

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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July 31, 2017
Part of
Public Record

APPLICATION OF GREAT LAKES BASIN	)	
TRANSPORTATION, INC. FOR AUTHORITY	)	Finance Docket No.
TO CONSTRUCT AND OPERATE A RAIL LINE	)	35952
IN WISCONSIN, ILLINOIS AND INDIANA	)	

APPLICANT'S REPLY TO PETITIONS FOR REJECTION OF APPLICATION

Great Lakes Basin Transportation, Inc. ("GLBT" or "Applicant"), by its undersigned counsel,
hereby replies to the following pleadings filed by opponents of the captioned Application:

- Petition for Rejection of Application dated July 10, 2017 by Block GLB Railroad LaSalle County, IL, Rock Against the Rail, LLC, Kankakee County IL Block GLB, Railed, Citizens Against the GLB Railroad, Boone County, IL and Winnebago County Against the GLB Railroad (collectively referred to herein as the "Block Opponents").
- Petition for Rejection of GLB's Application dated July 14, 2017 by Save Our Farmland, LLC (referred to herein as the "Save Opponent").

The Statutory Standard

Analysis of the adequacy of GLBT's Application must begin with the governing statute, 49 U.S.C.

§10901:

(a) A person may—

...

(2) construct an additional railroad line;

only if the [Surface Transportation] Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. . . .

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity.

Applying the governing statute to this case, GLBT filed its Application on May 1, 2017. The governing statute states that the Board “shall issue” a certificate permitting construction and operation of the rail line proposed in that Application “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” Congress, in the Staggers Rail Act of 1980 and the Interstate Commerce Commission Termination Act, established a clear and unambiguous policy in favor of the construction of new railroad lines:

The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 304 [of the Staggers Rail Act of 1980] deals with intramodal competition among railroads. Under present law, railroads may not construct new rail lines or extend their lines without the approval of the Interstate Commerce Commission. As Congress moves toward significantly less regulation of the services offered by railroads, the Congress should encourage, rather than discourage, competition among railroads. Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonable prices.

1980 U.S. Code Cong. & Admin. News 4011.

The Board recognized that procompetitive policy in *Tongue River R. Co., Inc.—Construction and Operation—Western Alignment*, Finance Docket No. 30186 (Sub-No. 3)(decision served October 9, 2007)(not printed):¹

Under the revised statute, proposed rail construction projects are to be given the benefit of the doubt. If they are not found to be inconsistent with the public interest, then they are to be approved.

¹ Footnote 32: “Pub. L. No. 104-88, 109 Stat. 803 (1995). Prior to 1980, the [Interstate Commerce Commission] had been directed to scrutinize rail construction proposals closely to prevent excess capacity, and the ICC was to issue a license only if it found that the [public convenience and necessity] ‘require’ the new line. See former 49 U.S.C. 10901(a)(1978). In the Staggers Rail Act of 1980, Pub. L. No. 96-448, 96 Stat. 1895 (1980), Congress relaxed the standard by providing that the ICC need only find that the PC&N ‘permit’ a proposed construction. See former 49 U.S.C. 10901(a) (1994). With [the Interstate Commerce Commission Termination Act], Congress completed its shift in policy, directing that the Board ‘shall’ issue construction licenses ‘unless’ the agency finds a proposal ‘inconsistent’ with the PC&N. See current 49 U.S.C. 10901(c).”

The Applicable Regulation--Financing

The Board's regulation at 49 CFR §1150.6(a) provides that an application under 49 U.S.C. §10901 for authority to construct a line of railroad must describe:

The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed charges, the extent to which funds for financing are now available, and whether any of the securities issued would be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.

GLBT's Application responded to this requirement as follows:

GLBT plans to build the proposed railroad using the latest technology and construction methods without public funding. The company presently has 24 stockholders who contributed funds, services or both during the project's startup phase. GLBT has been discussing, and continues to discuss, options for financing the permitting phase of the project and land acquisition and construction following approval with private investors. It is anticipated that such financing would be accomplished through sales of equity interests in the company, or combinations of equity and debt, as may be negotiated between GLBT and each investor. Financing for the construction phase would be accomplished primarily through the issuance of debt securities.

Information regarding how fixed charges would be met was provided in response to 49 CFR §1150.6(d):

"Fixed charges of an average \$101.7 million per year would be paid from operating revenues for a period of five years." In response to 49 CFR §1150.3, GLBT stated that "Great Lakes Basin is not affiliated in any way with any industry that may be served by the proposed rail line," which rules out the possibility that any on-line industry would underwrite the construction of the line.²

As explained in the verified statement of James T. Wilson, Vice Chairman of GLBT, which is filed herewith, potential institutional investors have informed GLBT that they are not able to consider financing the proposed rail line until STB authority to construct is obtained. This is because they cannot project future return on investment or cash flows until they know with a reasonable degree of certainty when the railroad will be constructed and begin competing for freight traffic moving through Chicago.

² As stated in the Application, the purpose of the proposed GLBT line is to provide an expedited route carrying through freight around Chicago, and the line has not been designed to serve any existing rail-served industries directly.

However, as Mr. Wilson continues, GLBT found that the investment community has considerable interest in financing this project once all required regulatory approvals are received. Consequently, GLBT is confident in its ability to finance the project *after regulatory approval is obtained*, but since such approval has not been obtained it is unable to project exactly what form that financing will take.

Thus, GLBT's Application provided a response to each required input in the governing regulation, and fully complies with the regulation's requirements.

The Applicable Regulation—Traffic Volume

The Board's regulation at 49 CFR §1150.4(e) requires the inclusion of the following information in line construction applications:

A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates or trackage rights.

GLBT's Application (as amended by supplemental filings on June 9 and June 22) contains extensive information, both in response to this requirement and in its Operating Plan, regarding counties and cities to be served by the proposed line, other railroads to which the new line would connect, proposed locations for interchange with other railroads, and estimates of traffic volume.

For example, the Application (as amended) identifies nine counties and five incorporated municipalities that would be crossed by the proposed line and up to 26 interchanges with other railroads. The operating plan includes a table showing the number of trains per day projected for each of GLBT's line segments, with an explanation of how the projections were made, and information regarding the volume of traffic projected to be interchanged at each junction with another railroad.

Since GLBT has no agreements concerning its proposed operations, no information concerning such agreements was provided. However, the absence of agreements is not fatal to the application. The applicant in *DM&E, infra*, based its operating plan on market projections which were reviewed by

the STB, not agreements with either potential shippers or connecting railroads, and its application was ruled to be adequate to support approval. Thus GLBT's Application, which presents similar data, provides the traffic and operating information required by this regulation.

Arguments of the Block Opponents

The Block Opponents advance two primary arguments against the Application: (1) the Application does not provide information regarding GLBT's financial fitness, as required by 49 CFR §1150.6; and (2) the Application does not demonstrate any public need for the proposed rail line, as purportedly required by 49 CFR §1150.4(e).

Regarding financing, the Application described "[t]he manner in which applicant proposes to finance construction or acquisition," as explained above. Contrary to the implication of the Block Opponents, it is not necessary for rail line construction applicants to come to the Commission with every penny of the cost of their proposed projects in hand. The governing statute, 49 U.S.C. 10901, doesn't mandate such a demonstration. The governing regulation, 49 CFR §1150.6(a), requires a general explanation of the applicant's financing plans, but not evidence that the financing is actually available at the time of filing. As discussed above, the Application provides an adequate explanation of GLBT's plans to finance the proposed rail line.

In 1998, the Dakota, Minnesota & Eastern Railroad ("DM&E") filed an application with the STB for authority to construct approximately 280 miles of new railroad to serve coal mines in Wyoming's Powder River Basin. There as here, DM&E saw a public need for this new railroad, but had neither enough cash to construct it nor firm plans to obtain financing for that purpose when it applied to the STB for authority to build it. The STB didn't see those uncertainties as fatal to the application:

DM&E indicates that a decision from the Board regarding the transportation aspects of this project will help it go forward and obtain necessary financing. This has been true in prior cases, and the lack of committed financing at this stage is not, in our opinion, grounds to reject the application.

Dakota, Minnesota & Eastern R. Corp. Construction Into the Powder River Basin, 3 STB 847 (1998)

("DM&E"). Specifically, the STB determined that DM&E's proposed line, offering a shorter route between mines and certain potential markets, would likely be successful in competing for coal movements to utilities in those markets and therefore would generate sufficient earnings to service the construction debt.

GLBT's Application presents an even more compelling case for financial viability than did *DM&E*. Everyone in the railroad business recognizes that the Chicago chokepoint drags down the performance of the entire national network, as the Board itself observed in the wake of hearings on the severe railroad service breakdowns of 2014:

At both hearings, carriers cited congestion in Chicago as one significant cause of the service problems. While congestion in the area was particularly acute during the last winter, it has been a recurring problem at this crucial network hub.

United States Rail Service Issues—Data Collection, Docket No. EP-724 (Sub-No.3)(decision served October 8, 2014)(not printed).

GLBT's proposed railroad would meet an obvious public need by providing additional capacity for movement of rail freight around the Chicago terminal far faster and more efficiently than the 19th Century jumble of rail lines in use today. As stated in the pro forma financial projection attached to the Application as Exhibit G, GLBT's railroad is projected to become profitable in the third year after completion of construction and to have an EBIT to fixed charges coverage of approximately 4.5 to 1 in its fifth year of operation. Those results would be more than sufficient to attract enough financing to construct the project, under the STB's rationale in *DM&E*.

The Block Opponents attempt to explain away the *DM&E* precedent by citing two earlier Interstate Commerce Commission and STB decisions, but neither is apposite. *Ozark Mountain Railroad—Construction Exemption*, Finance Docket No. 32204 (decision served December 15, 1994)(not printed) involved a petition for exemption covering construction of a much shorter line which did not

require the same demonstration of financial viability. Similarly, *Dr. Daniel R. Fiehrer—Feeder Line Application—Line of BNSF Ry. Co.*, Finance Docket No. 34947 (decision served November 22, 2006)(not printed), turned on a feeder line applicant's inability to satisfy an entirely different financial viability standard at 49 CFR §1151.3(a). That standard does not apply to rail line construction applications.³

Regarding §1150.4(e), nowhere in this regulation does the Board require an assessment of "public need." Instead, applicants are directed to provide projected traffic data and summaries of operating agreements, if any exist. As explained above, GLBT's Application amply fulfills these requirements.

Even though such support is not strictly required, GLBT's Application also included copious testimony and data to demonstrate why there is a public need for the proposed railroad:

As a railroad manager and transportation consultant, I have experienced firsthand the challenges of managing rail traffic into, out of and through the Chicago region. As a former rail shipper, I am well aware of the potential delays and frustrations associated with shipping via the Chicago rail hub. Under the best of circumstances, it is a marvel of coordination and execution, but when traffic surges, unexpectedly or not, or when adverse weather disrupts normal operations with the Chicago Terminal or in adjoining regions, the network slows to the point of causing major disruptions not only in Chicago, but also throughout the North American network.

Verified Statement of William E. Miller, at 2. Mr. Miller continued by pointing out that the congestion in Chicago, which is often debilitating now, will only get worse as freight rail traffic climbs by 61%, as GLBT projects, or 80-90%, as the Chicago Metropolitan Agency for Planning and the CREATE program project, by 2040.

The public need for additional capacity for rail shipments moving through Chicago was recognized by United Parcel Service, a major rail shipper that filed comments in this proceeding:

Of keen interest to UPS are efforts by Great Lakes Basin Transportation to construct a privately-funded railroad (i.e.—Great Lakes Basin Railroad or GLBR) around Chicago for freight rail traffic not destined for the greater Chicagoland geographic area. Although in its infancy, any effort to

³ The Block Opponents imply that GLBT's ability to obtain financing is somehow related to the personal wealth of GLBT's chairman, founder and majority stockholder, Mr. Frank Patton. However, this is not the case, and GLBT has never stated or implied that it is relying in any way on Mr. Patton's personal assets or credit to obtain financing for the project.

build new capacity and bypass the notorious Chicago bottleneck would have a material positive effect on the fluidity and velocity of the freight rail network, and a direct benefit to UPS and our customers. As a leading multimodal transportation services provider, UPS enthusiastically supports public policy initiatives that increase goods movement capacity. These type of projects are few and far between, as widely-accepted freight forecast data suggests additional pressure on our transportation networks in the coming 10-20 years.

The Block Opponents fail to recognize the distinction between the absence of detailed agreements to move current freight traffic over the proposed new line and the inevitable public need for more capacity as railroad shipments increase over the upcoming two decades. In *DM&E*, the applicant likewise offered no evidence of executed transportation contracts to haul coal from Powder River Basin mines—mines that already were served directly by Burlington Northern Santa Fe (now BNSF) and/or Union Pacific. But it did provide evidence regarding the projected growth of the target market for coal transportation, evidence that the Board found persuasive in deciding that DM&E's application demonstrated a public need:

The DM&E project would establish another PRB transportation competitor, which should have a positive impact on rates and service for the increasing volumes of PRB coal. There is presently competition for PRB coal provided by BNSF and UP. But DM&E is offering new PRB coal transportation service that should generate efficiencies and provide important benefits to PRB coal shippers.

As in *DM&E*, GLBT has shown that there is now, and will be in the future, sufficient freight traffic to support the construction and operation of a new rail line around Chicago, and that the new railroad, by virtue of its superior service, would be a strong competitor for movements currently moving through Chicago without being delivered to a customer there.

The Burden of Proof

The Block Opponents conclude their argument by postulating that “the proponent of track construction must carry the initial burden to go forward with evidence of” public convenience and necessity, and also “has the ultimate burden of proof, often referred to as the burden of persuasion,” which “is always on the person who is seeking a change in the status quo” (Block Opponents Petition at 10-11). But this position disregards the language of 49 USC §10901, which states that the Board “shall

issue a certificate authorizing activities for which such authority is requested” in the absence of a finding that “such activities are inconsistent with the public convenience and necessity.” The statute cannot reasonably be read as requiring the applicant to prove that its proposal is *not* “inconsistent with the public convenience and necessity.” Instead, the statute creates a presumption that rail construction proposals are consistent with the public convenience and necessity:

We agree with DM&E and WCTL that Congress intended to facilitate rail construction by amending section 10901 in the ICCTA by shifting the emphasis from whether a project is consistent with the public convenience and necessity to whether the project is inconsistent with the public convenience and necessity. Under the revised statute, proposed rail construction projects are to be given the benefit of the doubt. If they are not found to be inconsistent with the public interest, then they are to be approved. As the Board said *in Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901*, 1 STB 75, 79 (1996), “there is now a presumption that construction projects will be approved.”

DM&E, supra. Consequently, it is up to opponents of a rail line construction application to overcome the presumption by proving that the proposed line would be inconsistent with the public convenience and necessity.

Arguments of the Save Opponent

Save Our Farmland, LLC asserts, with respect to its constituent farm owners, that the “mere pendency of GLBT’s application—the threat of cutting through their farms—creates a cloud on the title to their lands and diminishes the going concern value of their farms” (Save Opponent Petition at 2). Whether this is true or not—and the Save Opponent offers only unverified comments from its legal counsel in support of its assertion—the impact of GLBT’s proposed railroad on farms in Rock County, Wisconsin is only one factor to be considered by the Board in its analysis of the Application. It has no bearing at all on the adequacy of the Application itself. So long as the Application meets the requirements of the Board’s governing regulations, which we have demonstrated it does, the Congressional policy established by 49 USC §10901 requires not only that the Application be considered by the Board, but also that it shall be approved unless the Board finds that it is inconsistent with the public convenience and necessity.

Conclusion

Since the passage of the Staggers Rail Act nearly forty years ago, the public policy of the United States has favored the construction of new railroad lines. Congress has directed the Board to approve applications to build new lines, provided the Board finds such lines not to be inconsistent with the public convenience and necessity.

The Board's regulations establish the requirements for an application for authority to construct a new line. They require that applicants explain how they plan to finance the construction of the new trackage, and that they provide certain information regarding the rail traffic expected to flow over that trackage.

GLBT's Application fulfilled the requirements of those regulations. The regulations do not require applicants to provide information that is as granular and assured as the Block Opponents suggest. The Board, in previous proceedings, has understood and accepted the fact that its licensing authority is a significant barrier to financing new rail lines, and that in light of the Congressional policy favoring new line construction a general finding that the proposed line offers some competitive advantage is sufficient to assume that financing will be located once the application is approved. Similarly, the Board has accepted the traffic projections of applicants, with such adjustments as are justified by the evidentiary record, as sufficient to meet the requirements of the regulation without signed transportation contracts or other legally enforceable commitments.

Since GLBT's Application meets the regulatory requirements, the Petitions for Rejection should be denied. The Application should be accepted for filing by the Board and consideration of the transportation merits of the proposed new rail line should commence.

Respectfully submitted,

GREAT LAKES BASIN TRANSPORTATION, INC.

By: 
Legal Counsel

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CERTIFICATE OF SERVICE

Michael W. Blaszak hereby certifies that on July 31, 2017 he served the foregoing pleading, Applicant's Reply to Petitions for Rejection of Application, on the following by first class mail and Electronic mail:

Thomas McFarland
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**Verified Statement
of
James T. Wilson
Vice Chairman, Great Lakes Basin Transportation, Inc.**

I am James T. Wilson, Vice Chairman of Great Lakes Basin Transportation, Inc., applicant in this proceeding ("GLBT"). I previously testified in support of GLBT's Application to construct and operate its proposed railroad line. I am now submitting this verified statement in response to the Petition for Rejection of Application filed by seven groups that oppose GLBT's proposal.¹

The purpose of this statement is to explain GLBT's efforts to secure financing for the construction of this project. I have been involved in these efforts since joining GLBT in 2014.

GLBT is a startup company. It began with a vision: easing the endemic congestion of the Chicago railroad terminal by building an entirely new, modern and efficient bypass rail line around the metropolitan area. To make this vision a reality, GLBT must first finance the preliminary process of developing a conceptual design for approximately 261 miles of new main line railroad, most of it double

¹ Block GLB Railroad LaSalle County, IL, Rock Against the Rail, LLC, Kankakee County, IL Block GLB, Railed, Citizens Against the GLB Railroad, Boone County, IL, Winnebago County Against the GLB Railroad and Save Our Farmland, LLC.

track, and applying for and securing Surface Transportation Board approval, including environmental review. After successfully completing that process, GLBT must finance the construction of the new line, which would be the second largest freight railroad construction project proposed in recent history, after the never-built 280-mile Dakota, Minnesota & Eastern Powder River Basin extension.

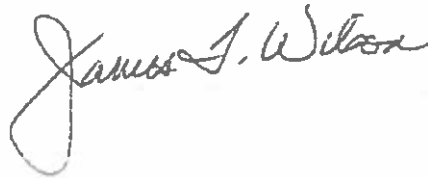
I have talked to many potential investors in support of GLBT's efforts to finance the preliminary, permitting phase of this project. Our executive team has met over the past three years with qualified individual investors, family investment offices, banks, investment bankers, attorneys, REIT funds, real estate developers, unions, insurance companies, pension funds, and infrastructure funds. We have talked with investors in the U.S., Canada, Mexico, Europe, Middle East, and Australia in our search for preliminary and construction funding. I cannot identify these potential investors due to confidentiality obligations, but they number in the hundreds.

With the exception of the individuals who have made equity investments in GLBT, potential investors, in particular institutional investors, have told us that they will not or cannot, because of their investment rules, invest in the preliminary stage of this project. This is because we cannot assure them that the Board will approve the project, or give them a timetable for the Board's decision. Therefore, they risk a loss of 100% of their investment if the project is not approved. Even if approval is obtained, the timing of approval is uncertain, and the investors cannot predict when they would begin to see a return on the investment.

I have been told repeatedly by many of these same investors that, once the preliminary phase is completed and GLBT has its construction authority, they would be interested in evaluating an investment in the construction phase, since they then could project with some certainty when the railroad would be completed, when freight traffic would begin flowing over it, and when freight revenue would begin generating a rate of return. Some of these potential investors, in view of the projected

growth of rail traffic over the decades to come, have gone so far as to tell me that the GLBT opportunity is a "no brainer." But they reiterate that they can't invest in the project until STB authority is obtained.

We continue to work constantly to secure the patient investment needed to complete the preliminary phase of the GLBT project. Once that is done, and if the project is approved for construction, I am confident from the discussions described in the foregoing paragraph that GLBT will be able to finance construction of the railroad.

A handwritten signature in dark ink, reading "James T. Wilson". The signature is written in a cursive style with a large, looping initial "J".

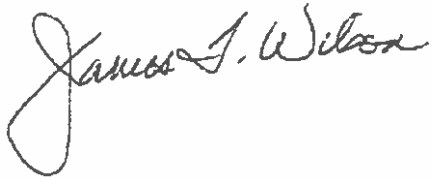
James T. Wilson

Vice Chairman, Great Lakes Basin Transportation, Inc.

VERIFICATION

I, James T. Wilson, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

A handwritten signature in black ink that reads "James T. Wilson". The signature is written in a cursive style with a large, looping initial "J".

James T. Wilson
July 28, 2017
