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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
- CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

MOTION TO STRIKE

ENTERED
Office of Proceedings

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Part of
Public Record

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January 19, 2010

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SURFACE TRANSPORTATION BOARD

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U.S. RAIL
– CONSTRUCTION AND OPERATION EXEMPTION –
BROOKHAVEN RAIL TERMINAL

MOTION TO STRIKE

The Town of Brookhaven (“Town” or “Brookhaven”) respectfully moves the Surface Transportation Board (“STB” or “Board”) for an order striking the letter filed by Petitioner U.S. Rail Corporation (“U.S. Rail” or “Petitioner”) dated December 30, 2009, or in the alternative, striking the portions thereof which relate to the content and conduct of the settlement negotiations between the parties.

PRELIMINARY STATEMENT

Pursuant to a Board decision issued on June 12, 2009 (“June 12th Decision”), this proceeding has been held in abeyance as a result of the parties’ mutual desire to engage in settlement discussions. Pursuant to its decision, the Board required that the parties file monthly status reports on the progress of the negotiations. From July 1, 2009 until December 1, 2009, the parties filed joint status reports, which were agreed upon by counsel for both parties prior to filing.

On December 30, 2009, U.S. Rail unilaterally submitted a letter with an attached verified statement of Gerard Drum (Collectively referred to herein as “Letter”) to the STB indicating that, in accordance with the Board’s June 12th Decision, the filing constituted the status report for the

month of December 2009. However, Petitioner's submission was inconsistent with the procedure used by the parties. In all other prior instances, Petitioner submitted a letter that had been approved by the Town prior to its filing. On December 30, 2009, for the first time, Petitioner submitted the Letter without the Town's consent. Moreover, the Letter contains objectionable materials far beyond the scope of the previously filed status reports.

First, Petitioner's Letter impermissibly seeks affirmative relief from the Board. In the Letter, Petitioner asks the Board to: 1) lift the Stay imposed by the June 12th Decision; 2) restore the matter to the Board's active docket; and 3) issue a Scheduling Order establishing dates for U.S. Rail's response to the Town's Motion to Compel Discovery, the Town's response to U.S. Rail's supplemental petition, and U.S. Rail's reply thereto. For the reasons discussed herein, the Board should reject Petitioner's Letter pursuant to 49 C.F.R. §§ 1104.10 and 1117.1.

Second, the Letter includes Petitioner's description of the parties' conduct throughout the settlement negotiations including the substance of those negotiations. Moreover, it contains allegations that the Town has been acting unreasonably and in bad faith. For the reasons set forth herein, the Board should reject the portions of the Letter relating to the substance of the negotiations insofar as this violates 49 C.F.R. § 1114.1, Federal Rule of Evidence 408, and Board policy and precedent.

Accordingly, the Town requests that the Board order that the Letter be stricken from the record, or in the alternative, that those portions of the Letter, which divulge the substance of the settlement negotiations be stricken.¹

¹ This motion is submitted in accordance with 49 C.F.R. § 1104.13, which permits a party to file a motion addressed to any pleading within twenty days after the pleading is filed with the Board. The Letter was filed without the Town's consent on December 30, 2009.

BACKGROUND

On August 7, 2008, U.S. Rail filed a Construction and Operation Exemption Petition pursuant to 49 U.S.C. § 10502 under Finance Docket No. 35141 relating to a proposed rail facility in Brookhaven, New York. On November 5, 2008, the Board instituted a proceeding and requested additional information to determine the extent of the Board's jurisdiction over the project. Pursuant to the Board's request, Petitioner supplemented its petition and replies were due December 29, 2008. Simultaneously pending before the Board was a motion to compel responses to discovery requests filed by the Town in October 2008.

In or about September 2008, the parties began settlement negotiations in an effort to resolve both this matter and the matter pending in the U.S. District Court for the Eastern District of New York.² Due to the ongoing settlement negotiations between the parties, from October or November 2008 until June 2009, the Board granted both the Petitioner and the Town several extensions to file their respective responses, each party consenting to the extensions. Finally, on June 12, 2009, the Board decided to hold the proceeding in abeyance (rather than grant the additional extensions requested by the parties) pending a request by either party to reinstate the procedural schedule. The Board required the parties to file monthly status reports on the progress of the negotiations beginning July 1, 2009. See U.S. Rail Corporation-Construction And Operation Exemption-Brookhaven Rail Terminal, STB Finance Docket No. 35141 (Served June 12, 2009).

From July 1, 2009, up to and including December 1, 2009, the parties filed joint status reports with both parties consenting to the content of each report. None of these reports

² Sills Road Realty LLC, U.S. Rail Corp., Watral Brothers, Inc., Pratt Brothers, Inc., Adjo Contracting Corp., and Suffolk & Southern Railroad LLC v. the Town of Brookhaven, E.D.N.Y. Case No. 07-CV-4584 (TCP)(ETB).

discussed the content or conduct of the settlement negotiations. See previous status reports annexed hereto at Exhibit A.

On December 30, 2009, Petitioner deviated from the previous course of conduct when it unilaterally filed a letter purporting to be Petitioner's monthly status report without the Town's consent. See Petitioner's Letter dated December 30, 2009 annexed hereto as Exhibit B. This letter contained the Petitioner's interpretation of the parties' conduct during settlement negotiations and enumerated settlement terms allegedly proposed by the Town. See Exhibit B.

ARGUMENT

Point I

The Board Should Strike Petitioner's Letter In Its Entirety As It Seeks Affirmative Relief Without Complying With Proper Board Procedure

Pursuant to 49 C.F.R. § 1104.10, the Board may reject a document submitted for filing if it does not comply with the Board's rules. In its Letter Petitioner seeks affirmative relief from the Board. Petitioner requests, *inter alia*, that this Board lift the stay imposed the June 12th Decision and restore the matter to the Board's active docket. See Exhibit B. However, Petitioner's request should have come in the form of a petition.

49 C.F.R. § 1117.1 states that a party seeking relief not provided for in any other rule may file a petition for such relief. The relief Petitioner seeks is not provided for in any other rule and thus Petitioner should have followed the procedure delineated in 49 C.F.R § 1117.1.

Moreover, Petitioner's requests directly affect the Town as an interested party and the Town should have been given proper notice. Clearly, Petitioner is attempting to expedite this matter by circumventing established Board procedure. As such, the Board should strike the Letter in its entirety and require Petitioner to file a petition.

Point II
**U.S. Rail's Statements Relating To The Content And Conduct Of The Settlement
Negotiations Between The Parties Should Be Stricken From The Letter**

Petitioner blatantly violated federal law and Board policy when it disclosed in its Letter the content and conduct of the settlement discussions between the parties. See Exhibit B at page 2.

49 C.F.R. § 1114.1 and Federal Rule of Evidence ("FRE.") 408 preclude the use of statements made during settlement negotiations. Moreover, it has been the policy and practice of both the Surface Transportation Board and the Interstate Commerce Commission ("ICC") to strongly encourage resolution of issues by agreements and to "discourage action that would chill the negotiation of agreements." Sandusky County-Seneca County-City Of Tiffin Port Authority, ICC Finance Docket No. 31438 (served February 9, 1990).

In Sandusky, the ICC granted the movant's motion to strike comments made during settlement negotiations, holding that a narrow view of the prohibition against disclosing the contents of settlement negotiations does not further the Commission's policy of fostering settlements. Id. Certainly, permitting Petitioner's to disclose the substance of settlement negotiations will only serve to discourage a possible settlement between the parties and would discourage other parties in the future from entering into such discussions.

Moreover, federal courts consistently hold that the public policy favoring out-of-court settlement requires the inadmissibility of settlement negotiations to foster frank discussion. F.R.E. § 408; see also United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982); Millenkamp v Davisco Foods Int'l, Inc. 562 F.3d 971 (9th Cir. 2009).

As the Board is aware, the Town and Petitioner are also involved in litigation in federal court. See Sills Road Realty LLC, U.S. Rail Corporation, Watral Brothers, Inc., Pratt Brothers,

Inc., Adjo Contracting Corp., and Suffolk & Southern Railroad LLC v. the Town of Brookhaven, E.D.N.Y. Case No. 07-CV-4584 (TCP)(ETB). The previously filed joint status reports further disclose that the settlement discussions were aimed toward settling the federal court matter as well. See Exhibit A. Accordingly, the objectionable material filed in Petitioner's Letter will not be admissible in the federal litigation and therefore should not be permitted in this proceeding either.

Finally, any material relating to the content or conduct of the settlement negotiations between the parties should be stricken from the Letter because it is impertinent and irrelevant. Pursuant to 49 C.F.R. § 1104.8, the Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.

Simply put, there is absolutely no reason for Petitioner to include in a submission to the Board the content or conduct of the parties' negotiations, especially the Town's alleged settlement proposals. What the Town deems to be appropriate and desirable settlement terms has no bearing on the issues before the Board. The Board is a decision-making body that interprets rules and regulations without prejudice to either party. Thus, Petitioner's efforts to vilify the Town in the eyes of the Board should not be permitted.

Furthermore, such material is irrelevant to achieve the end Petitioner desires, which is to restore this matter to active status and issue a Scheduling Order. See Exhibit B. Pursuant to the Board's June 12th Decision, this proceeding was held in abeyance "pending request by one or both parties to reinstate the procedural schedule." See June 12th Decision. Accordingly, Petitioner was not obligated to support its request to reinstate this matter with evidence pertaining to the content and conduct of the settlement negotiations between the parties.

Nonetheless, Petitioner's request came under the guise of a status report, which included superfluous and gratuitous attacks against the Town. Petitioner deviated from the prior course of conduct between the parties, as the parties had filed joint status reports each month since the Board's June 12th Decision. All previous status reports were submitted on consent by both parties. See Exhibit A. However, before filing the Letter at issue, Petitioner did not give the Town the same courtesy and requisite notice as was the parties' previous practice.

On December 30, 2009, counsel for Petitioner emailed counsel for the Town "monthly status report attached." By email dated December 31, 2009, counsel for the Town responded strongly objecting to the filing as it contained inadmissible and irrelevant material. On January 1, 2010, counsel for Petitioner replied simply indicating that Petitioner had already filed the "status report" with the Board on December 30, 2009. Petitioner's counsel did not indicate whether the "status report" was filed before or after notifying the Town of its intent to file. See Email correspondence between James H.M. Savage, Esq. and Jessica P. Driscoll, Esq. collectively annexed hereto at Exhibit C.

However, there is no dispute that Petitioner's filing occurred on the same day that it provided a copy to the Town. There is also no dispute that the Petitioner was aware of the Town's objections to the filing and that the Town did not consent to such filing. Petitioner acted in bad faith by disregarding the previous customs and practice of the parties with respect to the filing of joint status reports. Petitioner's actions contravene 49 C.F.R. § 1103.27 (f), which provides in pertinent part, "[a] practitioner shall not ignore known customs or practice of the Board, even when the law permits, without giving timely notice to the opposing practitioner."

Further, in submitting patently objectionable and inadmissible material, Petitioner violated 49 C.F.R. § 1103.27 (d). That statute provides that a practitioner "shall not offer

evidence which he knows the Board should reject in order to get the same before the Board by argument for its admissibility." 49 C.F.R. § 1103.27(d).

Based on the above, the Board should strike the portions of the Letter, which go beyond the scope necessary to restore the matter back to the Board's active docket.

CONCLUSION

For the foregoing reasons, and the reasons contained in the Verified Statement of Mark A. Cuthbertson, the Town respectfully requests that the Board grant its Motion to Strike U.S. Rail's letter dated December 30, 2009 in its entirety, or in the alternative, striking all portions of the Letter relating to the content and conduct of the settlement negotiations between the parties.

Respectfully submitted,



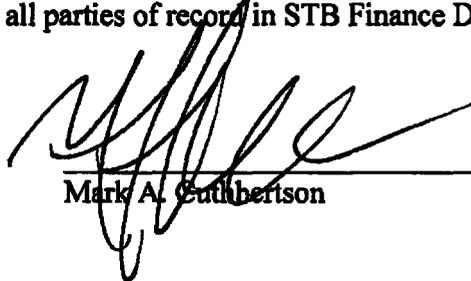
MARK A. CUTHBERTSON
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434 New York Avenue
Huntington, New York
(631) 351-3501

Attorneys for Town of Brookhaven

Dated: January 19, 2010

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 19th day of January 2010, I caused a copy of the foregoing document to be served on all parties of record in STB Finance Docket No. 35141.



Mark A. Cuthbertson

SERVICE LIST

**Party of Record:
New York State
Department of
Transportation**

**Robert A. Rybak (by mail)
50 Wolf Road
Albany, NY 12232**

**Party of Record:
U.S. Rail Corporation**

**James H. M. Savage, Esq. (by email)
Of Counsel to John D. Heffner, PLLC
1750 K Street, N.W. - Suite 200
Washington, DC 20006**

VERIFIED STATEMENT OF MARK A. CUTHBERTSON

I, Mark A. Cuthbertson, of full age, state the following, under the penalty of perjury:

1. I am outside counsel to the Town of Brookhaven ("Town"). I am fully familiar with the facts and circumstances of this matter from my personal knowledge.
2. I am also counsel to the Town in a related matter pending before the U.S. District Court for the Eastern District of New York, captioned Sills Road Realty LLC, U.S. Rail Corp., Watral Brothers, Inc., Pratt Brothers, Inc., Adjo Contracting Corp., and Suffolk & Southern Railroad LLC v. the Town of Brookhaven, E.D.N.Y. Case No. 07-CV-4584 (TCP)(ETB)(the "Federal Court Action").
3. I submit this verified statement in support of the Town's Motion to Strike a letter filed by Petitioner U.S. Rail Corporation ("U.S. Rail" or "Petitioner") dated December 30, 2009, or in the alternative, striking the portions thereof which relate to the content and conduct of the settlement negotiations between the parties.
4. Pursuant to a decision rendered by the Surface Transportation Board ("Board" or "STB") dated June 12, 2009 ("June 12th Decision"), this proceeding was held in abeyance due to the parties' ongoing attempts to settle this matter in conjunction with settlement negotiations in the Federal Court Action.
5. Since the Board's June 12th Decision, the parties have been actively engaged in settlement discussions and have made significant progress toward a stipulation discontinuing the action and resolving the dispute between the parties.
6. The Board's June 12th Decision required the parties to submit monthly status reports beginning July 1, 2009. Accordingly, Petitioner and the Town submitted joint status

reports from July 1, 2009 through December 1, 2009. Each status report was submitted on consent of both parties and none of the reports contained the content or conduct of the parties throughout the negotiations.

7. On December 30, 2009, Petitioner's counsel emailed my associate, Jessica P. Driscoll, Esq., with the proposed status report due January 2, 2010.

8. Upon review, Ms. Driscoll determined that the proposed status report contained the false accusation that the Town had acted in bad faith during the settlement negotiations. Furthermore, the report specifically divulged three alleged settlement demands orally demanded by the Town.

9. In response to this email, Ms. Driscoll replied to Petitioner's counsel the next morning – well in advance of the January 2, 2010 filing deadline – and strongly objected to the filing of the proposed status report. Ms. Driscoll advised Petitioner's counsel that the proposed report violated federal law and Board policies as it included inadmissible settlement materials and irrelevant and impertinent matters.

10. In an email dated, January 1, 2010, Petitioner's counsel replied simply stating that Petitioner had already filed the proposed status report with the Board on December 30, 2009. Petitioner's counsel did not indicate whether the filing occurred before or after the initial email to Attorney Driscoll.

11. Petitioner deviated from the prior course of conduct between the parties when it submitted a proposed status report without the Town's consent and without adequate notice to the Town. This action is a violation of 49 C.F.R. § 1103.27(f), which provides in pertinent part, “[a] practitioner shall not ignore known customs or practice of the Board, even when the law permits, without giving timely notice to the opposing practitioner.”

12. Petitioner also violated Federal Rule of Evidence § 408, 49 C.F.R. § 1114.1 and Board policy and precedent in divulging statements made during settlement negotiations.

13. Additionally, the matter contained in Petitioner's filing is completely irrelevant and immaterial to the matters pending before the Board. Thus, these statements should be stricken based upon the Board's authority to strike irrelevant or immaterial matter from any document pursuant to 49 C.F.R. § 1104.8.

14. Further, in submitting patently objectionable and inadmissible material, Petitioner violated 49 C.F.R. § 1103.27, which provides that a practitioner "shall not offer evidence which he knows the Board should reject in order to get the same before the Board by argument for its admissibility." 49 C.F.R. § 1103.27(d).

15. Finally, Petitioner included in its "status report" a request that the Board lift the stay imposed the June 12th Decision and restore the matter to the Board's active docket. Petitioner's attempt to seek affirmative relief from the Board in the form of a letter is impermissible as it completely contravenes 49 C.F.R. § 1117.1. The Town should have been given proper notice with an opportunity to respond.

16. For the reasons stated above, the Petitioner's submission dated December 30, 2009 should be stricken in its entirety, or in the alternative, the portions thereof relating to the content and conduct of the parties throughout settlement negotiations should be stricken.

I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: January 19, 2010
Huntington, New York



Mark A. Cuthbertson, Esq.