

SERVICE DATE – JUNE 1, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36447

LAKE PROVIDENCE PORT COMMISSION—
FEEDER LINE APPLICATION—LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.

Digest:¹ The Board denies a motion for protective order, denies as moot a related petition for issuance of a subpoena, and directs the parties to confer and report to the Board on any remaining discovery issues. The Board also denies two motions to strike and directs the parties to inform the Board whether they are interested in pursuing Board-sponsored mediation.

Decided: May 27, 2021

This case involves an application by a state entity to acquire an inactive rail line through a Board-ordered sale. To prepare its response to the application, the railroad that owns the line pursued discovery from the state entity's proposed operator for the line, which also operates a segment adjoining the line. This triggered numerous filings and led the Board to place the procedural schedule in abeyance pending further Board order. This decision resolves certain discovery issues, directs the parties to report to the Board the status of any remaining discovery issues, denies two motions to strike, and directs the parties to inform the Board whether they will participate in Board-sponsored mediation. A pending motion to dismiss will be addressed in a separate decision.

BACKGROUND

On November 12, 2020, Lake Providence Port Commission, a noncarrier political subdivision of the State of Louisiana (LPPC or Applicant), filed an application under 49 U.S.C. § 10907 and 49 C.F.R. part 1151 to acquire from Delta Southern Railroad, Inc. (DSR), a 20-mile rail line between milepost 471.0 and milepost 491.0, together with various ancillary tracks, in East Carroll and Madison Parishes, La. (the Line), for future operation by North Louisiana & Arkansas Railroad (NLA). (Appl. 1-3, 5.)² Concurrently, LPPC and SEAEDD filed a petition

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 The application explains that the Line is one segment of the 91.3-mile McGehee-Tallulah Railroad Corridor (the Corridor), which runs from milepost 408.9 in McGehee, Ark., to

seeking expedited consideration and acceptance of LPPC's application prior to submission of evidence regarding the Line's valuation. DSR filed a reply in opposition to the petition to expedite on December 2, 2020, and stated that it would respond to the application, if accepted, in accordance with the procedural schedule set by the Board. (DSR Reply 1, Dec. 2, 2020.)

By decision served December 11, 2020 (December 11 Decision), the Board found that the application was substantially complete, except for the absence of information pertaining to the net liquidation value (NLV) of the Line, and conditionally accepted the application subject to Applicant's submission of an NLV estimate and supporting information by December 28, 2020. December 11 Decision, FD 36447, slip op. at 1-2. The Board also stated that LPPC should submit a copy of any contract with NLA pertaining to the Line as soon as the parties reach an agreement. Id. at 6 n.17.

On December 22, 2020, LPPC submitted an estimate of the NLV and supporting evidence, along with the lease agreement between LPPC and NLA that would govern NLA's operation of the Line. By decision served January 15, 2021, the application was accepted and a procedural schedule was adopted, under which verified statements and comments addressing the application were due March 16, 2021, and verified replies were due April 5, 2021.

On February 18, 2021, NLA filed a motion for protective order under 49 C.F.R. § 1114.21(c). On February 26, 2021, DSR filed a response in opposition to NLA's motion and a petition for issuance of a subpoena under 49 C.F.R. § 1113.2. NLA filed a reply on March 1, 2021, in opposition to DSR's petition for issuance of a subpoena.

On March 2, 2021, DSR filed a motion to dismiss and request to hold the proceeding in abeyance pending disposition of the dismissal motion and unresolved discovery issues. On March 5, 2021, LPPC, SEAEDD, MPPC, and NLA (collectively, the Project Participants) filed a reply in opposition to DSR's motion, jointly requesting that the Board deny all relief requested

milepost 500.2 in Tallulah, La. (Appl. 1.) According to the application, LPPC and NLA jointly own the northernmost segment extending from milepost 408.9 to milepost 433.0 at Lake Village, Ark. Southeast Arkansas Economic Development District (SEAEDD), a noncarrier, owns the segment between milepost 433.0 and milepost 454.8 at or near the Louisiana/Arkansas border. LPPC owns the segment between milepost 454.8 and milepost 471.0, at or near Lake Providence, East Carroll Parish, La. DSR owns the segment that extends from milepost 471.0 to approximately milepost 500 at Tallulah, La. (Id. at 6-7; but see, e.g., id. at 1 (stating that the end milepost for DSR's segment is 500.2).) NLA currently operates all segments of the Corridor not owned by DSR. (See id. at 3, 6.)

According to the application, an Infrastructure for Rebuilding America (INFRA) grant for restoration of the Corridor was awarded to SEAEDD on behalf of a public-private partnership composed of SEAEDD, LPPC, the Madison Parish Port Commission (MPPC), NLA, and DSR, (Appl. 2, 10-11), and grant funds are to be used to reopen the entire Corridor (the Project), including the Line at issue, which is currently impassable, (id. at 2). LPPC asserts that it filed the application because DSR has refused to commit the funds needed to restore the Line, and that the proposed acquisition is therefore necessary to realize the goal of reopening the entire Corridor. (Appl. 2, 4-5; id. Ex. 3, V.S. Hargrove ¶¶ 13-16; id. Ex. 6, V.S. Gilfoil ¶¶ 13-14.)

by DSR. On March 8, 2021, DSR filed a motion to strike the March 5 reply. By decision served March 9, 2021, in light of the numerous recent filings and the upcoming March 16, 2021 deadline for submission of verified statements and comments addressing the application, the procedural schedule was suspended pending further Board order.

The Project Participants responded on March 12, 2021 to DSR's motion to strike. On March 22, 2021, DSR requested leave to file and filed a reply to the Project Participants' March 12 response. On March 24, 2021, the Project Participants filed a motion to strike the March 22 reply, to which DSR responded on March 26, 2021.

DISCUSSION AND CONCLUSIONS

As discussed below, the Board will deny NLA's motion for a protective order and will deny as moot DSR's related petition for issuance of a subpoena. The parties will be directed to confer and report to the Board on any remaining discovery issues by June 15, 2021. DSR's motion to strike the response to its motion to dismiss, and the Project Participants' motion to strike DSR's March 22 reply, will be denied. Finally, the parties will be directed to inform the Board by June 15, 2021, whether they will participate in Board-sponsored mediation. The pending motion to dismiss will be addressed in a separate decision.³

Discovery Issues. In its February 18, 2021 motion for a protective order filed under 49 C.F.R. § 1114.21(c), NLA sought relief from responding to certain interrogatories served by DSR on the grounds that NLA is not a party to this proceeding and, in addition, asserted various relevance, burden, and confidentiality objections. (NLA Mot. for Protective Order 2-3.) However, NLA thereafter joined the pleading filed in opposition to DSR's motion to dismiss. (See Project Participants Reply 1, 18, Mar. 5, 2021.) In addition, as the first exhibit of that pleading, NLA submitted a document styled "Supplemental Response to [DSR's] First Set of Interrogatories Nos. 1 through 6," which contains information pertaining to the interrogatories NLA had previously refused to answer and states that copies of all emails reflecting the referenced conversations would be produced under seal. (Project Participants Reply 3-7, Ex. NLA Suppl. Response 1-2, Mar. 5, 2021.)⁴

In these circumstances, the Board finds that NLA has participated as a party in this proceeding and that there is no basis for granting NLA relief from discovery on the ground that it

³ On May 11, 2021, LPPC filed a pleading styled "Supplementary New Evidence and Legal Argument," which will also be addressed in a separate decision, along with any reply filed by DSR, as described below.

⁴ Furthermore, as DSR has noted, NLA purports to have an interest in establishing an active interchange at its point of connection with DSR, and LPPC has designated NLA as the proposed operator of the Line if the application is approved. (See DSR Pet. for Subpoena 2-3; Appl. 5, 18-19; *id.* Ex. 4, V.S. Robbins ¶¶ 7-8.)

is not a party.⁵ Nor has NLA pled any facts to support a finding that protection is warranted on grounds of “annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding,” under the standard prescribed in § 1114.21(c). In its motion for protective order, NLA did raise various relevance, burden, and confidentiality objections. These remaining disputes are more appropriate for resolution by the parties through a meet-and-confer conference (as discussed below) if possible, and if not, through Board resolution under the process prescribed in 49 C.F.R. § 1114.31.⁶ Accordingly, NLA’s motion for a protective order under § 1114.21(c) will be denied. In light of the Board’s finding that NLA has participated as a party and the resulting denial of NLA’s motion for a protective order, DSR’s petition for issuance of a subpoena will be denied as moot.

In its discovery filings, DSR states that it had offered to confer with NLA on discovery issues. (DSR Reply 2, Feb. 26, 2021; see also DSR Pet. for Subpoena, Ex. A.) Because it appears that the parties have not yet conferred on the issues raised in NLA’s motion and DSR’s reply, they will be directed to confer on these and any other discovery issues, and to report to the Board by June 15, 2021, on the status of any remaining discovery issues in the case.⁷

DSR’s Motion to Strike. As noted above, on March 2, 2021, DSR filed a motion to dismiss the application (which the Board will address in a separate decision), to which the Project Participants responded on March 5, 2021. On March 8, 2021, DSR moved to strike the response, asserting that it impermissibly sought “to introduce new allegations and argument into the record in a manner that is procedurally prejudicial to DSR” due to the then-impending

⁵ The Board further notes that, while unnecessary to utilize here because NLA has already been participating as a party, the Board has the authority to direct persons to participate as a party in a proceeding. See 49 C.F.R. § 1101.2(d); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 4 (STB served Feb. 22, 2008) (directing entities that were integral to proposed transaction to participate as parties).

⁶ NLA’s concern about producing commercially sensitive information can be addressed by entry of a protective order under 49 C.F.R. § 1104.14 that limits the dissemination of such information and requires its filing under seal. The Board also notes that, based on NLA’s subsequent filings, its relevance and burden objections may have been resolved. (Compare, e.g., NLA Mot. for Protective Order 5-8 (objecting to relevance and burden of providing information sought in Interrogatories 1 through 6 for last six years) with Project Participants Reply, Ex. NLA Suppl. Response 1-5, Mar. 5, 2021 (providing responsive information including from 2016).) Additionally, the Board notes that NLA did not object to DSR’s related document request and that NLA has stated that it would produce copies of all emails reflecting conversations described in the supplemental responses. (Project Participants Reply, Ex. NLA Suppl. Response 1-2, Mar. 5, 2021.)

⁷ See CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P., NOR 42084, slip op. at 2 (STB served Nov. 23, 2004) (“[T]he parties should discuss and attempt to resolve the disputed discovery requests. As a general rule, the Board expects parties to try to resolve their differences on their own before involving the Board.”); Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 2 (STB served Apr. 3, 2015) (directing the parties, who had not yet conferred, to meet and confer on discovery issues).

deadline for DSR's substantive filing in response to the application. (DSR Mot. to Strike 1, 3.) In the alternative, DSR asks the Board to strike the additional evidence and argument included in the reply, which, in DSR's view, were submitted to "shore up the fatal deficiencies" in the application. (*Id.* at 1, 3, 7.) The Project Participants responded to the motion to strike on March 12, 2021. The response contends that DSR's claims of procedural prejudice have been mooted by the Board's March 9, 2021 order suspending the procedural schedule; disputes DSR's claim that the application failed to articulate any DSR service inadequacy; and asserts that respondents should be permitted to address arguments that could lead to the dismissal of the application if not rebutted. (Project Participants Reply 1-3, Mar. 12, 2021; *see also id.* at 5-6, 13 (stating that the new material is responsive to arguments raised in DSR's motion to dismiss).)

The Board will deny the motion to strike. DSR's claims that the response to its motion to dismiss and the material in question are "highly prejudicial" new arguments and evidence, (DSR Mot. to Strike 3), are not persuasive. Although DSR contends that the evidence and argument are "new," it also describes them as "cumulative." (*Id.*) The Board agrees. In the application, LPPC alleged that DSR had "repeatedly refused to come to the interchange point at the Port of Lake Providence" and gave examples of such refusals. (Appl. 18-19.) In their reply to the motion to dismiss, the Project Participants elaborated on this point by giving additional examples of shippers unable to move traffic over the Line because DSR has refused to maintain the Line or an active interchange. (Project Participants Reply 1-2, 5-7, 13-14, Mar. 5, 2021). Given the cumulative nature of the new evidence, DSR has not shown how it is prejudiced by it. Indeed, in DSR's own view, the new "cumulative" evidence pertains only to overhead traffic and thus fails to undermine DSR's main point, namely 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." (DSR Mot. to Strike 4.) Moreover, because the procedural schedule has been suspended, DSR will have sufficient time to prepare a substantive response to this material in advance of any rescheduled date for the submission of opening comments on the application, should the matter not be resolved by mediation or otherwise dismissed.⁸ In these circumstances, the Board finds that the motion to strike should be denied.⁹

The Project Participants' Motion to Strike. On March 22, 2021, DSR requested leave to file and filed a reply to the Project Participants' March 12 response to DSR's motion to strike. According to DSR, it filed the reply "to defend itself against procedural abuse" and "to rebut false claims that DSR is unable and unwilling to handle through traffic in interchange with [NLA]." (DSR Reply 1 n.1, Mar. 22, 2021.) DSR argues that the joinder of NLA and MPPC in recent pleadings filed on Applicant's behalf prejudices DSR, (*id.* at 1-2), reiterates that DSR is

⁸ If, after the parties meet and confer, DSR believes it has a legitimate need for additional discovery or briefing concerning the alleged new arguments and evidence, it may so advise the Board in the report on the status of any remaining discovery issues.

⁹ The case that DSR cites in support of its motion to strike is inapposite. Although a motion to strike was granted in Union Pacific Railroad—Abandonment—Wallace Branch, Idaho, 9 I.C.C.2d 496 (1993), the agency made no finding of prejudice. *See id.* at 496-97 n.2. In any event, as DSR acknowledges, the movant there claimed prejudice "due to the insufficient time to be able to respond substantively" to the new material that had been presented. (*See* Mot. to Strike 3 n.1.)

willing and able to interchange traffic with NLA, (*id.* at 3-4), and additionally claims that “no such requests [to move traffic via the DSR-NLA interchange] have arisen to DSR’s knowledge in the recent past,” (*id.* at 3). The Project Participants moved to strike, contending that DSR’s March 22 reply repeats arguments raised in its earlier motions and that DSR’s claims of prejudice have no merit. (Project Participants Mot. to Strike 1-3, Mar. 24, 2021.)

In the interest of having a complete record, the Board will accept DSR’s March 22 reply and deny the March 24 motion to strike. However, the Board disagrees with DSR’s claims that it has been prejudiced by NLA and MPPC’s appearances in this proceeding in recent pleadings. With respect to NLA, DSR’s concern that NLA “has invoked non-party status” with respect to discovery requests, (*see* DSR Reply 2, March 22, 2021), has been addressed in this decision. With respect to MPPC, DSR argues that prejudice arises because it is unclear whether DSR “would have a full and fair opportunity to undertake discovery of MPPC.” (*Id.*) The Board disagrees. MPPC’s involvement in the Corridor restoration project has been known to DSR from the outset. (*See* Appl. 8 (identifying MPPC as a Project partner); *id.* Ex. 7 (V.S. Murphy [Executive Director, MPPC]).) DSR could have sought discovery from MPPC (as it did from NLA) but chose not to do so and instead sought discovery only from the other Project partners (LPPC, SEAEDD, and NLA). Moreover, the recent pleadings in which MPPC has joined contain no evidence or argument about MPPC.¹⁰ In short, DSR has not shown that MPPC’s joinder in these pleadings has prejudiced DSR, or that DSR must be afforded additional time to take discovery if NLA’s or MPPC’s joinder is permitted.

Board-Sponsored Mediation. In its March 8, 2021 motion to strike, DSR contends that “DSR is currently willing and able to accommodate DSR-NLA interchange if so requested,” (DSR Mot. to Strike 5), and states that “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,” (*id.*).¹¹ In addition, DSR notes, in its motion to dismiss, that options available to LPPC to advance its vision for the Corridor could include “negotiations with DSR to explore arrangements that are mutually advantageous to both parties.” (Mot. to Dismiss 10.) Similarly, the application indicates that DSR expressed interest in working with LPPC to try to “come up with a creative solution to sell a portion of the right of way to the port” in August 2020, to which LPPC appears not to have replied. (Appl. 17; *id.* Ex. 6, V.S. Gilfoil ¶ 10.) At the same time, the application asserts, and the Project Participants continue to contend, that DSR has refused to maintain the Line and to accept interchanges. (*See, e.g.*, Appl. 14, 18-19; *id.* Ex. 4, V.S. Robbins ¶¶ 7-8; *id.* Ex. 6, V.S. Gilfoil ¶¶ 13-14; Project Participants Reply 4, 9, Mar. 12, 2021.) According to the application, LPPC perceived that it had no choice but to file a feeder line application, but it remains committed to working with DSR to achieve the goal of reopening the Corridor. (Appl., Ex. 6, V.S. Gilfoil ¶ 13 (LPPC determined that it “had no choice but to file a feeder application to acquire the track”); *id.* ¶ 15 (LPPC “will do everything in its power” to work with the parties, including DSR, to accomplish this goal).)

¹⁰ The Board also notes that the discovery DSR served on the other Project partners included multiple requests that required the respondents to provide information about MPPC. (*See* DSR Pet. for Subpoena, Ex. A, Interrogs. 2, 5, 9, 10, 15, 16, 17, 19, 24.)

¹¹ DSR reiterates these points in its March 26, 2021 reply. (*See* DSR Reply 3-4, Mar. 26, 2021.)

In these circumstances, the Board believes that mediation could be beneficial. Because the Board favors the resolution of disputes through alternative dispute resolution whenever possible, the Board requests that the parties inform the Board by June 15, 2021, if they are interested in participating in Board-sponsored mediation.¹²

LPPC's May 11, 2021 Pleading and Future Filings. As noted above, on May 11, 2021, LPPC filed a pleading styled "Supplementary New Evidence and Legal Argument." In light of the Board's March 9, 2021 order suspending the procedural schedule, the Board will not consider or take action on that pleading at this time. However, DSR will be permitted to file a response to that pleading, if it wishes to do so, by June 21, 2021. The parties are to refrain from submitting any further filings relating to the merits of their respective positions pending further Board order.

It is ordered:

1. NLA's motion for a protective order is denied, and DSR's petition for issuance of a subpoena is denied as moot.
2. The parties are directed to confer, as discussed above, and report to the Board on the status of any remaining discovery issues in this proceeding by June 15, 2021.
3. DSR's motion to strike the Project Participants' response to DSR's motion to dismiss is denied.
4. The Project Participants' motion to strike DSR's March 22, 2021 reply is denied and the reply is accepted into the record as discussed above.
5. The parties shall inform the Board whether they agree to participate in Board-sponsored mediation by June 15, 2021.
6. DSR may reply to LPPC's May 11, 2021 pleading by June 21, 2021.
7. This decision is effective on its service date.

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

¹² While parties participating in mediation are encouraged to work out as many issues as possible, the scope of the mediation would not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.