

SERVICE DATE – MAY 30, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36817

KANSAS DEPARTMENT OF TRANSPORTATION
AND SUNFLOWER REDEVELOPMENT, LLC—
PETITION FOR DECLARATORY ORDER

Digest:¹ The Board finds that certain track located at the former Sunflower Army Ammunition Plant is outside the Board's jurisdiction.

Decided: May 29, 2025

On February 7, 2025, Kansas Department of Transportation (KDOT) and Sunflower Redevelopment, LLC (SRL) (jointly, Petitioners), petitioned the Board for a declaratory order concluding that right-of-way containing approximately 1,850 feet of rail track located at the former Sunflower Army Ammunition Plant (SFAAP) in De Soto, Kan., is not subject to the Board's jurisdiction. No replies in opposition to the petition were filed. For the reasons explained below, the Board will grant the petition.

BACKGROUND

Petitioners state that they have an agreement in principle for KDOT to acquire right-of-way containing approximately 1,850 feet of track (the Project Area) from SRL.² (Pet. 2.) According to Petitioners, the acquisition of this property will facilitate KDOT's construction of a new interchange at state highway K-10 and Lexington Avenue in De Soto in preparation for the development of a new electric vehicle battery plant in De Soto, which Petitioners state represents the largest economic development project in Kansas history. (Id.) Petitioners state that the Federal Highway Administration is reviewing KDOT's project under the National Environmental Policy Act and that KDOT's preferred construction alternative will require highway ramps to be built across the Project Area. (Id. at 6.) Petitioners explain that they have

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 Petitioners state that the Project Area extends from just north of Commerce Drive (but south of the current terminus of existing track) to West 95th Street. (Pet. 2.)

filed this petition seeking certainty regarding the regulatory status of the Project Area track.³ (Id. at 6.)

Petitioners state that the SFAAP was located on property that was purchased in 1942 by the United States Government (Government) for the purpose of building an Army ammunition plant. (Id. at 7.) According to Petitioners, the Project Area track was owned by the Government and constructed to serve the SFAAP. (Id. at 7-8.) In May 1942, the Government entered into an agreement with Hercules Powder Company (Hercules) for Hercules to become the operating contractor for the ammunition plant. (Id. at 7; id., Ex. F.) Petitioners state that the SFAAP once contained 71 miles of track, including a classification yard and over 1,800 production facilities. (Pet. 7-8; id., Ex. G at 3.) The Government also constructed and owned approximately two miles of track between the SFAAP and a connection with the Atchison, Topeka & Santa Fe Railroad (Santa Fe). (Id. at 8.) According to Petitioners, Hercules (on behalf of the Government) conducted rail operations on the SFAAP for the transfer of commodities and goods in and about the plant. (Id.) In addition, in October of 1942, Hercules contracted with Santa Fe for Santa Fe to perform switching operations over the Government's right-of-way and into the Government's classification yard in the SFAAP. (Id. at 8-9.)

Although the majority of the plant went inactive in 1971, (id., Ex. G at 5), Petitioners note that it appears some chemical manufacturing production facilities continued to operate until the 1990s, (Pet. 9). According to a Government report provided by Petitioners, the Government produced a chemical called nitroguanidine at the SFAAP between 1980 and 1992. (Id., Ex. G at 5.) The record also indicates that some private entities were leasing areas of the SFAAP in the 1990s. (Id., Ex. G at 8; see id., Ex. H at 57-60.) Petitioners indicate that Hercules provided service at the SFAAP into the 1990s, (id., Ex. B, V.S. Todd Tripkos para. 6 (stating that the last shipments brought into SFAAP by rail, before rail service to the SFAAP permanently ceased around 1995, were being "picked up by a U.S. Government/Hercules switch engine")), and state that Santa Fe⁴ may have provided some level of service to the chemical facilities at the SFAAP in the 1990s, (Pet. 9). Petitioners state that, from 1992 onward, the major onsite activities were maintenance, environmental stabilization, and remediation and that, as best as Petitioners can determine, there has been no rail service into the SFAAP since approximately 1995. (Pet. 9.) According to Petitioners, the SFAAP was declared excess government property by the Army around 1997-98 and soon after, the Government began removing rail track in the SFAAP. (Id.) Petitioners state that the Project Area track, to the extent it still exists, is currently in a state of disrepair and is stranded because the tracks to the north and the south of the Project Area have been removed. (Id. at 15.)

In 2005, Congress passed the Sunflower Act, which authorized the Army to convey the former SFAAP to a private entity for the purpose of "facilitat[ing] the reuse of the property for economic development and revitalization." Sunflower Act, Pub. L. No. 108-375 § 2841(a),

³ The mayor of De Soto, Rick Walker, and the Chairman of the Johnson County Board of Commissioners, Mike Kelly, each filed statements in support of the petition.

⁴ Petitioners served a copy of the petition on BNSF Railway Company (BNSF), Santa Fe's successor. (Pet. 8 n.11.)

118 Stat. 2135 (2005). According to Petitioners, later that year, the Army conveyed to SRL fee simple title to the property containing the former SFAAP. (Pet. 4.)

Petitioners argue that the Project Area track is not within the Board's jurisdiction because there is no evidence that it was ever regulated main line track or otherwise considered to be subject to the Board's jurisdiction. (*Id.* at 13.) According to Petitioners, the Project Area track was built, owned, and maintained by the Government and its contractors to serve the SFAAP. (*Id.* at 12.) Moreover, Petitioners assert, the Project Area was owned by the Government during the entire period of its use, and no rail operations or "holding out" of common carrier service occurred during the entirety of SRL's ownership. (*Id.* at 12-13.) Petitioners also note that the Board has previously recognized that the Government may own a rail line without operating it as a common carrier and without the tracks being subject to the Board's jurisdiction. (*Id.* at 12, 15-16.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. 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 issue a declaratory order here to remove uncertainty regarding the status of the Project Area track and to provide clarity as Petitioners seek to move forward with their plans for the property.

The Board has explained:

When an entity conducts private carriage on its own private track, such track is not a rail line subject to the Board's jurisdiction. Private track is "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 only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve other shippers for compensation." Private track is not considered part of the national rail system even if a common carrier operates on the track, as long as the common carrier "operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner."

V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 8 (STB served July 12, 2012) (citations omitted) (quoting B. Willis, C.P.A., Inc.—Pet. for Declaratory Ord., FD 34013, slip op. at 2 (STB served Oct. 3, 2001); Devens Recycling Ctr., LLC—Pet. for Declaratory Ord., FD 34952, slip op. 2 (STB served Jan. 10, 2007)).

In this case, the Project Area track was built, owned, and maintained by the Government and was operated by contractors to serve the Government production facilities at the SFAAP, including switching performed under contract by Santa Fe, (Pet. 7, 8, 12), all of which supports a conclusion that the Project Area track was constructed and operated as private track outside the jurisdiction of the Board and its predecessor, the Interstate Commerce Commission (ICC), see V&S Ry., FD 35459, slip op. at 8; see also Saratoga & N. Creek Ry.—Operation Exemption—

Tahawus Line, FD 35559 (STB served May 14, 2012) (line owned and operated by the U.S. Government and its contractors was private track when sold decades later to a non-carrier).

Moreover, there is insufficient evidence of common carrier rail operations or holding out to justify treating the Project Area as having come within the Board’s jurisdiction. Although, as Petitioners acknowledge, (Pet. 9), the details of rail activity on the SFAAP in the 1990s are not entirely clear, the record does not show with any certainty that Santa Fe used the Project Area track for common carrier operations. While the record includes some vague references to possible rail activity for non-Government entities leasing property at the SFAAP in the 1990s, the Board cannot conclude from those references that the Project Area was ever anything other than private track. (See Pet. 9 (stating that “Santa Fe *may have* provided some level of service to some [chemical production facilities at the SFAAP] in the 1990s”) (emphasis added); *id.*, Ex. H at 60 (discussing the Government’s efforts to dispose of the SFAAP property in the late-1990s, a deponent states: “[Kansas Wastewater] was using [rail service] to bring in product to be processed . . . or planning to. I don’t know.”).) The only other statement in the record regarding rail service at the SFAAP in the 1990s suggests the service was for the benefit of the Government. Specifically, the verified statement of Todd Tripkos—who has worked on site at the former SFAAP nearly continuously for approximately 45 years—states that, to his knowledge, the last shipments brought into SFAAP by rail were being “picked up by a U.S. Government/Hercules switch engine.” (Pet., Ex. B, V.S. Todd Tripkos paras. 2, 6.)

Further, if any entity had sought to begin common carrier operations under 49 U.S.C. § 10901 over the Project Area track, it would have been required to seek authority from the Board or, prior to 1996, the ICC. See Saratoga & N. Creek Ry., FD 35559, slip op. at 7-8. Petitioners state that their investigation turned up no record of any entity seeking such authority. (Pet. 13.) Finally, even if Santa Fe used the Project Area track in the 1990s as ancillary track under 49 U.S.C. § 10906 (Pet. 14), BNSF has not claimed any interest in the track, although it was served with the petition, and there have been no rail operations performed by it or any other entity on the Project Area track for thirty years. (Pet. 8 n.11, 9-10); *see, e.g.*, NewVista Prop. Holdings, LLC—Pet. for Declaratory Ord., FD 36040, slip op. at 3 (STB served Mar. 17, 2017) (holding that § 10906 track was no longer within the Board’s jurisdiction where the railroad no longer needed it for operations and did not object to its removal from Board jurisdiction).

Overall, on this record and under the specific circumstances here, the Board will exercise its discretion to resolve the uncertainty by confirming that it does not have jurisdiction over the Project Area track. Accordingly, the Board will grant Petitioners’ unopposed petition. This decision is consistent with the congressional intent expressed in the Sunflower Act to allow the SFAAP to be used for economic development and revitalization, and enables a large public infrastructure project to move forward to support important economic development efforts.

It is ordered:

1. The petition is granted.

2. This decision is effective on the date of service.

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