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BEFORE THE
SURFACE TRANSPORTATION BOARD

BROOKHAVEN RAIL LLC –	)	
CONSTRUCTION AND OPERATION	)	
EXEMPTION – SUFFOLK COUNTY, NEW	)	Docket No. FD 36398
YORK, AND UNDOCKETED	)	Docket No. FD 36399
APPLICATION FOR A LAND-USE	)	
EXEMPTION UNDER 49 U.S.C. § 10909	)	
U S RAIL CORP. – CONSTRUCTION AND	)	
OPERATION EXEMPTION – BROOKHAVEN	)	Docket No. FD 35141
RAIL TERMINAL	)	
BROOKHAVEN RAIL TERMINAL AND	)	
BROOKHAVEN RAIL, LLC – PETITION FOR	)	Docket No. FD 35819
DECLARATORY ORDER	)	
SPECTRUM RR HOLDINGS, LLC – OPERATION	)	
EXEMPTION – RAILROAD LINE IN THE TOWN	)	Docket No. FD 36376
OF BROOKHAVEN, NY	)	
SILLS ROAD REALTY LLC – ACQUISITION	)	
EXEMPTION – RAILROAD LINE IN THE TOWN	)	Docket No. FD 36384
OF BROOKHAVEN, NY	)	
SPECTRUM RAILROAD HOLDINGS, LLC –	)	
ACQUISITION AND OPERATION EXEMPTION –	)	Docket No. FD 36385
LINE OF SILLS ROAD REALTY LLC, IN THE	)	
TOWN OF BROOKHAVEN, NY	)	

**REPLY OF CITIZENS CAMPAIGN FOR THE ENVIRONMENT
TO SHOW CAUSE FILINGS OF THE BROOKHAVEN PARTIES**

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**REPLY OF CITIZENS CAMPAIGN FOR THE ENVIRONMENT
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In accordance with the decision the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on September 27, 2023 (the “Decision”), as modified October 12, 2023, the Citizens Campaign for the Environment (“CCE”) respectfully replies to the filings of (1) Brookhaven Rail LLC (“BHR” or “Brookhaven Rail”)¹ dated October 17, 2023, (2) Brookhaven Logistics Center LLC (“BLC”) dated October 24, 2023, and (3) Sills Road Realty LLC (“Sills” or “Sills Road”) dated October 24, 2023. BHR, BLC, and Sills will be collectively referred to as the “Brookhaven Parties.”

PREFACE AND SUMMARY

The Board’s Decision directed the Brookhaven Parties to provide responses regarding the ownership and control of a rail line and other matters regarding the operation of their rail terminal in Brookhaven, New York.

Specifically, Sills and BLC were “directed to show cause why they should not be found to have violated 49 U.S.C. § 10901” with respect to their unauthorized acquisition of the rail line on Parcel A (which extends for a short distance onto Parcel B). Decision at 3. BLC and BHR were also directed to explain whether the BLC proposed warehouses on Parcels B and C would be used in the shipment of waste from the proposed solid waste rail transfer facility (“SWRTF”) that BHR has proposed to locate and operate on Parcel D. BHR was directed to explain whether it now intends to connect directly to the Long Island Railroad (“LIRR”) from Parcels B and C, and whether it still plans to connect to Parcel A.

¹ References to BHR include its predecessor, U S Rail Corporation (“US Rail”).

The Brookhaven Parties explain that the BLC warehouses on Parcels B and C are separate from the proposed SWRTF, Parcels B and C will not connect directly to the south side of the main line of the Long Island Railroad (“LIRR”) and instead will connect to the LIRR through the tracks on Parcel A, and the SWRTF will no longer interconnect with the rail lines on Parcels A, B, and C that connect to the north side of the LIRR.

However, the Sills and BLC “show cause” responses confirm violations of 49 U.S.C. § 10901 that include not only the unauthorized acquisition and control of the BHR line on Parcel A, but also the unauthorized construction and operation of that line.² Sills essentially confesses that it not only acquired, but also constructed and controlled the Parcel A line without obtaining or even seeking the required Board authorization, while now requesting lenient treatment that would leave all the Brookhaven Parties no worse off than if they had faithfully observed the Board’s requirements all along. BLC seeks what amounts to an advisory opinion whether its current sublicense arrangement with BHR is sufficient under *State of Maine*,³ and if not, whether a proposed conversion to a draft lease will bring it into compliance. If both those efforts fail, then BLC requests an exemption to clean up its affairs.

The Board’s order asked for Sills and BLC to show cause why they should not be found in violation of 49 U.S.C. § 10901. It did not seek input on what consequences

² BHR chose not to address the § 10901 issues since it was not asked to show cause itself. Nonetheless, the Sills and BLC responses, and BLC’s Highly Confidential exhibits, show that BHR is thoroughly enmeshed in the violations.

³ *Maine, Department of Transp.—Acquisition & Operation Exemption—Maine Central R.R (State of Maine)*, 8 I.C.C.2d 835, 836-37 (1991) (“*State of Maine*”), as extended by FD 35296, *Anthony Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc.* (STB served Aug. 31, 2010), to include nongovernmental entities.

should follow for such violations, and requests for leniency are thus premature. In any event, no leniency is warranted. Sills has still not provided any documentary support for its claim that it relied on advice of BHR's counsel. The record also shows that the same counsel represented Sills before purporting to represent BHR and that Sills is a repeat offender of unauthorized transactions over the line in question. Sills' decision to retain new counsel does not serve to exonerate itself from its past violations.

Issues of leniency and remedies cannot be properly addressed until the Brookhaven Parties disclose the proceeds and profits that they received from the unauthorized unlicensed activities that include not only railroading *per se*, but also conducting extensive sand extraction on the property with the benefit of preemption under the false color of constructing a common carrier railroad. Nor are the Brookhaven Parties entitled to leniency. Northpoint Development, which apparently now controls BLC (formerly NP/Winters), certainly knew or should have known of the Terminal's regulatory problems before voluntarily enmeshing itself in them. Also, BHR is the successor to US Rail, which served as the front for Sills' unauthorized control and construction. US Rail had been admonished repeatedly for failing to provide relevant information and/or providing false and misleading information, and BHR similarly knew, or reasonably should have known of the substantial regulatory issues that might arise with its acquisition of the carrier.

BLC's requests for advisory guidance are also unfounded. BLC cannot have acquired from Sills what Sills was not authorized to hold in the first place, and BLC also has no cognizable reliance interest since, again, it had full knowledge of, or at least ample reason to be aware of Sills' infirmities but elected to acquire the Parcel A line anyway. BLC's

existing and proposed arrangements with BHR do not qualify for *State of Maine* treatment, particularly given BLC's own railroading activities, including its ongoing entanglement in BHR's railroad activities.

What has not been submitted is also telling. BLC selectively submitted only the current version of the Amended and Restated Railroad Operating Agreement and Sublicense Agreement, but not its predecessor(s). Accordingly, the Board and the public are unable to view the prior relationship between BLC's predecessor (Sills) and BHR and any infirmities that may exist therein. The scope of past violations may have thus been even greater. BLC has also not submitted the main license or other agreement by which it grants its sublicense to BHR. Logically, a sublicense cannot be any broader than the associated main license. Since the terms of that main license are unknown, the sufficiency of BHR's possessory interest in the Parcel A rail line cannot be established. In any event, both the Sublicense Agreement and the proposed Lease Agreement indicate that BLC's role extends beyond that of a passive owner of railroad assets, and all of these agreements should have been submitted long ago.

BLC has also improperly designated the relevant agreements as Highly Confidential in their entirety, when only select portions qualify as Highly Confidential or even Confidential, and then selectively quoted and characterized individual provisions in its public reply. BLC's approach gives it an unwarranted advantage on an uneven playing field, and leaves CCE and the public at an informational disadvantage.

In short, no aspect of the current existence and operations of the railroad lines appears to be in order, as explained more fully below. Insofar as the show cause order

provides the Brookhaven Parties with a last opportunity to “come clean,” they have again failed to do so, and their transgressions and continuing “hide-the-ball” tactics require appropriate redress and penalties, including disgorgement of the substantial ill-gotten gains achieved by their substantial sand mining and other operations at the site conducted under the false pretense of a common carrier railroad operating under “Board authority.”

ARGUMENT

I. The Violations of 49 U.S.C. 10901 Regarding the Existing Rail Line on Parcel A Include Not Only Its Acquisition, but also Its Construction and Operation

The Decision directed Sills and BLC “to show cause why they should not be found to have violated 49 U.S.C. § 10901” with respect to the existing rail line on Parcel A (that extends for a short portion on Parcel B). Decision at 3. Sills purports to effectively concede that it did not acquire the line properly and instead utilized US Rail Corporation, BHR’s predecessor in interest, as its front.⁴

However, its concession is begrudging. In particular, Sills maintains that “[t]he Lines forming a part of the Brookhaven Terminal were constructed pursuant to Board authorization in *US Rail*.” Sills at 3. That statement is inaccurate. To be constructed “pursuant to” that authorization, the lines would have needed to have been constructed by US Rail, and not by Sills. In other words, “following” does not equate to “pursuant to.” The evidence of record clearly shows that BHR did not construct the line, but served as a front, as

⁴ Sills at 4 (“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”), 5 (explaining Sills’ preference to attempt to settle with BHR, rather than pursue remedial action), and 6 (“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.”).

Sills constructed and paid for the line and benefited from the associated sand extraction. Sills' insistence on conflating "pursuant to" with "following" the two is very revealing of its candor and very relevant to whether it should receive the leniency it requests. Indeed, Sills was considerably more candid in its February 21, 2023 response at 3: "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."

The reason BHR informed the Board in Docket No. FD 35141 that it would construct the track was to enable Sills to overcome the cease-and-desist line construction orders issued against Sills in Docket No. 35036,⁵ leading to its partnership with BHR to have BHR serve as Sills' proxy to obtain Board construction authority.⁶ Sills then proceeded to finance, construct, and install the lines itself as it had always intended, albeit in contravention of the Board's authorization decision that permitted only BHR, and not Sills, to construct the line. Acting in this manner allowed BHR to confer upon Sills the benefits of federal preemption under 49 U.S.C. § 10501(b) for the rail line construction in the FD 35141 proceeding in 2010, and then later in the FD 35819 declaratory order proceeding in 2016.⁷ In addition to enabling Sills and BHR to evade and overcome the Board's prior cease-and-

⁵ *Suffolk & S. R.R. – Lease & Operation Exemption – Sills Rd. Realty, LLC*, FD 35036 (STB served Oct. 12, 2007), *petition for recon. denied*, (STB served Dec. 20, 2007).

⁶ *US Rail Corp. – Constr. & Operation Exemption – Brookhaven Rail Terminal*, FD 35141 (STB served Sept. 9, 2010).

⁷ *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Petition for Declaratory Order*, FD 35819 (STB served Aug. 30, 2016).

desist orders, this scheme also allowed the Sills Parties to exploit Brookhaven Rail's status as a common carrier to obtain large sums of money through extensive sand mining of hundreds of thousands of cubic yards of commodities throughout the Terminal properties without any permission or oversight.

For its part, BLC claims that it is only a property owner, not a carrier, because it is sublicensing or proposing to lease the line to BHR and not engaging or interfering in rail operations, but BLC nonetheless requests a streamlined exemption if it is determined to require acquisition authority under 49 U.S.C. § 10904(a)(4). BLC at 4. BHR does not address the issue, as only Sills and BHR were directed to show cause. BHR at 3.

Again, the available evidence indicates that Sills improperly constructed and acquired the line by using BHR as a front. Under 49 U.S.C. § 10901, a person may construct a common carrier rail line only upon prior authorization and the issuance of a certificate authorizing such activity by that person or through an equivalent exemption under 49 U.S.C. § 10502. Also, decisions (including exemptions) authorizing rail line construction are permissive only, and apply only to the party actually granted the construction authority.⁸

“The Board expects that the appropriate parties will seek any necessary authority.” *Oakland Global Rail Enterprise, LLC – Operation Exemption – Rail Line of Union Pac. Railroad Co. and BNSF Railway Co.*, FD 35822 (STB served July 24, 2014), at 1.

⁸ *E.g., Rocky Mountain Railcar & Repair, Inc. – Acquisition & Operation Exemption – Line of Railroad in Tooele County, Utah*, FD 35478 (STB served Apr. 13, 2018), at 1; *Jackson County Port Authority A/K/A Port of Pascagoula – Petition for Declaratory Order*, FD 35994 (STB served July 28, 2016), at 2.

Here, BHR sought independent Board authority to construct and operate the Parcel A track in FD 35141. However, the facts of record to date reveal that BHR, despite having obtained Board authority to independently construct, own, and operate a new common carrier rail line in FD 35141, did not actually undertake to consummate that authority and construct the track that was authorized. The additional information the Board ordered to be provided confirms this fact. Because the track was improperly constructed by parties other than BHR, and/or it is owned by others, as Sills and BHR have previously admitted, contrary to the actual authorization granted to in FD 35141, the track's construction and operation remain unauthorized. The mere fact that Sills may have allowed BHR to conduct limited and circumscribed switching operations on its trackage does not bring the trackage or necessarily those operations within the Board's authorization. Nor does it transform BHR's operations into permissible common carrier operations, unless and until proper authorization requirements are met, which in this instance have not occurred to date.

Because Sills improperly constructed and acquired the line, it cannot convey what it did not properly acquire. BLC's contingent request for an acquisition exemption begs the question from whom it would acquire the line. That question has no palatable answer as the candidates are Sills, which did not properly acquire the line, or BHR, which allowed itself to be used as a front for Sills. BLC's claim that any violation was unintentional flies in the face of the continuing long-pending controversy over the legitimacy of the line. Furthermore, as explained *infra*, BLC's role and entanglement in the line is not limited to that of a passive landlord that has no involvement in the operation of the line.

Furthermore, the infirmity is not merely that the line was improperly acquired by Sills. Again, the salient fact is that the authorization for the construction and operation of the line was to US Rail, but US Rail did not construct the line. The decision to proceed by exemption in seeking construction and operation authority, as BHR did in FD 35141, carries the risk that the exemption may be revoked at any time. 49 U.S.C. § 10502(d); 49 C.F.R. § 1121.4(f). An exemption founded on incomplete, misleading, or false facts, which the facts of record show was the case with the construction and operation exemption petition in FD 35141, is *void ab initio*. 49 C.F.R. § 1150.32 (c) (“If the notice contains false or misleading information, the exemption is void *ab initio*.”); *see also* 49 C.F.R. §§ 1150.35(f), 150.43(c), 1150.45(f) (identical language); *San Francisco Bay Railroad-Mare Island – Operation Exemption – California Northern R.R.*, FD 35304 (STB served Dec. 6, 2010), at 3-4 (“failure to disclose all of the relevant facts is a material misrepresentation by omission”); *San Jacinto Transportation Company, Inc. – Operation Exemption – SJRE-Railroad Series*, FD 35996 (STB served Feb. 2, 2022), at 4 (finding a notice of exemption that omitted crucial information relating to the planned construction of the line, which the party planned to obtain authorization to construct, to be materially misleading, even if such omissions were unintentional). Since the line was not properly constructed in accordance with the exemption authorization, and there is a demonstrated failure to disclose all of the relevant facts, the law is clear that authorization must be deemed void *ab initio*. A line that was not validly constructed also cannot be validly owned or operated as a common carrier line.

The Board issued its construction authorization decision in FD 35141 based on representations of construction by a railroad, and not as it turned out, for construction by

non-railroad developers, and such developers and other non-railroads may not on their own, or in secret agreement with the railroad, assume the rights of a railroad for construction or any other purposes, and then seek to transfer an unauthorized railroad line. The reality is that the line currently operated by BHR is an uncertificated line that cannot be merely acquired, but requires some additional authorization in order to validly function as a common carrier railroad. Until there is such authorization, there is nothing to acquire under the Board's processes.

II. Sills' Claim that it Relied on Advice of Counsel and BLC's Claim of "Unintentional Error" are Unavailing

Sills continues to recite that it "did not have the benefit of its own regulatory counsel ... in that construction case" and "relied on the legal and regulatory guidance of counsel for U S Rail," that it "does not know why U S Rail Corporation did not consider Sills ... essential," that it "has no contemporary records on the contemporaneous guidance it received from U S Rail," and that U S Rail's "legal counsel is no longer alive to answer such questions." Sills at 3. Nonetheless, Sills makes clear that despite funding and owning the lines, it had no desire to become a common carrier (*id.* at 4 & n.2), although Sills did enjoy the benefits of preemption for the extensive sand mining it conducted while constructing and operating the lines. *See also* Supplemental Affidavit of Joseph Winters (May 20, 2020) (Attachment 1 to CCE May 7, 2023 filing), stating that "BHR has *no involvement* in any of the site clearing, excavation, grading or removal of sand 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 [Sills Road Realty LLC] and/or certain of its affiliates" (emphasis added).

However, it remains unclear to what lengths, if any, Sills has been willing to identify the guidance it supposedly received. Furthermore, Sills' explanation merely regurgitates its prior contentions that were already fully addressed and refuted. CCE explained in its March 7, 2023 reply to the Brookhaven Parties, at 7-8, that the US Rail counsel in question was anything but a stranger to Sills, as that counsel previously represented Sills regarding the line. *Suffolk & Southern Rail Road LLC – Lease And Operation Exemptions – Sills Road Realty, LLC*, FD 35036 (Verified Notice of Exemption filed May 18, 2007, and Petition for Stay filed October 18, 2007). That counsel 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. Sills' continuing feeble explanation rings especially hollow in light of this uncontested showing.

In short, Sills' repeated claim that it merely relied on advice of counsel has no documentary support, is contradicted by that counsel's previous representation of Sills, and contrary to what should be common sense. The available evidence of record indicates that Sills was very intentional in seeking to harness the benefits of preemption while avoiding or evading the associated requirements. There is no support for Sills' claim that it should receive leniency because it supposedly acted in "good faith."

Similarly, BLC states that its failure to obtain Board authority to purchase the line “was an unintentional error,” which it regrets, and “could have avoided by engaging rail counsel to advise on the transaction or seeking the Board’s advice on whether authority was necessary.” However, BLC certainly knew, or should have known through its due diligence when acquiring the property containing a rail line from an entity such as Sills, with such a sordid history, of all the attendant acquisition and regulatory risks.

The sale has nothing to do with, and certainly does not somehow absolve, BHR or BLC from their 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. Wrongdoing does not disappear or become moot because one of the wrongdoers or its tainted property is acquired by some successor or beneficiary.

III. The Brookhaven Parties Still Have Not Made a Full Disclosure of Their Internal Arrangements, and Their Showing Remains Deficient

BLC submitted, as its Highly Confidential Exhibit B, a self-selected Amended and Restated Railroad Operating Agreement and Sublicense Agreement. In doing so, it fails to explain why it, along with BHR and Sills, did not provide such agreement and related documents in their possession that reflect or address BHR’s possessory rights when they were ordered in response to the detailed questions for information required by the Board in its decision served on January 6, 2023. Further, the Brookhaven Parties did not submit, and have not submitted, (1) the predecessor agreement, apparently dated as of 2016, (2) the June 1, 2012 predecessor (a) Lease between Sills and Brookhaven Terminal Operations (“BTO”) and (b) Operating Agreement and Sublease between BTO and Brookhaven, and (3) the prior

agreements, as disclosed at footnote 11 on page 5 of BHR's March 3, 2020 reply in FD 36384 & 36385.

The failure of all of the Brookhaven Parties to submit these records in response to the Board's Information Requests is conspicuous and troubling. "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. It is clear that the Brookhaven Parties have been playing "hide the ball" with respect to their present and past agreements, and their repeated failures to fully provide this relevant information in their its possession is 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").

Without all of these earlier, relevant agreements, the record as to the relationships among the parties remains incomplete, both past and present, and the putative interests and roles of the Brookhaven Parties and their predecessors cannot be confirmed. Consequently, the full historical scope of the 49 U.S.C. § 10901(a) violations cannot be fully assessed. The responses to the Board's show cause order and the Board's earlier January 6, 2023 decision thus remain incomplete. The ongoing incompleteness of the disclosures and information weighs heavily against Sills' plea for leniency and BLC's request for any exemptions that may be needed.

The deficiencies are not limited to form. In particular, the fact that BHR's presence is achieved through a sublicense agreement, not from the property owner BLC, but rather from { [REDACTED] }, an entity whose interest in the property is unknown, raises the question of exactly what possessory interests in Parcel A and the track it might have to further convey to BHR. BLC has not explained who { [REDACTED] } is, or its relationship with BLC, and the sublicense agreement expresses no control or connections between BLC and { [REDACTED] }. It also implies that BLC's own rights are achieved via some license agreement or the equivalent. Without knowing the full extent of BLC's underlying license, it is impossible to confirm that BLC itself is in a position to grant a sufficient possessory interest that does not require BLC also to be a common carrier.

In that regard, licenses are not the standard vehicle for granting a common carrier railroad a possessory interest. There appears to be only one proceeding in which the Board considered the adequacy of a pure license, and that particular license was found insufficient to support a *State of Maine* approach. *Pro-Go Corp.—Op. Exempt.—in Suffolk County, NY*, FD 35120 (STB served June 12, 2008), at 5 & n.3 (noting that such determinations are made on a case-by-case basis). In any event, the Board requires parties to make a full showing, including providing all pertinent agreements reflecting a sufficient possessory interest in property, *in advance* of granting a common carrier certificate. *Id.* (“the transaction should be submitted to the agency in advance with a copy of the agreement”); *Anthony Macrie – Continuance in Control Exemption – N.J. Seashore Lines, Inc.*, FD 35296 (STB served Aug. 31, 2010) (requiring operators to provide in advance complete copies of agreements with the track owner to resolve any concerns over possible

interference with common carrier operations); *N. Shore R.R. – Acquisition & Operation Exemption – PPL Susquehanna, LLC*, FD 35377 (STB served Apr. 26, 2011), at 3 (same).

As explained next, the Sublicense Agreement leaves BLC, supposedly a non-carrier, very much enmeshed in the railroad activities.

IV. The Sublicense Agreement Appears to Leave BLC Enmeshed in the Rail Operations and with the Potential to Interfere with Those Operations, Precluding Application of *State of Maine*⁹

BLC’s core contention is that it is not, and will not be, a common carrier following *State of Maine* and *Macrie* because the Sublicense Agreement and/or fallback draft Lease Agreement leave it with no ability to interfere with BHR’s common carrier operations. As noted, BLC has submitted only the Sublicense Agreement from an entity that is not the landowner, begging the question what interests and rights have been actually conferred. Also, BLC filed as “highly confidential its Contract of Sale for Parcel A as Exhibit C. As part of that sale contract, {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. These Parcel A property conveyance exceptions and encumbrances may be significant, and thus require disclosure and proper review to determine any potential interferences with BHR’s common carrier operations.

⁹ This section and the next are significantly redacted in the public version because BLC classified the entire Sublicense Agreement as Highly Confidential, even though BLC referenced and quoted individual provisions of the agreement in its filing. The impropriety of BLC’s treatment is addressed *infra*.

The other question arising is what rights are, or are not conferred, by the License Agreement or equivalent that has not been submitted. If BLC's own rights, whatever they are, may be superseded, then the interference may come from elsewhere, and the Sublicense Agreement is insufficient. { [REDACTED]

[REDACTED] } It is for this reason that easements and leases are more typically utilized to convey the necessary possessory interest in the carrier.

Moreover, there is ample potential for BLC to interfere with the rail operation of the line. BLC is not just a passive property owner, but intends to construct its own connected spur, meaning it will be a customer for BHR's services. Accordingly, it may compete for limited car slots, and BHR's capacity may well be limited, especially in light of the volume of traffic that BLC's proposed warehouses and BHR's proposed SWRTF may generate, and the capacity limitations of the New York & Atlantic ("NY&A"), which uses the LIRR track. BLC is far more than a disinterested landlord.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Further, as referenced, *supra*, as part of the Parcel A sales contract to BLC at Exhibit C, several noteworthy { [REDACTED]

[REDACTED]

[REDACTED] } The extent to which these exceptions may seek to, or enable restrictions on BHR's common carrier operations by BLC, [REDACTED] } in favor of its own operations is unknown because BLC has failed to disclose these instruments to date, and it should be required to disclose such important information.

BLC's approach also ignores the long-standing principle that one can become a rail carrier without actually providing or being able to interfere with the linehaul services. This principle is illustrated by one of the authorities cited by Sills, *Association of P&C Dock Longshoremen v. The Pitts. & Conneaut Dock Co.*, 8 I.C.C.2d 280, 290 (1992) ("*P&C Dock*") (Sills at 10). *P&C* quotes *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647 (5th Cir. 1967), which holds that terminal-type companies, such as BLC, owned by or under contract to a rail carrier, can become rail carriers themselves when they perform rail-related activities as part of a common offering and receive compensation from the railroad. *Id.* In particular, "loading and unloading, performed under contract to a rail carrier, is railroad transportation service." *Id.* at 291. While BLC steadfastly disputes any interest in becoming a common carrier or holding itself out as a common carrier, those conditions may be met or surpassed in the case of BLC Sublicense and, as shown *infra*, the draft Lease Agreement as well.

{ [REDACTED] }¹⁰ { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The arrangement is not like that in *Macrie*, where the non-carrier owner remained merely served by the line, and more than suffices to cause BLC to become a rail carrier under *P&C Dock* and *Lone Star Steel*. The Sublicense Agreement thus falls outside the scope of *State of Maine*.

Under § 4.1(a), { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Furthermore, under § 4.1(b) and (c), { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } is indicative of a joint holding out and not what is contemplated under *State of Maine* or *Macrie*. The arrangement amounts to a { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], further demonstrating BHR's lack of autonomy and independent control. In addition, § 6.3 { [REDACTED] } further confirming that the parties are engaged in a joint undertaking.

Moreover, BLC appears to have been well aware of these arrangements at the time of its transaction with Sills. Exhibit C, the Contract of Sale { [REDACTED] } between Sills and Northpoint Development, makes clear { [REDACTED] }

[REDACTED] } BLC should have thus been fully aware of the arrangement to which it was entering, as well as the surrounding disputes and controversy. In particular, Sills filed a letter motion to withdraw in FD 36376, 36384, 36385, 38398, and 36399, on October 22, 2021, "pursuant to a confidential agreement with NorthPoint Development LLC," under which "they reserve all of their rights thereunder and pursuant to related settlement agreements." BLC may thus retain rights against Sills.¹¹ Significantly, neither Sills nor BLC (Northpoint) has submitted those related settlement agreements, and their disclosure should be required. Beyond that, Northpoint Development is hardly a stranger to issues surrounding rail development projects, having entered into an arrangement with BNSF to develop a rail-served logistics park in Kansas City by 2015,

¹¹ The Board's decision served January 6, 2023, noted Sills' attempt to withdraw (*id.* at 6), but denied the request, *i.e.*, Sills, along with BHR, was directed to respond to the Director's June 16, 2020 decision "and to provide all materials sought therein."

<https://www.beyondthecontract.com/construction-to-begin-on-rail-served-property-at-logistics-park-kansas-city-development-team-expands/>, and is now engaged in the development of a container terminal at Coos Bay, Washington, <https://www.railwayage.com/intermodal/port-of-coos-bay-submits-mega-grant-proposal-to-support-oregon-intermodal-project/>. Sill's ability to find a buyer and reach an accommodation with BHR does not make the problems go away or exonerate BLC.

It also bears noting that BLC has submitted only the { [REDACTED] } version of the agreement, not the earlier version and related documents that purported to govern the prior relationship between Sills and BHR. The { [REDACTED] } version may have been designed to address other or greater infirmities in that prior agreement.

In any event, the Sublicense Agreement does not support application of *State of Maine*, and there a number of additional agreements and encumbrances of record that would require further disclosure and review before the Board could possibly determine if BHR has a sufficient possessory interest to enable it to conduct common carrier operations on the line.

V. BLC's Proposed Lease Agreement Does Not Solve the Problems

Exhibiting some awareness that the existing Sublicense Agreement does not pass muster under *State of Maine*, BLC submits as an alternative a draft of a Lease and Operating Agreement as Exhibit E. The lease { [REDACTED] }
[REDACTED] } thus purportedly satisfying that element of *State of Maine*. However, the draft Lease

Agreement says little to nothing about the other aspects of the Sublicense agreement that are so problematic.

{ [REDACTED]

[REDACTED]

[REDACTED] }¹² { [REDACTED]

[REDACTED] } that make BLC a carrier under *P&C Dock* and related authority and that render *State of Maine* inapplicable. Furthermore, while the Lease Agreement purports to { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

The arrangement is thus not one under *State of Maine*, where a state or other third-party is the passive owner of the land. Instead, { [REDACTED]

[REDACTED]

[REDACTED] } The proposed lease may perhaps provide BHR with a modestly firmer interest in use of the premises, but it does not

¹² No party submitted the BHR Tariff. BHR's website, <http://brookhavenrailterminal.com/>, has a tab for its tariffs, but the link is nonexistent or broken.

resolve the other infirmities in the relationship or establish that BLC is a passive landlord as required under *State of Maine* to avoid becoming a common carrier.

VI. BLC Should Not Be Granted an Exemption from 49 U.S.C. § 10901(a)(4)

Perhaps recognizing that it cannot qualify as a non-carrier under *State of Maine*, BLC asks for a contingent exemption under 49 U.S.C. § 10502 for obtaining authority under 49 U.S.C. § 10901(a)(4) for its purchase of the line on Parcel A.¹³

No such exemption is warranted for multiple independent reasons. First, exemptions are “reserved for transactions involving routine, uncomplicated, and non-controversial matters,” and the Brookhaven Terminal and the arrangements surrounding it are certainly non-routine, complicated, and controversial. *Branch Line R.R., Inc. – Lease & Operation Exemption – Northwoods Distribution Servs., Inc.*, FD 36422 (STB served Apr. 6, 2021). Second, exemptions should not be used by parties that have evaded Board requirements and acted to conceal that evasion, as BLC and the other Brookhaven Parties have done. That evasion, extending over a decade, has contributed to the controversy.

Third, BLC understates the exemptions that would be needed. BLC would need an exemption not only for its ownership role in the line on Parcel A, but also for its rail-related activities carried out in conjunction with BHR.

Fourth, BLC’s ownership is not the only matter for which authorizations are needed. As explained *supra*, the line on Parcel A that was built and has been operated was not built and operated in accordance with the STB’s original exemption. That original

¹³ At p. 15, BLC mistakenly refers several times to 49 U.S.C. § 10904(a)(4), a provision that does not exist, instead of 49 U.S.C. § 10901(a)(4).

construction authorization should be deemed void *ab initio* for the detailed reasons set forth *supra*. Authority is needed for that line, that authority should not be granted by exemption, and it should not be granted to the parties that have participated in the violations of the Board's rules, decisions, and governing statute.

VII. Sills' and BLC's pleas for lenient treatment are premature and unfounded

Despite purporting to concede its violation of 49 U.S.C. 10901, Sills still claims "that it did not act intentionally or out of bad faith." Sills at 7-8. It further asserts that lenient treatment, such as an authorization for its unauthorized actions, is in order, at least going forward. *Id.* at 8-10. The outcome Sills seeks is one where no remedial consequences are imposed on any of the Brookhaven Parties. BLC seeks essentially the same thing, an after-the-fact authorization that allows it the benefit of its acquisition from Sills.

The requests for leniency are premature. The Board's Decision directed Sills and BLC to show cause why a violation should not be found, and did not include an invitation to discuss remedies. Furthermore, remedial treatment and consequences should logically be considered after the violation is established.

Before addressing remedies, there should be a full disclosure of the benefits that Sills has obtained from its authorized activity. The Board's powers include the authority to prevent an entity that obtains unlawful control of a carrier from "retain[ing] the fruits of its unlawful conduct." *Central of Georgia Ry. Co.*, 307 I.C.C. 39, 43 (1958). The Board is not to "sit idly by and wink at practices that lead to violations of [statutory] provisions." *Am. Trucking Assn's, Inc. v. United States*, 344 U.S. 298, 309 (1953); *Zola v. ICC*, 889 F.2d 508, 516 (3d Cir. 1989) ("*Zola*"). The Board's equitable powers mirror those of courts in antitrust

cases “to expunge an antitrust violation.” *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962). The touchstone is that “[t]hose who violate the [antitrust laws] may not reap the benefits of their violations.” *United States v. E.I. du Pont de Nemours & Co.*, 316 U.S. 316, 368 (1961). This equitable relief includes disgorgement of ill-gotten gains obtained through unlawful means. *E.g.*, *United States v. Keyspan Corp.*, 763 F.2d 633, 640 (S.D.N.Y. 2011) (“disgorgement comports with established principles of antitrust law”); Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 325a (3d ed. 2007) (“equity relief may include, where appropriate, the disgorgement of improperly obtained gains”).

The Board’s remedial powers are “drastic,” but not boundless. *Gilbertville Trucking* at 130. The Board’s authority is “corrective, not punitive;” it is to give “complete and efficacious effect to the prohibition of the statute with as little injury as possible to the interests of private parties or the general public;” and it must “tailor the remedy to the particular facts of each case.” *Id.* at 129-30. For example, the Board reversed and then phased-in on a deferred basis the premium that BNSF received following its unauthorized acquisition by Berkshire Hathaway Inc. *Western Coal Traffic League—Pet. for Decl. Oder*, FD 35506 (STB served July 24, 2013), at 28 & n.71, citing, *inter alia*, *Zola* and *Gilbertville Trucking*.¹⁴

¹⁴ See also *RFM Holdco LLC—Control Exemption—Pioneer Railcorp, et al.*, FD 36306 (Sub-No. 1) (STB served March 18, 2021), at 8, Member Primus, dissenting (“My hope is that, moving forward, the Board will begin to look at ways to effectively promote greater compliance and transparency as it relates to the licensing of rail activities. For those who continue to operate outside the rules, stronger enforcement, including the administering of severe penalties when appropriate, should prevail.”).

Sills and the other Brookhaven Parties have made no disclosure as to the benefits they received from their unauthorized activities. Those benefits would include not only the revenues that the Brookhaven Parties received from each other, their customers, and the NY&A for providing transportation and related services, but also whatever Sills (and possibly BHR) received from its extraction activities that it engaged in as part of its unauthorized construction and control of a rail line that was not constructed or operated in accordance with the Board authority. Indeed, the Town of Brookhaven and others have alleged that Sills' principal objective of the project was to obtain preemption in order to engage in the extraction and sale of sand on the land over which the lines were built.

An appropriate remedy should take into account the amount of those proceeds, so that Sills and the others are not unduly enriched by their unauthorized activities. The remedy might take the form of disgorgement and/or penalties for each day of violation under 49 U.S.C. § 11901. But the issue of remedies should not be addressed until there is disclosure of the magnitude of the ill-gotten gains.

It also bears noting that Sills is a repeat offender with respect to seeking unauthorized construction over the line in question. *Suffolk & Southern R.R. LLC-Lease and Op. Exemption—Sills Road Realty, LLC*, FD 35036 (STB served Oct. 12, 2007). Significantly, Sills was represented in that case by the same counsel that allegedly provided the flawed advice to BHR on which Sills now claims to have relied. Notably, BHR is also a repeat offender with the Board having admonished it in a similar proceeding during the same time period for similarly 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), at 4 (rejecting lease and operation exemption petition, and finding that “U S Rail was not candid in its notice of exemption” where the carrier omitted information and/or provided “false and misleading information”).

CCE wishes to make clear that it does not wish to disturb BHR’s service to the rail customers of the existing warehouses. However, their interests can be protected and preserved as BHR continues to operate as a switching carrier while appropriate remedies are imposed on the Brookhaven Parties themselves.

VIII. BLC’s Redaction of the Agreements in full is excessive and prejudicial.

CCE does not object to BLC’s use of a standard two-tier protective order for its filing *per se*. However, BLC elected to designate the agreements it submitted as Exhibits B, C, D, and E as highly confidential in their entirety and redacted them completely. Those Exhibits purport to establish the relationship among the Brookhaven Parties and bear directly on claims whether Sills and BLC are rail carriers. The global redaction is inappropriate and highly prejudicial for at least three separate reasons.¹⁵

First, very little of the information in the Exhibits can qualify as Highly Confidential or even Confidential. Redaction of the specific measures of compensation received or paid by the Brookhaven Parties might be appropriate for redaction, but that constitutes only a small part of the agreements, whereas BLC has designated the documents

¹⁵ CCE counsel wrote to BLC counsel regarding the appropriateness of its redactions, but BLC declined to change its designation. The email exchange is included as Exhibit A.

to be Highly Confidential in their entirety. For example, even the date of the Sublicense Agreement cannot be disclosed under BLC's treatment.

Second, the basic purpose the show cause order is to provide an opportunity for the Brookhaven Parties to come clean as to their actions and the concealment surrounding them. That purpose is negated when they refuse to make any portion of the relevant documents available to the public. For example, BLC's approach prevents CCE from discussing the Exhibits with its client. Beyond that, public knowledge and discourse are prejudiced by the lack of available information in a proceeding where a lack of disclosure has caused the Board, on its own accord, to take the extraordinary steps of ordering responses to Information Requests, and then issuing its show cause order.

Third, BLC elected to reference and even quote many individual provisions of the Exhibits in its filing. To the extent BLC has revealed the information in its own public filing, it should not be able to maintain simultaneously that the information is Highly Confidential. BLC is effectively seeking to have its cake and eat it, too.

Fourth, and closely related, BLC's ability to engage in selective declassification creates an uneven playing field that is tilted to the Brookhaven Parties' advantage. BLC has featured information that supports its cause, while blocking full access to parties and the public of other provisions that undermine its position. This tactic is especially unfair and inappropriate when issues surrounding the Brookhaven Parties are playing out in other forums, including ones where they are claiming the benefits of preemption associated with being a rail carrier.

CONCLUSION

As demonstrated above, the Brookhaven Parties have failed to show cause that they should not be found in violation of 49 U.S.C. § 10901(a). Sills essentially confesses its violation, and BLC's efforts to claim protection under *State of Maine* are contradicted by the agreements and draft agreement that BLC has improperly designated as Highly Confidential. The violations are more extensive than they acknowledge, as they include not only the unauthorized acquisition of control, but also the construction and operation of a line that was, and remains, not in accordance with the Board action they purport to rely upon.

The Brookhaven Parties requests for leniency and clean-up authorizations are premature and unwarranted, and additional disclosures are required. There should also be full disclosures of the extent to which they have benefited from their unauthorized actions before the issue of appropriate remedies can be addressed, including the possibility of disgorgement of substantial earnings gained from improper sand mining and appropriate penalties.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Citizens Campaign
for the Environment*

Dated: November 13, 2023

Exhibit A

**Email Exchange of Between Counsel for Citizens Campaign for the Environment
and Brookhaven Logistics Center LLC Regarding Highly Confidential Designations**

Robert Rosenberg - Outlook

RE: FD 35141 et al.

Tutrone, Jason <Jason.Tutrone@thompsonhine.com>

Tue 10/31/2023 9:21 PM

To: Robert Rosenberg <rdr@sloverandloftus.com>

Cc: Peter Pfohl <pap@sloverandloftus.com>

Hi Robert,

Thank you for your email.

BLC will not change its designation of Exhibits B, C, D, and E as Highly Confidential.

Best regards,

Jason

Jason Tutrone | Partner | **Thompson Hine LLP**

O: 202.263.4143 | **M:** 202.603.3109

From: Robert Rosenberg rdr@sloverandloftus.com

Sent: Tuesday, October 31, 2023 9:18 AM

To: Tutrone, Jason Jason.Tutrone@thompsonhine.com

Cc: Peter Pfohl pap@sloverandloftus.com

Subject: FD 35141 et al.

CAUTION EXTERNAL EMAIL

Dear Jason,

CCE writes to question BLC's decision to designate Exhibits B, C, D, and E of its October 24, 2023 filing as Highly Confidential in their entirety, even as BLC quoted and relied upon multiple individual provisions in the public version of its show cause response.

BLC's draft protective order generally limits the highly confidential designation to material "that contains compensation levels of other competitively sensitive information." Very few portions of the Exhibits appear to meet that standard, e.g., those that discuss the exact level of compensation. To qualify even as confidential, material generally needs to "contain proprietary or confidential information." The Exhibits also fail to meet that standard except in limited part.

The fact that BLC cites and quotes multiple portions of its exhibits in its public version demonstrates that at least substantial portions of the cited agreements and draft agreement are and should be made public. It is particularly inappropriate for BLC to create an un level playing field by selectively declassifying information from the exhibits that it believes benefits its position, while preventing CCE and others from making public use of other information from the same documents that may detract from BLC's position. Moreover, since BLC has designated the entirety of these exhibits as highly confidential, BLC's selective public quotation of the exhibits leaves us in the difficult position of attempting to discern what specific portions of the exhibits we might be able to discuss with our client. BLC's blanket redactions are particularly concerning here, where the central issues involve the concealment and lack

of transparency as to how the rail lines in question were authorized, constructed, owned, operated, acquired, and controlled.

For those reasons, we ask that BLC reconsider its wholesale, blanket redactions under its proposed protective order and redesignate the exhibits as public, except for any limited portions where BLC can definitively show that redactions are appropriate in accordance with the terms of its proposed protective order. If BLC does not intend to alter its designations, please let us know.

Best regards,
Robert

Robert D. Rosenberg
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202-347-7170
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202-347-3619 (fax)
rdr@sloverandloftus.com

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of November, 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