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SERVICE DATE - JULY 16, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION CONSTRUCTION
INTO THE POWDER RIVER BASIN

Decided: July 15, 1998

By application filed February 20, 1998, the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) seeks authority to construct and operate 280.09 miles of new railroad line, which would extend the DM&E into the Powder River Basin (PRB) coal fields in northeastern Wyoming. In connection with this construction DM&E also plans to undertake substantial rehabilitation along its approximately 600-mile existing line. This construction and operation project involves numerous communities in three states (Wyoming, South Dakota, and Minnesota) and is the largest project of its kind filed with the Board. By decision served May 7, 1998, the Board issued a procedural schedule pertaining to the transportation aspects of this proceeding. A draft scope for the Environmental Impact Statement (EIS) that will be prepared in this case also has been issued for public review and comment. Public scoping meetings also have been held in communities that would be affected by the proposed rail line. In this decision we will set this proceeding for modified procedure¹ and address a pending motion to compel discovery.² We will also discuss some of the unique issues and concerns that have been raised in this case to date to provide guidance for the material that will be filed in the second round of comments, in accordance with the procedural schedule set for this case.

BACKGROUND

Even though we are still at the preliminary stages of our review of this project, we have received numerous pleadings from landowners, environmental groups, shipper organizations, shippers and receivers (including electric utilities), DM&E and other railroads, government entities,

¹ The Board, like our predecessor agency, the Interstate Commerce Commission (ICC), has a well established and judicially approved practice of handling almost all of its cases under the "modified procedure," in which all hearing testimony is submitted in writing. Lakeland Bus Lines, Inc. v. ICC, 810 F.2d 280, 288 at n.7 (D.C. Cir. 1987).

² By petition filed June 17, 1998, the Mid-States Coalition for Progress (Coalition) seeks an order compelling discovery from DM&E. DM&E replied on July 7, 1998. Pursuant to 49 CFR 1114.21, the parties are permitted to conduct document discovery and depositions without prior Board approval, and we expect them to be forthcoming, not obstructive, in discovery matters. Any discovery disputes will be referred to an administrative law judge for resolution.

and rail labor unions, both in support of and in opposition to the project. We have reviewed all the pleadings, but will focus in this decision on DM&E's pleading and the pleading filed in opposition by the Mid States Coalition for Progress (the Coalition),³ which reflects the sort of objections being raised by the other parties in opposition.

The Coalition contends that in this construction case the Board must consider: (1) whether DM&E is fit, financially and otherwise, to undertake the construction and provide rail service; (2) whether there is public demand or need for the service; and (3) whether additional competition⁴ would be harmful to existing carriers.⁵ 49 U.S.C. 10901. The Coalition argues that DM&E is a marginal Class II carrier which has struggled for years to maintain its current operations, and that to undertake a project of this magnitude with no firm financing or customer commitments would jeopardize its common carrier obligation to serve its existing shippers. DM&E, the Coalition asserts, has no margin for error and, therefore, its application should be denied on fitness grounds.

Also, the Coalition claims that, even if the project were somehow successfully completed, the net public transportation benefits resulting from this project would be negligible. The Coalition claims there has been no credible showing of public demand for this project, and that the public interest is not served by the expenditure of \$1.4 billion on the construction of facilities that would be redundant to existing rail lines into the Powder River Basin, particularly where there has been no showing that existing service is inadequate.

Finally, the Coalition, while acknowledging that only the transportation aspects of the project are at issue now, contends that the application also raises a number of serious environmental issues.⁶ Combined with DM&E's weak financial position and the highly speculative transportation benefits that may result, the Coalition claims that the deleterious environmental impacts of the project require rejection of this application.

DM&E responds that the rail transportation policy favors the construction of new rail lines. It claims that under 49 U.S.C. 10901, there is a heavy burden on opponents to demonstrate clear inconsistency with the public convenience and necessity. DM&E points out that neither current shippers nor employees, the two groups with the most at stake in DM&E's ability to carry out this project, oppose the application. Similarly, DM&E claims that its shareholders do not oppose the

³ Members of the Coalition are listed in Attachment A to its comments filed June 11, 1998.

⁴ The Coalition concedes that the proposal would be unlikely to result in competitive harm to existing carriers.

⁵ The Coalition cites STB Finance Docket No. 30186 (Sub-No. 2), Tongue River R.R.-- Rail Construction & Operation-- Ashland to Decker, Montana, ICC served Nov. 8, 1996 (TRRC).

⁶ Indeed, complex environmental issues were raised by virtually every party which submitted comments opposing the application.

project and that the financial markets, not regulation, should have the ultimate say on whether the project is financially feasible. DM&E acknowledges the environmental concerns that many commenters have raised, but contends that this phase of the proceeding is not the proper time for addressing these concerns.

DISCUSSION AND CONCLUSIONS

The construction of a rail line is governed by 49 U.S.C. 10901, which states that the Board shall authorize such construction unless it finds doing so inconsistent with the public convenience and necessity. The statute does not define “public convenience and necessity,” but a three-part test has evolved to evaluate whether a proposed construction is permissible: (1) is the applicant financially fit to undertake the construction and provide service; (2) is there a public demand or need for the proposed service; and (3) will the new competition be in the public interest and not harmful to existing carriers/services?⁷

DM&E, in its reply to the comments filed on the procedural schedule noted, at 8, “If the schedule had not included a provision for a second round of comments [which it does], the Board would be justified in closing the record at this juncture, on the ground that opponents have not demonstrated any need for further submission.” This comment indicates, however, that DM&E may have misconstrued the applicable statutory standard and the extent to which it has satisfied that standard in the pleadings it has submitted thus far, given the breadth of the proposal and its environmental impacts.

Under the procedural schedule set for this case⁸, the next step is for us to set the case for modified procedure. The purpose of a modified procedure order⁹ is to review the comments filed in reply to a petition or application and to determine if the evidence and arguments submitted are adequate to enable the agency to decide the case. If not, the order discusses the additional material that is needed. Additional evidence and argument would be warranted here, even if the procedural schedule did not already provide for a second round of comments.

DM&E, in its June 16, 1998 reply states that the statute articulates a policy that “. . . establishes a strong presumption which necessarily imposes on opponents of new railroad construction a heavy burden of rebuttal by demonstrating clear inconsistency with the public convenience and necessity.” DM&E overstates the effect of the statute. The statute provides that

⁷ See TRRC, at 14.

⁸ Pursuant to this schedule, the due date for evidence and argument in opposition to the transportation aspects of the application is August 31, 1998, the due date for reply evidence and argument is September 21, 1998, and we anticipate issuing a decision by November 3, 1998.

⁹ As noted, the Board handles almost all of its cases under the modified procedure (i.e., on a written record). The Board rarely undertakes oral hearings.

construction applications should be granted unless we find that "such activities are inconsistent with the public convenience and necessity." That means that where, as here, opponents have presented strong evidence challenging the elements that make up the "public convenience and necessity" determination (i.e., financial fitness, and public demand or need) for such a broad proposal, it is critical for the applicant to respond to these allegations.¹⁰

To date in this case, DM&E has submitted general statements of support for its application. But neither these statements nor any other submission by the applicant explains with specificity why this rail line is needed. For example, what does DM&E project as the need for additional coal hauling capacity in the future and what are the bases for those projections, including specific support from individual shippers? In this regard, the record says nothing about the vigor of existing competition between the two carriers presently serving the Powder River Basin, the Burlington Northern Santa Fe Railroad (BNSF) and the Union Pacific Railroad (UP), nor does the record describe the extent of competitive benefit that service by the DM&E would provide to the public. Additional evidence on these issues now should be provided.

We also have questions about the level of support from the people who would be directly affected by the proposed new construction and expanded operation of the DM&E system. DM&E's application contained a number of statements of support from elective representatives (though more from the national and state level than the local level), but the initial round of comments produced a large number of statements in opposition to the project from those who live in the numerous towns, cities, counties and states that would be directly affected and produced very few statements in support of it. The people who are and would become neighbors of the DM&E would incur a large measure of the impact of the construction and subsequent operation. The extent and nature of those impacts, and whether they can be adequately mitigated, will not be entirely clear until the environmental review process, now underway, has been completed. Nonetheless, in the final analysis, we will decide whether the benefits to the public from the construction outweigh any adverse impacts, taking the potential environmental effects into account in our decisionmaking. This stage of the proceeding affords the applicant the opportunity to develop the record on what it believes those benefits will be and, given the extensive environmental concerns raised to date, it is our view that applicant bears an evidentiary burden in this regard.

Another issue requiring additional evidence and argument is the financial fitness of the applicant to carry out the proposed construction. As noted, various parties have challenged the applicant's financial fitness. Moreover, DM&E has asserted that the risk of this enterprise will be incurred by the financial community, not the railroad. To sustain this argument DM&E should offer more than mere assertions. That is especially true because DM&E says it expects to finance this enterprise in part with debt, and the consequences of failure in such circumstances usually do not fall exclusively upon the creditor.

¹⁰ This is particularly true where as here, serious environmental concerns have been raised as well.

The Coalition argues that the DM&E is a marginal carrier which should not be considering such an ambitious enterprise. To date, DM&E has offered little in the way of evidence or argument to rebut this contention. This is a multi-state, 1000-mile project that will be a huge financial undertaking. Myriad environmental concerns, including impacts on communities, Native Americans, and ranchers have been raised about this proposal, and the need for it also has been seriously questioned. In these circumstances, it is important that we ". . . be convinced that the proposed venture will not drain the railroad's resources and disable it from performing those duties of public service . . . with consequent detriment to the public . . ." Interstate Commerce Commission v. Oregon-Wash. R. & Nav. Co., 288 U.S. 14, 37 (1933). Even given the more favorable policy toward line constructions evidenced by the recent changes to 49 U.S.C. 10901, it is important that DM&E demonstrate its ability to carry the project through to completion in light of the state of the record to date in this proceeding.

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

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It is ordered:

1. The request for discovery will be addressed by the appointment of an administrative law judge.
2. This proceeding will be continued under the modified procedure, in accordance with the procedural schedule set forth in our May 7, 1998, decision.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary