

SERVICE DATE – JANUARY 6, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36398

BROOKHAVEN RAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—IN
SUFFOLK COUNTY, N.Y.

Digest:¹ This decision initiates Board-sponsored mediation between the Town of Brookhaven and Brookhaven Rail LLC.

Decided: January 6, 2021

Brookhaven Rail LLC (Brookhaven Rail) filed in this proceeding a petition for exemption to construct and operate a rail line in the Town of Brookhaven, N.Y. (the Town), that would serve a planned solid waste rail transfer facility (the Construction Petition) and included a request to consider the transportation merits before completion of the environmental review. Subsequently, Brookhaven Rail filed, in Docket No. FD 36399, a petition for exemption from the full application requirements of 49 U.S.C. § 10909 and 49 C.F.R. part 1155 subpart C for a land-use exemption permit for the planned facility (the Facility Petition).

On October 23, 2020, the Board, in a decision served in both dockets, rejected the Facility Petition and deferred action on Brookhaven Rail's request to now consider the transportation merits of the Construction Petition. Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y., FD 36398 et al., slip op. at 5 (STB served Oct. 23, 2020). The Board also noted that Brookhaven Rail and the Town had jointly filed a request for Board-sponsored mediation in a related docket, Docket No. FD 36399. Id. at 7. Brookhaven Rail and the Town stated that the petition for exemption in that docket raises a number of complex issues and questions and that they hope mediation would help provide clarity and mutual agreement on some of these matters. Id. The Board stated that, although it was rejecting the Facility Petition filed in Docket No. FD 36399, Brookhaven Rail and the Town could jointly inform the Board if they wished to pursue Board-sponsored mediation in Docket No. FD 36398. Id. at 8. On November 6, 2020, Brookhaven Rail and the Town notified the Board that they wished to do so.

On November 9, 2020, the Citizens Campaign for the Environment (CCE) filed in opposition to the mediation request. CCE claims that mediation is inappropriate because Brookhaven Rail and the Town fail to identify specific issues for mediation, although CCE notes that Brookhaven Rail and the Town have previously identified disagreements with respect to

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

environmental review issues. (CCE Reply 1-2, Nov. 9, 2020, FD 36398 & FD 36399.) CCE argues that mediation of environmental issues is inappropriate because it could allow two parties to potentially “sidestep” or “truncate” environmental review of the Construction Petition by the Board’s Office of Environmental Analysis (OEA) as well as the public scoping and opportunities for public input that is part of OEA’s environmental review process. (Id. at 2.) CCE asserts that, if the Board concludes that mediation is appropriate with respect to any issue pending in Docket No. FD 36398, fairness and due process require that any interested party or consulting party be allowed to participate, and it requests that it be allowed to do so. (Id.)

On November 18, 2020, Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the Sills Parties) also jointly filed in opposition to the request for mediation filed by Brookhaven Rail and the Town. The Sills Parties claim that any matters that would be subject to the mediation should instead be addressed openly amongst all of the parties of record. (Sills Parties Reply 1, Nov. 18, 2020, FD 36398.) The Sills Parties add that they were part of an earlier federal district court settlement involving Brookhaven Rail and the Town and argue that the issues regarding that settlement do not warrant Board-sponsored mediation. (Id. at 2.) If the Board nonetheless allows mediation, the Sills Parties ask that they be allowed to participate and that the parties disclose publicly the specific issues slated for mediation, and later, the issues resolved thereby. (Id. at 3.)

The Town opposes both CCE’s and the Sills Parties’ requests for inclusion in mediation. The Town argues that CCE’s and the Sills Parties’ inclusion in mediation would frustrate the goals of the mediation. (Town Reply 1-2, Nov. 13, 2020, FD 36399; Town Reply 2, Nov. 23, 2020, FD 36399.) The Town states that it is most concerned about ensuring that environmental mitigation measures and developmental restrictions stemming from the earlier district court settlement and environmental review done by the Town be imposed on any authority granted to Brookhaven Rail. (Town Reply 2, Nov. 23, 2020, FD 36399.)

Brookhaven Rail also opposes CCE’s inclusion in mediation. Brookhaven Rail states CCE was not a party to the settlement and claims that, based on CCE’s reply in opposition to the petition in Docket No. FD 36398, its only interest in mediation would be to oppose the authority sought by Brookhaven Rail in that docket and hence its participation in mediation would be contrary to 49 C.F.R. § 1109.1. (Brookhaven Rail Reply 2, Nov. 13, 2020, FD 36398 & FD 36399.) Brookhaven Rail also states that there are contractual and operational issues related to the earlier settlement to discuss in mediation, and such discussions could provide helpful guidance to OEA on key environmental issues it needs to address. (Id.) Brookhaven Rail did not respond to the Sills Parties’ request for inclusion in mediation.

On November 16, 2020, CCE replied to Brookhaven Rail’s and the Town’s filings, claiming, among other things, that the Board’s regulations at 49 C.F.R. § 1109.2(b) require that all parties consent to mediation and that it is a party before the Board. (CCE Reply 1-2, Nov. 16, 2020, FD 36398 & FD 36399.) CCE adds that issues raised during mediation will affect it and others, including OEA, and implicate aspects of the ultimate merits of the Construction Petition, which, it claims, is an improper use of mediation in a licensing proceeding. (Id. at 2.)

On November 30, 2020, as amended on December 1, 2020, the Sills Parties responded to the Town's filing, for the most part restating concerns that their exclusion from mediation would result in a "side deal" hurting their interests under the earlier settlement. (Sills Parties Reply 1-3, Dec. 1, 2020, FD 36398.)

PRELIMINARY MATTERS

Various filings that are not provided for by the Board's regulations have been submitted in response to the November 6 mediation request. In the interests of a complete record, however, all such filings will be accepted. Additionally, the Town's November 13, 2020 and November 23, 2020 filings were submitted in Docket No. FD 36399, which is closed, rather than Docket No. FD 36398, the Construction Petition docket in which the mediation request is pending. The Board will add these filings to the record in this proceeding, i.e., Docket No. FD 36398, and reminds the parties to submit any future filings in the appropriate docket.

DISCUSSION AND CONCLUSIONS

The Board favors the resolution of disputes through alternative dispute resolution in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1. The Board will grant the joint mediation request from Brookhaven Rail and the Town and will limit mediation to those parties. To the extent that mediation could help resolve or narrow the disagreements of Brookhaven Rail and the Town that are relevant to this proceeding,² the Board finds it appropriate under the circumstances to grant Board-sponsored mediation between those parties as they requested.

CCE incorrectly argues that § 1109.2(b) requires that all parties to a proceeding consent to Board-sponsored mediation. (CCE Reply 1, Nov. 16, 2020, FD 36398 & FD 36399.) Rather, that regulation provides that, in the event that all parties to a matter request mediation, the Board shall grant it. But the regulations also provide the Board discretion to order Board-sponsored mediation, even where all parties do not consent. See 49 C.F.R. § 1109.2(a) (permitting mediation "[p]ursuant to a Board order in response to a written request by one or more parties to a matter"); § 1109.2(b) ("The Board . . . *may* deny mediation where one or more parties to the underlying dispute do not consent to mediation") (emphasis added); § 1109.3(e) ("[w]here one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance").

CCE also argues that, as a matter of fairness, any interested or consulting party should be allowed to participate in mediation. (CCE Reply 2, Nov. 9, 2020, FD 36398 & FD 36399.) The Board declines to endorse such a broad view that would allow anyone who submits a filing to participate in mediation without regard to the specific issues of a case, the mediation request, or the parties involved.

² Regarding the Sills Parties' argument that Brookhaven Rail and the Town seek to override or circumvent the federal district court settlement, Board-sponsored mediation is not an appropriate forum to address issues related to compliance with the federal district court settlement.

The ultimate question before the Board in this docket will be whether to grant construction and operating authority to Brookhaven Rail and, if the Board were to do so, what conditions, if any, to impose. As required under 49 C.F.R. § 1109.1, mediation here would not encompass any grant, denial, stay, or revocation of regulatory authority.³ Nor would mediation limit or otherwise affect any necessary environmental review, which OEA will conduct in full regardless of the outcome of mediation. Should Brookhaven Rail and the Town reach resolution on any issues that have bearing on the merits of the Construction Petition, they would need to provide such information to the Board for consideration, and CCE and the Sills Parties would have an opportunity to reply at that time.

The Chairman will soon appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact Brookhaven Rail and the Town to discuss the timing and logistics for conducting the mediation, and other matters. At least one principal of each party, who has authority to commit that party,⁴ shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present.

The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The Board may extend mediation pursuant to mutual written requests of all parties to the mediation proceeding. *Id.* The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

It is ordered:

1. Filings not provided for by the regulations are accepted into the record, and the Town's November 13, 2020 and November 23, 2020 filings are added to Docket No. FD 36398.
2. Mediation will be initiated as discussed above.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

³ CCE argues that mediation is inappropriate because the specific issues for mediation have not been identified, and the Sills Parties ask that the specific issues slated for mediation be publicly identified. (CCE Reply 1-2, Nov. 9, 2020, FD 36398 & FD 36399; Sills Parties Reply 3, Nov. 18, 2020, FD 36398.) There is no regulatory requirement for specific issues to be identified in advance, and the Board typically declines to specify the exact scope and format of mediation when ordering mediation, instead allowing the mediator(s) to seek to effectuate the wishes of the participants to the extent appropriate.

⁴ CCE questions whether the Town has the ability to bind itself to a settlement, citing 49 C.F.R. § 1109.3. (CCE Reply 2, Nov. 9, 2020, FD 36398 & FD 36399.) The Board's mediation regulations do not preclude participation by governmental entities, even if their actions might otherwise be subject to public notice or other requirements.