

235777

ENTERED  
Office of Proceedings  
April 3, 2014 April 3, 2014  
Part of  
Public Record

ATTORNEYS AT LAW  
WASHINGTON HARBOUR  
3000 K STREET, N.W.  
SUITE 600  
WASHINGTON, D.C. 20007-5109  
202.672.5300 TEL  
202.672.5399 FAX  
WWW.FOLEY.COM

WRITER'S DIRECT LINE  
202.295.4097  
dralston@foley.com EMAIL

CLIENT/MATTER NUMBER  
105011-0101

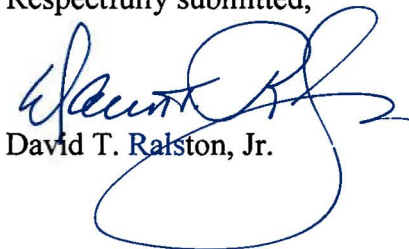
Ms. Cynthia T. Brown  
Chief, Section of Administration (PSA)  
Surface Transportation Board  
Office of Proceedings (PD)  
395 E Street, S.W.  
Room 1034  
Washington, D.C. 20423-0001

Re: **STB Finance Docket No. 35141, U S Rail Corporation—  
Construction and Operation Exemption—Brookhaven Rail  
Terminal – Reply to Motion to Reopen Proceeding**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket, please find Brookhaven Rail Terminal and Brookhaven Rail's Reply to Town of Brookhaven's Motion to Reopen Proceeding.

Respectfully submitted,

  
David T. Ralston, Jr.

Enclosures  
cc: Parties of Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 35141

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

---

**REPLY OF BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL,  
LLC TO TOWN OF BROOKHAVEN'S MOTION TO REOPEN PROCEEDING**

---

**David T. Ralston, Jr.  
Olivia S. Singelmann  
Zachary L. Coffelt  
Foley & Lardner LLP  
3000 K Street, N.W.  
Washington, D.C. 20007**

***Counsel for Brookhaven Rail Terminal  
and Brookhaven Rail, LLC***

Dated: April 3, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 35141

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

---

**REPLY OF BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL,  
LLC TO TOWN OF BROOKHAVEN'S MOTION TO REOPEN PROCEEDING**

Pursuant to 49 C.F.R. § 1104.13, Brookhaven Rail Terminal (“BRT”) and Brookhaven Rail, LLC, a Class III rail carrier (“Brookhaven Rail”)(collectively, “Respondents”), reply in opposition to the reopen/reconsideration motion filed by the Town of Brookhaven (“Town”) with the Board on March 14, 2014 with respect to STB Finance Docket No. 35141 (“Motion”).<sup>1</sup> The Town’s Motion should be denied because: (1) the Town has not shown or established material error, new evidence, or substantially changed circumstances to reopen the earlier proceeding, as required by 49 U.S.C. § 722(c), 49 C.F.R. § 1115.4, and Board precedent; (2) the grounds asserted by the Town are factually and legally without merit; and (3) the grounds asserted and relief sought in the Motion are not appropriate for consideration in a reopened proceeding under FD 35141; rather, these issues (to the extent they are not able to be resolved by the parties on their own) should be considered in connection with a petition for enforcement or declaratory order. To that end, Respondents are committed to continuing constructive discussions with the

---

<sup>1</sup> The Town’s Motion requests the Board (1) reopen the proceeding in STB Finance Docket No. 35141 (occasionally “FD 35141”), which concluded with the Board’s final decision, *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket No. 35141 (STB served Sept. 9, 2010)(“2010 Decision”), and (2) award the Town injunctive relief curtailing certain BRT railroad activities at BRT’s existing terminal and construction of BRT’s expansion facilities and track on adjacent parcels.

Town to narrow issues of disagreement. Respondents will also be filing, forthwith, a petition for declaratory order with the Board to address issues that require a Board decision to bring to final conclusion, including issues of preemption and whether the additional track to be installed by BRT constitutes a “spur, industrial, team, switching, or side track” within the scope of 49 U.S.C. § 10906.

**I. PRELIMINARY STATEMENT**

BRT is a railroad transloading facility located in Yaphank, Long Island, New York. Brookhaven Rail provides rail carrier and transloading services at BRT, principally switching activities and the receipt and marshalling of freight rolling stock at BRT for transportation over the rail lines of the Long Island Railroad (“LIRR”). Freight rail services are provided to BRT and Brookhaven Rail over LIRR lines by the New York & Atlantic Railway Company (“NYA”), a Class III rail carrier, which interchanges with Brookhaven Rail upon arrival of the switch lead at BRT.<sup>2</sup> In the 2010 Decision, the Board exempted BRT’s construction and operation of rail lines and related rail facilities from the prior approval requirements of 49 U.S.C. § 10901, subject to specified environmental mitigation requirements. 2010 Decision, slip op. at 8.

Since the commencement of rail and terminal operations on September 2, 2011, BRT has had a profoundly beneficial impact for consumers, markets and transportation on Long Island, reducing the delivered cost of commodities such as lumber and flour, and reducing truck traffic in the congested New York metropolitan area. For example, a number of bakeries have begun to

---

<sup>2</sup> Oakland Transportation Holdings LLC owns all of the equity interests in Brookhaven Rail (formerly known as US Rail New York, LLC), pursuant to a control exemption approved by the Board in *Nevada 5, Inc. and Oakland Transportation Holdings LLC—Control Exemption—GTR Leasing LLC and US Rail Holdings LLC*, STB Finance Docket No. 35635 (STB served June 15, 2012). See also, *Gabriel D. Hall – Corporate Family Transaction Exemption – U S Rail New York, LLC and U S Rail Corporation*, STB Finance Docket No. 35458 (STB served Jan. 7, 2011). BRT is the trade name for Brookhaven Terminal Operations, LLC.



ship IB flour via BRT and rail, reducing their transportation costs and permitting them to purchase materials from a wider range of suppliers. Recently, BRT transloaded approximately 9 million pounds of flour in a month, its highest month to date. BRT estimates that it has handled via rail more than the equivalent of 7,500 trucks since commencing operations. Thus, many of the very benefits identified by the Board in its 2010 Decision, such as reduction of shipper reliance on truck transportation and alleviation of highway congestion in the New York City metropolitan, 2010 Decision, slip op. at 4, have been realized. Indeed, BRT's impact on the community has been so positive that the New York State Department of Transportation ("NYSDOT") has awarded BRT a \$2.5 million grant award to help BRT's expansion – the very expansion challenged by the Town here.

BRT's existing rail line and facilities occupy essentially BRT's entire original 28-acre site, which is referred to in the Motion and this Reply as "Parcel A."<sup>3</sup> Because the success of BRT's existing operations have brought it close to capacity, BRT has undertaken expansion efforts onto properties immediately adjacent to its existing facility and rail line on Parcel A, properties referred to in the Motion and this Reply as "Parcel B" (19.3 acres) and "Parcel C" (73.7 acres).<sup>4</sup> The Parcel B and C expansion will be supported in part by the NYSDOT grant, which constitutes approximately 52% of BRT's planned track construction budget on those parcels.

Notwithstanding BRT's many benefits to Long Island consumers, retailers and wholesalers, the financial support of the NYSDOT, preemption of Town regulation by the

---

<sup>3</sup> Presciently, the Board anticipated more than three years ago in its 2010 Decision that BRT's rail operations and facilities would occupy the entire 28-acre site, *id.*, slip op. at 5, n.5.

<sup>4</sup> A site map is provided at Exhibit 1.

Board's jurisdiction under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), and Respondents' good faith efforts to keep the Town informed of BRT and Brookhaven Rail expansion activities, the Town nonetheless has undertaken actions directly interfering with BRT's construction, expansion and operations. These actions include impeding an environmental assessment, issuing a stop work order in March 2014 (ostensibly limited to non-railroad activities but directly impacting rail construction), and filing a lawsuit in New York state court – actions all taken *before* coming to the Board with the instant Motion.

The Town's issuance of the stop work order already has caused significant delays in the grading efforts on the Parcel B construction site, where BRT is working to achieve a flat land surface to lay the additional trackage, and BRT may lose the \$2.5 million NYSDOT grant award as a result. The disruption of BRT's construction and contractual affairs will impact other companies involved in the construction, potentially idling hundreds of workers, causing serious injury to the Long Island economy, and disrupting interstate commerce. Accordingly, while we submit that the instant Motion should be denied for procedural reasons, BRT and Brookhaven Rail intend to commence a separate petition for a declaratory order forthwith, in order to obtain expedited relief from the Board concerning the stop work order.

## **II. FACTUAL BACKGROUND**<sup>5</sup>

### **A. History Of The Brookhaven Rail Terminal**

For contextual purposes, and to correct misstatements in the Motion, a brief description of the history of the Respondents is provided below. The parties are introduced below, in the chronological order in which each became involved.

---

<sup>5</sup> The facts herein are supported by the declaration of Daniel K. Miller following this Reply, and documents attached hereto.

## **1. Sills Road Realty LLC And The Rail Transloading Facility**

Sills Road Realty LLC (“Sills Road”) is a New York limited liability company, comprised of five equal members, including Suffolk & Southern Rail Road LLC (“Suffolk & Southern”).<sup>6</sup> Sills Road was formed in 2006 by a producer and users of crushed stone to develop a rail transloading facility on Long Island that would economically meet the needs of its members for the transportation of stone and other construction materials, as well as to serve the broader Long Island market for such products. To provide adequate facilities for these activities, in May 2007, Sills Road purchased the 28-acre tract of land in Yaphank, New York, to build BRT, now known as “Parcel A.”

In 2007, Sills Road and U S Rail Corporation (“US Rail”), a Class III railroad, entered into a thirty-year lease and operating agreement. Under the agreement, US Rail leased the 28-acre Parcel A property from Sills Road to construct and operate BRT on Parcel A.

For the construction of BRT, US Rail hired Adjo Contracting Corporation (“Adjo”), a New York corporation, to serve as the general contractor to grade and excavate the Parcel A site. Watral Brothers, Inc. (“Watral”) and Pratt Brothers, Inc. (“Pratt”) are both New York corporations that subcontracted with Adjo to perform related construction activities at the Parcel A site.

## **2. Federal Lawsuit And Settlement**

In October 2007, the Town issued Appearance Tickets to Sills Road, Suffolk & Southern, Adjo, Watral Brothers, and Pratt Brothers for alleged violations of the Town’s zoning ordinances. In November 2007, Sills Road, US Rail, Watral Brothers, Pratt Brothers, Adjo, and

---

<sup>6</sup> Suffolk & Southern was initially formed to become the common rail carrier for the rail transloading facility, but never obtained such status.

Suffolk & Southern (collectively, “BRT Litigants”) filed a lawsuit against the Town, Case No. 2:07-cv-04584, in the United States District Court for the Eastern District of New York (the “Federal Lawsuit”) to enjoin the Town’s actions and to obtain damages. On June 30, 2009, U.S. District Court Judge Thomas C. Platt entered an Order denying the BRT Litigants’ motion for preliminary injunction. Federal Lawsuit, Dkt. 31, Order.

The parties subsequently settled the Federal Lawsuit, and on April 22, 2010, Judge Platt entered an Order that contained the terms of a stipulated settlement agreement between the Town and the Original BRT Litigants (“2010 Stipulation of Settlement”), Exhibit 2.<sup>7</sup> The 2010 Stipulation of Settlement restricts the definition of the “Project” to Parcel A alone (the only parcel at issue in that proceeding), defining it as “the construction and operation of a rail terminal located on Sills Road in Yaphank, New York . . . on a 28 acre property owned by [Sills Road].” *Id.* The 2010 Stipulation of Settlement contains a series of requirements that the parties agreed to abide by with respect to the Project. *Id.*, p. 1.

The parties agreed that the Project would be constructed consistent with the site plan attached thereto (the “Reference Site Plan”). The parties further agreed that the Project would be constructed pursuant to the “Applicable Standards” defined as: “(i) those provisions of the Town Code of the Town of Brookhaven and the Code of Suffolk County set forth in the Reference Site Plan and (ii) all applicable federal standards.” 2010 Stipulation of Settlement, ¶ 2. The 2010 Stipulation of Settlement further provides: “No additional approval of the Town or any agency or department thereof shall be required to construct or operate the Project as contemplated by the

---

<sup>7</sup> US Rail filed the 2010 Stipulation of Settlement with the Board in April 26, 2010, 2010 Decision, slip op. at 2.

Reference Site Plan unless, as set forth in paragraph [11]<sup>8</sup> below, the Project is found not to be subject to STB jurisdiction.” *Id.* Of course, the Board found the Project subject to STB jurisdiction later in 2010, and specifically incorporated the 2010 Stipulation of Settlement, 2010 Decision.

The 2010 Stipulation of Settlement required the BRT Litigants, excluding US Rail, to collectively pay the Town \$1 million, payable in installments, for public improvements. *Id.* at ¶4. To date, the Town has already received more than \$450,000 from the BRT Litigants. The Town, for its part, was required to, *inter alia*, dismiss all outstanding Appearance Tickets with prejudice and withdraw all stop work orders, which it did. *Id.* at ¶ 8.

### **3. BRT Obtained STB Exemption**

While the Federal Lawsuit was pending, on August 7, 2008, US Rail filed a petition with the Board under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10901 to construct and operate BRT on Parcel A. *See*, 2010 Decision. On September 7, 2010, after completing a Draft Environmental Assessment (“Draft EA”), receiving comments from numerous public officials, issuing a Final Environmental Assessment (“Final EA”) and incorporating the 2010 Stipulation of Settlement into its Order, the Board granted US Rail’s petition for exemption from the provisions of 49 U.S.C. § 10901, authorizing the construction

---

<sup>8</sup> The 2010 Stipulation of Settlement contains a typographical error in that it improperly cites to “paragraph 10” (which relates to the delivery of “covenants and restrictions with respect to the setbacks and vegetation requirements reflected in the Reference Site Plan . . .”) instead of paragraph 11 (which relates to STB jurisdiction). 2010 Stipulation of Settlement, ¶ 2.

and operation of BRT on Parcel A. *Id.*<sup>9</sup> Moreover, and critically, FD No. 35141 and the Board's 2010 Decision granting the exemption concerned *only* Parcel A.

**B. Current Operations And Planned Expansion Of BRT**

Since September 2011, Brookhaven Rail has operated BRT as a railroad facility.<sup>10</sup> Brookhaven Rail and BRT's current major rail customers include The Home Depot, Wenner Bread, one of the largest bakeries on Long Island, and Renewable Energy Group, Inc., a leading North American biodiesel producer and distributor.

In 2011 and 2012, Brookhaven Rail also gained the right to control the additional property immediately adjacent to the rail terminal, namely Parcels B and C, and it holds an easement for the property on which track will be laid. On Parcels B and C, Brookhaven Rail is working to lay the additional trackage and to construct storage and warehousing facilities for the sole and important purpose of expanding its customer operations. As can be seen on the site map, Parcel B and Parcel C adjoin Parcel A and the existing BRT rail terminal. (Ex. 1). The additional trackage on Parcels B and C will connect to the *existing* BRT rail yard on Parcel A, and utilize the same main line switch and interchange with the NY&A and the LIRR. As with Parcel A, rail operations on Parcels B and C will be controlled and operated by Brookhaven Rail as part of the same railroad transload facility, BRT.

---

<sup>9</sup> The Final EA notes that the U.S. Environmental Protection Agency concurred with the finding of the Board's Section of Environmental Analysis that there would be no significant environmental impacts from the project.

<sup>10</sup> Brookhaven Rail is the lessee on each of Parcel A, B, and C; quoting, invoicing and billing to shippers is done through Brookhaven Rail, subject to Brookhaven Rail Terms & Conditions and Tariff; BRT is marketed by Brookhaven Rail exclusively; and Brookhaven Rail provides the transloading services to shippers.

Although not required by law, the Town has had ample and express notice of BRT's expansion plans. On June 29, 2012, BRT sent the Town notice that it would commence construction of the additional tracks extending from Parcel A to Parcels B and C. (June 29, 2012 Letter from J. Pratt to M. Miner). The notice provided: "Since the expansion is clearly ancillary to the operation of the line of rail authorized by the [STB], the construction, and operation, qualifies under 49 USC 10906 as excepted from the need for further authorization." The notice enclosed a Storm Water Pollution Prevention plan to manage drainage during the construction phase.<sup>11</sup>

In late September 2012, representatives from BRT met with representatives from the Town in a continuing good faith effort to apprise the Town of construction activities. At the time, BRT was considering constructing a propane terminal on Parcels B and C. Although the propane terminal has not yet been built, during the meeting BRT once again provided grading plans showing that the grade must be brought to approximately 50 feet above sea level to lay tracks and construct facilities.<sup>12</sup>

On September 19, 2013, in recognition of the success of the terminal and the importance of expanding its reach, New York Governor Cuomo announced that BRT had been awarded a grant through the NYSDOT Passenger and Freight Rail Assistance Program (PFRAP) to support

---

<sup>11</sup> By letter dated July 3, 2012, Matthew Miner, the Town's Chief of Operations, responded to BRT's notice. (July 3, 2012 Letter from M. Miner to J. Pratt). Mr. Miner conceded that the construction on Parcels B and C is *not* subject to state and local regulation and is preempted by federal law: "As long as the work relates to the construction and operation of the rail line, it would appear that Brookhaven's authority is limited as its Town Code and New York State law would be superseded by Federal law." *Id.* (emphasis added).

<sup>12</sup> Despite the Town's allegations in its Motion of sand-mining, BRT is simply grading the property pursuant to a grading plan in the ordinary course of construction, just as was done on Parcel A. BRT is grading to a target site elevation that is realistic for its expected needs and rail and rail transportation-related operations. Further details will be provided in the petition for declaratory order to be filed by BRT and Brookhaven Rail.

the proposed track extension. The anticipated PFRAP grant will contribute \$2.5 million towards construction costs for the estimated \$4.8 million project, which is approximately 52% of the total projected cost.

Once again, although under no legal obligation to do so, in 2013, Brookhaven Rail commissioned and paid for an independent environmental review of Parcels B and C for delivery to the Town, which was similar to that provided to the Town for Parcel A pursuant to the 2010 Settlement Order. An independent environmental consulting firm, Gannett Fleming, Inc. (“Gannett Fleming”) conducted the environmental overview and analysis evaluating the environmental setting and potential resource concerns related to the additional trackage planned for Parcels B and C (the “Environmental Overview”). Gannett Fleming completed the Environmental Overview in February 2014. Significantly, Gannett Fleming concluded that there *were no environmental concerns implicated by the proposed expansion* onto Parcels B and C. BRT provided a copy of the Environmental Overview and these conclusions to the Town on February 26, 2014.<sup>13</sup>

In addition to the numerous notices and correspondence exchanged with the Town, there have been dozens of meetings with Town personnel regarding Parcel A and the related construction over the past four years, and numerous meetings concerning Parcels B and C. Furthermore, on August 5, 2013, BRT hosted a meeting at BRT with the East of Hudson Rail Freight Operations Task Force, attended by members of the New York Congressional delegation,

---

<sup>13</sup> Contrary to the Town’s claims, BRT has not laid track directly under the Long Island Power Authority (“LIPA”) power lines without proper authorization. BRT is expressly authorized to lay track connecting adjoining parcels because BRT purchased two permanent easements from LIPA that expressly authorize BRT to construct rail and truck access infrastructure between Parcels A and B.



New York State Assembly members, officials from the Town and Suffolk County, and the news media. The attendees addressed Long Island and New York freight rail issues, and toured BRT.

**C. The Town's State Court Lawsuit, "Stop Work" Order And Board Filing**

On March 11, 2014, the Town filed suit against Respondents in the Supreme Court of the State of New York, County of Suffolk, alleging that Respondents violated certain state and local ordinances, and breached the 2010 Stipulation of Settlement, and seeking declaratory, injunctive and monetary relief. This filing came despite the Town's 2010 agreement that that Project, as contemplated by the Referenced Site Plan, required "no additional approval of the Town" for construction and operation, *supra* 6, despite BRT's payment of almost \$500,000 for public improvements, *supra* 7, despite the Town's 2012 admission that Town regulation of construction and operation of the rail line on Parcels B and C is preempted by federal law, *supra* 9, n.11, and despite dozens of Respondents' communications with the Town on environmental and other issues, *supra* 9-10.

The Town also served BRT with a "stop work" order dated March 12, 2014, which, on its face, only applies to Parcel B. (March 12, 2014 Stop Work Order.) The stop work order provides: "Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees, excavating and removing excavated materials] regarding any matter not pertaining to railroad construction." *Id.* The stop work order may potentially be construed (and enforced), however, to encompass *all* of BRT's construction activities throughout the development, as they all pertain to railroad construction.<sup>14</sup>

---

<sup>14</sup> Whatever the precise reach of the stop work order, the Town's issuance of the stop work order evidences that the Town asserts its regulation apply to rail-transportation activities by BRT and Brookhaven Rail, despite ICCTA preemption. Respondents will address that issue in the forthcoming petition for declaratory order.

On March 15, 2014, more than three years since the Board's final decision in FD 35141, the Town filed the instant Motion before the Board. The Motion raises matters as to Parcel A, many of which the Town has known since at least 2012, *supra* 8, and raises matters as to Parcels B and C, even though neither was the subject of the FD 35141 proceeding at all, *supra* 7. The Motion does not assert material error in the Board's 2010 Decision, nor does it purport to present newly discovered evidence. Motion, at pp. 9-11.

The Motion does reference "substantial" changed circumstances since 2010, such as BRT's expanded service and customer base, Motion, p. 9 at second bullet (assumes expansion of customer base and possible new LIRR rail connection to be a "substantial change in circumstances), but does not indicate how those changes would mandate that the Board alter its original, 2010 Decision, to reach a different result. Motion, p. 9, at second bullet. This Reply follows.

### **III. STANDARD FOR REOPENING PROCEEDING**

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, the Board will grant a petition to reopen only upon a showing of material error, new evidence, or substantially changed circumstances. *E.g., Norfolk Southern Railway Co. – Adverse Abandonment – St. Joseph County, Ind.*, STB Finance Docket No. AB 290, slip op. at 3 (STB served Apr. 17, 2012); *Tongue River Railroad Company, Inc. – Construction And Operation – Western Alignment*, STB Finance Docket No. 30186, slip op. at 5 (STB served June 15, 2011); *Desert Xpress Enterprises, LLC – Petition For Declaratory Order*, STB Finance Docket No. 34914, slip op. at 6 (STB served May 7, 2010); *BNSF Railway Co. – Abandonment Exemption – In Oklahoma County, OK*, STB Finance Docket No. AB-6, slip op. at 5 (STB served June 5, 2008).

The Board's decision in *Tongue River Railroad Company, Inc.* is particularly pertinent to the instant Motion and amplifies the applicable statutory standard of Section 722(c). In that case,

petitioners sought to reopen a Board prior decision granting Tongue River Railroad Company, Inc. authority to construct a new railroad line, arguing substantially changed circumstances and newly discovered evidence. After stating the Section 722 statutory standard for evaluating a petition to reopen, the Board specifically held: “. . . alleged grounds must be sufficient to convince us that, if taken as facially true and correct, they might lead us to materially alter our decision in this case. If petitioner has presented *no new evidence or changed circumstances that ‘would mandate a different result,’ then the Board will not reopen.*” *Id.*, slip op. at 5 (emphasis added), citing *Montezuma Grain v. STB*, 339 F.3d 535, 542 (7th Cir. 2003); *DesertXpress Enterprises, LLC*, slip op. at 6-7. Thus, here, the FD 35141 proceeding cannot be re-opened unless the Town can establish that its petition justifies – if not mandates – a material alteration in the 2010 Decision tantamount to a different result, such as denial of the exemption authority.

Furthermore, with more than three years having passed since the final Board decision in FD 35141, the Town must establish *compelling changed circumstances*, weighed against countervailing equitable concerns of finality and prejudice to Respondents, for re-opening: “[w]here significant time has passed since issuance of a final Board decision, a party must establish compelling changed circumstances or new evidence to warrant reopening because otherwise petitions to reopen could be filed without end.” *Tongue River Railroad Company, Inc.*, slip op. at 5, citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554-55 (U.S. 1978)(denying petition to reopen where petitioner did not allege sufficient new evidence or changed circumstances to justify changing the Board’s prior decision, especially considering allegations against the equitable concerns of finality and repose, slip op. at 7.

As the Board observed, “. . . we must also weigh the magnitude of the alleged bases for reopening this case against countervailing equitable concerns regarding administrative finality and repose and detrimental reliance by the applicant and the public.” *Id.*, slip op. at 5, *citing Ariz. Pub. Serv. Co. and PacifiCorp v. The Atchison, Topeka & S.F. Ry. Co.*, 3 S.T.B. 70, STB Finance Docket No. 41185, slip op. at 5-6 (STB served Apr. 17, 1998). The Board further stated that “[c]oncerns of detrimental reliance and the need for administrative repose become greater the longer the time between our decision in a case and the time a petition for reopening is filed.” *Id.*, slip op. at 5, *citing Ind. Hi-Rail Corp—Lease & Operation Exemption—Norfolk & W. Ry. Company Line Between Rochester & Argos, Ind. & - Exemption From 49 U.S.C. 10761, 10762, & 11144*, STB Finance Docket No. 32162 (STB served Jan. 30, 1998).

#### **IV. ARGUMENT**

##### **A. The Motion Does Not Meet The Requirements To Reopen The Prior Board Matter As The Town Has Not Shown Material Error, New Evidence Or Changed Circumstances Mandating A Different Result**

As the Motion does not mention, much less discuss, the applicable statutory and regulatory standards of 49 U.S.C. § 722(c) and 49 C.F.R. § 1115, or the Board’s precedent, for a reopening, *per force*, it does not come close to demonstrating that the town’s allegations meet the standard for re-opening the 2010 Decision, either as to Parcel A or otherwise.<sup>15</sup> At most, the Motion purports to argue changed circumstances since 2010, such as BRT’s expanded services on Parcel A and its growing customer base, Motion, p. 9 at second bullet. However, the Town makes no suggestion, much less establishes, that those changed circumstance are compelling

---

<sup>15</sup> As noted *supra* 11, the Motion does not assert material error in the 2010 Decision, nor claim to present newly discovered evidence. Thus, those grounds can be eliminated from consideration.

reasons to reopen the proceeding, or would *mandate* that the Board alter the 2010 Decision to reach a different result. Nor has the Town addressed how the Town's supposed concerns with respect to BRT's intended expansion would weigh against countervailing equitable concerns, as required by the decision in *Tongue River Railroad Company, Inc.* For that matter, the Motion does not seem to even request a change in the 2010 Decision. Thus, again *per force*, the Town fails to make the statutorily required predicates, and provides the Board with no basis to re-open FD 35141 – period.

Specifically as to Parcel A issues, most of the issues raised in the Motion consist of complaints about BRT's alleged *non-compliance* with conditions in the Board's 2010 Order pertaining to Parcel A. *E.g.*, Motion p. 1 (“The Town now respectfully requests that: (1) the Board *re-open* STB F.D. No. 35141 *to address BRT's failure to comply with the conditions and environmental requirements imposed by this Board therein*, as well as a substantial change of circumstances.”)(emphasis added). This is further seen from the Town's allegations sprinkled throughout the Motion concerning Parcel A issues (so far as they can be divined from the Motion):

- Alleged use of Parcel A for burial of construction debris. Motion, p. 8, at d. (“combined sites”).
- Alleged improper track construction (presumably on Parcel A) near Long Island Expressway. Motion, p. 9, at g.
- Various allegations concerning warehouses and material handling facilities. *Id.*, at h.
- Alleged failures to comply with the conditions and environmental requirements imposed by the Board in its September 7, 2010 order, including vegetation and setback requirements, structures not contained in the 2010 plan or allowed on the site plan incorporated in the Stipulation, conducting activities not reflected on the site plan or permitted by the Board and overall Order, failing to employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils, failing to develop and implement a spill prevention, control and countermeasure plan (SPCC Plan). *Id.*, at first bullet.

While some non-compliance allegations might be a valid basis for re-opening a proceeding, these certainly are not, even if assumed accurate for purposes of the Motion. In short, they do not justify a re-opening as they do not result in an alteration of, or different result, from the 2010 Decision, a point confirmed by the fact the Town does not even seek new or different conditions as to Parcel A. Additionally, the Town has not argued, much less established, that its non-compliance allegations are so compelling as to outweigh the countervailing equitable considerations, such as administrative finality and prejudice to other parties.

In lieu of a motion reopen, the Town could have brought a petition to enforce. *See, e.g., Union Pacific Corporation Union Pacific Railroad Company & Missouri Pacific Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Co., SPCSL Corp., & The Denver & Rio Grande Western Railroad Co.*, STB Finance Docket No. 32760 (STB served Dec. 20, 2013)(joint petition for enforcement of prior Board decision denied as petitioners unable to show entitlement to relief based upon the Board’s prior decision); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. NOR 42056 (STB served July 27, 2011)(petition for enforcement of decision ruled upon, in lieu of Board *sua sponte* re-opening proceeding, where parties asked the Board not to re-open, and if the Board reopened its prior decision, Board would need to evaluate the relevant changed circumstances).

Accordingly, with the Town clearly unable to establish the requirements for a re-opening, the Board should deny the Motion. While, as shown below, the Town’s non-compliance allegations are without merit, Respondents are nonetheless committed to constructive discussions with the Town to resolve the Town’s concerns as to the non-compliance issues swirling around

Parcel A. Should the parties not resolve these concerns, they can be addressed (to the extent necessary) in connection with Respondents' forthcoming petition for a declaratory order.

**B. BRT Has Not Failed To Comply With The Board's Decision Concerning Parcel A**

Should the Board, notwithstanding the inadequacy of the Motion, elect to address the merits of the Town's allegations concerning Parcel A, they will be found to be without merit. First, expansion of BRT's operations and customer base is well within the scope of the 2010 Decision, which specifically noted: (1) the proposed 18,000 feet of track to be constructed on Parcel A, 2010 Decision, slip op. at 1, n.2; (2) BRT's planned use of all 28 acres of Parcel A, *id.* at 5, n.5; (3) possible expansion of BRT's customer base, *id.* at 4; and (4) per the Draft EA, as confirmed by the Final EA, construction and operation of BRT would not result in significant *cumulative* environmental impacts, *id.* at 5.<sup>16</sup>

Second, as the Board has repeatedly noted, Board regulatory approval is not required for (1) construction or expansion of facilities to support existing rail operations that do not penetrate new rail markets; (2) increases in service on an approved rail lines, or (3) construction of spur or ancillary rail lines. *E.g., Friends of the Aquifer et. al. Decision*, STB Finance Docket No. 33966, slip op. at 3-4 (STB served Aug. 15, 2001); *Fletcher Granite Company, LLC- Petition For Declaratory Order*, STB Finance Docket No. 34020, slip op. at 3-4 (STB served June 29, 2001); 49 U.S.C. § 10906; *see also, Nicholson v. Interstate Commerce Com.*, 711 F.2d 364 (D.C. Cir. 1983); *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186 (E.D. Wash. 2000).

---

<sup>16</sup> As the 2010 Decision noted, citing the Draft EA, Parcel A is an industrial area; already highly disturbed; without wetlands, surface waters, important wildlife habitats, historic structures or archeological resources; more than a quarter mile from noise-sensitive receptors, and with minimal emission of regulated pollutants. 2010 Decision, slip-op. at 5. Indeed, the Town's own Division of Environmental Protection had concluded that the project would not have a significant impact on the environment, applying New York state law. *Id.* The Motion provides *no record evidence* contrary to those conclusions.

When new facilities supporting rail operations are in the *same* geographic market as existing rail operations, the facilities are considered an expansion of existing facilities, not new construction, and are exempt from Board regulatory authority and review. *E.g., Friends of the Aquifer.*

In the instant case, not only are the expansion facilities in the same geographical market – they are literally next door to the existing facilities and an extension of them. Therefore, as to rail facility expansion issues, re-opening is a moot point, because there is no statutory or regulatory basis for the Board to consider a change of the 2010 Decision on that basis.

Third, as to non-compliance issues, while the Motion provides few details, those identified by the Town are wrong, immaterial or prematurely raised. The alleged improper burial of construction debris on Parcel A, Motion, p. 8, at d. (“combined sites”), is simply untrue,<sup>17</sup> while the track construction on Parcel A within the set-back area from the Long Island Expressway, Motion, p. 9, at g, is immaterial as there is no identified adverse impact related to the infringement.

The various non-compliance allegations concerning warehouses and material handling facilities, *id.*, at h, are also inaccurate. There is no “unauthorized” facility on Parcel A. The Reference Site Plan includes a shaded box with no dimensions that is referred to as a “covered transload *area*.” (Ex. 2, 2010 Stipulation of Settlement and attached Reference Site Plan) (emphasis supplied). Notably, the term *area* does not limit or otherwise specify the size or number of transloading facilities permitted. Instead, as expressly authorized by the Reference Site Plan, BRT has a covered transloading area on Parcel A.

---

<sup>17</sup> For example, the use of crushed recycled concrete aggregate for subsurface stabilization and engineered fill is proper as it meets industry standards.



Moreover, the facilities on Parcel A do not span 200,000 square feet *each*, as the Town claims. Instead, BRT currently has a single 60,000-square-foot transload area. The transload area is comprised of two, interconnected, 30,000-square-foot, pre-engineered, ClearSpan structures. The ClearSpan structures are connected by multiple interior corridors to allow free movement of forklifts across the 60,000-square-foot area. BRT's customers, The Home Depot and other local lumber distributors, currently require approximately 60,000 square feet of covered storage to protect plywood and other building materials from the elements. From a cost efficiency standpoint, it was more economical to erect and connect two 30,000-square-foot ClearSpan structures—considered stock size—than to special order a single 60,000-square-foot ClearSpan structure. Functionally, however, they serve as a single 60,000-square-foot transload area in compliance with the 2010 Stipulation of Settlement, and the engineering firm listed in the 2010 Stipulation of Settlement, Sidney B. Bowne & Son, L.L.P., certified that the ClearSpan structures complied with the 2010 Stipulation of Settlement.

Additionally, all water connections were installed in conjunction with — and this with the knowledge and express approvals of — Suffolk County Water Authority. Similarly, the septic facilities were installed by licensed contractors in accordance with approved engineering drawings and were inspected by Bowne AE&T Group.

Finally, the alleged failures to comply with vegetation and setback requirements, best management construction practices, and to develop a spill prevention, control and countermeasure plan, Motion, p. 9, at first bullet, are premature or erroneous. Because the construction on Parcel A is not yet fully completed, certain finishing requirements in the 2010 Settlement Order, such as planting a green barrier, have not yet been completed. Prior to the winter months and Hurricane Sandy, BRT was planting a green barrier in good faith and material

compliance with the 2010 Settlement Order. As Respondents have repeatedly communicated to the Town, during the winter months, and while heavy equipment still regularly traverses the site, it simply is not feasible to complete plantings on the site. Upon completion of construction on Parcel A, finishing requirements will be met. Required best construction management practices have been employed and the spill prevention plan is in place, and was in place prior to receipt of commodities to which it relates.<sup>18</sup>

**C. The Town's Allegations Concerning Parcel's B and C Are Outside The Scope Of A Motion To Reopen, And Must Be Brought By Petition For Declaratory Order**

As demonstrated above, the 2010 Decision was limited to Parcel A, and had no application to Parcels B and C; thus, there are no findings in the 2010 Decision with respect to Parcels B and C to be altered. Consequently, re-opening would be meaningless as to those parcels. Instead, an appropriate petition for declaratory order pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721(a) (and payment of the required filing fee) are required for board consideration of Parcel B and C issues,<sup>19</sup> which is what Respondents intend to do.

The Town raises three main points as to Parcels B and C:

- Whether BRT's rail activities on those parcels are an expansion of BRT's rail operations on Parcel A, or new rail line construction. Motion, p. 8, at a, b; pp. 9-10.

---

<sup>18</sup> BRT and Brookhaven Rail are also subject to periodic and regular safety inspections by the Federal Railroad Administration.

<sup>19</sup> The Town seeks to have the Board determine essential factual issues, render legal decisions, and then "grant new declaratory and injunctive orders" to address each issue, Motion, p. 9, quintessentially, in the nature of a petition for declaratory order pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721(a).

- The extent to which BRT's activities on Parcels B and C constitute rail transportation, and by extension, the extent of federal preemption of state and local regulation of those activities. Motion, p. 8, at e, f; pp. 10-11.
- Whether the BRT rail line to be constructed on Parcels B and C is, or is not, a "spur, industrial, team, switching, or side tracks," within the scope of 49 U.S.C. § 10906. Motion, pp. 9-10.

As noted previously, Respondents are now working on a petition for declaratory order to present those issues to the Board for consideration. Accordingly, the Board should dismiss the Motion, and revisit these issues once Respondents' petition has been filed.<sup>20</sup>

## V. CONCLUSION

For all the foregoing reasons, Respondents respectfully requests that the Board deny the Motion.

---

<sup>20</sup> Should the Board proceed to entertain the Motion on the merits now, BRT would establish:

- All of BRT's rail activities on Parcels B and C are an expansion of BRT's rail operations on Parcel A, and not new rail line construction. *Supra* 8-10, 17-18.
- All of BRT's activities on Parcels B and C constitute rail transportation within the meaning of 49 U.S.C. §10501(b), *id.*, and state and local regulation of those activities are pre-empted. *Id.*; e.g., *Green Mountain R.R. v. State of Vermont*, 404 F.3d 638 (2d Cir. 2005)(preemption for cement transloading facility).
- The BRT rail line to be constructed on Parcels B and C is a "spur, industrial, team, switching, or side tracks," within the scope of 49 U.S.C. § 10906, as it will be used to serve shippers similar to those already being served by BRT, and is in the same geographic territory and proximity as BRT's current service, *Indiana Railroad Co. - Petition For Declaratory Order*, STB Finance Docket No. 35181 (STB served April 15, 2009), and will be used for the "... loading, reloading, storage and switching of care incidental to the receipt of shipments by the carrier or their delivery to the consignee..." *Nicholson*, 711 F.2d 367-68, n. 11, *citing New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942, 17 L. Ed. 2d 873, 87 S. Ct. 974 (1967).

Respectfully submitted,

*Brookhaven Rail Terminal and Brookhaven  
Rail, LLC*

By:   
David T. Ralston, Jr.  
Foley & Lardner LLP  
3000 K Street, N.W.  
Washington, D.C. 20007

*Counsel for Brookhaven Rail Terminal and  
Brookhaven Rail, LLC*

Dated: April 3, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

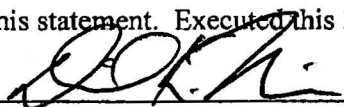
FINANCE DOCKET NO. 35141

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

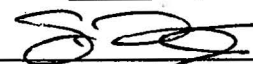
---

**DECLARATION OF DANIEL K. MILLER**

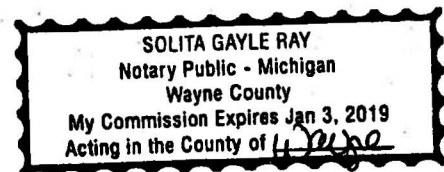
I, Daniel K. Miller, General Manager and Chief Financial Officer of Brookhaven Terminal Operations, LLC, t/a Brookhaven Rail Terminal, and Brookhaven Rail, LLC, declare under penalty of perjury that I have read the foregoing Reply of Brookhaven Rail Terminal and Brookhaven Rail, LLC to Town of Brookhaven's Motion to Reopen Proceeding and that any facts relevant to Brookhaven Rail Terminal and Brookhaven Rail, LLC are true and correct. Further, I certify that I am qualified to make this statement. Executed this 3<sup>rd</sup> day of April, 2014.

  
\_\_\_\_\_  
Daniel K. Miller

Subscribed and sworn to before me on  
this 3<sup>rd</sup> day of April, 2014

  
\_\_\_\_\_  
Notary Public

My Commission Expires January 3, 2019



## **CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2014, I served the Reply of Brookhaven Rail Terminal and Brookhaven Rail to Town of Brookhaven's Motion to Reopen Proceeding, by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

TO: Judah Serfaty, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, NY 11530

U S Rail New York LLC  
205 Sills Road  
Yaphank, NY 11980

NYS Dept of Transportation  
50 Wolf Road  
Albany, NY 12232  
Attn: Robert A. Rybak, Esq.

James H.M. Savage, Esq.  
1750 K Street, N.W., Suite 350  
Washington, D.C. 20006

Lyngard Knutson, Esq.  
Region 2 E.P.A.  
290 Broadway, 25<sup>th</sup> Floor  
New York, NY 10007

NYS Dept. of Environmental Conservation  
New York Natural Heritage Program  
Albany, NY 12233-4757  
Attn: Tara Seoane

Field Office Supervisor U.S. Fish and Wildlife Service  
Long Island Field Office  
3 Old Barto Road  
Brookhaven, NY 11719  
Attn: David A. Stilwell

MTA Long Island Rail Road  
Jamaica Station  
Jamaica, NY 11435-4380  
Attn: Helena E. Williams



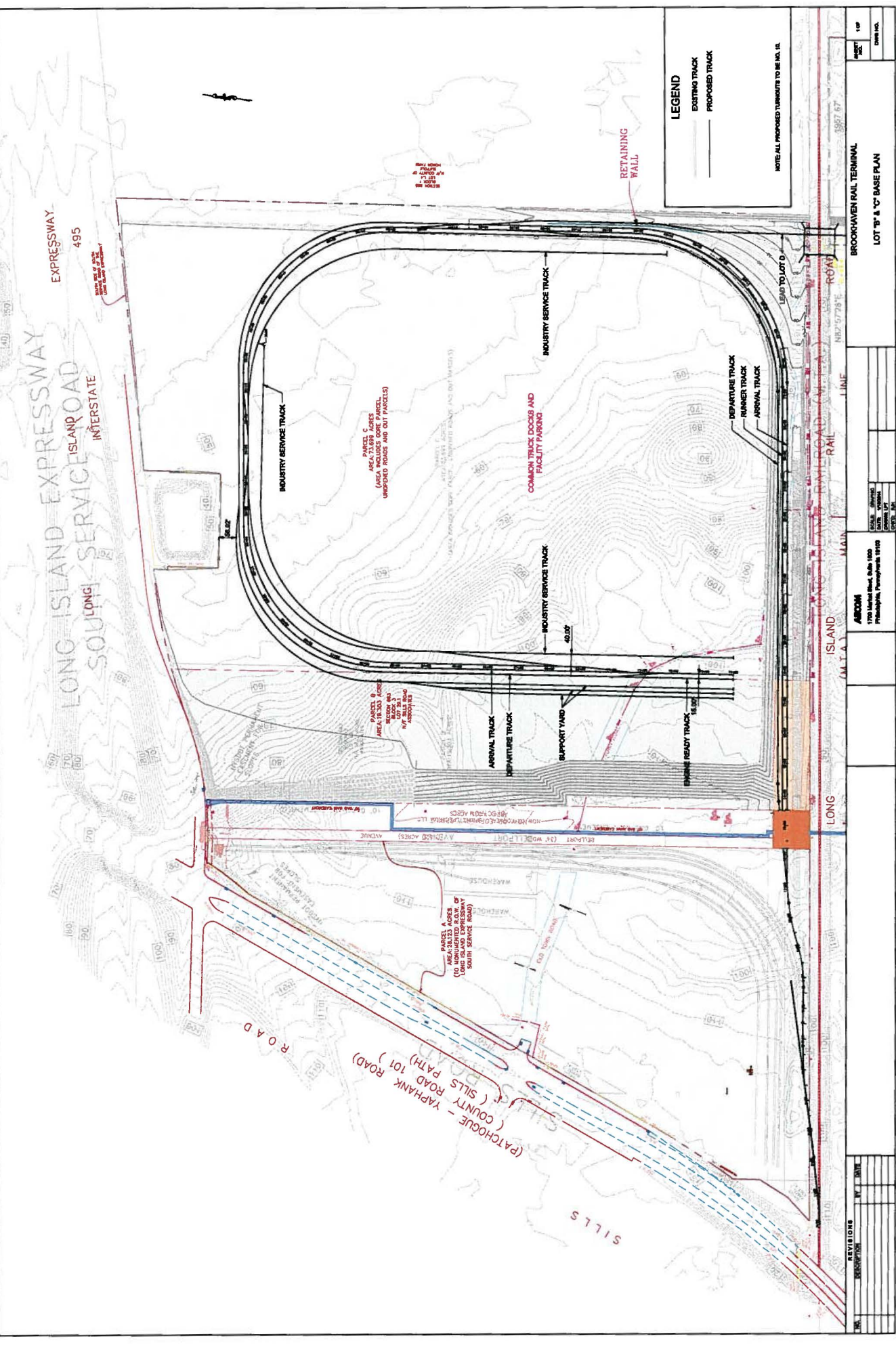
---

David T. Ralston, Jr.  
*Counsel for Brookhaven Rail Terminal  
and Brookhaven Rail, LLC*

## **EXHIBIT 1**



EXPRESSWAY 495  
 LONG ISLAND EXPRESSWAY  
 LONG ISLAND SERVICE ROAD  
 INTERSTATE



**LEGEND**

EXISTING TRACK

PROPOSED TRACK

NOTE: ALL PROPOSED TURNOUTS TO BE IN 1/4"

| NO. | REVISIONS | BY | DATE |
|-----|-----------|----|------|
|     |           |    |      |
|     |           |    |      |
|     |           |    |      |

**ABCOM**  
 1700 Market Street, Suite 1800  
 Philadelphia, Pennsylvania 19103  
 (215) 561-1000

**BROOKHAVEN RAIL TERMINAL**  
 LOT 'B' & 'C' BASE PLAN

1 of 1  
 DATE: 10/1/10

**EXHIBIT 2**

LAW OFFICES  
**JOHN D. HEFFNER, PLLC**  
1750 K STREET, N.W.  
SUITE 200  
WASHINGTON, D.C. 20006  
PH: (202) 296-3333  
FAX: (202) 296-3939

ENTERED  
Office of Proceedings  
APR 26 2010  
Part of  
Public Record

April 26, 2010

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

VIA ELECTRONIC FILING

Re: STB Finance Docket No. 35141  
U S Rail Corporation -- Construction and Operation Exemption --  
Brookhaven Rail Terminal

226895

And

STB Finance Docket No. 35036  
Suffolk & Southern Rail Road LLC-Lease and Operation Exemption-Sills  
Road Realty, LLC

226894

Dear Ms. Brown,

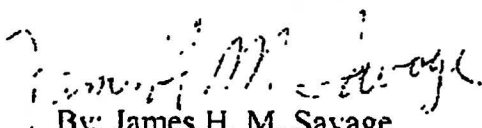
Please accept this letter supplementing the joint letter petition filed April 23, 2010 in behalf of U S Rail Corporation ("U S Rail") and the Town of Brookhaven ("Brookhaven" or "the Town") to provide the Stipulation of Settlement ("So Ordered Stipulation") entered April 22, 2010 in the U S District Court for the Eastern District of New York which document operates as the parties' agreement to resolve the Brookhaven Rail Terminal litigation. The parties submit same as an exhibit in support of their joint petition to vacate the Cease and Desist Order imposed by the Board's October 12, 2007 Decision in the related matter of Suffolk

& Southern Rail Road LLC-Lease and Operation Exemption-Sills Road Realty, LLC, STB Finance Docket No. 35036.

Mark Cuthbertson, attorney for the Town of Brookhaven has reviewed this letter and has approved its contents.

We thank the Board for its time and consideration.

Very truly yours,  
John D. Heffner, PLLC

  
By: James H. M. Savage  
Of counsel

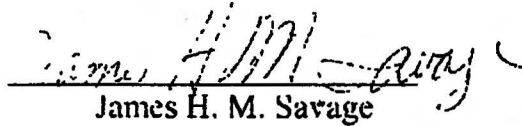
Attorneys for Petitioner  
U S Rail Corporation

Att.

cc: Mark D. Cuthbertson (via electronic mail w/att.)  
Robert Ryback (via First Class mail w/att.)  
Thomas Stilling (via electronic mail w/att.)

### CERTIFICATION OF SERVICE

I, James H. M. Savage, an attorney-at-law of the District of Columbia, certify that I have served this day by electronic mail a true copy of the within pleading upon counsel for the Town of Brookhaven and by first class mail upon the New York State Department of Transportation.

  
James H. M. Savage

Dated: April 27, 2010

DF

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SILLS ROAD REALTY, LLC, U S RAIL CORPORATION,  
WATRAL BROTHERS, INC., PRATT BROTHERS, INC.,  
ADJO CONTRACTING CORP. and  
SUFFOLK & SOUTHERN RAIL ROAD LLC,

Plaintiffs,

v.

THE TOWN OF BROOKHAVEN,

Defendant.

**SO-ORDERED  
STIPULATION**

Index No. 07 CV 4584  
(TCP) (ETB)

WHEREAS, Plaintiffs, Sils Road Realty, LLC ("SRR"), U S Rail Corporation ("U.S. Rail"), Watral Brothers, Inc., Pratt Brothers, Inc., ADJO Contracting Corp., and Suffolk & Southern Rail Road LLC (collectively "Plaintiffs"), commenced this action seeking declaratory relief declaring that defendant the Town of Brookhaven, ("Town" or "Defendant") is pre-empted by federal law from interfering with the construction and operation of a rail terminal located on Sils Road in Yaphank, New York (hereinafter "Project" or "Rail Terminal") on a 28 acre property owned by SRR ("Property"). Plaintiffs also sought declaratory and injunctive relief against Defendant to prohibit it from: (i) prosecuting appearance tickets issued by Defendant to Plaintiffs (the "Appearance Tickets") and declaring the Appearance Tickets to be null and void; and (ii) taking any other action that interferes with Plaintiffs' construction or operation of the Rail Terminal. Plaintiffs also sought damages from the Town pursuant to 42 U.S.C. §§



1983 and 1985 for violations of their civil rights and seek damages for malicious prosecution under the Court's supplemental jurisdiction; and

**WHEREAS**, Plaintiffs filed an application, brought on by Order To Show Cause, seeking to preliminarily enjoin Defendant from: (i) taking any action to prosecute the Appearance Tickets issued by the Defendant on October 4, 2007, against the Plaintiffs in connection with the construction and operation of the Rail Terminal, (ii) issuing any additional Appearance Tickets to Plaintiffs in connection with the construction and operation of the Rail Terminal; and (iii) taking any other action to interfere with or obstruct the construction and operation of the Rail Terminal; and

**WHEREAS**, an evidentiary hearing was held on Plaintiff's motion for a preliminary injunction on December 5-6, 2007 before Magistrate Judge B. Thomas Boyle; and

**WHEREAS**, after consideration of post-hearing submissions by the parties, Magistrate Judge E. Thomas Boyle issued a Report and Recommendations ("R&R") dated July 18, 2008, in which he recommended that Plaintiffs' motion for a preliminary injunction be denied; and

**WHEREAS**, Plaintiffs filed objections to the R&R and Defendant filed opposition to Plaintiffs' objections; and

**WHEREAS**, the Plaintiffs and Defendant (collectively, the "Parties") are in receipt of a decision, dated June 30, 2009, from United States District Judge Thomas C. Platt adopting the R&R and denying the Plaintiffs' request for preliminary injunctive relief; and

**WHEREAS**, the Town has taken an adversarial posture with respect to a petition ("Petition") submitted by US Rail to the United States Surface Transportation Board ("STB") for Exemption under the 49 U.S.C. 10502 from the requirements of 49 U.S.C. 10901, which Petition is currently pending under Finance Docket No. 35141( the "STB Proceeding"); and

**WHEREAS** the Parties, based on the terms set forth below, desire to settle the above-captioned matter that is pending in the United States District Court for the Eastern District and to have the Town withdraw its objections to, and resolve all disputes regarding, the STB Proceeding and to resolve all local proceedings;

**NOW THEREFORE**, in consideration of the mutual promises and undertakings contained herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties, hereto, wishing to settle the above captioned matter and resolve all disputes relating to the STB Proceeding and the local proceedings, intending to be legally bound, hereby agree as follows:

1. Without prejudicing any arguments previously advanced and/or pleaded by the Parties and reserving same, the Parties agree that the purposes of this Stipulation are to further the Town's objective to have the Project designed and constructed consistent with the Reference Site Plan and the Applicable Standards, each as defined in paragraph 2 below, and to further the Plaintiffs' objective to construct and operate the Project and the terms of this Stipulation shall be construed henceforth to effectuate these purposes.

2. The Parties agree that the Project will be constructed consistent with the site plan (the "Reference Site Plan") set forth in Attachment A, the Applicable Standards



and the other requirements of this Stipulation. For the purposes of this Stipulation, "Applicable Standards" means (i) those provisions of the Town Code of the Town of Brookhaven and the Code of Suffolk County set forth in the Reference Site Plan and (ii) all applicable federal standards. In the event of any conflict between or among the Reference Site Plan, the Applicable Standards or the other requirements of this Stipulation, the Reference Site Plan shall control. The Parties further agree that this Stipulation shall constitute full site plan review and approval of the Reference Site Plan for all purposes of New York State and local law. No additional approval of the Town or any agency or department thereof shall be required to construct or operate the Project as contemplated by the Reference Site Plan unless, as set forth in paragraph 10 below, the Project is found not to be subject to STB jurisdiction. The Plaintiffs will engage the services of Sidney B. Bowne & Son, LLP ("Bowne"), 235 East Jericho Turnpike, Mineola, New York 11501 or other firm of licensed professional engineers chosen by the Plaintiffs (together with Bowne, the "Engineers") to prepare and provide to the Town (a) during construction, engineering drawings relating to construction of the various phases of the Project prior to commencing construction of each such phase and (b) upon completion of construction, record plans for the Project. The Engineers will also prepare and provide to the Town (a) during construction, bi-monthly documentation to evidence the fact that the Engineers have inspected the Project and its certification that all site improvements on the Property covered in such report are in accordance with the Reference Site Plan and the Applicable Standards and (b) upon completion of construction, written certification that all site improvements constructed on the Property are in accordance with the Reference Site Plan and the Applicable Standards, including,

but not limited to, the setback and vegetation requirements set forth in the Reference Site Plan. The Engineers' costs and expenses in providing such services shall be paid for by the Plaintiffs.

3. In addition to Applicable Standards, the Project will be constructed consistent with Suffolk County Department of Public Works standards, if any, with respect to the re-grading of any County rights of way adjoining the Property, installation of retaining wall footings within such rights of way, installation and/or modification of the existing traffic signal and the granting of reasonable easements for future traffic signal maintenance.

4. To assist the Town in its construction of public improvements, the Plaintiffs, other than US Rail, shall collectively pay to the Town the sum of One Million & 00/100 (\$1,000,000.00) Dollars, payable in one installment of Two Hundred Thousand & 00/100 Dollars (\$200,000.00) payable on March 1, 2011 and in nine installments of Eighty-eight Thousand, Eight Hundred, Eighty-eight and 00/100 Dollars (\$88,888.88), payable on each January 1 thereafter, to pay a portion of the cost of such improvements.

5. The Project must comply in all regards with whatever mitigation and/or conditions are imposed by the STB inclusive of any mitigation and/or conditions resulting from any NEPA review in the STB Proceeding.

6. Plaintiffs agree that, in the event the Project receives STB approval, operations at the Property shall not include the collection, sorting, separation, processing (including, but not limited to, baling, crushing, compacting and shredding), incineration, treatment, management, disposal, transport or transfer of solid waste and construction and demolition debris unless required under federal law or regulations. The term solid waste

shall mean "solid waste" as defined in Section 1004 of the Solid Waste Disposal Act, 42 USC 6903. Plaintiffs warrant and represent that neither they nor any of their respective affiliates, subsidiaries, successors or assigns shall make any application for permits to allow the activities prohibited by this paragraph, including but not limited to an application for a land-use exemption under 49 U.S.C. 10908 and 10909, and shall not petition or otherwise apply to the STB to have the Project or Property declared to be a solid waste rail transfer facility, without the prior consent of the Town. To the extent any of the foregoing is required under federal law and regulation, and further to the extent legally permissible, Plaintiffs, shall pay to the Town a fee in the amounts set forth on Attachment B for each ton of daily landfill cover, construction and demolition debris and incinerator ash ("Commodities") transported from the Property. Within five business days following the end of each calendar month after commencement of rail operations at the Property, Plaintiffs shall provide the Town with copies, certified, under penalty of perjury, as accurate and complete by an authorized officer of US Rail, of all records relating to shipments, if any, of Commodities during the preceding month, including records of the rail cars and or containers in which such Commodities were shipped. The Town shall have the right to periodically, but no more than quarterly or such shorter interval, but not less than 60 days, as the Town may determine, review US Rail's records regarding shipments of Commodities to determine the tonnage thereof being shipped. Every ninety (90) days the parties shall reconcile the amounts of Commodities shipped in the preceding ninety (90) days, and Plaintiffs shall pay semiannually, on each January 1 and July 1, any fee then due to the Town.

7. To secure the payment obligations under Paragraph 6, Plaintiffs shall, within thirty (30) days of the commencement of rail terminal operations at the Property, furnish a security bond or, if such Plaintiffs are unable to secure such bond, a letter of credit in the amount of: (a) for the first year of commercial operation, One Million Dollars (\$1,000,000.00) and (b), for each subsequent year, the greater of (i) One Million Dollars (\$1,000,000) and (ii) one hundred ten percent (110%) of the aggregate fees payable to the Town under Paragraph 6 above for the preceding year (the "Surety"), and shall thereafter maintain the same in full force and effect. Upon any breach of such Plaintiffs' payment obligations, the Town shall have the right to make a claim against the Surety. Once such a claim is made, such Plaintiffs shall increase the amount of the Surety as required by the Town, to a maximum of Three Million (\$3,000,000.00) Dollars in the aggregate.

8. Upon execution of this Stipulation, the Town will (i) move to dismiss all outstanding Appearance Tickets with prejudice, (ii) withdraw all existing "stop work" orders relating to the Property, (iii) permit Plaintiffs, subject to the prior approval of the New York State Department of Environmental Conservation and amending of the October 12, 2007 STB Cease and Desist Order to permit the resumption of pre-construction activity including excavation and grading as well as non-rail site work, consistent with the requirements of the phasing plan with accompanying milestone / deliverable list attached hereto as Attachment E and (iv) execute and deliver a letter, in the form of Attachment F hereto, to the STB withdrawing the Town's opposition to the Project and requesting expedited consideration by the STB of the Petition.

9. Upon execution of this Stipulation, the Town will commence and diligently pursue appropriate proceedings to abandon all of its right, title and interest in and to all mapped streets lying within the boundaries of the Property and consent to the grading, in accordance with the Reference Site Plan, of the mapped street known as Bellport Avenue adjoining the Property, to the extent that such grading is legally permissible.

10. Simultaneous with the execution of this Stipulation, Plaintiffs will execute and deliver the covenants and restrictions with respect to the setbacks and vegetation requirements reflected in the Reference Site Plan and the commitments set forth in paragraph 6 above attached hereto as Attachment C and Plaintiffs and Defendant will execute and deliver the mutual releases attached hereto as Attachment D.

11. In the event of a final, unappealable determination in the STB Proceeding that the Project is not subject to STB jurisdiction, the Plaintiffs acknowledge that construction of the Project will be subject to all applicable State and local rules and regulations.

12. "Effective Date" of this Stipulation is hereby defined as the date Defendant's attorney notifies counsel for Plaintiffs that Defendant has authorized its counsel, by Town Board resolution or other action, to execute this Stipulation of Settlement and the attached Stipulation of Discontinuance.

13. All notices hereunder shall be transmitted via facsimile to the fax numbers designated below for each counsel and additionally shall be transmitted by first class mail to each counsel.

14. The Court shall retain jurisdiction to resolve any dispute under this Stipulation and to enforce any of the provisions herein.

15. This Stipulation may not be changed or modified except by the execution of a writing signed by all of the Parties.

16. This Stipulation is intended to, and shall, bind and inure to the benefit of the Plaintiffs, Defendants and their respective successors, assigns, heirs and legal representatives.

17. All counsel represent that they are authorized to enter into this Stipulation on behalf of the clients for whom they have appeared, and to bind such parties to the provisions hereof, subject only to the terms hereof.

18. This Stipulation may be executed in counterparts and by facsimile, and shall be binding upon all Parties and their counsel when so executed, provided that any Party or counsel executing a copy hereof by facsimile agrees to provide all others with duplicate original counterparts within three (3) business days thereafter.

19. This Stipulation constitutes the entire agreement and understanding between the Parties with respect to the matters contained herein, and there are no prior oral or written promises, representations, warranties, conditions, provisions, or terms related thereto other than those set forth in this Stipulation. The Parties further represent and acknowledge that, in entering into this Stipulation; they do not rely upon and have not relied upon any representations or statements (beyond those contained in this Stipulation).

20. This Stipulation shall be construed in accordance with the laws of the State of New York without regard to its conflicts of laws principles.

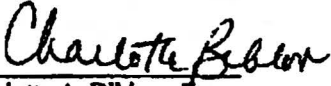


21. This Stipulation is a compromise of disputed claims and has been entered into to avoid the time, expense, uncertainty, and inconvenience of contested litigation. This Stipulation does not constitute an adjudication or finding on the merits of any of the Parties' allegations.

22. The Parties hereto participated jointly in the preparation of this Stipulation and each Party has had the opportunity to review, comment upon and redraft this Stipulation. Accordingly, it is agreed that no rule of construction shall apply against any Party or in favor of any Party and any uncertainty and ambiguity shall not be interpreted against any Party in favor of the other.

23. The Parties shall cooperate to effectuate the purposes of this Stipulation and shall execute reasonable and customary documents and take reasonable and customary actions that may be necessary or appropriate to give full force and effect to the terms of this Stipulation.

FARRELL FRITZ, P.C.

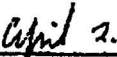
By:   
Charlotte A. Biblow, Esq.  
Aaron E. Zerykier, Esq.  
Attorneys for Plaintiffs  
1320 RexCorp Plaza  
Uniondale, NY 11556-1320  
Tel: (516) 227-0700  
Fax: (516) 227-0777  
[cbiblow@farrellfritz.com](mailto:cbiblow@farrellfritz.com)  
[azerykier@farrellfritz.com](mailto:azerykier@farrellfritz.com)

LAW OFFICES OF MARK CUTHBERTSON

By:   
Mark A. Cuthbertson, Esq.  
Jessica P. Driscoll, Esq.  
Attorneys for Defendant  
434 New York Avenue  
Huntington, NY 11743  
Tel: (631) 351-3501  
Fax: (631) 614-4314  
[mcuthbertson@cuthbertsonlaw.com](mailto:mcuthbertson@cuthbertsonlaw.com)  
[jdriscoll@cuthbertsonlaw.com](mailto:jdriscoll@cuthbertsonlaw.com)

SO-ORDERED:

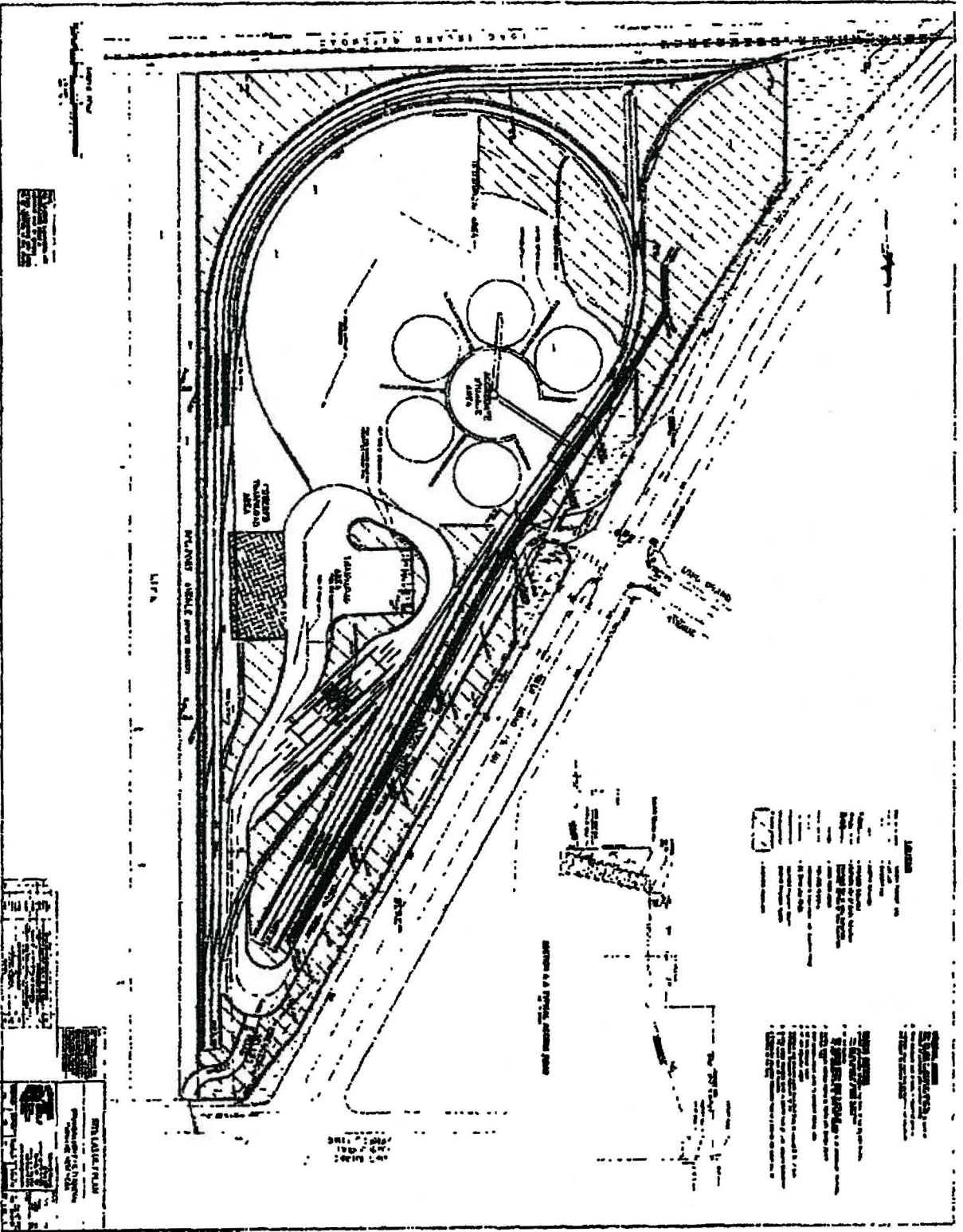
Hon. Thomas C. Platt  
United States District Judge

  
Date April 22, 2010

**ATTACHMENT A**

**Reference Site Plan**





**ATTACHMENT B**

**Processed or Unprocessed Daily Landfill Cover**

**Surcharge/Ton  
\$ 7.60**

**Construction and Demolition Debris  
(C&D)**

**Surcharge/Ton  
\$17.84**

**Resource Recovery Facility and/or Incinerator Residue (Ash)**

**Surcharge/Ton  
\$19.60**

**DECLARATION OF COVENANTS AND RESTRICTIONS**

THIS DECLARATION, made this \_\_\_\_ day of April, 2010, by SILLS ROAD REALTY, LLC, a New York limited liability company with offices located at 485 Underhill Boulevard, Suite 203, Syosset, New York (hereinafter referred to as the "DECLARANT").

**WITNESSETH**

WHEREAS, DECLARANT and the Town of Brookhaven entered into the So-Ordered Stipulation, Index No. 07 CV 4584 (TCP) (ETB), ("Stipulation");

WHEREAS, the Town Board of Town of Brookhaven, pursuant to the Stipulation, has agreed not to interfere with the construction and operation of a rail terminal located at Sills Road in Yaphank, New York on a 28 acre property now owned by the DECLARANT (the "Property"), subject to the filing of certain covenants and restrictions upon the subject property by the DECLARANT; and

WHEREAS, the Property is identified on the Suffolk County Tax Map as Section 663.00, Block 03.00, Lots 01.000, 27.001 to 27.004; Section 704, Block 04.00, Lots 001.00 and 002.00; Section 704, Block 05.00, Lots 001.00 and 002.00; and Section 704, Block 02.00; Lots 002.000, 001.001, 030.000 to 036.000 and is more particularly described as set forth in Exhibit "A" attached hereto.

1. Operations at the Property shall not include the collection, sorting, separation, processing (including, but not limited to, baling, crushing, compacting and shredding), incineration, treatment, management, disposal, transport or transfer of solid waste and construction and demolition debris unless required under federal law or regulations. The term solid waste shall mean "solid waste" as defined in

Section 1004 of the Solid Waste Disposal Act, 42 USC 6903. In addition, no application shall be made for permits to allow the aforementioned prohibited activities, including but not limited to an application for a land-use exemption under 49 U.S.C. 10908 and 10909, nor shall DECLARANT or any of its affiliates, subsidiaries, successors or assigns petition or otherwise apply to the Surface Transportation Board of the United States of America to have the Property declared to be a solid waste transfer facility, without the prior consent of the Town of Brookhaven. To the extent any of the foregoing is required under federal law and regulation, and further to the extent legally permissible, DECLARANT shall pay to the Town a fee in the amounts set forth on Exhibit "B" for each ton of daily landfill cover, construction and demolition debris and incinerator ash transported from the Property. Within five business days following the end of each calendar month after commencement of rail operations at the Property, Plaintiffs shall provide the Town with copies, certified, under penalty of perjury, as accurate and complete by an authorized officer of US Rail, of all records relating to shipments, if any, of Commodities during the preceding month, including records of the rail cars and or containers in which such Commodities were shipped. The Town shall have the right to periodically, but no more than quarterly, review US Rail's records regarding shipments of construction and demolition debris and incinerator ash to determine the tonnage of such materials being shipped. Every ninety (90) days the parties shall reconcile the amounts of Commodities shipped in the preceding ninety (90) days, and

Plaintiffs shall pay semiannually, on each January 1 and July 1, any fee then due to the Town.

2. DECLARANT, its successors and assigns shall maintain the setbacks and landscape coverage set forth in the Site Plan annexed hereto as Exhibit "C", including a landscape area of 367,216 square feet on the Property, which is an amount equal to thirty (30%) percent of the total square footage of 1,223,205 square feet.
3. The Property described in Exhibit "A" shall hereinafter and forever be held, sold and conveyed subject to the covenants and restrictions recited herein which shall run with the land and shall be binding upon the DECLARANT, its successors and assigns and shall inure to the benefit of, and be enforceable by the Town of Brookhaven.
4. If any one or more of the provisions of this Declaration shall be deemed or declared to be invalid or otherwise unenforceable, such determination shall in no manner affect the validity of the remaining provisions hereof and those remaining provisions shall remain in full force and effect.
5. The failure to enforce any of the provisions hereof shall not be deemed a waiver of the right to do so as to any continuing or subsequent violation.
6. If the DECLARANT its heirs, successors, or assignees shall violate or attempt to violate any of the covenants herein, it shall be lawful for the Town of Brookhaven to prosecute any proceedings at law or in equity against the persons or entities violating or attempting to violate any such covenants either to prevent said

violation and/or to recover damages or other relief for such violation.

**IN WITNESS WHEREOF**, the DECLARANT above-named has executed the foregoing Declaration the day and year first above written.

**SILLS ROAD REALTY, LLC**, a New York  
limited liability company

By: **Suffolk & Southern Railroad LLC**,  
its Managing Member

By: \_\_\_\_\_  
Name: **Andrew Kaufman**  
Title: **President**

STATE OF NEW YORK     )  
                                      ) ss.:  
COUNTY OF SUFFOLK    )

On the \_\_\_\_ day of April in the year 2010 before me, the undersigned, personally appeared Andrew Kaufman, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public



**EXHIBIT A**

ALL that certain plot, piece or parcel of land, situate, lying and being at Yaphank, Town of Brookhaven, County of Suffolk and State of New York bounded and described as follows:

**BEGINNING** at a point on the southerly side of Long Island Expressway (New York State Route 495; south service road) where same is intersected by the southeasterly side of Sills Road

**RUNNING THENCE** along the southerly side of said Long Island Expressway the following two (2) courses and distances:

- (1) North 84 degrees 06 minutes 52 seconds East, 71.07 feet;
- (2) Along the arc of a curve bearing to the left having a radius of 1030.00 feet a distance of 16.15 feet to the westerly side of Bellport Avenue (not open);

**THENCE** along the westerly side of Bellport Avenue South 05 degrees 50 minutes 33 seconds East, 1931.62 feet to the northerly side of land of the Long Island Rail Road;

**THENCE** along said last mentioned land, South 82 degrees 58 minutes 07 seconds West, 1079.92 feet;

**THENCE** North 05 degrees 10 minutes 04 seconds West, 245.33 feet to the southeasterly side of Sills Road;

**THENCE** along said last mentioned road the following two (2) courses and distances:

- (1) Along the arc of a curve bearing to the left having a radius of 2939.79 feet a distance of 330.72 feet;
- (2) North 23 degrees 04 minutes 16 seconds East, 198.72 feet;

**THENCE** South 05 degrees 32 minutes 19 seconds East, 104.42 feet to a Right of Way taking line;

**THENCE** North 23 degrees 04 minutes 16 seconds East, 336.66 feet to a monument found;

**THENCE** South 77 degrees 04 minutes 31 seconds East, 39.81 feet;

**THENCE** North 23 degrees 04 minutes 16 seconds East, 74.82 feet;

**THENCE** North 89 degrees 52 minutes 37 seconds West, 15.06 feet;

**THENCE** North 05 degrees 33 minutes 18 seconds West, 156.55 feet to the southeasterly side

of Sills Road;

THENCE along the southeasterly side of Sills Road the following two (2) courses and distances:

- (1) North 23 degrees 04 minutes 16 seconds East, 836.37 feet;  
Along the arc of a curve bearing to the left having a radius of 982.00 feet a distance of 151.99 feet to the southerly side of the Long Island Expressway at the point or place of

BEGINNING.

**EXHIBIT B**

**Processed or Unprocessed Daily Landfill Cover**

**Surcharge/Ton  
\$ 7.60**

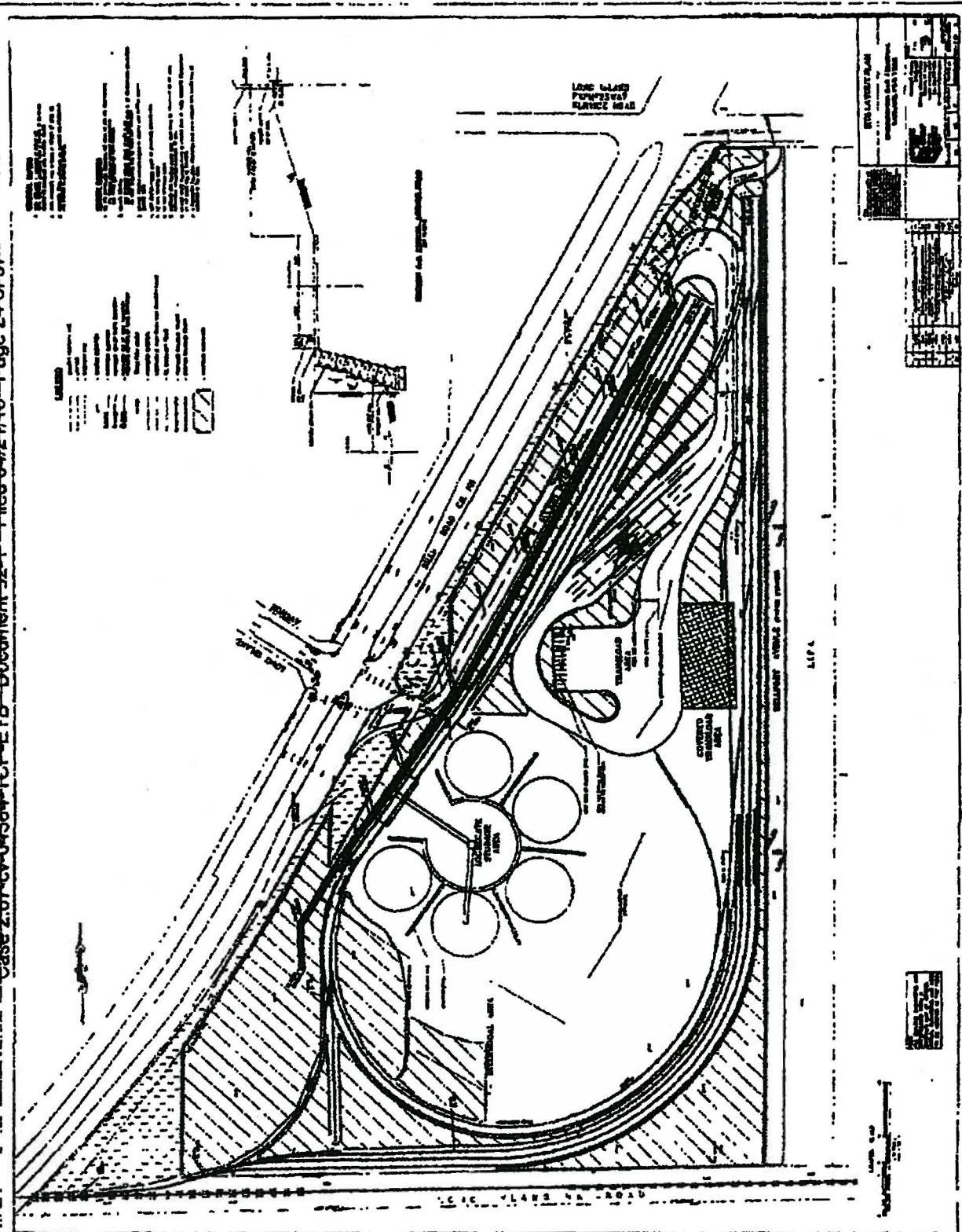
**Construction and Demolition Debris  
(C&D)**

**Surcharge/Ton  
\$17.84**

**Resource Recovery Facility and/or Incinerator Residue (Ash)  
Surcharge/Ton  
\$19.60**

**EXHIBIT C**

Case 2:07-cv-04584-TCP-ETB Document 32-1 Filed 04/21/10 Page 24 of 37





**ATTACHMENT D**

**Form of Release**

**TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY  
CONCERN,  
KNOW THAT**

**SILLS ROAD REALTY, LLC, U S RAIL CORPORATION,  
WATRAL BROTHERS, INC., PRATT BROTHERS, INC.,  
ADJO CONTRACTING CORP. and  
SUFFOLK & SOUTHERN RAIL ROAD LLC,**

23

**RELEASORS,**

in consideration of the sum of ten dollar(s) (\$10.00), and other good and valuable  
consideration,  
received from

**THE TOWN OF BROOKHAVEN**

25

**RELEASEE,**

receipt whereof is hereby acknowledged, releases and discharges

the RELEASEE, RELEASEE'S heirs, executors, administrators, successors and assigns from  
all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds,  
bills, specialties, covenants, contracts, controversies, agreements, promises, variances,  
trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in  
law, admiralty or equity, which against the RELEASEE, the RELEASORS, RELEASORS'  
heirs, executors, administrators, successors and assigns ever had, now have or hereafter can,  
shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the  
beginning of the world to the day of the date of this RELEASE.

The words "RELEASOR" and "RELEASEE" include all releasors and all releasees  
under this RELEASE.

This RELEASE may not be changed orally.

**[SIGNATURE PAGE TO FOLLOW]**

*In Witness Whereof*, each RELEASOR has hereunto set their hand and seal on the  
\_\_\_\_\_ day of March, 2010.

**SILLS ROAD REALTY, LLC, New York**  
limited liability company

By: Suffolk & Southern Railroad LLC,  
its Managing Member

By: \_\_\_\_\_  
Name: Andrew Kaufman  
Title: President

**U S RAIL CORPORATION**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**WATRAL BROTHERS, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**PRATT BROTHERS, INC.,**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ADJO CONTRACTING CORP.**

By: \_\_\_\_\_

Name:

Title

**SUFFOLK & SOUTHERN RAIL ROAD**

**LLC,**

By: \_\_\_\_\_

Name:

Title

State of New York )

) ss.:

County of )

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

State of New York )

) ss.:

County of )

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

State of New York )

) ss.:



County of \_\_\_\_\_ )

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

State of New York )

) ss.:

County of \_\_\_\_\_ )

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

State of New York )

) ss.:

County of \_\_\_\_\_ )

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

On March \_\_\_\_ 2010 before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

26

**TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY  
CONCERN,  
KNOW THAT**

**THE TOWN OF BROOKHAVEN**

as

**RELEASORS,**

in consideration of the sum of ten dollar(s) (\$10.00), and other good and valuable consideration,  
received from

**SILLS ROAD REALTY, LLC, U S RAIL CORPORATION,  
WATRAL BROTHERS, INC., PRATT BROTHERS, INC.,  
ADJO CONTRACTING CORP. and  
SUFFOLK & SOUTHERN RAIL ROAD LLC**

as

**RELEASEES,**

receipt whereof is hereby acknowledged, releases and discharges

the RELEASEES, RELEASEES' heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEES, the RELEASOR, RELEASOR'S heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE.

The words "RELEASOR" and "RELEASEE" include all releasors and all releasees under this RELEASE.

This RELEASE may not be changed orally.

**[SIGNATURE PAGE TO FOLLOW]**

## THE TOWN OF BROOKHAVEN

**Notary Public**

## **ATTACHMENT E**

### **Phasing Plan**

#### **PHASE I:**

- Prior to the start of any "pre-construction" excavation or any site work, any and all Cease and Desist Orders issued by the Surface Transportation Board ("STB") must be amended to permit the resumption of pre-construction activity including excavation and grading as well as non-rail site work. A copy of such decision or amendment shall be provided to the Town before any pre-construction, excavation or related site work occurs.
- The STB has previously determined that non-rail construction and preliminary site work are within the regulatory purview of the Town. Prior to the start of the "pre-construction" site work ("Work") outlined in the attached phasing plan ("Phasing Plan"), Sills Road Realty shall obtain approval from NYSDEC as required by Paragraph 8 of the proposed Stipulation of Settlement ("Stipulation Agreement").
- Upon receipt by the Town of Brookhaven ("Town") of the STB decision or amendment lifting all Cease and Desist Orders and approval from NYSDEC the Town shall issue a Notice to Commence Work in accordance with the terms and conditions set forth in the Stipulation Agreement.
- Sills Road Realty shall continue to cooperate with, and provide all requested assistance to, the Surface Transportation Board's Section of Environmental Analysis ("SEA") in SEA's completion of an Environmental Analysis ("EA") of the project.
- Within 60 calendar days of commencement of the Work, Sills Road Realty shall have delivered on site railroad ties, ballast stone and track required to complete site track construction relating to Phase I of the Phasing Plan and 50% of the required railroad ties and track required for Phase II of the Phasing Plan. The Project Engineer, Sidney B. Bowne & Son, LLP ("Bowne") shall inventory and confirm in writing to the Town, within 10 days after final delivery of above specified material, that all required material has been delivered to the Project Site.
- Prior to the start of the Work, Sills Road Realty shall provide the Town with a copy of the engineering retainer agreement with Bowne. The retainer agreement shall reflect the services that are contemplated in Paragraph 2 of the Stipulation Agreement.

- Within 60 calendar days of execution of the Stipulation Agreement, Sills Road Realty shall through its engineer, Bowne, submit 60% complete site grading and drainage drawings, which will represent not less than 25% of the complete engineering drawings related to the construction of the project.
- Within 90 calendar days of the execution of the Stipulation Agreement, SEA shall issue the proposed EA for public comment ("Comment Period"). In the event that the SEA fails to issue the EA for public comment, all work shall immediately cease until such time that the SEA issues the proposed EA for public comment.
- Under Phase I, Sills Road Realty is permitted to excavate up to 75,852 cubic yard of material in compliance with the Phasing Plan. In the event that Sills Road Realty fails to meet any of the above dates for the deliverables all work shall immediately cease until such time that compliance is achieved.

#### **PHASE II:**

- All items listed in Phase I must be completed to the Town's satisfaction prior to commencement of Phase II.
- The STB must issue a decision accepting and / or adopting the EA and SEA's conditions prior to the commencement of Phase II.
- Within 60 calendar days of commencement of Phase II work, Sills Road Realty shall have delivered on site the remaining balance of railroad ties and track required to complete site track construction relating to Phase II of the Phasing Plan. The Project Engineer, Bowne, shall inventory and confirm in writing to the Town, within 10 days after final delivery of the above specified material, that all required material has been delivered to the Project Site.
- Sills Road Realty must provide the Town with satisfactory proof of compliance with all SEA conditions, in any, applicable to the project which can be reasonably complied with during Phase II of the Phasing Plan prior to resuming any excavation or site work.
- Provided the above conditions are met, the Work may continue whereby Sills Road Realty shall be permitted to excavate up to an additional 91,852 cubic yard of material in compliance with the Phasing Plan.
- During Phase II, construction of precast concrete open-faced retaining walls backfilled with earth and planted with drought-resistant plantings, as shown on the Site Plan, shall commence and continue to the extent practicable in light of the requirements of the Phasing Plan and sound engineering practices.

**PHASE III:**

- No further Work shall occur until such time as the Surface Transportation Board has issued its decision to permit construction of the project.
- Upon such approval, all work to complete the project may resume in compliance with the Reference Site Plan set forth in the Stipulation Agreement.

**ATTACHMENT F**

**Form of STB Letter**





## Town of Brookhaven Long Island

26757

Mark Lasko, Supervisor

ENTERED  
Office of Proceedings

March 30, 2010

APR 05 2010

Part of  
Public Record

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings

Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423



Re: STB Finance Docket No. 35141 U S Rail Corporation -  
Construction and Operation Exemption - Brookhaven Rail Terminal

Dear Ms. Brown,

Pursuant to the settlement agreement concluded between the parties and approved by the Town Board at a public meeting on March 23, 2010, the Town of Brookhaven ("Brookhaven") hereby withdraws its opposition to the Brookhaven Rail Terminal project ("the Project").

Brookhaven joins with Petitioner in respectfully requesting the Board to restore this matter to its active docket, and, in view of the substantial passage of time since the filing of this matter, to afford the proceeding expedited consideration.

Brookhaven believes that the changes to the Project plans incorporated by the Petitioner at the Town's request, as well as the other matters covered by the settlement agreement, adequately address the concerns raised by the Town at an earlier stage of this proceeding.

The Petitioner has made the representations set forth in the following paragraph and if these representations are true the Project will have beneficial impacts.

The Project will have a strong positive economic impact upon the Town. Local jobs will be created on-site. Potentially significant economic synergy exists as a result of the Project's location, ideally situated adjacent to and between the major East-West highway and rail thoroughfares traversing Long Island. Significant reduction in long haul truck traffic of aggregate commodities such as stone will result from the introduction of a suitable capacity

The following pending motions by Brookhaven are hereby being withdrawn: Motion to Compel Discovery, filed October 13, 2009; and, Motion to Sift, filed January 19, 2010.

Office of the Supervisor  
One Independence Hill • Farmingville • NY 11735 • Phone (631) 451-0100 • Fax (631) 451-0677  
www.brookhaven.org

Printed on recycled paper

Page 2

3/30/10

C. Brown

Re: STB Finance Docket No. 35141 U S Rail Corporation -

Construction and Operation Exemption - Brookhaven Rail Terminal

truck-train transload terminal in Eastern Long Island, more than 60 miles east of the heavily congested highway bridges connecting Long Island to New York, New Jersey and New England. Other local businesses may benefit from the availability of nearby rail freight transportation facilities. Local truck traffic not destined for Brookhaven will have immediate access to the Long Island Expressway and will consequently not have to make extensive use of local roads. The Project site is located in an industrial zone not near to any sensitive receptors such as schools, hospitals, or senior living facilities.

We thank the Board for affording the parties the opportunity to resolve their differences, and in particular thank the mediator, Thomas Stilling, for his assistance in facilitating the amicable resolution of this matter.

Sincerely,

  
Mark Lasko  
Supervisor

cc: Silis Road Realty  
Robert F. Quinlan, Town Attorney