

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision finds that certain rail track proposed to be constructed and operated in Yaphank, Suffolk County, N.Y., is spur track under 49 U.S.C. § 10906.

Decided: August 29, 2016

On April 28, 2014, Brookhaven Rail Terminal, a railroad transloading facility (BRT),² and Brookhaven Rail, LLC, a Class III rail carrier (Brookhaven Rail) (together Petitioners), filed a petition seeking issuance of a declaratory order finding that the 12,500 feet of rail track (the Track) that BRT proposes to construct and operate over in Yaphank, Suffolk County, N.Y., is excepted from the Board's licensing requirements under 49 U.S.C. § 10906.

The BRT is a railroad transloading facility with approximately 18,000 linear feet of track on a piece of property known as Parcel A, on which certain activities were licensed by the Board in 2010.³ Brookhaven Rail provides rail and transloading services, including the switching and

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

² BRT is the trade name for Brookhaven Terminal Operations, LLC. We refer to “the BRT” when referring to the actual transload facility.

³ In U S Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal, FD 35141 (STB served Sept. 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 on Parcel A, in Brookhaven (now referred to as Yaphank). Brookhaven Rail (known at the time as U S Rail New York, LLC) subsequently obtained authority for the acquisition of these construction and operation rights. See 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).

In a letter filed on March 13, 2014, the Town of Brookhaven, N.Y., requested that Docket No. FD 35141 be reopened, contending that BRT and Brookhaven Rail were not complying with
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marshalling of rail cars in the BRT. Line-haul freight rail service is provided to the BRT over the Long Island Railroad (LIRR) by New York & Atlantic Railway Company (NY&A), a Class III rail carrier that interchanges with Brookhaven Rail at the switch lead to the BRT.

In their petition, which has now been partially superseded by a subsequent filing, Petitioners explained that the Track BRT proposes to construct and operate over would be built on Parcels B and C, which are adjacent to the track and facilities located on Parcel A. Petitioners argued that the Track falls under the definition of a “spur” track under 49 U.S.C. § 10906, and thus does not require Board construction approval under 49 U.S.C. § 10901, including the corresponding environmental review that would be required under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. The petition further requested that the declaratory order find that state and local permitting and preclearance statutes and regulations are thus preempted pursuant to 49 U.S.C. § 10501(b), although as explained later, this request is no longer at issue.

The Town of Brookhaven, N.Y. (the Town) replied in opposition to the petition on May 19, 2014, although its reply has likewise been superseded by a subsequent filing.⁴ In its reply, the Town stated that it commenced a lawsuit in the New York State Supreme Court, Suffolk County, arguing that BRT, Brookhaven Rail, and Sills Road Realty, LLC, have violated state and local ordinances and have breached the 2010 Stipulation of Settlement.⁵ The suit, by stipulation of the parties, was removed to the U.S. District Court for the Eastern District of New York (the Court).⁶

Following subsequent pleadings filed by Petitioners and the Town, the Board, in a decision served on August 28, 2014, found that the Court was in the process of addressing the preemption issues raised by Petitioners and, accordingly, held this proceeding in abeyance pending a final ruling by the Court. Brookhaven Rail Terminal—Pet. for Declaratory Order, FD 35819 (STB served Aug. 28, 2014).

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the environmental mitigation requirements embraced in a 2010 “Stipulation of Settlement” agreed to by the parties and with three other environmental conditions imposed by the Board. By decision served on August 28, 2014, in that proceeding, the Board denied the petition to reopen but directed BRT and Brookhaven Rail to file evidence of compliance with the three previously imposed environmental conditions. That docket is still pending in anticipation of the Town’s notifying the Board that it consents to close the proceeding. See Town Reply, May 12, 2016, Brookhaven Rail Terminal—Pet. for Declaratory Order, FD 35141.

⁴ For a description of the arguments initially raised by the Town in its reply, see Brookhaven Rail Terminal—Petition for Declaratory Order, FD 35819, slip op. at 2-3 (STB served Aug. 28, 2014).

⁵ See supra note 3.

⁶ Town of Brookhaven v. Sills Rd. Realty LLC, No. 14-CV-02286.

On April 13, 2016, Petitioners filed a motion to end the abeyance that the Board instituted in August 2014, explaining that they have resolved their dispute with the Town. Petitioners attach an order from the Court stating that Petitioners and the Town entered into another Stipulation of Settlement. However, the Court's order asks the Board for a determination on a single question: whether Petitioners' proposed track constitutes excepted spur track under 49 U.S.C. § 10906. Petitioners likewise in their motion request that the Board enter a decision with respect to the petition's request for a declaratory order that the Track is excepted from the Board's licensing requirements under § 10906. On April 14, 2016, the Town filed a motion to withdraw its opposition in this proceeding, stating that it "does not object to the 49 U.S.C. § 10906 classification of the track area of BRT's proposed expansion."

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). To remove uncertainty with regard to the nature of the Track and in response to the Court's request, we will issue this declaratory order.⁷

Ancillary, or "excepted," track, as opposed to a railroad line, is described in 49 U.S.C. § 10906 as "spur, industrial, team, switching, or side tracks," though these terms are not defined in the statute. The Board has jurisdiction over such track, which is used in performing loading, reloading, classification, storage, and switching operations that are "incidental to but not actually and directly used" in the carrier's line-haul transportation. Nicholson v. I.C.C., 711 F.2d 365, 367-68 (D.C. Cir. 1983) (internal quotation marks omitted). However, under § 10906, the "construction, acquisition, operation, abandonment, or discontinuance" of ancillary track is statutorily excepted from the entry and exit licensing requirements of 49 U.S.C. §§ 10901 and 10903 that apply to mainlines and branch lines.

There is no single test for what constitutes excepted track under § 10906. See JGB Props., LLC—Pet. for Declaratory Order, FD 35817, slip op. at 6-7 (STB served Dec. 10, 2015). In determining whether a particular track segment is railroad line or excepted track, the agency and courts consider the intended use of the track, the track's physical characteristics, its relationship to the rail system, and the history of the track. See Nicholson; ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co. (ParkSierra), FD 34126 et al., slip op. at 5 (STB served Dec. 26, 2001). The Board's decisions have relied on certain indicia, including: the length of the line; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the line;

⁷ Although Petitioners originally requested that the Board issue a declaratory order also addressing potential preemption of state and local requirements, the Board, in this decision, addresses only whether the proposed track falls under the definition of spur track under 49 U.S.C. § 10906, as requested by Petitioners in their motion to end the abeyance.

whether there is regularly scheduled service; traffic volume; who owns and maintains the line; whether the line was constructed with light-weight rail; the condition of the line; what the line is used for (e.g., switching, loading, and unloading); and whether there are stations on the line.⁸

Under the circumstances here, we find that the Track is excepted track under §10906.⁹ Petitioners state that the intended use of the Track is to load, reload, store, and switch “rail cars incidental to the receipt and delivery of shipments for existing and similarly situated customers in the same regional market now served by BRT’s existing terminal facilities.” (Petitioners Pet. for Declaratory Order 19-20, May 9, 2014.) According to Petitioners, the Track will “expand, improve, and increase” the capacity of Parcel A’s track, and its transloading and terminal facilities and services. (*Id.* at 20.) The record also shows that the Track will not reach new regional markets or invade another rail carrier’s established territory. (*Id.* at 20.)

Additionally, the physical characteristics of the Track are those of excepted track. Brookhaven Rail currently cannot “provide short or long-haul common carrier services” over the track connecting to Parcel A, which is owned by LIRR and operated by NY&A and is “limited to interlining with the NY&A.” (*Id.* at 19.) The Track is approximately 12,500 feet in length (less than 2.5 miles) and consists of a stub-ended loop “with transloading and terminal facilities located along the stub-end of the track.” (*Id.* at 19, 22-23.) Brookhaven Rail has no regularly-scheduled service: the service on the Track will consist of “as-needed” transloading and terminal services. (*Id.*)

For these reasons, we find that the intended use and physical characteristics of the Track are typical of those associated with spur track. We therefore will grant Petitioners’ request for a declaratory order to confirm that the Track constitutes spur track under 49 U.S.C. § 10906. Because the remaining issues in Petitioners’ request for a declaratory order are moot, this proceeding will be closed.

⁸ See ParkSierra; Chi. SouthShore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind., FD 33522 (STB served Dec. 17, 1998); S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty., Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991) (revoking abandonment exemption because trackage was excepted track).

⁹ Petitioners state that at some point in the future, they, their customers, or others, would construct facilities on Parcels B and C, and they acknowledge that whether those facilities would fall under the Board’s jurisdiction remains to be seen. (Petitioners Pet. for Declaratory Order 30 n.32, May 9, 2014.) Petitioners have also stated that they intend to “initiate a future, separate declaratory order proceeding” to request that the Board find that Parcel D (which consists of land practically adjacent to Parcels B and C but separated from those parcels by LIRR track) constitutes spur track under 49 U.S.C. § 10906. (Petitioners Mot. to End Abeyance 2 n.5, Apr. 13, 2016.) In this decision, we are only addressing the nature of the Track on Parcels B and C and not making any determinations regarding facilities that may be constructed in the future on Parcels B or C, or any track or facilities on Parcel D.

It is ordered:

1. This case is removed from abeyance.
2. The petition for declaratory order is granted to the extent discussed above.
3. The Board concludes that the Track is spur and therefore is excepted from Board licensing under 49 U.S.C. § 10906.
4. The remaining issues in the petition for declaratory order are denied as moot and this proceeding is closed.
5. This decision is effective on its date of service.

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