

STB FINANCE DOCKET NO. 34060

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

Decided October 3, 2002

Under 49 U.S.C. 10502, the Surface Transportation Board is granting the request of Midwest Generation, LLC (Midwest), for an exemption to allow Midwest to construct a rail line connecting its plant to track operated by the Union Pacific Railroad Company (UP). Under 49 U.S.C. 10901(d), the Board is granting Midwest's request to require that the Illinois Central Railroad Company allow UP to cross its track in building and operating this new rail line.

BY THE BOARD:

In STB Finance Docket No. 34060, we are granting final approval for an exemption sought by Midwest Generation, LLC (Midwest). The exemption will permit Midwest to construct a rail line connecting its plant to track operated by the Union Pacific Railroad Company (UP). We will also revoke the exemption in part and issue a certificate under 49 U.S.C. 10901.

In STB Finance Docket No. 34060 (Sub-No. 1), we are granting Midwest's request for a determination that, in building and operating this new line, it is entitled under 49 U.S.C. 10901(d) to cross the track of the Illinois Central Railroad Company (IC). We are also requiring the parties to enter into negotiations to set the compensation and terms of operation for the crossing.

BACKGROUND

In *Midwest Generation–Exemption–Construction Will County, IL*, 6 S.T.B. 218 (2002) (*Midwest Decision*) [67 Fed. Reg. 14,771 (2002)], we found, subject to consideration of the environmental impacts, that Midwest met the

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)*.

standards of 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10901 to build a rail line approximately 4,007 feet long in Will County, IL.² The line will connect Midwest's power plant in Joliet, IL, to nearby track owned by UP. Currently, this power plant is directly served only by IC. We stated that, upon completion of the environmental review process, we would issue a final decision addressing the environmental impacts and, if appropriate, make the exemption effective at that time.

Midwest's build-out to UP's line would cross track controlled by IC. The track to be crossed, called the "Ladder Track" by IC, is a currently unused track segment that can be utilized to distribute cars within a currently unused yard that is under the exclusive control of IC. IC has refused to grant permission to cross the Ladder Track. By petition filed in STB Finance Docket No. 34060 (Sub-No. 1) on June 19, 2001, Midwest asks that we determine that IC is required to allow the crossing under 49 U.S.C. 10901(d).

On July 13, 2001, IC filed a reply in opposition to Midwest's crossing petition. IC argues that (1) there is an alternate configuration that would eliminate the need to cross its track and (2) the construction would adversely affect its future use of the crossed line.³ IC also raised an objection to our jurisdiction to consider the crossing under section 10901(d). In *Midwest Decision*, we rejected this objection.

On April 12, 2002, our Section of Environmental Analysis (SEA) served an environmental assessment (EA). SEA analyzed the construction of two routes: (1) Midwest's proposed route (Route A); and (2) IC's suggested alternate configuration that would not involve the crossing of its track (Route B). SEA preliminarily concluded that, based on the information provided from all sources as of the date of the EA, neither Route A nor Route B would significantly affect the quality of the human environment if the preliminary mitigation conditions proposed in Chapter 7.0 of the EA were imposed.

Several comments to the EA were submitted. After considering the comments, SEA issued a post environmental assessment (Post EA) reaffirming its preliminary conclusion that neither Route A nor Route B would result in significant environmental impact if appropriate mitigation measures are imposed and implemented. Accordingly, SEA further determined that there was no need

² Midwest stated that it would contract with another railroad to perform rail operations over the line. Midwest acknowledged that it would retain a residual common carrier obligation to provide service over the line.

³ These issues were also discussed in pleadings filed by Midwest on July 26, 2001, and by IC on August 6, 2001.

to prepare an environmental impact statement. The final mitigation conditions recommended in Chapter 3 of the Post EA differ in minor respects from the preliminary mitigation conditions proposed in Chapter 7.0 of the EA. The final mitigation conditions are listed in the Appendix to this decision.

DISCUSSION AND CONCLUSIONS

Construction Exemption. Our conditional approval of the construction exemption in *Midwest Decision* was made subject to our completion of the environmental review process and on Midwest's compliance with any environmental mitigation conditions developed out of that process. With the assistance of SEA, we have analyzed the environmental impacts of constructing Route A and Route B, as well as the reasonably foreseeable rail operations.

In the EA, SEA explained that, as to Route A, the route sought by Midwest, with the mitigation proposed therein: (1) no property owners would lose access as a result of construction; (2) there are no known hazardous waste sites within the right-of-way; (3) while there is an environmental justice Community of Concern in the area, there would be no "high and adverse impacts" on that community; (4) there would be no adverse effects on groundwater, wetlands, or floodplains; (5) there would be no impacts on threatened or endangered species and only minimal impacts to wildlife due to conversion of land within the footprint of the rail bed from use as a habitat; (6) there would be no at-grade road crossings and related impacts; and (7) there would be no impacts on cultural or recreational resources. Moreover, the commencement of operations over Route A would have the beneficial effects of reduced locomotive idling time and shifting movements further from a neighborhood as compared to the current operations. Route B would involve more train movement than Route A and the resulting possibility of increased emissions and noise.

In the Post EA, SEA discussed 14 issues raised in response to the EA (most of the issues were raised by IC) and proposed minor modifications to the mitigation conditions.⁴ In response to a request by SEA, Midwest had provided additional information indicating that the construction would not result in

⁴ We will not discuss each of the 14 issues and SEA's comments on them because the Post EA will be added to the record and we are adopting the analysis contained in it as our own. We note that, as discussed in the Post EA, some of the comments addressed environmental problems that might arise even if there were no construction at all. Also, IC argued that the construction would cause environmental problems by interfering with IC's future use of the Ladder Track, but as the Post EA explained, the possibility of future use of that currently unused track is unknown and speculative.

increased train congestion elsewhere or interference with commuter train movements. Other important issues discussed in the Post EA were an historic preservation issue, an issue of whether a drainage ditch was a wetland deserving of mitigation, the effect of Route A on a riparian meadow, effects on aquatic wildlife, and effect on safety of rail and construction workers.

We are adopting SEA's findings and its conclusions in the Post EA as our own.⁵ We are satisfied that construction and operation of the proposed line under the conditions recommended by SEA would not have a significant adverse impact on the environment. This concludes the environmental review process in this case. Accordingly, we find it appropriate to grant the requested construction and operation exemption for Route A, the route proposed by Midwest, subject to Midwest's compliance with the mitigation conditions developed in the Post EA. A list of those conditions is attached as an Appendix to this decision.

Crossing Petition. Having determined to authorize the proposed construction, we now turn to the request by Midwest that we exercise our authority under 49 U.S.C. 10901(d)(2) to resolve the controversy between the parties as to whether Midwest is entitled under 49 U.S.C. 10901(d)(1) to cross the IC track with this line. Section 10901(d)(1) provides as follows:

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if –

- (A) the construction does not unreasonably interfere with the operation of the crossed line;
- (B) the operation does not materially interfere with the operation of the crossed line; and
- (C) the owner of the crossing line compensates the owner of the crossed line.

Section 10901(d) is triggered “when a certificate is issued by the Board under this section authorizing the construction or extension of a railroad line* * *” Here, we have acted by granting an exemption from section 10901 rather than by exercising the authority that provision confers. In *Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY*, 4 I.C.C.2d 749 (1988) (*Louisville & Jefferson*), our predecessor, the Interstate Commerce Commission

⁵ The Post EA is not attached to this decision, but it will be placed in the docket file as part of the record of these proceedings.

(ICC or Commission), issued a certificate for a line for which exemption authority had been sought and granted, stating, 4 I.C.C.2d at 752-53 (footnotes omitted):

The broad policy enunciated by Congress [in section 10901(d)] can and should be applied to individual transactions we have exempted* * * * [I]ssuance of a routine certificate, when the other requirements of §10901(d) have been met, assures that the crossing carrier will be able to serve the shippers for which the Commission has found construction to be in the public interest. This interpretation fulfills the legislative goal to prevent existing carriers from blocking new construction by their potential competitors.

In concluding that it could issue a certificate “summarily” in an exemption proceeding, the ICC cited its similar approach to addressing offers of financial assistance in abandonment cases in *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986), where it reversed an earlier policy of declining to apply the forced sale provisions of the statute in exemption cases. The ICC thus revoked the exemption it had granted in part so as to issue a certificate under 49 U.S.C. 10901.

Likewise, we will summarily issue a certificate here. We do so notwithstanding that neither party has raised this issue in their pleadings and that, in recent cases where we have granted exemptions from the statute to permit constructions, we have not observed this formality in related crossing cases. At least one court has recently stressed the statutory requirement for the issuance of a certificate in crossing cases,⁶ and our doing so here, while perhaps unnecessary, would comport with precedent in *Louisville & Jefferson*.

Accordingly, we revoke our grant of exemption to Midwest in part so as to issue a certificate under 49 U.S.C. 10901. We revoke an exemption where we find that application, in whole or in part, of a provision of the statute is necessary to carry out the transportation policy of section 10101. The issuance of a certificate pursuant to section 10901, a ministerial act, is justified by the public interest findings we have made in the exemption proceeding and the need to remove any possible room for doubt that the statutory requirements for the implementation of 49 U.S.C. 10901(d) are met.

IC does not use, and has not been using, the track to be crossed. Midwest witness R. Michael Bales states that the track is not in operating condition and is not able to be used for service in its current condition.⁷ Because IC does not use, and has not been using, the segment to be crossed, the operation of the

⁶ *Keokuk Junction Ry. Co. v. STB*, 292 F.3d 884, 885 (D.C. Cir. 2002).

⁷ Petition, Exhibit A, at 3.

crossing cannot presently have an adverse effect on IC's operation of the crossed line. IC Witness Thomas J. Goodwine maintains, however, that because the crossed track connects IC's main line with IC's tracks in the west side of the South Joliet Yard, the Route A crossing could interfere with IC's *future* ability to use that yard to respond to changing operational needs in the Chicago area. According to witness Goodwine, the yard could be brought back into service to serve new traffic, to relieve congestion at other IC facilities, or to be an overflow yard in the event of repair work at other IC facilities.

IC's plans for the future of the track lack any specificity. Even if the yard is brought back into service, IC has not shown that this crossing would have an adverse operational impact. In *Midwest Decision*, at 221, we granted IC discovery requests that were relevant to its claim of future interference. IC has had ample opportunity to supplement the record with additional evidence supporting its allegation of undue interference but has not done so. Thus, we see no reason why either the construction or operation of this new line would interfere in any significant way with operation of the IC line to be crossed.

Compensation and Other Terms. We agree with Midwest that construction need not be delayed pending determination of the compensation and terms of operation.⁸ Construction of the crossing may begin immediately upon the effectiveness of this decision. See *Illinois Central Railroad Company – Petition for Crossing Authority – in East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (Sub-No. 1) (STB served May 13, 2002); *Louisville & Jefferson*, 4 I.C.C.2d 749, 755 (1988). If the parties are unable to agree on the compensation or terms of operation, either party may submit the dispute to the Board. 49 U.S.C. 10901(d)(2). We will reserve jurisdiction over the proceeding until all issues are resolved.

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

It is ordered:

1. For the reasons explained in the Post EA, we adopt the mitigation measures set forth in the Appendix to this decision.

⁸ In this case, the terms of operation of the crossing need not be worked out in advance in order to avoid any interference with IC's operation of the crossed line because IC is not currently operating over the line to be crossed.

2. The exemption conditionally approved in *Midwest Decision* is effective on the effective date of this decision, subject to the condition that Midwest comply with the mitigation measures adopted in the Appendix to this decision.

3. That exemption is revoked in part and a certificate is issued pursuant to 49 U.S.C. 10901.

4. IC is directed to permit Midwest to cross its line to enable the construction and operation of the line authorized here.

5. Within 45 days of service of this decision, Midwest and IC will negotiate the compensation and terms of operation, and Midwest will file a report with the Board.

6. The Board reserves jurisdiction over this proceeding until the compensation and terms of operation are established.

7. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

APPENDIX

ENVIRONMENTAL MITIGATION MEASURES
FROM CHAPTER 3 OF POST EA⁹

Land Use

1. Midwest shall develop all sites related to the proposed rail construction, including staging areas, borrow/spoil sites, and haul roads, in accordance with all applicable environmental regulations.
2. Midwest shall dispose of all waste material generated during construction in accordance with applicable Federal, state, and local regulations.
3. Should hazardous wastes be encountered in the project area during the proposed construction, Midwest shall handle and dispose of such wastes in accordance with applicable Federal, state, and local regulations.
4. As agreed to by Midwest, Midwest shall obtain the required Will County building permit prior to initiating construction activities covered by the permit and shall comply with all conditions attached thereto.

Water Resources

5. As agreed to by Midwest, if it constructs Route A, it shall construct the Sugar Run bridge abutments behind the wing walls of the existing UP culvert.
6. As agreed to by Midwest, no fill shall be discharged into "waters of the U.S." as a result of construction of Route A or Route B.
7. As agreed to by Midwest, no herbicides shall be used in right-of-way maintenance of either Route A or Route B.
8. As agreed to by Midwest, it shall install the embankment and retaining walls early on to prevent incursions into environmentally sensitive areas.
9. As agreed to by Midwest, if it constructs Route A, it shall install coffer sheeting before construction of the parapet wall between Route A and the UP line as part of the Sugar Run bridge construction.

⁹ A condition that is applicable to only one of the routes has been identified as pertaining to the specific route.

10. Midwest shall require its construction contractor to obtain a National Pollutant Discharge Elimination System permit as required by the regulations in effect at the time of construction.
11. Midwest shall install silt fences or straw bales along toes of embankments where disturbed material may erode and straw bales along major drainage channels as required. Midwest shall require its construction contractor to apply erosion control measures in accordance with the latest edition of Illinois Procedures for Urban Soil Erosion and Sedimentation Control and The Illinois Urban Manual.
12. Midwest shall implement measures to prevent construction materials from entering and construction activities from affecting any waters of the United States.

Transportation

13. As agreed to by Midwest, if Route A is built, Midwest shall obtain the required approvals from the Illinois Commerce Commission and Joliet Township prior to beginning construction of the Patterson Road bridge and shall comply with all conditions associated with the permits.
14. As agreed to by Midwest, Midwest shall coordinate the construction of connections to existing track with the affected carriers in order to prevent interference to and ensure the safety of current rail operations.

Air Quality

15. Midwest shall use water suppression sprays and covered haul trucks to minimize dust emissions during construction.

Utilities

16. If Route A is built, Midwest shall consult with the owners of the public utilities under the Patterson Road right-of-way and take appropriate measures to ensure the safety and integrity of the utilities prior to construction of the Patterson Road bridge.
17. As agreed to by Midwest, Midwest shall determine whether the utility poles in the western part of the project site that hold railroad signal wires are active prior to construction. If the utility poles are active, Midwest shall relocate the signal wires off of the proposed site.

Cultural Resources

18. Based on the comments of the Illinois Historic Preservation Agency (IHPA), if previously undiscovered archaeological or human remains are found during construction, Midwest shall cease work and immediately contact the IHPA regarding appropriate measures to protect the resource.