

SERVICE DATE – SEPTEMBER 19, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36714

SUNFLOWER STATE INDUSTRIAL RAILWAY, LLC—CONSTRUCTION &
OPERATION—IN GARNETT, KAN.

Decided: September 19, 2023

On July 17, 2023, Sunflower State Industrial Railway, LLC (Sunflower), filed what it calls a “Notice of Intent to Construct & Operate Private Rail Tracks.” Specifically, Sunflower proposes to construct a 2.5-mile line, between milepost 83.+2185 and milepost 85.+0495, in Garnett, Kan. (Notice 1.) Sunflower states that Board authority under 49 U.S.C. § 10901 is not required because the proposed track would be ancillary track under 49 U.S.C. § 10906 and that, regardless of the track’s classification, construction of the trackage would not result in Sunflower becoming a common carrier. (*Id.* at 1.)

Sunflower’s submission will be rejected, as there is insufficient information to determine the nature of the proposed project and whether Board authorization is required. 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* 49 C.F.R., part 1150; Savannah Indus. Transp., LLC—Operation Exemption—in Effingham Cnty., Ga., FD 36489, slip op. at 4-5 (STB served Aug. 1, 2023). Under 49 U.S.C. § 10906, however, 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. *See Savannah Indus. Transp., LLC*, FD 36489, slip op. at 5. In addition, certain “private” track is outside of the Board’s jurisdiction altogether. *Id.* (citing Hanson Natural Res. Co.—Non-Common Carrier Status—Pet. for Decl. Ord., FD 32248, slip op. at 20-21 (ICC served Dec. 5, 1994)).

In determining whether a particular track is subject to the Board’s licensing authority or is ancillary track excepted from the Board’s licensing authority under § 10906, the Board has adopted a case-by-case, fact-specific approach. Factors relevant to that inquiry may include the track’s intended use, physical characteristics, relationship to the rail system, and history. *See N.Y.C. Econ Dev. Corp.—Pet. for Declaratory Order*, FD 36467, slip op. at 3-4 (STB served June 11, 2021). Certain indicia used in making this determination have included the length of the line; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the line; whether there is regularly scheduled service; traffic volume; who owns and maintains the line; whether the line was constructed with light-weight rail; the condition of the line; what the line is used for (e.g.,

switching, loading, and unloading); and whether there are stations on the line. Brookhaven Rail Terminal—Pet. for Declaratory Order, FD 35819, slip op. at 3-4 (STB served Aug. 30, 2016).

Here, the notice contains only sparse, and to some extent contradictory, information about the proposed track, with little indication as to how the track would connect to the rail network beyond a vague indication that Union Pacific Railroad Company is “agreeable to construction” of an interchange at Garnett. (Notice 1.) Sunflower states that it will operate the proposed trackage as an industrial spur that will serve an ethanol plant owned by East Kansas Agri Energy, LLC (EKAE), as the “sole customer on the line,” but it is unclear as to whether EKAE actually intends to use the industrial spur as described by Sunflower. (Id. at 1-2.) Further, while Sunflower states that it is “[n]ot planning to construct private tracks,” (id. at 1), it nevertheless describes its filing as a “Notice to Construct and Operate Private Rail Trackage.” (Id.) Moreover, even if the proposed tracks could otherwise be classified as ancillary track under § 10906, it is unclear whether the tracks would constitute Sunflower’s entire rail system, thus requiring Board licensing authority. See Effingham R.R.—Pet. for Declaratory Order—Constr. At Effingham, Ill., 2 S.T.B. 606, 609-10 (1997), *aff’d sub nom. United Transp. Union-Ill. Legislative Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999) (requiring a party to seek construction and operation authority under 49 U.S.C. § 10901 for what would otherwise be § 10906 track because the track to be constructed would constitute the entirety of the party’s rail system).

Because Sunflower’s notice does not provide sufficient information to determine the nature of the transaction and whether Board authority is necessary, it will be rejected.

It is ordered:

1. Sunflower’s notice is rejected.
2. This decision is effective on its service date.

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