

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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ENTERED
Office of Proceedings
July 6, 2016
Part of
Public Record

C. L. CONSULTING AND MANAGEMENT)
CORP.—PETITION FOR DECLARATORY)
ORDER—REASONABLENESS OF) DOCKET NO. FD 36042
DEMURRAGE CHARGES)

PETITIONER'S MOTION FOR LEAVE TO FILE
RESPONSE TO REPLY

C. L. Consulting and Management Corp. (CLC), by and through counsel of record, hereby moves for leave to file the attached Response to the Reply filed by Norfolk Southern Railway Company (NSR). As the Board has recognized, a reply to a reply is permitted for "good cause," especially when the tendered response affords the Board the opportunity to reach a fully informed decision.

In its Reply to CLC's petition, NSR has misled the Board by insisting that the magistrate judge in the District Court case declined to refer to the Board the issue that CLC has raised in its petition and that the law of the case prevents the Board from exercising its primary jurisdiction. CLC must be afforded the right to reply in order to demonstrate that the law of case would not preclude the Board from issuing a declaratory order that would resolve a major component of the dispute.

In its Reply, NSR, citing 49 C.F.R. § 171.1 has also argued that as "a matter of law, if a shipment is hazard when it is tendered to a carrier, it

remains a hazard shipment throughout its journey.”¹ In making that argument, NSR ignores various regulations that recognize that an “elevated temperature material” such as asphalt, as its temperature declines to less than 212° F, will no longer be deemed a hazardous commodity despite the fact that it was offered for transportation when it was characterized as an “elevated temperature material.”

Although NSR also claims that it would be an incredible burden on interstate commerce to require rail carriers to stop at various points in transit to test their hazardous loads, ensure that they remain hazardous, and to re-placard the cars in transit if the temperature falls to or within a certain range, that is little more than a straw-man argument that does not withstand close scrutiny. That argument disregards the fact that there is no requirement that a tank car loaded with elevated temperature must be placarded. See 49 C.F.R. § 172.502(b)(2). In order that CLC may demonstrate that specious nature of that unsupportable argument, which not only could not have been anticipated but is central to the resolution of the case, the Board should accept CLC’s Response.

In the final analysis, affording CLC an opportunity to respond to NSR’s frivolous Reply will provide the Board with a more complete record without material delay. By exercising its primary jurisdiction, the Board will ensure a consistent resolution of the unique factual issue presented: whether a material,

¹ Reply at 13.

after being offered in transportation as an “elevated temperature material,” which caused it to be recognized at origin as a “hazardous material,” is subject to an additional storage charge as a “hazardous material,” when, before being placed in storage, it had cooled to a temperature that had removed it from PHMSA’s definition of an “elevated temperature material.” Because this appears to be an issue of first impression, the Board should accept CLC’s Response so that the Board will have a complete record on which to reach a fully informed decision.

Respectfully submitted,

/s/ Richard H. Streeter

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Dated: July 6, 2016

Certificate of Service

I hereby certify that on this 6th day of July 2016, I caused a copy of Petitioner's Motion for Leave to File Response to Reply and Petitioner's Response to Reply to Petition for Declaratory Order to be served on the following party by first class mail, postage prepaid, or more expeditious method delivery:

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/s/ Richard H. Streeter
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