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**SURFACE
TRANSPORTATION BOARD**

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ORIGINAL

HAND DELIVERY

October 26, 2007

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

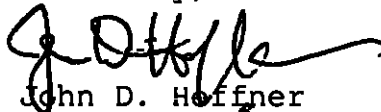


FILED
OCT 26 2007
**SURFACE
TRANSPORTATION BOARD**

Dear Mr. Williams:

On behalf of Sills Road Realty, LLC and U S Rail Corporation, I am filing an original and ten copies of a Petition for Reconsideration of the Board's decision in above-captioned proceeding. A check for the \$200 filing fee is also enclosed. Please date stamp and return one copy for our files.

Sincerely,


John D. Heffner

Enclosure

cc: Town of Brookhaven

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BEFORE THE
SURFACE TRANSPORTATION BOARD

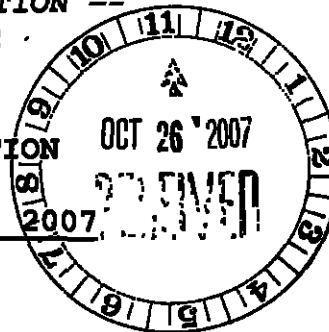
SURFACE
TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35036

ORIGINAL

SUFFOLK & SOUTHERN RAIL ROAD LLC
-- LEASE AND OPERATION EXEMPTION --
SILLS ROAD REALTY, LLC

PETITION FOR RECONSIDERATION
OF
DECISION SERVED OCTOBER 12, 2007



ORIGINAL

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and U S Rail Corporation

FILED
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SURFACE
TRANSPORTATION BOARD

Dated: October 26, 2007

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35036

**SUFFOLK & SOUTHERN RAIL ROAD LLC
-- LEASE AND OPERATION EXEMPTION --
SILLS ROAD REALTY, LLC**

**PETITION FOR RECONSIDERATION
OF
DECISION SERVED OCTOBER 12, 2007**

PREFACE

Pursuant to 49 CFR 1115.3, Sils Road Realty LLC ("Sills"), and U S Rail Corporation ("U S Rail") petition the Surface Transportation Board ("STB" or "Board") for reconsideration of its decision served on October 12, 2007, directing Suffolk & Southern Rail Road ("Suffolk"), Sils, or U S Rail, or any other related entity conducting rail construction in Yaphank, Brookhaven, or in the vicinity to immediately cease that activity and obtain construction authority from the Board pursuant to 49 U.S.C. 10901(a) or obtain a decision from the Board finding that such activity does not require Board approval.

By separate petition filed October 18, 2007, these parties sought a stay of that decision on the grounds that the Board's "cease and desist (construction work)" order is causing Petitioners irreparable harm.

For the reasons articulated below, Petitioners contend that the Board's October 12, 2007 decision involves material error as it failed to consider, reference or otherwise discuss either STB Office of Compliance and Consumer Assistance Director Melvin F. Clemens' letter of October 4, 2007 to Petitioners' counsel, or counsel's detailed October 9, 2007 letter response, thereby denying Petitioners' procedural due process. The Board's decision overlooked Petitioners' unrefuted highly probative evidence, submitted in a timely manner, and properly referenced to the controlling statutory and case law, that their activities were exempt from Board authority. Instead, the Board cited an unverified newspaper report and a letter from the local municipality as gravamen for entering its "cease and desist" order.

The Board's ill-considered action necessitates thorough reconsideration.

¹ Suffolk is no longer participating in the project, and consequently takes no part in this petition. In the event the petition for reconsideration were to result in the decision of October 12, 2007 being vacated or modified, Petitioners request entry of the resulting order as to all parties to this docket.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This proceeding commenced May 18, 2007, when Suffolk, a for-carrier, filed a verified notice of exemption under 49 CFR 1150.31 seeking to lease and operate approximately 11,000 feet of track to be constructed on a 28-acre parcel of land in Yaphank, an unincorporated hamlet within the Town of Brookhaven, Suffolk County, NY. Sills, also a non-carrier, was originally planning to utilize this track as a private side track.²

In a decision served June 1, 2007, the Board found Suffolk's exemption notice incomplete and directed Suffolk to file supplemental information describing the construction activities on the trackage undertaken to date and any construction anticipated in the future. On June 15, 2007, Suffolk filed a letter requesting withdrawal of its notice of exemption due to a change in circumstances.

Subsequently, by decision served August 13, 2007, the Board found that Suffolk had failed to sufficiently explain their proposed withdrawal and directed Suffolk to file, by August 23, 2007, the information required by the June 1 decision. In addition, the Board ordered Suffolk to

² The subject trackage will consist of a transloading facility with a small network of yard tracks and will be known as the Brookhaven Rail Terminal

explain whether it or Sills anticipated that for-hire service would be provided over the trackage being constructed. Suffolk replied that because it never concluded any agreement with Sills regarding the proposed transaction, Suffolk never initiated construction activities. Sills, as an industrial customer, never intended to provide rail service to anyone. The Board thereupon permitted Suffolk to withdraw its notice of exemption.

The respective roles of Sills and Suffolk in this project are described in the following paragraphs:

Sills is a distributor of stone and other construction products whose role has always been and always will be as the principal customer of the Brookhaven Rail Terminal. Suffolk is a minority investor (20%) in Sills, whose principals have experience with intermodal equipment and logistics.

As a consequence of the Board's June 1, 2007 decision, it became clear to Sills that the services Suffolk intended to provide at the Terminal could more expeditiously and economically be provided by an existing rail carrier operating within the Board's jurisdiction and established criteria regarding construction of an exempt spur.

On June 15, 2007 Suffolk requested its notice of exemption be withdrawn. Thereafter, Sills entered into an agreement with U S Rail, an existing class III rail carrier³ to construct and operate the subject trackage as an "exempt spur" under 49 U.S.C. 10906. As an existing carrier, U S Rail did not and does not require any Board authority to construct and operate an exempt spur.

On October 2, 2007 an article appeared in *Newsday*, a local Long Island paper, concerning U S Rail's activities at Yaphank (Exhibit A). That same day, the Town Attorney for the Town of Brookhaven, NY, (the "Town") wrote to the Board seeking information about the project (Exhibit B). On October 4, 2007, Mr. Clemens wrote to counsel for Petitioners stating his belief that the subject construction required Board approval under 49 U.S.C. 10901(a) (Exhibit C).

Mr. Clemens' letter directed Petitioners' counsel to:

"[A]dvise the Board in detail, by a response due to me no later than October 9, 2007, of any and all activities undertaken, or being undertaken, in Yaphank, Brookhaven, or anywhere in that vicinity, by U S Rail Corporation, or by any entity on its behalf, or by any other entity that you represent.

³ U S Rail was originally organized as The Great Miami & Scioto Railway Company. See The Great Miami & Scioto Railway Company - Change in Operator Exemption - Certain Lines of the City of Jackson, OH, STB Finance Docket No 32417 (served Jan 20, 1994). Suffolk had initially intended to engage U S Rail to operate the subject track as a contractor under Suffolk's STB operating authority.

If you believe that any of these activities do not require Board approval (whether as an 'exempt spur' or otherwise), tell us why you believe that to be the case."

Mr. Clemens further ordered that the work at the site not be resumed in any form until Board authority was obtained or the Board determined that its authorization was not required. (Exhibit C.)

On October 9, 2007, petitioners filed a detailed response to Mr. Clemens' letter, describing the activities undertaken to date,⁴ describing the proposed facility in detail, and maintaining that the proposed construction was an "exempt spur" under 49 U.S.C. 10906 (Exhibit D).

The Board's October 12th decision imposing a "cease and desist" stop-work order upon Petitioners references neither Mr. Clemens' October 4th letter, nor petitioners' October 9th response thereto.⁵

⁴ Those activities included attending meetings between Sills Road Realty (the owner of the land on which the facility is being constructed) with state and local officials to discuss this project, consultations with officials at the New York State Department of Transportation about funding for the project, discussions and negotiations with the New York & Atlantic Railroad (NY&A) and CP Rail about through transportation of inbound and outbound cargo, design of the rail terminal and related facilities, ordering of material for the construction of those facilities, and the clearing of land in anticipation of construction of those facilities. As yet, neither U S Rail nor any other entity has constructed any railroad track

⁵ The Board's October 12th order references letters from Petitioners' counsel to the Town Attorney dated July 12, 2007 (Exhibit E) and July 25, 2007 (Exhibit F)

SUMMARY OF ARGUMENT

Petitioner U S Rail, an existing Class III common carrier railroad, intends to construct and operate a rail terminal for the receipt and transloading of construction materials along Long Island Rail Road ("LIRR") track in Yaphank (Town of Brookhaven), NY. Although exclusive jurisdiction over railroad operations is vested in the Board by 49 U.S.C. 10902, the tracks serving the terminal are being constructed under 49 U.S.C. 10906 as an exempt disconnected spur of U S Rail's other operations. Hence, construction of the spur is not subject to Board regulation.

After site preparation operations were underway, a local newspaper published an article questioning the apparent absence of construction authorization for the work. The Town thereupon wrote to the Board seeking information in this regard. The Board, acting through its OCCS Director, corresponded with Petitioners' counsel, soliciting a detailed explanation of what was taking place in Brookhaven.⁶ Petitioners furnished their detailed

⁶ On September 27, 2007, Petitioners voluntarily suspended work in response to discussions with the New York State Department of Environmental Conservation

explanation in a timely manner. However, the Board took preemptory action, without considering Petitioners' explanation, issuing a decision directing Petitioners to 'cease and desist' work until they had taken steps to obtain either Board authorization to proceed, or an administrative declaration that no authorization was necessary.

Consequently, the Board's decision involves material error in not only failing to articulate a valid legal basis for enjoining the site work, but also in failing to consider Petitioners' timely and highly probative submissions, thereby denying them due process of law.

ARGUMENT

I. Petitioners were Denied Due Process - A Material Error Necessitating Reconsideration

A petition for reconsideration will be granted upon a showing that the prior Board action involves material error. 49 CFR 1115.3(b)(2). Petitioners seek the Board's reconsideration of its October 12th decision on the grounds of material error because: (a) the decision neither cited nor discussed any legal authority for entering an order directing Petitioners to suspend construction activity, and (b) the decision failed to consider or discuss Petitioners'

detailed arguments for a contrary result set forth in their October 9th letter to the Board. The Board's decision also failed to reference Mr. Clemens' October 4th letter to Petitioners' counsel. The only items cited by the Board in support of its ruling are the Town's October 2, 2007 letter and the *Newsday* article. Petitioners' contend neither item is probative, let alone dispositive, on the jurisdictional questions Mr. Clemens raised in his October 4th letter to Petitioners' counsel.

The Board issued its October 12, 2007 Order under a reopened Docket Number relating back to the withdrawn Suffolk & Southern petition, a proceeding to which U S Rail was not a party.

The Board improvidently issued its decision after reviewing only a partial record. Had the Board reviewed and considered all the available evidence, Petitioners submit the jurisdictional questions would have been answered, the issues resolved, and the need for entry of a cease and desist order would have been obviated.

Instead, by issuing its order, the Board denied Petitioners procedural due process by denying them an opportunity to be heard. The Board's action caused and continues to cause irreparable harm upon the Petitioners. Under the circumstances, the Board has both the duty and

the obligation to cure this miscarriage of justice by reconsidering its prior decision and rescinding it.

II. Petitioners' Construction Activities are Within the Board's Jurisdiction and Exempt from any Need for the Board's Approval

Petitioners contend that construction of the Brookhaven Rail Terminal as a Section 10906 "disconnected spur" of U S Rail is exempt from the need for prior Board approval.

As the Board knows well, the determination as to whether a specific piece of railroad is an "exempt spur" under 49 U.S.C. 10906 (for which no licensing authority is necessary in order to construct or operate) or a "line of railroad" under 49 U.S.C. 10901 (for which authority is required) is a mixed question of fact and law. New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 164 (5th Cir. 1966), cert. denied 386 U.S. 942, 87 S. Ct. 974, 17 L. Ed. 2d 873 (1967); cited in Illinois Commerce Com. v. United States, 779 F.2d 1270 (7th Cir. 1985). The determination of whether a particular track segment is a "line of railroad", requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side track," exempt from Commission [now Board] jurisdiction turns on the intended use of the track segment, not on the

label or cost of the segment. Nicholson v. Interstate Commerce Com., 711 F.2d 364 (D.C. Cir. 1983).

Nicholson holds that main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through trains between different points of shipment or travel are subject to section 10901(a). However, that mass of "tracks" (as distinguished from "lines") naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for such transportation service do not fall within that section. Detroit & M.Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923). Thus, track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Board pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a). New Orleans Terminal Co. v. Spencer, supra., 366 F.2d 160, 165-66. The latter is the case herein.

Determining whether a specific piece of track is an "exempt spur" or a regulated "line of railroad" requires the Board to consider various factors, no one of which is itself controlling. The Board's analysis focuses on a series of fact-based indicia including (1) the length of the track, (2) the number of customers to be served, (3) whether stub-ended, (4) whether there is scheduled service, (5) the volume of traffic moving over the track, (6) who owns and maintains the track, (7) the weight of the rail, (8) the condition of the track, (9) the proposed use of the track, and (10) the existence or absence of a "station" through which traffic is solicited. See CNW-Abar. Exemp.-In McHenry County, IL, 3 I.C.C.2d 366 (1987), rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989). Based on these factors, there is no doubt that the Brookhaven Rail Terminal is an exempt spur.

III. Brookhaven Rail Terminal Qualifies as an Exempt Spur.

Petitioners' October 9th reply to Mr. Clemens' letter described in great detail and analyzed the precedent applicable to the circumstances surrounding Brookhaven Rail Terminal's construction; including providing a chronology

of events, a site plan, and an aerial photo. Applying the above cited factors, there can be no doubt that U S Rail's construction and operation of the subject rail facility qualifies as an "exempt spur" under 49 U.S.C. 10906 for which no authority is needed. Indeed, there is no credible evidence disputing this conclusion. Moreover, the Board issued its October 12, 2007 decision neither addressing Petitioners' clear and insightful October 9th analysis, nor articulating any basis for issuing their "cease and desist" order.

The unrefuted evidence includes the following. The length of track is short, about 11,000 feet if laid out "end-to-end" on 23 acres of land. One principal customer, Sills Road Materials LLC, will be serviced by the Terminal. The facility will be a stub-ended network of tracks, with service to be provided on demand rather than on any scheduled basis. The weight of the rail will not exceed 115 pounds, a weight consistent with current standards for building new rail-served industrial facilities. The condition of the track will be good because it will be newly constructed to the currently applicable industry standards. The proposed use of the tracks will be for loading, unloading, switching, and storage of rail cars for a single principal user, all uses consistent with the

character of exempt industrial or yard tracks. The purpose of this transaction will be to bring stone to Long Island by rail instead of by truck movement over congested highways. Traffic moving to or from the Terminal will be interchanged with the New York & Atlantic Railway ("NY&A"), and through it, with other railroads comprising the national rail system. There will be no "station" listed in a tariff through which traffic will be solicited. The October 12th Board decision ignored this non-disputed evidence which clearly demonstrates that the activities in question can only be characterized as the construction of an exempt spur.

Controlling legal authority fully supports Petitioner's position that a regulated rail carrier can construct a small segment of track at another location as an exempt spur. For example, in The New York City Economic Development Corporation - Petition for Declaratory Order, STB Finance Docket No. 34429 (served July 15, 2004), the Board declared the construction and rehabilitation of a spur track 6,744 feet in length, owned by a New York City agency, identified by the Board as a non-carrier, to be both an exempt spur outside the Board's entry jurisdiction and entitled to preempt state or local law under 49 U.S.C. 10501(b). Significantly, in allowing the City to construct

this trackage without any agency licensing approval or environmental review, the Board authorized the construction of a disconnected piece of railroad as a spur.⁷ The decision indicated that some combination of Consolidated Rail Corporation, Norfolk Southern Railway (NS), and CSX Transportation, Inc. (CSX), would provide service once the line was constructed. However, neither NS nor CSX provided service in their own right in the area.

Similarly, in Tri-State Brick and Stone of New York, Inc., et al, STB Finance Docket No. 34824 (served August 11, 2006), the Board extended tacit approval to CP Rail, an existing Class I rail carrier operating in upstate New York with downstate trackage rights, to serve as an exempt spur a railroad yard in Brooklyn, NY, although the yard was 9.5 miles from the nearest facility where CP held trackage rights.⁸

⁷ At the time of the Board's July 15 decision, 3,650 feet of track were missing between the proposed construction and the national rail system. In STB Finance Docket No. 34428, the Board allowed the Port Authority of New York and New Jersey to construct that track without authority on the theory that this track replaced an unsatisfactory route consisting of a long discontinued car float service and other track segments that are either long out of service, abandoned, or active but heavily congested. Port Authority of New York and New Jersey - Petition for Declaratory Order, served Jan 21, 2004.

⁸ It provided service through a haulage agreement with NY&A which itself did not have STB authority to serve the yard (presumably serving it as a spur).

Likewise, in Raritan Central Railway, L.L.C. - Operation Exemption - Heller Industrial Parks, Inc., STB Finance Docket No. 34514 (served June 25, 2007), Conrail advanced the position that Raritan Central ("Raritan"), an existing Class III rail carrier operating in central New Jersey, could serve the Heller facility as an "exempt spur" rather than as a regulated line of railroad despite its physical separation from Raritan's other trackage.⁹

Finally, the Buffalo Southern Railroad ("Buffalo Southern"), an existing Class III rail carrier operating in western New York State, sought to lease and operate a disconnected spur track along the Hudson River at Croton, NY over local opposition. Buffalo Southern obtained a federal District Court order enjoining enforcement of local land use requirements, based upon the fact that the Board has exclusive authority and its operations were exempt from that authority because it was a spur. See Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006).

Under controlling precedent, Brookhaven Rail Terminal meets all of the indicia of an exempt spur which may be constructed and operated by an existing common carrier

⁹ The Board rejected Conrail's request for a stay but never decided its request to revoke Raritan's exemption because the parties settled their dispute and Raritan withdrew its exemption request

railroad, even though the spur is disconnected from the carrier's other rail operations.

IV. Reconsideration Furthers the Public Interest.

Reconsideration of the Board's October 12, 2007 decision is in the public interest. Rail service meets the national demand for efficient and economical transportation of goods and materials. That public interest overrides local opposition.

The Board is well aware of the lack of rail facilities east of the Hudson River generally and on Long Island specifically. See Coastal Distribution, LLC et al v. Town of Babylon et al, 216 Fed. Appx. 97 (U.S.C.A. 2d Cir. 2007). Long Island-based consumers have only two means of transporting inbound essential products: highway or rail. Highway transportation to eastern Long Island necessarily entails the use of the Long Island Expressway, aptly nicknamed the "world's longest parking lot," as well as some congested local roads. Other highways serving Long Island prohibit freight and commercial transportation.¹⁰ This leaves the alternative of rail transportation in the

¹⁰ Long Island has two other major east-west highways-- the Northern State Parkway and the Southern State Parkway. Commercial vehicles are barred from using either of these parkways.

form of the Long Island Rail Road ("LIRR") and its designated freight carrier, the NY&A.¹¹ New York State has long recognized the urgent need for additional transloading and intermodal freight facilities on Long Island and is developing its own plans for its intermodal transloading facility at Brentwood, Long Island.¹²

¹¹ Historically, the LIRR provided both freight and commuter rail passenger service. In 1997 the LIRR granted the NY&A an exclusive franchise to perform freight service over its tracks.

¹² <https://www.nysdot.gov/portal/page/portal/regional-offices/region10/projects/long-island-intermodal/li-truck-project-iframe> (October 24, 2007)

CONCLUSION

For the reasons expressed above, as well as the authority cited herein, Petitioners respectfully request that the Board reconsider its decision, served October 12, 2007, and enter an order permitting U S Rail to continue site preparation of Brookhaven Rail Terminal.

Respectfully submitted,



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Counsel for Petitioners
Sills Road Realty LLC,
and U S Rail Corporation

Dated: October 26, 2007

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Petition For Reconsideration of Sills Road Realty LLC and U S Rail Corporation was served on October 26, 2007 upon counsel for the Town of Brookhaven.



John D. Heffner

EXHIBIT A

newsday.com/news/local/crime/ny-lirail025398794oct02,0,6482362 story

Newsday.com

Jumping gun on big dig

Rail company, Syosset firm start on massive clearing project for Yaphank transfer site - but work is halted for lack of permits

BY JENNIFER SMITH AND ERIK GERMAN

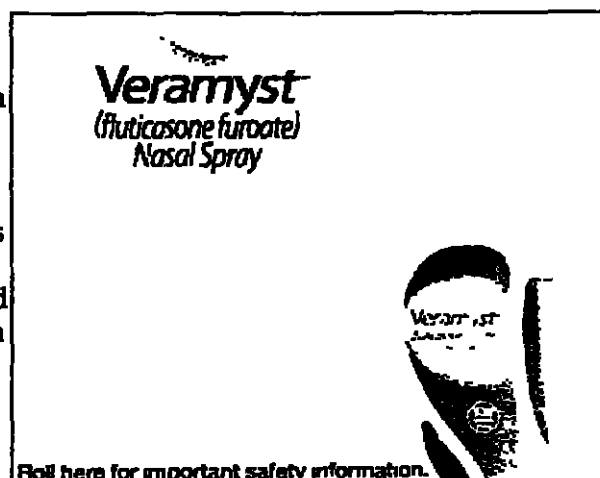
jennifer.smith@newsday.com, erik.german@newsday.com

October 2, 2007

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site - without having sought any government approvals.

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros., the Bay Shore subcontractor preparing the site, and to the owner of the land - Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week.



Federal defense

The railroad involved - U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty - says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the

Page 2 of 4

Jumping gun on big dig -- Newsday.com

citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

A big haul

citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

A big haul

Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day. "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for \$330,000 to \$750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project under state law that isn't mining." Drumm said Friday the sand was being sold.

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes.

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U.S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone - an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic.

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

Quite a surprise

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself.

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and .. we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the

Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization - as well as an environmental review.

Fall into disfavor

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of yesterday, nobody had formally done so.

About the project

LOCATION

28-acre parcel of industrially zoned land in Yaphank owned by Sills Road Realty.

WHAT'S BEING BUILT

A transload facility where stone, lumber and other construction materials would be shipped in via an 11,000-foot rail spur and loaded onto trucks.

ESTIMATED TRAFFIC

2,500 to 3,000 rail cars a year initially, with about 7,500 trucks picking up material

EXCAVATION

Over six weeks, about 1,000 cubic yards of sand were removed each day, town officials said

The track record

To prevent local and state regulations from bogging down interstate rail commerce, a 1995 federal law gave the Surface Transportation Board exclusive jurisdiction over railroads and all related facilities and activities. Previously states had been allowed to control the construction or removal of railroad spurs and other ancillary tracks.

Under the 1995 law, rail carriers need board approval to build a new railroad line but are allowed to make improvements and add new facilities to an existing line. If there is a concern that the federal pre-emption is being wrongly used to shield non-transportation activities, parties can ask the board to issue an order or a stay, or take the matter to court.

EXHIBIT B



Town of Brookhaven Long Island

Brian X. Foley, Supervisor

October 2, 2007

**Surface Transportation Board
Attention: Nancy Beiter, Esq.
395 E Street, S.W.
Washington, DC 20423-001**

Re: U.S. Rail Corporation Facility/Yaphank, New York

Dear Ms Beiter:

The Town of Brookhaven, New York has been in communication with representatives of U.S. Rail Corporation ("U.S. Rail") concerning a proposed rail facility on property that they have leased in Yaphank, Town of Brookhaven, New York. U.S. Rail has alleged that as a common carrier railroad, their construction and operation of this "Rail Yard" is governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board. They, therefore, claim that local laws, rules and regulations have no applicability to this project. A copy of identical letters from their counsel, John D. Heffner, one faxed July 12, 2007 and the other received by mail on July 27, 2007 are attached.

Although representatives of the Town have demanded proof of that authority, such as a copy of any documents or exemptions, U.S. Rail has not provided them. They appear to be relying on their authority to act because they are an authorized rail corporation.

Without obtaining the necessary permits under New York State and Town of Brookhaven laws, rules and regulations, representatives of U.S. Rail have commenced clearing and possibly sand mining on the premises. We are particularly disturbed that apparently no environmental review under either NEPA or New York State's SEQRA was undertaken.

**Department of Law
Robert F. Quinlan, Town Attorney
One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6500 • Fax (631) 698-4489 • Fax (631) 451-6505
www.brookhaven.org**

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Surface Transportation Board
Attention: Nancy Beiter, Esq.
October 2, 2007
Page -2-

Re: US Rail Corporation Facility/Yaphank, New York

The Town realizes that if U.S. Rail is acting under the authority of the Surface Transportation Board, than their actions may be justified. As we have not received adequate documentation from U.S. Rail or their counsel to prove their authority, the Town of Brookhaven will be filing a formal petition for a declaratory order with the Surface Transportation Board shortly.

The purpose of this letter is to advise you of that intended action as well as to ascertain if there is any existing process initiated by U.S. Rail on this action.

Very truly yours,



Robert F. Quinlan
Town Attorney

RFQ:dah
Enclosures

EXHIBIT C



Surface Transportation Board
Washington, D.C. 20423-0001

October 4, 2007

Office of Compliance and Consumer Assistance
395 E Street, S.W., Suite 1180
Washington, DC 20423-0001

202-245-0278
FAX 202-245-0462

John D. Heffner, Esq
1750 K Street, N.W.
Suite 350
Washington, DC 20006

**RE: Activities by U S Rail Corporation
In Yaphank, NY**

Dear Mr Heffner

This letter is directed to you in your capacity as representative of U S Rail Corporation.

Katherine Bezold, a member of the Board's Office of Compliance and Consumer Assistance, spoke with you yesterday to inquire about press reports that U S Rail Corporation is clearing and excavating land in preparation for building a rail-to-truck transfer facility in Yaphank, NY. The story, which appeared in Newsday on October 1, 2007, attributes to U S Rail a statement that "federal law allows railroads to undertake such projects without state and local permits." In reply to Ms Bezold's inquiry you did not deny that the construction of the facility in question was taking place and did not assert that U S Rail has received any authority from the Board to undertake such activities in Yaphank.

The Board also received a letter, copy attached, from the Town of Brookhaven, NY, signed by Robert F. Quinlan, the Town Attorney. Mr. Quinlan recites that the town has been in communication with representatives of U S Rail Corporation, who have asserted "their construction and operation of this 'Rail Yard' is governed by federal law, rules and regulations and [is] subject to the exclusive jurisdiction of the Surface Transportation Board." The letter also notes that representatives of the Town have demanded proof that U S Rail's project is governed by federal rather than state or local law, "such as a copy of any documents or exemption," and that U S Rail has failed to provide the requested documentation. The Board subsequently received copies of two letters (one dated July 12, 2007, and a second dated July 25, 2007) from you to Mr. Quinlan, in which you state that U S Rail intends to construct and operate, "as an 'exempt spur' within the meaning of 49 U.S.C. 10906, a line of rail" and other facilities "for the purpose of operating a common carrier railroad and transload facility at that location."

U S Rail Corporation has received no authority from this agency to construct any rail facilities at Yaphank, NY. Construction of rail facilities requires a license from this agency, pursuant to 49 U S C 10901 You are directed to advise the Board in detail, by a response due to me no later than October 9, 2007, of any and all activities undertaken, or being undertaken, in Yaphank, Brookhaven, or anywhere in that vicinity, by U S Rail Corporation, or by any entity on its behalf, or by any other entity that you represent. If you believe that any of these activities do not require Board approval (whether as an "exempt spur" or otherwise), tell us why you believe that to be the case.

I understand from the media account that work has been suspended Work should not resume in any form until Board authority is obtained or the Board determines that its authorization is not required

Sincerely,

A handwritten signature in black ink, appearing to read "Melvin F. Clemens", with a large, stylized flourish at the end.

Melvin F Clemens

EXHIBIT D

LAW OFFICE
JOHN D. HEFFNER, PLLC
1750 K STREET, N W
SUITE 350
WASHINGTON, D.C. 20006
PH (202) 296-3333
FAX (202) 296-3939

October 9, 2007

BY HAND DELIVERY

Mr. Melvin F. Clemens
Surface Transportation Board
Office of Compliance and Consumer Assistance
395 E Street, S.W , Suite 1180
Washington, D.C. 20006

**RE: Activities by U S Rail Corporation
In Yaphank, NY**

Dear Mr Clemens:

I am responding on behalf of U S Rail Corporation ("U S Rail") in response to your inquiry dated October 4, 2007. You wrote to follow up a discussion that I had with Ms. Katherine Bezold of your staff concerning press reports that U S Rail is clearing and excavating land preparatory to building a rail-to-truck transfer facility in Yaphank, NY ("the Brookhaven Rail Terminal" or "Terminal"). Your letter also references correspondence received from the Town Attorney for Brookhaven, NY, in connection with this project.

Your letter directs U S Rail "to advise the Board in detail, by a response due no later than October 9, 2007, of any and all activities undertaken, or to be undertaken, in Yaphank, NY, or anywhere in that vicinity, by U S Rail Corporation, by any entity on its behalf, or by any other entity that you represent." To the extent that U S Rail believes that its activities do not require Board approval, your letter asks why that is the case. Finally, your letter directs U S Rail to suspend work until Board authority is obtained or the Board determines that no authorization is required.

U S Rail contemplates that the Brookhaven Rail Terminal will provide inbound bulk freight services, principally for aggregates and other stone products as well as other construction related materials, such as lumber, and intermodal freight services to central Suffolk County. That market currently lacks adequate transloading facilities and relies predominantly on truck freight transportation. Truck safety and roadway congestion are major transportation issues within that market which the Terminal will help to address.

Activities occurring to date at this site have included meetings between Sills Road Realty (the developers of this facility) with state and local officials (see attached chronology) to discuss this project, consultations with officials at the New York Department of Transportation about funding for the project, discussions and negotiations with the New York & Atlantic Railroad (NY&A) and CP Rail about through transportation of inbound and outbound cargo, design of the rail terminal and related facilities (see attached site plan and rail layout), ordering of material for the construction of those facilities, and the clearing of land in anticipation of construction of those facilities¹. As yet, neither U S Rail nor any other entity has constructed any railroad track. As the attached site plan details, once constructed, the Terminal will comprise about 11,000 feet of terminal and switching track (about 11,000 linear feet if laid end to end) consisting of about six individual yard tracks ranging from 800 to 1,800 feet in length and occupying approximately 28 acres of previously undeveloped industrial/commercial-zoned land within the Brookhaven Empire Zone and there are no adjacent residences, schools or recreational facilities (please refer to the attached aerial photo of the site)

U S Rail maintains that Board authority is not required for this construction and operation on the grounds that the subject track is spur, industrial, team,

¹ The developers of this site (Sills Road Realty LLC) originally planned to construct it as a private railroad to be operated by an entity named the Suffolk and Southern Rail Road LLC. Suffolk and Southern sought an exemption from the Board to lease and operate this track once constructed. Suffolk and Southern subsequently withdrew that exemption after it failed to reach an agreement with Sills Road Realty LLC.

switching, or side track within the meaning of 49 U.S.C. 10906 for which no Board authority is needed for construction, operation, or abandonment.

U S Rail is an existing class III rail carrier with operations in central Ohio. Several years ago U S Rail acquired control of The Great Miami & Scioto Railway Company and recently changed that entity's name to U S Rail. I am enclosing for your attention copies of both that company's ICC operating authority and the corporate name change documents. A new common carrier railroad initiating operations must seek Board authority; however, it may add additional lines or operations as either a regulated transaction (i.e. an acquisition or operation transaction subject to Board entry authority) or an exempt spur depending upon the specific facts. Texas Central Business Lines Corporation- Operation Exemption - MidTexas International Center, STB Docket No. 33997, served September 20, 2002.

It is well established that the determination of whether a particular track segment is a "railroad line", requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction turns on the intended use of the track segment, not on the label or cost of the segment. Nicholson v. Interstate Commerce Com., 229 U.S. App. D.C. 86 (D.C. Cir. 1983).

Nicholson holds that Congress intended to subject to the entry requirements of section 10901(a) so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through trains between different points of shipment or travel, and to exclude from those requirements all that mass of "tracks" (as distinguished from "lines") naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for such transportation service. Detroit & M.Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923).

Thus it can be said that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be

approved by the Board pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a). New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967).

In determining whether a specific piece of track is an exempt spur or a regulated line of railroad, the Board considers various factors, no one of which is controlling. The Board's analysis focuses on a series of fact-based indicia including (1) the length of the track, (2) the number of customers to be served, (3) whether stub-ended, (4) whether there is scheduled service, (5) the volume of traffic moving over the track, (6) who owns and maintains the track, (7) the weight of the rail, (8) the condition of the track, (9) the proposed use of the track, and (10) the existence or absence of a "station" through which traffic is solicited. See CNW-Aban. Exemp.-In McHenry County, IL, 3 I.C.C.2d 366 (1987), *rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989).

Under these criteria, U S Rail's operation of the subject rail facility qualifies as an "exempt spur" under 49 U.S.C. 10906 for which no construction authority is needed. The length of track is short, about 11,000 feet if laid out "end-to-end" on 28 acres of land. One principal customer, Sills Road Materials LLC, will be serviced by the Terminal. The Terminal is a stub-ended network of tracks. Service will be provided on demand rather than on any scheduled basis. The weight of the rail will not exceed 115 pounds, a weight consistent with current standards for building new rail-served industrial facilities. The condition of the track is good because it is newly constructed to the currently applicable industry standards. The proposed use of the tracks is for loading, unloading, switching, and storage of rail cars for a single principal user, all uses consistent with the character of exempt industrial or yard tracks. The purpose of this transaction is to bring stone from northern New York to Long Island by rail instead of by truck movement over congested highways. Traffic moving to or from the Terminal will be interchanged with the NY&A, and through it, with other railroads.

comprising the national rail system. There will be no "station" listed in a tariff through which traffic will be solicited.

Another issue this matter presents is whether a regulated rail carrier can construct a small segment of track at another location as an exempt spur. The answer is "yes." For example, in The New York City Economic Development Corporation - Petition for Declaratory Order, STB Finance Docket No. 34429, served July 15, 2004, the Board declared the construction and rehabilitation of a spur track 6,744 feet in length, owned by a New York City agency, identified by the Board as a noncarrier, to be both an exempt spur outside the Board's entry jurisdiction and entitled to preempt state or local law under 49 U.S.C. 10501(b). Significantly, in allowing the City to construct this trackage without any agency licensing approval or environmental review, the Board tacitly authorized the construction of a disconnected piece of railroad as a spur.² The decision indicated that some combination of Consolidated Rail Corporation, Norfolk Southern Railway (NS), and CSX Transportation, Inc. (CSX), would provide service once the line was constructed. However, neither NS nor CSX provided service in their own right in the area.

Similarly, Tri-State Brick and Stone of New York, Inc., et al., STB Finance Docket No. 34824, served August 11, 2006, involved a situation where CP Rail had been serving a railroad yard located at 65th Street in Brooklyn, NY, that was owned by the very same New York City Economic Development Corporation that was the subject of the above-cited case. As the decision and record in that case indicate CP Rail was serving the yard as either an "exempt spur" for which it needed no entry and exit authority or as an unauthorized carrier for which it needed entry and exit authority and had neither. CP Rail's principal operations

² At the time of the Board's July 15 decision, 3,650 feet of track were missing between the proposed construction and the national rail system. In STB Finance Docket No. 34428, the Board allowed the Port Authority of New York and New Jersey to construct that track without authority on the theory that this track replaced an unsatisfactory route consisting of a long discontinued car float service and other track segments that are either long out of service, abandoned, or active but heavily congested. Port Authority of New York and New Jersey - Petition for Declaratory Order, served Jan 21, 2004

are in northern and western New York State. Although it had trackage rights from the Albany area to the Fresh Pond Yard in the Queens section of New York City, it had no authority to provide and provided no service³ between Fresh Pond and the 65th Street Yard, a distance of about 9.5 miles.

Finally, in Raritan Central Railway, L.L.C. - Operation Exemption - Heller Industrial Parks, Inc., STB Finance Docket No. 34514, served June 25, 2007, Consolidated Rail Corporation argued that Raritan Central could have served the Heller facility as an "exempt spur" instead of a regulated line of railroad although the track is physically disconnected from Raritan's other track. The Board rejected Conrail's request for a stay but never decided its request to revoke Raritan's exemption because the parties settled their dispute and Raritan withdrew its exemption request.

Accordingly, U S Rail submits that its construction of this line is an exempt spur under 49 U.S.C. 10906. As such, U S Rail also enjoys the preemption rights conferred under 49 U.S.C. 10501(b). In its recent ruling in the New England Transrail case, the Board clearly stated at 12

"[I]n enacting ICCTA, Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks. Those activities would therefore nevertheless be preempted from state regulation. Because they would also be excepted by section 10906 from Board licensing, the Board would not undertake any environmental review of the proposed service and could not impose any conditions for the protection of the environment "

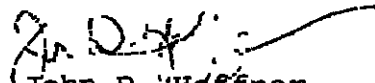
[emphasis supplied]

In conclusion, U S Rail may construct the subject track without Board approval. Please confirm your agreement in writing so that U S Rail can resume its work

³ It provided service through a haulage agreement with NY&A which itself did not have STB authority to serve the yard (presumably serving it as a spur)

U S Rail appreciates the Board's time and consideration in this matter and trusts that the Board will, in turn, appreciate the need to address this matter expeditiously.

Sincerely yours,


John D. Heffner

cc: Mr. Gabriel Hall

Meeting Chronology Brookhaven Rail Terminal

January 23, 2007 - Meeting with David Woods, Director of Planning, Town of Brookhaven, New York, Lynn Weynant, Director of Traffic Safety, Town of Brookhaven, New York and staff, and Fred Krebs, President of New York & Atlantic Railway (NY&A), to discuss the Brookhaven Rail Terminal business plan and to present the preliminary site plan for the project.

February, 2007 - Meeting with Thomas Isles, Director of Planning, County of Suffolk, New York and staff to discuss the Brookhaven Rail Terminal business and to present the preliminary site plan for the project

February, 2007 – Submission of grant application for the Brookhaven Rail Terminal to the New York State Department of Transportation

January – June, 2007 – Various meetings and telephone conversations with representatives of NY&A to discuss design and operation of the Brookhaven Rail Terminal

June, 2007 – Meeting with Kevin Law, Deputy County Executive, Suffolk County, New York

July 10, 2007 – Meeting with Karen J. Rae, Deputy Commissioner Policy & Strategy, and Donald V. Hannon, Director, Office of Program Development & Management, New York State Department of Transportation to discuss State grant assistance for the Brookhaven Rail Terminal

July, 2007 – Delivery of various legal memoranda to the Town Attorney, Town of Brookhaven, New York regarding preemption of local permitting procedures

July 12, 2007 – John Heffner, Esq., on behalf of U.S. Rail Corporation, submits notice of U.S. Rail's intent to commence construction to the Town Attorney, Town of Brookhaven, New York

July 20, 2007 – Meeting with Brian Foley, Town Supervisor, Town of Brookhaven, New York and Raymond Donnelly, Director of Economic Development, Town of Brookhaven, New York to discuss the Brookhaven Rail Terminal business plan and to advise regarding the commencement of construction.

August 20, 2007 – Site clearing commences.

September 5, 2007 – Meeting with Highway Department, Suffolk County, New York to discuss traffic ingress and egress and site traffic signage

September 12, 2007 – Meeting with Timothy Bishop's office, US Congressman, District 1 to discuss Brookhaven Rail Terminal

September 12, 2007 – Meeting with Yaphank Civic and Taxpayers Association

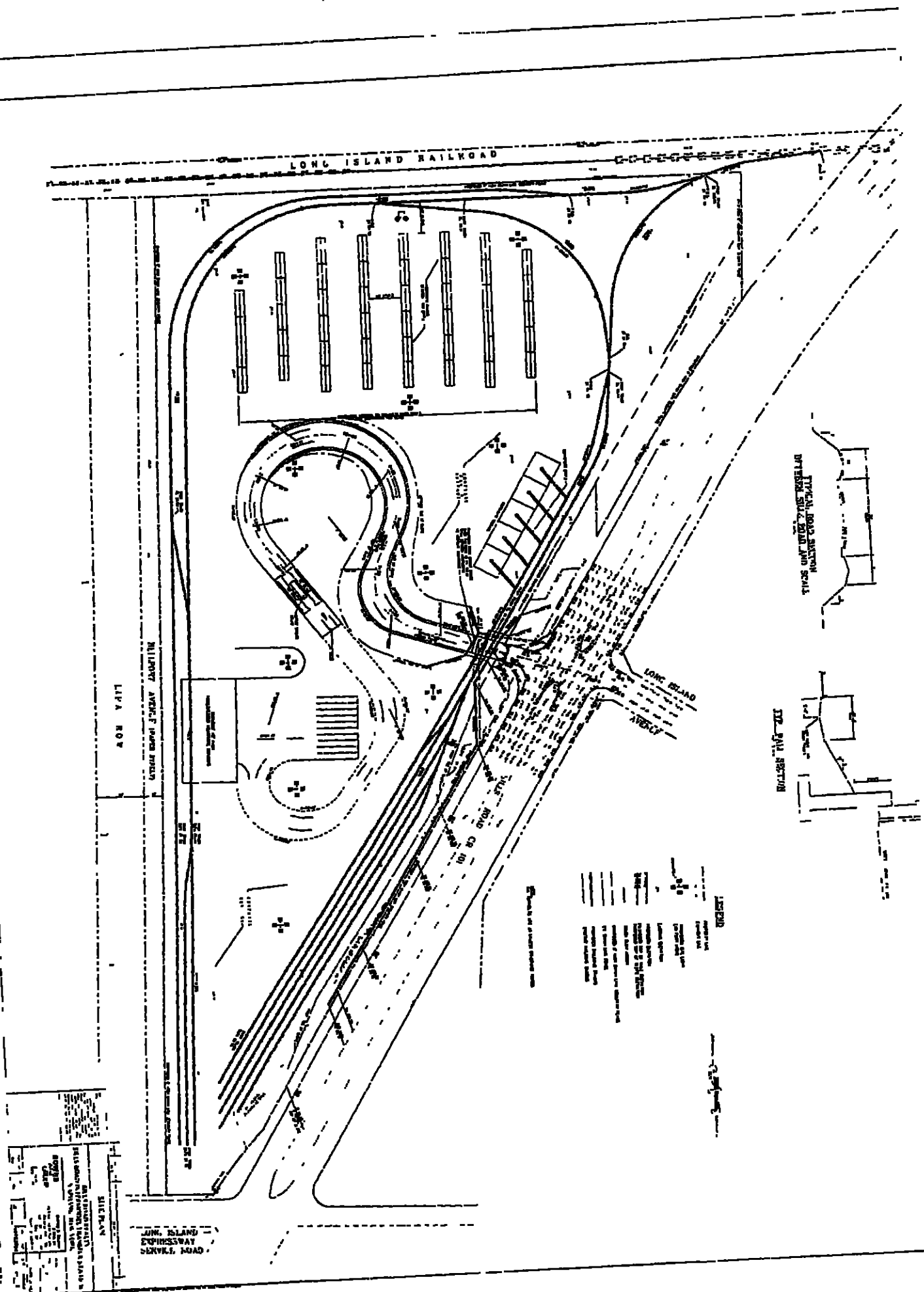


EXHIBIT E

JOHN D. HEFFNER, PLLC

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

PHONE 202-4180

FAX (202) 296-8939

j.heffner@verizon.net

By overnight courier and facsimile to
(631) 698-4489

July 12, 2007

Robert F. Quinlan, Esq.
Town Attorney
Department of Law
Town of Brookhaven
One Independence Hill
Farmingville, New York 11738

Re: Real Property Described in Attachment A (the "Real Property")

Dear Mr. Quinlan:

I am writing on behalf of U S Rail Corporation ("U S Rail"), an Ohio-based company and common carrier short line railroad operating pursuant to authority granted by the former Interstate Commerce Commission (now the Federal Surface Transportation Board). U S Rail has leased the Real Property and intends to construct and operate as an "exempt spur" within the meaning of 49 U.S.C. 10906, a line of rail and related side tracks, yard tracks, turn outs, switches and connecting track (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location.

The Rail Yard will provide rail transportation services to customers shipping and receiving and /or transloading aggregate stone and other stone products as well as lumber, plywood, sheetrock and related construction materials and other merchandise freight. As a common carrier railroad, U S Rail's construction and operation of the Rail Yard are governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board thereunder.

U S Rail desires to work with you and other community leaders to develop a very positive relationship. We are available to meet with you at your earliest convenience but anticipates commencing construction of the Rail Yard within the next thirty days.

Should you have any questions, please feel free to contact me at your convenience.

Very truly yours,

John D. Heffner, Esq.

cc: Gabriel D. Hall
President
U S Rail Corporation

Attachment A

**County of Suffolk
Town of Brookhaven
District: 0200**

Section 663.00, Block: 03.00, Lot(s): 001.00, 027.001, 027.002, 027.003 & 027.004

Section 704.00, Block: 04.00, Lot(s): 001.000 & 002.000

Section 704.00, Block: 05.00, Lot(s): 001.000 & 002.000

**Section 704.00, Block: 02.00, Lot(s): 001.000, 002.000, 030.000, 031.000, 032.000,
033.000, 034.000, 035.000 & 036.000**

EXHIBIT F

UL-04-2007 THU 08:21 AM US Law Dept.

FAX NO. 6314518505

P. 08

JOHN D. HEFFNER, PLLC

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3839

j.heffner@verizon.net

JUL 27 11:24

By facsimile to
(631) 698-4489

July 25, 2007

Robert F. Quinlan, Esq.

Town Attorney

Department of Law

Town of Brookhaven

One Independence Hill

Farmingville, New York 11738

Re: Real Property Described in Attachment A (the "Real Property")

Dear Mr. Quinlan:

I am writing on behalf of U S Rail Corporation ("U S Rail"), an Ohio-based company and common carrier short line railroad operating pursuant to authority granted by the former Interstate Commerce Commission (now the federal Surface Transportation Board). U S Rail has leased the Real Property and intends to construct and operate as an "exempt spur" within the meaning of 49 U.S.C. 10906, a line of rail and related side tracks, yard tracks, turn outs, switches and connecting track (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location.

The Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone and other stone products as well as lumber, plywood, sheetrock and related construction materials and other merchandise freight. As a common carrier railroad, U S Rail's construction and operation of the Rail Yard are governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board thereunder.

U S Rail desires to work with you and other community leaders to develop a very positive relationship. We are available to meet with you at your earliest convenience but anticipates commencing construction of the Rail Yard within the next thirty days.

Should you have any questions, please feel free to contact me at your convenience.

2025659011

SURFACE TRANSPORTATION BOARD

02 48 48 p m

10-04-2007

9/10

WI-04-2007 INU 08-21 AM 108 Law Dept.

FAX NO. 8314518505

P. U/

Very truly yours,



John D. Heffner, Esq.

cc: Gabriel D. Hall
President
U S Rail Corporation

Attachment A

**County of Suffolk
Town of Brookhaven
District: 0200**

Section 663.00, Block: 03.00, Lot(s): 001.00, 027.001, 027.002, 027.003 & 027.004

Section 704.00, Block: 04.00, Lot(s): 001.000 & 002.000

Section 704.00, Block: 05.00, Lot(s): 001.000 & 002.000

**Section 704.00, Block: 02.00, Lot(s): 001.000, 002.000, 030.000, 031.000, 032.000,
033.000, 034.000, 035.000 & 036.000**