

ENTERED
Office of Proceedings
February 22, 2019
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TEXAS RAILWAY EXCHANGE LLC –	)	
Construction and Operation Exemption –	)	
Galveston County, TX – Petition for Issuance	)	FD 36186 (Sub-No. 1)
of a Crossing Order Pursuant to 49 U.S.C.	)	
§ 10901(d)	)	

**PETITION FOR INSTITUTION OF
MODIFIED PROCEDURAL SCHEDULE**

The Texas Railway Exchange LLC (“TREX”) requests that the Surface Transportation Board (“STB” or “Board”) consider this matter pursuant to a modified procedural schedule, and in support hereof states as follows:

On November 21, 2018, TREX filed an exemption petition asking the Board to exempt TREX from the prior approval requirements set forth in 49 U.S.C. § 10901 for the proposed construction of an approximately 2,800-foot line of common carrier railroad. This line, when constructed, will provide for new direct, competitive transportation service for Texas International, Terminals, Ltd., TREX’s affiliate.

Today, TREX has filed its Petition for Issuance of A Crossing Order Pursuant to 49 U.S.C. § 10901(d) (“Crossing Petition”). Through its Crossing Petition, TREX asks the Board to issue an order to provide it with rights to cross the railroad line of Union Pacific Railroad Company (“UP”), and prevent UP from blocking construction of the new TREX line, which line must cross over the existing UP line.



In its decisions in the *WFEC*¹ and *Superior*² cases, the agency treated the filing of a § 10901(d) crossing petition, which petition contained opening evidence and argument, as an opening statement under the its modified procedure rules, and established an appropriate modified procedural schedule. (Copies of the *WFEC* and *Superior* decisions are appended hereto). Like the petitions in *WFEC* and *Superior*, TREX's Crossing Petition constitutes a complete evidentiary submission and therefore should be considered as an opening statement under the Board's modified procedure.

TREX requests that the Board adopt the following schedule for the remaining modified procedure filings:

- (a) Respondent's reply is due forty-five (45) days from the service date of the Board's modified procedure order; and
- (b) TREX's rebuttal is due thirty (30) days after receipt of respondent's reply.

The proposed schedule is the same schedule that UP's predecessor, Chicago and North Western Transportation Company ("CNW"), requested and obtained in *Superior*, which, as explained further in TREX's Crossing Petition, involved CNW's more complex and lengthy crossing of three railroad lines at-grade, with more affected

¹ *WFEC R.R. – Constr. & Operation Exemption – Choctaw & McCurtain Cntys., OK – Pet. for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, FD 32607 (Sub-No. 1) (STB served May 5, 1995) ("*WFEC*") (Attachment A).

² *Chi. & N. W. Transp. Co. – Constr. & Operation Exemption – City of Superior, Douglas Cnty., WI – Pet. for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, FD 32433 (Sub No. 1) (STB served Nov. 30, 1994) ("*Superior*") (Attachment B).

traffic than involved with the UP's crossed lines here. The proposed schedule is also over three weeks longer than the 51-day procedural schedule adopted in *WFEC*.³

As further explained in TREX's Crossing Petition, the adoption of the standard and orderly procedural schedule requested is necessary to ensure that the benefits of the more efficient and reliable railroad service that the new line will bring will be made available to the public as soon as possible. Further, as explained in its Crossing Petition, TREX seeks an expedited decision by the Board for TREX to be able to avoid substantial financial and project delay risks arising in connection with its diamond crossing manufacturer agreement.

WHEREFORE, for the reasons set forth above, TREX respectfully requests that its petition to establish a modified procedural schedule be granted.

³ TREX notes that in other crossing cases, such as in *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – for Construction in Will County, IL – Petition for Line Crossing Authority Under 49 U.S.C. 10901(d)*, FD 34060 (Sub-No. 1) (STB served Oct. 4, 2002) ("*Midwest Generation*") the Board's standard rules for replies have been used. In *Midwest Generation*, the crossed carrier's opposition filing was submitted 24 days after the crossing petition was filed and the parties engaged in two modest surreply filings over the next several weeks. *Id.* at 2. All responsive filings were submitted within 48 days of the filing of the crossing petition. *Id.*

Respectfully submitted,

TEXAS RAILWAY EXCHANGE LLC

A handwritten signature in black ink, appearing to read "Peter Pfehl".

Peter A. Pfehl

Robert D. Rosenberg

Katherine F. Waring

SLOVER & LOFTUS LLP

1224 Seventeenth St., N.W.

Washington, D.C. 20036

(202) 347-7170

(202) 347-3619 (facsimile)

Dated: February 22, 2019

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of February, 2019, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/
Katherine F. Waring
An Attorney for Complainant

ATTACHMENT A

1995 WL 259441 (I.C.C.)

SURFACE TRANSPORTATION BOARD (S.T.B.)

WFEC RAILROAD COMPANY—CONSTRUCTION AND OPERATION EXEMPTION—CHOCTAW AND
McCURTAIN COUNTIES, OK—PETITION FOR ISSUANCE OF AN ORDER PURSUANT TO 49 U.S.C. 10901(d)

Decided: April 28, 1995
Service Date: May 5, 1995

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 32607 (Sub-No. 1)

*1 By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

By petition filed February 27, 1995, the WFEC Railroad Company (WFEC) requests that we issue an order pursuant to 49 U.S.C. 10901(d) to allow WFEC to cross the right-of-way of the Kiamichi Railroad Company, Inc. (Kiamichi) in the construction¹ of a 14-mile railroad line to permit the Western Farmers Electric Cooperative, Inc. (Western Farmers) to receive service at its Hugo generating station by a second railroad.² In its section 10901(d) petition, WFEC alleges that efforts to negotiate a crossing agreement have not been successful. In a concurrently filed petition, WFEC requests that we issue a procedural schedule to consider its request under the modified procedure. Kiamichi has not replied. The United Transportation Union filed a protest (letter) to WFEC's section 10901(d) petition and requested employee protective conditions.

WFEC states that its section 10901(d) petition constitutes a complete evidentiary submission, that it should be considered as an opening statement under the modified procedure,³ that reply statements should be due 30 days from the service date of this decision, and that its rebuttal should be due 21 days after receipt of reply statements. WFEC argues that no more time is needed because this case involves a proposal to build an overpass over the existing line rather than an at-grade crossing, and it raises no compensation issues.⁴

WFEC's request is reasonable. We will consider its petition under the modified procedure and will treat WFEC's section 10901(d) petition as its opening statement. Thus, we need only establish a schedule for filing reply and rebuttal statements.

It is ordered:

1. A proceeding is instituted to consider WFEC's request for a crossing order under 49 U.S.C. 10901(d).
2. The proceeding will be handled under the modified procedure. WFEC's section 10901(d) petition will be treated as its opening statement.
3. Replies are due June 5, 1995.
4. WFEC's rebuttal is due June 26, 1995.
5. This decision is effective on its service date.

Vernon A. Williams

Secretary

Footnotes

- 1 By decision served February 27, 1995, we conditionally exempted the construction and operation of the proposed line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal. WFEC Railroad Company--Construction and Operation Exemption--Choctaw and McCurtain Counties, OK, Finance Docket No. 32607 (ICC served Feb. 27, 1995). Several petitions to reopen have been filed in that proceeding, including a petition by Kiamichi, and a decision on them is pending.
- 2 WFEC is a corporate subsidiary of Western Farmers.
- 3 WFEC served a copy of its petition on Kiamichi, Burlington Northern Railroad Company, and the Railway Labor Executives' Association.
- 4 In its section 10901(d) petition, WFEC asks us to adopt a two-step procedure here. First, WFEC asks us to issue the crossing order. Second, WFEC observes that if we authorize the crossing but the parties cannot subsequently agree on compensation, the Commission can address the compensation issue upon petition by a party.

1995 WL 259441 (I.C.C.)

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

ATTACHMENT B

EC

FD/EC/12
SERVICE DATE

NOV 16 1994

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32433 (Sub-No. 1)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY-CONSTRUCTION AND
OPERATION EXEMPTION--CITY OF SUPERIOR, DOUGLAS COUNTY, WI--
PETITION FOR ISSUANCE OF AN ORDER PURSUANT TO 49 U.S.C. 10901(d)

Decided: November 15, 1994

By petition filed September 1, 1994, the Chicago and North Western Railway Company (CNW)¹ requests that we issue an order pursuant to 49 U.S.C. 10901(d) allowing that carrier to cross track owned by Burlington Northern Railroad Company (BN) and the Soo Line Railroad in the construction of a railroad line to serve a coal dock owned by the Midwest Energy Resources Company in the city of Superior, WI. In its petition, CNW alleges that BN failed to respond to its requests to negotiate over the requested crossing. CNW requests that the Commission order the crossing,² accept the compensation proposed in its petition, and allow the parties 45 days from the requested order to negotiate crossing arrangements that are not related to compensation. CNW requests expedited action so construction may be completed in 1995.

In its reply, BN states that (1) it does not object to a crossing but that (2) it disagrees with the compensation proposed by CNW, and (3) it requests that the proceeding should be held in abeyance for an indefinite period while the parties negotiate all the terms of crossing. Under BN's approach, the parties would report to the Commission on the status of negotiations within 90 days.

In its reply to BN's reply, CNW opposes BN's alternate approach and renews its request for the relief sought in its petition.

In addition, the United Transportation Union (UTU) has filed a "protest" to the petition, and UTU requests a public hearing. UTU submits that the Commission should impose employee protective conditions for the benefit of BN employees if the transaction is allowed. UTU also argues that CNW has not complied with Commission regulations at 49 CFR 1150.1 et seq. governing the filing of applications under 49 U.S.C. 10901.

Under 49 U.S.C. 10901(d), either party to a crossing dispute may petition the Commission to order a crossing if the parties disagree over the terms of operation over the crossed line or the

¹ Prior to May 6, 1994, the Chicago and North Western Railway Company was known as the Chicago and North Western Transportation Company.

² Under 49 U.S.C. 10901(d)(1), the issuance of an order directing a crossing requires that the Commission first issue a "certificate of public convenience and necessity" authorizing the construction and operation of the line to be used in the crossing. In our prior decision in Chicago and North Western Transportation Company--Construction and Operation Exemption--City of Superior, Douglas County, WI, Finance Docket No. 32433 (ICC served May 11, 1994), we conditionally exempted the construction and operation of the line from the prior approval requirements of section 10901, subject to completion of the necessary environmental review. CNW argues that, because of this exemption, we may in (Sub-No. 1) summarily issue the required certificate of public convenience and necessity.

compensation to be paid by the party seeking to cross. Here, both parties agree to CNW's crossing of BN's line but BN disagrees with the specific terms proposed in CNW's petition. In its petition, CNW indicates that it attempted but failed to reach agreement with BN. Thus, CNW has filed its request for crossing authority and is entitled to have the Commission expeditiously dispose of it based on the evidence before it, without the delay that would be caused by holding the petition in abeyance.

We will proceed to hear CNW's petition under our modified procedure. See 49 CFR Part 1112. We note that the parties are free to negotiate while the Commission is hearing CNW's petition. They may request suspension of the proceeding if they mutually agree that this would facilitate negotiations. Because CNW's petition was a complete evidentiary statement, it will be treated as CNW's opening statement under the modified procedure, and only the rebuttal and reply statements remain to be filed.

We disagree with UTU's assertion that CNW's petition has failed to comply with the requirements for filing applications at 49 CFR 1150.1 et seq. These requirements apply for applications to construct and operate track under 49 U.S.C. 10901, not to track crossing petitions. CNW's construction and operation of the track were approved via exemption under 49 U.S.C. 10505 in Finance Docket No. 32433, n.2 supra. We will deal with UTU's position concerning labor protection in our final decision. However, UTU may comment on the remaining pleadings that are filed by BN and CNW under the modified procedure. We will deny the request for public hearing.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A proceeding is instituted to resolve the controversy.
2. The proceeding will be handled under the modified procedure. CNW's petition will be treated as its opening statement and pleadings must be filed and served according to the following schedule:
 - (a) BN's reply statement is due on January 30, 1995.
 - (b) CNW's rebuttal is due on February 28, 1995.
 - (c) UTU may file comments by March 10, 1995.
3. This decision is effective on November 30, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons, Morgan, and Owen. Vice Chairman Phillips recused herself in this proceeding.

(SEAL)

Vernon A. Williams
Secretary