

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35090

JP RAIL, INC.

-- LEASE AND OPERATION EXEMPTION --

NAT INDUSTRIES, INC.

REPLY OF JP RAIL, INC. TO MOTION OF THE COMMONWEALTH
OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR
LEAVE TO FILE RESPONSE TO JP RAIL'S REPLY

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Dated: January 7, 2008

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BACKGROUND

On October 17, 2007 JP Rail, Inc. (hereinafter "JP Rail"), an existing Class III short line railroad, filed a notice of exemption involving the lease and operation by JP Rail, as a common carrier, of a 75-year-old spur track that was formerly operated as a private industry track by NAT Industries, Inc. ("NAT"). In its exemption notice, JP Rail stated that it planned to commence common carrier operations on or after November 17, 2007, thirty days after

the filing of the notice. The subject rail property is a stub-ended spur connecting to the Donora Line¹ which, in turn, connects to Norfolk Southern Rail Corporation ("NSRC") main line trackage at Milepost ML40 in Carroll Township, PA. The NAT spur track is *approximately* one (1) mile in length.

On October 26, 2007 the Board issued a decision staying the effective date of JP Rail's exemption until December 6, 2007 and requesting more information, which JP Rail provided on October 31, 2007.

On October 31, 2007 JP Rail commenced operating at Donora as a non-common carrier serving private track for its account with Westmoreland Waste ("Westmoreland").

On November 29, 2007, the Commonwealth of Pennsylvania, acting by and through its Department of Environmental Protection ("PaDEP") filed a petition seeking to have the Board (1) void JP Rail's notice of exemption, (2) extend the stay for an indeterminate length of time beyond December 6, 2007, (3) order JP Rail to cease and desist operations at Donora, and (4) direct JP Rail to

¹ The Donora Line is apparently owned by the Middle Monongahela Industrial Development Association ("MIDA") and operated by the Borough of Donora pursuant to a 2004 Memorandum of Agreement. See PaDEP petition at Attachment A-1.

obtain and submit a "complete and thorough" environmental assessment.²

On December 5, 2007 the Board issued a decision directing JP Rail to remove waste-containing rail cars from this site, to refrain from bringing additional rail cars to the Line, and to immediately cease and desist from any further operations over the Line until further order of the Board. JP Rail has so complied. In the interim the Board ruled that the exemption which is the subject of the notice in this proceeding will not become effective, if at all, until January 20, 2008. On December 17, 2007 JP Rail filed its Reply to the petitions of PWIA, NJDEP, and PaDEP.

On December 28, 2007 PaDEP filed this motion seeking leave to file a limited response to JP Rail's Reply questioning JP Rail's permission to use track owned by MIDA, and asserting that JP Rail's operations will trigger an environmental review under 49 CFR 1105.7(e)(4) and (5).

JP Rail now files this Reply, requesting the Board strike PaDEP's December 28, 2007 submission as a prohibited reply to a reply, and answering the assertions raised therein.

² Also on November 29, 2007 the Pennsylvania Waste Industries Association ("PWIA") and the New Jersey Department of Environmental Protection ("NJDEP") filed petitions to revoke the exemption or in the alternative to stay in this matter.

LEGAL ARGUMENT

POINT I

PADEP'S MOTION FOR LEAVE TO FILE A RESPONSE IS A PROHIBITED REPLY TO JP RAIL'S REPLY

In form as well as substance, PaDEP's motion constitutes a prohibited sur-reply to JP Rail's December 17, 2007 reply to the PaDEP's November 29, 2007 petition to revoke JP Rail's Petition for an Exemption, filed October 17, 2007. For the reasons discussed below, PaDEP's motion should be denied on procedural grounds, as well as for the substantive reasons set forth in Point II below.

The Board's Rules of Practice expressly forbid the filing of a reply to a reply. See, 49 CFR 1104.13. Characterizing a reply as a "motion" or "response" 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 Commission found that TCC had filed a reply to Conrail's reply, which is prohibited under its rules.

Moreover, the ICC 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 under 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.

JP Rail submits that the PaDEP's response is in actuality a prohibited reply to a reply and should accordingly be disregarded.

POINT II

THERE EXISTS NO BASIS FOR VOIDING JP RAIL'S EXEMPTION

In the event the Board were inclined to consider PaDEP's response to JP Rail's Reply, fairness requires that the Board likewise accept JP Rail's Reply to the PaDEP's response.

Petitioner initiated this proceeding in good faith, believing NAT owned the subject rail Line. In the course of this proceeding, Petitioner has become aware that while NAT does own the property, MIDA owns the Donora Line, and that the track on NAT's property is a spur off that Line, also owned by MIDA. The parties appear to be in agreement that this is the case.

Under rule 4(d) of the Board's 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.

The Board should disregard the hearsay statement of PaDEP inspector Stanley Whitsel submitted in support of this motion. The statement does not, as counsel purports, represent the fruit of "further investigations" (See PaDEP

motion at Para. 4), as the cited evidence was reportedly gathered between November 9th and 16th, well before the November 29, 2007 filing of the PaDEP's motion to revoke³, and should have been disclosed to Petitioner's counsel at that time.

Moreover, the record should reflect that contrary to the verified statement of Inspector Whitsel, NAT Industries is an existing corporation, which among other things, pays real estate taxes (See Verified Statement of Sandra Eakin at Paragraph 3 (hereinafter "Eakin V.S.")), a portion of which, incidentally, funds the PaDEP.

In its response, PaDEP raises two objections it terms "critical". Upon closer examination, neither is a valid basis for denying JP Rail the exemption to which it is entitled.

(a) The first objection concerns JP Rail' right to use the subject rail line.

JP Rail's right to use the rail line turns not, as PaDEP suggests, on MIDA's ownership of the rail line, but rather on NAT's conferral of their longstanding usage rights upon JP Rail. As the accompanying verified statement

³ PaDep's brief is dated November 20, 2007, a date which is also subsequent to the purported additional evidence gathering.

of NAT principal Sandra Eakin indicates (See Eakin V. S. at Paragraph 4), NAT conducted coal distribution operations by rail at this site for decades prior to 1996 and never relinquished its rights. JP Rail's rights to use the line derive from the lease of those rights from NAT.

As the Board noted in its recent New England Transrail decision, response to arguments that it cannot grant entry authority to a prospective railroad absent the existence of an interchange agreement,

"NET is not now a rail carrier, but should we decide to grant it the necessary authority to become a rail carrier, connecting carriers would then be required to provide for the interchange of traffic from NET. See 49 U.S.C. 10742. Thus, it does not matter that no interchange agreement is yet in place."

New England Transrail, LLC, d/b/a Wilmington & Woburn
Railway - Construction, Acquisition, and Operation
Exemption - In Wilmington and Woburn, MA, STB Finance
Docket No. 34797 (served July 10, 2007).

Moreover, MIDA has confirmed that NAT and its lessee JP Rail have the right to use the track. (See Eakin V.S. at Paragraph 7.) PaDEP's first objection should accordingly be dismissed as unfounded.

(b) PaDEP's second objection concerns whether environmental review is mandated under 49 CFR 1105.7(e)(4) and (5). For the following reasons, no such review is triggered, as there will be no increased traffic on Nitrous Lane as a result of JP Rail's operations.

As the Eakin Verified Statement further indicates, vehicular access to the NAT property from heavily traveled Route 837 is gained via a private crossing over the NSRC main line, turning onto the unpaved NSRC right-of-way paralleling Canestrале Coal Yard, and proceeding east until reaching NAT's property. This route avoids the need for vehicles to travel upon Nitrous Lane or through the Coal Yard, and does not trigger 49 CFR 1105.7(e)(4) or (5) environmental thresholds. NSRC, having created the situation whereby NAT was essentially landlocked from reaching Route 837 by abolishing NAT's private grade crossing in 2002, was kind enough to grant NAT and JP Rail an easement over their unpaved right-of-way to reach NAT's yard. (See Eakin V.S. at Paragraphs 9 through 12.)

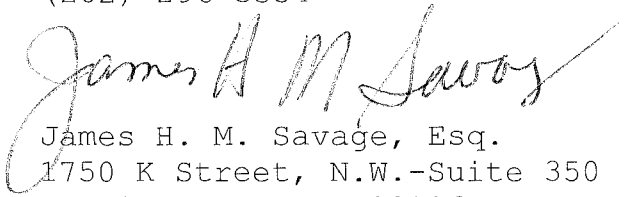
The issue of access to NAT property without increasing truck traffic on existing roadways more than 10% having been resolved in JP Rail's favor, PaDEP's second objection to the exemption likewise fails.

CONCLUSION

For the above stated reasons and based upon the above cited points and authorities, the Board should deny PaDEP's motion, as it constitutes an prohibited reply to a reply and as failing to meet the burden of proof with respect to establishing reasonable, specific bases for voiding JP Rail's notice of exemption.

Respectfully submitted,

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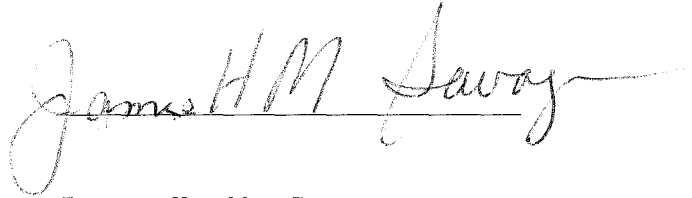

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Attorneys for Petitioner

Dated: January 7, 2008

CERTIFICATION OF PROOF OF SERVICE

I certify that I served this day by ordinary mail a true copy of the within pleading upon all parties to this matter.

A handwritten signature in cursive script, reading "James H. M. Savage", written over a horizontal line.

James H. M. Savage

Attorney for Petitioner

Dated: January 7, 2008

VERIFIED STATEMENT OF SANDRA EAKIN

Sandra Eakin, of full age, deposes and says:

1. I am an officer of NAT Industries, Inc., 16 Aiken Lane, Bentleyville, PA.
2. I make this verified statement in support of JP Rail's Petition for an exemption to lease and operate a rail-truck transloading facility on land owned by NAT Industries, Inc. ("NAT") in Donora, PA based upon facts which have become know to me in my capacity as an officer of this corporation.
3. At all relevant times, NAT has been the record owner of the property which it has now leased to JP Rail.
4. For many years up to and including 1996, NAT operated a coal distributorship on its property.
5. At all relevant times NAT has held rights to receive and unload shipments of coal delivered by rail cars operating upon a segment of the Donora Rail Line, a secondary track connecting to the Conrail (now Norfolk Southern) main line which passes through Donora, PA.
6. To the best of my knowledge and information, the Donora Rail Line is presently owned by the Middle Monongahela Industrial Development Association ("MIDA").
7. To the best of my knowledge and information, at no time has MIDA, or any predecessor of MIDA, revoked, attempted to revoke or otherwise curtail NAT's rights to make use of said track segment, including leasing the property to others others, which NAT previously did in 1996. In fact, MIDA Solicitor General Keith Bassi has informed NAT that MIDA does not oppose JP Rail's use of this site.

8. NAT has now leased its rights to make use of said track segment to leased to JP Rail, said lease being in full force and effect.

9. Prior to 2002, motor vehicle access to NAT's property was gained from Route 837, a heavily travelled highway, by way of a private grade crossing over the Conrail (now Norfolk Southern) main line.

10. In or about 2002, Norfolk Southern took this private grade crossing out of service without NAT's advance knowledge or permission. As a result, NAT, through no fault of its own, was deprived of direct access from its property to Route 837.

11. In 2007, NAT approached Norfolk Southern with a request for Norfolk to reinstall the private grade crossing leading to NAT's property. Ken Taggart of Norfolk Southern has granted NAT and its lessee permission to use Norfolk's private grade crossing which is situated to the immediate west of NAT's property, as well as Norfolk's unpaved right-of way, to access NAT's property.

12. Norfolk's permission enables vehicles to reach NAT's property without traveling on Nitrous Lane or over property owned by others.

13. I believe the foregoing information favorably resolves the issues raised by PaDEP in their December 28, 2007 motion, and respectfully request the Board to permit JP Rail's exemption to take effect.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January 4, 2008.


Sandra Eakon