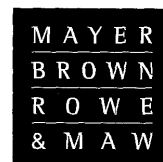


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July 3, 2003

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Washington, DC 20423

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Re: Finance Docket No. 34079, San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company – Construction and Operation of A Rail Line From Bayport Loop in Harris County, Texas

Dear Secretary Williams:

Please find enclosed for filing in the above-captioned proceeding the original and ten (10) copies of the San Jacinto Rail Limited, The Burlington Northern and Santa Fe Railway Company, and Bayport Producers' Motion to Strike the City of Houston's Reply In Support Of Its Motion For Reconsideration and Harris County and Harris County Flood Control District's Petitions For Leave to Intervene, for Stay Pending Judicial Review, and for Reconsideration

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to the messenger for our files. Thank you for your assistance.

Sincerely yours,

Kathryn Kusske Floyd / ay GAP
Kathryn A. Kusske Floyd

Enclosure

cc: All Parties of Record

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Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

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BEFORE THE SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34079

**San Jacinto Rail Limited Construction Exemption And
The Burlington Northern And Santa Fe Railway Company
Operation Exemption – Build-Out To The Bayport Loop Near
Houston, Harris County, TX**

**San Jacinto Rail Limited, The Burlington Northern And Santa Fe Railway Company,
And Bayport Producers' Motion to Strike The City Of Houston's Reply
In Support Of Its Motion For Reconsideration And
Harris County And Harris County Flood Control District's Petitions
For Leave to Intervene, For Stay Pending Judicial Review, And For Reconsideration**

Pursuant to 49 C.F.R. § 1104.13, San Jacinto Rail Limited ("San Jacinto"), The Burlington Northern and Santa Fe Railway Company ("BNSF"), and Bayport Producers¹ (collectively, "Petitioners") hereby move the Board to strike the Reply in Support of its Motion for Reconsideration filed by the City of Houston ("City") and the Petitions for Leave to Intervene, for Stay Pending Judicial Review, and for Reconsideration filed by Harris County and the Harris County Flood Control District (collectively, "Harris County"). These filings fail to comply with the Surface Transportation Board's ("Board's") rules and the briefing schedule announced by the Board in its May 16 and June 12, 2003 Decisions, and disregard Board precedent on intervention.

First, the City's Reply must be rejected because it violates the prohibition against submitting replies to replies. *See* 49 C.F.R. § 1104.13(c). Further, the information presented does not complete the record and merit a waiver as the Board noted recently when presented with

¹ ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company.

nearly identical arguments for permitting a reply to a reply. *See Waterloo Railway Co.—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Co. and Van Buren Bridge Co. In Aroostook County, Maine*, 2003 WL 21009328 (STB May 6, 2003), at *2 (denying waiver of prohibition on replies to replies where neither good cause was shown nor new information was necessary to develop a more complete record). The City simply restates legal arguments that it attempted to make in its petition for reconsideration, arguments pertaining to the Board’s use of the procedural mechanism contained in 40 C.F.R. § 1506.10(b) and its authority to act with a single member. As the Board has noted in similar contexts, “if [the City] desired to assure itself of the right to file the last word through a rebuttal, it should have filed a formal application.” *Paducah & Louisville Railway, Inc.—Abandonment Exemption—In McCracken County, KY*, 2003 WL 21421767 (STB June 20, 2003), at * 1; *Central Kansas Railway, L.L.C.—Abandonment Exemption—In Sedgwick County, KS*, 2001 WL 352251 (STB April 9, 2001) (“*Central Kansas*”), at *1.

Second, the City’s motion for leave to file a reply to a reply should be denied, and its Reply should be stricken from the docket, because the Board did not permit replies to replies in its June 12 decision setting out a briefing schedule. *See San Jacinto Rail Limited Construction Exemption and The Burlington Northern and Santa Fe Railway Company Operation Exemption—Build-Out to the Bayport Loop Near Houston, Harris County, Texas (“San Jacinto”)*, STB Finance Docket No. 34079 (served June 12, 2003), slip op. at 1. In that Decision, the Board permitted itself sufficient time to carefully consider the parties’ arguments by delaying the effective date of its decision granting final approval to Petitioners to construct and operate a 12.8-mile rail line in the Bayport Loop Industrial District. As such, “knowing that [the Board’s]

procedures provide only for the filing of a petition and a reply thereto . . . , [the City] should have made as thorough and accurate a presentation as possible in its petition.” *Central Kansas*, at *1.

Third, the Board should reject Harris County’s attempted intervention in this proceeding. The time for filing petitions for reconsideration has passed. *See San Jacinto*, (served May 16, 2003), slip op. at 2 (petitions for reconsideration due June 16, 2003). Harris County is one of the local governments that the Board’s Section of Environmental Analysis consulted in the environmental review process. The County has known about the status of this proceeding and could have filed its petitions by June 16. At any rate, the County’s motion for leave to intervene should be denied because the County’s arguments in its petition for stay and petition for reconsideration literally do no more than duplicate the City’s. *See Railroad Ventures, Inc. – Abandonment Exemption*, 2000 WL 1125904 (STB Jan. 6, 2000), at * 3 n.10 (motion to intervene in support of stay and reopening requests denied where would-be intervenor’s interests were similar and record was sufficient to address issues without intervenor’s participation); *B.J. Alan Co., Inc. v. United Parcel Service, Inc.*, 1990 WL 287495 (ICC June 1, 1990), at * 1 n.2 (denying leave to intervene because would-be intervenors raised no new issues that would add anything material to the record).

Conclusion

For the foregoing reasons, Petitioners respectfully request that the Board deny the City’s motion for leave to file a reply to a reply, and strike the City’s Reply and Harris County’s petitions for leave to intervene, for stay pending judicial review and for reconsideration filed in this

proceeding. Eleventh hour efforts to extend the record of this proceeding should not be rewarded, particularly where no good cause is shown.²

Respectfully submitted,

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Date: July 3, 2003

² See *Carolina Power & Light Co. v. Norfolk Southern Railway Co.*, 2003 WL 21055726 (STB May 12, 2003), at *1 ("there must be a clearly defined cut-off point, after which the record of the proceeding is closed").

CERTIFICATE OF SERVICE

I do hereby certify that copies of the San Jacinto Rail Limited, The Burlington Northern And Santa Fe Railway Company, and Bayport Producers' Motion To Strike The City Of Houston's Reply In Support Of Its Motion For Reconsideration And Harris County And Harris County Flood Control District's Petitions For Leave to Intervene, For Stay Pending Judicial Review, And For Reconsideration are being served on all parties of record via United States mail on July 3, 2003.

Julie Anna Patti