

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36616

SAVAGE TOOEELE RAILROAD COMPANY—CONSTRUCTION AND OPERATION
EXEMPTION—LINE OF RAILROAD IN TOOEELE COUNTY, UTAH

Digest:¹ Savage Tooele Railroad Company (STR) has filed a petition for exemption to construct and operate approximately 11 miles of rail line in Utah. This decision denies STR’s request that the Board preliminarily address the transportation merits of the proposed transaction before the environmental review process is complete.

Decided: March 29, 2023

On June 30, 2022, Savage Tooele Railroad Company (STR),² a noncarrier, filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately 11 miles of rail line connecting the Union Pacific Railroad Company (UP) Shafter Subdivision mainline at approximately milepost 897.84 near Burmester, Utah, to the Lakeview Business Park in Grantsville, Utah (the Park).³ STR asks that the Board issue a preliminary decision addressing the transportation merits of the project while the environmental review process is ongoing. STR asserts that, although the Board’s “general policy is to decide the transportation merits of a construction proposal based on a complete record that includes environmental review,” conditional approval of the proposed

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 STR is a wholly owned subsidiary of Savage Enterprises, LLC, and both are subsidiaries of Savage Companies. (Pet. 3.)

³ By decision dated August 24, 2022, the Board ordered STR to clarify how its proposed line would connect to the national rail network, as it appeared from STR’s petition that the approximately one mile of track connecting its proposed line to the UP Shafter Subdivision was no longer mainline track under 49 U.S.C. § 10901. In response, STR filed a verified supplement explaining that “UP has decided . . . to petition the Board to reinstate common carrier operating authority” over its right-of-way between milepost 0.0 and milepost 1.04, so that STR’s proposed line beginning at milepost 1.04 would connect directly to UP’s mainline. (Verified Suppl. 1, Sept. 20, 2022.) STR also indicated that it may instead acquire the right-of-way and track between milepost 0.0 and milepost 1.04 or obtain operating authority over such track. (*Id.* at 2.) To date, however, none of those things have occurred.

transaction is appropriate due to unique or compelling circumstances. (Pet. 10.) Specifically, STR states that conditional approval will help facilitate development of the project “by providing relative assurances to parties considering locating within the Lakeview Business Park that rail service from STR can be expected.” (*Id.*) STR also states that conditional approval will help it acquire a 0.54-mile segment of right-of-way that UP previously conveyed to private landowners. (*Id.*) Further, STR states that the environmental review process proceeds under a separate schedule that is often longer than the Board’s consideration of the transportation merits. (*Id.* at 10-11.)

On January 17, 2023, STR filed a supplement providing additional support for its request and asking the Board to conditionally approve the project by March 31, 2023. (Suppl. 1.) STR states that no party has objected to its petition and that several parties submitted filings supporting the proposed transaction.⁴ (*Id.* at 2-3.) According to STR, the Board has conditionally approved rail construction projects for similar reasons. (*Id.* (citing Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah (Uinta), FD 36284 (STB served Jan. 5, 2021); Ken Tenn Reg’l Rail Partners, Inc.—Constr. & Operation Exemption—in Fulton Cnty., Ky. & Obion Cnty., Tenn. (Ken Tenn), FD 36328 (STB served Dec. 1, 2020)).) STR also states that, absent “Board approval of the merits of STR’s project,” prospective Park tenants must decide whether to risk investing in railroad infrastructure for their proposed facilities. (*Id.* at 3-4.) STR asserts that such uncertainty caused STR (and the Park) to lose a potential customer in May 2022, and that another customer, Lineage Logistics, LLC (Lineage), has since asked for “assurances that the Board will approve the merits of the project.” (*Id.* at 4.) STR states that Lineage has purchased 40 acres within the Park to build a facility, which will not contain rail infrastructure absent “reasonable certainty” in the first quarter of this year that the Park will be rail-served. (*Id.*; see *id.*, Ex. 1.) Additionally, STR states that a preliminary decision approving the transportation merits of the project would assist its efforts to obtain federal and state grant funding. (*Id.* at 5.) STR also states that the Board’s Office of Environmental Review (OEA) is preparing an Environmental Assessment (EA) for the proposed project, rather than a more-rigorous Environmental Impact Statement (EIS). (*Id.* at 5-6 (noting that OEA’s review “is well underway”).)

The Board will deny STR’s request to conditionally address the transportation merits of the transaction before the environmental review is complete. As STR acknowledges, the Board generally will not grant conditional approval of a construction proposal absent “unique or compelling circumstances.” Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greeley (Delta Junction), Alaska (Alaska R.R.), FD 34658, slip op. at 2 (STB served Oct. 4, 2007). STR has not shown that such circumstances are present here. Although STR’s desire to provide assurances to parties that may be evaluating a new rail transportation option is understandable, the same general desire could be said to arise in any such transaction. See *id.* at 1-2 (denying a conditional construction exemption where a petitioner argued, inter alia, that it would permit shippers to evaluate a rail service option).

⁴ Letters in support of the proposed transaction were filed by U.S. Representative John Curtis (Utah), U.S. Representative Chris Stewart (Utah), Utah Governor Spencer J. Cox, the Utah Department of Transportation, and World Trade Center Utah.

Further, a preliminary decision approving the transportation merits of the project would not provide assurance that the Board will grant STR's petition, as "[a] possible outcome of the environmental review is denial of the construction proposal notwithstanding a prior conditional grant." Id. at 2.

STR also fails to explain why the length of the requisite environmental review process, or the type of review OEA is conducting, supports conditional approval. Should the EA process—including the taking of public comment—disclose unanticipated impacts that are significant and difficult to mitigate, then OEA may be required to prepare an EIS. (See Letter to T. Wilcox 2, Jan. 10, 2023 (EO 3781).) Moreover, the Board must consider the complete environmental record—including both draft and final EAs (and possibly EISs), public comments, and OEA's final recommended mitigation measures—when making its final decision. (Id.) STR implies that information obtained during that process is not pertinent to the Board's consideration of the transportation merits, (Pet. 10-11), but the Board has explained that "the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us." Alaska R.R., FD 34658, slip op. at 2. Similarly, STR does not explain how conditional approval would assist its efforts to obtain funding. (See Suppl. 5.) And, although STR argues that a conditional grant would assist STR in acquiring a right-of-way from private landowners, the Board is concerned that a preliminary decision could mislead landowners into believing that STR already effectively has Board authority to proceed with the construction project when in fact it does not.

Finally, neither Uinta nor Ken Tenn requires the Board to issue a preliminary determination on the transportation merits per STR's request. In Uinta, the Board granted a request for a preliminary determination on the transportation merits of a construction project where "economic circumstances, exacerbated by the current [COVID-19] pandemic, [were] compelling." Uinta, FD 36284, slip op. at 8-9. STR has not presented similar compelling circumstances here. Likewise, Ken Tenn provides no basis for a finding of unique or compelling circumstances in this case. Although the Board emphasized the lack of opposition to date when it preliminarily addressed that project's transportation merits in its December 2020 decision, see Ken Tenn, FD 36328, slip op. at 3-4, such opposition arose later. See Ken Tenn Reg'l Rail Partners, Inc.—Constr. & Operation Exemption—in Fulton Cnty., Ky. & Obion Cnty., Tenn., FD 36328, slip op. at 3-4 (STB served July 23, 2021) (describing opposition by landowners, including argument that they did not have an opportunity to raise objections prior to preliminary determination). Thus, a current lack of opposition to STR's petition does not mean the project will ultimately go unchallenged, further cautioning against a preliminary finding at this stage of the proceeding.

For the above reasons, the Board will deny STR's request to issue a preliminary decision on the transportation merits.

It is ordered:

1. STR's request for a conditional construction exemption is denied.

2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

BOARD MEMBER FUCHS, dissenting:

I dissent from today’s decision (Decision) because it does not adequately advance the statutory rail transportation policy (RTP) to ensure the development of a sound rail transportation system and to reduce regulatory barriers to entry. 49 U.S.C. § 10101(4), (7). I agree with Board Member Schultz’s thoughtful points regarding (1) the Board’s presumption in favor of rail construction, (2) the benefits of increased rail transportation, and (3) the importance of reducing uncertainty for a shipper deciding whether to invest in rail infrastructure. Decision (Board Member Schultz dissenting). I understand the majority’s concern that a preliminary decision—framed as a “conditional approval,” “conditional grant” of authority, or a preliminary “conclusion” on the merits—could mislead landowners into believing that STR already effectively has Board authority to proceed with construction, though I note that any such preliminary decision would explicitly state that it confers no such authority.¹ I write separately to suggest an alternative to reduce entry barriers and lower uncertainty for industry participants, thereby improving the prospects of public benefits from increased competition, safety, and energy efficiency.

The Board should have issued a different decision today that minimizes possible confusion—in particular, by not using terms like “approval,” “grant,” or “conclusion”—but that provides STR and Lineage with needed guidance and an assessment of the record to date. As guidance, the Board should have clearly stated its well-established presumption in favor of construction² and cited several cases in which it advanced a view that the ultimate test of financial fitness will come from the marketplace.³ In many contexts, the Board routinely provides guidance on its standards and precedent to better inform parties and the broader public. The Board should have then included a preliminary “assessment” or “determination”⁴ on the

¹ See e.g., Ken Tenn Reg’l Rail Partners, Inc.—Constr. & Operation Exemption—in Fulton Cnty., Ky. & Obion Cnty., Tenn., FD 36328, slip op. at 5-6 (STB served Dec. 1, 2020), recons. denied (STB served July 23, 2021).

² See e.g., Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op at 13 (STB served Oct. 9, 2007) (citing Mid States Coalition for Progress v. STB, 345 F.3d 520, 552 (8th Cir. 2003)) (explaining that the permissive licensing policy reflected in ICCTA includes a statutory presumption that construction of new rail lines should be approved).

³ See e.g., Mid States, 345 F.3d at 552 (noting the insight and expertise of financial institutions and agreeing with the Board that the ultimate test of financial fitness will come when the railroad seeks funding).

⁴ I acknowledge the difference between “determination” and “conclusion” is slight, but I view “determination” as less likely to engender confusion about finality. The Board uses “determination” in other preliminary contexts, as noted below.

record as it currently stands, which shows no opposition on financial viability or other grounds typically categorized as transportation merits. In other licensing proceedings, the Board provides preliminary assessments or determinations, without using other terms that might indicate finality,⁵ and those preliminary decisions can lower burden and uncertainty for applicants and others.

Guidance and preliminary assessment can provide additional information to those making critical investment decisions, and such information would have been particularly valuable here because the record indicates past confusion with the Board's licensing statutes, includes parties that do not typically come before the Board, and shows that small businesses are facing time-sensitive decision points in what has become a lengthy exemption proceeding. Consistent with the RTP, the Board has spoken forcefully about promoting entrepreneurial spirit and increasing competition, safety, and energy efficiency benefits. When needed, the alternative suggested in this dissent would better advance these policy objectives in construction proceedings.

BOARD MEMBER SCHULTZ, dissenting:

I respectfully disagree with the both the Board's conclusion under the Alaska Railroad standard and with the Board's continued reliance on that standard. Between 2020 and 2022, the Board received 59 applications, petitions, and notices from railroads seeking to abandon rail lines. In that same period, the Board received only *nine* requests for authority to construct new rail lines. Each construction petition represents a possible investment in the national rail network, and the Board should strongly consider in future cases whether it is appropriate to stymie such investments by unnecessarily withholding preliminary decisions on the transportation merits of rail construction projects.

As the Rail Transportation Policy at 49 U.S.C. § 10101 directs, the Board should endeavor to "reduce regulatory barriers to entry into . . . the industry." 49 U.S.C. § 10101(7). Accordingly, I believe it is incumbent on the Board to not stand as a barrier to construction projects where those seeking Board approval ask for conditional or preliminary approval on the transportation merits. STR states that the preliminary approval will help them by "providing relative assurances to parties considering locating within the Lakeview Business Park that rail service from STR can be expected." (Pet. 10.) The Board finds this reason to be neither unique nor compelling, noting that STR's desire "could be said to arise in any such transaction." Decision 2. While the Board's reasoning addresses the uniqueness of the request, it does not say why the Board does not find the request compelling—just, simply, that it does not.

In a supplemental filing, STR provides a letter from a shipper who is deciding whether to build out for rail service. (STR Supplement, Ex. 1, Jan. 17, 2023.) The letter states, in part:

⁵ See e.g., Soo Line Corp.—Control—Central Me. & Quebec Ry., FD 36368, slip op at 1, 5-6 (STB served Jan. 16, 2020) (preliminarily determining, based on the application, that the transaction was minor).

We have expressed our clear preference for this facility to be served by STRR, as it presents numerous efficiencies and allows Lineage to take advantage of transportation which is more cost-effective than a truck-only solution. Rail service is also less impactful on the surrounding communities and roads than commercial truck traffic.

However, Lineage cannot commit to make the approximately \$7 million investment in rail infrastructure for the new facility without reasonable assurances that the STB will grant STRR's petition for authority to construct and operate its new track. . . . Absent assurances in the first quarter of this year that the rail line project will be constructed, Lineage will be forced to choose to construct its new facility without the possibility of adding rail service.

Id. This, too, does not sway Board, which states that "a preliminary decision approving the transportation merits of the project would not provide assurance that the Board will grant STR's petition, as '[a] possible outcome of the environmental review is denial of the construction proposal notwithstanding a prior conditional grant.'" Decision 3 (quoting Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greeley (Delta Junction), Alaska (Alaska R.R.), FD 34658, slip op. at 2 (STB served Oct. 4, 2007)) (alteration in original). This is a situation in which the Board has discretion—it can certainly decline to weigh in on the transportation merits. But the Board could exercise its discretion in the opposite direction, and I believe the circumstances warrant it in this case.

Under the Alaska Railroad standard, I find Savage's request compelling. While the Board says that we cannot provide assurance that the Board will grant STR's petition, the Board does not grapple with the fact that we can provide, at the very least, some assurance. A conditional grant finding that Savage's construction petition should be granted in terms of the transportation merits, would provide assurance that, at least on those grounds, the Board will not be denying the petition. It is true that the Board could still deny the petition following environmental review, as the Board has done in at least one instance. See Ind. & Ohio Ry.—Constr. & Operation—Butler, Warren, & Hamilton Cntys., Ohio, 9 I.C.C.2d 783 (1993). But I do not see that as a reason to deny ruling on the transportation merits, especially when it is Congress's intent for the Board to, on balance, favor rail construction. See Lone Star R.R.—Track Constr. & Operation Exemption—in Howard Cnty., Tex., FD 35874, slip op. at 3 (STB served Mar. 3, 2016) ("Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise.").

This presumption that rail construction projects are in the public interest aligns with the decades-long shift in rail construction policy, which the Board has recognized before. Before the Staggers Act, the ICC "had been directed to scrutinize rail construction proposals closely to prevent excess rail capacity." Alaska R.R.—Constr. & Operation Exemption—Rail Line Between N. Pole & Delta Junction, Alaska, FD 34658, slip op. at 5 n.4 (Jan. 6, 2010). The Staggers Act eased that requirement, allowing the ICC to authorize construction if the public convenience and necessity "permit[ted]" it, as opposed to "require[d]" it. Id. The Interstate Commerce Commission Termination Act went one step further, requiring that the Board "*shall issue*" certificates authorizing rail construction (and certain other activities) "unless the Board

finds that such activities are *inconsistent* with the public convenience and necessity.” 49 U.S.C. § 10901(c) (emphasis added); see also Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 552 (8th Cir. 2003) (detailing same statutory progression and finding that “the Board correctly maintains that there is a statutory presumption that rail construction is to be approved”).

A conditional grant of authority would not provide absolute certainty to Savage or Lineage, given the ongoing environmental review, but it would provide useful information. It would let Savage, and shippers such as Lineage who would like to plan for rail service, know that the Board will not deny the petition on the transportation merits. Given the specific factual situation, in which a specific shipper is trying to decide whether to invest in rail infrastructure, I would find that that Savage has met the “unique or compelling circumstances” standard under Alaska Railroad. Accordingly, I would issue a decision on the transportation merits to give Lineage more information with which to make its business decision, in keeping with the statutory presumption in favor of rail construction and the understanding that the Board’s use of its discretion to disincentivize rail construction does not serve the public interest, competition, the rail industry, or shippers. In fact, I would also overturn Alaska Railroad, because it is not in keeping with the presumption in favor of rail construction.

Before Alaska Railroad, the Board and the Interstate Commerce Commission routinely reviewed the transportation merits of construction petitions separate from the environmental considerations.¹ Doing so expedites consideration of construction petitions and furthers the Rail Transportation Policy in multiple regards, including reducing regulatory barriers to entry into the industry, 49 U.S.C. § 10101(7), and providing for the expeditious handling and resolution of all proceedings, 49 U.S.C. § 10101(15). If the Board is not waiting to consider the transportation merits after the environmental review is completed, the Board would be able to issue its final decision much more quickly, and, in a case in which the Board ultimately denies a construction petition on the transportation merits, the Board can conserve both staff resources and the time

¹ See, e.g., S. Elec. Generating Co.—Pet. for Exemption—Constr. of a Rail Line in Shelby Cnty., Ala., FD 31498 et al. (ICC served Sept. 19, 1989); Joppa & E. R.R.—Constr. Exemption—Joppa, Ill., FD 31656 (ICC decided June 29, 1990); Iowa Power, Inc.—Constr. Exemption—Council Bluffs, Iowa, FD 31717 (ICC decided Dec. 11, 1990); Burlington N. R.R.—Constr. & Operation Exemption—Macon & Randolph Cntys., Mo., FD 32229 (ICC served Mar. 10, 1993); Big Stone-Grant Indus. Dev. & Transp., L.L.C.—Constr. Exemption—Ortonville, Minn. & Big Stone City, S.D., FD 32645 (ICC served Sept. 26, 1995), vacated on other grounds, FD 32645 et al. (STB served June 9, 1998); S. Elec. R.R.—Constr. & Operation Exemption—W. Jefferson, Ala., FD 33387 (STB served July 16, 1997); Dakota, Minn. & E. R.R. Constr. into the Powder River Basin, 3 S.T.B. 807 (1998); Ellis Cnty. Rural Rail Transp. Dist.—Constr. & Operation Exemption—Ellis Cnty., Tex., FD 33731 (STB served Feb. 15, 2000); Great Salt Lake & S. R.R.—Constr. & Operation—in Tooele Cnty., Utah, FD 33824 (STB served Dec. 15, 2000); Six Cnty. Ass’n of Gov’ts—Constr. & Operation Exemption—Rail Line Between Levan & Salina, Utah, FD 34075 (STB served Oct. 26, 2001); Sw. Gulf R.R.—Constr. & Operation Exemption—Medina Cnty., Tex., FD 34284 (STB served May 19, 2003); New Engl. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass., FD 34391 (STB served Mar. 2, 2004).

and funds of a petitioner because the environmental review will not need to be completed. The ICC found a similar argument persuasive in Southern Electric, granting a request to exempt construction of a proposed rail line but delaying the date the effective date until the environmental evaluation was completed. See S. Elec., FD 31498 et al., slip op. at 2. In that case, the petitioner argued that “if processing of this exemption is deferred until completion of the EIS, there may be insufficient time for the Commission to review the filing and then allow [the petitioner] to proceed with necessary business matters before January 1990.” Id.

Importantly, a conditional grant, or a preliminary review, or a bifurcated approach—whatever you would like to call it—would not affect the environmental review process or standards. See Big Stone, FD 32645, slip op. at 3 (ICC served Sept. 26, 1995) (“Granting the requested conditional exemption will not diminish our capacity to decide environmental matters when issuing a final decision.” (citing Ill. Commerce Comm’n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988))). The environmental review process could proceed normally, but the Board would still be able to further the RTP and congressional intent to favor rail construction by expediting the part of the decision that can be expedited, rather than allowing the decision to languish on the Board’s heavy docket.

Construction today—not just in the freight rail industry—faces a host of regulatory barriers that increase costs and decrease the ability of public and private actors to create societally beneficial projects. “Rail transportation is,” as the Board has recently noted, “overall safer and better for the environment than transportation by truck,”² and I am in favor of lowering what barriers we can to increase the use of freight rail, especially when doing so is costless. Accordingly, I would overturn Alaska Railroad and broadly allow entities seeking to construct rail lines and expand the rail network to request conditional approval on the transportation merits.

² Canadian Pac. Ry.—Control—Kansas City S., FD 36500 et al., slip op. at 4 (STB served Mar. 15, 2023).