

SERVICE DATE – MARCH 28, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36714 (Sub-No. 1)

SUNFLOWER STATE INDUSTRIAL RAILWAY, LLC—
PETITION FOR DECLARATORY ORDER

Digest:¹ The Board declines to issue a declaratory order but provides guidance on its jurisdiction and categories of railroad track.

Decided: March 27, 2025

On June 18, 2024, Sunflower State Industrial Railway, LLC (Sunflower), filed a petition for declaratory order, asking the Board to find that “Sunflower qualifies to operate as a Class 3 [Private Railroad].” (Pet. 1.) For the reasons explained below, the Board in its discretion will decline to issue a declaratory order but provides guidance to explain the Board’s jurisdiction and the categories of track generally recognized by the Board.

BACKGROUND

As described in a previous Board decision, Sunflower proposes to construct a 2.5-mile line, between milepost 83.+2185 and milepost 85.+0495, in Garnett, Kan. (the Line). See Sunflower State Indus. Ry.—Constr. & Operation in Garnett, Kan., FD 36714, slip op. at 1 (STB served Sept. 19, 2023).² Sunflower states that it intends to serve an ethanol plant owned by East Kansas Agri Energy, LLC (EKAE). (Pet. 3.) Sunflower further states that it would “enter into an [a]greement [with] Union Pacific [Railroad Company (UP)] whereby UP switches [rail] cars to [and] from Sunflower’s rails” and adds that UP is “[a]greeable to co-operating the Garnett interchange.” (Id. at 2.) Additionally, Sunflower notes that the track will be used for a private dining car service, rail car storage, and accessing Sunflower’s maintenance garage. (Id. at 4.)

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 Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² In Docket No. FD 36714, Sunflower filed a “Notice of Intent to Construct & Operate Private Rail Tracks.” The Board rejected Sunflower’s submission, finding that there was insufficient information to determine the nature of the proposed project and whether Board authorization would be required. Sunflower State Indus. Ry., FD 36714, slip op. at 1. In the same docket, on November 13, 2023, Sunflower supplemented its “Notice of Intent to Construct & Operate Private Rail Tracks,” in which it makes many of the same arguments raised in its petition for declaratory order in this docket.

On July 16, 2024, the Kansas Department of Wildlife and Parks (KDWP) filed a reply in opposition to Sunflower’s petition. KDWP indicates that Sunflower seeks to construct the Line in a right-of-way subject to interim trail use that was implemented in 1992 in Docket No. AB 335 (Sub-No. 2X). See KCT Ry.—Aban. Exemption—in Franklin, Anderson, & Allen Cntys., Kan., 7 I.C.C.2d 1035 (1991). KDWP states that it is the interim trail sponsor.³

For the reasons discussed below, the Board will decline to issue a declaratory order.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989).

The Board will decline to exercise its discretionary authority to issue a declaratory order here. As discussed in more detail below, although Sunflower indicates that it intends to build a “private trk” and does not “intend to become [a] common carrier,” (Pet. 4), it also suggests that the track should be considered excepted track or that it may be used to support common carrier operations. In any event, details regarding operation of the Line are lacking, with no indication from EKAE that it even intends to use the Line for the proposed “private” rail service. Nor is it clear whether Sunflower has any right vis-à-vis KDWP, or how it might obtain the right, to construct and operate “private” track (i.e., not under the Board’s jurisdiction) within an existing right-of-way subject to interim trail use. The Board will thus decline to weigh in on this matter, given the speculative and vague nature of the petition. See Delegation of Auth., 5 I.C.C.2d at 676 (stating that, in considering whether to exercise its discretion, an agency may consider an issue’s significance to the industry and the ripeness of the controversy); see also Tenth Ave.

³ Also on July 16, 2024, Sunflower filed a motion for leave to “amend” its petition to provide “missing information” that addresses issues raised by KDWP. (See Mot. 2, 3.) Although styled as an “amended petition,” Sunflower’s July 16, 2024 filing is a reply to a reply. While the Board has in the past often accepted replies to replies, such filings are prohibited under the Board’s regulations. See 49 C.F.R. § 1104.13(c); see Norfolk S. Corp.—Acquis. of Control—Norfolk & Portsmouth Belt Line R.R., FD 36836, slip op. at 10 (STB served Mar. 14, 2025) (Board Member Fuchs, concurring) (indicating that the Board should more strictly enforce the existing regulatory prohibition against replies to replies “to ensure fulsome initial filings, reduce burden on parties, and better use agency resources”). The Board assesses that the benefits from the orderly and efficient administration of cases, including reducing burden on the public and agency, justify enforcing this rule more strictly, and the Board notes that information provided in a reply to a reply often could have been included in an initial filing. Accordingly, Sunflower’s motion for leave will be denied. However, given the Board’s past acceptance of many replies to replies despite the 49 C.F.R. § 1104.13(c) prohibition, the Board reviewed Sunflower’s “amended petition” and concludes that, even if accepted into the record, that would not change the results reached in today’s decision because Sunflower’s filing does not provide clarity on the issues discussed below.

Neighbors—Pet. for Declaratory Ord., FD 36654 (STB served May 9, 2024) (denying as premature a request for a declaratory order regarding whether a spur line was subject to the Board’s jurisdiction).

While the Board will deny Sunflower’s request for a declaratory order, it provides the following guidance to explain its jurisdiction and describe generally the categories of track it recognizes.

Common carrier railroad lines. The Board has exclusive jurisdiction over rail lines over which a rail carrier provides “common carrier” line-haul service to shippers. 49 U.S.C. § 10501(a); see Allied Erecting & Dismantling Co. v. STB, 835 F.3d 548, 550 (6th Cir. 2016). A “rail carrier” is “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). “Railroad” and “transportation” are broadly defined to include virtually any property, track, or vehicle “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(6), (9). No one may build an extension to a railroad line, build additional lines, provide transportation over an extended or additional line, or abandon a line without Board authorization. 49 U.S.C. §§ 10901(a), 10903; see Allied Erecting & Dismantling Co., 835 F.3d at 550-51.⁴

Excepted tracks. “Excepted tracks” are defined as “spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. §§ 10501(b), 10906. They are used for loading cars, track switching, and other activities that are ancillary to mainline service. Nicholson v. ICC, 711 F.2d 365, 367-68 (D.C. Cir. 1983). The Board has exclusive jurisdiction over such tracks. 49 U.S.C. § 10501(b)(2). However, under 49 U.S.C. § 10906, the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks” (and related facilities) is statutorily excepted from the entry and exit licensing requirements of 49 U.S.C. §§ 10901-10905, as well as the sales and acquisition licensing requirements of 49 U.S.C. §§ 11321-26. Thus, while excepted tracks are under the Board’s exclusive jurisdiction, these tracks can be added or removed from the rail system without a license from the Board. See N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Ord., FD 36467, slip op. at 5 (STB served June 11, 2021); Tri-City R.R.—Pet. for Declaratory Ord., FD 36037, slip op. at 4 (STB served June 1, 2017). The Board considers various indicia when determining whether a track is excepted under § 10906, including a track’s relationship to the rail system, intended use, physical characteristics, and history. See Oakland Glob. Rail Enter.—Pet. for Declaratory Ord., FD 36168, slip op. at 8 & n.8 (STB served Mar. 15, 2019), pet. for recon. denied (STB served June 20, 2019). A track segment that constitutes a carrier’s entire line of railroad cannot be a siding or spur and is not statutorily excepted under 49 U.S.C. § 10906. Effingham R.R.—Pet. for Declaratory Ord.—Constr. at Effingham, Ill., FD 33468, slip op. at 5 (STB served Sept. 18, 1998).

⁴ When construction authority is required under § 10901, the Board must consider, among other things, the potential environmental and historic impacts of the construction and operation of a proposed rail line, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-11, Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, the Board’s environmental rules at 49 C.F.R. part 1105, and related environmental laws.

Private track. Private track is track typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve that shipper, moving the shipper's own goods, so that there is no "holding out" to serve other shippers for compensation. B. Willis, C.P.A., Inc.—Pet. for Declaratory Ord., FD 34013, slip op. at 2 (STB served Oct. 3, 2001). Such track is typically used exclusively by the track's owner for movement of its own goods, either by utilizing its own equipment or by contracting for service. B. Willis, C.P.A., Inc.—Pet. for Declaratory Ord., 6 S.T.B. 280, 281 (2002), *aff'd*, 51 Fed. App'x 321 (D.C. Cir. 2002); *see* Devens Recycling Center—Pet. for Declaratory Ord., FD 34952, slip op. at 2 (STB served Jan. 10, 2007) (finding no jurisdiction over operations on private track used exclusively to serve the owner of the track pursuant to a contractual arrangement with the owner). As long as railroad track is constructed and operated in a manner that does not constitute common carriage, the agency has held that rail track can be built and operated in private status not subject to the Board's jurisdiction. B. Willis, C.P.A., Inc., FD 34013, slip op. at 2.

As discussed above, it remains unclear what exactly Sunflower asks the Board to declare. Sunflower asserts that it seeks "[p]rivate [r]ail status," stating that it will serve no other shippers besides EKA and that its "main rails" would be used for private dining car service and caboose rides. (Pet. 3-5.) But Sunflower also makes several arguments as to why the Line is excepted track under 49 U.S.C. § 10906. (Pet. 3 (asserting that the Line's physical characteristics and "intended use" are consistent with excepted track under § 10906); *id.* (stating that the Line would be used for operations ancillary to UP mainline operations); *id.* at 4 (contending that the Line would not "invade the territory of another [railroad]"); *id.* (maintaining that the Line "meets requirements of 10906").) Additionally, the petition contains statements that could be read to suggest that the Line would support common carrier operations. (Pet. 4 (stating that UP would "acquire the common carrier obligation" once the proposed transaction is approved).)

The Board provides this guidance to explain and clarify the types of track generally recognized by the Board, as well as when authority should be sought for the construction and operation of a rail line. For the reasons discussed above, however, the Board declines to issue a declaratory order, and Sunflower's petition will be denied.

It is ordered:

1. The petition for declaratory order is denied.
2. Sunflower's July 16, 2024 request for leave to amend its petition is denied.
3. This decision is effective on its service date.

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