

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36447

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

REPLY TO DELTA SOUTHERN RAILROAD'S MOTION TO
STRIKE LPPC'S SUPPLEMENTARY NEW EVIDENCE AND
LEGAL ARGUMENT PURSUANT TO ORDER OF THE
SURFACE TRANSPORTATION BOARD

Pursuant to the Board's decision, dated February 9, 2022, LPPC, by and through its attorney, responds to Delta Southern Railroad, Inc.'s Motion to Strike that was filed May 28, 2021 (hereinafter referred to as "the *May Motion*"). The *May Motion* adds nothing of substance to the proceeding. The Board, since December 11, 2020, the Board has found that LPPC's application "was substantially complete, *except for the absence of information pertaining to the net liquidation (NLV) of the Line*".¹ Given the Board's multiple decisions finding that the LPPC's Application is complete, there has been no need for LPPC to submit additional evidence to "prop up" its Application.

**Because There is Nothing in the Board's Regulations that
Prohibits the Filing of New Evidence that Timely Responds
to False and Misleading Statements that have a Material**

¹ *January Decision* at 1, confirming the Board's decision served December 11, 2020 (*December Decision*), at 1-2. *See also*, Board's decision served June 1, 2021 (*June Decision*) at 2; and Board decision served October 21, 2021, (*October Decision* at 2.) There can be no doubt or confusion about the Board's decision.

Bearing on a Pending Case, the Board Should Accept and Consider LPPC's Verified Supplemental Evidence.

Since January 15, 2021, when the Board established the procedural schedule that contains the explicit requirement that “[v]erified statements and comments addressing both the initial and competing applications by March 16, 2021”², DSR has not filed a single verified comment. Moreover, it has violated the statement that “it would respond to the application, if accepted, in accordance the procedural schedule set by the Board.”³ On December 2, 2020, that statement was verified “under penalty of perjury” to be “true and correct” by John H. Marino, Jr.⁴

At that time, Mr. Marino was DSR’s Manager and the CEO of Continental Rail, LLC. DSR and the entities that own and indirectly control DSR must be held accountable for DSR’s clear violation of that sworn commitment.⁵ In addition, the Board should keep DSR’s conduct in mind when it considers DSR’s comment that it “will address the conflicting, conclusory, and irrelevant content of the Supplement only in the unlikely event that the Board accepts it.”⁶

² *January Decision* at 2.

³ DSR Reply to Petition Seeking Expedited Consideration, filed December 2, 2020, at 1. *Also see, December Decision*, at 1; *January Decision*, at 1, referencing DSR’s Reply in opposition to LPPC’s and Southeast Arkansas Economic Development District’s (SEAEDD) request for expedited consideration.

⁴ *See* Verification attached to DSR’s Reply filed December 2, 2020.

⁵ By the time that the Board issued is *January Decision*, Mr. Marino and his company, Continental Rail, LLC, had been fired. Shortly thereafter, DSR replaced it original attorneys.

⁶ *May Motion* at 1, n1.

As the record reflects, instead of filing verified statements and comments addressing LPPC's Application, DSR has sought to influence the Board's decision by filing various unsworn statements that cannot be substantiated. Such statements include the comment in DSR's Motion to Dismiss that it "is not aware of, and has not been approached by, any prospective customers seeking to originate or terminate traffic from any point along the line."⁷ After LPPC filed its reply to DSR's motion, a former DSR employee suggested that Donald Bush should be contacted to see whether he would provide an affidavit regarding DSR's service and its impact on Bayou Biochemical, LLC (Bayou)'s operations. Mr. Bush's Verified Statement speaks for itself. The same is true of Mr. Robbins Verified Statement that explains why Bayou's evidence had not been included in either LPPC's Application or its Reply to DSR's motion to dismiss.

Had Mr. Robbins been aware of DSR's action before the Feeder Application was filed on November 12, 2020, the Board can rest assured that such evidence would be included in LPPC's Feeder Application along with the other evidence that details examples of DSR's refusal to provide interchange

⁷ Motion to Dismiss at 3. While that may be true of the entities that indirectly control DSR through stock ownership from their offices in San Francisco, LPPC's sworn supplemental evidence demonstrates that multiple DSR employees, who were and still may be, located in Tallulah, are aware of such approaches and prospective customers.

service. The same applies to the Verified Statement that was submitted with LPPC's reply to DSR's motion to dismiss.⁸

The evidence in Mr. Bush's Verified Statement of Support unquestionably repudiates DSR's aforementioned claim, as well as DSR's latest unsworn assertion that it "has consistently and decisively refuted" all claims that it has refused to provide adequate service upon reasonable request."⁹ Where is there any sworn evidence in the record to support DSR's assertion? The answer is that there is no sworn testimony that does! Moreover, there is no denying that DSR was undoubtedly aware of Mr. Bush's sworn testimony when DSR, on May 28, 2021, filed its latest motion to strike.

Mr. Bush's statement is consistent with all previously submitted testimony that is in LPPC's Application. The only thing that is different is that no one learned about DSR's treatment of Bayou Bioenergy LLC (Bayou) until months after LPPC filed its Application. Because this new evidence reflects the impact of DSR's inadequate service and could materially influence the outcome of DSR's motion to dismiss, the Board should accept it.

Furthermore, because the new evidence, which was not discovered until after LPPC filed its reply to DSR's motion to dismiss *and* after the procedural schedule had been suspended, LPPC could not wait until after the Board issued its decision regarding DSR's motion to dismiss. As previously argued,

⁸ *Supplemental Response to DSR's First Set of Interrogatories* that is attached to LPPC's *Reply to DSR's Motion to Dismiss*, filed March 5, 2021.

⁹ *May Motion* at p. 2.

the Board's recent decision in *R. J. Corman Railroad Property, LLC- Abandonment Exemption- In Scott, Campbell and Anderson Counties, Tenn.*, served May 3, 2021, unquestionably supports LPPC's decision to file its Supplementary New Evidence and Legal Argument on May 11, 2021.

In its attempt to strike Mr. Bush's testimony, DSR does not contest the facts. Instead, it argues that the evidence "could have been reasonably discovered by LPPC before it filed its application"¹⁰ and accuses LPPC and Mr. Daniel B. Robbins, NLA's Vice President of presenting "a stunning misrepresentation to the Board."¹¹ When the Board decides whether to accept Mr. Robbins' new evidence, it should recognize the difference between knowing that an operation was shut down and knowing the causes for that shutdown. In this instance, NLA and LPPC did not learn of the reasons for the shutdown until after the Application was filed and after LPPC filed its reply to DSR's motion to dismiss.

As DSR has admitted, "[i]n 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).*"¹²

The situation in this case is similar to that in *Coos Bay*. As the Board clearly explained in the paragraph from which the foregoing fragment was

¹⁰ Motion at 6.

¹¹ *Id.*

¹² Motion at 5.

lifted, supplemental evidence will be allowed when the evidence is central to the case, could not have been introduced earlier, and could materially influence the outcome of the case. While the evidence in *Coos Bay* concerned the price of steel, the basic concept should be applied here where DSR has already had repeated opportunities to contest the evidence.

Because DSR has been provided Multiple Opportunities to Address LPPC's New Evidence and Legal Arguments that have been Submitted in Response to DSR's Motion to Dismiss, any suggestion that DSR has been deprived of due process must be summarily rejected.

DSR has had a full opportunity to provide sworn testimony to respond to every shred of evidence that LPPC, SEAEDD, MPPC and NLA (collectively the Project Participants) and others have introduced. This applies to the evidence in LPPC's Application *and* the new evidence that was filed in response to unverified comments that DSR filed instead of verified statements and comments that were required by the Board's *January Decision*. Moreover, even though the Board's *June 2021* decision granted DSR the right to "reply to LPPC's May 11, 2021 pleading by June 21, 2021,"¹³ DSR did not do so.

As a result, there is no jurisdictional or other reason for the Board to reject material, sworn evidence that sets out the facts that demonstrate the false nature of DSR's unsworn, self-serving claims regarding the alleged absence of knowledge of service inadequacies and shippers attempts to obtain rail service. Furthermore, the Board should reject DSR's claims that "[a]t this

¹³ *June Decision* at 7.

point, DSR is no longer certain of the legitimate scope of the Application against which it must defend itself”¹⁴, and that “[i]t is not clear whether LPPC could define the scope of its Application.”¹⁵ How DSR could be confused by the Project Participants’ filings is a mystery.

As the following comments demonstrate, Continental Rail, which DSR’s owners hired in 2015 to manage DSR’s operations, clearly recognized the need to rebuild the *entire* line. As Matt Prince, DSR’s former Director of Operations, stated in a letter addressed to Secretary of Transportation, Elaine Chao:

This grant will be used to modernize and improve rail safety infrastructure along an important freight corridor and improve the regional connectivity to three inland waterway ports. The infrastructure improvements described in the grant application are needed to provide the ports['] railroad customers['] access to the nation’s rail network. The improvements will have a significant impact to the region’s economic development efforts and will expand the effectiveness and cost savings to regional shippers.

The multimodal improvements described in the grant application will provide shippers in the region with new cost-effective alternatives for delivering their produce and manufactured goods to the nation and to the world, as well as providing a new economic development tool for the region, which is so desperately needed. This application for multimodal freight corridor improvements is a positive step for Arkansas and Louisiana, and a positive step for the region and the nation. Increased transportation of rail and river traffic is important to the growth of our region’s and nation’s economy.¹⁶

¹⁴ Motion at 4.

¹⁵ *Id.* at 3, n5

¹⁶ INFRA Application at B-45.

LPPC respectfully states that “confusion” has nothing to do with DSR’s positions in this proceeding. LPPC’s filings reflect a continued and consistent effort to satisfy the various goals that are identified in Mr. Prince’s letter. At no time has it, or any of the other Project Participants, deviated from those goals. Only DSR and its owners have disclaimed any interest in restoring the track to FRA Class 2 standards. Although they “have concluded that the desired track renovations as to the long-dormant Line are unjustified and unwarranted”, they are intent upon extracting a “pound of flesh” from the State of Louisiana and NLA to compensate them from the loss of revenue that would be realized if they were unable to continue storing railcars on the 20-mile segment that LPPC seeks to acquire. Without question, the public interest in having safe and efficient rail service that promotes desperately needed economic development for the region outweighs private interests that are served by storing empty railcars instead of using the track for the purpose for which they have been rehabilitated.

Respectfully submitted,

/s/ Richard H. Streeter

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CERTIFICATE OF SERVICE

I, Richard H. Streeter, hereby certify that on this 18th day of February, 2022, I served a true copy of the foregoing on Thomas J. Healey, counsel for the Delta Southern Railroad, Inc. at THealey@fletcher-sippel.com.

/s/ Richard H. Streeter