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October 1, 2008

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

VIA ELECTRONIC FILING

Re: STB Finance Docket No. 35141

U S Rail Corporation
- Construction and Operation Exemption -
Brookhaven Rail Terminal

Dear Ms. Quinlan,

Please accept for filing an original Motion to Strike the
Town of Brookhaven's September 18, 2008 Response to the
Exemption Petition in this matter. A certification of service is
also supplied.

Thank you for your time and consideration.

Respectfully submitted,
John D. Heifner, PLLC

James H. M. Savage
By: James H. M. Savage
of counsel

JHS/mhd
Enc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35141

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

**U S RAIL CORPORATION'S MOTION TO STRIKE SEPTEMBER 18,
2008 REPLY OF TOWN OF BROOKHAVEN**

Submitted By:

John D. Heffner
John D. Heffner, PLLC
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Washington, DC 20006
Tel. (202) 296-3331

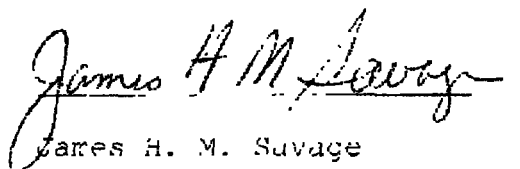
James H. M. Savage
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Washington, DC 20006
Tel. (202) 296-3331

Attorneys for Petitioner

Dated: September 23, 2008

CERTIFICATION OF PROOF OF SERVICE

I certify that I served this day by electronic mail a true copy of the within pleading upon all parties to this matter as per the accompanying service list.


James H. M. Savage

Attorney for Petitioner

Dated: October 1, 2008

SERVICE LIST

Party of Record:
Town of Brookhaven

Mark A. Cuthbertson & Jessica P.
Driscoll
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743

Party of Record:
New York State
Department of
Transportation

Robert A. Rybak
53 Wolf Road
Albany, NY 12232

EXHIBIT A

From: Jim Savage <jsavage@aim.com>
To: jdriscoll@cuthbertsonlaw.com
Bcc: j.heffner@verizon.net; gdh@usrailcorp.com; akaufman@lbiequip.com; gdrumm-sills@optonline.net
Subject: Re: US Rail/Brookhaven: STB FD 35141
Date: Thu, 11 Sep 2008 11:18 am

Jessica,

I don't understand your request. The Town filed its single permissible reply on 9/3/08. Any further reply would be subject to being stricken as an impermissible second reply.

Cordially,

James H. M. Savage
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-----Original Message-----

From: Jessica Driscoll <jdriscoll@cuthbertsonlaw.com>
To: James Savage <jsavage@aim.com>
Cc: mcuthbertson@cuthbertsonlaw.com
Sent: Thu, 11 Sep 2008 10:15 am
Subject: US Rail/Brookhaven: STB FD 35141

Jim:

As you may know, the parties are meeting on September 18, 2008 in an effort to discuss resolution of the issues between them. In light of the upcoming meeting, I am writing to request a 20-day extension of time (to October 8, 2008) for the Town to file its reply to the Petition for Exemption.

Please let me know whether you consent to such an extension.

Thank you
Jessica

Jessica P. Driscoll, Esq.
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35141

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

**U S RAIL CORPORATION'S MOTION TO STRIKE SEPTEMBER 18,
2008 REPLY OF TOWN OF BROOKHAVEN**

BACKGROUND

On August 7, 2008 U S Rail Corporation (hereinafter "U S Rail"), an existing Class III short line railroad currently operating in the State of Ohio, filed a petition for exemption involving the construction, lease and operation by U S Rail, as a common carrier, of an 11,000 foot line of rail to be constructed on a 28-acre parcel of land owned by Sills Road Realty, Inc. (hereinafter "Sills")

in the Town of Brookhaven, NY (hereinafter "Brookhaven"), and leased to U S Rail.

On September 3, 2008, Brookhaven filed a reply to the petition. On September 18, 2008 Brookhaven attempted to file a second reply to U S Rail's petition.

On September 11, 2008 U S Rail advised Brookhaven that any attempt on the Town's part to file a second reply would be opposed as prohibited. See petitioner's counsel's e-mail to Brookhaven's counsel, annexed hereto as Exhibit A. Despite being on notice of U S Rail's position, at no time has Brookhaven sought the Board's permission to file a second reply.

U S Rail now moves to strike Brookhaven's September 18th submission as an unauthorized and prohibited second reply which was filed in violation of 49 C.F.R.1104.13.

LEGAL ARGUMENT

POINT I

BROOKHAVEN'S SEPTEMBER 18, 2008 FILING IS A PROHIBITED SECOND REPLY TO U S RAIL'S PETITION

In form as well as substance, Brookhaven's September 18th filing constitutes a prohibited second reply to U S Rail's August 7th petition. For the reasons discussed

below, Brookhaven's September 18th filing should be stricken or otherwise disregarded as a prohibited second reply.

The Board's Rules of Practice expressly forbid the filing of a reply to a reply. See, 49 C.F.R. 1104.13. Characterizing its September 2nd reply as a "letter", does nothing to change the form of the pleading or overcome the prohibition of such a submission under the Rules. The Board's Office of Proceedings posted Brookhaven's September 2nd reply on the Board's official website at http://www.stn.dot.gov/tt_inrs.

Both the Board and its predecessor, the Interstate Commerce Commission ("I.C.C.") have ruled that the substance of the pleading or motion takes precedence over the form in which it is styled; and where appropriate, has rejected "motions" which were in reality replies to a reply. See, Consolidated Rail Corporation -- Exemption -- Abandonment of the Weirton Secondary Track in Harrison And Tuscarawas Counties, OH, I.C.C. Finance Docket No. AB-167 (Sub-No. 1088X), (served October 17, 1990).

Here, the Tuscarawas County Commission ("TCC") filed a motion to strike substantially all of Conrail's reply. TCC's motion to strike was denied. In essence, the

Commission found that ICC had filed a reply to Conrail's reply, which is prohibited under its rules.

Similarly, in St. Louis Southwestern Railway Company -
- Trackage Rights Over Missouri Pacific Railroad Company --
Kansas City to St. Louis Trackage Rights Connection,
I.C.C. Finance Docket No. 30,000 (Sub No. 16), (served
December 18, 1987), the Denver Rio Grande Western Railroad
Company ("DRGW") requested the ICC reject a letter from the
Union Pacific Missouri Pacific ("UP/MP") which sought "to
correct certain mistakes" in the DRGW's reply to a petition
to reopen. The DRGW argued that the UP/MP filing was
an impermissible reply to a reply under the I.C.C.'s rules
of practice. The DRGW also included a reply to the UP/MP's
arguments in the event the Commission accepted the UP/MP's
filing. The I.C.C. held DRGW correct in characterizing the
UP/MP filing as a reply to a reply. Both the UP/MP pleading
and the DRGW's reply were stricken.

Previously, in Missouri Pacific Railroad Company and
Consolidated Rail Corporation -- Joint Petition for
Declaratory Order -- Recovery of Transportation Charges,
I.C.C. Docket No. 60139, (served November 9, 1987), the
Kansas City Southern Railway Company ("KCS") filed a
combined motion to dismiss and a reply to Missouri Pacific

Railroad ("MP") and Conrail's joint petition for a declaratory order. MP and Conrail replied to the motion to dismiss. KCS then filed a motion to strike petitioners' reply, and MP and Conrail then replied to that motion. The Commission ruled that KCS's motion to strike was in essence a reply to a reply and not to be considered. The Commission ruled, in part,

Under 49 CFR 1104.13(c), a reply to a reply is not permitted. Our regulations for the filing of pleadings are designed to provide an opportunity for parties to present their arguments, but to end the presentation in an orderly fashion so that parties are not perpetually filing pleadings. Moreover, in its motion to strike, KCS simply restates arguments previously made, and otherwise replies to petitioners' reply. It raises no arguments supporting a motion to strike.

U S Rail accordingly submits that Brockhaven's September 18th reply constitutes an unauthorized prohibited second reply under 49 C.F.R. 1104.13(c) and should accordingly be stricken or otherwise disregarded by the Board.

FOOTNOTE 11

BROOKHAVEN HAS FAILED TO DEMONSTRATE GOOD CAUSE FOR THE
BOARD ALLOWING A SECOND REPLY

Even assuming Brookhaven were requesting the Board's permission to file a second reply--which it is not--the September 18th submission makes no showing of good cause sufficient to overcome the express prohibition of 49 C.F.R. 1104.13(c). In a footnote on page one of its September 18th submission, Brookhaven distinguishes the procedural arguments set forth in its September 3rd reply from the substantive arguments set forth in its September 18th reply. Brookhaven's explanation is beside the point. Absent Board permission and for good cause, no party is entitled to file a segmented pleading, motion or other document. See, e.g., 49 C.F.R. 1104.11.

Allowing Brookhaven to bifurcate its reply would send a signal to practitioners everywhere that the Board now countenances the practice, contrary precedent notwithstanding. Moreover, were the Board to allow Brookhaven's second reply, logic and fundamental fairness should then operate to afford U S Rail the opportunity to

respond to Brockhaven's second pleading with a second pleading of its own. And so on and so forth, *ad infinitum*.

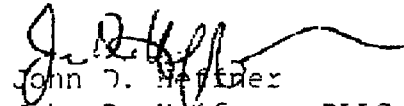
As the foregoing illustrates, not only would Petitioner be greatly prejudiced by the Board suddenly reversing its long-settled practice of limiting parties to a single submission at each stage of the proceeding, but the Board would also be tacitly permitting heretofore unauthorized and prohibited multiple, segmented, and bifurcated filings whenever, for example, "[A party] doesn't want its interim silence to be interpreted as consent[.]" See, Brockhaven's September 18th reply at P.1, EN 1.

By its ruling herein, the Board should actively discourage multiple replies before the practice proliferates.

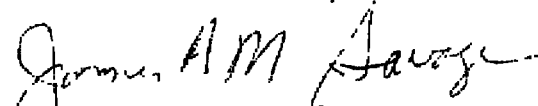
CONCLUSION

For the above stated reasons and based upon the above cited points and authorities, Petitioner U S Rail Corporation requests the Board strike or otherwise disregard Brookhaven's September 18th submission as an unauthorized and prohibited second reply.

Respectfully submitted,



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U S Rail Corporation

Dated: September 23, 2003