

STB DOCKET NO. 41986

EFFINGHAM RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER—CONSTRUCTION AT EFFINGHAM, IL

Decided September 8, 1997

The Board declines to issue a petition for declaratory order in this proceeding as requested by the Effingham Railroad Company because the Board would have jurisdiction over the proposed construction and operation of the trackage involved.

BY THE BOARD:

Effingham Railroad Company (ERRC), an Illinois chartered rail common carrier, seeks a declaratory order¹ that the Board does not have jurisdiction over its proposed construction and operation of track within a new industrial park at Effingham, IL. Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL) responded to the petition for declaratory order, and ERRC replied. Because we find that we would have jurisdiction over the proposed construction and operation, we are declining to issue the requested declaratory order.

BACKGROUND

The City of Effingham is served by two Class I railroads: Illinois Central Railroad Company (ICR), from the north and south, and Consolidated Rail

¹ Counsel for ERRC previously sought an informal opinion from the Board's Secretary, Vernon A. Williams, with regard to this matter. By letter dated November 5, 1996, the Secretary gave his informal opinion (not binding on the Board) that Board approval is required for the proposed construction (or lease) and operation of the trackage involved, because it is a line of railroad and not an exempt spur.

Corporation (Conrail), from the east and west. ICR and Conrail maintain an interchange track on the southwestern outskirts of the city.

An industrial park is being developed to the west of the interchange track.² It appears, based on the maps submitted with the petition, that the boundaries of the industrial park abut the Conrail right-of-way on the north, the right-of-way of the interchange track on the east, and the ICR right-of-way on the southeast.

ERRC describes its plan to serve the industrial park in two phases. Phase I has consisted of its acquisition from Agracel Corporation (Agracel) of five acres of real estate, a rail easement, and approximately 206.05 feet of a 490-foot "switch track,"³ that extends from Conrail's line to a small warehouse used to transfer shipments of beer from rail cars to trucks for delivery. Conrail also owns a portion of the "switch track," which it intends to use as part of a proposed 557-foot interchange track with ERRC.

In Phase II of the project, ERRC plans to construct⁴ 9,835 feet of track solely within the boundaries of the industrial park and roughly parallel to the existing interchange track. Part of this construction will consist of an 1,867-foot line to the north of the "switch track," which will serve an existing industry, Ready-Mix, that apparently does not currently have rail service. The remainder of this construction, to the south of the "switch track," will enable Ready-Mix to reach an interchange point with ICR. The new track will be stub-ended at both termini and will be used exclusively to switch cars to and from present and future shippers in the industrial park, for interchange with Conrail and ICR.⁵

Accordingly, while ERRC intends to operate as an independent carrier, it characterizes the operations it will perform as a "switching service inside an industrial park that would normally be performed by the Class I carriers" with

² According to ERRC, the industrial park is partially developed and currently has only limited rail service.

³ ERRC states that the "switch track" was always used as an industrial spur, and that because ERRC is a substitute carrier on a short piece of industrial track, we had no jurisdiction over the acquisition.

⁴ ERRC indicates that it has sought financial assistance for the construction from the State of Illinois. In response to UTU-IL's claim that funding for such a project would be unlikely, ERRC submits that, although the State has not formally committed to provide assistance, it has given its initial approval of ERRC's application for funding.

⁵ ERRC asserts that it will conduct no line-haul operations of its own and will not operate on the tracks of either Conrail or ICR. It further asserts that neither Conrail nor ICR will operate on its tracks, and that it will not operate as a connecting railroad for those two carriers.

which it intends to interchange. It has executed interchange agreements with both ICR and Conrail.

DISCUSSION AND CONCLUSIONS

The Board's authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty is discretionary. UTU-IL argues that a petition for declaratory order is not appropriate in the context of a proposed construction and operation, and that ERRC should have filed instead an appropriate application or petition for exemption, accompanied by a motion to dismiss. In response, ERRC points out that both the application and exemption procedures are significantly more expensive and would not elicit more meaningful information. While UTU-IL is correct that when jurisdiction is in question applicants often simultaneously file an application or petition for exemption accompanied by a motion to dismiss, there is no set procedure for determining jurisdiction and nothing to preclude ERRC from filing a petition for declaratory order.⁶

Under 49 U.S.C. 10906, the Board does not have authority over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks. Whether a particular track is a railroad line or a switching track turns on the intended use of the track segment. *See, Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983). Tracks are frequently constructed either to improve the facilities required by shippers already served by a carrier or to supply the facilities to others that are similarly situated within the same territory, and such construction does not require our approval under 49 U.S.C. 10901. *See, Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 278 (1926) (*Texas & Pacific*). Where, however, the proposed trackage extends into territory not already served by the carrier, and particularly where it extends into territory already served by another carrier, the Supreme Court has found its purpose and effect to be of national concern, and subject to the jurisdiction of the Interstate Commerce Commission (now the Board). *Id.*

⁶ Had ERRC chosen to file an application or petition for exemption accompanied by a motion to dismiss, we would have initially ruled on the motion and then considered the merits of the application or petition, once we had determined that we had jurisdiction. The only difference here is that ERRC will have to wait for a decision on the merits of its proposed construction until it files an appropriate application or petition for exemption.

In support of its petition for declaratory order, ERRC submits that the operations it proposes in this proceeding are analogous to those found to be switching operations in *Brotherhood of Locomotive Engineers v. Union Pac. R.R. and Chicago C. & P.R.R.*, Finance Docket No. 32127 (ICC served May 16, 1995) (*BLE v. UP & CCP*). Those operations are described by ERRC as: (1) the movement of cars solely for assembly or disassembly of trains; (2) cars coming to rest before and after movement to and from the shipper's plant; and (3) thereafter, movement by the line-haul carriers before or after switching of the cars to and from the shipper's plant. According to ERRC, it should make no difference that a separate corporate entity is performing the service, rather than the line-haul carrier, because the essential nature of the service to be performed is distinct from line-haul operations.

UTU-IL argues that the proposal is confusing and what it really involves is a new carrier seeking to serve a new shipper within the existing territory of Conrail, and perhaps also ICR.

The *BLE v. UP & CCP* case, cited by ERRC in support of its position, actually supports a finding of jurisdiction in this case. In affirming *BLE v. UP & CCP*, the Court of Appeals stated that, while we may look to the tenant's use⁷ as the controlling factor in determining the character of track for the purpose of finding exceptions to our jurisdiction, we may not allow the focus on use to obscure the larger purpose and effect of the transaction. According to the court, while we may focus on the tenant railroad's use of the tracks solely for switching operations as the controlling factor in determining the track's character, if those switching operations have the effect of substantially extending the tenant railroad's lines into new territory, then we may not decline jurisdiction. See, *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 728 (D.C. Cir. 1996) (*BLE*). Under the facts presented here, the character of the track may be switching, but the larger purpose and effect of ERRC's proposal is to construct what will constitute ERRC's entire line of railroad to serve a new rail shipper, Ready-Mix, or additional shippers whose facilities are to be constructed. ERRC argues that it will not be invading Conrail and ICR's territory because both carriers have served this general geographic area for years and neither has expressed any interest in extending their lines of railroad. What is important under the relevant precedents, however, is that

⁷ That case involved a dual-use situation where two carriers, a tenant and a landlord, were using the track in different ways.

ERRC is proposing to construct and operate in territory it has not previously served. The fact that it is a new carrier and that this proposal will constitute its entire operation is even more reason not to decline jurisdiction.

ERRC clearly intends to be a rail carrier and part of the national rail system, rather than merely a switching agent for line-haul carriers. It has negotiated and signed interchange agreements with both carriers, and accordingly it must assume the obligations of a common carrier in serving shippers in the new industrial park.

Accordingly, and consistent with the Secretary's informal opinion, we conclude that the proposed operation and construction of a line of railroad within the new industrial park at Effingham is subject to our authority. ERRC should file an appropriate application for the construction and operation under 49 U.S.C. 10901 or a petition for exemption, under 49 U.S.C. 10502, from the prior approval requirements of section 10901.⁸

Based on the facts as presented in the petition, it does not appear that a declaratory order proceeding is necessary to terminate a controversy or remove uncertainty. Thus, a declaratory order proceeding will not be instituted.

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

It is ordered:

1. The petition for a declaratory order is denied and this proceeding is discontinued.
2. This decision is effective on September 12, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

⁸ While not seeking a declaratory order with regard to the acquisition in Phase I of its proposal, we note that the same rationale applies and that ERRC must obtain our approval or an exemption before operating the 206.05 feet of track that it acquired from Agracel.