

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1020X

EAST PENN RAILROAD, LLC

-ABANDONMENT EXEMPTION-

IN BERKS AND MONTGOMERY COUNTIES, PA

BERKS COUNTY'S MOTION TO STRIKE

PETITIONER'S RESPONSE TO PROTEST

Submitted By:

John D. Heffner, PLLC
James H. M. Savage
1750 K Street, NW - Suite 200
Washington, DC 20006
Tel. (202) 296-3333

Attorneys for Protestant
Berks County, PA

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INTRODUCTION

Pursuant to 49 CFR 1104.8 and 1104.13, Berks County, PA ("Berks" or "the County"), moves the Board to strike as irrelevant, immaterial, impertinent, and scandalous statements contained in the "Motion for Leave to File Response to Protest and Response to Protest"¹ filed on September 26, 2008, by abandonment Petitioner East Penn Railroad, LLC ("ESPN"). Moreover, Berks moves under 49 CFR 1104.13 to strike certain statements submitted in ESPN's "Response" that were either gross distortions of statements

¹ Hereafter "Response."

by witnesses for Berks or should have been included in ESPN's initial Petition under the Board's "case-in-chief" policy. 49 CFR 1121.3(a).

PROCEDURAL HISTORY

By Decision served August 20, 2008, the Board provided notice of the filing of an unverified Petition for Exemption by ESPN seeking permission to abandon a line of railroad (the Colebrookdale Branch or simply "The Branch") extending from MP 0.0 in Pottstown, Montgomery County to MP 8.6 in Boyertown, Berks County, all in the Commonwealth of Pennsylvania. Consistent with that decision setting a procedural schedule, Berks County, PA ("Berks" or "the County") filed a timely protest of the proposed abandonment. On September 26, 2008, ESPN filed a "Motion for Leave to File a Response to the Protest" as well as a Response to the Protest to which Berks filed a Reply on October 7, 2008.

ARGUMENT

POINT I

PETITIONER'S CONTINUAL CHARACTERIZATION OF BERKS
COUNTY'S PRESENTATION IN A MANNER THAT IS IRRELEVANT,
IMMATERIAL, IMPERTINENT, AND SCANDALOUS VIOLATES THE
BOARD'S RULES OF PRACTICE

The Board's Rules of Practice at 49 CFR 1100 *et seq.* govern communications between litigants before the Board and the Board and communications between the litigants themselves. More specifically, 49 CFR 1103.25 requires that a practitioner treat adverse witnesses and other litigants with fairness and due consideration. Just as a party in a Board proceeding may not require that his or her practitioner abuse the opposing party or indulge in offensive personal attacks, it stands to reason that counsel for that client refrain from such actions. In the same vein, the Board's rules require that practitioners conduct themselves with fairness and candor. 49 CFR 1103.27(a).

Berks submits this Motion because it believes that ESPN has on numerous occasions identified below acted in violation of the spirit, if not the letter, of certain

provisions of the Rules of Practice. Its actions unnecessarily irritate the parties, their counsel and witnesses and unnecessarily detract from the basic issue of whether or not this abandonment exemption should be granted.

With that introduction, Berks moves to strike as objectionable under 49 CFR 1104.8, the following statements by ESPN in its Motion/Response:

Assertion #1, Page 5, lines 11-15: "The Protest is an extremely irritating document. It does not inform or clarify, rather it distorts and misleads...When the facts are inconvenient, the County ignores or distorts them. When the distorted data is inadequate, the County fabricates inaccurate or false data. Yet with all the distortions and fabrications...,"

Explanation: These comments are gratuitous and add nothing of value to the proceeding. They should be stricken.

Assertion #2, page 5, footnote 1: "The County holds Mr. Landrio out as an expert but there is no resume in the Protest to substantiate the County's assertion."

Explanation: There is no requirement in Board proceedings that witnesses qualify themselves as "experts" by furnishing resumes. Mr. Landrio's professional qualifications are contained in the body of his statement. By contrast, ESPN's Petition and subsequent filings are not verified, consist of statements and argument furnished by its counsel who presumably has no direct knowledge of the facts, contains no testimony, and does not indicate upon whom counsel relied for factual information. The Board should strike this footnote and disallow counsel's factual statements as evidence.²

Assertion #3, page 6, lines 19-21 and page 7, lines 4 and 6: "Not satisfied with the distorted and falsified cost data or the fabricated potential traffic, counsel for the County ("Counsel") step in the gutter and shamelessly malign ESPN's current management," "also, the irony of these accusations appears lost on Counsel since their client owned the Line longer than current management," and

² The Board follows the canons of conduct employed by the United States courts. 49 CFR 1103.11. Rule 3.7 of the D.C. Bar Rules of Professional conduct points out that counsel should not serve as a fact witness in a proceeding.

"Counsel's derogatory remarks would be better aimed at their own client."

Assertion #4, page 8, footnote 3, last sentence: "It is only Counsel, in their attempt to distort and confuse, that challenges the hourly rate."

Explanation: Casting aspersions on ESPN's counsel as well as its expert witness does not serve to advance ESPN's cause or assist the Board with a better understanding of ESPN's Petition. Berks challenged ESPN's wage costs that are based on a system-wide average because it failed to provide in its workpapers any information as to the total number of ESPN employees and the total wages paid all of its employees (or even information limited to train crew employees) to allow the public to make a system-wide average calculation.

Assertion #5, page 9, lines 16-17: "One would expect better from a purported "expert" who claims to have worked on numerous railroads."

Explanation: Once again, there is no place in STB proceedings for the sort of sarcasm displayed here. It should be stricken.

Assertion #6, page 10, footnote 4: "In their ongoing effort to distort and confuse, Counsel clam that ESPN's Workpapers suggests (but does not state) that ESPN has a locomotive fleet of 13 engines."

Explanation: Berks made this statement because it found the workpapers ambiguous on numerous matters including the size of the locomotive fleet. A simple statement in the text that ESPN locomotive fleet numbers 13 units would have sufficed.

Assertion #7, page 12, footnote 6, last line: "Apparently, Mr. Landrio's field of expertise does not extend to mathematics."

Assertion #8, page 16, line 6: "There are at least two major flaws in Mr. Landrio's appraisal (if one can call it that)."

Explanation: Once again, the Board should strike ESPN's unnecessary sarcasm.

POINT II

ESPN MISCHARACTERIZES OR DISTORTS STATEMENTS OR TESTIMONY GIVEN BY BERKS' WITNESSES

The Board's Rules also provide that it is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or argument of an opposing practitioner. 49 CFR 1103.27(b).

In that connection, ESPN mischaracterizes or takes out of context certain statements made by Berks witness Gary Landrio and Berks supporting shipper Martin Quarries (referred to by ESPN as "Quarries"). In particular, Berks wishes to bring to the Board's attention the following inaccuracies by ESPN:

Assertion #9, page 5, line 19 and 20, and page 6, lines 2, 3, 15, and 15:

"Conveniently ignored is the fact that ESPN cannot serve these entities unless ESPN first constructs new rail lines...The County makes no mention of who would pay for this folly...In order (sic) words, Quarries would have ESPN spend millions of dollars to connect the Line to Quarries' facilities..."

Assertion #10, page 18, lines 8-11: "In order to avoid destroying communities situated directly between the Line and the entities identified by the County, ESPN would need to build around them which could entail the construction of 10 to 20 miles of rail lines at a cost of millions of dollars."

Assertion #11, page 20, lines 7-9, page 21, and lines 1-2: Quarries position seems to be that, if ESPN spends millions of dollars connecting to its facilities, Quarries would be willing to ship...[without the burden of] having to construct new rail lines..."

Explanation: Berks objects to these statements because ESPN has seriously mischaracterized testimony by Quarries' witness Rod Martin. At no point has Mr. Martin or any witness or counsel for the County suggested that ESPN construct an extension to its railroad. Indeed, Berks notes in its Protest that Quarries is located about 1.5 miles beyond the current rail head adjacent to Boyertown Foundry.³ Protest at 4-5. What Mr. Martin did say is that

³ ESPN suggests that Boyertown Foundry is located 1,600 feet north of the end of the Line. In actuality, the right-of-way is intact from the point in downtown Boyertown where ESPN terminates its operations north to the Foundry property line. Little work and expense would be required to rehabilitate and/or restore a few hundred feet of track.

he would be willing to commit to shipping about 2,500 carloads per year of stone to New Jersey destination if he could obtain rates that are competitive to truck. He did not address what transportation arrangements that would be necessary to bring his traffic to ESPN's line. Martin VS at Para. 10. He testified that ESPN management never solicited his company's traffic and that his company's historic use of truck instead of rail transportation was due to lower fuel costs. But he added that rising trucking costs are causing Quarries to explore rail service as an alternative. Martin VS at Paras. 7 and 9. Accordingly, the Board should strike these assertions as gross distortions.

Assertion #12, page 5, line 16, page 7, line 12, page 13, lines 7-8: "the County's expert, Gary E. Landrio concludes that the Line was unprofitable in 2007, [t]he County's own expert has already conceded that the Line is unprofitable."

Explanation: Again, ESPN has distorted and taken out of context statements made by Mr. Landrio. Mr. Landrio has never explicitly stated that the line was unprofitable. Rather he testified that "the revenue that new traffic can

bring is so significant that abandonment should not even be considered. It is not often that in just a preliminary assessment of a railroad that I can find such a significant existing traffic flow. I firmly believe that ESPN or another rail operator working with this line's connection of Norfolk Southern and the shortline railroad connections to southern New Jersey can turn this rail line into a profitable operation with a solid future. Looking at the revised revenue projections and revised cost figures this line can be profitable." Landrio VS at 8-9. The Board should not condone such distortions and should strike these statements by ESPN.

POINT III

PETITIONER IMPROPERLY USES ITS "RESPONSE" TO SUBMIT INFORMATION THAT SHOULD HAVE BEEN INCLUDED IN ITS PETITION

The Board's Rules of Practice govern the content of Petitions for Exemption. As pertinent here, those Rules require a party filing a petition to provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition. 49 CFR 1121.3(a). Because ESPN has repeatedly violated the

Board's "case-in-chief" policy, Berks moves to strike the following information:

The discussion beginning with first full paragraph on page 8 with the sentence beginning "The ESPN crew that serves the Line..." and ending on page 9, lines 1-2 after the citation to 49 CFR Part 225 and the two sentences on page 9, lines 11-13, beginning with "The crew also" and ending after the word "Interrogatory 11 (Second).."

The discussion beginning on page 10, line 2, with the sentence that begins "The track maintenance function..." and extends to and including the second full paragraph on page 10.

Explanation: Under the Board's case-in-chief policy this information is vital to the public's understanding of the Petition and related economics and should have been included in the Petition. It may not be submitted now.

Similarly, ESPN's discussion as to how it calculated Net Salvage Value contains numerous statements that should have properly been included in the Petition. Among them, Berks moves to strike:

The discussion beginning in on page 15, line 5, with the sentence stating "as with virtually all salvage bids..." and continuing for the rest of this paragraph and for the first full paragraph beginning in the middle of page 15.

The sentence in the first full paragraph on page 16 beginning with the words "The Line traverses..."

The second sentence in the first full paragraph on page 17 starting with the words "According to Berks County records..."

Explanation: Berks moves to strike all of this information. It is necessary for the public's understanding of how ESPN computed the asset value for the Line and there is no reason why it couldn't have been included in the Petition. Although it may be standard practice for the term "net bid" to mean the asset value of track and track components after deducting transportation and other salvage costs such as grade crossing restoration, ESPN should not assume the public will know that. Similarly, while ESPN may have agreed to negotiate a rail-banking agreement with Montgomery County, there is no guaranty the parties will reach an agreement so the status of the bridges is still an option question. Again, whether or not ESPN should have

subtracted the bridge removal costs is a point that the Petition should have covered. It is too late to raise it now.

ESPN's statement that the most valuable real estate the Line traverses is located in downtown Pottstown and Boyertown and the \$163,197 appraised value of an acre of land that the local Wal-Mart sits on are additional examples of information bearing on the value of the right of way that should have been included in the Petition and were not. They must be stricken.

The discussion in the first and second full paragraphs on page 21 about the respective professional backgrounds of Regional Rail co-founders Robert Parker and Alfred Sauer.

Explanation: ESPN faults Berks County for not providing a resume for its witness Gary Landrio. ESPN goes one step further. It not only fails to provide this useful information about these two short line railroad executives. It fails to include any written testimony by either of these two individuals explaining ESPN's operations, how ESPN computed its costs, or discussing the assumptions underlying the workpapers accompanying the Petition. Absent information from these corporate officers, ESPN's

presentation rests upon the factual testimony of its counsel.⁴ The Board should strike this information as untimely. If not stricken, the Board should discount this evidence as coming from someone with no personal knowledge of the truth of these assertions.

CONCLUSION

ESPN's Response represents an "eleventh hour" effort to shore up a deficient Petition. Filings at the Board are no place for parties or their counsel to denigrate their fellow professionals with sarcasm or other unprofessional characterizations. The Board should strike such characterizations. Moreover, the Board should not allow ESPN to distort statements made by Berks' expert witness or supporting shipper or permit ESPN to "shore up" the deficiencies in its original Petition. It is ESPN, not Berks, which has the burden of proof in this proceeding.

⁴ See, footnote 2 at page 6, supra.

Respectfully submitted,

John D. Heffner, PLLC
James H. M. Savage
1750 K Street, N.W.-Suite 200
Washington, D.C. 20006
(202) 296-3333

Attorneys for Protestant
Berks County, PA

Dated: October 16, 2008

CERTIFICATION OF PROOF OF SERVICE

I certify that I have this 16th day of October 2008 served by electronic mail and/or U.S. Mail a true copy of the within pleading upon all parties to this matter as per the accompanying service list.

John D. Heffner

SERVICE LIST

Party of Record:

East Penn Railroad

Morell, Karl
Ball Janik, LLP
1455 F Street NW - Suite 225
Washington, DC 20005

Montgomery County, PA

Laurel Frankston Grass
P. O. Box 311
Norristown, PA 19404