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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35141

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

Docket No. FD 35036

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

Decided: June 7, 2010

This decision grants individual requests by U S Rail Corporation (U S Rail) and the Town of Brookhaven, N.Y. (Brookhaven), to return to the Board's active docket a proceeding titled U S Rail—Construction & Operation Exemption—Brookhaven Rail Terminal, FD 35141. The proceeding has been held in abeyance to allow U S Rail and Brookhaven to negotiate a possible settlement. This decision also grants a joint petition by those same parties to vacate a cease and desist order issued in Suffolk & Southern Rail Road LLC—Lease & Operation Exemption—Sills Road Realty, LLC, FD 35036, subject to the proviso that no rail construction activities may take place on the property without receipt of further appropriate authority from the Board.

BACKGROUND

On May 18, 2007, Suffolk & Southern Rail Road LLC (Suffolk), a noncarrier, filed a verified notice of exemption 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 on a 28-acre parcel of land in Yaphank, Suffolk County, N.Y. The notice of exemption also requested authority to operate over that track. On June 15, 2007, the Board found Suffolk's notice of exemption to be incomplete. U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC, FD 35042 (STB served June 15, 2007). Suffolk sought to withdraw its notice. The Board granted Suffolk's request to withdraw, but cautioned that it would view with disfavor any future request for authority to commence rail operations over trackage at that location, unless the construction of that trackage had first been authorized by the Board. Suffolk & S. Rail Rd.—Lease & Operation Exemption—Sills Rd. Realty, LLC, FD 35036 (STB served Sept. 25, 2007).

On October 2, 2007, the Board received a letter from Brookhaven concerning a proposed rail facility being constructed by U S Rail on property it had leased in Yaphank. Upon further

investigation, it appeared that this was the same property and proposed rail facility discussed in the Board's September 2007 decision in FD 35036.

Because evidence suggested that construction might be occurring or contemplated on the property and no Board authority had been sought, the Board reopened the proceeding on its own motion and directed U S Rail, Suffolk, Sills, or any other related entity undertaking construction of any rail facilities in Yaphank, Brookhaven, or anywhere in that vicinity, to immediately cease that activity and to obtain either Board authority or a Board decision (through a declaratory order proceeding or other appropriate formal means) finding that such activity does not require Board approval. Suffolk & S. Rail Rd.—Lease & Operation Exemption—Sills Rd. Realty, LLC (Cease and Desist Order), FD 35036, slip op. at 2 (STB served Oct. 12, 2007), pet. for recons. denied FD 35036 (STB served Dec. 20, 2007).

On May 2, 2008, U S Rail sought clarification that, in advance of receiving construction and operation authority, it could begin certain activities under the umbrella of federal preemption contained in 49 U.S.C. § 10501(b). In Suffolk & Southern Rail Road—Lease and Operation Exemption—Sills Road Realty, LLC, FD 35036 (STB served Aug. 27, 2008), the Board denied U S Rail's petition, but provided guidance regarding the types of activities that were subject to the Cease and Desist Order and which were not.

By petition filed on August 7, 2008, U S Rail sought 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, in the Town of Brookhaven, Suffolk County, N.Y. By decision served November 5, 2008, the Board instituted a proceeding in the U S Rail—Brookhaven Rail Terminal matter in FD 35141.

In a decision served June 12, 2009, the Board ordered that the proceeding be held in abeyance pending further Board action to allow U S Rail and Brookhaven to negotiate a settlement. The Board also directed the parties to file monthly reports on the status of their negotiations beginning July 1, 2009.

The parties filed joint status reports until December 30, 2009, when U S Rail requested that the Board return the matter to its active docket. U S Rail asserted that the parties were at an impasse, and that the Board's intervention was necessary. In response, Brookhaven filed a letter on January 4, 2010, objecting to U S Rail's request.

By decision served February 3, 2010, the Board directed Brookhaven and U S Rail to appear and participate in a meeting facilitated by Board staff in an attempt to resolve the parties' differences.[1] Brookhaven and U S Rail met with the Board's staff on February 25, 2010. On

[1] The Board also invited New York State Department of Transportation (NYSDOT) to participate in the meeting by a decision served on February 18, 2010, but NYSDOT declined the Board's invitation.

March 30, 2010, U S Rail informed the Board that it had resolved its differences with Brookhaven and asked that the proceeding be restored to the active docket. On April 5, 2010, the Board received a letter from Brookhaven withdrawing its opposition to U S Rail's project and also requesting that the matter be returned to active status.

On April 22, 2010, U S Rail filed a joint letter petition on behalf of itself and Brookhaven asking the Board to vacate the Cease and Desist Order. On April 26, 2010, U S Rail filed a supplemental letter providing the parties' "Stipulation of Settlement" agreement. On May 7, 2010, U S Rail filed a request for expedited consideration by the Board of the request to vacate.

DISCUSSION AND CONCLUSIONS

Active Status Request.

The Board held U S Rail—Brookhaven Rail Terminal in abeyance to give U S Rail and Brookhaven time to negotiate. After Board-assisted mediation, U S Rail and Brookhaven were able to reach an agreement and have requested that the case be restored to the active docket in order for the Board to resume consideration of the pending construction exemption. Accordingly, the Board will return FD 35141 to its active docket, and the Board's Section of Environmental Analysis (SEA) will continue its environmental review of the project and preparation of an Environmental Assessment (EA), which will be issued for public review and comment when it is completed.

Motion to Vacate.

We will also grant the requests of U S Rail and Brookhaven to vacate the Cease and Desist Order, subject to the proviso that no rail construction activities may take place on the property until a final decision is issued in U S Rail—Brookhaven Rail Terminal and has become effective. Before the Cease and Desist Order was issued, U S Rail had argued that prior approval for the construction and operation of this rail facility was not required. The Board rejected that argument and ordered U S Rail to cease rail construction activities. The record before us indicates that all such activities at the site immediately ceased and have not resumed.[2] Moreover, U S Rail has filed for Board authority to construct and operate the subject rail facilities in U S Rail—Brookhaven Rail Terminal. Consequently, the basis for our Cease and Desist Order is no longer present, and U S Rail stands in the same position as any other petitioner seeking Board approval of a rail construction project.

The parties' request to vacate the Cease and Desist Order, however, indicates that there may remain some confusion as to the scope of that order and the effect of vacating it, particularly when read in conjunction with the parties' settlement agreement. Like any other landowner, U S Rail may conduct non-rail related activities, i.e., activities exclusively "designed to enhance the

[2] Brookhaven has also withdrawn its opposition to the project and has agreed to permit U S Rail to resume "non-rail preconstruction site activities" upon removal of the Cease and Desist Order. Joint Letter Petition 3, Apr. 22, 2010.

safety, security and utility of the property," without Board approval or oversight. Suffolk & S. Rail Rd.—Lease & Operation Exemption—Sills Rd. Realty, LLC, FD 35036, slip op. at 4 (STB served Aug. 27, 2008). Those activities, however, remain subject to applicable state and local laws. On the other hand, rail construction activities are precluded, absent the required Board authority. Thus, notwithstanding this decision vacating the Cease and Desist Order, U S Rail is and continues to be prohibited from performing any rail construction activities unless and until it receives Board approval for the proposed construction. See 49 U.S.C. § 10901(a) (requiring prior Board authorization to construct rail line).

Some of the proposed activities mentioned in the Stipulation of Settlement that are to take place during "Phase I" (which would occur prior to the Board ruling on the proposed construction) concern us, specifically: "pre-construction" excavation, site work (including clearing, grading, and drainage work), and the plan for Sills to excavate up to 75,852 cubic yards of material. While these activities may fall within "non-rail" construction, they may, on the other hand, be considered rail construction,[3] and it is not possible for the Board to make that determination from the information before us. If U S Rail plans to carry out the above-described Phase I activities prior to the Board issuing a decision on the proposed rail construction, U S Rail must provide to the Board a full explanation of why it believes those activities are non-rail construction activities. U S Rail should not undertake those activities until the Board rules on their status.

Finally, an attachment to the parties' Stipulation of Settlement (under a description of Phase I of U S Rail's plans) states that, "Within 90 calendar days of the execution of the Stipulation Agreement, SEA shall issue the proposed EA for public comment . . . ." No such deadline can be imposed. The National Environmental Policy Act, 42 U.S.C. 4321 et seq., requires this agency to take a "hard look" at potential environmental consequences. The agency will do so without regard to a party's artificial deadline on the length of the EA process.

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

It is ordered:

1. The abeyance in U S Rail—Construction & Operation Exemption—Brookhaven Rail Terminal, FD 35141, is terminated and the proceeding is returned to the Board's active docket.

2. U S Rail and Brookhaven's motion to vacate the cease and desist order in Suffolk & Southern Rail Road LLC—Lease & Operation Exemption—Sills Road Realty, LLC, FD 35036 (STB served Oct. 12, 2007), is granted, subject to the proviso that no rail construction activities may take place on the property without appropriate authority from the Board.

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[3] Rail construction activities include certain preparatory construction work, such as grading in preparation for laying track. Suffolk & S. Rail Rd.—Lease & Operation Exemption—Sills Rd. Realty, LLC, FD 35036, slip op. at 4 (STB served Aug. 27, 2008).

3. If Phase I plans will be carried out before the Board's final decision on the proposed construction is issued and becomes effective, then prior to performing "pre-construction" excavation, site work (including clearing, grading, and drainage work), or excavation, U S Rail must submit an explanation to the Board as to why those activities are not part of rail construction activities, and the Board must issue a decision so finding.

4. This decision is effective on it service date.

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