

STB FINANCE DOCKET NO. 34060

MIDWEST GENERATION, LLC
–EXEMPTION FROM 49 U.S.C. 10901–
FOR CONSTRUCTION IN WILL COUNTY, IL¹

Decided March 20, 2002

The Surface Transportation Board finds that railroad track that would be constructed to connect a coal-burning electric generating plant with track owned by the Union Pacific Railroad Company would create a common carrier line of railroad subject to the Board's licensing authority under 49 U.S.C. 10901 and the mandatory crossing provisions of section 10901(d). The construction of this line of railroad is conditionally exempted under 49 U.S.C. 10502, subject to the completion of environmental review.

BY THE BOARD:

In STB Finance Docket No. 34060, we tentatively conclude, subject to completion of the ongoing environmental review, that Midwest Generation, LLC (Midwest) should be granted an exemption from the prior approval requirements of 49 U.S.C. 10901 to construct a line of railroad. Following our practice in rail construction cases, this is a preliminary decision addressing transportation-related issues. We will not make a final determination, the exemption will not be effective, and construction cannot begin, until after the environmental review process has been completed and we have considered the potential environmental impacts associated with Midwest's proposal. We will make the exemption authority effective at that time, if appropriate, subject to any necessary mitigation conditions. The related crossing petition in STB Finance Docket No. 34060 (Sub-No. 1) will not be considered until we reach a final decision on the construction exemption request. However, in this decision, we are resolving jurisdictional issues that are common to both proceedings.

¹ This decision embraces STB Finance Docket No. 34060 (Sub-No. 1), *Midwest Generation, LLC – Petition for Line Crossing Authority Under 49 U.S.C. 10901(d)*.

BACKGROUND

By petition filed on June 19, 2001 (Petition), Midwest, an independent power producer that owns and operates several coal-burning electric generating plants, seeks an exemption from the prior approval requirements of 49 U.S.C. 10901 to allow it to construct a rail line approximately 4,007 feet long. The line would connect Midwest's power plant in Joliet, IL, the Joliet Generating Station, to nearby track owned and operated by the Union Pacific Railroad Company (UP). Currently this power plant is directly served by rail only by the Illinois Central Railroad Company (IC).²

Midwest's power plant burns coal that moves via UP from the Powder River Basin of Wyoming and Montana to a junction with IC that is a few hundred yards from the plant. IC then completes the movement into the plant. The proposed construction would enable UP to deliver the coal to Midwest's plant without interchanging the traffic to IC. Midwest and UP have negotiated a contract that would govern the single-line service to be provided by UP after the proposed construction.

Midwest's proposed build-out to UP's line would cross an IC track that is currently unused. IC has refused to grant permission for its line to be crossed by the proposed new line. Therefore, Midwest has simultaneously filed a petition for crossing authority under 49 U.S.C. 10901(d), docketed as STB Finance Docket No. 34060 (Sub-No. 1).

Midwest states that, although it would construct and own the line, it would not perform rail operations over it. Rather, Midwest would arrange for UP or some other rail carrier to perform operations over the track.³ Midwest acknowledges that it would "construct and own the track and maintain the residual common carrier obligations" on the line.⁴ Nevertheless, Midwest contends that it should not be considered to be a railroad for purposes of the

² The proposed line construction and its relationship to other track in the immediate area are set forth in maps attached to the verified statements of Midwest witnesses William E. Nock (V.S. Nock) and R. Michael Bales, and IC witness Thomas J. Goodwine. As reflected by these maps, the line proposed for construction would begin with a connection to Midwest's private track, proceed parallel to IC track before crossing it, and end with a connection to UP yard track shortly after that crossing. There would also be intermediate connections with UP track, via turnouts, between the junction with Midwest's private track at the plant and the crossing of IC's line.

³ Midwest Petition at 5.

⁴ *Id.*

Railway Labor Act (RLA)⁵ because it would not have any employees performing work related to the line. All rail-related work, Midwest states, would be done by railroad employees of the carrier actually performing service over the line.⁶

PRELIMINARY MATTERS

Participation by Interested Parties.

Joseph C. Szabo, Illinois Legislative Director, United Transportation Union (UTU-IL), filed a one-page statement on July 9, 2001, asking that we exercise our discretion under 49 CFR 1121.4(c) to seek public comments on the construction petition before reaching a decision, arguing that the construction may affect railroad employees. Midwest filed a reply opposing UTU-IL's request to the extent that it would delay the proceedings. We will deny UTU-IL's request. We have already received comments from two labor organizations in this proceeding. Notice of the proposed construction was provided to the head of the county in which the proposed construction is located, in compliance with 49 CFR 1105.7, and members of the public will be notified and consulted in connection with the preparation of the environmental assessment. Thus, interested parties can already participate in this proceeding.

The Brotherhood of Maintenance of Way Employees (BMWE) filed a petition on August 31, 2001, seeking to intervene, and filed comments on September 6, 2001, opposing Midwest's view that it should not be considered to be subject to the Railway Labor Act. Midwest replied, opposing BMWE's petition to intervene and asking that we reject BMWE's comments (to which Midwest also replied). We will grant BMWE's petition for leave to intervene, and will accept both its comments and Midwest's replies to those comments. Consideration of BMWE's comments will not unduly delay issuance of a final decision in this case. Nor does consideration of these comments prejudice Midwest, as it has had the opportunity to reply.

Discovery Matters.

IC seeks discovery against both Midwest and UP in the construction proceeding, STB Finance Docket No. 34060, and in the crossing proceeding,

⁵ 45 U.S.C. 151, *et seq.*

⁶ Midwest Petition at 5.

STB Finance Docket No. 34060 (Sub-No. 1).⁷ Midwest and UP each object to IC's discovery requests. By separate motions filed on August 9, 2001, IC requests that we compel discovery from Midwest and UP. Midwest and UP filed separate replies in opposition on August 22 and August 29, 2001, respectively.

Midwest's resistance to IC's discovery requests is based on two arguments. First, Midwest argues that IC's request for discovery comes too late, because the discovery sought would be justified only insofar as it would assist IC in replying to Midwest's petition and IC has already filed its reply. In support of this argument, Midwest cites our recent decision denying discovery in *Illinois Central Railroad Company-Construction and Operation Exemption-in East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served May 25, 2001) (*East Baton Rouge*). Second, Midwest argues that IC's discovery requests do not address the statutory standards we apply in authorizing new construction and are therefore not relevant.

We will not strike IC's discovery requests as untimely. IC submitted them with its reply, which was due under our rules within 20 days of the date that Midwest filed its petition. That is not an unreasonable delay. The fact that IC promptly replied to Midwest's petition should not be held against it, and if necessary, IC could file a supplemental reply. The facts here thus may be distinguished from those in *East Baton Rouge*, where discovery was sought much later in the proceeding.

The specific discovery requests relating to the potential for the proposed new track to interfere with future IC operations are relevant to Midwest's crossing petition in the Sub-No. 1 docket. Accordingly, as to that docket, we will grant the following specific discovery requests directed to Midwest by IC: interrogatories and requests for production of documents numbers 17, 18, 21(a) (in part, i.e., the volume of traffic by carload, in the aggregate, that Midwest expects to be transported to or from the power plant over the proposed line), 22, and 23.

The remainder of IC's discovery requests to Midwest lack relevance under our statutory standards. Many relate to the adequacy of the service that Midwest

⁷ On July 13, 2001, IC filed: (1) a set of 11 requests for admissions and companion interrogatories and requests for production of documents directed to Midwest; (2) a set of 30 interrogatories and requests for production of documents also directed to Midwest; and (3) a set of 17 interrogatories and requests for production of documents directed to UP.

now receives from IC, or to public need for the proposed new line.⁸ But, as IC notes in its August 9, 2001 motion to compel [at page 9, note 15], “IC recognizes that Midwest is not required to show there is a public need for its proposed additional line,” citing *East Baton Rouge* at 2. IC argues that its discovery on service issues should nonetheless be allowed because Midwest claims in its petition that IC’s service has been inadequate. As explained below, however, inadequacy of existing service is not a necessary showing under the statutory criteria for the licensing of new lines. Accordingly, we will deny IC’s motion to compel responses to all of IC’s discovery requests other than those specifically identified above.

In addition to the information it is attempting to obtain from Midwest, IC also seeks discovery against UP. IC asks that, if we do not grant this request, we strike the testimony of a UP employee that was submitted with Midwest’s petition (V.S. Nock). UP replied, stating that it is not a party to this proceeding and therefore should not be required to submit to discovery. UP also incorporates the objections to discovery made by Midwest. The discovery IC seeks from UP duplicates its requests for discovery from Midwest, which we have already addressed. To the extent its requests are relevant, IC will obtain the information from Midwest. Therefore, we will deny the discovery IC seeks from UP.

In summary, we will grant the discovery sought by IC from Midwest to the extent specified in this decision regarding the crossing proceeding. Midwest is directed to provide this information within 20 days of the service date of this decision. IC may supplement its reply, if necessary, with material based on this discovery. Any such supplement should be filed within 30 days after receipt of these materials.

⁸ IC also states that it seeks discovery from Midwest relating to the Board’s jurisdiction over Midwest’s petition. That involves the issue, discussed below, of whether Midwest’s proposed construction is subject to the Board’s jurisdiction, or whether, as IC contends, it would be private track not subject to the Board’s authority. But none of IC’s discovery requests relate to that issue.

IC also seeks discovery from Midwest regarding whether other shippers would be served from the track Midwest proposes to construct. But whether or not there are existing shippers waiting for service over the proposed line is not dispositive of whether the track would be private track or a line of railroad. The determinative factor as to that issue is whether Midwest would make the line available as a common carrier line to any shippers that might request service. Midwest clearly has made such a holding out.

Finally, some of IC’s discovery requests to Midwest are not supported by reference to any issue before us. For example, it is not clear for what purpose IC seeks to obtain a copy of the contract between Midwest and UP. Because the relevance of that and other such requests are not adequately supported, they will be denied.

DISCUSSION AND CONCLUSIONS

Jurisdiction.

IC alleges that we lack jurisdiction over the proposed line and therefore must dismiss both Midwest's rail line construction petition and the crossing petition.⁹ Alternatively, IC argues that, even if we have jurisdiction over the construction, the criteria for exemption under 49 U.S.C. 10502 are not met.¹⁰ On July 26, 2001, Midwest replied.¹¹

IC argues¹² that the rail line proposed to be constructed would be private track and thus would not come within the Board's jurisdiction. Under the statute, we have jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), and the term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5). Our jurisdiction does not extend to private rail operations (those that are not operated for hire in common carrier service). However, it is clear from the record before us that the proposed build-out would be a common carrier line, not private track. The proposed line would be "available to provide common carriage to other shippers who could be served by the proposed project."¹³ The proposed build-out would be a common carrier line of railroad, subject to the Board's licensing authority pursuant to 49 U.S.C. 10901, and also subject to the

⁹ On July 13, 2001, IC filed a reply in opposition to the proposed construction exemption and a separate reply to the crossing proposed in the Sub-No. 1 proceeding. IC's replies were due on July 9, 2001. On July 6, 2001, IC filed a motion seeking to extend the deadline until July 13, 2001. The motion is granted, and IC's replies will be accepted.

¹⁰ IC also argues that, if we determine that we have jurisdiction over the crossing under 49 U.S.C. 10901(d)(1), the crossing request must be denied because it would materially interfere with IC's future operation of the crossed line, thereby violating that provision. This issue will be resolved in the Sub-No. 1 docket in a future decision.

¹¹ On August 6, 2001, IC responded, urging us to reject Midwest's reply as an unauthorized reply-to-a-reply, or, alternatively, to accept its tendered response to Midwest's unauthorized reply. In a pleading filed on August 16, 2001, Midwest urges us to reject and not consider IC's August 6, 2001 response. We will accept Midwest's reply filed on July 26, 2001. IC's pleading of July 13, 2001, though styled a reply, raises issues not addressed in Midwest's petition, such as whether discovery should be permitted and whether more evidence is required. Therefore, Midwest should be permitted to respond. We will also accept IC's August 6, 2001 response.

¹² IC Reply dated July 13, 2001, at 3-8.

¹³ Midwest Reply dated July 26, 2001, at 5.

crossing provisions of 49 U.S.C. 10901(d).¹⁴ Because it is readily apparent from the record before us that we have jurisdiction over both the construction and crossing requests with regard to this proposed build-out, we need not, as IC suggests, seek more evidence on this issue.

The principal basis for IC's argument that the line would not come within our jurisdiction is Midwest's assertion that its ownership of the line would not make it subject to the RLA.¹⁵ However, given the facts as presented, it is clear to us that the line proposed for construction would be a common carrier line of railroad subject to our jurisdiction, and that Midwest would become a common carrier by railroad as a result of the authority it seeks in this case. The RLA definition of a "carrier" subject to the RLA is as follows: "The term 'carrier' includes any railroad subject to the jurisdiction of the Surface Transportation Board* * *" 45 U.S.C. 151, First.

Midwest proposes to build and own the line. The line will carry Midwest's traffic and the traffic of any other shipper desiring service. Even though Midwest would not actually operate the line, any contract between Midwest and UP, pursuant to which UP would operate over the line, would not relieve Midwest of the common carrier obligations it would acquire. Even if UP operates over the line, Midwest would retain a residual common carrier obligation.¹⁶ In sum, because the line to be built would be a railroad line and

¹⁴ See, e.g., *Public Service Company of Colorado – Construction Exemption – Pueblo County, CO*, STB Finance Docket No. 33862 (STB served August 23, 2000) (*PSCO*); *Joppa and Eastern Railroad Co. – Construction Exemption – Joppa, IL*, Finance Docket No. 31656 (ICC served July 5, 1990).

¹⁵ Midwest Petition at 5. Midwest's statement reflects its position that, as long as another carrier, like UP, is the sole operator on the line, Midwest would not become involved in employment matters arising under the RLA.

¹⁶ A common carrier need not actually conduct the operations over the line itself, so long as it provides for service by a carrier and stands ready to assume responsibility for service to shippers if the operating carrier discontinues service. Thus, in *Big Stone-Grant Industrial Development and Transportation, L.L.C. – Construction Exemption – Ortonville, MN and Big Stone City, SD*, Finance Docket No. 32645 (ICC served September 26, 1995), in addressing an argument that the party constructing the line would not be a common carrier because it would not be operating the line, our predecessor agency, the Interstate Commerce Commission (ICC) stated (at 2):

We disagree. We have a well-established policy of granting requests for authority to construct rail lines where the constructing entity would not operate the line. [citations omitted] In these cases, we have determined that the constructing entity holds itself out to fulfill the common carrier obligation that attaches to the line. That obligation remains with the constructing entity even though its fulfillment may be undertaken by operating railroads under trackage rights, leases, or similar
(continued...)

Midwest would become a common carrier by railroad, Midwest must obtain authority for its construction from us. Similarly, because Midwest would be assuming the responsibilities of a rail common carrier, Midwest would be entitled to invoke 49 U.S.C. 10901(d), if necessary, for authority to cross IC's line. *See PSCO* at 3.

Transportation Aspects of the Petition.

Generally, the construction of new common carrier railroad lines requires prior Board approval under 49 U.S.C. 10901. Under 49 U.S.C. 10901(c), we are directed to authorize a rail line construction project "unless the Board finds that such activities are inconsistent with the public convenience and necessity." This permissive licensing policy, introduced in the ICC Termination Act of 1995 (ICCTA),¹⁷ establishes a clear presumption in favor of rail construction proposals,¹⁸ and conforms to the broader Congressional policies to promote "effective competition among rail carriers" and to "reduce barriers to entry into * * * the industry." 49 U.S.C. 10101(4), (7). To prevent competing carriers from undermining these goals, the statute further directs that no rail carrier may refuse permission for a constructing carrier to cross its property, so long as the construction and operation of the crossing do not unduly interfere with the operation of the crossed line and the crossing carrier compensates the owner of the crossed line. 49 U.S.C. 10901(d)(1). If the parties cannot agree on the terms of operation or amount of payment for use of the crossing, either party may submit the dispute to the Board, which shall set terms within 120 days. 49 U.S.C. 10901(d)(2).

Under 49 U.S.C. 10502, we must exempt a proposed line construction from the detailed application procedures of section 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from the abuse of market power.

¹⁶(...continued)
arrangements.

¹⁷ Pub. L. No. 104-88, 109 Stat. 803 (1995).

¹⁸ Prior to ICCTA, the statute provided that construction proposals would be approved if the Board's predecessor, the ICC, found that the public convenience and necessity "require or permit" a proposed construction. Former 49 U.S.C. 10901(a) (1995). With ICCTA, Congress directed that the Board "shall" issue construction licenses "unless" the agency finds a proposal to be "inconsistent with the public convenience and necessity." 49 U.S.C. 10901(c).

Based on the information before us, we conclude that detailed scrutiny of this proposal under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy, and therefore this proposed construction project is appropriate for handling under the exemption process. We have sufficient information before us to enable us to evaluate Midwest's construction proposal. Indeed, Midwest's proposed line construction would promote the rail transportation policy. The proposed construction of new trackage would permit new, competitive rail service to Midwest's Joliet power plant, furthering the policy of allowing competition and the demand for services to establish reasonable rates for transportation by rail [section 10101(1)]. Exempting the proposed construction would reduce the need for Federal regulatory control over the rail transportation system [section 10101(2)], ensure the development of a sound rail transportation system with effective competition among rail carriers [section 10101(4)], foster sound economic conditions [section 10101(5)], and reduce regulatory barriers to entry [section 10101(7)]. Unless we determine otherwise following the environmental analysis, other aspects of the rail transportation policy would not be adversely affected.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. The proposed transaction would provide Midwest, and possibly other shippers that may locate on the line, with an additional rail transportation option, and thus would enable shippers to realize the benefits of increased railroad competition. In light of our finding that regulation is not necessary to protect shippers from an abuse of market power, we need not determine whether the transaction is of limited scope.

IC argues that the transportation and environmental issues are so intertwined that we should refrain from pursuing our standard approach of reviewing the transportation aspects of the proposed construction first and, if approval (or, in this case, an exemption) is warranted, conditionally granting it, subject to subsequent analysis of the effect of the construction on the public health, safety, and other environmental values. However, there is nothing particularly unusual about the matter at hand to justify a departure from our normal procedures. The effect of the construction on the public health and safety [section 10101(8)] will be fully considered in our environmental analysis. Only when our environmental analysis is completed will we issue a final decision.

IC contends that there is no need for an additional rail line because its service to the plant is adequate. As discussed above, however, the rail transportation policy of 49 U.S.C. 10101 contemplates competition as a means of ensuring that shippers receive reasonable service at reasonable rates. A showing that the incumbent railroad's service is inadequate is simply not

necessary to obtain authority for construction of a competing line.¹⁹ Indeed, the institution of an investigation into the adequacy of IC's service would contravene the rail transportation policy favoring rail competition. Thus, we will not deny the exemption based on IC's allegation that its service is adequate.

IC also maintains that the line as proposed would adversely affect its future use of the crossed line, and that there is an alternative configuration that would make crossing its line operationally unnecessary which should be considered. However, this issue does not concern whether Midwest should be authorized to build a line from its facility to reach the lines of UP — the determination under section 10901(a)-(c) — but rather, whether that line may interfere with the operation of the crossed line — an issue for consideration under section 10901(d). Congress has made it clear in the statute that the subsection (d) analysis is to be conducted after we have completed our analysis under subsections (a)-(c). Therefore, we will consider IC's arguments about the possible alternative configuration in the Sub-No. 1 proceeding. Evidence pertaining to the crossing that was submitted in this proceeding will be considered in the Sub-No. 1 proceeding. Our decision here, conditionally exempting Midwest's construction proposal, does not prejudice issues relating to the crossing of IC's line, including arguments about an alternative configuration.

Midwest has requested²⁰ that, consistent with our usual practice in rail construction cases, we issue a preliminary decision addressing the transportation-related issues prior to completion of our environmental review, which we are doing here.²¹ According to Midwest, this action will help it line up the resources that must be committed to the project. But we cannot, of course, authorize the construction until we have completed our environmental review. Therefore, this exemption will not be effective, and no construction can begin, until our environmental review process is concluded.

¹⁹ There is ample precedent for approval of construction exemptions and crossing petitions that increase competition. See *Class Exem. for the Construction of Connecting Track*, 1 S.T.B. 75, 79 (1996) (presumption that rail construction projects will be approved); *PSC Colorado; 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)*, Finance Docket No. 32433 (Sub-No. 1) (ICC served August 11, 1995), at 5 (“Promoting railroad competition and improving service to shippers are principal elements of the Commission’s rail transportation policy.”); *Omaha Public Power District – Construction Exemption – in Otoe County, NE*, Finance Docket No. 32630 (ICC served May 2, 1995).

²⁰ Midwest Petition at 11-12.

²¹ See *Great Salt Lake and Southern Railroad, L.L.C. – Construction and Operation – in Tooele County, UT*, STB Finance Docket No. 33824 (STB served December 15, 2000), at 8, 11-12.

After the environmental review process has been completed, we will issue a further decision addressing the environmental issues, and making the exemption effective at that time if appropriate, subject to mitigation conditions if necessary. *See Missouri Mining, Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994).²² This decision does not in any way prejudice our ultimate decision, and will not diminish our capacity to address environmental matters in rendering a final decision. *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989). Construction may not begin until our final decision in this proceeding has been issued and becomes effective.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt Midwest's construction of the above-described 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.

2. After completion of our environmental review, we will issue a further decision addressing environmental matters, and establishing an effective date for the exemption, if appropriate, subject to any necessary conditions, thereby allowing construction to begin at that time.

3. IC's motion to compel discovery is granted in part as specified in this decision.

4. Notice will be published in the *Federal Register* on March 27, 2002.

5. Petitions to reopen must be filed by April 16, 2002.

6. This decision is effective on April 26, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

²² We will then address the crossing petition, if necessary.