51795 SERVICE DATE – NOVEMBER 15, 2023
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36575

TOWNLINE RAIL TERMINAL, LLC—
CONSTRUCTION AND OPERATION EXEMPTION—IN SUFFOLK COUNTY, N.Y.

Digest:[1] The Board denies Townline Association's motion to dismiss the petition for exemption.

Decided: November 15, 2023

By petition filed November 17, 2022, Townline Rail Terminal, LLC (Townline), an affiliate of CarlsonCorp, Inc. (CarlsonCorp), seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a new rail line in Smithtown, Suffolk County, N.Y. (the Line). On January 12, 2023, the Board instituted a proceeding under § 10502(b).

On April 4, 2023, Townline Association, Inc. (Association), an association of local residents and property owners,[2] filed a motion to dismiss the petition for exemption, arguing that the Board lacks jurisdiction over the petition, or in the alternative, that the proposal is not appropriate for the exemption process. Townline replied on April 24, 2023. In addition, various local associations and community members have filed comments expressing concerns about the proposed line. As discussed below, the Board will deny the Association's motion to dismiss the petition for exemption.

BACKGROUND

According to Townline, the Line would extend approximately 5,000 feet on a portion of CarlsonCorp's industrial property[3] and would run parallel to the Long Island Railroad (LIRR) Port Jefferson Line. (Pet. 2.) Townline states that the New York & Atlantic Railway (NYAR)

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The Association was joined in its filing by Richard and Carol DiGrandi, Keith and Patricia Macartney, and Brian and Keegan Harris, all of whom own homes near the proposed rail construction project.

[3] CarlsonCorp currently operates a state-permitted waste transfer facility on its property. (Pet. 3.)

operates on the Port Jefferson Line and has entered into an agreement with CarlsonCorp, on behalf of LIRR, to install a new switch that would connect the Line to the Port Jefferson Line. (Id. at 2-3.) Townline also states that it would interchange with NYAR and anticipates that it would operate one train per day for five days per week. (Id. at 5.)

According to Townline, the purpose of the proposed construction is to provide common carrier rail service to a planned truck-rail transloading facility, which it states would be subject to state and local regulation. (Id. at 3.) CarlsonCorp would independently construct the transloading facility to handle the transportation of construction and demolition debris and incinerator ash from Long Island. (Id. at 3-4.) Townline explains that rail service to the planned facility is needed because the Brookhaven Landfill, the last remaining public landfill on Long Island to accept construction and demolition debris, is scheduled to close in 2024. (Id. at 3.) Townline adds that the Line also could serve other local shippers, including Covanta Energy, Kings Park Ready Mix Corp, Kings Park Materials, and Pelkowski Precast. (Id. at 4.)

On November 8, 2022, the Supervisor of the Town of Smithtown, N.Y. (Smithtown), filed a letter explaining that Smithtown supports Townline's petition in light of the need to find alternative means for waste disposal given the impending closure of the Brookhaven Landfill. Numerous filings from community members and associations of community members in opposition to the Line and the planned facility have also been received. (See, e.g., Ass'n Comment, Feb. 1, 2023; Commack Cmty. Ass'n Comment, Feb. 21, 2023; Fort Salonga Ass'n Comment, Feb. 21, 2023; Russo Opp'n Statement, Feb. 27, 2023.)[4]

In its motion to dismiss, the Association argues that the Board does not have jurisdiction over the construction project because Townline would not be a rail carrier, as it would provide only switching and transloading rather than common carrier service. (Ass'n Mot. 5-9.) In the alternative, the Association argues that if the Board finds it has jurisdiction over the project, it should dismiss the petition for exemption and require Townline to file an application under 49 U.S.C. § 10901, given the level of opposition to the Line and the planned transload facility and concerns about potential environmental impacts on the local community and the project's financial viability. (Id. at 9-12.)

Townline replies that it would be a rail carrier and that therefore the Board does have jurisdiction over the proposed line. (Townline Reply 13-16.) It confirms that it intends to offer common carrier service to any shipper that might request it. (Id. at 13.) Townline also argues that the Board should not require an application because the Line would only be 5,000 feet long

[4] These community comments express concerns about potential environmental impacts and explain that the Line and the planned transload facility would be located in a residential area and near schools. (E.g., Ass'n Comment, June 21, 2023.) Residents also express concerns about impacts on property values, (see, e.g., Ass'n Comment 12, Apr. 10, 2023), traffic congestion, (e.g., Ass'n Comment 5, Apr. 17, 2023), and other issues, such as possible effects of the project on air, light, sound, and water, and what some commenters describe as the existing environmental burden on the area, (e.g., Ass'n Comment 14, Mar. 6, 2023; Ass'n Comment 5-7, Mar. 13, 2023). As discussed below, (see infra pp. 7-8), these concerns with respect to the Line will be addressed in the ongoing environmental and historic review process.

and would be developed solely on private property. (Id. at 16-17.) Townline contends that opposition to the Line is based on unsubstantiated environmental concerns that will be addressed, as appropriate, in the Board's environmental review of the proposal. (Id. at 21-23.) Townline also asserts that the Association's purported concerns about financial viability are unsupported, as there is a need for the Line and construction of the Line would not involve public funding or the acquisition of any property via eminent domain. (Id. at 23-25.)

On May 3, 2023, the Association filed a supplement arguing that public statements made by Townline about the transportation of hazardous materials and service to local shippers indicate that it does not intend to fulfill its common carrier obligation and therefore would not be a rail carrier. (Ass'n Suppl. 1-2.) On May 16, 2023, Townline filed a response, arguing that the Association's supplement should be rejected as an improper reply.[5] (Townline Resp. 1-2.) Townline also claims that the Association misconstrues the statements and that Townline does indeed intend to fulfill its common carrier obligation to accept any reasonable request for service, including shipping hazardous materials and shipping to non-local customers. (Id. at 3-6.)

As discussed below, the Board will deny the motion to dismiss and proceed with the ongoing exemption proceeding.[6]

DISCUSSION AND CONCLUSIONS

Jurisdiction. The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a). The term "transportation" is defined to include a "property, facility, . . . or equipment of any kind" related to the movement of property by rail and "services" related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. § 10102(9)(A), (B). "Rail carrier" is defined as a person providing "common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Whether a particular activity

[5] Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept the Association's supplement in the interest of a complete record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

In addition, comments on the petition were due December 7, 2022. See 49 C.F.R. § 1104.13(a). Numerous filings regarding the petition have been made since then. In the interest of a complete record, and because no party will be prejudiced, all filings received until the date of service of this decision will be accepted into the record. See City of Alexandria, Va., FD 35157, slip op. at 2.

[6] On June 16, 2023, in Docket No. FD 36575 (Sub-No. 1), Smithtown filed a petition for declaratory order asking the Board to institute a proceeding to consider issues related to the transportation of hazardous materials (both on the Line and at CarlsonCorp's planned transloading facility) and to adopt its proposed procedural schedule. Townline filed a reply on June 21, 2023, stating that it did not oppose the petition or the proposed schedule. The Association filed a reply in opposition to the petition on July 5, 2023. The Board will address these filings in a future decision in Docket No. FD 36575 (Sub-No. 1).

constitutes transportation by rail carrier under § 10501(a) is a case-by-case, fact-specific determination. See, e.g., Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015); Town of Milford, Mass.—Pet. for Declaratory Ord., FD 34444, slip op. at 2 (STB served Aug. 12, 2004). A rail carrier has a common carrier obligation "to provide . . . service on reasonable request." 49 U.S.C. 11101(a); see also Union Pac. R.R.—Pet. for Declaratory Ord., FD 35219, slip op. at 3-4 (STB served June 11, 2009).

The Association concedes that Townline's planned activities would meet the definition of transportation, (Ass'n Mot. 7-8), and the Board agrees, as Townline's services would involve the receipt, handling, and transfer of property, see § 10102(9)(A), (B). The Association argues, however, that Townline would not be a rail carrier because "it would not provide common carrier transportation on the transload facility track proposed to be built." (Ass'n Mot. 8-9 (citing Town of Milford, Mass., FD 34444; Hi Tech Trans, LLC—Pet. for Declaratory Ord.—Newark, N.J., FD 34192 (Sub-No. 1) (STB served Aug. 14, 2003); Louisville & Jefferson Cnty. Riverport Auth.—Pet. for Declaratory Ord., FD 36463 (STB served Oct. 22, 2021); Town of Babylon—Pet. for Declaratory Ord., FD 35057 (STB served Feb. 1, 2008).)

The cases cited by the Association do not support its claims that Townline would not be a rail carrier. In the cited cases, the Board found that providers of *transloading services* were not rail carriers when they did not hold themselves out to provide common carrier services by rail for compensation or act as agents of a rail carrier, or when a rail carrier did not hold the transloading service out to the public as part of the rail carrier's service. See Louisville & Jefferson Cnty. Riverport Auth., FD 36463, slip op. at 5-6; Town of Babylon, FD 35057, slip op. at 5-6; Town of Milford, FD 34444, slip op. at 3; Hi Tech Trans, LLC, FD 34192 (Sub-No. 1), slip op. at 6-7. In contrast, Townline has sought authority here to construct and operate *the Line* as a rail carrier and has repeatedly stated that it would offer common carrier rail service to the public for compensation. (Pet., V.S. Carlson 2-3 (stating that Townline will offer rail service to a variety of customers); Townline Reply 13 (stating that Townline will hold itself out as a common carrier).)

Further, while the Association identifies various factors it contends show that Townline would not be a rail carrier, none are persuasive. First, the Association argues that "nothing in the record demonstrat[es] that [Townline] will be involved in offering or setting rates or service terms for any rail shippers." (Ass'n Mot. 8.) But Townline states that it would offer common carrier rail service to the public,[7] that those services would be separate from the transloading services offered by CarlsonCorp, and that Townline would bill rail customers independently from any contracts that CarlsonCorp may have with its customers. (Townline Reply 5, 13, 16.) This is adequate to show that, in the event that the Board grants the exemption and the Line is built, Townline would hold itself out as a common carrier providing service over the Line to the transloading facility for any shippers upon reasonable request. Cf. Town of Babylon, FD 35057, slip op. at 5-6 (finding no Board jurisdiction over transloading operations where the rail carrier was not involved whatsoever in transloading or billing shippers for transloading services).

[7] Indeed, Townline has identified several potential shippers to which it plans to offer service: Covanta Energy, Kings Park Ready Mix Corp, Kings Park Materials, and Pelkowski Precast. (Pet. at 5.)

Second, the Association argues that Townline's failure to provide evidence that it has entered into an interchange agreement with NYAR indicates Townline would not be a rail carrier. (Ass'n Mot. 8.) But the Association cites no precedent requiring evidence of an interchange agreement for such a finding. Further, NYAR has agreed to install a new switch connecting the Line to the Port Jefferson Line, indicating that NYAR is aware of Townline's plans for future interchange. (Pet. 2-3.) There is no reason to believe that Townline would not be able to enter into an interchange agreement with NYAR if the Line is ultimately approved and built, and the Board will not require such an agreement at this preliminary stage.

Third, the Association argues that Townline would not be "'engaged in the business of transporting persons or property from place to place for compensation' as it is only operating in one place—at the CarlsonCorp solid waste transfer facility." (Ass'n Mot. 8 (citing Am. Orient Express Ry. v. STB, 484 F.3d 554, 557 (DC Cir. 2007); Wis. Cent. Ltd. v. STB, 112 F.3d 881, 884 (7th Cir. 1997)).) It also claims that Townline "cannot be found to be entering new territory as it is only serving itself at this one location served by NYAR." (Ass'n Mot. 8.) However, Townline points out that "the CarlsonCorp property is not currently served by rail." (Townline Reply 4; see also Pet. 4 (stating that potential customers are currently served by truck and Townline would provide a rail option); Pet., Ex. A (map showing no current switch with Port Jefferson Line).) Under these circumstances, the Board concludes, consistent with Board precedent, that Townline would provide rail service to territory not currently served by a rail carrier and that therefore it was appropriate for Townline to seek Board authority for this 5,000-foot line. See Effingham R.R.—Pet. for Declaratory Ord.—Constr. at Effingham, Ill., 2 S.T.B. 606, 609-10 (1997) (finding that where a new carrier was proposing to construct and operate track to a new industrial park, the Board had jurisdiction and a Board license under 49 U.S.C. § 10901 or 49 U.S.C. § 10502 was required), pet. for review denied sub nom. United Transp. Union-Ill. Legis. Bd. v. STB, 183 F.3d 606, 613-14 (7th Cir. 1999).

The Association also argues that Townline does not intend to fulfill its common carrier obligation as a rail carrier. First, it contends that Townline would not be a rail carrier because it would refuse to carry hazardous materials, pointing to online statements by Townline's and CarlsonCorp's owner, Toby A. Carlson. (Ass'n Suppl. 1 (citing, e.g., Union Pac. R.R.—Pet. for Declaratory Ord., FD 35219, slip op. at 4 (STB served June 11, 2009)).) But Townline explains that these statements do not relate to the proposed line, but rather to the planned transloading facility that will be operated by CarlsonCorp, a noncarrier, and governed by state and local regulations. (Townline Resp. 3-4.) Townline also acknowledges that, as a common carrier, it would be obligated to transport hazardous materials on reasonable request. (Townline Resp. 4-6.) Second, the Association claims that Townline would not be a rail carrier based on a statement on its website that it would serve businesses within two miles of its facility. (Ass'n Suppl. 1-2.) However, Townline explains that the statement was not intended to limit the shippers it would serve but to explain its target market, and Townline reiterates its understanding that, as a rail carrier, it would be obligated to provide service on reasonable request. (Townline Resp. 6.) As Townline points out, (id.), a grant of authority for construction and operation of a rail line intended to serve local shippers is not unusual under Board precedent. See, e.g., N.W. Tenn. Reg'l Port Auth.—Constr. & Operation Exemption—in Lake Cnty., Tenn., FD 35802 (STB served Apr. 21, 2016).

Because Townline would provide common carrier railroad transportation for compensation if the proposed construction is approved and the Line built, the Board finds that Townline would be a rail carrier engaged in rail transportation, and that therefore the proposed construction is subject to the Board's jurisdiction.

Proceeding type. The construction of new railroad lines that are to be part of the interstate rail network requires prior Board authorization, through either a certificate under 49 U.S.C. § 10901 or, as requested here, an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. Section 10901(c) directs the Board to authorize rail construction proposals "unless the Board finds that such activities are inconsistent with the public convenience and necessity." See Alaska R.R.—Constr. & Operation Exemption—A Rail Line Extension to Port MacKenzie, Alaska, FD 35095, slip op. at 5 (STB served Nov. 21, 2011), aff'd sub nom. Alaska Survival v. STB, 705 F.3d 1073 (9th Cir. 2013). Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. See Lone Star R.R.—Track Constr. & Operation Exemption—in Howard Cnty., Tex., FD 35874, slip op. at 3 (STB served Mar. 3, 2016).

Further, 49 U.S.C. § 10502(a) directs the Board to exempt a transaction (including a construction proposal) from the prior approval requirements of § 10901 when it finds that (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope or (b) application of the statutory provision is not needed to protect shippers from the abuse of market power. Lone Star R.R., FD 35874, slip op. at 3. Congress thus has directed the Board to exempt a rail construction proposal from the requirements of the full application process—even if significant in scope—so long as the application of § 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. See Alaska Survival, 705 F.3d at 1082-83; Vill. of Palestine v. ICC, 936 F.2d 1335, 1337, 1340 (D.C. Cir. 1991).

The Association argues that even if the Board finds it has jurisdiction, it should dismiss the petition for exemption and require Townline to file an application. (Ass'n Mot. 9-12.) According to the Association, an application proceeding would be more appropriate due to opposition from the community, environmental issues related to the solid waste transfer facility, and questions about the financial ability of Townline to construct the project when other similar projects are already in progress on Long Island. (Id. at 9.) Townline responds that none of those factors require an application under § 10901 here. (Townline Reply 16-25.)

The Board has previously considered under the exemption process a number of controversial construction projects that were significantly larger and more expensive than this 5,000-foot rail construction project. See, e.g., DesertXpress Enters.—Constr. & Operation Exemption—in Victorville, Cal., FD 35544 (STB served Oct. 25, 2011) (190-mile passenger rail line estimated to cost $6.5 billion); Alaska R.R., FD 35095, slip op. at 1, 4 (35-mile rail line for which the state appropriated $62.5 million to support, among other things, initial construction expenses); San Jacinto Rail Constr. Exemption—Build Out to the Bayport Loop Near Hous., Harris Cnty., Tex., FD 34079, slip op. at 1 (STB served Aug. 28, 2002) (12.8-mile rail line). Moreover, the two cases the Association cites in which the Board *did* require an application

instead of a petition for exemption[8] involved projects much larger and much more costly than this proposed 5,000-foot freight rail line. See Ozark Mountain R.R.—Constr. Exemption, FD 32204, slip op. at 2, 5-6 (ICC served Dec. 15, 1994) (requiring an application for a proposed 75-mile passenger excursion line that was estimated to cost $310 million in 1992, where there were significant questions about its financing); Tex. Cent. R.R.—Pet. for Exemption—Passenger Rail Line Between Dall. & Hous., Tex., FD 36025, slip op. at 15 (STB served July 16, 2020) (requiring an application for a 240-mile proposed passenger line projected to cost over $30 billion given "the magnitude of the project, the questions about increased costs and funding sources, the substantial public interest, and the potential impact on numerous local landowners" who might be subject to eminent domain under state law). Indeed, in Ozark Mountain, the Board's predecessor, the Interstate Commerce Commission (ICC), distinguished the passenger excursion rail project at issue there from smaller freight rail projects like the one here, which have typically proceeded by petitions for exemption.[9] See Ozark Mountain R.R., FD 32204, slip op. at 4-5.

Nor would an application provide the Board with any additional information to address concerns about potential environmental issues and community concerns regarding the proposed line, such as possible effects on air, light, sound, water, local traffic congestion, and property values. Regardless of whether a construction proceeds by an application under § 10901 or a petition for exemption under § 10502, the Board's Office of Environmental Analysis (OEA) conducts an environmental and historic review under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12, and Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. During that review, the public will have ample opportunity to comment on environmental issues and community concerns related to the Line. Here, OEA will issue for public review and comment a Draft Environmental Assessment (Draft EA) evaluating potential environmental and historic impacts, addressing concerns raised by the community, and, if applicable, preliminarily recommending environmental and historic preservation mitigation.[10]

[8] In other cases cited by the Association, the filers chose to submit applications, and the Board did not need to consider whether a petition for exemption would have provided it with sufficient information. See Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 6 (STB served Oct. 9, 2007); Great Lakes Basin Transp., Inc.—Rail Constr. & Operation—in Rock Cnty., Wis., FD 35952, slip op. at 1 (STB served Aug. 31, 2017).

[9] The ICC noted that the proposal in Ozark Mountain differed substantially from other prior construction exemptions in that, among other things, the new carrier was not owned by the industry that would be the principal shipper and the new line was not being built to serve an industrial facility but rather was part of a larger development plan that included theme parks, restaurants, lodging, and other commercial establishments adjacent to the line. See Ozark Mountain R.R., FD 32204, slip op. at 4-5.

[10] Some commenters have objected to OEA's waiver of 49 C.F.R. § 1105.6(a) to allow preparation of an EA rather than an Environmental Impact Statement (EIS). (See, e.g., Ass'n Comment 3, Feb. 14, 2023.) But OEA explained the basis for its decision to waive preparation of an EIS, citing evidence from its site visit as well as the limited length of the Line and the small volume of the expected increase in rail traffic. (See OEA Letter 2, Sept. 29, 2022.) As

See 49 C.F.R. § 1105.10(b). OEA will then issue a Final EA responding to comments received on the Draft EA, with additional environmental analysis, as necessary, as well as OEA's final recommended environmental and historic resource mitigation. Thereafter, the Board will grant or deny the request for authority in a final decision that considers both the transportation merits of the proposed line and the potential environmental, historic resource, and community impacts. If the requested authority is granted, the final decision may impose appropriate conditions, including environmental mitigation conditions, if warranted. See 49 C.F.R. § 1105.10(f).

The Association also suggests that environmental concerns related to CarlsonCorp's proposed transloading facility call for an application proceeding with respect to the rail line construction. (Pet. 3.) However, Townline has stated that CarlsonCorp will develop its facility in compliance with state and local regulations, including applicable environmental regulations. (See Townline Reply 9, 18-19.) Thus, requiring an application here for the construction and operation of the Line because of environmental concerns related to the planned transload facility is unnecessary.

The Board also finds that, based on the record at this point, a construction application is not necessary to address the Association's generalized concerns "regarding funding sources for what appears to be a high dollar undertaking." (Ass'n Mot. 10-11.) The Association's concerns that Townline will not have adequate funding are vague and unsupported. The Association has merely asserted, in a single sentence without elaboration, that it questions the need for the project because there are similar projects in the area and because it does not know what all the funding sources will be. (See id.) Standing alone, such a summary assertion does not warrant requiring Townline to file an application.

It is ordered:

1. All filings received as of November 15, 2023 are accepted into the record.

2. The Association's motion to dismiss, or in the alternative, to find that an application under 49 U.S.C. § 10901 is required, is denied.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

noted above, an EA will consider and address community concerns. Further, OEA explained that, should the EA process disclose unanticipated significant environmental impacts, it would require the preparation of an EIS at that time. (Id.)