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SEC

SERVICE DATE – NOVEMBER 5, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35141

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

Decided: November 4, 2008

By petition filed on August 7, 2008, U S Rail Corporation (U S Rail), a Class III short line rail carrier, seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct and operate “a new line of railroad and related rail facilities” at a new, yet-to-be-constructed 28-acre site to be known as the Brookhaven Rail Terminal (BRT) in the Town of Brookhaven, Suffolk County, NY.

According to petitioner, the line would extend approximately 200 feet from a connection with the Long Island Rail Road (LIRR) into the rail yard of the BRT, where the line would branch out into a series of yard tracks totaling about 11,000 feet in length. U S Rail anticipates that Sills Road Realty, LLC, the owner of the underlying property, would be the line’s only rail customer at first but states that, as a common carrier, U S Rail would solicit freight business from other customers. Petitioner estimates that the traffic will initially consist of about 5,000 carloads of inbound aggregate crushed stone annually to be used in road and building construction on Long Island. U S Rail seeks expedited handling of its petition, requesting a final decision from the Board by December 31, 2008.

On September 18, 2008, the Board received two filings in response to U S Rail’s petition. First, the New York State Department of Transportation submitted comments expressing support for the potential benefits of the BRT project, but asking the Board to deny the request for expedited handling, to perform an appropriate environmental review, and to require LIRR and the New York & Atlantic Railway (which provides freight service on the LIRR) to provide the Board with an assessment of the impact of this new traffic on their operations.

Second, the Town of Brookhaven (Brookhaven) filed a reply asking the Board to deny U S Rail’s petition, arguing that petitioner has not provided sufficient information to determine whether the proposed construction and operation are subject to the Board’s jurisdiction. Brookhaven also argues that the proposed project will not constitute transportation by a rail carrier, that the track to be constructed will be private track, that regulation is necessary to carry

out the rail transportation policy at 49 U.S.C. 10101, and that this project will have significant environmental impacts.<sup>1</sup>

The petition for exemption raises issues that require consideration by the Board. By this decision, the Board is instituting a proceeding under 49 U.S.C. 10502(b). However, more information is required for the Board to determine the nature and scope of this project and the extent of the Board's jurisdiction over it. U S Rail makes a vague request for authority to construct and operate "a new line of railroad and related rail facilities" at the BRT, but it does not specify what those rail facilities will be or describe the proposed operations in any detail.

It does appear that at least a portion of this project—U S Rail's construction and operation of 200 feet of track from the connection with the LIRR to the BRT—would be subject to the Board's jurisdiction pursuant to 49 U.S.C. 10901. But numerous questions remain about the specifics of the proposal and the Board needs further clarification from U S Rail. For example, what exactly are the "related rail facilities" that petitioner plans to construct and operate?<sup>2</sup> Who will be constructing these facilities? What activities will be performed in these facilities? Who will be performing these activities?

U S Rail is directed to supplement its petition by December 5, 2008, with additional information clarifying in greater detail the proposed construction and operation. Replies are due by December 29, 2008. Additional information about the project will also help the Board determine the scope of its environmental review. Finally, while the Board will process this petition as expeditiously as possible, this case will require an environmental review and a legal analysis of various rail transportation issues. Because these tasks will not be completed within this calendar year, a final decision will not be issued by the end of 2008, and U S Rail's request for expedited action by that date will be denied.

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<sup>1</sup> On October 1, 2008, U S Rail filed a motion to strike Brookhaven's reply as an unauthorized and prohibited second reply. Brookhaven replied to the motion. U S Rail's motion will be denied. By letter filed August 14, 2008, Brookhaven requested an extension of time until September 18, 2008, to file a reply to U S Rail's petition, a request which was granted by Board decision served August 26, 2008. Brookhaven's only other prior submission, a letter filed September 3, 2008, simply opposed the expedited procedural schedule sought by U S Rail. Thus, Brookhaven has the right to substantively reply to the merits of U S Rail's petition.

On October 14, 2008, Brookhaven filed a motion asking the Board to issue an order compelling U S Rail to respond to discovery (in the form of document requests, interrogatories, and requests for admission) Brookhaven served on petitioner on September 18, 2008. That motion will be dealt with in a subsequent Board decision.

<sup>2</sup> It is unclear from the record how the rail facilities U S Rail describes relate to what it refers to as the BRT. Is the BRT among the facilities U S Rail seeks to construct? Is it a separate structure? Or is "BRT" simply the name for the rail yard as a whole?

It is ordered:

1. Under 49 U.S.C. 10502(b), a proceeding is instituted.
2. U S Rail is directed to supplement its petition by December 5, 2008. Replies are due by December 29, 2008.
3. U S Rail's request for expedited action by December 31, 2008 is denied.
4. U S Rail's motion to strike is denied.
5. This decision is effective on the date of service.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan  
Acting Secretary