

LAW OFFICE OF THOMAS W. WILCOX, LLC

**1629 K. STREET, NW SUITE 300
WASHINGTON, DC 20006
(202) 508-1065**

TOM@TWILCOXLAW.COM
WWW.TWILCOXLAW.COM

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By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. FD 36398, *Brookhaven Rail LLC – Construction and Operating Exemption – in Suffolk County, N.Y.*; FD 36399 *Petition for Exemption from Requirements of 49 U.S.C. § 10909*; FD 35141, *U S Rail Corp. – Construction and Operating Exemption – Brookhaven Rail Terminal*; FD 35819, *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for Declaratory Order*; FD 36376, *Spectrum RR Holdings, LLC – Operation Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36384, *Sills Road Realty LLC – Acquisition Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36385, *Spectrum RR Holdings, LLC – Acquisition and Operation Exemption – Line of Sills Road Realty LLC, in the Town of Brookhaven, N.Y.*

Dear Ms. Brown:

This letter is filed on behalf of Brookhaven Rail LLC (“Brookhaven Rail”) to briefly respond to the “surreply” proffered for filing by the Citizens Campaign for the Environment (“CCE”) in response to Brookhaven Rail’s Reply to CCE’s Petition for Declaratory Order and/or Order to Show Cause and Suspend.

CCE’s “surreply” is a “reply to reply” prohibited by the Board’s rules, and there exists no good cause to waive that prohibition. The filing is simply a continuation and expansion of CCE’s arguments in its Petition and prior filings. CCE also apparently believes that when Brookhaven Rail refutes CCE’s clearly wrong statements regarding particular relevant facts, then Brookhaven Rail has engaged in “material misstatements” that CCE must have an opportunity to “respond” to by rearguing and expanding on its wrong position. This is not legitimate grounds for allowing a reply to a reply. Moreover, CCE asserts that its surreply should be accepted so CCE can address

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“new evidence” introduced by Brookhaven Rail in its Reply, but the only potentially new evidence that CCE actually asserts was included in the Reply is the excerpts of 2012 Sale Agreement of Parcel D by the County of Suffolk attached as Reply Exhibit E.¹ However, this information was provided in order to rebut CCE’s misinformed allegations about the potential clearing of a portion of Parcel D to facilitate the construction of an access road. It was not “new evidence” rising to the level of justifying a surreply.²

If the Board accepts CCE’s surreply into the record, then Brookhaven Rail makes the following limited points in response:

First, Brookhaven Rail has taken great pains to counter CCE’s persistent misstatements and mischaracterizations of the relationships between the various entities developing Parcels B, C, and D, and the record speaks for itself.³ However, CCE once again has misstated numerous facts to advance its preferred narrative and Brookhaven Rail is compelled to respond. Specifically, the membership shares of Brookhaven Rail are owned by Shamrock Rail, LLC, not Winters Bros Waste Systems of Long Island, LLC.⁴ Moreover, CCE’s false assertion in its surreply that “BHR is intertwined and affiliated with NP/Winters”⁵ is contrary to all the evidence of record, and also is based in part on CCE’s assertion that Winters Bros. Industrial Park Realty, LLC (which CCE calls “Winters Bros.” in its surreply) is part of NP/Winters and is also the entity “designated . . . to own and control the southern portion of Parcel D (approximately 50 acres).” The latter assertion is wrong. Brookhaven Rail has explained on multiple occasions as far back as July 5, 2021 and as recently as its Reply that the entity which purchased the southern portion of Parcel D is Winters Brothers Shamrock Rail Realty, LLC, which has no affiliation with NP/Winters.⁶ CCE also falsely states that Winters Bros. Industrial Park Realty, LLC participated in “initial OEA meetings”⁷ on Brookhaven Rail’s projects, which is belied by the fact that this entity did not even exist at the time of any initial meetings with OEA on the projects. This series of falsehoods culminates with CCE’s statement that Brookhaven Rail is a “partner” of NP/Winters, which is also false.⁸ The entire section of CCE’s surreply addressing alleged ownership and relationship issues should be rejected.

¹ See surreply at 3.

² In contrast, in the sole decision cited by CCE for this potential justification for its filing, the new evidence warranting a “reply to a reply” consisted of a 41-page reply to a petition for abandonment submitted by the sole shipper on the line.

³ See, e.g., November 30, 2021 letter and attachments thereto filed in Docket Nos. FD 36398 and FD 36399; Reply at 3-7.

⁴ surreply at 2; this was first announced in the Petition for Exemption filed in Docket No. FD 36398 filed June 24, 2020 (at page 4).

⁵ surreply at 2.

⁶ See July 5, 2021 letter attached to November 30, 2021 letter filing. Reply at 4.

⁷ surreply at 2.

⁸ *Id.*

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Second, CCE's discussion about the potential clearing of trees on portions of Parcel D is wrong on several accounts. Specifically, CCE's statement that planned clearing on the 178-acre tract owned by NP/Winters would include "areas where rail construction is planned" is unsupported by any evidence, and Brookhaven Rail has described its efforts to ensure this will not be the case in its Reply. As for the planned access road on the approximately 50 acres of Parcel D purchased by Winters Brothers Shamrock Rail Realty, LLC, Brookhaven Rail notes that the arrival of NorthPoint Development and NP/Winters and the resulting changes in the rail-served industry to be developed on Parcel D all post-dated the filing of Brookhaven Rail's petitions for exemptions in Docket Nos. FD 36398 and 36399 by nearly a year. An access road will now serve not only the proposed solid waste rail transfer facility but the new warehouse facilities. Brookhaven Rail reiterates that it has apprised OEA of this and other developments pursuant to established Board practice and notes again that OEA has yet to respond or react to this information.

CCE has also totally misconstrued the discussion in the Reply about the aforementioned 2012 Agreement of Sale, as well as the terms of that agreement. Nowhere in the Reply does it state that the 2012 agreement "requires the access road to be built from Horseblock Road."⁹ Rather, it states that construction of roads to serve rail industry located on the site was a key consideration as part of the sale, including roads built from Horseblock Road, and that Section 4.2 of the agreement requires that if such a road is constructed its shall be offered for dedication to the Town of Brookhaven.¹⁰ CCE's discussion about Section 4.3 of the 2012 agreement is irrelevant, and its interpretation of the attached portions of the agreement to provide for a single access road is contrary to the plain and unambiguous language of Sections 4.2 and 4.3.

The rest of CCE's surreply consists almost entirely of recast and expanded versions of arguments that CCE has already made or could have made in its Petition and other filings, and all have been either addressed by Brookhaven Rail in its Reply and other filings and/or are refuted by the evidence of record in these proceedings.

Please do not hesitate to contact me if you have any questions. The undersigned certifies that a copy of this letter is being served on all parties of record in the referenced dockets.

Sincerely,



Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

⁹ surreply at 3.

¹⁰ Reply at 17.