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June 4, 2014

236150

Ms. Cynthia T. Brown  
Chief, Section of Administration (PSA)  
Surface Transportation Board  
Office of Proceedings (PD)  
395 E Street, S.W.  
Room 1034  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings  
June 4, 2014  
Part of  
Public Record

Re: **Finance Docket No. 35141, US Rail Corporation –  
Construction And Operation Exemption - Brookhaven Rail  
Terminal And Brookhaven Rail, LLC – Motion To Strike  
Town Of Brookhaven’s Submission Of May 15, 2014  
Update To Board**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket, please find Brookhaven Rail Terminal and Brookhaven Rail, LLC’s Motion to Strike Town of Brookhaven’s Submission of May 15, 2014 Update to Board.

Respectfully submitted,

David T. Ralston, Jr.

Counsel for Respondents Brookhaven Rail  
Terminal and Brookhaven Rail, LLC

Enclosures  
cc: Parties of Record

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.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35141

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

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**MOTION TO STRIKE TOWN OF BROOKHAVEN'S SUBMISSION OF  
MAY 15, 2014 UPDATE TO BOARD**

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Washington, D.C. 20007**

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

Dated: June 4, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35141

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

---

**MOTION TO STRIKE**  
**TOWN OF BROOKHAVEN’S SUBMISSION OF MAY 15, 2014 UPDATE TO BOARD**

Brookhaven Rail Terminal and Brookhaven Rail, LLC (collectively, “Respondents”), respectfully move the Surface Transportation Board (“Board”) to strike the Town of Brookhaven’s (“Town”) submission of May 15, 2014, entitled “Submission Of Town Of Brookhaven With Update To Board And Correcting Misstatements Of Fact Made By Brookhaven Rail Terminal” (Document No. 236050) (“Submission”). The Town’s Submission should be stricken because: (1) the Submission is a reply to a reply prohibited by the Board’s rules of practice, 49 C.F.R. § 1104.13(c), and Board precedent; (2) the Town did not show adequate cause to permit a reply to a reply; (3) acceptance of the Submission would prejudice Respondents unless they are permitted an opportunity to file responsive papers; and (4) the Submission was filed outside the 20-day time period prescribed by the Board’s rules of practice, 49 C.F.R. § 1104.13(a).

The Board’s rules of practice explicitly state: “[a] reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c). The Board repeatedly has enforced this rule in similar situations by granting a motion to strike an impermissible reply to a reply. *E.g., St. Lawrence & Atlantic Railroad Co. – Discontinuance of Service Exemption – In Cumberland County, ME.*, STB Docket No. AB 1117X, slip op. at 2 (STB served Feb. 25, 2014) (granting motion to strike because reply to a reply not permitted under the Board’s rules and filing not needed to complete

the record); *BNSF Railway Co. – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No. 430X), slip op. at 2 (STB served Jan. 26, 2007) (granting motion to strike because “[a]lthough purportedly filed to address alleged misrepresentations of the record and mischaracterization of the decisions cited by the railroads in their reply, petitioners’ . . . filing is an impermissible reply to a reply.”); *Central Kansas Railway, L.L.C. - Abandonment Exemption – In Sedgwick County, KS*, STB Docket No. AB-406 (Sub No. 14X), slip op. at 2 (STB served Sep. 28, 2001) (granting motion to strike because reply to a reply impermissible under the Board’s rules, and filing “advanced no legitimate grounds,” but instead merely disagreed with opposing parties’ points and “want[ed] to argue them further”).

The Town’s Submission here should be stricken because it plainly is an impermissible reply to a reply. While the Town attempts to disguise its Submission as an “update” or “correction,” apparently to avoid Rule 1104.13(c)’s prohibition against filing a reply to a reply, this disingenuous mislabeling technique is no different from that rejected by the Board in *BNSF Railway Co.* The genuine nature of the filing is revealed in pages 5-11 of the Submission, where the Submission directly responds to Respondents’ Reply, filed April 3, 2014 (Document No. 235777), and re-argues points previously made. Therein, the Town: (1) directly responds to (but misstates) the discussion in Respondents’ Reply concerning the import of certain Town actions, Submission, pp. 5-6; (2) again argues that “changed circumstances” warrant the Board’s reopening of the proceeding, *id.*, pp. 6-9, previously argued in the Town’s Motion to Reopen filed on March 14, 2014 (Document No. 235638), and responds to the arguments made in Respondents’ Reply that “changed circumstances” do not exist, *id.*, pp. 6-9; (3) responds to Respondents’ Reply as to the import of the Board’s 2010 Decision, *id.*, pp. 9-10; and (4)

responds to Respondents' position as to the Gannett Fleming study, and then re-argues points made in an earlier Town submission supplementing its original motion, *id.*, pp. 10-11.

The Town's various arguments responding to Respondent's Reply facially constitute a reply, as they (1) "advance no legitimate purpose" other than to indicate further disagreement with opposing parties' positions and "arguing them further[,]" *Central Kansas Railway, L.L.C.*, and (2) as was the case in *St. Lawrence & Atlantic Railroad Co.*, add nothing necessary to complete the record. Rather, the Town's Submission responds to and rehashes arguments that were already (or could have been) presented in earlier filings, which constitutes a prohibited reply to a reply. *See Central Kansas Railway, L.L.C.*

Respondents also object to the filing of the Submission exhibits, and the arguments advanced in the Submission concerning those exhibits, Submission, pp. 1-5, as acceptance of them by the Board would prejudice Respondents. Exhibit A (Stop Work Order) was previously submitted, and its import argued. Exhibit B is the May 12, 2014 Order by the U.S. District Court for the Eastern District of New York that concerns certain activities entirely on Parcels B and C, not on Parcel A, the only parcel that is the subject of the Town's Motion to Reopen. Submission Exhibits C through E are selective filings taken from the U.S. District Court proceeding, submitted to the Board by the Town as another artifice, comparable to the one rejected by the Board in *BNSF Railway Co.*, designed to provide additional evidence and argument to the Board under the guise of supplementation, as are the additional arguments in the Submission.

If for no other reason, even-handed consideration by the Board and avoiding prejudice to Respondents requires the Board to either strike the exhibits and accompanying Submission, or issue a decision permitting Respondents to file responsive papers and exhibits to complete the record. As the exhibits and the argument have little to do with Parcel A, they should be stricken,

but for Respondents to say more here about them would require Board permission to file a response.

The Town also failed to file a motion seeking Board leave to file the Submission and the exhibits. Instead, perhaps indicative of its own unease with that failure, the Town dropped a footnote requesting permission to file, to the extent permission “is required.” Submission, n. 1. The Town’s footnote, however, provides no argument beyond a bare one-sentence contention about the importance of the Submission, and advances no Board precedent supporting leave to file. *Id.*

Beyond that, the Town’s backhanded approach evinces a blatant disregard of the Board and its rules, the absence of a motion for leave, supporting argument and citations confirms the Submission cannot meet Board requirements for leave to file, and had a motion for leave been filed, it would have been denied as the Submission fails to add any new evidence, anything substantive, or anything missing from the record that would be needed to aid the Board’s understanding of the issues. *See, e.g., San Francisco Bay Railroad-Mare Island – Operation Exemption – California Northern Railroad*, STB Finance Docket No. 35304, slip op. at 2 (STB served Dec. 6, 2010) (rejecting reply to a reply because it was prohibited under the Board’s rules and it did not introduce any new evidence or anything necessary to adjudicate the original pleadings); *The Springfield Terminal Railway Co. – Petition For Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42108, slip op. at 2 (STB served June 16, 2010) (denying party’s motion for leave to file a reply to a reply because it was not permitted under the Board’s rules and the party did not provide “sufficient reason for the Board to make an exception”); *Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 1190X), slip op. at 2 (STB served May 26,

2009) (denying motion to accept a reply to a reply because it was not permitted under the Board's rules and the filing did not "add any substance to the record"); *James Riffin D/B/A The Northern Central Railroad – Acquisition And Operation Exemption – In York County, PA*, STB Finance Docket No. 34501, slip op. at 3-4 (STB served Feb. 23, 2005) (denying a motion for leave to file a reply to a reply because it was not permitted under the Board's rules and it would not add to the Board's "understanding of the issues"). The lack of a motion or reasoned argument to justify the Board's acceptance of a prohibited reply to a reply confirms the Town's Submission is a straightforward reply to a reply that attempts to reargue points that have already been presented to the Board in both parties' earlier filings, and therefore, should be stricken. *See Central Kansas Railway, L.L.C.*

The Town's Submission, in addition to ignoring the Board's rules and precedents prohibiting a reply to a reply, and not justifying an exception, also violates the Board's 20-day rule for filing a motion in response to a prior pleading. According to 49 C.F.R. § 1104.13(a), "[a] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided." The Respondents' Reply was timely filed on April 3, 2014, while the Town's Submission was not filed until May 15, 2014, *more than 40 days after* the filing date of the Respondents' Reply. Even if the Board does not consider the Town's Submission to be an impermissible reply to a reply, which it clearly is, the Town's Submission clearly qualifies as a "reply or motion addressed to any pleading" according to 49 C.F.R. § 1104.13(a) because the Submission's title page labels the Submission as "Correcting Misstatements Of Fact Made By Brookhaven Rail Terminal" and on pages 6-11 the Submission specifically addresses arguments in the Respondents' Reply. Thus, the Town's Submission should be stricken because it was untimely filed in violation of 49 CFR § 1104.13(a).

Wherefore, because the Town's Submission is a prohibited reply to a reply, did not meet the standard for leave to file, and was untimely filed, the Board should strike the Town's Submission. To act otherwise under these circumstances would reward the Town for ignoring the Board's rules and well-established precedent, and result in prejudice to Respondents unless they are permitted to respond as well.

Respectfully submitted,

***Brookhaven Rail Terminal and Brookhaven Rail, LLC***

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

Dated: June 4, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2014, I caused to be served Brookhaven Rail Terminal's and Brookhaven Rail's Motion to Strike Town of Brookhaven's Submission of May 15, 2014 Update to Board, by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

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U S Rail New York LLC  
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NYS Dept of Transportation  
50 Wolf Road  
Albany, NY 12232  
Attn: Robert A. Rybak, Esq.

James H.M. Savage, Esq.  
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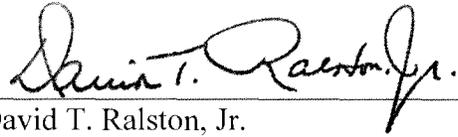
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Attn: David A. Stilwell

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

New York & Atlantic Railway  
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Glendale, NY 11385  
Attn: Paul Victor

A handwritten signature in black ink that reads "David T. Ralston, Jr." The signature is written in a cursive style and is positioned above a horizontal line.

David T. Ralston, Jr.  
*Counsel for Brookhaven Rail Terminal  
and Brookhaven Rail, LLC*