

SERVICE DATE – OCTOBER 23, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36398

BROOKHAVEN RAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—IN
SUFFOLK COUNTY, N.Y.

Docket No. FD 36399¹

BROOKHAVEN RAIL LLC—PETITION FOR EXEMPTION FROM REQUIREMENTS OF
49 U.S.C. § 10909

Digest:² In this decision, the Board finds that Brookhaven Rail LLC (Brookhaven Rail) should file an application to obtain a solid waste rail transfer facility land-use-exemption permit and rejects Brookhaven Rail's petition for exemption from the prior approval requirements of 49 U.S.C. § 10909. The Board also declines to act at this time on Brookhaven Rail's request, in a related petition for exemption for rail line construction and operation authority, that the Board issue a ruling on the transportation merits of the rail construction before examining the environmental impacts.

Decided: October 23, 2020

Brookhaven Rail LLC (Brookhaven Rail), a Class III rail carrier, has filed two petitions for exemption in furtherance of a planned solid waste rail transfer facility, which would be owned by Brookhaven Rail and for which Brookhaven Rail intends to provide rail service. In the petition filed on June 25, 2020, in Docket No. FD 36398 (Construction Petition), Brookhaven Rail seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for Brookhaven Rail to construct and operate approximately 23,680 feet of new rail line (the Line) to be located on Parcel D of the Brookhaven Rail Terminal (Terminal) in the Town of Brookhaven (Town) on Long Island, N.Y. (Constr. Pet. 1, 4, 5, FD 36398.)³

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

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

³ The Terminal includes four parcels of land, totaling 355 acres, which historically have been referred to as Parcels A, B, C, and D. (Constr. Pet. 2, FD 36398.) The parcels are adjacent

Brookhaven Rail states that, while its long-term plan for Parcel D is to establish transloading and other rail-served activities similar to those it now provides on Parcel A of the Terminal, the immediate purpose of the Line is to serve a planned solid waste rail transfer facility that it would own and potentially operate. (*Id.* at 5.) According to Brookhaven Rail, a local landfill will close in 2024, and the planned facility, which would handle and process for rail transportation construction and demolition (C&D) debris and municipal solid waste (MSW), is needed to provide replacement capacity. (*Id.* at 5, 8, 17-18.)

In the petition filed on July 27, 2020, in Docket No. FD 36399 (Facility Petition), Brookhaven Rail seeks an exemption “from the full requirements of 49 U.S.C. § 10909 and . . . 49 C.F.R. [part] 1155 subpart C . . . for a ‘land-use-exemption permit’ in conjunction with the construction, ownership and operation of a ‘solid waste rail transfer facility.’” (Facility Pet. 1, FD 36399 (footnotes omitted).) This permit would exempt Brookhaven Rail from a local zoning law that Brookhaven Rail claims would otherwise prevent such a facility from being constructed on Parcel D. (*Id.* at 17-18.) Brookhaven Rail notes that one of the activities at the facility would be recycling MSW and C&D debris, and it asks the Board to clarify that the permit would encompass such activities.⁴ (*Id.* at 11-12, 27-32.)

In both dockets, Brookhaven Rail asks that the Board, in considering its petitions, follow a two-step approach, addressing the transportation merits of the project in advance of the environmental impacts. (Constr. Pet. 17-18, FD 36398; Facility Pet. 32-33, FD 36399.) Brookhaven Rail claims that this approach would aid it in, among other things, acquiring Parcel D and having the facility constructed and operational before the anticipated 2024 landfill closure. (Constr. Pet. 17-18, FD 36398; Facility Pet. 32-33, FD 36399.)

On July 15, 2020, Sills Road Realty LLC (Sills Road), Brookhaven Terminal Operations LLC (BTO), and Brookhaven Rail Freight Services LLC (BRFS) (collectively, the Sills Parties)⁵

to the mainline of the Long Island Rail Road Company (LIRR), which runs in a generally east-west direction from Greenport, Suffolk County, N.Y., to New York City. (*Id.*) The New York & Atlantic Railway (NY&A) is LIRR’s designated operator of LIRR’s mainline for freight rail services, and Brookhaven Rail interchanges traffic with NY&A and delivers the traffic to and from shippers on Parcel A. (*Id.* at 2-3.)

⁴ Brookhaven Rail clarifies in the Facility Petition that it would be the owner of the tracks, buildings, and other structures and permanent fixtures comprising the facility and that an affiliate of Brookhaven Rail, Winters Brothers Waste Systems of Long Island LLC (Winters Brothers), would be the operator of the facility pursuant to an operation and maintenance contract with Brookhaven Rail. (Facility Pet. 2, 9, FD 36399.) The current plans call for Winters Brothers to manage both operational requirements and contractual arrangements for the acceptance of inbound waste commodities delivered by truck, as well as making all necessary arrangements for the rail shipment of processed MSW, C&D debris, and marketable recyclables from the facility. (*Id.*) Brookhaven Rail states that it would coordinate with Winters Brothers to provide rail services related to the loading and movement of railcars within the facility. (*Id.*)

⁵ According to the Sills Parties, Sills Road is the majority controlling owner of BTO, which in turn owns BRFS. The Sills Parties state that Sills Road owns Parcel A (and the tracks

filed in opposition to the Construction Petition, and on August 17, 2020, the Sills Parties filed in opposition to the Facility Petition. The Sills Parties argue that the Board should reject the Construction Petition as premature, incomplete, and materially misleading (among other reasons), or, in the alternative, hold the proceeding in abeyance subject to “extensive supplementation” in specific areas. (Sills Parties Reply 2-3, FD 36398, July 15, 2020.) They argue that the Board should reject the Facility Petition as contrary to the purpose and intent of 49 U.S.C. §§ 10501(c)(2)(b), 10908, and 10909, arguing, among other things, that Brookhaven Rail’s request for a land-use-exemption permit under § 10909 cannot be obtained through § 10502. (Sills Parties Reply 2-3, 15-17, FD 36399, Aug. 17, 2020.) They further argue that, at a minimum, the Board should defer action on both petitions, claiming that neither petition is ripe because there are unresolved questions surrounding Brookhaven Rail’s plans. Specifically, the Sills Parties claim that Sills Road is currently litigating in state court whether Brookhaven Rail can purchase Parcel D. (Sills Parties Reply 12, FD 36398, July 15, 2020; Sills Parties Reply 20-22, FD 36399, Aug. 17, 2020.) In addition, according to the Sills Parties, litigation has commenced in federal court partially related to whether Brookhaven Rail can change a prior plan and construct track over an existing conservation easement on Parcel D to reach the LIRR/NY&A mainline. (Sills Parties Reply 11, FD 36398, July 15, 2020; Sills Parties Reply 18-20, FD 36399, Aug. 17, 2020.)

Brookhaven Rail responded in opposition to the Sills Parties on August 4, 2020, in Docket No. FD 36398 and on August 31, 2020, in Docket No. FD 36399. On September 11, 2020, the Town filed in both dockets (1) a reply to the Facility Petition, in which it claims that it is “prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate,” (Town Reply 5, FD 36398 & 36399), and (2) a supplement to earlier submissions to the Board’s Office of Environmental Analysis in both dockets.⁶ On September 15, 2020, the Sills Parties responded to the August 31, 2020 filing by Brookhaven Rail in Docket No. FD 36399.

CCE replied in opposition to the Facility Petition on September 16, 2020, arguing, among other things, that Brookhaven Rail has not demonstrated that it meets the statutory requirements of § 10909 and that the first request for authority under § 10909 should not occur under a § 10502 exemption process. (CCE Reply 16-23, 30-33, FD 36399.) CCE asserts that there is no urgent need for a new facility to transfer MSW to rail for removal off Long Island because the landfill in the Town that is closing in 2024 does not accept MSW and has not for several decades. (*Id.* at 23-26.) Rather, that material is incinerated and stored as ash or recycled, and when existing storage capacity becomes depleted, the Town’s plan is to expand to additional land. (*Id.* at 24.) CCE claims that the Town has obtained state funding to expand its landfill storage capacity on nearby land to create a new 5.5 million cubic yard ashfill, and to construct an enhanced ash recycling facility, on 45 acres that will provide at least 12 additional years of

on it) and Parcel C and has a long-term lease for Parcel B, and that Brookhaven Rail operates within the Terminal pursuant to an operating agreement with BRFS. (Sills Parties Reply 4, FD 36398, July 15, 2020.)

⁶ On August 14, 2020, the Citizens Campaign for the Environment (CCE) filed, in Docket No. FD 36399, an unopposed request to extend the deadline for replies to the Facility Petition to September 16, 2020, which the Board granted on August 17, 2020.

disposal capacity beyond the remaining life of the Town's landfill. (*Id.*) CCE also claims that there is no urgent need for a new facility to handle C&D debris because there are already numerous C&D debris processing facilities, transfer stations, and recycling facilities that can accept C&D debris on Long Island. (*Id.* at 25.) According to CCE, there is no crisis, and Brookhaven Rail's real plan is not to promote recycling of C&D waste, but instead to establish a local monopoly in the receipt, processing, recycling, and transportation of solid waste to distant landfills. (*Id.* at 25-26.)

Additionally, CCE claims that Brookhaven Rail has failed to demonstrate that its activities would constitute transportation by or on behalf of a rail carrier as required by § 10909. (*Id.* at 43.) CCE notes that activities at the facility would be conducted by Winters Brothers, a non-railroad, which would manage the operations, while Brookhaven Rail would only be moving loaded and unloaded rail cars. (*Id.* at 44.) As such, CCE claims that the proposed operations would not be conducted by a railroad, or even by an agent under the control of the railroad, but rather, by a solid waste processing company performing its own business. (*Id.*) CCE also asserts that there would be extensive handling and manipulation of MSW and C&D waste at the facility and that much of the activity is not necessary for and therefore not integral to rail transportation, including sorting and shredding materials in furtherance of the sale of recyclables. (*Id.* at 45-46.) CCE argues that Brookhaven Rail has failed to show that these recyclables actually would travel by rail and that, under the circumstances, the Board should closely scrutinize whether the proposed activities actually involve the transportation of waste by a rail carrier or whether they are ancillary to transportation and hence not subject to the Board's jurisdiction, citing New England Transrail—Construction, Acquisition & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797 (STB served July 10, 2007). CCE further claims that, despite Brookhaven Rail's suggestion to the contrary, this precedent has not been superseded by the subsequent enactment of the land-use-exemption permitting process under § 10909. (CCE Reply 46-47, FD 36399.)

On September 22, 2020, CCE submitted a letter in Docket No. FD 36398 asking that the reply it filed in opposition to the Facility Petition in Docket No. FD 36399 be included in Docket No. FD 36398, the docket concerning the Construction Petition, as well because the issues in both dockets are "inextricably connected and inescapably intertwined." (CCE Letter 1, FD 36398.) CCE further asks that the Construction Petition be denied or that that proceeding be held in abeyance pending resolution of the issues concerning the Facility Petition. (*Id.* at 3.) On September 23, 2020, Brookhaven Rail replied in opposition to CCE's letter in Docket No. FD 36398, arguing that its late-filed request should be denied and that the rail line construction project has utility independent of the solid waste rail transfer facility project.

On September 28, 2020, State Assemblyman Steven Englebright filed a letter in Docket No. FD 36399 in support of CCE and in opposition to the Facility Petition. Assemblyman Englebright disputes Brookhaven Rail's claim that there is a "crisis," reiterates that the facility has not accepted MSW for decades, and asserts that "the closure of the Brookhaven Landfill does not create a waste emergency for C&D [debris] or ash that would justify streamlining or expediting the approval process" for the proposed facility. (Assemblyman Letter 3, FD 36399.) He also asserts that the facility would pose significant environmental risks to Long Island's residents, its sole-source aquifer, and its natural resources. He asks that the Board reject or deny

the Facility Petition and allow the review and siting of any such proposed solid waste transfer facility to be overseen and directed at the local level in the first instance. (*Id.* at 4.)

CCE, in an October 1, 2020 filing in Docket No. FD 36399 that it describes as a supplement to its September 16 filing in the same docket, submitted information about what it describes as “an alternative, superior” transloading facility on Long Island “that is actively being developed.” (CCE Suppl. 2, FD 36399.) On October 5, 2020, in Docket No. FD 36399, Brookhaven Rail filed an opposition in response to CCE’s September 16 filing in that docket. On October 15, 2020, the Town filed in Docket No. FD 36398 in opposition to CCE’s September 22, 2020 filing in that docket. Also on October 15, 2020, Brookhaven Rail filed, in Docket No. FD 36399, a response raising concerns about CCE’s October 1, 2020 supplement in that docket.

PRELIMINARY MATTERS

On September 23, 2020, the Director of the Office of Proceedings instituted a proceeding under 49 U.S.C. § 10502(b) in Docket No. FD 36398. That decision did not address various filings in that docket that were late-filed or not authorized by the Board’s regulations, instead stating that the Board would issue a subsequent decision addressing the requests by parties and procedural matters. Since that time, the Board has received additional filings in both dockets. In the interests of a complete record in these proceedings, all filings received to date in Dockets No. FD 36398 and 36399 will be accepted.⁷

DISCUSSION AND CONCLUSIONS

As explained below, the Board will require an application under § 10909 and reject the Facility Petition. As to the Construction Petition, the Board will decline to act at this time on Brookhaven Rail’s request to examine the transportation merits of the proposed rail construction before examining the environmental impacts.

Facility Petition. The Clean Railroads Act of 2008 (CRA), Pub. L. No. 110-432, 122 Stat. 4848, amended 49 U.S.C. § 10501(c)(2)(B) to restrict the Board’s jurisdiction over solid waste rail transfer facilities. The CRA also added three new statutory provisions—49 U.S.C. §§ 10908-10910—that address the Board’s regulation of such facilities, which is now limited to the issuance of “land-use-exemption permits” in certain circumstances. *See* 49 U.S.C. §§ 10908-10; Solid Waste Rail Transfer Facilities (Solid Waste Rail Transfer Facilities 2012), EP 684, slip op. at 1 (STB served Nov. 20, 2012). The Board may only issue a land-use-exemption permit if it determines that the facility does not pose an unreasonable risk to public health, safety, or the environment at that location, after weighing the facility’s potential benefits to and adverse impacts on public health, public safety, the environment, interstate commerce, and the transportation of solid waste by rail. *See* § 10909(c). The CRA enumerated six factors for the

⁷ In light of the Board’s acceptance of CCE’s September 22 filing into the record in Docket No. FD 36398, CCE’s September 16 filing in Docket No. FD 36399 will likewise be incorporated into the record in FD 36398. Not only will this make for a more complete record, but it is appropriate because the two proceedings are intertwined.

Board to consider, as well as “any other relevant factors, as determined by the Board,” in a land-use-exemption proceeding. See § 10909(d); Solid Waste Rail Transfer Facilities (Solid Waste Rail Transfer Facilities 2009), EP 684, slip op. at 3 (STB served Jan. 14, 2009).⁸

First, the Board notes, as CCE also points out, (CCE Reply 16, FD 36399), the unusual nature of Brookhaven Rail’s request for exemption from the full requirements of § 10909 given that this is the first time the agency has been asked to issue a land-use-exemption permit. The Board did not specifically address the interplay of the CRA and its exemption authority under § 10502(a) when adopting regulations in Solid Waste Rail Transfer Facilities, Docket No. EP 684. Indeed, the regulations at part 1155 only address applications and do not specifically discuss petitions for exemption. Second, the filings have raised concerns regarding the proposed rail transportation facilities and equipment and whether they will be operated “without detriment to public health and safety.” See 49 U.S.C. §§ 10101(8), 10909(c) (requiring the Board to weigh impacts to, among other things, public health and safety under the CRA); see, e.g., CCE Reply 19-20, 34-38, FD 36399.) The purpose of the CRA is to require solid waste rail transfer facilities to comply with applicable federal and state requirements concerning, inter alia, public health and safety, except where the Board issues “land-use-exemption permits, which preempt state and local laws and regulations ‘affecting the siting’ of such facilities.” Solid Waste Rail Transfer Facilities 2009, EP 684, slip op. at 2. Although the Facility Petition states that the Town does not object to having its zoning regulation preempted, (Facility Pet. 21, FD 36399), the Town’s subsequent filing casts some doubt on that assertion, (see Town Reply 5, FD 36398 & FD 36399, Sept. 11, 2020). Therefore, under these circumstances, Brookhaven Rail’s petition for exemption under § 10502 from the prior approval requirements at § 10909 in Docket No. FD 36399 is rejected. If Brookhaven Rail wishes to seek approval from the Board, it must file an application under 49 C.F.R. part 1155 and provide all the information required under the statute and the Board’s regulations.

CCE questions whether Brookhaven Rail would be acting as a rail carrier at the facility and whether the recycling activities would fall within the Board’s jurisdiction. (CCE Reply 43-47, FD 36399.) Brookhaven Rail asserts in response that it would own the facility and contract out much of the operations to Winter Brothers. These arguments raise the question of whether the activities at the proposed facility would constitute “transportation by rail carrier” under the Board’s jurisdiction. 49 U.S.C. § 10501(a). For operations at a facility to be part of

⁸ Section 10909(d) lists the factors as: (1) the land-use, zoning, and siting regulations or solid waste planning requirements of the State or State subdivision in which the facility is or will be located that are applicable to solid waste transfer facilities, including those that are not owned or operated by or on behalf of a rail carrier; (2) the land-use, zoning, and siting regulations or solid waste planning requirements applicable to the property where the solid waste rail transfer facility is proposed to be located; (3) regional transportation planning requirements developed pursuant to Federal and State law; (4) regional solid waste disposal plans developed pursuant to State or Federal law; (5) any Federal and State environmental protection laws or regulations applicable to the site; (6) any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility; and (7) any other relevant factors, as determined by the Board.

transportation by rail carrier, the rail carrier must exert sufficient control over those operations. See, e.g., N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 73-75 (2d Cir. 2011) (affirming the Board’s determination concerning whether a rail carrier sufficiently controlled the operations of a contractor in order for those activities to be transportation by rail carrier). Indeed, under the CRA, the Board may only grant a land-use-exemption permit to a facility that is “operated by or on behalf of a rail carrier.” 49 U.S.C. § 10909(a). The Board has found that the CRA did not intend to expand the Board’s jurisdiction, and in order to be eligible for a land-use-exemption permit, the solid waste rail transfer facility must come within the Board’s jurisdiction over “transportation by rail carrier” in § 10501(a). Solid Waste Rail Transfer Facilities, EP 684, slip op. at 9, 17 (STB served Mar. 24, 2011); Solid Waste Rail Transfer Facilities 2012, EP 684, slip op. at 2. Therefore, if Brookhaven Rail files an application under 49 U.S.C. § 10909, it will need to explain, as part of that application, 49 C.F.R. § 1155.21(a)(13), the degree of control it will exercise over the operations at the facility, addressing the factors the Board has utilized in previous decisions concerning whether a rail carrier exercises sufficient control for the operations to be considered part of transportation by rail carrier and therefore within the Board’s jurisdiction under § 10501(a). See N.Y. & Atl. Ry., 635 F.3d at 73-75, aff’g Town of Babylon—Pet. for Declaratory Order, FD 35057 (STB served Oct. 16, 2009), Town of Babylon—Pet. for Declaratory Order, FD 35057 (STB served Sept. 26, 2008), and Town of Babylon—Pet. for Declaratory Order, FD 35057 (STB served Feb. 1, 2008); City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157 (STB served Feb. 17, 2009); Hi Tech Trans, LLC—Pet. for Declaratory Order—Newark, N.J., FD 34192 (Sub-No. 1) (STB served Aug. 14, 2003).

As for CCE and Brookhaven Rail’s dispute about the recycling activities that would occur at the facility, Brookhaven Rail states that, in addition to recycling activities, other activities such as transloading MSW and C&D debris from trucks to rail cars are planned for the facility, (Facility Pet. 11-12, FD 36399), and those activities may fall within the Board’s jurisdiction and be suitable for consideration under a § 10909 application. See New England Transrail, FD 34797, slip op. at 10, 14. Because there is activity that may be appropriate for consideration in a § 10909 application, the Board need not resolve the questions about recycling activities at the outset.⁹

Construction Petition. In Docket No. FD 36398, Brookhaven Rail asks the Board to adopt a two-step approach, addressing the transportation merits of the Line before examining the environmental impacts. The Board declines to address Brookhaven Rail’s request at this time, but will do so in a future decision should Brookhaven Rail submit a complete application in Docket No. FD 36399.

Mediation Request. On October 22, 2020, in Docket No. FD 36399, the Town and Brookhaven Rail jointly filed a request for Board sponsored mediation, stating that the petition for exemption in that docket raises a number of complex issues and questions and that they hope mediation would help provide clarity and mutual agreement on some of these matters. Although the Board is rejecting the petition in Docket No. FD 36399, the Board favors the resolution of

⁹ Indeed, the Board has noted “[a] property could host different activities subject to varying levels of Board jurisdiction, or host activities not within the Board’s jurisdiction at all.” Solid Waste Rail Transfer Facilities 2009, EP 684, slip op. at 5.

disputes through mediation in lieu of formal Board proceedings whenever possible. See 49 C.F.R. § 1109.1. Therefore, the Town and Brookhaven Rail may inform the Board whether they would like to seek Board-sponsored mediation in Docket No. FD 36398, by November 6, 2020.¹⁰

It is ordered:

1. All motions for leave to file are granted, and all filings to date are accepted into the record in which they were filed.
2. Brookhaven Rail's petition for exemption in Docket No. FD 36399 is rejected.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹⁰ The scope of mediation would not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.