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215045
ORIGINAL



October 27, 2005

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

ENTERED
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OCT 27 2005
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Dear Secretary Williams:

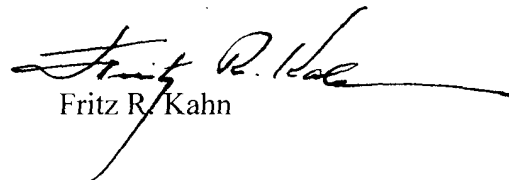
Enclosed for filing in STB Finance Docket No. 34337, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, are the original and ten copies of the Reply of Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc.

Additional copies of this letter and of the Reply are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

By copy of this letter, service is being effected upon counsel for North Coast Railroad Authority, d/b/a. Northwestern Pacific Railroad.

If you have any question concerning the foregoing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: William A. Mullins, Esq..

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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

v.

NORTH COAST RAILROAD AUTHORITY
d/b/a NORTHWESTERN PACIFIC RAILROAD



REPLY
OF

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

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Attorneys for

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTER RAILROAD, INC.

Dated: October 27, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

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REPLY
OF
MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

Complainant, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. ("CWR"), pursuant to 49 C.F.R. 1104.13(a), replies to the Motion to Strike of the Defendant, North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad ("NWP"), filed October 11, 2005, as follows:

A.

No evidence had been received or record compiled.

The Trustee understands full well that a party which, pursuant to 49 C.F.R. 1115.4(b), seeks reopening of a proceeding based, at least in part, on new evidence ordinarily is barred from offering evidence that he might have introduced at an earlier stage of the proceeding. In his

Petition to Reopen. filed September 21, 2005. at page 4. the Trustee acknowledged:

Petitioner is well aware that normally the evidence offered in support of a petition for reopening be new evidence which previously could not have been offered into evidence. See, STB Finance Docket No. 33989, Pejebscot Industrial Park, Inc., d/b/a Grimmel Industries–Petition for Declaratory Order, served November 7, 2003; Platnick Bros., Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782, 785 (1983). That principle, however, is inapplicable here, because the evidentiary phase of this proceeding had not yet been reached. The Board dismissed the Complaint without having allowed the parties to introduce *any* evidence.

For all its bombast, NWP's Motion to Strike does not take issue with the Trustee's statement. To the contrary, in each of the Board proceedings cited by NWP, at pages 6-7 of its Motion to Strike, and relied upon to support of its contention that petitions for reconsideration premised on evidence which might have been submitted earlier are routinely denied by the Board, the agency had received significant amounts of evidence and a voluminous record had been compiled.¹ In fact, NWP does not, and cannot, cite to a single decision of the Board, or the Interstate Commerce Commission before, it in which a petition for reconsideration was denied on the ground that the new evidence was belatedly tendered in which the agency had not previously provided for the receipt of evidence and for the making of an evidentiary record. In the instant proceeding, however, the Board dismissed the Trustee's Complaint without *any* evidence having been received by it and most assuredly *any* evidence which would have supported the findings

¹ See, STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, served September 27, 2004; STB Finance Docket No. 33556, Canadian National Railway Company, et al.–Control–Illinois Central Corporation, et al., served August 27, 2002; STB Finance Docket No. 33388, CSX Corporation, et al.–Control and Operating Leases/Agreements–Conrail, Inc., et al., served October 19, 1998. In STB Finance Docket No. 33989, Pejebscot Industrial Park, Inc., d/b/a Grimmel Industries–Petition for Declaratory Order, served November 7, 2003, the language quoted in NWP's Motion to Strike, at page 7, was *dictum*, since the Board received the evidence submitted with the petition for reconsideration.

and conclusions of the Board's Decision, served July 27, 2005, assailed in the Trustee's Petition to Reopen.

The principal purpose for tendering the Verified Statements of John Mayfield and Gary D. Milliman was to demonstrate that, not only were the assailed findings and conclusions in the Board's Decision unsupported by *any* evidence, they were factually in error. Moreover, the Verified Statements corroborate the allegations of the Trustee's Complaint which charged NWP with statutory infractions which the Board failed altogether to address in its Decision.

B.

Defendant's allegations did not support the Board's findings and conclusions.

The Trustee understands that the Board can, and does, render decisions based solely upon the pleadings submitted by parties to a proceeding and can, and does, reach findings and conclusions premised on their counsels' representations. Here, however, no party filed a pleading making the allegation which would support the assailed findings and conclusions of the Board's July 27, 2005, Decision. In its Motion to Dismiss, filed January 28, 2005, at page 3, NWP contended, "Meyer does not allege that CWR requested specific service, as required to trigger a common carrier service obligation under Section 11101," and, again at pages 14-15 of its Motion to Dismiss, NWP maintained, "[T]he complaint fails to allege that CWR made the specific request for service necessary to invoke that [section 11101(a)] obligation . . . Meyer has failed to allege any such request by CWR." That's all that NWP said on the subject. It certainly did not contend, as the Board found and concluded in its July 27, 2005, Decision:

CWR did not tender traffic to NWP for movement, nor did it ask NWP to make the necessary repairs to restore service over its line following the FRA order [p.2].

The trustee concedes that CWR never asked NWP to repair the line or provide service [p.3].

Here, the trustee concedes that, in the 6½ years since the line went out of service in 1998, neither CWR nor Georgia Pacific [Corporation], the only shipper on the line, ever requested that service be provided. Moreover, the record does not show that CWR or any other party ever asked that the line be repaired and put back into service [p.4].

NWP must have received a reasonable demand for its services. That did not happen. Nor is there any indication in the record that CWR or Georgia Pacific ever asked that the line be repaired [p.4].

The Verified Statements of John Mayfield and Gary D. Milliman tendered with the Trustee's Petition to Reopen flatly contradict the foregoing findings and conclusions. They underscore that the assailed findings and conclusions of the Board's Decision, served July 27, 2005, not only were completely unfounded: they were factually incorrect.

C.

The Trustee's Complaint noted Defendant's statutory infractions.

At page 5 its Motion to Strike, NWP argues that the contents of the Verified Statements of John Mayfield and Gary D. Milliman, having been known CWR for years, should have been submitted as part of the Trustee's Complaint. The Board's regulation, 49 C.F.R. 1111.1, which governs the filing of formal complaints, however, required no such disclosure. The regulation calls for a lengthy recitation of the facts in complaints challenging the reasonableness of rail rates but in no other complaints. All the regulation says is that the complaint "should set forth ***briefly and in plain language*** the facts upon which it is based [emphasis added]." The Trustee met the regulations's requirement and in his Complaint specifically charged NWP with the failure to interchange and interline shipments tendered by CWR at Willits for transportation on its line

between Willits and Shellville to consignees elsewhere. Among other things, the Trustee's Complaint alleged:

The cessation of operations by NWP and its violations of the statutory obligations which NWP had assumed as a common carrier railroad effectively have removed CWR from the freight hauling business, for without the connection at Willits and the operation of NWP's line to Shellville and the connection with the California Northern Railroad Company, CWR is unable to tender carloads of freight [originated by its principal shipper, Georgia Pacific Corporation] to be interlined for movement to points across the country or to receive carloads of freight interlined from other railroads.

In its Answer, filed December 21, 2004, NWP claimed that it "lacks sufficient knowledge or information to form a belief as to the truth of the [factual] allegations . . . and therefore denies them."

For purposes of NWP's Motion to Dismiss, however, the factual allegations of the Trustee's Complaint must have been assumed to be complete and correct. As the Board declared in STB Docket No. 41191 (Sub-No.1), AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, served March 19, 2004, "In considering a motion to dismiss, the factual allegations in a complaint must be construed in a light most favorable to the complainant." Accord, STB Docket No. WCC-101, Government of the Territory of Guam v. Sea-Land Service, Inc., et al., served November 15, 2001; STB Docket No. 42048, Petition for Declaratory Order—Nancy Hall v. Aloha International Moving Services, Inc., et al., served March 14, 2001; STB Docket No. WCC-104, Trailer Bridge, Inc. v. Sea Star Lines, LLC, served December 10, 1999; STB Docket No. 41687, Grain Land Coop v. Canadian Pacific Limited, et al., served December 8, 1999. It is evident at the Board failed to observe its own precedents in dismissing the Trustee's Complaint upon NWP's Motion to Dismiss.

Even assuming, however, as NWP's Motion to Dismiss had urged and the Board in its Decision had found, that the Trustee's Complaint had fallen short of laying out the elements for a violation by NWP of 49 U.S.C. 11101(a), the Trustee's Complaint additionally had charged NWP with having failed to provide facilities for the receiving, forwarding or delivering of traffic to or from the connecting line of CWR, in violation of 49 U.S.C. 10742, and with having prevented the continuous carriage of freight from origin to destination, in violation of 49 U.S.C. 10744.² The NWP's Motion to Dismiss and the Board's decision failed even to discuss these charges. The tendered Verified Statements of John Mayfield and Gary D. Milliman, however, fully corroborate the allegations of the Trustee's Complaint. The Trustee should have been afforded an opportunity to present evidence in support of the allegations of his Complaint. Instead of dismissing the Complaint, the Board should have set a procedural schedule and have given the Trustee an opportunity to make his case and meet his burden of proof. See, STB Docket No. 42088, Western Fuels Association, Inc., et al. v. The Burlington Northern and Santa Fe Railway Company, served November 10, 2004; STB Docket No. 42087, Groome & Associates, Inc., et al. v. Greenville County Economic Development Corporation, served October 12, 2004; STB Docket No. 42080, Minnesota Northern Railroad, Inc. v. Canadian National Railway Company, served July 25, 2003; STB Docket No. 42057, Public Service Company of Colorado d/b/a XCEL Energy v. The Burlington Northern and Santa Fe Railway Company, served October 9, 2002; STB Finance Docket No. 34236, Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc., served September 5, 2002; STB Docket No. WCC-105, DHX,

² In sharp contrast, in STB Finance Docket No. 34019, Montezuma Grain Company, LLP, et al. v. CSX Transportation, Inc., served September 13, 2002, the complaint alleged the violation of only section 11101(a).

Inc. v. Matson Navigation Company and Sea-Land Service, Inc., served March 28, 2002; STB Docket No. 42069, Duke Energy Corporation v. Norfolk Southern Railway Company, served February 5, 2002. Again, the Board failed to observe its own precedents in dismissing without affording the Trustee the opportunity to present evidence in support of his Complaint alleging the violation by NWP of its statutory obligations as a common carrier railroad.

D.

The Trustee is under a duty to preserve CWR's assets.

The most egregious error of its Motion to Strike, however, is NWP's evident confusion in treating the Trustee as being simply the *alter ego* of CWR, as NWP does, at pages 4 and 8 of the pleading. Indeed, NWP goes so far as to refer to the Trustee as merely CWR's "counsel." In doing so, NWP reveals an astonishing unfamiliarity with even the most basic provisions of the Bankruptcy Code relating to railroad reorganizations, 11 U.S.C. 1161, et seq. CWR is the debtor, and its duties are spelled out at 11 U.S.C. 521. Mr. Meyer is the Trustee of the CWR, having been appointed by the U.S. Trustee, pursuant to 11 U.S.C. 1163, and his duties are spelled out at 11 U.S.C. 1106. Among other things, the Trustee is required to "investigate the acts, conduct, **assets**, liabilities and financial condition of the debtor . . . and any other matter relevant to the case or to the formulation of a plan [of reorganization][emphasis added]." As the court said in Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989), "A trustee has a duty to preserve the assets of an estate . . ." Here CWR's claim for the net operating revenue lost as a result of NWP failure to keep the Willits interchange and its railroad line between Willits and Shellville in repair and operating condition is an asset of the debtor which the Trustee has a duty to preserve. The Trustee has endeavored to discharge that duty by filing his Complaint against NWP before

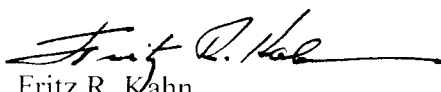
the Board, and in dismissing the Trustee's Complaint in advance of receiving *any* evidence the Board has committed a grievous, material error.

WHEREFORE, Complainant, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc., asks that the Motion to Strike of the Northcoast Railroad Authority, d/b/a Northwestern Pacific Railroad, filed October 11, 2005, be denied, that the Board determine that its Decision, served July 27, 2005, involved material error, that the Board receive and include in the record as new evidence the tendered Verified Statements of John Mayfield and Gary D. Milligan, and that, based thereon, the Board, upon applying for and being granted leave of the United States Court of Appeals for the Ninth Circuit,³ reopen the proceeding and vacate its Decision.

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTER RAILROAD, INC.

By his attorneys,

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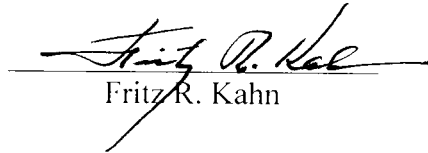
Dated: October 27, 2005

³ Pursuant to 28 U.S.C. 2342, the Court has been vested with exclusive jurisdiction to set aside the Board's Decision by virtue of the Petition for Review having been filed in No. 05-75440, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. The Surface Transportation Board. A stay of its proceedings pending the Board's action would be appropriate.

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Petition to Reopen upon North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, by facsimile transmitting and mailing copies thereof by prepaid first-class mail to it attorney, William A. Mullins, Esq.

Dated at Washington, DC, this 27th day of October 2005.


Fritz R. Kahn