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October 28, 2020

301222

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
October 28, 2020
Part of
Public Record

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

Dear Ms. Brown:

The Citizens Campaign for the Environment (“CCE”) submits this letter in reply to the letter that Brookhaven Rail LLC (“BHR”) filed in the above-captioned proceeding on October 27, 2020 (“Letter”), seeking certain “clarification” of the Board’s decision served on October 23, 2020 (“Decision”), that denied BHR’s Petition for an Exemption from the Requirements of 49 U.S.C. § 10909 that BHR filed on July 17, 2020 (“Petition”).

CCE strongly opposes BHR’s request for clarification. BHR’s Letter is instead a disguised and unfounded request for reconsideration and/or waiver of the Board’s public notice rules that govern land-use-exemption permit applications under 49 U.S.C. §10909.

In its Decision, the Board “rejected” BHR’s Petition in full, and instructed that “[i]f Brookhaven Rail wishes to seek approval from the Board, it must file an application under 49 C.F.R. part 1155 and provide **all the information required under the statute and the Board’s regulations.**” *Id.* at 6 (emphasis added). BHR states in its Letter that it “accepts the Board’s ruling and is proceeding accordingly,” but then seeks “confirmation” through an expedited decision that the Board’s Decision means that BHR can ignore the mandatory pre-application public notice requirements under 49 C.F.R. §§ 1155.20(a) and (b). None of BHR’s justifications supports its interpretation of the Decision or warrants the granting of its request.

First, while BHR claims that the Decision fails to specifically reference the public notice requirements under part 1155 of the Board’s rules, the Decision makes clear that if BHR elects to proceed to file a full § 10909 application, it must follow “all” of the

Board's rules. Second, BHR claims that there is "no need" to inform the public of any future § 10909 application "given the extensive factual and legal record compiled to date," because BHR has "already met and exceeded" its notice requirements through its limited dissemination of its now rejected Petition last summer, and because the Board's Office of Environmental Analysis previously sought initial input from consulting parties on BHR's Petition. BHR's claims ring particularly hollow and fail to justify its request. The Board's rules require an applicant to serve a specific and detailed notice of intent on a broader group of state and local officials and have the notice published in a general circulation newspaper. The notice must include a statement to the public where it can find a copy of the § 10909 application, notice as to when initial replies are due, notice of the opportunity to participate in the NEPA review process, and guidance as to how the public may participate. BHR did not comply with those notice requirements when it filed its Petition, and it still has not done so. BHR's Letter does not even definitively announce that it will be pursuing a § 10909 application.

Finally, BHR attaches a recent newspaper article referencing its proposed facility and describing, among other things, three other solid waste rail transfer facilities being pursued by BHR's competitors, as alleged evidence that the newspaper notice requirements of § 1155.20(a)(3) are met or exceeded. However, the article does not reference at all BHR's unsuccessful § 10502 Petition, or any possible future § 10909 application(s) that BHR or any other Long Island waste haulers may bring, and it gives no guidance for participating in the Board's review process.

BHR may well perceive that limiting public notice and participation regarding its contemplated application will enhance its prospects. However, circumvention of the notice requirements is contrary to the requirements of the Clean Railroads Act and the Board's implementing regulations. Additionally, BHR will not be prejudiced in any way by having to conform to the Board's rules. For the reasons stated, BHR's "clarification" request is unwarranted and accordingly, should be denied.

Respectfully submitted,

/s/ Peter A. Pfohl
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*Attorneys for Citizens Campaign
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cc: Service List for FD 36399

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of October, 2020, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/

Katherine F. Waring