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Via E-Filing

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

ENTERED
Office of Proceedings
March 7, 2023
Part of
Public Record

Re: FD 36398, *Brookhaven Rail LLC – Constr. & Op. Exemption – Suffolk County, New York*; FD 36399, *Application for a Land-Use Exemption Under 49 U.S.C. § 10909*; FD 35141, *U S Rail Corp. – Constr. & Op. Exemption – Brookhaven Rail Terminal*; FD 35819, *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for Decl. Order*; FD 36376, *Spectrum R.R. Holdings, LLC – Operation Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36384, *Sills Road Realty LLC – Acquisition Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36385, *Spectrum R.R. Holdings, LLC – Acquisition & Op. Exemption – Line of Sills Road Realty LLC, in the Town of Brookhaven*

Dear Ms. Brown:

The Citizens Campaign for the Environment (“CCE”) hereby seeks leave and responds to the Reply (“Reply”) that Brookhaven Rail LLC (“Brookhaven Rail”) submitted on February 15, 2023, in response to the Petition for Partial Reconsideration (“Petition”) that CCE submitted on January 25, 2023.

CCE respectfully submits that good cause exists for the Surface Transportation Board (“Board” or “STB”) to accept this surreply. BHR’s Reply both materially misstates the facts and the law and introduces new evidence not previously submitted, to which CCE should have an opportunity to respond in the interests of fairness and assembling a complete record. *E.g.*, *Michigan Air-Line Ry. Co. – Abandonment Exemption – in Oakland Cnty., Mich.*, AB 1053 (Sub-No. 1X) (STB served May 18, 2011), at 1 (accepting surreply that “addresses allegations first asserted on [] reply, and because it establishes a more complete record”); *Otter Tail Power Co. v. Burlington N. & Santa Fe Ry. Co.*, No. 42071 (STB served Nov. 15, 2002) (surreply authorized to address “alleged mischaracterization” and to provide a more complete record).

First, Brookhaven Rail asserts that there are no grounds for reconsideration because “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.” Reply at 6. It further asserts that reconsideration is inappropriate because “Brookhaven Rail has been exclusively conducting common carrier operations on the tracks pursuant to Board authority for over a dozen years,” and that “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.” *Id.* at 11-12.

Brookhaven Rail misstates both the critical issues and the relevant facts. The core issue is whether the line on Parcel A was constructed in accordance with the Board’s authorization. The facts of record to date – including the updated responses to the Information Requests submitted in response to the Board’s decision served January 6, 2023 (the “Decision”) by Brookhaven Rail on February 15, 2023, the Sills Parties¹ on February 21, 2023, and Brookhaven Logistics Center, LLC (“BLC,” stated successor to NP/Winters Long Island Industrial, LLP) on February 21, 2023, in the above-captioned proceedings – show that the rail track constructed on Parcel A was not actually built, owned, and operated in accordance with Board authority. And even assuming *arguendo* that the line was built in accordance with Board authority, the evidence of record to date also shows that Brookhaven Rail lacked, and still lacks, any possessory interest in the property or track that gives it the ability to exercise common carrier authority over the constructed track as demonstrated in CCE’s Reply to the Responses of Brookhaven Rail, the Sills Parties, and the BLC’s responses (“CCE’s Reply to Responses”) being filed concurrently with this Reply.

Second, Brookhaven Rail repeats its prior refrain that, because the current owner, Winters Brothers, and its current counsel “were not present” during the rail construction phase, they are somehow absolved of any and all responsibility for any prior bad deeds of the railroad, and in any event, the records that it has provided in response to the Board’s Information Requests establish no “deliberate scheme” to evade regulatory requirements. Brookhaven Rail’s contention that there was no deliberate scheme to evade the Board’s requirements is incorrect, as demonstrated in CCE’s Reply to Responses and prior submissions. In any event, this issue is a red herring and irrelevant. What Brookhaven Rail and the other respondents need to establish is that Brookhaven Rail (and its predecessor, U S Rail) complied with the law and the Board’s rules in obtaining construction and operation authority, and in seeking to provide common carrier operations, including the requirement that Section 10502 exemption notices not include any factual misstatements or omissions. Again, the record to date shows that they manifestly did not, and even today are still not providing operations properly as a common carrier because of these legal deficiencies. Additionally, Winters Brothers and its owners, affiliates, and partners certainly knew, or should have known through their due diligence, when acquiring a rail carrier such as Brookhaven Rail/U S Rail with such a sordid history of all the attendant acquisition and regulatory risks, especially given the long record of litigation over the development of the four parcels, before both the courts and the STB.

¹ 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).

Third, Brookhaven Rail contends that its lack of intent to evade the Board's rules is somehow established by its prior Chief Operations Officer's belief that "the railroad had received all required authorizations" and "did not perceive any need to inform the Board of Sills' involvement during the construction phase and its ownership of the tracks." Reply at 8-9. However, as demonstrated in CCE's Reply to Responses, that same official fully admits that he had no responsibility for track construction or regulatory approval.

Brookhaven Rail even points to the Sills Parties' contentions that they solely relied on the (erroneous) advice of Brookhaven Rail's counsel (who was paid by and first hired to represent the Sills Parties) that the Sills Parties were permitted to use Brookhaven Rail as a proxy for rail construction purposes. *Id.* However, as also demonstrated in CCE's Reply to Responses, Sills Parties' contentions are not true, but even if they were, it would not excuse Brookhaven Rail from its regulatory obligations, especially as Brookhaven Rail does not dispute that it had STB regulatory counsel at the time of construction (or at least counsel assigned to it and paid for by the Sills parties). That longstanding practitioner certainly knew, or should have known, the requirement that the track may not be constructed by or with parties other than Brookhaven Rail, and that a carrier seeking to provide common carrier service over track owned or constructed by another may not exercise such authority without also first seeking and obtaining separate Board authority, which Brookhaven Rail never did, as further explained in CCE's Petition. *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. Brookhaven Rail's further claims that "all affected parties were apparently in agreement that Brookhaven Rail was the sole holder of the common carrier obligation," with no need for Brookhaven Rail "to take any other action" (Reply at 9-11), is not true for the reasons stated, and otherwise in no way excuses it from failing to take the proper legal steps to seek to obtain bona fide common carrier service authority, again, especially since Brookhaven Rail was previously represented by counsel with close knowledge of this area of the law.

Fourth, Brookhaven Rail asserts that there was no violation of law because "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." Reply at 11. However, the evidence of record to date demonstrates the opposite, *i.e.*, that Brookhaven Rail had no material role in the line construction for which it sought authority in Docket No. FD 35141, as Sills Parties now fully admit in their responses to the Information Requests. This is further shown in CCE's Reply to Responses, including the sworn testimony of Brookhaven Rail's owner in the New York courts that Brookhaven Rail had "no involvement" in Parcel A site clearing and grading work that it now claims to have been involved.

And even if Brookhaven Rail had some nominal role in track construction, the main construction activities performed by Sills Parties were not carried out with Board authority. Additionally, the recent responses of the parties, particularly Brookhaven Rail's, to the Board's Information Requests are so woefully unresponsive and incomplete as to be misleading. The parties provide almost no new responsive information, no relevant

responsive documents, especially from the period of construction, and nothing new to establish that the tracks were actually constructed in accordance with the authority granted by the Board to U S Rail, and not the Sills Parties, in Docket No. FD 35141.

At a very minimum, Brookhaven Rail failed to fully disclose and omitted material known facts of the Sills Parties actual construction and track ownership plans in its Docket No. FD 35141 exemption petition. Such facts, if properly disclosed, clearly would have resulted in the rejection of the exemption petition, and having now been disclosed, require the exemption to be revoked and declared void *ab initio* under 49 U.S.C. § 10502(d), 49 C.F.R. § 1121.4(f), and the various legal authorities set forth in CCE's Petition for Partial Reconsideration (at 8-9) because the petition was based on incomplete, misleading, and false facts. Brookhaven Rail's lack of disclosure of these material facts, and failure to ever take corrective actions, is made all the more serious here because the Board had admonished it in a similar proceeding during the same time period for failing to provide relevant, material information and for its lack of candor. *U S Rail Corp. – Lease & Operation Exemption – Shannon G., A New Jersey Limited Liability Co.*, FD 35042 (STB served Oct. 8, 2008) (Board rejects lease and operation exemption petition finding that "U S Rail was not candid in its notice of exemption" where Brookhaven Rail omitted information and/or provided "false and misleading information").

Fifth, Brookhaven Rail asserts that any unauthorized construction, ownership, and operation of a rail line in the Terminal is somehow "mooted" because the Sills Parties (and related entities) have recently sold Parcel A to BLC. Reply at 5. However, the sale of land and track has nothing to do with the questions raised, and certainly does not somehow absolve Brookhaven Rail from its continuing legal transgressions, in light of the facts showing that the Parcel A track was constructed and rail line activities conducted in contravention of the law and the Board's rules. Unauthorized construction does not become authorized because the current holder acquires the assets or the underlying property of the party that undertook the unauthorized construction. Additionally the BLC owners, just like Winter Brothers, certainly knew, or should have known through their due diligence when acquiring the parcel of all the attendant acquisition and regulatory risks that they were also acquiring.² Also, while BLC may now own both Parcel A along with Parcels B and C (except perhaps for portions owned by Long Island Lighting Authority), such joint ownership of land and tracks does not establish that any new tracks built on Parcels B and C automatically become exempt § 10906 track, especially when Brookhaven Rail purports to be an "independent" entity.

² Because the Sills Parties have submitted only the deeds, but not the associated real estate and sale and purchase agreement, the possibility exists that the Sills Parties are indemnifying BLC from such risks, which would confirm BLC's awareness of the associated risks and liabilities that the parties indicate do not exist. It is also unclear whether the Sills Parties have any remaining ownership interest in, or continue to operate the Parcel A transloading and warehouse facilities.

Additionally, even assuming *arguendo* that the construction of the Parcel A tracks were properly authorized and Brookhaven Rail is operating as a bona fide common carrier on the property, which CCE strongly believes is not the case, BLC's actual acquisition of a common carrier line, especially with Brookhaven Rail's having failed to show any possessory right to the land or track, would likely trigger 49 U.S.C. § 10901, and require BLC to file an appropriate application for acquisition, or an appropriate exemption under § 10502 and the Board's governing rules. *E.g. Southern Pac. Transp. Co – Abandonment Exemption – Los Angeles County, CA*, 8 I.C.C.2d 495, 505 (1992) (quoting *New York Susquehanna & W. Ry. Co., et al., Exemption*, FD 30317 (served June 17, 1985), “[w]hen a noncarrier acquires an operating rail line, it assumes the common carrier obligation to ensure service over the line and retains that obligation whether it physically operates the line or leases the line to another for operations”). However, BLC has not sought to acquire any such common carrier line to date before the Board, and states that it has no “inten[t] to assume a common carrier obligation, or conduct common carrier operations. Verified Statement of Nathaniel Hagedorn at 3.

Sixth, for these same reasons, Brookhaven Rail's contention that *JGB Properties, LLC -- Petition for Declaratory Order*, FD 35817 (STB served Dec. 10, 2015) (“*JGB*”) controls, is incorrect. Also, even if the Parcel A track were determined to be a bona fide common carrier line, Brookhaven Rail asks too much of *JGB*, especially since if Brookhaven Rail is right that any land owner who builds track next to a common carrier line could establish the line as an exempt spur under § 10906, then the Board would likely need to turn back the clock and reverse its cease-and-desist orders in Docket No. FD 35036, *Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC* (STB served Oct. 12, 2007), *petition for reconsideration denied*, FD 35036 (STB served Dec. 20, 2007), and in the 2016 declaratory order proceeding in FD 35819, and determine and declare that the track constructed on Parcel A by Sills Parties, situated immediately adjacent to and connected with the New York & Atlantic Railway's mainline common carrier track, is §10906 track and controlled by the Sills Parties or its member Suffolk & Southern Rail Road. In that event, the newly constructed track on Parcels B and C would not be eligible to be considered an exempt spur under §10906 because it would not be directly connected to any § 10901 common carrier rail line.

Brookhaven Rail's attempted reliance on *JGB* also runs afoul of other agency precedent such as *Hanson Natural Resources Company—Non-Common Carrier Status—Petition for Declaratory Order*, FD 32248 (ICC served Dec. 5, 1994). *Hanson* represents the most extensive discussion of the distinctions and interaction among § 10901, § 10906 (then § 10907), and private lines. The decision, which predates *Effingham*, “noted ... that a private line, although it may be called a spur, is not a section 10907(b)(1) spur, because it is not, in the first place, a section 10901(a) railroad line.” *Id.* at 21 n.12. The decision also noted the various tests for distinguishing § 10906 spurs from § 10901 main lines, but observed that “all such tests necessarily assume, as a starting point, that the involved single-state tracks constitute a ‘railroad line’ as that term is used in sections 10901(a) and 10903(a).” *Id.* at 22. In *Honey Creek Railroad, Inc.—Petition for Declaratory Order*, Docket No. FD 34689 (STB served June 2, 2008), the Board explained that “[t]rack of a common carrier that is used for

loading ... is considered to be excepted track.” *Id.* at 8 (emphasis added). The Board further found that “even if ... the track has some of the characteristics of excepted track, HCR needed prior authorization under 49 U.S.C. 10901 in order to acquire, and operate the track (which HCR obtained). That is because the track was the only common carrier track operated by HCR and therefore could not be ancillary or incidental to any other HCR track.” *Id.* (citing *Effingham*). The notion that an entity such as BLC could have track that consists only of excepted common carrier track does not square with such precedent. Moreover, allowing an industry to declare that its track is excepted under § 10906 because a common carrier operates over the track would eviscerate numerous decisions limiting § 10502 preemption to track actually operated by common carriers. *E.g.*, Docket No. FD 36036, *Valero Refining Company—Petition for Declaratory Order* (STB served Sept. 20, 2016) (finding preemption unavailable because terminal facility was not owned or operated by a rail carrier).

Finally, if Brookhaven Rail counsel’s broad reading of *JGB* is accepted, such a determination would have no end and would lead to absurd results. Such an interpretation would seemingly allow any old or new businesses throughout the country, including those seeking to engage in highly hazardous materials shipments in sensitive communities and major metropolitan cities where such operations are outlawed, to construct any new track, as § 10906 track – anywhere that it connects to a common carrier line. Such a self-designation that the track being constructed (or presumably, any preexisting private track) is § 10906 track would immunize for all time all construction and operations over such lines from any local, state, or federal approval, permitting, or environmental review (including STB environmental review). Clearly, Brookhaven Rail’s broad and unending interpretation is not what the Board has intended or enabled under its § 10906 precedent. *E.g.*, *Emerson v. Kansas City Southern Ry.*, 503 F.3d 1126, 1132 (10th Cir. 2007) (interpreting ICCTA to avoid absurd results).

For the foregoing reasons, and the reasons previously stated by CCE, the Board should grant CCE’s Petition for Partial Reconsideration.

Respectfully submitted,

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Environment

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of March, 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