

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35042

Via electronic filing

**U S RAIL CORPORATION
-- LEASE AND OPERATION EXEMPTION --
SHANNON G., a New Jersey limited liability company**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

**REPLY OF U S RAIL CORPORATION TO THE CITY OF PATERSON, NJ'S
MOTION TO STRIKE OR IN THE ALTERNATIVE TO FILE A LIMITED
REBUTTAL**

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Due: September 19, 2007

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INTRODUCTION

U S Rail Corporation ("U S Rail") replies to the motion filed by the City of Paterson, NJ ("Paterson" or "the City"), entitled "Motion to Strike Portions of the August 17, 2007 U S Rail Filing, or in the Alternative, File a Limited Rebuttal" and filed with the Board on August 30, 2007.

In form as well as substance, Paterson's motion constitutes a prohibited sur-reply to U S Rail's August 17, 2007 reply to the City's July 26, 2007 opposition to U S

Rail's Petition for an Exemption, filed June 6, 2007. For the reasons discussed below, the City's motion should be denied on procedural grounds, as well as for failure to meet the burden of proof required by 49 U.S.C. 10502.

BACKGROUND

Briefly summarizing the procedural history of this matter, U S Rail, an existing class III short line rail carrier with operations in central Ohio, originally filed a Verified Notice of Exemption under 49 CFR 1151.41 on June 6, 2007 to lease and operate a 1,400 foot private siding under construction in Paterson, NJ. Shannon G ("SG"), a New Jersey-based real estate developer, was building the track that is the subject of this proceeding on its land as a private siding to serve a transload facility it was developing. U S Rail represented in its Verified Notice of Exemption that it had executed a Railroad Operating and Property Lease Agreement with SG for the common carrier lease and operation of the subject trackage and transload terminal that SG is currently constructing as a private railroad outside the regulatory jurisdiction of the Board, and that it [U S Rail] would hold itself out as the

exclusive provider of common carrier rail freight service at that facility.

By decision served June 15, 2007, the Board stayed U S Rail's exemption until further notice and requested supplemental information describing, in detail, why SG's track qualifies as a private line of railroad. U S Rail submitted that information on July 3, 2007.

Initially, only one party, the City of Paterson, NJ, protested U S Rail's exemption notice.¹ The City filed a "Notice of Intent to Participate and Certification of Service" on June 26, 2007, followed by its "Opposition Statement" on July 26, 2007. U S Rail filed its reply to the City's opposition on August 17, 2007.

On August 10, 2007, the DEP petitioned the Board to intervene and reply to the Board's request for supplemental information. U S Rail filed its reply to the DEP on August 30, 2007.

On August 30, 2007, the City filed this motion seeking to strike portions of U S Rail's August 17, 2007 reply, specifically portions of the August 17, 2007 verified

¹ The New York Susquehanna & Western Railway Company ("NYS&W") filed a letter containing its comments, but did not actually oppose the transaction.

statement of U S Rail President Gabriel Hall, as well as certain statements set forth in U S Rail's reply brief. U S Rail submits this reply to the City's motion.

LEGAL ARGUMENT

POINT I

A. THE CITY'S MOTION FOR LEAVE TO FILE A LIMITED REBUTTAL IS A PROHIBITED REPLY TO A REPLY

In the matter presently before this Board, the City has cobbled together a hybrid motion to strike/"rebuttal" to U S Rail's August 17, 2007 reply to the City's July 26, 2007 opposition papers. The Rules of Practice explicitly state that a reply to a reply to a motion is not permitted. See, 49 CFR 1104.13. Characterizing its reply as a "motion" or "rebuttal" does nothing to change the form of the pleading or to overcome the prohibition of such a submission under the Rules.

Both the Board and its predecessor, the Interstate Commerce Commission ("I.C.C.") have ruled that the substance of the pleading or motion takes precedence over the form in which it is styled; and where appropriate, has rejected "motions" which were in reality replies to a reply. See, Consolidated Rail Corporation -- Exemption -- Abandonment of the Weirton Secondary Track in Harrison And

Tuscarawas Counties, OH, I.C.C. Finance Docket No. AB-167 (Sub-No. 1088X), (served October 17, 1990).

There, the Tuscarawas County Commission ("TCC") filed a motion to strike substantially all of Conrail's reply. TCC's motion to strike was denied. In essence, the Board found that TCC had filed a reply to Conrail's reply, which is prohibited under Commission rules.

Moreover, the Board determined that TCC's motion failed to meet the requirements of 49 CFR 1104.8 for striking objectionable matter; i.e., TCC failed to demonstrate that the material was "... redundant, irrelevant, immaterial, impertinent, or scandalous...."

Similarly, in St. Louis Southwestern Railway Company - - Trackage Rights Over Missouri Pacific Railroad Company - - Kansas City to St. Louis Trackage Rights Compensation, I.C.C. Finance Docket No. 30,000 (Sub-No. 16), (served December 18, 1987), the Denver Rio Grande Western Railroad Company ("DRGW") requested the ICC reject a letter from the Union Pacific Missouri Pacific ("UP/MP") which sought "to correct certain mistakes" in the DRGW's reply to a petition to reopen. The DRGW argued that the UP/MP filing was an impermissible reply to a reply prohibited by the I.C.C.'s rules of practice. The DRGW also included a reply

to the UP/MP's arguments in the event the Commission accepted the UP/MP's filing. The I.C.C. held DRGW correct in characterizing the UP/MP filing as a reply to a reply. Both the UP/MP pleading and the DRGW's reply were stricken.

Previously, in Missouri Pacific Railroad Company and Consolidated Rail Corporation -- Joint Petition for Declaratory Order -- Recovery of Transportation Charges, I.C.C. Docket No. 40139, (served November 9, 1987), the Kansas City Southern Railway Company ("KCS") filed a combined motion to dismiss and a reply to Missouri Pacific Railroad ("MP") and Conrail's joint petition for a declaratory order. MP and Conrail replied to the motion to dismiss. KCS then filed a motion to strike petitioners' reply, and MP and Conrail then replied to that motion. The Commission ruled that KCS's motion to strike was in essence a reply to a reply and not to be considered. The Commission ruled, in part,

Under 49 CFR 1104.13(c), a reply to a reply is not permitted. Our regulations for the filing of pleadings are designed to provide an opportunity for parties to present their arguments, but to end the presentation in an orderly fashion so that parties are not perpetually filing pleadings. Moreover, in its motion to strike, KCS simply restates arguments previously made, and otherwise replies to

petitioners' reply. It raises no arguments supporting a motion to strike.

U S Rail submits that the City's rebuttal is in actuality a reply to a reply and should accordingly be disregarded.

B. THE CITY'S MOTION TO STRIKE PORTIONS OF THE ARGUMENTS OF U S RAIL SHOULD BE DENIED

In the event the Board were inclined to allow the City to submit this rebuttal, and were further inclined to consider the merits thereof, U S Rail contends that there is no basis for any of the City's allegations in support of its position that statements by U S Rail counsel should be stricken as "false", "reckless", or "scandalous".

U S Rail disputes each and every such assertion, beginning with the City's argument concerning the proximity of a ball field and a senior citizen residence to the proposed rail facility. These assertions should be rejected as redundant, irrelevant, and misleading.

Under rule 4(d) of the Rules of Practice [49 CFR 1104.8], language may be stricken which is **redundant, irrelevant, immaterial, impertinent, or scandalous**. A mere misstatement was held insufficient grounds for striking a statement. Nor is the alleged incorrectness of a legal argument sufficient ground for striking the statement. See,

Notification Of Rate Proposals Following Prior Independent Action, I.C.C. Ex Parte No. 297 (Sub-No. 2), 358 I.C.C. 487, (served October 4, 1978).

There the Commission denied a motion by Western Railroads to strike two statements from the Department of Justice's ("DOJ") reply. First, Western challenged DOJ's statement that Western chose not to comment on the issue of general rate increases, arguing that the statement is false. Secondly, it challenged DOJ's argument that because comment was permitted in an earlier proceeding it is not required in this proceeding. Western claimed that the DOJ's argument was irrelevant as a matter of law. The Commission determined that both of the foregoing factors are matters relating to the weight to be accorded the statement, not the admissibility of the statement.

Here the City strains credulity by asserting at page 4 of its motion, "US Rail [sic] falsely denies the existence of two sensitive receptors within *approximately* [emphasis supplied] 200 feet of the project area: a senior residence, and a children's athletic field."

With regard to the senior residence, the receptor is either within the 200 foot boundary set forth in the noise regulations of 49 CFR 1105 (e)(6), or it is not. There is

no regulatory basis for denying an application because something is located *approximately* 200 feet away.

The senior citizen residence is located on the north east corner of Rosa Parks Blvd. at Fulton or Harrison Place or Street. The City admits in a footnote at page 5 that deciphering street names in Paterson can be a guessing game. The senior residence is situated on the corner of the lot furthest away from the proposed rail facility. The actual distance of the building residents themselves from the boundary of the property at any given time is certainly much greater than the 210 foot distance cited by the City in this motion. Regardless, there is no dispute that the senior residence is beyond the 200 foot sensitive receptor perimeter referenced in 49 CFR 1105 (e)(6). The statements of U S Rail regarding the locus of the senior residence should be allowed to stand.

With regard to the ball field, nowhere are ball fields mentioned as "sensitive receptors" of noise in 49 CFR 1105(e)(6). The reason for this is quite logical, as the sensitive receptors listed in the regulation (schools, libraries, hospitals, etc.) are all places of quietude. A ball field, by its very nature is a venue for exuberance, both verbal and kinetic. Quite candidly, there is and was

no basis for counsel's argument in the first place, and the Board should by no means base its determination on a regulation which does not even remotely apply.

Moreover, though the City goes to considerable length to document the use of the ball field, counsel fails to disclose to this Board that the brick left field wall of the ball field is, in reality, the rear wall of the City's existing DPW facility, wherein numerous exhaust producing and presumably noisy vehicles enter, exit and idle, while dust producing stones, salt and other heavy road construction and repair materials are handled on a daily basis. See photos annexed hereto and made a part hereof. The City further fails to explain how its proposed alternative use of the U S Rail site as a recycling center and rock salt storage facility would be healthier for residents than would U S Rail's proposed operations.

POINT II

THE CITY FAILS TO MEET ITS BURDEN OF PROOF FOR ESTABLISHING CRIMINAL LIABILITY FOR PERJURY

There is no justifiable basis for the Board to accept Paterson's conclusion and find that U. S. Rail's president Gabriel Hall perjured himself where, as here, the perjury accusation is premised solely upon an alleged contradiction

between the contents of a verified statement and the *caption* of an earlier affidavit prepared by counsel for a third party. Indeed, the City fails to cite any precedent for this Board so finding.

The May 22, 2007 Hall affidavit is silent on the question of Mr. Hall's knowledge of the eminent domain lawsuit. Nothing subscribed to by the witness in the body of the May 22nd affidavit references the City's condemnation action. The document bears a caption, prepared by counsel for SG, apparently in response to an application for emergency relief, styled under local New Jersey practice as an "Order to Show Cause", referencing a dispute between Shannon G and the City. Neither Mr. Hall nor U. S. Rail were, at that time, party to the eminent domain lawsuit, nor were they represented by counsel. This fact was apparently not lost on the Superior Court motion judge, whose June 25, 2007 Order directs the City to file an amended condemnation complaint adding U. S. Rail as a party-defendant.

In reply to the City's baseless accusations, Mr. Hall has prepared the accompanying statement verifying that, indeed, he had no knowledge of the condemnation action at the time he executed the May 22nd affidavit. See September

17, 2007 verified statement of U S Rail President Gabriel Hall, annexed hereto and made a part hereof as Exhibit A.

Nor can criminal liability for perjury be established whenever the affiant can prove the sworn statements were literally truthful. The Code states, "Whoever . . . in any declaration, certificate, verification, or statement under penalty of perjury as permitted under [section 1746 of title 28, United States Code](#), willfully subscribes as true any material matter which he does not believe to be true . . . is guilty of perjury." [18 U.S.C. § 1621\(2\)](#).

The Supreme Court has held that a perjury conviction under [§ 1621](#) cannot be based upon a statement, "however misleading or incomplete, that is the 'literal truth.'" . [United States v. Shotts](#), 145 F.3d 1289, 1297 (11th Cir. 1998), cert. denied, 525 U.S. 1177, 143 L. Ed. 2d 108, 119 S. Ct. 1111 (1999) (citing [Bronston v. United States](#), 409 U.S. 352, 360, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973)). "An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury." [Shotts, supra. at 1297](#).

CONCLUSION

For the above stated reasons and based upon the above cited points and authorities, the Board should deny the City of Paterson's motion, as it constitutes an impermissible reply to a reply and as failing to meet its burden of proof with respect to establishing either perjury on the part of U S Rail's witness Gabriel Hall, or reasonable, specific bases for either revoking or rejecting U S Rail's notice of exemption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of U S Rail Corporation's reply to the motion to strike filed on August 30, 2007 has been served on all parties by E-mail transmission.

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