

SERVICE DATE – NOVEMBER 19, 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 The Board provides that, if Brookhaven Rail LLC submits a full application for a land-use-exemption permit, it need not comply with certain requirements under 49 C.F.R. § 1155.20(a) and (b) but in lieu thereof must serve this decision on the entities listed in § 1155.20(a)(2) at least 10 days before filing its application and certify in its application that it has done so.

Decided: November 18, 2020

On October 23, 2020, the Board rejected a petition filed by Brookhaven Rail LLC (Brookhaven Rail) in Docket No. FD 36399 seeking 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.”³ The Board stated that “[i]f 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.” Brookhaven Rail—Constr. & Operation

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

³ 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, EP 684, slip op. at 1 (STB served Nov. 20, 2012).

Exemption—in Suffolk Cnty., N.Y. (October 23 Decision), FD 36398 et al., slip op. at 6 (STB served Oct. 23, 2020).

On October 27, 2020, Brookhaven Rail submitted a letter seeking confirmation that it need not comply with 49 C.F.R. § 1155.20(a) and (b) before filing its application. (Brookhaven Rail Letter 1, Oct. 27, 2020, FD 36399.) Those sections require an applicant, among other things, to serve various entities with a “notice of intent” between 15 and 30 days before the application is filed. 49 C.F.R. § 1155.20(a)(2), (b)(1). The notice of intent explains filing procedures, including when comments on the application are due. The regulations also require that an applicant publish the notice of intent in a local newspaper once a week for three consecutive weeks within 30 days before filing the application. 49 C.F.R. § 1155.20(a)(3), (b)(2). Brookhaven Rail argues that the October 23 Decision did not mention the notice of intent requirements and that an extensive record has already been compiled. (Brookhaven Rail Letter 2, Oct. 27, 2020, FD 36399.) It adds that in July it served the now-rejected petition for exemption on state and local offices that would receive a notice of intent under § 1155.20(a)(2). (Id.) Finally, it asserts that newspaper publication is not necessary because the proposal to build the solid waste transfer facility is public knowledge and was already discussed in a local newspaper article, which Brookhaven Rail attaches to its letter. (Id.)

The Citizens Campaign for the Environment (CCE) filed in opposition to Brookhaven Rail’s letter on October 28, 2020. CCE argues, among other things, that Brookhaven Rail’s October 27 letter, the rejected petition, and the newspaper article relied upon by Brookhaven Rail have not alerted interested officials or the public of commenting procedures and deadlines for the application. (CCE Reply 2, Oct. 28, 2020, FD 36399.)

Under the circumstances here, Brookhaven Rail need not follow the agency’s notice of intent procedures and timetables set forth at § 1155.20(a) and (b) before it files its application. State and local entities are aware that Brookhaven Rail has sought to invoke the Board’s authority under the CRA concerning the proposed solid waste transfer facility. CCE’s involvement, as well as the newspaper article Brookhaven Rail includes with its letter, also suggest public awareness of the project. The Board will, however, require Brookhaven Rail to serve this decision on the entities that would receive a notice of intent under § 1155.20(a)(2) at least 10 days before filing its application and certify, in its application, that it has done so. This service will provide sufficient notice of the commenting procedures and deadlines set forth at 49 C.F.R. § 1155.23, including that comments on the application would be due 45 days from the filing date, should Brookhaven Rail choose to proceed with an application.

It is ordered:

1. If Brookhaven Rail intends to file an application seeking a land-use-exemption permit under 49 U.S.C. § 10909, it must serve a copy of this decision on the entities listed at § 1155.20(a)(2) at least 10 days before filing and certify in its application that it has done so.
2. This decision is effective on its service date.

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