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June 11, 2021

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
June 11, 2021
Part of
Public Record

Re: FD 36398, *Brookhaven Rail LLC – Construction and Operation
Exemption – Suffolk County, New York*

Dear Ms. Brown:

The Citizens Campaign for the Environment (“CCE”) submits this response to the petition that the NAACP filed June 1, 2021 (“NAACP Petition”), requesting that the Surface Transportation Board (“Board” or “STB”) order the public disclosure of certain materials relating to the STB-sponsored mediation between Brookhaven Rail LLC (“BHR”) and the Town of Brookhaven, New York (the “Town”) that the Board authorized in its decision served January 6, 2021 (“*Mediation Decision*”).¹ CCE supports the NAACP’s request, which is warranted and necessary in order to address BHR’s and the Town’s selective disclosure and misleading characterizations of matters relating to their supposedly confidential mediation. Indeed, BHR has recently engaged in selective disclosure of critical aspects of the mediation in a clear attempt to secure favor with the Board’s Office of Environmental Analysis and its third-party environmental contractor (collectively “OEA”).

Starting over two months ago, BHR disclosed to OEA that through their mediation, “the Town and BHR have agreed in principle . . . there would be a new switch on the LIRR mainline with a southern turnout and the Town has agreed to proceed with the adjustment of the Conservation Easement areas to accommodate this approach.” Those

¹ CCE also supports NAACP’s request for leave to become a party to this proceeding as NAACP has a legitimate interest in this proceeding and satisfies all of the requirements to be a party of record at 49 C.F.R. § 551(3). NAACP’s additional requests for an order requiring disclosure of the outcome of the mediation and denial of the May 27, 2021 mediation extension request may be moot inasmuch as BHR and the Town have already publicly disclosed the outcome of the mediation (in violation of confidential restrictions as described further herein), and the mediation extension was approved by the Acting Director’s stamp approval decision served May 28, 2021.

discussions became public when OEA posted the meeting agendas and minutes of its April 6, 2001, May 4, 2021, and June 1, 2021 meetings with BHR. Those agendas and minutes, presumably prepared by BHR, all prominently discuss the mediation or matters supposedly resolved therein. BHR also disclosed that the decision to attempt to breach or terminate the conservation agreement in favor of development, along with other issues agreed upon between the Town and BHR, “would be memorialized in a confidential MOU.” While BHR stresses in its reply dated June 9, 2021 (“BHR Reply”) that “the mediation will not []limit or otherwise affect any necessary environmental review” (at 5) and that mediation “covers only a subset of the issues that do not bear on the merits of the Petition for Exemption or the environmental review process” (at 3), that was clearly the actual intent and purpose of its disclosures of its mediation discussions to OEA.

Beyond that, BHR’s application shows that its proposed rail line, which will be used to serve its proposed Section 10909 transfer facility, will utilize a routing that runs through protected conservation land that BHR has no rights or authority to use, unless the Town consents to what is otherwise a deliberate violation and breach of the Conservation Agreement. If the settlement discussions have no bearing on OEA’s environmental review, why have they been a highlighted agenda topic and central component of the BHR’s recent discussions with OEA?² In point of fact, the discussions have a critical bearing on the project, because without rescinding the Conservation Agreement and obtaining appropriate approval of the New York State Legislature, the rail construction and waste transfer station projects *both* lack the basic feasibility that is a prerequisite for Board consideration. Also, while neither BHR nor the Town informed the Board when they sought STB-sponsored mediation that their purpose was to use confidential mediation to enable the Conservation Easement to be breached in order to facilitate a highly controversial project, the disclosures from BHR, and now the Town, make clear that was their central purpose for seeking mediation from the inception.

While BHR has violated the ordinary confidentiality protections for mediation discussions to further its interests, it now insists that those same confidentiality protections should be preserved in order to shield its wrongdoing and block public disclosure. Such inconsistency of position should not be allowed. “We will not permit our mediation program to be undermined” and “[a]ny future breach of our mediation rules . . . may result in sanctions.” *Canexus Chemicals Canada L.P. v. BNSF Ry. – Emergency Service Order*, FD 35524 et al. (STB served Nov. 1, 2011) at 3. Without full public disclosure, BHR’s actions threaten to discredit of the integrity of the Board’s mediation program and undermine the confidence of stakeholders who may seek to be involved in future mediation that the

² Furthermore, at the same time that BHR was discussing the mediation developments with the OEA, efforts were also made to obtain the approval of the New York State Legislature, which the Town has previously advised is required for any modification or termination of the Conservation Agreement. Those efforts were unsuccessful, as reported in the enclosed recent article from the Long Island press. There is no references in the OEA meeting minutes of these failed efforts.

processes are legitimate. Those concerns are especially acute here because of the Town's contradictory disavowals that it has been involved in any "smoky room" deal and that any violations are somehow sanitized because "the express requirements of New York statutory law, including the Town Law, the Brookhaven Town Code, and the N.Y. Open Meetings Law (Public Officers Law Section 103)" require public disclosure. CCE strongly agrees that sunshine and public disclosure are in order and required here under the circumstances.

Also, because BHR's disclosure implicates aspects of the ultimate merits of its proposal, which is an improper use of mediation in a licensing proceeding, the Board should consider conducting a further investigation of the matter. This should include consultation with the mediators and OEA staff, to determine for itself the extent of the violations, and whether appropriate additional actions are required, beyond public disclosure of the mediation discussions.

Finally, BHR's assertion that the mediation "is confined to issues related to the rail construction proposal in this docket" and has nothing to do with its proposed solid waste rail transfer facility (BHR Reply at 5-6) represent yet another falsehood. BHR's disclosures to OEA have been a part of the environmental review being conducted for the transfer station. Moreover, BHR's counterpart to the mediation, the Town, strongly disagrees and insists that a secret settlement agreement reached through confidential mediation is justified and essential here because "the STB could exercise complete Federal Pre-emption authority concerning the Solid Waste facility which an affiliate of Winters Bros. is seeking STB to construct." Town Reply at 4 (original emphasis).³ The Town thus reveals the full purpose of the discussion, notwithstanding how it completely misapprehends the law under 49 U.S.C. § 10909, which addresses only pre-emption with respect to the siting of facilities.⁴

BHR and the Town should not be permitted to pick and choose when they abide by the Board's mediation rules, especially when they engage in selective disclosure of settlement discussions in a blatant attempt to advance their interests in the environmental

³ Similarly, the Town filed its Reply in Reply in both FD 36398 and FD 36399, even though the Board previously admonished it not to make filings in FD 36399, "which is now closed." *Mediation Decision* at 3.

⁴ Ironically, the Town previously understood the provision correctly, when it stated that "[t]he Clean Rails Act of 2008 (CRA) severely limited the STB's jurisdiction over solid waste rail transfer facilities and their compliance with state laws and regulations," and that "[u]nder the CRA, a solid waste rail transfer facility must comply with all applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier, except for laws affecting the siting of the facility that are covered by the land-use-exemption permit." Response of the Town of Brookhaven, New York to Petition of Brookhaven Rail LLC for Exemption from Requirements of 49 U.S.C. § 10909, at 3, FD 36398 and FD 36399, (filed Sept. 11, 2020).

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review proceedings which are central to the Board's review of the proposed Section 10909 application. Selective disclosure should not be allowed, and good cause exists for granting the NAACP's request for public disclosure of *all* of the mediation discussions.

Respectfully submitted,

/s/ Peter A. Pfohl

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*Attorneys for Citizens Campaign
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Enclosure

cc: Service List for FD 36398

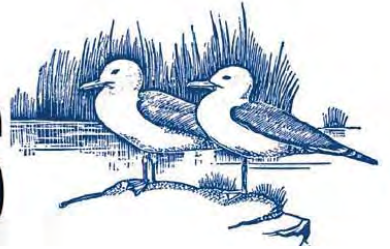
CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of June, 2021, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/

Katherine F. Waring

THE SOUTH SHORE PRESS



37TH YEAR • ISSUE 21

The People's Newspaper - Covering All of Brookhaven

May 26, 2021



COUNTY pg. 4

Shirley Man Pleads Guilty to Killing Woman in DWI Motor Vehicle Crash



TOWN pg. 5

William Floyd Lead Nurse Elected President of NYS Association of School Nurses



SPORTS pg. 8

NY Strikeout Exchange



STATE

Rail Transfer Station for Yaphank Stalled State Electeds Respond to Community Concerns Pull Bill that Would Move Project Forward

By Barbara LaMonica

An application by Brookhaven Rail LLC that, if approved, would permit construction of a rail solid waste facility and transfer station in Yaphank, is before the United States Surface Transportation Board, (STB). The project by the West Babylon-based Winters Brothers is facing mounting community opposition, and state elected officials are responding to constituents' concerns.

Legislation that was before the New York State Legislature was withdrawn last week, according to Senator Anthony Palumbo and Assemblyman Joe DeStefano. The bill called for the authorization for the Town of Brookhaven to alienate wooded parkland in Yaphank to facilitate development of a privately owned rail station for the transport of thousands of tons of construction and demolition, (C&D) debris and other materials daily.

The project proposes the construction of a rail station that would transport 6,000 tons of off-island C & D to a solid waste management facility that would be sited in Yaphank. The rail tracks would run through a 60 acre conservation easement in a parcel of property that contains the last wooded lands left in Yaphank.

Brookhaven Town Supervisor Edward Romaine reported in a telephone interview last week that the town has "absolutely no application for a transfer station in the Yaphank area" that he is aware of. Romaine did say, however, that the United States STB, which reviews all rail projects, can override town zoning codes if they so choose. "Not quite," asserts Citizens for the Campaign Environment (CCE) Executive Director, Adrienne Esposito. According to Esposito, CCE has "asked the Town of Brookhaven to



object to any exemption of local zoning," emphasizing that "the community should have a voice to express concerns." The property on which the rail project is being proposed is presently zoned L-1 industrial. Romaine said transfer stations are zoned L-2. Asked whether he would support the rail project and solid waste management facility being proposed by Winters Brothers, Romaine said he "doesn't know enough details about the project."

But Esposito expressed adamant opposition to the project, underscoring that Winters Brothers' pursuit of a federal permit from the STB should not be issued until the project has been fully vetted by the community. "The Surface Transportation Board is a little known entity, and we want our local laws and regulations to be adhered to," Esposito told South Shore Press last week. "There are two other rail terminal projects on Long

Island that were not exempt from local zoning, so what gives Winters Brothers the right to think they should be exempt?" she asked. "Alienating parklands to facilitate this development is premature, and we strongly object, because you can't take public parkland and give it away to a private entity," Esposito said. "The project needs to undergo a rigorous environmental review and community engagement process."

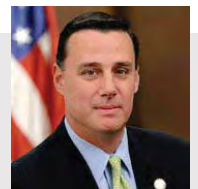
Meanwhile, New York State NAACP President Hazel Dukes announced she is joining forces with Town of Brookhaven NAACP President Dr. Georgette Grier-Key, NAACP Long Island Regional Director Tracey Edwards and other local organizations to oppose the plan without local approvals or local controls. In a prepared statement, Dukes said "The company (Winters Brothers carting), is attempting to use the obscure United States Surface Transportation Board to pervert federal laws designed to bolster railroads to silence the people of Brookhaven and avoid local zoning and control," and is calling on federal, state, county and town officials to "join the fight" to oppose the project.

State Senator Palumbo said because

there is "significant concern" about the project, the bill is being held: "My understanding is that there would be parkland dedicated to the MTA for environmental use which is getting trucks off the road for public transportation. But," Palumbo continued, "if there is any veracity or truth to what is being characterized by the NAACP and Citizens Campaign for the Environment for a transfer station, we are not going to pass this bill."

CitizensfortheCampaignEnvironment in a written statement further addresses potential negative environmental impacts of a waste management facility: "The protections that Long Island's parks, forested areas, and wetlands currently hold were hard-fought and hard-won. Parklands remain vital to the health of our drinking water, communities, and local economy, and we cannot set a precedent of alienating parkland when their location is an inconvenience to private developers."

"The bottom line is this is an application that is before a little known federal agency, and if this is approved, this would be the largest rail waste station on Long Island, and this deserves public vetting," Esposito said.



"My understanding is that there would be parkland dedicated to the MTA for environmental use which is getting trucks off the road for public transportation. But," Palumbo continued, "if there is any veracity or truth to what is being characterized by the NAACP and Citizens Campaign for the Environment for a transfer station, we are not going to pass this bill."

NYS Senator Anthony Palumbo

Members of 1969 Mets World Championship Team, East End Officials and RISE Life Services Expand Food Pantries as Need for Food Rises 300% Due to COVID

RISE Life Services responds to rising need for food donation on Long Island's East End

Hamptons Bays- RISE Life Services Executive Director Charles Evdos was joined by Southampton Supervisor Jay Schneiderman, other elected officials and two members of the 1969 World Champion Mets, to cut the ribbon on a new food pantry in Hampton Bays

this week.

The new food pantry, located Hampton Bays United Methodist Church, 158 West Montauk Highway, Hampton Bays, opened in response to the tremendous increases in the number of food insecure people in the Hamptons. Since the start of the COVID-19 pandemic, the number of food insecure Long Islanders has ballooned from 259,000 last March

2020 to more than 480,000 this year—a 300% increase since the beginning of the COVID pandemic.

The food pantry gave out 100 chickens at the event, donated by William V. Ferro of Ferro, Kuba, Mangano, Sklyar lawfirm. The pantry is opened Thursdays, from 10 a.m. to 1:30 p.m. For more information about how to donate or to volunteer, call 631-727-6220.