



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL
pap@sloverandloftus.com

301289

ENTERED

Office of Proceedings
November 16, 2020
Part of Public Record

November 16, 2020

Via 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 36398, *Brookhaven Rail LLC – Construction and Operation
Exemption – Suffolk County, New York*; 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 response to the surreplies that Brookhaven Rail LLC (“BHR”) and the Town of Brookhaven, New York (the “Town”) submitted on November 13, 2020, restating their request for confidential mediation in FD 39398¹ to the exclusion of CCE and other parties. The BHR and Town surreplies contain substantial misstatements and errors that only confirm the unsoundness of their request. Good cause exists for allowing CCE to briefly respond.

First, the Town’s claim that the Board has “already granted” its mediation request is wrong. Town Surreply at 1. The previous request for mediation was not granted, and the Board’s Decision instead provided that the parties “may inform the Board whether they would like to *seek* Board-sponsored mediation in Docket No. FD 36398” (emphasis added), as the Town and BHR then did in their November 6, 2020 mediation request. *Id.* at 8.

Second, BHR and the Town ignore that the Board’s rules require *all* parties to a proceeding to consent to Board-sponsored mediation. “The Board shall grant any mediation request submitted by all parties to a matter, but may deny mediation where one or more parties to the underlying dispute do not consent to mediation.” 49 C.F.R. § 1109.2(b). The Town’s attempt to evade this requirement by arguing that CCE “is at most an ‘*amicus*’ and not a ‘*party*’ in any legal sense,” is a misstatement of law. Town Surreply at 2. Under §

¹ While the Town filed its surreply exclusively in FD 36399, CCE infers that the Town intended to file in FD 36398 instead. The Board’s decision in FD 36399 served October 23, 2020 (the “Decision”), dismissed BHR’s Petition and directed that any future requests for mediation in FD 36398 be made in that Docket.

551(3) of the Administrative Procedure Act, “‘party’ includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.”² FD 36398 is not a two-party complaint proceeding, but instead a construction exemption proceeding involving multiple parties, including CCE. The Board’s Office of Proceedings confirmed CCE’s party status by designating CCE as a party of record in FD 36398 and FD 36399, and the Decision treated CCE as the same. CCE is no less a party than the Town, and cannot be excluded if the mediation is to proceed. Moreover, even if CCE were determined to be a non-party, which is incorrect, under the ADRA, “[a]n agency *shall consider not* using a dispute resolution proceeding if . . . the matter significantly affects persons or organizations who are not parties to the proceeding.” 5 U.S.C. § 572(a)(4) (emphasis added).

Third, BHR and the Town clarify in their surreplies that they seek to use exclusive, private mediation to obtain “partial resolution” (Town Surreply at 1-2) and “resolve” several “key” disputed issues in the proceeding including on environmental review (e.g., traffic studies and conservation easement infringement issues) and on the merits “pertain[ing] to the rail construction and operation proposed by BHR.” BHR Surreply at 1-2. Notwithstanding BHR and the Town’s protestations to the contrary, these issues significantly concern and affect CCE and other parties, including environmental review consulting parties, the Office of Environmental Analysis, and also at least implicate aspects of the ultimate merits, which is an improper use of mediation in a licensing proceeding.

Accordingly, the Board should not and cannot sponsor the mediation on the conditions specified by BHR and the Town.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Citizens Campaign
for the Environment*

cc: Service List for FD 36398 and FD 36399

² Also, the Board promulgated its mediation rules pursuant to the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-84 (“ADRA”). Under § 571(10), “‘party’ means (A) for a proceeding with named parties, the same as in section 551(3) of this title; and (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates proceeding.”

CERTIFICATE OF SERVICE

301289

I hereby certify that I have this 16th day of November, 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.

ENTERED

Office of Proceedings
November 16, 2020
Part of Public Record

/s/

Katherine F. Waring