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SERVICE DATE – SEPTEMBER 30, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36284

SEVEN COUNTY INFRASTRUCTURE COALITION—RAIL CONSTRUCTION &  
OPERATION EXEMPTION—IN UTAH, CARBON, DUCHESNE, AND UINTAH  
COUNTIES, UTAH

Digest:<sup>1</sup> This decision denies requests to reconsider the Board’s January 5, 2021 decision, which preliminarily concluded, subject to completion of the environmental review, that the proposed construction and operation of approximately 85 miles of rail line in Utah meets the statutory exemption standard.

Decided: September 29, 2021

In 2020, the Seven County Infrastructure Coalition (Coalition) filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authorization to construct and operate an approximately 85-mile rail line connecting two termini in the Uinta Basin near South Myton Bench, Utah, and Leland Bench, Utah, to the national rail network at Kyune, Utah (Uinta Basin Line). On January 5, 2021, the Board issued a decision assessing the transportation merits of the proposed transaction and preliminarily concluding, subject to completion of the ongoing environmental review, that the proposal meets the statutory standard for an exemption on the transportation merits. Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah (January 5 Decision), FD 36284, slip op. at 8-10 (STB served Jan. 5, 2021) (86 Fed. Reg. 1,564) (with Board Member Oberman dissenting).

The Board received petitions for reconsideration of the January 5 Decision from Eagle County, Colo. (Eagle County), on January 25, 2021, and the Center for Biological Diversity (Center) on January 26, 2021. As discussed below, the Board will deny these petitions.

BACKGROUND

On May 29, 2020, the Coalition filed a petition for exemption to construct and operate the Uinta Basin Line, which will connect with the Union Pacific Railroad Company (UP) at Kyune, Utah. The Coalition noted that it is an independent political subdivision of the State of

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<sup>1</sup> 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).

Utah, whose member counties include Carbon, Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah Counties. (Pet. for Exemption 5.) It was formed to, among other things, identify and develop infrastructure projects that will promote resource utilization and development. (Id.)

The Coalition asserted that goods produced or consumed in the Uinta Basin can be transported only by truck and that the proposed project would give shippers an additional freight transportation option, eliminating longstanding transportation constraints. (Id. at 13-15.) The Coalition claimed that adding a rail transportation option would provide local industries the opportunity to access new markets and increase their competitiveness in the national marketplace, and the removal of transportation constraints would benefit oil producers, mining companies, ranchers, farmers, and other local industries. (Id. at 15.)

The Coalition argued that regulation of the construction and operation of the proposed line under § 10901 was not needed to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101, that the project would promote several provisions of the RTP, and that an application under § 10901 was not required to protect shippers from an abuse of market power. (Pet. for Exemption 21-22.) As noted above, the Coalition requested that, in considering the petition, the Board follow a two-step approach, addressing the transportation aspects of the project in advance of the environmental issues. (Id. at 26-28.)

The Board received filings both supporting and opposing the petition for exemption. Several government officials filed in support.<sup>2</sup> See January 5 Decision, FD 36284, slip op. at 3. The opponents included the Center, the Argyle Wilderness Preservation Alliance (Argyle), and numerous individuals. See id. at 1. These commenters argued, among other things, that the requested preliminary decision was not appropriate, that the transportation aspects of the petition did not satisfy the § 10502 standards, and that the Board should reject the petition and require an application under § 10901. See January 5 Decision, FD 36284, slip op. at 1.

In its January 5 Decision, the Board concluded that an application was not necessary and that the requested approach of issuing a preliminary decision on the transportation merits was appropriate. The Board preliminarily concluded, subject to completion of the ongoing

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<sup>2</sup> On November 20, 2019, Utah's then-Governor Gary R. Herbert submitted a letter stating that the proposed rail line represents an important opportunity to enhance the rural economies in eastern Utah and improve the state's energy infrastructure and environmental stewardship. On December 1, 2020, a joint letter supporting the Coalition's project was filed by U.S. Senators Mitt Romney and Mike Lee and U.S. Representatives Rob Bishop, Chris Stewart, and John Curtis. On December 7, 2020, Utah State Senate President J. Stuart Adams and Utah State House of Representatives Speaker Brad Wilson separately filed letters in support of the project. Also on December 7, 2020, then-Governor Herbert, then-Lieutenant Governor Spencer J. Cox, Utah State Senate President Adams, and Utah State House of Representatives Speaker Wilson submitted a joint letter supporting the project.

environmental and historic review,<sup>3</sup> that the proposed transaction meets the statutory standards for exemption under § 10502. See January 5 Decision, FD 36284, slip op. at 1. The Board noted that it was not granting the exemption or allowing construction to begin and that after the Board has considered the potential environmental impacts associated with this proposal and weighed those potential impacts with the transportation merits, it will issue a final decision either granting the exemption, with conditions, if appropriate, or denying it. See id. at 2.

On January 25, 2021, Eagle County sought reconsideration. It notes that the Colorado, Midland & Pacific Railway Company (CMPR) recently filed a verified notice of exemption in Docket No. FD 36471 to lease and operate a dormant portion of the Tennessee Pass Line<sup>4</sup> that links to the proposed Uinta Basin Line via UP. (Eagle Cnty. Pet. for Recons. 2-3.) Eagle County claims that the reactivation of freight service in the Tennessee Pass corridor constitutes a materially changed circumstance that the Board must take into account in considering the potential impacts of granting the Coalition’s petition for exemption. (Id. at 5.) Eagle County also asserts that the Board committed material error in its January 5 Decision and it adopts the arguments in the dissent of Board Member Oberman. (Eagle Cnty. Pet. for Recons. 5-6.)<sup>5</sup>

On January 26, 2021, the Center also filed a petition seeking reconsideration. The Center similarly argues that the potential reactivation of the Tennessee Pass Line presents new circumstances supporting reconsideration and notes that it and many individuals and organizations are concerned that construction of what it refers to as the “oil railway” and reactivation of the Tennessee Pass Line could lead to crude trains traveling the Tennessee Pass Line. (Ctr. Pet. for Recons. 1-2.) The Center argues that, given the magnitude of this project and the numerous interests at stake, the Board should require further inquiry into the transportation merits of the proposed “oil railway.” (Id.) Furthermore, like Eagle County, the Center adopts the arguments in Board Member Oberman’s dissent. (Id.)

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<sup>3</sup> The Board’s Office of Environmental Analysis (OEA) issued a Notice of Intent to Prepare an Environmental Impact Statement (EIS) on June 19, 2019, a Final Scope of Study for the EIS on December 13, 2019, and a Draft EIS on October 30, 2020. OEA held six in-person public meetings in July 2019 to receive oral comments on the scope of the EIS and six virtual public meetings in November and December 2020 to receive oral comments on the Draft EIS. The public comment period for the Draft EIS ended on February 12, 2021. OEA issued a Final EIS on August 6, 2021.

<sup>4</sup> The portion extends approximately 163.1 miles between milepost 171.9 at Parkdale, Colo., and milepost 335.0 near Sage, Colo., in Fremont, Chaffee, Lake, and Eagle Counties, Colo. See CMPR Verified Notice 4, Dec. 31, 2020, Colo., Midland & Pac. Ry.—Lease & Operation Exemption Containing Interchange Commitment—Union Pac. R.R., FD 36471.

<sup>5</sup> Along with its petition, Eagle County also sought an extension of the comment period for the Draft EIS to allow localities and other stakeholders along the Tennessee Pass Line to have the opportunity to evaluate potential routing impacts. (Eagle Cnty. Pet. for Recons. 3.) OEA extended the comment period to February 12, 2021. See Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah, FD 36284, slip op. at 2 (STB served Jan. 28, 2021).

On February 12, 2021, the Coalition filed a reply opposing the petitions for reconsideration and asserting that neither petition for reconsideration meets the Board’s reconsideration standard. (Coal. Reply 3, Feb. 12, 2021.) The Coalition argues that CMPR’s lease does not change the potential for downline traffic on the Tennessee Pass Line from the Uinta Basin Railway and that the concerns raised by the County and the Center are unfounded. (*Id.* at 2-3.) It also argues, among other things, that simply adopting, without elaboration, the arguments made in a dissenting opinion does not satisfy the basic pleading requirements for a reconsideration petition, much less meet the petitioners’ burden of proving material error. (*Id.* at 6.) The Coalition argues that a petition for exemption does not trigger a public convenience and necessity analysis, that the market—not the Board—should determine the viability of and need for a project that qualifies for an exemption, and that the Board can assess a project’s transportation merits apart from its potential environmental impacts. (*Id.* at 6-10.)

On June 28, 2021, a joint letter supporting the Coalition’s project was filed by U.S. Senators Mitt Romney and Mike Lee and U.S. Representatives Burgess Owens, Blake Moore, Chris Stewart, and John Curtis. On August 30, 2021, Utah’s Governor Spencer J. Cox, Lieutenant Governor Deidre M. Henderson, State Senate President Adams, and State House Speaker Wilson also jointly filed in support of the project.

#### DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the Board’s prior decision, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. “[T]o be sufficient to warrant reconsideration, ‘new evidence’ must be evidence that was not reasonably available to the party when the record was previously developed.” Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018) (citing, inter alia, Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence)). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). Moreover, no matter the claimed basis for reconsideration (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4; see also 49 C.F.R. § 1115.3.

As discussed below, neither Eagle County nor the Center has shown material error in the January 5 Decision or substantially changed circumstances that would materially affect the decision. Accordingly, the petitions for reconsideration will be denied.

Changed Circumstances.

Eagle County asserts that the potential reactivation of the Tennessee Pass Line represents a changed circumstance warranting reconsideration. (Eagle Cnty. Pet. for Recons. 2-3.) Eagle County is concerned that traffic from the Uinta Basin Line, including unit oil trains, could travel over the Tennessee Pass Line and create safety and operational concerns. (*Id.*) It notes that the Tennessee Pass Line has not carried traffic in over 20 years and claims that the line is steeply graded and traverses a narrow canyon subject to frequent rockfall. (*Id.* at 2.) Eagle County asserts that the Board must consider these potential impacts on the Tennessee Pass Line when considering the potential impacts of granting the Coalition’s petition to construct a new rail line in the Uinta Basin. (*Id.* at 5.) Similarly, the Center argues that the potential reactivation of the Tennessee Pass Line is a “new circumstance” warranting reconsideration of the January 5 Decision. (Ctr. Pet. for Recons. 1-2.) Specifically, the Center is concerned about crude oil traffic from the Uinta Rail Line disrupting sensitive recreational areas and tourism along the Arkansas River; the Center argues that, because of the potential for Uinta Basin crude oil trains to traverse the Tennessee Pass Line, there are new concerns and opposition to the project now being raised. (*Id.*) The Center suggests, citing Ozark Mountain Railroad—Construction Exemption, FD 32204 (ICC served Sept. 25, 1995), that Board precedent requires a formal application in “controversial cases,” especially where numerous interests are affected and there is “significant opposition” to the project. (Ctr. Pet. for Recons. 1.)

Eagle County also claims that, because these changed circumstances involve the Coalition’s proposed operator, Rio Grande Pacific Corporation (RGP), and raise questions of common ownership and effects on market competition, further review is warranted. (Eagle Cnty. Pet. for Recons. 5.) Eagle County explains that CMPR is a wholly owned subsidiary of RGP. (*Id.*) Eagle County claims that, given the existing junction from the Tennessee Pass Line to the UP main line to which the Uinta Basin Line would connect, the potential for coordinated operations by affiliated railroads on the proposed Uinta Basin Line and reactivated Tennessee Pass Line presents a question of market competition and whether the exemption criterion at 49 U.S.C. § 10101(1), “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” is, in fact, satisfied. (Eagle Cnty. Pet. for Recons. 5.)

Eagle County and the Center have failed to demonstrate substantially changed circumstances that would materially affect the Board’s prior decision. First, the verified notice in which CMPR sought to lease and operate the portion of the Tennessee Pass Line has been rejected and to date CMPR has not sought authority to lease and operate that line through other procedures. See Colo., Midland & Pac. Ry.—Lease & Operation Exemption Containing Interchange Commitment—Union Pac. R.R., FD 36471 et al. (STB served Mar. 25, 2021).<sup>6</sup>

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<sup>6</sup> The Board also notes that, in that proceeding, CMPR made clear that it had no plans or ability to run oil trains over the line, pointing out that doing so would be “logistically impractical” in part because the line has more than 11 miles of 3.0 percent grade. (Mot. to Amend 1, Mar. 15, 2021, Colo., Midland & Pac. Ry.—Lease & Operation Exemption Containing Interchange Commitment—Union Pac. R.R., FD 36471.)

Additionally, the Coalition states that RGP has no plans to run trains carrying Uinta Basin oil over the Tennessee Pass Line and, further, that RGP believes it would not be economical to do so. (Coal. Reply 3, Feb. 12, 2021.) Indeed, a senior vice president with RGP explains that a route using the Tennessee Pass Line is the highest-cost option for moving oil from the Uinta Basin to destination refineries anywhere east of Utah, in terms of both capital expenditures and operating expenditures. (Coal. Reply, V.S. Hemphill 2, Jan. 26, 2021.) Furthermore, the modeling program used by OEA to examine the patterns for traffic coming off the Uinta Basin Line did not forecast any traffic travelling over the Tennessee Pass Line. (Final EIS, App. C, C-4, C-6.) Instead, OEA projects that “all rail traffic moving from Kyune to destinations in the east would travel over the existing rail line between Kyune and Denver, Colorado.” (Id. at C-4.)

In sum, the Tennessee Pass Line remains out of service, and there is currently nothing to suggest that it will be reactivated and operated as Eagle County and the Center argue. Even if it were reactivated, the volume of traffic that would move over the line—and whether, and to what extent, that traffic would include oil trains—is speculative at best. These facts also mean that Eagle County’s concern about collusion and the Center’s claim that an application is necessary do not support reconsideration. There is, therefore, no reason for the Board to revisit its earlier preliminary finding on the transportation merits and its conclusion that the project qualifies for an exemption under § 10502, as well as its determination that Ozark Mountain Railroad is not applicable to this case. See January 5 Decision, FD 36284, slip op. at 7.<sup>7</sup>

#### Material Error.

Eagle County and the Center suggest that the Board committed material error in its January 5 Decision and adopt the arguments in Board Member Oberman’s dissent. (Eagle Cnty. Pet. for Recons. 5-6; Ctr. Pet. for Recons. 1.) Eagle County also claims that the Board failed to address certain aspects of the RTP that it is required to consider when granting an exemption. (Eagle Cnty. Pet. for Recons. 4.) According to Eagle County, most relevant here is 49 U.S.C. § 10101(8), which requires that railroads “operate transportation facilities and equipment without detriment to the public health and safety.” (Id.) Eagle County claims that, “by performing only part of the necessary analysis to justify an exemption, the Board has essentially pre-judged this case by failing to consider whether unit trains of crude oil traveling through mountainous terrain will not incur any ‘detriment to the public health and safety.’” (Id. at 4-5.) They assert that the Board erred by issuing a preliminary decision on the transportation aspects of the proposed construction, finding at the preliminary stage that an application is not necessary, and choosing not to solicit additional information.

Eagle County and the Center have failed to demonstrate material error. They suggest that the Board erred by not adopting the dissenting view. As a preliminary matter, with regard to the parties’ arguments that the Board should adopt the position of Board Member Oberman’s

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<sup>7</sup> As the Board has stated, there is nothing in the language of § 10502 to suggest that an exemption proceeding is inappropriate if the viability of the proposed rail line is questioned. See Alaska Survival v. STB, 705 F.3d 1073, 1082 (9th Cir. 2013) (affirming the Board’s exemption proceeding where financial viability of the line was questioned).

dissent, the Board determined its approach after careful review of the evidence presented at that time, and summarily asking the Board to reweigh the evidence is not sufficient to justify overturning the decision under review. See R.J. Corman R.R. Prop., LLC—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 5 (STB served May 3, 2021) (citing Canadian Pac. Ry., FD 35081, slip op. at 4). The Board notes that the dissent neither claims regulation is needed to protect shippers from an abuse of market power nor cites to a specific aspect of the RTP that makes regulation necessary.

Furthermore, Eagle County’s claim that the Board did not consider necessary aspects of the RTP when examining the Coalition’s petition lacks merit. As a general matter, in considering the RTP, the Board need not “address each and every one of the policy’s fifteen components, for some may be completely unrelated to the exemption.” Ill. Commerce Comm’n v. ICC, 787 F.2d 616, 627 (D.C. Cir. 1986). Rather, the Board is entitled to wide deference when deciding which factors of the RTP are relevant in decisions regarding exemptions. See Alaska Survival, 705 F.3d at 1083-84. In this case, the Board has not issued its final decision on the exemption, and it did not fail to address relevant aspects of the RTP in making a preliminary finding subject to completion of the ongoing environmental review. The Board stated that the proposed line would enhance competition by providing shippers in the area with a freight rail option that does not currently exist and foster sound economic conditions in transportation, consistent with §§ 10101(4) and (5). See January 5 Decision, FD 36284, slip op. at 9. Additionally, the Board stated that §§ 10101(2) and 10101(7) also would be furthered by an exemption because an exemption would minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry by minimizing the time and administrative expense associated with the construction and commencement of operations. See January 5 Decision, FD 36284, slip op. at 9.

The Board also discussed claims that § 10101(8), concerning public safety, and § 10101(11), concerning safe working conditions, would be undermined by the project. Argyle made these points when raising concerns about rail traffic causing forest fires and substantial truck traffic. See January 5 Decision, FD 36284, slip op. at 8. The Board noted that it takes important concerns such as these seriously and that they will be examined as part of OEA’s ongoing environmental review and further examined by the Board in a final decision that will be issued after the Final EIS is completed. See id. at 9; see also Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—for Constr. in Will Cnty., Ill., FD 34060 et al., slip op at 9 (STB served Mar. 21, 2002) (explaining in a preliminary decision on the transportation merits that “[t]he effect of the construction on the public health and safety [section 10101(8)] will be fully considered in our environmental analysis”). After the Board has considered the potential environmental and historic impacts associated with this proposal assessed in the EIS, and weighed those potential impacts with the transportation merits, it will issue a final decision considering those impacts and either granting the exemption, with conditions, if appropriate, or denying it. See January 5 Decision, FD 36284, slip op. at 2; see also Six Cnty. Ass’n of Gov’ts—Constr. & Operation Exemption—a Rail Line Between Levan & Salina, Utah, FD 34075, slip op. at 5 (STB served Sept. 3, 2015) (reexamining RTP aspects in light of environmental analysis). Therefore, the Board did not and will not ignore necessary aspects of the RTP.

For the reasons discussed above, the petitions for reconsideration will be denied.

The Board next will issue a final decision assessing the potential environmental and historic impacts of the construction proposal. That decision will address OEA's recommendations, including any potential alternative routes and environmental mitigation, and determine whether the exemption will become effective (subject to appropriate mitigation conditions, including environmental conditions, if warranted). The Board's January 5 Decision constituted a preliminary approval concerning only the transportation merits of the project and did not constitute a final approval of the Coalition's exemption request. Also, as noted in that decision, construction of the Uinta Basin Line may not begin until the Board has considered the environmental impacts associated with this proposal, weighed those potential impacts with the transportation merits, and, if appropriate, decided to grant the exemption subject to any conditions found necessary.

It is ordered:

1. The petitions for reconsideration are denied.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Oberman dissented with a separate expression.

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BOARD MEMBER OBERMAN, dissenting:

I respectfully dissent from today's decision denying reconsideration of Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Counties, Utah (January 5 Decision), FD 36284 (STB served Jan. 5, 2021) (with Board Member Oberman dissenting). As explained in my dissent to the January 5 Decision, the Board should have withheld any judgment on the Uinta Basin Line's transportation merits until after assessing the project's environmental and historic impacts. January 5 Decision, FD 36284, slip op. at 20-22. My recent dissent in Ken Tenn Regional Rail Partners, Inc.—Construction & Operation Exemption—in Fulton County, Ky., & Obion County, Tenn. (Ken Tenn Reconsideration Decision), FD 36328 (STB served July 23, 2021), explains the importance of the Board adhering to its previously stated policy of not preliminarily exempting rail construction projects except in cases of unique or compelling circumstances. Ken Tenn Recons. Decision, FD 36328, slip op. at 10-24. For the reader's sake, I will not repeat those arguments here, except to note, in summary fashion, that not only are such preliminary approvals of questionable value, but they may confuse the public and, relatedly, be viewed as diminishing the Board's environmental and historic review process. Id. at 16-18. This is because the Board must complete its environmental and historic review, including by considering potential impacts analyzed by the Board's Office of Environmental Analysis (OEA), *before* it may authorize construction. Id. at 13-15.

Indeed, in the instant case, because OEA issued its Final Environmental Impact Statement (EIS) on August 6, 2021, the Board is now in a position to consider and issue a final

decision regarding construction authorization. Because no extraordinary circumstances exist in this case to justify deviation from the Board's policy against preliminary approvals, January 5 Decision, FD 36284, slip op. at 13 n.3 (Board Member Oberman dissenting), there was no good reason for the Board to have assessed the project's transportation merits before considering the impacts analyzed, and recommendations made, in the Final EIS. The Board erred in doing so.

I dissent.