

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

301729

FD 36447

ENTERED
Office of Proceedings
March 8, 2021
Part of
Public Record

**LAKE PROVIDENCE PORT COMMISSION
– FEEDER LINE APPLICATION –
LINE OF DELTA SOUTHERN RAILROAD, INC. LOCATED IN
EAST CARROLL AND MADISON PARISHES, LOUISIANA**

**DELTA SOUTHERN RAILROAD, INC.’S MOTION TO STRIKE THE
REPLY TO ITS MOTION TO DISMISS AND REQUEST TO
HOLD PROCEEDING IN ABEYANCE FILED BY
LAKE PROVIDENCE PORT COMMISSION, SOUTHEAST ARKANSAS
ECONOMIC DEVELOPMENT DISTRICT, MADISON PARISH PORT COMMISSION,
AND NORTH LOUISIANA & ARKANSAS RAILROAD**

Delta Southern Railroad, Inc. (“DSR”) moves for the Surface Transportation Board (the “Board”) to strike from the record in this proceeding the March 5, 2021 reply filing (the “Reply”) of Lake Providence Port Commission (LPPC”), Southeast Arkansas Economic Development District (“SEAEDD”), Madison Parish Port Commission (“MPPC”), and North Louisiana & Arkansas Railroad (“NLA”) (collectively, the “Opponents”), in which the Opponents oppose the dismissal of LPPC’s Feeder Line Application, but, in so doing, attempt impermissibly to introduce new allegations and argument into the record in a manner that is procedurally prejudicial to DSR. In the alternative, the Board should, at a minimum, strike the additional evidence and argument that the Opponents have included in their Reply in an effort to shore up the fatal deficiencies of LPPC’s Feeder Line Application. In addition, DSR hereby renews its request for this proceeding to be held in abeyance, particularly since the Opponents’ Reply filing formally introduces two new parties to this proceeding – MPPC and NLA – and raises questions regarding NLA’s resistance to discovery served upon it.

OVERVIEW

DSR filed on March 2, 2021 a 10-page (excluding one exhibit) motion (the “Motion”) to dismiss LPPC’s Feeder Line Application. In that Motion, DSR also requested that this proceeding be held in abeyance pending the outcome of the Motion, and pending the resolution of an outstanding discovery dispute involving NLA’s refusal to cooperate with discovery that is critical to DSR’s defense against LPPC’s attempts to force the divestiture of a roughly 20-mile portion of DSR’s railroad tracks (the “Line”). In its Motion, DSR pointed out that LPPC has failed in its Feeder Line Application to articulate any DSR service inadequacy, reminding the Board that there are no customers located on the Line, and that customers located on NLA and DSR already have access to adequate overhead service options.

Rather than attempt to rebut DSR’s Motion by highlighting evidence in LPPC’s case-in-chief for feeder line relief, the Opponents seek, by way of an 18-page response (excluding exhibits) to the Motion, to rehabilitate LPPC’s Feeder Line Application by offering new evidence and argument by way of – (1) a verified statement that NLA misleadingly styles as a “Supplemental Response” to DSR’s first set of interrogatories served on NLA; and (2) a supplemental, unverified letter from Complex Chemical Company, Inc. (“Complex” and the “Complex Letter”). The Opponents, incidentally, are unclear about the purpose and intent of NLA’s Supplemental Response. The Opponents refer to it as the “Supplemental Verified Statement of Daniel Robbins” (Reply, 3), yet the document itself is entitled as a Supplemental Response to previously-served DSR discovery.

DSR cannot tell how the document is intended to supplement NLA’s responses to DSR interrogatories (among other issues, it contains no attribution as to which discovery request each paragraph was intended to answer), although it is clear that the Opponents have intended to use Mr. Robbins’ verified statement to buttress perceived deficiencies in LPPC’s Feeder Line

Application. The Complex Letter, also, is intended to shore up deficiencies in the Feeder Line Application that the Opponent's Reply tacitly acknowledge exist. If the Feeder Line Application adequately detailed DSR service inadequacies warranting Board action, then the Opponents would not have felt compelled, as they were, to undertake the highly prejudicial step of trying to introduce new evidence and testimony less than two weeks from the currently-scheduled deadline for DSR's substantive filing in response to the Feeder Line Application.

ARGUMENT

If the Opponents want to revisit the procedural schedule and supplement LPPC's request for a Board-ordered taking, as they seem to, then the appropriate course would be for LPPC to seek leave to amend its Feeder Line Application, and then allow for a sufficient modification of the procedural schedule both to permit the orderly adjudication of the Motion, and to afford DSR adequate time to adjust, take discovery on, and respond to all of the evidence and argument, including newly-introduced allegations. Accordingly, the Board must either strike the Reply in its entirety as highly prejudicial to DSR and abusive of Board processes, or, at a minimum, it must strike the Supplemental Response and the Complex Letter and the portions of the Reply that cite to and depend upon those documents in keeping with agency practice.¹

The Opponents' Reply offers cumulative evidence that fails to rehabilitate the Feeder Line Application, which still fails to articulate a basis for the relief requested.

The new evidence and argument, like the balance of the Opponent's intemperate, hyperbole-driven Reply, is cumulative and dispositive of nothing with respect to LPPC's Feeder

¹ *Union Pacific Railroad Company – Abandonment – Wallace Branch*, AB-33 (Sub-No. 70) (ICC decided March 11, 1993) (striking a new verified statement offered by Union Pacific Railroad Company that introduced new evidence, and that prejudiced the abandonment proponent due to the insufficient time to be able to respond substantively).

Line Application. Even with the Opponents' latest, prejudicial tactics² and additional evidence, the fact remains that the Line has no customers, and no shippers that use the Line (there are none, currently) have alleged, much less demonstrated, inadequate DSR service. To be clear, some NLA and DSR customers (none of which have offered verified testimony of their own in this proceeding, including Complex, which has only supplied unverified letters of support) appear to claim that they would *prefer* to route overhead traffic via the Line, rather than via existing overhead routes, pointing in some instances to assumptions that DSR overhead service is cheaper than the alternatives.³ But the feeder line statute is not a tool for forging more cost-advantageous route options for opportunistic freight shippers – it is about rectifying genuine, and proven, service inadequacies, and none exist here, as DSR has pointed out in its Motion, and as the Opponents have implicitly acknowledged in explaining that LPPC's efforts are ostensibly a “means to ensure adequate rail service”⁴ (rather than to rectify inadequate service).

The Opponents mistakenly assume that DSR overhead service is not available.

In glossing over the absence of DSR service inadequacies, the Opponents' Reply entertains the utterly mistaken idea that a forced taking of the Line is warranted because DSR is either unable or unwilling to interchange traffic with NLA, or both. The Opponents seem to

² A major problem with the Reply is that it introduces new allegations regarding railroad service to customers bearing on the merits of the Feeder Line Application. Such a maneuver is highly prejudicial, procedurally, because, at this juncture of the proceeding, DSR would be unable to test the new allegations through supplemental discovery, unlike the allegations that LPPC offered in its case-in-chief.

³ The Complex Letter is especially misleading on the subject of service. Complex – which is located on DSR at a point south of the Line that is the subject of this proceeding – complains, for example, that DSR has “deprived Complex Chemical of its ability to reach UP directly.” Complex Letter, 1. But Complex cannot reach UP directly. It is a customer on DSR, and, to reach UP, Complex must either route traffic DSR-KCSR-UP or it can route traffic DSR-NLA-UP (that is, via the Line). Either way, the routings available to Complex require the services of an intermediate carrier to reach UP.

⁴ Reply, 11.

argue that DSR is not fulfilling its obligations under 49 U.S.C. § 10742 to provide reasonable, proper, and equal facilities for interchange, thus warranting feeder line relief. To be clear: while DSR's overhead service over the Line is not essential to any customer, due to the availability of alternative overhead routes, *DSR is currently willing and able to accommodate DSR-NLA interchange if so requested.* Accordingly, DSR will provide overhead service unless or until it is ever formally authorized to suspend common carrier service, including at the connection with NLA. Accordingly, the Reply correctly states that no interchange traffic has been routed over the DSR-NLA connection since 2017, but the hearsay allegation that portions of the line are "impassable"⁵ is untrue. So, while DSR would be eligible, if it wanted, to invoke the Board's discontinuance class exemption procedures at 49 C.F.R. Part 1152, Subpart F – among other things, there has been no local traffic over the line in well over two years and overhead traffic *can* be re-routed over other lines⁶ – DSR has not invoked the class exemption to this point, recognizing that it thus remains obligated to move traffic in interchange with NLA upon advance reasonable request. DSR could provide overhead service (notwithstanding that no one has requested service for some time), even with the car storage business that DSR accommodates over a portion of the inactive Line.

With NLA at this late stage formally becoming a party to the proceeding, DSR and the Board will need to sort out what this means for purposes of resolving the outstanding discovery dispute.

The Opponents Reply also establishes MPPC and NLA, formally, as parties of record. To this point, neither NLA nor MPPC have come forward, officially, as parties of record, but the Reply has been filed on behalf of each, in addition to LPPC and SEAEDD. This

⁵ Supplemental Response, 12 (apparently quoting a letter from Epstein Gin).

⁶ 49 C.F.R. 1152.50(b).

is a significant development, since NLA's appearance as a party to this proceeding raises new questions about NLA's previously-filed motion for protective order, DSR's response to the same, and DSR's related request for issuance of a subpoena directing NLA to respond to discovery. Much of those three discovery-oriented filings were premised upon NLA's asserted non-party status, which, as of March 5, has changed. Since DSR is now a party, it would appear that DSR's petition for a subpoena may no longer be necessary, and that DSR should, instead, proceed with moving to compel responses to DSR interrogatories and request to produce that NLA has to this point refused to respond to substantively, which is something that DSR will do shortly. This latest development may also nullify NLA's motion for a protective order, and DSR's response in opposition to it.

All of these 11th hour developments reinforce the need for this proceeding to be held in abeyance to ensure due process and the orderly administration of this proceeding.

If the latest round of filings show anything, it is that this proceeding is undeniably not in a posture to move ahead under the original procedural schedule. The Board must be afforded time to address – (1) the Motion, the Reply, DSR's present Motion to Strike, and the likely-forthcoming Opponents' response to the Motion to Strike; and (2) all outstanding discovery issues, including the ramifications of NLA formally joining in this proceeding. LPPC's tactics and unjustified efforts to rush this process all serve not only to threaten the baseless divestiture of DSR property (in which LPPC seeks, with the Board's aid, to accomplish a taking without just compensation to DSR), but they also threaten due process by blocking DSR from being able to fully and fairly defend itself against the taking effort. Indeed, the Reply does not contest the wisdom of DSR's requested abeyance order. More than ever, this proceeding must be held in abeyance pending disposition of DSR's Motion to Dismiss and all outstanding discovery issues.

CONCLUSION

LPPC's Feeder Line Application fails to state a basis for taking DSR's Line, as the Opponents' Reply demonstrates in its impermissible, 11th hour attempt to bolster LPPC's case-in-chief dating back to mid-December 2020. The Reply, while highly prejudicial and, thus, impermissible, does, however, highlight a key misconception that DSR is either unable or unwilling to interchange traffic with NLA. That is simply untrue. The Opponent's mistaken assumption regarding interchange should not overshadow the simple fact that DSR and NLA customers already have full and adequate access to the interstate rail network, regardless of the current situation at the DSR-NLA network, and the fact that customers have not used DSR's Line for overhead service underscores the absence of any allegedly "inadequate" DSR service, overhead or otherwise.

WHEREFORE, DSR respectfully moves that the Opponents' Reply be stricken in its entirety, or, in the alternative, that the Complex Letter and the Supplemental Response be stricken, along with all discussion in the Reply relating to those documents.

Respectfully submitted,

/s/ *Thomas J. Healey*

James D. Helenhouse

Thomas J. Healey

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 800

Chicago, Illinois 60606-3208

(312) 252-1500

**ATTORNEYS FOR DELTA SOUTHERN
RAILROAD, INC.**

Dated: March 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of March, 2021, I served copies of the foregoing Motion to Strike electronically (via email) upon each the following party of record:

Richard H. Streeter
5255 Partridge Lane, NW
Washington, DC 20016
rhstreeter@gmail.com

/s/ Thomas J. Healey
Thomas J. Healey