

SERVICE DATE – JUNE 27, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35106

UNITED STATES DEPARTMENT OF ENERGY—RAIL CONSTRUCTION AND
OPERATION—CALIENTE RAIL LINE IN LINCOLN, NYE, AND ESMERALDA
COUNTIES, NV

Decided: June 26, 2008

By motion filed on April 2, 2008, the State of Nevada (Nevada or State) asks the Board to reject as incomplete the Department of Energy's (DOE) application to construct and operate an approximately 300-mile line of railroad that would run across the state. In the alternative, the State asks that the Board delay the due date for filing reply comments to the application pending the submission of additional evidence from the applicant necessary to make the application complete. By motion filed on May 2, 2008, the State requests that the Board grant it leave to amend its motion, and that the Board hold an oral argument concerning the State's arguments. DOE filed replies in opposition to the State's requests. Although we will allow the State to amend its April 2 motion, we will deny the State's other requests.

BACKGROUND

On March 17, 2008, DOE filed an application seeking authority to construct and operate an approximately 300-mile rail line. The line, to be known as the Caliente Line, would connect an existing Union Pacific Railroad Company line near Caliente, NV, to a proposed geologic repository at Yucca Mountain, Nye County, NV. The purpose of this proposed rail line is to allow DOE to transport spent nuclear fuel (SNF) and high-level radioactive waste (HRW) to the proposed geologic repository for disposal, as well as to provide common carrier rail service to communities situated along the proposed line.¹

On April 2, 2008, the State of Nevada filed its motion asking the Board to reject DOE's application. The State submitted a correction to this motion on April 4, 2008. Nevada primarily argues that DOE's application fails to include certain pieces of data required by the Board's regulations, and that it does not provide other information necessary for the Board to fully analyze the submission. In case the Board requests additional information from DOE, the State

¹ On April 11, 2008, the Board published a Federal Register notice (74 FR 20748) announcing DOE's application. The Board, on its own motion, established a procedural schedule with filing due dates longer than those set forth in the Board's regulations. See 49 CFR 1150.10(g) and (h). Pursuant to the new schedule, parties have filed notices of intent to participate in the proceeding.

asks that the Board delay the time to file replies to the application until DOE has supplemented the record. DOE filed a reply in opposition to the State's requests on April 22, 2008.²

On May 2, 2008, the State of Nevada filed a motion seeking leave to amend its April 2, 2008 motion to reject by substituting an attached motion to reject for the April 2 motion. The new motion to reject contains the same arguments raised in the April 2 motion and several new arguments. Additionally, the State claims that the Board does not have jurisdiction over the rail line because DOE has not firmly committed to the use of the line as a common carrier line. The State concludes that, because the line is not certain to be a common carrier line, it does not fall within the limits of this agency's jurisdiction at 49 U.S.C. 10501.

The State additionally argues that the Board should enlist the assistance of other agencies in reviewing the instant application. In particular, the State argues that the Board should designate the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Transportation Security Administration (TSA) as "cooperating agencies," with the Federal Railroad Administration (FRA) as "lead agency" for safety and security matters. The State asks that the Board hold an oral argument to discuss the issues it raises in its filings. On May 19, 2008, DOE filed a reply asking that the Board reject the State's May 2 filing on procedural grounds.

PROCEDURAL MATTER

The State of Nevada moves for leave to amend its motion by substituting the May 2 motion to reject for the April 2 motion to reject. The State claims that this amendment is necessary for it to plead its claim that DOE's project does not fall within this agency's jurisdiction. DOE opposes the State's move to amend. DOE argues that the State's May 2 filing is actually a "reply to a reply," which is prohibited under our regulations.³ Furthermore, DOE argues that the State has failed to show good cause why the Board should accept the amended motion. DOE claims that the new arguments found in the State's motion could have been made in its April 2 motion. DOE asks that, if the Board accepts the State's amended motion to reject, it be allowed to file a reply to the merits of the new arguments found in the May 2 filing.

We will grant the State's motion to amend. Although we discourage pleadings like this one, which resembles a prohibited reply to a reply, our acceptance of the State's pleading will not unduly delay the proceeding or prejudice any party. And in light of our finding below that rejection of the application is not warranted, it is unnecessary to provide for DOE to file a substantive reply to the State's May 2 motion to reject. Accordingly, we will deny DOE's request to file an additional reply.

² On April 8, 2008, Nevada Central Railroad (NCR) filed preliminary comments along with a notice stating that it intends to participate in this proceeding. NCR also stated that it planned on filing a motion to reject DOE's application by April 16, 2008, but it did not submit a filing by that date. We will address NCR's comments in the decision on the merits of the application.

³ See 49 CFR 1104.13(c).

The State of Nevada also has requested that the Board hold an oral argument to discuss the issues it has presented in its filings. We will not hold an oral argument as requested by the State. We have a sufficient record upon which to make a determination on the issues raised by Nevada. Moreover, as discussed below, some of the issues raised by the State are better suited for a discussion on the merits of the application. Accordingly, those issues can be more fully discussed, if necessary, in comments replying to the application.

DISCUSSION AND CONCLUSIONS

Jurisdiction and Common Carrier Concerns. The State of Nevada questions whether DOE actually intends to build a common carrier line of railroad. The State notes that DOE has stated that it will not make a final decision on whether the line will be a common carrier line until it has completed further environmental review and that it has failed to submit an operating plan with its application. Nevada cites this uncertainty as the basis of its claim that the Board lacks jurisdiction over the line under the plain language of 49 U.S.C. 10501.

These concerns do not warrant rejection of DOE's application. First, this agency has jurisdiction over the instant transaction. Because DOE has applied to construct and operate a common carrier line of railroad, it is seeking to provide transportation by railroad, and therefore engage in an activity under our jurisdiction at 49 U.S.C. 10501. Moreover, as codified at 49 U.S.C. 10901, this agency has jurisdiction over applications wherein an entity seeks to construct a common carrier line of railroad.

While DOE may not have made a final decision as to whether to have common carrier service on the proposed Caliente Line, such uncertainty does not deprive this agency of jurisdiction over the project. In essence, Nevada would have us require a noncarrier applicant to be certain that it will construct and operate a common carrier line, thus transforming our grant of authority under 49 U.S.C. 10901 into a mandatory order to the applicant. It is well-settled, however, that our grant of authority under section 10901 is permissive, not mandatory. The permissive nature of our grant thus recognizes that the decision to go forward with a project is in the hands of the applicant and not this agency. We only determine whether such a common carrier project is inconsistent with the public convenience and necessity. And, at this point, only if DOE would definitely decide that it does not wish to have common carrier service on the Caliente Line would we lack jurisdiction over the proposed line construction.

Nonetheless, DOE has demonstrated that it is seriously considering using its line to provide common carrier service by virtue of its filing the instant application. We further note that DOE asserts that it would prefer to use the line for common carrier service.⁴ This is enough given the permissive nature of section 10901.

Operating Plan. The State argues that the application is incomplete because it lacks the operating data and plan required of an applicant by 49 CFR 1150.5. Nevada adds that DOE has had 20 years since the 1987 Nuclear Waste Policy Act Amendments to anticipate the operating data and plan requirements for this application. The State contends that the failure to include an

⁴ See DOE's April 22 reply at 7.

operating plan compromises full disclosure of essential information to stake holders regarding DOE's proposed rail transportation activity and infrastructure in Nevada.

We will not reject DOE's application for failure to provide an operating plan and underlying data. Our regulations contemplate the possibility that an applicant seeking construction authority has not yet chosen the operator of the proposed line. Indeed, section 49 CFR 1150.3(c) provides that, if an applicant has not chosen an operator, it should state who is being considered. Furthermore, in a recent proceeding, we granted a construction application even though the operator of the line had yet to be determined by the parties.⁵

Here, it is reasonable that DOE has not submitted a detailed operating plan given that it has not yet engaged in the formal procurement process to choose a contractor to provide service. As DOE explains, certain information cannot be provided until after the selection process is completed because the information is dependent on the operator selected. In particular, DOE cites to information about the crews and where the crews will come from, where the rolling stock will come from, and, if the potential operator has not provided service before, the entity's safety record, as being dependent on the operator selected.⁶ And DOE points out that it has committed to provide the Board with the necessary operating information once it chooses the operator.⁷

DOE also explains that it has included the operating data and information that can feasibly be presented prior to the selection of an operator. For example, DOE has provided descriptions of trains transporting SNF and HRW to the proposed repository, descriptions of trains transporting freight to support the repository construction, descriptions of common carrier trains, and traffic projections.⁸ DOE also correctly notes that certain topics identified in 49 CFR 1150.5 have no relevance to the proposed rail line.

Moreover, a detailed operating plan is less important here than in an undertaking involving private parties. In the latter situations, we examine the applicant to ensure that it has sufficient resources to undertake its proposed obligation and to ensure that the railroad does not spread its resources so thin as to jeopardize its common carrier obligation to other shippers. Here, the rail line is proposed to be built by the Federal Government and operated pursuant to its direction, and there are no other rail operations potentially put at financial risk by this proposal.

In sum, DOE has included sufficient operational information to warrant continuing processing its application under our rules.

⁵ See Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 11, 2007).

⁶ See 49 CFR 1150.5; DOE's April 22 reply at 10.

⁷ See DOE's April 22 reply at 11. Parties may seek leave to file a response to such supplemental information once it is filed.

⁸ Id.

Environmental Material. Nevada challenges whether the environmental material the applicant has included in Exhibit H of the application is sufficiently complete. The State argues that the material in Exhibit H can only serve as a basis for the agency's review of the environmental consequences of constructing and operating the line, and the State asks the Board to clarify how the agency will use this environmental material in conducting its environmental analysis. The State also claims that the application lacks necessary environmental information because it lacks an operating plan, which also is required for environmental review purposes by 49 CFR 1105.7(e)(11)(iv).

The nature of the information on the environmental impact of the proposed construction and operation contained in the application affords the State no basis to seek rejection of the application. Under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), and related environmental laws, this agency must issue a statement of the environmental impact of any action we authorize. The preparation of that statement is the Board's responsibility. This agency will seek and obtain whatever assistance from the applicant we need to fulfill our obligation under NEPA. All parties, including the State, will be able to participate in the environmental review process as provided in our regulations at 49 CFR Part 1105. The State makes no argument, nor can it, that the contents of DOE'S application affects any of the State's rights under our environmental regulations or under NEPA to participate in the development and review of whatever statement of environmental impact we ultimately issue in this case.

Exhibit H, which is required as part of a construction application pursuant to 49 CFR 1150.7, is intended to provide our Section of Environmental Analysis (SEA) with the material to examine the environmental impact of constructing and operating the Caliente Line in accordance with NEPA. DOE has included in Exhibit H its own Draft Nevada Rail Corridor Supplementary Environmental Impact Statement (RC-DSEIS) and Draft Rail Alignment Environmental Impact Statement (RA-DEIS). While these documents are not yet final, Nevada has not specifically challenged the adequacy of this information and data, and Exhibit H contains sufficient environmental material to support our accepting the filing of DOE's application.⁹

We note that SEA will thoroughly review the material and determine whether it provides an adequate analysis. SEA may recommend that additional environmental information or review is necessary. In processing the application, the Board will fully meet its obligations under NEPA.

Involvement by Additional Agencies. The State argues that the Board should make PHMSA and TSA cooperating agencies in the review of the project, and that the Board should make FRA a lead agency to examine safety and security issues. The State explains that bringing these agencies into the process will ensure that proper consideration is given to the safety factors found in the April 16, 2008 Interim Final Rule (73 FR 20752) issued by PHMSA in coordination with TSA and FRA. Under these regulations, which were to become effective on June 1, 2008, railroads are directed to take into consideration 27 factors when routing hazardous materials.

⁹ For the reasons discussed above, DOE does not need to provide a more detailed operating plan at this time.

Nevada also cites to two notices of proposed rulemaking by PHMSA and TSA involving new security regulations for rail shipments of hazardous materials.¹⁰

We are determining in this proceeding whether the construction and operation of a common carrier rail line running through Nevada to the Yucca Mountain facility is inconsistent with the public convenience and necessity. Any other interested governmental agency may participate in this proceeding. We are confident that all railroads will abide by the Interim Final Rule and any other safety and security regulations adopted by these agencies, regardless of how the agencies participate in this proceeding.

Safety Integration Plan. The State argues that, based on the scope and nature of this project, DOE should provide a Safety Integration Plan (SIP) as our regulations require at 49 CFR 1106.2 for cases involving certain rail consolidations. But the Board requires SIPs for consolidations under 49 U.S.C. 11323(a), not for line constructions under 49 U.S.C. 10901. The requirement is to ensure that work forces and operations are safely unified as part of a large merger transaction, and there will be no consolidation of work forces or operations as a result of the proposed transaction.

Additionally, Nuclear Waste Strategy Council noted in its April 24, 2008 filing that DOE has transported SNF for decades without the cargo causing a single death. We expect that, if the construction of this line is authorized and the line is built, DOE would require its operator to use the same level of care when transporting the hazardous material over the Caliente Line. Similarly, we expect that the carriers that would transport the SNF and HRW from various points to the Caliente Line will do so with the utmost care and attention to safety. Moreover, all parties will in any event need to comply with safety regulations provided for by bodies such as PHMSA, FRA, TSA and the various states.

Terrorism. The State argues that the Board should reject the application because it fails to provide a meaningful analysis of the possibility of terrorist attacks arising from the transaction, and because DOE's submission fails to address the PHMSA Interim Final Rule and other rulemakings cited above. While the Board takes threats of terrorism and questions of safety very seriously, we will not reject DOE's application based on these grounds. As DOE points out, it has included information addressing terrorism concerns in Exhibit H of its application. Whether DOE has adequately demonstrated that it has taken appropriate safety measures and whether this agency should deny the application based on terrorist concerns are questions of merit. These questions will be handled when we rule on the merits of DOE's application.

For the reasons discussed above, we find that DOE's application is sufficiently complete, and that we do not need additional information from the applicant at this time. Accordingly, we will deny the State of Nevada's motion to reject the application, and we therefore need not adjust the procedural schedule we announced in the April 11 Federal Register notice. Parties are welcome to file comments on the merits of the application pursuant to that schedule and to participate in the environmental review process.

¹⁰ See 71 FR 76834 and 76852 (Dec. 21, 2006).

It is ordered:

1. The State of Nevada's motion to amend is granted.
2. DOE's request to file a reply to the State of Nevada's May 2 filing is denied.
3. The State of Nevada's motion for an oral argument is denied.
4. The State of Nevada's motion to reject DOE's application is denied.
5. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary