

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Office of Proceedings
April 28, 2016
Part of
Public Record

FINANCE DOCKET NO. 35141

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

MOTION TO ENTER DECISION AND CLOSE PROCEEDING

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

Dated: April 28, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

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

MOTION TO ENTER DECISION AND CLOSE PROCEEDING

Brookhaven Rail Terminal (“BRT”) and Brookhaven Rail, LLC (“Brookhaven Rail”) (collectively, “Respondents”), respectfully move the Surface Transportation Board (the “Board”) to enter a decision that Respondents are compliant with the Board’s third, and final, environmental condition imposed by the Board in its 2010 decision.¹ As explained below, this matter is now ripe for a decision by the Board.

BACKGROUND

By Decision served July 8, 2015, the Board denied the March 14, 2014 motion of the Town of Brookhaven (the “Town”) to re-open this matter.² The Board also held in the 2015 Decision that Respondents were in compliance with two of the three environmental conditions imposed in the Board’s 2010 Decision.³ Regarding the third environmental condition, the Board directed Respondents to notify the Board’s Office of Environmental Analysis that Respondents’

¹ *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket 35141 (STB served Sept. 9, 2010) (“2010 Decision”).

² *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket 35141 (STB served July 8, 2015)(“2015 Decision”) at 4-5.

³ *Id.*

spill prevention, control, and countermeasures plan (“SPCC Plan”) satisfied Article 12 of the Suffolk County Sanitary Code (“SCSC Article 12”).⁴ The Board held that when Respondents so notified the Board, “they will have complied with the third condition.”⁵

In response to the Board’s directive, by filing dated October 9, 2015, Respondents advised the Board that Respondents’ SPCC Plan satisfied SCSC Article 12.⁶ As proof of compliance, Respondents’ filing included (1) its revised SPCC Plan (rev’d April 1, 2015), and (2) a Certificate of Compliance with SCSC Article 12 signed by Theresa M. Colabella, Professional Engineer, of environmental engineering consulting firm, P.W. Grosser Consulting Inc. Respondents’ filing also requested that the Board close the proceeding because Respondents’ filing satisfied the Board’s sole remaining open directive in the proceeding. The only objection lodged against Respondents’ October 9, 2015 filing was the Town’s “Objections of the Town of Brookhaven, New York,” filed on October 27, 2015.

On March 17, 2016, Respondents entered into a Stipulation of Settlement with the Town, portions of which are attached hereto as an Exhibit, wherein the Town agreed to withdraw its October 27, 2015 objections.⁷ The Stipulation of Settlement was executed by the Town’s

⁴ *Id.*

⁵ 2015 Decision at 4.

⁶ *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket 35141, Notification of Compliance with Board’s Remaining Environmental Condition and Motion to Close the Proceeding (filed October 9, 2015).

⁷ Exhibit at page 10. Exhibit D to the Stipulation of Settlement is a form letter the Town agreed to file at the Board which covers withdrawing the Town’s opposition to Respondents’ October 9, 2015 filing.

attorney and counsel of record at the Board. Respondents expect the Town to notify the Board of the withdrawal of its opposition shortly following the instant filing.⁸

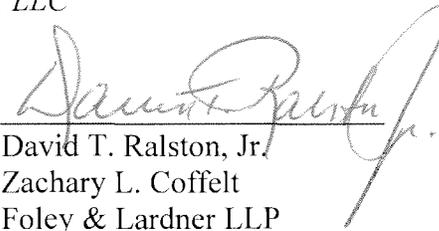
DISCUSSION

As Respondents have notified the Board of Respondents' compliance with the Board's sole remaining environmental condition—the only issue remaining in this proceeding—and there is no opposition to Respondents' compliance, Respondents have fulfilled all three conditions encompassed by the 2015 Decision. Accordingly, the matter is ripe for a final decision by the Board. Therefore, Respondents respectfully move the Board to enter a decision that: (1) Respondents are compliant with the Board's remaining environmental condition; and (2) this matter is closed.

Dated: April 28, 2016

Respectfully submitted,

*Brookhaven Rail Terminal and Brookhaven
Rail, LLC*

By: 

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

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

⁸In light of the Town's prospective withdrawal of its October 27, 2015 opposition, Respondents will not file a response to the Town's opposition as discussed in Respondents' three motions for an extension of time dated November 17, 2015; December 22, 2015; and January 28, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2016, I caused to be served the foregoing *Motion to Enter Decision and Close Proceeding* by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

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

Robert M. Calica, Esq.
Rosenberg Calica & Birney LLP
100 Garden City Plaza, Suite 408
Garden City, NY 11530

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

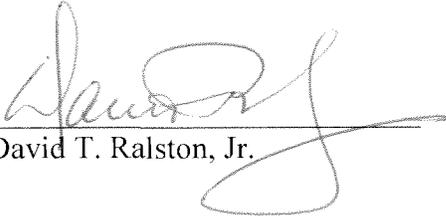
Lyngard Knutson, Esq.
Region 2 E.P.A.
290 Broadway, 25th Floor
New York, NY 10007

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

Field Office Supervisor
U.S. Fish and Wildlife Service
Long Island Field Office
340 Smith Road
Shirley, NY 11967

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

New York & Atlantic Railway
68-01 Otto Road
Glendale, NY 11385
ATTN: Paul Victor



David T. Ralston, Jr.

EXHIBIT TO
MOTION TO ENTER DECISION AND CLOSE PROCEEDING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN
RAIL LLC f/k/a U S RAIL NEW YORK LLC,
BROOKHAVEN TERMINAL OPERATIONS,
OAKLAND TRANSPORTATION HOLDINGS
LLC, SILLS EXPRESSWAY ASSOCIATES,
WATRAL BROTHERS, INC., and PRATT
BROTHERS, INC.,

Defendants.

Index No.: 14-CV-02286 (GRB)
(and Related Case Docket
No. 07-CV-4584)

**SO-ORDERED STIPULATION
OF SETTLEMENT**

-----X

RECITALS:

WHEREAS:

A. Defendants Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations ("Brookhaven Rail"), Oakland Transportation Holdings LLC, Watral Brothers, Inc., and Pratt Brothers, Inc. are the owners, developers, operators or contractors of the rail terminal located on an approximately 30 acre parcel at 205 Sills Road, Yaphank, New York ("Parcel A") now operating as a railway terminal and transloading facility (the "Operating Railway Terminal") under the jurisdiction of the United States Surface Transportation Board ("STB").

B. Prior disputes between plaintiff Town of Brookhaven ("Town") and certain of the Defendants or their predecessors, as the owners, former owners, developers, operators and/or contractors of the then-proposed Operating Railway Terminal resulted in prior litigation before this Court under Docket No. 07-CV-4587, which disputes were resolved pursuant to a certain So-

SEQRA requirements and plan review processes which are specifically provided for in this Stipulation as a settlement and resolution of the Environmental Preemption Disputes pursuant to the review and approval process and procedure herein. At the conclusion of the referenced process the Town will approve, disapprove, or specify modifications or additions to the Proposed New BRT Track Plans, the Additional Plans and the Parcel D Conceptual Track Plan and the subsequent site development plans which have been reviewed by VHB and for which VHB has prepared findings and recommendations to the Town. The Parties agree that the resolution of any dispute which may arise in connection with the review and approval process before the Town Board as provided for herein shall remain subject to the jurisdiction and determination of the District Court.

4. No further site development activities for the Railway Expansion shall proceed until such time as the Administrative SEQRA/Plan Review with the findings and recommendations prepared by VHB, is complete, reviewed and approved by the Town Board pursuant to the expedited process and procedure set forth above or, in the event of any dispute among the Parties concerning such Administrative SEQRA/Plan Review and approval and application of the Applicable Town Code Provision, upon determination of any such dispute by the Court in this action, upon application and made upon such notice, and in such manner and following such proceedings, as the Court may determine and direct.

5. Upon completion of the Administrative SEQRA/Plan Review and plan approval the Town will promptly (i) execute and file a Stipulation of Discontinuance of this lawsuit in the form annexed hereto as Exhibit C; (ii) execute and deliver a letter, in the form of Exhibit D annexed hereto, to the STB, withdrawing the Town's October 27, 2015 reply and objection to BRT's Motion to Close the Proceeding in STB Finance Docket No. 35141; (iii) withdraw the

SWO and (iv) will dismiss the Suffolk District Court Action. The Town further acknowledges and does not object that BRT may immediately upon the entry by the Court of this Stipulation of Settlement request that the District Court issue an appropriate inquiry, letter, and/or Order, in a form to be agreed upon by the parties, referring the issue of whether the track area, only, of BRT's short branch line expansion of its rail carrier services of the Operating Railway Terminal on Parcels B, C, and/or D, as depicted in the Proposed New BRT Track Plans (as may ultimately be modified by BRT and the Town in accordance with the planning, engineering and environmental review process set forth herein), falls under 49 U.S.C. § 10906. Notwithstanding the foregoing, the Administrative SEQRA/Plan Review process shall commence upon entry by the Court of this Stipulation of Settlement, and the construction and operation of all buildings and other structural improvements on Parcels B, C and D, including any site plans, building permits and Certificates and Occupancy, shall be governed by the provisions of this Stipulation of Settlement, and the classification of the track under 49 U.S.C. § 10906 shall not in any way limit or abrogate the Town's rights, remedies, and authority under Paragraph 16(c) below.

6. The BRT Defendants shall, at the same time the Town delivers the items set forth in Paragraph 5 above, execute and deliver to the Town a Conservation Easement encompassing the 62 acre Undisturbed/Conservation Area in the form reasonably required by the Town such that it shall remain permanently undeveloped and as open space/green space in perpetuity, with the exception of the existing LIPA easements/assets as identified on the Parcel D Conceptual Track Plan; however, BRT Defendants shall retain all the development rights from the Conservation Easement, including, but not limited to the sanitary credits, which may be utilized in the development and construction of the Railway Expansion at the sole discretion of the BRT Defendants. The BRT Defendants shall pay all title fees and recording fees for the Town

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

30. Each counsel executing this Stipulation represents his, her or its authority to bind such counsel's clients, as the Parties to this action, to the terms, provisions, conditions and obligations of this Stipulation to the same extent as though individually executed by each of them.

31. Each Party to this Stipulation shall execute an additional counterpart thereof within ten (10) business days following the execution of this Stipulation by counsel for the Parties.

32. This Stipulation shall be submitted to Honorable Gary R. Brown, Magistrate Judge to be "So Ordered". It is a condition to the binding effect of this Stipulation that it be "So Ordered" by the Court. In the event the Court declines for any reason, following due application, to "So Order" this Stipulation, then it shall be null, void, and of no further force and effect and all rights created, modified or waived hereby shall be immediately restored as they existed upon the day prior to the date upon which this Stipulation has been executed, unless otherwise agreed to by all Parties and counsel in a subsequent Stipulation or other written agreement.

Date: March 17, 2016

FOLEY & LARDNER LLP

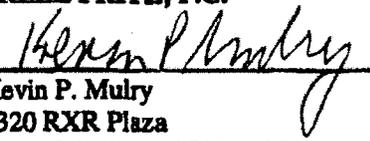
By: _____

Yonatan Yaronoff
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New York, NY 10016-1314
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yaronoff@foley.com

*Counsel for Sills Road Realty LLC,
Brookhaven Rail LLC f/k/a U S Rail New York
LLC, Brookhaven Terminal Operations,
Oakland Transportation Holdings LLC,
Watral Brothers, Inc., and Pratt Brothers, Inc.*

Date: March 17, 2016

FARRELL FRITZ, P.C.

By: 
Kevin P. Mulry
1320 RXR Plaza
Uniondale, NY 11556-1320
516-227-0620 (Telephone)
kmulry@farrellfritz.com

Counsel for Sills Expressway Associates

Date: March ____, 2016

ROSENBERG CALICA & BIRNEY LLP

By: 
Robert M. Calica
100 Garden City Plaza
Garden City, NY 11530
516-747-7400 (Telephone)
rob@rcblaw.com

*Special Counsel to Brookhaven Town Attorney
Annette Eaderesto, Esq.*

Date: March 17, 2016

ANNETTE EADERESTO, ESQ.


Brookhaven Town Attorney

Date: March ____, 2016

TOWN OF BROOKHAVEN

By: _____

Date: March ____, 2016

SILLS ROAD REALTY LLC

By: _____

EXHIBIT D

March 17, 2016

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

Re: **Finance Docket Nos. 35819 & 35141: Withdrawal of
Oppositions to BRT in Finance Docket Nos. 35819 & 35141**

Dear Ms. Brown:

We represent the Town of Brookhaven, New York (the "Town"). We write on behalf of the Town to withdraw our "Objections of Town of Brookhaven, New York" filed on October 27, 2015, in opposition to BRT's "Notification of Compliance with Board's Remaining Environmental Condition and Motion to Close the Proceeding" filed on October 9, 2015 in Finance Docket No. 35141.

Please contact us if you have any questions.

Respectfully submitted,
ROSENBERG CALICA & BIRNEY LLP
By:

Robert M. Calica
Judah Serfaty

BOSTON
BRUSSELS
CHICAGO
DETROIT

JACKSONVILLE
LOS ANGELES
MADISON
MIAMI

MILWAUKEE
NEW YORK
ORLANDO
SACRAMENTO

SAN DIEGO
SAN FRANCISCO
SHANGHAI
SILICON VALLEY

TALLAHASSEE
TAMPA
TOKYO
WASHINGTON, D.C.