

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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July 16, 2024
Part of
Public Record

Finance Docket No. 36447

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

**REPLY OF LAKE PROVIDENCE PORT COMMISSION TO
DELTA SOUTHERN RAILROAD, INC.'S MOTION TO DISMISS
AND FOR ATTORNEYS' FEES**

Lake Providence Port Commission (“LPPC”), a governmental entity of the State of Louisiana, by and through its counsel of record, respectfully requests the Surface Transportation Board (“Board” or “STB”), consistent with its ruling in *Eastside Community Rail, LLC--Acquisition & Operation—GNP RLY, Inc., slip op. 3-4* (STB served March 8, 2022), to not decide the Motion to Dismiss and for Attorneys’ Fees (“Motion”) ¹ filed by Delta Southern Railroad, Inc. (“DSRR”) until after LPPC’s authority to acquire rail-related property outside East Carroll Parish is clarified.

DSRR’s latest Motion to Dismiss² is based on a recent decision of an ad hoc judge for the Sixth Judicial District of East Carroll Parish, Louisiana that

¹ Because DSRR’s Motion seeks dismissal, it must be decided by the Board, and not by Administrative Law Judge McCarthy (who was assigned to address discovery disputes, but not the merits of the Amended Application).

² Previous efforts by DSRR to reject the Application have been denied by the Board. *See, e.g.,* Decision served November 20, 2023 (“*November 20 Decision*”).

found that LPPC, its Commissioners, and its Executive Director, Wylly Gilfoil, have no authority to acquire rail property outside of East Carroll Parish, LA where LPPC is located.³ As is demonstrated hereinafter, the court's amended judgment and order, which clearly clashes with past decisions made by Louisiana State officials other than LPPC, was timely appealed on July 3, 2024 by LPPC, its Executive Director, and the individual Commissioners of LPPC.⁴

Moreover, to avoid further controversy regarding LPPC's authority to pursue the Amended Application herein, on July 3, 2024, LPPC filed a Petition for Declaratory Judgment in the Sixth Judicial District in Tensas Parish, LA that would affirm LPPC's authority, under agreement with the Northeast Louisiana Multimodal Development District ("NELMMD"), to act as NELMMD's agent to acquire property for railroad development in Concordia, Tensas, and Madison Parishes, as well as in East Carroll Parish.⁵

Because LPPC is hopeful of obtaining a reasonably prompt ruling in response to that Petition that would resolve the issue that DSRR has belatedly raised, the Board should decline DSRR's demand that the Board rush to

³ By letter dated July 3, 2024, DSRR submitted the East Carroll Parish trial court's Amended Judgment and Order, dated June 26, 2024.

⁴ The East Carroll Parish trial court's amended judgment and order was issued in Civil Docket No. 23740 and was provided to the Board by letter from DSRR's counsel dated July 3, 2024. A copy of the appeal, titled a "Motion for Suspensive Appeal," was provided to the Board by letter dated July 5, 2024 from LPPC's counsel.

⁵ A copy of the Petition for Declaratory Judgment was provided to the Board by the July 5, 2024 letter from LPPC's counsel. It is noted that because the boundary between East Carroll Parish and Madison Parish is located at MP 488.61, the vast majority of the track between MP 471.0 and MP 491.0 is located in East Carroll Parish.

terminate this proceeding. Moreover, because DSRR waited for over three years and seven months to question LPPC's statutory authority, the Board should summarily reject DSRR's request for expedited consideration of its most recent motion to dismiss, as well as its request for attorneys' fees.⁶

Nevertheless, LPPC respectfully requests the Board to take official notice of the fact that **before** LPPC filed its initial Feeder Line Application in November 2020,⁷ it had to first file an application with the Louisiana Department of Transportation & Development ("DOTD") and to obtain the DOTD's approval, as well as that of the State's economist, to acquire and restore lines of railway outside of East Carroll Parish. Furthermore, because all lines of railroad and related facilities that may be acquired **would be owned by the State of Louisiana**, LPPC's application had to be sent to, and approved by, the

⁶ It is uncontested that LPPC is fully authorized to acquire the segment of the Lake Providence Branch that extends from MP 471.0 to MP 488.61, which marks the boundary of East Carroll Parish and Madison Parish. Because that artificial break in the Line would not facilitate efficient and economical rail transportation service over the Line it would undermine the reasons for filing the amended Feeder Line Application and would not satisfy the public convenience and necessity requirement of 49 U.S.C.A. § 10907(c). Nevertheless, LPPC's uncontested authority to acquire the portion of the rail line in East Carroll Parish alone justifies denial of the Motion.

⁷ Contrary to the erroneous statement at p. 3 of DSRR's latest Motion to Dismiss, that "this proceeding started in November of 2021," LPPC filed its initial Feeder Line Application on November 12, 2020. By November 1, 2021, the Board had (a) established and (b) suspended its original procedural schedule, (c) DSRR, after changing attorneys in late January 2021, had launched its first round of discovery against LPPC, SEAEDD and NLA, (d) which responded to DSRR's discovery requests and (e) DSRR's then-counsel agreed that discovery had been satisfactorily concluded. At no time until the filing of the Motion, three years and seven months after this proceeding was commenced, did DSRR ever question LPPC's statutory authority to acquire a line of railroad outside of East Carroll Parish.

Louisiana Legislature’s Joint House and Senate Committees on Transportation, which allocated multi-millions to help finance the projects. This process results in the establishment of *State Projects*.

Such State Projects, as explained at p. 19 of LPPC’s Amended Feeder Line Application, have included LPPC’s previous efforts to acquire all of the other segments of DSRR’s tracks. In AB-384 (Sub-No. 3X), *Delta Southern Railroad, Inc. – Abandonment Exemption – in Desha and Chicot Counties, ARK -- In the Matter of an Offer of Financial Assistance*, the Board, by its decision dated May 19, 2011, authorized LPPC and Arkansas Shortline Railroads, Inc. to acquire a 24.1-mile segment of the Lake Providence Branch Line between MP 408.9 at or near McGhee, AR and MP 433.0 at or near Lake Village, AR. That segment obviously is *not* located in East Carroll Parish, LA.

Before LPPC filed the OFA, it had already filed an application with the Louisiana State Bond Commission (“Bond Commission”) seeking authority from the Bond Commission and its members to incur debt and issue Taxable Revenue Bonds for the purpose of acquiring railroad tracks and property easement that were and are located in Arkansas.⁸ As explained at n. 3 of the *Joint Offer of Financial Assistance* filed on April 4, 2011,⁹ by LPPC and

⁸ The LA State Bond Commission’s statutory authority is provided by LA R.S. 34:1504 immediately after LA R.S. 34:1503, which establishes the broad range of rights and powers of the Lake Providence Port Commission.

⁹ For the convenience of the Board, a copy of the *Joint Offer of Financial Assistance (OFA)* to acquire DSRR’s rail lines in Rail Lines from DSRR in Desha and Chicot Counties, Arkansas is attached as Attachment 1 (outdated financial data submitted by NLA has been omitted).

Arkansas Short Line Railroads, the Bond Commission, on March 1, 2011, had “approved a Certificate of Indebtedness for the benefit of the Port Commission.” As was also noted, the “Port Commission is in the process of obtaining the necessary banking consents, has submitted all requested paperwork, and expects to receive approval in less than 10 days.”¹⁰

What was not mentioned in the Joint OFA is the fact that the Louisiana Legislature’s Joint House and Senate Committee on Transportation, after considering LPPC’s Application No. L11-023, had previously authorized LPPC to file its OFA with the Board to acquire the remaining segments of the Lake Providence Branch Line that were not located in East Carroll Parish but were required if rail transportation moving to and from the Lake Providence Port were to be restored.¹¹ It was only then that the matter was considered by the Bond Commission.

That same basic approach highlights the fact that the provisions of LA R.S. 34:1503C have been recognized by the Louisiana Legislature, the DOTD and the Bond Commission as authorizing LPPC to pursue the acquisition of lines of railroad track and property that is not located in East Carroll Parish. Simply stated, if LPPC can acquire lines of railroad located in Arkansas to assure the continuation of rail services to and from LPPC’s port facilities located East Carroll Parish that are within the Port’s jurisdiction, the same is

¹⁰ *Id.*

¹¹ The Certificate, dated March 10, 2011, issued by the State Bond Commission that reflects the members and the parties that they represent, is attached hereto as Attachment 2.

true of railroad lines that are located in the three Parishes that are located to the south of East Carroll Parish in Madison Parish, Tensas Parish and Concordia Parish.

In this regard, the Board should note that the first sentence of LA R.S. 34:1503C explicitly provides that “[t]he commission shall regulate the commerce, and traffic, within such port area in such a manner as may, in its judgment, be for the best interests of the state.” As also provided therein, the commission is authorized “to construct, own, operate and maintain terminal rail facilities, and ***other common carrier rail facilities for the purpose of rendering rail transportation to and from the facilities to be elected, owned and operated by the commission in both intrastate and interstate commerce.***” (Emphasis added). The track at issue herein clearly fits that description as it has previously been used to render rail transportation to the facilities located inside of the Lake Providence Port.

The Board’s attention is also invited to State Project No. H.014377. As explained in LADOT’s 31st Annual Report, “[t]he purpose of the project is to support construction of both harbor and rail improvements. These improvements will allow the port to maintain and upgrade its high level of cargo handling and shipping capacity in the agricultural region and marketplace of northeast Louisiana and southeast Arkansas.”¹²

¹² See, the 31st Annual Report was prepared by the Port Priority Program, LADOTD, Office of Multimodal Commerce January 2024. The relevant portions thereof are found in Attachment 3 hereto.

As recently explained in a letter, dated May 10, 2024, to Wyly Gilfoil from Mary “Molly” Bourgoyne, Director of Ports, Office of Multimodal Commerce:

The Port of Lake Providence submitted an application to the Louisiana Port Construction and Development Priority Program (PPP) in calendar year 2017 for H.014377 – Multimodal Freight Corridor Improvements. The application was evaluated and approved by DOTD staff as well as the state economist. It was then sent to and approved by the Louisiana Legislature’s Joint House and Senate Committees on Transportation. The project was approved for \$11,484,000, and has since been fully funded. On September 3, 2020, the Port of Lake Providence entered into an Intergovernmental Agreement with the State of Louisiana, Department of Transportation and Development. This Agreement provides for the full funding of the Multimodal Freight Corridor Improvements project.¹³

More recently, in calendar year 2022, LPPC submitted an Application to the Louisiana Port Construction and Development Priority Program (“PPP”) denominated as *H.015635 – Reconstruction of Railroad – Tallulah to Newellton*. The Application was evaluated and approved by DOTD staff as well as by the state economist. It was then sent to and approved by the Louisiana Legislature’s Joint House and Senate Committee on Transportation.¹⁴

The foregoing conclusively demonstrates that LPPC has the authority to file its Amended Feeder Line Application to acquire rail facilities from DSRR that are located in Madison Parish. Those facilities, when restored, will allow for the continuation of rail services to the port facilities that are located within

¹³ A copy of Director Bourgoyne’s letter is attached hereto as Attachment 4.

¹⁴ See Attachment 5, Letter written by Director Bourgoyne to Wyly Gilfoil dated May 9, 2024.

East Carroll Parish. Accordingly, DSRR's motion seeking dismissal lacks merit and should be denied.

In summary, the East Carroll Parish trial court's decision cannot be squared with multiple decisions of the Louisiana Legislature's Joint House and Senate Committees on Transportation to allocate millions of dollars of funds to LPPC to be used to acquire rail facilities outside of East Carroll Parish, as well as actions taken by the Louisiana Bond Commission pursuant to its authority granted by LA R.S. 34:1504 that authorized LPPC to issue bond in its name to acquire rail facilities in Arkansas that are clearly located outside of East Carroll Parish.

Given that the Louisiana Legislature has previously allocated funds for the purpose of allowing LPPC to acquire the rail line at issue herein, and given that the Louisiana Bond Commission has authorized LPPC to issue bonds to acquire railroad facilities that are outside of East Carroll Parish, LPPC urges the Board, as soon as possible, to find, based on the filing of LPPC's testimony concerning the Constitutional Minimum Value on July 5, 2024, that LPPC's Amended Feeder Line is complete and to establish a procedural schedule.

As stated *supra*, LPPC and NELMMD filed a Petition for Declaratory Judgment to define LPPC's authority to acquire rail-related property outside of East Carroll Parish as agent of NELMMD. By way of background, given the tremendous economic importance of the Louisiana ports and the need for the ports to work with one another, the Louisiana Legislature has authorized the creation of Railroad Development Districts composed of two or more parishes

that are intended to promote and encourage the development of rail service in the area of the member parishes.

In 2022, NELMMD was created pursuant to LA R.S. 33:140.71 for the purpose of promoting and encouraging development of rail service in and among the ports that are located along the Mississippi River in Concordia, Tensas, Madison, and East Carroll Parishes. In large measure this effort is driven by the need to counter the seasonal shifts in the depths of the Mississippi River that hamper the movement of goods by water between the ports in northeast Louisiana.

NELMMD is endowed with all powers necessary or convenient for the carrying out of its objects and purposes. Such powers include, but are not limited to the power:

[t]o acquire, whether by purchase, expropriation, exchange, gift, lease, or otherwise, and to construct and improve, maintain, equip, and furnish, one or more railway development project(s), including all real and personal properties which the board of commissioners may deem necessary in connection therewith. La. R.S. 33:140.73.

As discussed above, the Louisiana Legislature's Joint House and Senate Committees on Transportation have already approved several projects that have involved applications filed by LPPC that involve property outside of East Carroll Parish. In this regard, it is important to understand that the properties that are acquired are owned by the State of Louisiana.

Accordingly, either under its own statutory authority, or as agent for NELMMD, LPPC has authority to acquire rail-related property not only in East Carroll Parish, LA, but also in Concordia, Madison, and Tensas Parishes, LA.

As is the case herein, the exercise of such authority is subject to the STB's approval.

There is no legitimate basis to reward DSRR attorney fees.

If DSRR hadn't waited for over three years and seven months to question LPPC's statutory authority, this issue could have been resolved in 2021 at minimal cost. Hence, the Board should reject and summarily deny DSRR's request for expedited consideration of its request for attorneys' fees.

As shown above, LPPC has at all times acted within the scope of authority that it has been granted by the State of Louisiana. While DSRR claims that it has been forced to spend a large sum of money to respond to LPPC's discovery requests (which were explicitly authorized by the *November 20 Decision*), the same is true of LPPC and the citizens of Louisiana who have not only had to respond herein to repeated rounds of discovery from DSRR, but also have been forced to spend a substantial amount of time of clients and counsel, and to expend scarce public resources, to counter DSRR's decade-long refusal to rehabilitate the track between MP 471.0 and MP 491 that must be rehabilitated before efficient and economical interchange traffic can resume.

LPPC, SEAEDD and NLA have been compelled to respond to waves of discovery from DSRR that began in early February 2021 and that have continued to the present date. Even if DSRR cannot be faulted for seeking relevant discovery *after* the Board determined in January 2021 that LPPC's original application was complete and established a procedural schedule, the same thing cannot be said of its latest round of discovery that was launched in

January 2024, some two months after the Board in its *November 20 Decision* concluded that LPPC’s “amended application contains substantially all of the other information required by 49 C.F.R. § 1151.3(a), including information pertaining to criteria (A) and (E) of the PC&N criteria specified at § 1151.3(a)(11)(i).”¹⁵

While the Board did not authorize (at least, in so many words) DSRR to file yet another round of discovery, it made it crystal clear that “DSRR’s blanket objections to any discovery misconstrue the applicable regulations* and misdescribe the related process,”¹⁶ and also recognized that allowing L. E. Peabody, Inc. to verify or adjust its calculation of the Constitutional Minimum Value “should help to minimize or eliminate the need for LPPC to adjust its calculations later because it lacked access to DSR’s internal valuation information.”¹⁷

The Board’s decision, served December 11, 2023 (“*December 11 Decision*”), recognized that LPPC had fully complied with the requirements that had been specified by the Board in its November 20, 2023 decision. In defining permissible discovery at that stage, the Board specifically stated that “LPPC’s request for discovery relating to valuation may move forward under the process specified in the *November 20 Decision*.”¹⁸ Even though neither the *November 20* nor the *December 11 Decisions* provided that DSRR could pursue additional

¹⁵ *November 20 Decision* at 12.

¹⁶ *November 20 Decision* at 14 (*footnote omitted).

¹⁷ *Id.*

¹⁸ *December 11 Decision* at 2.

discovery until after the Board found LPPC's amended Feeder Line Application to be complete, on January 3, 2024, DSRR propounded a third round of discovery against LPPC and a second round against SEAEDD and NLA.

In response, LPPC's undersigned attorneys, who together have over 100 years of experience practicing before the ICC and STB, relied on their interpretation of the full context of the Board's *November 20* and *December 11 Decisions* to independently conclude that, while the Board had limited discovery at that point in time to "discovery relating to valuation," the Board had not authorized DSRR to propound further discovery requests before the Board accepted LPPC's Amended Feeder Line Application and issued a new procedural schedule.

Hence, on February 5, 2024, LPPC, SEAEDD and NLA, in addition to substantively responding to nearly all of DSRR's latest discovery requests, generally objected "to each and every Interrogatory and RFP to the extent that they are not relevant to the issue of valuation, which is the only subject as to which the Board provided for further discovery in its Decision served herein on November 20, 2023, slip op. at 16; *see also*, Decision served herein on December 11, 2023, at 1, citing Decision served herein on November 20, 2023, Decision at 16."

The General Objection mirrors the rationale that DSRR's current attorney expressed in a letter, dated January 21, 2023, that was addressed to LPPC's counsel. As stated therein:

The Board has yet to accept LPPC's renewed application of January 4, 2023, or set a procedural schedule, and DSRR has filed a motion to reject LPPC's new application and to terminate the case proceedings. Even if, as a procedural matter, LPPC were permitted to conduct discovery at this time, DSRR's motion to reject LPPC's application would render any discovery provided completely moot. And conduct of extensive discovery would be a waste of resources, constituting an undue burden on DSRR.

Notwithstanding the fact that the Board's *November 20* and *December 11 Decisions* limited discovery to valuation so that LPPC could complete its Amended Application, DSRR chose to conduct an extensive campaign to compel LPPC, SEAEDD and NLA to respond to numerous discovery requests to each of them that not only wasted DSRR's resources but also those of LPPC, SEAEDD and NLA.

Immediately following the filing on February 5, 2024 of the Responses to DSRR's January 3, 2024 discovery requests, DSRR objected to the Responses filed by LPPC, SEAEDD, and NLA in three virtually identical letters, dated February 9, 2024 and February 12, 2024. While DSRR counsel agreed that "[t]he STB found that LPPC could conduct discovery at this stage, on the limited issue of valuation of the line—which was the only subject LPPC sought discovery regarding to complete its application," it otherwise relied on the Board's assignment to ALJ McCarty of "any other discovery matters that may arise in this proceeding" to support DSRR's alleged right to propound its latest round of discovery requests. The letters concluded with the demand that LPPC, NLA and SEAEDD must withdraw their objections.

Rather than quarreling with DSRR, which would needlessly increase the cost of litigation, LPPC's attorneys reached out to ALJ McCarthy on February

20, 2024 and asked him to decide whether only LPPC was entitled to pursue further discovery prior to the release of the Board's determination that it would accept LPPC's Amended Feeder Line Application and establish a procedural schedule. A second request for clarification was filed with ALJ McCarthy on March 8, 2024. It was only after LPPC, SEAEDD and NLA filed an Emergency Motion regarding whether the Board's *November 20* and *December 11 Decisions* permitted DSRR to pursue further discovery prior to the Board's acceptance of LPPC's Amended Feeder Line Application, that ALJ McCarthy issued his decision in which he relied on a sentence at page 15 of the *November 20 Decision* to conclude that DSRR could propound further discovery requests before a procedural schedule was released. Thereafter, the discovery issues were quickly resolved because LPPC, NLA, and SEAEDD submitted supplemental responses to DSRR's January 3, 2024 discovery requests.

As the Board is aware, although LPPC, NLA, and SEAEDD continue to question whether the Board authorized DSRR to propound further discovery requests in its *Nov. 20 Decision*, they, unlike DSRR, chose to proceed without incurring needless, additional attorneys' fees. In sum, there is no basis here for criticism of LPPC, NLA, SEAEDD, or their counsel. Thus, there is no basis for granting DSRR's request for attorneys' fees. *Compare Consolidated Rail Corp.—Abandonment Authority—in Hudson County, NJ*, Docket No. 167 (Sub-No. 1189X), served April 28, 2017 (at 5-11) (conduct of James Riffin was extreme and occurred over a long period of time).

The Board's criticism of Mr. Riffin cannot be applied to LPPC's counsel or their multiple clients. As the record reflects, LPPC, NLA, and SEAEDD have spent countless hours responding to the DSRR's repeated rounds of discovery, including their responses to DSRR's latest discovery requests.

The sole instance where any of them balked at responding to discovery was in February 2021, when NLA did not consider itself to be a "party" to the proceeding. Even then, NLA voluntarily agreed to waive its objection to specified interrogatories that sought the release of highly confidential and proprietary shipper information that is protected by 49 U.S.C. § 11904 if the Board would grant it relief through a protective order. DSRR, however, chose to oppose that request. However, after the Board granted a protective order on June 23, 2021, NLA immediately released the requested documents and DSRR's then-counsel, by letter filed June 30, 2021, agreed that discovery had been satisfactorily concluded.

In any event, DSRR could have challenged LPPC's authority to acquire property, including rail-related property, outside East Carroll Parish, LA at any time in this proceeding. Instead, it first subjected LPPC, NLA, and SEAEDD to either two or three rounds of discovery, most recently on January 3, 2024, and moved to compel further responses to those discovery requests through three separate motions to compel. Only after LPPC, NLA, and SEAEDD provided their supplemental responses to those discovery requests did DSRR file its Motion. Given that DSRR's Motion is based on its view of LPPC's statutory authority,

DSRR could have filed its Motion *prior to* propounding its wholly unnecessary and wasteful January 3, 2024 discovery requests.

Plainly, it is DSRR, not LPPC, NLA, and SEAEDD (or their counsel), that has engaged in unnecessary litigation efforts, causing all parties to incur substantial costs and attorneys' fees. Hence, there is no basis to award DSRR attorney fees.

Conclusion

DSRR's Motion to Dismiss and for Attorneys' Fees should be denied, or, in the alternative, deferred until LPPC's statutory authority to acquire rail-related property outside of East Carroll Parish, LA has been clarified.

Respectfully submitted,

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