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Office of Proceedings

March 7, 2023

Part of

Public Record

March 7, 2023

Via E-Filing

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

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:

Pursuant to 49 C.F.R. § 1104.13, the Citizens Campaign for the Environment (“CCE”) submits this reply to the responses of (1) Brookhaven Rail (Brookhaven Rail LLC), successor to U S Rail Corporation (“U S Rail”)¹, filed on February 15, 2023, (2) the Sills Parties² filed on February 21, 2023, and (3) Brookhaven Logistics Center, LLC (“BLC”), stated successor to NP/Winters Long Island Industrial, LLP (“NP/Winters”), filed on February 21, 2023, in the above-captioned proceedings.

Brookhaven Rail, Sills Parties, and BLC responded to the decision that the Surface Transportation Board (“Board” or “STB”) served on January 6, 2023 (the “Decision”). The Decision agreed with CCE that there are “numerous questions” that remain unanswered concerning the rail line constructed on Parcel A of the Terminal, purportedly under the authority of the Board’s decision in FD 35141 (STB served Sept. 9, 2010).

¹ In this filing, any references to Brookhaven Rail shall also include its predecessor, U S Rail Corporation (“U S Rail”).

² 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 Decision found that “[i]t is still not clear what role each party played in the construction of that line, how or why Sills Road came to be involved in the construction given that construction authority was granted to Brookhaven Rail’s predecessor, U S Rail, and why no party sought to clarify these issues in Docket No. FD 35141 during the construction proceeding.” In order to “further explore the matter and provide information needed to determine how to proceed,” the Board ordered Brookhaven Rail and the Sills Parties to respond to the detailed questions for information (“Information Requests”) posed by the Director of the Office of Proceedings in FD 36376 (STB served June 16, 2020) at 5-6, concerning the construction of the line, the parties’ roles in requesting construction authority, and explaining why the developer who owns the line, rather than the railroad, appears to have paid for and constructed the line contrary to prior representations by the railroad. The Board also ordered the parties to provide all relevant agreements, documents, and other records relevant to their explanations.

A. The Responses to the Requests for Information Fail to Establish that the Track on Parcel A was Constructed in Accordance with Board Authority

For the reasons set forth below, the responses to the Board are inadequate, incomplete, highly misleading and contradictory in material ways, and fail to demonstrate that the rail line constructed on Parcel A, and the operations conducted on that line, were undertaken in accordance with the authority of the Board’s decision in FD 35141 (STB served Sept. 9, 2010).

1. The Responses, While Limited, Reflect that the Sills Parties Were Fully Responsible for Line Construction

Instead of conducting a careful review of its records and providing responsive documents and testimony of any persons with direct, personal knowledge of the information sought, or a company witness who has knowledge of and may have reviewed all the relevant company files and financial records (including U S Rail’s records), Brookhaven Rail offers the testimony of a third-party consultant, Mr. James Newell. Mr. Newell was previously employed by Brookhaven Rail, but was hired as Chief Operating Officer (“COO”) solely to manage railroad operations and crews. Verified Statement of James Newell (“Newell V.S.”) at 1-2.

Mr. Newell did not join Brookhaven Rail until the very last few months of line construction in May 2011. *Id.* at 2-3. Mr. Newell admits that:

- (1) He “had no involvement in the negotiations” between Brookhaven Rail and the Sills Parties on lease and operating arrangements (*id.* at 3);

- (2) He did not 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” (*id.*);
- (3) He has no knowledge of the roles of the parties in the construction proceeding (*id.* at 5) (“I personally do not know the answer to this question”);
- (4) He “was not present when the tracks eventually constructed on Parcel A were designed and contractors were hired” (*id.*);
- (5) He was not hired until the last few months of construction (*id.* at 2-3);
- (6) He “was not hired to oversee the remaining tasks related to track construction” (*id.* at 3);
- (7) His “role was . . . to develop new rail-served business” and “to manage the operation of the new railroad” (*id.* at 2); and
- (8) He has no relevant records responsive to the Requests (*id.* at 2-3, 5).

In other words, Brookhaven Rail’s sole witness to respond to the Information Requests admits having virtually no knowledge of the information that the railroad was ordered to provide.

Mr. Newell also professes no specific, first-hand knowledge of any specific agreements with contractors or subcontractors. Additionally, he does not point to anyone at Brookhaven Rail that engaged in any line design, construction, contracting, subcontracting, bill payments, or financing. At the same time, Mr. Newell states that “[m]y recollection is that in 2001 W.J. Riegel Rail Solutions was also a contractor involved in the track construction, and that this contractor worked primarily with Sills” (*id.* at 4), and thereby appears to admit that it was the Sills Parties that engaged in track construction.

Mr. Newell does not assert that Brookhaven Rail had any specific responsibility for contractor payments, line construction financing, legal fees, or environmental consultant costs, and he appears to acknowledge that it had none, stating that “[i]t became my understanding after I was hired that upon the track construction being completed Sills would own the tracks,” and that “some of the costs of the construction were financed by Sills and other parties.” *Id.* at 4-5.

Remarkably, even though he admits to having very little involvement and almost no direct knowledge of the matter, based on his “recollections,” Mr. Newell still claims that US Rail had an active role in rail line design, contracting, payments, and financing, but without any support and without providing any company documents that might support that assertion. *Id.* at 3-4. Mr. Newell’s “recollections” are, at best, rank hearsay and should be given little or no weight. In fact, Mr. Newell’s further assertion that “I would have been consulted as needed on design and operational issues,” even after admitting

his lack of responsibilities over rail construction activities as COO, serves only to further demonstrate that Brookhaven Rail had little or no involvement or responsibility for rail track design, or project contracting, financing, or payments.

This was a multi-million dollar project, Mr. Newell served as President of the Brookhaven Rail for eight years, from 2012 until 2020, and presumably he has good knowledge of Brookhaven Rail's business and financial records, and especially any major disbursements made during his tenure, or even before his tenure. However, Mr. Newell is unable to confirm the possible existence of, and if so, produce any relevant internal files or records. While within the scope of the Board's requests, no contractor and subcontractor agreements, purchase orders, invoices (including for legal assistance), payment records, financial records, tax returns, or any other company records that might help establish Brookhaven Rail's actual involvement in and responsibility for track construction, contracting, and financing, or even the administrative review proceedings, were provided. To the contrary, Mr. Newell represents that neither he, nor Brookhaven Rail, has any such agreements or documents. *Id.* at 5.

Brookhaven Rail otherwise refers the Board to "prior pleadings in the various dockets," and, specifically, to a prior unverified, "factual background" recitation that its lawyers prepared in a 2014 petition. However, none of these materials provide the Board with any new information or begin to answer any of the specific questions posed in the Information Requests.

For example, Mr. Newell appears to rely on these prior administrative filings as a basis for his general assertions that independent contractors, including Adjo Contracting Corporation ("Adjo"), Watral Brothers, Inc. ("Watral Bros."), and Pratt Brothers Inc. ("Pratt Bros."), were independently hired and managed by Brookhaven Rail to conduct pre-line construction grading work. Newell V.S. at 4. However, Mr. Newell and Brookhaven Rail fail to inform the Board that Adjo, Watral Bros., Pratt Bros., and their corporate affiliates, actually comprise (in major part) the Sills Parties, and the Sills Parties are Adjo, Watral Bros., and Pratt Bros. These are the same Sills Parties' partners that owned and controlled the Parcel A property and track that they recently sold to BLC. They are also the same Sills Parties' partners that the Board enjoined in 2007 from illegal rail line construction on Parcel A through the issuance of its extraordinary cease and desist order on its own motion. *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).

These partners' affiliation as the Sills Parties, along with the scope and nature of their illegal mining activities on Parcel A, were initially uncovered and revealed in an action in the U.S. District Court for the Eastern District of New York (07-CV-4584). In that matter, these Sills Parties' partners sought to enjoin the Town from enforcing local laws and fines for their massive unpermitted sand excavation on Parcel A. These illegal sand mining activities were initiated through collective arrangements among the Sills Parties as land owner, one of their partners, Adjo, as general contractor, and their other partners, Watral Bros. and Pratt Bros., as subcontractors. These arrangements enabled the Sills Parties, with

the cooperation of Brookhaven Rail, to collect millions of dollars selling sand mined from the property, well beyond what was needed for rail track grading purposes, as fully documented in the Reply that the Town of Brookhaven filed in Docket No. 35056 on May 30, 2008. Brookhaven Rail's attempts to claim that it engaged the Sills Parties partners independently, and disassociate them from their clear close association and partnership as the Sills Parties, is simply unavailing.

Brookhaven Rail's unverified claims of its active involvement in grading and excavation activities is all the more stunning in light of its owner's (also the owner of Winters Bros.) (the late Joseph Winters) sworn testimony submitted on May 20, 2020 in *Sills Road Realty LLC v. Winters Bros. Waste Systems of Long Island, LLC, et al.*, No. 602508 (S. Ct. Suffolk Cnty. 2020), that Brookhaven Rail had no involvement in any such activities. In that relatively recent action, Brookhaven Rail's owner verified and confirmed as "true and accurate," and based on his "direct knowledge," that **"BHR has no involvement in any of the site clearing, excavation, grading or removal of sand or gravel or any site development activities which have occurred or which may occur on Parcels A, B or C under the direction and/or control of SRR [Sills Road Realty LLC] and/or certain of its affiliates."** Supplemental Affidavit of Joseph Winters (May, 20, 2020). A copy this Affidavit is attached hereto as **Exhibit 1**. In that testimony, Brookhaven Rail's owner also verified that, at the time, Brookhaven Rail "holds no ownership interest in the real property comprising Parcels A, B or C or in any other improvements, structures or fixtures on these Parcels." *Id.*

The owner of Brookhaven Rail's unequivocal, sworn declaration that US Rail had "no involvement" in any Parcel A track grading and excavation work should put to rest any notions to the contrary. Brookhaven Rail's factual omissions, including its lack of disclosure of this directly relevant important testimony, and other failures to provide relevant information in its possession, are glaring. *E.g., Eastside Cmty. Rail, LLC – Acquisition & Operation Exemption – GNP Ry. Inc.*, FD 35692 *et al.*, (STB served Dec. 22, 2020), at 4 (explaining that "an integral component of all of the Board's processes is candor and full disclosure") (*Eastside Cmty.*).

If that were not enough, Brookhaven Rail's claims of material involvement in line construction is largely refuted by the Sills Parties themselves. To their credit, the Sills Parties (through their counsel) fully admit in their February 21, 2023 response to the Decision that Sills Parties intended from the outset to develop the Brookhaven Rail facility in its entirety, fund the construction, and own the facility, including the rail track, and that they actually did so:

Sills Road believes that there is no factual dispute over who exercised the construction authority granted in FD 35141. Sills Road had agreed, at the direction of legal counsel for US Rail Corporation ("US Rail"), to a plan of action whereby US Rail would seek and obtain federal authorization to construct and operate as a common carrier up to 18,000 feet of track to be

located on Parcel A pursuant to Board authorization. Sills Road had intended from the outset to function as the developer of the facility – to fund the pursuit of Board construction authorization on US Rail’s behalf, cover the railroad facility construction costs post-Board authorization, and own the facility thereafter. And that is precisely what happened.

Sills Parties Response at 3. Sills Parties also admit that they paid all legal fees and environmental consultant costs associated with the Board’s rail line construction proceeding in Docket No. FD 35141. *Id.* at 5.

2. The Responses, While Limited, Show that Sills Parties Controlled and Fully Funded STB Line Construction Authority and that Brookhaven Rail Allowed Itself to Be Used As A Proxy to Obtain Board Construction Authority

As referenced immediately above, Sills Parties fully admit that they, and not Brookhaven Rail, comprised the entity that undertook, fully funded, and sought to exercise the construction authority the Board granted to the railroad in Docket No. FD 35141. Especially with the Sills Parties’ recent sale of the Parcel A property and Track, with no remaining vested interest in the ownership of the property, this admission against interest appears all the more credible.

Brookhaven Rail states that it has no knowledge of why it was decided that US Rail would seek construction authority from the Board, but then adds that it appears to be that it was because “Sills and US Rail intended for US Rail to construct and operate the rail lines authorized by the Board.” Brookhaven Rail Response at 8. However, at least as for rail line construction, for the reasons stated *supra*, the available evidence clearly shows that the parties never actually intended for Brookhaven Rail to construct or pay for the tracks, nor did it. Also, neither Brookhaven Rail nor Sills Parties asserts that either one purported to engage in rail construction activities as the agent for the other.

In the end, the clear answer as to why the parties informed the Board in Docket No. FD 35141 that Brookhaven Rail would construct the track appears to be that the Sills Parties, faced with the cease-and-desist orders in Docket No. 35036, eventually partnered with Brookhaven Rail (then known as U S Rail) to serve as a proxy to obtain Board construction authority.³ The Sills Parties then proceeded to finance, construct, and install the lines themselves as they always had intended, albeit in contravention Board’s authorization decision that permitted only Brookhaven Rail, and not the Sills Parties, to construct the line.

³ *U S Rail Corp. – Constr. & Operation Exemption – Brookhaven Rail Terminal*, FD 35141 (STB served Sept. 9, 2010).

Acting in this manner allowed Brookhaven Rail to confer upon the Sills Parties the benefits of federal preemption under 49 U.S.C. § 10501(b) for the rail line construction in the 2010 proceeding in FD 35141 and then later in the 2016 declaratory order proceeding in FD 35819.⁴ This scheme enabled Brookhaven Rail and the Sills Parties to evade and overcome the Board's prior cease-and-desist orders, while also enabling the Sills Parties to exploit Brookhaven Rail's status as a common carrier to obtain large sums of money through extensive sand mining throughout the Terminal properties. These vast sand mining activities have continued on Parcel B, over the protests of the property owner, the Long Island Lighting Company n/k/a Long Island Power Authority ("LIPA"). LIPA has claimed that the Sills Parties' continuing massive mining activities have caused substantial damage to its property, "reduced to piles of sand and steep ravines," and harmed LIPA's electric power infrastructure. *See Long Island Lighting Company et al. v. Sills Road Associates, LLC, Brookhaven Eastern Holdings LLC, Brookhaven Rail LLC, Brookhaven Rail Freight Services LLC, Brookhaven Terminal Operations LLC, Oakland Transportation Holdings LLC, Pratt Brothers, Inc., Sills Expressway Associates LLC, Sills Road Realty LLC, Suffolk & Southern Railroad LLC, Watral Brothers, Inc., and John Does 1 through 10*, No. 612327 (S. Ct. Nassau Cnty. 2020) (Amended Complaint filed Apr. 30, 2021).

Sills Parties appear to contend that they did not have their own regulatory counsel during the Board's construction authorization phase, and that they relied only on the erroneous advice of Brookhaven Rail's counsel that they were permitted to use Brookhaven Rail as a proxy for it for regulatory approval construction purposes. However, even if that were true, which is not the case, that does not excuse Brookhaven Rail from its regulatory obligations, nor allow it to use and abuse the Board's prior decisions to advance its and the Sills Parties' private interests.⁵ In fact, a review of the Board's filings shows that Brookhaven Rail's regulatory counsel during the line construction phase (the late John Heffner) was actually Sills Parties counsel first and foremost. That same counsel had previously represented Sills Parties at least beginning in April and May, 2007 in Docket Nos. 35014 and 35036, in Suffolk & Southern Rail Road LLC's unsuccessful initiative to lease and operate rail lines on Parcel A and other nearby rail property. It was not until the Sills Parties failed in this initiative, that they brought in Brookhaven Rail (then U S Rail) to help it carry out its plans. Sills Parties' regulatory counsel was then provided by the Sills Parties to

⁴ *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Petition for Declaratory Order*, FD 35819 (STB served Aug. 30, 2016).

⁵ Furthermore, the reliance on advice of counsel defense of the Sills Parties and Brookhaven Rail carries with it waiver of the attorney-client privilege, at least as to communications relating to that advice, because the privilege cannot be used as a shield when advice of counsel is being used as a sword. *In re United Shore Fin. Servs.*, No. 17-2290, 2018 BL 1883, 2018 WL 2283893, at *2 (6th Cir. Jan. 3, 2018); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991); *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989). Accordingly, relevant communications between Sills Parties/U S Rail and Mr. Heffner should have been submitted.

Brookhaven Rail, at no charge to the railroad, and utilized by Sills Parties and Brookhaven Rail jointly, first in an unsuccessful attempt to avoid the Board's cease-and-desist orders in Docket No. FD 35036, and then in Docket No. FD 35141. *E.g.*, Sills Parties Response at 5 (acknowledging that Sills Parties paid for all "legal fees and related environmental consultant costs").

The Sills Parties and Brookhaven Rail's counsel was a longstanding ICC/STB practitioner, who certainly knew, or should have known, the requirement that the track may not be constructed by or with parties other than Brookhaven Rail. He also knew, or should have known, 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, through acquisition or lease authority, and a showing that it holds a sufficient property interest in the track and right of way. *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.

Also, while Brookhaven Rail may appear to believe that the unauthorized construction, ownership, and operation of a rail line in the Terminal is "mooted by Sills' sale of Parcel A to BLC" (Brookhaven Rail Response at 11), that obviously is not the case. The sale has nothing to do with, 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. Additionally, the BLC owners certainly knew, or should have known through their due diligence when acquiring the parcel 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. Wrongdoing does not disappear or become moot because one of the wrongdoers is acquired by the beneficiary of the wrongdoing.

B. The Parties Responses to the Information Requests Are Inadequate

As explained above, all relevant information provided to date shows that the developer, not the railroad, owns the line, and that the developer paid for and constructed the line, contrary to prior representations by the railroad. Other than Sills Parties admitting to having full control over the Parcel A track construction, which was always the design and intent of the parties, the responsive filings largely fail to provide the specific information the Board requested. Neither Brookhaven Rail nor the Sills Parties provide any new information on the construction of the line, or the parties' roles in requesting construction authority, except, as mentioned.

Notably, neither Brookhaven Rail nor the Sills Parties claim that responsive information is unavailable. They instead simply fail to provide it, and, again, engage in misdirection by pointing to Sills Parties' recent sale of Parcel A and the rail track to BLC. But this development obviously does not excuse them from withholding relevant responses to the Information Requests.

As for BLC, it explains that it only acquired the Parcel A property and track, “subject to Brookhaven Rail LLC’s existing rights to occupy Parcel A and its . . . authority to provide common-carrier service on Parcel A tracks.” Verified Statement of Nathaniel Hagedorn at 2. Yet BLC fails to provide any agreements or documents related to any such occupancy rights. If, as BLC suggests, Brookhaven Rail may have “existing rights to occupy Parcel A” outside of its self-professed authority to operate as common carrier, it, along with Brookhaven Rail and Sills Parties should have provided such agreements and documents in their possession that reflect or address Brookhaven Rail’s possessory rights. In addition, none of the responses indicate whether Sills Parties have any remaining ownership interest in, or continue to operate any of the Parcel A transloading and warehouse facilities.

Curiously, Brookhaven Rail asserts (through counsel) that because the current owner of Brookhaven Rail, Winters Bros., did not purchase the railroad until 2019, and its current counsel and owner were not present during the rail construction phase, “[it] is unable to provide the detailed information that the Director sought.” However, the relatively recent purchase of Brookhaven Rail by Winters Bros. and its retention of new outside counsel since the time of track construction in no way excuses the railroad’s failure to provide responsive information in its possession, custody, and control. Upon the sale of the railroad to Winters Bros., and the retention of different regulatory counsel, the railroad’s records (including those of U S Rail), did not suddenly disappear. All of those business records are now the property of Winters Bros. and its affiliates. Brookhaven Rail and its owners, Winters Bros., are simply playing “hide-the-ball” here. *E.g., Eastside Cmty.* Furthermore, Brookhaven Rail should have access to information that may be possessed by agents, such as attorneys and accountants.

The failure of all of the responding parties to submit any business records in response to the Board’s Information Requests is conspicuous. The Board has admonished (and fined) parties for similar failures:

Our regulatory process relies on the honest and truthful production of information held by the carriers we regulate. When a Board order calls for information to be produced, carriers do not have carte blanche to decide not to reveal obviously relevant information, as such a policy would undermine the basic integrity of the Board’s entire process.

Canadian Nat’l Ry. & Grand Trunk Corp. – Control – EJ&E W. Co., FD 35087 (STB served Dec. 21, 2010), at 8; accord, *Eastside Cmty.*

In proceedings before the Board, where similar discovery-type information is requested, parties are required to “conduct a reasonable search” and “search for records within its possession, custody or control . . . that are located on its premises, files that are kept electronically, and the off-site storage or archived files of those individual employees or

departments likely to have responsive information.” *Entergy Ark., Inc. & Entergy Serv., Inc. v. Union Pac. R.R. & Mo. & N. Ark. R.R.*, NOR 42104, slip op. at 5-6 (STB served May 19, 2008). As explained, in this case, Brookhaven Rail and Sills Parties failed to conduct a reasonable search of information and records in their possession, or that of their agents,⁶ and provide honest, truthful, and fulsome responsive information to the Information Requests.

Remarkably, Mr. Newell adds that he and Brookhaven Rail have no responsive documents and that “[a]ny 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”).” Newell V.S. at 5. Query, however, if Brookhaven Rail was actually actively involved in track design and construction as it claims it was, why Sills Parties or BLC might possess Brookhaven Rail’s records, instead of Brookhaven Rail itself, especially when the railroad has repeatedly claimed that neither Sills Parties or BLC (or its predecessor, NP Winters) has any affiliation or legal interest in the railroad. The clear answer is that, as the Sills Parties finally admit, they were the only entities that actually materially engaged in track construction, contracting, and financing, including the payment of all associated legal fees and environmental consultant costs. This is further confirmed through Mr. Newell’s admission that Sills Parties owned the tracks, and not Brookhaven Rail, until the recent sale of the tracks to BLC. *Id.* at 5. Also, the assertion by Mr. Newell that any and all such documents pertaining to the construction of the line would all be in the hands of Sills and/or BLC appears to be a further admission that Brookhaven Rail had no, or only a very limited role in line construction.

Even with the substantial insufficiencies in Brookhaven Rail and Sills Parties’ responses to the Board’s Information Requests, the limited record to date still appears to conclusively show that the rail track constructed on Parcel A was never actually built, owned, and operated in accordance with Board authority.

If there is any remaining doubt, the Board should again order Brookhaven Rail, Sills Parties, and BLC (to the extent necessary) to once again undertake the same type of “reasonable search” it already required in its Decision, and provide the detailed information the Board requested on the construction of the rail line, the parties’ roles in requesting construction authority, and why the developer, rather than the railroad, owned the track (prior to its recent sale) and appears to have constructed the track, without required authorization. This should include both written responses and all agreements, documents, and records relevant to the Requests, with appropriate company officers attesting and verifying as to the scope of their search, and the truth of the responses and accuracy of the information provided.

⁶ For example, accountant records would show if the track was an asset of Brookhaven Rail or the Sills Parties, if depreciation was taken, what, if anything, was paid for use of the track, etc.

C. The Parties' Responses Confirm that Brookhaven Rail Never Had, and Still Does Not Have, Any Possessory Interest in the Parcel A Property or Rail Track that It Requires to Operate as a Common Carrier

Sills Road has previously 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 previously conceded that it does not own the Parcel A tracks and that Sills Road owns the track. Director's Decision at 3 (Brookhaven Rail did "not dispute that Sills Road owns the line" on Parcel A).

In its response to the Information Requests, Brookhaven Rail further admits that the Sills Parties owned the tracks, and not Brookhaven Rail, until the recent sale of the tracks to BLC. Newell V.S. at 5; Brookhaven Response at 5, 9. Brookhaven Rail also claims BLC acquired the land and tracks "expressly subject to Brookhaven Rail's existing contractual rights to occupy and provide rail operations on Parcel A" (Newell V.S. at 6; Brookhaven Response at 5), but provides no specific information on or copies of any agreement reflecting such rights. Additionally, Brookhaven Rail and Winters Brothers have repeatedly insisted that they have no affiliation with BLC, and they do not explain how they know the land and track acquisition, to which they do not claim to have been a party, were actually "expressly subject to Brookhaven Rail's existing . . . rights" or provide any known documentation of same.

In any event, the record now clearly and conclusively shows that Brookhaven Rail has no property or possessory interest in the land, right of way, or the track on Parcel A.

CCE appreciates this opportunity to reply to the responses to the Information Requests.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
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Washington, D.C. 20036

Attorneys for Citizens Campaign
for the 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

EXHIBIT 1

Supplemental Affidavit of Joseph Winters (May, 20, 2020)

Sills Road Realty LLC v. Winters Bros. Waste Systems of Long Island, LLC, et al., No. 602508 (S. Ct. Suffolk Cnty. 2020)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
SILLS ROAD REALTY LLC,

Index No. 602508/2020

Plaintiff,

-against-

**SUPPLEMENTAL
AFFIDAVIT**

WINTERS BROS. WASTE SYSTEMS OF LONG
ISLAND, LLC, and OAKLAND TRANSPORTATION
HOLDINGS LLC, NEW YORK SITE OPERATIONS,
LLC and BROOKHAVEN RAIL LLC,

Defendants.
-----X

STATE OF NEW YORK)
) ss:
COUNTY OF SUFFOLK)

I, **JOSEPH WINTERS**, being of full age and duly sworn, do solemnly state:

1. I am a resident of the State of New York, residing at 3 Equine Road, St. James, New York.

2. I am an owner and officer of Winters Bros. Waste Systems of Long Island, LLC ("Winters Bros.")

3. I provide this supplemental affidavit in support of Winters Bros.' opposition to the motion for temporary restraining order and preliminary injunction submitted on behalf of Sils Road Realty LLC ("SRR") on May 5, 2020 in the Supreme Court of the State of New York, County of Suffolk, in the above-captioned action (the "SRR Action"), and filed on May 20, 2020.

4. On Monday, May 11, 2020, Shamrock Rail, LLC, an affiliate of my company, Winters Bros., acquired all of the outstanding membership interests of Brookhaven Rail, LLC ("BHR") from Defendant Oakland Transportation Holdings, LLC ("OTH").

5. BHR is a Class III rail carrier as designated by the U.S. Surface Transportation Board ("STB"). BHR is the only Class III rail carrier authorized by the STB to provide common carrier rail transportation services on what are known as Parcels A, B and C of the Brookhaven Rail Terminal in Yaphank, N.Y. (the "BRT").

6. Presently such common carrier services are only provided on Parcel A of the BRT, which is the only parcel where rail transportation activities are taking place.

7. BHR is prepared to provide common carrier rail service on Parcels B and C of the BRT, in accordance with authorization previously granted by the STB, upon the completion of construction of lines of rail and other improvements by SRR and/or certain of its affiliates that will allow for additional customers in need of common carrier rail service.

8. It is the intention of BHR to be the common carrier providing rail transportation services on the real property known as Parcel D as it is developed, and to secure appropriate STB authorization to construct and operate a line of rail on Parcel D.

9. BHR holds no ownership interest in the real property comprising Parcels A, B or C or in any other improvements, structures or fixtures on these Parcels.

10. BHR has no involvement in any of the site clearing, excavation, grading or removal of sand or gravel or any site development activities which have occurred or which may occur on Parcels A, B or C under the direction and/or control of SRR and/or certain of its affiliates.

11. BHR presently receives revenue only on the movement of railcars on Parcel A. BHR is paid on a per railcar basis by the New York & Atlantic Railway, the freight rail carrier for the Long Island Rail Road/Metropolitan Transportation Authority, for railcars moved by BHR on the BRT.

12. BHR is also paid by Brookhaven Rail Freight Services, LLC (an SRR affiliate) on a per railcar basis for the movement of railcars for Home Depot shippers on Parcel A.

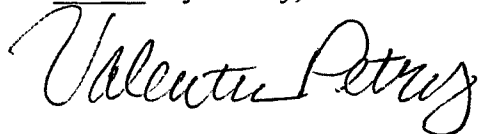
13. Going forward, BHR will operate under the name of "Shamrock Rail".

14. The representations in this affidavit are, as stated, to my direct knowledge and are true and accurate.



JOSEPH WINTERS

Sworn to before me this
20th day of May, 2020



VALENTINA PETRY
Notary Public - State of New York
Reg. No. 01PE6343895
Qualified in Suffolk County
My Commission Expires 06/20/2020