

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36463

**THE LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY -
PETITION FOR DECLARATORY ORDER**

REBUTTAL

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January 20, 2021

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REBUTTAL

Petitioner, The Louisville and Jefferson County Riverport Authority, d/b/a Louisville Riverport Authority ("LRA"), hereby respectfully submits to the Surface Transportation Board ("STB" or "Board") its Rebuttal to the Reply of New Albany Main Street Properties, LLC, which does business as the Port of Louisville ("Port of Louisville"), in support of its Petition for Declaratory Order ("Petition") herein. LRA petitioned for the declaratory order to eliminate uncertainty pursuant to the STB's authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, finding (1) the Port of Louisville has been improperly operating on rail lines in and around this port without the required authorization from the STB, (2) the Port of Louisville should cease rail operations immediately on said rail lines, and (3) LRA can seek authority from the STB to have another railroad operate on said rail lines.

The Port of Louisville submitted a strongly worded Reply to LRA's Petition that was filled with claims of conspiracy and false information being provided to the Federal Railroad Administration ("FRA").¹ Because of these unfounded claims, LRA feels compelled to clarify

¹ LRA will not address these unfounded accusations because they are not relevant to its Petition. It will state that these serious accusations are inaccurate and only tell half of the story. Also, it will note that three employees of the Port of Louisville attended a meeting by phone on

its purpose behind the filing of its Petition. Its sole purpose is to make sure that the rail operations at the Port Facility and over the entire Riverport Complex are operated in accordance with federal law. LRA is a state government entity with a fiduciary duty to the public and takes that responsibility seriously. Upon inspection of the rail operations conducted by the Port of Louisville, it determined that they were not in compliance with federal law, including the STB's and Federal Railroad Administration's statutes and regulations.² When LRA asked the Port of Louisville to bring itself into compliance with these federal railroad laws, it flatly refused on the basis that it considers itself to be a private switching contractor not subject to these laws as it has argued to the Board herein. As a result, LRA felt it had no other option than to bring this issue to the attention of the STB through this proceeding to seek clarification of the matter. That is its sole purpose here despite these unfounded accusations otherwise.

ARGUMENT

In its Reply, the Port of Louisville maintains that it only operates on the loop tracks in the Port Facility. However, even assuming this is accurate, its rail operations still require authorization from the STB as discussed below.

The Port of Louisville Cannot Be a Private Railroad.

The Port of Louisville continues to maintain that it is a "private contract switcher", which is not subject to the jurisdiction of the STB. Reply at 23. This argument has no merit because the

September 9, 2020, with the FRA and LRA after the FRA issued its letter regarding the rail operations at the Port Facility and Riverport Complex. FRA letter is quoted in full in Petition at 10-14. None of these employees of the Port of Louisville contradicted or objected to any of the findings by the FRA in its letter during the meeting.

² LRA is a small entity with only 3 employees. Until recently, it did not have an employee with a rail background. On March 30, 2020, LRA hired Executive Vice President Tim Kizer who has extensive rail experience. Once hired, Mr. Kizer conducted an extensive examination of LRA's rail operations run by the Port Louisville. This led him to discover these violations of federal law which has led to this proceeding.

Port of Louisville's own statements in its Reply demonstrate that it serves customers other than itself.

As LRA explained in its Petition, “[t]he agency’s jurisdiction does not extend to private rail operations (those not operated for hire).” *B. Willis, C.P.A., Inc. – Pet. for Declaratory Order*, FD 34013, slip op. at 2 (STB served Oct. 3, 2001), *pet. to reopen denied*, (July 26, 2002), *aff’d sub nom, B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx 321 (D.C. Cir. 2002). In this decision, the STB explained:

In other words, there is a category of rail operations that falls outside the Board's statutory jurisdiction. It consists of private tracks, typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no “holding out” to serve other shippers for compensation. Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board's jurisdiction.

Id. See also Public Service Company of Colorado – Construction Exemption – Pueblo County, CO, FD 34013 (STB served Aug. 23, 2000) (While line would only serve shipper constructing line, other shippers would be permitted to use it should demand arise, thereby making the line subject to the Board’s jurisdiction).

The Port of Louisville states that it falls within this narrow exception because it only conducts private rail operations on the loop track. At the same time, Lessee states as follows:

Rather than establishing one charge for its services in the Port Facility to assess generally to potential **customers**, the Port of Louisville has direct contracts with **customers** of the Port Facility (most of which are not located within the Riverport Complex) for loading or unloading a railcar that is placed on the loop tracks. The Port of Louisville does not charge a separate fee for switching cars on and off the loop track, but rather individually negotiates these fees on a case-by-case basis.

Reply at 25. Moreover, there are two rail shippers, Universal Minerals and ELG Metals, located inside the Port Facility that the Port of Louisville must provide rail service to upon request.³ Petition Exhibit A, Section V, A, 7. Therefore, it is clear that the Port of Louisville is not a private railroad under the STB's definition of that term as it serves customers other than itself.

The Port of Louisville's Claim that It Is Not a Rail Carrier Holding out to Provide Common Carrier Transportation for Compensation Is Not Correct.

The Port of Louisville's claim that it cannot be found to be a rail carrier under 49 U.S.C. § 10102(5) under any circumstances because it does not hold itself out to provide common carrier transportation for compensation is simply not correct. The Port of Louisville does not appear to dispute that its rail operations involve "transportation" as defined under 49 U.S.C. § 10102(9). It also states that it charges its customers for the loading and unloading of rail cars and switching cars on and off the loop track as quoted above, so it clearly does this for compensation. However, it asserts that it does not hold itself out to provide common carrier transportation for compensation, thereby arguing it cannot be found to be a "rail carrier".

First, its admission that it has more than one customer for whom it performs these services demonstrates that the Port of Louisville holds itself out to provide common carrier

³ In addition, there are numerous undeveloped parcels of land in the Port Facility that could be leased by new rail customers in the future.

transportation. It obviously conveys its ability to perform these rail services to the public in some fashion, or it would not have multiple customers that are located outside the Port Facility or the Riverport Complex. Moreover, it must provide rail service for the two rail shippers located in the Port Facility pursuant to its lease with LRA. Petition Exhibit A, Section V, A, 7.

Along those lines and most tellingly, the Port of Louisville has a website on which it advertises its services. One of the services is labelled “Railroad”.

www.portoflouisville.com/railroad Also attached hereto as Exhibit A. This Railroad page provides a section, “About our Railroad”, that has the following bullet points:

- 13 miles of on-site track and off-site track
- 23,000 foot double-loop track with 120-car unit train capability per track
- Dumper vault building with track mounted rail car indexer

The Railroad page goes on to provide a section labelled “Access”, that has the following bullet points:

- Indiana Railroad access via switch charge with Norfolk Southern
- Western Rail Carriers, Burlington Northern, Union Pacific and Canadian National can access on a two line haul with CSX, Norfolk Southern, or the Paducah and Louisville Terminal.

This page clearly demonstrates that Port of Louisville holds itself out to provide common carrier rail services.⁴

⁴ Moreover, this page also demonstrates that the Port of Louisville does hold itself out to provide common carrier rail service on the 13 miles of on-site and off-site track in the Riverport Complex. While it only claims to have operated on these lines in isolated instances, this rail

Even Based Solely on these Rail Operations inside the Loop Tracks, the Port of Louisville Still Must Obtain Authorization from the STB to Operate.

Even assuming the Port of Louisville only operates on the loop tracks⁵, this type of rail operation still clearly makes it a “rail carrier” in accordance with the *Effingham* line of cases. In the seminal case, Effingham Railroad sought a declaratory order that the Board did not have jurisdiction of its proposed construction and operation of track within a new industrial park.

Effingham R.R. Company – Petition for Dec. Order -- Construction at Effingham, IL (“*Effingham*”), 2 STB 606 (STB served Sept. 12, 1997). The railroad planned to perform switching services inside the industrial park on an existing piece of switch track and on a piece of track to be constructed to serve new and existing customers in the industrial park. The railroad would interchange with two Class I carriers at an interchange track. Based on these facts, the Board reasoned that it had jurisdiction over this operation:

According to the court, while we may focus on the tenant railroad's use of the tracks solely for switching operations as the controlling factor in determining the track's character, if those switching operations have the effect of substantially extending the tenant railroad's lines into new territory, then we may not decline jurisdiction. *See*

Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 728

(D.C.Cir.1996) (*BLE*). Under the facts presented here, the character of the track may be

activity on top of this advertising of rail services on its website clearly demonstrates that the Port of Louisville operates as a “rail carrier” on these rail lines outside the loop tracks.

⁵ Southern Railway Company and Paducah and Louisville Railroad, Inc. did obtain authority to operate over the loop tracks at issue here from the Interstate Commerce Commission. *See Southern Railway Company – Trackage Rights Exemption – Louisville and Jefferson County Riverport Authority*, FD 31747 (ICC decided Oct. 31, 1990); *Paducah and Louisville Railway, Inc. – Trackage Rights Exemption – Louisville-Jefferson County Riverport Authority*, FD 31573 (ICC decided Mar. 1, 1990).

switching, but the larger purpose and effect of ERRC's proposal is to construct what will constitute ERRC's entire line of railroad to serve a new rail shipper, Ready-Mix, or additional shippers whose facilities are to be constructed. ERRC argues that it will not be invading Conrail and ICR's territory because both carriers have served this general geographic area for years and neither has expressed any interest in extending their lines of railroad. What is important under the relevant precedents, however, is that ERRC is proposing to construct and operate in territory it has not previously served. The fact that it is a new carrier and that this proposal will constitute its entire operation is even more reason not to decline jurisdiction.

Id. at 609.

These facts are nearly identical to those at hand with respect to the Port of Louisville's loop track rail service. It performs switching services on this line. The loop tracks are in territory that the Port of Louisville had not previously served. One purpose of these loop tracks is to serve new and existing customers that are located in the Port Facility. This line of railroad would constitute its entire operation based on the Port of Louisville's description of its rail services in its Reply. Like Effingham Railroad, the Port of Louisville claims it is not a rail carrier subject to the jurisdiction of the STB; however, based on *Effingham* and its progeny, this simply is not the case.

In the progeny of *Effingham*, the Board found rail switching carriers at various ports to be rail carriers subject to the jurisdiction of the Board where the lines and service involved constituted their entire operations. See *Clark Shortline Railroad Company – Acquisition and Operation Exemption – Indiana Port Commission*, FD 32112 (STB served May 14, 1998) (STB

asserted jurisdiction over port terminal switching railroads on lines that had previously been switching track); *Texas Central Business Lines Corp. – Operation Exemption – MidTexas Int’l Center*, FD 33997 (STB served Sept. 20, 2002 (where company proposed to provide switching services over yard and switching track at inland port, Board found it had jurisdiction because the operations constituted the carrier’s entire line of railroad, enabling it to serve shippers in territory it had previously not served.); *See also Cordele Intermodal Services R.R., Inc. – Acquisition and Operation Exemption – Rail Line at East Industrial Park*, FD 35509 (STB served June 2, 2011)(STB asked for more information regarding 1500 foot rail line for shipments originating and terminating at industrial park to and from the Port of Savannah that would be the entity’s entire operation because it may have already become a common carrier without authority); *Chicago Rail & Port, LLC—Lease and Operation Exemption – Rail Line of South Chicago Property Development, LLC*, FD 36126 (STB served July 21, 2017)(exemption notice involving 3,797 feet of rail line which was entire rail operation of the filer); *Rock River Railroad, Inc. – Acquisition and Operation Exemption – Rail Lines of Renew Energy, LLC*, FD 35016 (STB served May 10, 2017) (denying stay where line entered new territory and constituted entire line of railroad). Therefore, even assuming the Port of Louisville only operates on the loop tracks as it claims, this rail operation would still be subject to the jurisdiction of the STB because it constitutes its entire line of railroad and serves territory it had not previously served.

Conclusion

Based on the foregoing discussion and its Petition, LRA respectfully asks the Board to issue a declaratory order making a finding as stated above.

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Counsel for LRA

January 20, 2021

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on January 20, 2021, I served a copy of this Rebuttal on counsel for all parties of record in this proceeding by the most expedient method.

/s/Daniel R. Elliott

VERIFICATION

I, Tim W. Kizer, Executive Vice President of The Louisville and Jefferson County Riverport Authority, hereby verify under the penalty of perjury that to the best of my knowledge, the foregoing Rebuttal is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of The Louisville and Jefferson County Riverport Authority in connection with this proceeding before the Surface Transportation Board.

Executed this 19th day of Jan, 2021



Tim W. Kizer
Executive Vice President,
The Louisville and Jefferson
County Riverport Authority

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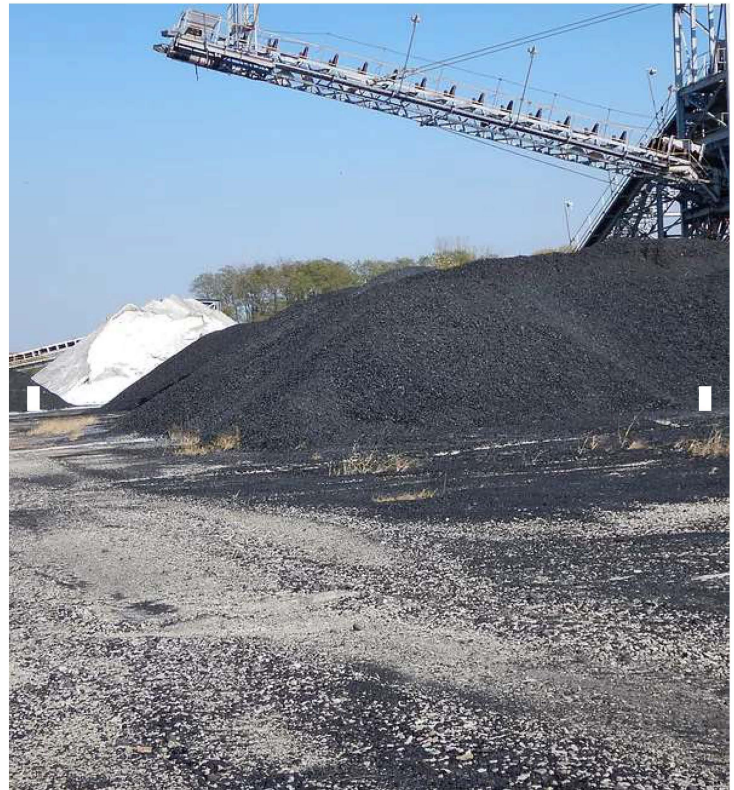
Railroad

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