

**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 REQUEST FOR INFORMATION

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February 15, 2022

REPLY TO REQUEST FOR INFORMATION

On January 6, 2023, the Board served a Decision (“*January 6 Decision*”) in the referenced dockets that denied the Petition for Declaratory Order and/or An Order to Show Cause and Suspend (“Petition”) of Citizens Campaign for the Environment (“CCE”) but “direct[ed] 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.”¹ In doing so, the Board declined CCE’s request to reopen Docket No. FD 35141, but stated it was seeking the information “to further explore the matter and provide information needed to determine how to proceed.”² Brookhaven Rail LLC (“Brookhaven Rail”) hereby responds to the Board’s request.

A. BACKGROUND

The “questions” referenced by the Board refer to a number of factual matters the Director of the Office of Proceedings identified in the context of her decision served on June 16, 2020 (“*Director’s Decision*”) to reject the notices of exemption filed by Sills Road Realty, LLC (“Sills”) and its subsidiary Spectrum RR Holdings, LLC (“Spectrum”) in Docket Nos. FD 36384 and FD 36385, and to grant the motion of Spectrum to withdraw a notice of exemption it filed in Docket No. FD 36376. In conjunction with these actions, the Director set out a number of factual issues for Sills to address in the event it and/or Spectrum filed any future pleadings seeking authority to own or operate the railroad tracks located on so-called “Parcel A” of the then-named Brookhaven Rail Terminal (“BRT”), which has been described in the pleadings and decisions issued in these dockets. At the time of the *Director’s Decision*, Sills owned Parcel A. The *Director’s Decision*

¹ *January 6 Decision* at 10.

² *Id.*

contained no questions or inquiries directed to Brookhaven Rail, which had opposed the notices of exemption filed in the three proceedings and had advocated their rejection. Neither Sills nor Spectrum subsequently sought to renew their respective requests.

The “Sills Parties” referred to by the Board in its *January 6 Decision* are Sills and its affiliates, Brookhaven Terminal Operations, LLC and Brookhaven Rail Freight Services, LLC. On October 22, 2021, citing “settlements with various parties intended to resolve longstanding disputes and litigation surrounding Brookhaven Rail Terminal [BRT],” the Sills Parties and Spectrum moved to withdraw with prejudice all their past filings in the three proceedings above, as well as filings the Sills Parties had submitted in Docket Nos. FD 35819, 36398 and FD 36399 (“Withdrawal Motion”). The letter also stated that “the Sills Parties and Spectrum are making this request pursuant to a confidential agreement with Northpoint Development LLC.” The Sills Parties and Spectrum reiterated these points in another letter to the Board dated December 14, 2021 filed in response to CCE’s Petition, and stated that “Sills Road owns Parcel A” but that “Sills is no longer developing, or seeking to develop, any facilities on Parcels A, B, C, or D,” including any new rail construction.³ In its *January 6 Decision*, the Board noted the Withdrawal Motion but did not take any action on the request.

Sills no longer owns Parcel A, nor does any of its affiliates. As Brookhaven Rail has informed the Board and its Office of Environmental Analysis previously, Northpoint Development LLC was part of a joint venture denominated NP/Winters Long Island Industrial Development, LLC (“NP/Winters”), that contracted to acquire Parcels “B” and “C” of the former BRT in July

³ Letter from Robert A. Wimbish to Cynthia T. Brown, dated December 14, 2021, filed in all of the dockets covered by the Petition, at pages 2 and 3.

2021 and consummated the purchase on October 20, 2021.⁴ Brookhaven Rail further understands that the name of the NP/Winters entity was changed to Brookhaven Logistics Center, LLC (“BLC”) effective March 25, 2022. Finally, Brookhaven Rail understands that Parcel A, including all of the tracks located on it that had been constructed by US Rail and other parties, was purchased by BLC from Sills effective May 4, 2022. The transaction was subject to Brookhaven Rail’s existing rights to occupy Parcel A and to provide common carrier service over the railroad tracks, and Brookhaven Rail’s service to shippers on Parcel A has indeed continued uninterrupted since that date.

Because Sills no longer owns Parcel A or any of the railroad tracks constructed on it there exists no possibility that Sills, the other Sills Parties, or Spectrum will again seek any authority from the Board with respect to the railroad lines on Parcel A. Moreover, as explained in the attached Verified Statement of Mr. James Newell (“Newell V.S.”), the former Chief Operating Officer (“COO”) of U.S. Rail-NY and President of Brookhaven Rail who serves as a consultant to the present owner of Brookhaven Rail, Shamrock Rail, LLC, BLC desires to solidify Brookhaven Rail’s position as the sole provider of common carrier rail service on Parcel A and the parties are in the process of finalizing new agreements to accomplish that goal.⁵ Against this updated factual backdrop, Brookhaven Rail provides the following responses to the matters raised by the *Director’s Decision*, with each grouping first stated in total for the Board’s convenience:

B. QUESTIONS RAISED IN THE *DIRECTOR’S DECISION* AND BROOKHAVEN RAIL’S RESPONSES

1. Responsibilities of Each Party in Construction of the Line. The record in these proceedings indicates a factual dispute as to who exercised the construction authority granted in Docket No. 35141. Should Sills Road seek authority based on the premise that it should have

⁴ See generally, Brookhaven Rail’s Reply to November 10, 2021 Filing of CCE and exhibits thereto, submitted in Dockets No. FD 36398 and 36399 on November 30, 2021.

⁵ Newell V.S. at 6-7.

sought and obtained construction authority, it should explain in detail the role of Sills Road, U S Rail/Brookhaven Rail, and any other entity or entities that may have been involved with the construction of the Line, including providing information on which entity or entities paid for the construction and in what proportions and what specific construction-related activities each entity performed and at what point in time. With respect to each of these activities, Sills Road also should explain whether the entity performing the activity was acting as an agent of another entity or otherwise taking direction from or acting under the supervision or oversight of another entity. Sills Road should provide any agreements, documents, or other records relevant to its explanations.

Brookhaven Rail's Response:

The administrative records compiled in the proceedings covered by CCE's Petition show that the construction of the tracks on Parcel A occurred between September 9, 2010, when the Board granted construction and operating authority to US Rail, and September 2, 2011, when rail operations began. Neither the current owner of Brookhaven Rail nor the undersigned counsel for Brookhaven Rail was present or involved in the prior activities regarding Parcel A that started around 2007 and culminated with the Petition for Exemption filed by US Rail in 2008 in Docket No. 35141. Their respective involvements with the railroad began in 2019. Brookhaven Rail is, therefore, unable to provide the detailed information that the Director sought from Sills with this first set of questions. However, prior pleadings in the various dockets discuss the construction phase and the parties that were involved, most notably the Petition for Declaratory Order filed by Brookhaven Rail Terminal and Brookhaven Rail in Docket No. FD 35819 on April 28, 2014, which includes a section entitled the "History of the Brookhaven Rail Terminal" starting on page 6 as well as other factual information about the development of Parcel A.

In an effort to be responsive to the *January 6 Decision*, Brookhaven Rail supplements the prior information about the construction phase with the attached Verified Statement of Mr. Newell, who was employed by U.S. Rail-NY (the successor to US Rail that was renamed Brookhaven Rail LLC in 2012), from May of 2011 to May 2020. Mr. Newell describes his recollection that the

tracks on Parcel A were approximately 75% complete upon his being hired as COO and assigned the primary task of facilitating the new railroad's commencement of common carrier service on Parcel A and also with developing new rail-served business on Parcel A.⁶ He was not tasked with overseeing or participating in the completion of the track's construction.⁷ However, when issues arose concerning track design, layout, interchange, and other issues that affected the planned operations, Mr. Newell would have been consulted.⁸ His recollection is that the rail construction was generally under the auspices of U.S. Rail-NY, pursuant to contracts entered into between US Rail and several subcontractors.⁹ He also recalls that one of the contractors involved in the rail construction was W.J. Riegal Rail Solutions, and that this contractor worked primarily with Sills, although he would have been consulted on design and operational issues.¹⁰ Mr. Newell also reiterates that it became his understanding after being hired that Sills would own the tracks on which Brookhaven Rail had received authority from the STB to provide common carrier operations over.¹¹

Neither Mr. Newell nor Shamrock Rail, LLC, the current owner of Brookhaven Rail, possess any agreements, documents, or other records from the initial construction phase of the railroad tracks on Parcel A.

2. Roles of the Parties in Prior Board Proceeding. Sills Road has at various points claimed that it constructed the Line, (Sills Road Verified Notice 3); that it financed the construction, (Joint Reply 17); and that it paid for the legal fees covering the construction proceeding at the Board, (*id.*). In any future request for authority, Sills Road should explain why the parties decided that U S Rail would seek construction authority rather than Sills Road. If Sills Road initially intended that U S Rail would construct the Line, Sills Road should explain why and when Sills Road changed its plans and why it did not inform the Board at any point

⁶ Newell V.S. at 2-3.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* at 5.

during the construction proceeding, which was ongoing through January 2018, that Sills Road, rather than U S Rail, was constructing or had constructed the Line. Sills Road should provide any agreements, documents or other records relevant to its explanations.

Brookhaven Rail's Response:

Shamrock Rail, LLC and Mr. Newell do not have firsthand knowledge of why Sills Road and US Rail decided that US Rail would seek construction authority from the Board in 2008.¹² However, the introduction of US Rail as the entity to construct and operate the tracks appears to have been the direct result of the Board's decisions served in STB Finance Docket No. 35036¹³ on June 1, 2007 and September 25, 2007, respectively. In the first decision, the Board held in abeyance a notice of exemption filed by the Suffolk & Southern Rail Road LLC to lease from Sills and operate approximately 11,000 feet of track "that Suffolk states Sills is currently constructing"¹⁴ In its decision, the Board noted "it appears that Sills is constructing a line of railroad subject to the Board's jurisdiction" but that "Sills has not sought Board authority for this construction."¹⁵ In the second decision, the Board stated that the planned construction and operation would very likely be subject to 49 U.S.C. §10901 and the requisite environmental review under the National Environmental Policy Act.¹⁶ The Board's statement appears to have prompted the filing of the Petition for Exemption in Docket No. 35141 by US Rail. The filings made in that proceeding state that Sills and US Rail intended for US Rail to construct and operate the rail lines authorized by the Board.

For the reasons expressed by Brookhaven Rail in prior pleadings in these proceedings,

¹² *Id.* at 5.

¹³ *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC. ("Suffolk Southern").*

¹⁴ *Suffolk Southern*, (served June 1, 2007) at 1.

¹⁵ *Id.*

¹⁶ *Suffolk Southern*, (served September 25, 2007) at 2.

and also in Mr. Newell's Verified Statement, neither the current owner of Brookhaven Rail nor Mr. Newell concede that Sills was the sole party that constructed the tracks covered by the authority granted in Docket No. 35141 and Sills never shared this belief with Mr. Newell in the 2010 to 2019 timeframe.¹⁷ Nevertheless, they acknowledge that Sills did participate in the construction phase and that Sills owned the tracks once they were constructed. However, Mr. Newell states that when was hired in 2011 as COO to manage the common carrier operations on Parcel A and to develop rail-served business for Brookhaven Rail and New York a& Atlantic Railway ("NY&A"), his presumption was that all necessary Board approvals had been obtained for Brookhaven Rail to commence operations, and no further action at the Board needed to be taken by either Sills or Brookhaven Rail.¹⁸

As for why Sills did not inform the Board until 2019 of its positions regarding the alleged extent of its participation in the construction of the railroad lines and that Sills might have required construction authorization, Brookhaven Rail maintains that Sills did not do so because previously it did not believe it needed to do so, for the reasons expressed in Brookhaven Rail's replies to the notices filed by the Sills Parties in Dockets FD 36384, FD 36385, and FD 36376. Further, Brookhaven Rail believes the belated advancement of these positions by Sills in 2019 was directly related to Sills' unsuccessful attempt to remove Brookhaven Rail from Parcel A,

For its part, Sills stated in 2020 it did not believe in 2010 and 2011 that it was necessary or appropriate to inform the Board of its alleged role in the construction of the tracks on Parcel A, in part due to its reliance on regulatory counsel for US Rail.¹⁹ While Brookhaven Rail does

¹⁷ Newell V.S. at 5.

¹⁸ *Id.* at 5-6.

¹⁹ 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," Docket Nos. FD 36384 and FD 36385, Joint Reply of Sills Road Realty LLC and Spectrum RR Holdings, LLC

not question that Sills possessed this belief in 2010, it nevertheless should be noted that the Petition for Declaratory Order filed in 2014 in Docket No. FD 35819 was submitted by different regulatory counsel retained by BRT and Brookhaven Rail, and this counsel also did not raise with the Board the issue of Sills' alleged involvement in the construction phase.²⁰ It is also apparent that issues concerning the construction and ownership of the tracks were not raised by any party during the environmental review component of the proposal in FD 35141, which, as the *Director's Decision* noted, had a few issues that lingered until 2018.

In summary, Brookhaven Rail believes that Sills did not notify the Board prior to 2019 of its then-stated positions concerning its alleged role in the construction phase because Sills previously believed there was no need for it to obtain STB authorization to construct and/or own a common carrier line of railroad. Rather, Sills believed that the sole party who required STB authorization and who was the sole party responsible for fulfilling the common carrier obligations on the tracks was Brookhaven Rail.

3. Legal and Factual Basis for Authority Sought. Sills Road states that it should have obtained Board authority to own the Line and that its verified notice of exemption to acquire under 49 C.F.R. § 1150.31 “is designed to secure remedial authorization to own the Line.” (Sills Road Verified Notice 7.) If Sills Road believes that remedial authorization to own the Line is needed, in any future proceeding it should explain the legal and factual basis for the authority it seeks. For example, in the instant proceeding, Sills Road failed to explain the legal basis for seeking acquisition authority under 49 C.F.R. § 1150.31 as opposed to, for example, seeking to reopen the construction docket. In any future proceeding seeking remedial authorization, it

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. *See also, Id.* 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.”). Sills later reiterated that it “may have erred by relying exclusively on regulatory counsel for US Rail Corp., who did not at the time of the FD 35141 proceeding disclose Sills Road’s role in the construction and ownership of the Brookhaven Rail Terminal.” Letter from Rob Wimbish to Ms. Cynthia T. Brown, dated December 14, 2021, filed in Docket No. FD 35141, et al.

²⁰ See e.g., Docket No. FD 35819, Petition for Declaratory Order at 4 -12.

should therefore explain why its approach is appropriate in light of the fact that Brookhaven Rail's predecessor, U S Rail, is the party that sought and obtained construction authority, claims to have been involved in overseeing and supervising construction of the Line, and has been the only operator on the Line to date. Sills Road should provide any agreements, documents, or other records relevant to its explanations.

Brookhaven Rail's Response:

The questions of whether Sills actually believed it needed "remedial authorization" and if the facts surrounding the construction of the tracks on Parcel A supported such a claim, have been mooted by Sills' sale of Parcel A to BLC, since Sills will never renew its request. Brookhaven Rail has maintained that "remedial authorization" was unnecessary in these factual circumstances, which include that U.S. Rail did participate in the track design and construction, and that Brookhaven Rail has been the exclusive provider of common carrier service over the lines for nearly 12 years, over which timeframe Brookhaven rail has transported over 26,000 cars for shippers on Parcel A.²¹ Brookhaven Rail has also maintained and repaired the tracks in close coordination with the Federal Railroad Administration ("FRA"), which solely looks to Brookhaven Rail for compliance with FRA rules.²² Accordingly, Brookhaven Rail declines to attempt to speculate about the legal and factual bases Sills might have asserted to support a renewed claim for "remedial authorization."

Brookhaven Rail has no agreements, documents, or other records that reflect Sills' legal and factual bases for the authority it sought in Docket Nos. FD 36384, FD 36385 or FD 36376.

4. Classification of Track as Excepted Track Under 49 U.S.C. § 10906. To the extent that any subsequent filing asks the Board to find that the portion of the Line other than the Main Stem is excepted track under 49 U.S.C. § 10906, the filing should explain the legal basis for such a determination in light of the fact that the Board previously granted construction and operation authority under 49 U.S.C. § 10901 for the entire Line and should include any agreements, documents, or other records relevant to such a request.

²¹ Newell V.S. at 4.

²² *Id.* at 6.

Brookhaven Rail's Response:

Brookhaven Rail has no present intention of seeking any determinations that any of the tracks on Parcel A for which its US Rail received construction and operating authority are excepted track under 49 U.S.C. §10906. This was a notion entirely advanced by the Sills Parties and Spectrum, and Brookhaven Rail objected to it when it was presented in Docket Nos. FD 36384 and 36385.

Respectfully submitted,

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

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Attorney for Brookhaven Rail LLC

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VERIFIED STATEMENT OF JAMES NEWELL

My name is James Newell. I am the former President of Brookhaven Rail LLC (“Brookhaven Rail”), and the same James Newell that submitted a verified statement in Docket No. FD 36398, Brookhaven Rail LLC – *Construction and Operation Exemption – In Suffolk County, New York*. As I explained in my prior statement, I am currently a consultant to Brookhaven Rail. This Verified Statement is being submitted at the request of counsel to provide certain factual information in response to the Board’s January 6, 2023 Decision in docket No. FD 35141, *U.S. Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, and several other, related dockets.

As explained in my previous verified statement, I have been employed in the railroad industry since 1965, including positions with CSX Transportation, Inc. and its predecessors. I began working for what is now Brookhaven Rail in May 2011, which was after U.S. Rail Corporation (“US Rail”) had received approval to assign its lease and STB authority to U.S. Rail – New York (“USR-NY”). I was hired to be the Chief Operating Officer (“COO”) of USR-NY to manage the operation of the new railroad to provide common carrier services to shippers located on “Parcel A” of what was then called the Brookhaven Rail Terminal (“BRT”) site in Suffolk County, Town of Brookhaven, Hamlet of Yaphank, New York. My role was also to develop new rail-served business on Parcel A.

Because I was hired in May 2011, I had no involvement in the negotiations between the owner of parcel A, Sills Road Realty, LLC (“Sills”), and US Rail that resulted in those parties entering into a 30 year lease and operating agreement covering Parcel A in 2007, nor did I have any involvement in the discussions between Sills and US Rail that culminated in US Rail filing a Petition for Exemption in Docket No. FD 35141 in August 2008 for authority to construct and operate the rail lines on Parcel A. I also was not present when the tracks eventually constructed on Parcel A were designed and contractors were hired by US Rail to perform the construction.

In May of 2011, the STB authority sought by US Rail had been granted and the construction of the tracks on Parcel A was well underway and was approximately 75% complete, in my estimation. As stated, my role as COO was to put the agreements, tariffs, and crews and equipment in place for the railroad to conduct common carrier services pursuant to the authority it had been granted. I was not hired to oversee the remaining tasks related to track construction. However, to the extent issues arose concerning track design, layout, interchange, and other issues that affected the planned operations, I would have been the railroad representative the contractors and Sills dealt with. My recollection is that the remaining construction tasks were being performed by contractors that had previously been hired by US Rail and by Sills.

In my role as COO I managed a two - person crew that operated the two locomotives leased by the railroad. I also oversaw the implementation of an Interchange Agreement between U.S. Rail – NY and the New York & Atlantic Railway (“NY&A”) which was dated effective February 11, 2011. The NY&A is the designated provider of freight rail services for the Long Island Rail Road. I also negotiated a Joint Commercial Marketing Agreement with NY&A that went into effect on June 16, 2011. These agreements are still in effect between BHR and NY&A to coordinate common carrier service to tenants of Parcel A. In furtherance of establishing USR-

NY as the common carrier operator of the new track I also developed common carrier Tariff BHR 9200, which was posted on the railroad's website.

USR-NY commenced common carrier rail service to shippers located on Parcel A in early September 2011. The railroad subsequently legally changed its corporate name to Brookhaven Rail LLC in March 2012. USR-NY and Brookhaven Rail have been the provider of common carrier service on the tracks for their entire existence. I became President of the railroad in 2012 and held that position until May 11, 2020. Since commencing operations BHR has used the railroad lines on Parcel A to transport over 26,000 railcars to and from the interchange with NY&A for shippers located on Parcel A. BHR has developed very good working relationships with the NY&A, the Norfolk Southern Railway, CSX, and New York New Jersey Rail, LLC (which operates a carfloat service between Greenville Yard in Jersey City, New Jersey, and 65th Street Yard in Brooklyn, New York), all of which coordinate with BHR for the provision of rail service to shippers on Parcel A.

Based on my personal recollection, the construction of the tracks prior to my arrival in 2011 had been predominantly under the overall auspices of US Rail and then U S Rail-NY, which had contracted with several subcontractors to conduct clearing, grading, and track construction. These contractors included Adjo Contracting Corporation, a New York corporation, to serve as the general contractor to grade and excavate the Parcel A site. Watral Brothers, Inc. and Pratt Brothers, Inc. were also New York corporations that subcontracted with Adjo to perform related construction activities on Parcel A. My recollection is that in 2011 W.J. Riegel Rail Solutions was also a contractor involved in the track construction, and that this contractor worked primarily with Sills, although I would have been consulted as needed on design and operational issues. My further recollection is that, while US Rail was the signatory to the contracts and oversaw the work, some of the costs of the construction were financed by Sills and other parties. It also became my understanding after

I was hired that upon the track construction being completed Sills would own the tracks but that USR-NY would be the sole and exclusive common carrier railroad operator of the newly constructed rail lines.

I do not have any documents or records in my possession pertaining to the rail construction phase, which spanned approximately the year between September 9, 2010 (when STB authority was granted) and September 2, 2011 (when rail service began). My understanding and belief is that Brookhaven Rail and its present owner Shamrock Rail, LLC, also do not have documents or records from that time frame on that subject. Any such documents, to the extent they still exist, would be in the possession of Sills and/or the new owner of Parcel A, Brookhaven Logistics Center, LLC (“BLC”).

In its January 6, 2023 decision, the Board has asked Brookhaven Rail to respond to a question posed to Sills by the Board’s Director of the Office of Proceedings in June of 2020 why Sills and US Rail decided in 2008 that US Rail would seek construction authority rather than Sills, given Sills’ later claims and representations in STB Dockets No. FD 36384 and FD 36385 about its role in the construction phase. I personally do not know the answer to this question. I also do not know why Sills did not inform the Board prior to its filings in those dockets in 2019 of its position that Sills rather than US Rail, was solely responsible for constructing the tracks. At no time between 2011 and 2019 did Sills share with me the belief it later expressed in its STB filings in STB Dockets No. FD 36384 and FD 36385 that it was solely responsible for constructing the tracks on Parcel A, or that its ownership of the tracks might require either Sills or Brookhaven Rail to provide this information to the STB.

My understanding when I arrived in 2011 was that all necessary authority to construct and operate the new railroad tracks had been obtained from the STB and there were no regulatory

impediments to me fulfilling my role as the facilitator of rail common carrier services to shippers on Parcel A and the development of rail-served business for the railroad.

My belief is that Sills did not take any additional action before the STB after the approval was received in 2010 because it did not believe it was necessary, in large part because Sills considered BHR to be the sole possessor of the common carrier obligation to provide service over the tracks. This is confirmed by many factors, which include (1) the initial 2007 lease and other agreements that granted BHR authority to occupy the tracks and be the exclusive provider of common carrier rail service; (2) the railroad separately entering into the Marketing Agreement and Interchange Agreement with NY&A, neither of which granted or reserved any authority to Sills as a track owner, and (3) the development of Tariff BHR 9200 by which Brookhaven Rail provides common carrier service. It is also significant that since the inception of rail service in 2011 the Federal Railroad Administration (“FRA”) has always dealt directly with Brookhaven Rail for all matters related to track safety and other compliance issues, and also with respect to inspections, maintenance and repairs.

In my opinion and personal experience from being directly involved in the railroad operations on Parcel A since their inception, the fact that Sills ultimately owned the tracks had no bearing or placed any limitations on the common carrier service provided by Brookhaven Rail.

Finally, effective May 4, 2022, Parcel A and all of the railroad assets on it were acquired by BLC. BLC acquired the rail assets expressly subject to Brookhaven Rail’s existing contractual rights to occupy and provide rail operations on Parcel A, and also subject to the operating authority granted by the STB in Docket No. 35141. BLC recognizes Brookhaven Rail as the exclusive provider of common carrier rail service to Parcel A, and since BLC’s acquisition of Parcel A, Brookhaven Rail and BLC have been taking steps to solidify BHR’s rights to continue to occupy

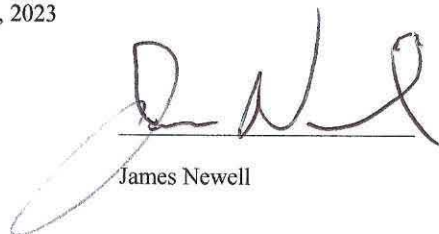
Parcel A and conduct common carrier rail operations over the tracks, including negotiating new agreements that affirm BHR's contractual rights to access and operate on Parcel A, and its rights and obligations as the exclusive common carrier railroad at this location.

VERIFICATION

I, James Newell, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: February 13, 2023

A handwritten signature in black ink, appearing to read 'J. Newell', is written over a horizontal line. The signature is stylized with a large initial 'J' and a long, sweeping underline that extends to the left.

James Newell

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of February, a copy of the foregoing Reply to Request for Information 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