

OAKLAND LAW GROUP, PLLC

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February 6, 2020

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By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings
February 6, 2020
Part of
Public Record

Re: STB Docket No. FD 36376, *Spectrum Holdings, LLC – Operation
Exemption – Railroad Line in the Town of Brookhaven, N.Y.*

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is Brookhaven Rail, LLC's Comments Regarding Spectrum RR Holdings, LLC's Request for Operation Exemption.

Please do not hesitate to contact the undersigned at (248) 536-3285 or wclifford@oaklandlawgroup.com if you have any questions. Thank you for your assistance on this matter.

Respectfully submitted,

OAKLAND LAW GROUP, PLLC

/s/ William B. Clifford, Jr.

William B. Clifford, Jr.
Attorney for Brookhaven Rail, LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36376

SPECTRUM RR HOLDINGS, LLC

-- OPERATION EXEMPTION --

RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NEW YORK

**COMMENTS OF BROOKHAVEN RAIL, LLC REGARDING
SPECTRUM RR HOLDINGS, LLC'S REQUEST FOR
OPERATION EXEMPTION**

William B. Clifford, Jr.
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ATTORNEY FOR BROOKHAVEN RAIL, LLC

Dated: February 6, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36376

SPECTRUM RR HOLDINGS, LLC

-- OPERATION EXEMPTION --

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SPECTRUM RR HOLDINGS, LLC'S REQUEST FOR
OPERATION EXEMPTION**

Brookhaven Rail, LLC ("BHR"), the common carrier operator of the Brookhaven Rail Terminal (the "BRT") in Brookhaven, New York, submits these comments in response to the Decision served in this Proceeding on January 17, 2020, which was served on BHR by the Board on that date. The Decision followed a December 20, 2019 Verified Notice of Exemption (the "Notice") filed by Spectrum RR Holdings, LLC ("SRHL") in which SRHL requests Board approval to operate under license an approximately 0.47-mile rail line located at the BRT. BHR provides the following comments on the issues raised in the Decision, and as explained herein, BHR opposes SRHL's request for Board approval.

BACKGROUND

The BRT is a railroad transloading facility with approximately 16,850 linear feet of track on a piece of property known as Parcel A (i.e., "Yard A" in the Notice), on which certain activities were licensed by the Board in 2010. As the Decision notes, BHR is the successor to U.S. Rail Corp, who received authority under 49 U.S.C. §10901 to construct and operate approximately 18,000 feet of a line of railroad on Parcel A. Today, BHR provides rail and transloading services, including all switching and 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 (“NYA”), a Class III rail carrier that interchanges with BHR at the switch lead to the BRT. BHR operates five days per week and presently has three employees.

BROOHAVEN RAIL’S COMMENTS

As explained in its January 22, 2020 letter, prior to receiving the Board’s January 17, 2020 Decision, BHR was completely unaware that SRHL had filed the Notice. Neither SRHL nor its corporate parent, Sills Road Realty, LLC (“Sills”), informed BHR of its desire to replace BHR with its own corporate subsidiary. More surprising is that Sills believes it has the authority to unilaterally replace BHR despite the existence of the following contractual arrangements related to BHRs common carrier obligations:

1. *Interchange Agreement* between US Rail New York, LLC (the predecessor of BHR) and NYA. The Interchange Agreement governs the interchange of rail traffic moving to and from the BRT. Pursuant to the terms of the Interchange Agreement, BHR, and not Sills or its corporate subsidiary, Brookhaven Terminal Operations, LLC (“BTO”), controls the switch and interchange track. Further, based on inquiries made by BHR representatives, the NYA was completely unaware of both the Notice being filed and Sills’ overall plan to replace BHR with SRHL. That Sills took no steps to notify NYA of the proposed transaction or to explore NYA’s willingness to enter into an Interchange Agreement prior to filing the Notice – which was silent as to how SRHL would interchange traffic with NYA – is a clear indication of Sills’ lack of knowledge and experience in the operation of a common carrier railroad.

2. *Joint Commercial & Marketing Agreement* (the “JCMA”) between US Rail New York, LLC (the predecessor of BHR) and NYA. The JCMA governs the ongoing commercial relationship between BHR and NYA. Specifically, the JCMA authorizes NYA to establish pricing

for the movement of all freight traffic into and out of the BRT on by BHR over the switch and interchange, to enter into contractual arrangements with other shippers for the movement of freight over the switch and interchange, and it governs NYA's offering of linehaul rail transportation services for cars originating or terminating at BRT. Again, given NYA's lack of knowledge related to the Notice, it is clear that neither SRHL nor Sills have taken any steps to establish a pricing structure with NYA, let alone considered how such an arrangement would interfere with the existing contract between BHR and NYA.

3. *Railroad Operating Agreement and Lease (Parcel C)* (the "Parcel C Lease") between BHR and Brookhaven Eastern Holdings, LLC ("BEH"). Parcel C is an approximately 73-acre site located adjacent to Parcels A and B. BEH is the owner of Parcel C and a wholly owned subsidiary of BTO. Section 2 of the Parcel C Lease grants BHR, in relevant part, "all rights, free from restrictions, interference, or hinderance from [BEH], it agents, affiliates, employees, or any entity connected to any of them, to: . . . [o]perate [Parcel C] as a common carrier railroad" In other words, absent an Event of Default, BHR is the exclusive provider of common carrier services until the Parcel C Lease expires on May 31, 2032.

4. *Railroad Operating Agreement and Sublicense Agreement* (the "Rail Agreement") between BHR and Brookhaven Rail Freight Services ("BRFS"). BRFS is the operator of the BRT and a wholly owned subsidiary of BTO. Section 2.5 of the Rail Agreement expressly states that BHR shall be the exclusive provider of various rail services -- including all interchange, switching and marshalling of rail cars -- at BRT during the Term of the Rail Agreement. Upon expiration of that Agreement, BHR's continued provision of common carrier service to the BRT would be subject to a new agreement and/or the Board's jurisdiction.

Next, SRHL's inference in footnote 1 of the Notice is that BTO, as the "primary user of rail service at the BRT", is the only customer being served by BHR could not be more misleading. All customers at BRT including The Home Depot, Lehigh Hanson Cement, Riverhead Builders Supply, Renewable Energy Group, North Dakota Milling, Gourmet Foods, among others, are reliant on BHR's experience in providing common carrier services. For example, the monitoring of inbound and outbound traffic is done exclusively by BHR; all customer calls to BTO are referred to BHR; and customers regularly contact BHR directly regarding car movement. Further, if a waybill is needed for a car, BTO contacts BHR for assistance retrieving the waybill. And all conversations with prospective customers regarding the rail movement of goods are had with BHR, not with BTO, Sills or its affiliates. In other words, BHR, and not Sills or its affiliates, is the face of BRT vis-à-vis its customers and its operations.

Finally, most surprising to BHR was the revelation, as represented to the Board by SRHL, that Sills expects that BHR "will, in a separate proceeding, seek to formally [and seemingly voluntarily] discontinue its common carrier operations over the subject trackage." To be blunt: any implication that BHR concurs with the proposed transaction or that it has agreed to cease its common carrier operations within the BRT is blatantly false. BHR has no intention of voluntarily giving up its common carrier rights and obligations at the BRT. At present, BHR only operates at BRT. As such, any termination of BHR's common carrier operations at BRT would effectively put BHR out of business, resulting in the immediate loss of three railroad jobs. It goes without saying that, absent extenuating circumstances, BHR would never voluntarily agree to any transaction that would put it out of business.

CONCLUSION

In conclusion, BHR reiterates its objection to the attempt by SRHL and Sills to wrest away BHR's operating rights at the BRT. Beyond the fact that the Notice is factually incorrect and misleading vis-à-vis BHR's plans to provide common carrier services at BRT, the proposed transaction would disrupt BRT's operations to the detriment of its customers, the NYA, and, ironically, BRFS. As such, BHR respectfully requests that the Board reject SRHL's request for Board approval to operate as a common carrier at the BRT.

CERTIFICATE OF SERVICE

I certify that I have, on February 6, 2020, served a copy of the foregoing Comments of Brookhaven Rail, LLC Regarding Spectrum RR Holdings, LLC's Request for Operation Exemption on all parties of record in this proceeding.

/s/William B. Clifford, Jr.

William B. Clifford, Jr.

Attorney for Brookhaven Rail, LLC