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Petition / Request for Immediate Public Disclosure of Outcome of Mediation

By and Between Brookhaven Rail LLC and Town of Brookhaven, NY

June 1, 2021

Surface Transportation Board Docket No. FD 36398

ENTERED
Office of Proceedings
June 2, 2021
Part of
Public Record

RELIEF REQUESTED. This Petition/Request for immediate public disclosure is filed on behalf of NAACP, as identified below (“Petitioner”), in response to a non-public mediation conducted after a January 6, 2021 Surface Transportation Board’s (“STB”) Decision issued in the above-referenced docket. Petitioner seeks to have the STB take four actions: (1) order immediate disclosure of the outcome of the non-public mediation; (2) deny a May 27, 2021 “Expedited Consideration” request to extend the term of the non-public mediation; (3) order ongoing communications and updates to Petitioner and/or the general public, as set forth in more detail below, and (4) add Petitioner as a “Party” to this Docket.

SUBMITTED TO: Ms. Cynthia T. Brown Chief, Section of Administration Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Room 1034 Washington, DC 20423-0001. *See also*, Certificate of Service below.

PETITIONER. Petitioner is a non-profit entity. Certain of Petitioner’s members live, work, engage in community, religious, spiritual, recreational, educational, athletic, legal advocacy and other activities in and around areas that could be adversely affected by the project that is the subject of the Construction Petition. Petitioner’s name and address is: Hazel N. Dukes, President NAACP New York State Conference, 44 Wall Street, Suite 604, New York, New York 10005; 212-344-7474; email address is naACP@nysnaACP.org. Petitioner can be reached through its undersigned counsel, Juan D. Reyes, III.

BACKGROUND. On January 6, 2021 STB determined that Brookhaven Rail LLC (“Brookhaven”) and the Town of Brookhaven, NY (“Town”) were entitled to engage in a confidential mediation of undisclosed and unspecified “complex issues” raised by Brookfield’s Construction Petition, Docket FD 36398. The STB rejected the petitions of Citizen’s Campaign for the Environment (“CCE”) and Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the “Sills Parties”) to participate in the mediation. To Petitioner’s knowledge, no other party to this docket or member of the public participated in the non-public mediation or has knowledge of the outcome.

Insofar as is known to the public, Brookhaven and the Town engaged in a confidential mediation earlier in 2021. By letter dated April 7, 2021, those parties requested the STB afford additional time to complete the non-public mediation, which term was set to expire on April 14, 2021. That same letter requested an extension of the non-public mediation period to April 28, 2021.

While Petitioner lacks details, it appears a second (or even a third) request has resulted in the non-public mediation being extended to May 28, 2021. Now, by letter dated May 27, 2021, the parties are requesting a third (or fourth) extension of the non-public mediation, all the way to

June 18, 2021. Six months of secrecy is far too much. Petitioner and other members of the public have not been apprised of the outcome of the non-public mediation. Sufficient time has lapsed that the parties to the mediation either have documented their understandings, or must acknowledge that the non-public mediation did not result in resolution of the undisclosed and unspecified issues. Moreover, the serial extension of the non-public mediation process now is being abused. The parties seek a far longer term of secrecy than the regulations contemplate. Petitioner disagreed with the STB's January directive to allow a *temporary* term for a non-public mediation. Now, however, the parties seek an excessive term for secret negotiations, now spanning up to six months, which appears to represent a disturbing effort *permanently* to bar public participation in a major project. Serial extensions render the process broken. The STB should not be complicit in never, or only very belatedly, allowing the public to be apprised of the outcome of the non-public mediation. The parties have had ample time. It is thus now time for the exceptional, and temporary, allowance for secrecy to end and the normal process of public input and commentary to resume.

LEAVE TO BE IDENTIFIED AS A PARTY: Petitioner's interests here are manifest. Given Petitioner's members live, work, engage in community, religious, spiritual, recreational, educational, athletic, legal advocacy and other activities in and around areas that could be adversely affected by the project that is the subject of the Construction Petition, Petitioner's members have a direct interest and right to participate in public proceedings subject to local, state and federal laws, consistent with the orderly administration of such laws and the opportunities afforded for public notice, comment and participation. No relief requested in this Petition is known to Petitioner to be contrary to law. In fact, disclosure of the mediation outcome would be in furtherance of an orderly, open STB and other applicable permitting and review process. While Petitioner previously has not appeared before the STB on this docket, Petitioner requests leave to be designated as a "party" for ongoing proceedings. Even if such status as a party is denied, however, STB may deny further extensions for secret meetings and order the parties to the mediation to provide the relief requested by means of public disclosures of the information petitioned for herein, or the STB itself may issue a determination documenting the outcome of the mediation. Sooner or later, the world must know the outcome of the mediation. This Petition includes an explication of the good cause supporting immediate disclosure.

AUTHORITY. Petitioner is not aware of any STB regulation, or federal law, which allows parties to a non-public mediation ordered by the STB in connection with a Construction Petition to suppress the results or outcome of that mediation, upon completion, from the public. Petitioner notes that the STB asserted its authority to limit the parties to a mediation in its determination on January 6, 2021, but did not preclude or rule against the public disclosure of the outcome of the completed mediation. The process now must once again revert to a public one. Petitioner is also unaware of authority that allows for mediations to be perpetually extended such that the secret process eclipses the public process. Further non-public proceedings are an abuse of the limited exception for secrecy for a brief time in a project's life cycle. Perpetrating secret meetings and process destroys accountability, robs the public of its right to know, fosters community distrust and simply is not allowed.

Accordingly, ***Petitioner respectfully requests the STB to order the immediate disclosure*** of any term sheets, settlement agreements, working agreements, memoranda of understanding, mediator's report, mediator's proposals or any other records ***documenting the outcome of the mediation***. All records documenting any such agreements or understanding are the subject of this Petition. If oral agreements were made, they should be memorialized and disclosed.

If the STB intends to issue any determination in respect of the outcome of the non-public mediation, Petitioner requests an opportunity to review and comment on a draft STB determination prior to STB finalizing it. Again, Petitioner is not aware of a law or regulation that would bar STB from issuing a draft determination on the outcome of the mediation, prior to issuing such determination in final form.

If the non-public mediation resulted in no agreements or understandings, oral or written, Petitioner requests a public acknowledgment by the mediator and/or the parties of the failure of the mediation to resolve the purportedly disputed issues and/or to achieve any agreements or understandings. In the case of "no agreements," Petitioner requests the STB deem the mediation closed (to the extent not already deemed closed and completed by operation of law), deny the Construction Petition and close the docket.

Petitioner asserts a second ground supporting this Petition. Petitioner's members' personal and community interests also could be adversely affected by a new Facility Petition seeking a 49 U.S.C. §10909 land use exemption. Based on such public information as is available—which is limited—Petitioner understands that on or about March 10, 2021 the STB retained Hennington Durham & Richardson Architecture and Engineering PC ("HDR") as the STB's outside environmental consultants in connection with what is expected to be a new or amended Facility Petition filed by Brookhaven and/or similarly interested parties. That anticipated Facility Petition will involve an environmental review by the Office of Environmental Analysis ("OEA"). Under 49 U.S. C. § 1105.10(a)(1), "[w]hen an environmental impact statement is required **or contemplated**, the prospective applicant must provide the [OEA] with written notice of its forthcoming proposal at least 6 months prior to filing its application." (emphasis added) Given the hiring of HDR, it appears an environmental review is, at the very least, "contemplated." Accordingly, a 6 month notification of the project proposal must be provided.

Petitioner's request for disclosure herein also is thus directly justified on account of its right to participate in the public review of environmental issues raised by this project, in that Petitioner must be informed of what terms and conditions (if any) the mediation purported to resolve in respect of any environmental review. If the Town purports to enter into "deals" or "agreements," particularly (but not exclusively) in respect of community quality of life issues—including noise, nuisance, vibration, air quality, waste management, conservation of open woodland or other open space, drinking water purity, among other issues—then Petitioner must be allowed to understand such elemental effects on daily life. Absent the information sought in this Petition, Petitioner almost certainly will be unable to prepare, fully and meaningfully, to participate in, develop positions in response to, timely consult with experts or community leaders, and otherwise promote and give voice to, its member's interests and positions. Such disclosure also may

inform Petitioner in respect of its assessment of, and promotion of, community environmental justice issues.

Per the STB's own website:

Under NEPA, the STB **must** take into account in its decision-making the environmental impacts of its actions, including direct, indirect and cumulative impacts. The STB must consider these impacts before making its final decision in a case. OEA assists the STB in meeting this responsibility by: conducting an independent environmental review of cases filed with the agency; preparing any necessary Environmental Impact Statement (EIS) or Environmental Assessment (EA); **conducting public outreach to inform the public and communities about proposals before the agency and to notify them of the opportunity to raise environmental concerns**; and providing technical advice and recommendations to the agency on environmental matters.

(emphasis added). Additionally, and similarly, 49 U.S.C. § 10909(b) provides:

(b) LAND-USE EXEMPTION PROCEDURES.—Not later than 90 days after the date of enactment of the [Clean Railroads Act of 2008](#), the [Board](#) shall publish procedures governing the submission and review of applications for [solid waste rail transfer facility](#) land-use exemptions. At a minimum, the procedures shall address—

(1) the information that each application should contain to explain how the [solid waste rail transfer facility](#) will not pose an unreasonable risk to public health, safety, or the environment;

(2) the opportunity for public notice and comment including notification of the municipality, the [State](#), and any relevant Federal or [State](#) regional planning entity in the jurisdiction of which the [solid waste rail transfer facility](#) is proposed to be located; . . .

(emphasis added). Accordingly, the relief sought in this Petition is necessary to allow the proper administration of the STB's own environmental review process. Quite simply, Petitioner and its members almost certainly will have a great deal to say on issues of public health, safety and the environment in their community. Note that while Petitioner insists the disclosure of the results of the non-public mediation is a necessary step in the overall process triggered by the Construction Petition and the anticipated Facility Petition (the latter being subject to the six month pre-filing notification term), that does not mean disclosure is sufficient to ensure STB and the Town comply with all applicable laws. Far from it.

Petitioners (and the public) should immediately be informed or apprised if there is any update to, amendment or modification of, any agreements or understandings arising from the mediation. Petitioner requests an order or directive from STB to this effect, requiring Brookhaven and the Town to keep Petitioner and/or the public informed, on an ongoing basis with no termination until the matters are fully completed, if the terms or conditions agreed upon in the mediation evolve, change or are rescinded or cancelled.

Finally, there is additional good cause for this Petition. This Petition seeks relief that possibly will avoid a conflict between state and federal laws. New York's Freedom of Information Law is comprised of various statutes intended to guarantee public access to public records of governmental bodies in New York. The Town is a public instrumentality. The Town is not

authorized to conduct public business in secret, subject to certain exceptions that do not appear obviously applicable here. Particularly upon completion of the mediation, Petitioner is entitled to a copy of such understandings and records documenting the outcome of the mediation. The STB is in a position to avoid a conflict with State law. Petitioner's request does not interfere with the STB's determination that the mediation initially be conducted in confidence, and the STB never determined that the outcome of the mediation must remain confidential, nor did the STB determine that the mediation could be conducted perpetually in secret. Thus, the relief requested herein—initial disclosure and ongoing disclosure—avoids a possible conflict between federal STB procedures and New York public right to know “sunshine” laws.

TIMELINESS. This Petition is timely given no official statement that the mediation in fact was completed on April 28, 2021, or on May 28, 2021, has been made, and no public disclosure of the outcome of the non-public mediation has been made and because this Petition in fact seeks just such public determinations.

RESERVATIONS. Nothing in this Petition is intended to be, nor shall be deemed a waiver or rights, or an admission against interest, and all such available rights, entitlements, interests in fact or law are hereby expressly reserved. Petitioner reserves the right to supplement or amend this Petition if Petitioner determines it is within its rights and interests to do so and, specifically, if presented with new or different information in respect of STB proceedings on this docket.

CLOSING: Petitioner respectfully requests the relief sought herein in full and immediately: (1) the STB order immediate disclosure of the outcome of the mediation; (2) deny a May 27, 2021 “Expedited Consideration” request to extend the term of the non-public mediation; (3) order ongoing communications and updates to Petitioner and/or the general public, and (4) add Petitioner as a “Party” to this Docket.

Respectfully submitted,



Juan D. Reyes, III

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Attorneys for Petitioner

CERTIFICATE OF SERVICE:

I hereby certify that, on this 2nd day of June 2021, I served copies of the foregoing Petition and enclosures electronically (via email) upon the STB and upon each the following parties of record:

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