

SERVICE DATE – DECEMBER 1, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36328

KEN TENN REGIONAL RAIL PARTNERS, INC.—CONSTRUCTION & OPERATION
EXEMPTION—IN FULTON COUNTY, KY. AND OBION COUNTY, TENN.

Digest:¹ Ken Tenn Regional Rail Partners, Inc., has filed a petition for exemption to construct and operate approximately 12.17 miles of rail line in southwest Kentucky and northwest Tennessee. The Board addresses the transportation merits of the proposed construction and preliminarily concludes, subject to completion of the ongoing environmental review, that the proposed construction meets the statutory exemption standard.

Decided: November 30, 2020

On September 2, 2020, Ken Tenn Regional Rail Partners, Inc. (KTRRP), a noncarrier, filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authorization to construct and operate approximately 12.17 miles of rail line (Line) between milepost TennKen 51.69 at the Hickman-Fulton County River Port (Port) in Fulton County, Ky., and milepost UCT 450 near Union City, in Obion County, Tenn.

KTRRP asks that the Board issue a preliminary decision addressing the transportation merits of the construction project while the environmental review is ongoing. As discussed below, the Board concludes that such an approach is appropriate here and preliminarily concludes, subject to completion of the ongoing environmental review, that the proposed construction meets the statutory standards for exemption under § 10502. This decision only addresses the transportation merits, however, and does not grant the exemption or allow construction to begin. After the Board has considered the potential environmental impacts associated with this proposal, it will issue a final decision either granting the exemption, with conditions if appropriate, or denying it.

BACKGROUND

KTRRP states that it is a non-profit corporation created to construct and operate the Line by the Fulton County Industrial Development Authority of Kentucky, which provides assistance with economic development in Fulton County, and the Industrial Development Board of the City

¹ 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 Pol’y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

of Union City, which is an economic development agency and sub-entity of Union City. (Pet. 3.)²

The petition states that the Port is a public entity that provides bulk and break-bulk cargo transfer operations for a variety of commodities and transloading transfer service, storage, and rail service. (*Id.* at 3-4.) Rail service at the Port is provided by the TennKen Railroad Company (TennKen), which connects with Canadian National Railway Company (CN) at Dyersburg, Tenn. (*Id.* at 4.)

As noted above, the proposed Line would begin at the Port at milepost TennKen 51.69, near the Mississippi River, and extend to milepost UCT 450 in Obion County. (*Id.* at 2.) According to KTRRP, two separate segments of the Line, totaling 3.47 miles, would be built over existing rights-of-way that are not currently in use: one would run from Union City to the north, on the west side of Tennessee Highway 21 to the Tennessee/Kentucky state line and then along the west side of Kentucky State Route 239 to Kentucky State Route 166; the other would parallel the east side of Kentucky Highway 125 just north of Kentucky Highway 166 for approximately 0.75 miles. The remainder of the Line would be newly constructed right-of-way running east to west until connecting to TennKen in Fulton County, Ky. (*Id.* at 6, Ex. B, Joint V.S. Billingsley & Curlin 3.) KTRRP notes that the proposed Line ultimately would join TennKen with the Union City Terminal Railroad to create a 46.1-mile loop connecting with CN at both Dyersburg and Rives, Tenn. (Pet., Ex. B, Joint V.S. Billingsley & Curlin 4.)

KTRRP states that the proposed Line is located in an area that is a “lightly settled, economically depressed, agricultural region.” (Pet. 6.) KTRRP asserts that the proposed Line would support economic development by providing the Port and local industrial facilities with easier and more cost-effective access to the interstate rail network. Specifically, a connection through Union City would allow the Port to utilize grain elevators in Union City and to transport outbound dried distillers’ grain from local ethanol production. (*Id.* at 7, Ex. B, Joint V.S. Billingsley & Curlin 4.) KTRRP states that the current transportation option for most shippers to the east of the Port is via truck along Tennessee Highway 5/Kentucky State Highway 125. (Pet. 7)

KTRRP argues that regulation of the construction and operation of the proposed Line is not needed to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101, and the transaction is of limited scope. (*Id.* at 9-10.) Alternatively, it argues that application of § 10101 is not necessary to protect shippers from an abuse of market power. (*Id.* at 11.) KTRRP argues that an exemption is consistent with §§ 10101(2) and 10101(7), as it would minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry. (*Id.* at 10.) Additionally, KTRRP asserts that the exemption would satisfy §§ 10101(4) and 10101(5), because it would provide an alternative means of transportation and/or enhance competition and the proposed Line meets a public need. (*Id.*)

² KTRRP states that it intends to contract with a Class III rail carrier to operate over the proposed Line. (Pet. 5.)

KTRRP asserts that a preliminary determination on the transportation merits is appropriate here because its proposed construction is a transportation and economic development project that has already received funding and other support from the state governments of Kentucky and Tennessee, as well as local governments in the region. (*Id.* at 12.) It further explains that a preliminary approval on the transportation merits will support fundraising and planning efforts, demonstrate that additional investment of state and local resources is warranted, and remove any uncertainty concerning the transportation benefits of the proposed Line. (*Id.*)

On October 8, 2020, U.S. Representative James Comer filed a letter in support of KTRRP's petition. No party has filed in opposition to the petition.

DISCUSSION AND CONCLUSIONS

The construction of new railroad lines that are to be part of the interstate rail network 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—A 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) (addressing the Board's construction exemption process).

Under 49 U.S.C. § 10502(a), however, “the Board, to the maximum extent consistent with [Part A], shall exempt” a transaction (including a construction proposal) from the prior approval requirements of § 10901 when it finds that: (1) regulation is not necessary to carry out the RTP of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope or (b) application of the statutory provision is not needed to protect shippers from the abuse of market power.

Issuance of Preliminary Decision on the Transportation Merits.

As noted above, KTRRP requests that the Board issue a preliminary decision addressing the transportation merits of the project in advance of a decision on the environmental issues. KTRRP asserts that a preliminary decision addressing the transportation issues would support continued fundraising and planning, demonstrate that additional investment of state and local resources is warranted, and remove any uncertainty concerning the transportation benefits of the proposed Line. (Pet. 11-12.)

The Board has considered requests for preliminary decisions addressing the transportation merits of a project over the years.³ Here, KTRRP has received support for the

³ See Six Cnty. Ass'n of Gov'ts—Constr. & Operation Exemption—A Rail Line Between Levan & Salina, Utah, FD 34075 (STB served Sept. 3, 2015); Alaska R.R.—Constr. & Op. Exemption—Rail Line Between Eielson Air Force Base and Fort Greely, Alaska, FD 34658 (STB served Oct. 4, 2007); Burlington N. & Santa Fe Ry.—Constr. & Op. Exemption—Merced Cnty., Cal., FD 34305 (STB served Mar. 28, 2003).

project from state and local entities and is seeking further investment assistance; the transportation merits of the project, which would support regional economic development, are apparent, as discussed in this decision; and there is no opposition to either the request for preliminary decision or the exemption itself. In these circumstances, the Board finds it appropriate to issue a preliminary decision while the Board continues the environmental review of the proposed construction.

Rail Transportation Analysis.

Based on the record, the Board preliminarily concludes that the proposed construction, which is unopposed on the transportation merits, qualifies for an exemption under § 10502 from the formal application procedures of § 10901. First, regulation under § 10901 is not necessary to carry out the RTP. The record here shows that the proposed Line would provide enhanced rail service to and from the Port and surrounding area. Currently, the primary transportation option for shippers east of the Port is via trucks. The connection through Union City would provide local industrial facilities access to the interstate rail network and allow traffic to utilize grain elevators and to transport outbound dried distillers' grain. The proposed Line would enhance competition by providing shippers in the area with an additional and more cost-effective freight option and foster sound economic conditions, consistent with 49 U.S.C. § 10101(4) and (5). Exempting the proposed construction from the requirements of § 10901 would also 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 in furtherance of 49 U.S.C. § 10101(2), (7) & (15). Other aspects of the RTP would not be adversely affected.

In addition, application of § 10901 is not necessary to protect shippers from an abuse of market power.⁴ Because shippers would be gaining additional and improved transportation options (with no reduction in service options), the proposed Line would enhance competition.

Environmental Review.

As discussed above, the Board has preliminarily concluded that the proposed construction meets the statutory standards for exemption, subject to completion of the ongoing environmental review. KTRRP has consulted with the Board's Office of Environmental Analysis (OEA) regarding the environmental review process. By letter dated May 29, 2020, KTRRP requested a waiver of the requirements of 49 C.F.R. § 1105.6(a), which generally requires the preparation of an Environmental Impact Statement for rail construction and operation proposals. OEA granted the request on June 9, 2020, finding that preparation of an Environmental Assessment (EA) is the appropriate level of environmental documentation for this proceeding. OEA currently is preparing a Draft EA and any associated historic or cultural review that will be made available for public comment. Following the conclusion of the environmental review process, the Board will issue a further decision assessing the potential environmental impacts of the construction

⁴ 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 transaction is limited in scope. 49 U.S.C. § 10502(a)(2).

proposal and determining whether the exemption will become finally effective (subject to appropriate mitigation conditions, if necessary). See Mo. Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994).

The decision issued today does not prejudice the Board's final decision, nor diminish the agency's environmental review process concerning the proposed Line's construction. See Ill. Com. Comm'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988). Construction may not begin until the Board's final decision in this proceeding has been issued and has become effective.

It is ordered:

1. Under 49 U.S.C. § 10502(b), a proceeding is instituted.
2. Under 49 U.S.C. § 10502, the Board preliminarily exempts the construction of the above-described Line from the prior approval requirements of 49 U.S.C. § 10901, subject to further consideration of the potential environmental impacts of the proposal.
3. On completion of the environmental review, the Board will issue a further, final decision addressing any potential environmental impacts and determining whether the exemption should become effective (subject to any appropriate mitigation conditions). Construction may not begin until the Board's final decision has been issued and has become effective.
4. Notice of this decision will be published in the Federal Register.
5. Petitions to reconsider must be filed by December 21, 2020.
6. This decision is effective 30 days from the date of service.

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