

**Before the
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 12, 2016
Part of
Public Record

**C. L. Consulting and Management Corp. – Petition
for Declaratory Order – Reasonableness of
Demurrage Charges**

DOCKET NO: 36042

**NORFOLK SOUTHERN RAILWAY COMPANY’S RESPONSE IN OPPOSITION
TO PETITIONER’S MOTION FOR LEAVE TO FILE A RESPONSE**

On July 6, 2016, petitioner C. L. Consulting and Management Corp. (“CLC”) filed a motion with the Board seeking leave to file further reply briefing in support of its Petition for Declaratory Order (“Motion”), and then (without awaiting a ruling on its Motion) proceeded with filing the reply brief. Such reply filings are expressly prohibited by 49 C.F.R. 1104.13(c), and CLC has not offered any meritorious basis for the Board to make a special exception here. Accordingly, CLC’s Motion must be denied and its impermissible reply must be struck prior to any substantive consideration.

I. 49 C.F.R. 1104.13(c) Prohibits Replies To Replies

The Board’s prohibition against the filing of reply briefs to reply briefs is unambiguous. 49 C.F.R. 1104.13(c) states clearly that “A reply to a reply is not permitted.” This longstanding rule is “designed to assure a predictable and orderly end to the filing of pleadings.” *Louisville & Jefferson Cty. Riverport Auth.*, 4 I.C.C.2d 749, 750 (I.C.C. July 27, 1988). The Board has also specifically denied leave to file, or struck, reply briefs which seek to, *inter alia*:

- Raise new arguments (*see, e.g., R.R. Ventures, Inc.--Abandonment Exemption*, AB-556 (SUB 2X), 2005 WL 3437630, at *3 (S.T.B. Dec. 14, 2005));

- Rehash or expand upon arguments already made in existing filings with the Board (*see, e.g., Minnesota Power, Inc.*, 4 S.T.B. 64 (1999));
- Provide further briefing on matters already well within the Board’s expertise (*see, e.g., California High-Speed Rail Authority - Petition for Declaratory Order*, FD 35861, 2014 WL 7149612, at *4 (S.T.B. Dec. 12, 2014)); and
- Respond to arguments that should have been anticipated (*see, e.g., Minnesota Power, Inc.*, 4 S.T.B. 64 (1999)).

Here the Board should reach the same result because the existing filings provide sufficient information to resolve CLC’s Petition, and CLC has failed to provide sufficient cause for the Board to deviate from its general prohibition against replies to replies.

II. CLC’s Motion Contains No Meritorious Basis For A Reply Brief

CLC’s Motion simultaneously posits that the arguments appearing in Norfolk Southern’s June 29, 2016 Reply are nothing more than “frivolous”, yet Norfolk Southern’s Reply is so exceptional as to warrant a departure from the Board’s general rules. CLC accuses Norfolk Southern of attempting to mislead the Board about the scope of the New Jersey District Court’s ruling in this case. CLC seeks an opportunity to respond to Norfolk Southern’s argument that CLC’s hazmat arguments are irrelevant due to the unambiguous text appearing in the governing federal regulations. CLC also seeks to inject two new legal theories that appear nowhere in its Petition: that this is a case of first impression, and that the Board should consider CLC’s Petition under the doctrine of primary jurisdiction. None of these arguments provide a meritorious basis for the Board to depart from its established practice of denying replies to replies.

The factual underpinnings of CLC's lead argument - "NSR has misled [sic.] 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" - are unclear. In its Petition, CLC raised a number of non-hazmat reasonableness arguments that were previously raised with the District Court and rejected as a basis for transferring this matter to the Board. *See* Petition at 10-12. For the reasons set forth in Norfolk Southern's Reply, the law of the case precludes re-litigation of those arguments before the Board. *See* Reply at 11-12.

Norfolk Southern's Reply also makes clear that CLC's hazmat argument was first specifically raised in CLC's Answer, which was filed in January of this year - two weeks after CLC's motion to transfer was denied. *See id.* at 6, 11-12. Nowhere in its Reply does Norfolk Southern argue that the law-of-the-case doctrine alone precludes substantive consideration of CLC's latest hazmat arguments. Norfolk Southern's position is simply that CLC's latest reasonableness argument, pertaining to hazmat, does not change the fact that this remains a routine demurrage case that the District Court has already found itself well-equipped to handle.

In any event, *Norfolk Southern* attached the District Court's Opinion and CLC's Answer as exhibits to its Reply, so as to allow the Board to independently review and consider the District Court's filings. To the extent that there are any questions as to the breadth of the District Court's ruling, they can easily be resolved from the text of the Opinion itself. There is no need for further briefing by CLC to explain what is stated in a written opinion that has been provided verbatim to the Board.

CLC's desire to offer additional arguments in support of its hazmat theory also does not make this an unusual circumstance where a reply is appropriate. As noted above, the Board has already determined that reply briefs are not a vehicle to rehash or expand upon arguments already raised in existing filings. *Minnesota Power, Inc.*, 4 S.T.B. 64 (1999). Yet CLC seeks leave to file a reply brief for exactly such a purpose.

CLC implicitly acknowledges this fatal flaw with its argument. Its Motion claims that further briefing is warranted because CLC could not have anticipated Norfolk Southern's argument that the express text of the federal hazmat regulations control the outcome of its Petition, and render CLC's hazmat arguments irrelevant. But whether or not CLC itself realized that Norfolk Southern would make the argument is not probative of whether a reply brief is appropriate. The operative question is whether a petitioner in CLC's petition *should have* anticipated that Norfolk Southern would argue the governing regulations. *Id.* And an argument that the Board should follow the express text of federal law, as memorialized by the governing regulations, is in no way novel or so unique that a reply brief is warranted. This is especially so in light of the fact that these regulations are well within the Board's expertise. *See California High-Speed Rail Authority - Petition for Declaratory Order*, FD 35861, 2014 WL 7149612, at *4 (S.T.B. Dec. 12, 2014) (denying leave to file a reply to reply as "[un]necessary to provide the information we need to provide our views . . . and address matters within the Board's expertise.").

Lastly, a reply brief should not be permitted because CLC improperly seeks to raise new arguments in its requested reply that appear nowhere in his Petition. In its Petition, CLC argued that the Board must hear this dispute because it is within the Board's "exclusive jurisdiction". *See* Petition at 9. In its Motion, CLC changes course and now

seeks to argue, as CLC argued in the District Court, that this dispute falls within the Board's "primary jurisdiction" – a distinct legal concept. *See generally Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 204-05 (1st Cir. 2000) (discussing distinction between exclusive and primary jurisdiction of the Board). Nowhere in its new Motion does CLC explain why it is no longer pursuing its exclusive jurisdiction, or even acknowledge the shift in the basis for the Board to hear this dispute.

Similarly, CLC's Motion repeatedly raises another argument that appears nowhere in its Petition, yet was a common refrain in the District Court: the Board should institute a declaratory proceeding because this is a case of first impression. In the District Court, CLC's argument was that this is a case of first impression due to the Board's new demurrage regulations. In its new Motion, CLC argues that this is a case of first impression due to CLC's perception that its hazmat argument is meritorious, yet no previous shipper of elevated temperature material has ever raised it before. Even assuming *arguendo* that this issue has never been raised, even a cursory reading of the applicable regulations leaves no doubt as to why this is the case. And the Board should not even consider the argument because reply briefs are not opportunities to offer new theories that were not properly raised in CLC's Petition. *R.R. Ventures, Inc.-- Abandonment Exemption*, AB-556 (SUB 2X), 2005 WL 3437630, at *3 (S.T.B. Dec. 14, 2005) ("much of [the petitioner's] tendered reply does not appear to be responsive to [the respondent's] reply, but instead consists of new arguments. We therefore deny [the petitioner's] motion for leave to file a reply to a reply.").

Norfolk Southern would also respectfully submit that if CLC is to be permitted to file a reply to a reply, and raise these new arguments, Norfolk Southern should be given an opportunity to substantively respond to them.

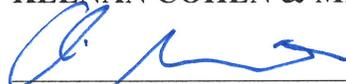
CONCLUSION

In sum, CLC's motion for leave to file a reply to Norfolk Southern's Reply must be denied and its prematurely-filed reply brief must be struck from the record. CLC's new legal arguments, its arguments that are in conflict with the existing record, and CLC's desire to rehash and expand upon its existing arguments are not a meritorious basis to depart from the well-established prohibition against replies to replies.

Respectfully Submitted,

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Certificate Of Service

I certify that I have this day served copies of document and all exhibits thereto upon all parties of record in this proceeding, by electronic mail and first-class U.S. Mail.

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