 U.S.C. § 10502(b). The Board's Office of Environmental Analysis (OEA) issued a Draft Environmental Assessment (EA) on February 22, 2019, examining the potential environmental impacts of TREX's proposal and requesting public comments, as required by the National

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f).³ After considering the comments received in response to the Draft EA, OEA issued a Final EA on May 2, 2019. Based on its analysis, OEA recommended environmental conditions to avoid, minimize, or mitigate the potential environmental impacts of the proposed construction and operation.

On February 22, 2019, TREX filed a petition for issuance of a crossing order pursuant to 49 U.S.C. § 10901(d) (Crossing Petition) to allow the proposed Line to cross tracks owned by Union Pacific Railroad Company (UP).

After considering both the rail transportation and environmental issues, the Board will grant the Petition for Exemption subject to the recommended environmental mitigation measures in the Final EA. Consequently, the Board will deny as moot TREX's request for a conditional grant of the exemption. The Board will also grant the Crossing Petition subject to the recommended environmental mitigation measures in the Final EA that pertain to the crossing, and require the parties to negotiate the compensation and any remaining terms for the crossing.

BACKGROUND

TREX is a corporate affiliate of TI Terminals, which owns and operates a liquid and dry bulk terminal in Galveston, Tex. In its Petition for Exemption, TREX states that the purpose of the proposed Line is to provide direct and permanent railroad service between BNSF's Valley Yard and TI Terminals' loop track. (Pet. for Exemption 3 & Sullivan V.S. ¶¶ 38-39.) According to TREX, TI Terminals' customers currently rely on reciprocal switching service from UP for BNSF trains to access TI Terminals. TREX states that UP's reciprocal switching entails restrictive operating conditions and rules that require several unnecessary train movements that result in significant delays. (*Id.* at 3 & Sullivan V.S. ¶¶ 14, 16-31, 32.) TREX states that direct access to TI Terminals would eliminate the need for the existing reciprocal switching service and the associated difficulties arising from multiple train movements and car switching events between the BNSF Valley Yard, the UP Interchange Yard, and TI Terminals' industry and loop tracks. (*Id.* at 4.)

On March 14, 2019, UP filed its reply to TREX's Petition for Exemption. UP argues that this is not a routine construction case and opposes issuance of a conditional grant, because the proposed Line must cross UP's tracks and extend laterally over other property owned by UP. (UP Reply 2, Mar. 14, 2019.) UP objects to TREX's characterization of UP's current service to TI Terminals, although UP acknowledges that service issues are normally irrelevant in construction cases. (*Id.* at 3 (citing Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—for Constr. in Will Cty., Ill., FD 34060, slip op. at 4 (STB served Mar. 21, 2002)).) According to UP, TREX fundamentally misrepresents the physical constraints on UP's ability to

³ Because TREX would need to cross the UP line to implement the proposed construction project, OEA's environmental analysis assessed both the proposed construction and operation of the Line and the planned crossing of UP's tracks.

switch cars delivered by BNSF into TI Terminals' facility. (UP Reply 3, Mar. 14, 2019.) UP further states that TREX misrepresents UP's responses to TI Terminals' requests for special switches. (Id. at 4.)

The Board has received letters in support of TREX's Petition for Exemption from United States Representative Randy Weber, Canadian Advantage Petroleum Corporation, and Archer Daniels Midland Company.

Pursuant to the procedural schedule for the Crossing Petition, set by the Board in a decision served April 4, 2019, UP filed its reply to the Crossing Petition on June 18, 2019. In its reply, UP consents to the issuance of the crossing order and states that it is prepared to negotiate with TREX the terms of operations and the amount of payment. On June 28, 2019, TREX filed its rebuttal, asserting that UP's consent establishes that TREX has fully satisfied the Board's § 10901(d) standards.

Subsequently, counsel for TREX indicated to OEA that TREX was considering modifying the type of crossing to be used in crossing UP's tracks. On August 5, 2019, the Board issued a decision directing TREX to file a report updating the Board on the status of discussions with UP regarding the possible modification of the proposed crossing configuration. TREX filed its report on August 15, 2019, stating that the parties had held discussions on the proposed routing, crossing, and operations, as well as related matters, and were engaged in further discussions. On November 7, 2019, following an October 11, 2019 Board order requesting an update on the parties' discussions, TREX submitted a status report stating that the parties' discussions have not resulted in an agreement to modify the type of crossing or routing specified in the Crossing Petition, and that TREX has elected to move forward with the proposed crossing configuration in its Crossing Petition.

On January 6, 2020, Representative Weber filed a letter requesting the Board promptly issue final decisions on TREX's Petition for Exemption and Crossing Petition. On January 7, 2020, TREX filed a request that the Board issue final decisions as soon as possible, and by no later than January 31, 2020.

DISCUSSION AND CONCLUSIONS

Petition for Exemption

Rail Transportation Analysis. The construction and operation of new railroad lines requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. Section 10901(c) directs the Board to grant rail construction proposals unless it finds the proposal "inconsistent with the public convenience and necessity." See Alaska R.R.—Constr. & Operation Exemption—Rail Line Extension to Port

MacKenzie, Alaska, FD 35095, slip op. at 5 (STB served Nov. 21, 2011), aff'd sub nom. Alaska Survival v. STB, 705 F.3d 1073 (9th Cir. 2013).

Under § 10502(a), the Board must exempt a transaction or service from regulation when it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) regulation is not needed to protect shippers from an abuse of market power.

Based on the record, the Board concludes that the proposed construction and operation of the Line qualifies for an exemption under § 10502 from the formal application procedures of § 10901.⁴ The formal application procedures of 49 U.S.C. § 10901 are not necessary in this case to carry out the rail transportation policy. The requested exemption would minimize unnecessary expense associated with the preparation and filing of a formal construction application, expedite regulatory decisions, and reduce regulatory barriers to entry for the Line. See 49 U.S.C. § 10101(2), (7), (15). Moreover, construction and operation of the Line would allow more effective competition for business at TI Terminals, thereby advancing the development and continuation of a sound rail transportation system with effective competition among rail carriers. 49 U.S.C. § 10101(1), (4). Other aspects of the rail transportation policy would not be adversely affected.

In addition, consideration of the proposed rail line under § 10901 is not needed to protect shippers from an abuse of market power. The construction and operation of the proposed Line

⁴ As TREX acknowledges, upon construction of the Line, TREX will have a common carrier obligation to provide service on the Line. (Pet. for Exemption 5.) TREX states that it expects to enter into overhead trackage rights arrangements for BNSF to operate over the Line to serve TI Terminals. Alternatively, if necessary, TREX would either contract with a short line railroad or provide its own service directly to any customers located on the Line, or enter into arrangements with TI Terminals to provide private switching of BNSF trains to TI Terminals. (Id.)

by TREX would enhance competition by providing a new rail option for TI Terminals⁵ and allowing more efficient movement of trains between BNSF's tracks and TI Terminals.⁶

UP's opposition to the Petition for Exemption is based on (1) TREX's characterization of UP's service to TI Terminals, and (2) TREX's request for a conditional grant of the exemption. These concerns do not warrant denying TREX's Petition for Exemption. First, the Board need not make, and is not making here, a determination as to the adequacy of UP's current service to TI Terminals. "[T]he rail transportation policy of 49 U.S.C. [§] 10101 contemplates competition as a means of ensuring that shippers receive reasonable service at reasonable rates. A showing that the incumbent railroad's service is inadequate is simply not necessary to obtain authority for construction of a competing line." Midwest Generation, FD 34060, slip op. at 9. Second, as noted above, the Board is denying as moot TREX's request for a conditional grant of the exemption.

For these reasons, the Board concludes that the evidence on the transportation-related aspects of this case demonstrates that the proposed construction and operation of the Line qualifies for an exemption from the prior approval requirements of § 10901. Given the statutory presumption favoring rail construction and the evidence presented, the requested exemption from § 10901 has met the standards of § 10502 on the transportation merits.

Environmental Analysis. NEPA requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public concerning those effects. See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction project as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). While NEPA prescribes the process that must be followed, it does not mandate a particular result. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, the agency may conclude that other values outweigh the environmental costs. Id.

⁵ UP argues that the Board should not credit TREX's claims that the proposed construction will improve BNSF's competitive position in relationship to UP, as such claims are inconsistent with TREX's claim that the project should not increase the total volume of traffic moving to TI Terminals. (UP Reply 6.) However, as TREX explains, the purpose of the proposed construction is to provide direct and permanent railroad service between BNSF's Valley Yard and TI Terminals' loop track to replace the existing reciprocal switching arrangement, not to increase the total volume of rail traffic moving to TI Terminals. (Pet. for Exemption 3, 6; see also UP Reply, Attachment D at 2-4.)

⁶ Because regulation of the proposed construction and operation is not needed to protect shippers from the abuse of market power, the Board need not determine whether the proposed transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

The Environmental Review Process. On February 22, 2019, OEA issued for public review and comment a Draft EA, addressing the potential environmental impacts of the proposed project, including both the construction and operation of the Line and the proposed crossing of UP's line. The Draft EA considered three alternatives in detail: (1) the No-Action Alternative; (2) the Green Alternative (with two potential designs, Option A and Option B); and (3) the Blue Alternative (with two potential designs, Option A and Option B).⁷ (Draft EA ES-11 to ES-12.)

The Draft EA concluded that the Green and Blue Alternatives, and Options A and B associated with each of those alternatives, would have similar, but not significant, environmental impacts if the mitigation measures set forth in the Draft EA were imposed. (Draft EA 6-1 to 6-2.) Accordingly, OEA determined that the Environmental Impact Statement (EIS) process is unnecessary. (Id. at 6-1 to 6-2.)

In response to the Draft EA, comments were received from TREX; the Texas Department of Transportation, Rail Division (TxDOT); the Texas General Land Office; and the Texas Parks and Wildlife Department (TPWD). (Final EA 1-11 to 1-12; 2-1 to 2-10.) On May 2, 2019, OEA issued a Final EA concluding the environmental review process. In response to the comments received, OEA revised certain mitigation measures preliminarily recommended in the Draft EA and added one new mitigation measure. OEA's final recommended mitigation measures also reflect TREX's proposed modifications to address the concerns raised by TxDOT and TPWD in those agencies' comments. (See Final EA 3-1 to 3-9.) Based on its review of the available information, OEA concluded that, if the recommended mitigation measures detailed in the Final EA are imposed, neither the Green Alternative nor the Blue Alternative (including the two design options for each alternative (Options A and B)) would result in any significant environmental impacts. (Final EA 3-1.) OEA recommended that the Board authorize both the Green and Blue Alternatives, although if TREX is able to obtain the access over UP's tracks needed to construct the Blue Alternative, OEA recommended that TREX construct and operate that alternative to minimize impacts to wetlands and waterways. (Final EA 3-2.) In the event TREX is unable to obtain the access needed to construct and operate the Blue Alternative, then OEA recommended the Green Alternative. (Final EA 3-2.)

The Board's Analysis of the Environmental Issues. The Board will adopt the analysis and conclusions made by OEA. As such, the Board adopts the Draft EA (as modified by the Final EA) and Final EA, including the final recommended mitigation measures. The Board is satisfied that OEA has taken the requisite hard look at the potential environmental impacts associated with the proposed construction and operation of the Line and properly determined that, with the recommended environmental mitigation in chapter 3 of the Final EA, the proposed project will not have potentially significant environmental impacts, and that preparation of an EIS is unnecessary.

⁷ Each of the alternatives is also discussed in the Final EA. (See Final EA 1-2 to 1-3.)

Crossing Petition

Under 49 U.S.C. § 10901(d)(1), a rail carrier may not block any construction or extension authorized by the Board under 49 U.S.C. § 10901 by refusing to permit the crossing of its property if: (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

UP consents to issuance of the crossing order requested by TREX, and the parties indicate that they are prepared to negotiate to reach an agreement on the compensation due to UP and terms for operations. (UP Reply 2, June 18, 2019; Crossing Petition 32-33.) If the parties are unable to agree on the amount of payment, or any remaining terms, either party may submit the matters in dispute to the Board for determination. 49 U.S.C. § 10901(d)(2).

CONCLUSION

After considering the various rail transportation and environmental issues and the record as a whole, the Board finds that the petition for exemption to allow construction and operation of the Line should be granted, subject to compliance with the environmental mitigation set forth in the Final EA, for either the Green Alternative (Option A or B) or the Blue Alternative (Option A or B).⁸ The Board will also grant the unopposed Crossing Petition.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TREX's petition for an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate the Line is granted as discussed above.
2. TREX's request for a conditional grant of the petition is denied as moot.
3. The Board adopts the environmental mitigation measures set forth in the Final EA and imposes them as conditions to the exemption granted here.
4. TREX's petition for issuance of a crossing order pursuant to 49 U.S.C. § 10901(d) is granted.

⁸ The mitigation conditions apply both to the construction and operation of the Line and the proposed crossing over UP's tracks. As previously noted, OEA considered the potential impacts from both the Line and the possible crossing in the Draft and Final EA.

5. Notice will be published in the Federal Register on January 23, 2020.
6. Petitions for reconsideration must be filed by February 6, 2020.
7. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.