

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

302425

FD 36447

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**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 LAKE PROVIDENCE PORT COMMISSION’S
SUPPLEMENTARY NEW EVIDENCE AND LEGAL ARGUMENT**

Delta Southern Railroad, Inc. (“DSR”) hereby moves to strike the “Supplementary New Evidence and Legal Argument” (“Supplement”) filed by Lake Providence Port Commission (“LPPC”) on May 11, 2021.¹ Astoundingly, the Supplement represents the ***eighth*** supplemental filing that LPPC and its cohorts² have made in an attempt to prop up LPPC’s incomplete (and fatally deficient) Feeder Line Application (the “Application”), filed on November 12, 2020. The Board’s Order of March 9, 2021, suspending the procedural schedule and allowing the Board to sort out the administrative record in light of LPPC’s stream of consciousness approach to filings, has done nothing to discourage LPPC’s abusive filing tactics. Moreover, the Supplement should be rejected for failing to qualify as truly new evidence under

¹ This Motion to Strike (the “Motion”) solely focuses upon whether the Surface Transportation Board (the “Board”) should accept the most recent in a series of evidentiary filings made LPPC, its co-applicants and commonly represented interests in this docket. DSR will address the conflicting, conclusory, and irrelevant content of the Supplement only in the unlikely event that the Board accepts it.

² North Louisiana & Arkansas Railroad (“NLA”), Southeast Arkansas Economic Development District (“SEAEDD”), and Madison Parish Port Commission (“MPPC”), all of which are represented by the same counsel in this docket.

applicable precedent, and because LPPC's filing of new legal arguments some six months after LPPC filed its case-in-chief is entirely unwarranted and unjustified as a matter of Board practice and precedent. Ultimately, LPPC should not be excused from its obligation to diligently investigate the facts and to file a complete application in the first instance.³

ARGUMENT

It is now manifest that LPPC's intends in this proceeding not to redress a refusal to provide adequate service upon reasonable request (a claim that DSR has consistently and decisively refuted), but rather to badger DSR into a wholly-unwarranted capitulation through the imposition of burdensome legal fees and the repeated disruption of DSR's employees. The Board should not countenance such an abuse of its procedures, nor should it tolerate the intentional harassment of a party appearing before it – if anything, LPPC should be censured. Given the rampant confusion that LPPC has generated through its multitude of supplemental filings (many of which are cumulative in nature and intended for the purposes of fomenting scandal), not only is the Board justified in striking the Supplement, but it should also consider whether the record in this docket is so hopelessly (and, apparently intentionally) confused that the Application should be dismissed.

I. LPPC'S REPEATED ATTEMPTS TO SUPPLEMENT THE RECORD ARE AN AFFRONT TO ORDERLY PROCEDURE.

The Board's regulations provide that a feeder line application must be complete and intact when filed (49 C.F.R. § 1151.3). They also set forth the orderly process by which the Board accepts responsive filings and renders a decision on the merits (49 C.F.R. § 1151.2). The

³ That LPPC attempts some six months into this proceeding to buttress its Application renders its call for expedited action on the Application non-credible. See LPPC's and SEAEDD's request for expedited consideration filed on November 12, 2020.

Board will accept a feeder line application once it is complete, and it will reject one that is incomplete. *See* 49 C.F.R. § 1151.2(b)(1) and (2). Here, the Board “conditionally accepted” an admittedly incomplete Application, calling for additional information required to render it complete. *See Lake Providence Port Commission – Feeder Line Application – Line of Delta Southern Railroad Located in East Carroll and Madison Parishes, LA*, FD 36447 (STB served Dec. 11, 2020). Little could the Board have realized that LPPC would deem this ruling as an open license for further and multiple evidentiary filings, offered whenever convenient. By DSR’s calculation, LPPC and its cohorts have now sought to supplement its Application eight separate times.⁴

Obviously, this docket reflects none of the orderly disposition of a feeder line case as contemplated by the Board’s regulations. Instead, in the absence of any clear Board intervention, LPPC has seen fit to supplement the Application repeatedly, struggling to resolve the deficiencies of each prior filing. At this point, DSR is no longer certain of the legitimate scope of the Application against which it must defend itself.⁵ In addition to the procedural issues

⁴ See the December 4, 2020 operating plan supplement and insurance certificate; December 22, 2020 supplemental evidence in support of railroad line valuation; February 18, 2021 filing of an October 13, 2020 (pre-Application) letter from Louisiana Senator Bill Cassidy; March 5, 2021 “Supplemental Response to Delta Southern Railroad Inc.’s First Set of Interrogatories Nos. 1 through 6” (which counsel refers to as a “Supplemental Verified Statement” in support of the Application), which included an undated “letter of support” from Complex Chemical Co. Inc. discussing pre-Application events); March 8, 2021 supplement of the March 5, 2021; March 12, 2021 filing attaching (i) a March 17, 2020 letter from SEAEDD to FRA, (ii) a June 1, 2020 response to SEAEDD from FRA, and (iii) an August 21, 2020 email from DSR to SEAEDD (all pre-dating the Application); April 8, 2021 letter filing verifying the Complex Chemical support letter filed a month prior; and finally, May 11, 2021 Statement of Support from Donald Bush and (yet another) Supplemental Verified Statement of Daniel B. Robbins, both attachments discussing pre-Application events.

⁵ It is not clear whether LPPC could define the scope of its Application. For example, the March 5, 2021 filing (p. 3) refers to a portion of a supplemental response to DSR discovery as a “Supplemental Verified Statement.” Similarly, LPPC has been unclear and evasive about which

that LPPC's recurring supplemental filings raise, DSR must struggle with whether and how to address both the procedural infirmities of such filings and their lack of substantive merit in the allegations, should LPPC be allowed to expand the record as it is trying to do. Habitual supplementation of the record also renders the Board's requirement that the application be served on select third parties when filed (*see* 49 C.F.R. § 1151.2(a)) all but useless, as those parties do not receive the applicant's entire evidentiary basis and legal arguments for initiating the feeder line proceeding.

LPPC's disregard for the Board's feeder line regulations cannot be blamed on counsel's inexperience. Counsel for LPPC, NLA, SEAEDD and MPPC is a seasoned and well-known Board practitioner with experience in many diverse Board matters, including feeder line cases. *See, e.g., Caddo Antoine and Little Missouri Railroad Company – Feeder Line Acquisition – Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, FD 32479 (STB served Jan. 26, 1999). Moreover, LPPC's counsel should be very familiar with the Board's clear standards for the admission of new evidence due to his years representing the Village of Barrington in *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, FD 35087 (“EJ&E”). *See, e.g., EJ&E*, 5 (STB served Aug. 30, 2019), denying Barrington's Petition to Reopen, in part, on the finding that “Barrington could have discovered and provided this evidence in any of its 2011, 2014, 2017, or 2018 petitions to reopen.” As such, the course that LPPC's counsel has charted here is the product of strategic intent, not inadvertence.

entities are the parties to this proceeding (compare NLA's February 18, 2021 filing cover letter at 1, stating that NLA is “not a party,” with the March 12, 2021 Reply to Delta Southern Railroad, Inc.'s Motion to Strike, where NLA joined nominally as a “Respondent”).

II. LPPC'S SUPPLEMENT DOES NOT CONTAIN TRULY "NEW" EVIDENCE WARRANTING ACCEPTANCE INTO THE RECORD.

At the outset of the Supplement, LPPC does little more than to pay scant lip service to the Board's standards for the introduction of allegedly new evidence, particularly a half a year after the filing of its Application. In fact, LPPC's asserted basis for offering such additional information is so superficial, so cavalierly-offered, and so contrary to agency jurisprudence on the subject that it reflects LPPC's disrespect of agency processes.

Board precedent clearly delineates the narrow occasions where "new" evidence and argument would be accepted. "It is axiomatic that ... new evidence must in fact be new; it is not new if the 'same substance' could have been brought before us previously." *Tongue River Railroad - Construction and Operation—Western Alignment*, FD 30186 (Sub-No. 3), (STB served June 15, 2011) slip op. at 13 (citing *Friends of Sierra Railroad v. Interstate Commerce Commission*, 881 F.2d 663, 667 (9th Cir. 1989)). "It is well established that new evidence is evidence that was not available earlier, not simply evidence that was not presented earlier." *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA* AB-556 (Sub-2X) (STB served Apr. 28, 2008), citing *Town of Springfield v. Surface Transportation Board*, 412 F.3d 187 (D.C. Cir. 2005); *Friends of Sierra Railroad. v. Interstate Commerce Commission*, 881 F.2d 663, 666-67 (9th Cir. 1989); *Beehive Telephone Company v. Federal Communications Commission*, 180 F.3d 314, 320 (D.C. Cir. 1999). In a feeder line case, new evidence is allowed into the record where it "could not have been introduced earlier..." *Oregon International Port of Coos Bay - Feeder Line Application – Coos Bay Line of Central Oregon & Pacific Railroad, Inc.*, FD 35160 (STB served Oct. 31, 2008). The Supplement fails to meet any of those standards, as it is replete with alleged facts occurring well before November 2020.

LPPC's citation to the Board's recent decision in *R. J. Corman Railroad Property, LLC – Abandonment Exemption – in Scott, Campbell and Anderson Counties, Tenn.*, AB 1296X (STB served May 3, 2021) ("*RJCRP*") is most curious. In *RJCRP*, the Board rejected the newly-provided materials because they did not constitute "new evidence," explaining that truly new evidence "must be evidence that was not reasonably available to the party when the record was previously developed" (Id., 6), and that such evidence will not be accepted when the proponent "makes no attempt to show how the information...could not have been adduced earlier." Id., 7. Additionally, *RJCRP* involved a petition for reconsideration; LPPC has not presented the Board with any precedent establishing a right to supplement a feeder line application with information that could and should have been presented with the "complete" application, and DSR is aware of none that would condone LPPC's abusive and prejudicial tactics. Far from supporting LPPC's attempted abuse of the Board's processes, *RJCRP* is an explicit recognition of the reasons why the Supplement must be rejected.

Moreover, there is no reason for the Board to accept late-filed evidence when the party presenting it makes no genuine effort to explain why the evidence was not submitted earlier. "When, in a petition filed under this section, a party seeks an opportunity to introduce evidence, the evidence must be stated briefly and must not appear to be cumulative, *and an explanation must be given why it was not previously adduced.*" 49 C.F.R. 1115.3(c) (emphasis added). LPPC boldly asserts (Supplement, 1) that the evidence "could not have been reasonably discovered by LPPC before it filed its application," a stunning misrepresentation to the Board, considering that Daniel B. Robbins, NLA's Vice President, who provided the Supplemental Verified Statement attached to the Supplement (which LPPC now seeks to introduce as "new

evidence”) actively supported the Application with a Verified Statement (Application, Exhibit 4), and, thus, could have supplied this information last November.

The body of the Supplement refers to nothing that occurred subsequent to the filing of the Application in November 2020 (save for the storage car count on DSR in April of 2021, and comments regarding DSR’s March 2021 affirmations that its interchange with NLA remains open). It therefore presents no truly new evidence, nothing that could not have been presented when LPPC filed its Application. In his Statement of Support (Attachment 1 to the Supplement), Mr. Bush acknowledges that his operation “shut down in December 2019,” almost a full year before LPPC’s Application was filed. Similarly, Mr. Robbins’ Supplemental Verified Statement (Attachment 2 to the Supplement) presents nothing that wasn’t known in November 2020 (other than the two issues referenced above). The “new evidence” presents nothing substantive that occurred after the filing of the Application in November, 2020.

Finally, the pages of legal argument presented with LPPC’s most recent unwarranted filing reflect citations to court decisions that are between 50 and 100 years of age; certainly, nothing that could not have been presented in the Application.⁶ And LPPC’s aforementioned *RJCRP* decision rejected proffered new arguments “that could have and should have been presented in the earlier stages of the proceeding.” *RJCRP* at 3, citing *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 24 n.29 (STB served Aug. 2, 2018).

⁶ Those same aged citations reflect LPPC’s efforts to shift the focus of the Application away from a refusal to serve (the basis for a feeder line case) and into a complaint about interchange, perhaps reflecting LPPC’s realization that it has not come close to satisfying the feeder line requirement (49 C.F.R. 1151.3(a)(11)(i)(B)) that it prove that a majority of the numerous customers it claims were refused service were actually denied service, or even whether those entities care enough about this docket to support the grant of the Application.

CONCLUSION

It is manifestly prejudicial to require a respondent to a feeder line application to expend scarce resources addressing the multiple shortcomings of an applicant's case, all the while also requiring the respondent to be prepared to address numerous late-filed claims of new evidence and argument. LPPC's legalistic version of Whac-A-Mole™ is simply not contemplated by the Board's regulations and precedent. At minimum, as the Board sorts through the unnecessarily confused record caused by LPPC's scatter-shot approach to litigating this matter, the Supplement must be rejected. Moreover, in light of LPPC's numerous efforts to confuse the record with additional filings, questionable representations of fact, and marked shifts in legal theories, the best way for the Board to resolve this case, and reign in abusive tactics here and in the future would be to dismiss the present Application, and to require LPPC to present its entire case in a single, complete case-in-chief.

Respectfully submitted,

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**ATTORNEYS FOR DELTA
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Dated: May 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of May, 2021, I caused a copy of the foregoing Motion to Strike Lake Providence Port Commission's Supplementary New Evidence and Legal Argument to be served electronically (via email) upon the following party of record:

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/s/ *Thomas J. Healey*

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