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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ST. LAWRENCE & ATLANTIC RAILROAD)	
COMPANY -- DISCONTINUANCE OF)	Docket No. AB-1117X
SERVICE EXEMPTION -- IN)	
ANDROSCOGGIN AND CUMBERLAND)	
COUNTIES, MAINE)	
)	

**MOTION TO STRIKE OR, IN THE ALTERNATIVE,
REPLY OF B&G FOODS NORTH AMERICA, INC.**

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Dated: January 6, 2014

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B&G Foods North America, Inc. (“B&G”), submits the following motion to strike or, in the alternative, reply to the reply (“Reply”) that St. Lawrence & Atlantic Railroad Company (“SLA”) filed with the Surface Transportation Board (“Board” or “STB”) on December 27, 2013, in response to the Protest and Comments that B&G filed on December 17, 2013, regarding the petition for exemption that SLA filed on November 8, 2013, in STB Docket No. AB-1117X to discontinue service over a rail line of approximately 24.3 miles in Androscoggin and Cumberland Counties, Maine.

SLA’s filing is a reply to a reply (B&G’s Protest and Comments of December 17, 2013) and should be struck for that reason alone. 49 C.F.R. § 1104.13(c). At 1 n.1 of its Reply, SLA references the reply procedures for an application for discontinuance. However, SLA, having chosen to file a petition for exemption in order to avoid the requirements for a full application, is not entitled to rely on the procedural protections for an application it never filed. It was also inappropriate for SLA to seek the expedition of an exemption based on information that SLA now acknowledges “could be

misleading” (Jones VS, ¶3). SLA thus seeks the “best of both worlds” (application and exemption) when it qualifies for neither. Accordingly, SLA’s reply should be struck. If, however, SLA’s Reply is considered, then B&G should be allowed to reply for the same reasons invoked by SLA.

SLA’s Reply does little to bolster its case. SLA acknowledges that it has understated B&G’s expected traffic by at least 50%. SLA Reply at 3. B&G’s need for continued rail service is thus substantially greater than SLA originally acknowledged.

SLA has also failed to establish the extent of its alleged burden. SLA claims its costs “greatly exceed its revenues,” *id.*, but SLA still has not provided any information regarding its actual maintenance and related costs. SLA does claim that those costs increase as B&G’s volumes increase. *Id.* at 4. But if SLA’s costs are volume-related, then the same should apply to Burlington Northern (“BN”) in SLA’s chosen cost proxy.¹ Since BN moved substantially greater volumes than SLA (and BN operated over excepted track instead of Class II track), it follows that SLA’s proxy overstates SLA’s actual costs. *See* B&G Protest and Comments at 10-12. SLA has not established its own cost burden.

SLA’s position ultimately appears to be (a) that its costs, whatever they may be, “greatly exceed its revenues” from B&G’s traffic, and (b) that if the value of rail

¹ *Burlington Northern Railroad Company--Abandonment--In Crawford and Labette Counties, KS*, ICC Docket No. AB-6 (Sub-No. 300) (STB served Feb. 1, 1989), 1989 ICC Lexis 22 at *17, 1989 WL 237878 (discussed in SLA Petition at 4).

service to B&G exceeds SLA's costs, then B&G's appropriate remedy is to subsidize the line through an Offer of Financial Assistance ("OFA"). SLA Reply at 3-4, 5-6.

SLA misstates the governing standard as well as B&G's position. B&G did not suggest that added cost to B&G suffices, by itself, to prevent discontinuance. SLA Reply at 5. However, the fact that continuing to provide service poses a burden on the carrier (*id.*) is also not enough permit discontinuance. Instead, the standard requires the potential harm to shippers from discontinuing service to be weighed against the present and future burden to the carrier from continuing to provide service. *See, e.g., Colorado v. United States*, 271 U.S. 153 (1926); *Chi. & N.W. Transp. Co.--Aban.*, 354 I.C.C. 1, 7 (1977). The factors are to be balanced, and no one factor is conclusive. *E.g., Cartersville Elevator, Inc. v. ICC*, 724 F.2d 688, *aff'd on reh'g, en banc*, 735 F.2d 1059 (8th Cir. 1984).

SLA has not rebutted B&G's showing that the harm to B&G outweighs the burden to SLA. SLA has not even shown that its asserted, but unquantified, burden is particularly significant, especially considering that SLA has already received \$6.8 million from the State of Maine for the right-of-way. SLA cites *Montreal, Maine & Atlantic Railway, Ltd.--Discontinuance of Service and Abandonment--In Aroonstook and Penobscot Counties, ME*, AB-1043 (Sub-No. 1) (STB served Dec. 27, 2010) (SLA Reply at 5-6) to support its position. However, the Board employed a balancing test in that case and explained that, even under the opponents' analysis, the carrier faced an annual burden of \$1.5 million a year, "potentially undermining MMA's service on its other

lines.” *Id.* at 7-9, 15. SLA has not shown any equivalent burden, especially in light of the amounts it has already received from the State of Maine. Again, the increased cost (burden) to B&G substantially exceeds SLA’s claimed operating loss, and SLA’s cited precedent supports B&G’s position, and not that of SLA.

SLA’s OFA fallback argument is also defective. As a threshold matter, OFA procedures become applicable only *after* the discontinuance has been found to be in the public interest. Here, SLA seeks to put the cart before the horse in claiming that the availability of the OFA procedure should be construed to justify the discontinuance. Moreover, the preferable approach, especially under the national rail transportation policy to rely on competition and demand to the maximum extent possible and to minimize the need for Federal regulatory control over the transportation system (49 U.S.C. § 10101(1) and (2)), would be for SLA to revisit its compensation arrangements with its connecting carriers. While SLA indicates that it has discussed increasing B&G’s volumes or changing its operations to reduce costs, SLA’s suggestions are not practicable. In contrast, increased compensation from connecting carriers would benefit SLA (and potentially the carriers themselves compared to the loss of B&G’s volumes) without burdening B&G. SLA gives no indication that it has considered or pursued that option.² An OFA is an incomplete and poor alternative in comparison. B&G would remain

² SLA also gives no indication that it has discussed seeking supplemental compensation directly from B&G. SLA filed its petition without advance consultation with B&G.

dependent on SLA for further movement of the cars. SLA would thus retain the leverage to seek the additional compensation from B&G or its connecting carriers.

In short, SLA has not met its burden to show that the “present or future public convenience and necessity require or permit” the proposed discontinuance. *E.g.*, *Georgia Pub. Serv. Comm’n v. ICC*, 704 F.2d 538, 545-46 (11th Cir. 1983). That burden is not relaxed because SLA has chosen to proceed with a petition for exemption instead of an application (and did so without prior communication to B&G). Indeed, an exemption carries an additional burden to show that regulation is not needed. SLA has not established its costs, shown that its cost burden is particularly significant, or shown that its burden exceeds the harm to B&G. In contrast, B&G has shown that its harm would exceed the burden to SLA (even if SLA’s theorized, but unsubstantiated, cost burden is credited), and it is improper and incorrect for SLA to posit that the infirmities in its request for discontinuance can be cured with an OFA.

Accordingly, SLA’s petition must be denied.

Respectfully submitted,

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Dated: January 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of January, 2014, caused copies of the foregoing document to be served on all known parties of record in STB Docket No. AB-1117X.

/s/ Robert D. Rosenberg