

SERVICE DATE – AUGUST 28, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35141

U S RAIL CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—  
BROOKHAVEN RAIL TERMINAL

Digest:<sup>1</sup> This decision denies a request to reopen the Board decision that granted U S Rail Corporation an exemption to construct and operate a new rail line in Brookhaven, N.Y., but directs Brookhaven Rail Terminal and Brookhaven Rail, LLC, to file evidence of compliance with three previously imposed environmental conditions.

Decided: August 26, 2014

In a decision served on September 9, 2010, the Board granted an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 for U S Rail Corporation (U S Rail), a Class III rail carrier, to construct and operate an 18,000-foot rail line (the Line) on a 28-acre parcel (Parcel A) in Brookhaven, Suffolk County, N.Y., subject to specific environmental mitigation conditions. Brookhaven Rail, LLC, a Class III rail carrier (Brookhaven Rail),<sup>2</sup> now uses the Line to provide service to Brookhaven Rail Terminal (BRT),<sup>3</sup> a railroad transloading facility located on Parcel A. Brookhaven Rail provides rail carrier and transloading services, principally the switching and marshalling of rail cars in the BRT. Linehaul freight rail service is provided to the BRT over the Long Island Railroad by New York & Atlantic Railway Company, a Class III rail carrier that interchanges with Brookhaven Rail at the switch lead to the BRT.

---

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

<sup>2</sup> U S Rail assigned its construction and operation authority involving Parcel A together with a leasehold interest in the underlying property to U S Rail New York, LLC (U S Rail NY). U S Rail NY was subsequently renamed Brookhaven Rail, LLC, by its equity-owner, Oakland Transportation Holdings LLC. See Gabriel D. Hall—Corporate Family Transaction Exemption—U S Rail N.Y., LLC, FD 35458 (STB served Jan. 7, 2011); Nev. 5, Inc.—Control Exemption—GTR Leasing LLC, FD 35635 (STB served June 15, 2012).

<sup>3</sup> BRT is the trade name for Brookhaven Terminal Operations, LLC. We refer to “the BRT” when referring to the actual transload facility.

In a letter filed on March 13, 2014, the Town of Brookhaven (the Town) requests that this exemption proceeding be reopened based on a number of different grounds. First, the Town contends that BRT and Brookhaven Rail<sup>4</sup> are not complying with the environmental conditions imposed by the Board in the September 2010 decision. These mitigation requirements included compliance with a “Stipulation of Settlement” agreed to by the parties<sup>5</sup> and three other environmental conditions imposed by the Board.<sup>6</sup>

Second, the Town alleges changed circumstances. It asserts that on two new parcels totaling 93 acres (Parcels B and C) located adjacent to Parcel A, BRT, Brookhaven Rail, and Sills Road Realty, LLC (Sills),<sup>7</sup> are constructing a 12,500-foot extension to the Line that requires a Board license under 49 U.S.C. § 10901, but under the guise of constructing new spur track that is exempt from Board regulation under 49 U.S.C. § 10906.

Third, the Town claims that Brookhaven Rail, BRT, and Sills are constructing extensive warehousing, manufacturing, and shipping facilities and a proposed liquefied petroleum gas (propane) transfer station on Parcels B and C, and are also engaged in illegal sand mining, deep excavation, and the processing of construction debris on those parcels.

Lastly, the Town contends that any activities being performed by or on behalf of Sills do not qualify for federal preemption, because Sills is not a rail carrier or acting on behalf of a rail carrier.

The Town states that it issued both a summons to BRT for non-permit related violations of the local law and a stop work order for non-railroad related activities. In addition, the Town states

---

<sup>4</sup> BRT and Brookhaven Rail together are referred to as “Respondents.”

<sup>5</sup> The Stipulation of Settlement entered into by U S Rail and the Town in 2010 among other things required the construction of a secondary egress, dust control measures, height limits for buildings and piles of aggregate, landscaping, noise reduction, “dark sky” friendly lighting, and water control measures to protect the Nassau-Suffolk Sole Source Aquifer (Aquifer).

<sup>6</sup> The Board required that U S Rail: (1) use best management practices before and during construction to minimize erosion, sedimentation, and instability of soils; (2) develop and implement a spill prevention, control, and countermeasures plan to ensure protection of the Aquifer in the event of an accidental spill; and (3) consult with the Natural Resources Conservation Service of the United States Department of Agriculture at its Syracuse, N.Y., office prior to initiating rail line construction activities.

<sup>7</sup> Sills is in the business of using and selling construction materials and aggregate and allegedly is the owner of all three parcels that are the subject of Brookhaven’s request to reopen.

that it commenced a lawsuit in the New York Supreme Court, Suffolk County, where it is arguing that BRT, Brookhaven Rail, and Sills have violated certain state and local ordinances and breached the Stipulation of Settlement.<sup>8</sup> The Town requests that this proceeding be reopened or a new proceeding be opened to address its claims and that declaratory relief or an injunction be granted.

Respondents filed a joint reply in opposition to reopening on April 3, 2014. They deny having violated any environmental mitigation conditions imposed by the Board in its September 2010 decision concerning Parcel A, and on that basis they contend that there are no grounds for reopening this proceeding as to that parcel. As to Parcels B and C, Respondents assert that these parcels were not encompassed by the September 2010 decision and that it would therefore serve no purpose to reopen that decision. Rather, they argue that the proper vehicle to address the Town's concerns regarding Parcels B and C would be a petition for declaratory order.<sup>9</sup>

The Town, on May 15, 2014, submitted a pleading to update the record and correct alleged misstatements of facts made by Respondents in their April 3, 2014 reply.<sup>10</sup> The Town expands on its contention that changed circumstances support reopening, asserting that Respondents downplayed their extensive construction activities and uses of Parcel A, which bear no resemblance to the environmental mitigation requirements agreed to by the parties and imposed by the Board in the September 2010 decision. On June 4, 2014, Respondents filed a motion to strike the Town's May 15 submission.

#### DISCUSSION AND CONCLUSIONS

The Stipulation of Settlement that the parties negotiated constitutes a contract, and that contract and the parties' performance under it are currently the subject of court litigation. While the Board imposed a condition requiring compliance with the Stipulation of Settlement in its 2010 decision, we see no need to reopen this proceeding to consider the same issue that is already before

---

<sup>8</sup> By stipulation of the parties, that lawsuit was removed to the U.S. District Court for the Eastern District of New York (the Court) on April 9, 2014.

<sup>9</sup> On April 28, 2014, Respondents did in fact file a petition for declaratory order in Brookhaven Rail Terminal & Brookhaven Rail, LLC—Pet. for Declaratory Order, FD 35819, in which they discuss their activities on Parcels B and C. The Board issued a decision in that proceeding today addressing the issues regarding Parcels B and C, including the status of the court litigation.

<sup>10</sup> The Town also requested permission to file the submission. Respondents on June 4, 2014, filed a motion to strike, or for leave to respond to, the submission, and the Town filed a reply on June 16, 2014. Granting the Town's request will not prejudice Respondents and will result in a more complete record. Accordingly, we will grant the Town's request for leave to file the May 15, 2014 submission and accept the submission into the record. Because we are denying the petition to reopen, Respondents' motion to strike or for leave to respond is moot and need not be addressed.

the Court. In response to the Town's allegation that Respondents have not complied with the three other environmental conditions imposed by the Board, we will direct Respondents to file proof of compliance in this proceeding and serve it on the parties of record, within 30 days from the service date of this decision. The Town will then have 20 days to respond. We will then determine whether this proceeding should be reopened to address compliance with these three environmental conditions.

We decline to reopen this proceeding to consider the Town's allegations concerning the new track construction on Parcels B and C. Those parcels are not subject to the Stipulation of Settlement or the three other environmental conditions imposed by the Board in this proceeding and are the subject of the petition for declaratory order that Respondents filed in Docket No. FD 35819, which is addressed in a separate decision being served today in that proceeding.

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

It is ordered:

1. The Town's request for leave to file the May 15, 2014 submission is granted and the submission is accepted into the record. Respondents' motion to strike or for leave to respond is denied.

2. The Town's request to reopen this proceeding is denied.

3. Respondents are directed to file in this proceeding and serve on the parties of record, by September 29, 2014, proof of compliance with the three environmental conditions imposed by the Board in the September 9, 2010 decision that do not involve compliance with the parties' Stipulation of Settlement. Replies are due by October 27, 2014.

This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.