

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35036

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

Decided: November 16, 2007

On October 18, 2007, U S Rail Corporation (U S Rail) and Sills Road Realty, LLC (Sills) filed a petition asking that the Board stay the effect of its decision issued October 12, 2007, directing 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, petitioners have failed to show that a stay is warranted under the well-settled four part test applicable to stay requests.

BACKGROUND

Suffolk & Southern. 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.¹ Rather than providing the

¹ There are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or acquire and operate, or 49 U.S.C. 10902 to acquire and operate, and an appropriate environmental review under the National Environmental Policy Act (NEPA) and the Board's environmental rules at 49 CFR Part 1105; (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906 (or an environmental review under NEPA), but is subject to the Board's jurisdiction under 49 U.S.C. 10501(b) so that most state and local regulation of such track is preempted; and (3) so-called "private" track, which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track.

information required in the Board's order, on June 15, 2007, Suffolk sought to withdraw its notice of exemption. Suffolk provided no substantive reason for its attempted withdrawal.

The Board found, in a decision served 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 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, stating 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 found that Suffolk had provided enough information to support its attempted withdrawal of 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 this location, unless the construction of that trackage had first been authorized by the Board.

U S Rail. 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 a decision served October 12, 2007 (Cease and Desist Order). U S Rail was made a party to this proceeding. 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 November 14, 2007, U S Rail and Sills filed a motion to strike portions of Brookhaven's reply, including the attached verified statement. Petitioners also seek leave to file a rebuttal to Brookhaven's reply. These motions will be denied. Petitioners have not justified their motion to strike. Moreover, our rules regarding petitions for stay make no provision for the filing of a rebuttal. See 49 CFR 1115.3 and 1115.5.

The petitions. On October 18, 2007, U S Rail and Sills filed a petition to stay the Cease and Desist Order.² U S Rail and Sills also filed a petition for administrative reconsideration of that decision on October 26, 2007. On October 30, 2007, Brookhaven filed a notice of intent to participate in this proceeding, and by letter filed October 31, 2007, Brookhaven requested that the Board allow it 5 days in which to respond to the petition for stay. The Board granted Brookhaven's request by decision served November 2, 2007, and Brookhaven filed its reply in opposition to the petition to stay on November 5, 2007.

In their October 18 petition, U S Rail and Sills ask that the Board stay the Cease and Desist Order pending a thorough review of the law and evidence submitted by petitioners in their petition for reconsideration. Petitioners argue that that evidence supports their position that construction of the Brookhaven facility does not require prior Board approval, because it is a disconnected "spur" of U S Rail and therefore falls within the section 10906 exception for the construction and operation of ancillary track.³ Petitioners further argue that there is a substantial likelihood that they will prevail on the merits of their argument that the Board's Cease and Desist Order involves material error 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), also providing support for petitioners' position. Petitioners further argue that they will suffer irreparable harm absent a stay due to opportunity costs and construction costs associated with delay from not being able to implement this project, without any corresponding harm to Brookhaven or any other entity, because the property at issue here is unused industrial-zoned property. Finally, petitioners argue that the public interest requires issuance of a stay because there is an urgent need for additional transloading and intermodal freight facilities on Long Island.

In its reply to the stay petition, Brookhaven argues that petitioners have not met the criteria for the grant of a stay. Respondent asserts that the proposed track is either a line of railroad subject to the Board's licensing requirements because it would be an invasion of new territory, or else "private" track not subject to the Board's jurisdiction. It cannot, Brookhaven

² A petition for judicial review of that decision is pending in Sills Road Realty LLC, et al. v. STB, No. 07-5007 AG (2nd Cir. filed Nov. 9, 2007).

³ The Board will consider all the arguments and evidence petitioners have presented regarding whether this case involves ancillary "spur" track in addressing the petition for reconsideration. A decision on that petition will be issued as expeditiously as possible.

contends, be characterized as ancillary “spur” or switching track because it is not adjacent or ancillary to U S Rail’s existing rail operations, which are located hundreds of miles away from Brookhaven in Ohio. Respondent further maintains that the harm petitioners allege is not irreparable because it is strictly monetary in nature. Brookhaven also emphasizes that the construction that has already taken place has harmed the environment and local residents, noting that petitioners have clear-cut 18 acres of land and mined hundreds of thousands of cubic yards of sand without any permission or oversight. Finally, Brookhaven argues that the public interest lies in the Board’s ensuring that its processes are not evaded or abused.

DISCUSSION AND CONCLUSIONS

The factors to be considered in addressing a petition for stay are: (1) whether there is a strong likelihood that petitioners will prevail on the merits; (2) whether petitioners would be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958) (Virginia Petroleum Jobbers). Parties seeking a stay carry the burden of persuasion on all of the elements required for a stay. See generally Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, petitioners have failed to make the showing required under these standards.

Likelihood of Success on the Merits. Petitioners have not shown that there is a strong likelihood that they will be successful in their petition for reconsideration of the Cease and Desist Order. Petitioners’ argument is that the proposed use of the track would 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. 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). Here, the purpose of the proposed construction and operations appears to be 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, as the proposed construction and operations will be located hundreds of miles from U S Rail’s existing operations in Ohio. Thus, petitioners are unlikely to prevail in their argument that no Board authority, or NEPA review, is required here, even though the track may have characteristics of a “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).

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 New York and Atlantic Railway (NY&AR), with which the “Brookhaven Rail Terminal” would connect and with which it would interchange traffic.

But petitioners fail to recognize that ancillary track means track that is ancillary to the operations of the carrier that proposes to operate over it. See Ohio & Morenci RR. Acquisition, 221 I.C.C. 558, 560 (1937). Here, there is no evidence in the record that the “Brookhaven Rail Terminal” and the NY&AR would operate over each other’s track, nor do the petitioners argue that the “Brookhaven Rail Terminal” is a “spur” of the NY&AR. Rather, they argue that it is a disconnected “spur” off the main line of U S Rail, whose line in Jackson, OH, is several hundred miles from Brookhaven.

Petitioners cite four Board decisions to support their claim that “a regulated rail carrier can construct a small segment of track at another location as an exempt ‘spur.’” None of the cases is apposite. In two of the cases,⁴ the carriers involved had rights to operate between their main line and their “spur,” in the former case by a car float service and in the latter by haulage agreement. Petitioners make no claim that U S Rail possesses any rights at all to operate between Jackson, OH, and Brookhaven, NY. In the third and fourth cases, the agency never reached the merits of the “spur” versus “rail line” issue.⁵ Petitioners have therefore failed to

⁴ The New York City Economic Development Corporation—Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004), and Tri-State Brick and Stone of New York, Inc., et al., STB Finance Docket No. 34824 (STB served Aug. 11, 2006).

⁵ Raritan Central Railway, L.L.C.—Operation Exemption—Heller Industrial Parks, Inc., STB Finance Docket No. 34514 (STB served June 25, 2007) (Raritan Central) and Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) (Buffalo Southern). The Raritan Central case was settled by the parties, and the Board never addressed the merits of that case. The decision that petitioners cite in Buffalo Southern made no finding that the track at issue was a “spur.” Rather, the court noted that “these are complicated and arcane questions, on which the ICC and STB have spoken in the past (albeit not on these precise facts). Clearly, such matters should be resolved as a matter of national rail policy, not in

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show any likelihood that they would prevail on the merits of their argument that the proposed “Brookhaven Rail Terminal” operations should be treated as falling within the section 10906 exception from the need to seek prior approval from the Board with an environmental review under NEPA.

Finally, petitioners contend that the Board’s failure to rely on the October 9, 2007 letter to OCCA Director Clemens in the Cease and Desist Order denied them procedural due process. However, OCCA’s role is to facilitate informal private sector dispute resolution between that office and rail shippers or railroads. Because correspondence to and from OCCA is part of an informal process, it is not linked to any formal proceeding. Accordingly, the Board did not make the letter part of the administrative record in these proceedings.

In any event, petitioners have not supported their procedural due process claim. They declined to provide the supplemental information about the nature of this project that the Board specifically required in the decisions preceding the Cease and Desist Order and never initiated a formal proceeding (through a declaratory order or other means) to have the issue presented here addressed as the Board had specifically suggested in the Cease and Desist Order. Moreover, they themselves have now made the October 9, 2007 letter part of the record. Therefore, that letter will be fully considered by the Board when it addresses the pending petition for reconsideration of the Cease and Desist Order.

Irreparable Harm. An administrative order is not ordinarily stayed without an appropriate showing of irreparable harm. Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). Here, petitioners have not demonstrated unredressable actual and imminent harm so as to warrant a stay of the effectiveness of the Cease and Desist Order. Petitioners’ claims of opportunity costs and construction costs are strictly monetary in nature. Alleged monetary damages, even if proven, do not constitute irreparable harm. See Sampson v. Murray, 415 U.S. 61 (1974); Virginia Petroleum Jobbers, 259 F.2d at 925.

Harm to Other Parties. Petitioners also have not supported their claim that neither Brookhaven nor any other entity would be harmed by a stay. To the contrary, Brookhaven

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a piecemeal fashion by unspecialized district courts.” Buffalo Southern, 434 F. Supp. 2d at 252. The court added that “these thorny issues need not be resolved in order to determine this motion.” Id. The parties then brought the issues before the Board in two related cases, but both were dismissed without addressing the merits when the involved carrier, Buffalo Southern Railroad, petitioned for withdrawal. Buffalo Southern Railroad Inc.—Acquisition and Operation Exemption—Line in Croton-On-Hudson, NY, STB Finance Docket No. 34903 and Village of Croton-On-Hudson, New York v. Buffalo Southern Railroad, Inc., et al., STB Finance Docket No. 34905 (STB served June 6, 2007).

claims that substantial harm has already occurred to the environment and to its residents because petitioners have clear-cut 18 acres of land and sand-mined hundreds of thousands of cubic yards of sand without regulatory oversight and approval. It also appears that the New York Department of Environmental Conservation has issued summonses and citations regarding these activities. If the proposed activities at issue here are found to require prior approval from the Board under 49 U.S.C. 10901, environmental review under NEPA would be conducted as part of that process. During the NEPA process there would be ample opportunity for all interested parties, affected communities, and members of the general public to participate and to comment on all aspects of the environmental analysis. Moreover, the Board could impose specific mitigation conditions, should it decide to authorize this proposal, to mitigate potential environmental impacts resulting from the transaction. Thus, as Brookhaven argues, the potential environmental harm would be exacerbated if the Board's Cease and Desist Order is stayed until a final determination is made as to whether this project requires a Board license. To the extent a stay of that decision might lead to further construction activity that might require Board authority and a NEPA review, it could, in fact, worsen this alleged harm to the environment and the residents of Brookhaven.

Public Interest. Finally, petitioners' argument that a stay of the Board's Cease and Desist Order would be in the public interest is unpersuasive. While petitioners cite the need for more freight facilities on Long Island, the Cease and Desist Order does not prevent the facility from being constructed once appropriate approvals are obtained. Thus, any potential public benefit could still be realized. Instead, the public interest is better served by precluding the potential evasion or misuse of the Board's processes that could result from allowing the construction and operations proposed here to proceed without the license and NEPA review that appear to be required.

Regardless of whether this project eventually is found to involve ancillary "spur" track or a railroad line, the scope of the federal preemption in 49 U.S.C. 10501(b) is the same.⁶ See Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005). Also, the federal preemption does not prevent exercise of the states' retained police powers to protect public health and safety so long as the state or local regulation does not unreasonably interfere with interstate commerce. Id.; New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Rwy.—Constr., Acquisition & Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797 at 9 (STB served July 12, 2007).

For all these reasons, petitioners have failed to meet their burden of showing that the stay criteria have been met. Therefore, their stay request will be denied, and the Board's Cease and Desist Order will remain in effect.

⁶ 49 U.S.C. 10501(b) gives the Board "exclusive" jurisdiction over rail transportation and rail facilities that are part of the national rail network, including even ancillary "spur" track.

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

It is ordered:

1. Petitioners' motion to strike and request for leave to file a rebuttal to Brookhaven's reply are denied.
2. The petition for stay is denied.
3. This decision is effective on its service date.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary