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BEFORE THE
SURFACE TRANSPORTATION BOARD

AUG 15 2005

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STB DOCKET NO. AB-441 (Sub-No. 4X)
SAN PEDRO RAILROAD OPERATING
COMPANY, LLC-ABANDONMENT EXEMPTION-
IN COCHISE COUNTY, AZ

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AUG 15 2005

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PETITION FOR EXEMPTION
UNDER 49 U.S.C. 10502
FROM 49 U.S.C. 10903

REPLY OF
SAN PEDRO RAILROAD OPERATING COMPANY, LLC
TO CHEMICAL LIME COMPANY'S
MOTION TO STRIKE PORTIONS OF REPLY

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Dated: August 15, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

AUG 15 2005
10:10 AM
STB

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INTRODUCTION

San Pedro Railroad Operating Company, LLC ("SPROC"), pursuant to 49 CFR 1104.13(a), replies to the Motion to Strike Portions of Reply, filed by Chemical Lime Company ("CLC"), on August 9, 2005. CLC is the sole industry at the end of 41.5 mile line of railroad authorized for abandonment 8 years ago in STB Docket No. AB-441 (Sub-No. 2X), SWKR Operating Co.-Abandonment Exemption-In Cochise County, AZ (served Feb. 14, 1997). This line of railroad lies at the end of another 19.9 mile long segment of railroad between Curtiss and Charleston, AZ, authorized for abandonment two years ago in STB Docket No. AB-441 (Sub-No. 3X), SWKR Operating Co.-Abandonment Exemption-In Cochise

County, AZ (served Nov. 4, 2003). CLC did not protest or otherwise oppose the abandonment of that railroad line in 2003 or give any indication that it would protest or otherwise oppose the present abandonment proposal by SPROC, a short line operator that tried but failed to revive a railroad previously authorized to be abandoned.

In effect, CLC faults SPROC for failing to include in its Petition for Exemption data which it should have contained had SPROC known or reasonably anticipated that CLC would object to its abandonment proposal. But SPROC had no sense that CLC would oppose its request until a June 14, 2005, conference call with CLC, which occurred 8 days after the filing of its abandonment petition. In its Reply to CLC's Statement of Opposition ("CLC's Statement") filed July 14, 2005, SPROC provided the information which CLC noted had not been included in the Petition, only to have CLC now urge that, since the data were provided out of time, SPROC's Petition should be rejected, and SPROC put to the time and expense of filing an abandonment application. CLC's contention would elevate form over substance. What is required here is for the Board to have a complete record upon which to make a determination whether CLC's proposed abandonment is warranted. The agency now has that record. SPROC would have no objection to the Board, out of a sense

of fairness, granting CLC the opportunity to reply to the data submitted by SPROC in its Reply. SPROC simply doesn't want to start out all over again, only to submit the same information already in the record, and it perceives no regulatory objective that would be served by such a tack.

ARGUMENT

As a general matter, the Board's Rules of Practice forbid the filing of a "reply to a reply." 49 CFR 1104.13(c). However, the Board's procedures applicable to formal abandonment proceedings do allow the abandonment applicant the right to respond to a protest or opposition comments. 49 CFR 1152.25(c)(4). It is in this context that SPROC sought and, it believes, the Board granted SPROC the opportunity to respond to CLC's opposition comments.

The gist of CLC's Statement is that SPROC should not be permitted to seek abandonment authority through the petition-for-exemption procedure because of CLC's opposition. Accordingly, CLC would have the Board reject SPROC's abandonment petition elevating form over substance and requiring SPROC to go to the great length and expense of refiling the abandonment by formal application. SPROC asserts that there is no public interest justification for imposing such a burden upon it. In March 2005, SPROC

concluded that it would have to seek abandonment for the subject rail line after numerous attempts to market the line and secure additional traffic had failed. SPROC's Chairman David Parkinson met with CLC officials and informed them of that fact. CLC does not contend otherwise. As late as July 14, 2005, some 8 days after it filed the abandonment as a petition for exemption, SPROC still had no sense that CLC would oppose any abandonment filing. After all, while CLC's Paul Spur plant was located on and served by the line, that facility had only been a sporadic user of rail. The plant had been closed for some period of time, and CLC had not opposed the abandonment filing submitted in 2003 by SPROC's predecessor, the San Pedro Southwestern Railroad. It was only then during a conference call with CLC's Mark Juszli that Dave Parkinson learned that CLC would oppose SPROC's petition.

Because SPROC did not expect CLC to oppose its abandonment request, it did not believe it necessary to provide the detailed information that CLC in its Statement had requested, or alternatively, to submit its abandonment request by formal application. Nevertheless, in the interest of the Board having a complete record on which to judge its abandonment and to insure that CLC is not, in its words, "prejudiced" by SPROC's response, SPROC urges the

Board to accept the challenged matter with CLC, if it chooses, to have a right of reply.

Altogether, CLC identifies as items to be stricken four items in SPROC's Reply Argument, five items in witness David Parkinson's statement, and seven items in attachments submitted by SPROC with its argument. SPROC has carefully reviewed each of these matters and CLC's assertions. Invariably, these matters fit into one of two categories. The first type of matter CLC seeks to have stricken amplifies matters addressed in the original Petition and subsequently questioned by CLC in its "Statement." The second type of matter CLC seeks to have stricken consists of events or documents that occurred after or did not exist at the time of the Petition's submission and relate to issues raised in the Petition. SPROC will discuss each of these 16 matters showing where they were originally addressed in the Petition and will explain why they should be received as evidence in the record.

A. Matters To Be Stricken From the Main Argument

1. Argument #2, paragraph 2: *CLC contends that SPROC relies heavily on newly filed financial statements in Attachment 3 and its introduction of a \$5,000 per mile track maintenance cost.*

SPROC response: SPROC originally addressed the financial results of operating the subject rail line at page 6 of its Petition and at pages 2-4 of witness Parkinson's statement (a loss of \$220,337 for 2004 and an "operating gain" of \$28,826, excluding track and bridge repairs (\$600,000 and \$500,000, respectively) and opportunity costs of \$840,000. Because CLC questioned the bases of these figures (CLC Statement at 6-9) (for example, CLC stated on page 6 that SPROC's 2005 operating results "understated" its annualized 2005 revenues had SPROC not terminated service; CLC stated at page 7 that Mr. Parkinson failed to present any evidence documenting that it would cost \$600,000 to bring the line up to FRA class I track standards or provide any breakdown to allow the Board to evaluate the necessity and cost of repairs; that CLC stated at page 8 that, without a breakdown of revenues, it would be impossible to tell whether the 2004 revenue figures include \$22,500 that CLC had advanced SPROC for track maintenance), CLC

has raised an issue making it appropriate for SPROC to answer CLC's assertions by submitting more detailed information in the form of SPROC's financial returns.

Regarding track maintenance, Mr. Parkinson originally testified that \$600,000 of track work would be necessary to upgrade this line to FRA class I standard. Parkinson VS at 3.

SPROC regards the normalized track maintenance figure of \$5,000 per mile per year to be in amplification of Mr.

Parkinson's statement in response to CLC's remarks. In any event, the Board can take official notice of the fact that the routine cost of FRA class I track maintenance runs about \$5,000 per mile per year.¹

2. Argument #4, paragraph 3. *CLC again takes Mr. Parkinson to task for not including the \$5,000 per mile track maintenance figure in the original Petition.*

SPROC response: Same as above.

¹ Wisconsin Central LTD. - Abandonment - in Ozaukee, Sheboygan and Manitowoc Counties, WI, STB Docket No. AB-303 (Sub-No. 27) (slip op. at 6, served October 18, 2004) (\$4,300 per mile); Union Pacific Abandonment, STB Docket No. AB-33 (Sub no. 140) (slip op. at 5, served December 22, 1999) (\$6,449 per mile).

3. Argument #5, paragraph 3: CLC challenges SPROC's use of the ICC's "historic 34 car per mile viability test," arguing that it could along with new calculations of traffic density have been included with the original petition.

SPROC response: Mr. Parkinson addressed the amount of traffic moving over the subject line at page 2 of his verified statement accompanying the Petition (96 cars for the first full year of operation and 155 cars for 2005 through May 15). Again, this response falls into the category of something that CLC raised in its Statement (at page 6). CLC asserts that SPROC has submitted no evidence demonstrating that the line is a burden on interstate commerce and SPROC should be entitled to address. In any event, the STB can take official notice of the "34 car per mile test" that its predecessor agency developed. While the 8.33 car per mile density referenced at pages 15 and 16 of SPROC's Reply is based on an expectation of 500 cars of CLC traffic

for the full 2005 year, that figure may be a bit optimistic. SPROC would be happy to rely on the lesser figure of 155 cars used in Mr. Parkinson's original testimony for a density of about 7 cars per mile. Parkinson VS at 2.

4. Argument #5, paragraph 3: *SPROC wants the STB to strike SPROC's annual deficit calculation of \$2 million as it does not appear in the original Petition.*

SPROC response: Once again, CLC's Motion to Strike refers to a matter that SPROC addressed in its Petition (at page 7)² and in Mr. Parkinson's original verified statement at 2-4. After indicating that SPROC had an "operating gain" of \$28,826, Mr. Parkinson then estimated bridge repair costs of \$600,000, track rehabilitation expenses of \$500,000, and "opportunity costs" of \$840,000, for a total loss of \$1,911,174. SPROC would be happy to

² The Petition contains a mistake at page 7 where SPROC stated that it would need to invest approximately \$600,000 in track, right of way, and bridge repairs. The correct figures as presented in the accompanying verified statement of David Parkinson at page 3, were in excess of \$500,000 in bridge repairs and \$600,000 worth of track work.

concede its loss is slightly less than
\$2,000,000.

B. Matters To Be Stricken From the New Parkinson
Verified Statement

.1. Section 5: CLC objects to SPROC's

*submission of evidence about the
construction of a transload facility to
handle CLC traffic.*

SPROC response: Again, it was CLC which
first raised this issue when at page 4 of
its Statement, CLC asserted that "SPROC has
never provided Chemical Lime with any
proposal to build such a facility, and based
on recent communications, does not appear to
be pursuing the issue actively...SPROC did not
respond at all until June 30, and then
provided only a token offer." SPROC
responded appropriately by furnishing as
Attachment 1 a copy of its July 22, 2005,
proposal to CLC's Thomas Hughes. Obviously,
SPROC could not have included that letter
with its Petition because it did not exist
on the June 6 date of filing.

2. Sections 7 and 10: CLC complained that SPROC significantly understated its 2005 revenues; stated that it cannot determine whether SPROC's 2004 revenues included the \$22,500 advanced by CLC for track maintenance; and said that SPROC did not provide sufficient evidence to allow it to conclude that SPROC's 2005 cost of operations exceeded its revenues.
- SPROC's response: With CLC making an issue of SPROC's 2004 and 2005 revenues, SPROC should be entitled to reply. It did so by submitting 2004 financial statements and 2005 pro forma financial statements, as Attachment 3, showing what the railroad's financial results would have been had it operated the line for the entire 2005 year.
3. Section 13: CLC vehemently criticizes SPROC for its failure to obtain an agreement with Ferromex.
- SPROC's response: At page 6 of its Petition and at page 1 of Mr. Parkinson's verified statement SPROC stated clearly that the plan to move international traffic between

Arizona and Mexico over this line never materialized, because SPROC could not persuade Ferromex to restore the Naco gateway. SPROC's response in Section 13 and the email from Ferromex submitted as Attachment 6 merely amplified what SPROC said in its Petition and does not constitute new matter.

3. Section 14. *CLC objected to the fact that SPROC did not include in its Petition the bridge report prepared by Osmose, an excerpt of which SPROC filed as Attachment 7.*

SPROC's response: This must be one of CLC's more bizarre objections to SPROC's Reply.

In his verified statement attached to the July 14, 2005, Statement, CLC's Mark Juszli complained loudly that the June 14 conference call with Mr. Parkinson was the first time he had ever heard about the necessity of any bridge repairs. Juszli V.S. at 3. Mr. Juszli must not have read Mr. Parkinson's original statement, appended to SPROC's June 6 Petition, very carefully. Had he done so, he would have seen Mr.

Parkinson's testimony that timber bridges will require in excess of \$500,000³ of repairs to sustain operations on this section of railroad. Parkinson VS at 3. While SPROC retained Osmose to conduct a bridge study prior to the June 6 filing date of its Petition, SPROC did not receive its copy of the complete Osmose report until after June 6. Accordingly, there was no way that SPROC could have submitted this document before then.

4. Section 17: *CLC objects to an extended chronology of events, which led SPROC to cease service to its plant on the grounds that this information could have been provided in the original Petition.*

SPROC response: Again, this is a most bizarre statement. CLC initially raised this issue in its Statement when it accused SPROC of terminating service on the line without any regulatory approval and without CLC's agreement. CLC Statement at 1. SPROC

³ Osmose estimated that \$731,500 in bridge repairs would be required. See, Attachment 5 submitted with SPROC's Reply to the Statement of Chemical Lime Company.

believed that the appropriate response was to provide the chronology of events, which appeared in SPROC's Reply at Section 17. Although SPROC could have included some of this information in its Petition, there would have been little need to do so but for the FRA's post-June 6 order to terminate service immediately over the bridge at MP 1044.4. As David Parkinson relates in his Reply Verified Statement, termination came as a result of a series of events and discussions taking place after June 6. Despite the railroad's stated desire to continue operations under careful conditions and its belief that Osmose's initial conclusions⁴ that operations could be conducted carefully, the FRA was most adamant. Had the FRA not issued its June 10 letter urging cessation of service as supplemented by the telephone conversation with FRA's Grady Cothen, there would be no

⁴ After issuance of its report finding that Priority 2 and 3 bridge repairs were necessary but allowing continued operations under careful control, Osmose refused to stand by its conclusions that operations could continue.

need for SPROC to submit the information
contained in section 17.

C. Matters To Be Stricken From The Attachments.

1. Letter dated July 22, 2005, from John H. Dugan to Thomas Hughes. See SPROC response to section B.1, above.
2. Letter from David Parkinson to Don Robinson dated June 1, 2004. This document submitted as Attachment 2 to SPROC's Reply to CLC's Statement explains the circumstances behind the \$22,500 in monthly payments from CLC to SPROC covering from March 1 through December 31, 2004. SPROC submitted this information to address the cash payments discussed at page 8 of CLC's Statement and at page 1 of Mr. Juszli's accompanying testimony.
3. Cover memorandum from David Parkinson to SPROC counsel John Heffner dated July 29, 2005, providing three years of SPROC financial statements. This document submitted as Attachment 3 to SPROC's Reply to CLC's Statement explains in more detail how SPROC's revenues did not cover its costs. SPROC submitted this material to amplify information

contained in Mr. Parkinson's Verified Statement accompanying SPROC's Petition (at 2) and to answer questions raised in CLC's Statement about the financial results of SPROC's operations and funding advanced by CLC. See CLC Statement at 7-8 and accompanying testimony of Mark Juszli at 1.

4. Series of emails (sic) between David Parkinson and Rogelio Velez Lopez of Ferromex dated Jan. 25, 2005. See SPROC response to Section B.3, above.
5. Bridge inspection report from Osmose dated June 6, 2005. See SPROC response to Section B.4.
6. Letter from David Parkinson to Mark Juszli, dated June 30, 2005, offering to return the \$50,000 CLC advanced to SPROC for track work.

After CLC's Mark Juszli vociferously complained about the costs CLC would incur as a result of the proposed abandonment, and, on June 6, 2005, the date of the abandonment filing, CLC requested a proposal from SPROC as to how it would offset CLC's financial damages, CLC now urges the Board to strike the very response it sought. Juszli VS at 3. Once

again, CLC raised an issue requiring a response, and it now objects to the Board's receipt of that response into the record as "new matter."

7. Letter from Edward W. Pritchard to David Parkinson dated June 10, 2005. CLC objects to this letter as "new evidence." As with the June 30 letter concerning financial impacts, this item concerns a matter originally raised in Mark Juszli's verified statement. Juszli VS at 3. Mr. Pritchard's letter is both relevant and timely, because it explains why SPROC was forced to terminate operations. While the letter was written and received after the date the Petition was filed, it clearly was not "new matter" as alleged by CLC, but was attached in response to the allegations of CLC.

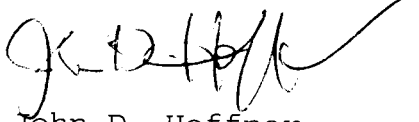
CONCLUSION

Despite CLC's numerous objections, the information originally provided on June 6, 2005, in its Petition and later in its Reply filed August 3, 2005, gives the Board sufficient information on which to analyze and grant the proposed abandonment Petition. To reject SPROC's Petition and require it to resubmit this abandonment request in an

application would merely serve to elevate form over substance without advancing the public interest. In any event, SPROC believes that the segment of railroad between MP 1055.8 near Charleston and MP 1097.3 near Paul Spur, which actually serves CLC's Paul Spur plant has long been abandoned. SPROC merely sought abandonment of this segment as well as the Paul Spur-Douglas and the Bisbee to Bisbee Jct. segments out of caution. The only segment for which abandonment authority is required, SPROC believes, is the segment from MP 1040.15 at Curtiss to MP 1055.8 near Charleston. There are no active shippers on that segment.

Accordingly, abandonment of the subject rail lines is consistent with the public convenience and necessity under 49 U.S.C. 10903 and also satisfies the exemption criteria of 49 U.S.C. 10502. The Board should issue a decision permitting this abandonment on September 23, 2005.

Respectively submitted,



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Dated: August 15, 2005

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the foregoing Reply of San Pedro Rail Operating Company, LLC To Chemical Lime Company's Motion to Strike Portions of Reply was served on August 15, 2005 to the following by first-class mail:

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