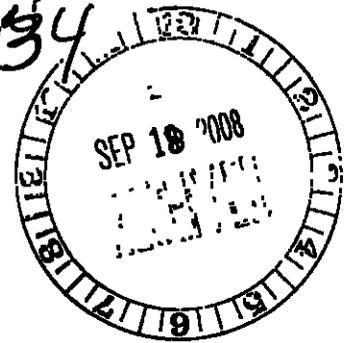


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September 18, 2008

VIA OVERNIGHT MAIL

Ann Quinlan, Acting Secretary
Surface Transportation Board
395 E. Street Southwest
Washington, DC 20024

ENTERED
Office of Proceedings

SEP 19 2008

Part of
Public Record

RE: U.S. Rail – Construction And Operation Exemption
STB Finance Docket No. 35141

Dear Ms. Quinlan:

Per the Board's decision on August 25, 2008, enclosed please find the Town of Brookhaven's Reply to Petition for Exemption and corresponding exhibits, which were electronically filed today in the above-captioned matter.

Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

A handwritten signature in black ink that reads "Jessica P. Driscoll".

Jessica P. Driscoll

Encl

CC: John D. Heffner, Esq. (by email)
James H. M. Savage, Esq. (by email)

223634



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
- CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

REPLY TO PETITION FOR EXEMPTION

ENTERED
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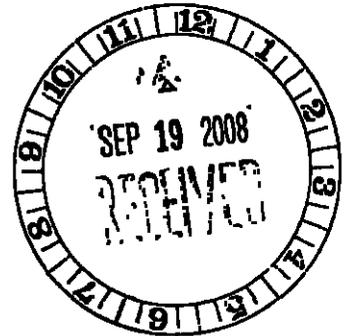
Attorney for the Town of Brookhaven

September 18, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

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



REPLY TO PETITION FOR EXEMPTION

Set forth below is the Reply of the Town of Brookhaven (“Town” or “Brookhaven”) to the Construction and Operation Exemption Petition (“Petition”) filed by U.S. Rail Corporation (“U.S. Rail” or “Petitioner”) on August 7, 2008.¹

PRELIMINARY STATEMENT

Suffolk & Southern Rail Road LLC (“Suffolk”) filed the first application to the Surface Transportation Board (“STB” or the “Board”) relating to the proposed facility in May 2007 under STB Finance Docket No. 35036. Since that time, Suffolk, Sills Road Realty (“Sills”), and U.S. Rail have filed numerous pleadings with the Board, the U.S. District Court for the Eastern District of New York, and the U.S. Court of Appeals for the Second Circuit. Over the course of those pleadings, the theory of the would-be railroad builders and operators has changed many times. Most recently, U.S. Rail has filed a Petition for Exemption seeking to invoke the Board’s jurisdiction for the project and claiming that it is proposes to build a line of railroad over which it

¹ On August 25, 2008, the Board granted the Town a 20-day extension to file this reply. U.S. Rail Corporation—Construction and Operation Exemption—Brookhaven Rail Terminal, STB Finance Docket No. 35141 (served August 25, 2008). Because the Town did not want its interim silence to be interpreted as consent to U.S. Rail’s request for expedited handling of the Petition, on September 2, 2008, the Town filed and served a 2-page letter responding solely to the request for expedited handling and proposed schedule set forth in the Petition at pages 17-19 and Exhibit E thereto. That letter did not respond to the merits of the 20-page Petition, which are exclusively addressed herein.

will operate as a common carrier. Despite all of the information that has been accumulated and presented over the course of the proceedings before the Board and the courts, the Petition does not include anywhere near the level of detail necessary for the Board to make a reasoned decision on the Petition. Further, the limited facts that have been presented reveal that the project as proposed would not fall under 49 U.S.C. § 10901, because U.S. Rail, which operates a non-connected track in Ohio, is not a common carrier for the purposes of the proposed track in eastern Long Island and the project is not “rail transportation” as defined by the Interstate Commerce Commission Termination Act (“ICCTA”). Further, even if the proposed track were to fall under the Board’s jurisdiction set forth in 49 U.S.C. § 10901, U.S. Rail has failed to establish that an exemption is warranted based on 49 U.S.C. § 10502(a). For all of these reasons and the reasons set forth below, the Petition must be denied

PROCEDURAL BACKGROUND

On May 18, 2007, non-carrier Suffolk filed a verified notice of exemption under 49 C.F.R. § 1150.31 to lease from non-carrier Sills approximately 11,000 feet of track that Suffolk claimed was currently being constructed in Yaphank, NY, and to operate over the track. Upon review, the Board found that Suffolk’s notice of exemption was incomplete and directed Suffolk to file supplemental information describing the construction of the trackage. See Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No 35036 (served June 1, 2007); Verified Statement of Robert F Quinlan in Support of Town of Brookhaven’s Reply to Petition for Stay (“Quinlan Statement”)(Exhibit 1 hereto) at 2-3. The Board made no decision regarding the exemption at that time.

On June 15, 2007, Suffolk sought to withdraw its notice of exemption without providing the additional information ordered by the Board Quinlan Statement at 3.

On July 12, 2007, Attorney John Heffner faxed a letter to then-Town of Brookhaven Attorney Robert F. Quinlan stating that he represented U.S. Rail, an Ohio-based company and common carrier short line railroad operating pursuant to authority granted by the Board. Letter from John Heffner to Robert Quinlan (Exhibit 2 hereto) at 1. His letter stated that as a common carrier railroad, U.S. Rail's construction of the rail facility is governed by federal law and subject to the exclusive jurisdiction of the Board. Id. The letter further indicated that U.S. Rail had leased the property and intended to construct and operate an "exempt spur" within the meaning of 49 U.S.C. § 10906. Id.; see also Quinlan Statement at 2-3.

During August 2007, the Board again directed Suffolk to file a substantive reason for its attempted withdrawal and a detailed explanation of "whether it or Sills anticipated that for-hire service would have been provided over the trackage that was to be constructed." See Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No. 35036 (served August 13, 2007) ("August 13th Decision"); Quinlan Statement at 4-5. The Board's decision explained that if for-hire service was intended for the trackage being constructed by Sills then the "construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board's jurisdiction, and the Board authorization for the construction is required under 49 U.S.C. § 10901." August 13th Decision at 1-2.

Based on the record at that time, the Board was justifiably suspicious of the situation and warned:

The Board increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds at 49

CFR § 1105.7(e)(4) or (5) will not be met. See 49 CFR § 1105.6(b)(4), (c)(2)(i). Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the Board's 3 train per day threshold for environmental documentation under 49 CFR § 1105.7(c)(5)(ii)(A). Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board's thresholds under 49 CFR § 1105.7(e)(5)(ii)(C).

August 13th Decision at 2.

Suffolk responded on August 23, 2007 and stated, *inter alia*, that "Sills never undertook any construction of rail facilities at the Sills Road location at issue here." See Document No. 220127 in STB Finance Docket No. 35036, at 3-4. On that basis, in a decision served September 25, 2007, the Board allowed Suffolk to withdraw its notice of exemption and noted that it would "view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board." See Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No. 35036 (served September 25, 2007)("September 25th Decision").

Nonetheless, in October 2007, evidence of construction occurring on the property came to the Board's attention. Based on this evidence that "rail construction may be occurring or contemplated on this property" – including a newspaper account indicating that Sills, Suffolk and/or others had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property² – the Board, *sua sponte*, issued an order to cease and desist and joined Petitioner U.S. Rail as a party to the action listed as STB Finance Docket No 35036. Specifically, the Board held.

² See, e.g., Smith, Jennifer, *Work Started for Yaphunk rail site without approvals*, NEWSDAY (October 1, 2007)(Exhibit 3 hereto).

. . . because *no party has sought authority from the Board to construct any rail facilities at this site*, this proceeding will be reopened on the agency's own motion and U.S. Rail will be made a party to this proceeding. If U.S. Rail, Suffolk, Sills, or any other related entity is undertaking construction of any rail facilities in Yaphank, Brookhaven, or anywhere in that vicinity, it is directed to *immediately cease that activity and to either obtain Board authorization pursuant to 49 U.S.C. § 10901(a) or a Board decision . . . finding that such activity does not require Board approval.*

Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty,

LLC, STB Finance Docket No. 35036 (served October 12, 2007)(“October 12th Decision”)(emphasis added)

The Board's decision prohibited *any* rail construction. By the time of the October 12th Decision, however, eighteen acres of land had already been clear-cut and tens of thousands of cubic yards of materials had been mined without any environmental study as to its impacts – as required by both the National Environmental Protection Act (“NEPA”) and the New York State Environmental Quality Review Act (“SEQRA”) – or whether measures could have been taken in mitigation. Quinlan Statement at 9-10. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sand mining. Id

U.S. Rail first sought to continue construction by way of a petition for a stay dated October 18, 2007. It claimed that the trackage it sought to build was disconnected and therefore an exempt “spur” pursuant to 49 U.S.C. § 10906. See Document No. 220465 in STB Finance Docket No. 35036. The motion for stay was denied on November 16, 2007. In denying the stay, the Board noted that Petitioner did not have a reasonable likelihood of success on the merits of its argument that the trackage was an ancillary “spur” because “the track cannot reasonably be viewed as used for a purpose ancillary to the operations that will be located hundreds of miles from U.S. Rail's existing operations in Ohio.” Suffolk & Southern Rail Road LLC – Lease And

Operation Exemption – Silks Road Realty, LLC, STB Finance Docket No. 35036 (served November 16, 2007)(“November 16th Decision”) at 4.

Next, on October 26, 2007, U.S. Rail filed a petition for administrative reconsideration of the cease and desist order. See Document No. 220546 in STB Finance Docket No. 35036 The Board denied the petition for reconsideration on December 20, 2007, holding that U.S Rail had not alleged changed circumstances or submitted any new evidence that would warrant reconsideration. Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Silks Road Realty, LLC, STB Finance Docket No 35036 (served December 20, 2007)(“December 20th Decision”) at 4. Again, the Board noted that there was “no evidence on the record before us” that the proposed trackage would be classified as an ancillary spur. Id. at 5.

While its petitions for stay and reconsideration were still pending before the Board, U.S Rail also appealed the cease and desist order and sought a stay from the U.S. Court of Appeals for the Second Circuit, which denied the stay on November 13, 2007 and thereafter dismissed the appeal in late December 2007.

U.S. Rail then filed an action in the U.S. District Court for the Eastern District of New York seeking to preliminarily enjoin Brookhaven from taking any action to prosecute appearance tickets it issued to Petitioner on October 4, 2007 or from issuing further tickets on the basis of preemption. Petitioner also sought to enjoin Brookhaven from taking any other action to interfere with or obstruct U.S. Rail’s construction and operation of the alleged rail terminal. After a two-day hearing, on July 18, 2008, U S. Magistrate Judge Thomas E. Boyle issued a Report and Recommendation (“Report”), which correctly concluded that (1) the federal court should abstain from interfering in the state court action based on the doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971); and (2) even if Younger abstention was not appropriate,

Plaintiffs failed to establish that a preliminary injunction was warranted because the issue of preemption was not clear. See generally Report (Exhibit 4 hereto) at 13-27.³

Not content with two petitions before the Board and two separate attempts at judicial review by federal courts, U.S. Rail filed a so-called “Petition for Clarification” on May 2, 2008 seeking permission to engage in certain “preconstruction” activities at the property. The petition sought – “in advance of receiving construction and operation authority,” clarification from the Board that “it can begin certain activities at the site of the Brookhaven Rail Terminal, and that those activities would not be subject to state and local permitting, zoning, and environmental requirements by virtue of the Federal preemption contained in 49 U.S.C. 10501(b)” See Document No. 222259 in STB Finance Docket No. 35036, at 3-4. On August 26, 2008, the Board denied the petition for clarification and held that the enumerated activities were not preempted. Once again, the Board emphasized that the proposed track cannot be reasonably viewed as a spur, stating that:

Although it is a licensed rail carrier elsewhere, U S Rail cannot operate as a rail carrier at the Brookhaven Rail Terminal because, as explained in the Board’s December 20, 2007 decision in this proceeding (at 5), there is no evidence that this facility is in any way connected to the carrier’s existing operations in Ohio. The proposed construction and operations in Brookhaven are located hundreds of miles from U.S. Rail’s operations in Ohio, and there is no evidence that U.S Rail presently has authority to operate over the track of NYAR in the vicinity of the Brookhaven Rail Terminal.

Suffolk & Southern Rail Road LLC – Lease And Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No. 35036 (served August 26, 2008)(“August 26th Decision”) at 3. To date, Suffolk, Sills and U.S. Rail have argued to the Board on multiple occasions that the proposed track is preempted and the Board has rejected the argument each time

³ U S Rail filed objections to the Magistrate’s Report and the issue is currently pending before U S District Judge Thomas C Platt.

On August 7, 2008, just days before it filed its objections to the Report in federal court, Petitioner filed the instant Petition for Exemption claiming that it is a common carrier seeking to construct and operate a line of railroad. For the reasons set forth below, the Petition should be denied in its entirety.

ARGUMENT

49 U.S.C. § 10901 governs the STB's authorization of construction and operation of railroad lines under the ICCTA. Exemption under 49 U.S.C. § 10502(a) from the requirements of § 10901 is only appropriate when the Surface Transportation Board (the "STB" or the "Board") finds that:

- (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 ("RTP"), *and*
- (2) either (a) the transaction is limited in scope or (b) regulation is not necessary to protect shippers from the abuse of market power.

Keokuk Junction Railway Company d/b/a Peoria & Western Railway – Lease and Operation Exemption – BNSF Railway Company, STB Finance Docket No. 34974 (served December 6, 2007) at 5 (discussing standard under § 10502(a))(emphasis added). A petition for exemption is only appropriate where the proposed facility would otherwise be subject to the requirements of § 10901. See 49 U.S.C. § 10502; see also Michigan Central Railroad, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company, STB Finance Docket No. 35064 (served December 10, 2007)(denying petition for exemption where proposed facility was not subject to § 10901).

First, because U.S. Rail has failed to provide sufficient information about the nature and extent of the proposed facility – and because the information previously provided by Suffolk, Sills and U.S. Rail raises serious questions as to whether this is "rail transportation" at all – the

Board is not in a position to make any determination relating to the nature or scope of U.S. Rail's proposed project. Second, the facility is not "transportation" by "rail carrier" subject to § 10901 and, as such, the petition is inappropriate and must be denied. U.S. Rail has not demonstrated that it is a "common carrier" for purposes of exemption, and the proposed project is more accurately classified as a private track than as a line of railroad. Finally, in any event, U.S. Rail has failed to demonstrate any of the criteria necessary for an exemption under § 10502, and the Board must therefore reject its Petition.

I. U.S. RAIL HAS NOT PROVIDED SUFFICIENT INFORMATION FOR THE BOARD TO DETERMINE WHETHER THE PROPOSED TRACK IS SUBJECT TO § 10901

A party seeking an exemption under § 10502 is required to "provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition." 49 U.S.C. § 1121.3. U.S. Rail has not provided the Board with sufficient information to make a reasoned decision whether the proposed construction and operation is subject to its jurisdiction. In support of its Petition, U.S. Rail appends a "description" of the proposed facility by U.S. Rail President Gabriel Hall, which includes, at most, 8 sentences relating to U.S. Rail's plans, with no supporting documentation. See Verified Statement of Gabriel D. Hall ("Hall Statement")(Exhibit A to the Petition). The Hall Statement discusses generically the intended operation, but provides no detail whatsoever regarding the construction or location of the proposed track on the Property. See id. In addition, U.S. Rail has provided a map printed from "mapquest" and two maps of the entire span of Long Island with handwritten indications of the proposed location of the new track (Exhibit B to the Petition). At Exhibit C to its Petition, U.S. Rail attaches a "site plan" that is largely illegible. Finally, U.S. Rail has offered the two-page Verified Statement of Gerald F. Drumm ("Drumm Statement," Exhibit E to the Petition), which

describes generally the proposed operations over the track, including that the freight cars will be interchanged with the New York & Atlantic Railroad (“NY&AR”), connecting through a switch to the existing Long Island Railroad (“LIRR”).

This background information merely scratches the surface of the project and lacks necessary details regarding even the most basic concepts, including the funding, design, ownership, or operations of the facility. For instance, the Petition does not include any:

- financial data relating to the construction of the proposed track or the operation thereon;
- agreement between U.S. Rail and LIRR to access/use LIRR’s track,
- interchange agreement between U.S. Rail and NY&AR;
- information regarding the construction of the connecting line to the existing line;
- detailed construction or site plans;
- information regarding length and location of the trackage to be constructed;
- information regarding the type and location of all proposed structures to be built on the property;
- description of the degree to which construction would involve excavation or the movement of soil;
- description of the locations where transloading would take place;
- facts regarding the proposed grinding, bailing, and other processes to which construction waste and solid waste could be subject at the site; or
- information about operations, including how U.S. Rail proposes to move their cars on and off the NY&AR track, whether the train cars will be required to sit waiting, and whether that will disrupt service on the LIRR;

See generally Petition. The Board has held that such “complete and accurate information” is necessary for it to weigh the possible transportation benefits of the proposal with the environmental and other impacts. See New England Transrail, LLC d/b/a Wilmington and Woburn Terminal Railroad Company – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA. STB Finance Docket No. 34391 (served May 3, 2005) at 4-5.

In New England Transrail (2005), the Board granted New England Transrail (“NET”) a conditional exemption under 49 U.S.C. § 10502 subject to an environmental review, in accordance with its prior policy⁴ Id. at 1. During the environmental process, which took more than a year, NET had presented its project to the Section of Environmental Analysis (“SEA”), which commenced a “detailed analysis” of the “potential environmental impacts of the proposed project” Id. at 1. After completion of the environmental review, NET returned to the Board for “final approval.” Id. When the Board determined, however, that the project NET proposed to the Board materially differed from the one it had proposed to the SEA, it dismissed the proceeding and cautioned NET that, if it were to re-submit its petition for exemption, it would have to “be as forthcoming as possible with all project details.” Id. The Board specifically requested that it submit, *inter alia*, “information such as the length and location of all trackage to be constructed, the exact types of structures to be built, the degree to which such construction would involve excavation or movement of any soil, and the locations where specific commodity transloading activities would take place.” Id. Distrustful of NET due to its past conduct, the Board also cautioned that “the information provided to the Board should be wholly consistent with the information NET presents to other agencies.” Id.

U.S. Rail has similarly demonstrated that it has not been entirely forthright in its prior filings. The lack of detailed information in its Petition is particularly disturbing given the

⁴ The Board no longer grants conditional approval while the environmental process is ongoing absent some “unique or compelling circumstances.” See Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658 (served October 4, 2007) (“we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.”)

information that U.S. Rail has previously filed in federal court, which suggests that the proposed track is nothing more than a sham transaction to disguise a lucrative sand-mining operation.⁵

The Board has the explicit statutory authority to obtain from carriers and persons information necessary for it to carry out its responsibilities under the Interstate Commerce Act. 49 U.S.C. § 721. Without “complete and accurate information,” the Board cannot determine (a) whether the project is “transportation” by “rail carrier” subject to its jurisdiction; (b) whether regulation of the construction would further the rail transportation policy set forth in § 10101; or even (c) the true scope of the project both in terms of construction activity, environmental impact and interruption to existing rail service. This factual deficit is fatal to U.S. Rail’s Petition and it must be denied as insufficient.

⁵ The evidence and testimony presented at the hearing on U.S. Rail’s application for preliminary injunction strongly suggested that U.S. Rail’s involvement at the Property is a mere subterfuge by which U.S. Rail and the parties that have an interest in the property are seeking to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation. Specifically, the following three documents were introduced into evidence. (a) a “Railroad Operating Agreement and Property Lease” (“Lease”) (Exhibit 5 hereto), (b) an Excavation Agreement (Exhibit 6 hereto), and (c) an unsigned Proposal for construction at the property (“Proposal”) (Exhibit 7 hereto). The Lease—which is for a 28-acre industrial site—has a 3-year term and an annual rent of \$1,000. Under the terms of the Lease, U.S. Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo Contracting Corp. (“Adjo”) (a general contractor for the BRT and partner in Sills) to sell the sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs. For its part, Sills gets up to \$6,000,000 plus a 50% fee. The third document, the Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a “Bid To Sills Road Realty.”

At the hearing, U.S. Rail claimed that the Proposal had been incorporated into the Excavation Agreement and that these documents demonstrate U.S. Rail’s obligation to construct a rail facility even though neither document contains any reference to the other. Transcript (Exhibit 8 hereto) at 39. U.S. Rail’s President and CEO, Gabriel Hall (“Hall”) testified that he was making payments to Adjo for rail construction but produced no proof of these payments at the hearing. *Id.* at 42. Hall was so ignorant of the details of the transactions occurring at the property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the property. *Id.* at 42. When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining, but could not confirm that this was the payment arrangement. *Id.* at 44.

Together, Hall’s testimony and the three documents present a very clear picture. U.S. Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility (in an effort to secure for the parties the protection of federal preemption) has only a nominal role in the property as evidenced by a sham agreement under which it pays \$1,000 a year to rent 28 acres of prime industrial land with no obligation to pay property taxes. In submitting these documents to the court at the hearing, U.S. Rail was asking the court to believe that it would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the property could be terminated on 90 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment.

In addition, the lack of information submitted here and the questions raised by the information produced in federal court (see supra footnote 4, at p. 12) warrant discovery. As such, the Town is serving discovery requests on U.S. Rail pursuant to Title 49, part 1114 of the Code of Federal Regulations concurrent with the filing of this reply brief and intends to notice depositions forthwith. See 49 C.F.R. § 1114.21 (“Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding.”)

II. THE PROPOSED TRACKAGE IS NOT TRANSPORTATION BY RAIL CARRIER SUBJECT TO 49 U.S.C. § 10901

By seeking exemption under 49 U.S.C. § 10502 from the requirements of § 10901, U.S. Rail has incorrectly presumed that the proposed facility would be subject to the regulations set forth in § 10901. The Petition for Exemption must be dismissed because the proposed track does not fall within the scope of section § 10901. See Michigan Central, FD 35064 (served December 10, 2007)(denying petition for exemption where proposed facility was not subject to § 10901).

A. U.S. Rail is Not a Common Carrier at the Proposed Site

The STB has already held that, while U S. Rail presently operates as a rail carrier at its Ohio location, it has not established that it is a rail carrier for purposes of the proposed facility in New York. See August 26th Decision at 3 (“US Rail cannot operate as a rail carrier at the Brookhaven Rail Terminal because, as explained in the Board’s December 20, 2007 decision in this proceeding (at 5), there is no evidence that this facility is in any way connected to the carrier’s existing operations in

Ohio.”) There has been no finding that U.S. Rail is a rail carrier for purposes of the proposed track because U.S. Rail does not intend to operate as a common carrier at all.⁶

A “rail carrier” is a “person providing common carrier railroad transportation.” 49 U.S.C. § 10102. The term “common carrier” is not separately defined in the statute, but is a common law term that predates the ICCTA and refers to “an entity *that holds itself out to the general public* as engaged in the business of transporting property from place to place for compensation.” New England Transrail, LLC d/b/a Wilmington and Woburn Terminal Railroad Company – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA, STB Finance Docket No 34797 (served July 10, 2007) at 11 (emphasis added). “The fundamental test of common carriage is *whether there is a public profession or holding out* to serve the public.” Id (emphasis added).⁷ U S Rail has provided no evidence that it has “held itself out” to the public. As described more fully below, the only evidence in the record is that U.S. Rail is seeking to construct and operate the track in order to fulfill its exclusive arrangement with Sills, its only customer.

Not only has U.S. Rail failed to demonstrate that it is a common carrier for the purposes of the proposed site, NY&AR, the entity with actual common carrier authority in this area, has not been

⁶ Incredibly, knowing the history of the proceedings before the STB in Finance Docket No 35036, U S Rail nonetheless states in its Petition, that “there is no question that US Rail is a ‘rail carrier’ within the meaning of the Act insofar as it is providing railroad transportation for compensation over its existing line in Ohio and will be providing transportation for compensation hereupon inception of operations ” Petition at 10 However, U S Rail has offered no information in its Petition that would alter the Board’s prior conclusion on this matter.

⁷ In New England Transrail (2007), the STB found that the petitioner was a common carrier because it was a regional rail company that had provided evidence of interchange agreements with local rail companies (Boston & Maine Railroad Company and Massachusetts Bay Transportation Authority) and established that it was offering “transportation” to the general public. FD 34797 at 3 In so finding, the STB specifically distinguished other cases where the carrier was merely transloading and/or operating pursuant to an agreement with a rail carrier These facts distinguish this situation from cases such as [Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444 (served August 12, 2004)](where the entity involved would not provide transportation, but would only operate a transloading facility in a rail yard pursuant to an agreement with the rail carrier for non-exclusive use of the yard) and Hi Tech Trans, LLC v New Jersey, 382 F.3d 295, 308-09 (3d Cir 2004)(where the entity involved merely loaded cargo from trucks onto rail cars via a licensing agreement with a rail carrier)

See FD 34797 at 11, n 52

approached regarding an interchange agreement and strongly opposes any common carrier designation of U.S. Rail. As the STB noted in its December 20th Decision:

In his verified statement on behalf of NY&AR, Mr. Lieberman explains that NY&AR supports Sills' construction of a private facility to receive carloads of stone and aggregate. He strongly opposes, however, the introduction of another rail carrier to operate the facility or to invoke federal preemption, and stresses that neither petitioner [U.S. Rail or Sills] is its agent or operator. Mr. Lieberman states that NY&AR has the common carrier freight rights to provide service over the portion of the Long Island Railroad adjacent to Sills' property, and that NY&AR stands ready, willing, and able to provide rail service to the proposed facility, including performing intra-plant switching within the facility.

December 20th Decision at 3. Unlike NY&AR – which as a common carrier by rail in eastern Long Island, serves and offers to serve customers within the public at large – U.S. Rail has not “held itself out” as a common carrier on Long Island.

B. U.S. Rail Has Been Hired by Sills to Transport its Product Over a Private Track

Further, the proposed track is not subject to § 10901 because it is a private track, over which the STB has no jurisdiction. See B. Willis, C.P.A. Inc. – Petition for Declaratory Order, STB Finance Docket No. 34013, 2001 WI. 1168090 at *2 (served October 3, 2001), aff'd sub non. B. Willis C.P.A. Inc. v STB, 51 Fed. Appx. 321 (D.C. Cir. 2002)). In B. Willis, the STB stated:

Operations over private tracks can be conducted by the shipper/owner itself, or the shipper/owner of the private track may arrange for a contractor to conduct operations over the track. As noted in Hanson, in New York Cent. R. Co. v. Southern Ry., 226 F. Supp. 463 (N.D.Ill. 1964), aff'd, 338 F.2d 667 (7th Cir. 1964), cert denied, 380 U.S. 954 (1965), reh'g denied, 381 U.S. 907 (1965) (New York Central), the court indicated that a common carrier operating over private track would not fall under the statutory requirements of [the ICCTA] with respect to those operations, so long as it does not perform common carriage service on the private track and does not maintain that track with its own funds.

Willis, FD 34013, 2001 WL 1168090 at *3. U.S. Rail has been hired by Sills as a private shipper to operate over the track for the purpose of transporting Sills's own product (crushed stone) As such, the STB should find that this is a "private track," outside the realm of the ICCTA and subject to state and local regulations. See JP Rail, Inc. – Lease and Operation Exemption – NAT Industries, Inc., STB Finance Docket No. 35090 (served January 17, 2008)("The Board's jurisdiction does not extend to wholly private rail operations conducted over private track, even when such operations are conducted by an operator that conducts common carrier operations elsewhere, if it operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner"); see also Devens Recycling Center, LLC-Petition for Declaratory Order, STB Finance Docket No 34952, 2007 STB LEXIS *8 (served January 10, 2007)("where, as here, track is built to meet a shipper's own transportation needs and there is no holding out of the possibility for any other shipper to obtain service, the track is a private track. Neither the construction of such track nor the wholly private operations over it are subject to the jurisdiction of the Board. This is so even when such operations are conducted by an operator such as Boston and Main that conducts common carrier rail operations elsewhere if, as in this case, operations over private track are exclusively to serve the owner of the track pursuant to a contractual arrangement with the owner.")

A review of the facts in this case demonstrates that U.S. Rail is not a common carrier, but rather, proposes on behalf of Sills to engage in a private business operation over private trackage. Sills is the owner of the Property. See Lease (Exhibit 5 hereto) ¶ 5. Sills has contracted with U.S. Rail to conduct operations over the proposed track and with Adjo to construct the track. See generally Lease; Excavation Agreement (Exhibit 6 hereto); and Proposal (Exhibit 7 hereto). To date, the evidence presented suggests that Sills is U.S. Rail's only "customer" and that U.S. Rail proposes to operate cars and perform transloading services for Sills on the proposed track. See generally Lease.

In its Petition, U.S. Rail notes that the proposed facility is “essential if Sills Group companies are to meet their contractual commitments to customers for the supply of stone.” Petition at 8. Where, as here, both the explicit and implicit purpose of the proposed track is to serve Sills’s private business needs, the Board must find that this is a private track not subject to STB jurisdiction

III. US RAIL HAS NOT MET ITS BURDEN FOR EXEMPTION UNDER § 10502

A. Continued Regulation is Necessary to Carry out the Rail Transportation Policy of 49 U.S.C. § 10101

Exemption may only be granted where further regulation is not necessary to “carry out the rail transportation policy.” Keokuk Junction, FD 34974 (served December 6, 2007) at 5 (discussing exemption standard under § 10502(a)) In this case, regulation is required to carry out the rail transportation policy.

Congress enacted the “most recent expression of rail transportation policy” in 49 U.S.C. § 10101. Petition at 15. The section lists 15 separate goals of the government in its regulation of the railroads, relating to, *inter alia*, competition, safety, fairness, efficiency, environmental concerns, and federal labor and discrimination standards.⁸

⁸ Specifically, Section 10101 states.

In regulating the railroad industry, it is the policy of the United States Government—

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail,
- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required,
- (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board,
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense,
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- (7) to reduce regulatory barriers to entry into and exit from the industry,
- (8) to operate transportation facilities and equipment without detriment to the public health and safety,
- (9) to encourage honest and efficient management of railroads.

U.S. Rail states in conclusory fashion that “a grant of the Petition would satisfy subsections (2) and (7) by minimizing federal regulatory control over and granting expedited consideration of Petitioner’s request to construct a self-contained rail yard ” Petition at 15. In this case, U.S. Rail is wrong. Although the Petition is the first document filed under Finance Docket No. 35141, this proceeding actually began when Suffolk filed its notice of exemption on May 18, 2007 See Document No. 219330 in STB Finance Docket No. 35036. Since that time, the Board has served *more than ten* decisions ordering Suffolk, Sills, and U.S. Rail to comply with the law, and the parties have filed numerous related pleadings. In addition, the obstructive efforts of Suffolk, Sills and U.S. Rail have resulted in unnecessary judicial involvement by the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Eastern District of New York. The tactics employed by Suffolk, Sills and U.S. Rail have maximized federal regulation and resulted in substantial delay. The deficient Petition filed by U.S. Rail will only add to that delay.

Equally unsupported is Petitioner’s statement that “[granting the Petition] would also satisfy subsections (4) and (5), by providing a shipper lacking adequate rail access the option of rail transportation, ensuring the development of a sound transportation system, with effective competition and coordination between railroads and other transportation modes, and fostering sound economic conditions in the transportation industry.” Petition at 15. U.S. Rail’s statement

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- (10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;
 - (11) to encourage fair wages and safe and suitable working conditions in the railroad industry;
 - (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination,
 - (13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information,
 - (14) to encourage and promote energy conservation, and
 - (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part. U.S. Rail has mentioned only four of the fifteen listed factors in its Petition.

49 U.S.C. § 10101

is simply unsupported by its Petition: it has not provided any information regarding agreements with either NY&AR or LIRR, nor has it submitted any evidence concerning track availability or usage, much less any evidence of demand for rail service by any party other than Sills. The NY&AR serves Long Island. If there were a demand for rail service for stone aggregates, it is likely that the NY&AR would provide one of its facilities, without the need for additional rail construction. There is no proven demand for rail service, especially in light of the ulterior motives that U.S. Rail and Sills seem to have.

Finally, U.S. Rail states that “a grant of this exemption would satisfy subsection (14) by promoting energy conservation through increased use of energy efficient rail transportation.” Petition at 16. U.S. Rail does not offer further explanation for this statement. Having no details regarding the nature of the proposed track or train cars, it is impossible to assess whether this statement is true. There is no evidence of the number of trucks currently used to transport stone aggregates and the fuel they consume, compared to the fuel that would be consumed in rail service. Indeed, rail service would not eliminate trucks, because the proposed facility would require transloading from train to trucks. Further, U.S. Rail does not estimate the fuel consumed by the trucks waiting for the train to arrive or waiting for the train to unload. In addition, the trains themselves are likely to sit idling while waiting to switch tracks. The exhaust attributable to trucks and trains during the transloading process has not been estimated or addressed at anywhere in the Petition.

Contrary to U.S. Rail’s unsupported arguments, regulation is necessary to advance the rail transportation policy. U.S. Rail has demonstrated in the past that it is willing to mislead both the Town and the Board in order to avoid any regulation at all. While professing to the Town that its laws were preempted by federal regulation and at the same time, arguing to the

STB that it was an “exempt spur” not subject to federal regulation, it began unauthorized clearing and construction on the property in the summer of 2007. Compare Heffner Letter (Exhibit 2) and November 16th Decision, with Newsday Article (Exhibit 3). Specifically, by the time the Board was alerted to the unauthorized activity and ordered it to stop, U.S. Rail had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the property. After the Board issued its cease and desist order, U.S. Rail filed three separate petitions (for stay, reconsideration and clarification) unsuccessfully attempting to persuade the Board to back down from its position. In addition, U.S. Rail appealed the cease and desist order to the Second Circuit, and started an action in federal court seeking a determination that state and local laws were preempted by federal law (while, at the same time arguing before the STB that it proposed to build an “exempt spur” not subject to federal regulation). To date, U.S. Rail has lost each and every attempt to evade the jurisdiction of the Board and the Town

U.S. Rail’s past conduct illustrates that it cannot be trusted and that further regulation is necessary to ensure the implementation of the rail transportation policy. Left to its own devices, U.S. Rail has no regard for the environmental, safety or community impact of its actions. Indeed, U.S. Rail’s Petition does not attempt to argue that exempted construction and operation would serve the remaining rail transportation policy goals relating to safety (subsections 3 and 8), and labor and discrimination standards (subsections 11 and 12). What is clear based on past conduct is that further regulation is necessary “to encourage honest and efficient management of railroads.” 49 U.S.C. § 10101(9). U.S. Rail’s failure to demonstrate that the rail transportation policy would be served by the exemption is fatal to its Petition. Keokuk Junction, FD 34974

(served December 6, 2007) at 5 (denying petition for exemption because regulation was necessary to further the rail transportation policy).

B. The Proposed Track is Not Limited in Scope

U.S. Rail claims that the construction proposal is “limited in scope within the meaning of 49 U.S.C. § 10501(a)(2)(A).” Petition at 16. However, U.S. Rail omits many facts and details from the six-sentence paragraph “supporting” this conclusion

First, the construction proposal will have significant environmental impacts on what has been characterized as a “deep flow recharge zone” that is ecologically part of the Long Island Pine Barrens. Declaration of John L. Turner in Opposition to Motion for Preliminary Injunction (“Turner Declaration”)(Exhibit 9 hereto) ¶ 5. By the time of the Board’s October 12th Decision, the unlawful activities on the property resulted in eighteen acres of land being clear-cut and 30,000 cubic yards of sand being mined without any environmental study as to its impacts, as required by both NEPA and SEQRA. Quinlan Statement at 9-10. To compound the problem, the clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sand mining. Id.

In addition, the massive scope of the project ahead cannot be underestimated. The grade change alone will require excavation and leveling on a grand scale. In the hearing on U.S. Rail’s application for preliminary injunction in the U.S. District Court for the Eastern District of New York, a representative for U.S. Rail testified that there is a grade change of 12 to 13 feet from the railroad line adjoining the property to the proposed track. See Transcript (Exhibit 8 hereto) at 24. This translates into either excavating and removing approximately 293,627 cubic yards⁹ of sand from the Property *before* construction even begins or building a track connecting to the

⁹ Assuming, conservatively, that half the property (14 of 28 acres, or 609,840 square feet) will be affected by the grade change, and that there will be a 13-foot grade change throughout, the project will require the excavation and removal of approximately 7,927,920 cubic feet (or 293,627 cubic yards) of sand

NY&AR that is much longer than portrayed on the diagram attached to the Petition at Exhibit C in order to keep the grade of connection usable with heavy stone cars.

Despite the fact that the environmental impact of changing the grade of a portion of a 28-acre site 12 to 13 feet will be very significant, U.S. Rail did not mention this fact in its brief discussion of the scope of the proposed project. Moreover, numerous agencies, organizations and individuals have expressed concern regarding the potential environmental harm that may result from U.S. Rail's activities at the site, including the New York State Department of Environmental Conservation ("DEC"), which has already issued summonses to the construction contractor at the property for mining without a permit. Quinlan Statement at 10-11.

With a 12 to 13 foot differential between the Sills' property and the line of the LIRR, U S. Rail would have to build a 1,200 to 1,300 foot connection track in order to limit the grade to one percent. A connecting line with a grade of three percent would have to be between 400 and 430 feet long.¹⁰ Based on the sparse information presented in the Petition, a line of between 400 and 1,300 feet would likely require construction under and beyond the two overpasses of County Road 101. The diagram submitted by U.S. Rail in Exhibit C does not appear to provide for a connection between the LIRR line and the proposed track long enough to result in a grade less than three percent.¹¹ Such a grade would exceed many grades in mountainous territory that exist throughout the country. See, e.g., Roseburg Forest Products Co ; Timber Products Company, L.P.; Suburban Propane, L.P.; Cowley D&L, Inc.; Sousa Ag Service and Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc., STB Finance

¹⁰ It should be noted that a line with a three percent grade would require at least five locomotives to haul a 40-50 car train loaded with stone up the grade. See, e.g., Roseburg Forest Products Co et al. FD 35175, Document No 223507 (filed September 3, 2008) at 13. Nowhere does U S. Rail indicate that it plans to maintain this number of locomotives on site, or even have them available.

¹¹ The diagram attached as Exhibit C contains substantial information that is illegible. The Board and parties should be able to clearly see the proposal and not be forced to guess.

Docket No. 35175, Document No 223507 (filed September 3, 2008) at 13 (describing one of the steepest grades (if not the steepest grade) in the United States, as 3.6 to 3.8 %).

U.S. Rail also has not provided any evidence that LIRR or NY&AR would consent to the connection of the proposed track to the LIRR line. To construct a line with a utility grade, U.S. Rail would need to build significantly within the right-of-way of the LIRR.¹² Not only would U.S. Rail have to build within the LIRR right-of-way, but it also appears that U.S. Rail would also have to build the connecting track under the two bridges of County Road 101. There is no indication as to whether there is sufficient clearance either vertically or horizontally to construct essentially a second track.

In addition to the problems that U.S. Rail has not addressed concerning the construction of the track from the LIRR into the proposed track, U.S. Rail has not addressed the operation of a 50- to 60-car train along a commuter rail line. In light of the recent tragedy involving the Los Angeles commuter railroad,¹³ Brookhaven urges the Board to closely examine any plans that U.S. Rail might have for operating along the LIRR commuter line. One operational problem not discussed by U.S. Rail is the movement of its train from the LIRR line into the proposed facility. A 40- to 50-car train is generally between 4,000 and 5,000 feet long. Based on the minimal information presented, the siding that U.S. Rail intends to build to access the proposed facility from the LIRR will not be that long. This means that when the NY&AR brings the train to the proposed facility, it will have to leave at least 3,000 feet of the train sitting on the LIRR main line waiting for U.S. Rail to pick up the cars. U.S. Rail has provided no information as to how it

¹² Brookhaven cannot determine the precise distance because of the lack of detail and illegibility of the maps provided by U.S. Rail

¹³ See, e.g., Steinhauer, Jennifer, *At Least 18 Killed As Trains Collide In Los Angeles*, NY TIMES (September 12, 2008), available at <http://www.nytimes.com/2008/09/13/us/13crash.html?partner=rssnyt&emc=rss> ("A freight train collided with a rush-hour commuter train in Los Angeles on Friday evening, killing at least 18 people and injuring scores of others, many of them critically.")

intends to interchange traffic with NY&AR. U.S Rail does not even have an interchange agreement with NY&AR.

Brookhaven urges the Board to deny the U.S. Rail proposal because it has failed to address the very important issues of safety involving its use of the LIRR's line, much less how it will avoid creating delays on the LIRR. U.S. Rail has failed to address the critical safety issues concerning its interface with the LIRR commuter operations.

Finally, U.S. Rail asserts that it will "initially handle about 5,000 carloads of freight annually after construction." Petition at 16. Contrary to U.S. Rail's assertion, the interface of a minimum of 5,000 carloads of stone with a rail commuter operation is not of limited scope. Rail cars filled with stone are very heavy and dense. Rail commuter cars, by contrast are built to be light, even though their lading (people) is very precious and fragile. U.S. Rail has not even addressed its interface with the LIRR commuter operation. Based on Petitioner's past conduct, Brookhaven contends that U.S. Rail should be required to spell out in precise detail how it will operate with respect to the LIRR. U.S. Rail has not addressed this issue in the Petition, even though it was required to submit its case-in-chief to the Board 49 C.F.R. 1121.3(a) Because this construction involves interface with one of the largest rail commuter authorities in the country, it cannot possibly be limited in scope.

Without any analysis, U.S Rail cites to four STB decisions in support of its brief "limited scope" section. However, *none* of the cases make any findings with respect to whether the proposed projects involved are of a "limited scope " Ellis County Rural Rail Transportation District – Construction and Operation Exemption – Ellis County, TX, STB Finance Docket No. 33731 (served February 8, 2000) at 2 ("we need not determine whether the transaction is limited in scope"); Pemscot County Port Authority – Construction Exemption – Pemscot County, MO,

STB Finance Docket No. 34117 (served July 2, 2002) at 3 (same); Alamo North Texas Railroad Corporation – Construction and Operation Exemption – Wise County, TX, STB Finance Docket No. 34002 (served November 16, 2001) at 3 (same); Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX, STB Finance Docket No. 34284 (served May 19, 2003) at (same).

In addition, all of the cases cited involve “conditional approvals” pending environmental review Ellis County, FD 33731 (served February 8, 2000) at 1 (“We will grant a conditional exemption and issue a final decision after completion of the environmental review process”); Pcmsicot, FD 34117 (served July 2, 2002) at 1 (same); Alamo, FD 34002 (served November 16, 2001) at 1 (same); Southwest Gulf, FD 34284 (served May 19, 2003) at 1 (same). However, as the Board announced last year, it will no longer grant conditional approval while the environmental process is ongoing absent some “unique or compelling circumstances.” See Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line between Fielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658 (served October 4, 2007)(“ we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.”) U.S. Rail has not argued that its situation is unique or compelling, let alone presented any evidence of unique or compelling facts or circumstances.

C. Regulation is Necessary to Protect Shippers from the Abuse of Market Power

U.S. Rail builds much of the case for its proposed track on eastern Long Island’s purported “lack” of “access to adequate rail service.” Petition at 9. See also Petition at 8 (“The need for the BRT is critical.”) In short, U.S. Rail argues that there is a growing and immediate

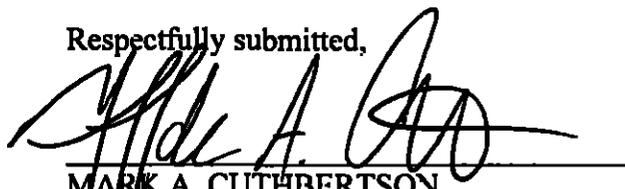
need in the eastern Long Island market for a rail facility. Assuming, arguendo, that this is the case, how does the proposed track foster competition on the open market?

Behind the vague promises that “more customers” will use the track in the “future,” is the fine print: Sills is U.S. Rail’s only “customer.” Sills has commissioned U.S. Rail to build (through contractor Adjo) and operate trackage for the private purpose of shipping and transloading Sills’s own product (crushed stone) to Sills’s customers. See, e.g., Petition at 7 (“There are very few industry sidings located along LIRR’s main routes available to serve the Sills’ Group’s requirement for crushed aggregate stone”); 8 (“While customers [of Sills Group] are currently using truck and inadequate rail capacity today, truck transportation will not economically handle the expected volumes of crushed stone the *Sills Group has agreed to receive* and will only add to the congestion afflicting Long Island’s road system)(emphasis added), and 16 (“The line would initially serve one major customer”). If constructed, the proposed track would allow Sills to have unfettered access to the line, to the detriment of any other aggregate stone shippers in New York. Further, without regulatory scrutiny under § 10901, as owner of the track, Sills could charge other shippers exorbitant rates to access the track and/or make such access economically impossible in order to retain a monopoly on the market. Rather than “protecting shippers from abuse of market power,” U.S. Rail’s proposal actually harms shippers and potentially creates a monopoly on the market. See Keokuk Junction, FD 34974 (served December 6, 2007) at 5 (denying petition for exemption because regulation was necessary to promote the rail transportation policy’s goal of fostering competition).

CONCLUSION

For the reasons set forth above, the Town respectfully requests that the Board deny the Petition for Exemption filed by U.S. Rail on August 7, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark A. Cuthbertson', is written over a horizontal line.

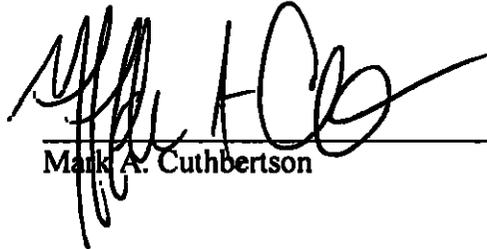
MARK A. CUTHBERTSON
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434 New York Avenue
Huntington, New York
(631) 351-3501

Attorneys for Town of Brookhaven

Dated: September 18, 2008

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 18th day of September, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No. 35141.



Mark A. Cuthbertson

EXHIBIT 1

**VERIFIED STATEMENT OF
ROBERT F. QUINLAN**

My name is Robert F. Quinlan. I am the Town Attorney of the Town of Brookhaven ("Brookhaven"). I am the chief legal officer of Brookhaven, a large town of approximately 480,000 people and 532 square miles in size. Brookhaven is located in central Long Island, in the state of New York.

As the Town Attorney I am responsible for significant facets of local land use regulation and code enforcement. In Brookhaven we have comprehensive regulations that govern, among other things, the zoning and site plans for facilities such as those proposed for property involved in this proceeding. Those regulations are intended to ensure that these facilities are sited in appropriate places. In addition, in siting and regulating such facilities we are required to follow the New York State Environmental Quality Review Act ("SEQRA") (the state counterpart to NEPA) to review the environmental impacts of projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented.

I submit this statement in support of Brookhaven's reply to the petition for stay submitted by Sills Road Realty, LLC ("Sills"), US Rail Corporation ("US Rail") (Sills and US Rail are hereinafter collectively referred to as "Petitioners"). The proceeding before the Board involves property located on Sills Road in the hamlet of Yaphank in Brookhaven ("Property"). I have set forth below the history of this matter before the Board, which clearly evidences how the Petitioners are abusing the exemption system to avoid appropriate state and local regulation.

On May 18, 2007, Suffolk filed another verified notice of exemption for the Property. The exemption was sought pursuant to 49 USC §10901 and 49 CFR §1150.31 and indicated that Suffolk has reached an agreement with Sills for the lease and operation of railroad trackage and facilities currently be constructed at the Property. The lease involved the use of approximately 11,000 feet of track on a 28-acre parcel. In the summary of the transaction, it indicated that the exemption involved a lease in common carrier operation by a new Class III short line railroad (Suffolk) over railroad trackage and facilities to be constructed. It contained an extensive description of the proposed facility, including that it will make provisions for rolling stock and construction of an on-site overpass bridge, cross dock, intermodal container storage and receiving, handling and storage bunkers with sufficient capacity to accommodate 500,000 tons of construction aggregates per annum. On June 1, 2007, the Board issued a decision indicating that, based on Suffolk's intent to provide for-hire service over trackage, it appears that Sills was constructing a line of railroad subject to the Board's jurisdiction. It noted that under 49 USC §10901, Board authority is required to construct a line of railroad and that Sills has not sought Board authority for this construction. The Board further indicated that if the Board were to accept Suffolk's verified Notice as complete, Board action might be seen as tacit approval of Suffolk's lease and operation over a line of railroad that has been constructed without Board authority and that because the Notice of Exemption did not provide sufficient information to make a definitive determination that exemption was appropriate here, additional information was necessary for Suffolk's Notice of Exemption to be considered complete. Suffolk was directed to file supplemental information by June

21, 2007 describing its construction activities on the trackage to date and any construction anticipated in the future.

On June 15, 2007 Mr. Heffner wrote the Board a letter indicating that due to a change in circumstance, Suffolk had decided to withdraw its Notice of Exemption.

On July 12, 2007, Mr. Heffner, faxed me a letter in my capacity as Town Attorney to advise me that he represented US Rail, an Ohio based company and common carrier short line railroad operating pursuant to authority granted by the former-ICC now the STB. His letter stated that US Rail has leased real property and intended to construct and operate a "exempt spur" within the meaning of 49 USC §10906 a line of rail and related side tracks, yard tracks, turn outs, switches and connecting tracks (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location. The letter further indicated the Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone or other stone products as well as lumber, plywood, sheetrock, and related construction materials and other merchandise freight and that as a common carrier railroad, US Rail's construction of the Rail Yard are governed by federal law and subject to the exclusive jurisdiction of the STB.

It is important to note that at this point I was not aware of any activities at the Property or any proceedings before the Board. At no point in his letter did Mr. Heffner indicate that there were any pending proceedings in front of the Board. Also, conveniently missing from Mr. Heffner's letter was any mention of the involvement of Sills or Suffolk. I was left to investigate the location of the property because all Mr. Heffner provided were tax map descriptions of the property.

On July 25, 2007, Mr. Heffner addressed and mailed a letter to me that was identical to his July 12, 2007 letter, which was received by my office on July 27, 2007 while I was away.

On August 13, 2007, the Board unaware of the new involvement by US Rail, issued a decision in response to Suffolk's attempt to withdraw its second Notice of Exemption. It noted that in its June 1, 2007 decision Suffolk's notice of exemption was found incomplete and it was directed to file supplemental information describing in detail the construction of trackage, which, it noted, would appear to be line of railroad subject to the Board's jurisdiction based on Suffolk's stated intention to provide for-hire service over it. The Board stated that Suffolk had not provided it with the supplemental information required by its June 1, 2007 decision nor had it provided a substantive reason for its withdrawal. In failing to explain the situation, the Board stated that Suffolk left unrefuted in its verified statement that for-hire service is intended for the trackage being constructed by its affiliate Sills. The Board's conclusion that Suffolk and Sills were affiliated was based on telephone conversations between Board staff legal counsel for Suffolk.

The Board's decision denied Suffolk's request to terminate the proceeding. Given the concerns raised, the Board directed Suffolk to file the information required by its June 1 decision, directed Suffolk to provide substantive reasons for the withdrawal and explain whether it or Sills will provide for-hire service at the trackage. The Board commented where, as here, a party concludes that environmental thresholds will not be exceeded, the notice of exemption should explain why the transaction would not exceed the thresholds or otherwise warrant the preparation of environmental documentation.

The Board's decision explained that if for-hire service was intended for the trackage being constructed by Sills then the "construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board's jurisdiction, and the Board authorization for the construction is required under 49 U.S.C. 10901. The proposed construction of a line of railroad also requires that the Board conduct an environmental review under the National Environmental Policy Act. See 49 CFR 1105.6(a)(b)(1)."

In its decision the Board was justifiably suspicious of Petitioner's activities and warned:

The Board increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds at 49 CFR 1105.7(e)(4) or (5) will not be met. See 49 CFR 1105.6(b)(4), (c)(2)(i). Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the Board's 3 train per day threshold for environmental documentation under 49 CFR 1105.7(e)(5)(ii)(A). Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board's thresholds under 49 CFR 1105.7(e)(5)(ii)(C).

In response to the Board's August 13, 2007 decision, Suffolk filed a response that can only be characterized as evasive.

It is important to note that, when Suffolk received the Board's August 13, 2007 decision, which inquired about its construction activity, it had planned to or was in the

process of commencing construction. Newspaper accounts¹ make it clear that construction commenced at the Property in late August.

Mr. Heffner wrote to the Board on August 23, 2007 and stated that the simple answer to STB's inquiry is that Suffolk and Sills never concluded any agreement or other relationship with respect to the lease, construction, or operation of the rail facility and incredibly also stated that "Suffolk has never undertaken any development construction or other activity at this site." He further stated Sills never undertook any construction of rail facilities at the Sills location for the simple reason that Suffolk and Sills never consummated their agreement.

The statement in Mr. Heffner's letter of August 23, 2007 that Suffolk and Sills never undertook any construction at the site is not only contradicted by newspaper accounts that demonstrate that construction began in late August, but also by Mr. Heffner's own letter to this Board of October 9, 2007, attached to the present Petition.

Attached to Mr. Heffner's October 9, 2007 letter as Exhibit D is a timeline submitted by Mr. Heffner which indicates: "August 20, 2007 - Site clearing commences." Clearly Mr. Heffner should have known of this clients' clearing activities before he wrote to the STB three days after they commenced, perhaps craftily, representing to the STB that his now former client "Suffolk has never undertaken any development construction or other activity at this site." Knowing full well that his client, Sills Road, had already started clearing. As both Sills and Suffolk had already been

¹ In a newspaper account on October 1, 2007 in *Newsday*, a Long Island daily newspaper, it was revealed in late August, 2007 work was begun at the Property, which involved clear-cutting 18 acres of the site and the mining of hundreds of thousands of cubic yards of materials. The article indicated that US Rail had signed a 30-year lease with Sills. In this article, Gerard Drumm, the chief financial officer of Sills indicated that they intended to build a rail facility at the site. The article also made it clear that Petitioners were attempting to make an end-run around the Board procedures that would have required Board authorization and environmental review.

identified by the Board as "affiliates" in its prior decisions, the actions of one are attributable to the other in spite of Heffner's efforts in his August 23, 2007 letter to distinguish them.

Additionally, upon information and belief, the source of such information and grounds for such belief being conversations with the Town of Brookhaven's Commissioner of the Department of Waste Management, John Kowalchuk, and review of a letter attached hereto as Exhibit A, one of the proposers who responding to the Town's Final Request For Proposals for the disposal of the Solid Waste Stream generated by the Town of Brookhaven, indicated that Sills Road had represented to others in the waste management industry that they "had commenced development efforts" at the Sills Road site prior to August 23, 2007. Attached hereto as Exhibit A is a letter from the President of Sills Road Realty, LLC to Tully Environmental, Inc., a proposer for the removal of waste materials stating the above. This also shows the real purpose to which the facility is intended to be used, as I have been advised by Mr. Kowalchuk that Tully submitted the letter in support of their proposal for waste removal to show that the Sills Road site could be used as a potential site for loading waste on to railcars in the future.

Thereafter, the Board, in a decision dated September 25, 2007, allowed Suffolk to withdraw its Notice for Exemption. This decision was based, in large part, on the misrepresentations set forth in Heffner's letter of August 23, 2007. Specifically, the Board relied on the misrepresentations about activity at the site when it stated that "because Suffolk states that neither it nor Sills has undertaken any construction of rail facilities at the Sills Road location or consummated any agreement with Sills Road to

lease or operate over the proposed trackage, Suffolk has provided information to support its attempted withdrawal of its Notice of Exemption."

Petitioners' response was so rife with misrepresentations that the Board made note of this in its decision when it stated:

Suffolk also asserts that Sills never anticipated providing for-hire rail service. However, this statement appears to contradict Suffolk's earlier statement that it "has reached an agreement with Sills for the lease and operation of railroad trackage [at issue here]," through which "Suffolk intends to hold itself out as a common carrier to provide service to all potential customers . . ." ² Suffolk's filing also appears inconsistent with the statement made by Suffolk's counsel in a telephone conversation with Board staff that Suffolk and Sills are affiliated parties (in that one owns a significant portion of the other).

Given these suspicious activities and the patent misrepresentations that had been made, the Board concluded with the following admonition:

At the same time, however, Suffolk and Sills should be aware that if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and [sic] an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

Newspaper accounts that reported on activities at the Property made it clear that Sills was constructing facilities at the location that would later be converted to rail facilities, which was in direct contradiction to the representations Heffner made to the Board.

It was only after review of the above referred to applications, decisions and other documents, as well as learning of the reported activity at the site, that the full scope and

² See Suffolk's Verified Notice of Exemption at 3-4.

nature of the Petitioner's activity became clear. Given that Petitioners' did not appear to have any approval from the Board, I wrote to Nancy Beiter of the STB on October 2, 2007. In that letter, I requested information as to what, if any, authorization US Rail had received from the Board and to advise the Board that if such information was not forthcoming that Brookhaven intended to file a petition for a declaratory order.

On October 4, 2007 Melvin F. Clemens, in the STB Office of Compliance and Consumer Assistance, wrote to Mr. Heffner and recounted that information that we had provided to the Board with respect to the construction at the Property. Mr. Clemens noted that Mr. Heffner did not deny that construction was taking place at the site (although he had done so shortly a month before that) and did not assert US Rail had received authority from the Board to undertake these activities. He noted that US Rail had sent letters to me in July, 2007 claiming that it was exempt from state and local law.

Since US Rail had received no authority from the STB to construct a rail facility, US Rail and Sills Road were directed by Mr. Clemens to cease activities at the site and to provide the Board with a detailed account of activities taken in the area and to explain why it did not believe Board approval was required. By this time, it was my understanding, that US Rail and Sills Road had already agreed with the New York State Department of Environmental Conservation to cease all activities until a mutual agreement could be reached.

At this point it was clear to me that Petitioners had pulled what could be characterized as a "classic developer's trick": build now and beg forgiveness later. Here, however, forgiveness should not be forthcoming. Eighteen acres of land have been clear-cut and hundreds of thousands of cubic yards of materials have been mined without any

environmental study as to its impacts as required by both NEPA and SEQRA and what, if any, measures could have been taken in mitigation. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sandmining.

Thereafter, US Rail did submit a response that alleges that what it is now seeking to do does not require Board approval because it is a spur, industrial, team, switching or side track within the meaning of 49 U.S.C. 10906. The merits of this argument are addressed in the foregoing reply prepared by our counsel.

Petitioners disingenuously argue that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

There are numerous agencies, organizations and individuals that are concerned with the potential environmental harm that may result from Petitioner's activities at the

Property, including the New York State Department of Environmental Conservation ("DEC"). As set forth in a newspaper account in *Newsday* on October 1, 2007 (annexed as Exhibit B), the DEC has issued summonses to the construction contractor at the Property for mining without a permit. In that article, the regional director for the DEC, Peter Scully, states that "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of yards of cubic material could move forward without any environmental review." In that article, US Rail's president acknowledges that had received citations from DEC and that it was "in discussions" with the DEC about the citations that could lead to administrative hearings. Annexed hereto as Exhibit C are two letters that DEC has sent to counsel for Sills and Suffolk about the sandmining activities that have taken place at the Property. In addition, in the same *Newsday* article, the president of the local civic association expressed her concerns about the potential environmental impacts of the activities at the Property.

Petitioners suggest that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I had learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes

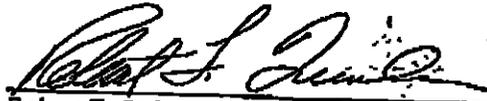
that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

I note in closing that given the lack of information given to the Board to date by Petitioners, the shifting nature of the parties and the outright misrepresentations³ that have been made, the Board should use whatever means are at its disposal and inquire into the true nature of operations proposed at the facility and the parties involved.

³ As further proof of this, I submit to you as Exhibit D a letter I received from counsel for Sills on October 5, 2007 indicating that it previously advised the Town that the Property will be used for an "intermodal transportation center that will incorporate switching and a railroad siding from existing Long Island Railroad tracks located on the property's southern boundary as well as freight transfer areas" and further states that no municipal solid waste will be processed at the site. Counsel offered on behalf of Sills to enter into an agreement to that effect. Conspicuously absent from the letter from Sills' counsel is any representation that it would not process construction and demolition solid waste at the site. A newspaper account in *Newsday* on October 5, 2007 (annexed as Exhibit E) explains the close ties that Sills Road has to the garbage industry and also reveals that US Rail has stated to this Board in a letter dated February 25, 2006 in the *New England Transrail* (annexed as Exhibit F) case that indicates that US Rail "generates a large part of its revenue from hauling solid waste materials" and further states that its research indicates that solid waste in the Northeast region of the United States is that region's major outbound component for export. It made these statements through its attorney who wrote a letter in support of the application of New England Transrail, which, as the Board knows, was seeking approval for its solid waste transload facility.

VERIFICATION

I, Robert F. Quinlan, declare under penalty of perjury that the facts stated in the foregoing document are true and correct, to the best of my knowledge, information and belief. Executed on this 5th day of November, 2007.



Robert F. Quinlan
Town Attorney
Town of Brookhaven

EXHIBIT 2

JOHN D. HEFFNER, PLLC

1800 N. GUYMON, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PHONE 202-4100
FAX (202) 298-8069
j.heffner@verizon.net

By overnight courier and facsimile to
(301) 498-4489

July 12, 2007

Robert F. Quinlan, Esq.
Town Attorney
Department of Law
Town of Brookhaven
One Independence Hill
Farmingville, New York 11738

Re: Real Property Described in Attachment A (the "Real Property")

Dear Mr. Quinlan:

I am writing on behalf of U S Rail Corporation ("U S Rail"), an Ohio-based company and common carrier short line railroad operating pursuant to authority granted by the former Interstate Commerce Commission (now the Federal Surface Transportation Board). U S Rail has leased the Real Property and intends to construct and operate as an "except spur" within the meaning of 49 U.S.C. 10906, a line of rail and related side tracks, yard tracks, turn outs, switches and connecting track (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location.

The Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone and other stone products as well as lumber, plywood, sheetrock and related construction materials and other merchandise freight. As a common carrier railroad, U S Rail's construction and operation of the Rail Yard are governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board thereunder.

U S Rail desires to work with you and other community leaders to develop a very positive relationship. We are available to meet with you at your earliest convenience but anticipates commencing construction of the Rail Yard within the next thirty days.

Should you have any questions, please feel free to contact me at your convenience.

Very truly yours,

John D. Maffner, Esq.

cc: Gabriel D. Hall
President
U S Rail Corporation

Attachment A

**County of Suffolk
Town of Brookhaven
District: 0200**

Section 663.00, Block: 03.00, Lot(s): 001.00, 027.001, 027.002, 027.003 & 027.004

Section 704.00, Block: 04.00, Lot(s): 001.000 & 002.000

Section 704.00, Block: 05.00, Lot(s): 001.000 & 002.000

**Section 704.00, Block: 02.00, Lot(s): 001.000, 002.000, 030.000, 031.000, 032.000,
033.000, 034.000, 035.000 & 036.000**

EXHIBIT 3

newsday.com/news/local/ny-lirail0927,0,3592796.story

Newsday.com

Work started for Yaphank rail site without approvals

BY JENNIFER SMITH AND ERIK GERMAN

jennifer.smith@newsday.com

erik.german@newsday.com

10:59 PM EDT, October 1, 2007

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site -- without having sought any government approvals.

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros., the Bay Shore subcontractor preparing the site, and to the owner of the land -- Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

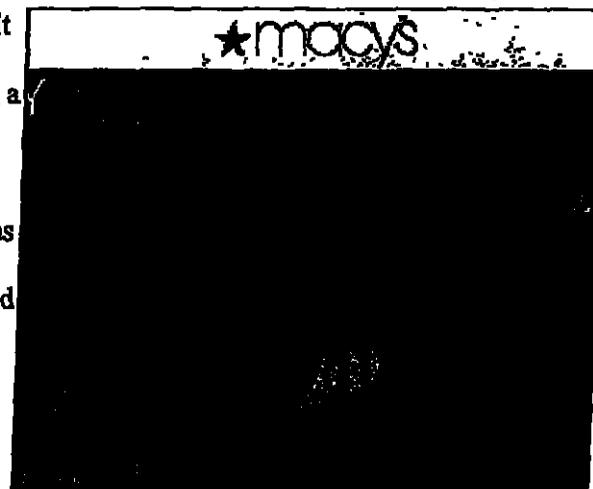
Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week.

Federal defense

The railroad involved -- U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty -- says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the state rejected the company's bid for rail bond funding in part because the Department of Transportation didn't have evidence that Sills Road Realty or U.S. Rail were authorized to operate as rail companies in the state.

The DEC visited the Yaphank site Monday to make sure work had not resumed, said Scully. Drumm and U.S. Rail president Gabriel Hall said their companies are "in discussions" with the DEC about the citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

A big haul



Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day. "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for \$330,000 to \$750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project ... under state law that isn't mining." Drumm said Friday the sand was being sold.

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes.

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U.S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone -- an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic.

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

Quite a surprise

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself.

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization -- as well as an environmental review.

Fall into disfavor

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized."

by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

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EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
SILLS ROAD REALTY LLC, US RAIL
CORPORATION, WATRAL BROTHERS, INC.,
PRATT BROTHERS, INC., ADJO
CONTRACTING CORP. and SUFFOLK &
SOUTHERN RAIL ROAD LLC,

Plaintiffs,

-against-

THE TOWN OF BROOKHAVEN,

Defendant.
-----X

REPORT AND
RECOMMENDATION

CV 07-4584 (TCP) (ETB)

TO THE HONORABLE THOMAS C. PLATT, UNITED STATES DISTRICT JUDGE:

Before the court is the motion of the plaintiffs, Sils Road Realty, LLC ("Sils Road"), US Rail Corporation ("US Rail"), Watral Brothers, Inc. ("Watral"), Pratt Brothers, Inc. ("Pratt"), Adjo Contracting Corp. ("Adjo"), and Suffolk & Southern Rail Road LLC ("Suffolk & Southern") (collectively referred to as "plaintiffs"), for a preliminary injunction enjoining the defendant, the Town of Brookhaven (the "Town" or "defendant"), from: (1) taking any action to prosecute certain appearance tickets issued to plaintiffs by the Town on October 4, 2007 (the "Appearance Tickets"); (2) issuing any new appearance tickets in connection with the construction or operation of a rail terminal plaintiffs seek to build in Yaphank, New York (the "Brookhaven Rail Terminal"); and (3) taking any other acts to interfere with or obstruct the construction and operation of the Brookhaven Rail Terminal, on the grounds that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts the Town from enforcing its local regulations. An evidentiary hearing with respect to plaintiffs' application was held

before the undersigned on December 5 and 6, 2007. For the following reasons, I recommend that plaintiffs' request for preliminary injunctive relief be denied.

FINDINGS OF FACT

I. The Plaintiffs

Sills Road is a New York limited liability corporation that owns a twenty-eight (28) acre parcel of real property located in Yaphank, New York, within the Town of Brookhaven, and on which the proposed Brookhaven Rail Terminal is to be built. (Tr. 52-53.) US Rail is an Ohio corporation and an existing Class III short line, or regional, rail carrier, authorized to operate as such by the Surface Transportation Board (the "STB"). (Tr. 15.) Adjo, a New York corporation, is the general contractor hired by US Rail to grade and excavate the site on which the Brookhaven Rail Terminal is to be constructed. (Tr. 25, 30) Watral and Pratt are both New York corporations and subcontractors hired by Adjo to perform certain construction activities at the Brookhaven Rail Terminal site. (Tr. 66.) Suffolk & Southern is a partner in Sills Road¹ and was initially formed to become a common rail carrier but never received such status. (Tr. 59) There is no common ownership between Sills Road and US Rail. (Tr. 39.) Nor is there any connection or interrelatedness between US Rail and Suffolk & Southern. (Tr. 40.)

All of the plaintiffs, with the exception of US Rail, were issued Appearance Tickets by the Town for alleged violations of the Town of Brookhaven Code regarding the construction of

¹ Other partners in Sills Road include AD Collins, a large quarry operator and construction company located in upstate New York, Adjo, and two unnamed individuals in the asphalt industry. (Tr. 58-59.)

the Brookhaven Rail Terminal.² (Tr. 25, 65-66; Pl. Ex. 1-5.)

II. The Brookhaven Rail Terminal

The Brookhaven Rail Terminal is a proposed rail terminal that plaintiffs seek to construct in Yaphank, New York, to serve as an intermodal transloading facility³ for the purpose of intermodal logistics, rail transfer, transloading of construction projects and similar commodities. (Tr. 16-17.) It is intended to be an interchange point⁴ on the New York and Atlantic Railroad, which would make it part of the national rail system. (Tr. 22-23.)

Sills Road acquired the property on which the Brookhaven Rail Terminal is to be constructed in May 2007, which is located within the Town's "Empire Zone," an area of the Town specifically designated for industrial and commercial development. (Tr. 53, 55.) Sills Road then leased the property to US Rail in or around August 2007 for the purpose of constructing and operating the Brookhaven Rail Terminal.⁵ (Tr. 18-19, 63; Ex. 7.) The lease is for a term of thirty years and, pursuant to the lease, US Rail is obligated to construct the Brookhaven Rail Terminal and, upon completion of the construction, to operate the facility. (Tr.

² Sills Road, Adjo, Pratt and Suffolk & Southern were each issued nine Appearance Tickets. (Tr. 65-66; Pl. Ex. 1-4.) Watral was issued eight. (Tr. 65-66; Pl. Ex. 5.)

³ Intermodal is a specialized term in the railroad business that pertains to products being transported from one mode of transportation to another. (Tr. 16.)

⁴ An interchange point is where two railroads exchange cars between their systems. (Tr. 22.)

⁵ Suffolk & Southern originally intended to construct and operate the Brookhaven Rail Terminal but, due to unforeseen circumstances, Sills Road learned that Suffolk & Southern would not be able to achieve common carrier status. Sills Road then sought out US Rail, as discussed infra.

19; Ex. 7.)

Construction activities at the Brookhaven Rail Terminal began in July or August 2007. (Tr. 31.) Such activities included tree removal and the initial grading of the property. (Tr. 24.)

III. The STB Proceedings

On May 18, 2007, Suffolk & Southern filed a notice of exemption with the STB, indicating that it had entered into an agreement with Sills Road to lease, construct and operate the railroad trackage and facilities intended to be constructed at the Brookhaven Rail Terminal as an exempt spur. (Tr. 61; Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 1576775, at *1 (S.T.B. June 1, 2007).) In a decision dated June 1, 2007, the STB found Suffolk & Southern's notice of exemption to be incomplete and directed it to file supplemental information describing the construction because, based on Suffolk & Southern's "intent to provide for hire service over the trackage, it appear[ed] that Sills [Road] [was] constructing a line of railroad subject to the [STB's] jurisdiction." (Suffolk & S. R.R. LLC, 2007 WL 1576775, at *1.) Suffolk & Southern did not provide the supplemental information requested but, instead, on June 15, 2007, sought to withdraw its notice of exemption before the STB "due to a 'change in circumstances.'"⁶ (Suffolk & S. R.R. LLC :

⁶ In its August 13, 2007 decision, the STB stated that Suffolk and Southern "did not provide . . . a substantive reason for its attempted withdrawal." (Suffolk & S. R.R. LLC, 2007 WL 2299734, at *1.) However, through testimony elicited during the preliminary injunction hearing, plaintiffs asserted that the reason Suffolk & Southern withdrew its notice of exemption was due to incurable title defects with a smaller facility owned by a company called Nicolia that Suffolk & Southern had planned to operate out of as a common carrier, and for which it had sought STB approval. (Tr. 54, 58, 60, 84-85, 90.) Upon learning of the defect in title, and that Suffolk & Southern would be unable to lease rail trackage from Nicolia, Suffolk & Southern withdrew its notice of exemption. (Tr. 84-85.) Sills Road then contracted with US Rail for the

Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2299734, at *1 (S.T.B. Aug. 13, 2007).)

By decision dated August 13, 2007, the STB denied Suffolk & Southern's request to withdraw its notice of exemption and directed it to file the supplemental information as previously ordered by August 23, 2007. (*Id.*) The STB further directed Suffolk & Southern to provide "a substantive reason for its attempted withdrawal" and to "explain in more detail whether it or Sills [Road] anticipates that for-hire service will be provided over the trackage being constructed." (*Id.*)

On August 23, 2007, Suffolk & Southern filed a response to the STB's August 13, 2007 decision, stating that Sills Road never undertook any construction of rail facilities at the Brookhaven Rail Terminal. (Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2778092, at *1 (S.T.B. Sept. 25, 2007).) Suffolk & Southern further stated that "it never concluded any agreement or other relationship with Sills [Road] with respect to the lease, construction, or operating of the trackage, and for [that] reason, had attempted to terminate the proceeding." (*Id.*) Suffolk & Southern also asserted that Sills Road "never anticipated providing for-hire rail service." (*Id.*)

Based on its submission, the STB permitted Suffolk & Southern to withdraw its notice of exemption. (*Id.*) However, the STB warned that if either Suffolk & Southern or Sills Road

construction and operation of the Brookhaven Rail Terminal: (Tr. 62-63.)

⁷ The STB noted that the submission by Suffolk & Southern appeared to contradict its "earlier statements that 'it ha[d] reached an agreement with Sills [Road] . . . for the lease and operation of railroad trackage . . . through which 'Suffolk [& Southern] intend[ed] to hold itself out as a common carrier to provide service to all potential customers. . .'" (Suffolk & S. R.R. LLC, 2007 WL 2778092, at *1.)

anticipated providing for-hire service over trackage to be constructed, approval by the STB and an environmental review would be required. (Id.) The STB further stated that it would "view with disfavor any future request for authority to commence rail operations over trackage at [the Brookhaven Rail Terminal location] unless the construction of that trackage has first been authorized by the [STB]." (Id.)

On October 2, 2007, the STB received a letter from the Town concerning a proposed rail facility being constructed by US Rail on the Brookhaven Rail Terminal site. (Suffolk & S. R R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2973596, at *1 (S.T.B. Oct. 12, 2007).) After receiving this letter, and upon further investigation, the STB found that the property the Town was concerned with appeared to be the property and proposed rail facility already at issue before the STB. (Id.) The STB also noted that an article in Newsday, dated October 1, 2007, appeared to concern the same property. (Id.) Citing "new evidence that rail construction may be occurring or contemplated on this property, and because no party has sought authority from the [STB] to construct any rail facilities at this site," the STB reopened the Suffolk & Southern proceeding on its own motion and US Rail was made a party to the proceeding. (Id. at *2.) The STB further ordered US Rail, Suffolk & Southern, Sills Road "or any other related entity" that was engaging in construction on the Brookhaven Rail Terminal site to "immediately cease" such activity and to either obtain STB authorization or a decision from the STB that such activity does not require the STB's approval. (Id.)

US Rail and Sills Road thereafter filed petitions for a stay and for reconsideration of the STB's October 12, 2007 decision on October 18, 2007 and October 26, 2007, respectively.

(Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 3437681, at *3 (S.T.B. Nov. 16, 2007).) By decision dated November 16, 2007, the STB denied the petition for a stay, finding that US Rail and Sills Road had failed to make the requisite showing to warrant issuing a stay. (Id.) In rendering its decision, the STB found that US Rail and Sills Road were unlikely to succeed on the merits of the argument underlying their petition for reconsideration: that construction of the Brookhaven Rail Terminal would not require prior STB approval because it would qualify for an exception to the licensing requirement as an ancillary spur. (Id.) The STB further found that US Rail and Sills Road had failed to establish that they would suffer any irreparable harm absent the issuance of a stay because "claims of opportunity costs and construction costs are strictly monetary in nature." (Id. at *5.) Finally, the STB found US Rail and Sills Road's argument that a stay would benefit the public interest unpersuasive and stated that "[w]hile petitioners cite the need for more freight facilities on Long Island; the Cease and Desist Order does not prevent the facility from being constructed once appropriate approvals are obtained." (Id.)

On November 9, 2007, while their petition for reconsideration was still pending before the STB, US Rail, Suffolk & Southern and Sills Road, filed a petition for judicial review of the STB's October 12, 2007 decision with the Second Circuit, requesting a temporary restraining order and a preliminary injunction enjoining enforcement of the STB's decision. (Joint Ex. 1, Tab.10.) The request for injunctive relief was denied and the petition was dismissed by the Second Circuit on November 13, 2007, on the grounds that the October 12, 2007 decision of the STB was not final. (Id.) US Rail and Sills Road's petition for reconsideration to the STB was also denied - on grounds similar to the denial of the petition for a stay - on December 20, 2007

and the STB directed that the cease and desist order would remain in effect.⁸ (Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 4466696, at *5 (S.T.B. Dec. 20, 2007).)

IV. Testimony Concerning the Operations at the Brookhaven Rail Terminal

A. Plaintiffs' Testimony

Plaintiffs called two witnesses to testify on their behalf, Gabriel Hall ("Hall"), the President and Chief Executive Officer of US Rail, and Gerard Drumm ("Drumm"), the Chief Financial Officer and General Counsel for Sills Road. (Tr. 15, 52.) In January 2007, Sills Road and representatives of Suffolk & Southern, as well as the New York and Atlantic Railroad, met with the Director of Planning for the Town, David Woods ("Woods"), and his staff. (Tr. 52-53.) At this meeting, plaintiffs provided Woods with a schematic of the Brookhaven Rail Terminal and explained their intentions for the facility and that Suffolk & Southern would construct and operate it once they obtained authority from the STB to operate as a common carrier. (Tr. 53, 90.) Drumm testified that Woods was receptive to plaintiffs' presentation. (Tr. 53.) Subsequent meetings with other Town officials also took place in February and May 2007, prior to the commencement of any construction. (Tr. 64.)

In approximately July 2007, plaintiffs learned that Suffolk & Southern would not be able

⁸ On May 2, 2008, US Rail filed a petition seeking clarification of the STB's October 12, 2007 decision as to whether it can begin certain activities at the Brookhaven Rail Terminal site. (Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2140792 (S.T.B. May 21, 2008) (granting the Town additional time to respond to US Rail's petition).) A decision on that petition has not yet been issued by the STB.

to obtain authority to operate as a common carrier, and therefore could not operate the Brookhaven Rail Terminal. (Tr. 62-64; 89.) Sills Road then decided that it needed to partner with an existing railroad to operate the facility. (Tr. 62-64.) Drumm testified that plaintiffs did not apprise the Town of this change in circumstances. (Tr. 90-91.)

Hall testified that a member of Sills Road contacted US Rail - an existing railroad - to discuss the possibility of operating the proposed Brookhaven Rail Terminal facility. (Tr. 15, 17-18.) After negotiations, Sills Road and US Rail entered into a thirty-year lease and operating agreement for the Brookhaven Rail Terminal site, pursuant to which US Rail will lease the twenty-eight (28) acres of property from Sills Road and is obligated to construct and operate the proposed rail facility on the property. (Tr. 18-20, 24, 63; Pl. Ex. 7.) There are optional periods of renewal available upon the expiration of the thirty-year lease. (Tr. 24.) US Rail intends to act as a common carrier at the Brookhaven Rail Terminal site.⁹ (Tr. 24.)

After entering into the agreement with Sills Road, US Rail had the property surveyed and had a track layout created with the assistance of Sills Road and the New York and Atlantic Railroad. (Tr. 20; Pl. Ex. 9.) Pursuant to the track layout, approximately four thousand (4,000) feet of track is to be placed into the Brookhaven Rail Terminal; however, the amount of track may be increased up to seventeen thousand (17,000) feet. (Tr. 21; Pl. Ex. 9.) In Hall's opinion, the track layout for the Brookhaven Rail Terminal represents a spur as opposed to a line of railroad or a private track.¹⁰ (Tr. 21.)

⁹ Suffolk & Southern now serves only as an investor in Sills Road. (Tr. 85.)

¹⁰ According to Hall, where a common carrier, such as US Rail, operates a transload facility, like the Brookhaven Rail Terminal is expected to be, it is considered a spur. (Tr. 21.) Conversely, where such a facility is operated by a private entity, such as a lumber company, it

With respect to the construction of the Brookhaven Rail Terminal, Hall testified that limited construction, such as tree removal and grading of the property began in July or August 2007. (Tr. 24, 31.) US Rail hired Adjo as the general contractor for the construction of the Brookhaven Rail Terminal¹¹ and entered into an excavation agreement with Adjo for purposes of clearing the property.¹² (Tr. 30-31; Pl. Ex. 8.) Watral and Pratt were conducting some excavation and trucking work on the property as well. (Tr. 66.) However, all construction at the Brookhaven Rail Terminal site has been halted as a result of the STB's cease and desist order. (Tr. 24-25.) US Rail did not seek authorization from the STB before commencing construction of the Brookhaven Rail Terminal on the belief that the facility is an exempt spur and therefore, no authorization from the STB is required. (Tr. 32.)

Hall testified that in preparation for the operation of the Brookhaven Rail Terminal, US Rail purchased two locomotives, at a cost of \$175,000 each, which are in Indiana, awaiting delivery to the Brookhaven Rail Terminal site. (Tr. 26-27.) In addition, US Rail has undertaken a sales and marketing effort, such as negotiating rates and destinations, with some of its other transloading customers. (Tr. 26.) However, US Rail has not entered into any contracts as of yet because it is unable to accurately determine when the Brookhaven Rail Terminal will be open.

may be designated as a private track. (Tr. 21.) Hall does not consider the Brookhaven Rail Terminal a line of railroad because it does not connect with any other rail line but instead is both the origin and destination at that particular point. (Tr. 22.)

¹¹ Hall testified that US Rail is the only entity responsible for construction of the Brookhaven Rail Terminal and that Suffolk & Southern is not, nor has it ever, undertaken any construction activities on the property. (Tr. 38.) Nor is Sills Road in any way constructing or operating the Brookhaven Rail Terminal. (Tr. 63.)

¹² As part of its agreement with US Rail, Adjo is permitted to sell the material it excavates from the Brookhaven Rail Terminal site as compensation for the excavation. (Tr. 43-44; Pl. Ex. 8.)

(Tr. 26.) US Rail has also purchased computers and an officer trailer that is currently on-site at the Brookhaven Rail Terminal and has ordered steel rail track, cross-ties, and some ballasts to be used in the construction of the facility. (Tr. 27-28.)

Between October 12 and 16, 2007, each of the plaintiffs, with the exception of US Rail, were issued Appearance Tickets by an inspector for the Town Attorney's office, Brian Tohill, which are virtually identical except for the party named. (Tr. 65-67.) The Appearance Tickets were issued subsequent to the STB's October 12, 2007 cease and desist order. (Tr. 66.) Drumm testified that although the Town was not formally participating as an intervenor in the STB proceeding at the time it issued the Appearance Tickets, it was aware of the proceedings that were occurring. (Tr. 66-67.) Almost all of the Appearance Tickets pertain to the violation of zoning ordinances. (Tr. 67.) Plaintiffs risk potential criminal prosecutions as well as fines as a result of the Appearance Tickets that have been issued. (Tr. 69.)

Both Hall and Drumm testified that nothing in the Appearance Tickets issued by the Town directed US Rail to cease construction of the Brookhaven Rail Terminal; nor did the issuance of the Appearance Tickets cause US Rail to cease its construction. (Tr. 40-41, 73-74.) Rather, the STB's cease and desist order, as well as tickets issued by the New York State Department of Environmental Conservation (the "DEC") for sand mining violations at the Brookhaven Rail Terminal site are what prompted the cessation of construction.¹³ (Tr. 24-25, 41-42, 74.)

¹³ The DEC tickets for sand mining violations are not included in the plaintiffs' request for injunctive relief.

B. Defendant's Testimony

Brian Tohill, an investigator for the Town, was the defendant's only witness. (Tr. 94.) Tohill testified that he has been employed as an investigator for the Town for eleven years. (Tr. 94.) As such, Tohill works in the Town Attorney's office, responding to complaints received by the Town Attorney, which typically pertain to violations of the Town Code. (Tr. 94-95.)

Tohill testified that, at the direction of the Town Attorney, he conducted an investigation of the Brookhaven Rail Terminal site in October 2007 and took photographs of the site in connection with his investigation. (Tr. 95-96, 102; Def. Ex. A.) No other investigation of the Brookhaven Rail Terminal site was conducted by the Town prior to Tohill's investigation. (Tr. 102.)

In connection with his investigation, Tohill determined that upwards of 18 acres of the Brookhaven Rail Terminal site had been cleared and that there were several large holes on the site indicating that material had been removed from the site. (Tr. 96.) Tohill testified that he was unable to make a clear determination as to how much material was actually removed. (Tr. 96.) As a result of this investigation, Tohill issued Appearance Tickets to the plaintiffs.¹⁴ (Tr. 96.) Tohill testified that he did not issue tickets to US Rail, even though he knew that they were affiliated with the Brookhaven Rail Terminal site, because he could not find any corporate record or corporate information pertaining to US Rail within New York State. (Tr. 97.) As a

¹⁴ Tohill testified that the DEC also issued tickets with respect to the Brookhaven Rail Terminal site, which were for illegal mining activity on the site. (Tr. 96-97.) Tohill does not know the status of the DEC tickets. (Tr. 97.)

result, Tohill could not "reach" US Rail for purposes of service of the Appearance Tickets.¹⁵ (Tr. 97-98.)

Tohill testified that the Appearance Tickets issued to plaintiffs are for violations of the Town Code. (Tr. 106.) In terms of the category of offenses, the violations for which plaintiffs were issued Appearance Tickets "fall under civil or less than criminal in nature," although some are misdemeanor violations. (Tr. 107-08.) The Town does not seek the imposition of jail sentences with respect to these violations; however, if a state district court judge were to issue penalties for the violations, such penalties could include jail time as well as fines. (Tr. 109-10.)

CONCLUSIONS OF LAW

I. Federal Jurisdiction

The Town argues that the court should refrain from interfering with the pending state court proceeding based on principles of abstention. Abstention is a judicially created doctrine by which the court "is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an ongoing state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context." City Partners, Ltd. v. Jamaica Sav. Bank, 454 F. Supp. 1269, 1271 (E.D.N.Y. 1978) (citing Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 477 (1977)). Under the Younger abstention doctrine, derived from the Supreme Court's holding in Younger v. Harris, 401 U.S. 37 (1971), federal courts are generally required "to abstain from taking jurisdiction .

¹⁵ Tohill explained that typically, the Town can only "go to just one county over as far as service" when issuing summonses or tickets. (Tr. 98.)

over federal . . . claims that involve or call into question ongoing state proceedings.” Diamond “D” Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002) (citing Younger, 401 U.S. 43-44). The Younger abstention doctrine applies to pending state criminal actions; see, e.g., Citizens for a Better Environment, Inc. v. Nassau County, 488 F.2d 1353, 1358 (2d Cir. 1999), as well as state civil or administrative proceedings. See Washington v. County of Rockland, 373 F.3d 310, 318 (2d Cir. 2004) (“Younger abstention has also been extended beyond the ambit of state criminal prosecutions to state civil proceedings and administrative proceedings.”); Diamond “D”, 282 F.3d 191, 198 (2d Cir. 2002) (“Although the Younger abstention doctrine was born in the context of state criminal proceedings, it now applies with equal force to state administrative proceedings.”). Younger abstention is appropriate if: “(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal . . . claims.”

The first requirement is that there is a “parallel proceeding, pending at the time the federal court action was filed.” Int’l Fid. Ins. Co. v. City of New York, No. 00-693, 2003 WL 21142985, at *5 (E.D.N.Y. Apr. 24, 2003). Here, it is undisputed that there is a pending state court proceeding concerning the Appearance Tickets issued by the Town to plaintiffs. Accordingly, the first requirement for abstention is satisfied.

Regarding the second requirement, the Circuit has held that “it is axiomatic that a state’s interest in the administration of criminal justice within its borders is an important one.” Hansel v. Town Court, 56 F.3d 391, 393 (2d Cir. 1995) (citing Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982)); see also Davis v. Lansing, 851 F.2d 72, 76

(2d Cir. 1988) ("There is no question that [an] ongoing prosecution implicates important state interests."). Similarly, "the right of a municipality to regulate land use and enforce its regulations through criminal and civil enforcement actions implicates important state interests." Sendlewski v. Town of Southampton, 734 F. Supp. 586, 591 (E.D.N.Y. 1990). The testimony at the evidentiary hearing held before the undersigned established that at least some of the Appearance Tickets issued to plaintiffs are for misdemeanor offenses, which are unequivocally criminal. Moreover, to the extent that any of the Appearance Tickets issued pertain to civil enforcement violations, as noted above, Younger abstention is appropriate in such circumstances as well. Accordingly, the second requirement for abstention is also satisfied.

As for the third requirement, the Circuit has held that for Younger abstention purposes, it is enough that "a plaintiff is not barred on procedural or technical grounds from raising alleged . . . infirmities" in the state court action. Hansel, 56 F.3d at 394 (citations omitted). Although Younger abstention typically arises in actions involving constitutional claims, the Supreme Court has also found it applicable in cases where, as here, plaintiffs are challenging a state court action based on claims of federal preemption, provided the plaintiffs have an opportunity for judicial review of their preemption claims in the state court. See New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 365 (1989) (reasoning that preemption claims and constitutional claims should be treated identically because "[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action"); see also J.W. Seligman & Co., Inc. v. Spitzer, No. 05 Civ.

7781, 2007 U.S. Dist. LEXIS 71881, at *11-14 (S.D.N.Y. Sept. 26, 2007) (stating that the Supreme Court has held "that courts should apply Younger abstention principles even when a case asserts a 'substantial claim' that a state action is preempted by federal law"). Here, plaintiffs can certainly defend against and challenge the Appearance Tickets issued to them in the state court action on the grounds asserted herein - that, under ICCTA, the Town is preempted from enforcing its local regulations. "Where the federal plaintiff has 'an opportunity to raise' its [federal] claims in a 'competent state tribunal,' abstention is appropriate." J.W. Seligman, 2007 U.S. Dist. LEXIS 71881, at *18 (quoting Middlesex County Ethics Comm. v. Garden State Bar Assn'n, 457 U.S. 423, 437 (1982)) (rejecting plaintiffs' claim that Younger abstention is inapplicable to claims of federal preemption and granting motion to dismiss).

Notwithstanding the foregoing, a federal court may still exercise its jurisdiction and enjoin a state proceeding when abstention would lead to "great and immediate irreparable harm . . . when a state court is engaging in flagrantly unconstitutional acts, or statutes are being enforced in bad faith." Hansel, 56 F.3d at 393 (citing Williams v. Lambert, 46 F.3d 1275, 1282 (2d Cir. 1995)). The party seeking to invoke federal jurisdiction bears the burden of establishing that an exception to abstention applies. See Diamond "D" Constr. Corp., 282 F.3d at 198 (citing Kirshner v. Klemons, 225 F.3d 227, 235-36 (2d Cir. 2000)). Here, plaintiffs attempted to establish that certain Appearance Tickets issued to a related entity, Empire Asphalt¹⁶ ("Empire") - who is not a party to this action - were part of a scheme by the Town to enact retribution or punishment against plaintiffs for their activities at the Brookhaven Rail Terminal site. Plaintiffs

¹⁶ Drumm testified that Empire is an asphalt company that is owned by several of the partners of Silis Road. (Tr. 75.)

failed to make such a showing.

As the Town's investigator, Tohill, testified, he was the individual responsible for issuing the Appearance Tickets to Empire and, at the time he did so, was unaware of any connection between Empire and the plaintiffs. (Tr. 98-99.) Tohill further testified that the Appearance Tickets issued to Empire were not in reprisal for the plaintiffs' activities at the Brookhaven Rail Terminal site, but rather, were issued as a result of complaints of a separate incident received from a resident who lives in the vicinity of Empire's facility on or about September 28, 2007,¹⁷ (Tr. 98-101, 105, Def. Ex. C.) Moreover, the testimony elicited at the evidentiary hearing established that Empire is located approximately twenty (20) miles away from the Brookhaven Rail Terminal site. (Tr. 106:) Based on the testimony and evidence submitted, I find that the Appearance Tickets Empire received were not issued in bad faith or to purposely harass plaintiffs as part of a conspiracy, as claimed. As such, plaintiffs have failed to meet their burden of establishing that an exception to Younger abstention exists here.

Plaintiffs herein request an injunction enjoining the Town from taking actions aimed at enforcing its local regulations, including prosecuting the Appearance Tickets issued to plaintiffs. Such relief is unquestionably sought in an attempt "to derail the state proceedings" currently pending. Sendlewski, 734 F. Supp. at 590. Were the court to grant plaintiffs' requested relief, "the result would be 'interference' with the state court proceedings - an underlying concern of

¹⁷ Tohill testified that the resident informed the Town Attorney's office that she had a complaint against Empire on September 28, 2007 but did not actually fill out the complaint form until October 5, 2007, which she then mailed to the Town Attorney's office. (Tr. 101.) The complainant also wrote a letter complaining about Empire to her town councilman on August 30, 2007 (Tr. 101:) Tohill testified that he used all of this information when investigating and issuing Appearance Tickets to Empire. (Tr. 101.)

Younger abstention." Id. (citing Davis, 851 F.2d at 77). More specifically, in order to afford the relief sought by plaintiffs, the entire state court proceeding would have to be enjoined. This is exactly what Younger abstention seeks to prevent. See Bryant v. Comm'r of Soc. Servs., 530 F. Supp. 1175, 1182 (S.D.N.Y. 1982) (stating that "the sine qua non of abstention under Younger v. Harris is the possibility that a finding for the plaintiff would involve *enjoining* a state proceeding") (emphasis in original). Accordingly, the court should abstain from interfering with the state court action currently pending and the plaintiffs' request for preliminary injunctive relief should be denied.

II. Legal Standard for a Preliminary Injunction

Even assuming arguendo that Younger abstention is not appropriate here, plaintiffs' application for a preliminary injunction would still fail. The purpose of a preliminary injunction is to prevent legal harm and preserve the status quo until final determination of the action. See Warner Vision Entm't v. Empire of Carolina, Inc., 101 F.3d 259, 261-62 (2d Cir. 1996). Generally, in order to prevail on a motion for preliminary injunctive relief, the movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Forest City Daly Housing, Inc. v. Town of N. Hempstead, 175 F.3d 144, 149 (2d Cir. 1999); Jackson Dairy Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). However, "where a preliminary injunction is sought against government action taken in the public interests pursuant to a statutory or regulatory scheme, the less-demanding 'fair ground for litigation'

standard is inapplicable, and therefore a 'likelihood of success' must be shown." Forest City Daly Housing, 175 F.3d at 149 (citing Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996)); see also No-Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001). The movant must carry the burden of persuasion by a clear showing, and the harm must be imminent or certain, not merely speculative. See Tom Doherty Assoc., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 37 (1995). Moreover, it has long been held that "[w]here there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." Id. (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992)); see also Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001).

A. Likelihood of Success on the Merits

In order to prevail on their application for a preliminary injunction, plaintiffs must establish that they are likely to succeed on the merits of their underlying claim - that, pursuant to ICCTA, the Town is preempted from enforcing its local regulations. Plaintiffs have failed to meet this burden.

State law is preempted by federal law when:

- (1) the preemptive intent is 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose';
- (2) state law 'actually conflicts with federal law'; or (3) 'federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.'

Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 641 (2d Cir. 2005) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)) (additional quotations and internal quotation marks omitted) (alteration in original). "The 'ultimate touch-stone' of preemption analysis is

congressional intent.” Green Mountain, 404 F.3d at 641 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996)).

Where Congress has enacted an express preemption provision, the scope of the preemption is determined by the language of the preemption provision and the surrounding statutory framework. See Medtronic, 518 U.S. at 486. The statute at issue here, the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10101, *et seq.*, was enacted by Congress in 1995 and states that the remedies provided by the ICCTA “with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10101. Further, the legislative history indicates that the principal purpose of the ICCTA was to eliminate the remaining areas where states retained regulatory authority over railroad facilities and operations.¹⁸ See H.R. 104-311, 104th Cong., 1st Sess. 82-83 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08.

In general, courts have consistently held that the ICCTA preempts state and local regulations. See, e.g., R.R. Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 562-63 (6th Cir. 2002); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001); City of Auburn v. United

¹⁸ Specifically, the legislative history states as follows:

This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads . . . The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.

H.R. 104-311, 104th Cong., 1st Sess. 82-83 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08.

States, 154 F.3d 1025, 1030 (9th Cir. 1998); Dakota, Minnesota, & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002), aff'd in part & rev'd in part on other grounds, 362 F.3d 512 (8th Cir. 2004). But see Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1330-1332 (11th Cir. 2001) (holding that the ICCTA did not preempt a municipal zoning regulation).

In Green Mountain Railroad Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005), the Second Circuit stated as follows: “[T]he plain language of Section 10501 [of the ICCTA] reflects clear congressional intent to preempt state and local regulation of integral rail facilities.” Id. at 645. However, the Second Circuit also noted that “not all state and local regulations are preempted [by the [ICCTA]]; local bodies retain certain police powers which protect public health and safety.” Id. at 643 (quoting Green Mountain R.R. Corp. v. Vermont, No. 01-CV-181, 2003 U.S. Dist. LEXIS 23774, at *13 (D. Vt. Dec. 15, 2003)) (first alteration in original). According to the circuit court, “states and towns may exercise traditional police powers over the development of railroad property,” but only to the extent that such regulations “protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and be approved (or rejected) without the exercise of discretion on subjective questions.” Green Mountain, 404 F.3d at 643. The Circuit noted that “[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.”¹⁹ Id. (citation omitted).

¹⁹ The Circuit further stated that it “need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued” Green Mountain, 404

Here, plaintiffs assert that they are likely to succeed on the merits of their claim: that the Brookhaven Rail Terminal is an ancillary spur, over which the STB has jurisdiction; that neither STB or Town authorization is required for construction; and that the Town will be preempted from enforcing its local regulations. Plaintiffs further assert that the STB has already made a clear assertion of jurisdiction over the Brookhaven Rail Terminal in its October 12, 2007 decision. The Town disputes plaintiffs' characterization of the STB's October 12, 2007 decision and argues that the Brookhaven Rail Terminal will be found to be either a line of railroad, over which the STB has jurisdiction and its authorization for construction is required, or "private track," over which the STB has no jurisdiction whatsoever and, to which, state and local regulations are fully applicable.

A review of the November 16, 2007 decision of the STB indicates that the STB appears to have already rejected plaintiffs' argument that the Brookhaven Rail Terminal is an ancillary spur. As the STB stated in its decision, which rejected plaintiffs' petition for a stay of the October 12, 2007 cease and desist order, plaintiffs "have not shown that there is a strong likelihood that they will be successful in their petition for reconsideration of the Cease and Desist Order" on the grounds that the proposed use of the Brookhaven Rail Terminal qualifies as an ancillary spur. (Suffolk & S. R.R. LLC, 2007 WL 3437681, at *3.) The STB further stated as follows:

The key test to determine whether construction and use of a track

F.3d at 643. This is a crucial distinction from the within action where, as discussed infra at Section II(B), nothing in the Appearance Tickets issued by the Town directed the plaintiffs to cease construction. Accordingly, based on the reasoning of the Green Mountain case, it appears that the issue of preemption here may not be as clear as plaintiffs would like to persuade the court to find.

requires [STB] approval (and an environmental review under NEPA) is whether the 'purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory' not served by the carrier or already served by another carrier. Texas & Pac. Ry. v. Gulf Etc. Ry., 270 U.S. 266, 278 (1925). The track cannot reasonably be viewed as used for a purpose ancillary to the service that US Rail is already authorized to provide, as the proposed construction and operations will be located hundreds of miles from US Rail's existing operations in Ohio.

(Id.) Accordingly, it appears that plaintiffs will not prevail on the merits of their underlying claim that the Brookhaven Rail Terminal is an ancillary spur.

If the Brookhaven Rail Terminal is not found to constitute a spur, which, as stated above, seems likely, it will be deemed either a line of railroad, which is part of the national rail system and requires STB approval for construction and operation, or "private" track, which is not part of the national transportation system and is not subject to the STB's jurisdiction. (Id. at *1 n.1.) Plaintiffs argue that the STB has clearly asserted its jurisdiction over the Brookhaven Rail Terminal by its October 12, 2007 decision, implying that the facility will be considered a line of railroad as opposed to private track. However, a review of the October 12, 2007 decision demonstrates that the STB made no such assertion. Rather, the STB stated that if any of the plaintiffs, or any related entities, are undertaking any construction at the Brookhaven Rail Terminal site, or anywhere in that vicinity, they are directed to immediately cease and desist such activity and "to either obtain [STB] authorization pursuant to 49 U.S.C. 10901(a) or a [STB] decision . . . finding that such activity does not require [STB] approval." (Suffolk & S. R.R. LLC, 2007 WL 2973596, at *2.) One such exemption from STB authority and approval would be if the Brookhaven Rail Terminal is delineated as "private" track. If the STB makes such a finding, the Town would not be preempted in any way from enforcing all of its local

regulations. Moreover, even if the Brookhaven Rail Terminal is found to constitute a line of railroad, while the Town would be preempted from enforcing many of its local regulations, it would, as stated supra, still retain the authority to enforce its traditional police powers.

Based on the foregoing, I find that plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their underlying claim. Accordingly, plaintiffs cannot meet the standard necessary for the issuance of a preliminary injunction.

B. Irreparable Harm

Plaintiffs, similarly, cannot establish that, in the absence of a preliminary injunction, they will suffer irreparable harm. Plaintiffs assert that they will suffer irreparable harm without a preliminary injunction in three ways: (1) by being denied the right to construct the Brookhaven Rail Terminal, and accordingly, participate in interstate commerce; (2) the potential of being punished through jail sentences or monetary fines; and (3) that the money US Rail has expended in preparation for the Brookhaven Rail Terminal, such as purchasing locomotives and rail track, will have been for nothing if the Town is allowed to enforce the Appearance Tickets issued to plaintiffs. I find plaintiffs' assertions meritless.

As a threshold matter, it is black letter law that "irreparable injury means injury for which a monetary award cannot be adequate compensation." Jackson Dairy, 596 F.2d at 72. Accordingly, where damages are clearly "economic" in nature, they "do not justify injunctive relief." Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate, 690 F. Supp. 1192, 1999 (E.D.N.Y. 1988). If plaintiffs are foreclosed from constructing the Brookhaven Rail Terminal, the purchases of locomotives and rail track will constitute purely economic damages, for which plaintiffs may be compensated monetarily, should they choose to pursue an action.

Accordingly, the money expended by US Rail in preparation for the construction and operation of the Brookhaven Rail Terminal cannot constitute irreparable harm for purposes of a preliminary injunction application.

As to the potential jail sentences and fines that may accompany the Appearance Tickets, the mere fact that plaintiffs may be subject to criminal prosecution does not establish irreparable harm. See Feerick v. Sudolnik, 816 F. Supp. 879, 884 (S.D.N.Y. 1993) (noting that "the cost, anxiety, and inconvenience of having to defend against a . . . criminal prosecution" does not constitute irreparable injury). Moreover, plaintiffs will have the opportunity to defend against the Appearance Tickets in the state court proceeding and the additional opportunity to appeal any decision rendered against them. "The fact that Plaintiff[s] ha[ve] the opportunity for redress . . . in state court . . . necessarily defeats Plaintiff[s'] claim that [they] face[] irreparable harm absent a preliminary injunction." Hart v. Felder, No. 07-CV-5045, 2007 U.S. Dist. LEXIS 89915, at *5-6 (E.D.N.Y. Dec. 6, 2007)

With respect to plaintiffs' claim that it will suffer irreparable harm by being denied the right to engage in interstate commerce if the Town is not enjoined from issuing and enforcing the Appearance Tickets, this argument fails as well. Plaintiffs appear to argue that the Town is in some way preventing them from engaging in construction activities on the Brookhaven Rail Terminal site and that the Appearance Tickets were issued by the Town in an effort to halt construction of the Brookhaven Rail Terminal. However, such an assertion is clearly belied by the testimony and documentary evidence introduced at the evidentiary hearing. The testimony elicited from plaintiffs' own witnesses at the evidentiary hearing clearly established that nothing in the Appearance Tickets instructed the plaintiffs to cease their construction activities. (Tr. 40-

41, 73-74.) Rather, plaintiffs were directed to cease and desist from performing any further construction by the STB's October 12, 2007 decision, which still remains in effect. (Suffolk & S. R.R. LLC, 2007 WL 2973596, at *2 (issuing cease and desist order); Suffolk & S. R.R. LLC, 2007 WL 446696, at *5 (denying petition for reconsideration of the October 12, 2007 cease and desist order and stating that "the Cease and Desist Order will remain in effect"); Tr. 24-25, 41-42, 74.) Moreover, plaintiffs' own witnesses, Hall and Drumm, testified that the DEC tickets for illegal sand mining, which are not part of this action, further caused the cessation of construction at the site. (Tr. 24-25, 41-42, 74.) Accordingly, the relief that plaintiffs seek, even if granted, will not permit plaintiffs to resume construction of the Brookhaven Rail Terminal. A decision by the STB lifting the October 12, 2007 cease and desist order will apparently achieve the result plaintiffs seek here, coupled with a favorable resolution of the outstanding DEC violations.

Based on the foregoing, I find that plaintiffs have failed to establish that, in the absence of a preliminary injunction enjoining the Town from enforcing the Appearance Tickets, or taking any further action with respect to the Brookhaven Rail Terminal site, including issuing new Appearance Tickets, they will suffer irreparable harm

RECOMMENDATION

For the foregoing reasons, I recommend that plaintiffs' motion for a preliminary injunction be denied.

OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a copy to the undersigned within ten (10) days of the date of this report. Failure to file objections within ten (10) days will preclude further appellate review of the District Court's order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), and 72(b); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822 (1994); Frank v. Johnson, 968 F.2d 298 (2d Cir. 1992), cert. denied, 506 U.S. 1038 (1992); Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

SO ORDERED.

Dated: Central Islip, New York
July 18, 2008

/s/ E. Thomas Boyle
HON. E. THOMAS BOYLE
United States Magistrate Judge

EXHIBIT 5

RAILROAD OPERATING AGREEMENT AND PROPERTY LEASE

THIS AGREEMENT is made by and between: Sils Road Realty LLC, a New York limited liability company, whose address is 435 Underhill Boulevard, Syosset, New York, hereinafter "LESSOR" and by U S RAIL Corporation, whose address is 7846 W. Central Avenue, Toledo, Ohio 43617, hereinafter "LESSEE", and collectively the "PARTIES"

THE PARTIES AGREE AS FOLLOWS:

1. LEASED ASSETS.

Lessor hereby leases to Lessee, upon the terms and conditions of this Agreement, the real property right of way more fully described on the attached Exhibit # 1, (the "Leased Assets") for the purpose of operating a common carrier railroad and transload facility, including but not limited to the following assets:

- (a) All tracks, switches and connecting track, related or connected property, or any other property associated or connected with the running, operating or servicing of customers of the Lessee, and all road ways or other property used, connected or related to the operation of the railroad, including all buildings described on Exhibit #1 to be built by the Lessee and constructed to the design and satisfaction of Lessor;
- (b) All transferable governmental permits, consents, approvals and licenses owned or used by Lessor in connection with the Leased Assets;

- (c) All rights, benefits and privileges of the Lessor in connection with the Leased Assets in its capacity as grantor, licensors, lessor or franchiser, or in any similar capacity, arising out of or under any contract, easement, franchise, right-of-way, license or lease, if any, relating to the Leased Assets;
- (d) All leases, easements, licenses, rights-of-way or other interests in real property owned, leased, used, held for use or otherwise held by the Lessor in connection with the operation, use or enjoyment of the Leased Assets, if any, and
- (e) All utility service contracts in connection with the operation, use or enjoyment of the Leased Assets (including, without limitation, public and private grade crossing agreements, and pipeline, wireline, fiber optic and other utility service agreements) if any.

2. LESSEE'S RIGHTS.

- (a) Effective on the date of execution of this Agreement, Lessee will have all rights, free from restrictions, interference or hindrance from the Lessor, its agents, affiliates, employees, or any entity connected to any of them, to:
 - (i) To fully and completely use all Leased Assets for any lawful purpose;
 - (ii) To operate the Leased Assets as a common carrier railroad or other legitimate business connected with the operation of a common carrier railroad.

- (iii) to receive and demand payment for rail services from customers; and
 - (iv) To receive and demand payments for equipment leases, rentals or repair services.
- (b) At any time during the term of the Lease, Lessee may enter into an agreement with an affiliated business entity that will handle the actual day-to-day operation of the Leased Assets as a common carrier railroad, provided however, that Lessee shall remain primarily liable for the performance of such day-to-day operations in accordance with this Lease.

3. TERM AND RENTAL PAYMENTS.

- (a) **Term:** Subject to Section 3(c) of the Lease, the term of this Agreement shall be thirty (30) years, beginning July 1, 2007. Thereafter, this Lease will automatically renew for additional periods of ten (10) years each unless Lessee gives written notice of its intention to terminate the Lease to the Lessor at least one (1) year prior to the expiration of the Lease.
- (b) **Base Rent:** Lessee will pay annual rent in the amount of one thousand dollars (\$1,000) per year during the term of this Lease, including any renewal periods.
- (c) **Early Termination:** Lessor may terminate this Lease at any time upon ninety (90) days prior written notice to the Lessee. In the event of such termination, Lessor shall pay promptly upon receipt of Lessee's invoices hereto, all of Lessee's reasonable costs of termination, including costs of moving Lessee's equipment from the premises.

4. INDUCEMENT TO LESSEE.

In order to induce Lessee to enter in to this Lease, Lessor agrees to pay Lessee upon execution of this Lease, the sum of Ten Thousand Dollars (\$10,000.00). Lessee agrees that it will treat this payment by Lessor for services provided by Lessee to Lessor and credited to Lessor for engineering and construction services provide in connection with the construction of the track on the Leased Assets.

5. OWNERSHIP AND USE.

- (a) The Leased Assets shall be the exclusive property of Lessor, except for Lessee's rights to use them in normal business operations under this Lease.
- (b) Lessee shall keep all Leased Assets at all times free and clear from all liens and encumbrances, unless agreed to by Lessor. Lessee shall give Lessor immediate notice of any such attachment or other judicial process affecting any of the Leased Assets.
- (c) Lessee shall use the Leased Assets in a careful and proper manner and shall comply with all federal laws regarding railroads and all other applicable laws. Lessee shall not make any alterations to the Leased Assets that shall decrease the value of said Leased Assets without Lessor's prior written consent.
- (d) Lessee may not sublease any of the Leased Assets without Lessor's prior written consent.
- (e) Notwithstanding anything to the contrary set forth in this Lease, Lessee's use and occupation of the Leased Assets shall be solely for the purpose, and only to the extent necessary, to provide for the movement of freight and

the loading and unloading thereof, as required or requested by the Lessor or a customer situated on the premises and to fulfill its obligations under Section 11(a) hereof. Lessor retains all rights to otherwise use and occupy the Leased Assets for its purposes. Lessor and Lessee agree to execute and deliver such modifications to this Lease or such other instruments, as may be necessary or desirable to evidence and implement their respective rights hereunder to use and occupy the Leased Assets.

6. NOTICES.

Lessee, at its own cost and expense, will be responsible for preparing and filing all notices, if any, with respect to this lease that are required by the United States Surface Transportation Board, the Federal Railroad Administration, and any other federal government agency or administrative body having jurisdiction over the operation of the Leased Assets by Lessee or its assignee.

7. REPAIRS AND REPLACEMENTS.

Lessee shall keep the Leased Assets in good condition and, at Lessee's own cost and expense, make all repairs and replacements where necessary. All such replacements shall immediately become the property of Lessor.

8. INSURANCE.

Lessee, at Lessee's own cost and expense, shall insure the Leased Assets against casualty, fire, and vandalism in the amount of \$2 million, and obtain public liability insurance with minimum limits of \$1 million per person / \$5 million per incident.

for bodily injury and \$1 million for property damage, all in the form and with the insurance companies that shall be satisfactory to Lessor. All insurance policies shall name both Lessee and Lessor as insured, and copies of the policies and the receipts for the payment of premiums shall be furnished to Lessor. Each liability policy shall provide that all losses be paid on behalf of Lessee and Lessor as their respective interests appear. Each insurance company shall agree that it will give Lessor 30 day's prior written notice of any alteration or cancellation of any policy.

9. **TAXES.**

Lessor shall pay when due all taxes imposed with respect to the Leased Assets during the term of the Lease, other than Lessee's income taxes.

10. **INDEMNITY.**

Lessee assumes liability for and shall indemnify Lessor from all losses, damages, claims, suits, costs, expenses and disbursements, including legal expenses, incurred by Lessor in any way relating to the use of the Leased Assets. The indemnities contained in this section shall continue even after the termination of this Lease if arising with respect to occurrences during the term of this Lease.

11. **INSPECTION.**

Agents of or the Lessor may at reasonable times enter Lessee's premises to inspect the Leased Assets and the manner in which the Leased Assets are being used.

12. **REPRESENTATIONS AND WARRANTIES OF LESSOR.**

Lessor represents and warrants the following to be true:

- (a) Status of Lessor. Lessor is a New York limited liability company, duly organized, validly existing, and in good standing under the laws of that State, and Lessor is properly authorized, according to its Operating Agreement, and duly adopted Resolutions, to enter into and carry out the transactions contemplated by this Lease.
- (b) Authority. When executed, this Lease will be a legal, valid, and binding obligation of Lessor.
- (c) Absence of Undisclosed Liabilities. Lessor does not now or have reasonable grounds to know of any basis for the assertion against Lessor, of any claim that, if presented, would impair Lessor's ability to enter into this Lease, or impair Lessee's ability to use the Leased Assets to operate a railroad.
- (d) Title to Properties. Lessor has good and marketable title to all of the Leased Assets, subject to no mortgage, pledge, lien, encumbrance, security interest, or charge, other than the encumbrances set forth in Exhibit 2 to this Lease. Further, except as set forth in this Lease, there are no imperfections of title that would affect the marketability of title of Lessor's assets, or the ability of Lessor to lease the Leased Assets to Lessee.
- (e) Status of Contracts. Lessor has, to the best of its knowledge, complied with all of the provisions of contracts described in this Lease, if any, and of all other contracts and commitments to which Lessor is a party, to the extent non-compliance would materially and adversely affect Lessor's performance of this Lease.

(f) Taxes. All personal property taxes and other taxes of any nature assessed against Lessor and/or the Leased Assets are fully paid by Lessor when due through the date of execution of this Lease.

(g) No Tax Disputes. Lessor is not involved in any dispute with any tax authority on the amount of taxes due nor has it received any notice of any deficiency, audit, or other indication of deficiency from any tax authority not disclosed to the Lessee to this Lease, other than as set forth in Exhibit #2 to this Lease.

(h) Litigation or Insolvency Proceedings.

(i) Litigation. There are no actions, suits, claims, investigations, or legal, administrative, or arbitration proceedings pending or, to the best of Lessor's knowledge, threatened or likely to be asserted or brought against Lessor or relating to the Leased Assets of this Lease before any court, governmental agency, or other body, including any quasi-judicial or administrative forum, and no judgment, order, writ, injunction, decree, or other similar command of any court, governmental agency, or body has been entered against or served upon Lessor which, in the aggregate, would materially and adversely affect Lessor's performance of this Lease.

(ii) Insolvency Proceedings. Lessor is not involved in any proceeding by or against it in any court under the Bankruptcy Code or any other insolvency or debtors' relief act, whether state or federal, or for the appointment of a trustee, receiver, liquidator, assignee, or other similar official of Lessor or its property.

(k) Labor Relations—Employees.

(i) Collective Bargaining Agreements: There are no collective bargaining agreements currently in effect between Lessor and labor unions or organizations representing any of Lessor's employees, and there does not now exist and there has been no formal or informal request to Lessor for collective bargaining or for an employee election from any union or from the National Labor Relations Board (the "NLRB").

(ii) Employment Regulations Compliance: Lessor is in material compliance with all applicable federal, state, and local laws and regulations, respecting employment and employment practices, terms, and conditions of employment and wages and hours, and further, (a) there are no unfair labor practice complaints against Lessor pending before the NLRB and no such complaints have been threatened; (b) there is no labor strike, dispute, slowdown, or stoppage actually in progress or threatened against Seller; (c) no grievance or arbitration proceedings are pending and no such claim has been asserted; and (d) Lessee will not incur any liability or obligation of any kind arising out of Lessor's employment or termination of Lessor's employees nor for any other claim by any of Lessor's employees arising out of any employment relationship with Lessor.

(iii) Exclusion of Employee Benefits: Lessor acknowledges:

Lessee does not assume any employee benefits of Lessor whatsoever; and (b) Lessee shall have no obligation to provide employee benefits other than such benefits as Lessee shall agree to provide to its employees in the exercise of Lessee's sole discretion.

(l) Environmental Matters. To the best of Lessor's knowledge there is no Hazardous Material in, on, or under any of the property of the Leased Assets. In addition, there are no presently pending or threatened administrative or enforcement actions, investigations, compliance orders, claims, demands, actions, or litigation based on environmental laws or regulations or otherwise related to the presence of Hazardous Material, in, on, or under the Leased Assets. Lessor makes no other environmental representations or warranties, but Lessor acknowledges that neither Party is required to sign this Lease unless satisfied with the environmental reports or assessments conducted by or on behalf party in accordance with this Agreement. For purposes of this paragraph the term "Hazardous Material" shall mean any toxic or hazardous waste or substance (including without limitation asbestos and petroleum products) which is regulated by applicable local, state, or federal environmental laws or regulations.

(m) Condition of Leased Assets. Subject to Section 14(c) hereof, the following representations are made with respect to the Leased Assets:

- (i) There are not any known defects that have not been disclosed to Lessee.
- (ii) There are no known outstanding citations issued by any health, building, or other governmental agency, under the Occupational Safety and Health Act and/or under the Americans with Disabilities Act having jurisdiction over the operation of the Leased Assets and/or the Lessor, including any claims or any violation of any federal, state, or local environmental statutes, regulations, ordinances, or other environmental regulatory requirements.

- (n) **No Violation or Breach.** The performance of this Lease will not be in violation of any laws, statutes, local ordinances, state or federal regulations, court or administrative order, or ruling, nor is the performance of this Lease in violation of the conditions or restrictions in effect for financing pursuant to any loan documents, whether any such loan is secured or unsecured other than as set forth in Exhibit A to this Lease.
- (o) **Broker's or Finder's Fees.** No agent, broker, investment banker, person, or firm acting on behalf of Lessor or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with the Lease.
- (a) **Reliance.** Subject to Section 14(c) of this Lease, the foregoing representations and warranties are made by the Lessor with the knowledge and expectation that Lessee is placing complete reliance on them.

14. **REPRESENTATIONS AND WARRANTIES OF LESSEE**

Lessee represents and warrants the following to be true:

- (a) **Status of Purchaser.** Lessee is an Ohio corporation duly organized, validly existing, and in good standing under the laws of that State; and, further, is properly authorized according to its Articles or Bylaws and by a duly adopted Resolution, to enter into and carry out the transactions contemplated by this Lease.
- (b) **Authority.** This Lease when executed will be a legal, valid, and binding obligation of Lessee.

(c) Awareness of Lessee. Lessee acknowledges the following:

(i) Lessee has had an opportunity to examine the Leased Assets and agrees to accept the same "As Is," subject to the remaining conditions and other provisions of this Lease.

(ii) Lessee has, either individually or through its agents or employees, sufficient knowledge, expertise, and financial capacity, Lessee is capable of evaluating the merits and risks of leasing the Leased Assets pursuant to this Lease.

(d) Litigation. There are no actions, suits, or proceedings pending or, to Lessee's knowledge, threatened or likely to be asserted, against the Lessee, before any court, administrative agency, or other body that would impair Lessee's ability to enter into this Lease or to operate the Leased Assets as a railroad as contemplated, and no judgment, order, writ, injunction, decree, or other similar command of any court or governmental agency has been entered against or served upon Lessee relating to this Lease and/or the transactions contemplated by this Lease.

(e) Broker's or Finder's Fees. No agent, broker, investment banker, person, or firm acting on behalf of Lessee(s) or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with this Lease.

15. LIABILITY FOR DAMAGE.

Lessee shall be responsible for any damage to the Leased Assets during the term of this lease and shall pay to lessor the

value of as much of the Leased Assets as may be damaged or destroyed. On receipt of the payment, Lessor shall, to the extent of the amount paid, assign to Lessee any right Lessor may have with respect to the damaged or destroyed Leased Assets under any insurance.

16. BREACH.

Upon a failure to pay rent when due or upon a breach of any other condition of this Lease, or Lessee discontinues business, Lessor shall have the right to terminate this Lease, upon giving sixty (60) days advanced written notice, with respect to a breach other than the failure to pay rent when due to Lessee, specifying the breach on which such termination is based. Lessee shall have adequate time, but not less than 60 calendar days from the date of such notice to cure the breach specified by Lessor. In the event this Lease is terminated for failure to cure the breach, Lessor shall have the right to pursue any remedies available to Lessee as are permitted by law.

17. GENERAL.

- (a) Lessee may not assign or transfer (by operation of law or otherwise) any of its rights or obligations under this Lease, except to an affiliate of Lessee, or with the agreement of Lessor.
- (b) Lessor may not assign this Lease without Lessee's consent, other than to financial institutions that may, from time to time, provide financing to the Lessor, in connection with the Leased Assets.
- (c) This Lease contains the entire agreement between the Parties, cannot be modified except in writing and signed by Lessor and Lessee, and shall be binding upon the

parties and their legal representatives, heirs, successors, and assigns.

- (d) This Lease can be specifically enforced.
- (e) The interpretation and enforcement of this Lease shall be governed by New York law, and applicable federal law.
- (f) This Lease may be executed in counterparts, with each counterpart constituting one and the same instrument.

18. Agreement Not To Compete:

From the effective date of this Lease until two years following the termination hereof, Lessee will not, without the express written consent of Lessor, own, lease, operate or otherwise provide railroad operating services at any rail yard, side track, industrial side track or other railroad facility located within the County of Suffolk, New York. Lessee recognizes and acknowledges the competitive value of its agreement contained in this Section 18 and the damage that would result to Lessor from Lessee's breach thereof. Accordingly, Lessee agrees that money damages would not be a sufficient remedy for any such breach by it, and that, in addition to the rights and remedies otherwise available to Lessor, Lessor shall be entitled to equitable relief by way of specific performance, injunction or otherwise if Lessee breaches or threatens to breach any of its agreements contained in this Section 18. In the event of any legal proceedings to enforce or protect any rights under this Section 18, Lessor shall be entitled to recover its costs (including reasonable attorneys' fees) incurred in connection therewith. Lessee hereby submits to the jurisdiction of any federal or New York State court located in the City of New York, New York, in connection with any legal proceedings brought by Lessor to enforce its rights hereunder. Notwithstanding any other provision herein to the contrary, Lessee shall not be liable to punitive

consequential, special, indirect, exemplary or any other damages other than actual damages arising under or as a result of a breach of, its obligations under this Section 18.

This Lease is executed on the dates set forth below and the parties intend it to be effective as of the commencement of the lease term specified in §3(a).

[Signature Page Follows]

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES

Sills Road Realty, LLC, Lessor

By: *[Signature]*, Pres.

Date: 8/6/2013

U S RAIL Corporation, Lessee

By: _____

Date: _____

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES

Sills Road Realty, LLC, Lessor

By: _____

Date: _____

U S RAIL Corporation, Lessee

By: _____

J. Hall, President

Date: _____

EXHIBIT 1
Leased Assets

Property Name
Location

Vacant Land-Sills Road
S/W/C of Sills Road & Express Drive South,
Yaphank, New York

Assessor's Parcel Number

663-3-1, 27.001, 27.002, 27.003 & 27.004
704-2-2, 30, 31, 32, 33, 34, 35 & 36
704-4-F & Z
704-5-1 & Z

EXHIBIT 2
Qualifications to Lessee's Representations

Section 12 (d). Encumbrances on the Leased Assets. The Leased Assets are subject to a first mortgage lien, securing debt in the principal amount of \$5,300,000, in favor of Kennedy Funding Inc.

Section 12 (g). Tax disputes. Lessee has asserted a claim challenging the real property tax assessment on the Leased Assets.

Section 12 (n). Compliance with other agreements. Execution and delivery of the Agreement requires the consent of Kennedy Funding Inc.

EXHIBIT J

EXHIBIT 6

EXCAVATION AGREEMENT

AGREEMENT entered into as of the 7th day of August, 2007, among ADIO CONTRACTING CORP., a New York corporation, having its principal place of business at 207 Knickerbocker Avenue, Bohemia, New York 11716 (hereinafter referred to as "Contractor"), U S RAIL CORPORATION, an Ohio corporation, having its principal place of business at 7846 W. Central Avenue, Toledo, Ohio 43617 (hereinafter referred to as "U S Rail") and SILLS ROAD REALTY LLC, a New York limited liability company having its principal place of business at 485 Underhill Boulevard, Syosset, New York 11791 (hereinafter referred to as "Owner").

WHEREAS, Owner has acquired land in the Town of Brookhaven, Suffolk County, New York, described more fully in Exhibit A hereto (the "Subject Properties") and has leased the Subject Properties to U S Rail for the purpose of constructing and operating a rail terminal ("Rail Terminal") thereon but has retained all rights to any minerals which may be extracted from the Subject Properties;

WHEREAS, U S Rail has contracted with Contractor for the improvement of the Subject Properties and the installation of the Rail Terminal;

WHEREAS, in order to facilitate the improvement of the Subject Properties and the installation of the Rail Terminal, the parties desire to enter into an agreement under which Contractor will arrange for the excavation and site preparation of the Subject Properties;

NOW THEREFORE, for and in consideration of the mutual promises and benefits herein contained, the parties agree as set forth herein.

1. APPOINTMENT; EXCAVATION PLAN.

U S Rail agrees to retain Contractor, on the terms and conditions set forth in this Agreement, to excavate on, and under the Subject Properties and to remove all materials, and any products derived from such materials (collectively, "Bank Run"), from the Subject Properties. Contractor shall arrange for and conform its operations on the Subject Properties during the Term hereof and to perform its obligations hereunder in compliance with the excavation and site preparation plan in effect from time to time (the "Excavation Plan"). For all excavation and site preparation work hereunder, Contractor shall be entitled to recover, from the proceeds of the sale of Bank Run, the greater of (i) \$ 3,000,000 less ten percent (10%) thereof for overhead, ten percent (10%) thereof for profit and five percent (5%) thereof for management (collectively, the "25% Allowance") or (ii) all of Contractor's Costs, as hereinafter defined, plus the 25% Allowance; provided, however, that, with respect to Contractor's Costs that are attributable to the 25% Allowance shall be ten percent (10%).

2. CONTRACTOR'S EXCLUSIVE RIGHTS; U S RAIL'S RESERVED RIGHTS.

Contractor shall have the exclusive right to enter on the Subject Properties at any and all times during the term of this Agreement to remove Bank Run for Contractor's use in accordance herewith. U S Rail reserves to itself the right to go on and use the Subject Properties, for any purpose, without unreasonable interference with the operations of Contractor. However, neither U S Rail nor Owner shall remove Bank Run from the Subject Properties except for use in constructing the Rail Terminal. Owner shall not grant, lease, or license, any rights to remove Bank Run from the Subject Properties to any person other than Contractor.

3. TERM AND TERMINATION.

(a) Term. The term of this Agreement shall be deemed to have commenced as of the effective date of this Agreement as set forth in the first paragraph on the first page of this Agreement (the "Effective Date") and shall continue for a period of two (2) years from the Effective Date of this Agreement (the "Term"). This Agreement may be terminated prior to the end of the Term in accordance with the provisions of Sections 3(b) and 3(c).

(b) Termination by U S Rail or Owner. Either U S Rail or Owner may terminate this Agreement upon sixty (60) days notice to Contractor.

(c) Termination by Any Party. This Agreement may be terminated by any party upon or after the occurrence of any of the following events:

(i) failure by any other party to make any payment due hereunder within ten (10) days after receipt of written demand therefor;

(ii) breach by any other party of any of the other material terms or conditions of this Agreement which is not cured within ninety (90) days after receipt of written notification thereof, provided however that the ninety-day cure period shall be extended to account for any period during which cure is made impossible or impractical by seasonal or weather conditions;

(iii) depletion of Bank Run reserves on the Subject Properties;

(iv) entry of an "Order for Relief" naming any other party as a "Debtor" under Title 11 of the United States Code or upon the entry of a decree or order by a court having competent jurisdiction in respect to any petition filed or action respecting such party directly involved in a reorganization, arrangement, creditors composition, readjustment, liquidation, dissolution, bankruptcy or similar relief under any state, present or future statute, law or regulation, whether or not resulting in the appointment of a receiver, liquidator, assignee, trustee, custodian, or other similar official, and the continuation of any such decree or order is unstayed and in effect for a period of sixty (90) consecutive days; or

(v) making by any other party of an assignment for the benefit of creditors, or the admission by such party in writing of its inability to pay its debts generally as they become due, or the taking of action by such party in furtherance of any such action.

4. PRICING; PAYMENT; QUANTITIES.

(a) For all Bank Run, Contractor agrees to pay, or provide payment, to Owner (i) Six Million Dollars (\$6,000,000) (the "Base Payment") plus (ii) fifty percent (50%) of the excess (the "Excess Payment") if any, of all Revenues (as hereinafter defined) over Contractor's Expenses (as hereinafter defined). The Base Payment shall be paid in installments as set forth in Exhibit B hereto. The Excess Payment shall be paid within sixty (60) days following the end of the Term or earlier termination of this Agreement. Quantities of Bank Run extracted from the Subject Properties shall be determined using Owner's scales installed on the Subject Properties.

(b) For the purposes of this Agreement, (i) "Revenues" shall mean the gross revenues derived from the sale of Bank Run and all other gross revenues derived from the excavation and site preparation of the Subject Properties and (ii) "Contractor's Expenses" shall mean all documented costs of Contractor in performing its obligations under this Agreement ("Costs"), an allowance equal to twenty five percent (25%) of Costs and the Base Payment actually paid to Owner. Owner shall have the right from time to time to inspect Contractor's books and records to confirm any determination of Revenues or Contractor's Expenses.

(c) Owner agrees to allow Contractor to remove an indeterminate quantity of Bank Run from the Subject Properties, with no annual or cumulative maximum quantities, limited only by the requirements of the Excavation Plan and the depletion of Bank Run reserves on the Subject Properties.

5. OPERATIONS; ROADS; MACHINERY AND EQUIPMENT.

(a) Contractor agrees to perform all labor and provide all equipment necessary for the excavation, extraction, processing, loading, and hauling of Bank Run and to otherwise perform its obligations under this Agreement.

(b) Contractor and U S Rail will consult, confer, and cooperate in planning excavation of the Subject Properties and establishing stockpile or processing areas, and arranging brush and timber as needed for such purposes.

(c) In order to obtain access to the Subject Properties, and to carry on its operations, Contractor shall have the right to make use of and, if Contractor so desires, improve all roadways now existing on the Subject Properties, and shall have the right to build such additional roads as may be necessary for the excavation, processing, stockpiling and removal of Bank Run and to otherwise perform its obligations under this Agreement. In maintaining, improving, or building such roads, Contractor may use said gravel and fill from the Subject Properties. Contractor shall not be required to pay for such material as used. Any roads not in use by Contractor shall be left in a condition at least as good as existed before use by Contractor under this Agreement. Contractor shall consult and confer with US Rail as to the location, layout and standards of new roads that may be required, but U S Rail shall not unreasonably withhold approval of any such new road. Contractor and U S Rail shall negotiate in good faith to share the costs of construction and maintenance of any such roads that will be used to a significant extent by U S Rail, based on the relative use of such roads by Contractor and U S Rail. Contractor and U S Rail may construct and maintain other roads as either may require, at the cost of the party so requiring, provided that the other party shall be given keys thereto.

(d) Contractor shall have the right to place on the Subject Properties machinery, equipment, Bank Run processing equipment, tool sheds, and other structures required by it in connection with its operations, with the full right to remove all the machinery, equipment and structure within one hundred eighty (180) days after termination of this Agreement.

6. PERMITS; TAXES; INSURANCE

(a) U S Rail and Contractor shall cooperate, consult and confer to plan operations in accordance with existing permits and licenses and to obtain new permits and licenses as needed, and Owner, as property owner, shall provide any and all approvals and signatures that are necessary to maintain and/or obtain such permits and licenses.

(b) Contractor shall be responsible, on behalf of Owner, for payment of and filing all reports and returns for excavation or similar taxes relating to the Subject Properties. Owner shall be responsible for the payment of and filing all reports and returns for property taxes relating to the Subject Properties.

(c) Contractor shall be responsible for any taxes on any machinery, equipment, or structures that it owns.

(d) Contractor shall maintain in full force and effect at all times during the term of this Agreement insurance with reputable carriers insuring U S Rail, Owner and Contractor as their interests may appear against liability to third parties arising from Contractor's operations on the Subject Properties in accordance with industry standards for similar operations. Prior to entry on the Subject Properties, Contractor shall provide U S Rail and Owner with certificates evidencing the insurance required by this Section (d).

7. RECLAMATION

On conclusion of operations of any significant portion of the Subject Properties and on termination of this Agreement, Contractor shall perform at its cost any reclamation work required by the Excavation Plan by law or under the applicable permits, and remove Contractor's machinery, equipment, and structures.

8. COMPLIANCE WITH LAW

Each party agrees to comply with all applicable laws, statutes, ordinances, and governmental rules and regulations applicable to the subject matter of this Agreement. U S Rail and Owner shall have the right to inspect the Subject Properties, and to require Contractor to perform such tests as may be desired, to confirm Contractor's compliance with its obligations under this Section.

9. INDEMNITY

(a) Contractor will hold U S Rail and Owner harmless from all claims that may arise out of its operation of the Subject Properties and operations conducted thereon by it, its employees, agents, or contractors and shall indemnify and defend U S Rail and Owner against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Contractor or the negligence or willful misconduct of Contractor in the exercise of any of its rights pursuant to this Agreement, but only to the extent that U S Rail or Owner, as the case may be, is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(b) Owner and US Rail, severally and not jointly, will hold Contractor harmless from all claims that may arise out of Owner's or US Rail's ownership or use of the Subject Properties and shall indemnify and defend Contractor against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Owner or US Rail, as the case may be, or the negligence or willful misconduct of Owner or U S Rail, but only to the extent that Contractor is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(c) The obligations of the parties under this Section shall survive the expiration or termination of this Agreement.

10. FORCE MAJEURE

No party shall be liable for failure to perform any of its obligations under this Agreement, other than an obligation for the payment of money, during any period in which performance is prevented by any cause beyond such party's control, which causes are called "force majeure" below. For purposes of this Agreement, "force majeure" includes, but is not limited to, acts of God, fire, flood, undue shortage of energy or power, strikes, insurrection or mob violence, requirements or regulations of government with which a party cannot reasonably comply, and other causes of a similar nature that are beyond the control of a party. The party whose performance is prevented will notify the other parties of the nature of such commencement and cause of each period of force majeure and the time of removal of such cause.

11. INDEPENDENT CONTRACTORS

This Agreement shall not constitute or give rise to a partnership or joint venture between or among the parties. All activities by a party under the terms of this Agreement shall be carried on as independent contracting parties and not as an agent for or employee of any other party, and each party shall be solely responsible for the acts of its agents and employees. No party shall have any right, power, or authority to create any obligation, express or implied, on behalf of any other party.

12. NOTICES

All notices, reports, and consents required or permitted to be given under this Agreement shall be in writing and deemed given when hand delivered or by documented overnight delivery service, or sent by facsimile, telefax, or other electronic transmission service, provided a confirmation copy is also sent by first class mail, return receipt requested, to the party to whom the same is directed at its address as set forth in the first paragraph of this Agreement or to such other address as such party may designate by notice under this Section.

13. GENERAL

(a) **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to its principles of conflicts of laws.

(b) **Entire Agreement.** This Agreement, including all exhibits hereto, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior understandings, whether oral or in writing.

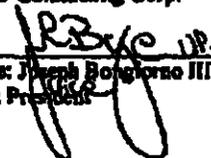
(c) Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable, shall not invalidate this Agreement, and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. To the extent such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

(d) Headings; Construction. Section headings contained in this Agreement are for convenience of reference only and shall not in any way affect the meaning or interpretation of this Agreement. The language used in this Agreement will be deemed the language chosen by the parties hereto to express their mutual intent and no rule of strict construction will be applied against any party.

(e) Counterparts. This Agreement may be executed simultaneously in one or more counterparts, including by means of telefaxed signature pages, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

THIS AGREEMENT has been executed by the duly authorized representative of the parties as of the date first hereinabove set forth.

ADJO Contracting Corp.

By: 
Name: Joseph Bongiorno III
Title: President

Sills Road Realty, LLC

By: 
Name: Andrew Kaufman
Title: President

U S Rail Corporation

By: _____
Name: Gabriel D. Hall
Title: President

(c) Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable shall not invalidate the Agreement; and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. If the court's such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

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THIS AGREEMENT has been executed by the duly authorized representative of the parties in accordance with the data first hereinabove set forth.

ADJO Contracting Corp.

By: _____
Name: Joseph Bongiorno III
Title: President

Sills Road Realty, LLC

By: _____
Name: Andrew Kaufman
Title: President

J S RM Corporation

By: _____
Name: Gabriel D. Hall
Title: President

Exhibit A
Description of Subject Properties

Property Name

Vacant Land-Sills Road

Location

**S/W/C of Sills Road & Express Drive South,
Yaphank, New York**

Assessor's Parcel Number

663-3-1, 27 001, 27 002, 27 003 & 27 004

704-2-2, 30, 31, 32, 33, 34, 35, & 36

704-4-1 & 2

704-5-1 & 2

**Exhibit B
Payment of Base Payments**

Base Payments shall be payable on the first day of the months and in the respective amounts set forth below:

September, 2007	\$250,000
October, 2007	\$350,000
November, 2007	\$350,000
December, 2007	\$200,000
January, 2008	\$200,000
February, 2008	\$200,000
March, 2008	\$200,000
April, 2008	\$350,000
For the 8 months thereafter	\$487,500 each month

EXHIBIT 7

4-JUN-01

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
207 Knickerbocker Avenue, Bohemia, NY 11716

RII (43) 589-0800
LAX (43) 589-0801

Don Quigley

proposal

Page 1 of 3

PROJECT NAME:

Brookhaven RR Link, Site Road, Platform

BID TO:

Site Road, Realty

ADDRESS

TOWN

STATE

ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

Brookhaven Rail Terminal
28 acre facility

We propose to perform the following scope of work at the above referenced project.

Site subgrading work for 1,097,712 square feet

\$500,000.00

Site Drainage

\$65,000

Subbase and Paving

\$600,000.00

	Quantity	Unit Price	Total
New Main Line Switch	1	\$ 800,000	\$ 800,000
Reconditioned Interior Switch	17	\$ 45,000	\$ 765,000
New Track ties and ballast	11,000	\$ 120	\$ 1,320,000
Misc. track equipment	1	\$ 100,000	\$ 100,000
Entrance and Bridge	1	\$ 500,000	\$ 500,000
Aggregates Unloading & Bunkers	1	\$ 350,000	\$ 350,000
Transfered Facility	1	\$ 1,000,000	\$ 1,000,000
General Conditions			\$250,000
GC Fee			\$400,000
Misc.			\$180,000

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in accordance with the above specifications, for the sum of

and payment to be made as follows:

All quantities are estimated to be as specified. All work to be completed in a workmanlike manner, according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the contract price. All payments contingent upon strikes, accidents or delays beyond our control. ADJO Contracting reserves the right to renegotiate contract price if strikes, accidents or delays are encountered. Owner to carry fire, theft and other necessary insurances. Our workers are fully covered by Workers's Compensation insurance.

Accepted Signature

ACCEPTANCE OF PROPOSAL

The above price, specifications and conditions are acceptable and are hereby accepted. You are authorized to do the work under the contract and to make an official check.

Accepted

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
 207 Krickerbocker Avenue, Bohemia, NY 11716

RU (631) 599-0800
TAX (631) 599-0804

Don Quigley

proposal		Page 2 of 3
PROJECT NAME: Brookhaven Rail Line, Still Road, Yaphank		
BID TO: Still Road Realty		
ADDRESS		
TOWN	STATE	ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

Site Lighting w/ 60 foot poles, concrete bases, high intensity fixtures

Site Utilities
 \$66,000.00

Prestressed Membrane Building with Concrete Foundation

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in accordance with the above specifications, for the sum of:
 and payment to be made as follows:

All work to be completed in accordance with the above specifications. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be executed by order of the owner, and will become an extra charge over and above the contract price. All payments contingent upon strikes, accidents or delays shall be as follows. ADJO Contracting reserves the right to renegotiate contract price if strikes, accidents or delays are encountered. Owner to carry fire, liability and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

(Contract Signature)

NOTE: This proposal may be withdrawn by us if not accepted within

ACCEPTANCE OF PROPOSAL

The above price, specifications and conditions are accepted and are hereby accepted. You are authorized to do the work and the contract will be made as outlined above.

ACCEPTED

 Signature

 Signature

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
 207 Knickerbocker Avenue, Bohemia, NY 11716

PA (609) 509-0800
 FAX (609) 509-0808

Don Quigley

Exclusion List		Page 3 of 3
PROJECT NAME: Brookhaven Rail Line, 6115 Road, Tappan		
BID TO: 6115 Road Realty		
ADDRESS		
TOWN	STATE	ZIP

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

EXCLUSION LIST:

- Engineering, line, grade, or stake out
- Bonds, fees, permits
- Saw cut, demolition & removal of concrete subroad, if any
- Soils engineer & testing
- Removal & dumping of buried debris, rubble, hazardous material, contaminated soil, buried fuel tanks
- Asbestos abatement
- Unsuitable excavation- below plan grade and control fill & backfill of the same
- Furnish and install bankrun, gravel and/or select backfill materials, collar material from on site only
- Rock excavation
- Erosion control-silt fence-hay bales
- dust control
- Frost excavation and backfill
- Mechanical trade excavation & backfill
- Curb excavations
- Removal of excess fill
- Off set, sheeting, shoring, bracing, and/or underpinning or excavation for same
- Utility interference/utility disconnects and/or damage to unmarked underground utilities
- Dewatering & pumping of any kind
- Winter Conditions
- Conflicts for minimum separation between sewer, water, or drainage
- Cast iron pipe
- Hand labor excavations
- Any Penetration of building, all piping terminates 5 feet outside of building
- Vents, traps, pits, cast iron/ductile pipe, dummy ring, add. depth for proper percolation as per county requirements
- Electrical disconnects or other Utility disconnects
- Select pipe type due to conflicts for minimum cover of water, sewer, or drainage
- Site to be plus or minus 6" to rough grade prior to the commencement of work
- Temporary fencing, barricades, lights, etc.
- RPZ freeze protection, insulation, heat tracing, electrical wiring, yearly RPZ Certifications
- Irrigation sprinkler systems and winterizing
- Micro biological testing and lab analysis of water systems
- Tap fees / Meter fees
- Water Meter or RPZ assembly
- Tree protection and restoration
- As Built on Millar, CAD or Microfilm, stamped by a LS/PE
- Restoration (curb, sidewalk, asphalt, landscape, sawcutting, fence, etc.)
- Master Mechanics, Teamster Stewards and/or Labor Stewards or charges related to same
- Any compaction around drywells other than water jetting, if required
- Removal of concrete paving
- Changes in time, labor, equipment due to a higher water table than indicated on the plans or test borings
- If item is not listed on proposal or excluded, then it is excluded

ACCEPTED

Signature

EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
SILLS ROAD REALTY, LLC,
US RAIL CORPORATION, et al.,

07-CV-4584 (TCP)

Plaintiff,

-against-

US Courthouse
Central Islip, NY

THE TOWN OF BROOKHAVEN,

Defendant. :

December 5, 2007
2:50 p.m.

----- X
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE E. THOMAS BOYLE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: FARRELL FRITZ PC,
1320 RexCorp Plaza
Uniondale, New York 11556-1320
BY: CHARLOTTE A. BIBLOW, ESQ.

For the Defendant: MARK A. CUTHBERTSON, ESQ.,
434 New York Avenue
Huntington, New York

Court Reporter: Dominick M. Tursi, CM, CSR
US District Courthouse
1180 Federal Plaza
Central Islip, New York 11722
(631) 712-6108 Fax: 712-6124
DomTursi@email.com

Proceedings recorded by mechanical stenography
Transcript produced by computer.

1 (Call to Order of the Court. Appearances stated
2 as indicated above.)

3 THE COURT: I set this down for an evidentiary
4 hearing today, and I assume both sides are ready to
5 proceed.

6 Before we proceed with the hearing, if someone
7 could bring me up to date. I'm familiar with the
8 background on this case, and the assigned district judge I
9 believe was under the impression when you last appeared
10 before him that this request had been resolved and
11 settled.

12 MS. BIBLOW: I will give you an update, your
13 Honor. We thought so, too.

14 THE COURT: I have no objection if you want to
15 remain seated

16 If you want to use the podium you are more than
17 welcome to do it. Make sure the lights are on. There
18 should be a little green light at the base

19 Thank you

20 MS. BIBLOW. Can you hear me now?

21 Your Honor, when we were last before Judge
22 Platt, which was on November 2 when we filed the order to
23 show cause, what we were seeking was a temporary
24 restraining order and a preliminary injunction.

25 What the parties had said at that hearing was --

1 and these concerned, related to a transloading facility
2 being built in Brookhaven town.

3 What the town had said at this hearing was that
4 they would agree during the interim phase, while we tried
5 to work out a schedule for the briefings, was they
6 wouldn't issue any more tickets and wouldn't pursue the
7 other tickets on the record.

8 The judge also indicated that he didn't want any
9 of the activity to proceed as well, although it wasn't
10 culminated in a final written order

11 The matters were supposed to agree to a
12 scheduling order.

13 Mr. Cuthbertson went back to his client, we had
14 worked out some proposed language on the temporary
15 restraining order, and he could not get the town to agree.
16 So we wrote to the court saying that we needed the court
17 to intercede, to set a briefing schedule and to issue the
18 TRO because there are two sets of tickets of concern.

19 One set of appearance tickets are returnable
20 next week, which is why we brought the application at the
21 beginning of November. And there is a second set of
22 tickets that are returnable in December 27.

23 So that is, you know, a thumbnail sketch of
24 where we're at.

25 THE COURT: The town refuses to hold off on any

1 prosecution of those matters while you are before me,
2 what is it, the federal Surface Transportation Board?

3 MS. BIBLOW: We have asked them to do so and we
4 have not gotten any final commitment or an order in
5 writing saying that they would agree to do that.

6 THE COURT: What are the disputed issues of
7 fact, as you see them?

8 MS. BIBLOW: Quite frankly, your Honor, I don't
9 know that there are any disputed issues of fact.

10 We are in front of the STB. The defendant
11 concedes that. In the joint exhibit that we presented to
12 you is the proceedings and the decisions that are in front
13 of, from the STB.

14 One order in particular, that was issued on
15 October 12, specifically says that the STB has
16 jurisdiction over this facility, and either we have to get
17 approval from the STB as a new rail line or we have to
18 show that we are an exempt spur. We have believe were an
19 exempt spur.

20 But in either situation, your Honor, because
21 there is exclusive and preemptive jurisdiction in the STB,
22 the town has issued a series of tickets that deal with
23 site plan preparation and things like that. They are
24 preempted from doing that. That is the issue with respect
25 to the TRO.

1 THE COURT: That is the legal issue. Are there
2 any disputed factual issues?

3 MS. BIBLOW: The only disputed

4 THE COURT: From the plaintiff's perspective?

5 MS. BIBLOW: We don't believe that there are any
6 factual disputed issues because we believe that the facts
7 are as they are. They issued tickets when they knew we
8 were already in front of the STB, that the STB had already
9 asserted jurisdiction, and these tickets are in violation
10 of the Interstate Commerce Commission Termination Act
11 clearly.

12 The only disputed issues that I believe that
13 they contend, that we don't believe is disputed is that
14 there was a set of tickets that were issued with respect
15 to a facility that is not a plaintiff in this matter.
16 They were issued a couple of weeks after an entity
17 called Empire. It is related to the plaintiff also. And
18 it is an asphalt facility.

19 They were issued by the same inspector. They
20 were issued for lack of site plan, lack of certificate of
21 occupancy, and for noise for a facility that is a
22 preexisting nonconforming use and doesn't need that kind
23 approval.

24 And the noise violations relate to something
25 that happened at 7:30 at night, you facility is closed at

1 5:30

2 So to the extent that they dispute this that
3 facility is somehow related here, we believe it is and we
4 believe that that is a violation of what they said they
5 weren't going to do in front of Judge Platt.

6 THE COURT. Empire isn't before this court, are
7 they?

8 MS BIBLOW. Empire is not before this court,
9 but those tickets are

10 THE COURT That is the entity that was served
11 with those tickets?

12 MS. BIBLOW That's correct.

13 THE COURT. What does the town have to say?

14 What is disputed here and why aren't you agreeing to let
15 the federal surface -- what is the name of that board?

16 MP CUTHBERTSON. Surface Transportation Board,
17 your Honor

18 THE COURT The Surface Transportation Board
19 Thank you very much.

20 Why aren't you agreeing to let the Surface
21 Transportation Board decide whether or not it has
22 exclusive jurisdiction?

23 MR. CUTHBERTSON: We are and have been actively
24 litigating in front of that board.

25 We had proposed a settlement with plaintiffs

1 that would have involved us not issuing more appearance
2 tickets during the pendency of the STB proceeding; that we
3 would not prosecute the tickets that are currently
4 outstanding during the pendency of the ST proceeding.

5 The plaintiffs wanted another prong of the
6 settlement that said we won't do anything else that would
7 interfere with their construction at the site.

8 We are currently litigating before the Surface
9 Transportation Board The town has made two filings
10 before the Surface Transportation Board one to oppose a
11 motion for a stay that they made to the Surface
12 Transportation Board

13 That motion, the petition for a stay before the
14 Surface Transportation Board, was denied, so they have
15 tried to show irreparable harm and a chance of success on
16 the merits on this spur argument that Ms. Biblow alluded
17 to, and the STB said no, we don't think that argument has
18 merit, nor do we think that there is irreparable harm.

19 THE COURT What is the town's interest in
20 prosecuting these cases when do they come up on the 12th?

21 MS. BIBLOW: The first batch are on December 13
22 The second batch is December 27

23 THE COURT. Why don't you wait to do that?

24 MR CUTHBERTSON: I was previously willing to
25 recommend to the client, and did recommend to the client,

1 that pending the STB proceedings, that we not prosecute or
2 issue further tickets.

3 THE COURT: The client is not willing. Your
4 client is not will to accept that?

5 MR. CUTHBERTSON: Well, I wasn't able to go to
6 the client with that offer because the plaintiffs had a
7 third part of it, a settlement that they wanted, which was,
8 we wouldn't take any other actions that would interfere
9 with construction.

10 We are not willing to do that because we don't
11 believe that this jurisdictional issue is as simple as
12 they have stated to you, your Honor, with respect to the
13 STB jurisdiction.

14 The STB, when it denied the stay in this
15 particular case, issued a decision saying there are three
16 possibilities here in terms of a legal theory. One is the
17 spur theory that they say which would mean that the STB
18 has jurisdiction but does not issue an approval.

19 One is that it is a minor railroad, which means
20 the STB has jurisdiction and it also issues an approval.

21 The third is that this would be a private line
22 railroad, which would be fully subject to local
23 jurisdiction.

24 So we believe, unlike plaintiffs, that there is
25 a chance that this will be found to be a private line

1 railroad, in which case the town's local land use
2 jurisdiction will apply.

3 THE COURT: I understand, but the sole basis to
4 the application is to enjoin prosecution and issuance of
5 any further tickets, not any of these other issues that
6 you say the plaintiff has added to the mix as far as any
7 settlement.

8 MR. CUTHBERTSON. Again when we talked about a
9 settlement, there was a third prong to the settlement that
10 said we are not going to take any other actions that
11 interfere with construction at the facility. That was
12 what was problematic.

13 THE COURT. Let me hear from plaintiff's counsel
14 on that.

15 MS. BIBLOW. The third prong for our request of
16 the TRO relate that we didn't want to interfere with
17 anything --

18 THE COURT. That is the third prong before this
19 court on this motion for a preliminary injunction?

20 MS. BIBLOW. Yes.

21 THE COURT. Tell me why where it is please. I
22 have your application before me.

23 MS BIBLOW. If you look in the order to show
24 cause, on page 2, it is item number 3. It is the third
25 prong

1 THE COURT Page 2, No. 3
 2 MS BIBLOW Yes
 3 THE COURT I'm looking at an affidavit The
 4 complaint?
 5 MS BIBLOW No it is the actual order to show
 6 cause, your Honor It has it in here And it is also in
 7 our papers but it is laid out there.
 8 THE COURT: Do you want to read what that says?
 9 MS BIBLOW: Would you like me to read it?
 10 THE COURT. Yes.
 11 MS BIBLOW The third prong says prelinarily
 12 enjoining the defendant from taking any other action to
 13 interfere with or obstruct plaintiff's construction or
 14 operation of the Brookhaven Rail Terminal That was the
 15 third prong we were looking for But I would like to make
 16 one comment --
 17 THE COURT. How can you possibly make that
 18 application?
 19 MS BIBLOW Because we are in front of the STB.
 20 And if the STB allows us to continue to grade but they
 21 believe that we are a spur, we don't want the town
 22 stopping us
 23 THE COURT: Call your first witness
 24 MS BIBLOW Sure
 25 THE COURT I'm very familiar with this As you

1 Didn't you just litigate this issue, this cease
 2 and desist, before the circuit?
 3 MS. BIBLOW We filed a petition at the Second
 4 Circuit. They last week dismissed it as being premature.
 5 THE COURT. But you received a cease and desist
 6 letter saying *Stand still. Don't do any more work on*
 7 *this site.*
 8 MS BIBLOW: And we have not done anything.
 9 THE COURT: From the Surface Transportation
 10 Board
 11 MS BIBLOW: That is correct.
 12 THE COURT. Now you are looking for this court
 13 to overturn that
 14 MS BIBLOW No, we are not. What we are
 15 looking for this court to do is to tell the town that we
 16 are in front of the STB, and whatever the STB tells us to
 17 do --
 18 THE COURT: I think they know that.
 19 MS. BIBLOW: Excuse me I'm sorry.
 20 But whatever the STB tells us to do, they are
 21 the appropriate agency to say what this facility is and
 22 whether you need authority or whether you are exempt.
 23 And with respect to what activity falls, we are
 24 now figuring out. We have applications before the STB to
 25 figure out what activities they may or may not allow with

1 probably know, if you did your research, I did this
 2 evidentiary hearing in the Coastal case that went up to
 3 the circuit is before the STB now.
 4 MS. BIBLOW. We are very aware of that. If I
 5 just may comment on one thing, your Honor
 6 What Mr Cuthbertson said to me when he came
 7 back is what the town was willing to do and what they were
 8 not willing to do.
 9 What we were willing to do was that they were
 10 not even willing to deal with the issuance of the tickets
 11 that had been issued And that is when the
 12 negotiations --
 13 THE COURT That is not what counsel is saying.
 14 MS BIBLOW That is what he told us.
 15 MR. CUTHBERTSON I advised and recommended that
 16 to the client. I couldn't advise them to accept the third
 17 prong of this
 18 THE COURT. Call your witnesses.
 19 MS BIBLOW: We call Mr Gabriel Hall
 20 **GABRIEL HALL**
 21 called by the Plaintiff, having been first duly
 22 sworn/affirmed, was examined and testified as
 23 follows:
 24 THE COURT Before we go any further

1 respect to construction.
 2 We are not constructing, but if the STB tells us
 3 you can do certain things on this site in this interim
 4 period, we want to be able to do that without the town
 5 jumping in and closing us down. That is our concern.
 6 THE COURT: As long as they have an opportunity
 7 to oppose anything before the Surface Transportation
 8 Board Does the town have a problem with that?
 9 MR CUTHBERTSON With them doing other
 10 construction?
 11 THE COURT: Assuming you litigate it before, you
 12 are litigating before the Surface Transportation Board.
 13 MS. BIBLOW: They are an intervenor already in
 14 the STB proceeding, your Honor.
 15 THE COURT: That is fine. What is wrong with
 16 that?
 17 MS BIBLOW: There is nothing wrong. But they
 18 certainly have the opportunity and have taken the
 19 opportunity, to oppose certain things that we requested.
 20 MR. CUTHBERTSON: Here is the issue, your Honor
 21 At the town level there has already been a
 22 discussion between the plaintiffs and the STB to say
 23 listen, is there some level of construction activity that
 24 you would allow?
 25 The STB has emphasized to us that the town has

1 local police powers that we can exercise in this context.
 2 And the reason the town would not stipulate to
 3 the last part of the relief that Miss Biblow wanted is
 4 that in the event that they go back, the STB says okay, we
 5 will allow some reconstruction activity. It is not rail
 6 construction.

7 The town needs the ability to still be able to
 8 litigate that issue because it is not necessarily, when
 9 the STB is saying it is not rail construction, if it is
 10 not rail construction, then we believe it is not subject
 11 to STB jurisdiction.

12 THE COURT: Well, if the STB says that they are
 13 permitted to do some limited construction or to work on
 14 the site, is it your position that that is unacceptable to
 15 you?

16 MR. CUTHBERTSON: I believe it would.

17 THE COURT: You would need relief in court?

18 MR. CUTHBERTSON: I believe my client would take
 19 that position. Yes.

20 THE COURT: All right.

21 Okay. The witness has been sworn. Your

22 questions.

23

24 DIRECT EXAMINATION

25 BY MS. BIBLOW

1 Q. Mr. Hall, can you please state by whom are you
 2 employed?

3 A. US Rail Corporation.

4 Q. And what is US Rail Corporation?

5 A. Were a Class III shortline rail carrier.

6 Q. And what does that mean? What is a Class III?

7 A. There are three designations the Surface
 8 Transportation Board has established, as well as under
 9 federal statute there are three distinctions.

10 We are of the smaller type. The Class II is a
 11 regional. A Class I is the larger railroads, the CSX,
 12 Norfolk Southern. Those type.

13 Q. What are your duties and responsibilities for US
 14 Rail?

15 A. I oversee the entire operation of the rail company.

16 Q. And can you just briefly tell the court how long you
 17 have been in the railroad business?

18 A. Approximately 30 years.

19 Q. And can you tell the court what your various
 20 positions have been over these 30 years?

21 A. I started out as a locomotive fireman. Became a
 22 locomotive engineer. Was a train master.

23 Then went into the shortline railroad business

24 about 1992 and have been running shortline railroads since

25 then.

1 Q. Does the fact that US Rail is designated a Class III
 2 railroad in any way limit its geographical ability to do
 3 business?

4 A. Not in my belief, no.

5 Q. In your role as -- I'm sorry. What is your title?

6 A. My actual title is president and chief executive
 7 officer.

8 Q. And in your role as the president and chief executive
 9 officer, have you had dealings with the Surface
 10 Transportation Board, or the STB?

11 A. Yes.

12 Q. Have you had dealings with the STB in connection with
 13 this case? In connection with this case.

14 A. Yes, ma'am.

15 Q. Can you tell me, sir, what is an intermodal transload
 16 facility?

17 A. Intermodal is a very specialized term in the railroad
 18 business.

19 It means that you take a usually containerized
 20 it is either a boxcar with dry product in it or a tank
 21 that is inserted in a square structure that would contain
 22 liquid, oils, other different chemicals.

23 And the term intermodal means that it goes from
 24 one mode of transportation to another; that it would go
 25 from a customer's loading dock, be placed on a flatbed

1 truck, driven to a railroad loading site such as our
 2 proposed site in Brookhaven, load it on a flatbed railcar
 3 there, and then transport it to some other destination,
 4 once again placed on a truck and unloaded at a
 5 destination.

6 Q. What role does the STB have in such facilities?

7 A. They regulate anything to do with common carrier
 8 the railroad operation side of that.

9 Q. You mentioned the Brookhaven rail terminal.

10 Can you tell us what that is?

11 A. That is a proposed rail terminal that US Rail is
 12 hopefully going to construct in Yaphank, Long Island, for
 13 the purpose of intermodal logistics, rail transfer,
 14 transloading of construction products and similar
 15 commodities.

16 Q. How is it that US Rail got involved with the
 17 Brookhaven Rail Terminal, as you called it?

18 A. Shortline railroads historically have been involved
 19 in such projects. We do them in other locations, in not
 20 only in Ohio but in Indianapolis, Michigan, Pennsylvania,
 21 one in Paterson, New Jersey, and another one that we are
 22 under discussion with currently in the immediate Chicago
 23 area.

24 Q. And again can you tell us how it is that US Rail
 25 learned of the facility that is going to be built in a

1 Brookhaven?

2 A. A member of Sills Road Realty contacted us, who we
 had a previous relationship with in rail operations, and
 he contacted us and asked us to come out and visit and
 5 discuss the possibility of our operating a rail facility
 6 there.

7 Q. And did those discussions come to fruition?

8 A. Yes, they did. We entered into a lease and an
 9 operating agreement for the property there in Yaphank.

10 Q. What I would like to do is show the witness what has
 11 been premarked as Plaintiff's Exhibit 7.

12 Mr. Hall, can you tell us what Plaintiff's
 13 Exhibit 7 is?

14 A. This is the railroad operating agreement and lease
 15 that we entered into with Sills Road Realty for the
 16 Yaphank operation.

17 Q. And if you could, identify your signature on the back
 18 page.

19 Is that your signature?

20 A. Yes.

21 Q.

22 MS BIBLOW: Your Honor, I would ask that this
 23 be moved into evidence.

24 THE COURT. Any objection?

MR CUTHBERTSON Let me look at it quickly,

1 your Honor

2 No

3 BY MS BIBLOW

4 Q. Under this agreement, Exhibit 7 --

5 THE COURT Admitted.

6 (Plaintiff Exhibit 7 in evidence)

7 BY MS BIBLOW:

8 Q. Under this exhibit, Exhibit 7, it lists Sills Road
 9 Realty as the seller and US Rail Corporation as the
 10 lessee.

11 What exactly was being leased?

12 A. The real estate that would operate where the rail
 13 would be and where either the transloading of products
 14 such as stone, aggregate, or where intermodal containers
 15 might be on or off, or boxcar loads of lumber or brick
 16 might be unloaded.

17 Q. Under this railroad operating agreement and property
 18 lease, what were US Rail's obligations and
 19 responsibilities?

20 A. We were, or are, obligated to construct a facility as
 21 far as the rail service is concerned. And then, once it
 22 is completed, to operate the railroad there.

23 Q. Prior to the STB Issuing its October 12, 2007, order,
 24 what activities did US Rail undertake -- let me withdraw
 25 that

1 How big a facility or how big a site is this?

2 A. Approximately 28 acres.

3 Q. And prior to you doing any activities, did you
 4 undertake to survey the property?

5 A. Yes. We had it surveyed. We had a track layout with
 6 the assistance of Sills Road and the New York and Atlantic
 7 Railroad. We produced a track layout for the facility for
 8 the future operation of it, with grades, topography, et
 9 cetera.

10 Q. What I would like to do now is to show the witness
 11 what has been premarked as Plaintiff's Exhibit 9.

12 Mr. Hall, can you tell us what Exhibit 9 is?

13 A. It is a track layout for the Brookhaven Rail
 14 Terminal.

15 Q. That is the track layout that you were talking about
 16 that you helped create?

17 A. Yes. That is what I just immediately referenced.
 18 Yes.

19 Q. Can you explain what that track layout shows?

20 A. It shows on the far left-hand side the approach to
 21 the Yaphank yard, or Brookhaven Rail Terminal, where it
 22 will interchange traffic with the New York and Atlantic
 23 Long Island Rail Road system. It shows the tracks for
 24 storage and for transloading.

25 And it shows where the aggregate storage bins

1 would be.

2 It describes the bridge, sort of a flyover
 3 bridge, to enter the property from the Sills Road side and
 4 then entry to it.

5 And then, whether it be parking and other such
 6 things, scales, other things that are necessary to operate
 7 a railroad transload facility.

8 Q. How much track is intended to be placed into this
 9 facility under this schematic?

10 A. Approximately 4,000 feet, but up to 17,000.

11 Q. And sir, in your 30 years of experience, the diagram
 12 that is in front of you, does that represent a line of
 13 railroad, a spur, or a private track?

14 A. In my opinion it is a spur.

15 Q. And C is what, sir?

16 A. Well, what we have traditionally done in the
 17 industry, and what I've been used to doing previously, is
 18 that a transload facility, if it is a common carrier
 19 operated by a railroad such as US Rail it would be
 20 considered a spur. It is one of the two designations that
 21 the STB affords us to operate as a common carrier.

22 If this were not operated by a common carrier,
 23 not by a railroad but just by a lumber company or someone
 24 like that, it could be considered, in my view, to be
 25 a private track.

1 In my opinion it is not a line railroad because
2 there is no other rail line that we connect to. We are
3 the destination or origin at this point. And because of
4 that we don't become a line railroad. The definition has
5 historically been that way.

6 Q. You also used a couple of terms before You said
7 interchange Could you tell us what you meant by
8 interchange.

9 A. Intarchange is a terms used in the railroad industry
10 for a hundred years, where two railroads exchange cars
11 between their systems.

12 So where we would get cars from the New York and
13 Atlantic, or give the New York and Atlantic freight cars,
14 that is called an interchange movement.

15 It is governed by the American Association of
16 Railroads' Rules of Interchange.

17 Q. And does a railroad such as New York and Atlantic,
18 can they refuse to interchange with US Rail?

19 A. It is my understanding, no.

20 I have never had the experience where a carrier
21 such as New York and Atlantic could legally refuse to
22 interchange freight cars with a carrier such as US Rail.

23 Q. So if when the Brookhaven Rail Terminal is built, it
24 is your intention to interchange with the New York and
25 Atlantic Railroad?

1 A. Our facility will be an interchange point on the New
2 York and Atlantic. Part of the national rail system.

3 Q. Okay You also used a term called, I think you said
4 storage bins for aggregate

5 Could you explain what you meant by that

6 A. In the center portion of the drawing is some squares
7 with lines that run from the track. That is where those
8 cars would be unloaded and then put in an area that
9 confines the stone or aggregate so that it doesn't spill
10 all over the place.

11 It then is transferred into trucks such as you
12 would could into an intermodal move, and then it is
13 transported off the property to whatever customer.

14 MS BIBLOW Your Honor, I ask that Exhibit 9 be
15 moved into evidence

16 THE COURT Any objection?

17 MR. CUTHBERTSON No objection.

18 THE COURT Admitted.

19 (Plaintiff Exhibit 9 In evidence)

20 BY MS. BIBLOW:

21 Q. Mr. Hall, going back to the lease agreement, the
22 railroad lease agreement

23 I'm sorry, the railroad operating agreement and
24 property lease

25 To your knowledge how long is that agreement?

1 A. I believe it is a 30-year term.

2 Q. And does it also allow for option periods or
3 renewal?

4 A. Yes, at the expiration.

5 Q. And what is US Rail going to do specifically at this
6 facility?

7 A. It is our intention to operate it as a common
8 carrier.

9 Q. Are you also going to construct it, sir?

10 A. Oh. Yes. I'm sorry.

11 We are going to construct it and then operate it
12 as a common carrier. Yes.

13 Q. And in regard to the construction aspect, can you
14 tell us what steps US Rail has taken to get this project
15 constructed

16 A. We have hired a general contractor who has
17 subsequently hired subcontractors

18 The property has been under construction, very
19 limited construction, tree removal. And they had to begin
20 grading it.

21 It is approximately 12 or 13 feet above the
22 level that the Long Island New York Atlantic Railway main
23 line is, and it is impossible to operate a rail line with
24 that kind of a short grade like that, so it has to be
25 brought down.

1 Q. You said that you have started to do that. Are you
2 currently doing any construction?

3 A. We are doing nothing at this juncture.

4 Q. Why?

5 A. Well, basically for two reasons.

6 One, the matter is before the Surface
7 Transportation Board. They have issued some sort of
8 ruling prohibiting us from further construction until they
9 rule on the matter.

10 And then, secondly, because the Town of
11 Brookhaven issued some appearance tickets. Those were part
12 of it. And we haven't done any more construction.

13 Q. Well, let me ask you something, sir.

14 The appearance tickets that we are here about
15 were any appearance tickets issued to US Rail?

16 A. No, ma'am.

17 Q. Now, in terms of what you have done, withdrawn.

18 Who was the contractor that you hired to do the
19 grading?

20 A. The general contractor is a company called Adjo.

21 Q. And do you know what the names of the subcontractors
22 that they have hired are?

23 A. No, I don't.

24 Q. To your knowledge did Adjo get tickets issued by the
25 Town of Brookhaven?

1 -A. I'm not sure. I don't know.
 2 Q. Now, with respect to the activities that you have
 3 done so far in terms of being eventually able to operate
 4 this facility.

5 Can you tell the court what activities you have
 6 done in that respect?

7 A. This would be after construction is completed?

8 Q. Well, what you have done up to date

9 For instance, have you purchased any equipment?
 10 Have you done anything in that context?

11 A. We have acquired two locomotives, numbers 112 and
 12 115, they are currently in Indianapolis, Indiana, awaiting
 13 delivery to Brookhaven.

14 They were supposed to be delivered to Brookhaven
 15 sometime in March. Early March or sooner.

16 We have also undertaken quite a sales and
 17 marketing effort with some of our other customers for
 18 transloading. And we have been working with them in terms
 19 of rates and destinations and things like that.

20 Nothing has, we have no contract as of yet
 21 because we can't for sure say when the facility is going
 22 to be opened.

23 Q. The two locomotives that you spoke of, what is the
 24 purpose of having two locomotives at the Brookhaven Rail
 25 Terminal?

1 A. Well, we estimated we will be quite busy there. And
 2 you can actually operate, you could operate two in here at
 3 a time. It would be kind of congested, but when you are
 4 running one crew and the locomotive has to be maintained
 5 so when it goes down there is another locomotive there to
 6 take to the place of it. It is a machine and sometimes
 7 locomotives do break down.

8 Q. So is the purpose, just so I'm clear, is the purpose
 9 of those locomotives to move the rail cars that are in the
 10 facilities once they are taken off the interchange?

11 A. They would be, the purpose would be to switch the
 12 cars to the various tracks where they would be unloaded.

13 Also to go up into the interchange track,
 14 receive cars, pull cars into the facilities, off of the
 15 New York and Atlantic, and then take empty cars back.

16 Q. Where would you store those locomotives? If you
 17 can't store them at Brookhaven Rail Terminal in March?

18 A. We would have to find someplace. We would probably
 19 send them to our Jackson, Ohio, division for cold storage.

20 Q. How much do these locomotives cost?

21 A. Approximately \$175,000 each.

22 Q. Have you made any other purchases with respect to
 23 equipment or orders regarding the construction of the
 24 facility and the eventual operation of it?

25 A. We have got an order for rail in place, cross-ties,

1 and some ballasts that would come in in February it would
 2 hope, or March.

3 We also have just sundry other things, such as
 4 computers, an office trailer that's on site now.

5 We haven't purchased it, but we will have an on
 6 site motor vehicle, a pick-up truck of sorts, and some
 7 other tools for track maintenance and such.

8 Q. And the track that you are purchasing or that you
 9 already purchased, what kind of track is that?

10 A. Well, it is made of steel. 50-foot lengths, 132
 11 pound weight to 115 pounds.

12 The reason for those weights, on we have
 13 designated it for that is, because of the heavy weight of
 14 stone cars and some other products we expect, you need a
 15 heavier rail to do that.

16 Q. To your knowledge -- you keep mentioning stone and
 17 aggregate -- do you know if there are any plans that have
 18 been developed to bring stone to the facility at this
 19 time?

20 A. Yes.

21 Q. Could you tell the court about that?

22 A. Our first deliveries are supposed to arrive sometime
 23 in early March. We estimate during that season or during
 24 the stone season, as it would be construction, somewhere
 25 in the neighborhood of about 4,000 to 5,000 carloads.

1 Q. Where is this stone coming from?

2 A. It comes from the Canadian Pacific Railroad in
 3 Upstate New York, in a large quarry. I believe it is
 4 Upstate New York. But it comes off the Canadian Pacific
 5 Railroad and then comes to New York Atlantic Interchanges
 6 there and then interchanges with us.

7 Q. Is US Rail involved in any current transloading
 8 operations on Long Island that involve stone?

9 A. No.

10 THE COURT: When you say stone and the ballast,
 11 you are referring to --

12 THE WITNESS: That is all separate. The ballast
 13 would be for the construction of the rail. The stone
 14 would be for resale to customers and that would be
 15 customer product being brought in for transloading.

16 BY MS. BIBLOW:

17 Q. Perhaps you can tell the court what kind of
 18 materials -- you mentioned stone, what you intend to do at
 19 the facility; what kind of material that you have been
 20 talking to other people about.

21 A. We have some customers who have expressed a high
 22 degree of interest in transloading structural steel. In
 23 fact that particular customer has asked to come out to the
 24 site in early February. They would like to begin
 25 transloading in May or June.

1 We have some customers that want to bring in
2 lumber, particle board, plywood.

3 One customer has expressed an interest in
4 transloading brick. I even have a customer that would
5 like to transload salt material, salt-based materials.

6 I'm not sure if it is bagged salt or road salt or whatever
7 it is, but he asked for a rate for salt.

8 Q. The salt that you are mentioned, just so everyone is
9 clear, that is stone that would be eventually used in
10 construction?

11 A. I believe so, yes.

12 Q. Sir, you also mentioned Adjo as the contractor that
13 you hired

14 Did you enter into an excavation agreement with
15 Adjo to do the work?

16 A. Yes, we did.

17 Q. What I would like to do is show you what has been
18 premarked as Exhibit 8.

19 Mr. Hall, can you tell us what Exhibit 8 is.

20 A. It is an agreement to do excavation on the site at
21 Yaphank.

22 Q. And is this the excavation between, in which you
23 hired Adjo?

24 A. Yes. This is the Adjo agreement to do the
25 excavation

1 MS. BIBLOW: Your Honor, I would ask that this
2 be marked into evidence.

3 THE COURT: Any objection?

4 MR. CUTHBERTSON: No objection

5 THE COURT: Admitted.

6 (Plaintiff Exhibit 8 in evidence)

7 BY MS. BIBLOW

8 Q. Sir, when did US Rail start construction activities
9 at the site?

10 A. This past summer. July, August sometime.

11 Q. And you mentioned that you have a project manager
12. What was his name again?

13 A. Martin Lomasney.

14 Q. Is he on site every day during the construction?

15 A. Yes.

16 Q. Is he still currently your employee?

17 A. Yes.

18 Q. And since the site has had construction stopped by
19 the STB what is Mr --

20 A. -- Lomasney --

21 Q. -- doing?

22 A. Talking to us on the telephone every once in a while,
23 but nothing much else.

24 Q. You are still paying him, correct?

25 A. Yes.

1 Q. If you can please tell us, prior to doing the
2 construction activities did US Rail seek approval from the
3 STB to do the work?

4 A. Prior to construction activities?

5 Q. Prior

6 A. No.

7 Q. Why not?

8 A. It is our belief and our STB railroad/counsel's
9 advice to us was that it was an exempt spur and it had all
10 to the appearances of everything we have done before as an
11 exempt spur, so there was no need to apply for any status
12 with the STB.

13 THE COURT: Is US Rail a petitioner now in the
14 proceeding before the Surface Transportation Board?

15 THE WITNESS: Yes, we are.

16 THE COURT: Did you initiate that proceeding?

17 THE WITNESS: No, I don't think we initiated it.
18 I think it was a responsive.

19 It was a response to the STB's letter from
20 someone at the board directing us to cease and desist our
21 actions.

22 MS. BIBLOW: Your Honor, in your documents you
23 have a joint exhibit that has all of the STB findings in
24 this matter and included

25 THE COURT: Who initiated?

1 MS. BIBLOW: I can tell you the following -- It
2 has had a loan history.

3 Originally this was started by an entity called
4 Suffolk and Southern Railroad which my next effort will
5 explain who that is.

6 They withdrew their application, which was
7 allowed to be withdrawn, and then our clients, Sils Road,
8 entered into the agreement with US Rail to do the work and
9 to do the construction and the operation.

10 In October, October 4 of this year, we received
11 a letter from the STB's director of enforcement, a man
12 named Mr. Clemens -- that letter is in the joint
13 exhibits -- that basically said that they had gotten a
14 copy of article from Newsday, it was written October 1
15 and a letter of inquiry from the town about this facility
16 and he wanted an explanation of what was going on and
17 asked, basically said to stop the construction.

18 In response to that we pulled a reply explaining
19 why it was that what was happening was an exempt spur that
20 was preempted but was exempt.

21 On October 17 what the STB did was they reopened
22 the Sils, I'm sorry, the Suffolk and Southern Railroad
23 added US Rail as a party to that and we learned from
24 there

25 So that's now US Rail got involved with the STB

1 proceeding.

2 THE COURT. So US Rail is joined as a petitioner
3 in that action.

4 MS BIBLOW. It is, along with Suffolk and
5 Southern who really does not have a role to play any more
6 and Sills Road is the owner of the property.

7 THE COURT: What is the relief that is sought in
8 that proceeding?

9 MS. BIBLOW. Well, there are a couple of things
10 that are going on there, your Honor.

11 In response to the October 12 stay, we have
12 filed a petition for reconsideration, which is still
13 pending, saying that we are a spur and should not have to,
14 you know, the cease and desist order should be lifted so
15 we can go forward with the proceeding.

16 In addition we have filed a petition for relief
17 from the -- stay, I guess is what you would call it,
18 November 16 that was denied.

19 You have those decisions in front of you as the
20 joint exhibit. So --

21 THE COURT. It seems to me by operation of law
22 you are standing in the shoes of, what is it, the Southern
23 Railroad?

24 MS. BIBLOW. The Suffolk and Southern.

25 THE COURT. The Suffolk and Southern.

1 So what is the relief that is sought in that
2 proceeding?

3 MS. BIBLOW. We are seeking to have the STB
4 declare the activity, the construction, as an exempt spur.

5 MR. CUTBERTSON. Your Honor?

6 MS BIBLOW: And obviously to lift their cease
7 and desist order.

8 THE COURT. Sure.

9 MR CUTBERTSON: There is more law I think it
10 is important because Miss Biblow, as a good advocate, has
11 characterized the STB's record. I think it important for
12 the court the know that Suffolk and Southern and US Rail
13 have the same attorney, a fellow named John Heffner, who
14 works out of Washington, DC.

15 In August, August 23 specifically, of 2007
16 Mr. Heffner was asked to reply to an STB inquiry when
17 Suffolk and Southern attempted to withdraw their
18 application

19 He said at that time that Suffolk and Southern,
20 on August 23, 2007, was not doing any construction at the
21 site; that Sills was not doing any construction at the
22 site. However, US Rail, who he also represented, had
23 started full core on construction.

24 And the STB, in allowing Suffolk and Southern to
25 withdraw their application -- and they were very specific

1 about this -- said there should not be rail construction
2 at the facility based on those representations --

3 They said in a decision in August, while Suffolk
4 has stated that Sills has not undertaken any construction,
5 of rail facilities.

6 This is based on Mr. Heffner who represents both
7 of these entities representations, Suffolk has not stated
8 that Sills has not constructed other facility at that
9 location that might be converted in the future to rail
10 facilities.

11 And I think this is the important part. The
12 board would view with disfavor any future request for
13 authority to commence rail operation over track at this
14 location until the construction of that trackage has first
15 been authorized by the board.

16 The STB said this in August.

17 Now theirs wasn't, the STB's reaction to an
18 issuance of a cease and desist order wasn't just from
19 letter to the town of Brookhaven and a front page article
20 in Newsday. It was because there were prior activities in
21 this case. And they said: Listen, Don't you start rail
22 construction until you come to us and make sure that this
23 is not a line of railroad.

24 The STB's position still is that this is a line
25 of railroad subject to their jurisdiction and construction

1 authority Prior to that the STB had even said they
2 warned Suffolk and Southern, who is a related entity in
3 this, they warned them in a decision before that in
4 August, and I will be very brief, your Honor, but the
5 wording is, and this is from a decision dated August 13
6 from the STB, the board, being the STB, has increasingly
7 grown concerned that persons using the notice of exemption
8 procedures to obtain authority for the lease or other
9 acquisition and operation of railroad lines may not be
10 making a thorough review of their circumstances prior to
11 filing a verified statement that a proposal should be
12 exempted from environmental and historical reporting
13 thresholds

14 So they specifically said to Suffolk and
15 Southern we are concerned about this notice of exemption
16 you filed with us.

17 THE COURT: Okay. Thank you very much.

18 If you can, make sure I receive copies of any
19 rulings that were made.

20 MS. BIBLOW: Your Honor, you have them. Joint
21 Exhibit one. We have stipulated without the court knowing
22 it that those should be entered into the record as an
23 exhibit. So you do have that.

24 THE COURT. Thank you very much. And thank you
25 for those responses

1 Wou'd you like to continue with your
2 examination?

MS. BIBLOW Yes, sir.

BY MS BIBLOW:

3 Q. Just to follow up on something that Mr Cuthbertson
4 said

5 To your know'edge is the US Rail the entity that
6 is doing the construction via its hiring of obviously
7 contractors?

8 A. Yes. We are.

9 Q. Is Suffolk and Southern doing anything on this
10 facility?

11 A. Not at all. Not to my knowledge.

12 Q. To your know'edge has Suffolk and Southern ever done
13 any construction activities at this site?

14 A. Not to my knowledge.

15 MS. BIBLOW: Your Honor, may I have one moment,
16 please?

THE COURT Surely.

BY MS BIBLOW:

17 Q. Sir, what I would like to do so is show you what has
18 been premarked as Exhibit 10.

Sir, have you seen this before?

19 A. Yes, I have.

20 Q. And can you tell us what Exhibit 10 is.

1 A. It is a proposal for construction work at the Yaphank
2 Brookhaven railroad terminal by Adjo Contracting
3 Corporation.

4 Q. And was this proposal eventually adopted into what
5 now has been Exhibit 8, the excavation agreement?

6 A. Yes.

7 MS. BIBLOW. Your Honor, I would like to have
8 Exhibit 10 admitted into evidence

9 THE COURT Any objection for purposes of this
10 hearing?

11 MR. CUTHBERTSON. You are saying that this was
12 incorporated into the excavation agreement?

13 MS. BIBLOW. This s the bid.

14 MR CUTHBERTSON. And that was the testimony

15 MS. BIBLOW. Yes

16 MR CUTHBERTSON No objection.

17 THE COURT: Admitted

18 (Plaintiff Exhibit 10 in evidence)

19 Q. Sir, I just want the clarify one thing.

20 Is there any common ownership between US Rail
and Sills Road Realty?

21 A. None whatsoever.

22 Q. And who, besides yourself, are the officers and
23 directors of US Rail?

24 A. We are a family-owned railroad company.

1 I'm the fourth generation. My children that are
2 working are fifth generation.

3 US Rail is all family owned.

4 Q. And do you know, is there any connection or any
5 interrelatedness between Suffolk and Southern Railroad and
6 US Rail?

7 A. None whatsoever.

8 MS. BIBLOW: I have nothing further, your Honor.

9 THE COURT: Thank you very much.

10 Cross-examination.

11 CROSS-EXAMINATION

12 BY MR CUTHBERTSON:

13 Q. Good afternoon, Mr. Hall. You noted that US Rail has
14 not been issued tickets in this case. Correct?

15 A. That is correct.

16 Q. Okay. Do you know why they weren't issued tickets?

17 A. No, I don't.

18 Q. Now, it is not the issuance of these tickets that has
19 stopped your construction. Correct?

20 A. No.

21 Q. Okay. Is there anything in those tickets that you
22 know of that has told you to stop construction?

23 A. The fact that they were issued brought concern to us
24 as US Rail that --

25 as US Rail that --

1 Q. I would like you to answer the question I asked:

2 Is there anything in those tickets

3 MS BIBLOW: Your Honor --

4 BY MR CUTHBERTSON:

5 Q. -- that told US Rail to stop construction?

6 BY MR. CUTHBERTSON:

7 Q. Could you allude to

8 THE COURT: I think he was answering it

9 Would you like to answer the question, please?

10 THE WITNESS Thank you, your Honor.

11 No, there is nothing in there directing US Rail

12 to stop construction.

13 BY MR. CUTHBERTSON:

14 Q. Okay. And you claim that you will be harmed by the
15 work stoppage that is going on?

16 A. Correct. Oh, yes.

17 Q. But the harm that you are going to suffer is not
18 going to be caused by these tickets, is there?

19 A. That I can't tell you. I wouldn't know how to answer
20 that.

21 Q. The New York State Department of Environmental
22 Conservation issued tickets as well, correct?

23 A. I'm not aware of that.

24 Q. You are not aware that the DEC has issued sand mining
25 tickets?

1 A: Oh, yes. That I'm aware of. Yes.
 2 Q: And the DEC also exacted from either Sills Road or US
 3 Rail an agreement to stop construction. Isn't that
 4 correct?
 5 A: I believe so.
 6 Q: Now, you provided to the court an excavation
 7 agreement that you entered into with Adjo. Is that
 8 correct?
 9 A: Yes.
 10 Q: And in that it provides for certain payment to Adjo.
 11 Correct?
 12 A: That's correct.
 13 Q: Have you had to write a check to Adjo?
 14 A: We have written some checks to them, yes.
 15 Q: And is the method that they are being paid with by
 16 selling the materials they pull out of the site?
 17 A: I can't tell you that. I don't know.
 18 Q: Are they being compensated for and allowed to sell
 19 the material they take out of the site?
 20 A: I'm not aware of that.
 21 Q: Let me direct your attention, if I could, sir, to
 22 paragraph one of the contract, the excavation agreement
 23 A: Yes.
 24 Q: Perhaps you could read for me where it says
 25 appointment excavation plan.

1 A: That entire paragraph?
 2 Q: Yes, sir.
 3 Well, read the first sentence, if you would
 4 Maybe that will refresh your recollection
 5 A: US Rail agrees to retain contract on the terms and
 6 conditions set forth in this agreement to excavate in, on,
 7 and under the subject property, and remove all the
 8 material and any products derived from such material,
 9 collectively bankrun, from the subject properties.
 10 Contractor shall use its best efforts to conform
 11 its operations on the subject properties during the term
 12 hereof and in the performance obligations hereunder in
 13 compliance with the excavation and site preparation plan
 14 in effect at that from time to time, the excavation plan.
 15 For all excavation and site preparation work
 16 hereunder, contractor shall be entitled to recovery from
 17 the proceeds of the sale of bankrun the greater of, (1) \$3
 18 million plus 10 percent thereof for overhead, 10 percent
 19 thereof for profit, and 5 percent thereof for management,
 20 collectively the 25 percent allowance or --
 21 Q: Let me stop you there.
 22 It appears from that language that the excavator
 23 and the contractor Adjo is being permitted to sell the
 24 material from the site
 25 Correct, sir?

1 A: Yes.
 2 Q: And that is the way in which they are receiving their
 3 compensation for their work. Is that correct, sir?
 4 A: I can't tell you that.
 5 Q: But you signed this contract
 6 A: Yes.
 7 Q: And did you review the contract before you signed it?
 8 A: Yes.
 9 Q: But you didn't know that that was how they were going
 10 to be compensated?
 11 A: Not entirely.
 12 Q: Okay. You had mentioned that it is your opinion
 13 that what is shown on that map is spur track. Correct?
 14 A: Yes.
 15 Q: And the STB has disagreed with that opinion. Is that
 16 your understanding?
 17 A: No.
 18 Q: That is not your understanding?
 19 A: That is not my understanding. No.
 20 Q: What is your understanding of what the STB has
 21 determined thus far?
 22 A: The STB has really only prohibited us from doing
 23 certain things. They have stopped us from further
 24 construction.
 25 I don't believe they even made any finding or

1 any decision that this is a line of railroad or an exempt
 2 spur or private track.
 3 Q: You don't believe -- let me just -- there is a part
 4 of the joint exhibits that have been submitted. I don't
 5 know offhand which number it is submitted by the
 6 plaintiffs
 7 THE COURT: Would you like to mark that a
 8 Defendant's Exhibit?
 9 MR. CUTHBERTSON: Yes. And recognize that it is
 10 also part of the joint exhibits that were submitted.
 11 THE COURT: Mark that as Defendant's Exhibit A
 12 for identification at this point.
 13 Does counsel have a copy of that?
 14 MS. BIBLOW: Yes, I do, your Honor.
 15 THE COURT: Excuse me. I stand corrected. You
 16 already have A, B, and C.
 17 This is D. Correct?
 18 MR. CUTHBERTSON: I have A, B, C. This would be
 19 D, your Honor. Correct.
 20 THE COURT: Does plaintiff's counsel
 21 MS. BIBLOW: I have Exhibit D, yes.
 22 BY MR. CUTHBERTSON:
 23 Q: Directing your attention Mr. Hall to page 4 of 7 of
 24 this particular decision
 25 it says at the top of that page, "likely" of

1 success on the merits.

2 Do you see that?

3 A: Yes.

4 Q: If you could, just read that first sentence

5 A:

6 THE COURT: Before you read it. I understand
7 there is no objection to this.

8 MS. BIBLOW: There is no objection, your Honor.

9 THE COURT: This is all part of the record.

10 Good.

11 MR. CUTHBERTSON: So there is no need for him to
12 read it.

13 THE COURT: Proceed.

14 THE WITNESS: Petitioners have now shown that
15 there is a strong likelihood that they will be successful
16 in their petition for reconsideration of the cease and
17 desist order

18 Petitioner's argument is that the proposed use
19 of the track would not require prior board approval for
20 construction under 49 USC 10901 or operations under 49
21 USC 10902A, but rather qualifies for the exception from
22 the board's entry-exit licensing authority in 49 USC 10906
23 because the track has some of the characteristics of spur
24 track that would be used as a disconnected ancillary spur
25 of an existing carrier, US Rail.

1 The key test to determine whether
2 construction --

3 Q: Let me stop you there, Mr. Hall, just in the interest
4 of time.

5 Based on that sentence, isn't it correct that
6 the STB has not accepted your argument when it comes to it
7 being a spur track?

8 MS. BIBLOW: Objection. Mischaracterization.

9 THE COURT: Yes, I will sustain that. I think
10 this decision really speaks for itself

11 MR. CUTHBERTSON: Okay, your Honor I will move
12 on.

13 BY MR. CUTHBERTSON:

14 Q: Now, the railroad that you operate, the railroad line
15 is in Ohio.

16 Is that correct, Mr. Hall?

17 A: One of them.

18 Q: And you currently don't have an agreement with New
19 York Atlantic Railroad to move freight from this facility,
20 do you?

21 A: Correct. We do not.

22 Q: But in the future you are looking to interchange with
23 New York Atlantic Railroad.

24 A: Correct.

25 Q: Okay. But isn't it the case that New York Atlantic

1 has opposed your effort to claim federal preemption in
2 this case?

3 A: That I'm not aware of.

4 Q: Okay. I will move on.

5 The locomotives that you referenced before, the
6 intention is to eventually deploy them at Brookhaven. Is
7 that correct?

8 A: That's correct.

9 Q: But those locomotives could be deployed to other
10 locations, correct?

11 A: If I had a use for them someplace else.

12 Q: And are you obligated to purchase the locomotives at
13 this point?

14 A: I have signed contracts for them, yes.

15 Q: And are you obligated for them?

16 A: Yes.

17 Q: Are there other ways to move stones and aggregates to
18 Long Island?

19 A: The only other way would be by truck.

20 Q: Isn't it true that stone can get moved by barge?

21 A: It is my understanding on a very, very limited basis
22 that it could be moved. Nowhere's the volume that we
23 would bring on to the island.

24 Q: So it could be moved by barge, though?

25 A: On a very limited basis.

1 Q: Now, have you ever met with the town of Brookhaven
2 with respect to your plans to construct a rail facility?

3 A: Not with the town representatives of Brookhaven.

4 Q: And in fact -- but your attorney sent the town a
5 letter. Is that correct?

6 A: Yes. At our direction.

7 Q: And have any other officers or employees of US Rail
8 met with the Town of Brookhaven about this facility?

9 A: I'm not aware of who would have if they had.

10 MR. CUTHBERTSON: I have no further questions,
11 your Honor.

12 THE COURT: Any further questions?

13 MS. BIBLOW: Yes.

14 REDIRECT EXAMINATION

15 BY MS. BIBLOW:

16 Q: Mr. Hall, you were asked during cross about an
17 agreement with New York and Atlantic. You were
18 negotiating one.

19 Do you need such an agreement in order to be

20 able to interchange with that railroad?

21 A: Well, you need some sort of interchange agreement.

22 Yes.

23 Q: And isn't New York and Atlantic obligated to

24 interchange without such an agreement?

25

1 A. Yes.

2 Q. So when you said you need such an agreement, I'm not
3 quite sure what you meant.

4 A. Well, there are some AAR rules that provide for basic
5 interchange without written agreement, but for liability
6 purposes -- derailments, wrecks, and other such things --
7 it is best to have an agreement delineating those things
8 for rerailling of cars and such.

9 Q. But do you need one?

10 A. No.

11 Q. You were asked about the locomotives that you were
12 talking about.

13 And do you have a need for locomotives except
14 for the Brookhaven Rail Terminal?

15 A. At this time no, we have no other need.

16 Q. And you were also questioned about truck
17 transportation of stone.

18 Could you explain to the court the difference
19 and the issues that are associated with truck
20 transportation versus rail transportation of the stone.

21 A. Well, to be as generalized as possible, your Honor,
22 The truck transportation has for a long time,
23 you have to get on the island via the bridges. And the
24 bridges, the condition that they are in, they are now
25 reducing the weights of the trucks, which means when you

1 could transport a certain quantity in 1,000 trucks, you
2 now need 12,000 or 1,500 or possibly 1,800 trucks to
3 accommodate the same tonnage.

4 It has been reported repeatedly in our
5 industrial trade newsletters about the condition of the
6 bridges, et cetera, and the need to begin transportation
7 of an alternate plan, and rail seems to be the number one
8 selection by all of the politicians in and around New York
9 to move it on to Long Island by rail, to move the stone.

10 Rail moves it without any interruption on the
11 highway. There is less pollution. Less fuel consumption.
12 It is just a much, much better mode of transportation.

13 Q. And how much? Can you do some sort of comparison of
14 how much stone or aggregate you can move in a rail car
15 versus a truck?

16 A. In a single rail car, up to 210 tons. Excuse me, 115
17 tons in a rail car. Whereas, in a truck it is going to be
18 reduced down to about 18 tons and eventually 15 tons.

19 MS. BIBLOW: Thank you

20 THE COURT: Thank you very much. You can step
21 down.

22 (The witness was excused.)

23 MS. BIBLOW: Gerard Drumm, please.

24

25 GERARD DRUMM

1 called by the Plaintiff, having been first duly
2 sworn/affirmed, was examined and testified as
3 follows:

4

5 DIRECT EXAMINATION

6 BY MS. BIBLOW:

7 Q. Mr. Drumm, can you tell us by whom are you employed?

8 A. I'm employed by Sils Road Realty, LLC.

9 Q. What is Sils Road Realty, LLC?

10 A. Sils Road Realty owns the site at the Brookhaven
11 Rail Terminal.

12 Q. And would it be correct that Sils Road Realty is a
13 property owner?

14 A. It is a property owner. That is correct.

15 Q. What are your duties and responsibilities with
16 respect to Sils Road Realty?

17 A. I'm their chief financial officer and general
18 counsel.

19 Q. And could you explain to us -- withdrawn --
20 What property does Sils Road Realty own?

21 A. Sils Road Realty owns the 28-acre site in Yaphank.
22 It is the only property that it owns.

23 Q. And could you describe the size of the property and
24 where it is located.

25 A. Yes. The property is 28, plus or minus acres, located

1 in what really is an ideal site for a rail terminal.

2 Its northern border is the Long Island
3 Expressway. Its southern border is the Long Island Rail
4 Road.

5 There is an entrance on to the property from
6 Sils Road, which is a county road that has already been
7 developed with road infrastructure, including light
8 turn lanes both for ingress and egress.

9 It's located within the Town of Yaphank's Empire
10 Zone, which is a specifically designated 1,500 acres or
11 so within the Town of Brookhaven specifically earmarked
12 for industrial commercial development which, according to
13 the town planning department, a rail facility would be
14 consistent with.

15 Q. How do you know that that is the position of the town
16 planning department?

17 A. In January of this year Sils Road representatives
18 of Suffolk and Southern Rail Road and the New York and
19 Atlantic met with David Woods, who is the director of
20 planning for the town of Brookhaven and members of his
21 staff. We provided him with a schematic of the facility,
22 explained to him what we were intending to do with it and
23 why we were building it, and eventually in my view
24 received a fairly favorable reception to it.

25 The idea of one creating a rail facility was the

1 catalyst for other development inside their zone. Their
2 Empire zone was attractive. The county officials and
3 local officials have been grappling with ways of reducing
4 truck traffic, not only on the Long Island Expressway but
5 on congested local highways as well. This seemed to fit
6 very well into what they felt was the appropriate use of
7 this property.

8 And the reason Sills Road chose to do this.
9 Aside from the location of the property from a business
10 perspective, members of Sills Road and its partners have
11 been involved for the last three years really in bringing
12 stone into Long Island, much smaller facilities about two
13 miles east of here. That facility as of the end of
14 November was really no longer available to us and wasn't
15 sufficient to meet our needs in the first place. It could
16 only provide a small percentage of the stone that we need
17 for related businesses.

18 This facility was viewed as an opportunity to
19 meet all the needs for construction aggregates that the
20 members had. Stone would be provided by another member of
21 the company, which was the quarry owner up in Saratoga
22 Springs. And so it provided an opportunity for the
23 members of Sills Road to obtain material for their
24 businesses at a lower cost and also provided an
25 opportunity to actually sell to generate third-party

1 sales.

2 THE COURT: Generate what?

3 THE WITNESS: Third-party sales

4 Sales to third parties.

5 BY MS. BIBLOW:

6 Q. Mr Drumm, the property that was purchased by Sills
7 Road, when did you acquire that site?

8 A. Early May of this year.

9 Q. And what kind of zoning district is it in?

10 A. I believe it is L-1, which is light industrial and
11 commercial.

12 Q. And are there any residences anywhere near, residence
13 property anywhere near this?

14 A. This site was, as I said, it is 28 acres. To our
15 knowledge it had never been developed. There was no use
16 of it beforehand.

17 The nearest property owners are north of the
18 Long Island Rail Road, roughly. Residence property owners
19 are north of the Long Island Rail Road, roughly a quarter
20 of a mile away from the property.

21 Q. What about the adjacent properties? What are they
22 used for?

23 A. If you go to the east, I'm sorry, if you go to the
24 west of the property, on the other side of Sills Road,
25 much of that is also in the Empire Zone of the town. So

1 much of it actually is vacant land, there are some spots
2 which have been developed and there are plans for other
3 development, but that is all zoned in the Empire Zone and
4 zoned for further commercial and industrial development.

5 To the east of us is again empty land, there is
6 a plot. Directly to the east of us there is an easement
7 for high tension wire, high voltage towers.

8 Further east of that there is another 20 acres
9 that is privately owned but undeveloped forever.

10 And further east of us there is about an 800
11 acre county farm. But there is no residential development
12 within sight of this facility.

13 Q. From whom did Sills Road acquire this? Who did you
14 buy the property from?

15 A. We bought the property from Brookhaven Energy LP,
16 which was a special purpose entity that was set up by
17 American National Power.

18 American National Power is an independent energy
19 producer. Their plan was to develop this site as a gas
20 pipe --

21 MR. CUTHBERTSON: Your Honor, I mean they are
22 claiming that their preempted local zoning is preempted.
23 Now we have had about five minutes of local zoning
24 patterns.

25 I'm not sure what the relevance of what they

1 prior owner was going to do or what the local land use
2 scheme is in view of the claim of preemption.

3 MS. BIBLOW: Well, we are trying to establish
4 the property that is --

5 THE COURT: Keep your eye on what the real
6 issues are as far as this application is concerned.

7 MS. BIBLOW: I will move on your honor.

8 THE COURT: Sure.

9 BY MS. BIBLOW:

10 Q. You mentioned in your answer -- well, you drew --

11 Can you explain to the court the genesis of the
12 Brookhaven Rail Terminal, how that came about?

13 A. Yes.

14 As I said, this Sills Road Realty was formed by
15 strategic partners, both of whom produce and have a need
16 for stone. And some of its partners have been receiving
17 stone by rail for several years at a smaller adjacent site.
18 A smaller site up the road.

19 This entity was formed, as I said, to be able to
20 acquire this property and have it developed by a railroad
21 as a rail terminal that would be used principally for
22 bringing stone in from Upstate New York and distributing
23 it on Long Island.

24 Q. You mentioned the other rail facility that you had
25 been using

1 A. Right.

2 Q. First of all, who owns that facility?

3 A. As it turns out, we now know that the trackage,
4 itself, is owned by the Long Island Rail Road.

5 The property surrounding it is owned by a
6 company called Nicolla.

7 Q. Why is it that your strategic partner, as you called
8 it, no longer can use there Nicolla facility?

9 A. There was a lease of that site that expired, I
10 believe it is at the end of November, and it is not going
11 to be renewed under any circumstances.

12 Q. How much stone?

13 THE COURT: I'm sorry. I'm not understanding
14 this witness.

15 You are going to have to talk slower. Please
16 talk into the microphone.

17 Maybe the court reporter could read back the
18 last question and answer.

19 (The record was read.)

20 Q. Can you tell the court who are the, you mentioned
21 strategic partners. Who are they?

22 A. Partners within Sills Road?

23 Q. Yes.

24 A. The partners within Sills Road are a company called
25 AD Collins, which is a large quarry operator and

1 construction company in upstate New York, in the Albany
2 area.

3 Suffolk and Southern Rail Road, which was formed
4 initially to become a common carrier. It never has become
5 a common carrier but it was formed by people, individuals
6 who have had experience in rail logistics and rail
7 transportation.

8 Another one of the partners is an affiliate of
9 Adco Construction, which is in the construction business
10 and has a need for stone in its businesses.

11 Another partner, the last partner actually, are
12 two individuals who are in the asphalt business who have
13 significant need for stone in the production of asphalt.

14 Q. You mentioned Suffolk and Southern Rail Road in your
15 answer?

16 A. Yes.

17 Q. Could you explain to the court what that is and
18 whether Suffolk and Southern -- well, first explain what
19 that is.

20 A. Suffolk and Southern Railroad was formed to become a
21 common carrier.

22 Suffolk and Southern made an initial filing with
23 the STB to actually get authority to operate as a common
24 carrier at the Nicolla site that I mentioned. After that
25 filing was made, and in fact after the STB had agreed to

1 give us exemption so that we could become a common

2 carrier, we found out that the real estate interest in the
3 lease that we thought we had, we didn't have.

4 Q. Of which site?

5 A. Of the Nicolla site.

6 So we were going to operate Suffolk and
7 Southern was going to operate as a common carrier at the
8 smaller site, the Nicolla site. So we went to the STB for
9 authority to do that.

10 It was granted, but then because of defects
11 basically in our real estate business, our lease interest
12 in that site, we actually asked the STB to hold that
13 application in abeyance while we tried to correct the
14 situation.

15 Q. What kind of defect are you talking about?

16 A. It turned out that the site it was actually owned by
17 the rail site was actually owned by the Long Island Rail
18 Road and there were some environmental issues.

19 The Long Island Rail Road had apparently used
20 that site for some period of time to dump batteries and
21 they were in the process of either the process of
22 cleaning it up or otherwise. But there was no way that we
23 were going to be able to get a sufficient real estate
24 interest in that site from the Long Island Rail Road.

25 Q. Did Suffolk and Southern ever request from the STB

1 approval to do any activities at the Sills Road site?

2 A. At the Brookhaven Rail Terminal?

3 Q. Yes.

4 A. Yes. Our plan was, after having gotten authority to
5 act as a common carrier, that we were in fact going to be
6 the entity that as a railroad that was going to construct
7 and operate the Brookhaven Rail Terminal.

8 Once it became clear that the first application
9 that we made had any connection with that plan, we then
10 filed the application to operate, to then build and
11 operate the Brookhaven Rail Terminal as an exempt
12 spur.

13 Q. You are talking about as Suffolk and Southern?

14 A. As Suffolk and Southern.

15 Once it became clear that the first filing that
16 we made and the problems with the real estate interest
17 that we had at Nicolla could not be resolved, we informed
18 the STB that we were withdrawing our application with
19 respect to the Brookhaven Rail Terminal.

20 Q. Has Suffolk and Southern done

21 THE COURT: I just have a question. You have
22 used the term we several times.

23 THE WITNESS: Yes.

24 THE COURT: I don't know who you are referring

25 to.

1 THE WITNESS: Suffolk and Southern.
 2 In my capacity as CFO and general counsel of
 3 Sills Road Realty, I also act in a similar fashion for
 4 Suffolk and Southern Rail Road.
 5 THE COURT: That is who you are referring to
 6 when you are referring to a single entity.
 7 THE WITNESS: Yes. We, meaning Suffolk and
 8 Southern Rail Road in this case.
 9 THE COURT: You don't have any financial
 10 interest in that or any officer position other than
 11 general counsel. Is that what you are saying?
 12 THE WITNESS: Correct. Yes I act in that
 13 capacity for them.
 14 Q. Now, has Suffolk and Southern ever done any
 15 construction activities at the Brookhaven Rail Terminal?
 16 A. No. I mean, we recognize that --
 17 Q. And if you can, be very clear about the we.
 18 A. I'm sorry.
 19 Suffolk and Southern, because we recognize that,
 20 Suffolk and Southern recognize that because of the
 21 problems with the lease, our lease of the Nicolla site, we
 22 realize that were not going to be in a position to obtain
 23 the common carrier status that would be necessary to build
 24 the Brookhaven Rail Terminal and operate it as an exempt
 spur.

1 And so it was decided that in order to bring
 2 this plan to fruition we needed to, and the best way to do
 3 this was to work with an existing railroad.
 4 At that time then Sills Road Realty contracted
 5 with entered into a lease and operating agreement with US
 6 Rail in order to build, construct, and operate the
 7 Brookhaven Rail Terminal.
 8 Q. Sir, I believe you have in front of you Plaintiff's
 9 Exhibit 7, which is the railroad operating agreement and
 10 property lease?
 11 A. Yes.
 12 Q. Is that the agreement that Sills Road entered into
 13 with US Rail?
 14 A. Yes. That's correct.
 15 Q. And is it your understanding of that agreement that
 16 US Rail was the entity that was operating, constructing
 17 and operating, the Brookhaven Rail Terminal?
 18 A. Yes.
 19 Q. Was Sills Road in any way constructing or operating
 20 the Brookhaven Rail Terminal?
 21 A. No.
 22 Q. How was it that you came to know about US Rail?
 23 A. I understand that some of the principals of Sills
 24 Road have had previous business dealings with US Rail, and
 25 so once it became clear that Suffolk and Southern was not

1 going to be capable of providing the service that was
 2 expected, that we had to get in touch with an existing
 3 operating railroad in order to do that.
 4 Q. Prior to entering into the railroad agreement with US
 5 Rail, which is Exhibit 7, did Sills Road have any
 6 discussions with representatives of the town of
 7 Brookhaven?
 8 A. Oh, yes.
 9 Q. Would you tell the court about those?
 10 A. Sure.
 11 As I said, in January we met with David Woods,
 12 who is the town's director of planning. We also met in
 13 the subsequent month, February, with -- I wasn't at the
 14 meeting but I know the meeting took place -- with the
 15 county director of planning as well.
 16 There was a meeting -- it was before
 17 construction was started. I think it was in May -- with
 18 the town supervisor as well as Mr. Foley as well as with
 19 Ray Donnelly who is the director of economic development
 20 for the town.
 21 I think that was all the meetings that were held
 22 with the town.
 23 Q. Was there any discussions, in your meetings with the
 24 town, about needing town approval for this facility?
 25 A. One of the things that we, Sills Road, Suffolk and

1 Southern actually, had prepared initially, was legal memos
 2 from our STB counsel as well as from Farrell Frit, which
 3 were delivered to the town attorney's office, I believe
 4 late June, which explained in great detail our
 5 understanding of what the legal circumstances were with
 6 respect to STB or the federal preemption of
 7 local environmental requirements, as well as the fact that
 8 this facility was going to be an exempt spur under the
 9 federal law.
 10 Q. Did the town ever respond to the receipt of this memo
 11 describing the preemption?
 12 A. Not that I'm aware of.
 13 Q. Sir, what I would like to do is give to you what has
 14 been premarked as Plaintiff's Exhibits 1 through 6. I
 15 believe.
 16 Actually, I want to give you Exhibits 1 through
 17 5 first.
 18 Sir, have you ever seen these tickets before?
 19 A. Yes.
 20 Q. Can you tell the court what Exhibits 1 through 5 are?
 21 A. They are a series of town of Brookhaven appearance
 22 tickets, virtually identical except for the party who's
 23 named in them. And they were tickets that were issued to
 24 Sills Road Realty, Suffolk and Southern Rail Road, Adjo
 25 Contracting, Pratt Brothers, and Wetral Brothers.

1 Q. Who are Pratt and Watral?
 2 A. Pratt and Watral are I believe subcontractors of Adjo
 3 Contractors.
 4 Q. Were they doing work at the Brookhaven Rail Terminal?
 5 A. Yes. They were doing some excavation and I believe
 6 trucking work.
 7 MS. BIBLOW: Your Honor, I would ask that these
 8 series of tickets, marked collectively as Exhibit 1
 9 through 5, be entered into evidence.
 10 MR. CUTHBERTSON: No objection.
 11 THE COURT. Admitted.
 12 (Plaintiff Exhibit 1 through 5 in evidence.)
 13 BY MS. BIBLOW:
 14 Q. Sir, when were these tickets served?
 15 A. If memory serves me, they were served over a series
 16 of days. I think it was from October 12 through October
 17 16.
 18 Q. And at the time that they were served, had the STB
 19 entered its October 12 ruling regarding the cease and
 20 desist order?
 21 A. Yes.
 22 Q. And to your knowledge, at the time that decision was
 23 issued by the STB was the town participating in the STB
 24 proceeding?
 25 A. They were not formally an intervenor, as I understand

1 it, but they certainly were aware of the proceeding since
 2 it was in part engendered by their letter to the STB.
 3 Q. Who served these tickets?
 4 A. The town inspector, Tohill, who I understand is an
 5 inspector with the town attorneys office.
 6 Q. You mentioned that the tickets there are a series of
 7 tickets. And I believe, if you look at them carefully,
 8 there are nine tickets issued to everybody except Adjo.
 9 And Adjo has eight tickets?
 10 A. I think it was everybody but Watral. Watral had
 11 eight, and all the other tickets there were nine tickets
 12 to each of those entities, all of which cited the same
 13 violations.
 14 Q. And the violations that are noted in those tickets,
 15 first of all when are those tickets returnable?
 16 A. The 13th of December, I believe.
 17 Yes, all them are returnable on the 13th of
 18 December.
 19 Q. Sir, to your knowledge what are the issues or the
 20 code provisions that are being raised in these tickets?
 21 A. Most of them, almost all of them, had to do with
 22 violation of zoning ordinances.
 23 Mining without permits. Not posting a bond
 24 against mining, I believe. Failure to have a permit for
 25 tree removal. There was no building permit. I believe

1 something related to site plan approval. No CEOs.
 2 Nonpermitted use.
 3 Q. Sir, is it clear in your mind that none of these
 4 tickets deal with health and safety issues?
 5 A. No.
 6 MR. CUTHBERTSON: Objection.
 7 THE COURT: Overruled.
 8 BY MS. BIBLOW:
 9 Q. Is that your understanding that none of these tickets
 10 do that?
 11 A. No. They all appear to be related to
 12 THE COURT: You are asking the question again.
 13 MS. BIBLOW: I thought you said overruled. I'm
 14 sorry.
 15 THE COURT: No. I sustained the objection and I
 16 struck the answer.
 17 MS. BIBLOW: I'm sorry.
 18 MR. CUTHBERTSON: Actually in deference to Ms.
 19 Biblow, you did say overruled.
 20 THE COURT: Did I say overruled? I struck the
 21 answer.
 22 THE WITNESS: I'm sorry.
 23 THE COURT: Do you want to rephrase your
 24 question? You can go ahead.
 25 BY MS. BIBLOW:

1 Q. Is it your understanding that all of the tickets that
 2 were issued deal with site plan and zoning concerns?
 3 A. Yes.
 4 Q. Do any of the tickets to your knowledge concern
 5 health and safety issues?
 6 MR. CUTHBERTSON: Objection.
 7 THE COURT: Sustained.
 8 MS. BIBLOW: I'm sorry. I didn't hear what you
 9 said, your Honor.
 10 THE COURT: Sustained.
 11 BY MS. BIBLOW:
 12 Q. What have you done as a result of the issuance of
 13 these tickets?
 14 A. Well, obviously we take issuance of the tickets quite
 15 seriously.
 16 These violations are we risk potential criminal
 17 prosecution as well as fines. These tickets essentially
 18 came in after we had been notified by the STB that we were
 19 no longer permitted to work at the site. But certainly we
 20 have taken these tickets very seriously and we risk
 21 criminal prosecution for something that we don't believe
 22 for violations we don't believe we committed.
 23 Q. Can you tell the court what activities Silb and
 24 taken, or its partners have taken with respect to being
 25 in the stone business and activities that you intend to do

1 - at the Brookhaven Rail Terminal

2 A. With respect to the stone business. As I said, we
3 continue, we have set up a sister company called Sills
4 Materials LLC, which is owned by the same entities that
5 own Sills Road Realty, to be wholesale stone distributor
6 of stone on Long Island.

7 We have entered into an agreement with our
8 upstate partner.

9 Q. Who is we?

10 A. I'm sorry. Sills Materials has entered into an
11 agreement that Sills material, has been operating under
12 really since April of this year to supply stone to Long
13 Island from quarries in upstate New York.

14 Our upstate quarry partner has undertaken to
15 lease a fleet of cars, roughly 104 cars, that would be
16 used to, has been used to transport stone down to Long
17 Island from the quarries.

18 We have been providing and selling aggregate
19 stone to principally to our partners for related entities.

20 We have been actively engaged in what we expect
21 to be engaged in, which is the wholesale sale of
22 aggregates on Long Island.

23 Q. Can you describe these rail cars that you have
24 mentioned that you have gotten.

THE COURT: Do you really need this testimony

Drumm - for the Plaintiff - Direct/Ms. Biblow

1 for purposes of the application that is before the court?

2 MS. BIBLOW: I believe it goes to irreparable
3 harm your Honor.

4 THE COURT: Okay. Proceed.

5 MR. CUTHBERTSON: If I can be heard.

6 Your Honor, it is an upstate quarry. That is
7 not before the court. I don't know how the upstate
8 quarry's lease for railroad cars goes to the issue about
9 irreparable harm in this action.

10 THE COURT: I will permit it. Go ahead

11 Try to get some focus on your examination. It
12 is a very limited purpose that were here for. We are not
13 trying the whole case.

14 MS. BIBLOW: I understand that.

15 THE COURT: The hopes and aspirations of the
16 lead plaintiff. I really don't know what you have in this
17 proceeding.

18 MS. BIBLOW: In our view, your Honor, we have a
19 dual obligation in order to get preliminary relief: To
20 show likelihood of success, which we think is very clear
21 with respect to the STB who we are in front of, and these
22 tickets should be held in abeyance, or shouldn't have been
23 issued actually.

24 And we also have to show irreparable harm. This
25 is activities that has been undertaken in order to go into

1 the business at the Brookhaven Rail Terminal

2 These are expenses that have been incurred

3 These are contracts that have been entered into. There is
4 an expectation that the business will start in March or
5 April. And these are all part and parcel of irreparable
6 harm.

7 If Mr. Cuthbertson wants to stipulate to it,
8 fine.

9 THE COURT: I said proceed.

10 MS. BIBLOW: I'm sorry. I thought you meant to
11 respond.

12 BY MS. BIBLOW:

13 Q. Mr. Drumm, if you can very briefly talk about and
14 do mean briefly, talk about the impact of the tickets that
15 have been issued to your business and your ability to
16 develop a Brookhaven Rail Terminal.

17 A. As I said, the first impact

18 MR. CUTHBERTSON: Objection, your Honor. It was
19 asked and answered already.

20 Miss Biblow asked about what the tickets meant
21 to Mr. Drumm and he said it is a criminal prosecution. He
22 is afraid of that. I think it was answered already.

23 THE COURT: Haven't you covered that?

24 MS. BIBLOW: Your Honor, I think there are other
25 aspects to it. If the court would

Drumm - for the Plaintiff - Direct/Ms. Biblow

1 THE COURT: Do you want to focus in on an aspect
2 that you haven't covered?

3 MS. BIBLOW: Yes, with respect to the economic
4 and noneconomic issues relating to that.

5 THE COURT: Please go ahead.

6 MS. BIBLOW: Thank you.

7 BY MS. BIBLOW:

8 Q. As I said, if you can briefly talk about those
9 impacts as opposed to just the criminal proceedings.

10 A. Well, again, the fact that the town is attempting to
11 stop the construction of this site, of this facility, is
12 going to adversely affect our Sills Road Materials
13 ability to be able to market its wholesale distribution
14 services to third parties.

15 It will adversely affect

16 THE COURT: Mr. Drumm, you understand that the
17 STB has issued the cease and desist order.

18 THE WITNESS: That's correct.

19 THE COURT: Is there anything in these
20 violations, the cease and desist, doing anything?

21 THE WITNESS: I'm sorry. I take a ticket that
22 says come into a court and you may be subject to a
23 criminal violation, to be a very serious

24 THE COURT: You are a lawyer. I'm asking you a
25 legal question. Do you see anything that says ceases

1 desist?

2 THE WITNESS: There is no specific cease and

3 desist.

4 THE COURT: However, the STB has issued a cease
5 and desist order.

6 THE WITNESS: Yes That's right.

7 THE COURT: Isn't that the reason why you are
8 not proceeding with your construction?

9 THE WITNESS: No Frankly, I think if the STB
10 had not issued a cease and desist order, we would be
11 concerned about moving forward with ongoing violations of
12 town

13 THE COURT: But that is my point They have
14 entered a cease and desist order

15 THE WITNESS: That is correct.

16 THE COURT: And you have taken that to the
17 circuit and they have said we are not going to review it
18 because that is not a final order.

19 THE WITNESS: Correct.

20 THE COURT: So it not really these tickets that
21 are stopping anything, is it?

22 THE WITNESS: No.

23 MS. BIBLOW: Your Honor, if I may be heard on
24 this point.

25 THE COURT: I just ask the witness questions I

1 through 5 in evidence? I'm sure you want to do that.

2 MS. BIBLOW: I'm sorry I did.

3 THE COURT: Any objection?

4 MR. CUTHBERTSON: I object to the relevance of
5 it. I don't know how Mr. Drumm is able to authenticate it
6 because he hasn't indicated that he is a principal of
7 Empire Asphalt.

8 THE COURT: With Exhibits 1 through 5 is there
9 any issue? For whatever relevance they may have in this
10 hearing.

11 MR. CUTHBERTSON: You know what your Honor?
12 For the hearing I will not object. I withdraw the
13 objection.

14 THE COURT: Thank you very much. Admitted
15 BY MS. BIBLOW:

16 Q. Now we are on Plaintiff's Exhibit 6.

17 MS. BIBLOW: Just to be clear, all the tickets
18 are in?

19 MR. CUTHBERTSON: All the tickets are in.
20 No objection your Honor.

21 THE COURT: Thank you. Admitted.
22 (Plaintiff Exhibit 6 in evidence.)

23 BY MS. BIBLOW:

24 Q. Mr. Drumm, when were the tickets issued to Empire

25 A. These were issued to Empire around November 14,

1 will give you ample opportunity to be heard at the end of
2 the case.

3 BY MS. BIBLOW:

4 Q. Mr. Drumm, who is Empire Asphalt?

5 A. Empire Asphalt is an asphalt be company that is owned
6 by several of the partners of Sills Road Realty.

7 It acquired the asphalt operation's previous
8 company in April of this year. And it is one of the
9 users, one of the purchasers, of stone from Sills
10 Materials.

11 Q. And after the commencement of this action and the
12 filing of the order to show cause, was Empire Asphalt
13 issued tickets by the Town of Brookhaven?

14 MR. CUTHBERTSON: Objection, your Honor. I
15 don't believe that Empire Asphalt is relevant to this
16 action. They are not a party to it and I don't see the
17 relevance.

18 THE COURT: I will permit the testimony.

19 MR. CUTHBERTSON: Okay

20 A. I'm sorry? Were they issued tickets?

21 BY MS. BIBLOW:

22 Q. Yes. Were they issued tickets?

23 A. Yes, they were.

24 Q. I would like you to look at premarked Exhibit 6.

25 THE COURT: Why don't you offer Exhibits 1

1 Q. And do you see the date of the tickets, sir? They
2 are September 26, '07.

3 Do you know what the delay was in issuing the
4 ticket so far as the sixth ticket?

5 A. No. I have no idea.

6 Q. Who served the sixth ticket on behalf of the town?

7 A. I understand that they were served by the inspector
8 Tohill.

9 Q. Is that the same person that served the other
10 tickets, Exhibit 1 through 5?

11 A. Yes.

12 Q. Could you explain the connection between Empire
13 Asphalt, Sills Road Realty, and Adjo Swatral and Pratt
14 who were all plaintiffs in this matter?

15 A. Well, Empire Asphalt is owned by entities that are
16 owned by -- share common ownership with Pratt Brothers
17 with Watral Brothers, with Adjo Contracting.

18 Q. And to your knowledge

19 A. Who are all owners of Sills Road?

20 Q. And to your knowledge was the town of Brookhaven
21 aware of that interconnection of ownership?

22 A. Yes.

23 MR. CUTHBERTSON: Objection.

24 THE COURT: I will sustain.

25 BY MS. BIBLOW:

1 Q. Sir, does the Town of Brookhaven use the Empire

2 Asphalt facility, itself, to obtain asphalt?

MR. CUTHBERTSON: Objection.

THE COURT: Overruled.

5 A. Yes.

6 BY MS. BIBLOW:

7 Q. And did to your knowledge Empire have to provide a

8 bid document to the town in order to get this business?

9 A. Yes.

10 Q. I would like to show you what has been premarked as

11 Exhibit 12.

12 MR. CUTHBERTSON: Your Honor, looking at this I

13 believe now were going completely far afield.

14 The fact that one arm of Brookhaven town

15 government may use this asphalt plant, and to attribute

16 that knowledge, that there is some connection in what is

17 probably, this is a board matter, to expect that an

18 investigator in the town attorneys office is going to have

19 knowledge of this is really ludicrous. And I believe

20 completely far out.

21 THE COURT: I believe counsel is trying to

22 establish knowledge on behalf of the town which is a

23 single entity Help him.

24 I will permit it.

25 MR. CUTHBERTSON. Okay.

1 THE COURT: You have your objection.

2 MR. CUTHBERTSON: Thank you, your Honor.

3 BY MS. BIBLOW:

4 Q. Mr. Drumm, can you tell us what Exhibit 12 is?

5 A. Yes. It is a Town of Brookhaven transactional

6 disclosure form.

7 Q. And in that document does that explain who the

8 partners are of Empire?

9 A. Yes, it does.

10 There was a supplemental filing made with the

11 town which outlined in detail both the corporate owners of

12 Empire and who their individual owners were.

13 Q. And when was this submitted to the town?

14 A. This was submitted in April of 2007.

15 Q. Sir, can you just briefly describe, and I do mean

16 briefly describe, how long the Empire facility has been in

17 existence and whether or not, in your knowledge as an

18 attorney, it requires any permits to operate.

19 MR. CUTHBERTSON: Excuse me, your Honor. If I

20 can just stop there.

21 If Miss Biblow is no longer talking about this

22 and has not offered it into evidence, I would object to

23 this particular document and the line of questioning and

24 ask that it be stricken.

25 MS. BIBLOW: Then I will ask the court to move

1 Exhibit 12 into evidence because it does give knowledge

2 THE COURT: You moving this into evidence?

3 MS. BIBLOW: Yes.

4 MR. CUTHBERTSON: There is no foundation, your

5 Honor.

6 She hasn't indicated that Mr. Drumm prepared

7 this, that he signed it, that his signature is anywhere on

8 this document.

9 THE COURT: What are you seeking to establish by

10 this document?

11 MS. BIBLOW: I'm seeking to establish that the

12 town had knowledge of who the entity was with respect to

13 Empire in April, your Honor, several months before they

14 decided to issue tickets to Empire, after they were aware

15 of the interconnection with the plaintiffs and after they

16 were aware that their own attorney in this court said that

17 they would not issue any other tickets.

18 THE COURT: What is it exactly in this page

19 document that establishes this relationship?

20 MS. BIBLOW: If you look on the last page, sir,

21 it talks about all of the members of the entities, these

22 are all the same people that are Pratt, Watral, Bonjourno,

23 was Adjo.

24 And the town uses this facility to get their

25 asphalt, so they are well aware of who Empire is, this is

1 a facility that has operated for over 50 years, sir.

2 THE COURT: Where are you going? I see a James

3 Pratt III, and an individual Thomas Pratt, Watral,

4 Is that what you are relying on?

5 MS. BIBLOW: That is correct. Those are the

6 same people who are the principals of Watral, Adjo, and of

7 Pratt, sir.

8 THE COURT: Who is Adjo, sir?

9 MS. BIBLOW: Mr. Bonjourno.

10 THE COURT: I will permit that whatever

11 relevance it may have.

12 Objection overruled.

13 MR. CUTHBERTSON: Okay.

14 (Plaintiff Exhibit 12 in evidence)

15 BY MS. BIBLOW:

16 Q. Mr. Drumm, do you have a connection to Empire?

17 You have already testified you have a connection to

18 Empire. How many years has Empire been in operation?

19 A. Empire itself started operation in April of 2007, the

20 year when it acquired the plant.

21 Q. And how long has the plant been in operation?

22 A. We understand the plant has been in operation

23 MR. CUTHBERTSON: Objection. The witness is

24 testifying he understands, not saying that he has any

25 direct knowledge of how long it has been in existence.

THE WITNESS: Well, I have --

THE COURT: Do you have any personal knowledge?

THE WITNESS: I do, actually, in terms of --

THE COURT: Overruled

THE WITNESS: -- In doing due diligence I was involved in forming Empire Asphalt and in representing them in the acquisition of the assets.

For the due diligence that we undertook, I undertook, in connection with that purchase, it was clear that the plant had been operated by the previous owners since 1985. The previous owners were in business and various records indicated that the plant had actually been originally built and in continuous operation since 1969.

THE COURT: Did you say 1969?

THE WITNESS: 1969.

BY MS. BIBLOW.

Q: To your knowledge in representing the entity that purchased this, had Empire Asphalt ever received any other ticket relating to nonconforming use such as the ticket that was issued in those other tickets and Exhibit 6?

A: No, we didn't see anything in their file indicating any tickets.

And we got representations in fact from the seller that there were no violations.

Q: Can you explain to the court very briefly what the

nonconforming preexisting use means.

A: Essentially it is, as I understand it is a commercial, essentially a commercial use of property that was later zoned for other than that use.

And governments aren't permitted to take property without compensation. So as a consequence, when zoning ordinances change --

MR. CUTHBERTSON: Your Honor, if I can. First, I think the definition is probably wrong, and I don't know what it is really relevant.

THE COURT: I will permit it.

I don't know what relevance all this has.

You seem to be ignoring the reason for incorporating. You form a separate corporation for the purpose of limiting liability. What relevance is it that similar individuals happen to have other corporations? They are separate entities

MS. BIBLOW: I understand what you are saying, your Honor, but our view is that the town was very well aware of the interconnective entities at the time it issued this ticket.

THE COURT: We don't have a jury here so I'm going to permit you to make your record. But try to keep your eye on the ball here.

MS. BIBLOW. Thank you.

BY MS. BIBLOW.

Q: If I may shortcircuit your answer, sir, is it your understanding that this is a grandfathered use, as that term is used?

A: That is correct.

Q: And that you don't have to go back and get permits once the zoning has changed if it's a pre-existing nonconforming use?

MR. CUTHBERTSON: Objection.

THE COURT: Yes, I'm going to sustain that question.

BY MS. BIBLOW.

Q: Mr. Drumm, what I would like to do is ask you a little bit, or question you a little bit about the STB proceeding.

A: Yes.

Q: If you could, tell the court basically the genesis of that proceeding and where it is now.

A: As I mentioned earlier, the first filing that was made with the STB was made on behalf of Suffolk and Southern Rail Road to obtain operating authority as the common carrier with respect to the rail line at Norfolk.

There was a subsequent filing with the STB again by Suffolk and Southern with respect to the Brookhaven Rail Terminal. When again it became clear that

Suffolk and Southern was not going to be able to correct the defect in the title to the Norfolk site, it withdrew the applications, both applications and --

THE COURT: You said both applications were withdrawn?

THE WITNESS: Yes.

A: And Suffolk and Southern now served only as an investor in Sills Road Realty. It is not an operating entity in any way, shape, or form other than investor.

I guess it was on October 1, in response to a Newsday article and a letter of inquiry from the town of Brookhaven, Sills Road and Suffolk and Southern received a letter from Melvin Clemens, who is the director of enforcement at the STB.

MR. CUTHBERTSON: Your Honor, Mr. Drumm is now really essentially testifying in the narrative. And I understand the wide latitude that the court has to hear testimony under these circumstances and Miss Biblow tries to establish a record, I understand and respect that, but all

of this information, all of this characterization is a part of the STB record, so I don't know what more we need to have Mr. Drumm's characterization of the STB proceeding.

THE COURT: Do you have any records you are

1 going to be submitting with regard to what is happening in
2 that proceeding?

MS. BIBLOW: Your Honor, we have already submitted, and it is Joint Exhibit 1 which you have entered into evidence.

6 I will sum up in a couple of questions this witness, if I might.

THE COURT: Proceed.

BY MS. BIBLOW:

10 Q. Sir, is Sills Road Realty and US Rail before the STB in connection with getting permission to operate Brookhaven Rail Terminal?

13 A. Yes, we are.

MS. BIBLOW: No further questions.

THE WITNESS. Thank you.

THE COURT: Okay. Cross-examination.

18 CROSS-EXAMINATION

19 BY MR. CUTHBERTSON:

20 Q. Mr. Drumm, you testified before that legal memorandum were produced and provided to the town.

22 Your counsel didn't bring them here today, and you haven't submitted them to the court, have you?

24 A. No.

25 Q. The you mentioned that Suffolk and Southern had made

Drumm - for the Plaintiff - Cross/Mr. Cuthbertson

1 a filing with the STB?

2 A. Correct.

3 Q. Did you have an attorney that represented you in that?

5 A. Yes, we did.

6 Q. And who was that?

7 A. Name is John Heffner.

8 Q. And you referred to two filings. One was the Nicola filing. Is that correct?

10 A. Yes.

11 Q. And then the other was for what you term the Brookhaven Rail Terminal. Correct?

13 A. Yes.

14 Q. With respect to the Brookhaven Rail Terminal. You submitted that in May of 2007. Is that correct?

16 A. I think, yes, I think that's correct.

17 Q. And at the time you indicated that Suffolk and Southern had reached an agreement with Sills Road Realty for the lease and operation of the rail track in Yaphank, New York. Correct?

22 A. Yes. Subject to our ability, Suffolk and Southern's ability to perform that agreement, yes.

23 Q. Did it say anything to that effect in the submission you made to the STB? Withdrawn.

25 You just mentioned some subject-to language

1 about subject to Suffolk and you said ability to perform?

2 A. Right.

3 Q. Did you couch your STB filing in those words?

4 A. No.

5 Q. So you said that Suffolk and Southern and Sills had reached a lease agreement when you submitted in May of 2007. Correct?

8 MS. BIBLOW: Objection.

9 THE COURT: Was that an objection?

10 MS. BIBLOW: He never said it was a lease agreement, sir.

12 MR. CUTHBERTSON: Okay.

13 THE COURT: Would you like the transcript read back?

15 MR. CUTHBERTSON: Yes. I just want to grab an exhibit. I apologize.

17 In the interest of time, your Honor, I'll can characterize.

19 THE COURT: Do you say want to rephrase?

20 MR. CUTHBERTSON: It will move along. I don't think it is necessary. Your Honor, I apologize.

22 BY MR. CUTHBERTSON:

23 Q. You testified that you had a number of meetings with the Town of Brookhaven. Correct?

25 A. Yes, sir.

Drumm - for the Plaintiff - Cross/Mr. Cuthbertson

1 Q. And prior to July 2007, your intention was to have

2 Suffolk and Southern establish a railroad and operate at the Brookhaven Rail Terminal?

4 A. Build and operate the terminal, yes, that is correct.

5 Q. That changed, however, at some point in July 2007?

6 A. Yes. Around that time.

7 Q. And is it fair to say that the Suffolk and Southern application was based on a different legal theory than US Rail is pursuing?

10 A. No. Not really.

11 Q. Okay. In the case of US Rail, do you know whether US Rail has ever submitted an application to the STB?

13 A. In terms of what?

14 Q. With respect to getting authority to or for?

15 A. Operate what?

16 Q. To operate at the Brookhaven Rail Terminal?

17 A. Oh. Sorry. No.

18 Q. But in the case of Suffolk and Southern, then, was a submission, wasn't there?

20 A. Yes, that's correct.

21 Q. So they were made under two different legal theories, wouldn't you believe, based on one had an application, one did not?

24 A. One really had to do with the fact that it wasn't clear yet that Suffolk and Southern really had authority

1 as a carrier because of the fact that the first filing had
2 some defects in it. And so, as I said, the reason we then
3 turned to US Rail --

4 Q. Let me stop you. So you needed to get authority for
5 Suffolk and Southern --

6 MS. BIBLOW: Can we let the witness finish?

7 THE COURT: Did you finish your response?

8 THE WITNESS: No.

9 We then turned to US Rail, because of that
10 problem, because they are an existing Class III carrier.

11 BY MR. CUTHBERTSON:

12 Q. So Suffolk and Southern needed to go to the STB to
13 get authority to become a carrier. Is that correct?

14 A. Yes. That's correct.

15 Q. And US Rail didn't because they are a Class III
16 carrier. Correct?

17 A. Yes. That's correct.

18 Q. And you had meetings in the spring of 2007, at a time
19 when Suffolk and Southern was the entity that was going to
20 operate this facility. Correct?

21 A. That is correct.

22 Q. Did you ever go back to the town and say we have
23 changed our plans; we have changed our legal theory; we
24 are now going to operate as US Rail?

MS. BIBLOW: Objection.

1 THE COURT: Overruled.

2 A. Did we ever go back and tell them that we were going
3 to use US Rail?

4 BY MR. CUTHBERTSON:

5 Q. Correct.

6 A. No.

7 Q. You allege that you are going to be harmed as a
8 result of the construction not moving forward at this
9 facility. Correct?

10 A. Yes.

11 Q. And currently, stone aggregates comes to Long Island,
12 I think you have indicated, by a single, the majority of
13 it by a single vendor. Correct?

14 A. Yes. As far as I'm aware, yes.

15 Q. So aggregate does get here to Long Island for
16 construction. Right?

17 A. Yes.

18 Q. And it makes its way here by truck. Correct?

19 A. Some by truck and some by barge.

20 Q. So you want to position yourself to be a competitor
21 with this large vendor, correct?

22 A. Correct. As well as provide for our own needs. More
23 constant actually.

24 Q. Now, you also made an application to the Second
25 Circuit for a preliminary injunction. Correct?

1 A. That's correct.

2 Q. You had a different claim of harm in front of the
3 Second Circuit. Isn't that correct?

4 MS. BIBLOW: Objection.

5 THE COURT: I will permit.

6 BY MR. CUTHBERTSON:

7 Q. In the filing with the Second Circuit, you indicated
8 that the harm you were suffering was that AT/inders were
9 trespassing on the facility. Is that correct?

10 A. That's part of it. Yes.

11 Q. And that you needed the ability to grade the facility
12 to take away those hills. Correct?

13 A. Yes.

14 Q. You also said that trespassers were coming on and
15 discharging shotguns on the site.

16 A. That's correct.

17 Q. But you are not making those arguments in this case.
18 are you?

19 A. We haven't raised them. No.

20 Q. You have indicated that you have done some
21 substantial marketing in connection with the site.

22 A. Yes.

23 Q. Have you produced a brochure?

24 A. No.

25 Q. Have you taken out any advertisement in the trade

1 Journal?

2 A. No. That would be foolhardy, not knowing when
3 exactly the site was going to be available for use.

4 Q. Well, you have indicated that you have undertaken
5 substantial marketing. Correct?

6 A. Yes. We have gone out and talked to any number of
7 people who are interested in acquiring stone.

8 Q. But you haven't developed a web site?

9 A. No, we have not done that.

10 Q. To your knowledge is the Empire Zone a zoning
11 designation in the Town of Brookhaven?

12 A. I'm not sure if it is a zoning designation, although
13 I understand it applies to industrial and commercial
14 developments.

15 The Empire Zone, as I understand it, is a
16 especially-designated site within the town where certain
17 estate and local tax breaks are available to businesses
18 that built in that particular zone.

19 MR. CUTHBERTSON: No further questions, your
20 Honor.

21 THE COURT: Any further questions of this
22 witness?

23 MS. BIBLOW: Nothing further, your Honor.

24 THE COURT: Thank you very much, you can step
25 down

1 (The witness was excused.)
 2 THE COURT: I think we will break for the day
 3 How many more witnesses do you have?
 4 MS. BIBLOW: I have no further witnesses, your
 5 Honor.
 6 THE COURT: Okay
 7 MR. CUTHBERTSON: I have one witness who would
 8 be brief. On the order of five minutes, ten minutes.
 9 THE COURT: Okay.

BRIAN TOHILL

11 called by the Defense, having been first duly
 12 sworn/affirmed, was examined and testified as
 13 follows

DIRECT EXAMINATION

17 BY MR. CUTHBERTSON

18 Q: Mr. Tohill, by whom are you employed?
 19 A: Town of Brookhaven.
 20 Q: What is your title?
 21 A: Town Investigator.
 22 Q: And how long have you been employed by the Town of
 23 Brookhaven?
 24 A: 11 years.
 25 Q: And can you quickly describe what your duties are as

1 a town investigator?
 2 A: Town investigator works in the Town Attorneys office.
 3 And we respond to complaints received by the Town
 4 Attorneys office. These complaints normally involve
 5 violations of the town code.
 6 Q: I show you what has been marked as Defendant's
 7 Exhibit A.

8 Can you tell me what those are.

9 A: Photographs of the site known to me as the Sills Road
10 site.

11 Q: And when were they taken?

12 A: These were taken on October 4, 2007.

13 Q: And do they fairly and accurately depict the
14 conditions at the Sills Road site on October 4, 2007?

15 A: Yes, they do.

16 MR. CUTHBERTSON: I would move those into
17 evidence.

18 THE COURT: Any objection?

19 MS. BIBLOW: No objection, your Honor

20 THE COURT: Admitted for purposes of this
21 hearing.

22 (Defense Exhibit A in evidence.)

23 BY MR. CUTHBERTSON:

24 Q: Can you generally describe what the photos depict.
 25 A: The photos generally depict the front entrance of the

1 premises. Some equipment that was stored on the premise
 2 piles of material, sand on the premise.
 3 Some darker materials, also photographed. A tree
 4 stump. Some more equipment and rammers. A screening
 5 machine. And several holes that were dug on the premise.
 6 Q: And for what purpose were the photos taken?
 7 A: An investigation into the activity on the site.
 8 Q: And did you issue tickets as a result of your
 9 investigation?
 10 A: Yes, I did.
 11 Q: And do you have an idea how much land has been
 12 cleared on the site at this point?
 13 A: It was determined that it was generally upwards of 18
 14 acres.
 15 Q: Any idea how much material has been removed from the
 16 site?
 17 A: It wasn't clear to me or I couldn't make a clear
 18 determination as to how much material was removed.
 19 There was quite a good amount of material on the
 20 site, and there were several holes on the site, large
 21 holes.
 22 Q: Do you know if yours is the only agency that has
 23 issued tickets with respect to this violation?
 24 A: No, I'm not the only agency.
 25 Q: What other agency has issued tickets?

1 A: The DEC also issued summonses.
 2 Q: Do you know what they were for?
 3 A: They were for illegal mining activity on the site.
 4 Q: Do you know what the status of those tickets are?
 5 A: I did not know. No.
 6 Q: Let me ask you: there is an entity named US Rail?
 7 Did you issue tickets to them?
 8 A: No, I did not.
 9 Q: And were you aware that they were affiliated with the
 10 Sills Road site?
 11 A: Yes, I was.
 12 Q: And why didn't you issue tickets to US Rail?
 13 A: I could not find any corporate record or corporate
 14 information regarding US Rail within the State of New
 15 York.
 16 Normally when I issue summonses to a corporate
 17 entity that has a violation located within the town of
 18 Brookhaven, I do a search either through Suffolk County or
 19 the State of New York.
 20 I could not find anywhere information regarding
 21 US Rail within the state.
 22 Q: And is that what stopped you from issuing tickets to
 23 US Rail?
 24 A: Yes.
 25 Q: Why does that stop you from issuing tickets to US

1 Rail?

2 A. I couldn't reach them.
These are violations, they are normally
violations of misdemeanors, normally we just reach from
within Suffolk County and we go to just one county over as
far as service.

7 Q. I would ask you to take a look at, it should be in
front of you, Plaintiff's Exhibit 6.

9 Do you recognize those?

10 A. Yes, I do.

11 Q. What are they?

12 A. These are appearance tickets issued to Empire
Asphalt.

14 Q. And you issued those tickets. Correct?

15 A. Yes, I did.

16 Q. And was their issuance based on a complaint?

17 A. Yes, it was.

18 Q. And did you, were you the one who investigated that
complaint?

20 A. Yes, I was.

21 Q. And at the time you recorded that complaint, you
investigated that complaint, did you know of any
connection between Empire and Sills Road?

24 A. No, I did not.

Q. At the time the tickets were written, did you know of

1 any connection between Empire and Sills Road?

2 A. No, I did not.

3 Q. Were the tickets written in reprisal for the
activities were taking place on Sills Road?

5 A. No, they were not.

6 Q. Did there come a time you learned that Empire had
some relationship to the Sills Road site?

8 A. Yes.

9 Q. And how did that happen?

10 A. After issuing, physically issuing the tickets, the
summons, at the Empire facility, I returned to my office
and did a corporate search upon Empire Asphalt Inc, and
did find that their corporate address is located at 485
Underhill Road in Syosset.

15 Q. What is the significance of that?

16 A. 485 Underhill Road in Syosset is also the location of
Sills Realty and Suffolk and Southern Rail Road.

18 Q. Did there come a point in time when you were directed
not to issue any further tickets at the Sills Road site?

20 A. I was asked, after my investigation into the Sills
Road site and my multiple tickets issued, to back off,
essentially to stop my investigation into any further
connections, and to wait until the federal case was heard.

24 Q. I show you what has been marked as Defense Exhibit C,
Tell me if you recognize that document.

1 A. Yes, I do.

2 Q. Well, it is a series of documents. Maybe you can
take a look at it first.

4 A. Yes.

5 Q. And are these records that are kept by the town of
Brookhaven?

7 A. Yes.

8 Q. And are these records in connection with the
complaint on the Empire Asphalt site?

10 A. Yes.

11 Q. And are they records that you use in your
investigation?

13 A. Yes, they are.

14 MR. CUTHBERTSON: I would ask that they be
moved into evidence.

16 THE COURT: Any objection?

17 MS. BIBLOW: Your Honor, it may have a minute
to just look at this.

19 THE COURT: Surely.

20 MS. BIBLOW: I have no objection, your Honor.

21 THE COURT: Admitted for purposes of this
hearing.
(Defense Exhibit C in evidence)

24 BY MR. CUTHBERTSON:

25 Q. Can you tell me briefly what this pack of documents,

1 is

2 A. These documents are several complaints filed by a
constituent living in the area of the Empire Asphalt
facility. They refer essentially to disruptive noise,
smells, emanating from the premises.

6 Q. And when did you first receive a complaint from the
complainant that is mentioned in this document?

8 A. Our complaint form that came to our office was
just so we are clear, that is the first page, the first
page of the document.

11 The complainant then informed our office that
they had a complaint regarding this location on 9/28.
They filled out the complaint form on 10/5 and it was
mailed to our office.

15 The second page is a document, however, it refers
to a letter sent from the same complainant to her
councilman, Mr. Furey Rosenfeld, on August 30. This
information was forwarded to me just prior to the town of
Brookhaven complaint form.

20 Q. Did you use this information in your investigation of
Empire?

22 A. Yes.

23 MR. CUTHBERTSON: No further questions, your
Honor.

24 THE COURT: Any cross-examination?

MS. BIBLOW: Yes, I do.

CROSS-EXAMINATION
BY MS. BIBLOW

Q: Mr. Tohill, who directed you to go to the Brookhaven Rail Terminal site on October 4, 2007?

A: I believe Mr. Quinlan, the town attorney, directed my senior to send someone to the site, and I was directed to go.

Q: And did you speak to Mr. Quinlan about this site?

A: Afterwards, yes.

Q: And what was your discussion with Mr. Quinlan about the site?

A: Briefly, I just let him know what I observed on the site.

Q: And had you read any articles in Newsday before going to the site about the Sills Road Realty site?

A: Yes.

Q: And when was that?

A: I believe the articles began appearing on or about October 1st.

Q: And prior to that had you ever gone to that site before?

A: Not myself. No.

Q: Did anybody else from the Town of Brookhaven

investigative office to your knowledge ever go there?

A: No.

Q: With respect to the Empire ticket, sir, if you look on Exhibit C7, the complaining witness, Catherine Goldhaft, signed this on October 5, 2007. Do you see that?

A: Yes.

Q: Is that when it actually got to the Town of Brookhaven?

A: No.

Q: Then what is the significance of that 10/5/07 date?

A: The form as you see up on the top, towards the top, underneath the 07 and 10/05, also has a date of 9/28/07. This is the date the complainant initially called the Town of Brookhaven Town Attorney's office to make the complaint.

Q: Sir, can I refer to you Plaintiff's Exhibit 6, or to the Empire ticket. It should be in front of you.

A: Yes.

Q: Can you explain to the court why those are dated two days before you got the complaint.

The date is September 26, 2007. Did you get the complaint on 9/28/2007?

A: As I had stated previously, the second page of the document also refers to a letter forwarded from the 2 sheets.

complainant to Councilman Purey (Rosenfeld) office on September 30.

Q: When did your office get the complaint? Was that 9/28?

A: No, it was not.

Q: When was it?

A: I don't have the exact date that this particular document reached my office, no.

Q: Well, is it clear that the tickets were issued before you got the complaint from Miss Goldhaft?

A: The complaint that came from the Town of Brookhaven's Town Attorney's office, I need to back up obviously. Complaints come from various locations. We are directed from either the Council people or from a supervisor's office or from building department, planning department.

Lots of these different agencies receive complaints. Some of them can handle what's going on or they don't understand or they want to get this information to a different agency.

The Town Attorney's office, the town investigates, receives these complaints, sometimes in the form of a letter or an email, stating that this individual has a complaint regarding the location, can we go and check it out.

At the same time we direct these other agencies, supervisor's office and council people to have that individual call the Town Attorney's office and make a formal complaint so that we can also have that documentation.

Q: And it is your testimony, it is not clear, that the complaint came in from Miss Goldhaft on 9/26/07?

A: Correct. They called the Town of Brookhaven Town Attorney's office on that date.

Q: Had you seen the letter that Miss Goldhaft - when was the first time you saw that August 30, 2007 letter?

A: In between August 30 and you September 26.

Q: Do you have any record with you today that shows when you got that?

A: No.

Q: How about the October 3 letter that is attached to that same exhibit? This is page 10 of the fax.

Would you look at that. When did you get that, sir?

A: That would probably be on or about October 3.

Q: Does that concern the same entity?

A: Yes, it does.

Q: Sir, did you ever see Mr. Bonjournais - first of all, do you know Mr. Bonjournais?

A: I met him when I served the summons. I didn't know

1 him prior, no.

2 Q. Had you ever asked Mr. Bonjourno to identify what
3 facilities Adjo was associated with before you issued the
4 tickets to Empire?

5 A. No, I did not.

6 MS. BIBLOW: Nothing further, your Honor.

7 THE COURT: Where is this Empire site as

8 distinct from the site where they want to operate what
9 they consider to be a railway spur?

10 THE WITNESS: It is essentially on the North

11 Shore, your Honor. The Empire facility is an asphalt

12 plant located on Cornsewogue Road in Setauket. It is quite
13 a distance away

14 THE COURT: About 20 miles away?

15 THE WITNESS: Yes, your Honor.

16 THE COURT: What are these offenses? Are they
17 violations of town law?

18 THE WITNESS: Yes, sir.

19 THE COURT: And code?

20 THE WITNESS: Town of Brookhaven town code.

21 Yes, sir.

22 THE COURT: Are they civil in nature or

23 criminal.

24 THE WITNESS: They are violations, sir. They
25 appear in the Sixth District Court.

1 THE COURT: My recollection of state law is, you
2 have categories of felonies, misdemeanors. And then
3 violations, which would be prosecuted in the district
4 court, are really considered noncriminal in nature.

5 THE WITNESS: Yes, your Honor.

6 THE COURT: Do you know what category these
7 violations are in?

8 THE WITNESS: Well, I believe that they could
9 fall under civil or less than criminal in nature. They
10 are essentially violations.

11 I don't believe, to the best of my recollection
12 the zoning violations don't hold a high penalty as far as
13 monetary fees

14 THE COURT: Would this all be defined
15 particularly in the town code?

16 THE WITNESS: Yes, it would, your Honor

17 MS. BIBLOW: Your Honor, if I may follow up on
18 that

19 If you look on Exhibits 1 through 5, they
20 tually have indicated what the tickets are. Some of
21 in are misdemeanors.

22 You are asking about the Empire violations or
23 others?

24 THE COURT: I was just asking you about the
25 tickets in general. They all seem to be very, very

1 similar.

2 THE WITNESS: Yes, the counsels correct, there
3 are some misdemeanor violations.

4 The grading violations are considered

5 misdemeanors.

6 THE COURT: The return date on this is December

7 12 or 13 or thereabouts. Is that right?

8 THE WITNESS: On the 13th, roughly, yes.

9 THE COURT: On that date that would

10 considered to be an initial appearance.

11 THE WITNESS: Yes, your Honor.

12 THE COURT: And that is when they would appear

13 with counsel or appear pro se.

14 THE WITNESS: Yes, sir.

15 THE COURT: It wouldn't be a return that date.

16 THE WITNESS: No, your Honor.

17 THE COURT: That would be a district court judge

18 that they would appear before on that date.

19 THE WITNESS: Yes, your Honor.

20 THE COURT: Thank you very much.

21 Does that generate any questions at all by

22 either of you?

23 MR. CUTHBERTSON: Just one follow up, your Honor.

24 Honor.

25 REDIRECT EXAMINATION:

1 BY MR. CUTHBERTSON:

2 Q. Mr. Tohill, in your experience does the town of

3 Brookhaven seek criminal penalty as a result of these

4 violations?

5 MS. BIBLOW: Objection.

6 THE COURT: The witness overruled.

7 A. The misdemeanors, when they get to or they reach the

8 District Court obviously the defendant normally does have

9 the opportunity to ask for a trial in the district court.

10 However, I have very rarely seen anything that amounts to

11 trial in the district court.

12 We normally would take an action in the

13 initially what we would do is seek remedy in a lower court

14 and then proceed to a state or a county Supreme Court.

15 Q. Do you seek, does the town in these cases seek jail

16 sentence?

17 A. No.

18

19 RECROSS-EXAMINATION:

20 BY MS. BIBLOW:

21 Q. Mr. Tohill, the tickets that were issued, Exhibits 1, 2, 3, 4,

22 through 5, as you mentioned, some of them were

23 misdemeanors. Correct?

24 A. I would like to take a look at them, believe they are

25 Yes.

1 Yes, they are. Yes. Yes, the first one, right
2 here, Adjo Contracting Corp., ticket number 91293.

3 Q. These are returnable in a district court.
4 This is People of the State of New York v, for
5 instance, Adjo Contracting.

6 These are criminal appearance tickets. Correct?

7 A. The Town of Brookhaven versus. Yes.

8 Q. And as far as you know, if a district court judge
9 decided to issue a penalty, could that include jail time
10 as well as fines?

11 A. Yes.

12 MS. BIBLOW: Thank you.

13 MR. CUTHBERTSON: No further questions.

14 THE COURT: Thank you very much.

15 You may step down.

16 (The witness was excused.)

17 THE COURT: Have you offered all your exhibits?

18 I don't recall anything with regard to B.

19 MR. CUTHBERTSON: Actually, if I could just see
20 the list, I apologize, your Honor.

21 B, I believe is Plaintiff's Exhibit 6. So yes,
22 that has been offered so it would not be offered as B.

23 THE COURT: So that is part of Plaintiff's
24 Exhibit 6.

MR. CUTHBERTSON: It is identical to Plaintiff's

1 Exhibit 6, your Honor.

2 THE COURT: All right.

3 In light of the hour what I would like to do is
4 put this over until tomorrow.

5 Both sides rest?

6 MS. BIBLOW: Yes, your Honor.

7 MR. CUTHBERTSON: Yes, your Honor.

BOTH SIDES REST

8 THE COURT: I assume you would like to be heard.

9 MS. BIBLOW: Your Honor, if we are going to be
10 heard tomorrow, is it possible that we are heard in the
11 morning? Only because I have another matter in the
12 afternoon at 4 o'clock with the Town of Brookhaven and I
13 would like to make it.

14 THE COURT: I don't think I have tomorrow
15 morning free.

16 MS. BIBLOW: As long as it is before 3 o'clock.

17 THE COURT: What I was going to suggest was 11
18 o'clock tomorrow.

19 MR. CUTHBERTSON: Fine, your Honor.

20 Your Honor, if eventually the courts does ask us
21 to submit findings of fact and conclusions of law, would
22 you prefer that in lieu of an appearance tomorrow?

23 THE COURT: No. I would prefer to question both
24 you a little bit more in regard to your original
25 needs.

1 arguments, so be prepared.

2 The plaintiff, in particular, should be prepared
3 for what I see as a very substantial issue with regard to
4 asking this court to intervene in an administrative
5 proceeding under circumstances where the Second Circuit
6 Court of Appeals has already refused to intervene in any
7 way and where in my opinion it affects the material
8 structure of how we litigate cases of this nature.

9 In other words, you go before the Surface
10 Transportation Review Board and then if there is an adverse
11 determination you have the right to come into this court.
12 So if you could address that tomorrow, that would be
13 helpful.

14 I will be asking for a copy of the transcript
15 and your proposed findings of fact and conclusions of law.

16 The other thing I would ask Miss Biblow to
17 address is why any federal preemption issues can't be
18 raised in the district court of Suffolk County in defense
19 of these cases.

20 MS. BIBLOW: Your Honor, just so I'm clear, do
21 you want the findings of fact and conclusions of law
22 tomorrow?

23 THE COURT: No. No. I will hear your
24 summations tomorrow and then we will set a schedule
25. It would probably take a lot of pressure off

1 everyone if you could form some kind of agreement with
2 regard to the outstanding proceeding. But I don't see any
3 eminent trial at this point, so you have some flexibility.
4 I think I think it would be a better way to proceed, but
5 that is left up to you.

6 MR. CUTHBERTSON: Certainly, your Honor.
7 Pending your determination the town is willing not to
8 issue more tickets and/or to prosecute. They would just
9 adjourn the existing tickets either without date or until
10 such time as the court renders a decision.

11 THE COURT: I think that is very, very helpful.

12 The plaintiff also of course has to address
13 whether the irreparable harm in this case comes from the
14 cease and desist order or comes from these notices of
15 violation or violations appearance tickets.

16 Okay. I will see you again at 11 o'clock tomorrow.
17 (Proceedings adjourned at 5 pm)

I N D E X

1		
2		
3		
4	GABRIELL HALL	11
	DIRECT EXAMINATION	14
	BY MS. BIBLOW	
	CROSS-EXAMINATION	40
	BY MR. CUTHBERTSON	
	REDIRECT EXAMINATION	49
	BY MS. BIBLOW	
7		
	GERARD DRUMM	51
8	DIRECT EXAMINATION	52
	BY MS. BIBLOW	
9	CROSS-EXAMINATION	86
	BY MR. CUTHBERTSON	
10		
	BRIAN TOHILL	94
11	DIRECT EXAMINATION	94
	BY MR. CUTHBERTSON	
12	CROSS-EXAMINATION	102
	BY MS. BIBLOW	
13	REDIRECT EXAMINATION	108
	BY MR. CUTHBERTSON	
14	RECROSS-EXAMINATION	109
	BY MS. BIBLOW	
15	BOTH SIDES REST	111

16

17

E X H I B I T S

18	Plaintiff Exhibit 7 in evidence	19
	Plaintiff Exhibit 9 in evidence	23
19	Plaintiff Exhibit 8 in evidence	31
	Plaintiff Exhibit 10 in evidence	39
20	Plaintiff Exhibit 1 through 5 in evidence	66
	Plaintiff Exhibit 6 in evidence	76
21	Plaintiff Exhibit 12 in evidence	81
	Defense Exhibit A in evidence	95
22	Defense Exhibit C in evidence	100

23

24

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

SILLS ROAD REALTY, LLC,
US RAIL CORPORATION, et al.

07-CV-4584 (TCP)

Plaintiff,

US Courthouse
Central Islip, NY

-against-

THE TOWN OF BROOKHAVEN,

Defendant.

December 6, 2007
11:40 am

X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE E. THOMAS BOYLE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography
Transcript produced by computer

1 (Call to Order of the Court. Appearances stated
2 as indicated above.)

3 THE COURT: This is the application of the
4 plaintiff. So Miss Biblow, if you would like to start
5 off.

6 MS. BIBLOW: Good morning, your Honor. What I
7 would like to do in my summation is to address my
8 summation to three questions that you asked at the end of
9 the proceeding, and do it in the order that I believe you
10 asked them.

11 The first question had to do with the Second
12 Circuit. The second question had to do with raising
13 federal preemption in the local district court. And the
14 third question, which is really the crux of the matter, is
15 the irreparable harm.

16 What we have done for your Honor's purposes is,
17 we have created a binder with all of the materials that
18 were submitted to the Second Circuit. We have a copy for
19 Mr. Cuthbertson, although I'm sure he has his own set.
20 But if we would like to hand that up to you so that you
21 will have a complete set of everything, including the
22 orders.

23 THE COURT: And Mr. Cuthbertson has seen that?

24 MR. CUTHBERTSON: I haven't seen it. I trust
25 that it is what Miss Biblow represents it is.

1 THE COURT: Just to set the framework for your
2 argument.

3 I assume that any appeal from the STB goes
4 direct to the circuit?

5 MS. BIBLOW: That is correct, your Honor.

6 THE COURT: Is that your understanding?

7 MS. BIBLOW: Yes. That is correct.

8 THE COURT: So any adverse determination that
9 the plaintiff would receive before the STB would not be
10 resolved in this case?

11 MS. BIBLOW: That is correct.

12 Appeals of decisions go directly to the circuit
13 court, either the Second Circuit or the DC Circuit. In
14 this case it would go to the Second Circuit. And this is
15 exactly what it is.

16 So I would like to just explain the Second
17 Circuit because I think there was some confusion yesterday
18 or may have been some misstatements as to what is going on
19 there, what is being challenged there, and what the
20 decision of the circuit was.

21 As we were discussing yesterday, the STB issued
22 an order on October 12th that contained two things. It
23 contained a clear assertion of jurisdiction by the STB
24 requiring Sills Road, US Rail and Suffolk and Southern to
25 either apply to the STB for approval as a rail line or to

1 demonstrate to the STB that they were an exempt spur
2 Also in that order was a cease and desist order with respect
3 to construction of the rail terminal.

4 Under the STB rules what you do is, you can file
5 two things. One is a petition to stay the cease and
6 desist order, and the other is an petition for
7 reconsideration of the entire decision. We did both.

8 The petition for the stay, one would file that
9 you have the ability to go directly to the Second Circuit
10 to challenge the determination. That is the direct route
11 which we took that opportunity to do as well.

12 The Second Circuit has the discretion to decide
13 the case, the hold it in abeyance, or to dismiss it as
14 premature pending the determination of the petition for
15 reconsideration.

16 What we were challenging in the Second Circuit
17 and in the petition was the decision of October 12th.

18 THE COURT: In all respects?

19 MS. BIBLOW: In all respects.

20 And we coupled that with a motion for temporary
21 restraining order and preliminary injunction to do certain
22 construction activities because the October 12th order was
23 a blanket restriction.

24 THE COURT: So are you saying that your
25 application before the circuit de novo was for all that

1 you hadn't sought before the STB?

2 MS. BIBLOW: We had not sought -- well, we
3 hadn't sought the ability to construct prior to the
4 October 12th order. That is the one that stopped us. But
5 we did ask for in our petition to lift the stay. In our
6 petition for reconsideration we asked to be able to
7 continue constructing.

8 THE COURT: And you filed that with the STB?

9 MS. BIBLOW: Yes, we did.

10 In our application with the Second Circuit what
11 we focused in on the TRO application there were certain
12 conditions that became apparent after our filing of the
13 two petition. The two state petition had to do with
14 basically safety issues.

15 One had to do with the fact that there was a
16 construction project that had stopped mid-stream and that
17 there were these large piles of sand and that Army workers
18 were coming on the site, were using this as a fresh for
19 All.

20 In addition, we became aware of the fact that
21 people were coming onto the site and shooting shotguns at
22 the holes that were there and --

23 THE COURT: It is an open area?

24 MS. BIBLOW: It is 13 2/3 acres. There is
25 certainly a fence in the front but people are breaking

1 through and getting through.

2 They were bringing in ATV vehicles. And because
3 we had been stopped from constructing, we were also
4 stopped from putting in utilities.

5 So we had this condition of people riding ATVs,
6 people with shotguns, there are no lights, and that is
7 what we had asked the circuit court to focus in on. We
8 also asking to be allowed to continue the construction.
9 But that was the main focus.

10 What the Second Circuit did is, they denied our
11 request for a TRO but they expedited our hearing on the
12 preliminary injunction. And we had oral argument on that
13 November, I think it was the 27th.

14 THE COURT: And you are seeing to continue
15 construction.

16 MS. BIBLOW: We are seeking to continue
17 construction, yes.

18 THE COURT: Before the STB.

19 MS. BIBLOW: Yes. And in front of the Circuit.

20 What the circuit did rule on our preliminary
21 injunction that is in the binder is; they decided that the
22 entire case was premature. It is before the STB. Go to
23 the STB. So that is where that stands.

24 THE COURT: Don't we have the same situation
25 here?

1 MS. BIBLOW: Well, what you have here, your
2 Honor, is different. Because the harm, the tickets you
3 cannot adjudicate.

4 THE COURT: That is a matter of record.

5 The reason this case is continuing, as I
6 understand it then, is your third request for relief. And
7 that request is that the town is preempted by federal
8 law -- this is what you are seeking -- from interfering
9 with the construction and operation of the Brookhaven Rail
10 Terminal.

11 Now, in Green Mountain, the Second Circuit told
12 us that as the agency authorized by Congress to administer
13 the termination act, the STB is uniquely qualified to
14 determine whether state law should be preempted by the
15 termination act.

16 And the Green Mountain case goes on to say that
17 notwithstanding the termination act's preemption
18 provision, state and local authorities retain police
19 powers to enforce regulations, and they define the types
20 of powers that they are entitled to do.

21 But you are asking this court to give you a
22 blanket preemption from any interference by the Town of
23 Brookhaven with the operation or construction. It is
24 voidous on its face.

25 MS. BIBLOW: Your Honor, perhaps if I can

tears

1 explain exactly what we are looking for in that proho
2 Maybe it was poorly worded, but this is what the intent
3 was.

4 There were certain activities, clearly that are
5 preempted, as you have mentioned, and there were certain
6 activities that may be allowed. I mean, they talk about
7 police powers. They are talking about things
8 nondiscretionary things such as high fences. Whether you
9 are use are the right light bulb to illuminate things.
10 They are not talking about the kinds of things that these
11 entities --

12 THE COURT: But I want to get back to my
13 observation to you, because the Court of Appeals said this
14 is premature, go back to the STB. What I'm suggesting to
15 you is your application is premature here.

16 You may not even have a case in controversy
17 before this court as far as that request for relief.
18 Because at this point everything is hypothetical.

19 I don't know what is going to happen before the
20 STB. I don't think you do either. And that could be very
21 defining as far as the extent to which the town of
22 Brookhaven may or may not want to get involved in the
23 operation and the construction involved in this project.

24 MS. BIBLOW: Your Honor --

25 THE COURT: I don't know how you can come to

1 this court and ask for that kind of blanket relief given
2 these circumstances.

3 MS. BIBLOW: Well, what we are trying to do
4 there, sir, is, the town has issued a series of appearance
5 tickets. They have other mechanisms that they can use
6 other codes of enforcement.

7 THE COURT: We have to deal with reality.

8 MS. BIBLOW: We are dealing with reality.

9 THE COURT: I'm not dealing with hypotheticals.
10 We are dealing with the real world.

11 They have made the representation that there
12 will be no further tickets issued pending the outcome of
13 the proceedings before the STB. And they have said that
14 the prosecution won't go forward.

15 MR. CUTHBERTSON: Your Honor, yesterday
16 believe I said on the record we would do that pending your
17 decision in this case.

18 MS. BIBLOW: Your Honor --

19 THE COURT: Okay. So that is very much alive.
20 Don't spend any time on it.

21 MS. BIBLOW: The problem we are having is and
22 the issue that we have here with respect to that is we
23 mentioned the whole issue about the Empire tickets.

24 This is a town that is taking steps to interfere
25 and issue tickets that it is preempted from doing, and it

1 has continued to do that. There are other mechanisms that
2 it has at its ability to --

3 THE COURT: This is the site over in East
4 Setauket; you are talking about?

5 MS. BIBLOW: Yes. That is one of the sites.

6 THE COURT: They are not even a party

7 MS. BIBLOW: Excuse me?

8 THE COURT: They are not even a party. It
9 doesn't even fall within the category of your request for
10 relief.

11 MS. BIBLOW: I understand that, your Honor. But
12 you are also telling us you have to look at the whole
13 totality of what this town is doing.

14 If you look at the documents that
15 Mr. Cuthbertson put into the record, Exhibits A and C,
16 which were relating to the Sills Road site, we saw the big
17 US Rail sign.

18 And if you look at exhibit, I think it is C,
19 which was the complaint form for Empire, what you see is
20 it is a whole series of entities that are listed there,
21 some of which have nothing to do with my client. Some of
22 them, they happen to be in that area

23 The only entity that was issued a ticket was
24 Empire. Empire had nothing with noises. They had nothing
to do with the complaints, if you look at that exhibit.

1 So it raises an issue on what it is the purpose
2 of these tickets.

3 THE COURT: They are not a party before the
4 court. They are not included in your request for relief.
5 Your request for relief refers to tickets that were issued
6 on October 4. This ticket was issued on September 26th.
7 It is then a separate entity. It is not a plaintiff here.

8 MS. BIBLOW: I understand that. But we are
9 talking about the tickets for the six entities that are in
10 front of it you, the six plaintiffs that are in front of
11 you.

12 And you have asked me about the third prong, and
13 the third prong is very important to our client. And you
14 can rephrase it any way you, the judge, wants. If you
15 choose to --

16 THE COURT: I'm not going to rephrase any
17 request you have for relief.

18 MS. BIBLOW: Well, I'm trying to say that the
19 interpretation that we intend by that provision was we
20 didn't want the town to continue to issue anything that
21 would be preempted by the STB. In addition to appearance
22 tickets --

23 THE COURT: I think I probably spoke too soon.
24 You better cover in your remarks, that entire issue.

25 MS. BIBLOW: C-1-V

1 THE COURT: With regards to a stay. With
2 regards to the prosecution of anything. You can include
3 Empire

4 So I'm still waiting for an answer to my
5 question.

6 MS. BIBLOW: The answer to your question, sir,
7 is that this is a town, what we are seeking by that third
8 prong is that we want to forestall any other mechanism
9 that this town will use to usurp the power of the STB in
10 operating and constructing this rail terminal. This is
11 what the intent of that third prong was.

12 And whether they do it through appearance
13 tickets, whether they do it through some other mechanism
14 that the town has prospectively, it is not hypothetical.
15 I mean that is reality. They have been doing that with
16 respect to this

17 THE COURT: Let me restate your request again.
18 That the town is preempted by federal law from interfering
19 with the construction and operating of Brookhaven Rail
20 Terminal.

21 Are you modifying your request for relief?

22 MS. BIBLOW: I'm sorry. I didn't understand
23 that

24 THE COURT: Are you modifying your request for
25 relief?

1 MS. BIBLOW: To the extent that -- I guess we
2 are.

3 But to the extent that you are saying that, to
4 the extent that I'm saying that we want that third prong
5 to be anything that is preempted by federal law, whatever
6 activities are going to do with respect to construction
7 and operation of that rail terminal, whatever it be.

8 And we don't intend that to include
9 participating in the proceeding obviously in front of the
10 STB, but anything that would run aroud of the STB's
11 authority with respect to this facility, they are
12 preempted and they should be, and this court should tell
13 them they are preempted, in addition to the fines
14 themselves. That is what we are seeking.

15 THE COURT: Do you have anything further?

16 MS. BIBLOW: I do have other comments. I
17 believe I covered all of the -- let me go back to the
18 Second Circuit, just to finish up my comments about that --

19 One last comment is that three of the entities
20 that have been subject to these tickets, namely, Watral,
21 Adjo, and Pratt, are not before the draft, would not be
22 before them. This was not part of the entities doing
23 construction. All it is is US Rail.

24 So clearly, with respect to the tickets issued
25 to them, they have not earned an intervention on the Second

1 Circuit. Their remedy is here, your Honor.
2 With respect to the question you raise about
3 isn't the correct place to handle these tickets in the
4 local District Court. The answer to that is no, it is
5 not.

6 First of all, that is a court of very limited
7 jurisdiction. Generally, they have very limited equity
8 power, your Honor.

9 THE COURT: That is part of the Unified Court
10 System of the State of New York, is it not?

11 MS. BIBLOW: Yes, it is.

12 THE COURT: Are you suggesting that they don't
13 have the authority to rule on constitutional issues?

14 MS. BIBLOW: They don't have the equitable
15 powers, your Honor, that we are seeking here. That is one
16 point.

17 THE COURT: You are charged with criminal acts
18 and you had asserted a defense based on the criminal law
19 presumably and you would challenge jurisdiction.

20 Those aren't issues that can be raised in the
21 district court? Are you saying that?

22 MS. BIBLOW: I'm not suggesting that, your
23 Honor. What I'm suggesting is, with respect to the
24 equitable remedy that we are seeking in this lawsuit,
25 including declaratory judgments, there is more at stake

1 here than just these tickets.

2 THE COURT: You misunderstood my question.
3 My question, which I directed yesterday
4 afternoon, was, tell me why these issues couldn't be
5 addressed as part of the defense to the misdemeanor trial.

6 MS. BIBLOW: Your Honor, we certainly could
7 raise those as defenses. The issue is, those tickets are
8 preempted under federal law. It is a federal question.
9 And we shouldn't have to incur the cost, the expense, the
10 fear of criminal convictions in a district court who may
11 or may not understand claim or questions.

12 And the town has basically conceded that these
13 tickets are preempted. They did not put on any witnesses
14 who claimed that --

15 THE COURT: I don't take that as any kind of a
16 concession by the town. You have the sole burden. Go
17 ahead.

18 MS. BIBLOW: And I believe we have handled that
19 burden. We are in front of the STB. They are certainly,
20 this court is better certainly better equipped to deal
21 with federal questions of preemption than a local district
22 court.

23 And again, as I said, they are certainly not
24 eligible or able to handle certain of the equitable claims
25 that we have raised here.

1 And, in addition, the party that basically is
2 the source of the preemption, which is the common carrier,
3 US Rail, is not in front of the district court and was not
4 issued tickets.

5 So that is a problem also being able to raise
6 that defense, because it is US Rail's status as a common
7 carrier doing the operation, the construction and operation
8 of the rail facility that brings us into the jurisdiction
9 of the STB and brings us into the preemption of STB and
10 they are not in front of the local district court.

11 I would like to raise one other point with
12 respect to the likelihood of success as irreparable harm
13 in the local district courts.

14 I don't believe the local district court has the
15 ability to issue a temporary restraining order restricting
16 the town from issuing new tickets. They can certainly
17 adjudicate what is in front of them, but I don't believe
18 they have that authority. This court does.

19 As to the two prongs of the request for interim
20 relief, your Honor, I would like to briefly talk on the
21 likelihood of success and I would concentrate on
22 irreparable harm.

23 With respect to likelihood of success, it is
24 clear in our view that we are before the STB on an
25 application that involves construction of a railroad

1 facility, as a spur. There is no question that that
2 activity in front of the STB preempts any local activity
3 to enforce the kinds of issues and the kinds of tickets
4 that were issued in this matter.

5 If you look at the tickets and the kinds of
6 issues that were raised, they are all with respect to site
7 plan, certificates of occupancy, getting approval from the
8 planning board. These are precisely the activities that
9 Green Mountain and the Coastal case said is not a role for
10 local control.

11 THE COURT: Didn't one of the most recent
12 decisions from the STB, I believe the date is
13 November 16th, on one of your motions for a stay or for
14 reconsideration, get into this area of likelihood of
15 success? And didn't they opine in that opinion that you
16 had failed to establish that likelihood of success?

17 MS. BIBLOW: That had to do with lifting of the
18 stay for construction and/or continuing the construction
19 cease and desist order.

20 THE COURT: That is your third prong, is it not?

21 MS. BIBLOW: Excuse me.

22 THE COURT: That is your third prong here.

23 Didn't they go just counter to what you just said?

24 MS. BIBLOW: No, they didn't. In fact what they
25 have done is, they actually in that decision, what they

1 have done is, in my view, reinforced our point about
2 likelihood of success
3 They are saying in that decision you are either
4 a railroad, you are either a spur, and they even discussed
5 private track. But whatever it is you are, it is the STB
6 that has jurisdiction to control that project: to approve
7 it, to not approve it, and --

8 THE COURT: Well, this is the very reason that
9 I'm suggesting to you that your issue with regard to your
10 third prong is premature before this court

11 MS BIBLOW: Your Honor, may I have one minute,
12 please? I just want to talk to my client for one minute.

13 (There was a pause in the proceedings)

14 MS BIBLOW: Your Honor, with respect to the
15 November 16th decision of the STB and your comment
16 about --

17 THE COURT: There is a whole section on
18 likelihood of success.

19 MS. BIBLOW: Right. But what they did not say
20 in that decision, and which is crucial to this court, is
21 that they never said that US Rail was not a railroad and
22 not a common carrier. They clearly are. They clearly
23 were. They never said they weren't.

24 That is all I need to show here, your Honor,
25 basically is that we are a --

1 THE COURT: What they said is with a huge gap
2 between Ohio and Long Island this probably wasn't going to
3 be considered a spur by them

4 MS. BIBLOW: And that is a --

5 THE COURT: I realize that is not a definitive
6 decision by them, but it seems to me if you are going to
7 argue to this court that there is a likelihood of success
8 before the STB, that is something you have to deal with.

9 MS BIBLOW: The likelihood, the reason, the
10 likelihood of success we are talking here is in terms of
11 preemption, your Honor, not in terms of what eventually
12 the STB allows us to do on that piece of property

13 The question before this court is whether the
14 STB has asserted jurisdiction over this project, which it
15 has, which then results in, under the Interstate Commerce
16 Commission Determination Act, preempting local control

17 That has happened. The STB has not said you
18 don't belong in front of us on this project. We are not
19 making a ruling on it. You don't belong. What they have
20 actually said is, you do belong here.

21 So the likelihood of success in front of the STB
22 is a different question as opposed to the likelihood of
23 success in this case

24 THE COURT: Is it really?

25 MS. BIBLOW: Yes. I believe so.

1 THE COURT: In relation to your third prong
2 MS. BIBLOW: Well, let me discuss the third
3 prong because that seems to be the issue

4 What we are trying to do in the third prong, and
5 if I have to make an application to modify that, I will do
6 that. All we are intending to do by that is to prevent
7 the town from using any of its code enforcement activities
8 separate and apart from issuing appearance tickets that
9 run afoul of the jurisdiction and preemptive powers of the
10 STB. That is what we want from this court. And I think
11 that --

12 THE COURT: That is not what you have asked this
13 court.

14 MS. BIBLOW: Which is why, to the extent that
15 if that is what you are viewing our request, I'm asking
16 that that be modified

17 THE COURT: It's a little bit later to modify
18 it.

19 MS. BIBLOW: If I may go back to the likelihood
20 of success and the irreparable harm with respect to the
21 issuance of the tickets that are currently before you
22 your Honor,

23 The criminal prosecutions that my client's face
24 involve serious penalties that can be enforced against
25 them

1 With respect to the sand and gravel violations
2 that have been issued, we are looking at fines up to
3 \$2,000 and imprisonment not exceeding 15 days for each
4 violation. And every day is considered a new violation.

5 THE COURT: Why are you only concerned with the
6 town? The DEC has issued similar violations, have they
7 not?

8 MS. BIBLOW: What the DEC has done, your Honor,
9 is, they issued us a letter, this is not in front of you,
10 which basically said to us if you show us that we are
11 preempted and in front of the STB, fine, and until we are
12 shown that you are not preempted, they have some concerns
13 about it

14 They did not issue a formal cease and desist
15 order. It was a voluntary.

16 THE COURT: The town didn't either.
17 MS. BIBLOW: Excuse me.

18 THE COURT: The town didn't either. Are you
19 saying that the DEC didn't actually assert charges for
20 mining without a permit?

21 MS. BIBLOW: They served charges that were
22 returnable before the regional council as opposed to a
23 hearing. Our clients contacted the regional council,
24 Craig Elligot
25 And Mr. Elligot and I have been in

1 communication There is a letter from the DEC that says
2 if you are not under the STB preemption, then you have to
3 go through our proceedings, but if you are, then the DEC
4 is going to back off, basically That is where we are
5 with the DEC

6 They are not in front of your Honor. We do not
7 need, and there was no imminence of harm because those
8 tickets are not returnable any time. As I said, they were
9 basically a request that my clients contact the DEC, which
10 they did There is no hearing scheduled There is no
11 return date on those tickets And that is the position of
12 the DEC presently They have said if we are preempted, we
13 are preempted And that is what they are waiting for,
14 your Honor

15 Some other penalties that may be imposed by
16 these tickets, your Honor, with respect to the Tree
17 Reservoir standard are again violations that are not
18 insignificant. They are written as a per tree, the way we
19 look at it, violation. This was several acres of clearing
20 that had been done And we are talking about fines of
21 \$250 or not more than \$1,000 and imprisonment for again a
22 period of 15 days

23 With respect to the site plan and the
24 nonapproval and the lack of a certificate of occupancy, we
25 are looking at violations that every week is viewed as a

1 new violation under the town code. Again, we are looking
2 at violations that have fines and imprisonment We have
3 fines of \$500 and imprisonment of not more than 15 days
4 for the first offense

5 For the second offense within a 5-year period we
6 are looking at fines of \$350 not exceeding \$1,000 and
7 imprisonment for 15 days or both.

8 For a third offense within a 5-year period, of
9 fines go up to \$750 not exceeding \$2,000 and a jail term
10 of 6 months.

11 And again under their code every one of a
12 continued violation is considered a new violation. So
13 these penalties and jail terms are cumulative

14 This is the kind of irreparable harm that our
15 clients face if these tickets are allowed to proceed or
16 additional tickets are issued.

17 Again, when you look at the tickets, the kinds
18 of tickets that were issued, these are precisely the kinds
19 of local control that the case law clearly says the STB
20 preempts That that statute preempts

21 And there is a reason for that. They do not
22 want to leave local control to local discretion because
23 they are going to be unduly interfering with interstate
24 commerce and with the control of commerce That is an STB
25 function

1 With respect to other area of irreparable harm
2 which we prepared testimony about yesterday, we are
3 talking about losing customer base. Mr. Hall and
4 Mr. Drumm both testified about that.

5 As you can well imagine, having criminal charges
6 pending against you is certainly going to come back. It
7 may impair the relationship with existing customers. It
8 may impair the ability to bid on contracts because these
9 things have to be disclosed. There is a risk to the
10 business reputation just being criminal. That is what is
11 going on here.

12 And I also think you have to look at how these
13 tickets were issued and the manner in which they were
14 issued to get a feel for the animus we believe that the
15 town has experienced with respect to this project.

16 We have tickets that were issued to the
17 plaintiffs after the STB issued its decision saying that
18 they have jurisdiction. The town was well aware of it.
19 They were participating in that proceeding.

20 In addition, to get back to the Empire tickets
21 your Honor, just to show you how that animus continues,
22 the town had knowledge of the interrelationships between
23 the entities. In fact I believe in Mr. Tohill's answer to
24 one question responded that he was instructed to stop
25 looking at the connection, it was his phrase, between the

1 companies

2 These tickets, if you look at Exhibit G from the
3 defendants what you see is a complaint that supposedly was
4 received in August about noise and a variety of things

5 The tickets are written up September 6th. They don't get
6 the actual complaint from the complainant until
7 September 28th. And those tickets are not served
8 until well after the STB had ruled on this and after the
9 appearance tickets were issued. What is the intimidation
10 what is going on here?

11 THE COURT: Is Empire before the STB?

12 MS. BIBLOW: No, they are not. But I don't
13 think you can look at this in a vacuum, your Honor.

14 THE COURT: I know. You keep talking about this
15 interrelationship because you know investors happen to be
16 involved in different entities, legal entities.

17 Don't you respect the distinctness and the
18 reason for a legal entity, a corporation?

19 MS. BIBLOW: I certainly respect them. I don't
20 think the town is respecting them.

21 THE COURT: This is the site that is 20 miles
22 away.

23 MS. BIBLOW: But it is also a site that has
24 operated for many, many years and never had a violation
25 And when you look at it, never had these kind of violations

1 issued.
2 When you look at the complaint that was issued,
3 the complaint talks about a whole variety of different
4 sites in Selauket that are located in the whole area, none
5 of which has to do with Empire, none of which have to do
6 with my clients' principals

7 The only entity that ended up getting a ticket
8 with respect to this complaint that is two months old with
9 respect to a noise violation was Empire. That is the only
10 entity. Meanwhile, when you look--

11 THE COURT: That was part of your joint
12 submission

13 MS BIBLOW: Well, actually it is a Defendant's
14 Exhibit. I believe it is Exhibit C

15 THE COURT: What are they supposed to do, ignore
16 the resident complaint because of this, quote,
17 interrelationship?

18 MS BIBLOW: I think what they should do, your
19 Honor -- I didn't mean to interrupt you. If I did, I
20 apologize.

21 THE COURT: You didn't.

22 MS BIBLOW: They should ticket the entities
23 about whom they are complaining, and they did not do that.

24 When you look at the complaint and when you look
25 at the allegations in August and in October that are in

1 those letters from the neighbor, she is not complaining
2 about activities of the asphalt plant that Empire runs.
3 She is complaining about activities at adjacent companies
4 that have nothing to do with Empire. Yet, it is only
5 Empire.

6 THE COURT: So defend it.

7 MS BIBLOW: We will. But again, this goes to
8 the third prong, your Honor, which is that this town is
9 doing other things with respect to its code enforcement
10 that is impacting our clients

11 And that is the kind of thing that we are
12 looking to avoid, and we believe that we have demonstrated
13 why it is irreparably harming us

14 That is the issue with respect to the third
15 prong. The first two prongs, the tickets issued to five
16 of the six plaintiffs because they did not serve US Rail.

17 THE COURT: The issue on the third prong is
18 limited to the Empire situation? Is that what you just
19 said?

20 MS BIBLOW: No, it is not limited to them. It
21 is the enforcement of their code in a manner that runs
22 afoul of the STB's jurisdiction. And that is what it is
23 they are preempted from

24 But if they are going to enforce their code in a
25 manner which is an abuse of process, that is certainly

1 part of this lawsuit

2 THE COURT: Okay. Do you have anything else
3 Otherwise I will hear from the town.

4 MS. BIBLOW: If I just may sum up very, very
5 quickly

6 THE COURT: Sure

7 MS: BIBLOW: We are seeking in this application
8 three things, and they are to address the appearance
9 tickets that have been issued with respect to this
10 facility; to get the town to stop issuing tickets and to

11 get the town to not take any other actions with respect to
12 their code enforcements or other activities that will run
13 afoul of the jurisdiction and the preemptive nature of the
14 proceedings in front of the STB. That is what we are
15 seeking

16 In order to do that we had to demonstrate
17 likelihood of success on the merits and irreparable harm
18 I'm not going to repeat what I said before, but just

19 clearly the activities that the town is seeking in these
20 tickets to enforce are clearly within the jurisdiction of
21 the STB and they are clearly preempted from going forward

22 Thank you

23 THE COURT: Thank you

24 Mr. Cuthbertson, why isn't the town willing to
25 take the wait-and-see attitude that was described by Miss

1 Biblow with regard to the DEC violation?

2 MR. CUTHBERTSON: With regard to the DEC?
3 Because they actually don't believe that the STB has
4 clearly asserted their jurisdiction. They believe there
5 are circumstances, and the STB's November 16th decision
6 indicate, that one of the possible outcomes in this case
7 is that it is private line of railroad, in which case
8 state and local jurisdiction fully apply

9 THE COURT: That is true. But that is exactly
10 my point. Why don't you take a wait-and-see attitude with
11 regard to any further ticketing? As the DEC says, they
12 will to wait and see whether it is determined to be a
13 private line, whether it is a spur or whether it is a
14 railroad line.

15 MR. CUTHBERTSON: The town --

16 THE COURT: It seems to me that is a very
17 reasonable position for a town to take.

18 MR. CUTHBERTSON: The town's concern, and this
19 relates directly to the third prong Miss Biblow was
20 talking about, is that there is the potential here that

21 the STB is going to issue an order to clarify what
22 construction is permitted, in which case the town believes
23 that there is the possibility that the local police power
24 that you spoke of before, which the town maintains since
25 Green Mountain would come into play, and that there would

1 be a role for the town to play based on their local police
2 powers, specifically based on the sand mining that has
3 gone on at this site

THE COURT: Presumably, it would be exercising
whatever powers it did have under Green Mountain and,
under the structure that Congress has set up, with
knowledge of what the STB had done. Because what they do
in this case is determinative of how far you the town can
go. Would you agree with me?

MR. CUTHBERTSON: If this is a private line

THE COURT: As you argued before the STB, then
you may be entitled to enforce all your rules and
regulations or your ordinances

On the other hand, if they were found to be a
rail carrier it seems to me there would be limitations and
there might be federal environmental review, and I think
that is what you argued to the STB.

MR. CUTHBERTSON: Your Honor, before this
hearing I might have agreed with that statement. I have
to tell you, based on the evidence that was presented
yesterday, I don't agree with that because I think what
was presented, granted the nature of a preliminary
injunction hearing is very fast, was a sham lease for the
property

And I can explain to you why I believe that is,

because, and a sand mining agreement that doesn't involve
any construction by a rail carrier.

Let me be specific about that because I believe
at the end of the day that this is a sand mining operation
that is seeking to cloak itself under a federal
preemption.

The lease that they provided your Honor is a
lease for a 28-acre industrial site. The rent for that
28-acre industrial site that is to be paid is \$1,000 a
year. That wouldn't even cover the taxes for a month on
this property. The taxes are to be paid by the landlord.
The tenant doesn't pay any of the taxes under this lease.
The lease also says at any time during the lease
US Rail can transfer the day-to-day operations to another
entity. It doesn't say that it has to be a railroad
entity. And here it specifically says that all US Rail
can do at this site is to provide for the loading and
unloading of rail cars as requested by the landlord or
their customer.

The lease is not for the fee interest in the
property. The lease is for the right-of-way on the
property.

Now, even more troubling in this situation is
the excavation agreement. The president of US Rail was
here yesterday and he has stated in his affidavit to the
court sheets

1 court that they have leased this site from Sills Road and
2 they are paying to construct a rail facility at the site
3 and that they have done this at significant expense.
4 All that they produced yesterday is a sand
5 mining agreement. Under the terms of the agreement it
6 says that US rail is to allow the contractor to come onto
7 the property and the contractor is to be paid up to \$3
8 million

And it has a formula for various things so I
can't say exactly, but one of the things that they are
going to get is up to \$3 million

The contractor here is Adjo. Adjo is the
general contractor who is also an interested party in the
Sills Road entity, the entity that owns the property. So
Adjo gets the sand mine at the property. Okay?

There is another party to the excavation
agreement. That is the owner of the property. The owner
of the property is Sills Road. Sills Road, based on the
sand mining that can take place, gets up to \$6 million
under this contract, this so-called construction contract.

Now, there was a representation yesterday in
court that there were construction specifications that
were unsigned that were incorporated into this excavation
agreement

There is no reference to an incorporation of

1 that at least construction item. So what you have before
2 the court right now is a sham lease and you have a sand
3 mining agreement.

What is necessary here for US Rail to claim
preemption is for them to construct a rail facility.
There is no evidence right now before this court that they
are constructing a rail facility.

So, as I said, your Honor.

THE COURT: Do you think that the cease and
desist order had something to do with that?

MR. CUTHBERTSON: What is that?

THE COURT: I said did you think that this
cease and desist order had something to do with that?

MR. CUTHBERTSON: To do with what, your Honor?

THE COURT: Stopping the progress?

MR. CUTHBERTSON: I think that had something to do
with stopping the progress. Yes.

THE COURT: The construction. Yes.

MR. CUTHBERTSON: I think the STB had tremendous
suspicions about what was going on.

THE COURT: You said there is no evidence before
this court that this is construction of a rail terminal
and I'm suggesting to you that perhaps the cease order had
something to do with that.

Did it stop the construction in its tracks?

MR CUTHBERTSON Perhaps it did

THE COURT: Yes.

MR CUTHBERTSON. But in order for federal preemption to apply, they have to show you at least that federal preemption would be applicable. And I don't believe, based on the evidence they have produced, that federal preemption is going to be applicable.

THE COURT: Isn't that a question for the STB?

MR CUTHBERTSON: They have presented here I mean, they are asking for your relief. They are asking for an injunction, your Honor.

So the question is before you. And the question is one of likelihood of success on the merits. And Miss Biblow said it, before that it goes to whether preemption is going to apply.

Based on the evidence they have presented, I don't believe preemption is going to apply.

If I can continue, your Honor. I think what may be useful, to try and sum up, is to look to the Coastal case. It is a case you are familiar with. It is a case I'm intimately familiar with.

In Coastal the town issued a stop-work order, and there was an existing operating rail facility. There was a finding by this court that there was going to be irreparable harm on that basis.

In this case is that is not the case. There is no town stop-work order. The two agencies who ostensibly have made the work-stop, the STB and the DEC, are not before this court.

The plaintiff sought to enjoin the STB's cease and desist order in the Second Circuit. They were not successful in doing that.

There is a long history of procedure before the STB already in this case, as opposed to Coastal where there was none.

I would say, though, these facts are very different from Coastal as well. In Coastal you had a letter from the DEC that said we don't have jurisdiction, there is federal preemption, based on what we have examined at the facility. And, as I mentioned, at the time there was a business that was up and running. You also had the involvement in Coastal.

It a very different legal argument of the New York and Atlantic Railroad. The New York and Atlantic Railroad has the freight rights for all of Long Island. They are the entity that can use the Long Island Rail Road tracks in order to move freight on Long Island.

New York and Atlantic Railroad has actually participated in the STB proceeding and made submissions in that proceeding and they oppose this effort.

THE COURT: They changed their position in the proceeding, didn't they?

I was reading the materials you submitted last night, and it seemed to me that they had almost come full circle here.

MR. CUTHBERTSON: They believed they had an agreement with the owner of the property.

THE COURT: Sills?

MR. CUTHBERTSON: As to the way they were going the present their application to the STB.

When they believed Sills reneged on that agreement, they no longer support the basis for preemption.

Here you have an entity that first went to the STB under a different legal theory, pulled back from that, got the STB to allow them to withdraw their application based on their statements that they weren't constructing at the property.

Their attorney, that represents both the Sills Road entity and US Rail, actually put in a submission to the STB on August 3, after the clearing had started, that said, well, Sills isn't doing any construction at the property. Oh, and by the way, Suffolk and Southern, the agreement we said we had before that would have enabled us to be in front of you we don't have. Never mentioned that.

US Rail, ostensibly US Rail, was undertaking sand mining and construction at the facility. And I think that is an important difference.

In this case the basis of irreparable harm, I don't think, there is no basis for irreparable harm.

The tickets. They have the right, as your Honor alluded to, to defend in that case. The issue of this Empire company, 20 miles away in Saratoga, I asked the inspector yesterday directly was this nonrenewal appraisal for what was going on at Sills Road? He said under oath it was not.

THE COURT: Why isn't the criminal prosecution and the recurring violations, there are apparently three, according to counsel representations, why isn't that irreparable harm?

MR. CUTHBERTSON: Because they can contest those or pay money. It is not an irreparable. These companies can gain a criminal conviction when in fact there may not be any basis for the tickets.

MR. CUTHBERTSON: Well, first there isn't any petition for the tickets. That is for the district court to adjudicate. They are competent.

THE COURT: Does the district court have equity powers?

MR. CUTHBERTSON: I don't believe they need

1 equity powers, your Honor.

2 THE COURT: So if this court were to agree with
3 your reasoning, what would prevent the town from just
4 ricketing throughout the duration of this case before
5 the STB?

6 MR CUTHBERTSON: What would?

7 THE COURT: What prevents the town from doing
8 that?

9 MR CUTHBERTSON: There is nothing to prevent
10 the town if you do not enjoin our activity.

11 THE COURT: To you really want to do that here?

12 MR CUTHBERTSON: It is not, your Honor --

13 THE COURT: That is not what the state, the
14 position the state has taken, either

15 MR CUTHBERTSON: Your Honor, we don't want to
16 be handcuffed into being able to do nothing

17 (There was a pause in the proceedings)

18 THE COURT: Excuse me, finish your sentence.

19 The court reporter has been summoned. We will
20 take a short break and when he comes back we will resume
21 this argument.

22 MR. CUTHBERTSON: Sorry for the interruption
23 just for your line of thought if you would.

24 There is the potential here that the STB is
25 going to allow the plaintiffs the limited ability to move

1 forward with construction. Construction that we don't
2 believe will be --

3 THE COURT: So why don't you wait and see what
4 they do and then you are dealing with a definite rather
5 than hypotheticals.

6 The two of you are dealing with hypotheticals
7 and you are asking this court to anticipate everything,
8 when this is the exclusive agency that has been designated
9 by Congress to deal with the very issue that you are
10 talking about

11 MR CUTHBERTSON: Your Honor --

12 THE COURT: The extent to which there is local
13 control over ordinances and the project

14 MR CUTHBERTSON: What I'm doing is resisting a
15 prong of an injunction that they want that would bind my
16 hands in the event what is now speculation comes to pass.

17 THE COURT: We are going to take a break and you
18 can pick up after

19 (Recess taken from 12:35 pm until 12:50 pm.)

20 THE COURT: Back on the record.

21 MR CUTHBERTSON: I will bring it to a close:

22 We talked about success on the merits

23 In terms of irreparable harm. With respect to
24 the economic harm arguments that are made here, the STB
25 has already rejected the notion that there is irreparable

1 harm in their proceedings

2 THE COURT: What about the harm from the
3 prosecution? You have indicated that you would stipulate
4 until you can get a decision with regard to this
5 application?

6 MR. CUTHBERTSON: Correct your Honor.

7 THE COURT: But that leaves open a period of
8 time. I assume it will be thereafter that this case may
9 be before the STB, so during that period of time you can
10 continue to prosecute. That is the respective harm.

11 Why isn't that irreparable harm?

12 MR. CUTHBERTSON: Again, your Honor, they can
13 defend. Like any other type of criminal/civil summons,
14 they can go two before

15 THE COURT: It is not slash civil summons. This
16 is a criminal action.

17 MR. CUTHBERTSON: Which normally is adjudicated
18 by the payment of money. The inspector that that
19 testified here --

20 THE COURT: It is still a criminal action. It
21 is a criminal proceeding.

22 MR. CUTHBERTSON: It is a criminal proceeding
23 that normally results in the payment of money or an
24 acquittal. As the inspector who testified here yesterday
25 said, they don't seek, nor has he ever seen it before, a

1 jail sentence imposed in those cases.

2 THE COURT: So because the only punishment is by
3 a fine against the corporation, you can't send a
4 corporation to jail, there is no irreparable injury
5 that your position?

6 MR. CUTHBERTSON: I think that is a fair
7 statement of the position.

8 THE COURT: Have you got some basis to back that
9 up?

10 MR. CUTHBERTSON: Not here but certainly would
11 when we submit findings of fact.

12 THE COURT: If there are any out there, I would
13 be very interested in seeing them.

14 MR. CUTHBERTSON: Okay.

15 THE COURT: Thank you.

16 MR. CUTHBERTSON: With that, the last thing is
17 just, your Honor, why does the town care about this case?
18 And is this just the town opposing an industrial project?

19 THE COURT: You don't have to explain to me why
20 the town is interested in this case.

21 MR. CUTHBERTSON: Good enough. Thank you.

22 Thank you.

23 THE COURT: You get the last word.

24 MS BIBLOV: Thank you, your Honor.

1 Your Honor, I just want to address a few points
2 raised by Mr. Cuthbertson

3 With respect to his claim that this is a sand
4 mining operation and not a railroad. First of all, I
5 would like to say the testimony yesterday clearly
6 established what was happening at this facility.

7 We had testimony from Mr. Hall that it is a rail
8 facility and going to be a rail facility and not a sand
9 operation. Mr. Cuthbertson can recast the excavation
10 agreement any way he wants, but he did it incorrectly.

11 You have to excavate in order to bring this
12 property down to grade. You had the testimony of Mr. Hall
13 as to why that was being done. You have in the record the
14 schematic of the plan. We have testimony about the
15 purchase of locomotives. We have testimony about the
16 purchase of 104 rail cars. We have testimony about
17 interaction with the Long Island Rail Road and New York
18 and Atlantic to put a switch in to have an interchange
19 agreement.

20 These are all part and parcel of operating a
21 rail facility, not a sand mine operation, your Honor.

22 THE COURT: Did you mention the locomotives?

23 MS. BIBLOW: Two locomotives. I thought I had

24 And so to suggest otherwise I think is just
25 disingenuous, quite frankly. This is a rail operation.

1 And it is being done by US Rail, a Class III shortline
2 railroad, that is authorized by the STB already.

3 With respect to the question about what the town
4 is or is not willing to stipulate to, that seems to be a
5 moving target, quite frankly, and that is our concern.

6 Yesterday they said one thing. When they were
7 talking about we had this application, they said they
8 would do something else. It seems, absent this court
9 entering an order telling the town what it can and cannot
10 do during this interim period, we have no guarantee that
11 they will live up to any representations they have made
12 because they just --

13 THE COURT: I intend to rely on the town's
14 position to the stipulation, that they are willing to hold
15 off with regard to any further tickets of any of the
16 plaintiffs and any prosecution with regard to any of the
17 present tickets, with the exception of Empire, until there
18 is a decision on this application.

19 MR. CUTHBERTSON: That's correct. Until there
20 is a decision on this application.

21 MS. BIBLOW: And the last thing I would like to
22 clarify with respect to the November 16th decision and
23 likelihood of success.

24 That decision was dealing with whether or not we
25 are likely to succeed as an exempt spur. Nothing as to

1 whether or not we were a railroad, your Honor, and whether or
2 not we were under the rubric of preparing under the STB.
3 It had to do with whether we were an exempt spur or a
4 spur --

5 THE COURT: Correct me if I'm wrong, but I
6 didn't see anything where you have ever maintained that
7 this would be a railroad line.

8 MS. BIBLOW: Our view.

9 THE COURT: As opposed to a spur.

10 MS. BIBLOW: Our view is that it is a spur.

11 It is the STB's view in the November 16th that it
12 may not be an exempt spur. But that is a distinction and
13 that is a ruling for the STB to determine, not for this
14 court. And that is why these tickets should be preempted,
15 your Honor.

16 Thank you.

17 THE COURT: Okay. Thank you all very much.

18 Now, you want to submit proposed findings of
19 fact and conclusions of law.

20 How much time do you need to do that? Make all
21 your citations to the record of course.

22 This is why the town's stipulation is important

23 to me, because it takes the pressure off you of a

24 December 13th date.

25 MR. CUTHBERTSON: Yes. And those will

1 adjourned.

2 Three weeks, your Honor.

3 THE COURT: Three weeks?

4 Do you want to do joint submissions and then
5 reply?

6 MS. BIBLOW: The only concern I have is the
7 transcript.

8 I assume we need to wait for that in order to
9 cite the record.

10 THE COURT: How about three weeks from receipt
11 of the transcript?

12 MR. CUTHBERTSON: Fine.

13 MS. BIBLOW: Fine with me.

14 Just so I'm clear as to what's being done today,
15 so that my clients, obviously sitting in the back, are
16 very clear.

17 Is this court going to enter an order that
18 incorporates the town's stipulation as to the pending
19 tickets and no further tickets?

20 THE COURT: I take counsel's grant at their
21 word.

22 I don't know if that is necessary. If you think
23 that something else is appropriate, why don't you talk
24 it seems to me that is a stipulation on this record.

25 MR. CUTHBERTSON: I have made the

1 representation I will send a letter to my client to that
2 effect, that that is exactly what is to happen. I don't
3 feel there is the need for the entry of an order.

4 VS. BIZLOW: If I may suggest because as I said,
5 we have been hearing different things from town, the town
6 board is changing in January, I would be certainly much
7 more comfortable if that letter was so ordered by the
8 court.

9 THE COURT: Why don't you draw something up if
10 you would look something in writing, a stipulation, and I
11 would be glad to sign it. But counsel has made the
12 representation that he has

13 MR. CUTHBERTSON: I really don't think it is
14 necessary. This is a case that has been in the media. So
15 now we are going to have an order reported that the town
16 is restrained for a time period, and there is going to be
17 something imputed to that.

18 I don't think that that is necessary. I'm
19 making a representation in open court. I don't think a
20 signed order that becomes a public document is something
21 that is necessary.

22 THE COURT: Why don't the two of you discuss it
23 further, and if there is any need for intervention, I'm
24 always available.

25 Anything further from either side? Decision

1 reserved

2 (Proceedings concluded at 1 pm.)

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4
5
6

EXHIBIT 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SILLS ROAD REALTY, LLC, SUFFOLK &
SOUTHERN RAIL ROAD, LLC and
U.S. RAIL CORPORATION,

07-5007AG

Petitioners,

**DECLARATION OF
JOHN L. TURNER
IN OPPOSITION TO
PETITIONERS MOTION
FOR A PRELIMINARY
INJUNCTION**

v.

SURFACE TRANSPORTATION BOARD;
and THE UNITED STATES OF AMERICA,

Respondents.
-----X

John L. Turner, under penalty of perjury pursuant to 28 U.S.C. §1746, declares as follows:

1. I am the Director of the Division of Environmental Protection for the Town of Brookhaven ("Brookhaven"). I am fully familiar with the facts and circumstances set forth herein, except those set forth on information and belief.
2. I submit this Declaration in Opposition to Petitioners' motion for a preliminary injunction.
3. As the Director of the Division of Environmental Protection, I am responsible for the environmental review of land use projects that are proposed for Brookhaven Town. In Brookhaven we have comprehensive rules and regulations that govern environmental review for facilities such as those proposed for the property in question. In addition, in siting and regulating such facilities we are required to follow New York State Environmental Quality Review Act ("SEQRA") to review the environmental impacts of proposed development projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented.

4. After reviewing the plans that have been submitted for this site and inspecting the property in person, I am of the opinion that if this project were submitted to my division for a review, that a positive declaration under SEQRA would be required.

5. The need for a positive declaration stems from, among other things, the fact that this property is in a deep flow recharge zone and is ecologically part of the Long Island Pine Barrens and therefore development of the property may cause significant hydrological and ecological impacts.

6. When a positive declaration is required, an applicant is mandated to prepare an Environmental Impact Statement ("EIS") The EIS is required to look at, among other things, the environmental setting, the resources and features of the property, the impacts of the proposed development, the strategies that can be implemented to mitigate those impacts, and reasonable alternatives to the sponsor's project, one alternative potentially being an assessment of alternative sites.

7. Overall, the EIS is required to detail the impacts the project would have on the natural resources on site and in the the surrounding environment. Among the impacts that the EIS would examine are the effects of the proposal on water quality, wildlife, traffic, air pollution, noise pollution, the removal of soils. In this case, in particular, the removal of sand between the land surface and the water table which is the uppermost expression of the groundwater system as reflected by the upper glacial aquifer reduces a filtering capability of the soil and subsoil regarding water which is recharged into the aquifer.

8. Prior to the preparation of an EIS, a scoping session typically takes place with notice to the public. At that session, public input would be solicited as to the relevant topics that would be considered in the EIS.

9. The applicant would then prepare an EIS, which would include a description of the action, a description of the physical setting, a description of all the environmental resources.

a discussion of the impacts of the project on the environment, as well as strategies for mitigating these impacts. In the case of this property, due to the nature and scope of the project, many mitigation strategies might be considered .

10. Under SEQRA, as stated above, the EIS must also contain a discussion of alternatives to the project, including a "no action alternative" where the possibility of no development would take place. In addition to the no action alternative, the EIS would have to examine whether this project could be developed on another property in Brookhaven where it would have less of an impact upon the environment.

11. The draft EIS would be submitted to the Brookhaven planning staff for their review to ensure accuracy, adequacy of content and to ensure that all the issues raised in the public scoping session were addressed. If the EIS was deemed to be complete, a public hearing would be scheduled. At the public hearing interested parties would comment upon the EIS and further revisions to the EIS would likely be made. When and if the staff and the applicant agreed that all environmental impacts had been identified and sufficient mitigation measures could be employed, the SEQRA process would be closed and the Town would adopt a final environmental impact statement and adopt findings related thereto.

12. It should be noted that applicants often submit the most aggressive plan for its business enterprise, which does not take into account preservation of the natural environment. One of the many positive attributes of the SEQRA process is that it seeks to allow the use of land but requires that consideration of the environment be taken into account. In this case the applicant has submitted a plan that makes maximum use of the site and involves significant vegetation removal, grading, and mining to the Property. After the appropriate SEQRA review, it could be the case that ways are identified to allow the Petitioners to operate while reducing or minimizing environmental impacts through less grading and mining at the site and establishing greater buffer areas.

13. Based on my site visit and a review of the plans submitted by the Petitioners, there are a number of items I anticipate would be examined in an EIS. First, I believe the layout of the facility would be closely examined. The assigned staff people would inquire as to whether there were other alternative layouts of the site to minimize disturbance to the environment and thereby create layer buffer areas.

14. Another issue that would require close examination is the grading of the property and the mining of materials that takes place in connection therewith. There is a significant change of grade from the northern portion of the property as you go south to the middle of the property. Based on the plans it appears that the whole northern portion of the project would be lowered approximately ten feet.

15. During the SEQRA process, the applicant might be required to examine alternative ways to lay out the site so that less vegetation removal and grading would be required.

16. Another issue that would likely be examined during the SEQRA process is the impact of the traffic generated by the facilities' operations. The traffic generation and configuration of the site would be reviewed and traffic mitigation measures (e.g., reconfiguration of the site, requirement of road widening and turning lanes) might be required.

17. I have been advised by counsel that the purpose of the Declaration is to provide an overview of the SEQRA process and to provide illustrations of what types of mitigation measures might be required. As such I have not touched upon the many other facets of the project that might require further examination. Suffice it to say that a project of this size (28 acres) and intensity (11,000 square feet of rail track and associated facilities and equipment) would entail an exhaustive review and assessment of the many environmental impacts and mitigation measures.

18. The SEQRA process always occurs before construction. In this way unacceptable environmental impacts that would be identified by the SEQRA process can be avoided before they occur.

19. I am advised by counsel that there is a possibility in this case that the SEQRA process would be preempted and that the federal environmental standards under NEPA would apply.

20. Upon information and belief the NEPA process is very similar to the SEQRA process outlined and has been described as follows:

The NEPA process consists of an evaluation of the environmental effects of a federal undertaking including its alternatives. There are three levels of analysis depending on whether or not an undertaking could significantly affect the environment. These three levels include: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement (EIS).

* * *

If the EA determines that the environmental consequences of a proposed federal undertaking may be significant, an EIS is prepared. An EIS is a more detailed evaluation of the proposed action and alternatives. The public, other federal agencies and outside parties may provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.

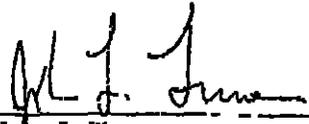
If a federal agency anticipates that an undertaking may significantly impact the environment, or if a project is environmentally controversial, a federal agency may choose to prepare an EIS without having to first prepare an EA.

After a final EIS is prepared and at the time of its decision, a federal agency will prepare a public record of its decision addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process.

Source: United States Environmental Protection Agency web site, <http://www.epa.gov/compliance/basics/nepa.html#requirement>

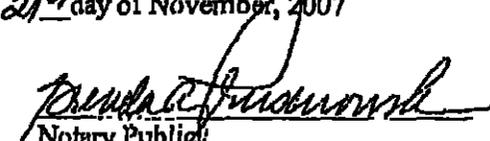
21. Presumably the same environmental issues would be identified in the NEPA process and provision would be made for similar mitigation measures. Brookhaven would participate in that process as an interested party and offer the comments noted above, which, as noted above are illustrative of the issues involved and is by no means an exhaustive examination of the environmental concerns.

22. For the reasons set forth above, Petitioners request for a preliminary injunction should be denied.



John L. Turner

Sworn to before me this
21st day of November, 2007



Notary Public

BRENDA A. PRUSINOWSKI
Notary Public, State of New York
No. 4584350, Suffolk County
Commission Expires 7/1/2011