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CITIZENS CAMPAIGN FOR THE ENVIRONMENT

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PETITION FOR PARTIAL RECONSIDERATION

Pursuant to 5 C.F.R. § 1115.3, the Citizens Campaign for the Environment (“CCE”) respectfully submits this petition for partial reconsideration of the decision the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceedings on January 6, 2023 (the “Decision”), on grounds of material error.

PREFACE AND SUMMARY

Issues as to illegal rail line construction on portions of the Brookhaven Rail Terminal (“Terminal”), situated on the four Terminal parcels (denominated Parcels A, B, C, and D), have persisted for over fifteen years, dating to when the Board issued an extraordinary cease and desist order on its own motion.¹ Significantly, the recent decision of the Director of the Office of Proceedings in FD 35141 (STB served June 16, 2020), referenced new admissions that the involved developer constructed track entirely on its own, without any prior STB authorization that the railroad had failed to disclose to the Board, and that the railroad did not own or control any of the track over which it operated. With compelling evidence of an improper scheme by a railroad and a developer to evade and overcome prior cease-and-desist orders and engage in unauthorized construction and ownership of a rail line in the Terminal, largely confirmed² to date, the Decision granted, in

¹ *Suffolk & S. R.R. Lease & Operation Exemption – Sills Rd. Realty, LLC*, FD 35036 (STB served Oct. 12, 2007), *petition for reconsideration denied*, FD 35036 (STB served Dec. 20, 2007).

² *See* Sills Parties’ Reply (Dec. 14, 2021) at 1 (Sills Road admits that “it funded the construction,” “it holds title” to the railroad assets, and that US Rail Corp. “did not at the time of the FD 35141 proceeding disclose Sills Road’s role in the construction and ownership” of the assets).

part, the Petition for a Declaratory Order that CCE filed on November 23, 2021 (the “Petition”).

As part of its Decision, the Board reopened FD 35141 and ordered Brookhaven Rail (Brookhaven Rail LLC or “BHR,” successor to U S Rail Corporation (“U S Rail”)) and the Sills Parties³ to provide detailed information on the construction and ownership of the involved rail line that already exists on Parcel A, the parties’ roles in requesting construction authority, and all relevant agreements and documents explaining why the developer, rather than the railroad, appears to own the line and have constructed the line, without required authorization, and contrary to prior representations by the railroad.

Under 49 C.F.R. § 1115.3(b)(2), the Board will reconsider its prior action upon a showing that “[t]he prior action involves material error.” CCE agrees with the portion of the Decision requiring the filing of additional evidence and further consideration as to the status of the track on Parcel A. However, having properly reopened FD 35141 based on an initial showing of material error, new evidence, and substantially changed circumstances, and ordered Brookhaven Rail and the Sills Parties to provide detailed relevant information on whether the line of Parcel A was actually built, owned, and operated in accordance with Board authority, the Board need not, and should not, have denied the other aspects of CCE’s petition.

³ The Sills Parties are Sills Road (Sills Road Realty LLC), BTO (Brookhaven Terminal Operations, LLC), Brookhaven Rail Services LLC, and SRHL (Spectrum RR Holdings, LLC).

The instant petition is directed exclusively to the Decision's findings and conclusions regarding the regulatory status of the rail line proposed for construction over Parcels B/C of the Terminal, and the Board's need to include that construction as a connected jurisdictional project and impact, and not merely a cumulative impact, of its Environmental Impact Statement to be prepared for Brookhaven Rail's construction petition in FD 36398 and its anticipated § 10909 application. *Id.* at 8 & 10 n.11.

The lines on the other Terminal parcels, including the proposed construction on Parcel D in FD 36398, and the proposed construction on Parcels B/C, are linked in various ways to the line on Parcel A. The Board's determination that the track to be constructed on Parcels B/C is merely "ancillary to the mainline tracks Brookhaven operates on Parcel A" improperly presupposes and assumes that the track previously constructed on Parcel A actually was properly authorized, constructed, and owned by the common carrier seeking construction authority. However, the new facts of record to date reveal that the Parcel A track was likely constructed in contravention of the law, the Board's rules, and the Board's prior cease-and-desist order, prompting the Board to order the parties to submit additional pertinent information related to the regulatory status of the Parcel A track.

In sum, the Board's denial of the aspects of CCE's Petition relating to the regulatory status of the rail line proposed for construction over Parcels B/C, is at best premature until the validity of the construction and operation of the Parcel A track is resolved. Also, the Board's related decision to treat the construction of the lines on Parcels B/C and D as merely cumulative impacts, and not connected impacts, of its environmental review to be prepared for Brookhaven Rail's construction petition in FD 36398 and its

anticipated § 10909 application, is similarly premature. Additionally, by resolving these other issues adversely to CCE, the Board has effectively prejudged the outcome as to Parcel A itself. The approach is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, and a violation of due process. It also undermines recent statements of individual Board Members that the Board should “promote greater compliance and transparency as it relates to the licensing of rail activities” and “[f]or those who continue to operate outside the rules, stronger enforcement, including the administering of severe penalties when appropriate, should prevail.” *RFM HoldCo LLC – Control Exemption – Pioneer Railcorp, et al.*, FD 36451 (STB served Mar. 19 2021), at 8 (Commissioner Primus dissent).

Finally, even if the Parcel A line were found to be in order, two independent infirmities attach to the Decision’s treatment of the line on Parcels B and C. First, the difference in ownership between the line on Parcels B and C (Winters/NP) and on Parcel A (Sills Parties or Brookhaven) means that the Parcel B/C track cannot be viewed as ancillary to the second track for purposes of 49 U.S.C. § 10906. Second, the Decision improperly found that the line constituted excepted track by ignoring how it would be used to serve new customers of NP/Winters. *Chicago Rail Line, L.L.C.—Lease and Op. Exempt.—Union P. R.R. Co.*, FD 33323 (STB served Sept. 2, 1997), at 5 (finding § 10906 inapplicable because the tenant “intends to extend its operations to reach new customers” and nothing that “[t]he fact the subject trackage is short is not significant here”).

ARGUMENT

I. The Decision's Determinations Regarding Activities on Parcels B, C, and D are Premature, and Improperly Prejudge the Outcome as to the Status of Parcel A

The status of the line on Parcel A serves as the foundation for the proposed other track segments and must be resolved before the other segments can be found to pass muster. For example, if the Parcel A line is not proper or is unauthorized, then line on Parcels B and C cannot be found to be ancillary track that is excepted under 49 U.S.C. § 10906. Likewise, the development on Parcel D of the Terminal cannot be viewed in isolation, especially given NP/Winters intertwined involvement in the development of all the parcels and Winters ownership of Brookhaven Rail. If the Board has jurisdiction over the new rail line to be constructed on Parcels B and C, then that project must be considered a connected, and not just a cumulative, impact for environmental review purposes. Further, the clearcutting that has recently occurred on Parcels B and C, along with any other activities conducted in furtherance of rail line construction, is clearly unlawful.

The Decision (at 8) suggests that Brookhaven Rail currently operates over STB authorized "mainline tracks," by which the Board may mean common carrier tracks that were authorized to be constructed in FD 35141. However, again, that would prejudice the Board's ultimate determination on the status of the Parcel A tracks, on which it has ordered the filing of additional information from Brookhaven Rail and the Sills Parties that has yet to be received.

Under 49 U.S.C. § 10901, a person may construct a common carrier rail line only upon prior authorization and the issuance of a certificate authorizing such activity or

through an equivalent exemption under 49 U.S.C. § 10502. Also, decisions (including exemptions) authorizing rail line construction are permissive only, and apply only to the party actually obtaining construction authority. *E.g., Rocky Mountain Railcar & Repair, Inc. – Acquisition & Operation Exemption – Line of Railroad in Tooele County, Utah*, FD 35478 (STB served Apr. 13, 2018), at 1; *Jackson County Port Authority A/K/A Port of Pascagoula – Petition for Declaratory Order*, FD 35994 (STB served July 28, 2016), at 2. “The Board expects that the appropriate parties will seek any necessary authority.” *Oakland Global Rail Enterprise, LLC – Operation Exemption – Rail Line of Union Pac. Railroad Co. and BNSF Railway Co.*, FD 35822 (STB served July 24, 2014), at 1.

Here, Brookhaven Rail sought independent Board authority to construct and operate the Parcel A track in FD 35141. However, the facts of record to date reveal that, Brookhaven Rail, despite having obtained Board authority to independently construct, own, and operate a new common carrier rail line in FD 35141, did not actually undertake to consummate that authority and independently construct the track that was authorized. The additional information the Board has ordered to be provided will shed further light on the subject. If the track turns out to have been improperly constructed with or by parties other than Brookhaven Rail, and/or it is owned by others which Sills Road has already admitted (Sills Parties’ Reply (Dec. 14, 2021) at 1), contrary to the actual authorization granted to in FD 35141, then the track’s construction and operation are unauthorized.

A carrier seeking to provide common carrier service over track owned or constructed by others may not exercise any authority to operate, without also first seeking and obtaining appropriate Board authority. To do so, the carrier must establish it holds a

sufficient property interest in the track to ensure that the property owner (as a non-carrier) does not have the authority to exert undue control or interference over the common carrier operations. *E.g., Ohio River Partners LLC – Acquisition & Operation Exemption – Hannibal Development, LLC*, FD 35984 (STB served Apr. 1, 2016), at 2; *James Riffin – Petition for Declaratory Order*, FD 35245 (STB served Sept. 15, 2009), at 6.

Again, Sills Road has already confirmed and verified that it actually owns and possesses title to the tracks. Sills Parties’ Reply (Dec. 14, 2021) at 1. The operator of the Parcel A tracks, Brookhaven Rail, has conceded that it does not own the Parcel A tracks. Director’s Decision at 3 (Brookhaven Rail did “not dispute that Sills Road owns the line” on Parcel A). Yet Brookhaven Rail has failed to obtain STB authority to operate any third party tracks on Parcel A, and namely, here, Sills Road’s track. Additionally, Brookhaven Rail has failed to provide the Board with any evidence that it has a suitable legal interest in the track that gives it the ability to exercise any common carrier authority over the constructed track.⁴

“The question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether that party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority.” *Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, FD 33905 (STB served Oct. 22, 2001).

⁴ *E.g., Anthony Macrie – Continuance in Control Exemption – N.J. Seashore Lines, Inc.*, FD 35296 (STB served Aug. 31, 2010) (requiring operators to provide in advance complete copies of agreements with the track owner to resolve any concerns over possible interference with common carrier operations); *N. Shore R.R. – Acquisition & Operation Exemption – PPL Susquehanna, LLC*, FD 35377 (STB served Apr. 26, 2011), at 3 (same).

Put simply, if it turns out that the Parcel A track was not constructed solely by Brookhaven Rail, and/or is owned by a non-carrier, which Sills Parties have already confirmed (Sills Parties' Reply (Dec. 14, 2021) at 1), the mere fact that the Sills Parties may have allowed BHR to conduct limited and circumscribed switching operations on its trackage does not bring the trackage or necessarily those operations within the Board's jurisdiction. Nor does it transform Brookhaven Rail's operations into permissible common carrier operations, unless and until the above-referenced authorization requirements are met, which in this instance has not occurred to date.

Finally, the decision to proceed by exemption in seeking construction and operation authority, as BHR did in FD 35141, carries the risk that the exemption may be revoked at any time. 49 U.S.C. § 10502(d); 49 C.F.R. § 1121.4(f). An exemption founded on incomplete, misleading, or false facts, which the information known to date reveals was likely the case with the construction exemption petition in FD 35141, is void *ab initio*. *E.g.*, *San Francisco Bay Railroad-Mare Island – Operation Exemption – California Northern R.R.*, FD 35304 (STB served Dec. 6, 2010), at 3-4 (“failure to disclose all of the relevant facts is a material misrepresentation by omission”); *San Jacinto Transportation Company, Inc. – Operation Exemption – SJRE-Railroad Series*, FD 35996 (STB served Feb. 2, 2022), at 4 (finding a notice of exemption that omitted crucial information relating to the planned construction of the line, which the party planned to obtain authorization to construct, to be materially misleading, even if such omissions were unintentional).

The facts known to date evince a strong likelihood that Brookhaven Rail has knowingly partnered with the developers to allow use of its name and status as a rail carrier to seek and obtain STB authority to construct and operate track, but apparently with no intention of ever engaging in any of the construction activities for which it sought authorization. At a minimum, it appears the Board issued its construction authorization decision in FD 35141 based on representations of construction by a railroad, and not as it appears to have turned out, for construction by or with non-railroad developers, and such developers and other non-railroads may not on their own, or in secret agreement with the railroad, assume the rights of a railroad for construction or any other purposes.

Those facts also establish a strong likelihood that Brookhaven Rail has intentionally used and abused the streamlined Board exemption and declaratory order procedures in a deliberate scheme to secure federal preemption to evade local review. Brookhaven Rail's participation in the scheme is made more serious by its status as a certificated rail carrier. 49 U.S.C. § 11901(c) (“[a] person knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title . . . is liable to the United States Government” for monetary penalties).

It is thus inherently self-contradictory and inconsistent for the Decision to find that there are no outstanding issues as to the line and related activities on Parcels B, C, and D, when the Decision also finds, correctly, that there are fundamental issues that need to be resolved with respect to the legitimacy of the construction and operation of the line on Parcel A. Without the rail line on Parcel A, the neighboring parcel segments would have no reason to exist. Furthermore, the line on Parcel A is the only railroad track that is physically in

place today. By determining that there are issues as to the regulatory status of the line on Parcel A, but no issues requiring Board resolution as to proposed connected lines to be constructed on the other Terminal segments (which unauthorized construction activities have already commenced, at least with respect to clearcutting on Parcels B/C), the Board has effectively prejudged the outcome as to the line on Parcel A. At a minimum, the Board should, on reconsideration, defer resolution as to the other segments until the legitimacy of the existing line on Parcel A has been resolved.

II. The Decision's Determinations Regarding Connected Development Being a Cumulative Impact, and Not a Connected Impact, for Environmental Review Purposes, is Premature, and Improperly Prejudge the Outcome as to the Status of Parcel A

The Decision found that the NP/Winters' development on Parcels B and C and even Parcel D of the Terminal itself should be treated as cumulative, rather than connected, developments for purposes of Brookhaven's Rail proposed solid waste rail transfer facility and associated rail line. Decision at 8, 10 n.10. That determination was erroneous for several reasons.

First, the Board's determination that the Parcel B/C construction will only be considered as a cumulative impact as part of the environmental review, rather than as a connected impact, rests on a finding that the line proposed to be constructed on Parcels B/C is excepted spur track under § 10906, which does not require the Board's prior approval or any prior environmental review under the National Environmental Policy Act. However, for the reasons stated *supra*, that determination prejudices the Board's determination of the regulatory status of Parcel A track, which the Board is still considering. Again, if the Parcel

A rail track is not authorized and properly constructed jurisdictional track, then the proposed line on Parcels B and C cannot be found to be ancillary track that is excepted under 49 U.S.C. § 10906. Furthermore, the divergence in ownership between the line on Parcel A and that on Parcels B/C, and the proposed use of the proposed line on Parcels B/C to reach new customers rather than to use it as switching or yard track to more efficiently serve existing customers, also prevents the Board to afford § 10906 treatment for the B/C track, as addressed *infra*. If it is ultimately determined that the Board has jurisdiction over the new rail line to be constructed on Parcels B/C on either basis, then that project must be considered a connected, and not just a cumulative impact for environmental review purposes.

Second, the development of the NP/Winters' warehouse and related projects and the Brookhaven Rail solid waste rail transfer are being pursued on a coordinated and integrated basis by related entities. The collective nature of the undertaking is made apparent by their efforts to obtain joint governmental assistance.⁵ The development on Parcel D cannot be viewed in isolation, especially given NP/Winters intertwined involvement in the development of all the parcels and Winters ownership of Brookhaven Rail.

Also, the overall project presents severe impacts on such matters as whether the New York & Atlantic Railway Company ("NY&A") has adequate capacity to serve the

⁵ As the record shows, the Application for Financial Assistance with the Town of Brookhaven Industrial Development Agency (June 14, 2021) depicts the new Terminal development of Parcels B, C, and D as one large, interconnected project of "rail contiguous warehouse and distribution facilities developed in four buildings." The record further shows that the Brookhaven Rail Terminal: Economic & Fiscal Impact Assessment (Apr. 28, 2021), (at 2) defines the "Project" as "the construction of four rail-served industrial buildings totaling approximately 2.5 million square feet."

warehouses and solid waste rail transfer facility at the projected level of volumes both locally and on a downstream basis.⁶ The same is also true for road traffic since all of the solid waste departing by rail will arrive by truck and those trucks will arrive and depart over roads, and all the freight being delivered by rail to the interconnected warehouses will need to depart by truck and those trucks will arrive and depart over the same roads. Furthermore, all of the development and its construction, including additional clearcutting, will have combined and interrelated impacts on the local ecosystems, particularly groundwater, safety, biological resources, and environmental justice, etc.

Under these circumstances, the environmental impacts on these connected projects must be reviewed on an integrated basis as connected impacts, not merely cumulative ones. The cumulative impact treatment, as if the projects, developments, and undertakings were separate, distinct, and indirect, and merely occurring in the same general area, is inadequate and incomplete and does a disservice to the local residents and their communities.

III. Even Assuming *Arguendo* that the Exemptions for the Line on Parcel A Survive Review, the Line on Parcels B and C Cannot Be Found to be Excepted § 10906 Track Because of Its Different Ownership and Because NP/Winters is Constructing the Line to Serve Its New Customers

As explained above, the Board should not allow construction of the line on Parcels B/C, as well as that on Parcel D, to proceed until it first resolves the status of the line on Parcel A. If the line on Parcel A is not properly constructed and operating, then the line

⁶ The impact is not limited to the NY&A since the additional cars will need to move on other carriers in terms of their ultimate origins and destinations.

on Parcels B and C cannot be found to excepted track under § 10906 as it would be ancillary only to impermissible track. Similarly, the environmental review of the Parcel D track cannot commence because the project scope of study will not be able to be finally ascertained until the regulatory status of the track to be constructed on Parcel C and D is determined.

However, even assuming *arguendo* that the construction and operation exemptions of the line on Parcel A survive review, the proposed line on Parcels B and C still could not be found to be excepted track under § 10906 because of its different ownership. Specifically, Brookhaven Rail is the putative owner and/or operator on Parcel A, although the evidence to date shows the Sills Parties as the track owner, but NP/Winters is the putative owner of the proposed line on Parcels B and C. Indeed, the Decision itself highlights the separation between the two entities. “[F]or activities to be subject to the Board’s jurisdiction, they must be performed by, or under the auspices of a rail carrier,” and “[h]ere, the record does not demonstrate that NP/Winters is affiliated with Brookhaven Rail.” Decision at 9.

The Supreme Court, per Justice Brandies, explained “paragraph 22 [the predecessor to 49 U.S.C. § 10906] *refers to tracks built by the carrier as part of its railroad.*” *Cleveland, C., C. & St. L. Ry. Co. v. United States*, 274 U.S. 404, 408 (1928) (emphasis added). When the tracks are built by an entity other than a common carrier, but utilized by a carrier, they may be private or industry track, but not excepted track. *E.g., New York Central R.R. v. Southern Ry.*, 226 F. Supp. 463 (N.D. Ill.), *aff’d*, 338 F.2d 667 (7th Cir. 1964). Furthermore, when the common carrier track is the only track that the entity has, in this case the isolated segment of NP/Winters on Parcels B and C, that track must be common

carrier track, regardless of what functions occur, under the Board’s precedent in *Effingham Railroad—Petition for Declaratory Order—Construction at Effingham, Ill.*, 2 S.T.B. 606 (1977).

The Decision seeks to evade *Effingham* by relying on outlier decisions and the presence of “joint” in the text of § 10906. Decision at 10 n.8 (citing In *JGB Props.—Pet. for Declaratory Order*, FD 35817 (STB served Dec. 10, 2015), at 8-9, and *N.Y. City Econ. Dev. Corp.—Pet for Declaratory Order*, FD 34429 (STB served July 15, 2004)). Neither decision considers the Justice Brandeis language from the *Cleveland* case. Moreover, both cases involved rail operation by at least one independent Class I railroad. In contrast here, related entities with overlapping ownership are involved. The Decision thus creates a situation where an entity (NP/Winters) can benefit from preemption despite not being subject to a common carrier obligation or even the Board’s general jurisdiction. That is the point of *Effingham*: if an entity has no other track, then the common carrier track it does have is inherently § 10901 track, regardless of how the line is utilized. The Board cannot salvage the point by relying on isolated and suspect precedent involving Class I railroads operating over entirely independent track or pointing to the term “joint” in § 10901. The reference to the term “joint” in the § 10906 text is unavailing, as it refers to activities of two jurisdictional common carriers (as in “subchapter II of chapter 113 of this title”), not a common carrier and a non-common carrier. A putative common carrier’s operation over private track does not convert it to § 10906 track. *E.g.*, *New York Central R.R. v. Southern Ry.*, 226 F. Supp. 463 (N.D. Ill.), *aff’d*, 338 F.2d 667 (7th Cir. 1964).

The Decision erred in an additional and related respect. CCE explained that the track on Parcels B/C could not be classified as excepted track because it was being used to serve multiple new customers. CCE Petition at 9 & n.15 (citing *Chicago Rail Link*, *supra*, and CCE's July 28, 2021 letter to the Office of Environmental Analysis, included as Attachment A to the Petition). The Decision disagreed, noting that while "NP/Winters now owns Parcels B and C and will be constructing track there to support its warehouses," that "fact ... is not determinative here of whether the track will be spur or mainline track," as the controlling factor is that "those tracks ... are ancillary to the mainline tracks Brookhaven operates on Parcel A." Decision at 8.

The Decision's analysis flies in the face of *Chicago Rail Link* and failed to address it. That precedent holds that where a connected line is that of a second entity (a tenant, in that case), the carrier's use of the connected track, rather than the character of the trackage itself, governs:

In a lease transaction such as this, **we focus on the tenant railroad's use** as the controlling factor in determining the character of the track as to the lessee.... Applying the law to the facts of this case, we conclude that, as to the tenant, CRL, the subject track is not yard or switching track. This is not a case in which a carrier simply proposes to serve its existing customers more efficiently. [Citation omitted.] By means of the lease transaction, **CRL intends to extend its operations to reach new customers**. Thus, the transaction contemplates "an extended or additional rail line." **The fact that the subject trackage is short is not significant here.**

Chicago Rail Link at 5 (emphasis added). The principle applies with even greater force here since NP/Winters will not be a mere tenant, but is the party actually constructing the track, and is doing so in order to serve the new tenants of its warehouses, who are not existing rail

customers in the Terminal, but rather new customers. As such, even though short, the proposed track is to be used to reach new shippers, rather than used for switching or yard purposes to more efficiently serve existing Terminal customers. The Decision improperly conflates NP/Winters with Brookhaven Rail for purposes of § 10906 with respect to NP/Winters ownership of the track and how the track will be used to serve new shippers.

CONCLUSION

For the reasons stated above, CCE respectfully requests that the Board reconsider its Decision in part as to its findings that (a) the line to be constructed on Parcels B and C is non-common carrier line, and (b) that the activities on Parcels B and C are to be viewed as cumulative impacts, rather than connected impacts over which the Board has jurisdiction, with the proposed activities on Parcel D. Furthermore, CCE's Petition as to those two matters should not have been denied until Brookhaven Rail and the Sills Parties have submitted the information specified in the Director's Decision and the status of the putative common carrier line on Parcel A is resolved.

Respectfully submitted,

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for the Environment*

Dated: January 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of January, 2023, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record in the above-captioned dockets.

/s/

Peter A. Pfohl