

SERVICE DATE – JUNE 16, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36376

SPECTRUM RR HOLDINGS, LLC—OPERATION EXEMPTION—RAILROAD LINE IN
THE TOWN OF BROOKHAVEN, N.Y.

Docket No. FD 36384

SILLS ROAD REALTY LLC—ACQUISITION EXEMPTION—RAILROAD LINE IN THE
TOWN OF BROOKHAVEN, NEW YORK

Docket No. FD 36385¹

SPECTRUM RR HOLDINGS, LLC—ACQUISITION & OPERATION EXEMPTION—LINE
OF SILLS ROAD REALTY LLC, IN THE TOWN OF BROOKHAVEN, NEW YORK

Decided: June 15, 2020

On February 13, 2020, Sills Road Realty LLC (Sills Road), a noncarrier, filed a verified notice of exemption in Docket No. FD 36384 under 49 C.F.R. §1150.31, seeking acquisition authority for its ownership of 16,710 feet of track (the Line) currently operated by Brookhaven Rail, LLC (Brookhaven Rail), on a site known as the Brookhaven Rail Terminal (BRT) in Brookhaven, Suffolk County, N.Y.² Sills Road’s subsidiary, Spectrum RR Holdings, LLC (SRHL), also a noncarrier, simultaneously filed a verified notice of exemption in Docket No. FD 36385 under 49 C.F.R. §1150.31, to acquire the Line from Sills Road and operate it.

At the same time, Sills Road and SRHL jointly filed a motion (Joint Motion) asking that the Board partially dismiss their verified notices (the Notices). They ask the Board to find that an approximately 2,502-foot (or 0.47-mile) segment of the Line, known as the “Main Stem,” is rail line under 49 U.S.C. § 10901 and that the remainder of the Line is excepted track under 49 U.S.C. § 10906. By decision served on March 13, 2020, the effective date of the exemptions was postponed until further order of the Board, to provide sufficient time for the Board to fully consider the verified notices and the arguments presented.

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

² The underlying real property that comprises the BRT consists of three separate, but generally contiguous, parcels of land known as Parcel A, Parcel B, and Parcel C. (Sills Road Verified Notice 1.) The track at issue here is located on Parcel A. (*Id.* at 5.)

For the reasons discussed below, the Board will reject the Notices, deny the Joint Motion as moot, and grant a motion by SRHL to withdraw a separate verified notice of exemption it filed on December 20, 2019, in Docket No. FD 36376, seeking authority to operate the Main Stem. The Board also will identify certain information that would be needed should Sills Road renew its requests for authority under more appropriate procedures, as explained below.

BACKGROUND

In 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) to construct and operate an approximately 18,000-foot rail line on Parcel A of the BRT. See U S Rail Corp.—Constr. & Operation Exemption—Brookhaven Rail Terminal, FD 35141 (STB served Sept. 9, 2010). In that decision, the Board identified Sills Road as the owner of the underlying property on which the proposed rail line would be constructed by U S Rail. U S Rail Corp., FD 35141, slip op. at 1. U S Rail assigned its construction and operation authority together with a leasehold interest in the underlying property to U S Rail New York, LLC (U S Rail NY). U S Rail NY was subsequently renamed Brookhaven Rail, LLC. See Nev. 5, Inc.—Control Exemption—GTR Leasing LLC, FD 35635 (STB served June 15, 2012); Hall—Corp. Family Transaction Exemption—U S Rail N.Y., LLC, FD 35458 (STB served Jan. 7, 2011).

On December 20, 2019, SRHL filed, in Docket No. FD 36376, a verified notice of exemption to operate the Main Stem. According to SRHL, Sills Road had decided to install SRHL in the BRT to provide common carrier service in place of Brookhaven Rail. (SRHL Verified Notice 2, Dec. 20, 2019.) SRHL stated that the BRT contains roughly 16,850 feet of track but that it was only seeking authority to operate 2,502 feet (or 0.47 miles) because the remainder of the track is yard track excepted from Board licensing under 49 U.S.C. § 10906. (*Id.* at 5, Ex. A.) SRHL also stated that all 16,850 feet of track is owned by Sills Road. (*Id.* at 2.)

In a decision served on January 17, 2020, the effective date of the exemption was postponed pending further Board order, and SRHL was directed to provide certain additional information. However, rather than filing a supplement with the requested information, SRHL instead filed a motion on February 6, 2020, to withdraw its verified notice.

On February 13, 2020, Sills Road and SRHL filed the Notices and the Joint Motion described above. Sills Road states that although U S Rail was the entity that sought and obtained Board authority to construct 18,000 feet of track on Parcel A of the BRT, it was actually Sills Road that constructed the Line and has owned the Line since construction. (Sills Road Verified Notice 1-3.) In addition, Sills Road notes that it did not construct the entire 18,000 feet of track that U S Rail was authorized to construct but rather chose to construct only 16,710 feet of track. (*Id.* at 3.) According to Sills Road, it should have obtained Board authority to own the Line and its verified notice “is designed to secure remedial authorization to own the Line.” (*Id.* at 7.) Sills Road states that it expects to be a Class III carrier once its ownership of the Line is authorized. However, it plans to transfer ownership of the Line to its subsidiary, SRHL. (*Id.* at 4.)

SRHL states that it seeks authority to acquire the Line from Sills Road once Sills Road's ownership of the Line is authorized by the Board. (SRHL Verified Notice 1, Feb. 13, 2020.) Although SRHL also seeks authority to operate the Line, it states that it has no immediate plans to commence rail operations over the Line, either in place of or alongside the current operator, Brookhaven Rail. (Id. at 4.)

On March 3, 2020, Brookhaven Rail requested that the Board reject the Notices and dismiss the Joint Motion as moot. Brookhaven Rail argues that the Notices should be rejected because they do not involve the type of routine and non-controversial transactions for which the class exemption process was designed. (Brookhaven Rail Reply 8-10.) Brookhaven Rail claims that Sills Road's attempt to displace Brookhaven Rail as the operator on the Line against its wishes, without any justification for removing it, is neither routine nor non-controversial. (Id. at 8-9.) Additionally, Brookhaven Rail disagrees with Sills Road's assertion that U S Rail had no role in overseeing or managing the construction of the Line and its assertion that Sills Road alone constructed all of the track. (Id. at 4.) Brookhaven Rail does not dispute that Sills Road owns the Line but states that when U S Rail obtained construction and operation authority for the Line, Sills Road chose to be merely a noncarrier owner of the Line and did not seek to acquire any status as a common carrier. (Id. at 3-5, 9-10.) According to Brookhaven Rail, Sills Road's attempt to now obtain a residual common carrier obligation on the Line after originally choosing to be a noncarrier owner without any "legal rights *vis a vis* the use or disposition of the common carrier obligation" makes this matter non-routine and controversial. (Id. at 9-10.) Brookhaven Rail also states that the Joint Motion raises evidentiary and legal issues that the class exemption process was not designed to address and that it should be dismissed as moot if the Notices are rejected. (Id. at 11-12.)

On March 13, 2020, New York & Atlantic Railway Company (NYA), a Class III carrier, filed a submission in Docket No. FD 36385, arguing that the transactions proposed by SRHL are not the type of routine and non-controversial transactions for which the notice of exemption procedures are intended. (NYA Reply 3.) NYA explains that it connects to and interchanges traffic with Brookhaven Rail at the BRT. (Id. at 1.) According to NYA, before SRHL is granted operating authority, the Board should determine whether SRHL's operations at the BRT would result in adverse consequences for NYA's operations. (Id. at 2.)³

As noted above, on March 13, 2020, the Board issued a decision postponing the effective date of the exemptions to give sufficient time to consider the Notices and the arguments presented.

On March 23, 2020, Sills Road and SRHL filed a joint reply (Joint Reply) arguing that the Board should deny the requests of Brookhaven Rail and NYA to reject the Notices. The

³ NYA has petitioned to intervene in Docket No. FD 36385 pursuant to 49 C.F.R. § 1112.4. (NYA Reply 3.) The Board does not typically require a petition to intervene when a party seeks the rejection of a verified notice of exemption. See, e.g., FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155, slip op. at 1-2 (STB served Aug. 8, 2008) (granting a petition to reject from a party that had not filed a petition to intervene). Accordingly, NYA's petition to intervene will be denied as moot.

Joint Reply contends that the Notices are not defective, false, or misleading, or abusive of the Board's processes, and do not involve transactions that the parties are not entitled to undertake. (Joint Reply 4-5.) According to the Joint Reply, Brookhaven Rail's and NYA's requests to reject the Notices are based on their belief that Sills Road and SRHL intend to remove Brookhaven Rail from the Line. (*Id.* at 7-8.) The Joint Reply claims that the potential removal of Brookhaven Rail is beyond the scope of this proceeding and that Board precedent does not support rejection of the Notices. (*Id.* at 8-16.) The Joint Reply further argues that the degree to which U S Rail oversaw or managed construction of the Line is not relevant to this proceeding and that Brookhaven Rail fails to provide any evidence that U S Rail was involved in the construction. (*Id.* at 17.) Finally, the Joint Reply asserts that, contrary to the claims of Brookhaven Rail, the Joint Motion is appropriate for the Board to address in the context of the Notices and that the Board should consider the Notices independent of whether it intends to grant or deny the Joint Motion. (*Id.* at 18-19.)

DISCUSSION AND CONCLUSIONS

The Board's streamlined class exemption procedures are reserved for transactions involving routine, uncomplicated, and non-controversial matters. Tri-City R.R.—Lease & Operation Exemption—N. Pac. Dev., LLC, FD 36170, slip op. at 1 (STB served Mar. 21, 2018); V&S Ry.—Aban. Exemption—in Kiowa Cty., Colo., AB 603 (Sub-No. 3X), slip op. at 2 (STB served June 17, 2014). Notices raising unresolved issues or questions that require considerable scrutiny may be rejected. *E.g.*, V&S Ry., AB 603 (Sub-No. 3X), slip op. at 2.

This case is not the type of routine, uncomplicated, and non-controversial matter for which the class exemption procedures were designed. Indeed, seeking acquisition authority to remedy a prior unauthorized construction of a rail line is unusual, and Sills Road and SRHL have not cited to any precedent where the Board has granted such authority. Use of the class exemption process is not appropriate in such circumstances. Providence & Worcester R.R.—Acquis. & Operation Exemption—Certain Rights of Consol. Rail Corp., FD 33132, slip op. at 1 (STB served Sept. 27, 1996) (finding that the proposed transaction “appears to be without precedent” and that “[t]he expedited notice of exemption procedure, designed to process routine acquisitions, is an inappropriate vehicle for such an unusual transaction.”). Moreover, the Notices raise unresolved, complicated questions that require a more detailed examination than the expedited class exemption process is designed to provide. For example, it is not clear what role each party played in the construction of the Line;⁴ how or why Sills Road came to be involved in the construction given that construction authority was granted to Brookhaven Rail's predecessor, U S Rail; and why no party sought to clarify these issues during the construction

⁴ The Joint Reply states that Sills Road “financed the construction of the Line, and it covered the legal fees that US Rail incurred in obtaining authority.” (Joint Reply 17.) However, Sills Road previously indicated that it did more than finance the construction, stating that it “constructed the trackage [on Parcel A].” (Sills Road Verified Notice 3.) Brookhaven Rail claims that U S Rail oversaw or managed at least part of the construction. (Brookhaven Rail Reply 4.) Brookhaven Rail notes that in a prior proceeding in 2014, U S Rail stated that it hired a general contractor to grade and pave the BRT site and that two other entities had subcontracted with that general contractor for related construction activities. (*Id.*)

proceeding in Docket No. 35141. These facts could be relevant to what type of authority, if any, should now be granted to Sills Road and whether any additional action by the Board is appropriate. The streamlined class exemption process is not the appropriate procedure for addressing such complicated, unresolved issues. See, e.g., S. San Luis Valley R.R.—Acquis. & Operation Exemption—Iowa Pac. Holdings, LLC, FD 35586 et al., slip op. at 2-3 (STB served Feb. 10, 2012) (rejecting verified notice of exemption due to unexplained issues related to prior unauthorized acquisition of the rail line at issue); Pro-Go Corp.—Operation Exemption—in Suffolk Cty., N.Y., FD 35120, slip op. at 1 (STB served Mar. 13, 2008) (rejecting verified notice of exemption due to, among other things, questions regarding the relationship between the parties, the degree to which the party seeking the exemption had previously engaged in unauthorized rail operations, and whether the type of authority sought was appropriate for the proposed transaction).

For the reasons explained above, the Board will reject the Notices.⁵ Because the Notices will be rejected, the Joint Motion will be dismissed as moot.

The rejection of the Notices does not preclude Sills Road or SRHL from seeking authority through more appropriate procedures.⁶ However, any future pleading seeking authority from the Board with respect to these matters should address the following:

1. Responsibilities of Each Party in Construction of the Line. The record in these proceedings indicates a factual dispute as to who exercised the construction authority granted in Docket No. 35141. Should Sills Road seek authority based on the premise that it should have sought and obtained construction authority, it should explain in detail the role of Sills Road, U S Rail/Brookhaven Rail, and any other entity or entities that may have been involved with the construction of the Line, including providing information on which entity or entities paid for the construction and in what proportions and what specific construction-related activities each entity performed and at what point in time. With respect to each of these activities, Sills Road also should explain whether the entity performing the activity was acting as an agent of another entity or otherwise taking direction from or acting under the supervision or oversight of another entity. Sills Road should provide any agreements, documents, or other records relevant to its explanations.

2. Roles of the Parties in Prior Board Proceeding. Sills Road has at various points claimed that it constructed the Line, (Sills Road Verified Notice 3); that it financed the construction, (Joint Reply 17); and that it paid for the legal fees covering the construction proceeding at the Board, (*id.*). In any future request for authority, Sills Road should explain why the parties decided that U S Rail would seek construction authority rather than Sills Road. If Sills Road initially intended that U S Rail would construct the Line, Sills Road should explain

⁵ Because the verified notice filed on December 20, 2019 in Spectrum RR Holdings, LLC, Docket No. FD 36376, seeks to achieve a result similar to the Notices and raises some of the same questions as the Notices, the Board will grant SRHL's motion to withdraw it.

⁶ The Board reminds the parties that the Rail Customer and Public Assistance program is a resource to informally discuss Board procedures and answer questions and may be contacted at (866) 254-1792 or by email at rcpa@stb.gov.

why and when Sills Road changed its plans and why it did not inform the Board at any point during the construction proceeding, which was ongoing through January 2018, that Sills Road, rather than U S Rail, was constructing or had constructed the Line. Sills Road should provide any agreements, documents or other records relevant to its explanations.

3. Legal and Factual Basis for Authority Sought. Sills Road states that it should have obtained Board authority to own the Line and that its verified notice of exemption to acquire under 49 C.F.R. § 1150.31 “is designed to secure remedial authorization to own the Line.” (Sills Road Verified Notice 7.) If Sills Road believes that remedial authorization to own the Line is needed, in any future proceeding it should explain the legal and factual basis for the authority it seeks. For example, in the instant proceeding, Sills Road failed to explain the legal basis for seeking acquisition authority under 49 C.F.R. § 1150.31 as opposed to, for example, seeking to reopen the construction docket.⁷ In any future proceeding seeking remedial authorization, it should therefore explain why its approach is appropriate in light of the fact that Brookhaven Rail’s predecessor, U S Rail, is the party that sought and obtained construction authority, claims to have been involved in overseeing and supervising construction of the Line, and has been the only operator on the Line to date. Sills Road should provide any agreements, documents, or other records relevant to its explanations.

4. Classification of Track as Excepted Track Under 49 U.S.C. § 10906. To the extent that any subsequent filing asks the Board to find that the portion of the Line other than the Main Stem is excepted track under 49 U.S.C. § 10906, the filing should explain the legal basis for such a determination in light of the fact that the Board previously granted construction and operation authority under 49 U.S.C. § 10901 for the entire Line and should include any agreements, documents, or other records relevant to such a request.

⁷ The Board notes that it has previously authorized the transfer of construction authority from one entity to another. See, e.g., Tongue River R.R.—Acquis. & Operation Exemption—Tongue River R.R., FD 33644 (STB served Nov. 13, 1998) (allowing notice of exemption to acquire agency permit to construct rail line to proceed, and stating “[h]aving obtained authority to construct and/or operate a rail line, we see no reason why such persons should not be able to transfer construction and operation permits”). Here, however, Sills Road has not sought the transfer of the construction authority previously granted to U S Rail, Brookhaven Rail’s predecessor, to it.

It is ordered:

1. Sills Road's and SRHL's verified notices in Docket Nos. FD 36384 and FD 36385, respectively, are rejected.

2. The Joint Motion in Docket Nos. FD 36384 and FD 36385 is denied as moot.

3. In Docket No. FD 36385, NYA's petition to intervene is denied as moot.

4. SRHL's motion to withdraw its verified notice in Docket No. FD 36376, is granted.

5. This decision will be effective on its date of service.

By the Board, Allison C. Davis, Director, Office of Proceedings.