

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
– FEEDER LINE APPLICATION –
LINE OF DELTA SOUTHERN RAILROAD, INC. LOCATED IN
EAST CARROLL AND MADISON PARISHES, LOUISIANA**

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**DELTA SOUTHERN RAILROAD, INC.’S REPLY IN OPPOSITION TO
MOTION SEEKING ENTRY OF PROTECTIVE ORDER**

Delta Southern Railroad, Inc. (“DSR”) hereby responds in opposition to the “Motion Seeking Entry of Protective Order” (the “Motion”) filed on February 18, 2021, by North Louisiana & Arkansas Railroad (“NLA”). The Motion fails to meet any of the criteria for relief under the regulation NLA has invoked – 49 C.F.R. § 1114.21(c) – and is merely an attempt to preempt DSR’s legitimate efforts to obtain relevant information from an entity that, if not a party, is nevertheless closely allied in interest to (and supportive of) the feeder line applicant in this case, Lake Providence Port Commission (“LPPC”), which seeks to force DSR to relinquish ownership of an inactive railroad line. For these reasons, NLA’s Motion should be denied.

BACKGROUND

LPPC initiated this proceeding by way of an amended feeder line application (the “Application”) filed pursuant to 49 U.S.C. § 10907 and corresponding regulations of the Surface Transportation Board (“Board”) at 49 C.F.R. Part 1151 on December 28, 2020. The Board accepted the Application as complete in a decision served on January 15, 2021. As pertains here, DSR, the owner of a long-out-of-service railroad line that is the target of LPPC’s Application,

served discovery upon LPPC and Southeast Arkansas Economic Development District (“SEAEDD”), both parties to this proceeding, and NLA. In so doing, DSR invited NLA to confer on discovery issues to see if the parties could reach an accord informally on the information that NLA would supply in response. NLA ignored DSR’s proposal, and instead filed the subject Motion.

The Motion seems to constitute NLA’s formal response to DSR’s discovery. Specifically, NLA has invoked its non-party status as a basis to object, and has admitted in the process that it has been a “witness” in this proceeding (Motion, 1). NLA – represented here by the same legal counsel as LPPC and SEAEDD – has supplied testimony in support of the Application, and has been cooperating in a plan to divest DSR of its railroad assets, and potentially to operate over those railroad assets in place of DSR. After having raised many of the usual general objections commonly encountered in the course of formal responses to discovery (Motion, 2-4), NLA has offered substantive (but unverified)¹ responses to DSR Interrogatories 7-10, 12-23, 25-26, and 28-31, and has refused to respond substantively to DSR Interrogatories 1-6, 11, 24, and 27. In having refused to provide substantive responses, NLA has argued, among other things, that the responses are unwarranted because the information sought is already in DSR’s possession, irrelevant, or involves disclosure of allegedly commercially-sensitive (or “confidential”) information, or that to respond would subject NLA to undue burden. Incidentally, NLA’s Motion addresses DSR’s interrogatories, but it does not raise any issue with

¹ See 49 C.F.R. § 1114.6(a). To the extent that NLA has already responded substantively to certain requests, waiving any categorical objections in the process, DSR will ask NLA to formalize its substantive responses by having them verified in accordance with Board rules of discovery as referenced above.

DSR's single request for document production covering all documents identified in response to DSR's interrogatories.

ARGUMENT

NLA's failure to explore informal resolution of the matter at DSR's invitation is reason enough to deny the Motion.

Beyond failing to provide a discernible basis for protective relief under Section 1114.21(c), the Motion is premature because NLA failed to attempt to resolve its discovery dispute with DSR (or to limit the scope of that dispute) through informal discussion.² DSR did not discuss NLA's objections at any time prior to DSR's receipt of NLA's Motion. NLA's actions are all the more egregious in view of DSR's written invitation (included with service of the discovery) to explore a resolution of any issues that NLA may have with DSR's information requests. Indeed, DSR's and NLA's respective counsel in this case have had numerous, constructive discussions on other matters related to this proceeding. If NLA is, like its allied interests in this proceeding, committed to an expedited processing of LPPC's Application as its Motion seems to suggest, then efforts at informal resolution of discovery issues would have been best to keep LPPC's efforts on track. This is especially so, where the dispute involves only nine of the 31 discovery requests that DSR served upon NLA, which further convinces DSR that discussion among reasonable parties could have resolved most, if not all, of the lingering issues. Because NLA ignored the Board's longstanding expectation that parties to discovery disputes

² See, e.g., *CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. And Kaneb Pipe Line Operating Partnership, L.P.*, NOR 42084 (STB served Nov. 23, 2004) ("the parties should discuss and attempt to resolve the disputed discovery requests. As a general rule, the Board expects parties to try to resolve their differences on their own before involving the Board . . . If, after making a good faith attempt to resolve any disputes over the particulars of the discovery requests, the parties are still at an impasse, they should notify the Board in writing").

will first explore informally resolution (and did so despite DSR's invitation), the Board must deny the Motion.

If NLA is predicated its Motion on its asserted non-party status, then the Motion should be denied as premature (or moot) pending Board action on a contemporaneously-filed request for a subpoena.

NLA's Motion is peculiar in that it seeks a protective order with respect to specific interrogatories, leaving off any clear line of demarcation between the information requests which it will accommodate and those that it has thus far declined to answer. NLA may seek protection due to its asserted non-party status (Motion, Transmittal Letter, and 1), but, if so, NLA has already partially waived that objection. On the other hand, if NLA believes that its non-party status justifies its selected objections, then that issue awaits resolution through a motion for a Board-issued subpoena that DSR has filed concurrently with the present Reply. DSR will show in that motion that information that NLA may possess would be crucial to DSR's feeder line defense (a proceeding that entails the extreme remedy the forced divestiture of DSR rail assets), to the extent that point is not already apparent. If NLA were to prevail in quashing such a subpoena, then NLA's Motion would be moot, since DSR would not be entitled to discovery of NLA under applicable Board rules.

NLA has failed to identify what relief it seeks under Section 1114.21(c), and has not pleaded a basis for any such relief in any event.

NLA's Motion reads as a preemptive, anticipatory strike against a motion to compel. Indeed, the elements of NLA's discovery objections are standard in discovery responses – irrelevance, burden, overbreadth, etc. But none of this comports to the objectives and purpose of Section 1114.21(c), which reveals the meritlessness of NLA's Motion.

Section 1114.21(c) provides in pertinent part that any party or person of whom discovery is sought may “for good cause shown” seek from the Board “any order which justice requires . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding.” Relief under Section 1114.21(c) may include any of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;
- (3) That the discovery may be had only upon such terms and conditions as the Board may impose to insure financial responsibility indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred;
- (4) That the discovery may be had only by a method other than that selected by the party seeking discovery;
- (5) That certain matters not be inquired into or that the scope of discovery be limited to certain matters;
- (6) That discovery be conducted with no one present except persons designated in the protective order;
- (7) That a deposition after being sealed be opened only by order of the Board;
- (8) That a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way; and
- (9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Board.

NLA’s request for Board protection from discovery does not comport with the purpose of the regulation invoked, and, in any event, NLA has not provided “good cause” for the protections it seeks. NLA does not demonstrate that DSR’s discovery serves to annoy,

embarrass or oppress,³ and NLA does not offer support for the notion that DSR's efforts at discovery generally are untimely or unduly burdensome. Indeed, NLA cannot contend that DSR's discovery is burdensome as a general matter, because it has already responded substantively to the majority of DSR's information requests. And, while NLA argues that certain information requests are irrelevant, those requests pertain to the merits of LPPC's Application and NLA's related support for the feeder line effort. Disputes over relevance are appropriate for informal resolution first, and then resolution by the Board (in the context of an orderly motion to compel and response) as necessary under 49 C.F.R. § 1114.31; they do not support a protective order under Section 1114.21. Because NLA cannot, and does not, argue that the information that it wants to withhold is "inappropriate to the proceeding" – that it is scandalous, abusive, or is intended to seek information that is pertinent to some unrelated litigation or administrative proceeding – it has failed to satisfy the criteria for a Board order.

Furthermore, while Section 1114.21(c) clearly functions, and reads, as a series of potential discovery ground rules – whether discovery is available, whether certain forms of discovery will be permitted, allocation of the costs of responding to discovery, sealed depositions, for example – NLA's Motion is not about ground rules. Instead, the Motion relates to the relevance or burden of certain specific information requests that would otherwise be permissible in a Board proceeding. If NLA wanted to set certain ground rules for discovery to protect itself, its Motion should have specified the relief it wanted under Section 1114.21(c), but the Motion lacks such specificity. NLA's Motion does not identify which numbered subsection

³ To be fair, NLA characterizes DSR's discovery as "unwarranted, burdensome harassment" (Motion, 2). NLA's bald allegation, compared against DSR's requests (contained in NLA's Motion) prove otherwise. If this Motion were to turn on such baseless hyperbole, then DSR points out that NLA's unwarranted evasion is intended to deprive DSR of a full and fair opportunity to present its case against the forced taking of its property, and is thus abusive.

of Section 1114.21 encompasses NLA's request for relief, but it is rather clear that NLA is not seeking relief pursuant to Section 1114.21(c)(1),⁴ (2), (3), (4), (6), (7), (8), or (9). Furthermore, if NLA intended to seek protection from discovery on "certain matters," or to limit discovery to "certain matters" (49 U.S.C. § 1114.21(c)(5)), its Motion does not so plead.

At no point in the Motion does NLA cogently point to any "certain matter" to which discovery should be limited, or for which discovery should be prohibited categorically. Instead, because NLA pleads for relief under the rubric of 49 C.F.R. §§ 1114.21(a)(1)-(2), the matter should be adjudicated and resolved in accordance with Section 1114.31, with the parties seeking first to resolve discovery disputes informally. Nothing in Section 1114.21(c) suggests that disagreements over discrete discovery requests not falling within an "prohibited matter" category should be resolved under a protective order, rather than under 49 C.F.R. § 1114.31. Indeed, NLA has not offered a shred of precedent supporting its novel idea that the protections of Section 1114.21(c) can or should short-circuit dispute resolution under Section 1114.31 where, as in this case, NLA has not argued for categorically prohibiting discovery as to "certain matters." Indeed, DSR knows of no such precedent, and submits that NLA's would-be application of Section 1114.21(c) would render Section 1114.31 meaningless.

⁴ It is possible that NLA's objection to certain discovery requests turns on its asserted non-party status, and that the underlying premise of NLA's Motion is that, despite having been forthcoming with responses to certain of DSR's interrogatories, NLA could have objected categorically, so its limited objections are defensible under 49 C.F.R. § 1114.26. If so, that issue can be resolved one way or the other under DSR's pending request for Board issuance of a subpoena directing NLA to respond to discovery, not under a motion for protective order.

DSR will pursue resolution of disputes over specific discovery requests in the ordinary course, but NLA is welcome to designate its Motion as NLA's reply to a forthcoming motion to compel if, in the interest of time, it so wishes.

Having demonstrated above that NLA's Motion does not satisfy the threshold criteria for protection under Section 1114.21(c), and that the requested relief does not comport with any of the categories of relief under that regulation, DSR need not here address issues of relevance, burden, or any of the other specific objections to individual interrogatories NLA has raised. DSR will do so in a motion to compel that it very soon will file, barring an informal dialogue that may yet facilitate an accord. But DSR will observe here that the proceeding warrants issuance of a protective order under 49 C.F.R. § 1104.14 to permit the exchange of sensitive and proprietary information, and to protect such information from public disclosure. NLA's objections to discovery stem, in part, from concerns over sensitive information, which concerns (along with NLA's unfounded and misguided concerns over compliance with 49 U.S.C. § 11904), can, of course, be addressed and set aside by a Section 1104.14 protective order, rather than one issued under Section 1114.21(c). DSR intends, then, very soon to file such a motion, if LPPC or some other party does not do so first.

Finally, NLA's Motion reads decidedly like an anticipatory reply to an as-yet-unfiled motion to compel from DSR. Accordingly, and given NLA's (and LPPC's) vaguely-articulated need for expedited handling of this proceeding, if NLA wishes for the Motion, or parts of it, to serve as NLA's substantive reply to a potential DSR motion to compel (barring informal resolution), then DSR has no objection to NLA so designating its Motion

CONCLUSION

For all of foregoing reasons, the Board must deny NLA's Motion. The issues raised herein are appropriate for resolution by way of a pending motion for Board-issuance of a

subpoena and a potentially-forthcoming motion to compel. In the meantime, DSR would suggest that the wisest and swiftest course, given the limited scope of NLA's objections, would be for NLA and DSR to confer as the Board would have expected.

Respectfully submitted,

/s/ *Thomas J. Healey*

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CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of February, 2021, I served copies of the foregoing Reply electronically (via email) upon each the following party of record:

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