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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36433

ENTERED
Office of Proceedings
November 2, 2020
Part of
Public Record

NORTH COUNTY TRANSIT DISTRICT PETITION FOR DECLARATORY ORDER

**OBJECTION BY CONCERNED DEL MAR RESIDENTS LAURA
SCHAEFER AND SHIRLI FABBRI WEISS TO NORTH COUNTY TRANSIT
DISTRICT MOTION FOR LEAVE TO FILE REBUTTAL**

Del Mar residents Laura Schaefer and Shirli Fabbri Weiss (“Del Mar Residents” or “Residents”) respectfully submit this objection and opposition to the North County Transit District’s (“NCTD”) “Motion for Leave to File a Rebuttal,” (the “NCTD Motion” or “Motion”) filed October 26, 2020. The NCTD’s Motion asks the Board to approve sandbagging. It is the NCTD’s belated attempt to make up for the sweeping deficiencies in its original Petition for Declaratory Order filed on August 28, 2020 (the “Petition”) and should be denied for multiple reasons. **First**, the Motion and the extensive documents and arguments the NCTD seeks belatedly to introduce are a “reply to a reply,” flatly prohibited by the Board’s governing regulations with no exceptions. 49 CFR 1104.13(c). **Second**, it is the Petitioner’s burden to present its case-in-chief *in its opening submission*. The NCTD failed to meet that burden, and it cannot resurrect its case in a sur-reply. **Third**, at the time it filed the Petition, the NCTD had, but chose not to file, the Exhibits it now wishes to add. Contrary to NCTD’s disingenuous

representation to this Board, the parties have no “familiarity” with the exhibits submitted in support of its reply, because the NCTD withheld them until early October, 2020, transparently as part of a strategy that backfired. Acceptance of the submission would be unfair and prejudicial, and would reward the NCTD’s gamesmanship.

BACKGROUND

On August 28, 2020, the NCTD filed its Petition seeking a Declaratory Order finding that the ICCTA preempted all local and Coastal Commission regulations applicable to its intended or imagined construction of current and future projects in a railroad-right-of-way (Railroad Zone”) located along the coastline of the City of Del Mar. NCTD sought an order granting it sweeping permission to construct various current and future “projects” that were either completely undescribed or vaguely described. Among its to-be-determined projects was the erection of fencing on scenic bluffs in Del Mar, and stabilization of ground traversed by the railroad that had suffered the adverse effects of erosion and train vibration which threatened the bluff’s collapse. The NCTD also sought to preempt and silence all discussion of possible future relocation of the tracks from the Del Mar bluffs to a safe location that did not threaten a collapse of a train onto the beach below, as the NCTD admitted had occurred in the past. Del Mar historically worked cooperatively with the NCTD on bluff stabilization, and had no indication that NCTD would be filing the Petition with this Board seeking to circumvent all local and Coastal Commission regulation of Del Mar’s most precious asset. NCTD had approved the filing of the Petition, a 100 plus-page tome of arguments and exhibits, in a secret closed session held in May 2020, excluding Del Mar’s representative from the meeting. By at least as early as June 30, 2020, two months prior to the filing, NCTD possessed exhibits it now wishes to introduce through its

“Rebuttal” (Exhibits A and A1). NCTD chose not to file these exhibits with the Petition or share them with Respondents until October, 2020.

NCTD, joined by the Association of American Railroads opposed NCTD’s request for any extension to respond to the lengthy Petition, though they knew Respondents had been taken by surprise as shown in their Replies, and notwithstanding that the NCTD’s filing was extensive and sought a dramatic, sweeping order of great significance to Del Mar and the Coastal Commission. The Board issued an Order on September 23, 2020, granting an extension until October 5, 2020 and, acknowledging the significance of the issues, and invited “any interested person” to reply. The City of Del Mar, the Coastal Commission, the Surfrider Foundation, the Residents, and another resident, Jeff Sturgis, filed timely Replies to the Petition on October 5, 2020.

Now, NCTD seeks to file a “reply to a reply,” hoping to “supplement” its inadequate Petition, acknowledging that it would be in violation of the Board’s rules, so as to “be helpful to the Board” in reaching a decision. The NCTD seeks to “supplement” the Petition with material itself commissioned, which it had in its possession for several months before the Petition was filed but kept from the parties until October, 2020.

ARGUMENT

I. NCTD’s “Reply to the Reply” Is Prohibited by 49 CFR Section 1104.13(c)

Respondents and other “interested persons” filed their Replies to the Petition on October 5, 2020 as directed by the Board. The Motion and the extensive documents and arguments that NCTD seeks belatedly to introduce are a “reply to a reply,” which the Board’s governing regulation flatly prohibits *with no exceptions*. 49 CFR 1104.13(c). This regulation simply and

unambiguously commands “A reply to a reply is not permitted.” NCTD’s “reply to a reply” is not subject to “leave of the Board” and there is no exception for the submission of documents NCTD had for months before it filed the Petition, which it now deems “helpful” to the Board, after the replies were filed. The Board should deny the Motion on this basis alone. Beaufort R.R. – Modified Rail Certificate, Finance Docket No. 34943 (STB served July 21, 2009) at 5. See, e.g., Pennsylvania R. R. – Merger – N.Y. Cent. R. R., Finance Docket No. 21989 (Sub-No. 4) (STB served Jan. 10, 2011) at 7.

II. Even If the Board Accepts the New Pleadings, Board Precedent Is Clear That NCTD May Not Fill the Glaring Deficiencies in Its Case-In-Chief with New Information.

It is the Petitioner’s burden to present its case-in-chief in its opening submission. If Petitioner fails to meet that burden, it cannot resurrect its case in a sur-reply. As the Board stated in Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., STB Docket No. NOR 42121 (May 30, 2013):

“Board rules clearly direct that complainants put forth their best and most complete case on opening. Gen. Procedures, 5 S.T.B. at 445-46 (explaining that ‘the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence’)... The [complainant] must ‘submit its best, least-cost, fully supported case on opening and may not hold back to see the railroad’s reply evidence before finalizing or supporting its own case.’ Duke Energy Corp. v. Norfolk S. Ry. (Duke Energy), 7 S.T.B. 89, 101 (2003). Principles of fairness and the orderly handling of cases require that ‘parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence.’ Xcel Energy v. BNSF Ry., NOR 42057, slip op. at 2 (STB served Apr. 4, 2003).”

Thus, even if the Board were to waive its rules for NCTD's benefit and accept a sur-reply, these precedents hold that an additional pleading cannot be used to salvage a fatally flawed case, such as that presented by NCTD in its Petition. NCTD says it believes it provided sufficient information in its Petition to support its request for relief. The Board should take NCTD at its word, hold it to that showing and evaluate whether the matter is ripe and the preemption ruling it seeks is warranted on the basis of the case presented in the Petition and the Replies submitted.

III. At the Time It Filed the Petition, the NCTD Had, But Chose Not to File, Exhibits it Now Wishes to Add to Respondents' Prejudice. The Board Should Not Permit Such Gamesmanship.

The "supplemental" information and arguments that NCTD now seeks to present obviously were available to it when it filed the Petition. It simply chose not to present them in the Petition. For example, NCTD's proposed Exhibit A is a report to itself that NCTD commissioned (clearly in an attempt to justify extensive fencing on Del Mar's ocean bluffs) that was finalized on June 30, 2020. The NCTD undoubtedly had it when it filed its Petition and chose not to include it which was its prerogative. But once it made that tactical choice, it is bound by it. What a Petitioner may not do is choose to withhold evidence or parts of its case and then spring them later to plug the holes in its case that are revealed by the Replies. This is not only unfair to opposing parties, it abuses the Board's process and promotes inefficiency. Surely if a Petitioner is allowed to succeed with this tactic, there is no incentive for a party to follow the rules and submit a full case at the time required. Rather, parties will have every incentive to hold evidence in reserve and present it after the opposing party has made its submission. NCTD and its counsel know the rules. Rules are rules, and fairness is fairness, and NCTD should not be excused from the former in order to flout the latter.

Moreover, to say that submitting new and “supplemental” material would not prejudice the other parties is absurd and an insult to the Board and Respondents. *Of course* allowing one party a second bite at the proof apple is prejudicial to the opposing party. (See, SWKR Operating Co. - Abandonment Exemption - In Cochise County, AZ. STB Docket No. AB-441 (Sub-No. 2X) (STB served Nov. 12, 1997) [Finding that a party’s attempt to present a more detailed itemized report in rebuttal was “improper, and would prejudice” the opposing party, which would have no opportunity to comment on it].) The question is whether allowing such prejudice would be justified in the interests of fairness or some other compelling reason. Here, it is not.

NCTD’s assertion that this material it had in its possession when it filed its Petition (it now realizes) would be “helpful” to the Board is an insufficient justification for failing to present the material originally in its case-in-chief, and a “helpful” standard would eviscerate the prohibition of filing replies to replies. A party could always argue that further filings would be “helpful” and allow a fuller and more complete record. But that could result in an endless and costly series of filings and responses, and the very sort of delay NCTD claims it is trying to avoid.

The Residents respectfully request that NCTD’s Motion to file a Rebuttal be denied. In the event that the Motion is granted, the Residents request 20 days from the date of the Board’s Order to file a Sur-Rebuttal.

Respectfully submitted,

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Proof of Service Financial Docket No. 36433

Parties of record:

I certify on November 2, 2020 all parties of record have been served via email in this matter.

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Signed:

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