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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
April 13, 2016
Part of
Public Record

FINANCE DOCKET NO. 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC –
PETITION FOR DECLARATORY ORDER

MOTION TO END ABEYANCE PERIOD AND ENTER EXPEDITED DECISION

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Dated: April 13, 2016

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Brookhaven Rail Terminal (“BRT”) and Brookhaven Rail, LLC (“Brookhaven Rail”) (collectively, “Petitioners”), respectfully move the Surface Transportation Board (the “Board”) to (1) end its “holding in abeyance” period in STB Finance Docket No. 35819, (2) close the record, and (3) to the extent practicable, expeditiously enter a decision that BRT’s proposed track construction on Parcels B and C falls under the definition of a “spur” track under 49 U.S.C. § 10906. In support thereof, Petitioners state:

On June 9, 2014, Petitioners requested that the Board close this proceeding and enter a decision on BRT’s Petition for Declaratory Order because (1) no rail carrier had filed a reply or otherwise entered the case, demonstrating that BRT’s proposed track met the requirements of a spur under 49 U.S.C. § 10906, and (2) the matter was sufficiently briefed by both Petitioners and the only participating and opposing party to Petitioners’ Petition for Declaratory Order, the Town of Brookhaven (the “Town”), for the Board to enter a decision.¹ In its Decision served August

¹ See *Brookhaven Rail Terminal and Brookhaven Rail, LLC—Petition for Declaratory Order*, Motion to Close the Record and Enter Decision, STB Finance Docket No. 35819 (June 9, 2014). Petitioners renewed their request for the Board to enter a decision in their filings titled “Reply of Brookhaven Rail Terminal and Brookhaven Rail, LLC to Town of Brookhaven’s Emergency Application,” dated June 20, 2014, and “Petitioners’ Opposition to Town of

28, 2014, the Board held in abeyance Petitioners' request to issue a declaratory order because (1) there was related ongoing litigation between Petitioners and the Town in the U.S. District Court for the Eastern District of New York (the "Court"), (2) the Court was addressing issues raised by Petitioners in this docket, and (3) the Court had not referred the dispute to the Board under 28 U.S.C. § 1336(b) for the Board's determination.² Thus, The Board held its consideration of the Petition for Declaratory Order under abeyance pending a ruling by the Court.³

On April 5, 2016, the Court entered a ruling in the aforementioned federal litigation, a copy of which is attached hereto as Exhibit A, in which the Court acknowledged that the parties to the litigation had resolved their disputes by a proposed Stipulation of Settlement, and pursuant thereto, the Town agreed to withdraw its objection in this proceeding.⁴ Accordingly, the Court respectfully re-referred to the Board, pursuant to 28 U.S.C. § 1336(b), the determination of whether Petitioners' proposed track meets the definition of a "spur" under 49 U.S.C. § 10906.⁵ Furthermore, the Court respectfully requested that the Board expedite the requested

Brookhaven's Supplementation of Emergency Application to Update the Record," dated July 14, 2014.

² *Brookhaven Rail Terminal and Brookhaven Rail, LLC—Petition for Declaratory Order*, Decision, STB Finance Docket No. 35819 at 4 (August 28, 2014).

³ *Id.*

⁴ *See* Exhibit A, U.S. District Court, E.D.N.Y., Case No. 14-2286, Order dated April 5, 2016.

⁵ *Id.* We would call to the Board's attention that the Court's order, Exhibit A, encompassed Petitioners' proposed track on Parcels B, C and/or Parcel D. Parcel D is a plot of land practically adjacent to Parcels B and C, but separated from Parcels B and C by the Long Island Railroad track. Petitioners intend to extend their track from Parcels B and C onto Parcel D through construction of a tunnel under the Long Island Railroad track. Because the current Board proceeding has been limited to the track on Parcels B and C, Petitioners request for a declaratory order in the instant proceeding remains limited to a spur declaration as to the track on Parcels B and C only. Petitioners intend to initiate a future, separate declaratory order proceeding before the Board seeking a spur designation as to the proposed track on Parcel D.

determination because the speedy resolution of the instant issue would be of substantial assistance to the Court and the parties.⁶

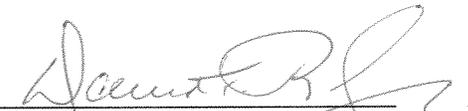
Thus, because the Court has referred the issue regarding the classification of Petitioners' proposed track to the Board, the Town is anticipated to withdraw its objection in this proceeding,⁷ and to this date no rail carrier has participated in this proceeding, the matter is ripe for a decision by the Board. Therefore, Petitioners respectfully request the Board to expeditiously enter a decision in this proceeding that BRT's proposed track construction on Parcels B and C falls under the definition of a "spur" track under 49 U.S.C. § 10906.

Dated: April 13, 2016

Respectfully submitted,

*Brookhaven Rail Terminal and Brookhaven
Rail, LLC*

By:



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⁶ *Id.*

⁷ Petitioners expect the Town to submit shortly a letter to the Board withdrawing their opposition to this proceeding and in support of Petitioners' request that the proposed track be classified as a "spur" track under 49 U.S.C. § 10906.

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I caused to be served the foregoing *Motion to End Abeyance Period and Enter Expedited Decision* by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

TO: Judah Serfaty, Esq.
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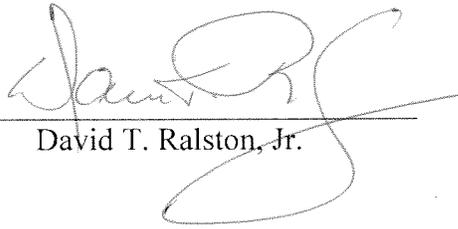
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New York Natural Heritage Program
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Attn: Tara Seoane

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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 A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

ORDER
CV 14-2286 (GRB)

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

Defendants.

-----X
GARY R. BROWN, United States Magistrate Judge:

WHEREAS, Brookhaven Rail Terminal, a party to this litigation, and Brookhaven Rail LLC (collectively “BRT”), a rail carrier operating under licensing authority granted by the Surface Transportation Board (the “STB”), initiated a proceeding at the STB seeking a declaratory order that the expansion railroad track area proposed to be constructed on Parcels B, C, and/or D may be classified under 49 U.S.C. § 10906. *Brookhaven Rail Terminal and Brookhaven Rail, LLC—Petition for Declaratory Order*, Petition for Declaratory Order, FD 35819 (filed April 28, 2014);

WHEREAS, the Town of Brookhaven (the “Town”) was provided notice of BRT’s declaratory order request, participated in the STB proceeding, and filed objections;

WHEREAS, by Order served August 28, 2014, the STB ruled as follows:

. . . [t]he Court is addressing the preemption issues that [BRT] ha[s] raised in this docket. . . the Court has not indicated that the matters in the petition before the Board should be addressed by the Board in order to facilitate proceedings before the Court. Nor has the Court referred the dispute before it to the Board under 28 U.S.C. § 1336(b) for the Board’s determination. Under these circumstances, we will hold our consideration of the petition in abeyance pending a ruling by the

Court.

Brookhaven Rail Terminal and Brookhaven Rail, LLC—Petition for Declaratory Order, FD 35819 (STB served August 28, 2014);

WHEREAS, the parties to this litigation have resolved their disputes by a proposed Stipulation of Settlement, and pursuant thereto, the Town has agreed to withdraw its objection in the STB proceeding to the designation of the proposed expansion track area on Parcels B, C and/or D may be classified under 49 U.S.C. § 10906;

WHEREAS, in view of the STB's decision to hold in abeyance its decision pending resolution of the litigation in this Court, and that the litigation has now been settled, BRT has moved this Court under 28 U.S.C. § 1336(b) to refer the question of whether BRT's proposed expansion track area on Parcels B, C and/or D may be classified under 49 U.S.C. § 10906, and the Town does not object to such referral;

NOW, THEREFORE, upon consideration of the foregoing, and good cause having been shown, it is hereby ORDERED as follows:

The determination of whether BRT's proposed expansion track area on Parcels B, C and/or D may be classified under 49 U.S.C. § 10906 is hereby respectfully referred to the STB pursuant to 28 U.S.C. § 1336(b). While the Court recognizes that the STB has many important matters before it, the speedy resolution of the instant issue would be of substantial assistance to this Court and the parties. Therefore, it is further requested that, to the extent practicable, the STB expedite the requested determination.

SO ORDERED.

Dated: Central Islip, New York
April 5, 2016

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge