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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO 35036

**SUFFOLK & SOUTHERN RAIL ROAD LLC
-- LEASE AND OPERATION EXEMPTION --
SILLS ROAD REALTY, LLC**

REPLY TO MOTION TO STRIKE

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June 26, 2008

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Set forth below is the reply of the Town of Brookhaven ("Brookhaven") to the Motion to Strike Town of Brookhaven's Reply to Petition for Clarification ("motion to strike") filed by U.S. Rail Corporation ("U.S. Rail" or "Petitioner"). Petitioner's "motion," including the rebuttal contained therein, is an impermissible reply to a reply and must be denied.

PROCEDURAL BACKGROUND

On May 2, 2008, Petitioner filed a "Petition for Clarification" of the Board's October 12th Decision. Brookhaven sought an extension for the time allowed to reply to the Petition and submitted its reply pursuant to 49 C.F.R. § 1104.13(a) on May 30, 2008. The rules prohibit a reply to a reply. See 49 C.F.R. § 1104.13(c). Still, on June 19, 2008, Petitioner filed its "Motion to Strike Town of Brookhaven's Reply to the Petition for Clarification," which includes a rebuttal statement and two exhibits¹ that Brookhaven had never before seen.² The motion to

¹ The Exhibits are numbered Exhibit "B" and "C." Brookhaven has not been served with Exhibit "A" if one exists

² Brookhaven has requested that it be copied on correspondence between the SEA and Petitioners but has been informed that its request is "premature."

strike is nothing more than a reply that has been disingenuously captioned as a new motion. The Board must deny the motion and strike the "rebuttal" included therein

ARGUMENT

The Rules clearly provide that a reply to any pleading may be filed within 20 days of service of the pleading, 49 C.F.R. § 1104.13(a), but that a reply to a reply is not permitted. 49 C.F.R. § 1104.13(c). As it did in its previous motion to strike (which was denied),³ U.S. Rail argues in its recent motion that a perfectly permissible reply filed by Brookhaven contains material that is some combination of "irrelevant, immaterial, impertinent, and scandalous" and thus objectionable pursuant to 49 C.F.R. § 1104.8. Motion at 4. In addition, its second motion to strike squarely addresses the *merits* of Brookhaven's reply, explicitly contains a rebuttal statement with new evidence, and "seeks leave" to file a rebuttal. The irony of this situation – arguing that a permissible reply is "objectionable" while filing a clearly impermissible reply to a reply – is apparently lost on U.S. Rail.

U.S. Rail does not point to any prejudice it would suffer if its motion were denied; conversely, Brookhaven would be substantially prejudiced were it not allowed to raise arguments in this adversarial proceeding before the Board. The Board must therefore deny U.S. Rail's motion to strike and motion for leave to file a rebuttal.

A. The "Motion to Strike" is Nothing More Than a Reply Brief.

Of the 19-page pleading, U.S. Rail devotes 7 pages to the so-called "motion to strike." In those 7 pages, U.S. Rail lists 13 sentences from Brookhaven's Reply that it argues should be stricken. Each excerpt consists of *argument* and/or *characterization* – not new facts or evidence.

³ On November 13, 2007, U.S. Rail moved to strike portions of Brookhaven's Reply to U.S. Rail's Petition for Stay and sought leave to file a rebuttal. The Board found that U.S. Rail had not "justified [its] motion to strike" and denied its request to file a rebuttal because rebuttals were not provided for under the rules regarding petitions for stay. See Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No. 35036 (served Nov. 16, 2007)

Arguments and characterizations offered by an adversary are not an appropriate target of a motion to strike. See, e.g., The Kansas City Southern Railway Company—Abandonment Exemption, STB Docket No AB-103 (Sub-No. 21X)(served Feb. 6, 2008) and Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway, STB Finance Docket No. 32549 (Sub-No. 23)(served Sept 25, 2002), both discussed below.

Further, Petitioner offers no substantive reason to strike Brookhaven's arguments other than because it disagrees with them. For example, as reason for striking the excerpts, Petitioner states, *inter alia*

- the excerpts “show Brookhaven’s animus,” (Motion at 9) and that “Brookhaven continues to harbor grudges” (*id.* at 11);
- Brookhaven “ignores” U.S. Rail’s statements regarding its intentions (*id.*),
- “There is nothing controversial” about U.S. Rail’s actions (*id.* at 12); and
- “Brookhaven’s thesis is wrong” (*id.* at 14).

Throughout its pleading, U.S. Rail proffers that statements in Brookhaven’s Reply are “inaccurate” (*id.* at 14) and could not be “further from the truth.” (*id.* at 5).

After summarily dismissing each of the arguments and characterizations as “wrong” or “inaccurate,” U.S. Rail gives its *counterargument* to each statement. This rhetoric constitutes a classic reply brief and is not a “motion to strike” no matter how it is labeled. The Kansas City Southern Railway Company—Abandonment Exemption, STB Docket No AB-103 (Sub-No. 21X)(February 6, 2008)(denying motion to strike and finding that it was “thinly veiled reply to [a] reply” where it disputed statements and arguments made in its adversary’s reply). Where, as here, the only proffered reason for striking an adversary’s arguments is because a party *disagrees* with them, a motion to strike must not be granted. See, e.g., Burlington Northern Inc. And

Burlington Northern Railroad Company –Control And Merger– Santa Fe Pacific Corporation

And The Atchison, Topeka And Santa Fe Railway, STB Finance Docket No. 32549 (Sub-No.

23)(served September 25, 2002)“The motion to strike will be denied. The three statements to which [petitioner] objects . . . *constitute argument and characterization of the record.*

[Petitioner] may fairly dispute them, but the [petitioner]’s disagreement with their import is not a reason to strike them from the record. [Petitioner]’s objections go to the weight to be accorded the statements rather than to their admissibility. Accordingly, the motion to strike will be denied.”(emphasis added).

B. U.S. Rail Will Not Suffer Any Prejudice if its Motion is Denied.

U.S Rail has not argued that it will suffer any prejudice as a result of the Board receiving Brookhaven’s reply in its entirety. Typically, a party brings a motion to strike when new evidence is introduced as part of a reply or a rebuttal (if permitted) and the introduction of that evidence might be prejudicial to the party who does not have an opportunity to respond. See, e.g., Duke Energy Corp. v. CSX Transportation Inc., STB Finance Docket No 42070 (March 21, 2003)(granting a motion to strike where rebuttal included evidence of two modifications of original design plan for rail project and holding that proper procedure for introducing new evidence was to file a petition to supplement the evidentiary record).

Here, U.S. Rail does not argue that any of the documents or attachments filed with Brookhaven’s reply are “new evidence” or somehow prejudicial.⁴ To the contrary, U.S. Rail claims that Brookhaven’s arguments are repetitive and that the brief discusses matters that were

⁴ The only time U S Rail even mentions the word “prejudice” is when it argues that the Board should – in effect – not consider the arguments raised in Brookhaven’s brief when reviewing U S Rail’s Petition for Clarification. Specifically, U.S. Rail states, “The Board should not view U.S. Rail’s submissions under the presumption of falsehood, as this would unfairly prejudice the Petitioner.” Motion at 12. Again, U.S. Rail simply disagrees with Brookhaven’s arguments and does not offer any valid reason for striking the pleading or anything in it. U.S. Rail’s disagreement with Brookhaven’s statements regarding U S Rail’s veracity goes to the weight, not the admissibility, of the statements. See Burlington Northern, STB Finance Docket No. 32549 (served September 25, 2002), discussed supra at page 3-4.

"previously decided." (Motion at 18) If U.S. Rail is taken at its word, there is no prejudicial "new evidence" that typically warrants a motion to strike. If the Board has in fact heard all of Brookhaven's arguments before, there is no prejudice and the motion to strike should be denied. See, e.g., New York City Economic Devel. Corp. – Adverse Abandonment, STB Docket No. AB-596 (served Aug 27, 2003)(denying motion to strike assertions in reply brief where information provided "is not new and had been previously asserted" in pleadings before the Board)

C. Brookhaven will Suffer Prejudice if U.S. Rail's Motion is Granted

On the other hand, Brookhaven will be prejudiced if the so-called motion to strike is granted. First, as stated, the motion is a not so thinly veiled reply to a reply that is not permitted by the rules. The Kansas City Southern Railway Company—Abandonment Exemption, STB Docket No. AB-103 (Sub-No 21X)(February 6, 2008)(denying motion to strike and finding that it was "thinly veiled reply to [a] reply" where it disputed the statements and arguments made in its adversary's reply and an "attempt to circumvent a statutory scheme").

Second, basic principles of advocacy and fundamental fairness dictate that Brookhaven should be able to make good faith arguments, supported by its knowledge of the facts, in the manner that it deems most persuasive. While U.S. Rail may disagree with the form or style of Brookhaven's reply – and clearly it disagrees with Brookhaven's views – there is nothing in the reply that is "scandalous" or not based on a good faith view of the facts from Brookhaven's perspective. Striking Brookhaven's reply would severely prejudice its right to be heard and to raise arguments before the Board.

CONCLUSION

For the reasons stated herein, Brookhaven respectfully requests that the motion to strike and for leave to file a rebuttal be denied. In the alternative, Brookhaven requests permission to file a limited reply to address the arguments raised in the motion to strike and rebuttal.

Respectfully submitted,



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June 26, 2008.

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 26th day of June, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No.

35036



Mark A. Cuthbertson