

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849



William A. Mullins
wmullins@bakerandmiller.com

Direct Dial: (202) 663-7823

October 11, 2005

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

OCT 11 2005

Part of
Public Record

214883

RE: STB Finance Docket No. 34337
Michael H. Meyer, Trustee In Bankruptcy For California Western Railroad, Inc.
v. North Coast Railroad Authority

Dear Secretary Williams:

North Coast Railroad Authority ("NCRA"), hereby submits an original and eleven copies of North Coast Railroad Authority's Motion to Strike Evidence Supporting Petition to Reopen. As can be seen from the Certificate of Service, a copy of said filing has been served by courier on Petitioner's counsel.

Please acknowledge the receipt and docketing of the enclosed filing by receipt stamping the eleventh copy thereof enclosed for that purpose and returning same to the person making this filing, for return to me. If there are any questions concerning this filing, please contact me.

Sincerely,

William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34337



**MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.**

v.

NORTH COAST RAILROAD AUTHORITY

**NORTH COAST RAILROAD AUTHORITY'S
MOTION TO STRIKE EVIDENCE SUPPORTING PETITION TO REOPEN**

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**Christopher J. Neary
General Counsel
NORTH COAST RAILROAD AUTHORITY
110 South Main Street, Suite C
Willits CA 95490
Tel.: (707) 459-5551
Fax: (707) 459-3018**

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for North Coast Railroad
Authority**

October 11, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34337

**MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
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NORTH COAST RAILROAD AUTHORITY

**NORTH COAST RAILROAD AUTHORITY'S
MOTION TO STRIKE EVIDENCE SUPPORTING PETITION TO REOPEN**

Defendant North Coast Railroad Authority ("NCRA") hereby moves to strike the evidentiary statements of John Mayfield and Gary D. Milliman, and related arguments of counsel, submitted in support of the petition of Michael H. Meyer ("Meyer" or the "Trustee"), bankruptcy trustee for California Western Railroad, Inc. ("CWR"), to reopen this proceeding. Said statements and argument are not "new" evidence. Accordingly, they are not a proper basis for a petition to reopen and should be stricken.

PROCEDURAL BACKGROUND

On December 1, 2004, Meyer submitted a complaint to the Surface Transportation Board ("STB") seeking \$270,000 plus additional damages from NCRA for the alleged failure of NCRA to meet its common carrier obligation to interchange with CWR. NCRA answered the complaint on December 22, 2004, and moved to dismiss the complaint on January 28, 2005.

In its motion to dismiss, NCRA asserted that the complaint did not present reasonable grounds for investigation because, "Meyer does not allege that *CWR* requested specific service, as required to trigger a common carrier service obligation under Section 11101." (Emphasis

added.) NCRA Motion to Dismiss at 2.¹ NCRA later reiterated this point, stating, “[T]he complaint fails to allege that CWR made the specific request for service necessary to invoke that obligation. . . . [A]ny inquiry about a railroad’s duty to provide service under its common carrier obligations can only arise *after* it has received details of a specific shipment. Meyer has failed to allege any such request *by CWR*.” (Emphases added.) NCRA Motion to Dismiss at 14-15.

In reply to NCRA’s Motion to Dismiss, Meyer reasserted that he sought damages principally for CWR’s inability to handle traffic of Georgia Pacific’s mill at Fort Bragg, CA, which he blamed on CWR’s inability to interchange traffic with NCRA. Meyer’s Reply later stated that NCRA denied any common carrier obligation “in the absence of a request by Complainant for service. Complainant . . . has been on notice that Respondent . . . has not been able to interchange traffic at Willits . . . since November 25, 1998 . . . [F]or the Complainant to have asked the Respondent to start hauling shipments originating on the CWR . . . would have made no sense whatsoever.” Meyer’s Reply at 9 - 10.

By decision served July 27, 2005, the Board denied Meyer’s complaint. In so doing, the Board stated in part as follows:

We find no merit to the trustee’s complaint. In order to be found to have violated the common carrier obligation at 49 U.S.C. 11101(a), a carrier must have failed to provide service upon reasonable request. . . . Here, the trustee concedes that, in the 6½ years since the line went out of service in 1998, neither CWR nor Georgia Pacific, the only shipper on the line, ever requested that service be provided. . . .

¹ Other reasons cited by NCRA for dismissal of the complaint included: (1) the fact that the statute of limitations for filing a complaint had passed; (2) that NCRA, as a state agency, had immunity from suit under the Eleventh Amendment; (3) that NCRA was the wrong party against which to file a complaint because it was not the carrier with the common carrier obligation over the line; (4) that a Federal Railroad Administration order barred operation of the line thereby making any failure to perform railroad operations reasonably excused; and (5) that no common carrier obligation was due CWR because CWR was not a shipper.

Furthermore, the record shows that there was minimal traffic on the line and that the repairs that would have been required to bring the line into compliance with FRA safety regulations would have been extensive. . . .

The Supreme Court has found that “[it] is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation.”

Slip op. at 4 (citations omitted). Meyer now petitions to reopen that decision, largely on the basis of alleged new evidence contained in the Milliman and Mayfield statements.

Argument

Under 49 C.F.R. §1115.4, a petition to reopen an administratively final action must be based on material error, new evidence, or substantially changed circumstances. Meyer’s petition alleges material error and submits so-called “new” evidence in the form of the Milliman and Mayfield statements to establish the alleged error. However, the “new” evidence that Meyer’s petition submits is not “new” evidence at all, but rather consists of knowledge and evidence that has been in the CWR’s possession for years and should have been submitted as part of the Complaint. Because the Milliman and Mayfield statements do not consist of new evidence, they should therefore be stricken.

Failing to strike these statements would simply encourage parties to Board proceedings to wait until the Board issues a ruling, review that ruling, determine what the weaknesses of the losing parties’ position was, and then submit, in the guise of a petition to reopen, pertinent evidence to deal with that weakness notwithstanding the fact that the evidence should have been presented in the first place. If this practice were to be encouraged, litigation would never end and the Board’s procedures and rules would be constantly abused. It is for this reason that the Board’s precedents clearly prohibit such practices and provide that reopening will be ordered only on presentation of evidence that is truly new, not just newly-submitted.

It is true that new evidence can be submitted to support a petition for reconsideration or reopening, but only if the new evidence was not available during the course of a proceeding. Indeed, Board precedent requires that such new evidence supporting a petition for reconsideration or petition to reopen be evidence that was not previously available. “[N]ewly raised evidence is not the same as *new* evidence.” *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). “[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.” *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33356, slip op. at 6 (STB served Aug. 27, 2002)(“*CN/IC*”). This principle was reaffirmed just last year, when the Board said:

[T]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term “new evidence” refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. See *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 484 (2d Cir. 1988). And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to “behave like Penelope, unraveling each day’s work to start the web again the next day.” *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (served Sept. 27, 2004), slip op. at 3.

The Board will accept evidence that is genuinely new. See, e.g., *Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069, *et al.* (served Oct.

20, 2004) (accepting a new government coal production forecast as the basis for recalculating volumes on which stand-alone costs were determined). It will not, however, accept evidence which is merely newly-produced. *See Pejepscot Industrial Park, Inc., d/b/a Grimm Industries – Petition for Declaratory Order*, STB Finance Docket No. 33989 (served Nov. 7, 2003), slip op. at 3:

Parties in proceedings such as this one are strongly encouraged to provide the Board with a complete and accurate record prior to the issuance of the Board's decision. Indeed, the Board would not ordinarily accept evidence or argument offered in connection with a petition for reconsideration unless the material in question is truly new (as opposed to newly offered) evidence. [Footnote citing authorities omitted.]

Petitions for reconsideration premised on evidence that was previously available but was merely not submitted are routinely denied by the Board. *See, e.g., Canadian National Railway Company, Grand Trunk Corporation, And Grand Trunk Western Railroad Incorporated -- Control -- Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central And Pacific Railroad Company, And Cedar River Railroad Company*, 2002 STB LEXIS 500 at *14 (served Aug. 27, 2002) (holding that Board did not commit material error by failing to consider evidence that was not presented, and that evidence now presented which could have been presented during the earlier phase of the case was not new evidence), and *CSX Corporation, et al.-Control and Operating Leases/Agreements- Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 96 (served Oct. 19, 1998), slip op. at 19 (denying petitioner's reopening request that the Board reverse its general override of contract anti-assignment clauses with respect to a contract that the petitioner failed to mention until after the Board issued its decision). The principle and the law are clear: for the Board to accept evidence as the basis of a petition for reopening, such evidence must be truly new – *i.e.*,

not having been reasonably available to the party when the record was developed - not merely be newly-raised evidence.

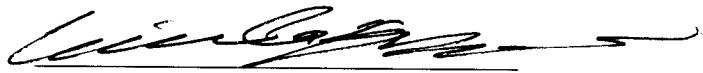
A review of Meyer's petition with the foregoing principle and precedents in mind plainly demonstrates that the Milliman and Mayfield statements are not "new" evidence, but simply newly raised evidence. Having had its complaint dismissed on the basis that CWR itself admitted through its counsel that it never requested service and therefore presented no evidence that it ever requested service, Meyer and his counsel now seek to remedy that defect by presenting the Milliman and Mayfield statements. But nothing in those statements is new. Both Milliman and Mayfield were officers of CWR between 1996 and 2002. Their statements each discuss operations of CWR during that period and set forth the discussions each allegedly had with NCRA and/or its alleged agent during that period. In short, each discusses matters that are at least several years old, all of which preceded Meyer's complaint and Meyer's response to NCRA's motion to dismiss. All of this "evidence" was clearly previously available and could have previously been submitted. The fact that Meyer and his counsel chose not to do so was their own decision. Of course now having lost, they want to present their previously available evidence as "new" evidence. It is not new evidence, does not fit the Board definition of new evidence, and cannot form the basis to reopen an administratively final decision.

Board precedent is clear: evidence that was previously available cannot form the basis of a petition to reopen under the guise that such evidence is new evidence when in fact it is merely newly raised evidence. The Milliman and Mayfield statements are exactly that, newly raised evidence. As such, their statements should therefore be stricken and should not be considered by the Board as a basis for reopening the Board's July 27 decision. Similarly, the discussion on

pages 4 and 5 of Meyer's petition that is based on the Milliman and Mayfield statements should be stricken by the Board.

WHEREFORE, NCRA moves the Board to strike and to not consider in ruling on Meyer's petition to reopen the Milliman and Mayfield statements and the portions of pages 4 and 5 of the petition discussing same.

Respectfully submitted,



Christopher J. Neary
General Counsel
NORTH COAST RAILROAD AUTHORITY
110 South Main Street, Suite C
Willits CA 95490
Tel.: (707) 459-5551
Fax: (707) 459-3018

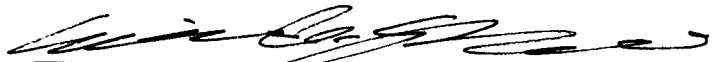
William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for North Coast Railroad Authority

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2005, I have caused the foregoing North Coast
Railroad Authority's Motion to Strike to be served by hand delivery on:

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601



William A. Mullins
Attorney for North Coast Railroad Authority