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May 17, 2019

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
May 17, 2019
Part of
Public Record

Re: Docket No. AB-290 (Sub-No. 117X)
*Norfolk and Western Railway Company – Abandonment Exemption –
Between Indianapolis and Tipton in Marion, Hamilton, and Tipton Counties, Ind.*

MOTION TO REJECT AND TO STRIKE

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

On May 10, 2019, US Rail Holdings, LLC (“USR”) tendered in the above-referenced proceeding, and in a related, but closed, docket (FD 36137), the following three documents:¹ (1) a Motion for Leave to File Rebuttal (the “Rebuttal Motion”); (2) a Rebuttal; and (3) a Motion for Protective Order (the “MPO”), the last of which ostensibly to protect financially-sensitive, but not new, financial evidence that USR seeks now to introduce. The USR Filings are intended to buttress USR’s Motion to Vacate NITUs and to Reactivate Rail Service and its Verified Motion for Preliminary Injunction Pursuant to 49 U.S.C. § 1321(b)(4), both filed on March 29, 2019 (the “March 29 Filings”). The May 10 Filings must be rejected, and the proffered Rebuttal must be stricken as patently abusive of the Board’s rules of procedure.

Under 49 C.F.R. § 1104.13(c), replies to replies are not permitted, unless otherwise permitted under other, applicable Board procedures. USR is not entitled to file a Rebuttal. Presuming that practitioners and the Board honor section 1104.13(c) in the breach, USR shamelessly flaunts this longstanding rule by arguing that it should have an opportunity to present additional evidence and argument due to a self-serving and contrived allegation as to the “complexity of the matters at issue.” There is no such “complexity,” and USR’s attempt to use an un-sanctioned Rebuttal as a vehicle to present evidence and argument that it had a full and fair

¹ Collectively, these documents shall be referred to as the “May 10 Filings.”

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opportunity to present in March is irresponsible. In keeping with agency precedent and policy, the Board should impose order in this proceeding, protect its own staff resources, and uphold its rules of procedure by denying USR's latest attempt to perpetuate filings for the sake of perpetuating filings.²

USR's Rebuttal seeks to address three items. It seeks to introduce new evidence of USR's financial wherewithal to acquire the "NITU Line" (the subject of USR's March 29 filings); it re-argues that its pending request to have the Board vacate recently-issued notices of interim trails use ("NITU") is appropriate; and it contends, rather out of nowhere, that Ballard Terminal R.R. Co., LLC – Acquisition and Operation Exemption – Woodinville Subdiv., Docket No. 35731, et al. (STB served Dec. 30, 2014) ("Ballard Terminal – 2") supports a finding that USR is financially responsible so as to justify the forced transfer of a reactivation right that would be held by The City of Fishers, Indiana, the City of Noblesville, Indiana, and Hamilton County, Indiana (collectively the "Owners"). The idea that any of this evidence and argument is necessary or appropriate to address nonexistent "complexity" is absurd.

Board precedent and policy are abundantly clear: *Even where a rebuttal filing may be permitted* (and it is expressly prohibited here), introducing new evidence and argument at this phase is inappropriate, particularly where the information could have been offered at an earlier juncture. Any such late-introduced evidence must be rejected.³ In flagrant disregard of this principle, USR seeks in its Rebuttal to offer new evidence of its dubious financial wherewithal, including new information proffered under seal pursuant to the MPO. This financial information was available to USR at the time of its March 29 Filings, and USR has not explained why it opted to exclude it then. In fact, USR contends that this new information is unnecessary anyway, since the evidence of financial wherewithal included in its March 29 Filings was sufficient to make its case.⁴

² See, e.g., 212 Marin Blvd. Inc. – Petition for Declaratory Order, Docket No. Docket No. FD 35825 (STB served Aug. 8, 2014), slip op. at 3; City of Lincoln – Petition for Declaratory Order, Docket No. FD 34425 (STB served Aug. 11, 2004), slip op. at 2.

³ 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. 14X) (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).

⁴ Rebuttal at 6.

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It is important, also, that the Board deny USR's MPO, by which USR seeks indirect Board sanction to introduce this additional evidence. Specifically, the Board should deny the MPO to avoid tacitly approving the introduction of USR's new financial information, and to avoid burdening the Owners with the task of formulating a substantive response to an un-sanctioned Rebuttal.

It is entirely unclear why the Board would desire or need another round of argument concerning whether USR's March 29 Filings are premature. As the Board has said, USR's rail service reactivation right efforts may commence "after [1] a NITU or NITUs has or have been issued and [2] the Board is notified a Trails Act agreement has been reached,"⁵ and yet one of these two prerequisites have not occurred. Simply offering two pages of meandering discussion of the Board's role in interim trails use processes (which never do get to the issue of why USR may believe that the preceding quote is incorrect or taken out of context), as USR has done, does not make the timing issue "complex" to warrant Rebuttal discussion. As such, once again, the Rebuttal is unnecessary and unwarranted and, accordingly, the Rebuttal Motion must be denied.

The last prong of USR's proffered Rebuttal – that Ballard Terminal – 2 supports a finding that USR is financially fit to acquire the NITU lines – is a baffling *non sequitur*. The Owners never argued that Ballard Terminal – 2 supported a conclusion that USR was not "financially responsible." It may be that Ballard Terminal – 2 supports such a conclusion, but the Owners relied on other evidence and argument on reply to make their point.⁶ Rather, the Owners relied upon Ballard Terminal-1⁷ (issued at an earlier point in that proceeding) to point out that USR was not entitled to the extraordinary injunctive relief it sought. USR's re-visitation of Ballard Terminal – 2 rebuts nothing that the Owners put at issue, and it is but a willful and unjustified continuation of USR's March 29 Filings. Accordingly, this element of the Rebuttal also is unnecessary and the corresponding Rebuttal Motion must be denied.

The Owners do not intend to respond further to the substance of Rebuttal on the understanding that the Board will stand up to USR's abusive tactics, deny the Rebuttal Motion and the MPO (as moot), and thereby obviate the need for further pleadings, all in the interest of upholding its rules of procedures and administrative order. If, however, the Board were to

⁵ AB-290 (Sub-No. 117X), December 21 Board Decision, slip op. at 9.

⁶ See Owners' Reply, April 22, 2019, at 6-9.

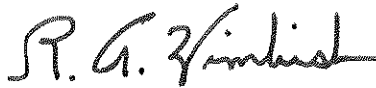
⁷ Ballard Terminal R.R. – Acquis. & Operation Exemption – Woodinville Subdiv., FD 35731, et al. (STB served Aug. 1, 2013) ("Ballard Terminal-1").

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decide to admit the Rebuttal, then the Owners urge expedited action to confirm that it has, so that the Owners can be afforded a full and fair opportunity to respond fully to the Rebuttal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. A. Wimbish".

Robert A. Wimbish
Counsel for City of Indianapolis, Indiana; City of
Fishers, Indiana; City of Noblesville, Indiana; and
Hamilton County, Indiana

cc: All parties of record