

SERVICE DATE – JUNE 14, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35424

SWANSON RAIL TRANSFER, LP—DECLARATORY ORDER—SWANSON
RAIL YARD TERMINAL

Digest:¹ This decision advises Swanson Rail Transfer, LP that it does not need Board permission to expand and realign rail track at a facility it operates in Philadelphia, Pa.

Decided: June 13, 2011

BACKGROUND

On October 7, 2010, Swanson Rail Transfer, LP (Swanson) filed a petition asking the Board to issue a declaratory order finding that the expansion and realignment of the petitioner's rail track and related facilities in the Swanson Rail Yard (the Yard) in Philadelphia, Pa. (Philadelphia or the City) are not subject to the Board's rail construction licensing authority at 49 U.S.C. § 10901.

The Yard is a 9.16-acre rectangular parcel of land approximately 159.54 feet wide and 2,063 feet long.² It is located about 25 feet east of Interstate Highway 95 between Pattison Avenue and the Delaware River Port Authority right-of-way³ in Philadelphia. Conrail's Swanson Street Lead runs along the western side of the Yard. The eastern side is bordered by the Philadelphia Southeast Wastewater Treatment Plant (Treatment Plant). Currently, a 981-foot rail line traverses the Yard diagonally. The track begins at a switch connecting to the Swanson

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Yard was previously owned by Consolidated Rail Corporation (Conrail). On August 18, 2010, the Board served and published a notice of exemption for BDB Company (BDB) to acquire the Yard from Conrail. BDB Co.—Acquis. Exemption—Consol. Rail Corp., FD 35398 (STB served Aug. 18, 2010). The same day, the Board also served and published a notice of exemption for Swanson to lease the Yard from BDB and to operate it. Swanson Rail Transfer, L.P.—Lease & Operation Exemption—BDB Co., FD 35399 (STB served Aug. 18, 2010).

³ The Port Authority right of way underlies a ramp on Interstate Highway 76 that leads to the Walt Whitman Bridge.

Street Lead and extends to the Treatment Plant. Formerly, the line was used to deliver chlorine to the Treatment Plant. The line is not currently in use, although Swanson has authority to operate the line as a common carrier pursuant to the notice of exemption it filed with the Board in August 2010.⁴ According to Swanson, there are no mileposts on the line.

Swanson proposes to construct the Swanson Rail Yard Terminal (Swanson Terminal) on the property. In addition to building a new transload facility, Swanson plans to relocate a portion of the existing track, but keep the switch to Conrail's lead intact, along with the segment leading to the Treatment Plant. Swanson also plans to build: (1) two new connections to the Swanson Street Lead; (2) 1,295 feet of track (the SRT Lead) to serve the transload facility; and (3) 3,600 feet of track for rail car storage and holding.

Swanson intends to use the line to resume service to the Treatment Plant and to haul solid waste, recycled materials, and wood chips brought to the site via truck by the Philadelphia Department of Sanitation and by private businesses. Swanson states that "[c]urrently, there are no solid waste transfer stations in the City of Philadelphia which utilize rail to transport solid waste."⁵ According to Swanson, the transload operation will allow 500,000 tons of solid waste generated annually in the Philadelphia area to be moved by rail and will divert 50,000 truck trips each year from the City's roads, thus reducing "air pollution, congestion, noise, and highway wear and tear, while furthering safety and energy independence."⁶

Swanson states that, in January 2010, it received a permit from the Pennsylvania Department of Environmental Protection to construct and operate the proposed transload operation and a zoning certificate from the City approving the operation of the facility. According to Swanson, the Yard is located in a heavily industrial area, with the nearest residential area 2,000 feet away and screened off from the Yard by highway traffic structures.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554 (e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. Swanson has requested that we issue a declaratory order defining the scope of our authority over its proposed actions at the Yard. To remove uncertainty with regard to the scope of our authority over Swanson's currently proposed actions, we will issue this declaratory order.

Pursuant to 49 U.S.C. § 10901, a rail carrier must seek Board authority to construct a new line of rail or to extend an existing line of rail. However, Board approval under § 10901 is not always necessary for carriers to lay track. First, no Board authority is necessary when a carrier proposes to improve or relocate an existing line without extending the railroad's territory. See Tex. & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266, 278 (1925); BNSF Ry.—Petition for Declaratory Order, FD 35164 et al., slip op. at 8 (STB served May 20, 2009); Union Pac.

⁴ See supra note 2.

⁵ Swanson's Pet. For Declaratory Order 4.

⁶ Id. at 3.

R.R.—Petition for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction, Tex., 3 S.T.B. 646 (1998); Denver & Rio Grande W. R.R.—Joint Constr. Project—Relocation Over Burlington N. R.R., 4 I.C.C.2d 95, 97 (1987). Second, pursuant to 49 U.S.C. § 10906, no Board authority is required for an existing carrier to construct ancillary “spur, industrial, team, switching, or side tracks.” As discussed below, we find Swanson’s proposal constitutes a combination of (1) an improvement and relocation of existing facilities; and (2) the construction of ancillary spur track within the meaning of § 10906. Therefore, the combination of these 2 limitations on our authority support the conclusion that no prior approval is required from the Board for Swanson’s proposed actions in the Yard.

Line improvement and relocation. A railroad may undertake to upgrade or relocate an existing line in order to carry out its common carrier obligation under its existing license on that line without additional authority from the Board. These actions may be contrasted with a carrier’s expanding the scope of its service, which requires an additional license. In distinguishing between a relocation or an expansion, the agency considers a variety of factors. In particular, the agency looks at whether the proposed line would operate in the same manner as the existing one, whether a shipper is or would be involved, and whether new competitive territory would be reached. Denver & Rio Grande W. R.R., 4 I.C.C.2d at 97. In Texas & Pacific Railway, the Supreme Court noted that when the “proposed trackage extends into territory not theretofore already served by the carrier, and particularly where it extends into territory served by another carrier, its purpose and effect are . . . of national concern,” thus triggering the requirements of what is now § 10901. Tex. & Pac. Ry., 270 U.S. at 278.

Swanson’s track construction will not extend its line into new territory, as its line will begin and end at the same previously existing points – Conrail’s Swanson Street Lead and the plant – on the western and eastern boundaries of its existing rail property. The project includes the construction of 2 new switches to the existing Conrail line, but that line is already connected to Swanson’s line serving the Treatment Plant, so the project will not take Swanson’s rail service into any new territory or market. We conclude that the proposed changes to Swanson’s existing line will merely enable Swanson to enhance, augment, and improve the service it is already authorized to offer in the same territory. The traffic created by the transload facility will not impinge on any nearby carrier’s customers because there is currently no rail option in the City of Philadelphia for shipping municipal solid waste and no other rail connection to the Treatment Plant. Thus, this project involves a line improvement and relocation, not the construction of a new line. See, e.g., City of Detroit v. Canadian Nat’l Ry., 9 I.C.C.2d 1208 (1993), aff’d sub nom. Detroit/Wayne Cnty. Port Auth. v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).

Spur track under 49 U.S.C. § 10906. The terms “spur, industrial, team, switching, or side tracks” (collectively, “spur” track) are not defined in the Interstate Commerce Act, nor does the legislative history of the statute reveal a clear Congressional intent regarding the meaning of these terms. Bhd. of Locomotive Eng’rs v. United States, 101 F.3d 718, 726 (D.C. Cir. 1996). The agency and the courts have adopted a case-by-case, fact-specific approach to make this determination. See, e.g., Chi. & N. W. Trans. Co.—Aban. Exemption—In McHenry Cnty., Ill., 3 I.C.C.2d 366 (1987), rev’d on other grounds sub nom. Ill. Commerce Comm’n v. ICC, 879 F.2d 917 (D.C. Cir. 1989).

In distinguishing between ancillary spur track and track used for line haul service, the Board and its predecessor, the Interstate Commerce Commission, have primarily looked to the “intended use” of the track. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983). Typically, spur track is used for loading, unloading, storage, or switching operations that are incidental to the movement of trains. Swanson plans to use the spur track it will lay for loading, unloading, and storage. Swanson’s proposed track construction will increase its yard’s storage capacity for cars.⁷ Moreover, the new track will be used to load onto rail cars commodities brought to the site by truck and to switch traffic to Swanson’s relocated main line, which connects to Conrail’s Swanson Street Lead. The intended use of the Swanson track, which is ancillary to Swanson’s main line, thus is typical of activities associated with spur track, and we find Swanson’s proposed construction of track ancillary to its main line to be the laying of spur track excepted by § 10906 from the licensing requirements of 49 U.S.C. § 10901.

While no Board authority is required for Swanson’s proposal, we note that the record indicates that the proposal will benefit the public interest. The City is looking for alternative ways of handling solid waste, and the transfer facility will reduce the number of trucks moving over congested City streets. The proposal is also designed to benefit shippers by giving them access to more distant landfill areas. Moreover, according to Swanson, it has already received the necessary state and local permits to build and operate its transload facility at the Yard.

We will grant Swanson’s petition for declaratory order to confirm that the proposed laying of track does not require Board authorization.

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

It is ordered:

1. Swanson’s petition for declaratory order is granted and the Board confirms that no Board authority is necessary for the proposed laying of track at issue.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

⁷ Swanson’s Pet. For Declaratory Order 4, 11.