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Office of Proceedings
February 13, 2020
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36384

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

AND

DOCKET NO. FD 36385

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

JOINT MOTION OF SILLS ROAD REALTY LLC AND SPECTRUM RR HOLDINGS, LLC
FOR PARTIAL DISMISSAL

For the reasons set forth herein, Sills Road Realty LLC (“Sills Road”) and Spectrum RR Holdings LLC (“SRHL”) hereby move that their respective notices of exemption filed in FD 36384 and FD 36385 be dismissed in part, such that each of the class exemptions would apply only to a segment of track referred to herein as the “Main Stem” (which would qualify as a line of railroad pursuant to 49 U.S.C. § 10901), while clarifying that no Board authority is required for track referred to herein as the Yard Tracks, which properly are regarded as ancillary track under 49 U.S.C. § 10906.

BACKGROUND

In Docket Number FD 36384, Sills Road has filed a notice of exemption for authorization to own as a rail common carrier roughly 16,710 feet of track (the “Line”) located in Brookhaven, New York. In turn, in FD 36385, SRHL has filed a notice of exemption for authorization to acquire the Line following Sills Road obtaining remedial Board authorization to

own the Line, and to operate over it as a rail common carrier should it at some point in the future elect to conduct operations in place of, or in addition to, the incumbent rail operator. As is explained at length in those class exemption filings, the underlying purpose of both is to facilitate SRHL's assumption of ownership of the Line, and for SRHL to assume a common carrier status as a consequence. The configuration of the trackage comprising the Line is such that it is more appropriate for the Board to construe a particular, roughly 2,500 foot (0.47-mile) segment of that trackage (the "Main Stem") as a regulated line of railroad, while construing the balance of the Line (some 14,210 feet of parallel-aligned tracks – the "Yard Tracks") as yard trackage falling under the scope of 49 U.S.C. § 10906. Accordingly, Sills Road and SRHL hereby jointly move for partial dismissal of their respective class exemption notices under a Board determination that only the ownership, transfer and operation of the Main Stem (and not the Yard Tracks) requires Board authorization.

As the maps attached hereto as Exhibit A reflect, the Line consists of roughly 16,710 feet of parallel-running tracks located in what is commonly known as "Parcel A" of the Brookhaven Rail Terminal ("BRT"). The Line was constructed by Sills Road in 2011 pursuant to construction authority granted in *US Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, Docket No. FD 35141 (STB served Sep. 9, 2010) ("*USRC-Construction-1*").¹ The Line is owned by Sills Road, and is comprised of the track

¹ See also *US Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, Docket No. FD 35141 (STB served Jan. 18, 2018) ("*USRC-Construction-2*") (in which the Board found that there were no unresolved issues concerning compliance with the Board's environmental conditions, and thereupon ordered the proceeding closed). In the FD 35141 proceeding, the Board authorized the construction of roughly 18,000 feet of what was described in the construction petition as "yard track" on BRT Parcel A, but, as is explained in the present class exemption proceedings, only 16,710 feet of track has been built on Parcel A.

segments shown on Exhibit A in red and yellow and the portion of the magenta track segment to the west of the boundary between Parcels A and B.

In a recent proceeding, SRHL had sought Board authority to operate (pursuant to an agreement with Sills Road) a roughly 2,500-foot (0.47-mile) portion of the Line (shown in yellow on the attached maps) – the Main Stem – as a federally-regulated line of railroad, while proposing to operate the balance of the Line (the tracks depicted on Exhibit A in red and magenta) as § 10906 yard track outside of the scope of STB regulatory oversight. In a decision served last month, the Board questioned whether SRHL could “unilaterally” demarcate between § 10901 railroad lines and § 10906 ancillary track in light of the Board’s perception that all of the tracks that comprise the Line appear to have been authorized for construction in the FD 35141 proceeding.

ARGUMENT

Sills Road and SRHL respectfully submit that the configuration of the tracks in Parcel A, their use, agency precedent, the Rail Transportation Policy (“RTP”) set forth at 49 U.S.C. § 10101, and common sense all militate in favor of granting the present Motion. If, however, the Board is not persuaded that this Motion is the correct vehicle to reasonably delineate between – (a) trackage within a complex that clearly is oriented, and functions, as ancillary (yard) track, and (b) that which would well qualify as a § 10901 line of railroad, then Sills Road and SRHL intend nevertheless to undertake the transactions that are encompassed by the FD 36384 and FD 36385 class exemptions.

Sills Road and SRHL have tendered the present Motion on the understanding that the Board can and does through such procedures establish or clarify the scope of its regulatory

oversight over certain transactions through either a motion to dismiss coupled with a notice of exemption (as is the case here) or by way of a stand-alone declaratory order proceeding.²

As shown on the attached maps, the tracks within Parcel A all run roughly parallel to one another, with the Main Stem serving to connect the balance of the BRT trackage to the interstate rail network by way of a connection to the Long Island Rail Road and the New York & Atlantic Railway Company. The Yard Tracks (shown in red and magenta) reach into territories already accessed by the Main Stem. The Yard Tracks shown in red on the supplied maps would be used by SRHL to place cars for loading and unloading or for staging for such purposes – they are oriented and function as tracks ancillary to the Main Stem. The track on Parcel A shown in magenta, on the other hand, serves as a lead track intended to connect the Parcel A component of the BRT with the modest amount of track currently located on Parcel B, and would ultimately connect with as-yet-unbuilt trackage that would be installed on Parcels B and C that the Board previously has held would qualify as ancillary track under § 10906.³

The tracks depicted on the attached maps in red and magenta are ancillary to the Main Stem, do not affect access to a given shipper or station, do not permit Sills Road, SRHL or Brookhaven Rail to “invade” the territory of some other rail carrier (or open new traffic areas), and do not affect the competitive situation within the vicinity of the BRT. As such, there is no practical basis for the Board to discern the Yard Tracks as anything other than ancillary to the

² See, e.g., *Brazos River Bottom Alliance – Petition for Declaratory Order*, Docket No. FD 35781 (STB served Feb. 19, 2014) (“*Brazos River Bottom*”) (declaring that the proposed construction of yard track does not require Board approval); and *Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of Pan Am Southern LLC*, Docket No. 35943 (STB served Dec. 4, 2015) (finding that the sale of track assets by a rail carrier to a state subdivision, subject to the selling railroad’s retention of a permanent and exclusive easement to provide common carrier service over the track assets, would not require Board authorization sought in a related class exemption filing; motion to dismiss granted).

³ *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, Docket No. FD 35819 (STB served Aug. 30, 2016).

Main Stem, and no reason for the Board to regard those tracks as distinguishable lines of railroad when considered alongside the Main Stem.⁴ Precedent, in fact, supports such a distinction.

This agency has long held, for example, that abandonment authority is not needed to remove “one or more of several tracks . . . when the [construction or] removal still left a line of railroad between the points involved.”⁵ Sills Road and SRHL acknowledge that the initial construction proposed in FD 35141 was intended as an invasion of new territory and intended for the purpose of commencing common carrier operations over a new “line of railroad” in light of *Effingham Railroad – Petition for Declaratory Order – Construction at Effingham, Ill.*, 2 S.T.B. 606 (1997), *aff’d sub nom. United Transportation Union-Illinois Legislative Board v. STB*, 183 F.3d 606 (7th Cir. 1999), but submit that FD 35141 contemplated the construction of a discernible *line* of railroad (in the singular, not “lines” of railroad) to access a new rail transload terminal, not multiple, parallel lines reaching the same territory as the Main Stem.

For that matter, were the facts slightly different here, and had the FD 35141 construction case involved only the construction and operation of the Main Stem, Sills Road and SRHL believe that the Board would have considered the subsequent construction of the Yard Tracks as involving the installation of § 10906 track.⁶ Were the Board in this case to hold that

⁴ See *Brazos River Bottom* at 4 (citations omitted) (“While it is well established that a rail carrier must seek Board authority under 49 U.S.C. § 10901 to construct a new rail line or to extend an existing rail line into a new market, it is equally well established that . . . construction of ancillary railroad facilities and yard track is excepted from these prior approval requirements pursuant to 49 U.S.C. § 10906. In distinguishing between ancillary track and track used for line haul service, the Board and its predecessor, the Interstate Commerce Commission, have primarily looked to the ‘intended use’ of the track . . . Ancillary track is typically used for loading, unloading, switching, and other purposes that are incidental to main-line operations”).

⁵ *Boston & Albany R. Abandonment*, 312 I.C.C. 458, 461 (1961) (“*Boston & Albany*”) (*citing to Chicago, M., St. P. & P. R. Co. Trackage Rights*, 312 I.C.C. 75, 76 (1960)).

⁶ See, e.g., *Nicholson v. ICC*, 711 F.2d 364,368 (1983); *Union Pac. R.R.—Pet. for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. between Jude and Ogden Junction, Tex.*, 3 S.T.B. 646, 651 (1998).

the Yard Tracks nevertheless are all separate and distinct lines of railroad subject to STB regulatory oversight despite their alignment and purpose, such a holding would elevate regulatory form over substance. It would pin the regulatory fate of the Yard Tracks to a circumstance under which it appears that neither the Board nor the applicant in the FD 35141 proceeding may have fully considered in the construction proceeding. Moreover, under the logic of *Boston & Albany*, even if the Board were to consider each parallel track as an independent line of railroad, the removal of such parallel lines would not require Board authorization, provided the Main Stem remained.

To be clear, if the Board were to deny the present Motion, Sills Road, and, in turn, SRHL would assume ownership of the entire 16,710-foot Line as interconnected lines of railroad, with each track on Parcel A of the BRT fully subject to Board regulation, then Sills Road and SRHL are willing to proceed accordingly. But, in so doing, SRHL (as the intended downstream owner of the Lines) could find itself in an impractical and inefficient situation where it could not transfer any trackage within Parcel A to a third party customer, remove any of the tracks, or suspend service over any of the tracks without obtaining advance Board authorization – particularly if the Board did not consider *Boston & Albany* controlling.⁷ Clearly such an inefficient and impractical situation would be contrary to the RTP, and, in particular sections –

- 10101(2) (minimizing the need for Federal regulatory control over the rail transportation system, and to requiring fair and expeditious . . . decisions when regulation is required);

⁷ Sills Road and SRHL acknowledge that Brookhaven Rail possesses a pre-existing common carrier status over the Line, which could extend to all of the trackage on Parcel A. Although it would appear incongruous to regard all of the Line as § 10901 track exclusively for Brookhaven Rail's purposes, Sills Road and SRHL are willing to extend § 10901 status to all of the Line, strictly for Brookhaven Rail's purposes if Brookhaven rail so chooses under the so-called "tenant use" test. *See Texas & Pacific Railway Co. v. Gulf Colorado & Santa Fe Railway Co.*, 270 U.S. 266 (1926). (Brookhaven Rail, of course, will be afforded an opportunity to respond to this Motion as it sees fit.)

- 10101(3) (promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues);
- 10101(4) (ensuring the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense);
- 10101(5) (fostering sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes);
- 10101(7) (reducing regulatory barriers to entry into and exit from the industry);
- 10101(14) (encouraging and promoting energy conservation); and
- 10101(15) (providing for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.).

Moreover, none of the provisions of the RTP would be thwarted by favorable action on the present Motion.

If, on the other hand, the Board were to authorize the transactions as set forth in FD 36384 and FD 36385, but were to deny the Motion and hold here that *Boston & Albany* is not controlling, then SRHL would likely opt in a subsequent proceeding to seek authorization to abandon the Yard Tracks to facilitate their conversion from regulated lines of railroad to ancillary track falling under § 10906. SRHL believes that such a process to re-classify the Yard Tracks to more accurately reflect their relation to the Main Stem and their purpose would be a wasteful and costly exercise, both for itself and the Board, yet, upon its acquisition of the Line, SRHL will likely pursue such remedial action through an abandonment petition if the Board is not receptive to this Motion.

CONCLUSION

For the foregoing reasons, Sills Road and SRHL jointly request that the Board partially dismiss their respective class exemption filings in FD 36384 and 36385 to the extent that the Board determines that the Yard Track described herein is indeed § 10906 track, the

ownership and operation of which does not require Board authorization pursuant to § 10901.

Under the present Motion, Sills Road and SRHL seek Board clarification that the line of railroad located on Parcel A of the BRT consists of approximately 2,500 feet (roughly 0.47 miles) of track described herein as the Main Stem.

Respectfully submitted,

By: 

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**ATTORNEY FOR SILLS ROAD REALTY
LLC, AND SPECTRUM RR HOLDINGS, LLC**

Dated: February 13, 2020

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36384

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

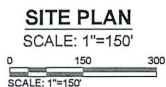
AND

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**SPECTRUM RR HOLDINGS, LLC
-- ACQUISITION AND OPERATION EXEMPTION --
LINE OF SILLS ROAD REALTY LLC, IN THE TOWN OF BROOKHAVEN, NEW
YORK**

**JOINT MOTION OF SILLS ROAD REALTY LLC AND SPECTRUM RR HOLDINGS,
LLC FOR PARTIAL DISMISSAL**

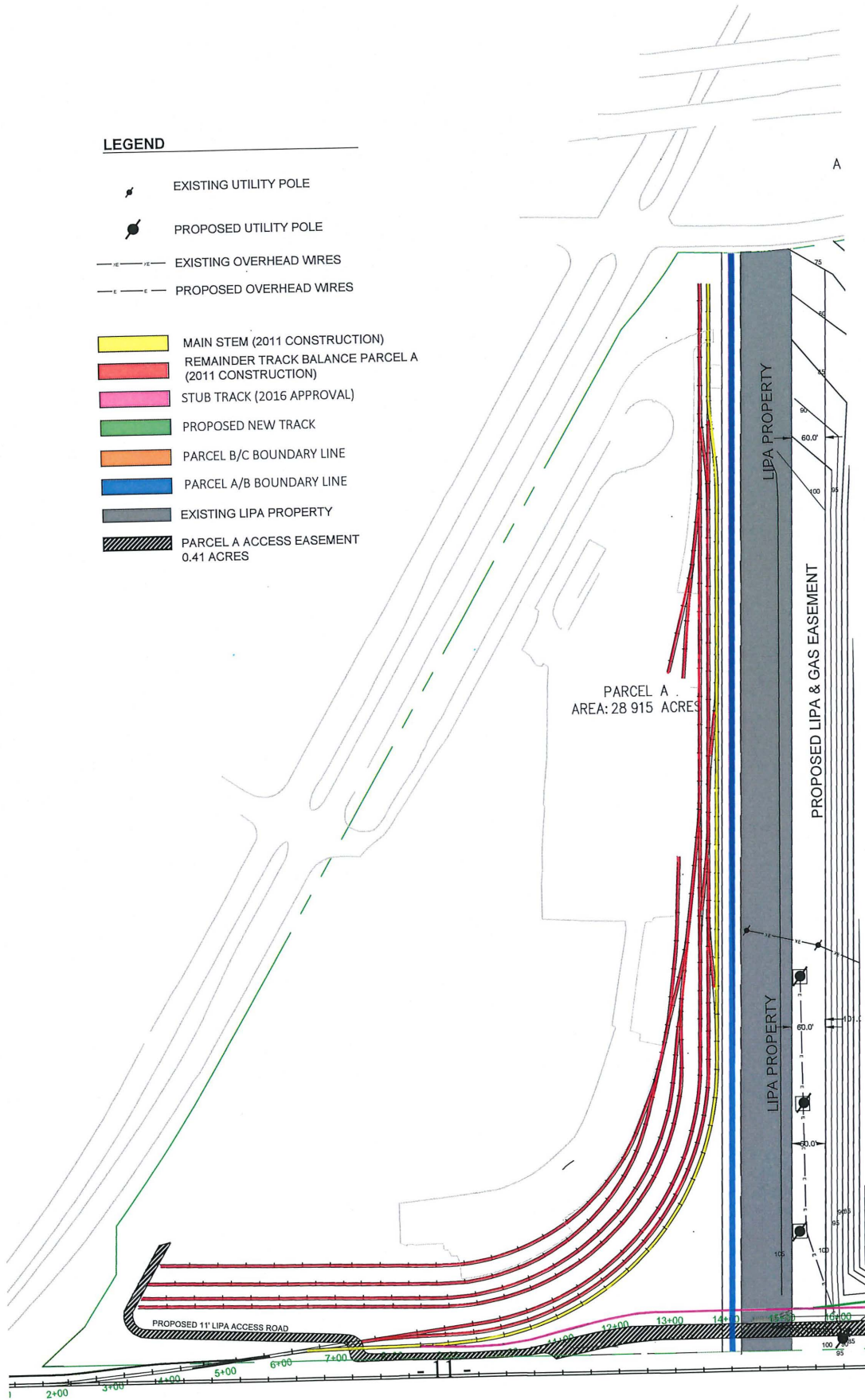
EXHIBIT – MAPS





LEGEND

- EXISTING UTILITY POLE
- PROPOSED UTILITY POLE
- EXISTING OVERHEAD WIRES
- PROPOSED OVERHEAD WIRES
- MAIN STEM (2011 CONSTRUCTION)
- REMAINDER TRACK BALANCE PARCEL A (2011 CONSTRUCTION)
- STUB TRACK (2016 APPROVAL)
- PROPOSED NEW TRACK
- PARCEL B/C BOUNDARY LINE
- PARCEL A/B BOUNDARY LINE
- EXISTING LIPA PROPERTY
- PARCEL A ACCESS EASEMENT 0.41 ACRES



CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of February, 2020, a courtesy copy of the foregoing Joint Motion for Partial Dismissal was served by email upon each the following two parties:

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