

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 25, 2022
Part of
Public Record

FD 36447

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

**DELTA SOUTHERN RAILROAD, INC.'S
MOTION TO STRIKE LAKE PROVIDENCE PORT COMMISSION'S
VERIFIED REBUTTAL AND SUPPORTING VERIFIED STATEMENTS
IN SUPPORT OF MOTION TO FILE A SUPPLEMENTAL APPLICATION
TO ACQUIRE THE ENTIRE LAKE PROVIDENCE LINE BETWEEN
MP 471.0 AND MP 498.6**

On April 4, 2022, Lake Providence Port Commission ("LPPC") filed the curiously-titled "Verified Rebuttal and Supporting Verified Statements in Support of Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6" (the "Rebuttal"). Delta Southern Railroad, Inc. ("DSR") moves to strike this unauthorized and untimely filing. LPPC's continued abuse of the Board's offices and its flaunting of established feeder line procedures can no longer be countenanced. LPPC's Rebuttal should be stricken as part of the Board's reclaim of control of this docket.

LPPC is flatly unentitled under the Board's rules to tender a "rebuttal" in support of its own motion. Board regulations state that, in this circumstance, a reply to a reply is not allowed. 49 C.F.R. § 1104.13(c). LPPC's refusal to comply with basic Board requirements is all the more glaring here, because LPPC never bothered to attempt to seek the Board's leave to

tender its Rebuttal. LPPC merely submitted the 86-page Rebuttal filing as if of right. Clearly, that is not the case.

Board precedent and policy are abundantly clear: Even where a rebuttal filing may be permitted (and it is expressly prohibited here), the Board nevertheless will not permit a party to introduce new evidence and argument that could have, and should have, been introduced earlier in a proceeding.¹ The Board must adhere to that principle in this situation, where LPPC seeks in its Rebuttal to offer new evidence to support unverified claims contained in LPPC's previously-filed Motion to Supplement.² The information contained in the Rebuttal was available to LPPC well before the March 4 Motion to Supplement, and LPPC has not explained why it excluded this information then or in any of LPPC's many previous filings.

A review of the Rebuttal makes clear that if LPPC is attempting to rebut anything, it is the observation made by Delta Southern Railroad, Inc. ("DSR") in its reply filing³ that the Motion to Supplement was lacking in any actual evidence. Instead, the Motion to Supplement consisted entirely of counsel for LPPC's statements and arguments regarding a host of factual matters and law. Yet LPPC makes no effort to explain why the materials contained in the

¹ See, e.g., *Total Petrochemicals and Refining USA v. CSX Transportation, Inc.*, Docket No. NOR 42121 (STB served Dec. 19, 2013), slip op. at 18, n.55 (reply to reply stricken where purpose was to present new evidence); *Gen. Procedures for Presenting Evidence in a Stand Alone Cost Rate Case*, 5 S.T.B. 441, 446, (2001) (rebuttal with new evidence that could have been submitted in initial pleading stricken); *Central Kansas Railway, L.L.C. – Abandonment Exemption - In Sedgwick County, Kansas*, Docket No. AB-406 (Sub.-No. 1 4X) (STB served Apr. 10, 2001), slip op. at 2 (evidence that could have been included in initial petition stricken when filed at a later phase).

² Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6 (filed March 4, 2022) ("Motion to Supplement").

³ Response of Delta Southern Railroad, Inc. to Lake Providence Port Commission's Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6 (filed March 24, 2022) ("Reply"), 2.

Rebuttal, if crucial (in LPPC's view) to restarting the entire feeder line process, were not submitted with the Motion to Supplement. Perhaps LPPC intended to deprive DSR from an opportunity to comment on LPPC's newly-tendered evidence by "waiting out" DSR's Reply. Such sandbagging has no place in Board proceedings. Worst of all, the Motion to Supplement, the Rebuttal, and the Rebuttal's three verified statements all stand in stark defiance of the Board's admonition that "The parties are to refrain from submitting any further filings relating to the merits of their respective positions pending further Board order."⁴ Based on this directive, the Board would have cause to disregard any filing made after June 1, 2021 in disregard of the Board's directive.

LPPC repeatedly has emphasized its filing of a "complete" Feeder Line Application,⁵ and has asserted that "there has been no need for LPPC to submit additional evidence to 'prop up' its Application."⁶ Nevertheless, LPPC provides *thirty pages* of verified statements in its Rebuttal that have no bearing upon the Motion to Supplement's central issues – specifically, whether LPPC should be allowed to expand the scope of its feeder line efforts, and, if so, whether the Board should restart the application proceeding in this docket.

But if LPPC's Application is complete (as it asserts), then it did not need to file a voluminous supplement to it months later by way of the Rebuttal. In fact, LPPC's egregious filing tactics, including the submission of its Rebuttal, do little but create uncertainty about what

⁴ Lake Providence Port Commission - Feeder Line Application - Line of Delta Southern Railroad Located in East Carroll and Madison Parishes, LA, FD 36447 (STB served June 1, 2021), 7.

⁵ LPPC reasserts this fact yet again in its Motion to Supplement, 2.

⁶ Reply to Delta Southern Railroad's Motion to Strike LPPC'S Supplemental New Evidence and legal Argument Pursuant to Order of the Surface Transportation Board (as amended) (filed Feb. 22, 2022), 1.

materials, exactly, constitute the Application to which DSR may have to respond, and that this Board may have to consider if the agency does not dismiss the Application (as it should, and as LPPC's behavior here warrants). LPPC is seeking now, some 17 months after its "complete" Application was filed, to tender new verified statements as evidence (little of which is truly new) to prop up its forced taking efforts, and to plug holes in LPPC's prior filings. That is simply not the orderly progression of a feeder line case envisioned in the Board's regulations at 49 C.F.R. § 1151.1 *et. seq.*

The Rebuttal serves three clear purposes, none of which are sanctioned under the Board's rules. First, it is offered as a reply to a reply to address deficiencies in LPPC's Motion to Supplement. Second, it is representative of LPPC's insistence upon having the last word in any round of filings, whether or not permitted under the rules. And third, the Rebuttal is, on its face, a very late attempt to revisit LPPC's opposition to DSR's long-pending motion to dismiss⁷ LPPC's Application. At the opening of the Rebuttal's conclusion section, for example, LPPC states (to no one's surprise) that, "For all of the above-stated reasons and based on all evidence of record, *the Board should deny DSR's motion to dismiss.*"⁸ LPPC responded to DSR's Motion to Dismiss on March 5, 2021, and so cannot possibly be allowed under the Board's procedures to engage in a thinly-veiled collateral attack on the Motion to Dismiss. If the Board were to accept the Rebuttal, such a step would only sanction LPPC's procedural abuse, and further confuse the extent of the evidence that comprises the Application.

DSR awaits Board action on its Motion to Dismiss, noting that favorable action on that request would moot the Motion to Supplement and its illegitimate progeny, and that such

⁷ Delta Southern Railroad, Inc.'s Motion to Dismiss Proceeding and Request to Hold Proceeding in Abeyance (filed March 2, 2021) ("Motion to Dismiss").

⁸ Rebuttal, 27 (emphasis added).

action would, in the process, uphold appropriate procedural order. If the Board were, on the other hand, to deny DSR's Motion to Dismiss, it should nevertheless strike LPPC's alleged "Rebuttal" filing and deny LPPC's Motion to Supplement upon which the Rebuttal ostensibly is based, since granting the Motion to Supplement would require a re-start of the entire proceeding. If the Board were to do none of that, and instead were to grant the Motion to Supplement and were to accept the Rebuttal filed in support of it, then DSR respectfully requests that the Board issue an order to that effect, in which the Board should also permit DSR to have 20 days to respond substantively to the Rebuttal. At this point, also, DSR implores the Board to restore order to this proceeding, impose clear guidelines for the balance of this proceeding to govern the filing of any new documents (if any new filings are warranted), and, if necessary (depending upon the disposition of the pending Motion to Dismiss) clarify which of LPPC's myriad, undisciplined filings should be construed as being included among those properly to be considered as part of LPPC's feeder line Application for purposes of DSR's formal response on the merits. Finally, DSR asks the Board to weigh whether sanctions should be considered in the future as a constraint in the event that LPPC does not cease and desist from tendering extraneous, impermissible filings well beyond the scope of permissible agency procedure.

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: April 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of April, 2022, I served a copy of the foregoing “Delta Southern Railroad, Inc.’s Motion to Strike Lake Providence Port Commission’s Verified Rebuttal and Supporting Verified Statements in Support of Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6” 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