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Via E-Filing

PUBLIC

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, D.C. 2006

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ENTERED
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Part of
Public Record

Re: FD 36398, *Brookhaven Rail LLC – Constr. & Op. Exemption – Suffolk County, NY*; FD 36399, *Application for a Land-Use Exemption Under 49 U.S.C. § 10909*; FD 35141, *U S Rail Corp. – Constr. & Op. Exemption – Brookhaven Rail Terminal*; FD 35819, *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for Decl. Order*; FD 36376, *Spectrum R.R. Holdings, LLC – Operation Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36384, *Sills Road Realty LLC – Acquisition Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36385, *Spectrum R.R. Holdings, LLC – Acquisition & Op. Exemption – Line of Sills Road Realty LLC, in the Town of Brookhaven*;

Dear Ms. Brown,

To the extent the Surface Transportation Board (“Board” or “STB”) elects to consider the surreply letter that Brookhaven Rail LLC (“BHR” or “Brookhaven Rail”) submitted on November 29, 2023 (“BHR Surreply”), or the Reply that Brookhaven Logistics Center LLC (“BLC”) submitted in the above-captioned proceedings on December 4, 2023 (“BLC Surreply”), Citizens Campaign for the Environment (“CCE”) respectfully submits that good cause exists to accept this response in the interest of compiling a complete record.

As explained below, the BHR and BLC Surreplies do not resolve any of the problems and issues that CCE noted in its Reply filed November 23, 2023, but instead amplify them.

BHR

BHR asserts that it is “disingenuous” and “false[]” to associate it with or hold it responsible for the acts of its predecessor, U.S. Rail, that it complied fully with the Board’s Decision served January 6, 2023 and the earlier Director’s Decision served June 16, 2020, and that it possesses no responsive documents. Those assertions lack support.

BHR’s desire to disassociate itself from the bad deeds of its predecessor (in conspiracy with Sills Road Realty (“Sills”)) is readily understandable. However, just like any other acquiror of a railroad, the acquiror remains legally responsible for its predecessor’s actions (and transgressions), *e.g.*, CP is now legally responsible for the actions of its predecessor, KCS. Moreover, the separation between the “new” and “old” BHR is hardly as distinct as BHR asserts. As CCE has previously shown, the current BHR has previously asserted and demonstrated knowledge of the activities conducted under its earlier iteration. For example, in its reply filed November 13, 2023 (the same date as CCE’s reply), BHR reaffirmed that “it does not believe Sills violated 49 U.S.C. § 10901(a)(4) by owning the track assets on Parcel A while [BHR] possessed the exclusive authority to provide, and did so provide, common carrier over them *since the day construction of the track was completed.*” *Id.* at 2 (emphasis added). Also, as CCE previously documented in its March 7, 2023 reply, BHR’s owner (also the owner of Winters Bros.) (the late Joseph Winters) verified and confirmed in sworn testimony based on his “*direct knowledge*” that “*BHR has no involvement* in any of the site clearing, excavation, grading or removal of sand or gravel or any site development activities *which have occurred* or which may occur on Parcels A, B or C under the direction and/or control of [Sills] and/or certain of its affiliates.” Supplemental Affidavit of Joseph Winters (May 20, 2020) (emphasis added). BHR plainly felt able to address events and circumstances that existed before Shamrock Rail LLC (“Shamrock”) acquired BHR’s shares on May 11, 2020.

Furthermore, BHR’s Petition for Exemption in FD 36399 (filed July 27, 2020) included a Verified Statement from James Newell that stated: “I am the former President of [BHR]... I held that position from 2012 to May 11, 2020, when I formally resigned as President of BHR and was re-hired by the railroad as a consultant, maintaining my prior duties under the new President of BHR.” Newell V.S. at 1. When acquiring BHR, Winters/Shamrock kept the same management, and it has not changed the carrier’s name. For BHR (Winters) now to disclaim information about or access to pre-Shamrock business, accounting, tax, and related information pertinent to rail line construction defies credulity. Beyond that, BHR previously demonstrated in its own pleadings that it possesses relevant documents that still have not been submitted to the Board, including prior versions of documents that BLC submitted. *See* BHR’s Reply in

FD Nos. 36384 and 36385 dated March 3, 2020, at 5 n.11, discussed in CCE's November 13, 2023 Reply at 12-13.

Despite BHR's protests to the contrary, BHR is U.S. Rail and U.S. Rail is BHR, and Winters cannot disassociate itself from what is a clear scheme to evade regulatory requirements. The Board's "show cause" order may not have been as broad as it could be, but BHR has chosen to address additional matters and should not be heard to disclaim its own statements that demonstrate knowledge of, and participation of its own personnel in, BHR's earlier dealings, along with pertinent information showing a lack of participation by U.S. Rail in rail line construction activities. BHR's claim that it lacks responsive documents is belied by its own March 3, 2020 pleading.

BLC

A. Sills Ongoing Involvement in BHR Through BRFS

BLC first asserts that it has *not* acquired Brookhaven Rail Freight Services ("BRFS") or assumed any of its rights or obligations, other than to honor BRFS's obligation to allow BHR to conduct rail operations on Parcel A, that there is no parent license because BHR assumed that obligation from BLC, and that BLC has no control or ownership interest in BRFS. BLC Reply at 3-7.

CCE's understanding was that Sills purported to have divested all of its interests in the Brookhaven Terminal to BLC as part of "paving the way for Sill Road's voluntary divestiture of the Brookhaven Terminal." Sills Reply (Oct. 24, 2023), at 4. CCE qualified that understanding, noting that more information was needed. CCE Reply at 17-18 n.10 {

}. BLC now asserts that "BLC has no right to control, or ownership interest in, BRFS" and that BRFS remains under the control of Sills. BLC Reply at 6-7.

BLC then states that the Sublicense Agreement "does not give BLC any right to performance from BRFS {

} BLC Surreply at 3-5 & { }. Nonetheless, it remains the case that BRFS {

{

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These arrangements leave BRFS, meaning presumably Sills, enmeshed in BHR's railroad transportation activities. As BLC candidly admits, it has no right to control BRFS, "BLC has not assumed any of BRFS's rights and obligations under the Sublicense Agreement," and "there is no contract by which BLC assume the Sublicense Agreement." BLC Surreply at 3 & n.3. Such involvement makes BRFS a common carrier under *Association of P&C Dock Longshoremen v. The Pitts. & Conneaut Dock Co.*, 8 I.C.C.2d 280, 290 (1992), and *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647 (5th Cir. 1967). Neither BHR nor BLC addresses this matter, and Sills did not submit any surreply or address its ongoing entanglement through BRFS in its November 13, 2023 Reply. Consequently, what CCE previously explained is problematic of the BLC-BHR relationship now applies to the Sills (BRFS)-BHR relationship. The situation is made more problematic because of Sills' acknowledged fault and the impression created by all the Brookhaven Terminal participants that Sills has extracted itself from the arrangements. In other words, the violations of 49 U.S.C. § 10901(a)(4) are ongoing. Also, while BLC asks the Board not to "conflate BRFS and BLC" (Surreply at 7), when BLC schemed with Sills to "honor[] BRFS's obligation to allow Brookhaven Rail to conduct rail operations on Parcel A," BLC became unavoidably enmeshed in the same problematic arrangements (along with BHR and Sills) to which the Board's show cause order is addressed.

B. The Brookhaven Terminal Parties Have Not Been Forthcoming

Second, BLC rejects any claim that it has not been forthcoming based on a narrow reading of the requests, *i.e.*, the January 6, 2023 decision did not apply to BLC, the documents referenced were not responsive, there is no parent license for the Sublicense, and the easements are all public documents { [REDACTED] }. BLC Reply at 7-10. However, the January 6, 2023 decision requested all associated agreements related to line construction activities, and in any event, BLC's protestations are beside the point. The fact that remains that the Brookhaven Terminal participants, individually and in the aggregate, have still not provided full information regarding their involvement in the lines, particularly the construction and current operation of the line on Parcel A and whether BRFS/Sills remains an unauthorized carrier by virtue of its entanglement that the Sublicense appears intended to conceal or obscure.

Furthermore, BLC appears to adopt BHR's tactic of construing Board requests as narrowly as possible at some times, while feeling free to offer broader statements at others. The critical fact remains that to the extent the railroad segments at

issue were authorized by the Board, they were authorized pursuant to exemptions, which are avoid *ab initio* if they rest on false or misleading information. Statements may be false or misleading by omission as well as inclusion. The Brookhaven Terminal participants have plainly not been as forthcoming as they could have and should have been, as reflected by the rare issuance of a “show cause” order.

C. BLC Has Not Justified Its Excessive Redactions

Lastly, BLC seeks to defend its designation of the various agreements as highly confidential in their entirety, despite its decision to discuss and even quote various provisions in the public version of its reply. BLC presents a panoply of arguments, *e.g.*, that redesignation “would discourage the very transparency that CCE contends is lacking,” CCE’s counsel was able to submit a reply, CCE itself has no need for the information, the information should not be made available to competitors, the document is commercially sensitive, “[i]t is common practice for parties to apply blanket ... designations ... even where they contain these nonconfidential aspects,” CCE did not request any specific redesignations,” and “BLC’s public quotation of the agreements essentially eliminated the high risk of inadvertent disclosure ... while also making the quoted text publicly available to CCE and other interested parties.” BLC Reply at 10-13. In its Motion for Leave, BLC further faults CCE for not having filed a separate motion regarding the designations.

BLC’s varied contentions, including the “blame the victim” ones, are makeweight. “To obtain confidential status, . . . a party must do more than simply assert a desire to keep a document confidential.” *Stagecoach Group PLC & Coach USA, Inc. et al. – Acquisition of Control – Twin America, LLC*, MC-F-21035 (STB served Feb. 8, 2011), at 6. Here, BLC’s claims of “commercial sensitivity” are highly generalized, conclusory, and belied by the fact that most of the redacted documents, [REDACTED]

[REDACTED] are not marked confidential and do not contain any confidentiality clause. *Application of the National R.R. Passenger Corp. under 49 U.S.C. § 24308(a) – Canadian National Ry. Co.*, FD 35743 (STB served Dec. 11, 2015), at 2 (where an agreement contains no confidentiality provision, a party may not designate it as confidential and “[t]hat information is therefore properly treated as public”). [REDACTED]

The Board has prohibited the practice of parties in cases as “treat[ing] as confidential virtually their entire case” as BLC has done here, and admonished that doing so is “contrary to our regulations, our practice in other types of proceedings, and the spirit of open government.” *Procedures to Expedite Rail Rate Challenges to Be Under the Stand-Alone Cost Methodology*, EP 638 (STB served Apr. 3, 2003), at 10 (footnotes omitted). Also,

what may be “common practice” in uncontested proceedings or where the disputes are primarily commercial has little bearing in a show cause proceeding, especially one where the issues concern long-term concealment of the actual relationships among parties, unauthorized construction, operation, and control, efforts to bypass environmental requirements and review, and attempts to resolve those inquiries without further Board review.

The issue is not whether CCE was able to reply effectively. The issues are public openness, participation, and knowledge of potential efforts to evade Board requirements. In that regard, BLC’s ultimate position, that it be allowed “to withdraw the agreements from the record as an alternative to disclosing them to CCE [even presumably as confidential documents] or making them publicly available” (BLC Reply at 13), indicates a basic unwillingness to comply with the Board’s requirements, something that the Board may wish to weigh in considering other contentions of BLC and the other Brookhaven Terminal parties.

For the reasons stated above, CCE respectfully submits that the Brookhaven Terminal parties have failed to show cause that violations of 49 U.S.C. § 10901(a)(4) have not occurred and are not continuing.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg

*Counsel for Citizens Campaign
for the Environment*

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 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 that are known to be eligible to receive the document.

/s/ Peter A. Pfohl