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April 10, 2024

Ms. Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB FD 36447, *Lake Providence Port Commission—Feeder Line Application-Line of Delta Southern R.R. Located in East Carroll And Madison Parishes, LA.*

Dear Ms. Brown:

Lake Providence Port Commission ("LPPC"), Southeast Arkansas Economic Development District ("SEAEDD") and North Louisiana and Arkansas Railroad, Inc. ("NLA), by and through their counsel of record, hereby file their Joint Request for Leave to Respond. Consistent with the Board's decision of November 20, 2023, this Joint Reply is being served simultaneously on the Board and ALJ McCarthy, as well as the other "parties of record" on the Service List.

Respectfully submitted,

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/s/ Richard H. Streeter

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Cc: Parties of Record on Service List (Including ALJ McCarthy)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36447

LAKE PROVIDENCE PORT COMMISSION
--FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.

Joint Petition of Lake Providence Port Commission, Southeast Arkansas Economic Development District and North Louisiana and Arkansas Railroad, Inc. Requesting Leave to Respond to Letter Reply Filed April 3, 2024 by Delta Southern Railroad, Inc.

Lake Providence Port Commission ("LPPC"), Southeast Arkansas Economic Development District ("SEAEDD") and North Louisiana and Arkansas Railroad ("NLA") ("collectively referred to as the "LPPC Parties'), by and through counsel of record, request leave to object to the receipt into the record of, or in the alternative to respond to, the April 3, 2024 response in the form of a letter ("April 3, 2024 Letter") submitted by Delta Southern Railroad, Inc. ("DSRR") as an impermissible "reply to a reply" to the LPPC Parties' Reply to DSRR's three Motions to Compel filed March 28, 2024. Although its caption may suggest otherwise, it is crystal clear that DSRR's April 3, 2024 Letter is intended to attack the LPPC Parties' March 28, 2024 Joint Reply to the virtually identical Motions to Compel filed by DSRR on March 8, 2024, with arguments that either were made, or could have been made, in DSRR's three March 8, 2024,

Motions to Compel. As such, DSRR's April 3, 2024 Letter openly violates the prohibition against filing a reply to a reply. *See* 49 C.F.R. § 1104.13 (c).

It is tempting to stop there, because the LPPC Parties consider that the impropriety of DSRR's April 3, 2024 Letter is clear. However, to avoid waiving any argument that the LPPC Parties waited too long to voice their concerns, the LPPC Parties, should Administrative Law Judge McCarthy or the Board accept into the record DSRR's April 3, 2024 Letter for its substantive assertions, must be afforded at this time the opportunity to respond to the substance of DSRR's April 3, 2024 Letter.

DSRR's April 3, 2024 Letter raises several specious arguments that seriously misstate and distort the LPPC Parties' March 28, 2024 Joint Reply and the existing record. In addition, the LPPC Parties note that, while DSRR has repeatedly castigated them for failing to fully comply with DSRR's interpretation of the "clear regulations governing discovery in this matter,"[1] it is extremely ironic that DSRR failed to comply with the requirement in 49 C.F.R. § 1114.31(a) that a motion to compel must be filed within 10 days after expiration of the period allowed for submission of answers to interrogatories. Given the history of this case and the price that the LPPC Parties paid as a result of timely responding to the series of demands and objections that DSRR filed at the start of this proceeding between February 5, 2021 and March 9, 2021, they have attempted to show good faith by informally reaching out to the Board and the ALJ for an early resolution of the issue of whether DSRR is now

[1] DSRR's April 1, 2024 Reply, at p. 2.

permitted to propound discovery (and, if so, whether that discovery is limited to valuation). Unfortunately, the LPPC Parties' efforts have been met by the untimely motions to compel and by DSRR's April 3, 2024 Letter which serves only to further delay the proceeding.

A. Introduction

On April 1, 2024, DSRR filed what it labeled as *Delta Southern Railroad, Inc.'s Reply in Opposition to Emergency Motion for Ruling by ALJ McCarthy or, in the Alternative, for Referral by ALJ McCarthy to the Board, on the Scope of Discovery Permitted at this Time under the Board's Decisions Dated November 20, 2023 and December 11, 2020*" ("DSRR's Reply"). Although LPPC's Emergency Motion, filed March 11, 2024, was less than two (2) pages in length, DSRR's Reply is 160 pages in length (including attachments). Most importantly, however, it was largely not a reply to LPPC's Emergency Motion, which simply posed the question of whether it will be necessary to file a formal motion seeking a ruling or whether Judge McCarthy will provide guidance regarding whether DSRR may continue to seek yet another round of discovery from the three LPPC Parties at this time. Instead, DSRR's Reply is a reply to the *Joint Reply*, filed March 28, 2024, by the LPPC Parties in response to the identical arguments and claims that DSRR asserted in its three substantially identical but separate Motions to Compel filed on March 8, 2024.

On April 3, 2024, DSRR followed up with its Letter addressed to the Board "to clarify the issues presented in the 'Joint Reply,' filed on March 28, 2024," by the LPPC Parties in response to DSRR's three Motions to Compel

Discovery. DSRR's April 3, 2024 Letter, to which DSRR attached two (2) opinions of a Magistrate Judge for the Eastern District of New York, which DSRR touts as supporting DSRR's arguments, clarifies nothing. Instead, it criticizes the manner in which the LPPC Parties have responded to discovery requests (that the LPPC Parties do not think are even appropriate at this time, which was the point of the LPPC Parties' Emergency Motion) and speculates about the intensity of the LPPC Parties' searches for documents.

1. DSRR's Claim That The LPPC Parties' Refusal To Provide Responses to DSRR's Discovery Is Obstructionist Behavior And Is Baseless.

As a review of the past discovery responses will demonstrate, all of the LPPC Parties, including NLA, have always responded to DSRR's discovery requests. They have, of course, relied on the protective conditions that are set out in 49 C.F.R. § 1114.21 (c) to object to DSRR's Interrogatories and RFP's that are not relevant and that are unduly burdensome, and, solely with respect to the latest round of discovery that DSRR launched in January of this year, which are untimely. In this instance, however, they have also based their objections on the language in the Board's *November 20, 2023 Decision* that placed limitations on what was to be accomplished immediately following the Board's conditional acceptance of LPPC's Amended Application. In this instance, the latest wave of Interrogatories and further Requests for Production of documents is not relevant to the issue of valuation, which is the only subject as to which the Board ordered further discovery at this time.

2. DSRR's Repeated Arguments Regarding the Impact of a Procedural Schedule in a Feeder Application Case Add Nothing New.

The LPPC Parties' argument regarding the timing of further discovery that does not involve the narrow issue of the Constitutional Minimum Value, i.e., the greater of the Going Concern Value ("GCV") or the Net Liquidation Value ("NLV"), of the Line of railroad that is the subject of the Amended Application was addressed in their March 28, 2024 Joint Reply to DSRR's Motions to Compel. As was explained at pages 7-9 of the Joint Reply, the Board's preclearance procedures in Feeder Line proceedings have created a unique situation that is distinguishable from other Board proceedings, such as the complaint proceeding that was involved in *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, NOR 42179 (STB served August 7, 2023) cited in DSRR's April 3, 2024 letter. As a result, the LPPC Parties will not burden the ALJ and the Board with any further responses to this issue.

3. NLA Has Never Engaged In Obstructionist Behavior Or Attempted To Shut Down Discovery In This Proceeding.

DSRR's assertion, in its April 1, 2024 Reply, that "NLA attempted to shut down DSRR's discovery efforts claiming … DSRR waited too long to seek discovery" is both absurd and unsupported by the record. NLA never attempted to shut down DSRR's discovery efforts, nor did it ever make the claim that DSRR had waited too long to seek discovery.

DSRR's claim that NLA sought to shut down DSRR's discovery efforts is also repudiated by the letter, written by counsel, dated February 18, 2021,

addressed to Ms. Cynthia Brown, the Section Chief of the Board's Office of Proceedings ("Letter and NLA Protective Order Motion").[2] In the first paragraph of that letter, it was explained that, on February 5, 2021, DSRR filed its First Set of Interrogatories on LPPC and SEAEDD, which are parties to the proceeding. "It also filed the same Interrogatories on [… NLA], which is not a party."[3]

Despite taking the position that it was not a party, the letter notes that NLA had filed several documents along with its Motion that also included NLA's General Objections to DSRR's Interrogatories, as well NLA's objections to a limited number of interrogatories that seek "information about customers of NLA that is of a most confidential nature."[4] To support this objection, NLA included a very narrow request that the Board ***grant it relief through a protective order against Interrogatories that seek the release of highly confidential and propriety information that is not conceivably relevant to the issues involved in the proceeding*** (Emphasis added).[5]

In particular, NLA asked the Board to "provide relief through a protective order that discovery not be had regarding"[6] ***a limited number of DSRR's Interrogatories, namely "Nos 1 through 6, 11, 24, and 27."[7] These Interrogatories involved "sensitive nonpublic information relating to***

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[2] A copy of which is attached hereto.
[3] *See,* Letter and NLA Protective Order Motion at p. 1.
[4] *Id.* at p. 7.
[5] *Id.* at p. 1.
[6] *Id.* at p. 7.
[7] *Id.* at p. 3.

third parties that, if produced, could result in the violation of contractual obligations to third parties or violate 49 U.S.C. § 11904."[8]

As was also explained, "NLA has agreed to waive its objection to specified Interrogatories that would otherwise be barred on the grounds that while 49 C.F.R. § 1114.26 states that any 'party may serve upon any other party written interrogatories,' 49 C.F.R. § 1101.2(d) states that the term 'Party' 'will not include persons merely signing certificates of support.'"[9]

The lack of any intent to "shut down DSRR's discovery efforts" is also demonstrated by the following sentences of the Letter and NLA Protective Order Motion that "NLA requests the Board to expeditiously rule on its stated objections to multiple Interrogatories. T*he motion is filed at this time in order not to delay the proceeding for which LPPC and SEAEDD have sought expedited handling"* (Emphasis added).[10]

The Board did not issue a ruling on NLA's Motion until June 1, 2021. In its decision, the Board reasonably found that NLA, by joining in pleadings opposing DSRR's motion to dismiss and submitting a "Supplemental Response to [DSRR's] First Set of Interrogatories," had participated as a party. Hence there was "no basis for granting NLA relief from discovery on the ground that it

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[8] *Id.* at p. 5. Rather than clutter this pleading, LPPC notes that between pages 9 and 20 of its Motion (Letter and NLA Protective Order Motion pages 11-22), NLA specifically waived its objections to Interrogatories Nos. 7 through 10, 12 through 23, 25-26, and 28 through 31 and responded to them.
[9] *Id.* at p. 1.
[10] *Id.*

is not a party."[11] The Board did ***not*** address the merits of NLA's "various relevance, burden, and confidentiality objections,"[12] but left them to be resolved by the parties, which was done. In sum, there is nothing in the Board's *June 1, 2021 Decision* that supports DSRR's comment that the Board "rejected" a claim raised by NLA in its Motion filed in February 2021 that DSRR's discovery was "too soon." In the interim, LPPC and SEAEDD had responded to DSRR's discovery requests.

On June 15, 2021, NLA filed a status report with the STB in which it noted that it had conducted a further review that:

> revealed relevant documents that correct and clarify prior responses to Interrogatories Nos. 7 and 13. In addition, NLA has adopted by reference certain documents that were previously submitted to DSR's counsel by LPPC and SEAEDD in their responses to Interrogatories Nos. 15, 16, 17, and 27.[13]

This submission included several additional documents that had previously been overlooked, as well as confidential documents that were filed under seal. NLA simultaneously filed a new Motion for Protective Order that, after LPPC filed a correction a few days later, was granted by the Board on June 23, 2021. Thereafter, the confidential materials were released to DSRR.

While DSRR has deemed it necessary to present its misleading analysis of the steps that NLA took in early 2021, the LPPC Parties must note that DSRR never mentioned the Board's decision, served February 9, 2022. As succinctly

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[11] Slip Op. at pp. 3-4
[12] *Id.* at p. 4.
[13] *See* letter, dated and entered as part of the Public Record on June 15, 2021, at p. 1. A true copy of the letter is attached hereto.

stated therein, after the Board had resolved certain discovery issues and "directed the parties to report the status of any remaining discovery issues… the Board thereafter acknowledged the parties' reports that discovery issues had been resolved."[14]

In NLA's status report, it was also explained that ***"[d]uring the course of conferring with DSR's counsel, an agreement was reached that it* would *not be necessary to reproduce documents that have already been produced by LPPC and SEAEDD."***[15] Thomas J. Healey, Esq., DSRR's then-attorney, who has many years of experience before the STB, never contested the foregoing statement or the practice that serves to reduce the number of copies of identical material that must be filed in response to Requests for Production of Documents. As is now apparent, DSRR's current attorneys of record have not honored the earlier agreement reached with their predecessor. Instead, they repeatedly insist that the LPPC Parties "continue to reply jointly to discovery as though they can piggy-back on one another, point fingers at one another, or not produce responsive documents in the hopes that another party will produce the identical document."[16] DSRR's current counsel take the case as they found it, and are bound by prior counsel's representations and agreements.

DSRR's speculative claims that each of the LPPC Parties has failed to "conduct a thorough search of its own hard-copy documents, electronic files,

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[14] February 9, 2022 decision at p. 1.
[15] June 15, 2021 letter at p. 1
[16] DSSR April 3, 2024 Letter at 2.

email, etc., for materials related to issues that they have placed in the record,"[17] are baseless. The fact is that counsel engaged on an individual basis with all persons at LPPC, SEAEDD and NLA who were identified as being involved in this proceeding to ensure that they diligently examined documents in their personal possession, in both paper as well as in electronic form, to identify information that would be responsive to DSRR's inquiries.

Without question, the LPPC Parties have been engaged for 20 years in a joint effort to prevent the Line's abandonment (effectively or formally). To do so, they were forced to acquire and rehabilitate other segments of the Line in order to counter the massive damage that has been done by DSRR and to address the economic harm that has been inflicted on shippers and industries in Northeast Louisiana and Southeast Arkansas.

Those joint efforts do not extend to discovery in this proceeding. DSRR's speculative allegations that the LPPC Parties have not independently conducted their own, individual efforts to respond to all of DSRR's relevant discovery requests, or that the LPPC Parties are engaged in "more gamesmanship … to prevent DSRR from obtaining the materials needed to defend against the baseless allegations that have been made against it,"[18] are not credible. As stated above, each of the LPPC's Parties conducted their own searches and did not plot with one another to deny DSRR access to any relevant evidence.

[17] *Id.* at p. 3.
[18] *Id.* at p. 2.

4. DSRR's Recent Pleadings Ignore the Protective Conditions Set Forth in 49 C.F.R. § 1114.21(c).

DSRR's April 3, 2024 Letter, and the U.S. District Court Magistrate Judge's Orders attached thereto, suggest that DSRR is intent on requiring the Board to strictly apply the Federal Rules of Civil Procedure ("Federal Rules") in this matter. The Board, however, has explicitly ruled that in discovery matters, it is "neither governed nor limited by the Federal Rules." *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company,* NOR 42022, slip op. at 3-4 (STB served Feb. 5, 1998). While the Magistrate Judge deemed responses that claim that a request is "overly board and unduly burdensome" as meaningless boiler plate, the Board, in *FMC Wyoming* specifically condemned requested discovery that was "burdensome on its face."[19]

As the Board has long recognized:

> Under 49 C.F.R. 1114.21(a) and (c), discovery must be "*relevant* to the subject matter involved in a proceeding" or be "reasonably calculated to lead to the discovery" of *relevant* evidence. The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Under CFR 1114.21(c), discovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

See, e.g., Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, AB-124 (Sub-No. 2), slip op. at 2 (served November 14, 2003).

[19] Slip Op at p. 5.

With few exceptions, the LPPC Parties' objections contest the relevancy and the undue burden that production of irrelevant documents would place on the LPPC Parties.

5. DSRR's Complaints Regarding LPPC's Expansive Explanation In The LPPC Parties' Joint Reply Regarding LPPC's Reply To RFP No. 29, Which Pertains To The Near Total Lack Of Communications With The List Of Twenty Nine (29) Shippers Are Specious.

There is no reason for the fuss that DSRR makes over Wyly Gilfoil's sworn statements in his response to RFP No. 29 or in the Joint Reply that LPPC "has had no communications with any of the foregoing entities [namely the twenty three (23) companies that are listed in RFP No. 29] that relate to rail service provided by either DSRR or NLA from 2017 to the present date,"[20] and that LPPC, with the exception of documents related to the APEX incident that involved both NLA and DSRR, "does not have any documents from any of the other foregoing entities that relate to rail service provided by either DSRR or NLA from 2017 to the present date."[21]

While DSRR touts the statement from the Magistrate Judge that "parties cannot hide behind the statement that they are 'not currently aware' of responsive documents and are obligated to thoroughly search for responsive documents,"[22] the phrase "not currently aware" was never expressed in the Joint Reply or in LPPC's *Response to Third Set of Discovery Requests Propounded by Delta Southern Railroad*.

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[20] March 8, 2024 DSRR Motion to Compel at p. 16.
[21] *Id.*
[22] DSRR April 3, 2024 Letter at p. 7.

Nor is there anything to support DSRR's suggestion that "NLA is thrown under the bus by LPPC's response."[23] As explained above, LPPC provided a series of emails to DSRR in 2021 that concerned service complaints. Attention is also invited to the various documents that were provided to the Board in 2023 related to APEX's well-documented complaints about the service provided by both DSRR, which has failed to maintain the segment of its track between mileposts 471.0 and 472.25, which NLA must traverse to provide service to APEX (which is located within the Lake Providence Port), and NLA, which also experienced issues with track located inside of the Port.

DSRR's statement that "if LPPC parties are saying that LPPC (or any other supporting party) will not introduce evidence related to potential customers in this feeder line case, DSRR would be willing not to further pursue these documents"[24] is way off the mark. As the Board has repeatedly explained, it "looks to former, current, and potential shippers when examining" the issue of whether "transportation over the line is inadequate for the majority of shippers who use the line." *See, e.g., KCVN, LLC and Colorado Pacific Railroad, LLC—Feeder Line Application—Line of V and S Railway, LLC, Located in Crowley, Pueblo, Otero, and Kiowa Counties, Colorado*, FD 36005, slip op at 10 (STB served July 31, 2017); *see also Int'l Port of Coos Bay—Feeder Line Application-- Coos Bay Line of the Cent. Or. & Pac. R.R.*, FD 35160, slip op. at 6 (STB served Oct. 31, 2008); *Pyco Indus.—Feeder Line Application—South Plains*

[23] *Id.*
[24] *Id.*

Switching, Ltd., 34890 (STB served Aug. 31, 2007); *Keokuk Junction Railway Company-Feeder Line Acquisition—Line of Toledo Peoria, and Western Railway Corporation Between La Harpe and Hollis, IL*, 7 S.T.B 893, 898 (2004).

Conclusion

The Board should strike DSRR's April 3, 2024 Letter as an impermissible reply to the reply under 49 C.F.R. § 1104.13(c).

Respectfully submitted,

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Southeast Arkansas Economic Development District
North Louisiana and Arkansas Railroad, Inc.

Dated: April 10, 2024

Certificate of Service

It is hereby certified that a true and accurate copy of the foregoing Joint Petition has been served via email on all Parties of Record on the Service List (including ALJ McCarthy) this 10th day of March2024.

/s/ Richard H. Streeter