

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

307766

ENTERED
Office of Proceedings
January 5, 2024
Part of
Public Record

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

January 5, 2024

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.-Room 1034
Washington, D.C. 20006

**Re: *U S Rail Corp. – Constr. & Op. Exemption – Brookhaven Rail Terminal,*
 FD 35141¹**

Dear Ms. Brown:

In a three-page decision served in these proceedings on September 27, 2023 (the “*September Order*”), the Surface Transportation Board, among other items not bearing upon Sills Road Realty LLC (“Sills Road”), directed Sills Road to “show cause why [it] should not be found to have violated 49 U.S.C. § 10901” with respect to Sills Road’s presumed “acquisition” (construction and ownership) of the railroad lines located on Parcel A within Brookhaven Terminal. *September Order*, 3. Sills Road responded to the Board’s inquiry on October 24, 2023. On November 13, 2023, Citizens Campaign for the Environment (“CCE”) replied to Sills Road’s filing (and those of other parties – the “CCE Reply”) as it evidently believed it was entitled to do.

¹ This proceeding also embraces *Brookhaven Rail Terminal & Brookhaven Rail, LLC—Petition for Declaratory Order*, FD 35819; *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; *Spectrum RR Holdings, LLC—Acquisition & Operation Exemption—Line of Sills Road Realty, LLC, in the Town of Brookhaven, N.Y.*, FD 36385; *Brookhaven Rail LLC—Construction & Operation Exemption—in Suffolk County, N.Y.*, FD 36398; and *Brookhaven Rail LLC—Petition for Exemption From Requirements of 49 U.S.C. § 10909*, FD 36399.

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

Ms. Cynthia T. Brown

January 5, 2024

Page 2

The CCE Reply included baseless allegations against Sills Road and misstatements of fact, but Sills Road was mindful of the Board's rules concerning party submissions – particularly the prohibition of replies to replies at 49 C.F.R. § 1104.13(c) – and refrained from submitting a sur-reply. Sills Road was confident the Board would recognize that CCE's baseless allegations concerning Sills Road went far beyond the scope of the Board's show cause Order which requested specific information from specified parties.

CCE's November 13, 2023 filing should have closed the record, but parties other than Sills Road offered additional filings nevertheless. Most recently, CCE tendered a six-page, single-spaced filing on December 19, 2023 (the "CCE Sur-sur-reply") preconditioned upon the Board's acceptance of post-November 13th sur-reply filings from Brookhaven Rail LLC ("BHR") and Brookhaven Logistics Center LLC ("BLC"). CCE's Sur-sur-reply, once again, goes beyond the scope of the Board's show cause order. A section of that filing attempts to revisit Sills Road's status at the Brookhaven Terminal by expanding the discussion to an indirect Sills Road holding (Brookhaven Rail Freight Services – "BRFS") on a tangential argument. The thrust of CCE's new argument appears to be that BRFS is a railroad common carrier knowingly in violation of required Board authorization as part of some vague conspiracy. CCE is wrong. BRFS is not a common carrier at the Brookhaven Terminal.

Sills Road reluctantly must respond, recognizing that doing so would be moot if the Board were either to reject all pleadings past November 13, 2023 in accordance with Board Rules, or to disregard the portions of those pleadings reaching beyond the *September Order's* scope of inquiry. But, unless or until the Board were to impose such order, Sills Road must request (and is hereby requesting) Board leave to file this very limited response to CCE's Sur-sur-reply in the interest of a complete record, and to allow Sills Road to address CCE's new line of argument regarding BRFS (assuming the Board were to entertain this new allegation).

To the extent at all pertinent here, BRFS, is an indirect Sills Road holding. It continues to operate at the Brookhaven Terminal under a "Cooperation and Transition Services Agreement" (the "Transition Agreement") with BLC. BRFS is a vestige of Sills Road's prior ownership of the Brookhaven Terminal warehouse facilities. Its ties to the facility will likely soon be severed. Under the Transition Agreement, BRFS has committed temporarily to provide certain "transitional services" at Brookhaven Terminal, including transloading, stevedoring, warehousing, and terminal facilities upkeep (not including railroad track maintenance) to third parties pursuant to arrangements or contracts between BRFS and the third-party service recipients. This transitional arrangement was intended to facilitate an orderly succession from Sills Road to BLC following the sale of Sills Road's property at the Brookhaven Terminal to

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

Ms. Cynthia T. Brown

January 5, 2024

Page 3

BLC. The Transition Agreement has a limited term, subject to brief extensions, and it is terminable by either party upon as little as 75 day's advance notice.

BRFS's services are at times related, but not integral, to BHR's common carrier service. BRFS does not offer, and has never held itself out to provide, common carriage. BRFS services are rendered pursuant to third-party arrangements or contracts, it bills customers separately from BHR, and it has no public rates. Accordingly, CCE's baseless allegation that BRFS is an unauthorized common carrier purposefully disregarding agency authorization procedures – aside from being a CCE-invented scandal – is outside of the scope of the Board's show cause inquiry. CCE's bewildering claim (which begs the motive behind it) is as meritless and unsupported as are its corresponding pot-stirring allegations of "scheming," "enmeshment," and "entanglement." Sur-sur-reply, 4.

Sills Road regrets having to speak up at this juncture, the procedural inattention of others notwithstanding. It would be better if the Board were to impose order by cutting off dialogue beyond the limited focus of the *September Order*. Given where these proceedings *should* be at this point, Sills Road will presume that CCE does not speak for the agency (and that it is not the prosecutor, judge, and jury CCE seems to believe that it is). Sills Road will leave it to the Board to ask the questions, assess the facts, and prescribe the path forward. And so, in the interest of procedural decorum, and in recognition of the *September Order*'s scope, Sills Road will not respond to any additional, unsupported allegations that CCE may present hereafter.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Counsel for Sills Road Realty LLC

cc: All parties of record