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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35036

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

Decided: December 20, 2007

On October 26, 2007, U S Rail Corporation (U S Rail) and Sills Road Realty, LLC (Sills) filed a petition seeking reconsideration of the Board's decision issued on October 12, 2007 (Cease and Desist Order). That decision directed U S Rail, Suffolk & Southern Rail Road LLC (Suffolk), Sills, or any related entity conducting rail construction in Yaphank or Brookhaven, NY, to immediately cease that activity and either obtain authority from the Board or a Board decision finding that such activity does not require Board approval. For the reasons discussed below, we will deny the petition for reconsideration.

BACKGROUND

On May 18, 2007, Suffolk, a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to lease from Sills, also a noncarrier, approximately 11,000 feet of track and to operate over it. Suffolk said that the track was currently being constructed by Sills on a 28-acre parcel of land in Yaphank, Suffolk County, NY. In a decision served on June 1, 2007 (June 1 Decision), Suffolk's notice of exemption was found to be incomplete. Suffolk was directed to file supplemental information describing the construction because the track appeared to be a line of railroad subject to the Board's licensing authority, based on Suffolk's stated intention to provide for-hire service over it. On June 15, 2007, rather than provide the information required in the Board's order, Suffolk sought to withdraw its notice of exemption. Suffolk provided no substantive reason for its attempted withdrawal.

The Board found, in a decision served on August 13, 2007 (August 13 Decision), that, in failing to offer any explanation for the situation, Suffolk had left unrefuted its verified statement that for-hire service was intended for the trackage underlying Suffolk's notice of exemption. The Board explained that, if that was the case, then the construction of the trackage that has already taken place, or would occur in the future, is construction of a line of railroad subject to the Board's licensing authority and the requirement for an environmental review under the National Environmental Policy Act (NEPA). Given the concerns that had been raised, 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, claiming that Sills had never undertaken any construction of rail facilities at the Sills Road location. Further, Suffolk stated that it had 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.

In a decision served on September 25, 2007, the Board permitted Suffolk to withdraw its notice of exemption. At the same time, however, the Board stated that it would view with disfavor any future request for authority to commence rail operations over trackage at the Sills Road location, unless the construction of that trackage had first been authorized by the Board.

On October 2, 2007, the Board received a letter from the Town of Brookhaven, NY (Brookhaven), concerning a proposed rail facility being constructed by U S Rail, an existing Class III carrier with operations in Ohio, on property U S Rail had leased in Yaphank. Upon further investigation, it appeared that this was the same property and proposed rail facility previously sought to be acquired by Suffolk.

Based on the new evidence that rail construction might be occurring or contemplated on this property, and because no party had sought authority from the Board to construct any rail facilities at this site, the Board reopened this proceeding on its own motion in the Cease and Desist Order and made U S Rail a party. The Board stated that, if U S Rail, Suffolk, Sills, or any other related entity was undertaking construction of any rail facilities in Yaphank, Brookhaven, or anywhere in that vicinity, that entity was directed to immediately cease that activity and to either obtain Board authorization for the construction, or a Board decision (through a declaratory order proceeding or other appropriate formal means) finding that such activity does not require Board approval.

On October 18, 2007, U S Rail and Sills filed a petition to stay the effect of the Cease and Desist Order, to which Brookhaven filed a reply. By order of the Chairman served November 16, 2007, the Board denied the petition for stay, finding that petitioners had failed to meet the four-part test applicable to stay requests (November 16 Decision). Consequently, the Cease and Desist Order remained in effect.

U S Rail and Sills filed the instant petition for administrative reconsideration of the Cease and Desist Order on October 26, 2007, to which Brookhaven filed a reply. On November 19, 2007, New York and Atlantic Railway Company (NY&AR) filed a verified statement from its Chairman, Bruce A. Lieberman, addressing the facts of this proceeding.

On November 9, 2007, with their petition for administrative reconsideration still pending, Sills, Suffolk, and U S Rail filed a petition for judicial review of the Cease and Desist Order in the United States Court of Appeals for the Second Circuit, in Sills Road Realty LLC, et al. v.

STB, No. 07-5007 AG. At the same time, petitioners requested that the court temporarily restrain the enforcement of the Cease and Desist Order and issue a preliminary injunction allowing construction activities to continue. The court denied the request for a temporary restraining order on November 13, 2007. On November 28, 2007, the court dismissed the petition for judicial review, on grounds that the Cease and Desist Order was not final, and it denied as moot the request for a preliminary injunction.

POSITIONS OF THE PARTIES

In seeking reconsideration, U S Rail and Sills argue that the Cease and Desist Order involves material error because it failed to cite legal authority for the Board's action and because it failed to consider an October 9, 2007 letter petitioners sent to Melvin Clemens, Director of the Board's Office of Compliance and Consumer Assistance (OCCA). According to petitioners, these failures deprived them of procedural due process. Petitioners also reiterate their argument that construction of the "Brookhaven Rail Terminal" is exempt from the need for prior Board approval because it qualifies as "disconnected spur" track under 49 U.S.C. 10906. Finally, they argue that the public interest requires reconsideration of the Cease and Desist Order because there is an urgent need for additional transloading and intermodal freight facilities on Long Island.

In his verified statement on behalf of NY&AR, Mr. Lieberman explains that NY&AR supports Sills' construction of a private facility to receive carloads of stone and aggregate. He strongly opposes, however, the introduction of another rail carrier to operate the facility or to invoke federal preemption, and stresses that neither petitioner is its agent or operator. Mr. Lieberman states that NY&AR has the common carrier freight rights to provide service over the portion of the Long Island Railroad adjacent to Sills' property, and that NY&AR stands ready, willing, and able to provide rail service to the proposed facility, including performing intra-plant switching within the facility. Mr. Lieberman also attaches a July 27, 2007 letter from the President of Sills requesting the installation of a main line switch to allow NY&AR to provide direct rail service to the proposed facility, and stating that Sills does not intend to change its status as a shipper by becoming a connecting rail carrier.

In its reply, Brookhaven argues that the Cease and Desist Order is not in error and should not be reconsidered. Respondent maintains that the arguments in the petition for reconsideration have already been addressed by the Board in the November 16 Decision. Finally, Brookhaven claims that, as a consequence of Mr. Lieberman's statement, petitioners' representation that traffic moving from the proposed facility will be interchanged with NY&AR remains open to question.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3(b), a petition for reconsideration must show that the prior action will be affected materially because of changed circumstances or new evidence or that the prior action involves material error. Petitioners have failed to show material error by the Board in the Cease and Desist Order, and they have not alleged changed circumstances or submitted any new evidence that would warrant reconsideration.

In seeking reconsideration, petitioners assert that the Board's Cease and Desist Order failed to consider arguments made in their October 9, 2007 letter to OCCA. They argue that this omission denied them due process and constitutes material error. However, correspondence to and from OCCA is part of an informal process, not linked to any formal proceeding. For this reason, it was entirely appropriate that the Board did not make the letter part of the administrative record at that time. In any event, petitioners have not supported their due process claim because petitioners themselves made the October 9 letter part of the administrative record when they sought reconsideration, and the letter has been fully considered in reaching this decision.

The primary argument in the petition for reconsideration and the October 9 letter is that petitioners' proposed use of the property does not require prior Board approval for construction under 49 U.S.C. 10901 or operations under 49 U.S.C. 10902(a) but, rather, qualifies for the exception from the Board's entry/exit licensing authority in 49 U.S.C. 10906 because the track has some of the characteristics of spur track and would be used as a "disconnected" ancillary spur of an existing carrier, U S Rail.

As noted in the November 16 Decision, however, the key test to determine whether construction and use of a track requires Board approval (and an environmental review under NEPA) is whether the "purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory" not served by the carrier or already served by another carrier. Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U.S. 266, 278 (1925) (T&P). In this case, the purpose of the proposed construction and operations is to allow U S Rail to serve new shippers. The track cannot reasonably be viewed as used for a purpose ancillary to the service that U S Rail is already authorized to provide, because the proposed construction and operations will be located hundreds of miles from U S Rail's existing operations in Ohio. Therefore, petitioners have not justified their argument that no Board authority, or NEPA review, is required here, even though the track may otherwise have some physical characteristics of spur or industrial track. T&P; Effingham RR Co.—Pet. For Declaratory Order, 2 S.T.B. 606 (1997), reconsideration denied, Effingham Railroad Company—Petition for Declaratory Order Construction at Effingham, IL, et al., STB Docket No. 41986 (STB served Sept. 18, 1998), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606 (7th Cir. 1999) (Board license required because acquisition of existing track that would otherwise be characterized as spur track created a new common carrier, which necessarily had the purpose and effect of extending the service of that carrier into new territory).

See also, UTU v. STB, 169 F.3d 474, 477-78 (7th Cir. 1999); Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 728 (D.C. Cir. 1996) (looking to larger purpose and effect of the transaction at issue to determine if Board authority was required).

Petitioners cite Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), and New Orleans Terminal Co. v. Spencer, 366 F.2d 160 (5th Cir. 1966), for the proposition that track segments that are merely incidental to, and not required for, a railroad's services between points of shipment and delivery are exempted from the Board's licensing requirements. They contend that their proposed Brookhaven Rail Terminal would perform service incidental to line haul service over the adjacent NY&AR, with which the Brookhaven Rail Terminal would connect and with which it would interchange traffic.

But ancillary track means track that is ancillary to the operations of the carrier that proposes to operate over it, not ancillary to some other carrier's operations. Compare Ohio & Morenci RR. Acquisition, 221 I.C.C. 558, 560 (1937) (license needed for ancillary "switching" track because of the physical separation of the tracks in question from other tracks of the railroad applicant)[1] with Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (railroads do not require authority to build facilities ancillary to their railroad operations). There is no evidence on the record before us here that U S Rail would operate over NY&AR's track, nor do petitioners argue that the "Brookhaven Rail Terminal" is a spur of NY&AR. Indeed, to the contrary, NY&AR has made it clear that it strongly opposes any plans of U S Rail to become a rail carrier in the Yaphank area. In these circumstances, the Board properly issued the Cease and Desist Order to guard against potential abuse of its processes (unauthorized construction activities that appeared to be taking place without the required Board license and NEPA review).[2]

Petitioners also suggest that the Board committed material error because it lacked authority to issue the Cease and Desist Order. However, 49 U.S.C. 721 gives the Board the authority to issue appropriate orders when necessary to prevent irreparable harm, and to obtain information from carriers and persons necessary to carry out its responsibilities under the Interstate Commerce Act. Here, there was substantial evidence that rail construction activities that the Board had not authorized might be occurring or contemplated on this property without any regulatory oversight and that irreparable harm to the environment might be occurring as a result of petitioners' unauthorized construction activities. As such, it was appropriate for the

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[1] Petitioners make no claim that U S Rail possesses any rights at all to operate between Jackson, OH, and Brookhaven, NY, which is several hundred miles away.

[2] Petitioners cite the same four Board decisions they cited in their stay petition to support their argument that a regulated rail carrier can construct a small segment of track at another location as exempt spur. See November 16 Decision at 5-6. The Chairman found that none of the cases supported petitioners' argument and we concur.

Board to issue the Cease and Desist Order to preclude any further construction activities until U S Rail, Suffolk, Sills, or a related entity had obtained Board authority, or a Board determination that no Board authority is required. See, e.g., Boulder Airporter, Inc. v. Stapleton Stagecoach Co., 8 I.C.C.2d 553, 561 (1992) and Gray Line Tours Co. of S. Nv. v. Interstate Tours, Et Al., 133 M.C.C. 551, 559-561 (1985), aff'd, Gray Line Tours Co. of Southern Nevada v. ICC, 824 F.2d 811 (9th Cir. 1987).

Finally, the need for additional transloading and intermodal freight facilities on Long Island does not mean that the Cease and Desist Order should not have been issued, as petitioners suggest. The Cease and Desist Order does not prevent the facility at issue from being constructed once appropriate approvals have been obtained. Any potential benefits of the project can still be realized once petitioners go through the appropriate processes.

In sum, petitioners have failed to demonstrate material error on the Board's part warranting reconsideration of the Cease and Desist Order. Consequently, their request for reconsideration will be denied and the Cease and Desist Order will remain in effect.

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

It is ordered:

1. The petition for reconsideration is denied.

2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary