

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 9, 2021
Part of
Public Record

DOCKET NO. FD 36398

**BROOKHAVEN RAIL, LLC – CONSTRUCTION AND OPERATION EXEMPTION
- IN SUFFOLK COUNTY, NEW YORK**

**REPLY TO PETITION/REQUEST FOR IMMEDIATE PUBLIC DISCLOSURE OF
OUTCOME OF MEDIATION BY AND BETWEEN
BROOKHAVEN RAIL LLC AND TOWN OF BROOKHAVEN, NY**

Pursuant to the Surface Transportation Board’s (“Board” or “STB”) procedural rules Brookhaven Rail LLC (“BHR”) hereby submits this Reply to the “Petition/Request for Immediate Public Disclosure of Outcome of Mediation by and Between Brookhaven Rail LLC and Town of Brookhaven, NY” (“Petition”) filed by the NAACP New York State Conference (“NAACP NY”) in this docket on June 1, 2021.¹ The Petition is defective on multiple procedural and substantive grounds and demonstrates a lack of understanding of the Board’s regulations governing mediation and review of the environmental impacts of proposed rail construction projects, and so must therefore be denied. BHR addresses each of the key defects of the Petition in this Reply.

¹ BHR notes that Petition should not have been accepted for filing on June 1. This is because by its terms it was not properly served on all parties on the Service List for this docket. It was emailed to the wrong address for BHR counsel and it was not served at all on the Town of Brookhaven (“Town”). The undersigned counsel for BHR received a copy of the filing from a third party via email on June 2.

As a threshold matter, the Petition asks the Board to deny the May 27, 2021 request of BHR and the Town to extend the mediation period to June 18, 2021.² However, the Board, through the Director of the Office of Proceedings, granted that extension request on May 28, 2021. As such, this aspect of the Petition is moot.³ Because the mediation period has been extended, even if there were any valid grounds for the broad disclosures sought by NAACP NY – and there are none – the mediation has not concluded and so therefore the Petition’s request for “immediate disclosure of [a broad range of written materials] documenting the outcome of the mediation” is at best premature.⁴ But in any event, NAACP NY’s request for such broad disclosure is flatly contrary to the Board’s regulations and applicable law, and demonstrates a lack of understanding of the Board’s mediation and environmental review processes.

Distilled to its essence, the Petition’s complaint is that the Board’s mediation processes are confidential and that NAACP NY believes that the mediation in this proceeding has gone on too long. However, the fact of the matter is that the Board’s mediation processes *are* confidential by design, and the Board often extends mediation periods to facilitate discussion and potential

² Petition at 1-2.

³ While the Board’s website labelled NAACP NY’s Petition an “Appeal” there is nothing in the Petition that states it is appealing any decision of the Board (indeed the word “appeal” appears nowhere in the document). Moreover, to the extent the Petition can be generously construed solely for the sake of argument to be an appeal of the May 28 decision of the Director of the Office of Proceedings to extend the mediation period, NAACP NY makes no attempt to meet any of the requirements of 49 C.F.R §1115.1(c), which states appeals of decisions of the Director acting under authority of the Board “are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” Labelling a document an “appeal” does not make it so. Nevertheless, out of an abundance of caution BHR states in this Reply that the mere act of the Director to extend the mediation period three weeks cannot be construed as a “clear error of judgement” nor did the extension create “manifest injustice” to any party, so there are zero grounds for Board to rule the extension should not have been granted.

⁴ Petition at 3.

agreement outside of the formal docket.⁵ NAACP NY’s assertions that the modest extension requests of the Town and BHR to date “appear[] to represent a disturbing effort *permanently* to bar public participation in a major project” (emphasis in original) and that further extensions could mean “the secret process eclipses the public process” are without any support, contrary to the facts, and frankly absurd given the limited scope of the mediation, as discussed further below. Further, NAACP NY’s general demand that the Board direct BHR and the Town to disclose the outcome of the mediation is not only premature for the reasons discussed above, it is not necessary. Specifically, the mediation in this proceeding by regulation and Board order covers only a subset of the issues that do not bear on the merits of the Petition for Exemption or the environmental review process. As the Board explained in the decision initiating mediation:

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. 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.⁶

Because the mediation only covers a subset of issues related to the rail construction project, the disclosure of the outcome of the process is governed by 49 C.F.R. §1109.3(g), which requires that if resolution of any issues is achieved, “[the parties] or the mediator(s) shall so inform the

⁵ See *e.g.*, Docket No. NOR 42168, *Twin City Metals, Inc. v. KET, LLC* (served August 13, 2020); Docket No. FD 35068, *Soo Line Railroad Co. d/b/a Canadian Pacific Railway – Acquisition and Operation Exemption – BNSF Railway Co.*, (served March 3, 2020). In in Docket NOR 42117, *Cargill, Inc. et al v. Aberdeen and Rockfish Railroad Company, et al*, the mediation period was extended nine times over a two year period. See Decision served March 9, 2012 in that docket.

⁶ Docket No. FD 36398, *Brookhaven Rail LLC – Construction and Operation Exemption – In Suffolk County, NY* (served January 26, 2021) at 4 (“*Mediation Decision*”).

Board, and the parties shall file any stipulations they have mutually reached, and ask the Board to reactivate the procedural schedule in the underlying proceeding to decide the remaining issues.” BHR fully expects to comply with this regulation. Consequently, there is no need for the Board to issue a decision directing “the public disclosure of the outcome of the completed mediation.”⁷

On the other hand, NAACP NY’s additional demands that the Board also order [1] 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.**” . . . [2] “All records documenting any such agreements or understanding,” and [3] “[i]f oral agreements were made, they should be memorialized and disclosed,”⁸ are all flatly contrary to the Board’s regulations as well as the Administrative Dispute Resolution Act upon which the Board’s regulations are founded.⁹ These rules prohibit, with limited exceptions,¹⁰ the disclosure of

⁷ Petition at 3. BHR adds that the conclusion of an unsuccessful Board-sponsored mediation (which is not expected to be the case in this proceeding) does not, as NAACP NY erroneously asserts, result in the underlying petition being denied and the proceeding closed.

⁸ *Id.* (emphasis in original).

⁹ 49 C.F.R. §1109.3(d).

¹⁰ For example, on June 8, 2021, the Town filed a response to NAACP NY’s Petition which in part briefly discussed two aspects of “the Town’s mediation agreement:” (1) constructing the line of railroad covered by the Petition for Exemption to provide access to Parcel D in lieu of constructing an underpass; and (2) requiring the environmental measures contained in the 2016 “So-Ordered” Stipulation and 2017 SEQRA approvals to be applied to the development of Parcel D under the jurisdiction of the Board. See Letter from Robert M. Calica to Cynthia T. Brown, dated June 8, 2021 at 3-4. While these two topics have been part of the mediation process, constructing the rail line via a turnout from the Long Island Rail Road main line in lieu of the underpass is the subject of BHR’s petition, and the record in this proceeding and Docket No. FD 36399 contain references to the Town’s concurrence with this alternative means of accessing Parcel D. See, Docket FD 36398, *Response of Brookhaven Rail LLC to Reply of Sills Road Realty LLC, et al*, (August 4, 2020) at 12; and Docket No. FD 36399, *Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. 10909, BHR’s Reply to Reply in Opposition to the Citizen’s Campaign for the Environment (“CCE”)* (October 5, 2020) at 16, and Exhibit C, page 3 (Letter from Town to CCE explaining the agreement to expand the Conservation Easement to account for the new rail line’s encroachment over three acres). Similarly, BHR’s agreement to apply the environmental measures in the 2016 “So-Ordered” Stipulation and 2017 SEQRA to the rail construction project is also discussed in the respective public dockets of the two proceedings.

documents shared by parties and discussions that occur in Board-sponsored mediations.¹¹ NAACP NY has presented no valid reasons why the Board should make such an unprecedented and drastic departure from its established rules and policies in this case, which would have the certain result of chilling future mediations in Board proceedings. Particularly misplaced is NAACP NY's claim – which constitutes the bulk of its Petition - that broad disclosure of the documents and other materials from the mediation are required to enable NAACP NY to participate in the environmental review process associated with the rail construction project. As the Board explained above, the mediation will not “limit or otherwise affect any necessary environmental review, which OEA will conduct in full regardless of the outcome of mediation.”¹² Consequently, denying the Petition will have no effect on NAACP NY's “right to participate in the public review of the environmental issues raised by this project.”¹³

Similarly misplaced is NAACP NY's claim that the disclosure it seeks from the mediation in this docket is required because BHR is intending to file an application for land-use exemption permit pursuant to 49 U.S.C. §10909 in a separate docket and that application will also involve environmental review.¹⁴ The Board explicitly explained in the *Mediation Decision* that the mediation it authorized between BHR and the Town is confined to issues related to the rail

See, e.g., BHR's Petition for Exemption in this proceeding at 18. BHR therefore has no objection to the Town discussing these two topics in its June 8, 2021 letter. *See* 5 U.S.C. §474(b)(2) and (3), which permit disclosure of mediation materials if the parties agree and/or if the information has already been made public.

¹¹ *Id.*; *See* STB Docket No, FD 35524, *Canexus Chemicals Canada L.P v. BNSF Railway Co.* – *Emergency Service Order*; and Docket No. NOR 42131, *Canexus Chemicals Canada L.P. v. BNSF Railway Co.* (served November 1, 2011)(where the disclosure by a party of the substance of the negotiations in a mediation session without consent of the other party resulted in the information being stricken from the party's pleading).

¹² *Mediation Decision* at 4.

¹³ Petition at 3.

¹⁴ *Id.*

construction proposal in this docket. As such, the Petition's references to the potential application for land-use exemption permit under §10909 are irrelevant because the mediation in this proceeding explicitly excluded any discussion of the merits of that proposed project.

In conclusion, the Petition is procedurally and substantively defective, and the relief it seeks is directly contrary to the Board's rules and policies governing mediation. It also displays a misunderstanding of the limited scope of the mediation in this docket, and a lack of recognition that NAACP NY will not be restricted in any manner from participating in the environmental review being conducted by OEA pursuant to the Board's rules and the National Environmental Policy Act. For all the reasons set forth in this Reply the Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of June, 2021, a copy of the foregoing Reply to the “Petition/Request for Immediate Public Disclosure of Outcome of Mediation by and Between Brookhaven Rail LLC and Town of Brookhaven, NY” was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox