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ORIGINAL

THOMAS F. MCFARLAND

September 15, 2003

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

208925

ENTERED
Office of Proceedings

SEP 16 2003

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Public Record



Re: Docket No. AB-308 (Sub-No. 3X), *Central Michigan Railway Company --
Abandonment Exemption -- in Saginaw County, MI*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply To (1) Motion For Protective Order and (2) Motion To Strike, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Plastatech Engineering, Ltd.

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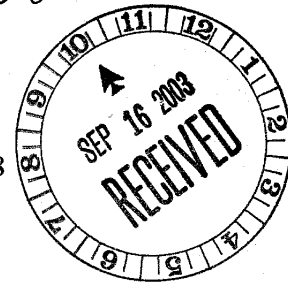
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

208925

CENTRAL MICHIGAN RAILWAY)
COMPANY -- ABANDONMENT)
EXEMPTION -- IN SAGINAW COUNTY,)
MI)

DOCKET NO. AB-308
(SUB-NO. 3X)



REPLY TO (1) MOTION FOR PROTECTIVE
ORDER AND (2) MOTION TO STRIKE

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PLASTATECH ENGINEERING, LTD.
725 Morley Drive
Saginaw, MI 48601

Protestant

THOMAS F. McFARLAND
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Attorney for Protestant

DATE FILED: September 16, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

CENTRAL MICHIGAN RAILWAY	)	
COMPANY -- ABANDONMENT	)	DOCKET NO. AB-308
EXEMPTION -- IN SAGINAW COUNTY,	)	(SUB-NO. 3X)
MI	)	

**REPLY TO (1) MOTION FOR PROTECTIVE
ORDER AND (2) MOTION TO STRIKE**

Pursuant to 49 C.F.R. § 1104.13(a), Protestant PLASTATECH ENGINEERING, LTD.
(Plastatech) hereby replies to (1) a Motion for Protective Order filed by Central Michigan
Railway Company (CMR) on August 20, 2003,^{1/} and (2) a Motion to Strike filed by CMR on
August 27, 2003.

PLASTATECH'S POSITION ON THE MOTIONS

1. Plastatech does not oppose issuance of a protective order covering the materials
that were attached to CMR's Motion. However, mischaracterizations in the
Motion about Plastatech's motives and position should be corrected.
2. Plastatech opposes the Motion to Strike inasmuch as Board regulations did not
require that Plastatech's Reply to the Petition for Exemption be verified, and the
factual allegations in the Reply are not otherwise inadmissible.

^{1/} By decision served September 4, 2003, the Board's Secretary extended the date
for filing a reply to the Motion for Protective Order to September 16, 2003. That is the due date
for a reply to CMR's Motion to Strike.

ARGUMENT

1. Reply to Motion for Protective Order

Plastatech's letter of August 14, 2003 to CMR was a settlement initiative. Plastatech thereby suggested a private-sector solution in lieu of litigation -- a process for which the Board has consistently expressed a strong preference. *See, e.g., Review of Rail Access and Competition Issues*, 3 S.T.B. 92 (1998) at 100 ("... we believe that private-sector solutions are generally preferable..."), and *Norfolk Southern Ry. Co. -- Petition for Declar. Order -- Interchange with Reading, B.M. & N. R. Co.*, 2003 STB LEXIS 216 at *11, Docket No. 42078, decision served April 29, 2003 ("such language is consistent with our strong preference for private sector solutions over regulation").

In order for settlement negotiations to be effective, they must be informal and private. It was thus unusual and unseemly for CMR to have filed Plastatech's settlement proposal with the Board. Now that CMR has disregarded the private nature of negotiations, it is appropriate for the Board to issue a protective order to prevent negotiations from being further publicized, and the Board might as well be aware that CMR has counteroffered an inadequate settlement amount.

However, contrary to the tenor of CMR's Motion, neither Plastatech nor its predecessor counsel has anything to hide, nor to be embarrassed about. This becomes apparent when CMR's mischaracterization of Plastatech's motives and position is corrected.

Contrary to CMR's characterization, Plastatech is not seeking to obstruct the highway widening project as a means of obtaining self-enrichment (Letter to the Board dated Aug. 20, 2003 at 2). Plastatech seeks only to be treated fairly in this matter. CMR will receive over \$3 million from the State if the rail line is abandoned. Plastatech is confident that it will be able to

show in a formal abandonment proceeding that abandonment would not be warranted upon consideration of traditional decisional criteria such as rail line profitability and shipper harm. In those circumstances, if abandonment were to be approved instead on the basis of taxpayer savings in the highway widening project, a legitimate issue would be presented under 49 U.S.C. § 10903(e)(1)(B) whether as a condition to such approval, public convenience and necessity require that CMR compensate Plastatech for the additional costs and losses that Plastatech would suffer as a result of abandonment, or bear the cost of relocating Plastatech to an alternate rail-served site.

The amount of settlement suggested by Plastatech was a realistic estimate of the total costs associated with a condition of that nature. That amount cannot be said to be unreasonable in light of the added costs and losses identified in Plastatech's Reply, totaling over \$200,000 in just the first year, and the very substantial costs associated with relocation of an established business. In no way, therefore, was Plastatech's settlement proposal an abuse of the Board's exemption procedures, nor an attempt to coerce CMR to pay money to which Plastatech has no legal entitlement, nor a "shakedown," nor any of the other pejorative and inflammatory terms used in CMR's Motion. Indeed, CMR has already counteroffered a lesser payment to Plastatech in attempted resolution of the matter, as indicated above. Thus, Plastatech's letter to CMR was nothing more than a good-faith settlement offer, acknowledged as such by virtue of CMR's counteroffer.

The Board should issue the requested protective order, but it should disregard CMR's attempt to distort Plastatech's motives and to mischaracterize Plastatech's position on the merits of abandonment.

2. Reply to Motion to Strike

Board regulations did not require that Plastatech's Reply be verified. There is a specific Board regulation at 49 C.F.R. § 1104.4 that governs verification of pleadings, documents and papers. It is provided in subsection (a) of that regulation that where a Board filing is signed by an attorney or practitioner –

A pleading, document or paper thus signed need not be verified or accompanied by affidavit unless required elsewhere in these rules.

Board regulations on rail exemption procedures at 49 C.F.R. Part 1121 do not require verification of pleadings. On the contrary, it is provided at 49 C.F.R. § 1121.4(a) that exemption proceedings are informal. Verification of pleadings is not required in informal proceedings.

In reference to 49 C.F.R. § 1104.4, CMR has argued that an attorney's signature on a pleading is not an attestation to the truth of the facts asserted in the pleading (Motion at 5). Be that as it may, that contention does not address the dispositive issue of whether verification of a reply to a petition for exemption of abandonment is required for its admissibility. Significantly, CMR failed to disclose to the Board that it is specifically provided in the governing regulation that verification of a pleading is not required where an attorney has signed the pleading, unless otherwise provided in Board rules. CMR has not identified a regulation that requires verification of a reply to a petition for exemption of abandonment. That is because there is no such regulation.

CMR has argued that Plastatech's Reply was required to be verified because the Board's verification rules apply to pleadings, citing *SF&L Ry., Inc. -- Acq. & Oper. Exempt. -- Toledo, Peoria & Western Ry. Corp.*, 2001 STB LEXIS 369, at *3 (STB F.D. No. 33996, decision served

April 13, 2001). That decision did not so find. The Board did not strike a pleading in that proceeding for lack of verification. Instead, the Board denied a motion to strike that was directed at letters from shippers and governmental entities that were attached to a petition to revoke an exemption for acquisition and operation of a rail line. (*Id.* at *3). The Board stated in dicta that its verification rules apply only to pleadings and verified statements (*id.*), but that was in the context of the verification provision in the Board's formal modified procedure rules at 49 C.F.R. § 1112.8, which was the basis for the motion.^{2/} That regulation does not apply to Plastatech's Reply, which was not filed under formal modified procedure. As previously noted, 49 C.F.R. § 1104.4(a) applies to Plastatech's Reply, and that regulation did not require that the Reply be verified.

Even if there were a requirement of verification as to Plastatech's Reply, the absence of verification would warrant striking only the factual allegations in the Reply, not the entire Reply as sought by CMR. That would not aid CMR's case. CMR's Petition for Exemption is required

^{2/} The regulations for modified procedure in formal proceedings appear at 49 C.F.R. Part 1112. 49 C.F.R. § 1112.8 provides as follows:

1112.8 Verification

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

The following from the *SF&L* decision shows that the Board's reference to verification of pleadings referred to pleadings under the above provision of the formal modified procedure rules (2001 STB LEXIS 369 at *3):

Pointing out that none of the letters is verified as required under 49 C.F.R. § 1112.8, *SF&L* and Applicants contend that they should be removed from the record or placed in the correspondence section of the dockets and that the related discussion should be stricken.

to be denied because CMR failed to provide an adequate record to permit the Board to make the requisite findings in support of exemption under 49 U.S.C. § 10502(a) (*see* Plastatech Reply at 9-13). That failure of proof would nonetheless doom CMR's Petition even if factual allegations in Plastatech's Reply regarding harm to it from abandonment and the like were to be stricken for lack of verification.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should enter the Protective Order sought by CMR, but CMR's Motion to Strike should be denied.

Respectfully submitted,

PLASTATECH ENGINEERING, LTD.
725 Morley Drive
Saginaw, MI 48601

Protestant

Thomas F. McFarland

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Attorney for Protestant

DATE FILED: September 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2003, I served the foregoing document, Reply to (1) Motion For Protective Order and (2) Motion To Strike, on William A. Mullins, David C. Reeves and Christine J. Sommer, Baker & Miller, PLLC, 915 Fifteenth Street, N.W., Suite 1000, Washington, DC 20005, by UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland