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Before the
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

MOTION TO STRIKE

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Washington DC 20036

Attorney for Samuel J. Nasca

November 15, 2011

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Preliminary Statement

Petitioner, Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits this Motion to Strike the Reply to Petition for Reconsideration, filed October 26, 2011, by Middletown & New Jersey Railroad, LLC (M&NJ Reply).^{2/} In the alternative, if this Motion to Strike the M&NJ Reply is denied, or ruled inappropriate, UTU-NY asks that its Motion to Strike be deemed a petition for leave to file a reply to the October 26, 2011 pleading, with his reply-to-reply set forth herein.

The Surface Transportation Board (STB), on September 21, 2011 (served Sept. 22), issued its decision (Decision) denying the UTU-NY petition to reject or revoke the M&NJ notice of exemption.

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} This Motion to strike M&NJ Reply in its entirety, also embraces specific portions of the document for special attention.

(Decision, 13).^{3/}

UTU-NY on October 13, 2011, filed its petition for reconsideration, for the STB's September 22 Decision, to which M&NJ replied on October 26, 2011. (M&NJ Reply).

OBJECTIONABLE MATERIAL
WHICH SHOULD BE STRICKEN

1. Failure to Seek Permission. M&NJ acknowledges it has attempted to introduced additional evidence belatedly (in its reply) which is not in accordance with the STB's rules. (M&NJ Reply, 5). Apart from the invalidity of the additional M&NJ evidence, there was no request by M&NJ for leave to submit additional evidence, or have the agency waive its prohibition in this instance. 49 CFR 1104.13(c), 1117.1. Accordingly, UTU-NY is prejudiced, particularly since UTU-NY was denied an opportunity to reply with respect to any such motion, and to contest M&NJ Reply. The failure to seek and obtain appropriate STB approval warrants rejection of the entire pleading.

2. Verified Statement of Alfred Sauer. The statement of Alfred Sauer, and the accompanying exhibits, should be stricken. The individual does not claim to have the requisite personal knowledge of the purported facts, or to claim that certain information was recorded in the ordinary course of business. Primary reliance is placed upon data apparently collected by Association of American Railroads (AAR), through its Railinc subsidiary. In

^{3/} More accurately, the UTU-NY petition, filed Sept. 27, 2010, was to reject the notice, or to revoke the exemption.

addition and of particular importance--the three "Time Report" forms prepared by Bryan Van Kirk, the General Manager as well as the sole claimed Employee, do not indicate the requisite "common carrier providing transportation subject to the jurisdiction of the Board," (§10902), or even "providing common carrier railroad transportation for compensation," (§10102(5)), so as to qualify for invoking the carrier acquisition class exemption. There is no indication the date when the forms were prepared, and the multiple notation of "MOW" would seem to indicate track work, or inspection or repair--not even "transportation" engine service. For all that appears, the M&NJ trackage was used for storage or other use by Norfolk Southern Ry. (NS), without any compensated transportation subject to STB jurisdiction performed by M&NJ. The "interchange" information which Alfred Sauer derives from AAR data may not indicate active train movement by M&NJ, but simply NS movement of cars on or off the limited M&NJ trackage. Similarly, the FRA Injury & Illness Statement, prepared at Kennett Square, PA, does not give any information as to the type of transportation, compensated, or subject to STB jurisdiction, etc. allegedly performed by M&NJ.^{4/}

3. Reply Argument. The M&NJ argument (M&NJ Reply, at pp. 4-6) should be stricken. Much of this material is a recitation from the verified statement of Alfred Sauer, where there is no attempt to connect the individual's statement with the relevant factual basis required by 49 U.S.C. 10102(5), 10902. Mr. Sauer does

^{4/} The reference by Alfred Sauer (pp. 1-2) to new customers and NS efforts in M&NJ's behalf ignores the fact that NS is a party to this proceeding and can speak for itself, rather than remain silent.

not have personal knowledge of the alleged facts. M&NJ Reply at 5n.1, suggests that if there were evidence of fraudulent interchange reports, UTU-NY could have sought leave to file a reply or motion to strike. M&NJ overlooks the issue--it is not interchange per se, but rather the nature of the involved "transportation" performed by M&NJ (not NS) subject to STB jurisdiction, on August 31, 2010, prior to M&NJ tariff filing. Unfortunately, M&NJ interprets the STB's December 23, 2010 decision as directing M&NJ to serve copies upon only those shippers situated on the leased lines using M&NY subsequent to October 7, 2010. (Decision, 12/23/10, at 2); M&NJ Reply, 4). Unfortunately, the STB's September 22, 2011 action adopts, post hac, the M&NJ's limited interpretation, contrary to the STB's December 23, 2010 language which did not limit service to those situated on the leased lines, or after October 7, 2010. Cf. Decision, 12/23/10, at 2; Decision, at 2. The more critical issue is the existence of M&NJ compensated transportation prior to October 7, 2010, on the non-leased lines.^{5/}

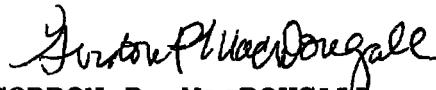
4. Reply-to-Reply. UTU-NY asks that this pleading be treated as a reply-to-reply, to M&NJ Reply, with relief from 49 CFR 1104.13(c), to do so, in the event this Motion to Strike is denied or deemed inappropriate, in whole or in part.

^{5/} Contrary to the M&NJ Reply reference to the RRB's finding that M&NJ is a rail carrier, such finding is not definitive of M&NJ's standing to invoke 49 U.S.C. 10902 at a particular point in time. M&NJ Reply, at 6; Cf. UTU-NY Pet. for Reconsid., Add. B.C.D 11-46, at 2. (Mar. 11, 2011).

CONCLUSION

M&NJ's October 26, 2011 reply pleading, and/or specified portions therein, should be stricken. If such relief is denied or not entertained, UTU-NY requests this Motion to Strike be treated as a permissible reply-to-reply. 49 CFR 1117.1. Cf. 1104.13(c).

Respectfully submitted,



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November 15, 2011

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.


Gordon P. MacDougall

Dated at
Washington, DC
November 15, 2011