

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35036

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

Decided: August 26, 2008

In this decision, we are denying U S Rail Corporation's petition for clarification of the Board's decision served on October 12, 2007, in this case. In that decision, the Board directed U S Rail Corporation (U S Rail) or any related entity undertaking construction of rail facilities in Yaphank or Brookhaven, NY, to immediately cease that activity and to obtain either Board authorization pursuant to 49 U.S.C. 10901(a) or a Board finding that such activity does not require Board approval. On November 16, 2007, U S Rail's motion for stay of that decision was denied. On December 20, 2007, the Board denied a petition for reconsideration of the October 12, 2007 decision filed by U S Rail and Sills Road Realty, LLC (Sills). On May 2, 2008, U S Rail filed a petition asking the Board to clarify its October 12, 2007 decision by finding that U S Rail can begin certain activities at the site of a future rail terminal (the Brookhaven Rail Terminal) free from state and local regulation. On June 4, 2008, the Town of Brookhaven (Brookhaven) filed a reply in opposition. U S Rail filed a motion to strike Brookhaven's reply on June 18, 2008,<sup>1</sup> to which Brookhaven replied on June 26, 2008. U S Rail's petition will be denied for the reasons discussed below.

BACKGROUND

U S Rail states in its petition for clarification that it plans to file with the Board a petition for authorization (through an exemption under 49 U.S.C. 10502) to construct and operate the Brookhaven Rail Terminal, a future rail terminal to be located in Brookhaven, NY, on property owned by and leased from Sills.<sup>2</sup> According to U S Rail, this facility would be used for receipt of aggregates (including stone) arriving by rail over the New York and Atlantic Railway

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<sup>1</sup> U S Rail's motion to strike will be denied. Brookhaven's evidence is relevant to the issues presented, and the objections raised by U S Rail go more to the weight to be accorded the evidence than to its admissibility.

<sup>2</sup> U S Rail subsequently filed a petition for exemption under 49 U.S.C. 10502 to construct and operate a new line of railroad and related rail facilities at the site of the Brookhaven Rail Terminal on August 7, 2008. STB Finance Docket No. 35141, U S Rail Corporation—Construction and Operation Exemption—Brookhaven Rail Terminal.

(NYAR) and subsequently transloaded into trucks for movement to recipients primarily on eastern Long Island. U S Rail states that it is in consultation with the Board's Section of Environmental Analysis (SEA) regarding the project and the environmental review that would be required. In advance of receiving construction and operation authority, U S Rail asks the Board to clarify that it can begin certain activities at the site of the Brookhaven Rail Terminal, and that those activities would not be subject to state and local permitting, zoning, and environmental requirements by virtue of the Federal preemption contained in 49 U.S.C. 10501(b). The activities include: (1) grading and removal of uneven mounds and pits to eliminate potentially unsafe conditions created as a result of prior excavation work; (2) installation of electric utilities; (3) installation of surveillance cameras, security equipment, and communications equipment; (4) installation of lighting; (5) installation of new, and maintenance of existing, fencing; and (6) use of the site for temporary structures such as trailers.

U S Rail states that it is a rail carrier and that it would be providing transportation for compensation upon the inception of operations at the Brookhaven Rail Terminal. U S Rail maintains that, based on its existing operations in Ohio, the Board can find that its six proposed activities in Brookhaven would qualify for Federal preemption under 49 U.S.C. 10501(b), and that the fact that U S Rail has not yet filed a petition for a construction and operation exemption should not prevent the Board from ruling on the scope of Federal preemption for these activities.

In reply, Brookhaven argues that U S Rail's petition for clarification is premature and that, under the circumstances presented here, the Board should not determine whether the proposed activities can go forward, or come within the scope of Federal preemption, in advance of determining whether to authorize U S Rail's proposed rail construction. Brookhaven contends that U S Rail is attempting to begin the proposed activities without oversight or authority from any governing agency—federal, state or local. Brookhaven alleges that this project would involve potentially significant environmental impacts and that the proposed activities U S Rail would like to begin require environmental oversight. Finally, Brookhaven asserts that there is a serious question as to whether the activities U S Rail proposes undertaking at the Brookhaven Rail Facility would constitute rail transportation by a rail carrier and therefore fall within the Board's jurisdiction. For all of these reasons, it asks that the Board deny the petition for clarification, because it is an attempt to circumvent the Board's prior decisions in this case and is premature.

## DISCUSSION AND CONCLUSIONS

U S Rail has filed its "petition for clarification" under the Board rule at 49 CFR 1117.1, which provides an avenue for relief not otherwise provided for in any other rule. The petition is in the nature of a petition for declaratory order under 5 U.S.C. 554(e) and 49 U.S.C. 721 to eliminate a controversy or remove uncertainty. We will address the issues U S Rail has raised, but we cannot and will not make all of the findings it requests. Therefore, U S Rail's petition will be denied.

To come within the Board’s jurisdiction, an activity must constitute transportation and must be performed by, or under the auspices of, a rail carrier. See 49 U.S.C. 10501(a)(1); Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004); Fla. E. Coast Ry. v. City of Palm Beach, 266 F.3d 1324 (11th Cir. 2001). Transportation is defined to include a “facility” related to the movement of property by rail. 49 U.S.C. 10102(9)(A). To be within the Board’s jurisdiction, a facility must be closely related to, and indeed part of, a railroad’s ability to provide direct rail service. Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ, STB Finance Docket No. 34192, slip op. at 4 (STB served Nov. 20, 2002); Borough of Riverdale—Petition for Declaratory Order, 4 S.T.B. 380, 389 (1999). “Rail carrier” is defined as a person providing “common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5). Where the Board has jurisdiction over transportation by rail carrier, that jurisdiction is “exclusive,” 49 U.S.C. 10501(b), and state and local laws and regulations are generally preempted. This preemption, however, does not prevent state and local governments from imposing appropriate health and safety regulations and exercising their police powers in a manner that is non-discriminatory and does not unreasonably interfere with interstate commerce. Federal environmental laws also generally are not preempted.

Here, Federal preemption does not apply to any of the six enumerated activities described by U S Rail at the Brookhaven Rail Terminal. Although it is a licensed rail carrier elsewhere, U S Rail cannot operate as a rail carrier at the Brookhaven Rail Terminal because, as explained in the Board’s December 20, 2007 decision in this proceeding (at 5), there is no evidence that this facility is in any way connected to the carrier’s existing operations in Ohio. The proposed construction and operations in Brookhaven are located hundreds of miles from U S Rail’s operations in Ohio, and there is no evidence that U S Rail presently has authority to operate over the track of NYAR in the vicinity of the Brookhaven Rail Terminal.

U S Rail’s six proposed activities therefore do not come within the scope of any license issued by this agency. Petitioner’s statement that it planned to file a petition for construction and operation authority for this facility, its subsequent filing of such a petition, and its initiation of the environmental review process with SEA, provide no support for a claim that the proposed activities are somehow sanctioned by Board authority. Thus, section 10501(b) preemption does not apply to any of petitioner’s enumerated activities at the planned Brookhaven Rail Terminal. U S Rail’s request that we clarify that application of state and local law to the six enumerated activities is federally preempted must therefore be denied.<sup>3</sup>

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<sup>3</sup> This case differs from DesertXpress Enterprises, LLC—Petition for Declaratory Order, Finance Docket No. 34914 (STB served June 27, 2007), on which U S Rail relies. There, the petitioner, DesertXpress, sought guidance as to whether its activities, following receipt of a Board license, would be preempted from state and local laws. Here, U S Rail is seeking a finding that unlicensed activities would be preempted from state and local regulation.

At the same time, we note that it does appear that some of the activities U S Rail seeks to perform at the Brookhaven Rail Terminal could be undertaken without Board approval or oversight, as they are activities any landowner could perform, consistent with applicable state and local law, irrespective of the Board's jurisdiction. Based on the description provided by U S Rail, activities (2) through (6) enumerated above appear to be designed to enhance the safety, security, and utility of the property, regardless of whether rail construction is subsequently undertaken. Thus, those activities do not fall within the prohibition of our October 12, 2007 cease and desist order. As for activity (1)—grading and removal of uneven mounds and pits—whether that activity is within the scope of the Board's October 12, 2007 cease and desist order would seem to depend on what type of construction is planned; grading necessary to remedy unsafe conditions would not be subject to our cease and desist order, while grading in preparation for rail construction activities would be. In any event, however, we emphasize that, as discussed above, to the extent U S Rail wishes to engage in any of activities (1) – (6) prior to obtaining from the Board the rail construction and operation authority it is seeking, the application of state and local law to those activities is not federally preempted. Thus, those activities would be subject not just to regulation under the state and local governments' police powers, but to the full panoply of state and local law and regulation that would apply to any non-railroad entity conducting those activities.

It would be inappropriate to opine further on the scope of Federal preemption for the planned activities at the Brookhaven Rail Terminal unless and until U S Rail obtains authorization from this agency to construct and operate rail facilities at the Brookhaven Rail Terminal.

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 motion to strike is denied.
2. U S Rail's petition for clarification is denied.

3. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary