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September 15, 2020

301078

VIA E-FILING

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

ENTERED
Office of Proceedings
September 15, 2020
Part of
Public Record

Re: *Brookhaven Rail LLC – Petition for Exemption from Requirements of
49 U.S.C. §10909, FD 36399*

Dear Ms. Brown:

On August 31, 2020, Brookhaven Rail LCC (“BHR”) tendered in the above-referenced proceeding a supplemental letter filing (the “Sur-reply”) intended to respond substantively to the Sills Parties’¹ Reply of August 17, 2020 (the “Reply”) in opposition to BHR’s attempt under an individual petition for exemption (the “Petition”) to secure a land use exemption permit (“LUEP”) pursuant to 49 U.S.C. § 10909. The Petition seeks to bypass the Surface Transportation Board’s (the “Board”) LUEP procedures set forth at 49 C.F.R. Part 1155, subpart C in an effort to fast-track BHR’s effort to obtain a ruling from the Surface Transportation Board (the “Board”) pursuant to 49 U.S.C. § 10909 preempting state and local land use ordinances and related permitting processes otherwise applicable to the siting and operation of BHR’s proposed transfer facility in Brookhaven, New York. BHR assiduously avoids calling its letter filing a reply to a reply prohibited by 49 C.F.R. 1104.13(c), although that is assuredly what it is. BHR’s proffered justification for its Sur-reply is in line with arguments commonly used to try to excuse an otherwise-prohibited filing. If BHR’s Sur-reply is to be accepted into the record under the cases cited to in footnote one (at page one) of that filing, then those same BHR-cited cases happen to support acceptance of this response. As discussed below, nothing in BHR’s Sur-reply supports Board acceptance and consideration of the subject Petition.

¹ Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC – the “Sills Parties.”

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While the Sur-reply backpedals on the basis for preemption relief (as will be discussed later), the Sur-reply suffers from a fundamental problem. BHR cannot cogently rebut the Reply's main proposition that – particularly in the context of the Clean Railroads Act (“CRA”) and in the absence of guiding precedent – it has failed to demonstrate that 49 U.S.C. § 10502 is an appropriate vehicle, and standard, by which to preempt state and local land use laws and permitting processes otherwise governing the construction and operation of a solid waste rail transfer facility (“SWRTF”). BHR is left to claim that the “statutory requirements of §10909 are clearly demonstrated” in its Petition (Sur-reply, 3) ignoring the fact that the Board has only ever identified one process that assures the agency sufficient information to determine whether a proposed SWRTF would “not pose an unreasonable risk to public health, safety, or the environment” (49 U.S.C. §10909(c)(1)) – an application under Subpart C.

On a related note, BHR makes no effort to dispute that it is coordinating with the Town of Brookhaven to secure a Board-issued preemption order not as a matter of necessity, but rather out of expedience.² This collusion entails a petition for exemption process that would strip the LUEP proceeding of the inclusive and detailed notice and comment process set forth at Subpart C. As BHR should recognize, diminishing the opportunity for, and role of, public input under the amorphous framework of the Board's individual petition for exemption processes, and relegating the Board's public, health and safety mandate to the Board's Office of Environmental Analysis (as if encompassed entirely by the agency's ongoing NEPA obligations)³ is contrary to the Board's Section 10909 mandate.

² The interests and objectives of the Town of Brookhaven, as enunciated in this proceeding, have thus far been remarkably vague, even contradictory. The Town recently as stated that “should BHR . . . [apply] for a change of zone or seek other Permits required and appropriate to authorize . . . the SWRTF, the Town is prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such an Application by BHR.” Town of Brookhaven Response filing, September 11, 2020, unnumbered page 5. On the other hand, the Town has not requested that the Board reject the Petition as the Sills Parties have done, suggesting that BHR's appearance before the Board is not, and favorable Board action on BHR's exemption request would not be, an unwelcome development in the eyes of the Town. Moreover, the Town has not officially rescinded its statement of support appended to the Petition, nor has it disproven its collusion with BHR in the furtherance of BHR's Petition.

³ The National Environmental Policy Act (“NEPA”), unlike the Clean Railroads Act, is primarily a procedural, rather than a substantive, statute. *See, e.g., CSX Corp., et al – Control – Conrail, Inc., et al.*, 3 S.T.B. 196, 354, n.227 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

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The Township's support of BHR's Petition, and its September 11, 2020 Response filing not only reflect collusion to bypass local zoning processes, but also prove false BHR's contention that the Township zoning approval process would be unduly burdensome (supported only by the vaguest of unproven BHR notions that Board preemption would be more swiftly granted than a Town zoning change could be accomplished). The Sills Parties understand that the Board is under no mandate to initiate an⁴ LUEP proceeding where the evidence indicates that local land use authorities are willing and able to accommodate an SWRTF as proposed through the appropriate zoning processes. The Town's support for the Petition similarly disproves BHR's bald assertion that the Town's zoning laws (or application of the same) discriminate against railroad transportation of solid waste.

Finally, BHR spends most of its Sur-reply faulting (strangely) the Sills Parties for taking at face value BHR's past statements on the record, and, in the process, BHR attempts to obscure the fact that its Sur-reply signals a departure from a key element of the Petition. (BHR's inordinate attention to the issue itself, of course, obscures larger issues of whether the Board should initiate any LUEP proceeding in the first place, and, if so whether an individual petition for exemption process is appropriate and contemplated under Section 10909.) BHR's states that, "§10901(a)(1) [sic] 'allows a rail carrier to petition the Board for [an LUEP] 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." Sur-reply, 2 (quoting *Solid Waste Rail Transfer Facilities*, EP 684 (STB served January 14, 2009) ("*Solid Waste Transfer-1*"), 8.

But BHR did not do in its Petition as it later claims in its Sur-reply. In fact, BHR clearly framed its Petition upon a threshold Board finding of unreasonable burden and discrimination. Petition, 2 ("BHR seeks a determination pursuant to 49 U.S.C. §10909(a) that a zoning law enacted by the Town that would otherwise prohibit the construction of this facility on this parcel constitutes" unreasonable burden and discrimination against railroad transportation") and 24. Because BHR asked Board to make an unreasonable burden / discrimination finding, the Sills Parties responded in kind to the merits of BHR's request, pointing out that, under *Solid Waste Transfer-1*, BHR's request for a preemption order, when based upon an alleged unreasonable burden, *must* be supported by evidence of an insurmountable state or local land obstacle,⁵ of which none exists here. But it appears that BHR wants to retract its unreasonable burden / discrimination argument, insisting on Sur-reply that it did not need to make such a

⁴ As guidance for BHR, see <https://www.grammar.com/a-vs-an-when-to-use/> and <https://www.shearsoneditorial.com/2013/07/a-or-an-with-abbreviations-it-depends/>

⁵ *Solid Waste Transfer-1*, 8.

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presentation. If so, however, BHR has failed to explain why, in the absence of its reliance upon an unreasonable burden showing, the appropriate path is an individual petition for exemption, rather than an application under subpart C, contrary to the Board's rulemaking.⁶

As explained herein, BHR has failed to rebut the proposition that its Petition is appropriate under the circumstances or is a suitable shortcut around the Board's application processes at subpart C. Accordingly, the Petition must be rejected.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Counsel for the Sills Parties

cc: All parties of record

⁶ *Id.* (“While a rail carrier need not make any showing to the Board of unreasonable burden or discrimination prior to applying for a land-use-exemption permit, the rail carrier must then submit to Subpart C of the Board's rules to obtain a land-use-exemption permit”).