

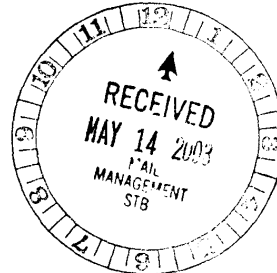
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May 14, 2003



Via Courier

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

**Re: Paducah & Louisville Railway, Inc.
Abandonment Exemption -- In McCracken County
Kentucky -- Docket No. AB-468 (Sub-No. 5X)**

Dear Secretary Williams:

Enclosed please find an original and eleven copies of Boral Bricks, Inc.'s Motion to Strike in the above-referenced proceeding. Please date stamp the eleventh copy and return it to our courier.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



Ronald E. Quirk, Jr.

Enclosures

cc: All parties of record (w/enc.)

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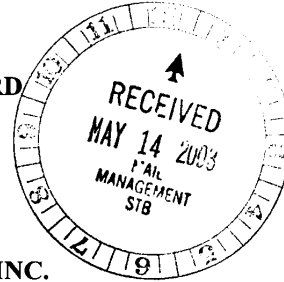
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-468 (SUB-NO. 5X)

**PADUCAH & LOUISVILLE RAILWAY, INC.
- ABANDONMENT EXEMPTION -
IN MCCrackEN COUNTY, KY**

**BORAL BRICKS INC.
MOTION TO STRIKE**



Boral Bricks Inc. ("Boral"), by its attorneys and pursuant to Section 1104.13(a) of the rules of the Surface Transportation Board, 49 C.F.R. §1104.13(a), hereby submits its Motion to Strike ("Motion") the Rebuttal to Boral Bricks, Inc. Reply in Protest to Petition for Exemption ("Rebuttal") filed by Paducah & Louisville Railway, Inc. ("P&L") on May 1, 2003.¹ P&L's Rebuttal violates the Board's procedural rules and policies, and is an improper attempt by P&L to circumvent them. Consequently, the Rebuttal should be stricken from the record of this proceeding.

I. P&L'S Rebuttal is a Prohibited Reply to a Reply

P&L commenced an exemption proceeding when it filed its Petition for Exemption ("Petition") from the requirements of 49 U.S.C. § 10903, to expedite abandonment of a railroad line ("Line") in Paducah, Kentucky.² Consequently, P&L must abide by the Board's rules for exemption proceedings. See Notice, STB Docket No. AB-468 (Sub-No. 5X), FR 4915-00-P, March 24, 2003 at 1 ("Notice"). One such rule is

¹ Section 1104.13(a) states that a party may file a motion to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided. See 49 C.F.R. § 1104.13(a). Accordingly, this Motion is timely filed.

Section 1104.13(c) of the Board's rules, which expressly forbids a party from filing a reply to a reply. See 49 C.F.R. §1104.13(c).

On April 14, 2003, Boral filed its Reply in Protest to P&L's Petition ("Reply").³ In its Reply, Boral explained, inter alia, that P&L's Petition did not meet the statutory criteria for exemption, and that the information contained therein was incorrect and insufficient for grant of an exemption. See Reply at 3-12. P&L's Rebuttal is a direct response to the matters addressed in Boral's Reply. See Rebuttal at 3. Consequently, P&L's Rebuttal is a reply to a reply to an exemption petition, which violates 49 C.F.R. § 1104.13(c).

P&L contends that its Rebuttal is "not a reply to a reply" and submits a number of erroneous arguments in its attempt to substantiate its specious contention. See Rebuttal at 4. P&L's arguments are inaccurate and constitute nothing more than an attempt to evade the Board's procedural rules for the purpose of improperly augmenting its Petition.⁴

II. P&L May Not Avail Itself of Formal Abandonment Procedural Rules in this Exemption Proceeding

P&L argues that because Section 1152.25 of the Board's rules, 49 C.F.R. § 1152.25, permits rebuttals to written protests in full abandonment proceedings, the Board should accept P&L's Rebuttal in this exemption proceeding. See Rebuttal at 4. P&L also contends that the Board has accepted rebuttals to replies in other exemption

² See Paducah & Louisville Railway, Inc., Petition for Exemption, Docket No. AB-468 (Sub No. 5X), March 4, 2003.

³ See Boral Bricks, Inc., Reply in Protest to Petition for Exemption, Docket No. AB-468 (Sub No. 5X), April 14, 2003.

⁴ P&L contends that the purpose of its Rebuttal is to add to the record in this proceeding in response to Boral's Reply. See Rebuttal at 3.

proceedings. Id. citing Burlington Northern Railway Company – Abandonment Exemption – In Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-55 (Sub-No. 262X) (STB served June 30, 1994) (“BNR”) and CSX Transportation, Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC, STB Docket No. AB-55 (Sub-No. 562X) (STB served Dec. 1, 1999) (“CSX”).

P&L’s arguments are erroneous, and have no basis in fact or law. Section 1152.25 applies solely to abandonment proceedings, not to exemption proceedings. See 49 C.F.R. § 1152.25 (a)-(b). The Board has separate rules applicable to exemption proceedings, which do not include the abandonment procedures stated in 49 C.F.R. § 1152.25. See e.g., 49 C.F.R. §§ 1121, 1152.60.

By filing its Petition, P&L chose to avail itself of the Board’s exemption procedures. P&L cannot now attempt to take advantage of the rules that apply to full abandonment proceedings. That is manifestly unfair and is in violation of the Board’s rules and policies.

In similar cases, the Board has expressly rejected attempts to utilize rules for full abandonment proceedings in exemption proceedings. For example, in denying a rebuttal pleading similar to that filed by P&L, the Board stated “Although styled a rebuttal, the pleading is a reply to protestant’s reply to [the railroad’s exemption] petition, and as such is prohibited by 49 C.F.R. § 1104.13(c). [The railroad] filed its petition knowing that our procedures provide only for the filing of a petition and reply thereto. Had [the railroad] wished to assure itself the right to rebut a filing in opposition to its abandonment request, it could and should have filed a formal [abandonment] application.” See Central Railroad Company of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin,

Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998) (“CRCI”) at 2; see also Burlington Northern and Santa Fe Railway Company – Abandonment of Chicago Area Trackage in Cook County, IL, STB Docket No. AB-6 (Sub-No. 382X) (STB Served September 21, 1999) (“SFRC”) at 2 (the Board’s exemption procedures provide only for the filing of a petition and a reply thereto).

Moreover, the cases cited by P&L do not support its contention that the Board has accepted rebuttals to replies to exemption petitions. In BNR the Board accepted a rebuttal to a reply to a request to set terms and conditions for the sale of a railroad line. See BNR at 2. In CSX the Board accepted rebuttals to a motion to vacate an order granting an exemption petition after an offer for financial assistance was accepted by the Board. See CSX at 2. In neither of these cases did the Board accept a reply to a reply to an exemption petition.

P&L itself admits that 49 C.F.R. § 1152.25 is inapplicable to this exemption proceeding. Said P&L: “the [Board’s] regulations do provide, at 49 C.F.R. § 1152.25, specific timeframes to be followed in the case of abandonment applications, as opposed to individual petitions for exemptions. See Rebuttal at 4 (emphasis added). Because this proceeding is strictly an exemption proceeding, 49 C.F.R. § 1152.25 is inapplicable and P&L’s Rebuttal should be rejected as an improper reply to a reply.”⁵

III. The Board’s Modified Procedural Rules Are Inapplicable to this Proceeding

P&L also argues that the Board should accept P&L’s Rebuttal because the “filing and processing [of exemption petitions] are analogous to the Board’s processes under

⁵ P&L also argues that its rebuttal is a “timely response to Boral’s protest.” See Rebuttal at 4. Because 49 C.F.R. § 1152.25 is inapplicable to exemption proceedings, P&L’s Rebuttal is an illegal reply to a reply and the issue of “timeliness” is irrelevant.

modified procedure” and one of the rules governing conduct under the Board’s modified procedures, 49 C.F.R. § 1112.2, permits rebuttals. See Rebuttal at 5.

P&L fails to explain in what respect the Board’s rules for modified procedures are analogous to its exemption rules. In any event, P&L’s argument fails because the modified procedure rules are applied only when the Board has issued a decision stating that a proceeding is to be governed by those rules (see 49 C.F.R. § 1112.1); the Board has not issued any such decision in this proceeding. Consequently, the Board’s modified procedure rules do not govern this proceeding, and those rules provide no basis for the Board to accept P&L’s Rebuttal.

IV. The Board’s Exemption Procedure Policy Forbids P&L’s Rebuttal

P&L’s other procedural argument is that the Board purportedly has a policy of permitting parties to file rebuttals in order to compile a complete record; so, the Board should accept P&L’s Rebuttal. See Rebuttal at 4-5.

As applied to exemption proceedings, P&L assertions are simply not true. The Board’s policy, as codified in 49 C.F.R. §1104.13(c), is not to accept rebuttals (i.e. replies) to replies in exemption proceedings. See CRCI at 2; SFRC at 2.

P&L cites a number of cases to argue that the Board purportedly “accepts rebuttals,” but none of them involve an exemption proceeding wherein the Board permitted a petitioner to file a reply to a reply. Rather, those cases concern unrelated issues such as: (a) Board approval of a transfer of control of a railroad, see Canadian National Railway Company, et al., STB Finance Docket No. 34000 (STB served May 9, 2001) at 1; (b) a full abandonment proceeding, see Kansas City Southern Railway Company, STB Docket No. AB-103 (Sub-No. 14) (STB served Jan. 19, 1999) at 2; (c) a

motor carrier's alleged charging of unreasonable rates, see TJX Companies, Inc., Docket No. 41192 (STB served Sept. 20, 2002 at n.4; (d) terms and conditions for the sale of a railroad line see BNR at 2; and (e) financial assistance matters, see CSX at 2.

None of the cases cited by P&L involve a waiver or exemption of 49 C.F.R. §1104.13(c), or of other rules that prohibit rebuttals. Hence, P&L has not shown that the Board has a "policy" of allowing rebuttals in situations where its rules state that they are not permitted. In an exemption proceeding, the Board's ironclad policy is to require a petitioner to make its prima facie case in its original petition, or the petition will be denied. See CRCI at 2.

V. Conclusion

P&L's Rebuttal is an impermissible reply to a reply in violation of 49 C.F.R. § 1104.13(c), and it should be stricken from the record in this proceeding. Because P&L's Rebuttal is an illegal pleading, Boral has not addressed the substantive arguments contained therein. If this proceeding becomes a full abandonment proceeding, Boral will address P&L's substantive arguments at that time.

Respectfully submitted,

BORAL BRICKS INC.



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Ronald E. Quirk, Jr.
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May 14, 2003

CERTIFICATE OF SERVICE

I, Sonya Williams, an employee at the law firm of Alston & Bird, LLP, do hereby certify that on this 14th day of May 2003, true and complete copies of the foregoing Motion to Strike in STB Docket No. AB-468 (Sub-No. 5X) by Boral Bricks, Inc., were served by first class mail, postage prepaid, on the following:

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Sonya Williams