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SERVICE DATE – SEPTEMBER 9, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35141

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

Decided: September 7, 2010

Digest: U S Rail Corporation is permitted to build and operate an 18,000 foot rail line in Brookhaven, Suffolk County, N.Y. that will connect U S Rail with the Long Island Railroad. The new line will allow U S Rail Corporation to provide rail freight service to the Brookhaven Rail Terminal, thereby reducing truck traffic in the New York metropolitan area. This approval to construct is subject to environmental mitigation conditions.¹

BACKGROUND

On August 7, 2008, U S Rail Corporation (U S Rail), a Class III rail carrier with existing operations in Ohio, filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10901 to construct and operate a line of railroad at a 28-acre site to be known as the Brookhaven Rail Terminal (BRT), in Brookhaven, Suffolk County, N.Y. According to U S Rail, the total length of the track to be constructed is about 18,000 feet.² The track would connect with an existing rail line of the Long Island Rail Road (LIRR), over which the New York & Atlantic Railway Company (NY&A) provides freight service. U S Rail also proposes to construct various facilities on the BRT site, including a rail switch, crushed stone aggregate handling and storage facilities, an intermodal freight storage area, and a transload area with truck scales.

The purpose of the proposed construction is to enable U S Rail to serve the BRT as a common carrier and to deliver up to 500,000 tons of aggregate annually from sources in upstate New York to Sills Road Realty, LLC (Sills), the owner of the underlying property, and its

¹ 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 of Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In a filing dated May 25, 2010, U S Rail revised its original proposal to construct 11,000 feet of track, indicating that it planned to add 7,000 feet of track.

affiliates and related companies on Long Island. The project is intended to reduce Sills' reliance on truck transport of aggregate through the New York City metropolitan region. Trucks currently use local roads to bring aggregate to Sills' existing construction facilities on Long Island (the Scatt Materials Plant and the Empire Asphalt Plant). With the use of U S Rail's rail service at the BRT site, most of the heavy truck traffic needed to access these plants would use Interstate 495, and there would be no heavy truck traffic related to Sills' business activities through Port Jefferson or Port Washington, N.Y. Sills would use 250,000 tons of the aggregate at its own facilities and would make the remaining 250,000 tons of aggregate available to its customers.

Rail operations would consist of an average of six trains per week: three inbound trains, each consisting of approximately 40 to 50 railcars of aggregate delivered to the BRT, and three empty outbound trains, each consisting of 40 to 50 railcars. NY&A would deliver the aggregate to the BRT on the LIRR line that terminates at Greenport, N.Y. Upon arrival at the switch lead into the BRT, NY&A would then interchange the traffic to U S Rail, which would haul the cars into the BRT.

The Board instituted a proceeding under 49 U.S.C. § 10502(b) in November 2008 to consider U S Rail's construction and operation exemption. U S Rail—Constr. & Operation Exemption—Brookhaven Rail Terminal, FD 35141 (STB served Nov. 5, 2008). Initially, the Town of Brookhaven (Brookhaven) opposed construction of the BRT. In a decision served June 12, 2009, the Board held the proceeding in abeyance pending ongoing settlement negotiations between the Brookhaven and U S Rail. U S Rail—Constr. & Operation Exemption—Brookhaven Rail Terminal, FD 35141 (STB served June 12, 2009). The Board also directed the parties to file monthly reports on the status of their negotiations beginning July 1, 2009. Id.

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, asserting that negotiations had reached an impasse. 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 U S Rail and Brookhaven to appear and participate in a meeting facilitated by Board staff in an attempt to resolve the parties' differences. Brookhaven and U S Rail met with the Board's staff on February 25, 2010. On 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. U S Rail filed a supplemental letter on April 26, 2010, which included the parties' "Stipulation of Settlement" agreement. In U S Rail—Construction & Operation Exemption—Brookhaven Rail Terminal, FD 35141 et al.

(STB served June 9, 2010), the Board, among other things, granted the request to return this proceeding to its active docket.³

The Board's Section of Environmental Analysis (SEA) has conducted an environmental review of the proposal. On July 26, 2010, SEA issued a Draft Environmental Assessment (Draft EA) for public review and comment. A Final Environmental Assessment (Final EA), served on August 20, 2010, responded to comments from the U.S. Environmental Protection Agency (EPA), LIRR, Assembly Member Margaret M. Markey of New York's 30th District, the Suffolk County Department of Public Works (Dep't Pub. Works), and Civics United for Railroad Environmental Solutions (CURES); corrected information in the Draft EA; and included final recommendations for environmental mitigation.

SEA also received comments individually from Congressman Anthony D. Weiner, Congressman Joseph Crowley, Elizabeth S. Crowley of the Council of the City of New York's 30th District in Queens, and Gary Giordano, the District Manager of Community Board No. 5 of the City of New York, raising concerns similar to those of Assembly Member Markey. Congressman Crowley's, Council Member Crowley's and Mr. Giordano's comments were received by SEA on August 25, 2010, August 19, 2010, and August 24, 2010, respectively. Likewise, four New York State representatives—Assembly Member Andrew Hevesi, Assembly Member Michael Miller, Senate Member Joseph P. Addabbo, Jr., and Assembly Member Catherine Nolan—individually sent letters received on August 25, 2010 (Assembly Member Nolan's letter was received September 1, 2010). Also received on August 25, 2010, was a letter from the USDA Natural Resources Conservation Service (USDA-NRCS). While these comments were not addressed in the Final EA, the Board has reviewed and considered them all in this decision, as reflected in the environmental review section below.⁴

DISCUSSION AND CONCLUSIONS

After considering the entire record, including both the transportation aspects of the petition and the environmental issues, we will grant the requested construction exemption as discussed below, subject to the environmental mitigation measures recommended in the Final EA and one additional condition developed to respond to the comments of USDA-NRCS.

³ In that decision, the Board also granted a motion by U S Rail and Brookhaven to vacate an October 2007 cease and desist order, subject to the proviso that no rail construction activities may take place on the property unless and until U S Rail received Board approval for the proposed construction. U S Rail subsequently sought clarification as to which activities it could engage in prior to obtaining Board authority, but U S Rail moved to withdraw that request on July 27, 2010. The withdrawal request will be granted.

⁴ All comments submitted to SEA in this proceeding are available on the Board's Web site. Surface Transp. Board, <http://www.stb.dot.gov> (from "Environmental Matters" dropdown select "Environmental Correspondence" hyperlink; then follow "Full Text Search" hyperlink; then search for "35141").

Rail Transportation Analysis. The construction of new railroad lines requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. Under § 10502, we must exempt a proposed rail line construction from the detailed application procedures of § 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power.

Based on the record before us, we conclude that the proposed construction project is appropriate for handling under the exemption process. First, detailed scrutiny of the proposed construction under § 10901 is not necessary to carry out the rail transportation policy. The proposed rail line would allow U S Rail to deliver crushed stone aggregate by rail from sources in upper New York State to its primary customer, Sills, and eventually to other customers desiring rail service. The proposed construction would reduce shippers' reliance on truck transportation and alleviate highway congestion in the New York City metropolitan region, including the communities of Port Jefferson and Port Washington. Thus, granting this exemption would ensure the development and continuation of a sound rail transportation system and foster sound economic conditions in transportation. 49 U.S.C. §§ 10101(4), (5). Exempting the proposed construction project from the requirements of § 10901 would also minimize the need for Federal regulation and reduce regulatory barriers to entry. 49 U.S.C. §§ 10101(2), (7). Second, use of the formal application process is not necessary here to protect shippers from an abuse of market power. Nothing in the record suggests that any shipper will lose access to a rail option as the result of the proposed construction. Rather, the proposed rail line will enhance competition and provide an efficient alternative to truck shipment of stone aggregate. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Environmental Analysis. In making our decision here, we have also analyzed the environmental impacts associated with this proposal identified in the Draft EA and Final EA, as well as all of the public comments. Based on the environmental record, we have also assessed the imposition of appropriate environmental conditions.

The Requirements of NEPA. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-43, requires Federal agencies to examine the environmental effects of proposed Federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential adverse environmental impacts. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. See Mid States Coal. for Progress v. STB, 345 F.3d 520, 533-34 (8th Cir. 2003). Thus, once the adverse environmental effects have been adequately identified and evaluated, an agency may

conclude that other values outweigh the environmental costs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

The Environmental Review In This Case. In preparing a Draft EA, SEA mailed consultation letters to federal, state, and local agencies, and special interest groups. SEA received replies from several entities. As pertinent here, Brookhaven, EPA, and the New York State Geological Survey each expressed concern over potential terrestrial and aquatic environmental impacts. In particular, the comments drew attention to erosion concerns and the possible contamination of groundwater in the Nassau-Suffolk Sole Source Aquifer.

On July 26, 2010, SEA published a Draft EA for public review and comment. The Draft EA examined the potential impacts of the proposed new rail line on a wide variety of environmental resource areas, such as air (including emission of particulate matter and ozone), water (including protection of the aquifer), noise, biological, and historic resources, and environmental justice (minority and low income) communities. The Draft EA also examined the no-action alternative (which would maintain the status quo) and potential cumulative effects of the construction of the facilities associated with the planned BRT.⁵

The Draft EA preliminarily concluded that the construction and operation of the proposed rail line would have no significant environmental impacts if the Board imposed the recommended mitigation measures. It also concluded that the construction and operation of the BRT facilities would not result in significant cumulative environmental impacts. The Draft EA explained that the site at issue here is in an industrial area that is already highly disturbed. The site contains no wetlands, surface waters, important wildlife habitats, historic structures or archeological resources and is located one quarter of a mile from the nearest noise-sensitive receptors (e.g., residences, schools, or hospitals). Emissions of regulated pollutants also would be minimal. In addition, Brookhaven's Division of Environmental Protection has completed an environmental review of the BRT proposal and site under New York's State Environmental Quality Review Act (SEQRA). That review concluded with a Negative Declaration Finding indicating that, under SEQRA, the proposed project would not have a significant impact on the environment.

As noted above, in April 2010, U S Rail and Brookhaven entered into a "Stipulation of Settlement," in which U S Rail committed to several mitigation measures for the site, including constructing a secondary egress in case of emergencies, dust control measures, height limits for buildings and aggregate piles, landscaping, noise reduction, "dark sky friendly" lighting, and water control measures to protect the Nassau-Suffolk Sole Source Aquifer. Because the Stipulation of Settlement addresses many of the environmental concerns raised in this proceeding, the Draft EA recommended, as a mitigation measure, that U S Rail be required to comply with the terms and obligations in the Stipulation of Settlement as a condition of the Board's approval. Based on the comments received while preparing the Draft EA and the results

⁵ No other alternatives were considered because the proposed rail line and planned facilities would use essentially the entire 28-acre BRT site, and there was no evidence suggesting that there was another more appropriate location for the proposed rail line.

of SEA's environmental analysis, SEA also recommended mitigation that would require U S Rail to employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils, and to implement a spill prevention plan to protect the Nassau-Suffolk Sole Source Aquifer in the event of an oil or fuel spill.

SEA served a Final EA on August 20, 2010, which discussed comments submitted on the Draft EA. As the Final EA explains, EPA concurred with SEA's findings of no significant impact. The Final EA fully addressed each of EPA's concerns regarding air emissions, the Nassau-Suffolk Sole Source Aquifer, and the use of wooden railroad ties at the BRT site. LIRR indicated its support for projects like this one that will divert vehicular traffic from highways to rail.

The Final EA addressed the concerns raised by Assembly Member Markey about impacts to residential communities in Queens. SEA found that the increase in traffic of 6 trains per week is well below the thresholds warranting analysis in the Board's regulations, that U S Rail would not be transporting solid waste, and that the existing conditions near rail yards in Glendale, Queens are not related to this proceeding. The concerns of the Dep't Pub. Works were also addressed. The Stipulation of Settlement requires U S Rail to comply with certain requirements set forth by the Dep't Pub. Works, and compliance by U S Rail with the Stipulation of Settlement is a condition imposed on the grant of authority. Finally, regarding CURES' comments, the Draft EA adequately explained the basis for the shorter 15-day comment period challenged by CURES. CURES' remaining concerns either relate to matters outside the scope of the environmental review for this project or are already addressed by the mitigation measures to be imposed. In sum, SEA concluded that no additional analysis was warranted and that the construction and operation of the proposed rail line would not result in any significant environmental impacts, if the mitigation measures originally recommended in the Draft EA were imposed and implemented.

With one exception, the comments not discussed in the Final EA raise issues similar to those in Assembly Member Markey's letter related to existing conditions in the Queens neighborhoods near the Fresh Pond Rail Yard. These comments do not provide any basis for additional environmental analysis or additional mitigation measures, except for the comment submitted by the USDA-NRCS.

Specifically, Congressman Weiner expressed concerns for his constituents in Middle Village and Glendale, N.Y., regarding additional waste and noise from increased rail traffic. Similarly, Congressman Crowley urged the Board to reduce air and noise pollution from the increased rail traffic. Council Member Crowley requested that the Board prepare a full Environmental Impact Statement (EIS) (a more comprehensive review than an Environmental Assessment, required in cases that would result in significant environmental impacts) addressing the impact of an increase in rail traffic on the neighborhoods surrounding the Otto Road Rail Yard in Glendale. District Manager Gary Giordano of Community Board No. 5, Borough of Queens, raised similar concerns, stating that additional train traffic on rail lines operated by NY&A would increase the negative environmental effects currently experienced in communities near the Fresh Pond Rail Yard. Likewise, Assembly Member Markey, Council Member Crowley and District Manager Giordano raised concerns regarding existing conditions resulting

from NY&A's handling of solid waste and construction and demolition debris at the Fresh Pond Rail Yard in Glendale. Assembly Member Nolan expressed concerns about the existing noise pollution and smell coming from rail tracks in Queens. Assembly Members Hevesi and Miller, and Senate Member Addabbo are concerned about the increased traffic and worry about the possibility of solid waste movements from the BRT site in the future.

As SEA explained in the Final EA, however, the increased traffic levels projected by U S Rail—6 trains per week—are well below the Board's thresholds for warranting environmental review. U S Rail Corp.—Constr. & Operation Exemption—Brookhaven Rail Terminal, FD 35141, slip op. at 10 (STB served Aug. 20, 2010). The Stipulation of Settlement and information on the record in this proceeding show that the purpose of U S Rail's proposal is the transportation of crushed stone aggregate, not municipal solid waste. Nothing in the record indicates that U S Rail intends to handle or transport solid waste from the BRT site. Nor does the record show that the construction exemption at issue here will adversely affect existing conditions at residential areas near rail yards in Glendale. Thus, these comments do not cast doubt on the adequacy of the analysis in the Draft and Final EA, or demonstrate that an EIS or further mitigation was warranted in this case.

USDA-NRCS concurred with SEA's determination in the Final EA that the proposed construction and operation of U S Rail's 3.4-mile long rail line would not result in significant environmental impacts. USDA-NRCS also agreed with the mitigation measures in the Stipulation of Settlement and proposed in the Final EA. USDA-NCRS, however, noted that the "vegetation requirements" cited in the Stipulation of Settlement have not yet been fully designed and asked that U S Rail consider three conservation practices to improve the successful establishment, long term survival, and future functional value of any new plantings at the BRT site. To ensure that U S Rail has the opportunity to take USDA-NCRS's suggestions into account in its final site plan, the Board has added a requirement for U S Rail to consult with USDA-NCRS.

In short, in reaching our decision here, we have taken into account the potential environmental impacts associated with this construction proposal by fully considering the Draft EA, Final EA, and the entire environmental record, including all of the comments received. We are satisfied that the Draft EA and Final EA have taken the requisite "hard look" at the potential environmental impacts associated with this construction proposal and that SEA's final recommended mitigation, with the addition of the condition developed in response to the comments of USDA-NCRS, is adequate to address the environmental concerns raised during the course of the environmental review.

Effective Date. On August 13, 2010, U S Rail filed a motion requesting that this decision be served within 30 days of August 10, 2010, and the exemption be made effective within 10 days of the service date. In support, U S Rail cites "significant and ongoing debt service obligations" and other costs. Inasmuch as no party has demonstrated any potential for significant environmental impacts from the proposed rail line or from the BRT site, we will make our decision effective September 20, 2010.

CONCLUSION

We find, after weighing the various transportation and environmental concerns and considering the entire record, that the petition for exemption should be granted, subject to compliance with the environmental mitigation listed in the Appendix to this decision. For the reasons discussed above, we adopt SEA's analysis and conclusions as set forth in the Draft EA and Final EA with respect to the potential environmental effects identified during the course of the environmental review. We further find that SEA's final recommended mitigation, with the additional condition developed in response to the comments of USDA-NCRS, is adequate to address the potential environmental effects identified during the environmental review process.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. U S Rail's July 27, 2010 motion to withdraw its request for clarification is granted.
2. Under 49 U.S.C. § 10502, the Board exempts the construction and operation of the above-described line and related rail facilities from the prior approval requirements of 49 U.S.C. § 10901, subject to the environmental mitigation measures set forth in the Appendix to this decision.
3. Notice will be published in the Federal Register on September 13, 2010.
4. Petitions to reconsider must be filed by September 20, 2010.
5. This decision shall be effective on September 20, 2010.

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

APPENDIX
ENVIRONMENTAL MITIGATION CONDITIONS

1. U S Rail shall comply with the terms and obligations applicable to it that are set forth in the “Stipulation of Settlement” filed with the Surface Transportation Board on April 26, 2010.
2. U S Rail shall employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils.
3. U S Rail shall develop and implement a spill prevention, control, and countermeasures plan (SPCC Plan) to ensure protection of the Nassau-Suffolk Sole Source Aquifer in the event of an accidental spill. The SPCC Plan shall be developed in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7.
4. U S Rail shall consult with the USDA Natural Resources Conservation Service at the Syracuse, New York office prior to initiating rail line construction activities at the Brookhaven Rail Terminal site.