38360 SERVICE DATE – SEPTEMBER 25, 2007
SEC

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35036

SUFFOLK & SOUTHERN RAIL ROAD LLC—LEASE AND OPERATION EXEMPTION—SILLS ROAD REALTY, LLC

Decided: September 25, 2007

On May 18, 2007, Suffolk & Southern Rail Road LLC (Suffolk), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to lease from Sills Road Realty, LLC (Sills), a noncarrier, approximately 11,000 feet of track that Suffolk stated was currently being constructed by Sills in Yaphank, Suffolk County, NY, and to operate over it. In a decision served on June 1, 2007 (June 1 decision), Suffolk's notice of exemption was found incomplete, and Suffolk was directed to file supplemental information describing the construction of the trackage that appeared to be a line of railroad subject to the Board's jurisdiction based on Suffolk's stated intention to provide for-hire service over it. On June 15, 2007, Suffolk sought to withdraw its notice of exemption without providing the information required by the June 1 decision or a substantive reason for its attempted withdrawal.

In a decision served on August 13, 2007 (August 13 decision), the Board found that, in failing to explain the situation, Suffolk had left unrefuted its verified statement that for-hire service was intended for the trackage underlying Suffolk's notice of exemption, in which case Board authorization of the construction of the trackage, and an environmental review under the National Environmental Policy Act, would be required. Under these circumstances, the Board directed Suffolk to file: (1) the information required by the June 1 decision; (2) a substantive reason for its attempted withdrawal; and (3) a detailed explanation of whether it or Sills anticipated that for-hire service would have been provided over the trackage that was to be constructed.

On August 23, 2007, Suffolk filed a response to the August 13 decision, stating that Sills never undertook any construction of rail facilities at the Sills Road location at issue here. Further, Suffolk states that that it never concluded any agreement or other relationship with Sills with respect to the lease, construction, or operation of the trackage, and, for this reason, had attempted to terminate the proceeding.

Suffolk also asserts that Sills never anticipated providing for-hire rail service. However, this statement appears to contradict Suffolk's earlier statements that it "has reached an agreement with Sills . . . for the lease and operation of railroad trackage [at issue here]," through which "Suffolk intends to hold itself out as a common carrier to provide service to all potential

customers . . . ."[1] Suffolk's filing also appears inconsistent with the statement made by Suffolk's counsel in a telephone conversation with Board staff that Suffolk and Sills are affiliated parties (in that one owns a significant portion of the other).

Because Suffolk states that neither it nor Sills has undertaken any construction of rail facilities at the Sills Road location or consummated any agreement with Sills to lease or operate over the proposed trackage, Suffolk has provided enough information to support its attempted withdrawal of its notice of exemption. At the same time, however, Suffolk and Sills should be aware that, if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Suffolk's request to withdraw its notice of exemption is granted, and this proceeding is discontinued.

2. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

[1] See Suffolk's Verified Notice of Exemption at 3-4.