

SERVICE DATE – MARCH 24, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36398

BROOKHAVEN RAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—IN
SUFFOLK COUNTY, N.Y.

Digest:¹ This decision denies requests concerning prior Board-sponsored mediation and explains that all interested parties have the opportunity to participate in the Board's proceeding.

Decided: March 23, 2022

On June 1, 2021, the NAACP New York State Conference (NAACP-NY) filed a petition asking, among other things, that the Board order disclosure of the outcome of mediation that previously occurred in this proceeding between Brookhaven Rail LLC (Brookhaven Rail) and the Town of Brookhaven, N.Y. (Town). As discussed below, the Board will not require the disclosure sought but will provide information on how NAACP-NY can participate in the proceeding.

BACKGROUND

As explained in Brookhaven Rail's rail construction petition (Construction Petition), which is further described below, the Brookhaven Rail Terminal (Terminal) is located in the Town, on Long Island, N.Y. (Constr. Pet. 1, 4.) The Terminal has historically been described as consisting of four sections, which are referred to as Parcels A, B, C, and D. (Id. at 2.) A Long Island Rail Road Company (LIRR) mainline runs north of and adjacent to Parcels A, B, and C.² (Id. at 2, Ex. A.) Parcel D is located south of Parcel C. (Id., Ex. A.) This proceeding concerns proposed rail service to Parcel D, which is not currently served by rail and is covered, in part, by a conservation easement held by the Town. (Constr. Pet. 3 n.7, 4.)

In 2014, the Town commenced litigation against multiple parties, including Brookhaven Rail, in the United States District Court for the Eastern District of New York regarding development and activities on Parcels B and C. (Id. at 10-11.) The litigation ended with a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Brookhaven Rail interchanges with the operator on the LIRR mainline, New York & Atlantic Railway, to provide rail service to Parcel A. (Constr. Pet. 2-3.)

settlement, which incorporated potential expansion plans for Parcel D. (*Id.* at 11.) Those plans included the “Parcel D Conceptual Track Plan” under which Parcel D would be served by tracks connecting to the LIRR mainline by an underpass running south to Parcel D. (*Id.* at 6, 11.)

In this proceeding, Brookhaven Rail filed its Construction Petition seeking an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a 23,680-foot rail line that would serve a planned solid waste rail transfer facility to be located on Parcel D of the Terminal. Brookhaven Rail proposes a route connecting to the interstate rail network via a line off the LIRR mainline onto Parcel D rather than the underpass mentioned above. (Constr. Pet. 6.) That route, however, would cross a conservation easement held by the Town on a portion of Parcel D. (See Brookhaven Rail Reply 11-12, Aug. 4, 2020.) Brookhaven Rail asked that the Board consider the transportation merits of the proposed rail construction before completion of the environmental review. Subsequently, Brookhaven Rail filed, in Docket No. FD 36399, a petition for exemption from the full application requirements of 49 U.S.C. § 10909 and 49 C.F.R. part 1155 subpart C for a land-use-exemption permit for the planned facility (the Facility Petition).

On October 23, 2020, the Board, in a decision served in both Docket Nos. FD 36399 and FD 36398, rejected the Facility Petition, finding that an application under § 10909 was necessary for the proposed facility, and deferred action on Brookhaven Rail’s request to consider the transportation merits of the Construction Petition before examining the environmental impacts. Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y., FD 36398 et al., slip op. at 5 (STB served Oct. 23, 2020). As pertinent here, the Board noted that Brookhaven Rail and the Town had jointly filed a request for Board-sponsored mediation in Docket No. FD 36399 to address ongoing complex issues and questions between those parties. *Id.* at 7. The Board stated that, although it was rejecting the Facility Petition filed in Docket No. FD 36399, Brookhaven Rail and the Town could jointly inform the Board if they wished to pursue Board-sponsored mediation in Docket No. FD 36398. *Id.* at 7-8. On November 6, 2020, Brookhaven Rail and the Town notified the Board that they wished to do so.

Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the Sills Parties), as well as the Citizens Campaign for the Environment (CCE), opposed the mediation request. (CCE Reply 1-2, Nov. 9, 2020; Sills Parties Reply 1, Nov. 18, 2020.) In addition, both the Sills Parties and CCE argued that mediation, if ordered, should be open to any party. (CCE Reply 1-2, Nov. 9, 2020 (arguing that fairness and due process required that any interested party or consulting party be allowed to participate in any mediation and requesting that CCE be allowed to do so); Sills Parties Reply 3, Nov. 18, 2020 (asking that the Sills Parties be allowed to participate in any mediation and that the parties disclose publicly the specific issues slated for mediation, and later, the issues resolved thereby).) The Town opposed inclusion of the Sills Parties and CCE in mediation. Town Reply 1-2, Nov. 13, 2020, Brookhaven Rail—Pet. for Exemption from Requirements of 49 U.S.C. § 10909, Docket No. FD 36399; Town Reply 2, Nov. 23, 2020, Brookhaven Rail—Pet. for Exemption from Requirements of 49 U.S.C. § 10909, Docket No. FD 36399. Brookhaven Rail opposed inclusion of CCE but did not reply to the Sills Parties’ request. (Brookhaven Rail Reply 2, Nov. 13, 2020.)

In a decision served on January 6, 2021, the Board granted the joint mediation request from Brookhaven Rail and the Town and limited mediation to those parties. Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y. (Jan. 2021 Ord.), FD 36398, slip op. at 3 (STB served Jan. 6, 2021). Because the subjects of the mediation would need to be distinct from the matters to be decided by the agency, the Board rejected as too broad CCE’s argument that fairness requires all parties to participate in the mediation. The Board noted that the ultimate question before the Board in this proceeding is whether to grant construction and operating authority to Brookhaven Rail and, if so, what conditions to impose. However, as provided under 49 C.F.R. § 1109.1, mediation could not encompass any grant, denial, stay, or revocation of regulatory authority that the Board may exercise in this proceeding. Jan. 2021 Ord., FD 36398, slip op. at 4. Nor would mediation limit or otherwise affect any necessary environmental review of the Construction Petition, which the Board’s Office of Environmental Analysis (OEA) would conduct in full regardless of the outcome of mediation. (Id.) The Board added that, should Brookhaven Rail and the Town reach resolution on any issues bearing on the Construction Petition, they would need to provide such information to the Board for the information to be considered in the proceeding, and that CCE and the Sills Parties would have an opportunity to reply at that time. (Id.) The Board also rejected the argument of CCE and the Sills Parties that mediation is inappropriate unless the specific issues to be mediated are identified in advance. (Id. at 4 n.3.) The Board set 30 days for the mediation period but stated that mediation could be extended pursuant to mutual written requests of the parties to the mediation proceeding. (Id. at 4.)

Brookhaven Rail and the Town began mediation, and, following two extensions of the mediation period at those parties’ request, Brookhaven Rail and the Town requested a third extension on May 27, 2021, which was granted the next day. Accordingly, the mediation period ended on June 18, 2021.

In its June 1 petition, NAACP-NY asks the Board to (1) order immediate disclosure of the outcome of the non-public mediation; (2) deny the May 27, 2021 request to extend the term of the non-public mediation; (3) order ongoing communications and updates to NAACP-NY and/or the general public; and (4) add NAACP-NY as a party of record for the docket. (NAACP-NY Pet. 1, June 1, 2021.) NAACP-NY states that its members live, work, and engage in activities in and around areas that could be adversely affected by the project that is the subject of the Construction Petition and that extended negotiations appear to represent an effort to permanently bar public participation in a major project. (Id. at 2.)

NAACP-NY also argues that the forthcoming request for a land-use exemption permit under § 10909 for the planned facility justifies disclosure as its members and their interests could be adversely affected by the facility. (NAACP-NY Pet. 3, June 1, 2021.) It notes that the land-use exemption will involve environmental review by OEA and that absent disclosure it will be unable to meaningfully participate in that process. (Id. at 3-4.) NAACP-NY also claims that disclosure could avoid a conflict between federal and state laws. (Id. at 4-5.)

On June 2, 2021, NAACP-NY submitted an additional letter expressing concern regarding the proposed facility’s possible impacts on the residents of the area and encouraging transparency and opportunities for public input on the project. NAACP-NY notes that it,

Brookhaven and Long Island NAACP officials, NAACP chapters across the region, and other local organizations are jointly opposing “the plan to build an enormous garbage transfer station in Brookhaven . . . while circumventing meaningful local approvals, public comments or controls.” (NAACP-NY Letter 1, June 2, 2021.) NAACP-NY seeks denial of the waiver that Brookhaven Rail sought from the requirement in 49 C.F.R. § 1105.10(a)(1) that a party such as Brookhaven Rail must give OEA notice six months before it may file an application. (NAACP-NY Letter 2, June 2, 2021.) NAACP-NY asserts that the community at large has been “kept in the dark” and is just now organizing an evaluation of this project and that requiring the full six-month notice period would promote fairness. (Id.)

The Town replied to NAACP-NY on June 8, 2021. The Town claims, among other things, that the disclosure sought by NAACP-NY is inconsistent with the Board’s mediation regulations, which it argues are based in confidentiality, and with the public policy behind those rules. (Town Reply 5, June 8, 2021.) However, the Town does indicate that under its proposal, (1) Brookhaven Rail would, as proposed in the Construction Petition, eliminate the underpass option beneath the LIRR mainline in favor of a routing south onto Parcel D; (2) the track would cross three acres of the conservation easement, but in exchange, the easement would expand by six acres; and (3) in light of the possibility of federal preemption, the environmental mitigation measures resulting from the settlement of the Town’s 2014 litigation would be applied to the development of Parcel D under the jurisdiction of the Board. (Town Reply 3-4, June 8, 2021.) The Town adds that any binding agreement would require public approval under local law. (Id. at 5.)

On June 9, 2021, Brookhaven Rail also filed in opposition to the relief sought by NAACP-NY. Brookhaven Rail notes that the Board’s mediation processes are confidential by design and that the Board often extends mediation periods to facilitate discussion and potential agreement outside of the formal docket. (Brookhaven Rail Reply 2-3, June 9, 2021.) Brookhaven Rail also claims that disclosure is premature given that discussions are ongoing and that disclosure is unnecessary as it covers only a subset of issues that do not bear on the merits of the Construction Petition or the environmental review process. (Id. at 3.) Regardless, Brookhaven Rail intends to provide notice of the mediation outcome pursuant to 49 C.F.R. § 1109.3(g). (Brookhaven Rail Reply 4, June 9, 2021.) Brookhaven Rail adds that denial of NAACP-NY’s petition will have no effect on NAACP-NY’s right to participate in the public review of the environmental issues raised by this construction project or any forthcoming application seeking a land-use exemption for the proposed facility under § 10909. (Id. at 5.)

On June 11, 2021, CCE filed in support of the disclosure sought by NAACP-NY. CCE argues that Brookhaven Rail and the Town have only selectively disclosed matters related to the mediation and have provided misleading characterizations of those matters. (CCE Reply 1, June 11, 2021.) Specifically, CCE asserts that Brookhaven Rail disclosed to OEA the mediation agreements concerning the switch and the adjustment of the conservation easement. (Id.) CCE claims that Brookhaven Rail has done so to secure favor with OEA and OEA’s third-party contractor. (Id.) CCE argues that such selective disclosure should not be allowed and that without full public disclosure, Brookhaven Rail’s actions threaten to discredit the integrity of the Board’s mediation program. (Id. at 2-3.)

Furthermore, CCE claims that because Brookhaven Rail's disclosure implicates aspects of the ultimate merits of Brookhaven Rail's proposal, which CCE argues is an improper use of mediation in a licensing proceeding, the Board should consider conducting a further investigation of the matter. (*Id.* at 3.) Finally, CCE alleges that Brookhaven Rail has falsely claimed that the mediation was confined to issues related to the rail construction proposal in this docket and did not concern its proposed solid waste rail transfer facility. (*Id.*)

On June 15, 2021, Brookhaven Rail replied to CCE's allegations.³ Brookhaven Rail asserts, among other things, that the proposed use of a switch leading to Parcel D and the potential modification of the conservation easement are not undisclosed and that Brookhaven Rail wrote to CCE describing these proposed plans in August 2020. (Brookhaven Rail Reply 2, June 15, 2021.) Also on June 15, 2021, Brookhaven Rail submitted an additional filing responding to NAACP-NY's June 2 letter, noting that Brookhaven Rail and its affiliates have been engaged in public outreach since October 2020 and had invited NAACP-NY to discussions in May 2021. (Brookhaven Rail Reply 2, June 15, 2021.)

On July 26, 2021, U.S. Representative Kathleen M. Rice filed a letter urging the Board to thoroughly examine any request by Brookhaven Rail for a waiver regarding local zoning laws, environmental reviews, or public participation laws and to keep in mind the strong objections by the New York State and Brookhaven Chapters of the NAACP.⁴ The Board received a similar letter from U.S. Representative Thomas R. Souzzi on November 9, 2021. On November 10, 2021, CCE filed in opposition to Brookhaven Rail's request for waiver of the six-month notification requirement also challenged by NAACP-NY. U.S. Senators Charles E. Schumer and Kirsten Gillibrand jointly filed a letter on November 12, 2021, noting community concern related to the proposed waste transfer facility and the need for transparent review. Similarly, on December 29, 2021, County Legislator Kara Hahn filed a letter expressing concern over the proposed facility and federal involvement.⁵

³ Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept it in the interest of a complete record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

⁴ On October 22, 2021, the Sills Parties filed a motion to withdraw from the proceeding with prejudice.

⁵ On September 17, 2021, the (then Acting) Director of OEA responded by letter to a separate allegation by CCE of a potential conflict of interest resulting from OEA's approval of Henningson, Durham & Richardson Architecture and Engineering P.C. as the third-party contractor for the environmental review of the Construction Petition and the potential application for a land-use-exemption permit. The Acting Director found that there was no basis for the allegation and, on October 6, 2021, CCE appealed the Acting Director's determination to the Board. On October 20, 2021, OEA suspended its environmental review until the Board issues its decision resolving CCE's administrative appeal. In addition, CCE filed a petition for declaratory order on November 24, 2021, concerning, among other things, activities on Parcels B and C and tree removal on Parcel D. Although CCE asks the Board to suspend further action until the agency issues a decision on CCE's petition for declaratory order, the petition and appeal are

DISCUSSION AND CONCLUSIONS

NAACP-NY is concerned that the mediation may have adversely affected the public participation process in the Construction Petition proceeding, as well as NAACP-NY's ability to participate meaningfully, develop and prepare positions, and otherwise give voice to its members' interests and positions on environmental matters if Brookhaven Rail seeks a land-use-exemption permit under § 10909. (See NAACP-NY Pet. 2-3, June 1, 2021.) However, as discussed below, the mediation has not affected the environmental review process,⁶ the Board's decision-making process, or the opportunity for public participation by all interested parties and entities in those processes. All interested members of the public, including NAACP-NY, will have the opportunity to participate in the Board's consideration of the Construction Petition, as well as any application for a land-use-exemption permit that Brookhaven Rail might file. As a result, the relief requested in NAACP-NY's petition regarding disclosure and communications in connection with the mediation will be denied.⁷

Regarding NAACP-NY's request to be made a party to the proceeding involving the Construction Petition (NAACP-NY Pet. 1, June 1, 2021), the Board notes that, upon its initial filing, NAACP-NY was added to the service list for this proceeding, thereby becoming a party of record. As such, NAACP-NY will receive all filings in the docket as well as all Board decisions, including issuances from OEA.

The ultimate question before the agency in this docket will be whether to grant construction and operating authority to Brookhaven Rail and, if the Board were to grant such authority, what mitigation conditions (if any) to impose. See Jan. 2021 Ord., FD 36398, slip op. at 4. The Board's analysis on these points will be based upon the record in this proceeding, including all environmental issuances by OEA, all filings the Board receives, and all comments received during the environmental review process. And, as discussed below, there will be ample opportunities for public input.

During its review process, OEA will analyze the environmental impacts of granting authority for the construction project and, if Brookhaven Rail files an application for a land-use-exemption permit, the environmental impacts of granting that permit as well. OEA has

sufficiently distinct from NAACP-NY's requests that CCE will not be prejudiced by issuance of this decision addressing NAACP-NY's concerns. CCE's administrative appeal and petition for declaratory order will be addressed by the Board in the near future.

⁶ As noted, the environmental review process is suspended, but in its appeal of the OEA Acting Director's decision, CCE does not seek to permanently discontinue the process. (See Appeal 31.) Moreover, the environmental review will be completed before the Board decides whether to authorize the Construction Petition and the potential application for a land-use-exemption permit.

⁷ Additionally, NAACP-NY's request to deny extension of the mediation period will be denied as moot. The request to extend the mediation period was granted on May 28, 2021, before NAACP-NY's petition was filed, and the extended mediation period has ended. (See Surface Transp. Bd. Letter 1.)

determined that the preparation of an Environmental Impact Statement (EIS) is appropriate for these projects and will first conduct scoping to determine the scope of the environmental issues to be addressed in the EIS. Scoping will include an opportunity for input from the public, and NAACP-NY will be able to participate in that process. Following scoping, OEA will issue for public review and comment a Draft EIS, which will set forth its preliminary conclusions and recommended environmental mitigation. OEA will also conduct public meetings to allow for additional public comment on the Draft EIS. Based on all comments received, and further analysis conducted in response to the public comments as appropriate, OEA will then issue a Final EIS addressing those comments and revising, if appropriate, its conclusions and recommended mitigation. In making its decision on the Construction Petition, the Board will consider the entire environmental record, including all environmental comments received, as well as all filings and comments filed with the Board on the transportation merits; if an application is filed for a land-use-exemption permit, the Board will also consider the entire record before it on that project when analyzing that application. Neither the EIS process nor the Board's consideration of the merits of the Construction Petition (or potential application for a land-use-exemption permit) have occurred and, once the EIS process formally begins, public participation in that process will be available in the same manner and on the same topics as it would have been had no mediation occurred.

Pursuant to the order granting the request for mediation, the scope of the mediation was limited and specifically precluded reaching any conclusions concerning "any grant, denial, stay, or revocation of regulatory authority," which are exclusively within the purview of the Board. Jan. 2021 Ord., FD 36398, slip op. at 4. The Board's order also explained that mediation would not "limit or otherwise affect any necessary environmental review." Id. Moreover, any agreements that may have been reached in the mediation that are relevant to the Construction Petition (or potential application for a land-use-exemption permit) and that the parties would like the Board to consider in making its determination will need to be disclosed in Brookhaven Rail's filings to the Board or OEA. Thus, any agreements reached during mediation will not limit the Board's analysis of the Construction Petition, potential application for a land-use-exemption permit, or opportunity for public input.

Brookhaven Rail notes that the "mediation agreement" includes Brookhaven Rail eliminating the possibility of the underpass route and the Town agreeing to the Line crossing the conservation easement. (Brookhaven Rail Reply 4 n.10, June 9, 2021.) In addition to the latter being the routing Brookhaven Rail proposed in the Construction Petition, questions of whether a petitioner or applicant has sufficient property rights to consummate a grant of Board construction authority are generally beyond the scope of the Board's focus. See Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3) et al., slip op. at 16 n.50 (STB served Oct. 9, 2007). The Board's construction authority is permissive, meaning that while the Board provides authority to construct a rail line as part of the interstate rail system, it does not determine or grant any real property or contractual rights that may be necessary for the construction to occur. See Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah, FD 36284, slip op. at 6 (STB served Jan. 5, 2021). Brookhaven Rail would need to independently obtain any such property or contract rights under state and local law. Thus, any agreement reached in the mediation as to property rights

and/or modification of the easement is outside the Board's authority and the scope of its review of the Construction Petition or any potential application for a land-use-exemption permit.

As provided at 49 C.F.R. § 1109.3(d), mediation is confidential. The Board favors resolution of disputes through mediation, where possible, see 49 C.F.R. § 1109.1. Confidentiality is a crucial component of mediation because it permits parties to have open and candid discussions that are necessary to resolve disputes. After-the-fact waiver of that confidentiality would fundamentally undermine the process and discourage, or even prevent, participation in mediation.⁸ In any event, the Board's analysis of the Construction Petition will be based solely on the record, not on any agreements or other materials that are not filed in this proceeding.⁹

There will be ample opportunity for NAACP-NY to be heard during the environmental review process in this docket and in any proceeding concerning a land-use-exemption permit should Brookhaven Rail apply for one. The Board will therefore not require disclosure of any material documenting any aspect of the mediation or its outcome unless such disclosure is necessary under 49 C.F.R. § 1109.3(g), if applicable, or the January Order. (See NAACP-NY Pet. 3, June 1, 2021.) Beyond those exceptions, the Board will not require Brookhaven Rail and the Town to alert the public if any terms or agreements evolve, change, or are cancelled. (See id. at 4.)

Finally, NAACP-NY notes that Brookhaven Rail has sought a waiver from OEA of the requirement at 49 C.F.R. § 1105.10(a)(1) that Brookhaven Rail give six-months' notice before it files its application for a land-use-exemption permit. NAACP-NY asks that OEA not grant the waiver, claiming that "the community at large has been kept in the dark and is just now organizing an evaluation of this project." (NAACP-NY Letter 2, June 2, 2021.) NAACP-NY further asserts that there has been an attempt to avoid public debate and that rejecting the waiver would promote fairness and transparency. (Id.) Similarly, CCE opposes the request for a waiver, claiming, among other things, that Brookhaven Rail modified its plans in July by detailing possible warehouses on nearby parcels. (CCE Reply 2, Nov. 10, 2021.)

The purpose of 49 C.F.R. § 1105.10(a)(1) is to provide prospective applicants with information about the Board's environmental review process and for applicants to inform OEA about the proposed project before starting the formal environmental review. Here, however, because six months have already passed since OEA received the request for waiver on

⁸ See In re Teligent, Inc., 640 F.3d 53, 57-58 (2nd Cir. 2011) ("Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. Promising participants confidentiality in these proceedings 'promotes the free flow of information that may result in the settlement of a dispute' and 'protect[s] the integrity of alternative dispute resolution generally.'" (internal citations omitted).

⁹ To the extent that the NAACP-NY is concerned about a conflict between the New York State freedom of information laws and a decision here denying NAACP-NY's disclosure request, questions regarding the applicability of state laws are better addressed by a state court or other appropriate judicial forum.

April 23, 2021, and the request for waiver constitutes notice of the potential application, Brookhaven Rail's waiver request is moot and therefore denied.

It is ordered:

1. Brookhaven Rail's June 15 reply to CCE is accepted into the record.
2. NAACP-NY's petition is denied.
3. Brookhaven Rail's April 23, 2021 waiver request is denied.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.