

**BEFORE THE
SURFACE TRANSPORTATION BOARD****ENTERED**
Office of Proceedings
February 2, 2021
Part of
Public Record

DOCKET NO. FD 36463

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

**REPLY IN OPPOSITION TO MOTION FOR LEAVE TO FILE A REBUTTAL
AND MOTION TO STRIKE REBUTTAL**

Pursuant to the regulations of the Surface Transportation Board (“Board” or “STB”), New Albany Main Street Properties, LLC, d/b/a Port of Louisville (“Port of Louisville”) respectfully files this Reply in opposition to The Louisville and Jefferson County Riverport Authority, d/b/a Louisville Riverport Authority’s (“LRA”) Motion for Leave to File a Rebuttal (“Motion”). LRA’s Motion should be denied because it and the proffered “Rebuttal” constitute a reply to a reply that is clearly prohibited by both 49 C.F.R. § 1104.13(c) and Board precedent. LRA has not shown that good cause exists to permit a reply to a reply nor does its proffered Rebuttal provide the Board with a more complete record for which to render a decision. Moreover, even though LRA filed a motion for leave to file its rebuttal, it took the improper step of separately filing its proffered “Rebuttal” in this docket instead of attaching it to its Motion. Consequently, to the extent necessary, and out of an abundance of caution, the Port of Louisville also moves the Board to strike the proffered Rebuttal from the record of this proceeding.

I. INTRODUCTION

The Board's regulations at §1104.13(c) specifically prohibit replies to replies.¹ Among other things, such filings impede and delay Board action. They are also inherently prejudicial, since a petitioning party is required to make its best case in its opening filing and not withhold evidence and argument and/or rehash its opening submittal after another party submits its reply. In numerous prior decisions, the Board has required parties seeking to file such replies in violation of its regulation to demonstrate good cause for it to be accepted. The STB has found that good cause to file a reply to reply is not present when the submission consists entirely of "rebuttals to the arguments made by [the replying party] and none of which are necessary to develop a more complete record."² The Board has also consistently rejected proffered replies to replies when they merely repeat the parties' prior arguments.³ Moreover, in considering whether to waive its prohibition, the Board has considered whether allowing the reply to reply will result in further delays to a proceeding.⁴

When replies to replies are liberally accepted by the Board, however, they provide opportunities and incentives for parties and their counsel to violate these rules and to file such replies simply to try and get in the last word without adding anything of substance to the proceeding. In several recent proceedings, the Board has accepted replies to replies based only on

¹ See 49 CFR 1104.13(c) (a "reply to a reply is not permitted").

² Docket No. FD 36148, *Adrian Blissfield RR Co. – Petition for Declaratory Order*, slip op. at 3 (served January 31, 2018).

³ Docket No. EP 664 (Sub-No. 2) *Petition of Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital*, slip op. at 1, note 2 (served August 14, 2017).

⁴ Docket No. AB 167 (Sub – No. 1189X) *et al, Consolidated Rail Corp. – Abandonment Exemption – In Hudson County, N.J.*, slip op. at 4, note 7 (served July 1, 2016).

a cursory statement that to do so is “in the interest of a more complete record.”⁵ Usually, no further analysis or discussion is provided.⁶ The Port of Louisville respectfully submits that a practice that lessens the showing parties must make to demonstrate good cause or other reasons justifying violation of the prohibition on replies to replies will lead to further proliferation of such filings, and that such filings will increasingly look like the one submitted by LRA in this proceeding, which clearly cannot withstand any legitimate scrutiny. Also, even if the Board continues to apply a standard that a reply to reply will be allowed “in the interest of a more complete record,” a prerequisite to this determination has been and should continue to be that the proffered material is *needed* to complete the record of the proceeding.⁷ The Board has expressly prohibited replies to replies that “advance[] no legitimate purpose” and add nothing necessary to complete the record.⁸

⁵ Docket No. FD 36369, *Association of American Railroads —Petition for Declaratory Order*, (served February 19, 2020); Docket No. AB 1296X, *R.J. Corman Railroad Property, LLC—Abandonment Exemption – In Scott, Campbell, and Anderson Counties, Tennessee* (served May 26, 2020); Docket No. AB 853 (Sub-No. 1X), *Kansas & Oklahoma Railroad, Inc. – Abandonment Exemption—In Hodgeman, Comanche, Kiowa, and Pratt Counties, KS* (served April 30, 2020); FD No. 36398, *Brookhaven Rail LLC—Construction and Operation Exemption—In Suffolk County, NY* (served October 23, 2020) at 5. *See also* decision served January 6, 2021 in that docket (“Various filings that are not provided for by the Board’s regulations have been submitted in response to the November 6 mediation request. In the interests of a complete record, however, all such filings will be accepted”).

⁶ *Cf.* Docket No. FD 36284, *Seven County Infrastructure Coalition—Rail Construction & Operation Exemption – In Utah, Carbon, Duchesne, and Uintah Counties, Utah* (served January 4, 2021) (where Board applied “in interests of complete record standard but did provide some explanation and justification).

⁷ Docket No. 41989, *Potomac Electric Power Co. v. CSX Transportation, Inc.*, slip op. at 1, note 1 (served June 27, 1997) (denying CSXT’s motion to file a reply to a reply as it is “merely an attempt to have the last word in argument, which contravenes the intent of our prohibition of replies to replies”).

⁸ *See* Docket No. FD 35825, *212 Marin Boulevard, LLC, Et. Al.—Petition for Declaratory Order*, slip op. at 3 (served August 11, 2014)(rejecting all replies “as they do not clarify the record and are not necessary to complete it”); FD No. 34501, *James Riffin D/B/A The Northern Central Railroad-Acquisition And Operation Exemption—In York County, PA*, slip op. at 5 (served February 23, 2005)(reply to reply denied as its “would not add to our understanding of the questions raised in the request for declaratory order”).

II. ARGUMENT

The Port of Louisville submits that LRA's proffered Rebuttal is exactly the type of surreptitious 49 CFR §1104.13(c) was promulgated to prohibit and that the Board's prior decisions have guarded against. Rather than attempt to add anything new or substantive prompted by the Port of Louisville's Reply to LRA's Petition for Declaratory Order, or any material new facts since that Reply was filed, LRA's seeks only to rehash its unsubstantiated and factually inaccurate claims and tries to correct deficiencies in its Petition that it could have and should have anticipated and addressed in its initial filing. The Motion freely admits this, stating that the Rebuttal's primary purpose is to "describe in more detail" the Port of Louisville's operations and rehash LRA's flawed factual and legal arguments—rebutted in great detail in the Port of Louisville's Reply—that the Port of Louisville is somehow a common carrier after nearly 11 years of not being one. As the Petitioner seeking relief from the STB, LRA had the obligation to support its claims with as much detail as it believed was necessary to make its case and anticipate the responses the Port of Louisville would make to LRA's accusations. It cannot now seek to file an impermissible reply to reply for the purpose of trying to shore up the glaring deficiencies and errors in its Petition and try to raise arguments or claims it failed to raise initially.

As discussed below, the proffered Rebuttal advances no legitimate purpose, nor does it provide any information that is necessary to ensure a complete record for decision or otherwise aid in the Board's understanding of the issues raised.

A. The Port of Louisville is a Private Switching Railroad

LRA's Rebuttal impermissibly "reiterates facts and arguments that are already of record."⁹ In its Petition, LRA asserted that the Port of Louisville cannot be found to be a private railroad. In support of its contention, it cited to prior Board precedent, *B. Willis, C.P.A., Inc. – Pet. for Declaratory Order*, FD No. 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), and that the Port of Louisville cannot be a private railroad because it has more than one customer. LRA's Rebuttal continues to assert—*without any evidence*—the same argument. Indeed, LRA restates almost word for word the same language from its original Petition.¹⁰ Further, its allegation in the proffered Rebuttal that "there are two rail shippers . . . that the Port of Louisville must provide rail service to upon reasonable request," is not grounded in any legal or factual basis, appears nowhere in the Petition, and is essentially invented out of thin air.

B. Common Carrier Service

LRA's proffered Rebuttal next makes the ludicrous claim that factual statements on the Port of Louisville's website (*e.g.*, "13 miles of on-site track and off-site track" and a list of the three common carrier railroads that provide service at the Port Facility) somehow demonstrate that the Port of Louisville is holding itself out to provide common carrier rail service. This is especially illogical considering the Port of Louisville's website does not state that it would provide rail service to shippers. Rather, it simply lists the three railroads that do provide rail service to the Port Facility. This is merely an argument in opposition to the Port of Louisville's reasoning and explanation of the undisputed facts and applicable law. It is also an argument—flawed as it is—

⁹ Docket No. FD 21989 (Sub-No. 4), *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, slip op. at 7 (served January 10, 2011).

¹⁰ Petition at 22; Rebuttal at 4.

that LRA could have and therefore should have, raised in its Petition. By any standard, LRA has not demonstrated good cause for the Board to accept this claim, and there is no need to accept it “in the interest of a more complete record.”

C. The Port of Louisville Does Not Need Operating Authority

Finally, LRA’s proffered Rebuttal wrongly tries to expand and (unsuccessfully) correct some of the deficiencies of its original Petition. Specifically, LRA erroneously represented in its Petition that the Port of Louisville’s Lease with LRA requires the Port of Louisville to provide service to “over 100 shippers” over all 13 miles of track in the Riverport Complex.¹¹ This assertion was flatly wrong according to the plain language of the Lease and the Railroad Agreements. Having been informed of its error by the Port of Louisville’s Reply, LRA now tries to belatedly argue in its proffered Rebuttal—for the first time ever over the parties 11-year relationship and directly contrary to the facts, Lease, and Railroad Agreements—that the Port of Louisville’s operations confined to the loop tracks within the Port Complex require Board authority under cases where the Board has found rail carriers conducting operations in industrial parks and rail yards to be common carriers. LRA offers no new evidence or changed circumstances for these assertions, just additional argument. This is directly violative of the responsibility LRA had to include in its Petition “all arguments supporting the requested action,”¹² and the Board has specifically prohibited rebuttals that seek to expand or correct deficiencies in a petitioner’s opening evidence.¹³ But this transgression is ultimately of no import because none of the decisions LRA now cites are

¹¹ Petition at 23-24.

¹² Docket No. FD 34943, *Beaufort Railroad Co., Inc.—Modified Rail Certificate*, slip op. at 5 (served July 21, 2009).

¹³ See Docket No. FD 42069, *Duke Energy Corp. v. Norfolk Southern Railway Co.*, slip op. at 13-14 (served November 6, 2003).

applicable to these facts. Most importantly, unlike all the railroad companies in the cited cases, the Port of Louisville does *not* hold itself out to provide rail service for compensation to rail shippers, and it has not done so in practice. Also, unlike the railroad company in *Effingham*,¹⁴ for example, the Port of Louisville did not construct the track at issue, let alone do so for the purpose of providing rail service to shippers. Moreover, the Port of Louisville has not entered into any interchange agreements with line haul railroads.¹⁵ As explained in detail in the Port of Louisville's Reply, unlike the railroad entities in the decisions now cited by LRA, the Port of Louisville is not a railroad, and it is not involved in setting rates or service terms for any rail shippers located in the Riverport Complex, or the Port Facility specifically. It is merely the agent of LRA in fulfilling LRA's private switching duties under the Railroad Agreements. And unlike the facts of the cases now cited by LRA, the Port Facility and the loop tracks were not constructed to be an industrial park housing multiple shipper facilities requiring rail service,¹⁶ but to be a rail to barge transfer facility.

In formal complaint proceedings, the Board has repeatedly held that a complainant cannot hold back reply evidence "before finalizing or supporting its own case, as an opportunity to correct deficiencies in its opening evidence is not assured."¹⁷ Accordingly, surreplies are prohibited to prevent parties from withholding information or arguments. This rule should apply here, since

¹⁴ Docket No. FD 41986, *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, Il*, slip op. at 2 (served September 12, 1997).

¹⁵ *Id.* at 2, 3 ("ERRC clearly intends to be a rail carrier and part of the national rail system, rather than merely a switching agent for line-haul carriers. It has negotiated and signed interchange agreements with both carriers, and accordingly it must assume the obligations of a common carrier in serving shippers in the new industrial park.").

¹⁶ See e.g., Docket No. FD 33997, *Texas Central Business Lines Corp. – Operation Exemption – MidTexas Int'l Center* (served September 20, 2002)(industrial park with over a dozen shipper formally served by a Class I railroad who transported between 8,000 to 10,000 carloads annually).

¹⁷ See Docket No. FD 42069, *Duke Energy Corp.* slip op. at 13-14.

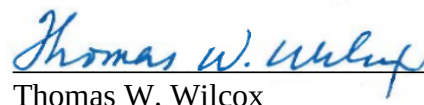
LRA is merely seeking to correct a deficiency in its Petition, as opposed to rebutting anything new or materially different in the Port of Louisville’s Reply.

III. CONCLUSION

In conclusion, the Board should not follow its practice in recent cases and simply grant the Motion and accept the proffered Rebuttal “in the interests of a complete record.” Instead, it should apply a more rigorous standard and determine (1) good cause does not exist to accept the proffered Rebuttal, (2) the filing would not add anything to this proceeding, and (3) it is being offered for the sole purpose of trying to impermissibly “get in the last word” by rehashing the Petition and trying to cure its deficiencies.¹⁸ Indeed, LRA has not even alleged that good cause exists for its rebuttal filing, only that it would be “helpful.” Moreover, how such a filing does not prejudice the Port of Louisville—as LRA asserts—is not clear since *all* of what is contained in the Rebuttal could have and should have been included in the Petition. As such, the Port of Louisville is prejudiced because it must spend time and resources responding in opposition. For all the reasons set forth in this Reply, the Board should deny LRA’s Motion and strike the separately filed Rebuttal from the record in this proceeding.

¹⁸ See, Docket No. FD 36148, *Adrian & Blissfield Railroad Co—Petition for Declaratory Order*, slip op. at 3 (served January 31, 2018)(Where Board denied a request to submit a reply to reply because all of the arguments intended to be made on reply were “rebuttals to the arguments made by Consumers and none of which are necessary to develop a more complete record. Thus, ADBF has not demonstrated good cause for waiving the Board’s prohibition on replies to replies, 49 C.F.R. § 1104.13(c), and ABDF’s petition for leave to file a reply will be denied.”).

Respectfully submitted,



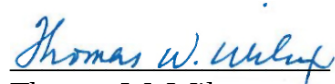
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February 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of February 2021 a copy of the foregoing Reply in Opposition to Motion for Leave to File a Rebuttal and Motion to Strike Rebuttal was served by email on all parties on the official Service List for Docket No. FD 36463.


Thomas W. Wilcox