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BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 35141

U S RAIL CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—BROOKHAVEN
RAIL TERMINAL

Docket No. FD 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC—PETITION FOR
DECLARATORY ORDER

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, N.Y.

Docket No. FD 36385

SPECTRUM RR HOLDINGS, LLC—ACQUISITION & OPERATION EXEMPTION—LINE OF
SILLS ROAD REALTY LLC, IN THE TOWN OF BROOKHAVEN, N.Y.

Docket No. FD 36398

BROOKHAVEN RAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—IN SUFFOLK
COUNTY, N.Y.

Docket No. FD 36399

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

**Motion for Leave to File a Reply
by Brookhaven Logistics Center LLC**

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December 4, 2023

In its reply dated November 13, 2023, Citizens Campaign for the Environment (CCE) makes several factual misstatements and incorrect factual assumptions that are material to its arguments regarding Brookhaven Logistics Center LLC (BLC). It also makes a disguised motion to redesignate highly confidential documents that BLC submitted as public, which deprives BLC of a right to respond. Left unaddressed, these serious factual inaccuracies impair the Board's consideration of the alleged noncompliance about which it originally sought information in its recent order to show cause, *U S Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal (OSC Decision)*, FD 35141 et al. (STB served Sept. 27, 2023). Further, CCE's disguised motion will deprive the Board of access to opposing positions about the redesignation of the highly confidential documents. Thus, BLC asks the Board to grant it leave to file the attached surreply to address the significant factual misstatements in CCE's reply and to respond to CCE's disguised motion to redesignate BLC's highly confidential documents.

Although the Board's rules generally prohibit a reply to a reply (49 C.F.R. § 1104.13(c)), the Board construes this rule liberally to allow a party to file a reply that will contribute to the just determination of the issues presented without prejudicing any party or unduly prolonging the proceeding. 49 C.F.R. § 1100.3 (stating that the Board's rules "will be construed liberally to secure just . . . determination of the issues presented"); *R.R. Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X),

slip op. at 1 (STB served July 30, 2003); *Reading Blue Mountain & N. R.R.—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001). The Board has routinely found good cause to allow a reply to a reply if it will complete the record, clarify arguments, or allow a party to respond to new arguments it could not have anticipated. *E.g.*, *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087, slip op. at 4 (STB served Apr. 26, 2017) (granting a reply in the interest of a more complete record); *BNSF Ry.—Discontinuance of Trackage Rights Exemption—In Peoria & Tazewell Counties, Ill.*, AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010) (granting a reply that would provide a more complete record and clarify the arguments); *R.R. Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003) (granting a reply to complete the record); *SF&L Railway, Inc.—Acquisition & Operation Exemption—Toledo, Peoria & W. Ry.*, FD 33996, slip op. at 2 (STB served Feb. 1, 2002) (granting a reply to allow a response to new arguments); *Reading Blue Mountain & N. R.R.—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001) (granting a reply that address new factual issues because it is in the interest of developing a complete record); *Cross Oil Refining & Marketing, Inc. v. Union Pac. R.R.*, FD 33582, slip op. at 1 (STB served Oct. 27, 1998) (granting a reply to respond to a new assertion).

Here, the Board has good cause to allow BLC to respond to CCE’s reply because the response would provide a more complete record, clarify significant

factual misstatements by CCE, and allow BLC to respond to CCE's request to redesignate BLC's highly confidential documents as public, which CCE formally made for the first time in its reply. Specifically, it would allow BLC to correct the serious factual inaccuracies and incorrect assumptions underpinning CCE's arguments, as further described in the attached surreply. These factual issues are likely to cause the Board to act without a sound factual basis.¹

Additionally, if CCE had properly raised its request to redesignate documents in a motion, BLC would have had an opportunity to respond to the request. This opportunity to respond is an important procedural fixture intended to develop a complete record and narrow the issues before the Board. In fact, the Board's rules generally allow a reply to motions and pleadings within 20 days. 49 C.F.R. § 1104.13(a).

Further, allowing the surreply will not unduly prejudice any party or prolong these proceedings. BLC has narrowly drafted the surreply to address the most critical factual misstatements by CCE, which CCE should have avoided in its reply. Further, BLC is presenting it in the normal 20-day window for filing a reply.

In sum, allowing BLC's proposed surreply is necessary to facilitate an appropriately developed record on the matters at issue in the *OSC Decision*. BLC, thus, respectfully requests that the Board accept the attached surreply.

¹ The Board's reliance in the *OSC Decision* on a misleading news post, illustrates the importance of an accurate factual record. If the Board had not provided BLC and Brookhaven Rail LLC an opportunity to comment on issues raised in the news post, the Board could have taken action that was grossly inconsistent with the factual circumstances before it.

Respectfully submitted,

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Surreply of Brookhaven Logistics Center LLC

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In its reply dated November 13, 2023 (the CCE Reply), Citizens Campaign for the Environment (CCE) constructs its arguments regarding Brookhaven Logistics Center LLC (BLC) using serious factual misstatements and incorrect factual assumptions. It also appears to ask the Board to redesignate as public the highly confidential agreements that BLC submitted in its response dated October 24, 2023 (the BLC Response). Part I of this reply explains that the factual underpinnings of CCE's core arguments in opposition to BLC's Response are unsound. Part II explains that CCE has failed to identify a legitimate need for redesignation of the highly confidential agreements that BLC has submitted. It also explains that BLC has a strong and legitimate need for its blanket highly confidential designation of these agreements, which contain competitively sensitive information that could be used to the disadvantage of BLC and other entities. Accordingly, the Board should find that BLC's highly confidential designation of these agreements is appropriate.

I. CCE makes several factual misstatements that are critical to its arguments.

CCE contends that BLC has violated 49 U.S.C. § 10901(a)(4) and cannot avoid a residual common carrier obligation because it is enmeshed in the rail operations on Parcel A and has the potential to interfere with them. It also calls on the Board to conduct a further investigation, contending that BLC has not been forthcoming. But it constructs these contentions from factual misstatements and omits information that directly contradicts these contentions.

A. BLC is not involved in rail operations on Parcel A.

CCE bases its contention that BLC is enmeshed in rail operations on Parcel A on three main factual allegations: (1) BLC assumed *all* the rights and obligations of Brookhaven Rail Freight Services, LLC (BRFS) under the Amended and Restated Railroad Operating Agreement and Sublicense Agreement between Brookhaven Rail and Brookhaven Rail Freight Services, LLC, dated October 20, 2021 (the “Sublicense Agreement”),² not just BRFS’s obligation to provide access to Parcel A to conduct rail operations; (2) a fictional parent license agreement to the Sublicense Agreement may allow for interference with Brookhaven Rail’s operations on Parcel A; and (3) BLC has a right to control BRFS, which CCE contends engages jointly with Brookhaven Rail in providing rail transportation. These allegations are false.

First, BLC has not assumed any of BRFS’s rights and obligations under the Sublicense Agreement, except that it honors BRFS’s obligation to allow Brookhaven Rail to conduct rail operations on Parcel A. (BLC Response Ex. C § 26(ii), Ex. D § 2).³ Specifically, BLC has agreed concerning the Sublicense Agreement only that

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² The *existence* of this agreement and the parties to it are not confidential. Its predecessor agreement was first disclosed to the Board in December 2019. (Spectrum RR Holdings, LLC, Verified Notice of Exemption, Dec. 20, 2019, *Spectrum RR Holdings LLC—Operation Exemption—R.R. Line in the Town of Brookhaven, N.Y.*, FD 36376.)

³ Although the draft Lease contains a recital stating that the Sublicense Agreement is between Brookhaven Rail and BLC, as the assignee of BRFS, (BLC Response Ex. E at 1) this statement was intended to convey that BLC has effectively assumed BRFS’s obligation under the Sublicense Agreement to provide Brookhaven Rail with access and use of Parcel A for railroad operations. Further, as explained in this paragraph, there is no contract by which BLC assumes the Sublicense Agreement.

[REDACTED]

[REDACTED] }⁴ (BLC Response Ex. C § 26(ii), Ex. D § 2 (emphasis added)) and that “Brookhaven Rail LLC will have certain exclusive rights with respect to rail services to be provided on the Property under [the Sublicense Agreement].” (BLC Response Ex. C, Schedule B ¶ 5.) This language plainly does not allow BLC to step into the shoes of BRFS, whether to enforce any of Brookhaven Rail’s obligations under the Sublicense Agreement,

{ [REDACTED] } or otherwise.

It also does not give BLC any right to performance from BRFS, { [REDACTED]

[REDACTED] }⁵ [REDACTED] }.

And, except for BRFS’s obligation to allow Brookhaven Rail to access and perform rail operations on Parcel A, it does not impose any BRFS obligation on BLC,

including but not limited to { [REDACTED] }.

In sum, BLC merely has agreed to allow Brookhaven Rail to engage in exclusive common-carrier rail

⁴ Throughout this document, text enclosed in double braces (*i.e.*, {{ . . . }}) is Highly Confidential pursuant to the protective order issued in these proceedings.

⁵ {{

}}

operations on Parcel A, and it has no other involvement, contractually or otherwise, in Brookhaven Rail's operations.

Second, the Sublicense Agreement, and BLC's agreement to honor Brookhaven Rail's rights to operate on Parcel A under the Sublicense Agreement, are not subordinate to any parent license or similar document that would allow for interference with Brookhaven Rail's rail operations. CCE's imagined license conflicts with the Contract of Sale for Parcel A, which states that, {{ [REDACTED]

[REDACTED] 6 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }.

CCE's allegation that a fictional parent license exists also ignores that BLC effectively assumed BRFS's promises under the Sublicense Agreement to allow Brookhaven Rail rights to use Parcel A for common-carrier rail operations, converting any sublicense to a license. In the Contract of Sale and Continuing

6 {{ [REDACTED] }
[REDACTED] }

Obligations Agreement involving BLC's acquisition of Parcel A, BLC promised to BRFS that it would honor these rights of Brookhaven Rail, which BRFS granted under the Sublicense Agreement. (BLC Response Ex. C § 26(ii), Ex. D § 2.) This was necessary because BRFS's rights to grant a sublicense under the Sublicense Agreement arose from rights that {{[REDACTED]}}

[REDACTED] } Since
 { [REDACTED]
 [REDACTED] } no license survived the sale, as explained above, BLC agreed to provide
 Brookhaven Rail with the access and use rights to Parcel A under the Sublicense
 Agreement. Thus, upon BLC's purchase of Parcel A, Brookhaven Rail's rights to
 access and use Parcel A without interference flowed directly from BLC.

Third, BLC has no right to control, or ownership interest in, BRFS. On this point, the record in these proceedings is clear.

- The Contract of Sale describes BRFS as {{[REDACTED]}}
- The Sublicense describes BRFS as {{[REDACTED]}}

- The filings in these proceedings dating to 2019, well before BLC became involved with Parcels A, B, C, or D,⁷ assert that Sills Road Realty indirectly controls BRFS. (Sills Road Realty LLC Reply 2 n.1, July 15, 2020, *Brookhaven Rail LLC—Construction & Operation Exemption—In Suffolk County, N.Y.*, FD 36398 (explaining that Sills Road Realty is the majority controlling owner of Brookhaven Terminal Operations, LLC, which owns BRFS); Verified Notice of Exemption, Dec. 20, 2019, *Spectrum RR Holdings, LLC—Operation Exemption—R.R. Line in the Town of Brookhaven, N.Y.*, FD 36376.)

Thus, CCE's claim that it has insufficient information to understand the relationship between BRFS and BLC conflicts with the record, and the Board should reject CCE's attempts to conflate BRFS and BLC, including in its interpretation of the Sublicense Agreement.

B. CCE has constructed a false narrative that BLC has not been forthcoming.

To convince the Board to conduct a fishing expedition into various matters involving Parcel A, CCE advances a false narrative that BLC has not been forthcoming in these proceedings. This narrative rests on three contentions: (1) the Board's decision served on January 6, 2023 in these proceedings⁸ (the *January Decision*), required BLC to submit the Sublicense Agreement along with several

⁷ BLC first purchased any of these parcels on October 20, 2021. (See Brookhaven Rail LLC Reply to Pet. for Reconsideration 5 n.9., Feb. 15, 2023.)

⁸ *U S Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal (January Decision)*, FD 35141 et al. (STB served Jan. 6, 2023).

other lease, operating, and license agreements regarding Parcel A that other parties entered into between 2012 and BLC's acquisition of Parcel A in 2022 (CCE Reply 12-13); (2) BLC has failed to submit a purported parent license or other agreement by which it grants a "sublicense" to Brookhaven Rail for use of Parcel A and its track (CCE Reply 14); and (3) BLC has failed to appropriately disclose easements, covenants, and other restrictions pertaining to Parcel A (CCE Reply 15, 16-17). These contentions are incorrect.

First, the *January Decision* did not apply to BLC. The decision ordered only Brookhaven Rail and the Sills Parties—not BLC—to submit information or documents. *January Decision*, slip op. at 11.

In any event, the documents that CCE claims should have been submitted in response to the *January Decision* are not responsive to that decision. The *January Decision* sought information and materials in response to the Director's decision dated June 16, 2020, in Docket No. FD 36376, (the Director's Decision) which asked for information and materials about only the construction of the line on Parcel A, decisions to seek authority concerning this construction and Sills Road's ownership of the line, and the legal basis for any request to classify the track as excepted track. But the documents that CCE claims are responsive to the Director's Decision have nothing to do with the construction of the line, decisions to seek authority for constructing the line, or Sills Road's decision to seek remedial authorization. Instead, they relate only to use of the line after it was constructed. Also, they do not relate to any request to classify the track as excepted track, since no party seems to

currently contend that any of the track constructed on Parcel A should be excepted track.

Second, as explained above, there is no parent license or other agreement by which BLC grants a sublicense to Brookhaven Rail. BLC has granted Brookhaven Rail's right to access and use Parcel A directly from BLC's own rights as landowner of Parcel A. Also, BLC has submitted the Contract of Sale for Parcel A and the related Continuing Obligations Agreement, which grant Brookhaven Rail's access to and use of Parcel A for common-carrier operations, free from interference from BLC's own rights to use Parcel A. (BLC Response Ex. C § 26(ii), Ex. D § 2.)

Third, CCE omits that the easements, covenants, and other restrictions that CCE seeks pertaining to Parcel A are public documents. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. BLC's designation of agreements as highly confidential is appropriate.

CCE contends that BLC's highly confidential designation of the agreements it submitted as Exhibits B, C, D, and E of the BLC Response is excessive and prejudicial, and CCE apparently seeks redesignation of these documents. But this designation is consistent with the Board's framework for evaluating confidentiality designations. Further, CCE's contentions that this designation is excessive and prejudicial are inaccurate, especially considering CCE's extensive analysis of and citation to these documents in its reply. Additionally, requiring extensive redesignation of information in these documents pursuant to CCE's requests would discourage the very transparency that CCE contends is lacking.

When the Board evaluates designations of confidential information and material, it seeks to "strike the appropriate balance between legitimate access and legitimate protection." *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 4 (STB served July 15, 2011). Here, CCE fails to explain why anyone other than its outside counsel and consultants need access to these agreements. BLC submitted these agreements in response to the Board's inquiry into violations of the requirement under 49 U.S.C. § 10901(a)(4) that noncarriers obtain Board authority before acquiring a railroad line. While this authority matter falls squarely within the competence of CCE's outside counsel, CCE's own staff has no apparent background involving the legal standard under 49 U.S.C. § 10901(a)(4).

Rather, CCE is staffed by environmental policy advocates, and the inquiry under 49 U.S.C. § 10901(a)(4) does not involve an environmental review. Moreover, CCE's reply contained a thorough analysis of these agreements and their relevance to BLC's compliance with 49 U.S.C. § 10901(a)(4), which belies CCE's contention that it was prejudiced by highly confidential designation of the agreements.

CCE also disregards that BLC has a strong and legitimate need to designate these agreements as highly confidential. First, the Contract of Sale of Parcel A, the Continuing Obligations Agreement, and the proposed Lease and Operating Agreement with Brookhaven Rail are competitively sensitive documents of BLC and NorthPoint Development LLC, which has a controlling interest in BLC. As CCE observes, NorthPoint engages in the development of rail development projects. (CCE Reply 19-20.) Making the provisions of NorthPoint's and BLC's past and current transactions publicly available to their competitors and potential counterparties in other transactions would give these competitors and potential parties an advantage over NorthPoint and BLC and, thus, inflict serious competitive harm on NorthPoint and BLC.

Second, the Sublicense Agreement is a competitively sensitive document. {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]} Information in the Sublicense Agreement would allow third parties to design competing transload and rail operations with sensitive information about the cost and risk structure of the services offered on Parcel A, giving these parties a clear competitive advantage. {[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}

Third, CCE's position that a few aspects of these agreements may not be confidential does not make the need for a blanket highly confidential designation any less legitimate. CCE's only example of a nonconfidential aspect of these agreements is the date of the Sublicense Agreement. But nearly every agreement contains a few common provisions that parties generally have little need to protect from disclosure, like provisions stating that the agreement may be executed in any number of counterparts, identifying the agreement's date, deeming headings nonsubstantive, or stating that the agreement will not be interpreted against the drafter merely because it drafted the agreement. It is common practice for parties to apply blanket highly confidential and confidential designations to agreements even where they contain these nonconfidential aspects. Regardless, CCE did not seek

redesignation of the date of the Sublicense Agreement or any specific aspect of any of the agreements that BLC designated as highly confidential.

Further, BLC's public quotation of these agreements does not warrant removing their blanket designation as highly confidential. The provisions that BLC publicly quoted nearly all state that Brookhaven Rail has an exclusive right to conduct common-carrier operations on Parcel A free of interference, which is a single narrow aspect of the agreements and which BLC's argument in the BLC Response implies even without these quotes. Also, while these narrow quotes do not pose confidentiality risks in isolation, complying with CCE's request to provide them and the rest of the agreements redesignated as public, except for limited portions, (CCE Reply Ex. A) creates a high risk of revealing highly sensitive information. Accordingly, BLC's public quotation of the agreements essentially eliminated the high risk of inadvertent disclosure of highly sensitive information while also making the quoted text publicly available to CCE and other interested parties.

For these reasons, the Board should not require redesignation of any of the agreements that BLC submitted. But, if the Board decides that redesignation is appropriate, BLC requests that the Board allow BLC to withdraw the agreements from the record as an alternative to disclosing them to CCE or making them publicly available.

III. Conclusion

As explained above, the factual pillars of CCE's key arguments in opposition to BLC are unsound, and BLC's highly confidential designation of agreements it

submitted in the BLC Response is appropriate. Thus, the Board should reject CCE's arguments that BLC is in violation of 49 U.S.C. § 10901(a)(4), that BLC has not been forthcoming in these proceedings, and that the highly confidential agreements in the BLC Response should be redesignated as public.

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Dated: December 4, 2023

CERTIFICATE OF SERVICE

I certify that I have this December 4, 2023, served copies of the foregoing Motion for Leave to File a Surreply and Surreply upon all parties of record in Docket Nos. FD 35141, FD 35819, FD 36376, FD 36384, FD 36385, FD 36398, and FD 36399 by email or first-class mail.

/s/Jason D. Tutrone
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