

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36398

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

DOCKET NO. FD 36399

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

DOCKET NO. FD 35141

U.S. RAIL CORP. - LLC – CONSTRUCTION AND OPERATION EXEMPTION -BROOKHAVEN
RAIL TERMINAL

DOCKET NO. FD 36376

SPECTRUM RAILROAD HOLDINGS, LLC – OPERATION EXEMPTION – RAILROAD LINE IN
THE TOWN OF BROOKHAVEN, NY

DOCKET NO. FD 36384

SILLS ROAD REALTY LLC – ACQUISITION EXEMPTION
- RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NY

DOCKET NO. FD 36385

SPECTRUM RAILROAD HOLDINGS, LLC – ACQUISITION AND OPERATION EXEMPTION –
LINE OF SILLS ROAD REALTY LLC, IN THE TOWN OF
BROOKHAVEN, NY

DOCKET NO. FD 35819

BROOKHAVEN RAIL TERMINAL & BROOKHAVEN RAIL, LLC –
PET. FOR DECLARATORY ORDER

REPLY TO PETITION FOR PARTIAL RECONSIDERATION

Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street NW
Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Attorney for Brookhaven Rail LLC

February 15, 2022

REPLY TO PETITION FOR PARTIAL RECONSIDERATION

Brookhaven Rail LLC hereby replies to the Petition for Partial Reconsideration (“Petition”) filed by Citizen’s Campaign for the Environment (“CCE”) on January 25, 2023. The Petition followed the Surface Transportation Board’s (“STB” or “Board”) denial on January 6, 2023 of CCE’s Petition for Declaratory Order and/or An Order to Show Cause and Suspend (“Initial Petition”) and its directive to Brookhaven Rail and the “Sills Parties”¹ to provided certain information to the Board by February 21, 2023 (“*January 6 Decision*”).

PREFACE AND SUMMARY

The relief CCE requests in its Petition is for the Board to reconsider (1) its affirmation in the *January 6 Decision* of the Board’s prior determination in Docket No. FD 35819² that railroad tracks proposed to be constructed on Parcels B and C of the former Brookhaven Rail Terminal (“BRT”)³ will be excepted tracks under 49 U.S.C. §10906, and (2) its determination that planned development activities on Parcels B and C are not connected to the pending rail construction project on Parcel D of the former BRT for which Brookhaven Rail has sought authority in Docket No. FD 36398.⁴ CCE further argues that its Initial Petition should not have been denied before Brookhaven Rail and the Sills Parties submitted the responses to certain issues posed to

¹ Sills Road Realty (“Sills”) and its affiliates Brookhaven Terminal Operations, LLC and Brookhaven Rail Freight Services, LLC.

² Docket No. FD 35819, *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Petition for Declaratory Order*, (served August 30, 2016).

³ The definition of the terms “Parcel A,” “Parcel B,” “Parcel C,” and “Parcel D” and their respective locations are well known and understood by all parties participating in these dockets, and so Brookhaven Rail will continue to use them in this reply.

⁴ Petition at 3, 16. Brookhaven Rail has indicated that it intends to also file an Application for Land Use Exemption pertaining to development on Parcel D, but it has not yet done so.

Sills by the Director of the Office of Proceedings in 2020 concerning the construction phase of the rail tracks on Parcel A.⁵

Contrary to CCE's erroneous statements in its Petition, the *January 6 Decision* did not reopen Docket No. 35141.⁶ Rather, the Board stated that "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 The Board later elaborated on this directive, stating: "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."⁸

Brookhaven Rail is submitting a Reply to Request for Information to the Board's directive contemporaneous with this reply to the Petition. As explained in that response, effective May 4, 2022 neither Sills nor any other of the Sills Parties owns Parcel A or any of the railroad tracks located on it. As of that date Sills sold Parcel A and all of the physical assets on it to Brookhaven Logistics Center, LLC ("BLC"), which prior to March 25, 2022 was named NP/Winters Long Island Industrial Development, LP. As a result of that transaction, BLC owns

⁵ The questions referenced by the Board were posed to Sills in a decision served on June 16, 2020 in 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, New York*, and Docket No. FD 36385, *Spectrum RR Holdings, LLC – Acquisition & Operation Exemption – Line of Sills Road Realty, LLC, in the Town of Brookhaven, New York* at 5-6. ("Director's Decision").

⁶ Petition at 2.

⁷ *January 6 Decision* at 6.

⁸ *Id.* at 10.

all of Parcels A, B, and C, and 178 acres of Parcel D.⁹ For the reasons discussed in Brookhaven Rail’s response to the *January 6 Decision* and this Reply, there are no grounds for the Board to reopen Docket No. FD 35141, as there is not “material error, new evidence, or substantially changed circumstances . . . sufficient to convince the Board that its prior decision in the case would be materially affected for reopening to be granted.”¹⁰

In the *January 6 Decision* the Board properly confirmed that the tracks that will eventually be constructed on Parcels B and C will be exempt spur or sidetracks under 49 U.S.C. §10906, and so there is no basis whatsoever for reconsidering its conclusions. CCE’s arguments to the contrary in its Petition have been mooted by recent events described above, and they are also directly refuted by established precedent. CCE also attempts to re-argue, yet again, its discredited and rejected claim that Brookhaven Rail is an affiliate of BLC and an active participant in the plans for BLC to develop Parcels B and C. The cases CCE cites for claiming that only common carrier railroads can construct track subject to §10906 do not support its claim, and its attempts to erase clearly applicable Board precedent fall flat. CCE’s claims also find no support in the language of §10906. For all the reasons set out in this Reply, the Petition should be denied.

ARGUMENT

A. There are No Grounds for Reopening Docket No. FD 35141

While CCE’s actual request to the Board is for it to reconsider its conclusions about tracks that may be constructed on Parcels B and C, nearly half of the Petition is devoted to CCE rehashing and supplementing its unsupported allegations and conspiracy theories about the tracks

⁹ NP/Winters acquired 178 acres of Parcel D, and Parcels B and C on October 20, 2021.

¹⁰ Docket No. FD 35068, *Soo Line Railroad Co. d/b/a Canadian Pacific Railway – Acquisition and Operation Exemption – BNSF Railway Company* (Served December 29, 2020)(“*Soo Line Railroad*”) at 4.

on Parcel A. This is in spite of the Board acceding to one of CCE's requests in its Petition, which was for Brookhaven Rail to respond to the questions posed for Sills in the *Director's Decision*.

The entire basis for CCE's claims regarding Parcel A is that U.S. Rail Corporation ("US Rail"), the predecessor to US Rail – NY and Brookhaven Rail, sought and received the authority to construct and operate the tracks on Parcel A, but US Rail allegedly did not "independently construct, own, and operate" the authorized tracks.¹¹ CCE also attempts to attach to this basic claim, without any supporting evidence, certain nefarious intentions of US Rail and other parties involved in the development of Parcel A between 2007 and 2011.¹² However, CCE does not dispute that the only railroad to independently provide common carrier operations over the authorized tracks since their construction has been Brookhaven Rail and its predecessor U.S. Rail-NY, so CCE's complaint is about the construction phase of the project that took place approximately 12 years ago, between September 2010 and September 2011.

The current owner of Brookhaven Rail and its undersigned counsel were not present in 2007 when the development of Parcel A began, or when the Petition for Exemption was filed by US Rail in Docket No. FD 35141. Nor were they present during the construction phase of the project or any of the other proceedings before the Board and federal courts that accompanied the development of Parcel A, such as Docket No. 35819. *Brookhaven Rail Terminal & Brookhaven*

¹¹ Petition at 6.

¹² Despite being active on Long Island, New York since 1985, CCE did not participate in any of the STB dockets listed in its Initial Petition prior to September 16, 2020 when it belatedly objected to the Petition for Exemption filed by Brookhaven Rail in Docket No. FD 36399. Nor did CCE intervene or otherwise participate in any of the federal district court litigation over the construction of railroad tracks and development of Parcel A, and subsequently over the extension of that service in to Parcels B and C. That litigation resulted in a 2010 So-Ordered Stipulation of Settlement concerning the development of Parcel A, and a 2016 So-Ordered Stipulation of Settlement governing the future development of Parcels B and C, and to a limited extent, Parcel D.

Rail – Pet. for Declaratory Order, which was commenced in 2014. Brookhaven Rail nevertheless has attempted in its Reply to Request for Information to address the issues identified by the Director and posed to Sills in the *Director’s Decision*. Brookhaven Rail’s response includes the verified statement of Mr. James Newell, who was hired as the Chief Operations Officer of US Rail - NY in May of 2011, and served as its President from 2012 to 2020, when he resigned to become a consultant to current owner of Brookhaven Rail. Mr. Newell explains that construction of the tracks on Parcel A was around 75% complete when he arrived, and that he was not hired to oversee the remaining construction, but rather to start the common carrier rail operations on the site and to develop common carrier, rail-served business.¹³

CCE’s strained efforts to conjure up “schemes” allegedly hatched over a decade ago and to assign nefarious intent to the parties engaged in such development lack credibility because prior to September 2020 CCE had no prior interest in pursuing such theories in any of the STB and federal and state court proceedings that have accompanied the proposed development of what was previously named the Brookhaven Rail Terminal. Even so, despite the presence of literally a decade of material and documents accumulated in Board proceedings and court dockets related to the development of Parcels A, B, C, and D, CCE has never produced any actual evidence of supporting its strident accusation 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*,” because there is none.¹⁴ Instead, it now apparently clings to the false promise that such evidence will be gleaned from the responses provided by Brookhaven Rail to the questions the Director posed to Sills in 2020.

¹³ Reply to Request for Information, Verified Statement of James Newell (Newell V.S.) at

2.

¹⁴ Petition at 9 (emphasis supplied).

In reality, the evidence and pleadings contained in the relevant administrative records do not show an intentional abuse of the Board’s rules, nor do they show a deliberate scheme to secure federal preemption to evade local review of the development of Parcel A. This latter allegation (evasion of local review) is easily exposed as spurious by the presence of the 2010 So-Ordered Stipulation of Settlement entered into by Sills, US Rail, their contractors, and the Town of Brookhaven, N.Y., memorialized by the U.S. District Court for the Eastern District of New York, and submitted into the record of Docket No. FD 35141.¹⁵ This document settled the federal district court litigation between the Town of Brookhaven and the developers of Parcel A¹⁶ in part by setting out in detail how such development – in addition to being subject to the Board’s jurisdiction – would also comply with state and local laws.

As for an alleged “deliberate scheme” to intentionally hide Sills’ involvement in the construction phase, the evidence of record shows instead that in 2010-2011 Sills did not believe it was required to inform the Board of the facts that it was participating in the construction phase and that it would own the tracks upon the completion of construction. For example, Sills has stated “Sills did not choose to not seek common carrier authority at the time because it did not understand that it would be appropriate for it to do so,”¹⁷ and that Sills “may have erred by relying exclusively on regulatory counsel for US Rail Corp., who did not at the time of the FD

¹⁵ A copy of the So-Ordered Stipulation was filed with the Board in Docket No. FD 35141 on April 26, 2010 by then-counsel for US Rail.

¹⁶ *Sills Road Realty, LLC, U S Rail Corporation, Watral Brothers, Inc., Pratt Brothers, Inc., Adjo Contracting Corp and Suffolk & Southern Rail Road, LLC v. The Town of Brookhaven*, Docket No 07 CV 4584 (U.S. Dist. Ct for the Eastern District of New York).

¹⁷ Docket Nos. FD 36384 and FD 36385, Joint Reply of Sills Road Realty LLC and Spectrum RR Holdings, LLC to the Motions to Reject Filed by Brookhaven Rail, LLC and New York & Atlantic Railway Company, filed March 23, 2020 (“Joint Reply”) at 10, note 14.

35141 proceeding disclose Sills Road's role in the construction and ownership of the Brookhaven Rail Terminal.”¹⁸

As for Brookhaven Rail, Mr. Newell states in his verified statement his belief and understanding upon being hired by U.S. Rail-NY in 2011 and tasked with commencing common carrier operations and developing rail-served business on Parcel A, was that the railroad had received all required authorizations from the Board to conduct common carrier operations, and so he went to work facilitating and developing common carrier rail service on Parcel A. He also did not perceive any need to inform the Board of Sills' involvement during the construction phase and its ownership of the tracks.¹⁹

This belief by all interested parties, *i.e.* that Brookhaven Rail had received all requisite authority to be the common carrier railroad on Parcel A and there was no need for Sills or Brookhaven Rail to take any additional action, is supported by later filings and decisions in other proceedings. In April 2014, for example, BRT and Brookhaven Rail – both represented by regulatory counsel different than the attorney who represented US Rail in Docket No. FD 35141 - submitted the Petition for Declaratory Order in Docket No. FD 35819 regarding the status of the tracks proposed to be constructed by BRT on Parcels B and C and operated by Brookhaven Rail. The petition contained an extensive discussion about the history and development of Parcel A and the construction and operation of the rail tracks.²⁰ The petition was vigorously contested by the Town of Brookhaven, and yet no issues about the construction phase of the tracks on

¹⁸ Letter from Rob Wimbish to Ms. Cynthia T. Brown, dated December 14, 2021, filed in Docket No. FD 35141, et al.; *See also* Joint Reply at 17 (“Sills has learned that it would have been better served not to have allowed US Rail to assume oversight of the STB authorization process on its own (through attorneys whose duty was to US Rail, and not to Sills), and that it should have secured its own regulatory counsel at the time to guide it through the Board's processes and clarify the ramifications of Line ownership.”)

¹⁹ Newell V.S. at 4.

²⁰ *See* Reply to Request for Information at 5-6.

Parcel A or their jurisdictional status were raised in either Docket No. FD 35819 or the federal court litigation that accompanied the petition.²¹ Rather, all affected parties were apparently in agreement that Brookhaven Rail was the sole holder of the common carrier obligation to provide service over the railroad lines on Parcel A, and there was no need for Sills to inform the Board of its alleged involvement in the construction phase or for it or Brookhaven Rail to take any other action.

This view was arguably even shared by the Board, which denied a separate petition by the Town of Brookhaven filed in 2014 to reopen Docket No. FD 35141 to force BRT and Brookhaven Rail to comply with certain environmental conditions imposed by the Board in its September 2010 decision approving the rail construction and operation on Parcel A.²² However, the Town's request for reopening also asked the Board to review the legality of certain activities being performed "by or on behalf of Sills" on Parcel A (although the Town again raised no questions concerning the construction phase or track ownership).²³ The Board denied this aspect of the Town's Petition, relying primarily on the aforementioned 2010 So-Ordered Stipulation of Settlement concerning the development of Parcel A and its compliance with local and state laws.

Finally, Brookhaven Rail notes that throughout the litigation in Docket No. FD 35819 and negotiations that resulted in the 2016 So-Ordered Stipulation of Settlement and the

²¹ *Town of Brookhaven v. Sills Road Realty, LLC, Brookhaven Rail LLC f/k/a U.S. Rail New York, LLC, Brookhaven Terminal Operations, Oakland Transportation Holdings, LLC, Sills Expressway Associates, Watral Brothers, Inc. and Pratt Brothers, Inc.*, Docket No. 14-cv-02286, U.S. District Court for the Eastern District of New York.

²² It should not be glossed over or minimized that the design and purpose of the rail construction project proposed by US Rail on Parcel A remained substantially the same throughout the process in Docket FD 35141, and it received a full and complete review from the STB on its merits. Additionally, the potential environmental impacts of the project were reviewed by the Office of Environmental Analysis pursuant to the Board's regulations implementing the National Environmental Policy Act. No party has ever argued otherwise.

²³ Docket No. FD 35141, *U.S. Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal* (Decision served August 28, 2014) at 12.

subsequent August 30, 2016 decision in that docket by the Board determining that new tracks to be constructed on Parcels B and C would be §10906 excepted tracks, no party or the STB raised any questions about the legitimacy of the common carrier rail operations being conducted by Brookhaven Rail on Parcel A, or the ramifications of Sills' alleged participation in the construction phase and its ownership of the tracks.

Indeed, it was not until 2019 that the role of Sills in the construction phase of the tracks on Parcel A was raised by any party, when it was raised by Sills in the context of it searching for a premise to try to remove Brookhaven Rail from Parcel A when its shares were to be sold to Shamrock Rail, LLC. Sills' belated (and disputed) claims about being solely responsible for construction of the tracks on Parcel A and that it needed "remedial authorization" to own the tracks on Parcel A and be subject to STB jurisdiction were apparently viewed with skepticism by the Director, given that the *Director's Decision* rejected the notices of exemption in Docket Nos FD 36384 and 36385 and posed the questions to Sills. But even so, Sills' belated advancing of these positions in 2019 was not an admission of a secret, deliberate scheme in 2010 to avoid STB scrutiny and local review, as CCE would have the Board believe.

In summary, the relevant facts surrounding the construction phase of the rail construction on Parcel A do not point to any "material error, new evidence, or substantially changed circumstances" that should lead the Board to conclude the decision in 2010 to grant construction and operating authority to U.S. Rail should be reopened for any reason, let alone the draconian and disruptive measures suggested by CCE. The evidence of record shows that Sills did not solely construct the tracks on Parcel A, although it is not disputed that Sills owned the tracks upon the completion of that construction. Reopening the proceeding to address issues related to the construction phase would not materially change the fact that Brookhaven

Rail has been exclusively conducting common carrier operations on the tracks pursuant to Board authority for over a dozen years and has transported over 26,000 railcars in interstate commerce.²⁴ There is also no reason to reopen the proceeding to require Sills to take any action because Sills no longer owns Parcel A or the tracks constructed on it. In addition, BLC, the new owner of Parcel A, has pledged to affirm and solidify Brookhaven's presence and role as the exclusive provider of common carrier service on Parcel A.²⁵ To the extent the Board requires any action to be taken on Parcel A, it should be confined to steps the Board determines are necessary to correct any past mistakes concerning the regulatory process related to the status of the track owner in the eyes of the STB, and Brookhaven Rail pledges to fully cooperate with any such measures.

B. The Board's Conclusions About the Status of Parcels B and C Were Correct

In the *January 6 Decision* the Board properly confirmed that the tracks that will eventually be constructed on Parcels B and C will be exempt spur or sidetracks under 49 U.S.C. §10906, and so there is no basis whatsoever for reconsidering its conclusions. CCE's arguments to the contrary have been mooted by the recent events described above, and they are also directly refuted by established precedent. CCE also attempts to re-argue, yet again, its discredited and rejected claim that Brookhaven Rail is an affiliate of BLC and active participant in the plans for BLC to develop Parcels B and C. The Board has correctly agreed with Brookhaven Rail that this is not the case, stating "[h]ere, 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."²⁶ CCE simply re-hashing

²⁴ Reply to Request for Information, Newell V.S. at 3.

²⁵ *Id.* at 6-7.

²⁶ *January 6 Decision* at 9.

assertions that have been considered and rejected by the Board provides no basis for the Board to reconsider its findings.²⁷

CCE's claim that the tracks on Parcels B and C cannot be track under §10906 because of "different ownership"²⁸ from Parcel A has been mooted by the acquisition of Parcel A by BLC, which already owned Parcels B and C. Consequently, the circumstances are now very similar to those that resulted in the 2016 decision in Docket No. FD 35819: Parcels A, B & C are owned by BLC, which intends to facilitate the expansion of current rail-served operations on Parcel A to Parcels B and C through the construction of track connecting to the common carrier tracks on Parcel A.

CCE's mooted arguments about "different ownership" were irrelevant anyway, as tracks on Parcels B and C constructed by BLC and operated by Brookhaven Rail would still have been considered §10906 track even if BLC had not acquired Parcel A. This is because it is well established that track constructed by a third party and operated by a railroad can be excepted track. For example, in STB Docket No. FD 35817, *JGB Properties, LLC – Petition for Declaratory Order* ("JGB")²⁹, the Board found that tracks constructed by a private, non-carrier party to permit a common carrier railroad to reach shippers in an industrial park were §10906 excepted track. The Board expressly stated it "is incorrect" that excepted track can only be built by a rail carrier.³⁰ The Board's decision in *JGB* followed a previous proceeding where the Board held that an approximately 1.3 mile track to be constructed by a state entity was §10906 excepted

²⁷ STB Finance Docket No. 35160, *Oregon International Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.* (Served March 12, 2009) at 8.

²⁸ Petition at 13.

²⁹ STB Docket No. FD 35817, *JGB Properties, LLC – Petition for Declaratory Order* (Served December 10, 2015) at 8.

³⁰ *Id.* at 8, note 11.

track, and, accordingly, the Board had “exclusive jurisdiction over the planned new track, and state and local regulation is preempted, because the new track will be operated by rail carriers . . . as part of the interstate rail network. The fact that the track owner, petitioner NYCEDC, is not itself a rail carrier is not relevant.”³¹

The cases and decisions cited by CCE for the contrary view that §10906 tracks must be constructed by a common carrier do not stand for that proposition. Most notably, *Cleveland, C. C. & St. L. Ry. Co. v. United States*,³² the Supreme Court did not even have a case before it involving a potential §10906 track (at time paragraph 22 of the Interstate Commerce Act of 1920). Rather, the passage cited in the Petition is *dicta* in an opinion reviewing a dispute over whether a rail carrier was required to establish a switch connection to an indisputably private industry track.³³ Also inapposite is *New York Central R.R. v. Southern Ry.*,³⁴ where the “single issue to be decided” was “whether the defendant's operation over the private Peabody trackage to serve the Lynnville Mine constitutes an extension of [a jurisdictional railroad] line within the meaning of section 1(18) of the Interstate Commerce Act.”³⁵ CCE’s citation to *Effingham*³⁶ is also easily refuted, as that case involved a situation where a railroad constructed track in a rail yard as part of its plans to hold out to provide common carrier service as part of the national rail system, an intent shown in part by its entering into interchange agreements with two Class I railroads.³⁷ BLC, and NP/Winters before it, have never demonstrated such intentions. Finally,

³¹ Docket No. FD 34429, *N.Y. City Econ. Dev. Corp – Pet. for Declaratory Order* (Served July 15, 2004) at 8.

³² 49 U.S. 404 (1928).

³³ *Id.* at 406.

³⁴ 226 F. Supp. 463 (N.D. Ill.) *aff’d*, 338 F.2d 667 (7th Cir. 1964).

³⁵ *Id.* at 466.

³⁶ *Effingham Railroad—Petition for Declaratory Order—Construction at Effingham, Ill.*, 2 S.T.B. 606 (1997).

³⁷ *Id.* at 610.

CCE's attempt to find a requirement that only rail carriers can construct excepted track in the language of §10906 also fails because the statute says no such thing. On the contrary, it states "a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the . . . *joint use* of spur, industrial, team, switching, or side tracks,"³⁸ without specifying the status of the entity constructing those tracks.

CCE also argues that the *January 6 Decision* "flies in the face of *Chicago Rail Link*,"³⁹ but its argument is incoherent, and factually wrong in any event. It is simply wrong that BLC would construct tracks on Parcels B and C so BLC can "serve the new tenants of its warehouses." Rather, similar to the owner of the industrial park in *JGB*, BLC would construct the excepted track to enable shippers on Parcels B and C to receive service from Brookhaven Rail. To the extent CCE is making a strained attempt to argue BLC somehow will become a common carrier by constructing tracks on Parcels B and C that Brookhaven Rail uses to provide rail service, then this argument is frivolous.⁴⁰

In summary, there is no basis for the Board to reconsider any aspect of its prior determination in Docket No. FD 35819, as affirmed in the *January 6 Decision*, that the track to be constructed on Parcels B and C will have the status of excepted track under 49 U.S.C. §10906. As such, there is no legal basis for BLC to obtain construction authority from the

³⁸ 49 U.S.C. §10906 (emphasis supplied).

³⁹ Docket No. FD 33323, *Chicago Rail Link, LLC – Lease and Op. Exemption -Union P. R.R. Co* (served September 2, 1997)

⁴⁰ In *Chicago Rail Link*, a carrier (Chicago Rail Link), entered into a lease for tracks from the Union Pacific Railroad Company, and sought exemption authority to lease and conducted common carrier operations over the tracks. A labor union sought to revoke the exemption, arguing that the tracks were §10906 excepted tracks. *Id.* at 3. However, the Board rightfully determined that it was the intended use of the tracks by Chicago Rail Link that was determinative, and the railroad intended for the leased tracks to be an extension of its common carrier tracks. *Id.* at 5. This case has absolutely no application to the facts before the Board in these proceedings.

Board for tracks eventually constructed on Parcels B and C, and Brookhaven Rail does not need to obtain operating authority to serve BLC's planned warehouses once the construction is complete. Brookhaven Rail and BLC, and the Town of Brookhaven for that matter, all understand and accept that the Office of Environmental Analysis will evaluate the proposed development on Parcels B and C as a cumulative impact during the environmental review of the rail construction project described in Brookhaven Rail's petition for exemption in Docket No. FD 36398 and also the review of the impacts associated with an application for land-use exemption, should one be filed by Brookhaven Rail.

CONCLUSION

For all the reasons set forth in this Reply, the Board should expeditiously deny the Petition. Further, Brookhaven Rail believes there is no reason for the Board to take any additional action regarding Docket No. FD 35141. However, should the Board conclude that the circumstances surrounding the construction and ownership of the tracks on Parcel A require remedial regulatory action, Brookhaven Rail will fully cooperate with whatever the Board deems is appropriate and necessary to resolve its concerns.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox".

Law Office of Thomas W. Wilcox, LLC
1629 K. Street NW
Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Attorney for Brookhaven Rail LLC

February 15, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of February, a copy of the foregoing Reply to the Petition for Partial Reconsideration was served by email on all parties on the official Service Lists for Dockets No. FD 36398, Docket No. FD 36399, Docket No. FD 35141, Docket No. FD 35819, Docket No. FD 36384, Docket No. FD 36376, and Docket No. 36385.

/ss/ Thomas W. Wilcox