

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
October 24, 2023
Part of
Public Record

FD 36398
BROOKHAVEN RAIL LLC – CONSTRUCTION AND OPERATION EXEMPTION - IN
SUFFOLK COUNTY, NEW YORK

FD 36399
BROOKHAVEN RAIL LLC - PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909

FD 35141
U.S. RAIL CORP. - LLC – CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

FD 36376
SPECTRUM RAILROAD HOLDINGS, LLC – OPERATION EXEMPTION – RAILROAD
LINE IN THE TOWN OF BROOKHAVEN, NY

FD 36384
SILLS ROAD REALTY LLC – ACQUISITION EXEMPTION
- RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NY

FD 36385
SPECTRUM RAILROAD HOLDINGS, LLC – ACQUISITION AND OPERATION EXEMPTION
–LINE OF SILLS ROAD REALTY LLC, IN THE TOWN OF BROOKHAVEN, NY

FD 35819
BROOKHAVEN RAIL TERMINAL & BROOKHAVEN RAIL, LLC –
PET. FOR DECLARATORY ORDER

**REPLY OF SILLS ROAD REALTY LLC TO THE
SURFACE TRANSPORTATION BOARD’S SHOW CAUSE ORDER**

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Dated: October 24, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36398

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

ET AL.

**REPLY OF SILLS ROAD REALTY LLC TO THE
SURFACE TRANSPORTATION BOARD’S SHOW CAUSE ORDER**

Sills Road Realty LLC (“Sills Road”) hereby responds to the order of the Surface Transportation Board (the “Board”) served September 27, 2023 in the above dockets (“*September Order*”). The Board has directed Sills Road to respond to a show cause order concerning Sills Road’s past ownership of certain lines of railroad (the “Lines”) located within what these proceedings refer to alternatively as Parcel A or the Brookhaven Rail Terminal. Sills Road previously attempted to undertake appropriate remedial action in good faith to address its ownership of the Lines, but the Board rejected that effort, leaving unresolved in the process whether any remedial action was required. The *September Order* indicates that the agency presumes that – (a) Sills Road’s past ownership of the Lines should have been Board-authorized; and, in turn, (b) Sills Road’s divestiture of the Lines also should have been Board-authorized. If the Board concludes (or has concluded) that Sills Road’s past ownership of the Lines warrants remedial action, then Sills Road stands ready and willing to correct such an oversight as the Board may deem appropriate under the circumstances, and as it may – and is urged to – prescribe.

BACKGROUND

As the Board has stated, “[a] fuller history of these proceedings can be found in the Board’s” *January Decision*.¹ As such, Sills Road would prefer to dispense with a general recitation of facts and circumstances surrounding the proceedings that appear to pertain most to it – *U S Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal*, FD 35141 *et al.* (“*US Rail – Construction*”); *Spectrum RR Holdings, LLC—Operation Exemption—Railroad Line in the Town of Brookhaven, N.Y.*, FD 36376; *Sills Road Realty LLC—Acquisition Exemption—Railroad Line in the Town of Brookhaven, N.Y.*, FD 36384 (“*Sills Road – Acquisition*”); *Spectrum RR Holdings, LLC—Acquisition & Operation Exemption—Line of Sills Road Realty, LLC, in the Town of Brookhaven, N.Y.*, FD 36385 (collectively, the “Sills Proceedings”). But certain elements of the records in the Sills Proceedings warrant revisitation here as follows:

- The Lines forming a part of the Brookhaven Terminal were constructed pursuant to Board authorization in *US Rail – Construction*, a case whose hallmark was extensive environmental scrutiny under Board auspices. Indeed, that environmental review, and challenges to it, extended some ten years, until the Board formally closed that proceeding. Nothing in the Board’s *September Order* indicates that there is any basis to revisit the extensive environmental review that surrounded approval of the construction of the Brookhaven Terminal on Parcel A.
- During the pendency of the *US Rail – Construction* proceeding, Sills Road did not have the benefit of its own regulatory counsel to advise on the Board’s processes and on Sills Road’s role (if any) in that construction case. As Sills Road has explained throughout the Sills Proceedings, it relied on the legal and regulatory guidance of counsel for U S Rail Corporation. Sills Road does not know why U S Rail Corporation did not consider Sills Road essential to that railroad line construction proceeding. Sills Road has no contemporary records on the contemporaneous guidance it received from U S Rail Corporation. U S Rail is no longer associated with Brookhaven Terminal, and U S Rail Corporation’s legal counsel is no longer alive to answer such questions.

¹ As that decision is defined in the *September Order*, 1.

- Sills Road funded the construction of the Lines and had owned them from the point of construction until Sills Road divested itself of the Brookhaven Terminal (including the Lines) as of May 4, 2022. Although probably no longer disputed, Brookhaven Rail, LLC (“Brookhaven Rail”) had contested Sills Road’s asserted involvement in the Lines’ construction in Brookhaven Rail’s vigorous opposition to *Sills Road – Acquisition*. In that proceeding, Brookhaven Rail argued that Sills Road’s interests in the Lines were such that it did not need remedial Board authority, *even if* Sills Road’s ownership claims were accurate, because Sills Road did not intend at the time of the construction proceeding to “acquire any status as a common carrier.”²
- In early 2020, having retained the undersigned regulatory counsel the year before, Sills Road initiated *Sills Road – Acquisition* in an effort to secure formal jurisdictional status as the owner of the Lines. Sills Road presumed that its efforts would be accepted as remedial, addressing presumed oversight of its non-inclusion as a named party in *US Rail – Construction*, and, relatedly, correcting U S Rail Corporation’s decision (for whatever reason) not to disclose that Sills Road would own the Lines (which U S Rail Corporation knew to be the case). As is reflected in the record in the Sills Proceedings, Sills Road and affiliated entities were locked in multi-jurisdictional civil litigation with Brookhaven Rail and affiliated companies at the time over the operation and disposition of the Brookhaven Terminal and adjacent parcels. As is also reflected in those proceedings, Sills Road intended at the time to engage in appropriate Board processes to install a new common carrier on the Lines, and to remove Brookhaven Rail from the Lines, pending an initial step of remedying what Sills Road’s counsel had perceived was an oversight involving Sills Road’s non-inclusion in U S Rail Corporation’s Lines construction case before the Board.
- In rejecting Sills Road’s remedial filing in a decision in *Sills Road – Acquisition* served on June 16, 2020 (the “*June 2020 Decision*”), the Board’s Director of the Office of Proceedings (the “Director”) explained that the matter involved issues considered to be too controversial and complex to be resolved in a class exemption proceeding, citing to past agency decisions such as (among others) *S. San Luis Valley R.R.—Acquis. & Operation Exemption—Iowa Pac. Holdings, LLC*, FD 35586 *et al.*, slip op. at 2-3 (STB served Feb. 10, 2012) (“*Southern San Luis*”) (rejecting a verified notice of exemption due to unexplained issues related to prior unauthorized acquisition of a given rail line). While the Director was clear that the *Sills Road – Acquisition* class exemption was not appropriate, she did not state whether or not Sills

² Sills Road agrees with Brookhaven Rail that it did not desire to obtain a common carrier status in the Lines. Sills Road never had any interest in holding itself out to the public to provide common carrier service or in possessing a residual common carrier obligation should its chosen, Board-authorized operator fail to fulfill its own common carrier obligations.

Road needed remedial authorization from the Board,³ and, if it did, the Director was unclear as to what the appropriate remedial action should be.⁴

- Shortly after the onset of the Covid-19 pandemic, and after the *June 2020 Decision*, circumstances between Sills Road and Brookhaven Rail changed abruptly, facilitating a constructive dialogue among the litigants. This led, ultimately, to a mutually amicable resolution of the aforementioned civil litigation, paving the way for Sills Road's voluntary divestiture of the Brookhaven Terminal. During settlement negotiations, Sills Road knew that any return to the Board could be mistaken by Brookhaven Rail as provocative, counter-productive to ongoing dispute resolution. Sills Road's next formal action in the Sills Proceedings on October 22, 2021, was undertaken as a part of its settlement with Brookhaven Rail.
- As the records in these proceedings indicate, no interested party disputes that Sills Road had owned the Lines until it sold them on May 4, 2022. But Sills Road is unsure as to whether any of the other parties would argue that Sills Road's past ownership of the Line "violated 49 U.S.C. § 10901." *September Order*, 3. Brookhaven Rail has never clearly rescinded its contention that Sills Road did not need Board authority to own the Line (given that Sills Road never intended to hold itself out as a common carrier). But the Board, among other things, has observed in its *September Order* (at 3) that Sills Road "never obtained Board authority for its previous acquisition" of the Lines, and through its show cause order has indicated that Sills Road indeed should have acted to remedy that regulatory oversight.

Sills Road believes that the foregoing facts offer meaningful context to the balance of this responsive filing. They indicate why Sills Road did not renew any remedial

³ *June 2020 Decision*, 5 (should Sills Road return to the Board in light of the Board's rejection of its notice of exemption, it should be prepared to address certain questions that would better enable the Board to ascertain "what type of authority, *if any*, should now be granted to Sills Road and *whether any additional action by the Board is appropriate.*") (emphasis added).

⁴ *Id.*, 5 n. 6 wherein the Director recommended that Sills Road confer with the Rail Customer and Public Assistance Program ("Public Assistance") to determine the path forward. The undersigned did as the Director recommended shortly after service of the *June 2020 Decision*. The undersigned consistently has found Public Assistance to be an exceedingly helpful resource over the years. But Public Assistance, in this instance, acknowledged that it lacked any insight as to the Director's expectations going forward. It admitted to being unsure about whether Sills Road needed to undertake any remedial action, and offered its best guesses as to whether, for example, Sills Road should seek to reopen *US Rail – Construction* or initiate a separate individual petition for exemption, if remedial action was necessary.

effort after the *June 2020 Decision*, influenced as Sills Road was by Brookhaven Rail's argument that Sills Road did not need any STB authorization to own the Lines, and by subsequent settlement efforts associated with wide-ranging litigation with Brookhaven Rail leading to divestiture of the Lines.

RESPONSE

The Board appears to have concluded that Sill Road's past ownership of the Lines required authorization under 49 U.S.C. § 10901, which authorization Sills Road sought after-the-fact to secure, but did not obtain.

The Board has ordered Sills Road to “show cause why [it] should not be found to have violated 49 U.S.C. § 10901” in connection with its “previous acquisition” of the Lines through Sills Road's funding of the construction, and past ownership, of them “without the necessary authority.” *September Order*, 3.

Sills Road does not dispute that the Board may conclude that Sills Road should have been identified as the Lines' builder and intended owner in *US Rail – Construction*, when, in fact, it was not. The records in these proceedings already contain Sills Road's explanation for why it did not formally join in that proceeding. The Board appears to have determined that Sills Road's ownership of the Lines, post-construction, was not in accordance with Section 10901.⁵ If

⁵ In certain analogous circumstances involving Section 10901 that the Board may or may not find to be distinguishable, the agency has found that the owner of track operated in common carriage by a third party may be exempt from the Board's jurisdiction. *See, e.g., Wisc. Cent. Ltd. v. STB*, 112 F.3d 881 (7th Cir. 1997) (“The . . . lease of [a] line [previously removed from the agency's jurisdiction by way of abandonment] to an operator who wishes to provide service to the public over that line will of course subject the operator and the service it provides to the [agency]'s regulatory power, but not the owner and its property.”); *Merced County Central Valley Railroad, LLC—Lease and Operation Exemption—Track in Merced County, Cal.*, FD 36589 (STB served June 10, 2022); *Chicago Rail & Port, LLC—Lease and Operation Exemption—Rail Line of South Chicago Property Development, LLC*, FD 36126 (STB served July 21, 2017); *Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc.*, FD 35296 *et al.* (STB served Aug. 31, 2010).

so, Sills Road’s presumed violation was not committed intentionally, or done with intent to evade Board processes, as is evidenced in the records in these proceedings. Sills Road understands, however, that the Board’s show cause inquiry (which appears to have arisen of the Board’s own initiative and not by way of complaint from any interested party) is directed to the agency’s longstanding commitment to address and resolve regulatory oversights pragmatically,⁶ and without resorting to punitive action.

If the Board were to conclude that Sills Road’s oversight constitutes a violation of Section 10901, the record reflects that it did not act intentionally or out of bad faith.

Sills Road undertook in 2020 to remedy what the undersigned counsel perceived to be a regulatory oversight dating back to the recently-concluded, ten-year *US Rail – Construction* proceeding. It did so, admittedly, in connection with a contemporaneous plan (no longer being pursued) to invoke other Board procedures thereafter to evict Brookhaven Rail from the Brookhaven Terminal. But Sills Road maintains that its action – upon learning of what its undersigned counsel considered to be a regulatory oversight – and subsequent inaction were each undertaken in good faith, and without any intent (or reason) to evade the Board’s regulations.

Brookhaven Rail’s arguments in *Sills Road – Acquisition* appear to give credence to the proposition that Sills Road’s ownership of the Line could have been beyond the scope of the Board’s jurisdiction, particularly since the *June 2020 Decision* leaves the issue unresolved. It could be argued that, because Sills Road intended to construct a line of railroad to be operated by a third party, and did not intend thereby to hold itself out to provide common carrier service or to assume any residual common carrier obligation, Sills Road may have been properly excluded as a party in *US Rail – Construction*. Sills Road had entertained the proposition after issuance of the *June 2020 Decision*. But it now accepts that Section 10901 may require any builder and owner of a new, Board-authorized line of railroad (including Sills Road) to join as a party in the railroad line construction proceeding, even if the new line would be operated exclusively by a third party under its own operating authority.

⁶ See, e.g., *Colorado Pacific Rio Grande Railroad, LLC – Petition for Exemption – Acquisition and Operation of Line of Railroad in Costilla County, Colorado*, FD 36694 (STB served Sep. 18, 2023) (“*Colorado Pacific*”).

Indeed, no party in these proceedings has alleged – and there is no evidence to support the conclusion – that Sills Road has intended to evade STB regulation. The records in these proceedings, in fact, reflect the opposite.

The *June 2020 Decision* left unclear whether the agency believed that any remedial action was necessary, particularly in the presence of Brookhaven Rail’s contention that Sills Road did not need, and should not be seeking, Board authorization to own the Lines. If, as it now appears, the Board has concluded that Sills Road should have sought and secured Board authorization to “acquire” (in this case, to construct and to own) the Lines, Sills Road offers that its inaction following the *June 2020 Decision* was the product of regulatory uncertainty and concern that renewed remedial efforts would be opposed by Brookhaven Rail at a time when Sills Road was undertaking considerable effort to resolve underlying federal and state civil litigation with Brookhaven Rail. Sills Road would urge the Board to consider these circumstances as it assesses next steps, if any.

Had the *June 2020 Decision* been definitive that remedial action before the Board would be appropriate – and it wasn’t definitive, as the passage quoted in footnote 3 reflects – then Sills Road would have renewed its remedial efforts under some alternative approach, even in the face of what likely would have been continued, strenuous Brookhaven Rail opposition.

Consistent with agency policy and precedent, Sills Road would like to resolve the Board’s concerns under whatever process the Board deems appropriate to authorize Sills Road’s past ownership, and subsequent divestiture, of the Lines.

Sills Road would like to resolve this situation constructively, for the convenience of all involved parties and in the interest of the public good, consistent with its current non-ownership of the Brookhaven Terminal. It is willing to undertake appropriate remedial steps that the Board may prescribe, if any, to resolve the issues underlying the show cause order directed to

it. Accordingly, Sills Road appeals to the Board either to authorize on its own motion Sills Road's past ownership of the Lines, or to provide clear guidance on the specific authorization process that Sills Road should pursue.

The Board does not need to be assured of its intrinsic authority and discretion under 49 U.S.C. § 10502 to issue, on its own motion, an exemption from the agency's formal authorization processes as circumstances may warrant, and it may do so here to address Sills Road's presumed violation if it so chooses. *Colorado Pacific* is but a recent example of the Board's pragmatic and remedial exercise of its authorization powers in a similar situation, tying together past regulatory oversights.⁷ Indeed, in *Colorado Pacific*, the Board clearly reconciled past regulatory oversight in the face of an order in which the Board was clear about past regulatory missteps, and what it expected of those involved to address the transfer of a railroad line without past authorization.⁸ Accordingly, Sills Road would ask that the Board exercise the

⁷ Cf. *Independence Rail Works Ltd – Acquisition and Operation Exemption – Byesville Scenic Trails, LLC*, FD 36432 (STB served Apr. 13, 2021); *ABE Fairmont, LLC—Abandonment Exemption—in Fillmore County, Neb.*, AB 1106X *et al.*, (STB served Jan. 29, 2018); and *Grand Elk Railroad, Inc. – Acquisition of Incidental Trackage Rights Exemption – Norfolk Southern Railway Company*, FD 35187 (Sub-No. 1) *et al.* (STB served Nov. 20, 2017); and see *American Orient Express Railway Company LLC – Petition for Declaratory Order*, FD 34502 (STB served Dec. 29, 2005); *Paducah & Louisville Railway, Inc. – Control Exemption – Paducah & Illinois Railroad Company*, FD 33362 (STB served Aug. 25, 1997); *Pennsylvania Department of Transportation – Abandonment Exemption – Portion of Valley Branch*, AB-373X, *et al.* (I.C.C. served Apr. 29, 1993) 1993 WL 134106, *3 (“We conclude that an exemption is appropriate since PNER’s failure to obtain a Modified Certificate may have been due to an oversight, and its subsequent operations on the segment may well have served the salutary objective of continuing needed rail service. Accordingly, we grant the exemption for the reasons stated below.”) (footnote omitted).

⁸ The complex regulatory backstory of the Blanca Spur – the railroad line segment at issue in *Colorado Pacific* – is briefly accounted for in the Board’s September 11 Decision in that docket. *Colorado Pacific*, 1-2. Specifically, the Board had instructed a prior (now defunct) owner of the Blanca Spur (Iowa Pacific Holdings, LLC (“IPH”)) on the remedial steps it and its intended transferee should undertake for IPH to own, and subsequently to transfer, the Blanca Spur. See *Southern San Luis*, FD 35586 *et al.*, 3. IPH and its transferee did not secure authorization, despite the Board’s instructions. *Colorado Pacific*, 2.

same discretion and authority here to grant on its own motion appropriate exemption authorization for Sills Road to have owned the Lines until they were divested on May 4, 2022.

If the Board will not grant an exemption on its own motion, then Sills Road looks to the agency for instruction on the appropriate remedial steps that Sills Road should take to authorize its past ownership and later divestiture of the Lines. Sills Road's desire to address and resolve the issues underlying the Board's show cause order through appropriate remedial action is entirely in keeping with longstanding agency precedent, as reflected in cases such as *Colorado Pacific*, and as more generally set forth in *Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut Dock Co.*, 8 I.C.C.2d 280, 295 (1992) ("*P&C Dock*"), where the agency stated as follows concerning ongoing, unauthorized control:

To rectify improperly acquired control, the Commission must impose remedies that are "corrective, not punitive," and, while giving effect to the statutory violations, cause "as little injury as possible to the interests of the private parties or the general public." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962).

In addition, the agency in *P&C Dock* afforded the party found to be in violation of agency-administered law (Blackstone) the opportunity either to divest itself of the carrier it currently controlled in violation of law, or to seek remedial authorization for control going forward, noting that, "None of the parties has expressed any interest in disturbing [the carrier]'s present operations at Conneaut, nor reversing Blackstone's acquisition of control."⁹

Thus, at a minimum, if the Board were to conclude that Sills Road's past ownership of the Line was not in accordance with the law, *P&C Dock* and agency jurisprudence observing the remedial policy enunciated in that decision militate here in favor of corrective, not punitive, action. There is no evidence that Sills Road's actions or inactions have inflicted any

⁹ *P&C Dock*, 295.

harm upon anyone. The Board, in turn, should be mindful of longstanding federal policy set forth in *P&C Dock* and elsewhere to assure that corrective measures as may be required avoid injury to private parties and the general public (including, in this case, to shippers making use of the Brookhaven Terminal). Sills Road is receptive to the Board's remedial guidance about what specific process Sills Road should take (if any) to secure authority to have owned the Line. To that end, at the same time that the Board may eliminate any uncertainty as to the need for remedial action, Sills Road urges the Board eliminate guesswork as to the appropriate remedial task (as existed in the wake of the *June 2020 Decision*) either by way of specific direction to Sills Road in an upcoming Board order, or by way of a technical conference led by Board staff.

CONCLUSION

Sills Road understands that the *September Order's* show cause order reflects the agency's presumption that Sills Road had "acquired a rail line" (*September Order*, 3) absent appropriate Board authorization. But Sills Road also is mindful of the Board's policy preference, in keeping with the Rail Transportation Policy of 49 U.S.C. § 10101 and extensive precedent, to remedy such regulatory oversight, either on the Board's motion or by alternative remedial processes as may be prescribed to resolve the issue with the least amount of regulatory burden. Such remedial action is particularly warranted where, as here, Sills Road had attempted in good faith to rectify a presumed oversight, only to confront uncertainty over whether and how to do so. Accordingly, if the Board were to find that Sills Road unintentionally has violated Section 10901, then Sills Road urges the Board either to rectify this oversight on its own motion (in keeping with its issuance of the show cause order), or, alternatively, to provide clear guidance on the most appropriate process by which Sills Road could correct its mistake, and, in turn, extricate itself from the Board's jurisdiction as a former owner of a railroad line.

Respectfully submitted,

/s/ *R. A. Wimbish*

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**ATTORNEY FOR SILLS ROAD
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Dated: October 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of October, 2023, a copy of the foregoing was served by email on all parties of record on the official Service Lists for Dockets FD 36398, FD 36399, FD 35141, FD 35819, FD 36384, FD 36376, and FD 36385.

/s/ *R. A. Wimbish*