

39453
DO

SERVICE DATE – DECEMBER 2, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35181

INDIANA RAIL ROAD COMPANY—PETITION FOR DECLARATORY ORDER

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: In response to a petition filed by Indiana Rail Road Company (INRD) on October 7, 2008, the Board is instituting a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e). The Board seeks to determine whether a track INRD proposes to construct from its east-west main line at Dugger, IN, to a new coal operation south of that main line will be a spur track exempt from Board approval under 49 U.S.C. 10906 or a line of railroad subject to the Board's jurisdiction and requiring Board approval under 49 U.S.C. 10901. The Board seeks public comment on this matter.

DATES: Comments are due by January 16, 2009. Replies are due by February 5, 2009.

ADDRESSES: Send an original and 10 copies of any comments, referring to STB Finance Docket No. 35181, to: Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001. In addition, send one copy of comments to INRD's representative, John Broadley, 1054 31st Street NW, Suite 200, Washington, DC 20007.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245-0395.
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339].

SUPPLEMENTAL INFORMATION: INRD's petition for declaratory order concerns the proposed construction of a track approximately 5 miles long from INRD's east-west main line at Dugger to a new coal operation in the coal bearing area south of the INRD east-west main line. INRD requests that the Board issue a decision stating that the proposed track will be a "spur," and thus would be exempt from Board regulation pursuant to 49 U.S.C. 10906.

The proposed track, which INRD will construct, will serve a coal mining operation run by a subsidiary of Peabody Energy—the Black Beauty Coal Company (collectively, Peabody). The track will run west from INRD's east-west main line for approximately one mile, then turn south and run almost directly to a coal loadout and loop track that Peabody will construct to serve the new mine, the Farmsburg Mine, Bear Run Pit.

The Board does not exercise licensing authority “over construction, acquisition, operation, abandonment, or discontinuance of spur . . . tracks.” 49 U.S.C. 10906. The determination of whether a particular track segment is a “railroad line” requiring Board authorization under 49 U.S.C. 10901(a), or an exempt spur turns on the intended use of the track segment. Nicholson v. I.C.C., 711 F.2d 364, 368 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984). Exempt spurs are “commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier.” Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U.S. 266, 278 (1926) (Texas & Pacific). In contrast, if a railroad constructs tracks that extend substantially its line into new territory, then the new track is an extension subject to Board licensing requirements and not an exempt “spur.” Id.

Petitioner asserts that the track proposed to be constructed here meets the test for spur track set forth in Texas & Pacific because the track: (1) will not invade the territory of any other railroad, as the closest railroad is a CSXT main line track located approximately 6.2 miles west of the new Peabody coal mine, and (2) will not constitute a significant extension of INRD’s line into new territory as INRD and its predecessors have historically served this area through other spurs off the existing INRD main lines.¹

INRD further argues that finding this track to be an exempt spur would be consistent with the Supreme Court’s holding in United States v. Idaho, 298 U.S. 105 (1936) because: (1) the track will be built pursuant to an agreement with the shipper—Peabody, (2) either Peabody or its customers will enter into contracts for transportation that will make financing possible, (3) the shipper to be served by the track, Peabody, will provide a large part of the right-of-way—4.2 of the approximate 5 miles, (4) the proposed track will be stub-ended, and (5) the track will serve only one shipper.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. A declaratory order proceeding is thus instituted in this proceeding to invite broad public comment. Any person seeking to participate in support of, or in opposition to, INRD’s petition may submit written comments to the Board regarding whether the proposed track is a “spur.”

¹ Regarding this last factor, petitioner also cites the Board’s holding in New York City Economic Development Corporation—Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004).

Board decisions, notices, and filings in this and other Board proceedings are available on our website at WWW.STB.DOT.GOV.

Decided: November 25, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary