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August 31, 2020

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: FD No. 36399, *Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. §10909*

Dear Ms. Brown:

This letter is submitted on behalf of Petitioner Brookhaven Rail LLC (“BHR”) for the purpose of briefly responding to several points raised in the Reply of Sills Road Realty LLC, Brookhaven Rail Terminal LLC and Brookhaven Rail Freight Services LLC (collectively “Sills”) to the Petition for Exemption from Requirements of 49 U.S.C. §10909 filed by BHR (the “Reply”). BHR asserts good cause exists to include this letter in the record of this proceeding because the Reply contains inaccurate statements of fact and law that bear on material issues in this proceeding, and no party will be prejudiced by the acceptance of this letter into the record.¹

¹ See, e.g., F.D. 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016); F.D. 35157, *The City of Alexandria, Virginia – Petition for Declaratory Order* (served Nov. 6, 2008); F.D. 35765, *Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order* (served May 20, 2014). See also 49 C.F.R. §1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

First, the Reply erroneously asserts that 49 U.S.C. §10909(a)(1) requires all parties who seek a “land use exemption” to first seek and obtain an adverse determination from a state agency. Reply at 8. Indeed, the Reply asserts that seeking and obtaining such a determination is “the essential predicate for Board intervention.” *Id.*² The Reply then relies on this misstatement of the law to bootstrap a fallacious argument that because a state agency may express support for a proposed solid waste rail transfer facility while having at least on paper a means to change its laws adversely “affecting the siting” of the facility, the Board lacks jurisdiction to issue a land use exemption. *Id.*

The Reply seriously misstates the text of §10909(a)(1) and the Board’s interpretation of it to clearly contemplate a *rail carrier* - in this case BHR - that plans to own or operate a new solid waste rail transfer facility need not first seek and receive a negative determination from a state agency. This rule is actually stated in the Reply itself although it is immediately disregarded. See Reply at 7- 8, *citing Solid Waste Rail Transfer Facilities*, EP No. 684 (Served January 14, 2009) at 10 (one of the three ways to obtain an exemption is “(2) a *rail carrier* that owns or operates an existing facility or *plans to own or operate a new facility* petitions the Board for a land-use-exemption permit *without first receiving an unsatisfactory result from the state.*”)(emphasis supplied).³ In that decision the Board further clarified that section §10901(a)(1) “allows a rail carrier to petition the Board for a land-use-exemption permit without first receiving an unsatisfactory result from a state agency, regardless of the facility’s existence as existing or proposed. The rail carrier would not need to make any showing to the Board of unreasonable burden or discrimination prior to applying for a land-use-exemption permit.” This is precisely what BHR has done in this proceeding, only it has sought the requested land use exemption from the Town of Brookhaven’s zoning code through a Petition for Exemption instead of a land-use-exemption permit application because the requirements of 49 U.S.C. §10502(a) are clearly met in these particular circumstances.

Further, the Board has expressly rejected the position the Reply now espouses, *i.e.*, that where the state solid waste transfer facility permitting process includes a siting determination, the state should be allowed to make its determination before the Board acts on the request for a land use exemption. In *Solid Waste Rail Transfer Facilities*, Docket No. EP 684 (Served March 24, 2011) at 10, the Board held “this suggestion conflicts with the language of the statute, which explains that a rail carrier that owns or operates a facility [or seeks to own operate a new facility] may come before the Board prior to seeking a siting determination from the state.” *Id.*, See also *Solid Waste Rail Transfer Facilities*, Docket No. EP 684 (Served November 20, 2012) at 9.

² See also Reply at 15 (“Absent a showing that state or local land use processes are being used to thwart SWRTF development or operation, the Board has no authority to impose its jurisdiction at all.”).

³ Despite quoting the Board’s rules, the Reply goes on to erroneously state “[c]learly, scenarios 2 and 3 from the first of the two above-quoted passages from *Rail Transfer-1*, are inapplicable, since the proposed Parcel D development has not yet occurred and there is no existing SWRTF.” *Id.*

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There is therefore utterly no basis for the assertion in the Reply that “where local land use processes can work to permit the construction and operation of an [sic] SWRTF, the Board lacks statutory authority to intervene and should not serve as a surrogate for local decision makers.” Reply at 8. In addition to being contrary to the explanation provided by the Board above, such a rule would essentially negate *any* Board jurisdiction under §10909 because *all* states and local agencies have, at least on paper, processes to change their laws and regulations. But in any event, even though it doesn’t have to, BHR has demonstrated – and the Reply makes no effort to refute – that the Town’s zoning law on its face “unreasonably burdens the transportation of solid waste by railroad” and “discriminates against the railroad transportation of solid waste and a solid waste transfer facility” and therefore is preempted.

Second, the Reply grossly mischaracterizes the scope of the land use exemption request sought by the Petition, which is uniquely suited for a determination under §10502(a) because it seeks a targeted and limited exemption from a single zoning law. Contrary to the hyperbole in the Reply, BHR is not asking the Board to “sweep aside” all other state and local permitting requirements and regulations that are applicable to the siting and construction of the proposed facility. BHR has expressly stated that it will comply with all applicable state and local laws and regulations, as well as environmental mitigation measures imposed by the existing record of environmental review and any additional mitigation measures or requirements imposed by the STB.

Similarly, the notion that the Petition is seeking the equivalent of an exemption from §10901 to construct a line of railroad, Reply at 13, is seriously misplaced. Also clearly wrong is the notion that granting the requested exemption from a single zoning law in this proceeding would require the Board to expand its jurisdiction over solid waste rail transfer facilities beyond the scope of 49 U.S.C. §§10908-10910. Reply at 16. The exemption Petition seeks the remedy provided by §10909(a)(1), which is a “land use exemption for a solid waste rail transfer facility,” because the statutory requirements of §10909 are clearly demonstrated in these circumstances without requiring BHR to submit an application for a land-use-exemption permit..

Finally, BHR notes that the Reply’s assertions concerning pending federal district court litigation are identical to those addressed in the Motion for Leave to file Reply to Reply, and proffered Reply to Reply, filed by BHR in Docket No. FD 36398, which are hereby incorporated by reference. The dispute presently before the court continues to be about what the Town contends is Sills’ and/or their affiliates’ excessive excavation and removal of sand and other native materials from their property without the construction of railroad track or any approved track plan.

Please do not hesitate to call me if you have any questions.

Sincerely,



Thomas W. Wilcox

Attorney for Brookhaven Rail LLC



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2020, a copy of the foregoing letter was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox