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SERVICE DATE –APRIL 15, 2024

ALJ

SURFACE TRANSPORTATION BOARD

Docket No. FD 36447

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

**ORDER RESOLVING LPPC’S EMERGENCY MOTION AND ORDERING DSRR AND
LPPC TO MEET AND CONFER**

Before: ALJ Thomas P. McCarthy

I have before me Lake Providence Port Commission’s (“LPPC”) March 11, 2024 Emergency Motion for Ruling by ALJ McCarthy or, in the alternative, for Referral by ALJ McCarthy to the Board, on the Scope of Discovery Permitted at this Time Under the Board’s Decisions Dated November 20, 2023 and December 11, 2023 (“Emergency Motion”).

In this matter, LPPC filed an initial feeder line application on November 12, 2020, which was accepted by the Board on December 11, 2020. LPPC filed an amended feeder line application on January 4, 2023. By decision dated November 20, 2023, the undersigned was tasked with overseeing discovery disputes in FD 36447 pursuant to an interagency agreement between the Federal Mine Safety and Health Review Commission and the Surface Transportation Board (“Board”).

In its November 20, 2023 Decision, the Board directed the parties “to (i) meet and confer on the scope of discovery necessary for LPPC to develop a sound valuation assessment and (ii) report to the administrative law judge assigned below on any remaining disputes within 30 days after the service date of a decision conditionally accepting the amended application.” *See* Lake Providence Port Comm’n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 14 (STB served November 20, 2023). In a subsequent decision dated December 11, 2023, the Board further ordered that (1) LPPC’s amended feeder line application was conditionally accepted, and (2) LPPC’s request for valuation discovery could proceed as specified in the November 20 Decision. *See* Lake Providence Port Comm’n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 2 (STB served December 11, 2023). The Board later extended the deadline for the parties to meet and confer and report back on any disputes concerning valuation discovery to March 25 and then to April 24, 2024.

On January 3, 2024, Delta Southern Railroad, Inc. (“DSRR”) served discovery requests on LPPC. On March 8, 2024, DSRR filed three separate motions to compel seeking that discovery from LPPC, the North Louisiana and Arkansas Railroad (“NLA”), and Southeast Arkansas

Economic Development District (“SEAEDD”). DSRR, NLA, and SEAEDD are jointly represented in this proceeding by Van Ness Feldman, LLP, and the Law Offices of Richard Streeter. In its motion to compel discovery from LPPC, DSRR contends that

LPPC has failed and now refused to respond to DSRR’s discovery requests, all of which address highly relevant and central issues in this case. DSRR accordingly seeks an order compelling LPPC to respond fully and completely to DSRR’s discovery requests, pursuant to 49 C.F.R. §§ 1114.21, et seq., and 49 C.F.R. § 1117.1.

DSRR Mot. to Compel Discovery from LPPC at 1.

DSRR further states:

LPPC’s sole basis for refusing to conduct discovery is a strained reading of the Board’s orders as somehow limiting *DSRR’s* discovery. That contention is meritless. The Board’s regulations permit discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding,” 49 C.F.R. § 1114.21(a)(1); which discovery “may be used by parties *without* filing a petition and obtaining prior Board approval, 49 C.F.R. § 1114.21(b) (emphasis added). Moreover, the Board’s regulations require the opposite of what LPPC now contends is the law of the case: “methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party’s discovery,” unless otherwise ordered by the Board. 49 C.F.R. § 1114.21(d).

Id.

On March 11, 2024, LPPC, NLA, and SEAEDD filed their “Emergency Motion”, wherein they

respectfully request[ed] Administrative Law Judge (“ALJ”) McCarthy to decide, or in the alternative for the Board to expeditiously clarify whether the Board’s Decisions, dated November 20, 2023, and December 11, 2023, which specifically ordered that “LPPC’s request for discovery relating to valuation may proceed under the process specified in the November 20, Decision,” also authorized Delta Southern Railroad, Inc. (“DSRR”), at this point in the proceeding, to pursue discovery against LPPC, et al.

Emergency Mot. at 1.

The Emergency Motion further requests that

[b]efore responding to the merits of DSRR’s pending motions to compel, LPPC, et al., submit that simple fairness to all parties requires that ALJ McCarthy or the Board decide the issue that is posed above. Indeed, resolution will require a simple

“No” or “Yes” whether DSRR is entitled to take discovery from LPPC, et al., at this time.

Emergency Mot. at 2.

I find that DSRR is entitled to take discovery from LPPC et al. I am persuaded by the initial arguments presented by DSRR in its Reply in Opposition to the Emergency Motion. In its Reply, DSRR argues as follows:

DSRR is fully entitled to discovery at this time, based on clear regulations governing discovery in this matter, and there is no reason to seek clarification from the Board. The Board’s regulations and its organic statute, specifically 49 C.F.R. § 1114.21(a)(1) and 49 U.S.C. § 10907(c)(1), affirm that DSRR has the right to comprehensive discovery on all relevant issues without needing prior Board approval. Additionally, 49 C.F.R. § 1114.21(d) clarifies that DSRR's discovery process is not to be constrained by the sequencing or timing of any other party's discovery actions, allowing DSRR to use any discovery methods it chooses, in any order. The Board has explicitly stated that “the Board’s regulations do not prevent parties from starting discovery before a procedural schedule is issued.” *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, NOR 42179, 2023 STB LEXIS 145 at *7 (STB decided Aug. 4, 2023). Indeed, a close look at STB orders in feeder line cases reveals that its procedural schedules in feeder line cases do not even mention discovery. And, the Board has done nothing to alter the generally applicable discovery rules applicable to DSRR in this matter. While the Board’s feeder line regulations do limit the timing and sequence of discovery by the Applicant, those rules say nothing that limits DSRR’s rights, and the general rules apply. See 49 C.F.R. § 1151.2(d).

DSRR Reply to Emergency Mot. at 2.

As DSRR identifies, 49 C.F.R. § 1114.21(a)(1) affords a party the opportunity to conduct discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” LPPC’s position, at least in its emergency motion, is not that the discovery sought by DSRR is irrelevant or subject to privilege, but rather that the Board has “waved the discovery starting flag” only for LPPC, and to the exclusion of DSRR. LPPC therefore requests that I draw an inference from the Board’s relative silence on DSRR’s capacity to conduct discovery and conclude that this silence reflects the Board’s reticence to allow DSRR to conduct discovery at all. I decline to draw this inference.

In any event, despite the fact that the Board had before it only the narrow issue of the completeness of the Amended Feeder Line Application when issuing its November 20, 2023 Decision, the Board clearly contemplated that DSRR would be afforded that opportunity of obtaining at least some discovery by explicitly holding that

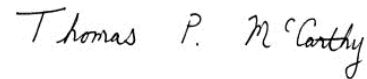
The parties are further directed to notify the Board upon **DSR’s** completion of discovery to which the parties mutually agree or that is ordered by the

administrative law judge. LPPC will have 45 days from the date of that notice to file and serve revised valuation calculations and supporting evidence in its amended application, if desired (and shall file and serve notification if no changes are required).

See Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 15 (STB served November 20, 2023)(emphasis added). Given this plain language, and in light of the arguments presented by DSRR, DSRR is permitted to take discovery in this matter.

As DSRR indicated in its Reply to the Emergency Motion, LPPC has already partially responded to DSRR's initial attempts at discovery. *See* DSRR Reply to Emergency Mot. at 7. As evinced by (1) DSRR's filing of motions to compel, (2) LPPC's filing of an Emergency Motion, and (3) the parties' extensive e-mail correspondence on the issue of discovery, it is apparent that the parties have not yet been able to agree on the nature and scope of discovery in this matter. The undersigned encourages the parties to "work this out," and orders that the parties meet and confer immediately as to any remaining discovery disputes – including any disputes concerning the discovery sought through DSRR's motions to compel. A conference call will be scheduled for 11 a.m. EST on April 24, 2024 to discuss and resolve any remaining discovery issues. LPPC will have 45 days from April 24, 2024 to file and serve any revised valuation calculations and supporting evidence in its amended application,

So Ordered.



Thomas P. McCarthy
Administrative Law Judge

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