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ENTERED
Office of Proceedings
May 26, 2017
Part of
Public Record

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May 26, 2017

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

By electronic filing

Re: STB FINANCE DOCKET NO. 36117
LRY, LLC D.B.A. LAKE RAILWAY-- PETITION FOR DECLARATORY
ORDER — RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA

Dear Ms. Brown:

Petitioner LRY, LLC hereby files the accompanying Motion to Strike the May 19, 2017 Reply of Lake County counsel John Heffner in the within proceeding. The notarized Verification of Paul Didelius and Service Certification of counsel are included.

If there are any questions about this matter, please contact me directly, either by telephone (908) 361-7097 or by email jsavagelaw@aim.com.

Respectfully submitted,


James H. M. Savage
Counsel for LRY, LLC

cc: Service List

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36117

**LRY LLC D.B.A. LAKE RAILWAY
-- PETITION FOR DECLARATORY ORDER --
RAIL LINE IN LAKE COUNTY, OR AND MODOC COUNTY, CA**

**PETITIONER LRY'S MOTION TO STRIKE REPLY OF LAKE COUNTY TO
PETITION FOR DECLARATORY ORDER**

Pursuant to 49 C.F.R. §1103.16 (b) and (c) LRY LLC D.B.A. Lake Railway ("LRY") hereby moves for an Order of the Surface Transportation Board ("Board" or "STB") striking the May 19, 2017 Reply of Respondent Lake County to LRY's Petition for Declaratory Order and directing Respondent's counsel John Heffner to cease any further representation of Respondents before the Board on matters involving the subject Rail Line.

Statement of Facts and Procedural History

As set forth in LRY's Petition for Declaratory Order, this dispute arises out of County's service on April 12, 2017 of a letter notice terminating LRY's lease to operate the Lake Rail Line effective April 30, 2017. See, Petition Appendix Tab D, termination notice. To protect its STB license, LRY on April 28, 2017 in the United States District Court for the District of Oregon, filed a Complaint seeking, *inter alia*, injunctive relief in the form of a temporary restraining order ("TRO") enjoining the County from terminating LRY's lease. See, Complaint and Motion for TRO, with attachments and exhibits, accompanying Petition for Declaratory Order.

Effective May 7, 2009 LRY undertook to act as County's agent for providing rail service on the Line. In connection therewith, in or about May, 2009 Paul Didelius, owner of LRY, retained John Heffner to represent LRY in negotiating the agency agreement with Lake County and thereafter, a formal lease agreement. See, May 25, 2017 Verification of Paul Didelius at Paragraph 1 ("Didelius Verification"). On January 1, 2010 LRY's exemption to lease and operate the Lake County-owned Rail Line took effect. See, STB Finance Docket No. 35250 (Sub-No. 1), *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Rail Line in Lake County, OR* (service date Dec. 18, 2009). LRY currently leases from Lake County and operates 54.45 miles of railroad, extending from milepost 458.60 at Alturas, in Modoc County, CA to milepost 513.05, at Lakeview, OR. The agency agreement between Lake County and LRY remained in full force and effect until the lease agreement forming the subject matter of this proceeding was entered into on November, 3, 2010. See Petition Exhibit B, Lake County-LRY leaser.

Once the present litigation arose, on April 28, 2017 LRY filed a Complaint for breach of contract and a Motion for TRO in the United States District Court in Medford, OR against Lake County. See, Petition Tabs A and B. LAR successfully obtained a Temporary Restraining Order ("TRO") from the Federal District Court enjoining lease termination. See, TRO filed with LRY counsel's May 11, 2017 letter in this proceeding. Thereafter, a Temporary Injunction hearing was held in on May 12, 2017 at which time the Court dissolved the injunction on the basis that the Petitioner LRY had failed to meet its burden of showing irreparable harm, while also holding that the Petitioner had met three other requirements for a temporary injunction including likelihood of success on the merits. See, May 17, 2017 Order of Judge McShane annexed to Respondent's letter filing of May 19, 2017. LRY's breach of contract lawsuit against Lake

County continues in Federal District Court.

Legal Argument

Heffner was counsel of record for LRY in its negotiations with Lake County leading up to entry of the agency agreement to operate the Rail Line. Heffner remained counsel of record for LRY in negotiations with Lake County of the very lease that is the subject of this proceeding. Heffner continued as LRY's counsel of record not in the exemption proceeding authorizing LRY's lease and operation of the Rail Line (see above), but also in related exemption proceedings involving lease and operation of the contiguous Union Pacific Railroad-owned segments Rail Line. See, STB Finance Docket No. 35250, *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Union Pacific Railroad Company* (service date Dec. 18, 2009) and STB Finance Docket No. 35389, *LRY, LLC D.B.A. Lake Railway — Lease and Operation Exemption — Union Pacific Railroad Company* (service date July 30, 2010).

Heffner's tenure as LRY's counsel of record lasted no fewer than 27 months, from no later than May 2009 to July 30, 2010. 49 CFR § 1103.16 prohibits Heffner from representing Respondent Lake County in its efforts to terminate Petitioner LRY's lease to operate the same Line of railroad that LRY, his prior client, sought to acquire and operate. The Regulation states, in pertinent part: (c) The obligation to represent the client with undivided fidelity and not to divulge secrets or confidences forbids also the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The regulation has previously been invoked by the Board to prohibit Heffner from representing adverse parties in a matter where he sought to represent opposing parties in a

dispute matter involving a Rail Line whose ownership was contested. STB Finance Docket No. 35438 *Eighteen Thirty Group, LLC—Acquisition Exemption—In Allegany County, MD* (Service Date – April 5, 2012) (“Eighteen Thirty Group”).

Although in *Eighteen Thirty Group* argued persuasively that Heffner did not represent Riffin or WMS-Maryland, they conceded that Heffner represented a prior iteration of WMS. In the present matter, there is no dispute that LRY is the very same entity represented by Heffner before this Board in 2009 and 2010. The Respondent is even the same counter-party involved in Heffner’s prior representation of LRY. Plainly and simply, Heffner has impermissibly switched sides in a dispute over the termination of the very lease he negotiated in behalf of LRY with his new client, Lake County.

It is simply inconceivable that Lake County was unaware of Heffner’s conflict of interest before retaining him in this matter. Heffner’s name appears as LRY counsel of record for in the November 3, 2010 Lake County-LRY lease. See, Lease attached as Petition Tab E at p. 19. Nor did Heffner obtain LRY’s consent prior to changing sides as required by 49 C.F.R. § 1103.16(b), which states, in part, “It is unethical for a practitioner to represent conflicting interests except by express consent of all concerned[.]” See, Didelius Verification at Paragraph 4. Respondent should not be placed in the potentially advantageous position of profiting from Heffner’s insider knowledge of LRY, obtained in the course of attorney-client communications. Even if Heffner has withheld such confidential information from Lake County thus far, there remains the taint that potential future disclosure could create. The cure involves prohibiting Respondent from continuing to engage with Heffner in this matter and striking the suspect Reply.

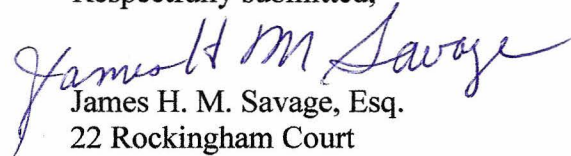
By acting in an adversarial capacity against LRY, Heffner’s involvement in this

proceeding runs afoul of 49 C.F.R. § 1103.16(b) and (c) prohibiting attorneys from acting in the face of a known conflict of interest. For this reason LRY has authorized the filing of the within motion to strike.

CONCLUSION

For the above stated reasons and based upon the above cited authority, Petitioner LRY requests entry by the Board of an Order striking the May 19, 2017 Reply of Respondent Lake County to LRY's Petition for Declaratory Order and directing Respondent's counsel John Heffner to cease any further representation of Respondents before the Board on matters involving the Line.

Respectfully submitted,

A handwritten signature in blue ink, reading "James H. M. Savage".

James H. M. Savage, Esq.
22 Rockingham Court
Germantown, MD 20874
(908) 361-7097

jsavagelaw@aim.com

Attorney for Petitioner LRY, LLC

Dated: May 26, 2017

SERVICE CERTIFICATION

I, James H. M. Savage, an attorney-at-law of the District of Columbia, certify that I have served this day a true copy of the within Motion to Strike Reply of Lake County upon the following persons:

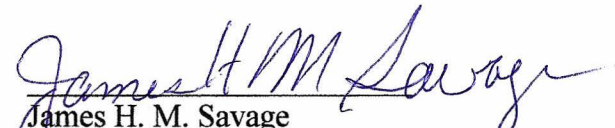
John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W., Suite 717
Washington, DC 20036
John.Heffner@strasburger.com
Counsel for Lake County Board of Commissioners

By electronic service

and

James E. Bailey, III
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Bend, OR 97701
jbailey@byllp.com
Phone: (541) 317-9000
Counsel for Lake County Board of Commissioners

By electronic service


James H. M. Savage
Counsel for LRY, LLC

Dated: May 26, 2017

VERIFICATION

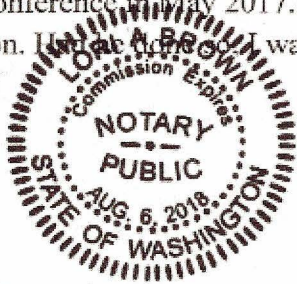
I, Paul Didelius, declare under penalty of perjury that I am the owner of LRY, LLC, that I have read the foregoing Motion to Strike the Reply of Lake County, know the facts asserted therein, and that the foregoing is true and correct. Further, I verify that I am qualified and authorized to execute this verification.

1. I retained John Heffner as counsel of record in behalf of LRY in connection with negotiating an agency agreement for LRY to operate the Lake county Rail Line in May, 2009. Thereafter LRY continued to be represented by John Heffner in connection with negotiating leases between LRY and Lake County as well as between LRY and Union Pacific Railroad for the operation of contiguous Rail Lines in Lake County, OR and Modoc County, CA. The Heffner firm handled STB exemption proceedings in connection with these lease transactions. This period of representation by Heffner concluded in late 2010 upon the sought-after exemptions taking effect.

2. I never formally discharged Heffner as counsel for LRY, nor was I in any way dissatisfied with the services performed by Heffner in LRY's behalf. Strictly as a matter of business convenience I saw fit to retain my present counsel in 2012 when certain other matters arose requiring my businesses to be represented before the Board.

3. I continued to entrust Heffner with the custody and possession of LRY's legal files for the period from 2009-2010.

4. In 2017 I became aware that Heffner was communicating with one of LRY's customers regarding LRY-related matters. Thereafter I personally conferred with Heffner at a rail industry conference in May 2017. Heffner did not seek my permission to oppose LRY in this or any litigation. I was prepared to deny him such permission.



A handwritten signature of Paul Didelius in dark ink.

Paul Didelius
Owner, LRY, LLC

Subscribed and sworn to before me this 35th day of May, 2017

A handwritten signature of Lori A. Brown in dark ink.
Notary Public

My Commission expires:

Aug 6, 2018