

BEFORE THE
SURFACE TRANSPORTATION BOARD

232520

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DOCKET NO. 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

UNION PACIFIC RAILROAD COMPANY

MOTION OF NORTH AMERICA FREIGHT CAR ASSOCIATION
TO STRIKE PORTIONS OF THE FINAL BRIEF OF
UNION PACIFIC RAILROAD COMPANY

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I. INTRODUCTION

On March 23, 2012, Defendant Union Pacific Railroad (“UP”) asked the Board to direct the filing of simultaneous final briefs in this proceeding. Complainant North America Freight Car Association (“NAFCA”) opposed UP’s petition, arguing that both parties had already filed extensive legal arguments along with their evidence.

In its decision served May 11, 2012, the Board granted UP’s petition, and did not pose questions for the parties to address in their briefs. However, consistent with UP’s petition, the Board’s decision specified that the briefs could not exceed 20 pages “and may not include attachments, exhibits or new evidence, but may refer to exhibits or other material already in the record.”

In its brief, UP attempts to reinforce one of many arguments challenged by NAFCA as lacking support in the documentary record (as opposed to conclusory claims by a UP witness) with a citation to over 2000 pages of UP discovery responses that were never introduced in evidence. This effort plainly violates the Board’s prohibition against new evidence in briefs. In addition, UP compounds its offence by arguing that NAFCA bears the burden of proof because the procedural schedule provides for opening and closing evidence by NAFCA. Its other flaws aside, this argument is undermined when UP uses its brief to have the last word on key issues in this proceeding, improperly supplement the record, and impeach earlier evidence.

Accordingly, NAFCA files this motion to strike under 49 C.F.R. §§ 1104.8 and 1117.¹

¹ 49 C.F.R. 1104.8, entitled “Objectionable matter,” provides: “The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.” 49 C.F.R. 1117, titled “Petitions (for Relief) Not Otherwise Covered,” allows a party to seek relief not provided for in any other rule of the Board.

II. THE ATTEMPT BY UP TO RELY IN ITS BRIEF ON DISCOVERY RESPONSES IT NEVER FILED IN EVIDENCE IS CLEARLY IMPROPER

The first issue here arises in the discussion by UP at page 7 of its brief, where UP claims NAFCA “falsely asserts that UP does not try to stop cars with lading residue problems until after overspeeds occur,” citing NAFCA’s Rebuttal Statement at 24, 31. In support of this claim, UP states as follows:

NAFCA ignores (i) Mr. Ronci’s testimony that employees who observe cars with unsafe conditions are instructed to stop the cars and that they commonly identify problems before incidents occur, (ii) his exhibit showing cars that were stopped for cleaning, and (iii) the Damage Prevention database that UP produced in discovery, which contains many more examples of cars that were stopped before accidents could occur. (Ronci V.S. at 16-17 & Ex. 3; UP Discovery documents UP 000001 to UP 002547.)

Of course, NAFCA did not ignore Mr. Ronci’s testimony. The problem is rather that UP offered no data to support its claim that employees “commonly identify problems before incidents occur.” Only Mr. Ronci’s unsupported claims address this issue, and they are totally self-serving, without a single record placed in evidence by UP to quantify its claim that its employees “commonly identify problems before incidents occur.” If they do so identify problems, there is a complete absence of documentation showing where UP employees record their findings and record the removal of cars from trains to in order to prevent overspeed incidents. Mr. Ronci’s testifies that employees who observe cars with unsafe conditions are instructed to stop the cars. However, the question is not what UP says it tells its employees to do, but what in fact happens. UP does not address that question, and its claim that NAFCA’s assertions are “false” is unsupported.

Evidently, UP recognized that it had failed to support Mr. Ronci’s conclusory claims with any documentary evidence (other than a few photographs of dirty cars). Accordingly, the quoted

paragraph from its brief cites “UP discovery documents UP000001 to UP 002547,” in the apparent hope that the Board will accept Mr. Ronci’s claims as having been substantiated.

UP’s attempt to bolster its case by citing over 2,500 pages of its discovery responses, of which well over 2,000 pages are not part of the evidentiary record, is objectionable for many reasons. In the first place, discovery responses that were not submitted into evidence by a party are not “evidence” of anything, and UP is, in essence, asking the Board to assume the existence of documentary support that the record of this proceeding does not contain.

Second, this citation by UP clearly violates the Board’s order allowing final briefs but directing the parties to refer only to “exhibits and other material already in the record.” Documents produced in discovery but not offered in evidence are not “already in the record.” See also 49 C.F.R. § 1114.28, allowing discovery documents to be offered in evidence, but only subject to objections.

Nor is this violation harmless. UP invites the Board to draw legal conclusions based on documents it has not seen. The Board cannot know whether the documents in question support UP or NAFCA, or whether they are internally inconsistent or otherwise unreliable, or whether they are business records or documents newly developed in response to evidence and arguments by NAFCA.

In addition, if objectionable material is not stricken from UP’s brief, the Board can expect to see more such efforts to use briefs to make assertions that should, at best, have been raised earlier in proceedings. This practice is particularly problematic with railroads, which tend to be defendants in STB complaint proceedings, when they are often expected to provide all of their evidence at the reply stage. Efforts to use final briefs (especially simultaneous final briefs) to supplement evidentiary records encourages “sandbagging” through citations to “facts” that the other party cannot rebut.

III. OTHER ARGUMENTS IN UP'S BRIEF ARE ALSO IMPROPER

UP flouts the Board's order and its regulations in another instance, where it refers to a website as proof of facts that were not introduced in evidence by UP and, in fact, are contrary to the evidence that UP did introduce. See UP Final Brief at 11, fn. 11, comparing NAFCA evidence with a "newdomino.bnsf.com/website" listing. Once again, UP accuses NAFCA of falsity in stating that BNSF's hopper car rule took effect after Item 200-A. The Board should not tolerate UP's effort to rely on some obscure website that was not heretofore offered in evidence by any party. UP is using its Final Brief to impeach its own evidence in this regard, just as it does when it "clarifies" Mr. Ronci's statement that a white-glove standard is not imposed by saying (Brief at 19) that all residue must be removed. UP again ignores the Board's May 11, 2012 decision expressly prohibiting reliance in final briefs of matters that were not previously part of the record.

In short, NAFCA moves to strike the language at the end of the paragraph on page 7 of the UP Final Brief beginning with the words: "It also falsely asserts", on the grounds that there are no proven NAFCA "false assertions" as charged, and (b) that the Board cannot properly infer the existence of "many more examples of cars that were stopped before accidents could occur" from discovery documents that were never produced in evidence.²

² Interestingly, NAFCA itself produced certain documents obtained in discovery from UP, including some that explain how the Damage Prevention Services process described at page 17 of Mr. Ronci's statement began to fail shortly after it was instituted. See NAFCA Opening Statement, Exhibit 8, pp. 1, 2.

IV. CONCLUSION

In its recent decision served May 2, 2012 in Docket No. 35412, *Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company*, the Board granted a motion to strike a verified statement and exhibits accompanying a reply to a petition for reconsideration. Where, as here, UP has offered evidence that violates the Board's briefing order and is otherwise plainly objectionable, an order striking improper material is even more appropriate.

Respectfully submitted,

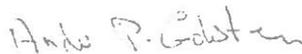


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of North America Freight Car Association to Strike Portions of the Final Brief of Union Pacific Railroad Company has, this 29th day of June 2012, been served on counsel for defendant.



Andrew P. Goldstein