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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
- CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

MOTION TO COMPEL DISCOVERY

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October 13, 2008

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SURFACE TRANSPORTATION BOARD

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CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

MOTION TO COMPEL DISCOVERY

Pursuant to 49 CFR § 1114.31, the Town of Brookhaven ("Town" or "Brookhaven") respectfully moves the Surface Transportation Board ("STB" or "Board") for an order compelling Petitioner U.S. Rail Corporation ("U.S. Rail" or "Petitioner") to respond to its First Demand for Discovery.

PRELIMINARY STATEMENT

Although U.S. Rail filed a petition for exemption under part 1121, it thereafter refused to respond to the Town's discovery requests, which are clearly authorized by 49 C.F.R. § 1121.2 (providing for "Discovery" in "Rail Exemption" proceedings). U.S. Rail's misstatements of law in correspondence with the Town and its subsequent failure to follow the Board's regulations have unnecessarily caused the Town to file this motion to compel. For the reasons set forth herein, U.S. Rail must be ordered to respond to the Town's discovery requests. In addition, because counsel for U.S. Rail has knowingly maintained an untenable position in an effort to obstruct the lawful discovery efforts of the Town, the Board should issue a declaratory order stating that U.S. Rail has waived all objections to the form and substance of the Town's requests.

BACKGROUND

On August 7, 2008, U.S. Rail filed a Construction and Operation Exemption Petition ("Petition") pursuant to 49 U.S.C. § 10502 under Finance Docket No. 35141 relating to a proposed rail facility in Brookhaven, New York. Having been granted an extension of time to reply to the Petition, the Town filed its Reply on September 18, 2008. On the same day, it served its First Demand for Discovery, including document requests, interrogatories, and requests for admission, which are annexed hereto at Exhibit A.

On October 3, 2008, U.S. Rail responded by letter to counsel for the Town objecting to the discovery requests on the principle that discovery is not permitted in "informal proceedings."

The entire text of that letter read:

Inasmuch as petitions for exemption are informal proceedings under the Board's rules, such matters are not subject to the discovery proceedings of 49 C.F.R. 1114. Accordingly, no further response to the Town's discovery initiatives will issue.

Please do not hesitate to contact me if you have any further questions.

See October 3, 2008 Letter from James H.M. Savage, Esq. to Jessica P. Driscoll, Esq. annexed hereto at Exhibit B.

In a good faith effort to resolve the discovery dispute prior to filing this motion, the Town replied on October 6, 2008, and implored counsel for U.S. Rail to change U.S. Rail's clearly erroneous position. That letter is annexed hereto at Exhibit C. Counsel for U.S. Rail replied that same day, stating, "In response to your October 6th letter, 49 C.F.R. 1121.4 defines exemption proceedings as informal. Hence, the discovery provisions of 1114 are inapplicable." See October 6, 2008 Letter from James H.M. Savage, Esq. to Jessica P. Driscoll, Esq. annexed hereto at Exhibit D.

U.S. Rail's complete failure to respond to all discovery requests and its position that discovery is not permitted in exemption proceedings leave the Town no choice but to file this motion to compel pursuant to 49 C.F.R. § 1114.31.

LEGAL ARGUMENT

Point I

Discovery Is Permitted in Rail Exemption Proceedings, Including Petitions for Exemption Filed Under 49 U.S.C. § 10502

U.S. Rail does not object to the form or substance of the requests. If it had, the Town would consider the objections, work in good faith to reach resolution and cure any alleged defects if necessary. Rather, U.S. Rail advances one clearly erroneous argument in support of its failure to respond to discovery requests: that "part 1114" does not apply to "informal proceedings," and a petition for exemption is an "informal proceeding." See Exhibits B and D. This argument entirely ignores the regulations specific to rail exemption proceedings.

As counsel for U.S. Rail surely knows, U.S. Rail's Petition is a petition for exemption filed under 49 U.S.C. § 10502. Title 49, Part 1121 of the C.F.R. governs the procedures for such petitions before the Board. 49 U.S.C. § 1121.1 ("These procedures generally govern petitions filed under 49 U.S.C. 10502 to exempt a transaction or service from 49 U.S.C. subtitle IV, or any provision of 49 U.S.C. subtitle IV, or to revoke an exemption previously granted. These procedures also apply to notices of exemption.")

Discovery is explicitly permitted in exemption proceedings under part 1121. Specifically, § 1121.2, which governs "Discovery" in "Rail Exemption" proceedings, states:

Discovery shall follow the procedures set forth at 49 C.F.R. part 1114, subpart B. Discovery may begin upon the filing of a petition for exemption or petition for revocation of an exemption.

49 U.S.C. § 1121.2 (emphasis added). In fact, discovery in rail exemption proceedings is a common practice. See, e.g., Western New York & Pennsylvania Railroad, LLC - Lease And Operation Exemption - Certain Assets Of Norfolk Southern Railway Company And Chautauqua, Cattaraugus, Allegany And Steuben Southern Tier Extension Railroad Authority, STB Finance Docket No. 35019 (served July 13, 2007) at 1 (discovery permitted after notice of exemption filed); Yellowstone Valley Railroad, Inc. - Lease And Operation Exemption - BNSF Railway Company, STB Finance Docket No. 34737 (served August 10, 2005) at 1 (discovery permitted relating to petition to revoke notice of exemption); Holrail LLC - Construction And Operation Exemption - in Orangeburg And Dorchester Counties, SC, STB Finance Docket No. 34421 (served October 20, 2004) at 3 (discovery permitted after filing of petition for exemption under § 10502). Indeed, Petitioner has offered no case support for its theory that discovery is not permitted.

While the *authority* for discovery in rail exemption procedures arises out of part 1121, practitioners are directed to part 1114 for the *procedure*. See 49 C.F.R. § 1121.2. Accordingly, the Town correctly served its discovery requests and deposition notices under the procedures listed in part 1114.

Point II

U.S. Rail's Argument That An Exemption Proceeding Is An "Informal Proceeding" For Purposes of Part 1114 Is A Misstatement of The Law.

U.S. Rail seizes on the words "informal proceeding" in part 1114 to support its incongruous position. The section states,

Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding, other than an informal proceeding.

49 C.F.R. § 1114.21(a)(1). U.S. Rail claims that because the rail exemption part – part 1121 – defines exemption proceedings as “informal,” see 49 C.F.R. § 1121.1(a), discovery under part 1114 is not permissible. This is wrong for two reasons.

First, U.S. Rail ignores the next sentence of the general discovery provision, which states that, “For purposes of this subchapter, informal proceedings are those not required to be determined on the record after hearing and include informal complaints and all proceedings assigned for initial disposition to employee boards under § 1011.6.” 49 C.F.R. § 1114.21(a)(1) (emphasis added). Thus, the statement in part 1121 that an exemption proceeding is “informal” is not relevant to the application of part 1114, which defines the term internally for its own application.

Second – and more importantly – the authority for discovery arises out of the rail exemption regulations themselves: it is part 1121 that gives the explicit authority for discovery in exemption proceedings. Such discovery begins “upon the filing of a petition for exemption” and is governed by the procedures set forth in part 1114. 49 U.S.C. § 1121.2. In other words, even if rail exemption proceedings were somehow excluded from the general discovery provision, in adopting the specific exemption rules, the Board made a conscious decision to permit discovery under 49 U.S.C. § 1121.2 upon the filing of a petition for exemption under 49 U.S.C. § 10502. Expedited Procedures for Processing Rail Rate, 1 S.T.B. 754, 770 (1996).

Point III

Discovery From U.S. Rail Is Necessary

Discovery from U.S. Rail is necessary for three reasons. First, as set forth more fully in the Town’s Reply to the Petition for Exemption (Document No. 223634 in this matter) at pages 10-13, U.S. Rail failed to “provide its case-in-chief, along with its supporting evidence,

workpapers, and related documents at the time it file[d] its petition." 49 U.S.C. § 1121.3.

Specifically, the information supplied by U.S. Rail did not include any:

- financial data relating to the construction of the proposed track or the operation thereon;
- agreement between U.S. Rail and LIRR to access/use LIRR's track;
- interchange agreement between U.S. Rail and NY&AR;
- information regarding the construction of the connecting line to the existing line;
- detailed construction or site plans;
- information regarding length and location of the trackage to be constructed;
- information regarding the type and location of all proposed structures to be built on the property;
- description of the degree to which construction would involve excavation or the movement of soil;
- description of the locations where transloading would take place;
- facts regarding the proposed grinding, bailing, and other processes to which construction waste and solid waste could be subject at the site; or
- information about operations, including how U.S. Rail proposes to move their its cars on and off the NY&AR track, whether the train cars will be required to sit waiting, and whether that will disrupt service on the LIRR;

See generally Petition (Document No. 223118 in this matter). The Town's discovery requests are aimed at unearthing this information, all of which is necessary for the Town to properly address the Petition and for the Board to make a reasoned decision in this matter. See generally First Demand for Discovery, Exhibit A hereto.

Second, U.S. Rail has a history of playing fast and loose before the Board. U.S. Rail's assorted attempts to circumvent jurisdiction are well-documented in Finance Docket No. 35036 and the Town will not repeat them here. The Town's response to U.S. Rail's Petition for Clarification in that matter is annexed hereto at Exhibit E. Pages 3-8 specifically lay out the

double-speak and backdoor tactics employed by U.S. Rail relating to the proposed rail facility in Brookhaven, New York.

In addition, the Board recently rejected a notice of exemption filed by U.S. Rail in another proceeding because it found that U.S. Rail had provided false and misleading information in violation of 49 C.F.R. § 1150.42(c). U.S. Rail Corporation—Lease And Operation Exemption—Shannon G., A New Jersey Limited Liability Company, STB Finance Docket No. 35042 (served October 8, 2008) (annexed hereto at Exhibit F). Specifically, the Board found that U.S. Rail's President Gabriel Hall's verified statement revealed that U.S. Rail was "not candid in its notice of exemption," and "was attempting to use the federal preemption that the use of our notice of exemption process would confer on [the property] as a means of avoiding the City's authority." *Id.* at 4 (emphasis added).

In addition, the Town had similar concerns with respect to the veracity of the witnesses that U.S. Rail offered at the preliminary injunction hearing in a related matter pending before the U.S. District Court for the Eastern District of New York. See Sills Road Realty LLC, U.S. Rail Corporation, Watral Brothers, Inc., Pratt Brothers, Inc., Adjo Contracting Corp., and Suffolk & Southern Railroad LLC v. the Town of Brookhaven, E.D.N.Y. Case No. 07-CV-4584 (TCP)(ETB). U.S. Rail's witnesses at the hearing were Gerard Drumm, who testified that he is CFO and General Counsel to both Sills Road Realty LLC and Suffolk & Southern Railroad Corp. and Gabriel Hall, President and CEO of US Rail. Specifically, Mr. Hall was not forthcoming with respect to the circumstances surrounding the ongoing construction at the property, or even with respect to which entity was conducting the construction.

A review of the pleadings filed in Finance Docket No. 35036 and in federal court, clearly demonstrates that U.S. Rail is using similar obstructive tactics in this matter. In light of its lack

of veracity and the wealth of misleading filings and statements; U.S. Rail's plans must be subject to full vetting by the Board and full disclosure to all interested parties. At the very least, U.S. Rail must be compelled to produce documents relevant to the construction and operation of the railroad in response to valid discovery requests.

Finally, it goes without saying that without full disclosure of U.S. Rail's proposed plans, it would be impossible to safeguard against safety and environmental concerns associated with the property. See, e.g., New England Transrail, LLC d/b/a Wilmington and Woburn Terminal Railroad Company - Construction, Acquisition and Operation Exemption - in Wilmington and Woburn, MA, STB Finance Docket No. 34391 (served May 3, 2005) ("complete and accurate information" is necessary for the Board to weigh the possible transportation benefits of the proposal with the environmental and other impacts). As set forth more fully in the Town's Reply to the Petition for Exemption at pages 4-5, U.S. Rail has demonstrated a total disregard for the environmental consequences of its actions.

In August 2007, U.S. Rail commenced unauthorized construction occurring on the property. Based on evidence that "rail construction may be occurring or contemplated on this property" - including a newspaper account indicating that Sills, Suffolk and/or others had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property¹ - the Board, *sua sponte*, issued an order to cease and desist and joined Petitioner U.S. Rail as a party to the action listed as STB Finance Docket No. 35036. Specifically, the Board held:

because no party has sought authority from the Board to construct any rail facilities at this site, this proceeding will be reopened on the agency's own motion and U.S. Rail will be made a party to this proceeding. If U.S. Rail, Suffolk, Sills, or any other related entity is undertaking construction of any rail facilities in Yaphank, Brookhaven, or anywhere in that vicinity,

¹ See, e.g., Smith, Jennifer, Work Started for Yaphank rail site without approvals, NEWSDAY (October 1, 2007).

it is directed to immediately cease that activity and to either obtain Board authorization pursuant to 49 U.S.C. § 10901(a) or a Board decision finding that such activity does not require Board approval.

Suffolk & Southern Rail Road LLC - Lease And Operation Exemption - Sills Road Realty,

LLC, STB Finance Docket No: 35036 (served October 12, 2007) ("October 12th

Decision") (emphasis added).

The Board's decision prohibited *any* rail construction. By the time of the October 12th Decision, however, eighteen acres of land had already been clear-cut and tens of thousands of cubic yards of materials had been mined without any environmental study as to its impacts – as required by both the National Environmental Protection Act ("NEPA") and the New York State Environmental Quality Review Act ("SEQRA") – or whether measures could have been taken in mitigation. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sand mining. Such utter disregard for the Board's processes and the potential safety and environmental impacts mandate full disclosure from U.S. Rail. See generally Petition for Exemption at 4-5.

Point IV

U.S. Rail Has Waived Its Right to Object to Discovery.

U.S. Rail's responses to the Town's discovery requests were due on October 3, 2008. See Exhibit A hereto; see also 49 C.F.R. §§ 1114.26, 1114.27 and 1114.30. In its October 3rd and 6th letters, however, U.S. Rail failed to make any substantive objections to the discovery sought by the Town. In accordance with the Board's rules and the Federal Rules of Civil Procedure ("FRCP"), the Town therefore urges the Board to conclude that U.S. Rail has waived its right to object to discovery and must fully respond to all discovery requests proffered by the Town.

With respect to interrogatories, the Board's rules require that the "reasons for the objection should be stated in lieu of an answer." Section 1114.26(a). With regard to interrogatories, the FRCP provide, "The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Rule 33(b)(4). There was no good cause for U.S. Rail's failing to respond to the discovery sought by the Town. The dismissive letter sent by U.S. Rail was not a good faith attempt to respond to discovery. See Exhibit B.

As explained herein, the only "objection" that U.S. Rail made to the interrogatories propounded by the Town, was that the Town could not seek discovery under the exemption procedures. Brookhaven has demonstrated that discovery is proper in exemption proceedings and has been permitted in the past by the Board. Since U.S. Rail waived all other objections to discovery, Brookhaven urges the Board to compel U.S. Rail to fully respond to all of the interrogatories propounded by the Town in Exhibit A without opportunity for further objection. With regard to document production, Brookhaven urges the Board to follow the same procedure as provided for with regard to interrogatories.

U.S. Rail similarly did not respond to the Town's requests for admissions. Pursuant to 49 C.F.R. § 1114.27(a), "The matter is admitted unless ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter." U.S. Rail did not answer or object to the matter raised in any of the admissions sought by the Town. Therefore, the Town requests the Board to conclude that by failing to obey the Board's rules, U.S. Rail has admitted the matters in the admissions sought by the Town.

Brookhaven contends that the U.S. Rail's complete disregard of the Board's discovery procedures should result in the Board rejecting any objections to discovery that U.S. Rail seeks.

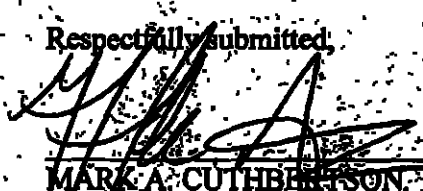
to file in response to this Motion and ordering U.S. Rail to respond to all of the interrogatories and document production requests. Pursuant to the Board's regulations and the FRCP, the Town also respectfully requests the Board to conclude that U.S. Rail has admitted all of the matters in the requests for admission.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Board grant its Motion to Compel Discovery and order that:

- (1) U.S. Rail must respond to the Town's First Demand for Discovery within 15 days of service of the Board's order on this Motion;
- (2) U.S. Rail has waived all further objections to the discovery requests; and
- (3) All requests for admission included in the First Demand Discovery are deemed admitted.

Respectfully submitted,


MARK A. CUTHBERTSON
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, New York
(631) 351-3501

Attorneys for Town of Brookhaven

Dated: October 13, 2008.

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 13th day of October, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket

No. 35141.


Mark A. Cuthbertson

EXHIBIT A

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
- CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

FIRST DEMAND FOR DISCOVERY

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Hempstead, New York
(631) 351-3501

Attorney for the Town of Brookhaven

September 18, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
CONSTRUCTION AND OPERATION EXEMPTION
BROOKHAVEN RAIL TERMINAL

FIRST DEMAND FOR DISCOVERY

Pursuant to 49 C.F.R. §§ 112.2 and 114.21, 26, 27, and 30, the Town of Brookhaven ("Town" or "Brookhaven") submits its First Discovery Request to U.S. Rail Corporation ("U.S. Rail"), in connection with the petition filed on August 7, 2008, by U.S. Rail. Counsel for U.S. Rail should contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

The Town hereby requests that U.S. Rail respond to the following Interrogatories, Document Requests and Requests for Admission in compliance with 49 C.F.R. Part 114 and in accordance with the following Definitions and Instructions. The responses to these discovery requests should be served on the Town through its Attorneys, the Law Offices of Mark A. Cuthbertson, 434 New York Avenue, Huntington, NY, 11743, on or before October 3, 2008.

DEFINITIONS AND INSTRUCTIONS

1. The "Town" shall mean the Town of Brookhaven, Suffolk County, New York.
2. "U.S. Rail" shall mean U.S. Rail Corporation, and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
3. "STB" shall mean the Surface Transportation Board.
4. "Petition" shall mean the Petition for Exemption filed with the STB by U.S. Rail in Finance Docket No. 35141 on August 7, 2008.
5. "Property" shall mean the 28-acre site located in the Town on which U.S. Rail has proposed to build a line of railroad in its Petition.
6. "Proposed Facility" shall mean the proposed railroad facility -- including all tracks, structures and roads -- that U.S. Rail proposes to construct and operate on the Property in the Petition.
7. "Sills" shall mean Sills Road Realty, Sills Group, and any departments, subsidiaries, affiliates, or related companies, present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
8. "Adjo" shall mean Adjo Construction and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf, including.
9. "NY&AR" shall mean New York & Atlantic Railroad and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.

including.

10. "LIRR" shall mean Long Island Railroad and any departments, subsidiaries, affiliates, or related companies; its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf, including:

11. "Communicate" and "Communication" shall mean every manner or means of disclosure or transfer or exchange of information whether orally, by document, or otherwise, and whether face to face, in a meeting, by telephone, or other electronic media, mail, personal delivery, or otherwise.

12. "Person" shall mean and include natural persons, partnerships, corporations, and all other forms of organization or association.

13. "Document" or any variation thereof is used in its broadest sense and shall mean any writing, drawing, graph, chart, photograph, tape, phone record, magnetic disc, compact disc, or other data compilation from which information can be obtained, translated, if necessary through devices into reasonably usable form, and includes, but is not limited to, correspondence, telegrams, cables, telex messages, minutes, reports, studies, specifications, order forms, bills of sale, leases, recordings of telephone or other conversations, de of interviews, conferences or other meetings, affidavits, statements, journals, statistical records, financial statements, accounting records, desk calendars, appointment books, diaries, lists, tabulations, summaries, computer printouts, photographs, maps, or any other items of a similar nature, including all originals, drafts, and non-identical copies.

14. The terms "relate" or "relating to" are to be used in their broadest sense and shall mean to refer to, discuss, involve, reflect, deal with, consist of, represent, constitute, emanate,

from, be directed at, or in any way to pertain to, in whole or in part, the subject.

15. The singular shall include the plural and vice versa, and the conjunctive shall include the disjunctive and vice versa in order to give these interrogatories and requests for admission the broadest scope.

16. To "identify" or to "describe" a document means to state the following:

- a. The full name of the person who prepared it and his last known address;
- b. The full name of the person who signed it or over whose name it was issued and his last known address;
- c. The full name of each person to whom it was addressed or distributed and his last known address;
- d. The nature and substance of the document with sufficient particularity to enable it to be identified;
- e. Title and number of pages;
- f. Its date or, if it bears no date, the date or approximate date when it was prepared;
- g. Whether any other documents were attached to or included with such documents; and
- h. Its physical location and the name and address of its custodian.

17. To "identify" a person when used with respect to a natural person means to state the person's full name, home and business addresses and telephone numbers, employer and job position at the present time and at the time to which the interrogatory relates, and whether the person is ill, disabled, incompetent, or deceased. To identify a person where the person to be identified is anything other than a natural person means to state its full name, the kind of legal entity which it is, its present or last known address, and its chief executive officer.

18. "Identify," "describe," or any variation thereof, when used with respect to a conversation, meeting, or oral discussion, shall mean stating and describing the date and location of such conversation, meeting, or oral discussion, the name of each person who was present at or who participated in such conversation, meeting, or oral discussion, and the manner in which the

conversation, meeting, or oral discussion was conducted (e.g., face-to-face conversation, telephone, etc.)

19. "Identify" means to describe or explain when used in any other context.

20. The answers to these interrogatories, document requests and requests for admissions shall include such information and documents as are within U.S. Rail's custody, possession, or control, or are within the custody, possession, or control of any of U.S. Rail's consultants, accountants, attorneys, or other agents, or which are otherwise available to U.S. Rail. In responding to these interrogatories and requests for admissions, U.S. Rail is specifically instructed to review the personal files, records, notes, correspondence, daily calendars, and telephone logs or records of all persons who have knowledge of the information inquired about in each request.

21. If the answers or portions of answers to these interrogatories are supplied upon information and belief rather than upon actual knowledge, U.S. Rail should so state and specifically describe or identify the source or sources of such information and belief.

22. Each interrogatory should be answered separately and fully in writing. The answers to these interrogatories should include, but not be limited to, an identification of each person having knowledge of the information provided in the answer, and of all documents (including calculations) and communications relating to that information.

23. If U.S. Rail objects to any interrogatory, document request or request for admission, U.S. Rail must state in writing the reason for the objection.

24. These discovery requests are continuing in nature and should be amended and supplemented immediately if at any time any of the following occurs:

- a. U.S. Rail determines that the original answers to these discovery requests as of the time they were filed, for whatever reason, were incorrect;
- b. new developments occur (such as the retaining of an expert, etc.) which, if U.S. Rail's answers were being filed as of the time of these new developments, would have to be disclosed in those answers;
- c. new information is developed (such as the identification of additional witnesses or additional documents) which, if known at the time of the filing of the original answers, would have been required to have been disclosed in such answers.

25. Unless otherwise specified, the time period covered by these discovery requests is January 1, 2007, to the date of U.S. Rail's responses.

26. Each interrogatory, document request and request for admission herein stands independent of each and every other interrogatory, document request and request for admission. No interrogatory, document request or request for admission modifies, limits, or relates to any other interrogatory, document request or request for admission unless specifically stated in the interrogatory, document request or request for admission.

27. If any discovery request herein cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why full compliance is not possible.

28. If any document sought to be discovered is in the Petition, then U.S. Rail shall refer to the page number in the Petition where the document may be found.

INTERROGATORIES

- 1. Identify the location and dimensions of all tracks, which may be constructed as part of the Proposed Facility.

2. Identify the location and dimensions of all structures, which may be constructed as part of the Proposed Facility.
3. Identify the location and dimensions of all roads, which may be constructed as part of the Proposed Facility.
4. Identify all customers U.S. Rail will serve if its Proposed Facility is constructed.
5. Identify the total annual number of rail cars to be shipped to and from the Proposed Facility in each year for the years of 2009, 2010, 2011, 2012, and 2013.
6. Identify the nature of the cargo, which will be shipped in the rail cars identified in Interrogatory No. 5.
7. Identify the person who created the document annexed as Exhibit C to the Petition.
8. Identify the date that the document annexed as Exhibit C to the Petition was created.
9. Identify the date of creation of each document produced in response to the following document requests. If the exact date of creation of the document is not known, identify whether it was created before or after the filing of the Petition on August 7, 2008.
10. Identify the factors U.S. Rail has used to determine that Suffolk County and/or the Town has a need for a rail facility.
11. Identify the point of connection between the Proposed Facility and the LIRR.
12. State whether any environmental study or analysis of the Property has been performed by or on behalf of U.S. Rail and identify the person or persons responsible for the study.
13. Identify the number and capacity (in cubic feet or yards) of annual truckloads that U.S. Rail projects to transport outbound.

14. Identify the number and capacity (in cubic feet or yards) of annual truckloads that U.S. Rail projects to transport inbound.
15. Identify the third party consultant retained by U.S. Rail in compliance with 49 C.F.R. §1105.10(d).
16. Identify the total dollar amount budgeted by U.S. Rail or Sills for construction of the Proposed Facility.
17. Identify the Board resolutions of U.S. Rail or Sills authorizing expenditure of funds to construct the Proposed Facility.
18. Identify all entities affiliated with Sills.
19. Identify all of Sills's existing customers that ship product to or from eastern Long Island.
20. Identify the total amount of product supplied by Sills to each of the customers listed in response to Interrogatory No. 19.
21. Identify all "commitments" made by Sills Group and U.S. Rail for "the delivery of aggregate stone" referenced at page 17 of the Petition.
22. Identify how many acres of the 24-acre Property will be affected by the grade change necessary to construct the Proposed Facility.
23. Identify approximately how many cubic yards of sand will be removed from the Property in order to complete the grade change necessary to construct the Proposed Facility.
24. Provide the calculations used to arrive at the figures given in response to Interrogatory No. 23.

DOCUMENT REQUESTS

1. Produce all documents used to prepare the Petition.
2. Produce all documents used to respond to these discovery requests.
3. Produce all agreements granting U.S. Rail access to the land owned by any neighboring property owner.
4. Produce all agreements between U.S. Rail and Sills.
5. Produce all agreements between U.S. Rail and LIRR.
6. Produce all agreements between Sills and LIRR.
7. Produce all agreements between U.S. Rail and NY&AR.
8. Produce all agreements between Sills and NY&AR.
9. Produce all agreements between U.S. Rail and Adjo.
10. Produce all agreements between Sills and Adjo.
11. Produce all agreements and correspondence between U.S. Rail and any other person or entity relating to the Property.
12. Produce all agreements and correspondence between U.S. Rail and any other person or entity relating to the construction or operation of the Proposed Facility.
13. Produce all construction plans for the Proposed Facility.
14. Produce all documents relating to the services to be provided by U.S. Rail at the Proposed Facility, as discussed in the Petition.
15. Produce all documents that are the basis for the statements at page 7 of the Petition that eastern Long Island is in dire need of a rail facility.
16. Produce all documents relating to the solicitation by of freight business in eastern

Long Island by U.S. Rail of any customer, including notes or meetings and any other correspondence.

17. Produce all documents that are the basis for the statement at page 7 of the Petition that western and central Long Island are so overdeveloped that there are few locations where a rail facility could be located.

18. Produce all documents that are the basis for the statement at pages 7-8 of the Petition that the LIRR line uses limited passenger service east of Ronkonkoma.

19. Produce all documents that are the basis for the statement at page 8 of the Petition that "rail service is essential if Sills Group companies are to meet their contractual commitments to customers for the supply of stone."

20. Produce all contracts or agreements between Sills and any of its customers that may send or receive freight over the trackage at the Proposed Facility.

21. Produce all contracts or agreements between U.S. Rail and any of its customers that may send or receive freight over the trackage at the Proposed Facility.

22. Produce all documents that are the basis for the statement at page 9 of the Petition that "the environmental effects of its proposed construction project will be minimal."

23. Produce all documents that are the basis for the statement at page 19 of the Petition that "there are no residences, schools, hospitals, recreation facilities, or shopping centers nearby."

24. Produce all documents relating to financing of the Proposed Facility, including any and all documents between U.S. Rail and any lender.

25. Produce all documents relating to financing of the Proposed Facility, including any and all documents between Sills and any lender.

26. Produce any agreements between U.S. Rail or Sills and LIRR to access/use LIRR track.
27. Produce any interchanging agreements between U.S. Rail or Sills and NY&AR.
28. Produce any and all documents relating to the construction of the connecting line to the existing line.
29. Produce any and all documents reflecting the length and location of the trackage to be constructed on the Property.
30. Produce any and all documents reflecting the type and location of all proposed structures to be built on the Property.
31. Produce any and all documents reflecting the degree to which construction of the Proposed Facility would involve excavation or the movement of soil, including projected amounts of excavated sand and methods of excavation.
32. Produce any and all documents reflecting a description of the locations where transloading would take place at the Proposed Facility.
33. Produce any and all documents regarding whether construction and demolition debris and or solid waste could be shipped, received or transloaded at the Proposed Facility.
34. Produce any and all documents reflecting U.S. Rail's plans for moving its train cars on and off the NY&AR track.
35. Produce any and all documents reflecting U.S. Rail's financial interest in the construction or operation of the Proposed Facility.
36. Produce any and all documents reflecting meetings between U.S. Rail and any members of the "community" regarding the Proposed Facility.

37. Produce any and all documents reflecting meetings between Sills and any members of the "community" regarding the Proposed Facility.
38. Produce all documents substantiating U.S. Rail's claim that it is a "common carrier."
39. Produce all documents substantiating U.S. Rail's claim that the Property is a "non-attainment" area.
40. Produce any and all documents reflecting payments made by U.S. Rail under the Lease annexed hereto at Exhibit A.
41. Produce any and all documents reflecting payments made by Sills under the Lease annexed hereto at Exhibit A.
42. Produce U.S. Rail's Articles of Organization and Bylaws, and any Resolutions adopted by U.S. Rail relating to the Proposed Facility.
43. Produce Sills's Articles of Organization and Bylaws, and any Resolutions adopted by Sills relating to the Proposed Facility.
44. Produce any and all documents reflecting assignments of any of the rights and liabilities under the Lease annexed hereto at Exhibit A.
45. Produce any and all documents reflecting termination of or modifications to the Lease annexed hereto at Exhibit A.
46. Produce any and all documents relating to the mortgage held by Kennedy Funding Inc. in the amount of \$5,300,000 described at Exhibit 2 to the Lease annexed hereto at Exhibit A.
47. Produce any and all documents relating to the "claim challenging the real property tax assessment" on the Property described at Exhibit 2 of the Lease annexed hereto at Exhibit A.
48. Produce any and all agreements between Sills and Kennedy Funding Inc.

49. Produce any and all agreements between U.S. Rail and Kennedy Funding Inc.
50. Produce any and all documents reflecting payments made under the Excavation Agreement annexed hereto at Exhibit B.
51. Produce any and all documents reflecting the total amount and type of material that has been excavated from the Property under the Excavation Agreement annexed hereto at Exhibit B.
52. Produce any and all documents reflecting the total amount and type of material that will be excavated from the Property under the Excavation Agreement annexed hereto at Exhibit B.
53. Produce any and all documents reflecting the sale of "Bank Run" as described in the Excavation Agreement annexed hereto at Exhibit B, including documents reflecting the purchase price and purchaser.
54. Produce any and all documents reflecting "Revenues" as described in the Excavation Agreement annexed hereto at Exhibit B.
55. Produce any and all applications or requests to any local, state or federal administrative body or agency requesting permits, licenses or approvals relating to the Property.
56. Produce any and all documents reflecting permits, licenses or approvals by or from any local, state or federal administrative body or agency relating to the Property.
57. Produce any documents reflecting surveys or inspections of the Property by any person.
58. Produce any and all documents reflecting termination of or modification to the Excavation Agreement annexed hereto at Exhibit B.

59. Produce any and all documents reflecting bills for or payment of taxes relating to the Property.

60. Produce any and all documents reflecting whether the "Proposal" annexed hereto at Exhibit C was adopted or executed, including any and all signed copies of the same.

61. Produce any and all documents reflecting invoices submitted or payments made relating to the "Proposal" annexed hereto at Exhibit C.

62. Produce any and all documents reflecting any installations made on the Property since January 2007.

REQUESTS FOR ADMISSIONS

1. Admit or deny that the line will be 11,000 feet in length.
2. Admit or deny that the Proposed Facility will handle approximately 5,000 carloads of freight annually.
3. Admit or deny that U.S. Rail has not entered into any agreement with LIRR.
4. Admit or deny that U.S. Rail has not entered into any agreement with NYAR.
5. Admit or deny that the only customer of the Proposed Facility is Sills.
6. Admit or deny that the sand excavated from this Property has been sold.
7. Admit or deny that the sand excavated from the Property in the future will be sold.
8. Admit or deny that a 12-13 feet grade change on the Property will be necessary to construct the Proposed Facility.
9. Admit or deny that U.S. Rail has no plans to transport solid waste of any kind, including construction and demolition debris and municipal waste.
10. Admit or deny that Sills has no plans to transport solid waste of any kind, including

construction and demolition debris and municipal waste.

11. Admit or deny that Adjo has no plans to transport solid waste of any kind, including construction and demolition debris and municipal waste.

12. Admit or deny that as of the date of the Petition, U.S. Rail had not met with officials from the Town since 2007.

Respectfully submitted,



Jessica P. Driscoll
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, New York
(631) 351-3501

Attorneys for Town of Brookhaven

Dated: September 18, 2008.

CERTIFICATE OF SERVICE

I, Jessica P. Driscoll, certify that, on this 18th day of September, 2008, I caused a copy of the foregoing document to be served by e-mail and mail on counsel for U.S. Rail.


Jessica P. Driscoll

EXHIBIT B

LAW OFFICES

JOHN D. HEFFNER, PLLC

1750 K STREET, N.W.

SUITE 200

WASHINGTON, D.C. 20006

Ph. (202) 896-8388

FAX (202) 896-8389

October 3, 2008.

Jessica Driscoll, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743

Via fax 631-614-4314

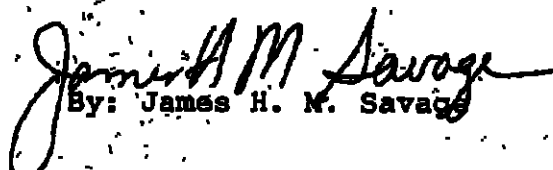
Re: STB Docket No. FD-35141 U S Rail Corp. - Petition for
Construction and Operation Exemption - Brookhaven Rail Terminal

Dear Ms. Driscoll:

Inasmuch as petitions for exemption are informal proceedings under the Board's rules, such matters are not subject to the discovery provisions of 49 CFR 1114. Accordingly, no further response to the Town's discovery initiatives will issue.

Please do not hesitate to contact me if you have any further questions.

Very truly yours,
John D. Heffner, PLLC


By: James H. M. Savage

JHS/mhd

EXHIBIT C

Law Offices
of
Mark A. Cuthbertson

434 New York Avenue
Huntington, NY 11743

cuthbertsonlaw.com

P: (631) 351-3501

F: (631) 614-4314

Mark A. Cuthbertson

Jessica P. Driscoll

Joseph C. DeJesu

Of Counsel

Michelle M. Pfeifferberger

October 6, 2008

By Fax (202) 296-3939

James H. M. Savage

John D. Heffner PLLC

1750 K Street, NW, Suite 200

Washington, DC 20006

RE: US Rail - Construction and Operation Exemption - Brookhaven Rail Terminal
STB Finance Docket No.: 35141

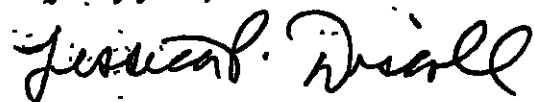
Dear Mr. Savage:

I am in receipt of your letter dated October 3, 2008.

As you well know, 49 C.F.R. §1121.2 specifically permits discovery upon the filing of a petition for exemption and *explicitly* states that such discovery "shall follow the procedures set forth at part 1114." Your statement that petitions for exemption are "not subject to the discovery provisions of 49 C.F.R. 1114" is therefore a clear misstatement of the law.

While your letter comes very close to violating the Canons of Conduct with respect to candor, *see* 49 CFR §.1103.27(b), I am writing to offer you an opportunity to reconsider U.S. Rail's position and respond to the discovery requests in due course. If you choose to stand by your unsupported position, I will be forced to file a motion to compel with the Board. 49 C.F.R. § 1114.31.

Very truly yours,



Jessica P. Driscoll

Cc: John D. Heffner, Esq.

EXHIBIT D

Law Offices

JOHN D. HEFFNER, PLLC

1750 K STREET, N.W.

SUITE 200

WASHINGTON, D.C. 20006

PH: (202) 394-3333

FAX: (202) 394-3333

October 6, 2008

Jessica Driscoll, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743

Via fax 631-614-4314

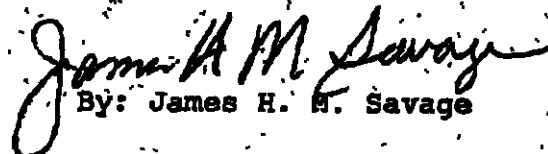
Re: STB Docket No. FD-35141 U S Rail Corp. - Petition for
Construction and Operation Exemption - Brookhaven Rail Terminal

Dear Ms. Driscoll:

In response to your October 6th letter, 49 CFR 1121.4
defines exemption proceedings as "informal". Hence, the
discovery provisions of 1114 are inapplicable.

Please do not hesitate to contact me if you have any further
questions.

Very truly yours,
John D. Heffner, PLLC


By: James H. M. Savage

JHS/mhd

EXHIBIT E

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35036

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

REPLY TO PETITION FOR CLARIFICATION

MARK A. CUTHBERTSON
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, New York
(631) 351-3501

Attorney for the Town of Brookhaven

May 30, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35036

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

REPLY TO PETITION FOR CLARIFICATION

Set forth below is the reply of the Town of Brookhaven ("Brookhaven") to the Petition for Clarification of Decision of October 12, 2007 filed by U.S. Rail Corporation ("U.S. Rail" or "Petitioner"). Petitioner's pleading is yet another attempt to evade regulation of its construction/mining activities at the Silks Road site by any governmental authority, be it Federal, State or local. Brookhaven contends that the Surface Transportation board (the "Board") should not condone or foster U.S. Rail's activities, but instead should condemn those activities. U.S. Rail's arguments do not address the current situation of an entity without construction authority from the Board seeking to commence the construction of a rail line, but instead rely on precedent involving the construction of a rail line by an entity that has received advance Board authorization to commence construction, or is a railroad with local operations.

¹ Brookhaven also believes that the Board should consider imposing the penalties of 49 U.S.C. § 11501(c) and (d) on U.S. Rail, Silks, Suffolk and their respective officers.

Petitioner's request for clarification would require the Board to illogically leap to the determination of whether so-called "preconstruction activities," which Brookhaven views as "construction activities," should be permitted in advance of a threshold determination of whether to authorize regulated rail construction, or to determine whether the rail construction that is being proposed comes within the scope of the federal preemption. Because Petitioner has no track record of authority on these threshold issues, the Board cannot grant the Petition for Clarification. In short, Petitioner has put the cart well before the horse.

PROCEDURAL BACKGROUND

On May 18, 2007, non-carrier Suffolk & Southern Rail Road LLC ("Suffolk") filed a verified notice of exemption under 49 C.F.R. § 1150.31 to lease from non-carrier Sills Road Realty ("Sills") approximately 11,000 feet of track that Suffolk claimed was currently being constructed in Yaphank, NY. At the same time, Suffolk requested authority to operate on the track. In its notice, Suffolk had included a verified statement that "for-hire service was not needed for the trackage underlying Suffolk's notice of exemption, in which case Board authorization of the construction of the trackage, and an environmental review until the National Environmental Policy Act, would be required." See Suffolk & Southern Rail Road LLC - Lease And Operation Exemption - Sills Road Realty, LLC, Finance Docket No. 35036 (served October 12, 2007) (hereinafter the "October 12th Decision"). See also Verified Statement of Robert J. Quinlan in Support of Town of Brookhaven's Reply to Petition for Stay (filed Nov. 3, 2007) ("Quinlan Statement"), annexed hereto at Exhibit A, at 2. Upon review, the Board found Suffolk's notice of exemption to be incomplete and directed Suffolk to file certain supplemental information describing the construction of the trackage. See Suffolk & Southern Rail Road LLC - Lease And Operation Exemption - Sills Road Realty, LLC, Finance Docket No. 35036.

(served June 1, 2007)(hereinafter the "June 1st Decision"); Quinlan Statement at 2-3. The Board made no decision regarding the exemption.

On June 15, 2007, Suffolk sought to withdraw its notice of exemption without providing the additional information ordered by the Board. Quinlan Statement at 3.

On July 12, 2007, Attorney John Heffner faxed a letter to then-Town of Brookhaven, Attorney Robert F. Quinlan stating that he represented U.S. Rail, an Ohio based company and a common carrier short line railroad operating pursuant to authority granted by the Board. His letter stated that as a common carrier railroad, U.S. Rail's construction of the rail facility is governed by federal law and subject to the exclusive jurisdiction of the Board. Quinlan Statement at 3. The letter further indicated that U.S. Rail had leased real property and intended to construct and operate an "exempt spur" within the meaning of 49 U.S.C. §10906.

In August 2007, the Board again directed Suffolk to file the information required by the June 1st Decision; a substantive reason for its attempted withdrawal and a detailed explanation of "whether it or Sills anticipated that for-hire service would have been provided over the trackage that was to be constructed." See Suffolk & Southern Rail Road LLC -- Lease And Operation

Exemption -- Sills Road Realty, LLC, Finance Docket No. 35036 (served August 13, 2007)(herein after the "August 13th Decision"); Quinlan Statement at 4-5. The Board's decision explained that if for-hire service was intended for the trackage being constructed by Sills then the "construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board's jurisdiction, and the Board authorization for the construction is required under 49 U.S.C. § 10901." Further, the Board made it abundantly clear that: "The proposed construction of a line of railroad also requires that the Board authorize

an environmental review under the National Environmental Policy Act. See 49 C.F.R. §

1105.6(a)(b)(1).” August 13th Decision at 2; Quinlan Statement at 5.

Given the record before the Board, it was justifiably suspicious of the situation and

warned:

The Board increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds at 49 CFR § 1105.7(e)(4) or (5) will not be met. See 49 CFR § 1105.6(b)(4), (c)(2)(i). Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the Board’s 3 train-per day threshold for environmental documentation under 49 CFR § 1105.7(e)(5)(ii)(A). Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board’s thresholds under 49 CFR § 1105.7(e)(5)(ii)(C).

August 13th Decision at 2.

Suffolk filed an evasive response on August 23, 2007 and stated, *inter alia*, that Sills never undertook any construction of rail facilities at the Sills Road location at issue. Response to Information Requested by the Surface Transportation Board at 3-4. On this basis, in a decision served September 25, 2007, the Board allowed Suffolk to withdraw its notice of exemption and noted that it would “view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.” See Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC, Finance Docket No. 35036 (served September 25, 2007) (hereinafter the “September 25th Decision”). However, U.S. Rail now admits that

construction was occurring on the property as early as August 2007. Verified Statement of Gerald T. Drum in Support of Petition for Clarification ("Drum Statement") ¶ 8.

In October 2007, evidence of the on-going construction came to the Board's attention. Based on this evidence that "rail construction may be occurring or contemplated on this property" – including a newspaper account indicating that Sills, Suffolk and/or others had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property – the Board, *sua sponte*, issued an order to cease and desist and joined Petitioner U.S. Rail as a party to this action. Specifically, the Board held:

... because no party has sought authority from the Board to construct any rail facilities at this site, this proceeding will be reopened on the agency's own motion and U.S. Rail will be made a party to this proceeding. If U.S. Rail, Suffolk, Sills, or any other related entity is undertaking construction of any rail facilities in Yaphank, Brookhaven or anywhere in that vicinity, it is directed to immediately cease that activity and to either obtain Board authorization pursuant to 49 U.S.C. 10901(a) or a Board decision . . . finding that such activity does not require Board approval.

Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty LLC, Finance Docket No. 35036 (served October 12, 2007) (hereinafter the "October 12th Decision").

The Board's decision was crystal clear; it prohibits any rail construction. By the time of the October 12th Decision, however, eighteen acres of land had already been clear-cut and hundreds of thousands of cubic yards of materials had been mined without any environmental study as to its impacts – as required by both the National Environmental Protection Act ("NEPA") and the New York State Environmental Quality Review Act ("SEQRA").

³ See Smith, Jennifer, *Work Started for Yaphank rail site without approvals*, *NEWSDAY* (October 1, 2007), included hereto at Exhibit B.

measures could have been taken in mitigation. Quinlan Statement at 9-10. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sand mining. *Id.*

Still, U.S. Rail's Petition for Clarification seeks to negate the effect of the Board's October 12th Decision and to continue construction activities. Though captioned as a different pleading, the Petition for Clarification is merely the latest in a series of many similar, un-intentioned pleadings aimed at beginning construction free from any regulation and outside the bounds of the established regulatory framework by a non-railroad.

Petitioner first sought to continue construction by way of a petition for a stay, dated October 18, 2007. It claimed that the trackage it sought to build was disconnected and therefore an exempt "spur" pursuant to 49 U.S.C. § 10906. The motion for stay was denied on November 16, 2007. In denying the stay, the Board noted that Petitioner did not have a reasonable likelihood of success on the merits of its argument that the trackage was an ancillary "spur" because "the track cannot reasonably be viewed as used for a purpose ancillary to the operations that will be located hundreds of miles from U.S. Rail's existing operations in Ohio." Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC Finance Docket No. 35036 (served Nov. 16, 2007) at 4.

Next, on October 26, 2007, Petitioner filed a petition for administrative reconsideration of the cease and desist order. The Board denied the petition for reconsideration on December 20, 2007, holding that U.S. Rail had not alleged changed circumstances or submitted any new evidence that would warrant reconsideration. Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC Finance Docket No. 35036 (served Dec. 20,

2007) at 4. Again the Board noted that there was "no evidence in the record" that the proposed trackage would be classified as an ancillary spur.

While its petitions for stay and reconsideration were still pending before the Board, Petitioner also appealed the cease and desist order and sought a stay from the U.S. Court of Appeals for the Second Circuit, which denied the stay on November 13, 2007 and thereafter dismissed the appeal.

Finally, U.S. Rail filed an action in the U.S. District Court for the Eastern District of New York seeking to preliminarily enjoin Brookhaven from taking any action to prosecute applications for tickets it issued to Petitioner on October 4, 2007 or from issuing further tickets. Petitioner also sought to enjoin Brookhaven from "taking any other action to interfere with or obstruct Petitioner's construction and operation of" the alleged rail terminal. Order to Show Cause at 2. A hearing on the preliminary injunction was held on December 5-6, 2007, and, to date, no decision has issued.

Not content with two petitions before the Board and two separate attempts at judicial review by federal courts, through its Petition for Clarification U.S. Rail now comes to the Board for yet another bite at the apple. Incredibly, Petitioner again asks the Board "whether it can begin certain activities . . . with those Activities pre-empted from state and local permitting, zoning and environmental regulations." Petition at 1.

Although it is still the case that "no party has sought authority from the Board to construct any rail facilities at this site," (October 12th Decision at 2), Petitioner seeks permission to ignore the Board's prior mandate, side-step all state and local regulation, and begin activities without *any* oversight or authority from *any* governing agency. The Petition for Clarification must be denied unless and until U.S. Rail obtains "authorization pursuant to 49 U.S.C.

10901(a) or a Board decision . . . finding that such activity does not require board approval.

October 12th Decision at 2.

After the hearing on the preliminary injunction, on March 26, 2007, Petitioner submitted to the Section of Environmental Analysis ("SEA") for a waiver of the six-month's pre-filing notice required by the Board's environmental regulations at 49 C.F.R. § 1105.10(a)(1). See generally March 26, 2007 Letter to the SEA appended hereto at Exhibit C. In a letter dated April 2, 2008, U.S. Rail claimed that the SEA had reached a "consensus" that the project would require an Environmental Assessment ("EA") rather than an Environmental Impact Statement. In fact, this statement by U.S. Rail was so inaccurate that the Chief of the SEA, Victoria Rutson, deemed it necessary to respond by letter correcting the record on May 1, 2008 ("May 1 Letter"). See generally May 1, 2008 Letter from Victoria Rutson to John Heffner, annexed hereto at Exhibit D. Forced to own up to its misrepresentation, U.S. Rail corrected itself by letter dated May 13, 2008. This distorted account of statements made at a meeting with the SEA is the latest in a string of misrepresentations by U.S. Rail before the Board.

In support of its request for the waiver of the environmental notice period, U.S. Rail also claims that "within the next several weeks U.S. Rail plans to petition the Board for an exemption under 49 U.S.C. § 10502 from the requirements of 49 U.S.C. § 10901 to construct and operate a new rail-served facility . . . in the Town of Brookhaven." March 26, 2007 Letter (Exhibit C) at 1. The inaccuracy of U.S. Rail's prior statements strongly suggests that this statement should be closely scrutinized. Indeed, because of the controversy created by U.S. Rail's continuing attempts to evade the Board's construction jurisdiction, Brookhaven contends that the Board should require U.S. Rail to file an application in order to fully vet its proposal instead of the less rigorous petition for exemption.

In fact, U.S. Rail has not even petitioned the Board for an exemption; instead, Petitioner filed the instant Petition for Clarification on May 2, 2007. Notwithstanding the Board's prior decisions described above, the Petition seeks "clarification" of the cease and desist order and permission to proceed with seven enumerated construction activities.

ARGUMENT

Not only is the Petition for Clarification a thinly veiled attempt to continue construction activities without regulation, it is simply premature. No application has been filed seeking a grant of authority to construct a line of railroad under 49 U.S.C. § 10901(a). As the Board has already held, the proposed line of railroad is not an "exempt spur," where U.S. Rail's existing track is located hundreds of miles away in Ohio. Moreover, as set forth in detail below, there is evidence of U.S. Rail's involvement in a lucrative sand-mining operation at the property, which raises a significant question as to whether U.S. Rail and its affiliates even intend to build a line of railroad *at all*.

A. No petition or application has been filed seeking a grant of authority to construct a line of railroad under 49 U.S.C. § 10901(a).

Petitioner misrepresents its dealings with the Board to date. Despite assurances and indications to the contrary, no petition or application has been filed for authority to construct a line of railroad. Still, the Petition repeatedly asserts: "U.S. Rail has initiated the process of seeking Board authority to construct and operate the BRT."³ To the contrary, under the statute,

³ Petition for Clarification at 5. Petitioner also states that it "desires to undertake the Activities described above while the Board is processing its request for authority." *Id.* Moreover, it repeatedly makes the request to continue its activities "during the time that its construction proposal is undergoing Board and SEA analysis and review" (Petition at 9) and "during the pendency of its petition for exemption for construction." Petition at 11. U.S. Rail also goes so far as to presumptively state: "Once the Board grants its request for authority, the services for which U.S. Rail seeks the construction and operation exemption preempt any otherwise applicable state and local laws." Petition at 12 (citing *New England Transrail LLC d/b/a Wilmington & Woburn Terminal Railway - Construction, Acquisition and Operation Exemption - In Wilmington and Woburn, MA*, Finance Docket No. 34797 (Issued July 15, 2006)). Finally, U.S. Rail misleadingly asserts that "the fact that the Board has yet to decide U.S. Rail's petition for exemption should not prevent the Board from ruling [in its favor]." Petition at 15. This attempt to try

proceeding to grant authority begins when an application is filed. 49 U.S.C. § 10901(b). In the midst of the hyperbole, Petitioner does concede that no application or petition has yet been filed. See, e.g., Petition for Clarification at 5 ("will file a separate Petition for Exemption" and "file this petition in advance of submitting the aforementioned Petition for Exemption").

In fact, *nothing* has changed since the Board found in October 2007 that no party had sought authority from the Board to construct any rail facilities at this site: October 12, 2007, at 2. As such, the threshold question regarding jurisdiction has not been answered. The jurisdictional question is paramount since if the Board has jurisdiction over Petitioner's activities, its jurisdiction is exclusive and preempts the application of many state and local laws and regulations. 49 U.S.C. § 10501(b); see also New England Transrail LLC d/b/a Wilmington & Woburn Terminal Railway - Construction, Acquisition and Operation Exemption - in Wilmington and Woburn, MA, Finance Docket No. 34797 (served July 10, 2007) ("New England Transrail") ("Section 10501(b) also expressly provides that 'the remedies provided under 49 U.S.C. §§ 10101-11908] are exclusive and preempt the remedies provided under Federal or State law.' The purpose of the Federal Preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.")

In support of its premature request, however, Petitioner cites to the Board's decision in DesertXpress Enterprises, LLC - Petition for Declaratory Order, Finance Docket No. 34514 (served June 27, 2007) ("DesertXpress"). Petitioner's reliance on DesertXpress is misplaced. Although in that case, like this one, DesertXpress had petitioned the Board prior to obtaining authority to construct a rail facility, the similarities begin and end there:

mischaracterize the so-called undecided "petition for exemption" completely misconstrues the reality that *no petition has been filed*.

First and foremost, in DesertXpress, the rail carrier was not asking the Board for "clarification" of a previous order or for permission to begin any "construction" activity. Rather, DesertXpress asked the Board "to issue a declaratory order finding that its proposed construction of an interstate high speed passenger rail system is not subject to state and local [regulations] because of the Federal preemption in 49 U.S.C. § 10501(b)." DesertXpress at 1. The relief sought was both procedurally and substantively different than the result U.S. Rail seeks by its petition for clarification.

Second, there was no question that the activity proposed by DesertXpress was "rail transportation" warranting federal preemption. The Board noted:

DesertXpress' petition for declaratory order concerns its proposed project to construct an approximately *200-mile interstate high speed passenger rail system* between Victorville, CA and Las Vegas, NV . . . that would involve the construction of significant lengths of new track and auxiliary facilities, including two passenger stations and a 50-acre train maintenance and storage facility and operations center. DesertXpress states that the proposed route is planned alongside or within the median of Interstate 15 and would provide an alternative to automobile travel on that highway. Petitioner anticipates that the project would utilize European high-speed trains that would operate at speeds up to 125 miles per hour and would travel between the two termini in under 105 minutes.

DesertXpress at 1-2 (emphasis added). To the contrary, the Board has already noted its skepticism regarding whether U.S. Rail's proposed trackage would be an exempt "port" and there remain significant factual issues with respect to whether U.S. Rail is constructing a rail facility at all. See *infra* sections D and E at pages 18-22.

Finally, unlike U.S. Rail, at the time of its Petition, DesertXpress had already met with the SEA and had begun the preparation of an Environmental Impact Statement ("EIS") under NEPA. State and local authorities and concerned citizens were being encouraged to participate

in the EIS process, a fact to which the Board specifically pointed in its decision. Moreover, it was not just the rail carrier that was seeking clarification in DesertXpress, but also a number of state and local officials who were looking for answers. Noting the particularities of the situation before it, the Board clearly stated, "our findings here are relevant only to the specific project DesertXpress is proposing and the individual facts and circumstances at issue here."

DesertXpress at 3. In that particular case, the Board was able to certify that its decision would not significantly affect either the "quality of the human environment or the conservation of energy resources." Id. at 4.

U.S. Rail, on the other hand, has not begun any environmental review. To the contrary, all that U.S. Rail has done to date is to request a *waiver* of the six-month notice requirements under the Board's environmental regulations, arguing disingenuously that the 6-month notice is not required because the proposed construction would have such minimal impact on the environment that it would not require an environmental impact statement.

U.S. Rail's argument flies in the face of the facts. This is not the first time that it has requested permission for so-called "pre-construction activities." Such permission was requested (and denied) by way of a motion for a stay and for preliminary injunction to the United States Court of Appeals for the Second Circuit. In opposing that application, Brookhaven submitted an affidavit from its Director of the Division of Environmental Protection, Mr. John Turner. See Declaration of John L. Turner in Opposition to Petitioners' Motion for a Preliminary Injunction, annexed hereto as Exhibit B. Mr. Turner pointed out that if he were called upon to review the project pursuant to the SEQRA (the state counterpart to NEPA), U.S. Rail would undoubtedly be required to prepare an

environmental impact statement because, among other things, the property is in a deep flow recharge zone and is ecologically part of the Long Island Pine Barrens and therefore development of the property may cause significant hydrological and ecological impacts. Turner Affidavit ¶¶ 4-5. Thus, despite the representations that Petitioner has made to the SEA, the project has and is going to involve significant environmental impacts.

In addition, the Regional Director of the New York State Department of Environmental Conservation recently summarized the significant environmental impacts when he stated that 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 yards of cubic materials could move forward without any environmental review." See supra, Smith, note 2.

Similarly, in New England Transrail, the Board clearly stated that it would grant an exemption for a requested activity "only if it is satisfied that it has sufficient information about the transportation and potential environmental aspects of the proposal to be confident that it has no cause for regulatory concern." New England Transrail, LLC, Finance Docket No. 34797 at 11. Where, as here, there has been no environmental analysis to date, the Board by its own standard cannot approve any requested activities on the property. Id. (finding that the Board could not authorize New England Transrail's proposal before conducting the environmental review required by NEPA).

As the Board stated in its decision on U.S. Rail's Petition to Stay:

If the proposed activities at issue here are found to require prior approval from the Board under 49 U.S.C. § 10901, environmental review under NEPA would be conducted as part of that process. During the NEPA process there would be ample opportunity for all interested parties, affected communities, and members of the general public to participate and to comment on all aspects of the environmental analysis. Moreover, the Board could impose specific mitigation

conditions, should it decide to authorize this proposal, to mitigate potential environmental impacts resulting from the transaction.

November 16th Decision at 7.

By skipping the first step — “determination of prior approval” — U.S. Rail is basically asking the Board to sanction construction without any environmental accountability. The process was purposefully designed to prevent such a result. See Stewart Park and Recreation Coalition, Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003) (finding that NEPA requires an agency to “withhold its decision to proceed with an action until it has taken a hard look at the environmental consequences”); Pogliani et al. v. U.S. Army Corps of Engineers, 366 F.3d 1237 (2d Cir. 2002) (holding that NEPA was enacted “to ensure federal agencies examine and disclose the potential environmental impacts of projects before allowing them to proceed”); also 40 C.F.R. § 1500.1 (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions to protect, restore and enhance the environment.”)

U.S. Rail is seeking to engage in actual construction activities. This is clearly within the Board’s construction jurisdiction. “[T]he bringing of a condemnation proceeding constitutes construction.” Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69, 72 (1952). The Interstate Commerce Commission (the “ICC”), the Board’s predecessor, considered condemnation to be construction. Condemnation is usually the first step in the construction of a railroad line. After property is condemned, activities on the property commence, similar to those claimed to be “preconstruction” activities by U.S. Rail, grading, installation of utilities, equipment, lighting, fencing, and temporary structures. Petition at 5. Since the ICC had jurisdiction over a construction project at the condemnation stage, it defies logic for U.S. Rail to

argue that actual construction activities do not require Board approval and can be authorized by the Board prior to a full review of the proposal and a full environmental analysis.

In short, U.S. Rail's petition is the most recent in a string of attempts to begin actual construction without Board authority contrary to prescribed law and procedure. Brookhaven urges the Board to follow the ICC precedent and reject U.S. Rail's misleading and illogical argument.

B. Petitioner has made no attempt to engage state and local authorities but rather has maintained from the beginning that the facility is not subject to state or local regulation of any kind.

Contrary to U.S. Rail's assertion that it has engaged state and local authorities through a series of meetings, Petitioner has in fact totally ignored any input from state and local authorities to date. By all accounts, U.S. Rail's "meetings" with state and local authorities, were not participatory meetings, but rather pronouncements by U.S. Rail to local officials that it was proposing rail construction that was exempt from state or local regulation. These pronouncements did not invite comment or collaboration. A careful read of the "meeting chronology" reveals the true course of events: a clever but transparent "bait and switch."

All of the meetings prior to July 2007 listed in the "Meeting Chronology" at Exhibit A to the Petition for Clarification took place when it was the stated intention of the owners of the site to operate at the site pursuant to a Notice of Exemption under 49 U.S.C. § 10901 and 49 C.F.R. 1150.31 and based on a lease between Suffolk and Southern Rail Road LLC and Sills Road Realty LLC; U.S. Rail was not a party to any of the meetings.

The first interaction between Petitioner U.S. Rail and Brookhaven was on July 12, 2007, just a few weeks before U.S. Rail commenced its unauthorized construction activities. Petitioner claims that on that date "John Heffner, Esq. on behalf of U.S. Rail Corporation submitted a letter

US Rail's intent to commence construction to the Town Attorney, Town of Brookhaven, New York." Exhibit A to Petition for Clarification. First, the "notice of intent to commence construction" was by no means an introduction to a cooperative relationship. Indeed, the letter merely stated that U.S. Rail had leased the Property and intended to construct and operate an "exempt spur" within the meaning of 49 U.S.C. §10906. See July 12, 2007 Letter from U.S. Rail to Heffner to Robert F. Quinlan, annexed hereto at Exhibit F. Secondly, not only was U.S. Rail announcing its plans to operate without state or local approval, the self-designation of its project as an "exempt spur" signaled its intention to operate outside the bounds of federal authority as well. By way of context, this letter was sent just a few weeks after Suffolk attempted to withdraw its notice of exemption and the Board directed it to provide more information. See June 1st and August 13th decisions.

To add insult to injury, U.S. Rail began clearing the Property just a few weeks later. This was the start of the unauthorized construction process. Indeed, by its own account U.S. Rail proceeded unsupervised with its initial plans and caused "potentially unsafe" conditions on the property. Drum Statement ¶ 9. These conditions were caused by the actions taken by U.S. Rail beginning in August 2007, at which time it had no authority whatsoever to proceed. As a matter of fact, it was not even a party to the proceedings at this juncture.

Still, U.S. Rail now argues that the Board must grant it the authority to perform certain "limited" preconstruction activities because it would be otherwise prejudiced. As stated above, the activities Petitioner seeks to begin are actually construction activities under ICC provisions. Further, as explained below, Petitioner will not suffer any harm if it is not permitted to commence construction.

As evidence of the alleged "harm" it would suffer, U.S. Rail cites to the fact that it has already ordered 2 locomotives and that it has various "contractual commitments" that it must fulfill. Exhibit B to Petition for Clarification (Hall Affidavit) ¶¶ 23-24. This argument is a non-sequitor. First, Petitioner has raised all of these arguments in its application for preliminary injunction, which remains pending before the U.S. District Court for the Eastern District of New York. The Board has clearly spoken on this issue and it should not be persuaded to re-visit these arguments because they have been cleverly captioned as a different motion. Secondly, assets U.S. Rail has purchased or commitments it has made to third parties are due solely to its own actions and not at the behest of any Board decision or directive. The Board has been clear and consistent since June 2007 and has never suggested that U.S. Rail should proceed with its plans and operations. Similarly, no state or local authority has given the green light because no state or local permission has been sought.

Instead of any suggestion from the Board that U.S. Rail should proceed, what it has said—and clearly—is that U.S. Rail should cease and desist. That U.S. Rail chose to ignore the Board's directive should not now be grounds for a finding in its favor due to some unquantifiable economic harm it might suffer due to its own flagrantly subversive tactics.

C. Neither the Board nor the Board's Section of Environmental Analysis has suggested that U.S. Rail seek this Petition for Clarification.

U.S. Rail claims that:

The Parties sought judicial review of the Board's October 12th Decision. In its November 19, 2007 Brief in Response to the Parties' Preliminary Injunction Request, the Board suggested that the Parties seek Board clarification as to whether the Cease and Desist Order permitted the activities requested herein, a suggestion reiterated by the Board's Section of Environmental Analysis ("SEA") during its March 17, 2008 meeting with the Parties.

Petition at 8.

Neither the Board nor SEA have ever committed such a suggestion to writing and U.S. Rail's representation that the Board and SEA have requested this Petition for Clarification is just another entry in its continuing ledger of misrepresentations and embellishments.

A review of all of the decisions issued for this docket, demonstrate that the Board has never advanced such a suggestion. U.S. Rail's attempt to attribute to the Board that it requested this petition for clarification is based upon the argument of the office of General Counsel in an appellate brief. Petition at 4, 8, and 10-11. The Board did not "invite" the Petition for Clarification, but rather in an appellate pleading filed in the U.S. Court of Appeals for the Second Circuit, counsel for the Surface Transportation Board argued that it would have been more appropriate for Petitioner to address the scope of permitted activities before the Board than to file for a preliminary injunction. Petition at 11, n.2. The Board makes its positions known through its decisions and not the arguments advanced by its attorneys in litigation.

Similarly, the SEA has never offered a written suggestion that U.S. Rail seek this petition for clarification. In fact, to date, the only correspondence issued by SEA was a letter from the Chief of SEA admonishing U.S. Rail for mischaracterizing the level of environmental review that would be required under the circumstances. See May 1, 2008, annexed hereto as Exhibit D.

D. The Proposed Trackage is not an exempt spur pursuant to 49 U.S.C. § 10906.

As the Board itself has stated, Petitioners are unlikely to prevail in their argument that the proposed trackage ought to be classified as an exempt "spur" so that it will be exempt from both state and local authorities and the Board. For this reason alone, the Board should deny their petition for Clarification.

U.S. Rail has argued that the rail facility is likely to be deemed a "spur" track, which is subject to Board jurisdiction but does not require construction approval. Specifically in its submission to the

Board, it has claimed the proposed use of the track would not require prior Board approval for construction under 49 U.S.C. § 10901 or operations under 49 U.S.C. § 10902(a) but rather qualifies for the exception from the Board's entry/exit licensing authority in 49 U.S.C. § 10906 because the track would be used as a "disconnected" ancillary "spur" of an existing carrier, U.S. Rail. See e.g., Petition for Reconsideration at 7; Petition for Stay at 4; Petition for Clarification at 2, 13.

In fact, the proposed track is either a line of railroad subject to the Board's licensing requirements because it would be an invasion of new territory, or else a "private" track not subject to the Board's jurisdiction but subject to state and local regulations. The track in question cannot be characterized as ancillary "spur" or switching track because it is not adjacent or ancillary to U.S. Rail's existing rail operations, which are located hundreds of miles away from Brookhaven in Ohio.

To date, the Board has agreed: in its November 16th Decision, the Board concluded that the subject track is likely to be characterized as "a line of railroad"⁴ because:

The purpose of the proposed construction and operations appears to be to allow U.S. Rail to serve new shippers. The track cannot reasonably be viewed as used for a purpose ancillary to the service that U.S. Rail is already authorized to provide; as the proposed construction and operations will be located hundreds of miles from U.S. Rail's existing operations in Ohio.

November 16th Decision at 4.

⁴ In reaching this conclusion, the Board noted that "[t]here are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or remove and operate; (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require Board authorization from the Board to construct or remove under 49 U.S.C. 10906; and (3) so called "private track" which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track." November 16th Decision at 1, n.1.

K. U.S. Rail's Intended Use of the Property Does not merit prior Board approval for construction under 49 U.S.C. § 10901 or operations under 49 U.S.C. § 10502, because U.S. Rail is not constructing a rail facility

U.S. Rail states that "as a preliminary matter," this transaction is a matter "within the jurisdiction of the I.C.C. Termination Act insofar as it involved the construction and operation of a line of railroad under 49 U.S.C. 10901." Petition at 12. Repeating this conclusion over and over again does not make it so without a Board decision. It is for the Board and the Board alone to make the determination regarding whether to exempt rail carrier construction from 49 U.S.C. § 10502. Indeed, based on ICC precedent, it is logical for the Board to conclude that the activities proposed by U.S. Rail in the Petition are construction activities subject to jurisdiction and cannot commence until the Board completes the required environmental review and grants an application or petition for exemption.

While U.S. Rail's Petition pre-supposes that the Board will grant it authority to construct a railroad and that it will receive the concomitant benefit of preemption, there remain serious questions with respect to whether what is being proposed at the facility is truly construction that will be undertaken by a rail carrier. Given U. S. Rail's previous omissions, which are well documented in the Board's prior decisions in this matter, a healthy dose of suspicion about its motivations and representations is warranted.

In the pending action in the U.S. District Court for the Eastern District of New York, U.S. Rail and the owner of the Property, Sills Road Realty ("Sills") sought to enjoin the Green Haven from enforcing its local zoning code with respect to the activities that had taken place at this Property. While a decision in that matter has not yet been issued, the testimony and evidence

from that preliminary injunction hearing³ is closed and the parties have submitted post-trial briefs. The evidence and testimony presented at the hearing strongly suggested that U.S. Rail's involvement at the Property is a mere subterfuge by which U.S. Rail and the parties that have an interest in the Property are seeking to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation. A copy of Brpokhaven's proposed findings of fact and conclusions of law, which summarize this argument, are annexed hereto as Exhibit H.

During the preliminary injunction hearing, the following three documents that were introduced into evidence at the hearing demonstrate U.S. Rail's involvement in a sand-mining scheme: (a) a "Railroad Operating Agreement and Property Lease" ("Lease") (Exhibit I herewith); (b) an Excavation Agreement (Exhibit J herewith); and (c) an unsigned Proposal for construction at the Property (Exhibit K herewith). The Lease—which is for a 28-acre industrial site—has a 3-year term and an annual rent of \$1,000. Under the terms of the Lease, U.S. Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo Contracting Corp. ("Adjo") (a general contractor for the BRT and partner in Sills) to sell sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs. For its part, Sills gets up to \$6,000,000 plus a 50% fee. The third document, the Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a "Bid To: Sills Road Realty."

At the hearing, U.S. Rail claimed that the Proposal has been incorporated into the Excavation Agreement that these documents evidence U.S. Rail's obligation to construct a rail facility even though neither document contains any reference to the other. Transcript (Exhibit G)

³ The preliminary injunction hearing was held in the United States District Court for the Eastern District of New York before United States Magistrate Boyle on December 5-6, 2007. A transcript of that hearing is annexed hereto as Exhibit G.

at 39. U.S. Rail's President and CEO, Gabriel Hall ("Hall") testified that he was making payments to Adjo for rail construction but produced no proof of these payments at the hearing. Id. at 42. Hall was so ignorant of the details of the transactions occurring at the Property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the Property. Id. at 42. When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining but could not confirm that this was the payment arrangement. Id. at 44.

Hall's testimony and the three documents U.S. Rail offered into evidence present a very clear picture: U.S. Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility (and thus affording the parties the protection of federal preemption) has only a nominal role in the property as evidenced by a sham agreement under which it pays \$1,900 a year to rent 28 acres of prime industrial land with no obligation to pay property taxes. In submitting these documents to the court at the hearing, U.S. Rail was asking the court to believe that it would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the property could be terminated on 30 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment.

While on its face, the Agreement does not make economic sense, when you consider the very lucrative arrangements that Sills and Adjo (a partner in Sills) have negotiated based on their ability to sand-mine at the Property without any state or local oversight, this arrangement makes complete sense. The testimony and evidence at the hearing call into question whether U.S. Rail is truly obligated to construct the rail facility. In short, it is quite possible that U.S. Rail has not petitioned the Board for

exemption because it cannot present evidence that it is in fact constructing a rail facility on the Property.

CONCLUSION

The Petition for Clarification is an attempt to circumvent the Board decisions in this case and well-established regulatory framework, and is premature. For all of the reasons set forth above, Brookhaven respectfully requests that the Petition be denied.

Respectfully submitted,



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May 30, 2008.

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 30th day of May, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Order

No. 35036.


Mark A. Cuthbertson

EXHIBIT F

38467

EB

SERVICE DATE - OCTOBER 8, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35042

**U S RAIL CORPORATION—LEASE AND OPERATION EXEMPTION—SHANNON G., A
NEW JERSEY LIMITED LIABILITY COMPANY**

Decided: October 7, 2008

On June 6, 2007, U S Rail Corporation (U S Rail) filed a verified notice of exemption to lease and operate approximately 1,400 feet of track then under construction. The Board delayed the effectiveness of the exemption pending additional evidence and further order of the Board. The City of Paterson, NJ (City), and the New Jersey Department of Environmental Protection (NJDEP) submitted filings in opposition to the notice of exemption. As discussed below, we are rejecting U S Rail's notice of exemption.

BACKGROUND

On June 6, 2007, U S Rail, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to lease from Shannon G. (SG), a New Jersey limited liability company and noncarrier, approximately 1,400 feet of track that U S Rail stated SG was then constructing in Paterson, NJ, and to operate over it. As a result of this transaction, U S Rail stated that it would provide exclusive common carrier rail freight service over the trackage serving a transload terminal owned by SG.

In a decision served June 15, 2007, the Board held that it would not allow U S Rail's exemption to become effective until further notice and that the applicant should provide additional information. Noting that the track which SG was constructing might be a line of railroad that requires prior Board approval, the Board directed U S Rail to file supplemental information to explain its claim that the track was not subject to the Board's jurisdiction because it was so called "private" track. U S Rail timely filed its supplement on July 3, 2007.

U S Rail claims that it would interchange traffic with The New York, Susquehanna and Western Railway Company (NYS&W). On June 11, 2007, NYS&W submitted a filing in which it explains that it has not entered into an interchange or switching agreement with U S Rail, and that it currently has no rail connection with SG's facility. NYS&W further stated that, should the exemption become effective, it would be prepared to negotiate arrangements to provide service to the facility.

The City, in its opposition, explained that, on April 25, 2007, it began eminent domain proceedings on the property upon which the track in question was located. In its reply in opposition, NJDEP explained that it believes that U S Rail is using the notice of exemption process to shield the carrier's handling of waste from state and local environmental laws. U S Rail filed a rebuttal to the City's submission on August 17, 2007, and a reply to NJDEP's submission on August 30, 2007.

POSITIONS OF THE PARTIES

The City argues that we should reject the notice as being void ab initio because U S Rail omitted information or presented a number of facts and issues inaccurately. The City claims that U S Rail failed to tell the Board in its notice of exemption that the City had already initiated a condemnation action involving the property at issue here. The City also claims that U S Rail was not truthful when it stated that it did not intend to handle waste.

Additionally, the City argues that the carrier's proposed operations appear to meet or exceed our thresholds for an environmental review and that U S Rail's claims to the contrary are false and misleading.

The City argues that the transaction is not suited for the notice of exemption process, as the project is controversial. The City also points out that the transaction does not involve the continuation of rail service on the line, because U S Rail is actually seeking to lease and operate newly constructed track on SG's property.

The City further asserts that the Board should reject the notice of exemption based on another Board proceeding, Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal). The City explains that the Board revoked the exemption in that case for a number of reasons that also apply here, including that the applicant there also failed to be candid about a pending condemnation proceeding.

NJDEP echoes many of the arguments raised by the City. NJDEP asserts that U S Rail is attempting to use the Board's processes as a means of shielding waste activities at the site from state and local environmental laws and that U S Rail has not demonstrated that environmental review is unnecessary in this proceeding. NJDEP argues further that the Board should reject the notice because U S Rail has not sufficiently explained why the track that SG was constructing is private track and thus beyond the Board's jurisdiction.

In its replies to the arguments presented by the City and NJDEP, U S Rail asserts that it no longer handles solid waste at any of its other locations and that it does not seek to handle waste, including construction and demolition debris, at the SG transloading site. U S Rail claims that its plans with SG to bring rail service to the site significantly predated the City's condemnation action and that U S Rail, a bona fide rail carrier, had no intent to deceive anyone by failing to disclose the existence of the condemnation suit in its notice of exemption.

Specifically, U S Rail contends that it was unaware of the condemnation proceeding prior to filing the notice of exemption.² U S Rail thus argues that this case is unlike Jefferson Terminal.

U S Rail reiterates why none of the environmental thresholds would be exceeded here. U S Rail further argues that the fact that there is controversy in this case should not prevent the Board from allowing the notice of exemption to go into effect. U S Rail adds that SG has indeed constructed a private track on its property, and that no prior Board approval was necessary.

PRELIMINARY MATTERS

On August 30, 2007, the City filed a motion asking the Board to strike portions of U S Rail's August 17, 2007 rebuttal or, in the alternative, to accept its arguments refuting some of the applicant's assertions. U S Rail filed a reply in which it claims that the City's motion to strike is nothing more than a reply to a reply, a pleading prohibited by our regulations.³

We will accept the arguments proffered by the City and not strike U S Rail's arguments. The parties' pleadings and attached exhibits provide for a more complete record regarding the proposed transaction. For this same reason, we will also grant NJDEP's request to intervene in the proceeding.

DISCUSSION AND CONCLUSIONS

An exemption under 49 CFR Part 1150 Subpart E is void *ab initio* if the notice contains false or misleading information. 49 CFR 1150.42(c). U S Rail's notice of exemption (at 3) describes the property to be leased as "a rail-served transload terminal owned by Shannon," and the caption summary attached as Exhibit C to the notice states that the property to be leased is "currently owned by Shannon G." However, the record shows that, at the time the notice of exemption was filed on June 6, 2007, the City had begun a condemnation action – the very purpose of which was to end SG's ownership. Moreover, although U S Rail claims that it did not know about the condemnation proceeding when it filed its notice of exemption, we find that it did. The record shows that U S Rail leased the subject property from SG on August 10, 2006,⁴ and that the City offered to buy the property in a letter dated February 13, 2007.⁵ The record further shows that the City initiated the condemnation proceeding on April 25, 2007, by filing a verified complaint in state court. The City also submitted a fact certification by Gabriel Hall, as President and CEO of U S Rail, dated May 22, 2007, as evidence of U S Rail's acknowledgment of the condemnation proceeding.⁶ That document demonstrates that, despite its assertion to the contrary, U S Rail had actual notice of the condemnation action before it filed its notice of exemption on June 6, 2007. We find that U S Rail's failure to disclose the condemnation action

² See U S Rail's August 17, 2007 Reply, V. S. Hall at 1.

³ See 49 CFR 1104.13(c).

⁴ See NJDEP's August 10, 2007 Reply, Exhibit A.

⁵ See City's July 26, 2007 Reply at 6.

⁶ See City's Motion to Strike, filed August 30, 2007, at 2-3 and Appendix at 1.

in its notice of exemption renders the notice's assertions regarding SG's ownership of the property materially misleading by omission, rendering the notice void *ab initio*.

Additionally, Mr. Hall states in his verified statement on behalf of U S Rail that he learned of the condemnation proceeding and that a representative of NYS&W then advised him "to do what he had to do" and seek STB operating authority.⁷ Not only does Mr. Hall's verified statement indicate that U S Rail was not candid in its notice of exemption, but the statement leaves us with the clear impression that U S Rail was attempting to use the federal preemption that the use of our notice of exemption process would confer on SG's property as a means of avoiding the City's authority to pursue the condemnation proceeding. In Jefferson Terminal, we found similar actions to be unacceptable.⁸ These actions are unacceptable here too, and the false and misleading information U S Rail provided warrants rejecting the notice of exemption.

Because we are rejecting the notice of exemption, this proceeding is terminated.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NJDEP's motion to intervene is granted.
2. The City's motion to strike is accepted, but it is denied as described above.
3. As described above, U S Rail's notice of exemption is rejected, and this proceeding is terminated.
4. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

⁷ See U S Rail's July 3, 2007 Supplement, V: S. Hall at 3.

⁸ See Jefferson Terminal, slip op. at 5.