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SERVICE DATE – JANUARY 6, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35141

U S RAIL CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—
BROOKHAVEN RAIL TERMINAL

Docket No. FD 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC—PETITION FOR
DECLARATORY ORDER

Docket No. FD 36376

SPECTRUM RR HOLDINGS, LLC—OPERATION EXEMPTION—RAILROAD LINE IN
THE TOWN OF BROOKHAVEN, N.Y.

Docket No. FD 36384

SILLS ROAD REALTY LLC—ACQUISITION EXEMPTION—RAILROAD LINE IN THE
TOWN OF BROOKHAVEN, N.Y.

Docket No. FD 36385

SPECTRUM RR HOLDINGS, LLC—ACQUISITION & OPERATION EXEMPTION—LINE
OF SILLS ROAD REALTY LLC, IN THE TOWN OF BROOKHAVEN, N.Y.

Docket No. FD 36398

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

Docket No. FD 36399¹

BROOKHAVEN RAIL LLC—PETITION FOR EXEMPTION FROM REQUIREMENTS OF
49 U.S.C. § 10909

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

Digest:² This decision denies in part a petition for declaratory order concerning activities in a rail terminal in Brookhaven, N.Y., and directs the parties to provide additional information on the remaining issue raised in the petition.

Decided: January 6, 2023

On November 24, 2021, the Citizens Campaign for the Environment (CCE) filed a petition for declaratory order in the above-titled proceedings concerning various activities on a site known as the Brookhaven Rail Terminal (Terminal) in the Town of Brookhaven, N.Y. (Town). CCE seeks three separate findings and related relief. As discussed below, the Board will decline to issue a declaratory order concerning two of the requested findings but will seek more information concerning the remaining issue raised by CCE in its petition.

BACKGROUND

As explained in CCE's petition and depicted on the map it provides, the Terminal has historically been described as consisting of four sections, which are referred to as Parcels A, B, C, and D. (CCE Pet. for Declaratory Ord. 3, FD 35141 et al.) A Long Island Rail Road Company (LIRR) rail line separates Parcels A, B, and C from Parcel D. (Id.) Over more than a decade, the Board has examined various rail proposals involving these parcels.

Docket Nos. FD 35141 and FD 35819

In 2010, the Board granted, in Docket No. FD 35141, an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 for U S Rail Corporation (U S Rail) to construct and operate an approximately 18,000-foot rail line on property, now known as Parcel A, owned by Sills Road Realty LLC (Sills Road). See U S Rail Corp.—Constr. & Operation Exemption—Brookhaven Rail Terminal, FD 35141 (STB served Sept. 9, 2010). In 2014, U S Rail's successor, Brookhaven Rail LLC (Brookhaven Rail),³ and Brookhaven Terminal Operations, LLC (BTO),⁴ jointly petitioned the Board in Docket No. FD 35819 to find that BTO's plan to construct, and Brookhaven Rail's plan to operate, an additional 12,500 feet of track on Parcels B and C of the Terminal did not require Board authority. The Board agreed and found, under 49 U.S.C. § 10906, the additional 12,500 feet of track to be ancillary "spur" track, statutorily excepted from the entry and exit licensing requirements of § 10901 and § 10903 that

² 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 Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

³ U S Rail assigned its construction and operation authority involving Parcel A, together with a leasehold interest in the underlying property, to U S Rail New York, LLC (U S Rail NY). U S Rail NY was subsequently renamed Brookhaven Rail, LLC, by its equity-owner, Oakland Transportation Holdings LLC. See Gabriel D. Hall—Corp. Family Transaction Exemption—U S Rail N.Y., LLC, FD 35458 (STB served Jan. 7, 2011); Nev. 5, Inc.—Control Exemption—GTR Leasing LLC, FD 35635 (STB served June 15, 2012).

⁴ BTO operates under the trade name Brookhaven Rail Terminal.

apply to mainlines and branch lines. See Brookhaven Rail Terminal—Pet. for Declaratory Ord. (Brookhaven Rail Terminal 2016), FD 35819, slip op. at 1 & n.3, 3-4 (STB served Aug. 30, 2016).

Docket Nos. FD 36376, FD 36384, and FD 36385

On December 20, 2019, in Docket No. FD 36376, Spectrum RR Holdings, LLC (SRHL), a subsidiary of Sills Road, filed a verified notice of exemption to operate track primarily located on Parcel A. SRHL stated that BTO was now a subsidiary of Sills Road, that Sills Road funded construction of the rail line on Parcel A and owns that line, and that Sills Road wished to install its subsidiary, SRHL, to provide common carrier service in place of Brookhaven Rail on that line and other track in the Terminal. (SRHL Verified Notice 2, 4, FD 36376.) In a decision served on January 17, 2020, the effective date of the exemption was postponed pending further Board order, and SRHL was directed to provide certain additional information. Spectrum RR Holdings—Operation Exemption—R.R. Line in the Town of Brookhaven, N.Y., FD 36376, slip op. at 2-3 (STB served Jan. 17, 2020). Notably, in light of SRHL's claim that Sills Road owned the § 10901 rail line in the Terminal, SRHL was directed to explain why Sills Road did not need Board authority under § 10901 to own that track. See Spectrum RR Holdings—Operation Exemption, FD 36376, slip op. at 2. Rather than providing the requested information, on February 6, 2020, SRHL filed a motion to withdraw its verified notice.

On February 13, 2020, Sills Road filed a verified notice of exemption in Docket No. FD 36384 under 49 C.F.R. § 1150.31, seeking acquisition authority for its ownership of track operated by Brookhaven Rail on Parcel A, and SRHL simultaneously filed a verified notice of exemption in Docket No. FD 36385 under 49 C.F.R. § 1150.31 to acquire the track from Sills Road and operate it. In a decision served on June 16, 2020, SRHL's motion to withdraw the verified notice in Docket No. FD 36376 was granted, and the verified notices in Docket Nos. FD 36384 and FD 36385 were rejected because they raised various unresolved questions that required more detailed examination than the expedited notice of exemption process is designed to provide. The decision also identified certain information that would be needed should Sills Road renew its request for Board authority in the future. See Spectrum RR Holdings—Operation Exemption—R.R. Line in the Town of Brookhaven, N.Y., FD 36376 et al., slip op. at 2, 4-6 (STB served June 16, 2020).

Docket Nos. FD 36398 and FD 36399

On June 25, 2020, in Docket No. FD 36398, Brookhaven Rail filed a petition seeking an exemption under § 10502 from the prior approval requirements of § 10901 to construct and operate a 23,680-foot rail line (2020 Rail Construction Petition) that would serve a planned solid waste rail transfer facility to be located on Parcel D of the Terminal. Brookhaven Rail asked that the Board consider the transportation merits of the proposed rail construction before completion of the environmental review. Subsequently, on July 27, 2020, 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, in a decision served in Docket Nos. FD 36398 and FD 36399, the Board rejected the Facility Petition, finding that a full application under § 10909 would be necessary for the proposed facility. The Board also deferred action on Brookhaven Rail's request to consider the transportation merits of the 2020 Rail Construction Petition before examining the environmental impacts. See Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y., FD 36398 et al., slip op. at 5 (STB served Oct. 23, 2020).⁵

CCE's Petition for Declaratory Order and Subsequent Filings

Against this backdrop, CCE filed its petition for declaratory order in the above-referenced dockets. CCE claims that since the Board halted certain unauthorized rail construction in the Terminal in 2007, Sills Road, BTO, Brookhaven Rail Services LLC, and SRHL (collectively, the Sills Parties) have worked in partnership with Brookhaven Rail on a "scheme" to enable the Sills Parties to use Brookhaven Rail's status as a rail carrier to evade local project review and permitting requirements for their development activities at the Terminal. (CCE Pet. for Declaratory Ord. 3-5, FD 35141 et al.) In particular, CCE asserts that the developers have admitted that "they had, with [Brookhaven Rail's] full cooperation and partnership, engaged in, undertaken, and paid for **all** of the rail construction on Parcels A and B to date." (Id. at 6.)

CCE asserts that there is also a current effort to construct new rail line and engage in other rail-related activities on Parcels B, C, and D without the Board licensing and environmental review CCE believes are needed. It claims that Brookhaven Rail and the current developer, Winters Bros. Waste Systems of Long Island, LLC (Winters Bros.), which also owns Brookhaven Rail, have changed plans for Parcels B and C and that the track now proposed for those parcels is no longer exempted spur, and should be subject to prior approval from the Board under § 10901. (CCE Pet. for Declaratory Ord. 8-9, FD 35141 et al.) Furthermore, according to CCE, Brookhaven Rail informed OEA that the railroad's affiliates are actively proceeding to clear-cut trees on Parcel D in furtherance of rail construction without prior review or permission from the Board. (Id. at 11.)

As such, CCE asks the Board to find that:

1. the track to be constructed on Parcels B and C is common carrier line under § 10901, thereby requiring prior authorization from the Board as well as an environmental review, and the proposed construction and operation should be treated as connected to the projects proposed in Docket Nos. FD 36398 and FD 36399;

⁵ On October 20, 2021, the Board's Office of Environmental Analysis (OEA) suspended the environmental review in Docket Nos. FD 36398 and FD 36399 until the Board issues a decision resolving CCE's October 6, 2021 administrative appeal of a September 17, 2021 letter by the (then-Acting) Director of OEA finding no basis for CCE's allegation of a potential conflict of interest resulting from OEA's approval of a third-party contractor for the environmental review in those proceedings. That appeal will be addressed in a separate decision.

2. initiatives to construct, acquire, operate, or use lines on any part of Parcels A, B, C, or D, including any related construction work such as the plans to clear-cut on Parcel D, absent prior agency approval, are prohibited and should cease and desist, and be subject to civil penalties; and

3. “earlier decisions granting construction and operating authority for some lines on the Parcels, and declaring that no authorization was needed for the construction and operation of other new lines on the Parcels”—by which CCE apparently means decisions in Docket Nos. FD 35141 and FD 35819—were based on misrepresentations by the rail carrier and/or made in error, and must be reopened, revoked, and rescinded.

(CCE Pet. for Declaratory Ord. 1, FD 35141 et al.)

Although CCE asserts that the information in its petition is sufficient to support a grant of the requested relief, it suggests that the Board may wish to institute a proceeding for the receipt of evidence. (*Id.* at 2.) If the Board does so, CCE asks, among other things, that the 2020 Rail Construction Petition pending in Docket No. FD 36398, and any work on the forthcoming application for a land-use-exemption permit for the planned solid waste rail transfer facility under § 10909 in Docket No. FD 36399, be put into abeyance until the matters raised in its petition are resolved. (CCE Pet. for Declaratory Ord. 2, FD 35141 et al.) In addition, CCE suggests that the Board consider conducting its own investigation under 49 U.S.C. § 11701. (CCE Pet. for Declaratory Ord. 2, FD 35141 et al.)

Brookhaven Rail replied to CCE’s petition on December 13, 2021. It argues that CCE has failed to justify the findings it seeks or to support the issuance of any cease and desist orders. Among other things, Brookhaven Rail claims that CCE misunderstands Brookhaven Rail’s involvement in the activities taking place on Parcels B, C, and D. (Brookhaven Rail Reply 3-4, Dec. 13, 2021, FD 35141 et al.)⁶ Brookhaven Rail explains that it has not proposed to construct any tracks on Parcel B or C, that it has no ownership or leasehold rights to either of those parcels, and that it has no future plans or commitments to construct any tracks on them. (*Id.* at 6.) Rather, Brookhaven Rail asserts that it has only certain contractual rights to be the rail operator of tracks that may eventually be constructed on Parcels B and C. (*Id.* at 3.) Brookhaven Rail further states that NP/Winters Long Island Industrial, LLC (NP/Winters) owns Parcels B and C and has conceptually proposed to construct track on those parcels, that NP/Winters is not affiliated with Brookhaven Rail, and that an affiliate of Brookhaven Rail’s parent has only a minority interest in NP/Winters. (*Id.* at 3, 5; CCE Pet. for Declaratory Ord., Attachment A, FD 35141 et al.; Letter from T. Wilcox, July 6, 2021, FD 36398 (EI 30903).)

Additionally, Brookhaven Rail asserts that there is no reason to enjoin the tree-cutting on Parcel D. It states that NP/Winters also owns 178 acres of Parcel D and claims that the clearing on that section of the parcel would be in furtherance of the construction of NP/Winters’ warehousing facilities, which are presently proposed for Parcel D. (Brookhaven Rail Reply 15, Dec. 13, 2021, FD 35141 et al.) According to Brookhaven Rail, any tree-cutting on the

⁶ Brookhaven Rail initially failed to file its reply in Docket No. FD 35819 and subsequently corrected its omission on December 27, 2021.

remaining 50 acres of the parcel, the Shamrock Rail Reality Tract, which would house the planned solid waste transfer facility, would be limited to clearing for the purpose of constructing an access road to reach NP/Winters' southernmost warehouse and distribution facility. (Id. at 16.)

The Sills Parties jointly filed a response on December 14, 2021. They note that they had moved to withdraw with prejudice from Docket Nos. FD 36376, FD 36384, FD 36385, FD 36398, and FD 36399 in October 2021, and ask that any action the Board takes on CCE's declaratory order petition not disrupt ongoing and longstanding railroad common carrier operations taking place on Parcel A. (Sills Parties Reply 2, Dec. 14, 2021, FD 35141 et al.) They further assert that CCE has not identified any reason why Docket Nos. FD 36376, FD 36384, and FD 36385 should be reopened or what reopening those dockets would accomplish in connection with the current proposals to develop Parcel D. (Id. at 3.)

On December 22, 2021, CCE filed a reply challenging various assertions by Brookhaven Rail and claiming, among other things, that tree clearing would occur for rail construction on NP/Winters' section of Parcel D. (CCE Reply 3, Dec. 22, 2021, FD 35141 et al.) The railroad filed a response to CCE's reply on January 5, 2022.⁷

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n. 2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board, in its discretion, declines to issue a declaratory order here. The evidence presented by CCE does not support issuance of the declaratory order CCE seeks regarding the activities taking place on Parcels B, C, and D.⁸ The Board will also not reopen Docket No. FD 35819 under 49 U.S.C. § 1322 and 49 C.F.R. § 1115.4 as CCE has failed to demonstrate material error, new evidence, or substantially changed circumstances that would mandate a different result. See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018). However, to determine how to appropriately proceed in Docket No. FD 35141, Brookhaven Rail and the Sills Parties will be directed to provide additional information regarding the previous rail construction on Parcel A, as described further below.

⁷ Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept CCE's December 22, 2021 filing and Brookhaven Rail's January 5, 2022 filing in the interest of a complete record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

⁸ In addition, given the extensive replies to CCE's petition in the record, it is unnecessary to institute a declaratory order proceeding to permit the filing of additional evidence on the issues raised by CCE involving activities on these parcels.

1. Track on Parcels B and C

CCE asserts that Brookhaven Rail and Winters Bros. should be required to seek § 10901 rail line construction authority and that the Board should conduct an environmental review prior to allowing any track work on Parcels B and C. (CCE Pet. for Declaratory Ord. 7, FD 35141 et al.) According to CCE, the track on Parcels B and C no longer qualifies as spur, yard, switching, or other excepted track under § 10906. (CCE Pet. for Declaratory Ord. 9, FD 35141 et al.)

Although CCE acknowledges that the Board examined the status of the track on Parcels B and C in the agency's 2016 decision in Docket No. FD 35819 and found the track to be excepted spur track, it claims that changed circumstances warrant a different conclusion now. Among other things, CCE asserts that: (1) the track will not be constructed by any of the parties that filed the original Docket No. FD 35819 petition but instead by NP/Winters; (2) the track plans submitted to OEA depart materially from the track plans submitted earlier in Docket No. FD 35819; and (3) the new track previously was intended to expand the existing facility operations on Parcel A, but the new plan is to serve multiple shippers to be located in two large warehouses owned by NP/Winters. (CCE Reply 2-3, Dec. 22, 2021, FD 35141 et al.) In particular, CCE notes that a map NP/Winters filed as part of an application for financial assistance from the Town's Industrial Development Agency (IDA), (CCE Pet. for Declaratory Ord., Attach. A, FD 35141 et al.), as well as a later schematic from Brookhaven Rail, (Letter from T. Wilcox, Attach. 2, July 6, 2021, FD 36398 (EI 30903)), depict the track to be constructed on Parcels B and C as connecting directly to the LIRR.

Therefore, CCE asks the Board to find that Brookhaven Rail requires construction and operation authority under § 10901 for the track on Parcels B and C. (CCE Pet. for Declaratory Ord. 1, FD 35141 et al.) It also asks the Board to treat the Parcel B and C activities as connected to the 2020 Rail Construction Petition in Docket No. FD 36398, as well as the anticipated land-use-exemption permit application for the solid waste rail transfer facility in Docket No. FD 36399. (*Id.*) CCE asserts that, at a minimum, the Board should require Brookhaven Rail to resubmit or substantially amend its petition in Docket No. FD 36398. (*Id.* at 9.)

CCE has not submitted evidence adequate to support these requested findings. Nor has CCE shown a need to reopen the Board's decision in Docket No. FD 35819 because it fails to demonstrate material error, new evidence, or substantially changed circumstances that would mandate a different result. In its 2016 decision, the Board found the track on Parcels B and C to be excepted spur track because the intended use and physical characteristics of the track are typical of those associated with excepted track. Brookhaven Rail Terminal 2016, FD 35819, slip op. at 4. Among other things, the Board noted that the intended use of the track was to load, reload, store, and switch rail cars incidental to the receipt and delivery of shipments for existing and similarly-situated customers in the same regional market now served by existing terminal facilities. *Id.* The Board added that the track would expand, improve, and increase the capacity of Parcel A's track and its transloading and terminal facilities and services. *Id.* The Board also found that the track would not reach new regional markets or invade another rail carrier's established territory. *Id.*

To be sure, some circumstances have changed since 2016, including that NP/Winters now owns Parcels B and C and will be constructing the track there to support its warehouses. Those changes, however, do not suggest a different conclusion regarding the nature of the track to be built on Parcels B and C, which still appear to be § 10906 excepted spur track. As Brookhaven Rail has stated previously to OEA and NP/Winters confirmed in its application to IDA, NP/Winters is developing Parcels B and C for rail-served warehousing and distribution facilities. (Brookhaven Rail Reply 10, Dec. 13, 2021, FD 35141 et al.) Such facilities necessarily involve rail transloading and other activities consistent with the track's use as spur track. (*Id.*) The fact that NP/Winters may construct the track is not determinative here of whether the track will be spur or mainline track. Brookhaven Rail has explained that it has agreed to provide service to shippers on those tracks by delivering and receiving freight on them, and those tracks, as the Board previously held, are ancillary to the mainline tracks Brookhaven operates on Parcel A.

Furthermore, although Brookhaven Rail indicated to OEA at one point that the track to be constructed on Parcels B and C would directly connect to the LIRR, (*see* Letter from T. Wilcox, Attach. 2, July 6, 2021, FD 36398 (EI 30903)), Brookhaven Rail subsequently clarified that the referenced attachment was not accurate in that respect and that the Parcel B and C track would instead connect with the main line track already constructed on Parcel A, consistent with the plan previously proposed in Docket No. FD 35819. (*See* Email from T. Wilcox, July 7, 2021, FD 36398 (EI 31313).)

As such, CCE has not shown that any activities by NP/Winters on Parcels B and C are inconsistent with the Board's finding in 2016 that the track to be constructed on Parcels B and C would be excepted spur track. NP/Winters therefore does not need construction authority, and Brookhaven Rail does not need operating authority for the track currently proposed for Parcels B and C.⁹ However, OEA will evaluate the proposed NP/Winters development as a cumulative impact during environmental review of Brookhaven Rail's petition for exemption for the 2020 Rail Construction Petition in Docket No. FD 36398 and anticipated application for a land-use-exemption permit in Docket No. FD 36399. (*See* Letter to P. Pfohl 3, Sept. 17, 2021, FD 36398 (EO 3566).)

⁹ In Effingham Railroad—Petition for Declaratory Order—Construction at Effingham, Ill., 2 S.T.B. 606 (1997), the Board found that construction by Effingham Railroad Company (ERRC) of a stub-ended track for it to perform switching fell within the agency's licensing authority, because "the larger purpose and effect of ERRC's proposal is to construct what will constitute ERRC's entire line of railroad to serve a new rail shipper." Effingham R.R., 2 S.T.B. at 609. Here, however, there is no evidence establishing NP/Winters' intent on Parcels B and C to undertake or be legally responsible for the movement of rail cars for others. *See JGB Props.—Pet. for Declaratory Ord.*, FD 35817, slip op. at 8-9 (STB served Dec. 10, 2015); N.Y. City Econ. Dev. Corp.—Pet. for Declaratory Ord., FD 34429 (STB served July 15, 2004) (finding that track to be constructed by a third party and operated by a Class I railroad would be excepted track and that Effingham R.R. would not apply in that situation); *see also* 49 U.S.C. § 10906 (allowing for not just the "joint ownership," but also "joint use" of § 10906 track).

2. Tree-Cutting on Parcel D

CCE asserts that Brookhaven Rail notified OEA in a November 11, 2021 email that Brookhaven Rail's affiliates intended to cut down trees on Parcel D. (CCE Pet. for Declaratory Ord. 11, FD 35141 et al.) CCE asserts that Brookhaven Rail will be clearing a 150-foot strip across 50 acres of the parcel in furtherance of rail construction, and that these activities should be prohibited and enjoined because they require prior review and approval from the Board. (Id. at 1-2.)

According to Brookhaven Rail's email to OEA, NP/Winters will seek permission from the Town to begin cutting trees on parts of Parcel D in furtherance of two goals. First, NP/Winters will seek permission for areas on its portion of Parcel D that it has determined are needed for the construction of its warehouse buildings, utilities, access roads, and parking lots. (Email from T. Wilcox, Nov. 12, 2021, FD 36398 (EI 31313).) Brookhaven Rail states that the proposed clearing will not include the approximately 18.5 acres to be leased by it from NP/Winters to construct and operate the railroad lines covered by its petition for exemption in Docket No. FD 36398. (Id.) Second, according to Brookhaven Rail, NP/Winters will also seek permission to cut trees on a 150-foot-wide strip on 50 acres of Parcel D. (Id.) This area on Parcel D, where the proposed solid waste rail transfer facility may ultimately be located, is owned by Winters Bros. Shamrock Realty LLC, and Brookhaven Rail refers to the 50 acres as the Shamrock Rail Realty Tract. (Id.; Brookhaven Rail Reply 14, Dec. 13, 2021, FD 35141 et al.) Brookhaven Rail states that this clearing is required specifically for the construction of an access road to the NP/Winters' warehouses that will connect to Horseblock Road at the southern end of Parcel D. (Email from T. Wilcox, Nov. 12, 2021, FD 36398 (EI 31313).)

This is not the first time the Board has been asked about the appropriateness of various construction activities in the Terminal. Prior to filing its petition for exemption in Docket No. FD 35141, U S Rail petitioned the Board to clarify, among other things, what activities it could engage in independent of the Board's processes. The Board found that certain activities, such as grading, could occur without Board approval or oversight so long as they were not in furtherance of rail construction. See Suffolk & S. Rail Rd.—Lease & Operation Exemption—Sills Rd. Realty, LLC, FD 35036, slip op. at 4 (STB served Aug. 27, 2008). NP/Winters' tree cutting on Parcel D, needed for the construction of the warehouse buildings, utilities, access roads, and parking lots, appears not to be in furtherance of rail construction but rather for the use of NP/Winters' own facilities on its own property. Although CCE claims that the tree cutting would be in furtherance of the 2020 Rail Construction Petition, (see CCE Reply 3, Dec. 22, 2021, FD 35141 et al.), it has not supported that claim. Moreover, outside the rail line construction context, for activities to be subject to the Board's jurisdiction, they must be performed by, or under the auspices of, a rail carrier. See Suffolk & S. Rail Rd.—Lease & Operation Exemption, FD 35036, slip op. at 3; see also Del Grosso—Pet. for Declaratory Ord., FD 35652, slip op. at 4 (STB served Dec. 5, 2014). Here, the record does not demonstrate that NP/Winters is affiliated with Brookhaven Rail, and, although an affiliate of Brookhaven Rail's parent owns a portion of NP/Winters, that entity owns a non-controlling minority interest. (See CCE Pet. for Declaratory Ord., Attach A, FD 35141 et al.; Letter from T. Wilcox, July 6, 2021, FD 36398 (EI 30903).) It follows that this tree-cutting is beyond the Board's jurisdiction and, as

such, would be subject to the full panoply of state and local law. See Suffolk & S. Rail Rd.—Lease & Operation Exemption, FD 35036, slip op. at 4.

As to tree-cutting specifically for the access road on the Shamrock Rail Realty Tract, the map provided at Attachment 2 to the July 6, 2021 letter demonstrates that the road would serve NP/Winters' southernmost warehouse. Because NP/Winters can cut trees for the road to reach its warehouse without Board authority, the Board will not enjoin this tree removal either, even though this access road may also potentially serve the planned solid waste rail transfer facility. (Brookhaven Rail Reply 16, Dec. 13, 2021, FD 35141 et al.; Letter from T. Wilcox, Attach. 2, July 6, 2021, FD 36398 (EI 30903).) However, any tree-cutting for this access road would also be subject to the full panoply of state and local law.¹⁰

3. Reopening or Revoking the Exemption Granted in Docket No. FD 35141

CCE asks the Board to find that the decision granting construction and operation authority in Docket No. FD 35141 for the rail line on Parcel A was based on misrepresentations and should be reopened. (CCE Pet. for Declaratory Ord. 1, FD 35141 et al.) It asserts that the Board issued its decision in that docket based on the understanding that the planned construction would be conducted by a railroad, and not by non-railroad developers as allegedly turned out to be the case. (*Id.* at 15.) CCE also asks the Board to require Brookhaven Rail to substantively respond to the queries posited in Spectrum RR Holdings—Operation Exemption—Railroad Line in the Town of Brookhaven, N.Y., FD 36376 et al., slip op. at 5-6 (STB served June 16, 2020), and to provide all relevant documentation supporting its claims.

As discussed above and noted by CCE, the Board's decision in Spectrum RR Holdings raised numerous questions about Docket No. FD 35141. It is still not clear what role each party played in the construction of that line, how or why Sills Road came to be involved in the construction given that construction authority was granted to Brookhaven Rail's predecessor, U S Rail, and why no party sought to clarify these issues in Docket No. FD 35141 during the construction proceeding. To further explore the matter and provide information needed to determine how to proceed, the Board will direct Brookhaven Rail and the Sills Parties to respond to the questions posed in Spectrum Railroad Holdings and to provide all materials sought therein concerning Docket No. FD 35141 by February 21, 2023.¹¹

4. Request for the Board to Stop Work on Proposals for Parcel D

While various questions remain concerning Parcel A, they do not justify CCE's request to halt work on Brookhaven Rail's proposals related to Parcel D. (See CCE Pet. for Declaratory Ord. 2, FD 35141 et al.) The development of Parcel D involves rail line that is not connected to Parcel A. Moreover, the plans for Parcel D are being proposed approximately 10 years after the

¹⁰ In addition, like the development on Parcels B and C, OEA will evaluate the proposed NP/Winters development on Parcel D as a cumulative impact during environmental review of the 2020 Rail Construction Petition and anticipated application for a land-use-exemption permit.

¹¹ Because the Board seeks this information in Docket No. FD 35141, there is no need for an investigation under § 11701.

rail construction was authorized on Parcel A. Therefore, the projects on Parcels A and D are separate and distinct and CCE has provided no basis for the Board to enjoin the planned activities on Parcel D at this time.

It is ordered:

1. CCE's December 22, 2021 filing and Brookhaven Rail's January 5, 2022 filing are accepted.
2. CCE's petition for declaratory order is denied in part, as described above.
3. To determine how to proceed in Docket No. FD 35141, Brookhaven Rail and the Sills Parties are directed to respond to the Director's June 16, 2020 decision in Docket No. FD 36376 and to provide all materials sought therein concerning Docket No. FD 35141 by February 21, 2023.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.