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BEFORE THE
SURFACE TRANSPORTATION BOARD

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March 23, 2020
Part of
Public Record

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 REPLY OF SILLS ROAD REALTY LLC AND SPECTRUM RR HOLDINGS, LLC
TO THE MOTIONS TO REJECT FILED BY BROOKHAVEN RAIL, LLC,
AND NEW YORK & ATLANTIC RAILWAY COMPANY

Sills Road Realty LLC (“Sills”) and Spectrum RR Holdings, LLC (“Spectrum”)¹
hereby respond jointly to the requests of Brookhaven Rail, LLC (“BHR”), and New York &
Atlantic Railway Company (“NYA”) for the Board to reject the notices of exemption (the
“Notices”) filed in the above-captioned proceedings. For the reasons set forth below, rejection of
the Notices is unwarranted and unsupported by agency precedent. Rather, Board precedent
supports acceptance of the Notices, and, accordingly, the subject exemption should be allowed to
take effect promptly.

¹ Collectively, Sills and Spectrum will be referred to as “Realty-Rail.”

BACKGROUND

On February 13, 2020, Sills and Spectrum filed with the Board in the respective, above-captioned class exemption proceedings notices pursuant to which – (a) Sills seeks Board authority to own as a rail common carrier approximately 16,710 feet of track (the “Line”) located in Brookhaven, New York; and (b) Spectrum, an indirect subsidiary of Sills, seeks Board authority to acquire the Line and assume a common carrier status upon transfer of the assets from Sills. At the time the Notices were filed, Sills and Spectrum jointly filed in both proceedings a motion (the “Joint Motion”) for partial dismissal of each exemption notice, requesting a Board determination that only roughly 2,500 feet of track that are the subject of the Notices should be regarded as Board-regulated railroad line, while the balance of the 16,710 feet of parallel-running track should be deemed to be ancillary track under 49 U.S.C. § 10906. Realty-Rail explained that they intended to undertake the transactions encompassed by the Notices regardless of the Board’s ruling on the Joint Motion.

Sills, as the current owner of the rail assets over which BHR operates, seeks to maintain the right at its discretion to – (a) continue its relationship with BHR through Spectrum; (b) contract for common carrier operations from a separate third party; or (c) to bring common carrier operations in-house via Spectrum. Sills has no immediate plans to implement options (b) or (c). The transactions encompassed by the Notices are merely intended to assure that Sills (and, in turn, Spectrum) possess the same rights and legal status that any other owner of an active railroad line subject to the Board’s jurisdiction would possess.

Pursuant to the Board’s regulations at 49 C.F.R. § 1150.32(b), the Board ordinarily would serve notice of Sills’ and Spectrum’s class exemption filings on its website, and would arrange to have notice of Realty-Rail’s invocation of the class exemption procedures

published in the *Federal Register*, on or before February 29, 2020 (16 days from the filing of the Notices on February 13). The Board took neither action by that date.

On March 3, 2020, BHR, which possesses Board authorization to operate over the Line, filed what it styled as a “Reply” – functionally, a motion to reject the Notices² – arguing, also, that the Joint Motion should be dismissed. BHR acknowledges a tense relationship with Sills. BHR states that, as a result, it is looking to transfer its operating franchise over the Line to a third party. Reply at 7. BHR evidently perceives that the value of its operating franchise could be diminished if the Line’s owner were able to terminate BHR’s operating agreement and operations over the Line itself. The fact is that BHR’s contract to operate the Line is terminable, not perpetual, and reflects that the parties contemplated circumstances under which that agreement could expire or be terminated, with or without BHR’s consent. Consequently, BHR would have the Board override the applicable contract terms, and declare its rights on the Line to be irrevocable and interminable.³ BHR wants the Board to impede Sill’s plan for Spectrum to assume a common carrier rail line owner status through ordinary Board procedures, and hopes thereby to defend itself against possible termination of its operating contract, and to make it more difficult for BHR potentially to be replaced.

Thereafter, on March 13, 2020, New York & Atlantic Railway Company (“NYA”), a rail carrier that interchanges traffic destined to and from the Line with BHR, filed

² Because BHR’s so-called Reply is functionally a motion to reject, Realty-Rail are entitled under the Board’s rules to reply. Accordingly, the present filing does not violate the strictures of 49 C.F.R. § 1104.13(c).

³ BHR unveils its pitch for a permanent and irrevocable residency on the Line when it claims that Sills has “no legal right” or “authority” to determine how common carrier service is provided over the Line, or to decide who it may contract with to provide such service. Id at 9-10. BHR wants, with the aid of the Board, to make sure that Sills cannot take any steps that would facilitate the potential that BHR could be replaced or allow for joint operation of the Line.

what it styled as “Comments” vaguely directed to “the proceeding” (Comments at 1 – referring strictly to Spectrum’s class exemption filing, and not to the Sills proceeding under FD 36384), but which were revealed in the body of that filing to constitute a request to intervene and a separate motion for the Board to reject Spectrum’s exemption notice.⁴

In a Director’s Order issued in both proceedings on March 13, 2020 (the “March 13 Order”), the Board postponed the effectiveness of the Notices until further order. The Board noted BHR’s objection to the Notices, including BHR’s claim that the Notices were intended to remove BHR from the Line against BHR’s wishes, and BHR’s assertion that a BHR predecessor in interest – US Rail Corporation (“US Rail”) – had been more involved in the construction of the Line than Sills had stated in its class exemption filing. (The Board did not have time to address NYA’s Comments, which had been filed perhaps an hour to two before the Board acted.) The Order did not seek additional information from any of the involved parties or identify any Board concerns with the Notices, indicating only that the Board needed additional time to consider the Notices and the arguments thus far presented.

ARGUMENT

A. The Board’s standard for rejection of class exemption notices has not been satisfied.

Notices of exemption may be rejected in certain circumstances where the Board determines that – (1) the exemption notice is substantively defective;⁵ (2) the exemption notice is

⁴ Because, as the Comments state, NYA simply “echoes” (id. at unnumbered page 2) BHR’s Reply, Realty-Rail will not object to NYA’s request to intervene in the FD 36385 proceeding. In fact, Realty-Rail share NYA’s interest in assuring efficient and fluid operations in and around the Line, including interchange with NYA.

⁵ *Norfolk Southern Railway Company – Abandonment – In Beaufort County*, Docket No. AB 262 (Sub-No. 262) (STB served Dec. 7, 2005); *Eric Strohmeier and James Riffin –*

materially false or misleading;⁶ or (3) the exemption is deemed to be controversial in that the Board perceives that invocation of the class exemption is abusive of the Board's processes, or involves a transaction where it appears that the filer is not entitled to undertake the transaction presented to the agency.⁷

In seeking rejection, neither BHR nor NYA contend that the proposed transactions are categorically ineligible for Board authorization. Instead, both argue that the proposed transactions warrant increased regulatory scrutiny through either an individual exemption petition under 49 U.S.C. § 10502 or an application under 49 U.S.C. § 10901. In that vein, BHR and NYA do not argue that the Notices are incomplete or inaccurate, and there is no evidence that the information they contains is materially false or misleading. While BHR and NYA claim that the proposed transactions are “too controversial” for handling under the class exemption procedures, neither explains what sort of information the Board lacks to make an informed decision to resolve the alleged controversy (and the Board's March 13 Order indicates that no supplemental information is required), and neither offers a factually analogous case to support rejection. Rather, both argue without support that the Board should read additional

Acquisition and Operation Application – Valstir Industrial Track in Middlesex and Union Counties, N.J., Docket No. FD 35527 (STB served Oct. 20, 2011).

⁶ *Central Illinois Railroad Company – Lease and Operation Exemption – Lines of the Burlington Northern & Santa Fe Railway Company at Chicago, Cook County, IL*, Docket No. FD 33960 (STB served Sep. 6, 2002); *Georgia Pacific Corporation and NM Acquisition Corp. – Acquisition of Control Exemption – Nonconnecting Railroads*, Docket No. FD 31564 (ICC served Dec. 1, 1989)

⁷ *Steeltiver Infrastructure Partners LP, et al. and Patriot Funding LLC – Control Exemption – Patriot Rail Corp., et al.*, Docket No. FD 35622 (STB served Jun. 15, 2015) (“Steeltiver”); *Winamac Southern Railway Company – Trackage Rights Exemption – A&R Line, Inc.*, Docket No. FD 35208 (STB served Jan. 9, 2009); *SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo Peoria and Western Railway Corporation between Laharpe and Peoria*, Docket No. FD 33995 (STB served Oct. 17, 2002) (essentially addressing all three of the rejection criteria).

requirements into the class exemption processes. Both BHR and NYA argue, incorrectly, that, in rejecting the Notices, the Board should take sides against the Line's owner and rule that only BHR should be permitted to possess a common carrier status on the Line. The arguments BHR and NYA raise ring hollow; Board precedent supports denial of the unfounded rejection requests.⁸ BHR's and NYA's respective calls for rejection of the Notices must be denied.

B. Sills owns the Line that is the subject of this proceeding, and is entitled as such to be recognized as a rail common carrier under the Board's class exemption procedures.

Critically, none of the parties to this proceeding disputes that Sills owns the Line.⁹ Sills does own the Line, and has since Sills constructed it. Moreover, the Line was built pursuant to Board authorization under 49 U.S.C. § 10901, so the real questions here are why Sills *shouldn't* be expected – or required – to assume a common carrier status with respect to its

⁸ See, e.g., *Oakland Global Rail Enterprise, LLC – Acquisition Exemption – Rail Line in Alameda county, Cal.*, FD 36301, *et al.* (STB served Oct. 28, 2019); *Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, FD 35984 (STB served Apr. 1, 2016) (“*Ohio River*”); *Union Pacific Railroad Company – Operation Exemption – In Bexar and Wilson Counties, Tex.*, FD 35776 (STB served Dec. 24, 2012); and *Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc.*, FD 34486 (STB served Sep. 28, 2004).

⁹ “It is not disputed that Sills currently owns the other tracks constructed on Parcel A . . .” (Reply at 5). Characteristically, BHR cannot help but add a qualified statement regarding “other tracks” within the Brookhaven Terminal that is deliberately false and misleading. The truth is that Sills owns all of the track within Parcel A, and always has. The assets BHR regards as “other tracks” consists of track within Parcel A that it currently uses to interchange traffic with NYA. See Reply at 4-5. BHR suggests that Sills does not own the Parcel A tracks used for interchange, but BHR fails to identify specifically who owns that track, if not Sills, and it offers no evidence of title. In a shameless untruth, BHR suggests that by virtue of its “control” of the interchange tracks, it owns them. BHR’s purported “control” of those tracks is no different than for any other tracks within the terminal. The fact that BHR and NYA have negotiated an interchange agreement does not convey to BHR any title interest in the tracks designated for that purpose. BHR offers no case law to support its suggestion that an interchange agreements overrides Sills’ title to those track assets, and Realty-Rail are unaware of any.

ownership of the subject rail assets, and why the Board *shouldn't* support Sills' effort to invoke the class exemption procedures to become a Board-regulated carrier?

The best that BHR and NYA can muster in response to those questions are that the Notices could ultimately facilitate the future cessation of BHR's common carrier operations (an irrelevant consideration beyond the scope of either pending exemption notice), and that the Board should prevent against such a possibility right now. Neither BHR nor NYA explains what Board policy objectives would be accomplished or what abuse would be avoided by rejecting the Notices and subjecting the proposed transactions to greater scrutiny. Neither BHR nor NYA has offered a single case where the Board barred the owner of an active railroad line from securing a federally-recognized common carrier status with respect to the line for any reason, and Realty-Rail knows of none. Agency precedent offered below consistently supports the proposition that Sills and, in turn, Spectrum, would be expected to secure appropriate Board authorization for the proposed transaction, and to do so under the applicable class exemption processes.

C. The class exemption procedures under 49 U.S.C. § 1150.31, *et seq.*, do not encompass the discontinuance of BHR's common carrier status on the Line, and Realty-Rail has not sought such relief here or in any other pending proceeding.

BHR does not object to the Notices for what they would authorize. Instead, BHR objects to what it believes that the Notices could portend for it – specifically, that, by securing common carrier status for Spectrum, such a development would make it easier for Spectrum to assume common carrier operations over the Line, either alongside BHR or in its place. BHR does not appear to object to the limited concept of Spectrum emerging as the common carrier owner of the Line, provided that it were to be prevented from undertaking operations. Rather, BHR objects to certain “actions” that it believes that the Notices allegedly (but actually do not)

“contemplate”¹⁰ – specifically, an alleged Realty-Rail “scheme” (a term repeatedly employed by BHR for effect) to remove BHR from the Line against BHR’s wishes. To block the Notices, BHR misconstrues Spectrum’s proposed authorization to own the Line as a common carrier as authorization for Spectrum to remove BHR – even though BHR and the Board both know that such an undertaking would extend beyond of the scope of the present proceedings, and would require a separate proceeding that neither Realty-Rail nor its opponents have initiated.

To be perfectly clear, Realty-Rail acknowledge that BHR is a Board-authorized common carrier on the Line, albeit one that does not own the Line and operates pursuant to contract rights. Additionally, Realty-Rail recognize that longstanding precedent, beginning with *Smith v. Hoboken R.R.*, 328 U.S. 123, 130 (1946) (“*Hoboken*”), provides that BHR’s common carrier rights and obligations on the Line may not be terminated, and that BHR may not be removed from the Line, unless or until BHR’s federal status were to be terminated by appropriate Board order, even if BHR’s contract rights were to expire or to be terminated.¹¹ Realty-Rail are not merely paying “lip service” to the fundamental legal construct set forth in *Hoboken*, as BHR baselessly contends (Reply at 8). Rather, were BHR’s contract rights to terminate for whatever reason, Realty-Rail may not employ state law to remove BHR from the Line unless or until the Board were to terminate BHR’s common carrier status through an appropriate discontinuance proceeding, or a change of operator exemption. Realty-Rail have not initiated a discontinuance proceeding, and, although BHR and NYA want to litigate the merits of such discontinuance here,

¹⁰ Reply at 7.

¹¹ See, e.g., *Sierra Railroad Company, et al. v. Sacramento Valley Railroad Company, LLC, et al.*, NOR 42133 (STB served Nov. 28, 2012) (“*Sierra Railroad*”) at 3-4. *Sierra Railroad* instructive, because the complainant in the NOR 42133 docket, an incumbent operator, had failed under an alternative regulatory theory – unreasonable practices – to persuade the Board that only the incumbent operator should be allowed to operate over the line of railroad in question, despite arrangements by the line’s owner to install a new operator.

this is neither the time nor the proceeding. The issue that both opponents to the Notices have raised is thus unripe for Board consideration and is moot. The only pertinent question is whether Sills and Spectrum have satisfied the criteria for an exemption, and they have.

Spectrum has no current plans to commence service on the Line, but it cannot rule out the possibility that it may change its mind about assuming operations depending upon how circumstances unfold going forward.¹² Of course, the owner of an active line of railroad should always be prepared to act in the event of a third-party operator's inability or failure, for whatever reason, to provide responsive service or change of circumstance, particularly if the contract operator were ever to threaten or warn of common carrier service suspension or termination. (Again, BHR's contract anticipates circumstances under which the agreement would expire or be terminated, with or without BHR's consent – contract issues outside of the scope of the Board's regulatory mandate to enforce or interpret, of course.) Even if BHR were to remain at all times willing and able to provide service, BHR has failed to explain why the possibility that Spectrum may in the future install a different third-party operator on the Line or to commence service itself warrants rejection of the Notices, and it has offered no precedent for the proposition that the Notices are an inappropriate vehicle to accomplish the objectives clearly set forth in them.

¹² BHR has seized upon Spectrum's FD 36376 filing to assume operation of the Line under an arrangement with Sills, arguing that Spectrum is concealing a plan imminently to remove BHR. As BHR well knows, Spectrum has requested leave to withdraw its exemption notice in that docket. Neither Spectrum nor Sills intend to undertake the transaction contemplated in that proceeding. Accordingly, BHR's effort to resuscitate the past and litigate over a filing that does not frame the transactions that Realty-Rail are now proposing is irrelevant and pointless, and merely demonstrates how desperate BHR is try to find any foothold for its objections.

D. BHR’s premature objection to a hypothetical downstream discontinuance of BHR’s operations, and alleged concerns over potential joint operations on the Line do not make the transactions proposed in the Notices controversial or non-routine; precedent supports allowing the exemptions to take effect, not rejecting them.

Bereft of any precedent supporting the proposition that Sills and Spectrum should be prohibited from assuming a common carrier status as the current and proposed owner of the Line, respectively, BHR and NYA tumble to the predictable tactic of declaring the existence of a “controversy” – namely, that the Notices are controversial because they object to them, and because the proposed transactions, if Board-authorized, might make it easier for Realty-Rail to replace BHR. In fact, Sills’ and Spectrum’s invocations of the Board’s class exemption procedures are rather ordinary.¹³

For its part, Sills has discovered that it currently lacks Board authorization to own active railroad lines over which common carrier service is provided, and its invocation of the class exemption is a step to remedy that situation.¹⁴ Such a remedial step is not at all

¹³ See, e.g., *General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties*, FD 34867 (STB served Jun. 15, 2017) (“*General Railway Corporation*”); *ABE Fairmont, LLC – Acquisition and Operation Exemption – Fillmore Western Railway Company*, FD 35673 (STB served Sep. 21, 2012) (authorization for the after-the-fact acquisition of a railroad line by the current owner); *City of Maplewood, Minn. – Acquisition Exemption – Right to Restore Rail Service Over a Railbanked Right-of-Way in Ramsey County, Minn.*, FD 35450 (STB served Dec. 23, 2010) (same); and *Horsehead Corp. – Petition for Acquisition And Operation Exemption – Chestnut Ridge Railway Company*, FD 34481 (STB served Mar. 12, 2004) (same).

¹⁴ BHR argues (without corroborating evidence) that Sills had consciously opted against securing Board authorization for its ownership of the Line. BHR had no presence on the Line at the time that US Rail secured Board authorization for construction of the Line – a regulatory undertaking that BHR may not realize that Sills, not US Rail, funded entirely on US Rail’s behalf. (Sills, for example, funded US Rail’s line construction proceeding legal costs.) BHR did not emerge as a Board-authorized carrier on the Line until several months following completion of construction. In fact, Sills did not choose not to seek common carrier authority at the time because it did not understand that it would be appropriate for it to do so. Even assuming for the sake of argument that Sills had desired not to be regarded as a rail common carrier, BHR has offered no precedent to show that Sills should be foreclosed from seeking Board authorization

controversial. Rather, the purported controversy is that BHR objects to the Notices because it fears that Spectrum's intent to secure Board-authorized common carrier status could harm BHR's commercial interests. But the Board does not simply jettison class exemption proceedings at the scent of a commercial disagreement or potential operational complexity, as BHR would have the Board do. The Board evaluates the basis of the alleged controversy – particularly where, as here, the party alleging the controversy intends thereby to gain some strategic advantage by delaying Board action – and reserves rejection of a class exemption to situations where it perceives that invocation of the class exemption would facilitate potential abuse of the Board's processes, and where additional information is truly necessary.

In support of its argument that the Notices should be rejected on the basis of alleged "controversy," BHR offers only four cases, none of which factually resembles the facts here, and some of which support acceptance of the Notices. One of those cases involved Board rejection of an exemption notice over concerns about the proposed transaction's possible competitive impact.¹⁵ *South Dakota* is irrelevant on its facts, since no one here is arguing that Spectrum's assumption of Board-recognized ownership of the Line would be anti-competitive.

The next proceeding that BHR misapplies involved the use of the class exemption procedures for the transfer of an active line of railroad from an owner (and the owner immediately before that) that had not obtained Board authorization to own the Line in the first place.¹⁶ *Southern San Luis* supports acceptance of the Notices, not their rejection. Sills, the

now, particularly in light of ample precedent supporting authorization by way of the class exemption procedures, including, among others, the cases in the preceding footnote.

¹⁵ *The Burlington Northern and Santa Fe Railway Co. – Acquisition and Operation Exemption – State of South Dakota*, FD 34645 (STB served Jan. 14, 2005) ("*South Dakota*").

¹⁶ *Southern San Luis Valley RR, LLC – Acquisition and Operation Exemption – Iowa Pacific Holdings*, FD 35586 (STB served Feb. 10, 2012) ("*Southern San Luis*").

Line's first and only owner, has learned that it lacks, but should have obtained, authority to own an active line of railroad over which common carrier service is provided. That is, Sills is seeking to correct the very misstep that the downstream railroad line acquirer in *Southern San Luis* failed (willfully) to address, and, because Sills is undertaking remedial action that the notice-filer in *Southern San Luis* had attempted to evade, rejection of the Notices is unwarranted.

Northeast Interchange,¹⁷ yet another case that is utterly off-point for BHR's purposes, involved the Board's rejection of a class exemption notice concerning what the Board perceived was an attempt by a non-carrier construction waste terminal operator to invoke Board jurisdiction for purposes of preemptively blocking local permitting of, or restrictions to, the waste distribution facility under the protections afforded rail carriers under 49 U.S.C. § 10501. *Northeast Interchange* involved the proposed conversion of existing, non-STB-regulated track into regulated railroad line under questionable circumstances. Here, the legal status of the Line is not questioned, and, in fact, the Line was the subject of a full, and extensive, construction proceeding before the Board, as BHR is quick to recognize. Because the Notices merely seek authorization for Spectrum to assume ownership of existing lines of railroad, and not to convert un-regulated track to avert local oversight, *Northeast Interchange* does not support rejection. If anything, that case supports the proposition that use of the class exemption procedures for purposes of ownership of lines of railroad by existing non-carrier entities is entirely appropriate.

Finally, *Riverview Trenton*¹⁸ is little more than the factual precursor to *Northeast Interchange*, and it, too is irrelevant to the facts here, and thus is not controlling for the reasons

¹⁷ *Northeast Interchange Railway, LLC – Lease and Operation Exemption – Line in Croton-on Hudson, NY*, FD 34734 (STB served Nov. 18, 2005) (“*Northeast Interchange*”).

¹⁸ *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, FD 33980 (STB served Feb. 15, 2002) (“*Riverview Trenton*”).

provided above. Specifically, *Riverview Trenton* involved the effort of a private track owner to convert its operation to one for common carriage. The Board perceived that the invocation of the class exemption was intended to block local efforts to acquire some of the owner's property under state law eminent domain proceedings, and possibly otherwise to regulate the owner's private carriage operations. The Board revoked the exemption there, recognizing the local concerns over the broader impacts of converting the involved private track into a line of railroad, and perceiving that the use of the class exemption under the circumstances was abusive of the Board's processes. Once again, the Line is already subject to the Board's jurisdiction, so there is no proposed "conversion" of track afoot, and, if anything, *Riverview Trenton* militates in favor acceptance of the Notices, not their rejection, by focusing on the fact that the class exemption procedures in the 2002 case were being applied to private track.

NYA, for its part, offers only one case in support of rejection, and that case – *North Central Mississippi*¹⁹ – is tremendously off-point and completely irrelevant. NYA is correct only in noting that *North Central Mississippi* cites to the general proposition that the Board may not accept a class exemption filing in certain instances where it finds the proposed transaction to be controversial. But the Board's rejection of the "corporate family transaction" exemption there had nothing to do with controversy (it never found that any actually existed), and everything to do with the fact that the transaction, as described, appeared not to satisfy the regulatory criteria for an exemption – specifically, because the transaction would place under common control connecting rail common carriers, the class exemption procedures were

¹⁹ *North Central Mississippi Regional Railroad Authority – Acquisition and Operation Exemption – Mississippi Department of Transportation, FD 36182, et al.* (STB served Oct. 12, 2018) ("*North Central Mississippi*").

unavailable. *North Central Mississippi* bears no resemblance to this case, and thus offers no support for rejection of the Notices.

Where the cases upon which BHR and NYA rely in support of rejection are factually distinguishable and inapposite, *Ohio River* (FD 35984, *supra.*) is instructive and on-point, and supports upholding the Notices and allowing them to take effect. That case involved a proposed transaction wherein Ohio River Partners (“ORP”) invoked the Board’s non-carrier class exemption procedures to acquire and to operate certain rail assets operated at the time by a Board-authorized, third-party carrier (Ohio Terminal Railway Company – “OTRC”) under an easement. In remarkably similar terms to those employed here by BHR, OTRC argued that ORP’s exemption notice should be rejected “because the transaction presents non-routine and controversial issues. OTRC note[d] that . . . the exemption would . . . permit dual operations over the Line. OTRC claim[ed] that dual operations would not be feasible based on the Line’s limited capacity and constrained interchange facilities with Norfolk Southern Railway Company (NSR). OTRC [explained that it was] concerned about its ability to meet its common carrier obligation if the exemption [became] effective. It fault[ed] ORP for not addressing these issues in its verified notice and assert[ed] that any such authorization should only be granted after a full regulatory review, including the development of a complete factual record.”²⁰

NSR responded to the ORP class exemption echoing OTRP’s service concerns, and agreeing “with OTRC’s description of the existing capacity and geography constraints on the ability of carriers to conduct interchange operations with NSR on the Line.”²¹ NSR, compared to NYA, took a more restrained stance in *Ohio River*, merely expressing concern about

²⁰ *Ohio River* at 2.

²¹ *Id.* at 2.

interchange impacts, and urging an orderly approach to potential joint operations on the lines OTRP sought to acquire. NYA, on the other hand, supports rejection of Spectrum's exemption notice on the basis of the same sort of concerns that had motivated NSR in *Ohio River*.²²

The Board allowed ORP's class exemption to take effect over OTRP's objection and call for rejection of the notice. In so doing, the Board rejected the argument that the operational implications of ORP's joint operations with OTRP rendered the transaction too controversial or non-routine for approval under the class exemption process. *Ohio River* at 3.

The Board then went on to state as follows:

The exemption . . . does not require the information OTRC contends should have been provided here. Moreover, notices of exemption have been used to permit dual operations on capacity-constrained lines. See [*Central Illinois Railroad – Operation Exemption – Rail Line of City of Peoria & Village of Peoria Heights in Peoria & Peoria Heights, Peoria County, Ill.*, FD 34518 (STB served July 1, 2004 & Feb. 23, 2005)]; *City of Rochelle, Ill. – Notice of Exemption – Commencement of Rail Common Carrier Obligations*, FD 33587 (STB served July 7, 1998); *Luzerne & Susquehanna Ry. – Lease & Operation Exemption – Certain Lines of Luzerne Cty. Rail*, FD 32563, *et al.* (ICC served Sept. 1, 1994).

Id. at 4.

The idea that Realty-Rail would take action that would negatively affect rail service to, from and within the Brookhaven Terminal is counter-intuitive. Not only is Sills the owner of the Lines, but its subsidiary companies are active in promoting and in providing

²² Should Spectrum obtain Board authorization to own the Line, and should it seek to assume operations at some future date, it would coordinate carefully with NYA as a critical business partner, all in the interest of reliable rail service. Spectrum anticipates that, should it plan in the future to commence operations over the Line (particularly in the face of a possible BHR refusal voluntarily to secure discontinuance authority and to terminate its own operations), it has contemplated the construction of additional track within the Brookhaven Terminal to facilitate interchange with NYA, and to promote greater operating efficiency generally. It will seek to establish a positive and mutually-beneficial relationship with NYA, despite Spectrum's disappointment over NYA's intervention in the FD 36386 docket, and it plans to reach out to NYA to discuss Realty-Rail's business objectives and perspective on rail service soon.

transload services within the Brookhaven Terminal. Realty-Rail have a longstanding and continuing vested business interest in facilitating efficient, reliable, and cost-effective railroad transportation in support of its customers and its own business activities. Consequently, Spectrum is willing, should the need arise (and should it elect in the future to commence operations over BHR's continued objection and continuation of its own service), to negotiate appropriate joint service protocols, as the Board directed in *Ohio River*. See *id.*

Precedent demonstrates that the transactions contemplated in the Notices are routine, and that joint operations – even those to which an incumbent operator objects – are regularly permitted under the Board's class exemption procedures. The proposed transactions have no significant elements in common with the handful of cases upon which BHR and NYA have relied. Those cases are distinguishable, not controlling, and in at least two instances militate against rejection. The Board consistently has shown itself skeptical of transaction opponents invoking a contrived “controversy” as a means to block class exemptions that would not favor the opponent's interests, as BHR has tried to do here. In such cases, the agency regularly has denied calls for rejection of exemption notices (or, under since-revised procedures, after-the-fact revocation), and has allowed the challenged exemption to take effect.²³ For these reasons, the Board should allow the subject exemptions to take effect, and it should deny BHR's and NYA's unsupported calls for the Board to depart from precedent and reject the Notices.

²³ E.g., *General Railway Corporation; Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway Company*, FD 35187 (Sub-No. 1) (STB served Nov. 1, 2016); *Steelriver; Eighteen Thirty Group, LLC – Acquisition Exemption – In Allegany County, MD*, FD 35438, *et al.* (STB served Apr. 5, 2012); *New Hampshire Central Railroad – Lease and Operation Exemption – Line of the New Hampshire Department of Transportation*, Docket No. FD 35022 (STB served Dec. 10, 2007); *Luzerne & Susquehanna Railway Company – Lease and Operation Exemption – Certain Lines of Luzerne County Rail, F&L Realty, Inc. and Pocono Northeast Railway, Inc.*, Docket No. FD 32563 (ICC served Sep. 1, 1994); and the cases cited to above in footnote 8 in this Reply.

E. The extent to which US Rail may have been involved in overseeing or managing the construction of the Line is a red herring, and has no bearing on the merits of the Notices or upon BHR's motion to reject.

In its March 13 Order, the Board noted BHR's disagreement "with Sills' assertion that US Rail did not oversee or manage the construction of any of the track located on Parcel A ... and that Sills alone constructed the track." (Reply at 4). The issue is not revisited in the argument section of BHR's Reply, and Realty-Rail have no idea why the issue could be considered in any way real or material. Sills financed the construction of the Line, and it covered the legal fees that US Rail incurred in obtaining authority for its construction, and in securing US Rail's common carrier status. Sills has learned that it would have been better served not to have allowed US Rail to assume oversight of the STB authorization process on its own (through attorneys whose duty was to US Rail, and not to Sills), and that it should have secured its own regulatory counsel at the time to guide it through the Board's processes and clarify the ramifications of Line ownership. If anything, the subject proceedings are a by-product of Sills relying too heavily on US Rail's guidance on Board regulation alone.

None of this eclipses the central fact that Sills does own the Line, and that it has always had a central stake in the rail assets over which BHR currently operates.²⁴ It is odd that, although BHR "disagrees" with Sills' characterization of Sills' and US Rail's respective roles in the construction of the Line (Reply at 4), it offers no evidence to substantiate its disagreement.

²⁴ BHR squabbles over the fact that Sills did not, until very recently, come forward to acknowledge that it owned the Line, suggesting, without a shed of legal support, that such inaction renders the Notices forfeit. Reply at 9-10. Until very recently when Sills secured its own regulatory counsel, Sills did not appreciate that its ownership of the Line warranted Board authorization. The subject proceedings are intended to afford Realty-Rail the discretion over the disposition and operation of railroad lines used in interstate commerce that Sills believed it already legally possessed. For its part, BHR has known of Sills' ownership interest, and it has never disclosed that fact, even when it sought Board authority to operate the Line. Under BHR's apparent logic, is it also the case that BHR's operating authority is suspect?

BHR was not involved in the construction of the Line, and did not assume operation until later, so how would it know? It doesn't.

F. BHR's attack on the Joint Motion is nothing more than a legally-unsupported collateral attack on the Notices, devoid of any arguments addressing the merits of the relief that Realty-Rail have requested through partial dismissal.

BHR's response to the Joint Motion is another attempt to protect its own operations and to thwart establishing Spectrum as the common carrier owner of the Line; it is a set of poorly-considered arguments devoid of legal support that is ultimately nothing but an awkward collateral attack on the Notices. BHR begins by stringing together two fundamentally false premises – that the Joint Motion bespeaks “unilateral reclassification” of portions of the Line; and that the Joint Motion is inappropriate in the context of the Notices. Not only are both assertions plainly self-serving, but facts and precedent show that the Joint Motion is appropriate for consideration as an adjunct to the Notices.

The Joint Motion is hardly a unilateral re-classification. Realty-Rail have invoked the Board's class exemption procedures in their Notices to encompass the entire scope of the extant trackage covered by the *2010 Decision*,²⁵ pointing out that, if their Joint Motion were to be denied, they are ready and willing for Spectrum to assume ownership of the Line with each track being considered a separate common carrier line of railroad. Accordingly, the Notices do not depend upon the Board granting Realty-Rail the relief requested in the Joint Motion.

Second, the Joint Motion is entirely appropriate in the context of the Notices. Contrary to BHR's bald assertion, parties commonly invoke the Board's class exemption procedures, and seek dismissal of some or all of the exemption notice, with dismissal often

²⁵ *US Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, FD 35141 (STB served Sep. 9, 2010) (“*2010 Decision*”).

addressed separately from the Board's issuance and publication of the notice of exemption following analysis of the merits of the motion.²⁶ Thus, the Notices stand on their own respective merit, and Realty-Rail are willing to engage in the transactions proposed therein with or without success of the Joint Motion. As such, the Joint Motion raises distinct legal issues that do not inform the Notices, and so BHR is wrong to claim, again without a shred of case precedent, that Realty-Rail's Joint Motion somehow invalidates its use of the class exemption procedures to establish Spectrum as a common carrier owner of the Lines.

If BHR had believed that the Joint Motion should be denied on its merits as contrary to law or policy, then BHR should have provided a legal case for denial, but it hasn't. It doubtlessly did not present such an argument, because it recognizes that there is no case support for denial or rejection of the Joint Motion. Realty-Rail explained why longstanding agency precedent supported a finding that parallel-oriented tracks within Parcel A should be recognized as ancillary to a main line track, as shown in the map accompanying the Joint Motion. BHR merely relies on the feeble circular logic that because the *2010 Decision* appears to have deemed each of the tracks located on Parcel A to be distinct railroad lines, that must be the correct way to consider them, regardless. And, while BHR objects to a clearer delineation of the tracks in Parcel A under the legal considerations spelled out in cases such as *Boston & Albany R.*

²⁶ See, e.g., *New Jersey Transit Corporation – Acquisition Exemption – Consolidated Rail Corporation in the County of Middlesex, N.J.*, FD 36195 (STB served Aug. 30, 2018); *Hainesport Transportation Group, LLC – Corporate Family Transaction Exemption*, FD 36184 (STB served May 24, 2018); *Housatonic Railroad Company, Inc. and Housatonic Track Company, Inc. – Intra-corporate Family Transaction Exemption*, FD 35857 (STB served Dec. 23, 2014); *Transco Railway Products, Inc. – Acquisition and Operations Exemption – D&W Railroad, LLC*, FD 35688 (STB served Mar. 4, 2013); *R.J. Corman Railroad Company/Pennsylvania Lines, Inc. – Construction and Operation Exemption – In Clearfield County, PA*, FD 35116 (STB served Jul. 27, 2009).

Abandonment, 312 I.C.C. 458, 461 (1961) (and see, generally, Joint Motion at 4-6), BHR nowhere explains why such a delineation is unnecessary or inappropriate as a matter of law.

BHR wants the Board to deny to the Joint Motion for entirely self-serving reasons, which reveals all the more why the Joint Motion should be granted. The real reason for BHR objects is that it has decided to invoke any obstacle that it can think of that would impede Spectrum's assumption of Board-authorized ownership of the Line,²⁷ or for that matter pursuit of an adverse discontinuance of BHR's common carrier status on the Line if circumstances warranted.²⁸ As far as Realty-Rail are concerned, the Line may be regarded entirely as federally-regulated lines of railroad for BHR's purposes, if BHR finds some genuine common carrier service benefit from that, provided that would not prohibit Realty-Rail from securing a more precise delineation of the legal status of the Line's trackage for its own purposes.²⁹ Because BHR is merely registering objection to try to deprive Realty-Rail of the discretion to control the provision of common carrier service on the Line, and to block its ability to commence operations through Spectrum, the Joint Motion should be considered on its merits and granted.

²⁷ See Reply at 12 (where BHR insists, without explanation, that denial of the Joint Motion would protect BHR's interests in the Line).

²⁸ BHR revisits its tactic of trying to drag in issues not pending in the docketed proceedings. Just as BHR has tried to resuscitate the FD 36376 docket to introduce arguments predicated on that proposed transaction (which Spectrum has indicated it is no longer interested in pursuing), BHR attempts here to litigate the status of as-yet-unconstructed track for Parcels B and C. BHR falsely and irresponsibly contends that Realty-Rail have asked the Board in this proceeding to rule on the status of the proposed Parcel B and C track construction. Realty-Rail have done no such thing. If BHR is concerned about the proposed configuration of track for Parcels B and C, and believes that the track should not be deemed to be ancillary track under 49 U.S.C. § 10906, then it may reopen the FD 35819 proceeding if it considers that appropriate, or it may raise the issue at such time that construction of the Parcel B and C track becomes ripe for consideration. Otherwise, BHR's arguments should be recognized as mere obstruction.

²⁹ See *Brotherhood of Locomotive Eng'rs v. STB*, 101 F.3d 718 (D.C. Cir. 1996); and *Chevron USA Inc. – Lease and Operation Exemption – Richmond Belt Railway*, Finance Docket No. 32352 (ICC served Jun. 12, 1995) (articulating the well-established “tenant use” test).

CONCLUSION

For the foregoing reasons, the requests for rejection of the Notices must be denied. The Notices appropriately invoke the Board's class exemption procedures, and, therefore should be allowed promptly to take effect. As also is explained herein, the Board should carefully consider the corresponding Joint Motion and grant it on its merits.

Respectfully submitted,

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Dated: March 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of March, 2020, I served copies of the foregoing Joint Reply electronically (via email) upon each the following parties of record:

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