

SERVICE DATE – AUGUST 1, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36489

SAVANNAH INDUSTRIAL TRANSPORTATION, LLC—OPERATION EXEMPTION—IN
EFFINGHAM COUNTY, GA.

Digest:¹ The Board holds in abeyance the petition by Savannah Industrial Transportation, LLC (SIT) seeking an operation exemption and directs the owner of the track, Savannah Industrial Logistics, to file for construction authority after the fact. The Board is also ordering SIT to file for acquisition authority after the fact. To prevent harm to the shipper(s) currently located on the track, the Board grants SIT a limited exemption to operate during the pendency of the anticipated construction and acquisition proceedings.

Decided: July 31, 2023

On May 11, 2021, Savannah Industrial Transportation, LLC (SIT), a noncarrier, filed a petition (the Petition) under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to operate as a common carrier on railroad track (the Track) that it leases from noncarrier Savannah Industrial Logistics, LLC (SIL).² SIT is controlled by OmniTRAX Holdings Combined, Inc. (OmniTRAX), a company that controls other carrier and noncarrier subsidiaries. See Notice 2, May 11, 2021, OmniTRAX Holdings Combined, Inc.—Control Exemption—Savannah Indus. Transp., LLC, FD 36490. The Track, which has no mileposts, is located at or near Rincon, Effingham County, Ga., and extends from a connection with Norfolk Southern Railway Company (NSR) near NSR milepost 16.6 to a connection with CSX Transportation, Inc. (CSXT), near CSXT milepost S484.0, a distance of approximately 11,404 feet. (Pet. 2.)

BACKGROUND

The Petition indicates that the Track was constructed in 2020 as part of a larger project involving an industrial park in Rincon, Ga. (the Facility), located approximately 11 miles northwest of the Port of Savannah, Ga., that has access to both CSXT and NSR. (Pet. 1-3.) According to the Petition, the Facility’s dual access to NSR and CSXT “makes the location

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

² SIT states that it is an affiliate of SIL. (Pet. 1.)

highly attractive to rail shippers,” and SIL and SIT “expect to be able to attract numerous railroad service-dependent customers to the Facility.” (*Id.* at 3.) The intent was “that the Facility would host a variety of tenants.” (*Id.*, Ex. C, V.S. Touesnard 2.)

The Petition states that the Track was constructed without Board authority because, during the planning and construction of the Facility and the Track, SIT and SIL anticipated that SIT would function as a private switching carrier within the Facility. (Pet. 3, 5-6.) The Petition indicates that SIT perceived, at that time, that acting as a private carrier would offer certain cost and administrative advantages over becoming a common carrier. (*Id.* at 3, 6.) OmniTRAX indicates that it “determined not to have SIT pursue authorization to construct and operate the Track within the Facility as a common carrier,” noting that the decision was “relatively straightforward” in this instance. (*Id.*, Ex. C, V.S. Touesnard 2.)³

SIT states that it had anticipated that CSXT or NSR, as appropriate, would be the origin or destination carrier on the waybill for shipments to or from the Facility. (Pet. 3, 6.) According to SIT, CSXT and NSR had proposed to pay SIT a per-car private carriage switching allowance for SIT’s placement and retrieval of cars within the Facility, which was initially acceptable to SIT. (*Id.*) SIT represents that after the Track was completed, it discovered that CSXT and NSR intended to transmit payment to SIT for its services only once or twice a year. (*Id.*) SIT states that being paid, at best, twice a year would not provide it with the cash flow necessary to sustain its operations. (*Id.* at 6.) SIT asserts that these unforeseen financial constraints have prompted it to seek Board authority to operate as a common carrier on the Track.⁴ (*Id.*)

³ Peter Touesnard, OmniTRAX’s Chief Commercial Officer (CCO) at the time the Petition was filed, identified four factors that OmniTRAX considered when deciding to keep SIT as a non-carrier:

1) neither SIL nor SIT needed the condemnation authority afforded to railroads under state law to assemble the required real estate parcels; 2) it was assumed that negotiations with NSR and CSXT would proceed on reasonable business terms, and, indeed, each of the Class I’s was amenable to SIT functioning as a private carrier; 3) it was perceived that the Facility’s rail-dependent users would see little benefit from the insertion of an additional common carrier between their operations and the Class 1’s; and 4) the administrative burdens and costs associated with being a common carrier - compliance with federal laws applicable only to common carriers, such as the Federal Employers Liability Act (45 U.S.C. § 51 *et seq.*) and the Railroad Retirement Act (45 U.S.C. § 231 *et seq.*), coupled with the greater scrutiny that common carriers typically receive from the Federal Railroad Administration – were unnecessary to incur, given the very limited scope of SIT’s operation.

(Pet., Ex. C, V.S. Touesnard 2-3.)

⁴ SIT states that, by becoming common carrier, it would be able to register with the Association of American Railroads’ Interline Settlement System (ISS), an interchange database that “provides an automated, real time means to track cars exchanged between carriers.” (Pet. 3, 6.) SIT states that, as a common carrier, it would engage in formal interchange with CSXT and

Because some of the representations made in the Petition regarding the intended use of the Track appear to be inconsistent with OmniTRAX's prior representations to the Board, on September 14, 2021, the Board issued a decision requesting additional information from OmniTRAX and SIT. Savannah Indus. Transp., LLC—Operation Exemption—in Effingham Cnty., Ga. (Sept. Decision), FD 36489, slip op. at 2-3 (STB served Sept. 14, 2021). The decision noted that, on January 19, 2018, several individuals representing OmniTRAX attended a meeting (January 19 Meeting) with staff from the Board's Office of Environmental Analysis (OEA) and the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) to discuss a project referred to as the Savannah Gateway Industrial Hub (the Hub). At that meeting, OmniTRAX provided OEA with conceptual plans for the Hub, which appeared to be planned for a location at or near Rincon, Effingham County, Ga.

Subsequently, on July 3, 2018, Savannah Industrial Railway, LLC (SIR), a subsidiary of OmniTRAX, filed with OEA a request to waive the six-month prefiling notice requirements of 49 C.F.R. § 1105.10(a)(1) (the Waiver Request)⁵ for the rail line it proposed to build in the Hub.⁶ In the Waiver Request, SIR stated that it "intends to file an application under 49 U.S.C. § 10901, to construct a rail line in the Savannah Gateway Industrial Hub which is a 2,700-acre rail served master-planned development located near the Port of Savannah." The Waiver Request described the proposed rail line as connecting with CSXT's line "approximately 285 feet south of CSX milepost S483" and NSR's line "at milepost SA 16.5, of the NS Coastal Division, S&A Sub-Division." OEA issued a letter granting the Waiver Request on July 8, 2018,⁷ but an application to construct a rail line at Savannah Gateway Industrial Hub under § 10901 was never filed with the Board.

In light of the information previously provided by OmniTRAX to the Board regarding what appeared to be the Track at issue in the Petition, the Board requested information regarding whether the Track built by SIL at the Facility was the same rail line that was the subject of the Waiver Request. If so, OmniTRAX and SIT were required to submit any relevant documentation about the rail properties—including on uses and operations—and explain why § 10901 construction authority was not sought from the Board. Sept. Decision, FD 36489, slip op. at 3.

On September 28, 2021, SIT and OmniTRAX submitted a reply (the Reply) in response to the Board's request for more information. In the Reply, SIT and OmniTRAX confirm that the Hub and the Facility are the same project, and that the Track is substantially similar to, but constitutes only a portion of, the track described in the Waiver Request. (Reply 2-3.) In

NSR, which ISS tracks. This would eliminate the record-keeping and accounting issues that CSXT and NSR indicated were the impediment to paying SIT more frequently. (Id. at 6.)

⁵ Letter from Karl Morrell to Victoria Rutson, then-Dir. of OEA (July 3, 2018).

⁶ Under the Board's regulations, if an application may require an environmental impact statement, the applicant must provide OEA with written notice of its proposal at least six months prior to filing its application. 49 C.F.R. § 1105.10(a)(1).

⁷ Letter from Victoria Rutson, then-Dir. of OEA, to Karl Morell (July 9, 2018).

response to the Board's inquiry regarding why construction authority was not sought for the Track, SIT and OmniTRAX represent that OmniTRAX had considered two alternative approaches to the operation and construction of the track within the Facility: "one involving the construction and operation of a railroad line subject to the Board's jurisdiction, as was discussed with Board staff in 2018, and the other contemplating constructing and operating the trackage as part of a private (contract-only) switching facility outside of the scope of Board's jurisdiction." (Id. at 3.) SIT and OmniTRAX state that in 2018, following the meeting with Board staff, "OmniTRAX had not committed definitively to a common carrier operation at the Hub." (Id. at 4.) SIT and OmniTRAX contend that "contemporaneous communications examined since the [September Decision], in fact, reflect no definitive commitment to a common carrier path." (Id.) In support of their contention, SIT and OmniTRAX provided an almost entirely redacted legal memorandum from October 2017 that purports to discuss the pros and cons of operating as a common carrier versus a private carrier. (Id., Ex. B.)

SIT and OmniTRAX further represent that in 2019, when a shipper, A&R Logistics, approached OmniTRAX to construct a rail-served building at the Facility, "OmniTRAX concluded that the Facility trackage should be built and operated as a private switching enterprise." (Reply 4.) SIL was established to construct the Facility, and SIL and SIT entered into a lease agreement under which SIT was to provide private carriage. (Id.) According to SIT and OmniTRAX, SIL completed construction of the Track in "the latter half of 2020, and SIT operations commenced on or about October 30, 2020." (Id.) At the time of the Reply, SIT served only one industry located within the Facility: A&R Logistics. (Id. at 4-5.)

SIT and OmniTRAX explain that changes in OmniTRAX staff, a change in counsel, and an inadequate record review are responsible for inaccuracies in the Petition regarding the background of the decision to build and operate the Track. (Reply 5.) SIT and OmniTRAX further explain that since its construction, the Track has been operated as a private track. (See id. at 5-6 (explaining current operations on the Track).)

DISCUSSION AND CONCLUSIONS

Based on the record before it, the Board finds that SIT and OmniTRAX intended to operate the Track as jurisdictional track for which Board authority should have been obtained under 49 U.S.C. § 10901 before construction commenced. Therefore, the Board will direct SIL to file for authority after the fact to construct the Track, direct SIT to file for authority after the fact to acquire the Track via lease, and hold SIT's Petition seeking operating authority in abeyance during the pendency of the construction proceeding. However, the Board will grant SIT a limited exemption to operate on the Track during the pendency of the construction and lease proceedings so that service to the shipper(s) currently on the Track is not interrupted.

SIL Construction Authority under § 10901. 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 through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. See Hanson Natural Res. Co.—Non-Common Carrier Status—Pet. for Decl. Ord., FD 32248, slip op. at 20-21 (ICC served Dec. 5, 1994). When construction authority is required under § 10901, the Board, through OEA, normally must

prepare an Environmental Impact Statement (EIS) in order to comply with its responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-11, and must conduct a historic review under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f). See 49 C.F.R. §§ 1105.6(a), 1105.8(a).⁸

There are, however, exceptions. Under 49 U.S.C. § 10906, the construction of spur, industrial, team, switching, or side tracks does not require Board authority, although such track is still within the jurisdiction of the Board. In addition, certain “private” track is outside of the Board’s jurisdiction altogether. See Hanson Natural Res. Co., FD 32248, slip op. at 20-21.

Whether a particular line is within the Board’s jurisdiction is a multi-factored and fact-specific determination. See NewVista Property Holdings—Pet. For Decl. Order, FD 36040, slip op. at 2 (STB served Mar. 17, 2017) (“[T]he Board depends on a case-by-case evaluation of all the facts and circumstances to determine whether the track remains within its jurisdiction. . . .”); see also Grafton & Upton R.R. Co.—Pet. for Decl. Order, FD 35752, slip op. at 5 (STB served Sept. 19, 2014) (deciding whether an activity is within the Board’s jurisdiction “is a case-by-case, fact-specific determination”); Town of Babylon—Pet. for Decl. Order, FD 35057, slip op. at 4-5 (STB served Feb. 1, 2008). In particular, the nature of the transaction and/or service which the railroad holds itself out to provide are informative in determining the status of a railroad. Northern Plains R.R.—Constr. & Operation Exemption—Musselshell & Yellowstone Cntys., Mont., FD 32011, slip op. at 2 (ICC served Dec. 28, 1992). Here, OmniTRAX’s and SIT’s representations and interactions with the Board regarding the intended use of the Track are instructive. In the Waiver Request, OmniTRAX made a clear representation to the Board that it intended the Track to be jurisdictional, not private, track. (Letter from Karl Morrell to Victoria Rutson, then-Dir. of OEA (July 3, 2018), attached as Appendix A to Sept. Decision (stating that SIR “intends to file an application under 49 U.S.C. § 10901”).) This statement supports a finding that, even before it was constructed, the Track was intended to be operated as common carrier track. Therefore, the Board finds that SIL should have sought Board authority to construct the Track prior to commencing construction.

Moreover, the timing of OmniTRAX’s and SIT’s representations to the Board also supports a finding that the Track was intended to be operated as common carrier track for which Board authority—and the associated environmental and historic review—is required. Both before and after construction of the Track, OmniTRAX and/or its subsidiaries expressed to the Board a desire to operate the Track as a common carrier. The Waiver Request, filed in July 2018, stated that SIR would seek Board authority under § 10901 to construct the Track. Construction of the Track began sometime in 2019, without any environmental and historic review by the Board. Then, mere months after construction of the Track was complete, SIT filed the Petition seeking to become a common carrier.

The Board recognizes that SIT, in its Petition, provided a verified statement from its CCO identifying the reasons that OmniTRAX chose to construct the track as private track, and then in its May 11, 2021 filing, provided a second verified statement from its CCO attesting that the

⁸ For certain rail construction cases, the Board may reclassify the proposal to require an Environmental Assessment, rather than an EIS. See 49 C.F.R. § 1105.6(d).

statements regarding SIL's decision to build the Track as a private track are true and correct to the best of his knowledge. However, the legal memorandum discussing the pros and cons of operating as a common versus private carrier submitted by the parties as evidence that OmniTRAX had not yet decided which course of action to take is dated October 2017. It is significant that roughly eight months after the date of the legal memorandum, SIR filed the Waiver Request, which contained an unequivocal statement that the intent was for the Track to be operated as jurisdictional track. And there has been no contemporaneous documentary evidence submitted that indicates any other intention. The weight of the evidence presented—the current intended use of the Track, representations by the parties to the Board, and the timing of those representations—suggests that the parties intended that the Track would be operated as common carrier track. Because SIL should have sought authority before it began constructing the track, the Board will instruct SIL to seek construction authority after the fact. Prior to filing its request for construction authority, SIL must consult with OEA concerning the Board's environmental and historic review requirements.

In addition, the timing of the parties' actions—constructing the Track purportedly as private track and then almost immediately seeking common carrier authorization—raises a concern as to whether they sought intentionally to evade environmental review of the construction. The Board strongly cautions the parties and any similarly situated entities against attempts to evade environmental review, and more generally, against abusing the Board's processes.

SIT Acquisition Authority Under § 10901. The acquisition of a line of railroad by a noncarrier requires prior approval by the Board under 49 U.S.C. § 10901(a)(4). Because the Board finds that the Track is being operated as a rail line within the Board's jurisdiction under 49 U.S.C. § 10901, SIT should have sought Board authority prior to acquiring the Track through its lease agreement with SIL. Therefore, in addition to the operating authority SIT seeks in its current Petition, the Board will instruct SIT to seek acquisition authority after the fact. Prior to filing its request for acquisition authority, SIT, likewise, must consult with OEA concerning the Board's environmental and historic review requirements.

Limited Exemption Under § 10901 for SIT's Current Operations. Under 49 U.S.C. § 10901, a rail carrier may not operate an extended or additional railroad line without the prior approval of the Board. However, under 49 U.S.C. § 10502(a), the Board shall exempt a transaction or service from regulation upon finding that (1) regulation is not necessary to carry out the 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 needed to protect shippers from the abuse of market power. The Board may issue an exemption on its own initiative. 49 U.S.C. § 10502(b).

Here, the Board will issue, on its own initiative, a limited exemption to allow SIT to continue its current operations on the Track pending consideration of the anticipated construction and acquisition proceedings. The exemption will only apply to service provided to any shippers currently located on the Track at the time of service of this decision and only for the duration of the Board's consideration of SIL's request for construction authority after the fact and SIT's request for acquisition and operating authority after the fact.

This exemption meets the criteria set forth in 49 U.S.C. § 10502. Given the limited scope of the exemption and the Board's requirement for further approval procedures, prior approval under § 10901 is not necessary to carry out the rail transportation policy. Allowing SIT to continue to serve the limited number of shipper(s) currently located on the Track is consistent with the rail transportation policy, as doing so will ensure the continuation of a sound rail transportation system without a disruption in service for those shippers. See 49 U.S.C. § 10101(4). Moreover, the limited exemption satisfies § 10502(a)(2)(B). Any shipper currently located on the Track will have more transportation alternatives if service is allowed to continue than if it were to cease while the Board's processes are being followed. In addition, allowing service to continue is not likely to lead to an abuse of market power because the exemption will allow for rail service to continue where none would otherwise exist.⁹

To ensure transparency, SIT will be required to provide the Board with a list of shippers to which SIT currently provides service¹⁰ and to provide a copy of this decision to those shippers. SIT will also be directed to serve a copy of this decision on any rail carrier to which it currently connects. SIT will be directed to comply with these requirements by August 31, 2023.

It is ordered:

1. The Petition is held in abeyance.
2. SIL is directed to file for construction authority after the fact within 60 days of the service date of this decision. Prior to filing, SIL must consult with OEA concerning the Board's environmental and historic review requirements.
3. SIT is directed to file for acquisition authority after the fact within 60 days of the service date of this decision. Prior to filing, SIT must consult with OEA concerning the Board's environmental and historic review requirements.
4. Under 49 U.S.C. § 10502(b), the Board exempts SIT's operation of the Track from prior approval requirements of 49 U.S.C. § 10901, as discussed above, to shippers currently located on the Track on the service date of this decision, during the pendency of the anticipated construction and acquisition proceedings. The exemption will be effective on the service date of this decision.
5. SIT is directed to file with the Board a list of any shipper(s) to which it provides service by August 31, 2023.
6. SIT is directed to serve a copy of this decision on any rail carrier to which it connects and any shipper it currently serves directly and certify that it has done so by August 31, 2023.

⁹ Because the Board concludes that regulation is not needed to protect shippers from the abuse of market power, it is unnecessary to determine whether the proposed transaction is limited in scope. See 49 U.S.C. § 10502(a).

¹⁰ If SIT prefers to file this list under seal, it may seek an appropriate protective order.

7. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.