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May 27, 2010

**BY E-FILING**

Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings  
MAY 27 2010  
Part of  
Public Record

**Re: Philadelphia Belt Line R.R. – Petition for Declaratory Order,  
STB Finance Docket No. 35345**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Reply of HSP Gaming, L.P., and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino, to Motion of the Philadelphia Belt Line Railroad Company for Leave to File a Reply to a Reply.

Very truly yours,

*James M. Guinivan*

James M. Guinivan  
Counsel for HSP Gaming, L.P., and SugarHouse  
HSP Gaming, L.P., d/b/a The SugarHouse  
Casino

Enclosure

cc: Charles A. Spitulnik, Esquire  
Allison I. Fultz, Esquire

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35345**

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**PHILADELPHIA BELT LINE RAILROAD COMPANY  
- PETITION FOR DECLARATORY ORDER**

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**REPLY OF HSP GAMING, L.P., AND SUGARHOUSE HSP GAMING, L.P.,  
d/b/a THE SUGARHOUSE CASINO, TO MOTION OF THE  
PHILADELPHIA BELT LINE RAILROAD COMPANY  
FOR LEAVE TO FILE A REPLY TO A REPLY**

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SugarHouse Casino*

Dated: May 27, 2010

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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PHILADELPHIA BELT LINE RAILROAD COMPANY  
FOR LEAVE TO FILE A REPLY TO A REPLY**

HSP Gaming, L.P. (“HSP”), and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino (“Owner”),<sup>1</sup> hereby reply to the Motion for Leave to File a Reply to a Reply (the “Motion”), which the Philadelphia Belt Line Railroad Company (“PBL”) filed in this proceeding on May 7, 2010. With the Motion is a proffered Verified Reply of the Philadelphia Belt Railroad Company to Reply of HSP Gaming, L.P. and SugarHouse HSP Gaming, L.P. d/b/a The SugarHouse Casino (“Reply”).

If 49 C.F.R. § 1104.13(c) did not forbid the filing of a reply to a reply, PBL’s proffered Reply would have been due within 20 days of the SugarHouse Reply to which it is addressed. If the SugarHouse Reply had in fact “omitted relevant facts” or “mischaracterize[d] the nature and scope of PBL’s rights and operation” (*see* Motion at 3), then PBL should have been able to “correct the record in this proceeding” (*id.* at 1) within that period. PBL provides no explanation for its failure to do so, and there appears to be nothing in its Reply that could not have been submitted within that period. For that reason alone, PBL’s Motion “unduly prolong[s] the proceeding,” *see BNSF Ry. – Abandonment Exemption – In Kootenai County, ID*, STB Docket

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<sup>1</sup> HSP and Owner are referred to together as “SugarHouse.”

No. AB-6 (Sub-No. 468X), slip op. at 1 (STB served Nov. 27, 2009) (“*Kootenai County*”) (quoted in Motion at 2-3), and should be denied. But even if the proffered Reply had been timely filed, the Motion should be denied because there are no circumstances that would justify deviation from the Board’s rule here. The Reply contains nothing new that PBL could not have raised in its Petition. Moreover, as nothing in the Reply is material to the issues the Board must consider in this case, it fails to “provide[] a more complete record” or “clarif[y] the arguments. *See Kootenai County*, slip op. at 1 (quoted in Motion at 1).

#### ARGUMENT

PBL’s Petition for Declaratory Order (“Petition”) asks the Board to issue an order finding that PBL’s “right and obligation to provide rail freight common carrier service on the right-of-way including the former Penn Street in Philadelphia has not been abandoned or otherwise extinguished” (Petition at 1). As SugarHouse explained in its initial reply (“SugarHouse Reply”) to PBL’s Petition, such a finding requires that the Board first find that PBL “has or ever had a common carrier obligation with respect to the right-of-way in the former Penn Street” (SugarHouse Reply at 8-9). SugarHouse noted that PBL had neither “asked the Board to make such a determination” nor “provided any evidence or assertion that would support such a determination” (*id.* at 9). PBL’s proffered Reply contains nothing that even suggests a cure to these omissions. It presents four numbered points, none of which provides any basis for a claim that the former Penn Street ever contained “any part of [PBL’s] railroad lines,” *see* 49 U.S.C. § 10903(a), so as to bring PBL’s claimed right-of-way within the Board’s abandonment jurisdiction under 49 U.S.C. § 10903.

1. PBL refers to “a survey of the casino project site prepared for HSP Gaming, LP, by Urban Engineers, Inc.,” which, in relevant part, simply restates the facts that there used to be

tracks on the site and that the 1890 ordinance had been enacted (Reply at 2). PBL fails, however, to show that those facts (already known to the Board (*see, e.g.*, SugarHouse Reply at 4-5)) support its legal conclusion. SugarHouse has already pointed out that there was once a rail line in the former Penn Street, which was operated by Consolidated Rail Corporation (“Conrail”) and its predecessors and which Conrail was authorized to abandon in 1986.<sup>2</sup> PBL provides no reason to conclude (or even to suspect) that any “[s]egments of railroad tracks (no longer in use)” (*id.*) that Urban Engineers may have found on the SugarHouse property were anything other than remnants of the abandoned Conrail line. And Urban Engineers’ note listing the “Philadelphia Beltline Railroad right of way within the former bed of Penn Street (formerly Delaware Avenue) created by Ordinance of City Council approved December 26th, 1890, as amended by Ordinance of City Council approved July 1, 2004” as an “encumbrance as affecting the property” (*id.* at 2) adds nothing to the discussion of those ordinances already provided by SugarHouse in its Reply (at 4-6). Moreover, Urban Engineers’ listing of the 1890 and 2004 ordinances is not probative of the legal effect of those ordinances, which speak for themselves. In any event, the fact that PBL may have had an unexercised right, under local ordinances, to build a rail line on the former Penn Street, has no bearing on whether it has or ever had a line of railroad there that is subject to the Board’s abandonment jurisdiction.

2. PBL attempts to minimize the importance of its failure to exercised any right it may have had to build a rail line on the former Penn Street by asserting that “it had the right to operate on the tracks of others in that corridor” (Reply at 2), but it provides no evidence for this assertion. Contrary to PBL’s assertion, the Board’s predecessor agency, the Interstate Commerce Commission (“ICC”), never “acknowledged” PBL’s “right to use the tracks that were

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<sup>2</sup> SugarHouse Reply at 5, 9 (citing *Conrail Abandonment in Philadelphia County, PA*, Docket No. 167 (Sub-No. 1056N) (ICC served Sept. 10, 1986)).

located in Penn Street” (Reply at 2-3). In 1981, it is true, the ICC granted a petition for exemption in which PBL sought, among other things, an exemption from the statutory requirement that PBL seek regulatory approval under 49 U.S.C. § 10901 for trackage rights over “River Front Railroad – Callowhill to Cumberland Street; Trenton Avenue connection and Branches.”<sup>3</sup> But that exemption did no more than remove an impediment under regulatory law to exercising such trackage rights; if Conrail or its predecessors did not convey such rights to PBL, then the Board’s exemption did not and could not create them *ex nihilo*. And even if PBL had received such rights, PBL admits that it never exercised them by operating on the former Penn Street. As SugarHouse has already pointed out (SugarHouse Reply at 10), if a rail carrier never carries out rail operations or exercises trackage rights for which it has received regulatory authority, then there is no “regulated rail transportation” and no requirement that it receive abandonment or discontinuance authority under 49 U.S.C. § 10903. See *Kansas City S. Ry. – Acquisition & Operation of Trackage Rights Exemption – Ark. Cent. Ry.*, Finance Docket No. 31405, slip op. at 2-3 (ICC served Apr. 7, 1995) (“*Arkansas Central*”).

PBL also claims that “[i]ts tariffs, previously submitted to this Board, confirm that traffic moved between the two ends of [PBL’s] system” (Reply at 3). But as SugarHouse has already explained, the tariffs PBL has submitted demonstrate only that PBL held itself out as providing certain switching service in the City of Philadelphia, and in particular on its lines north of Allegheny Avenue and south of Callowhill Street. They do not demonstrate that PBL ever operated or had the contractual or property right to operate on tracks of other railroads between

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<sup>3</sup> Petition of The Philadelphia Belt Line Railroad Under 49 U.S.C. § 10505 for Exemption of Proposed Transaction from Provisions of 49 U.S.C. § 10901 at 5, *Philadelphia Belt Line R.R. – Operation in Philadelphia, PA – Exemption Under 49 U.S.C. § 10505 from 49 U.S.C. § 10901*, Finance Docket No. 29517 (filed Nov. 14, 1980). (PBL’s petition was granted in a decision served in Finance Docket No. 29517 on April 10, 1981.)

Allegheny Avenue and Callowhill Street (including those on the former Penn Street), much less that PBL ever built its own tracks there.

PBL cites “projections of growth in traffic to and through the Port of Philadelphia” and “proposals to increase freight rail capacity along the Eastern Seaboard” as demonstrating “the need to move traffic along the Delaware River waterfront” along the route PBL claims. While those projections and proposals might have some bearing were the Board to consider a proposal for abandonment or discontinuance of PBL’s claimed rail line, they are irrelevant to the issue raised in this declaratory order proceeding, which is whether PBL actually has a rail line, requiring abandonment or discontinuance authority.<sup>4</sup>

3. PBL’s discussion of its unsuccessful negotiations with SugarHouse (Reply at 3-4), offered as evidence of the validity of PBL’s claim, should be stricken as contrary to Rule 408 of the Federal Rules of Evidence, which “prohibits the admissibility of compromise offers [in order] to encourage settlements, which would be discouraged if such evidence were admissible.”<sup>5</sup> But even if this evidence were admissible (and even if SugarHouse conceded the accuracy of PBL’s discussion of the negotiations, which it does not), it would be irrelevant to the

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<sup>4</sup> In any event, PBL does not demonstrate, or even seriously argue, that other carriers operating in Philadelphia could not handle that projected traffic growth, or that PBL, which has not “move[d] traffic over this route” in the entire 120 years since it was chartered, is likely to receive requests to do so as a result of any increased demand for rail service (*see* Reply at 3). And PBL’s suggestion that, if faced with such a request, it would be “required to build” an “entire new right-of-way” along that route (*id.*) is fanciful. As noted above, if PBL never consummated any regulatory authority it may have received to operate as a common carrier on the former Penn Street right-of-way, then there is no “regulated rail transportation,” and thus no need to obtain abandonment or discontinuance authority to extinguish a common carrier obligation. *Arkansas Central*, slip op. at 2-3.

<sup>5</sup> *Sandusky County – Feeder Line Application – Consolidated Rail Corp. Carrothers Secondary in Sandusky & Seneca Counties, OH*, 6 I.C.C.2d 568, 582 (1990). Although the Board is not bound by the Federal Rules of Evidence, the prohibition of disclosure of the contents of settlement negotiation furthers the agency’s policy of “encourag[ing] the resolution of [disputed] issues by agreements between parties rather than by administrative action.” *Id.*

legal issues before the Board. SugarHouse's alleged willingness to consider paying PBL something to relinquish its claimed rights does not establish that PBL actually had such rights or even that SugarHouse acknowledged the validity of PBL's claim to such rights. At most, it establishes that SugarHouse recognized that even meritless claims by PBL had the potential to complicate its development plans, and that there was some nuisance value in those claims:

4. PBL's citation of "the interest of the Delaware River Port Authority ('DRPA') and the Southeastern Pennsylvania Transportation Authority ('SEPTA') in developing a transit corridor along the riverfront" using the corridor in which PBL claims an interest (Reply at 4), like its citation of potential growth in freight traffic, might have some bearing on a proposal for abandonment or discontinuance of PBL's claimed rail line, but it is irrelevant to the issue here, which is whether abandonment or discontinuance authority is required at all.<sup>6</sup>

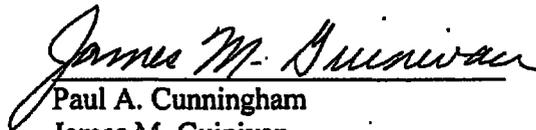
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<sup>6</sup> In any event, the "Map of PATCO's selected Locally Preferred Alternative," which PBL appends as Attachment 2 to its Reply, does not show a proposed transit corridor that would require use of the former Penn Street. Rather, it shows a corridor along "Columbus Blvd.," including a stop at "Frankford Ave." Frankford Avenue terminates on the west side of Delaware Avenue (or Christopher Columbus Boulevard extended), which in turn is the western boundary of the SugarHouse Casino site (which is itself marked on the map, to the east of the proposed transit corridor). It is therefore significantly to the west of the former Penn Street and is outside the SugarHouse property which includes the bed of the former Penn Street.

CONCLUSION

PBL's proffered Reply to a Reply add nothing new, adds nothing that PBL did not know or should have known when PBL filed its Petition, and does nothing to "correct the record in this proceeding and ensure that the Board's decision is based on a complete and accurate understanding of the pertinent facts" (Reply at 1). The Motion of the Philadelphia Belt Line Railroad Company for Leave to file a Reply to a Reply should therefore be denied.

Respectfully submitted,



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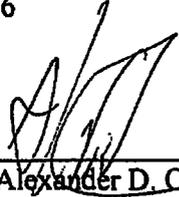
*Counsel for HSP Gaming, L.P., and  
SugarHouse HSP Gaming, L.P., d/b/a The  
SugarHouse Casino*

Dated: May 27, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 27th day of May, 2010, served a copy of the foregoing copies of the foregoing Reply of HSP Gaming, L.P., and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino to Motion of the Philadelphia Belt Line Railroad Company for Leave to File a Reply to a Reply by hand delivery upon

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