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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**

REPLY TO PETITION FOR RECONSIDERATION

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The Town of Brookhaven ("Brookhaven") responds to the Petition for Reconsideration of the Decision of October 12, 2007 served by counsel for Sills Road Realty, LLC ("Sills") and U.S. Rail Corporation ("US Rail") (US Rail and Sills are hereinafter collectively referred to as "Petitioners"). The issue before the Board is the status of US Rail's proposed operations at Sills Road in the Town of Brookhaven New York (the "Property") over 11,000 feet of track (the "Track") on a 28-acre site. As set forth below, the Board's decision dated October 12, 2007 ("October 12, 2007 Decision") is not affected by material error and therefore should not be reconsidered.

ARGUMENT

In order for a petition for reconsideration to be granted, it must establish one or more of the following points:

- (1) The prior action will be affected materially because of new evidence or changed circumstances.
- (2) The prior action involves material error.

49 C.F.R. § 1115.3.

As set forth below, Petitioners have not met the criteria for the grant of a petition for reconsideration. By separate petition filed October 18, 2007, Petitioners sought a stay of the October 12, 2007 Decision on the grounds that the portions of that decision that ordered Petitioners to cease and desist from further construction activity would cause them irreparable harm. In a decision dated November 16, 2007 ("November 16, 2007 Decision"), the Board denied the petition for a stay and articulated, among other things, why Petitioners were unlikely to succeed on the merits in this case. At this time, the Board has fully articulated why Petitioners' legal arguments lack merit.

The Board has indicated that one aspect of the Petitioner's motion for reconsideration remains to be addressed. Specifically, Petitioners contended that the Board's October 12, 2007 decision involves material error in that it failed to consider, reference or otherwise discuss either the STB Office of Compliance and Consumer Assistance ("OCCA") Director Melvin F. Clemens' letter of October 4, 2007 letter response, or counsel for Petitioners' October 9, 2007 letter response thereby allegedly denying Petitioners' procedural due process (these letters are hereinafter collectively referred to as the "OCCA Correspondence"). In the November 16, 2007 Decision, the Board noted that the OCCA's role is to facilitate informal private sector dispute resolution between that office and rail shippers or railroads, and that because the OCCA Correspondence is part of an informal process, it is not linked to any formal proceeding and therefore was not made a part of the administrative record in these proceedings.

Nonetheless the Board noted in the November 16, 2007 Decision, that since the Petitioners had now made the OCCA Correspondence a part of the record, it would fully consider the OCCA Correspondence when it considers the petition for reconsideration.

Insofar as the merits of Petitioners' arguments have already been considered and rejected, the Board's role in deciding this petition for reconsideration appears limited to considering whether anything set forth in the OCCA Correspondence provides evidences of a material error that would require the Board to reconsider the October 12, 2007 Decision.

All of the legal and factual arguments that were made in the in the OCCA Correspondence were also set forth in the petition for a stay. In fact, the letter from Petitioners' counsel that was part of the OCCA Correspondence is merely a condensed version of the arguments made in the petition for a stay. The legal arguments are identical. Petitioners relied on *Nicholson*¹ and *New Orleans Terminal Co.*² to set forth the criteria by which a "main line" is distinguished from "spur" track and then claim that four other decisions³ support the conclusion that a regulated rail carrier can construct a small segment of track at another location as an exempt spur.

The Board's November 16, 2007 Decision has addressed these arguments, reasoning that the key test in determining whether construction of the track requires Board approval is whether the "purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory" not served by the carrier or already served by another carrier based on *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 278 (1925) and *Effingham RR Co.—Pet. For Declaratory Order*, 2 S.T.B.606 (1997), reconsideration denied, *Effingham Railroad Company—Petition for Declaratory Order*

¹ *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983)

² *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966)

³ *The New York City Economic Development Corporation—Petition for Declaratory Order*, STB Finance Docket No. 34429 (STB served July 15, 2004); *Tri-State Brick and Stone of New York, Inc., et al.*, STB Finance Docket No. 34824 (STB served August 11, 2006); *Raritan Central Railway, L.L.C.—Operation Exemption—Heller Industrial Parks, Inc.*, STB Finance Docket No. 34514 (STB served June 25, 2007); and *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006).

Construction at Effingham, IL, et al., STB Docket No. 41986 (STB served Sept. 18, 1998), *aff'd sub nom United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999).

The Board also rejected the four decisions cited by Petitioners to support their claim that a "regulated rail carrier can construct a small segment of track at another location, as an exempt 'spur,'" noting that:

Petitioners cite four Board decisions to support their claim that "a regulated rail carrier can construct a small segment of track at another location as an exempt 'spur.'" None of the cases is apposite. In two of the cases, the carriers involved had rights to operate between their main line and their "spur," in the former case by a car float service and in the latter by haulage agreement. Petitioners make no claim that U S Rail possesses any rights at all to operate between Jackson, OH and Brookhaven, NY. In the third and fourth cases, the agency never reached the merits of the "spur" versus "rail line" issue.

November 16, 2007 Decision, p. 5 (footnotes omitted).

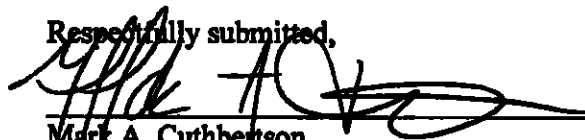
In sum, the argument in the petition for reconsideration—that the October 12, 2007 Decision overlooks "Petitioners' unrefuted highly probative evidence, submitted in a timely matter, and properly referenced to the controlling statutory and case law, that their activities were exempt from Board authority"—has already been decided by the Board in its November 16, 2007 Decision. The Board has had the opportunity to consider the full force of all of Petitioners' legal arguments, and not just the "unverified newspaper report and a letter from the local municipality" that allegedly formed the basis for the Board entering its October 12, 2007 Decision. Even with the consideration of this supporting information and legal authority, the Board has not accepted the Petitioners' argument that the facts as presented to the Board merit the decision that the construction of the "Brookhaven Rail Terminal" qualifies as "disconnected spur" of U S Rail and is exempt from the need for prior Board approval pursuant to 49 U.S.C § 10906.

The only item in the petition for reconsideration that merits further discussion is Petitioners' claim that the traffic moving from the "Brookhaven Rail Terminal" will be interchanged with the New York & Atlantic Railway ("NYA"). Petition for Reconsideration, p. 15. NYA, however, has submitted a verified statement in this proceeding from its Chairman Bruce A. Lieberman dated November 19, 2007 in which he states that he has consistently indicated to Petitioner Sills Road Realty, LLC ("Sills") that NYA opposes any attempt to claim railroad status or privilege, including preemption based on the activities undertaken at the "Brookhaven Rail Terminal." In his verified statement Mr. Lieberman notes that Sills provided NYA with a letter dated July 27, 2007 that indicated that it would act only as "a rail user (shipper), not a connecting rail carrier" and represented that it would "seek your [NYA's] concurrence if we wanted to become a rail carrier." In NYA's view, Sills' lease of the subject property to Petitioner U S Rail and U S Rail's claim that it is a common carrier hundreds of miles from its main line and -already-subject-to rail service by NYA is a breach of its prior commitment. Thus, Petitioners' representation that they will interchange with NYA is open to question.

CONCLUSION

Brookhaven asks the Board to deny reconsideration of its decision dated October 12, 2007.

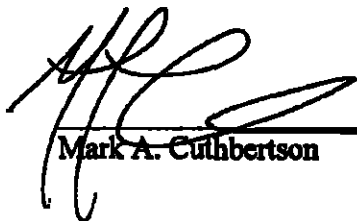
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 26th day of November, 2007, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No. 35036.


Mark A. Cuthbertson