

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141
U S RAIL CORPORATION – CONSTRUCTION AND OPERATION EXEMPTION–
BROOKHAVEN RAIL TERMINAL

TOWN OF BROOKHAVEN'S OPPOSITION TO MOTION TO STRIKE

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Preliminary Statement

The Town of Brookhaven (“Town”) respectfully submits this opposition to the motion to strike, dated June 4, 2014, filed by the Brookhaven Rail Terminal and Brookhaven Rail, LLC (collectively, “BRT”). BRT’s motion to strike must be denied, because: (a) the Town’s supplemental submission addresses new and recently discovered matters, including the Federal Court’s intervening issuance of a temporary restraining order (“TRO”) against BRT, and intervening discovery and critically important evidence of BRT’s massive and brazen illegal activities at the project site, which evidence was elicited during the course of expedited preliminary injunction proceedings recently conducted before the United States District Court for the Eastern District of New York; and (b) BRT’s reply is nothing short of shameful, misleading and a virtual affront to the integrity of this proceeding. As such, the Town’s supplemental submission was clearly necessary and proper to “*complete the record*” and “*more fully explain[] the factual situation*” upon the Town’s pending application to re-open this proceeding.

BRT’s motion to strike falsely and misleadingly contends that the Town’s supplemental submission is a mere “reply to a reply.” However, the relevant standard is whether the Town’s supplemental submission is “*needed to complete the record*” or “*more fully explains the factual situation.*” See St. Lawrence & Atlantic Railroad Company Discontinuance of Service Exemption in Cumberland County, Me., STB Docket No. AB 1117X, 2014 WL 712974 (S.T.B. Feb. 24, 2014) (upon application to strike supplemental submission on the alleged ground that it constituted a prohibited “reply to a reply,” this Board explained that a supplemental submission can be filed and should be accepted when it is “*needed to complete the record*”) (emphasis added); see also Wyoming and Colorado Railroad Company, Inc.–Abandonment Exemption –in Carbon County, WY, STB Docket No. AB-307 (Sub-No. 5X), 2004 WL 2619754 (S.T.B. Nov.

9, 2004) (“Although our regulations at 49 CFR 1104.13(c) do not permit filing replies to replies, we may do so in a particular instance if it is warranted. Here, the supplemental statement that IMR seeks to file *responds to new allegations raised in WYCO's reply to protests and more fully explains the factual situation. Thus, we will accept the supplemental statement for filing to complete the record in this proceeding*”) (internal citation omitted; emphasis added). The cases cited by BRT confirm the relevant standard, and merely involved inapposite situations where, unlike here, a party submitted an impermissible “reply to a reply” under the guise of completing the record. Even a cursory examination of the cases cited by BRT reveals how utterly distinguishable and inapposite they are on the facts, and none of them even remotely involved the unique situation presented here, where intervening and critically important evidence (and the Federal Court’s intervening issuance of a TRO) reveal the full extent to which: (a) BRT has utterly failed to comply with this Board’s directives and explicit conditions of approval; and (b) BRT has actively and knowingly misled this Board.

The Town’s underlying application to re-open this proceeding was filed on March 12, 2014. The Town filed its application herein to re-open this proceeding because BRT violated virtually every single condition and restriction imposed by this Board in 2010 in connection with BRT’s construction of a railway facility which to date is still not completed. In addition, because the same violations also constitute direct violations of New York law, including for massive illegal “sand mining” activities which severely threaten the Sole Source Aquifers upon which Long Island depends for its drinking water, as well as direct violations of a prior court-approved settlement with the Town, the Town simultaneously commenced a court proceeding to enjoin BRT from continuing those illegal activities.

Two months later, on May 12, 2014, the Federal District Court in the Town's pending lawsuit against BRT was compelled to take the unusual step of issuing a TRO against BRT and its affiliates concerning the exact same matters which form the basis of the Town's application herein to re-open this proceeding, thereby forcing BRT to cease its illegal "sand mining" and purported construction activities at the site. Accordingly, by means of the Town's May 15, 2014 supplemental submission, the Town promptly notified this Board of the Federal Court's intervening issuance of the TRO, and corrected a number of blatant misstatements of fact made by BRT to this Board as likewise proven by intervening disclosures and admission made during the course of accelerated preliminary proceedings before the Federal Court. BRT's motion to strike is therefore unavailing at best, and at worst, constitutes a further attempt by BRT to mislead and conceal the critically important and salient facts from this Board.

BRT's Motion to Strike Should Be Denied

At the outset, BRT misleadingly contends that the Federal Court's issuance of the TRO against BRT enjoining and prohibiting it from illegal sand mining and feigned construction activities is not the proper subject of an update submission to this Board. According to BRT, this proceeding only involves Parcel A, as opposed to the Brookhaven Rail Terminal in general (which, according to BRT itself, encompasses all three parcels, i.e., Parcels A, B and C). Thus, BRT ignores its own contentions, including to the Federal Court, that the Brookhaven Rail Terminal encompasses all three parcels. BRT also conveniently ignores the compelling evidence and basis for the Town's position – thus far accepted and credited by the Federal Court – that BRT's construction and excavation activities involve illegal "sand mining" on Parcels B and C under the guise and pretext of a purported "expansion" of the Terminal's instant limited plan

approved by this Board for Parcel A in this very proceeding.

BRT also ignores that the intervening TRO and recently discovered evidence is based upon the Town's discovery concerning the actual and full extent to which BRT has knowingly and brazenly breached the limited approval given to it by this Board in 2010, including by its flagrant breach of virtually every single condition imposed by this Board upon such approval, while at the same time BRT has exploited this Board's limited 2010 approval as a purported excuse and justification to undertake BRT's massive illegal "sand mining" operations which include the excavation and removal of upwards of 50 feet of sand worth \$20 million dollars across the entirety of Parcels B and C. Indeed, BRT's specious justification in this regard – thus far squarely rejected by the Federal Court – contradicts BRT's own reply submission to this Board.¹

Moreover, BRT's contention that the Board should not have been provided with the intervening expert declarations of a Geologist and Engineer concerning BRT's highly disturbing and destructive threat to the Long Island Sole Source Aquifers caused by BRT's illegal sand mining and construction activities are creating – which declarations are based on recently discovered documents that were only recently unearthed after submission of the Town's application to re-open this proceeding, as the direct result of expedited discovery in connection with the accelerated preliminary injunction proceedings before the Federal Court – is abjectly meritless. For one, the declarations are based on recently discovered evidence that was obtained after the Town's application herein was submitted. In addition, the expert declarations make

¹ BRT's Reply admits that its new and different construction activities on Parcel A are integral to and a part of its construction activities on Parcels B and C (BRT's Reply, p. 9).

clear that BRT is knowingly and flagrantly violating the express Environmental Conditions imposed by this Board, including this Board's express conditions that BRT "*develop and implement a spill prevention, control, and countermeasures plan (SPCC Plan) to ensure protection of the Nassau-Suffolk Sole Source Aquifer in the event of an accidental spill ... in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7*" (Environmental Condition No. 3), as well as this Board's express Condition that BRT "*employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils*" (Environmental Condition No. 2) (emphasis supplied).

Indeed, contrary to BRT's self-serving contentions, each and every one of the supplemental documents and exhibits was properly submitted to the Board in furtherance of the Town's legitimate steps to "*complete the record*" and "*more fully explain[] the factual situation*" upon the Town's pending application to re-open this proceeding. Specifically:

Exhibit A (Stop Work Order). BRT admits this document was already referenced and included in prior filings. There is accordingly no reason or purpose served in striking it. It was attached to the Town's supplemental submission for the Board's convenience, because after submission of the Town's application, and after BRT had initially ceased all mining and alleged "construction" as a result of the Stop Work Order, BRT recommenced its illegal mining and construction activities, thereby requiring the Town to move before the Federal Court for the issuance of a TRO against BRT, which was granted.

Exhibit B - Docket Entry and Order of Federal District Judge Wexler dated May 12, 2014, granting the TRO against BRT as requested in the Town's Order to Show Cause. As demonstrated above, BRT's contention that this is not a proper update to this Board is specious.

Exhibit C - Order to Show Cause with TRO enjoining BRT "*from undertaking any further actions or activities to excavate, screen, grade, or remove native sand and vegetation from the Brookhaven Rail Terminal*". This is the TRO granted by Judge Wexler.

The declarations and exhibits accompanying the Order to Show Cause cogently set forth

the recently discovered illegal activities by BRT, including with respect to the intervening April 1, 2014 “Bowne Plan” of BRT to dig 50 feet below grade. The remaining declarations are the two expert declarations discussed above. These expert declarations are based in significant part on the April 1, 2014 Bowne Plan, and admissions and concessions made by BRT’s engineers AECOM on April 15, 2014, where AECOM “*could not provide a sound engineering reason or need for the existing grade*” to be massively reduced as its plans show. Obviously, this evidence was not available in March, 2014 when the Town submitted its application to re-open herein, and is highly relevant to the Town’s application and the urgent need for this Board to re-open this proceeding and prohibit BRT from abusing the limited 2010 approval for Parcel A and from violating the express Environmental Conditions of this Board’s 2010 approval.

Exhibit D - Reply Declaration of Town of Brookhaven Chief of Operations Matthew J. Miner in further support of TRO, refuting the contention made by BRT in opposing the TRO that the Town was somehow aware of the plan to massively excavate the expansion site since 2012. This contention was conclusively dispelled at the subsequent and intervening preliminary injunction hearing, where it was uncovered that in fact BRT has never submitted to the Town a track plan showing the track extending to areas where the elevation is 100 feet above water level, that BRT to this day still does not have an actual plan to extend its track to that area as it still remains a mere “concept” plan. The Town appropriately updated and provided this Board with the full transcript of the intervening preliminary injunction hearing.

Exhibit E - Reply Expert Declarations of the same Geologist and the Environmental Engineer who submitted declarations accompanying the Town’s Order to Show Cause, both of which demonstrate that BRT’s illegal excavation and construction activities do not have any sound engineering basis, are clearly intended for the purpose of illegal “sand mining” by removing and selling the native soil for profit, and are highly destructive to the environment. These Reply Expert Declarations likewise respond to submissions and declarations filed by BRT long after the Town filed its application to re-open herein.

Exhibit F - The Declaration of BRT’s Chief Financial Officer Daniel Miller, dated May 7, 2014, i.e., long after the Town’s petition to re-open was filed, where he overtly admits to BRT selling the massive amounts of native soil being excavated from the site to numerous BRT “sand customers”.

Exhibit G - The Letter of BRT’s principal (and partial landlord) Sills Road Realty LLC dated April 30, 2012, which is incorporated into and specifically identified at page 5 of the Town’s March 12, 2014 application to re-open, where BRT conceded that the Environmental Conditions and other restrictions imposed by this Board with respect to Parcel A will apply to its construction on Parcels B and C as well. Because this letter was already referenced and identified in prior filings with this Board, there is no reason or purpose served in striking it.

In addition, the intervening preliminary injunction proceedings before the Federal Court have now allowed the Town to “more fully explain[] the factual situation” and “complete the record” with respect to the BRT’s overt misstatements of fact to this Board in its Reply. See Wyoming and Colorado Railroad Company, supra (accepting supplemental submission which “*more fully explains the factual situation*”). To this end, the Town’s supplemental submission aptly noted five overt misstatements of fact made by BRT in its Reply herein, each and every one of which was proven to be false as a result of the intervening evidence unearthed after the Town submitted its application to re-open:

1. BRT falsely claims the Town is preventing BRT's environmental review. BRT’s Reply, without any basis in fact or reality, asserted that the Town’s Stop Work Order is somehow preventing BRT from conducting its own “environmental review.” In addition to being an affront to reason and reality—because the Stop Work Order merely prohibits illegal mining/construction and not environmental assessments, BRT’s contention was utterly disproved by the events occurring subsequent to the Town’s filing of its application herein, inasmuch as BRT ignored the Stop Work Order and continued its illegal sand mining for weeks, including while the TRO application was being considered, and continued to fail to undertake any cognizable or meaningful environmental review.

2. BRT falsely claims the Stop Work Order violates federal preemption. By its intervening issuance of the TRO, the Federal District Court rejected BRT’s meritless contention both to this Board and to the Federal Court that federal preemption prohibits the Town from issuing a Stop Work Order directing BRT “to stop work [including, but not limited to, construction, cutting and removing trees, excavating and removing excavated materials] regarding any matter not pertaining to railroad construction” (emphasis supplied). The Federal Court’s rejection of BRT’s preemption argument by means of the Federal Court’s intervening issuance of the TRO was properly disclosed to the Board as a proper update and correction to the record.

3. BRT falsely claims there are insufficient “changed circumstances” to warrant the reopening of this proceeding. BRT asserted in its Reply that there have not been any “changed circumstances”, in part because its massive sand mining on Parcels B and C is supposedly: (1) unrelated to Parcel A; and (2) merely “grading”. Accordingly, the Town put the lie to BRT’s claim, by pointing to the “*the new grading plan purporting to connect the three Parcels*” (i.e. the April 1, 2014 Bowne Plan of BRT to dig 50 feet

below grade prepared weeks after the Town filed its application to reopen), and by submitted the above discussed expert declarations demonstrating that in fact the massive excavations are sand mining and not grading.

4. BRT falsely claims that “expansion of BRT's operations and customer base is well within the scope of the 2010 Decision”. As noted above, BRT's massive illegal sand mining operations were more fully and completely exposed by the intervening evidence submitted in connection with the TRO and preliminary injunction proceedings before the Federal Court. The Town thus properly supplemented the record with respect to BRT's demonstrably false and misleading contention in its Reply to this Board that its “expansion” activities and plans purportedly fall within the scope of this Board's 2010 approval. The Board's limited 2010 approvals starkly contrast with BRT's actual activities, the latter which demonstrates BRT's sheer and utter disregard of the Board's approved plans and conditions of approval.²

5. BRT falsely claims that its construction management firm Gannett Fleming prepared an environmental review “for delivery to the Town”. Approximately two weeks after the Town filed its application, the Town filed a supplemental submission dated April 3, 2014 containing a purported environmental review conducted by BRT's construction management firm, Gannett Fleming, dated January 2014, with a new version dated February 2014. That document was not an environmental review at all, and conspicuously did not even describe the proposed project. In preparation for the intervening preliminary injunction hearing, it became clear that BRT's assertion to this Board that the Gannett Fleming report was prepared “for” the Town was not merely rhetorical argumentation having no basis in fact, it was actually the culmination of years of BRT refusing to provide any pre-construction environmental assessment to the Town.

² See 2010 Decision, 2010 WL 3513386 at *1 (“The purpose of the proposed construction is to enable US Rail to serve the BRT as a common carrier and to deliver up to 500,000 tons of aggregate annually from sources in upstate New York to Sills Road Realty, LLC”); at *2 (“The Board's Section of Environmental Analysis (SEA) has conducted an environmental review of the proposal”); at *3 (“After considering the entire record, including both the transportation aspects of the petition and the environmental issues, we will grant the requested construction exemption as discussed below, subject to the environmental mitigation measures recommended in the Final EA and one additional condition”); at *7 (“In short, in reaching our decision here, we have taken into account the potential environmental impacts associated with this construction proposal by fully considering the Draft EA, Final EA, and the entire environmental record, including all of the comments received”); at *7 in Conclusion section (“It is Ordered: ... 2. Under 49 U.S.C. § 10502, the Board exempts the construction and operation of the above-described line and related rail facilities from the prior approval requirements of 49 U.S.C. § 10901, subject to the environmental mitigation measures set forth in the Appendix to this decision”) (emphasis supplied).

The testimony of the Town's Chief of Operations at the preliminary injunction hearing later proved this, albeit at the time the Town filed its supplemental submission the hearing had not yet taken place. The Town's supplemental submission thus denied BRT's claim that the Gannett Fleming report was purportedly prepared for the Town's benefit, pointed out that it was not even provided to the Town until after BRT engaged in massive illegal sand mining, and indeed not until after the Town demanded that it stop its illegal sand mining. The preliminary injunction hearing was subsequently held, and the full transcript of that proceeding has already been filed with this Board, both in this proceeding and in F.D. No. 35819. The intervening testimony of the Town's Chief of Operations demonstrated that BRT engaged in years of obfuscation in response to the Town's repeated demands for pre-construction environmental review. To date, BRT has continued to refuse to provide the Town with any environmental review or assessment. Instead, BRT continues to baldly claim that no environmental review or assessment is required based on BRT's false and misleading invocation of federal preemption in furtherance of BRT's false contention that BRT is merely constructing a spur on Parcels B and C in accordance with the Board's limited and conditional approval on Parcel A.³

Lastly, BRT disingenuously contends that the Town's supplemental submission violates the Board's 20-day rule for filing a motion in response to a prior pleading. 49 C.F.R. §

³ The preliminary injunction hearing transcript reflects that in a September 25, 2012 email to BRT, the Town's Chief of Operations Matthew Miner stated that "*the immediate need is for BRT to provide the Town with documentation from the STB which supports and authorizes the expansion to the east*" (Tr. 127-128). BRT never provided such documentation to the Town even though it was "*consistently*" sought by Miner (Tr. 128). In the same email chain, Miner questioned BRT whether BRT had "*written to or received any correspondence from the STB or support agencies regarding the expansion to the east (or do you need Gannett Fleming to complete that portion first)?*" (Tr. 129). Miner did not "*receive any correspondence provided by the Surface Transportation Board to the BRT regarding its expansion to the east*" nor any environmental review in 2012 (Tr. 129). Miner further verbally requested environmental review from BRT in 2012 and there may have been other email, but any environmental review of BRT's planned activities on the 93 acre site was not received until 2014 (Tr. 130). In an October 9, 2012 email from Miner to BRT, he again asking for BRT to "*provide the Town with an update as to your progress on the environmental review . . . and your communication with the STB*" (Tr. 130-131). BRT's representative Jim Pratt told Miner that Gannett Fleming was working on it, but the Town did not receive anything (Tr. 131). The Town also did not receive any communications from BRT concerning its interactions with the STB (Tr. 131). Miner did not "*receive any communications from BRT in 2013, the entire calendar year, that was responsive to [his] request that BRT show some communication or authorization from the Surface Transportation Board*" and received nothing with respect to NEPA analysis either (Tr. 131).

1104.13(a). However, it is self-evident that Section 1104.13(a) does not apply where, as here, the intervening developments and evidence only became available after such 20 day period, as a consequence of which the Town's supplemental submission is timely.

Conclusion

For these reasons, BRT's motion to strike should be denied.

Dated: Garden City, New York
June 16, 2014

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By:  _____

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CERTIFICATE OF SERVICE

I, JUDAH SERFATY, hereby certify that on the 16th day of June, 2014, I caused to be served the within **TOWN OF BROOKHAVEN'S OPPOSITION TO MOTION TO STRIKE** upon the attorneys/parties by Emailing same to their email addresses:

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