

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35952

GREAT LAKES BASIN TRANSPORTATION, INC.—RAIL CONSTRUCTION AND OPERATION—IN ROCK COUNTY, WISC., WINNEBAGO, OGLE, LEE, LASALLE, GRUNDY, AND KANKAKEE COUNTIES, ILL., AND LAKE, PORTER, AND LAPORTE COUNTIES, IND.¹

Digest:² In this decision, the Board rejects an application filed by Great Lakes Basin Transportation, Inc., for authority to construct and operate a rail line in the states of Wisconsin, Illinois, and Indiana.

Decided: August 30, 2017

On May 1, 2017, as supplemented on June 21, 2017, Great Lakes Basin Transportation, Inc. (GLBT), filed an application pursuant to 49 U.S.C. § 10901 and 49 C.F.R §§ 1150.1-10 seeking authority from the Board to construct and operate an approximately 261-mile rail line (the Line). According to GLBT, the proposed rail line would extend around the Chicago, Ill., area at a distance of 38 to 89 miles from downtown and pass through counties in Wisconsin, Illinois, and Indiana.³ For the reasons discussed below, the Board will reject GLBT's application.

BACKGROUND

In its application, GLBT explains that the purpose of the new rail line would be to allow rail traffic to bypass the Chicago area. GLBT states that the Line would be completely grade separated from major intersecting rail lines and major highways. GLBT further states that the Line would connect with each major rail line operated by the six Class I railroads serving Chicago, along with six regional railroads resulting in a total of 26 potential points of

¹ The case caption has been modified to add LaPorte County, Ind.

² 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ The proposed rail line would extend around the Chicago area in a partial ring shape through Indiana, Illinois, and Wisconsin.

interchange.⁴ According to GLBT, the Line would permit a train to travel between any two of those points of interchange in eight hours or less. GLBT further states that construction of the Line would create new capacity, permitting up to 110 trains per day to bypass the Chicago terminal and allowing the existing rail infrastructure to move freight and passenger trains originating and terminating in Chicago more efficiently and reliably.

With its application, GLBT filed a motion for protective order to govern the exchange and use of confidential information contained in filings in the proceeding. GLBT also filed under seal a list of GLBT's 10 principal stockholders and their respective holdings—information specifically required by the Board's regulations at 49 C.F.R. § 1150.3(f). Replies to GLBT's motion for protective order were filed by the following: (1) Environmental Law & Policy Center (ELPC); (2) jointly by Block GLB Railroad, LaSalle County, IL; Rock Against the Rail, LLC; Kankakee County, IL Block GLB; RAILED; Citizens Against the GLB Railroad, Boone County, IL; and Winnebago County Against the GLB Railroad (collectively, the Opposition Groups); and (3) jointly by Openlands and the Sierra Club, Illinois Chapter.

On May 3, 2017, the Opposition Groups filed a letter requesting a 55-day extension for written comments on GLBT's application and a 15-day extension to reply to GLBT's motion for protective order. The request was joined by the Illinois Agricultural Association a/k/a the Illinois Farm Bureau (along with the Farm Bureaus of Grundy, Kankakee, LaSalle, Lee, Ogle, and Winnebago-Boone counties) on May 10, 2017, and by ELPC on May 18, 2017. On May 19, 2017, Norfolk Southern Railway Company filed a letter of intent to participate in the proceeding, in which it noted that it does not object to the requests for extension of time.

On May 9, 2017, the Director of the Board's Office of Proceedings issued an order establishing procedures for the service of filings on the transportation merits in the proceeding, and the Opposition Groups requested clarification of that order on May 17, 2017.

On June 2, 2017, the Board issued a decision directing GLBT to supplement its application by filing: a corrected list of counties and cities to be served, as required by 49 C.F.R. § 1150.4(e); a recent balance sheet as Exhibit E and an income statement for the latest available calendar year prior to filing the application as Exhibit F, as required by 49 C.F.R. § 1150.6(b); a certification of the application, as required by 49 C.F.R. § 1150.10(c); a certification of service, as required by 49 C.F.R. § 1150.10(e); and an affidavit confirming publication, as required by 49 C.F.R. § 1150.10(f). The Board also tolled the deadlines imposed by the Board's regulations for comments and replies on the transportation merits of the application; granted with modifications the motion for protective order filed by GLBT; rejected GLBT's designation of the list of its 10 principal stockholders and their respective holdings as "highly confidential" and

⁴ GLBT states that the number of interchange points is based on GLBT's preferred route (Route Two), submitted to the Board's Office of Environmental Analysis on September 20, 2016. (GLBT Appl. 6.)

required that this information be publicly disclosed; addressed the Opposition Groups' request for extension of time to reply to the motion for protective order; and clarified the service requirements in the proceeding. On June 22, 2017, GLBT filed the requested supplemental information.

The Opposition Groups filed a petition for rejection of GLBT's application on July 10, 2017, and errata thereto on July 12, 2017. In the petition, the Opposition Groups argue that GLBT's application should be rejected because it does not contain the information required by 49 C.F.R. § 1150.4 regarding the public need for the new Line or 49 C.F.R. § 1150.6 regarding GLBT's financial ability to undertake the project and provide rail service. (Opposition Groups Pet. 4-10.) The Opposition Groups further argue that GLBT has failed to meet its burden of proof and burden of persuasion. (Id. at 10-11.)

On July 14, 2017, Save Our Farmland, LLC, filed a petition for rejection of GLBT's application. Save Our Farmland states that it joins in the petition for rejection, including the errata supplement, filed by the Opposition Groups. (Save Our Farmland Pet. 2.) It also argues that GLBT's application should be rejected as deficient because GLBT describes its preferred Route Two in general terms only, (id. at 2), and because the application lacks a substantive demonstration of financial capability and the support of prospective users of the proposed Line, (id. at 3). According to Save Our Farmland, the mere pendency of the application creates a cloud on the titles to the farmland that may be affected by the Line, diminishing the value of those farms and the available financed working capital for those farms. (Id. at 2-3.)

On July 31, 2017, GLBT filed a reply to the petitions for rejection of its application, urging the Board to reject both petitions. In response to the petition for rejection filed by the Opposition Groups, GLBT argues that it has fully complied with the requirements of § 1150.6 and § 1150.4(e). (GLBT Reply 5-8.) GLBT further claims that the Opposition Groups' argument regarding the burden of proof disregards the language of 49 U.S.C. § 10901, which, according to GLBT, requires opponents of a rail line construction application to prove that the proposed line would be inconsistent with the public convenience and necessity. (GLBT Reply 8-9.) With respect to the petition filed by Save Our Farmlands, GLBT argues that the impact of GLBT's proposed railroad on farms in Rock County, Wis., has no bearing on the adequacy of the application, although it is one factor the Board may consider in its analysis of the application. (Id. at 9.)

On August 25, 2017, ELPC filed a petition to reject GLBT's application, arguing that GLBT failed to (1) make a threshold showing that it is financially fit or has a feasible financing plan and (2) comply with the requirements of §§ 1105.7, 1150.4(e), and 1150.4(g)(2), which require, respectively, the submission of an Environmental Report, information about interchanges with existing railroads, and information about industries in the area. (ELPC Pet. 5-6, 9-11.)

The Board also received comments filed by U.S. Senator Richard Durbin of Illinois, U.S. Representatives Robin Kelly and Adam Kinzinger of Illinois, state and local officials and entities, and numerous comments filed by individual private citizens.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1150.10(f), the Board must, as soon as practicable, either publish a notice summary of a construction application in the Federal Register or reject the application if it is incomplete. Here, the Board finds GLBT's application incomplete and, therefore, rejects it.

GLBT has failed to provide the Board with accurate financial information upon which the Board can rely to make a determination on the transportation merits of the project as required by 49 U.S.C. § 10901. Under § 10901, the Board must authorize the construction and operation of a new line “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” In making this determination, the Board considers the financial condition of the applicant and the financial feasibility of the project. See Tongue River R.R.—Rail Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 14 (STB served Oct. 9, 2007). The Board's purpose in doing so is not to protect the applicant or possible investors, but rather, “to protect (1) existing shippers from financial decisions that could jeopardize the carrier's ability to carry out its common carrier obligation to serve them, and (2) the affected communities from needless disruptions and environmental impacts if the applicant were to start construction but not be able to complete the project and provide the proposed service.” Id. To permit the Board to properly analyze the transportation merits of the proposed transaction, accurate financial information is an essential component of a construction application.

The financial information provided in GLBT's application, as supplemented, is fundamentally flawed, making it impossible for the Board to determine whether GLBT can meet the statutory criteria. Specifically, the balance sheet provided as Exhibit E of GLBT's application, as supplemented, contains an unexplained line item for “net income” (amounting to negative \$1,203,545) that appears to account for a substantial difference between its assets and its liabilities and stockholders' equity. (GLBT Suppl. Information at 4, June 22, 2017.) Because GLBT provides no underlying information to explain the basis for this line item or its calculations, it is not possible for the Board to determine the cause of this discrepancy or evaluate the information provided. The financial information submitted by GLBT, therefore, cannot reasonably be relied upon by the Board to determine the financial condition of the applicant under the statutory criteria.

Moreover, while the Board does not require that construction projects be fully funded at the outset of a construction application proceeding, as discussed above, the financial fitness of the applicant is part of the § 10901 application process. GLBT's current assets of \$151 are so clearly deficient for purposes of constructing a 261-mile rail line that the Board will not proceed with this application given the impacts on stakeholders and the demands upon Board resources.

For these reasons, the Board finds GLBT's application incomplete and therefore rejects the application.⁵ Because the Board is rejecting GLBT's application, the Board is discontinuing the environmental review process associated with the proposed project.

It is ordered:

1. The application is rejected.
2. The environmental review is discontinued.
3. The petitions for rejection of GLBT's application filed by the Opposition Groups, Save Our Farmland, and ELPC are dismissed as moot.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.

⁵ Because the Board is rejecting GLBT's application as incomplete based on its own review, the petitions for rejection of GLBT's application filed by the Opposition Groups, Save Our Farmland, and ELPC will be dismissed as moot.