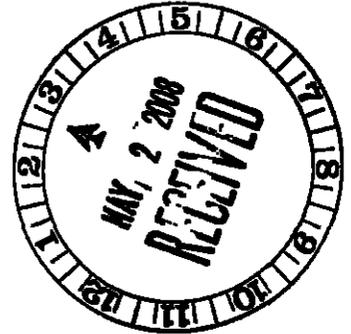


LAW OFFICE
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 350
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939



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May 2, 2008

**SURFACE
TRANSPORTATION BOARD**

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Office of Proceedings

MAY 02 2008

Part of
Public Record

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: STB Finance Docket No. 35036
U S Rail Corporation--Construction and Operation.
Exemption --Brookhaven Rail Terminal

Dear Ms. Quinlan:

On behalf of J S Rail Corporation, I am filing an original and ten copies of a Petition for Clarification of the Board's Decision served October 12, 2007 in above captioned proceeding. A check for the \$200 filing fee is also enclosed. Please date stamp and return one copy for our files.

FILED

MAY 02 2008

**SURFACE
TRANSPORTATION BOARD**

Sincerely,
John D. Heffner, PLLC

James H M Savage
By: James H. M. Savage

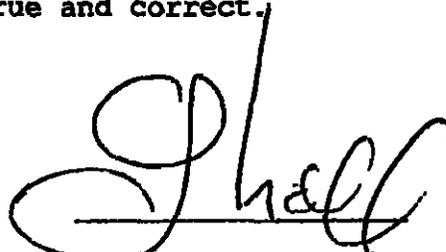
JHYS/mhd
Enc.

cc: Mark A. Cathbertson (w/enc.)

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

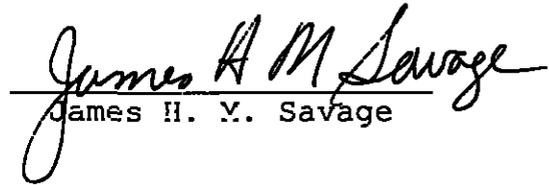
Executed on: May 3, 2008



[signature]

CERTIFICATE OF SERVICE

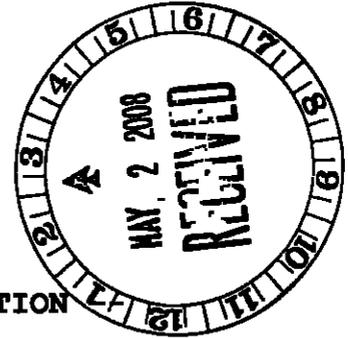
I, James H. M. Savage, certify that a copy of U S Rail Corporation's Petition for Clarification was served by ordinary mail on May 2, 2008 upon Mark A. Cuthbertson, counsel for the Town of Brookhaven.


James H. M. Savage

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35036

**U S RAIL CORPORATION
-- CONSTRUCTION AND OPERATION EXEMPTION
BROOKHAVEN RAIL TERMINAL**



**PETITION FOR CLARIFICATION
OF DECISION SERVED OCTOBER 12, 2007**

John D. Heffner
Joan D. Heffner, PLLC
1750 K Street, N.W.
Suite 350
Washington, DC 20006
(202) 296-3334

James H. M. Savage
1750 K Street, N.W.
Suite 350
Washington, DC 20006
(202) 296-3335

Counsel for Petitioner
U S Rail Corporation

Dated: May 2, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35036

**U S RAIL CORPORATION
- CONSTRUCTION AND OPERATION -
BROOKHAVEN RAIL TERMINAL
PETITION FOR CLARIFICATION**

INTRODUCTION

Pursuant to 49 CFR Part 1117.1 and at the invitation of the Board, U S Rail Corporation ("U S Rail") petitions for clarification of a Board Decision served October 12, 2007 ("October 12 Decision" or "Cease and Desist Order"), as to whether it can begin certain activities at the site of a future rail terminal (the Brookhaven Rail Terminal or "BRT") relating to site safety and security (the "Activities"), with those Activities pre-empted from state and local permitting, zoning and environmental requirements.

U S Rail has initiated the process of seeking Board authority to construct and operate the BRT and will file a separate Petition for Exemption under 49 U.S.C. 10901. U S Rail desires to undertake the Activities described below while the Board is processing its request for authority. The BRT will be located in the Town of Brookhaven ("Brookhaven") in Suffolk County, NY, and is adjacent to an existing rail line owned by the Long Island Rail Road ("LIRR") over which freight operations are conducted by the New York & Atlantic Railway ("NY&A"). [FN1]

The Activities for which U S Rail seeks clarification are 1) grading and removal of uneven mounds and pits created as a result of prior excavation work to eliminate potentially unsafe conditions, 2) installation of electric utilities, 3) installation of surveillance cameras, security equipment, and communications equipment, 4) installation of lighting, 5) installation of new, and maintenance of existing, fencing, and 6) use of the site for temporary structures such as trailers.

U S Rail files this petition in advance of submitting the aforementioned Petition for Exemption so that it may properly secure the site and eliminate potentially unsafe site conditions. It seeks expedited consideration for its request so

FN1 NY&A has an exclusive right to conduct freight service over the lines of the Long Island Rail Road See STB Finance Docket No 33300 (Service Date November 17, 1997)

that it can undertake this initial work during the 2008 construction season with a decision issued within 60 days of the date of filing and effective upon service.

BACKGROUND

U S Rail is an Ohio-based class III rail carrier selected by Sills Road Realty, LLC ("Sills"), for the purpose of constructing and operating a railroad facility on property owned by and leased from Sills. The facility would be used for the receipt of inbound aggregates, including stone, arriving by rail over the NY&A from quarries located off Long Island. Upon arrival at BRT, NY&A would interchange this traffic to U S Rail who would then break down the train, switching the cars to the appropriate tracks for unloading and servicing. The inbound cargo would then be loaded into trucks for movement to the ultimate recipients, aggregate customers, located principally on eastern Long Island. U S Rail would then reassemble the cars into an outbound train for interchange to NY&A to begin another cycle.

For several years, Sills and its members and affiliates have been rail-served consumers of crushed stone aggregate. The facility Sills leased until November 2007 to accept shipments by rail was inadequate to meet demand and has subsequently

become unavailable. In June 2007 Sills entered into a thirty (30) year lease with U S Rail, an existing Class III short line railroad, to construct and operate the BRT. See Drumm VS at 7. U S Rail leased the BRT site in anticipation of meeting the needs of Sills for aggregate, as well as to facilitate substantial third-party sales.

Preparatory to constructing the BRT, U S Rail and Sills held numerous meetings with local government representatives for the purpose of informing them about the proposed project and seeking their support. See Drumm VS at 6.

Relying on a number of cases where existing STB-licensed short line carriers had sought to operate disconnected rail lines as "exempt spurs" of their other operations pursuant to 49 U.S.C. 10906, U S Rail set out to construct and operate the BRT as an exempt adjunct of its own line in Ohio. See Sills Road Realty, LLC, Petition for Stay, filing date: October 18, 2007 (ID No. 220465); and Petition for Reconsideration, filing date: October 26, 2007 (ID No. 220546).

In August 2007, contactors engaged by U S Rail began preliminary site preparation work for the BRT. This work included tree removal and partial excavation of a portion of the site, as well as security fencing. See Drumm VS at 8.

By its October 12th Decision, the Board ordered the Parties to "cease and desist" their "preconstruction activities" without first obtaining Board approval or, alternatively, a ruling that no approval is required.

The Parties sought judicial review of the Board's October 12th Decision. In its November 19, 2007 Brief in Response to the Parties' Preliminary Injunction Request, the Board suggested that the Parties seek Board clarification as to whether the Cease and Desist Order permitted the Activities requested herein, a suggestion reiterated by the Board's Section of Environmental Analysis ("SEA") during its March 17, 2008 meeting with the Parties.

U S Rail accepts the Board's invitation to seek, in the Board's own words, clarification as to "whether the Cease and Desist Order would permit such activities." Specifically, U S Rail seeks agency guidance as to whether it can begin the following Activities subject to federal preemption and in advance of receiving construction and operation authority:

1) **Grading and removal of uneven mounds and pits to eliminate potentially unsafe conditions created as a result of prior excavation work;**

2) **Installation of electric utilities;**

3) Installation of surveillance cameras, security equipment, and communications equipment;

4) Installation of lighting;

5) Installation of new, and maintenance of existing, fencing; and

6) Use of the site for temporary structures such as trailers.

U S Rail requests that the Board decide whether it may commence any or all of these Activities free from state or local permitting, zoning and environmental requirements during the time that its construction proposal is undergoing Board and SEA analysis and review. It will continue to refrain from undertaking any of these Activities while awaiting the Board's clarification. U S Rail will only undertake those specific Activities authorized by the Board in its clarification ruling.

LEGAL ARGUMENT

The Board's rules, 49 CFR 1117.1, provide that a party seeking relief not provided for in any other rule may file a petition for such relief. The petition should contain (a) short, plain statement of the grounds upon which the Board's jurisdiction is based; (b) a short plain statement of the claim

showing the petitioner is entitled to relief; and (c) a demand for the relief the petitioner believes is appropriate.

The Board's rules do not contain a provision entitled "petition for clarification." Accordingly, it is appropriate to file a petition seeking such relief under this provision. Moreover, agency precedent authorizes the Board to clarify a prior decision whenever there appears to be a need for a more complete explanation of the action taken therein. See, e.g., FRVR Corporation--Exemption Acquisition and Operation--Certain Lines of Chicago and North Western Transportation Company--Petition For Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (clarifying jurisdiction and other matters) and St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 80 (1991) (clarifying four technical issues not explicitly considered in the prior decisions in that proceeding).

The Board has ample justification for looking favorably upon this Petition for Clarification and allowing U S Rail to undertake each of the seven Activities enumerated above.

Petitioner is submitting this request at the Board's very invitation, in response to a suggestion contained in the

Board's Response before the Second Circuit [FN2] as well as recommendations made by members of the Board's senior staff at the March 17, 2008 meeting with the Parties' representatives.

Finally, the relief U S Rail seeks is a Board ruling stating which of the seven enumerated Activities it can conduct subject to federal preemption under 49 U.S.C. 10501(b) during the pendency of its petition for exemption for construction. The Board has ruled that when a construction applicant or petitioner engages its jurisdiction, state and local environmental, permitting, and zoning laws are preempted. DesertXpress Enterprises, LLC—Petition for Declaratory Order, STB Finance Docket No. 34914 (Service Date: June 27, 2007).

As a preliminary matter, this transaction is a matter within the jurisdiction of the I.C.C. Termination Act insofar as it involves the construction and operation of a line of railroad under 49 U.S.C. 10901. There is no question that U S 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 [FN3] and will be providing

FN 2 Sills Road Realty, LLC, et al v Surface Transportation Board, et ano No -7-5007 (2d Cir 2007), Respondent's brief filed November 19, 2007 at 12.

FN 3 The carrier currently provides common carrier rail freight service as Great Miami & Scioto Railway on various lines in southern Ohio. See The Great Miami & Scioto Railway Company—Change in Operator Exemption—Certain Lines of the City of Jackson, OH, Finance Docket No. 32417 (ICC served Jan 20, 1994) However, the carrier is in the process of changing its name to U S Rail.

transportation for compensation here upon inception of operations at the BRT. See 49 U.S.C.10101(5). The facilities to be constructed and operated include switches, spurs, tracks, terminals, terminal facilities, freight depots, yards, and related grounds used for rail transportation, all of which are encompassed by the term "railroad." 49 U.S.C. 10102(6). The services to be provided by U S Rail at the BRT include, among other things, the switching, loading and unloading of rail cars, the storage of rail freight prior to loading or after unloading, and the transfer of rail freight between trucks and rail cars. See Drumm VS at 7 and Exhibit B (Hall Affidavit) thereto. These services clearly fit the statutory definition of rail transportation. 49 U.S.C. 10102(9). See New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway - Construction, Acquisition and Operation Exemption - In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. served July 10, 2007 at pages 10-11.

Moreover, once the Board grants its request for authority, the services for which U S Rail seeks the construction and operation exemption preempt any otherwise applicable state and local laws. New England Transrail, supra, at 12 (holding that services provided by a railroad whether under an STB-issued license to operate a line of railroad or on a "spur" exempt

from STB construction, acquisition, or operating authority are not subject to state or local regulation by virtue of federal preemption). The question here is whether U S Rail can undertake these Activities free from state and local permitting laws. The answer must be "yes" under the facts of this case.

In its November 19th Response the Board stated that most of the Activities that the Parties wanted to undertake to maintain safety, such as grading sand mounds, protecting the property, and installing utilities appeared to be the kind of activities that would be within the state's police powers and hence not prohibited by, or subject to the Cease and Desist Order. The Parties further maintained that the installation of lighting and fencing, the use of temporary buildings or structures such as trailers, and the temporary storage of materials also fall within those Activities deemed to be acceptable. For the Board to merely hold that these Activities are permissible without Board construction authority but subject to prior state or local permitting, zoning or environmental approvals would not be consistent with the Board's exclusive jurisdiction over the construction and operation of rail facilities under ICTA.

Had the Activities identified above been undertaken by an existing rail carrier building an "exempt" railroad spur under

the provisions of 49 U.S.C. 10906, there is no question but that state and local regulation would be preempted. New England Transrail, supra, at 1-2. Similarly, as the Court noted in Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006), even where an interstate rail carrier was operating a "disconnected spur" without obtaining proper operating authority from the Board, the otherwise applicable state and local laws were preempted. Accordingly, under Buffalo Southern, U S Rail's common carrier operations elsewhere - in Ohio - are sufficient for the Board to find that its Activities at the BRT should trump any state or local permitting, zoning or environmental requirements. [FN4] The fact that the Board has yet to decide U S Rail's petition for exemption should not prevent the Board from nevertheless ruling that the Activities described here are preempted state and local permitting, zoning or environmental requirements.

Moreover, as the Board well knows, obtaining such state or local approvals is a time consuming, burdensome, and sometimes expensive task and is so potentially onerous that it led the

FN 4 The Court in Buffalo Southern said "[b]ut as long as it is providing common carriage for compensation somewhere - and it is - it is still a carrier within the meaning of the statute. The Yard is a 'facility' under the statute, and BSOR proposes to move property by rail out of Croton. Under the ICCTA, that is sufficient to trigger STB preemption over both BSOR's operations and its facilities." 434 F Supp 2d at 252

Court in Green Mountain R.R. Corp. v. Vermont, [FN5] to opine that obtaining such pre-construction permits "can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely." The Green Mountain Court also noted that "states and towns may exercise traditional police powers over the development of railroad property to the extent that those regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions" [emphasis supplied]. By implication, the Court suggests that otherwise pertinent state and local laws may be preempted in railroad-related matters where compliance entails indefinite administrative delays and the approval process involves the application of subjective standards by officials with substantial discretion. The Board itself correctly summarized the state of the law in Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA, Finance Docket No. 33971, slip op. at 9-10, served May 1, 2001, ("Town of Ayer"), where it stated,

"Of course, whether a particular Federal environmental statute, local land use restriction, or

FN 5 No 01-CV-181, 2003 U.S. Dist LEXIS 23774, at 2-3

other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted."

The Parties have been diligent in meeting with local officials over the past two years to keep them apprised about the construction of the BRT. Those discussions have included the need to satisfy compliance with local building codes as well as the application of any other local permits that might be required. See Drumm VS at 6 and Exhibit A thereto (Meeting Chronology).

In Town of Ayer, the Board identified examples of reasonable conditions of cooperation it would expect railroads to undertake: 1) sharing plans on activities otherwise requiring a permit, 2) using state or local best management practices when constructing facilities, 3) implementing appropriate precautionary measures at railroad facilities, 4) providing representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns, and 5) to submit environmental

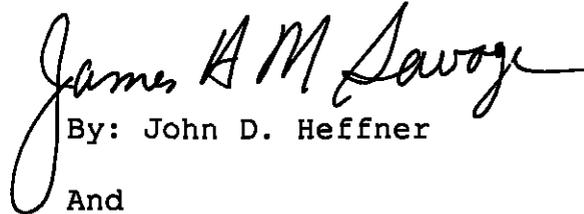
monitoring or testing information to local government entities for an appropriate period of time after operations begin. Town of Ayer, supra.

U S Rail is amenable to compliance with all of the above.

CONCLUSION

For the above stated reasons and based upon the above cited authority, Petitioner U S Rail requests that the Board consider and grant this Petition for Clarification of the Board's October 12th Decision, and authorize Petitioner to undertake the seven Activities identified herein in connection with the BRT.

Respectfully submitted,
JOHN D. HEFFNER, PLLC


By: John D. Heffner

And

James H. M. Savage

Attorneys for Petitioner
U S RAIL CORPORATION

Dated: May 2, 2008

**VERIFIED STATEMENT OF GERARD T. DRUMM
IN SUPPORT OF PETITION FOR CLARIFICATION**

I, Gerard T. Drumm, of full age, state the following, under penalty of perjury:

1. I am the Chief Financial Officer and General Counsel of Sills Road Realty, LLC ("Sills"). I am responsible for financial and legal matters with respect to Sills and its affiliated companies. I am fully familiar with the facts and circumstances of this matter from my personal knowledge.

2. I submit this verified statement affidavit in support of the petition of U S Rail Corporation ("U S Rail") for clarification of the Board's October 12, 2007 Decision ("the October 12th Decision").

3. Sills was formed to develop a rail facility on eastern Long Island that would economically meet the needs of its members for the transportation of construction aggregates and related materials (collectively "stone"), as well as serve the broader Long Island market for such products. Sills acquired a 28-acre tract of land in Yaphank, Town of Brookhaven, Suffolk County, Long Island, New York, which was ideally suited for this purpose. The site is called the "Brookhaven Rail Terminal" ("BRT").

4. The intended purpose of the BRT is to facilitate the transloading of stone between freight cars and trucks. The BRT will interchange freight cars upon a railroad siding connecting to the existing Long Island Rail Road ("LIRR") track adjoining the property's southern boundary; as well as provide freight transfer areas.

5. The location of the BRT is ideally suited for a rail transloading facility because it is located in an industrially-zoned area bordering the Long Island Expressway and an existing LIRR rail line. The site is not adjacent to any residences, schools or recreational facilities.

6. Beginning in January 2007, Sills engaged the Town of Brookhaven ("Brookhaven") in an extensive series of meetings to address and resolve any concerns Brookhaven might have regarding the BRT. A chronology of those meetings accompanies this statement as Exhibit A. During those meetings Sills provided Brookhaven with comprehensive details about what Sills intended to have constructed and placed into operation at the BRT. At no time prior to construction commencing did Brookhaven express any reservations about the project. In fact, the Brookhaven officials with whom Sills spoke expressed interest in the proposal.

7. In June 2007 Sills entered into a thirty (30) year lease with U S Rail, an existing Class III short line railroad,

to construct and operate the BRT. The November 8, 2007 affidavit of U S Rail President Gabriel Hall describes the proposed construction and operation of the BRT in detail. See Exhibit B.

8. In August 2007, contractors engaged by U S Rail began site preparation work; clearing and grading the site, which activities were to be followed by construction of tracks and related facilities, so that rail service could commence in March 2008.

9. The October 12th Decision halted all work at the BRT site, leaving the site inadequately secured, without proper utilities to insure site safety and with potentially harmful mounds and pits, which conditions need to be remedied in order to protect the site and reduce possible hazards.¹

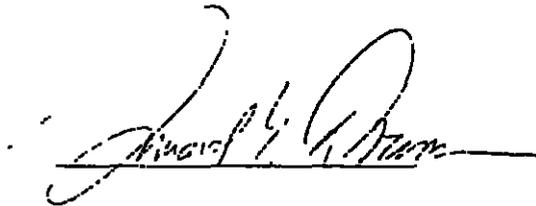
10. Accordingly, Sills requests the Board grant U S Rail's Petition to clarify the Board's October 12th Decision to allow the site safety and security work requested in U S Rail's Petition, and for such other and further relief as the Board deems appropriate.

¹ On September 26, 2007 the New York State Department of Environmental Conservation ("DEC") issued Sills a notice of violation of state permitting requirements. Sills advised DEC that it considers the BRT to be under exclusive STB jurisdiction, with state and local regulation accordingly preempted by the ICCTA, 49 U S C 10101 et seq. Sills agreed to suspended site work in return for DEC suspending enforcement proceedings pending resolution of the jurisdictional question.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April 20, 2007

A handwritten signature in black ink, appearing to read "Joseph R. ...", written over a horizontal line.

[signature]

Exhibit A

Meeting Chronology Brookhaven Rail Terminal

January 23, 2007 - Meeting with David Woods, Director of Planning, Town of Brookhaven, New York, Lynn Weynant, Director of Traffic Safety, Town of Brookhaven, New York and staff, and Fred Krebs, President of New York & Atlantic Railway (NY&A), to discuss the Brookhaven Rail Terminal business plan and to present the preliminary site plan for the project

February, 2007 - Meeting with Thomas Isles, Director of Planning, County of Suffolk, New York and staff to discuss the Brookhaven Rail Terminal business and to present the preliminary site plan for the project.

February, 2007 – Submission of grant application for the Brookhaven Rail Terminal to the New York State Department of Transportation

January - June, 2007 – Various meetings and telephone conversations with representatives of NY&A to discuss design and operation of the Brookhaven Rail Terminal

June, 2007 – Meeting with Kevin Law, Deputy County Executive, Suffolk County, New York

July 10, 2007 - Meeting with Karen J. Rae, Deputy Commissioner Policy & Strategy, and Donald V Hannon, Director, Office of Program Development & Management, New York State Department of Transportation to discuss State grant assistance for the Brookhaven Rail Terminal

July, 2007 – Delivery of various legal memoranda to the Town Attorney, Town of Brookhaven, New York regarding preemption of local permitting procedures.

July 12, 2007 John Heffner, Esq , on behalf of U S Rail Corporation, submits notice of U S Rail's intent to commence construction to the Town Attorney, Town of Brookhaven, New York

July 20, 2007 – Meeting with Brian Foley, Town Supervisor, Town of Brookhaven, New York and Raymond Donnelly, Director of Economic Development, Town of Brookhaven, New York to discuss the Brookhaven Rail Terminal business plan and to advise regarding the commencement of construction.

August 20, 2007 - Site clearing commences.

September 5, 2007 – Meeting with Highway Department, Suffolk County, New York to discuss traffic ingress and egress and site traffic signage.

September 12, 2007 – Meeting with Timothy Bishop's office, US Congressman, District 1 to discuss Brookhaven Rail Terminal.

September 12, 2007 – Meeting with Yaphank Civic and Taxpayers Association

Exhibit B

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,

Petitioners,

Docket No _____

v

SURFACE TRANSPORTATION BOARD and THE
UNITED STATES OF AMERICA,

Respondents

**AFFIDAVIT OF GABRIEL
HALL IN SUPPORT
OF PETITIONERS' ORDER
TO SHOW CAUSE**

----- x
STATE OF OHIO)
) ss.
COUNTY OF LUCAS)

GABRIEL HALL, being duly sworn, deposes and states the following, under penalty of perjury

1 I am the President of U S Rail Corporation ("U S Rail") and am responsible for all aspects of marketing, strategic planning, and corporate growth for US Rail

2 I submit this affidavit in support of the application of Petitioners, Sils Road Realty, LLC ("Sils Road"), Suffolk & Southern Rail Road LLC ("Suffolk") and U S Rail, (collectively "Petitioners") to (i) temporarily restrain the enforcement of the STB's October 12, 2007 Decision (the "October 12th Decision") to the limited extent of allowing Petitioners to continue to clear and grade the property and to install utilities at the property, (ii) to preliminarily enjoin enforcement of the October 12th Decision and allow construction activities to continue at the property, and (iii) grant such further relief as the Court deems just and proper

3 It is respectfully submitted that this preliminary injunctive relief is necessary because, absent the issuance of the requested interim relief, Petitioners will suffer irreparable harm without any corresponding injury to the Respondents or any other entity

History Of U S Rail

4 U S Rail began operations about six years ago when it acquired stock control of an existing Class III short line railroad operating about 100 miles of track in central Southern Ohio. That company was called the Great Miami & Scioto Railroad and has since been renamed U S Rail Corporation.

5 My goal since then has been to find other rail properties and facilities that are strategically located around the country where we can offer customers our expertise in railroad transportation.

6 U S Rail has leased from Sills Road the necessary land upon which to build the railroad facilities at the Brookhaven Rail Terminal and has begun the work of clearing the land for construction of tracks and related facilities so that service can commence in or about March 2008. These activities have been undertaken at great expense.

7 Specifically, the length of track to be constructed is short, about 11,000 feet if laid out "end-to-end" on 28 acres of land.

8. One principal customer, Sills Road Materials LLC, will be serviced by the Terminal.

9 The facility will be a stub-ended network of tracks, with service to be provided on demand rather than on any scheduled basis.

10 The weight of the rail will not exceed 115 pounds, a weight consistent with current standards for building new rail-served industrial facilities.

11 The condition of the track will be good because it will be newly constructed to the currently applicable industry standards

12 The proposed use of the tracks will be for loading, unloading, switching, and storage of rail cars for a single principal user, all uses consistent with the character of exempt industrial or yard tracks

13 The purpose of this transfer will be to bring Stone to Long Island by rail instead of by truck movement over congested highways. Traffic moving to or from the Terminal will be interchanged with the New York & Atlantic Railway ("NY&A"), and through it, with other railroads comprising the national rail system. There will be no "station" listed in a tariff through which traffic will be solicited.

14 Accordingly, U S Rail will be providing essential rail transloading services for compensation through the movement of materials, such as crushed stone and other construction materials ("Commodities"), to the Long Island market.

Plaintiffs Will Suffer Irreparable Harm

I. The Property Needs to Be Graded and Have Utilities Installed in Order to Protect the Public

15 Our construction activities were stopped in the middle of grading the property, because of the October 12th Decision. I am advised that this mid-work stoppage has left significant mounds and valleys of sand on the property. I am further advised that local all-terrain-vehicle ("ATV") riders have trespassed on the property in order to "joy-ride" on these mounds and valleys. Absent our ability to bring the property to grade, these conditions will persist.

16 Additionally, work was stopped on the site before we were able to install electric and telephone utility poles Without electrical and telephone service on the property, full lighting and other security services cannot exist which would otherwise deter trespassers

17 I am informed that this is a significant problem, because individuals also continue to trespass on the property in order to shoot shotguns In fact, I am informed, that the utility poles recently delivered to the property show fresh shotgun blasts

18 Without adequate lighting there persist dangerous conditions, which are compounded by the trespassers who come to utilize ATVs and shoot guns

19 It is respectfully submitted that work that Petitioners seek to do at the property is necessary in order to alleviate a dangerous situation escalating into a tragedy

II. Absent This Relief Petitioners Will Suffer Indeterminate Losses

20 Moreover, U S Rail, along with Sills Road, negotiated arrangements for the initial traffic expected at the Brookhaven Rail Terminal, to wit, shipments of aggregate from a quarry in upstate New York served by CP Rail to the Brookhaven Rail Terminal for ultimate distribution to customers on Long Island

21. Those arrangements contemplate that CP Rail would be the originating carrier on its line and would handle this traffic using its "East of the Hudson" tracking rights over CSX Transportation's Hudson Division to the Bronx and thence to Fresh Pond, NY, for interchange with the New York & Atlantic Railway ("NY&A") The NY&A will interchange the traffic to U S Rail at the Brookhaven Rail Terminal U S Rail will then break up the train, switching cars to the appropriate tracks, unload the cargo, turn and service the equipment, and ready inbound cars for outbound movements

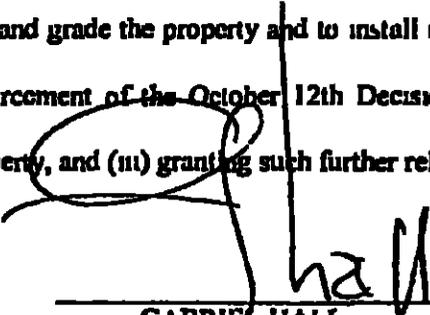
22 I have grave concerns that the October 12th Decision's requirement that all construction activities at the Brookhaven Rail Terminal be immediately stopped will cause U S Rail irreparable harm without any corresponding injury to either the STB or any other party

23 U S Rail has made contractual commitments to move inbound aggregate product for customers on Long Island Aside from any economic loss occasioned by a breach of contract, U S Rail will face significant damage to our business reputation by being seen as unable to perform a contract This will damage our ability to obtain other contracts in the future

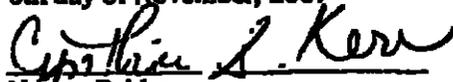
24 We will suffer great economic harm because of our reliance on developing the Brookhaven Rail Terminal traffic from our existing and future customers By being delayed or denied this opportunity, U S Rail will lose a major source for future revenues and numerous customer opportunities. We are committed to opening the terminal by the first quarter of 2008, and have ordered two locomotives to be deployed at the Brookhaven Rail Terminal This expense is significant

25. It is my opinion that, other than by rail, there is no way for that traffic to move in the volumes expected under our agreements with Sills Road Congested regional and local highways are incapable of handling that traffic Moving this cargo by highway would require tens of thousands of truck roundtrips per year, potentially inflicting considerable damage on area highways as well as unnecessary fuel consumption and air pollution. Moreover, there are no other transloading facilities on eastern Long Island that are equipped or suitable for handling aggregate, or any volume of freight, by rail

WHEREFORE, Petitioners respectfully request that, pending a full review of the STB's October 12, 2007 Decision on the merits, the Court issue an Order (i) temporarily restraining the enforcement of the STB's October 12, 2007 Decision to the limited extent of allowing Petitioners to continue to clear and grade the property and to install utilities at the property, (ii) to preliminarily enjoin enforcement of the October 12th Decision and allow construction activities to continue at the property, and (iii) granting such further relief as the Court deems just and proper


GABRIEL HALL

Sworn to before me this
8th day of November, 2007


Notary Public

CYNTHIA S. KERR
Notary Public, State of Ohio
My Commission Expires 08-06-2011

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