

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
October 17, 2023
Part of
Public Record

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

**VERIFIED REPLY TO SEPTEMBER 27, 2023
REQUEST FOR INFORMATION**

Brookhaven Rail LLC, (“Brookhaven Rail” or “BHR”) hereby responds to the questions posed to it by the Surface Transportation Board (“Board” or “STB”) in the Decision served in these non-consolidated dockets on September 27, 2023. The factual statements in this filing are verified by Mr. Sean P. Winters, President of Brookhaven Rail.

As a preliminary matter, Brookhaven Rail notes two errors in the Decision. First, while it is true that the rail line that Brookhaven Rail has proposed to construct on Parcel D¹ in Docket No. FD 36398 would serve a solid waste rail transfer facility if one were to be constructed on Parcel D,² Brookhaven Rail’s Petition for Exemption also expressly states “[t]his Petition encompasses the proposed construction by BHR and its subsequent operation of approximately 23,680 feet of new rail line for the purpose of enabling BHR to provide common carrier service to shippers as Parcel D of the BRT is developed into a rail-served industrial park.”³ The administrative record that has been developed in Docket No. FD 36398 confirms that the new rail line would serve other rail shippers locating on Parcel D, including two rail-served warehouses totaling approximately 1.3 million square feet that Brookhaven Logistics Center, LLC (“BLC”) has proposed to construct on Parcel D.⁴ The strong inference in the Decision that the proposed line of rail is being

¹ For convenience, Brookhaven Rail refers to the various land parcels at issue by the labels utilized by the parties and the Board throughout these proceedings: Parcels A, B, C, and D.

² Decision at 1.

³ Docket No. FD 36398, Petition for Exemption at 4.

⁴ See Brookhaven Rail’s Reply to Petition for Declaratory Order, filed December 13, 2021 at 14-16 and Exhibit D (discussing and showing BLC’s site plans for constructing two rail-served warehouses on Parcel D).

constructed solely for Brookhaven Rail to serve a solid waste rail transfer facility is therefore not correct.

Second, Brookhaven Rail clarifies that the decision of the Director of the Office of Proceedings served in Docket Nos. FD 36376, 36384, and 36385⁵ on June 16, 2020 instructed Sills Road Realty and Spectrum Railroad Holdings, LLC - if they filed future pleadings seeking licensing authority from the Board - to “provide information and supporting documentation with respect to several delineated topics”⁶ Brookhaven Rail was not also so instructed by the Director, as the Decision implies by stating generically “the Director instructed the parties to provide” information.⁷ Rather, Brookhaven Rail was asked by the Board years later to provide information on those topics by the Board’s decision served in these dockets on January 6, 2023. Brookhaven Rail complied with this request on February 15, 2023.

Brookhaven Rail provides the following responses to the two questions asked of it in the Decision, specifically, (1) “whether the warehouses on Parcels B and C are intended for use to store, sort and ship solid waste from the proposed solid waste transfer facility” that was the subject to the Petition for Exemption filed by Brookhaven Rail in Docket No. FD 36399⁸ and (2) “whether

⁵ 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* (served June 16, 2020) (“Director’s Decision”).

⁶ Decision at 2.

⁷ *Id.*

⁸ The reference on page 3 of the Decision to “the proposed waste transfer facility” can only mean the “planned solid waste rail transfer facility to be located on Parcel D” mentioned on page one of the Decision, as there is no other reference to such a facility, and there are no proposals to construct a solid waste rail transfer facility on Parcels A, B, or C.

[Brookhaven Rail] now intends to connect directly to the LIRR⁹ line from Parcels B and C, and whether it still plans to connect to Parcel A?”¹⁰

1. There are No Plans to Store On, Sort On, or Ship From Parcels B and C Solid Waste from the Potential Solid Waste Rail Transfer Facility on Parcel D

The short answer to the first question is that there are no plans by Brookhaven Rail, its affiliates, or any other party, to store, sort, or ship solid waste that comes from any solid waste rail transfer facility proposed to be constructed on Parcel D - or any other source - on or from the warehouses to be constructed on Parcels B and C. Brookhaven Rail’s plan has always been, and continues to be, that all solid waste trucked to any such facility constructed on Parcel D from generators on Long Island would be stored, sorted, and shipped by rail from that facility. No filings by Brookhaven Rail or any party in the administrative records of the proceedings referenced in the Decision have stated or even intimated otherwise.

Nevertheless, the Decision states “publicly available information indicates that the warehouses on Parcels B and C will be used to store, sort, and ship solid waste from the proposed waste transfer facility [that might be constructed on Parcel D].”¹¹ The only citation in support of this statement is an April 4, 2023 internet posting, the link to which is included in the Decision. However, Brookhaven Rail’s review of this post reveals it is replete with fundamental errors that are compounded by the author’s misunderstanding of even the basics of the actual project proposals that have been made or are being considered by BLC and Brookhaven Rail, and/or his inability to comprehend the documents on which he purportedly relied. The result is a mishmash

⁹ Long Island Rail Road.

¹⁰ Decision at 3.

¹¹ *Id.* at 2-3.

of erroneous versions of the various proposals pending for development of Parcels B, C, and D that have been conflated into a patently inaccurate amalgamation.¹²

While Brookhaven Rail is hesitant to speculate, the source of the author's erroneous premise that solid waste from Parcel D would be stored on, sorted on and shipped from facilities on Parcels B and C appears to emanate from a misreading of plain and unambiguous language contained in a Full Environmental Assessment Form ("FEAF") filled out by BLC that the Town of Brookhaven ("Town") submitted to the Board's Office of Environmental Assessment ("OEA") with a cover memo dated February 22, 2023 (EI-32828).¹³ The FEAF refers solely to the planned development by BLC of rail-served warehouses on Parcels B and C. It contains no references to Parcel D or to the solid waste rail transfer facility Brookhaven Rail proposed in Docket No. FD 36399. Nevertheless, as part of the internet post author's conflation of the separate proposals of BLC and Brookhaven Rail, the post appears to take information related only to Parcels B and C and wrongly intertwine it with Parcel D. Specifically, the post states:

According to the review, the proposed facility would require the management or disposal of at least 41 tons of waste per month and would not handle the disposal of hazardous waste. The warehouses

¹² The post's subject is supposedly the Town's March 30 Resolution 2023-286 discussed at pages 5-7 of this response, which approved a Negative Declaration, Notice of Determination of Significance ("Negative Declaration") for BLC's proposed site plan for development of Parcels B and C. The Negative Declaration contains no discussion of any development on Parcel D, in particular the solid waste transfer facility Brookhaven Rail proposed to construct on it in Docket No. FD 36399. Nevertheless, from the outset the author erroneously intertwines issues related to the solid waste transfer facility with the Town's action approving the Negative Declaration, which again was expressly limited to development of Parcels B and C. The result is to create the false impression that the Negative Declaration encompassed all three parcels and the solid waste transfer facility, a falsehood that is demonstrated by plain and unambiguous facts. The resulting mishmash is so erroneous and convoluted that it provides no "news" at all on the true state of affairs and begs the question as to the author's motivation in making the post.

¹³ Five identical copies of this document were submitted to OEA on February 22, 2023 by the Town's representative. A copy was not provided to Brookhaven Rail, LLC, and it was not notified that the submittal had been made.

would also not be considered the construction of a transfer station, dump, or any other kind of solid waste management facility.

The author cites no authority for this statement purported to be factual, nor is “the proposed facility” identified. Nevertheless, the statement appears to be based on information contained in the FEAF unambiguously addressing solid waste that would be generated by employees during the operations of the warehouses on Parcels B and C, not solid waste processed at, or transferred from, any facility on Parcel D. Specifically, a section of the FEAF asked BLC to “describe any solid waste(s) to be generated during construction or operation of the [warehouse] facility,” on Parcels B & C, to which BLC responded “[to be determined]” for the construction phase and “41+ to 52+ tons” per month during the operations phase.¹⁴ A footnote to the latter entry clarifies that it is based on an estimate of seven pounds of waste that would be produced by an employee each day multiplied by an estimated range of warehouse employees.¹⁵ Assuming this is the source of the reference to “at least 41 tons” in the internet post quotation above, the author’s attempt to link the solid waste generated daily by employees of warehouses on Parcels B and C to solid waste that might be managed by the potential solid waste rail transfer facility on Parcel D was obviously wrong.¹⁶

In any event, Brookhaven Rail reiterates that if a solid waste rail transfer facility was to be constructed on Parcel D, all solid waste received at that facility for processing would be sorted, stored on site, and shipped by rail from that facility.

¹⁴ FEAF at 8 (emphasis added).

¹⁵ *Id.*

¹⁶ Apart from the unambiguous language in the FEAF, its lack of any relation to the potential solid waste that would be processed by the facility proposed on Parcel D should have been obvious from the public administrative records in Docket Nos. FD 36398 and 36399 had the author bothered to look. The filings there are replete with specific references to the estimated volumes associated with that proposed facility.

2. Brookhaven Rail Has Never Contemplated Any New Connection to the LIRR Main Line Other than the One Contained in its Construction Petition

The second question posed by the Board is based on language contained in the Negative Declaration, which is attached to the only other document cited in the Decision: Resolution 2023-286 of the Town, dated March 30, 2023, which the Town submitted to OEA on April 19, 2023 (EI 32837).¹⁷ As stated, the Negative Declaration specifically addresses the modifications made to the proposed site plan for development of Parcels B and C by BLC subsequent to its purchase of those parcels. Consequently, it has no application whatsoever to Brookhaven Rail's proposed rail construction project on Parcel D. Brookhaven Rail had no role in drafting the Negative Declaration, which appears to have been authored by the Town.

Succinctly stated, Brookhaven Rail has no intention of serving Parcels B and C from a new direct connection to the LIRR mainline, and any indications to the contrary one might perceive from the Negative Declaration are due solely to it being unartfully drafted. For example, the statement that "[a]pproximately 7,906 linear feet of rail track would serve the two (2) transloading buildings and would connect to the LIRR Line along the southern boundary of both parcels"¹⁸ is inadvertently misleading because it leaves out the crucial additional fact that the plans have always called for the new track BLC intends to construct on parcels B and C for service to its warehouses will connect to the tracks over which Brookhaven Rail provides common carrier service on Parcel A. These existing tracks of course already connect directly to the LIRR main line so Brookhaven Rail and the NY&A can provide common carrier rail service to shippers on Parcel A.

¹⁷ Five identical copies of this document were submitted to OEA on April 19, 2023 by the Town's representative. A copy was not provided to Brookhaven Rail, LLC, and it was not notified that the submittal had been made.

¹⁸ Negative Declaration at 1.

The second passage in the Negative Declaration mentioning a potential direct connection to the LIRR appears to erroneously refer to the connection Brookhaven Rail has proposed for *Parcel D* in its rail construction Petition for Exemption. Specifically, the complete passage that is partially cited in the Decision states “The 2017 Negative Declaration proposed an underpass to connect Parcels B and C with Parcel D, which is no longer proposed. The current proposed action will provide a turnout from the LIRR rail line, which applicant asserts is a more efficient means of access and will result in significantly less material being removed from Parcels B and C.” This is remarkably similar to statements made by the Town in its filings with the Board in Docket No. FD 36398 supporting the proposed “southern turnout” onto Parcel D.¹⁹ Consequently, the presence of the passage cited in the Decision in the Negative Declaration could also be a drafting error. Brookhaven Rail understands that BLC intends to further clarify the LIRR connection issue for the Board in its submittal in response to the Decision. But in any case, Brookhaven Rail reiterates that it has no plans or intentions to seek the establishment of a new direct connection to the LIRR main line other than the southern turnout onto Parcel D proposed in its Petition for Exemption in Docket No. FD 36398.

As to the Decision’s additional question of “whether [Brookhaven Rail] still plans to connect to Parcel A,” it is unclear whether it is properly addressed to Brookhaven Rail because the

¹⁹ See, June 8, 2021 Letter from the Town to Cynthia T. Brown, Docket No. FD 36398 at 3 (“The NAACP New York opposition totally ignores that by accommodating the “southern turnout” Spur track from the existing LIRR tracks across a 3-acre corner of the 62-acre Conservation Easement area (in exchange for 6 added acres for a total of 65 acres) to provide rail access to Parcel D in lieu of the tunnel access, the Town’s proposed Mediation agreement would require the BRT owners/operators to agree to entirely eliminate the tunnel/underpass originally planned (and approved) to connect Parcels B and C with Parcel D. This will result in the elimination of approximately 500,000 cubic yards (one-half of the authorized total) of previously planned excavation, grading and removal of native soils and materials from the environmentally vulnerable Parcels B, C and D.”)

track over which it currently provides common carrier service is located entirely on Parcel A and as stated it already connects to the LIRR main line. Also, Brookhaven Rail has never represented in any filing or any other forum that the new line of railroad it proposes to construct on Parcel D would connect to Parcel A, so asking Brookhaven Rail whether it “still plans” to connect to Parcel A is based on an incorrect premise. Brookhaven Rail respectfully submits that the more appropriate question should be whether *BLC* still plans for the tracks it is proposing to construct on Parcels B and C to connect to the tracks on Parcel A over which Brookhaven Rail operates. As stated above, Brookhaven Rail believes it is still *BLC*’s plan to connect the tracks to be constructed on Parcels B and C to the tracks over which Brookhaven Rail provides common carrier service on Parcel A, and that *BLC* intends to further clarify this issue in its submittal in response to the Decision.

Respectfully submitted,



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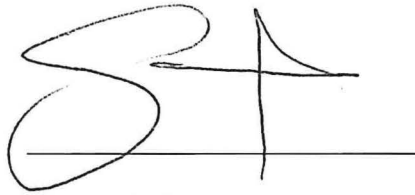
Attorney for Brookhaven Rail LLC

October 17, 2023

VERIFICATION

I, Sean P. Winters state, under penalty of perjury, that I have read the foregoing Verified Reply to September 27, 2023 Request for Information, know the facts asserted therein, and that the foregoing is true and correct. Further, I certify that I am qualified and authorized to execute this Verified Statement.

Executed: October 17, 2023

A handwritten signature in black ink, appearing to be 'SPW', is written over a horizontal line.

Sean P. Winters

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of October, 2023, a copy of the foregoing Verified Reply to September 27, 2023 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. FD 36385.

/ss/ Thomas W. Wilcox