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October 27, 2015

VIA E-FILING

Surface Transportation Board
 395 E Street, SW
 Washington DC 20423

Objections of Town of Brookhaven, New York

Re: U S Rail Corporation-Brookhaven Rail Terminal, STB F.D. No. 35141

Dear Members of the Board:

We are special counsel for the Town of Brookhaven, New York ("Town"). We write in response, and objection, to the October 9, 2015 motion of Brookhaven Rail Terminal (BRT) to close this proceeding, based on its purported compliance with this Board's Environmental Conditions. Because BRT's submissions do not even claim, much less demonstrate, that its over one-year long and extensive transloading of "used oil" at BRT's terminal did not violate Article 12 of the Suffolk County Sanitary Code, and instead BRT simply alleges that it has "withdrawn" its application to the County Department of Health for permit approval for used oil transports which it has for over a year conducted in violation of the Sanitary Code, the Board should rule that BRT had failed to comply with its Environmental Conditions.

The Board will recall that BRT's's unlawful transloading of millions of gallons of used oil was initially concealed by BRT and was not disclosed or uncovered until after this Board, on August 28, 2014, directed BRT to certify compliance with the Board's three outstanding Environmental Conditions, in response to which BRT in September, 2014 made a single passing reference to used oil transloading in its memorandum, requiring that its supporting documents be combed through to uncover (buried deep in its 100 page plus legal submission) that the oil transports were an enormous 100,000 gallons weekly. On July 8, 2015 this Board ruled that the question of whether the used oil transloading was a violation of BRT's stipulation of settlement with the Town, which expressly prohibits transloading of solid waste at the terminal, are matters which the U.S. District Court should decide. This Board, however, observed that with BRT's submissions asserting that its used oil permit requests were still pending before the Suffolk

County Department of Health, BRT had not actually shown that its operations had complied with Article 12 of the County's Sanitary Code so as to comply with Environmental Condition No. 2, and directed BRT to demonstrate such compliance.

In its October 9, 2015 submission, BRT now admits that it has not obtained a permit from the Department of Health for used oil transloading. Instead, it asserts that it has put on hold its permit application. Thus, BRT's submissions establish that BRT had for over a year transported millions of gallons of contaminated used oil out of the Terminal, had done so illegally without the Suffolk County Department of Health permits required by Article 12 of the Sanitary Code, and in direct violation of this Board's Environmental Condition No. 2.

As we reported to this Board on December 22, 2014, BRT only ceased the illegal used oil operations after the Town filed an emergency motion in the U.S. District Court for an injunction to bar it, whereupon BRT agreed to stop the used oil transloading only for the time-being but without any actual restriction on it recommencing those operations.

It is clear that BRT has violated Article 12 of the County Sanitary Code regulations¹ for

¹ BRT for over one year has purported to be "exploring" with the County Health Department whether its unpermitted used oil operations were subject to Article 12 of the Sanitary Code, only to now claim that it has temporarily put on hold its request. The Sanitary Code is published online at <http://www.suffolkcountyny.gov/Portals/0/Documents%20and%20Forms/Health%20Services/sanitary%20code/Suffolk%20County%20Sanitary%20Code.pdf>. There is no ambiguity in the fact that Article 12 directly prohibits the used oil transports without permits:

Its Sections 760-1203(O) and 760-1203(N)(4) provide that used oil constitutes a "Toxic or Hazardous Waste" and a "Toxic or Hazardous Material". Section 760-1203(N) thereof provides that biodiesel constitutes a "Toxic or Hazardous Material".

Its Section 760-1205 prohibits the pickup or transport of Toxic or Hazardous Waste without a NYS industrial waste collector registration, and prohibits the storage of Toxic or Hazardous Material in a facility constructed of materials "*[in]compatible with the product being stored.*"

The remaining sections of the Sanitary Code mandate obtaining of permits and impose criteria for obtaining a permit which depend on the type of storage and product transfers involved. In general, the obligation is that the facility be designed and constructed, to the satisfaction of the Commissioner, in such manner as to "*provide the maximum reasonable protection available against leakage or spillage from the facility*". See e.g. §760-1210(1).

over one year in a massive way, in volumes of 100,000 gallons weekly, which, if there had been a spill of the contaminated oil, would have contaminated the water supply for all of Long Island by virtue of the Sole Source Aquifer System underneath the Terminal, in direct violation of this Board's Environmental Condition No. 2.² The violation occurred while the proceeding was pending before this Board. It ceased, temporarily, only because the Town moved to enjoin it in federal court. Having now admitted that it has not obtained a permit for the used oil operations, retroactive or otherwise, BRT should be held to be in direct violation of Environmental Condition No. 2. Any other response by this Board will allow BRT to violate law and this Board's express conditions with impunity, and with the sole risk being that once caught it need only temporarily cease the illegal activity until after this Board closes the proceeding.

Additionally, a directive that BRT not recommence used oil transloading without complying with County health regulations should be issued, but that will not suffice to address BRT's deliberate and extensive violation of Environmental Condition No. 2. The Town requests that the Board first and foremost declare BRT's used oil transloading to have been in violation of Environmental Condition No. 2, and moreover that it impose significant and meaningful administrative penalties and restrictions on future used oil transports sufficient to prevent a recurrence. The restrictions should include providing the Town and the STB with detailed advance notice of any future plan to seek permission from the County Health Department of such operations, a delineation in such notice of the source and makeup of the used oil, and an obligation to provide other information to the Town and the STB concerning its planned operation upon request.

This Board's July 8, 2015 Order makes clear that owing to its limited resources, the STB's review is limited to what is occurring while the applicant happens to be before it, and that it generally does not reopen closed proceedings based on changed and different operations, unless there is (somehow) proof that the applicant in its own mind planned to engage in that different operation during the STB approval process and failed to disclose it. This limited review can predictably result in abuses of the process, with a clever applicant predictably delaying disclosure or commencement of illegal or controversial operations until the day after this Board

Additionally, numerous restrictions are imposed regarding "Piping, Fittings, [and] Connections" under §760-1212, including that it must "*be fabricated, constructed and installed in a manner that will prevent the escape of the toxic or hazardous materials contained therein to the ground, groundwater or surface waters of Suffolk County*".

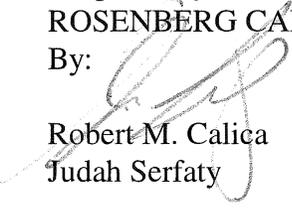
² The risk of a catastrophic spill is heightened by the fact that in the last couple of months alone there have been at least to major rail derailments on Long Island.

grants approval. Closure of this Board's review is therefore a pivotal event in the STB regulatory process, which requires that the Board at the least meaningfully redress the violations of its own conditions and directives which occurred while the application was before it, was uncovered as a result and in the context of its own directive, pertains specifically to the health regulation specified in its own "Environmental Condition", and the applicant has indicated that it has simply put "on hold" the used oil transports for the time being and has conducted those transports for over one year while before this Board. A prospective directive which ignores or imposes no meaningful penalty for the over one year extensive violation of this Board's express Environmental Condition is not enough.

We appreciate the Board's consideration.

Respectfully,
ROSENBERG CALICA & BIRNEY LLP

By:


Robert M. Calica
Judah Serfaty

CERTIFICATE OF SERVICE

I, JUDAH SERFATY, hereby certify that on the 27th day of October, 2015, I caused to be served the within **LETTER OF OCTOBER 27, 2015** upon the attorneys/parties by E-mailing same to their email addresses:

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Dated: October 27, 2015



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