

ENTERED
Office of Proceedings
June 7, 2017
Part of
Public Record

June 7, 2017

JOHN D. HEFFNER
(202) 742-8607
Direct Fax (202) 742-8697
John.Heffner@strasburger.com

BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: FD 36117, LRY, LLC D.B.A. LAKE RAILWAY – Petition for
Declaratory Order – Rail Line in Lake County, OR, and Modoc, CA**

Dear Ms. Brown:

I am submitting on behalf of Lake County, Oregon, its reply to the Motion to Strike filed by LRY, LLC D.B.A. Lake Railway in the above-captioned proceeding. Please contact me if the Board has any questions or concerns.

Sincerely yours,



John D. Heffner
Counsel for Lake County

Enclosure

cc: James Bailey, Esq.
service list parties

9027317.1/SP/46853/0101/060717

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36117

**LRY, LLC D.B.A. LAKE RAILWAY
- PETITION FOR DECLARATORY ORDER -
RAIL LINE IN LAKE COUNTY, OR, AND MODOC COUNTY, CA**

**REPLY OF LAKE COUNTY, OREGON TO
LRY, LLC D.B.A. LAKE RAILWAY'S MOTION TO STRIKE**

Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., NW
Suite 717
Washington, D.C. 20036
(202) 742-8607

James E. Bailey, III
Bailey & Yarmo
780 NW York Drive
Suite 104
Bend, OR 97701
(541)317-9000

Counsel for Lake County, OR

Dated: June 7, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36117

**LRY, LLC D.B.A. LAKE RAILWAY
- PETITION FOR DECLARATORY ORDER -
RAIL LINE IN LAKE COUNTY, OR, AND MODOC COUNTY, CA**

**REPLY OF LAKE COUNTY, OREGON TO
LRY, LLC D.B.A. LAKE RAILWAY'S MOTION TO STRIKE**

**I.
INTRODUCTION**

On May 26, 2017, Petitioner LLC D.B.A. Lake Railway (“Petitioner” or “Lake Railway”) filed a Motion to Strike the Reply of Respondent Lake County, OR (“Respondent” or “Lake County”), in the above-captioned matter. The *sole* ground for Petitioner’s relief is its allegation that Respondent’s counsel, John D. Heffner, is disqualified from representing Lake County because of a prior representation of Lake Railway *seven to eight years ago!* For the reasons asserted below, Lake Railway’s Motion should be denied as frivolous.¹

¹ If Petitioner believes Respondent’s counsel is disqualified then the proper motion is a motion to disqualify, not a motion to strike.

II. STATEMENT OF FACTS

This proceeding involves a notice of lease termination provided by Lake County to its rail carrier tenant, Lake Railway,² for the railroad's failure to comply with the material terms of that lease. Lake Railway initiated litigation by filing a motion for a temporary restraining order and a preliminary injunction in federal district court in Oregon. Fearing that Lake County would seek Board authority for discontinuance of Lake Railway's service, the railroad petitioned the Board to stay any proceedings that Lake County might bring at the Board. However, after granting the TRO *ex parte*, the Court later denied the injunction request and dissolved the TRO. Lake County filed a Reply on May 19, 2017, along with a copy of the Court's decision. Lake County has not initiated any proceeding before the Board.

Lake Railway filed a Motion to Strike Lake County's Reply on the grounds that the undersigned counsel had formerly represented Lake Railway between 2009 and 2010 and is therefore disqualified from representing Lake County now. Lake Railway concedes that the undersigned counsel last represented Lake Railway between May 2009 and July 30, 2010. At that time the undersigned counsel was assisted on an informal basis by Lake Railway's present counsel James Savage.

² A small Class III short line railroad owned by an individual named Paul Didelius. Mr. Didelius markets his short line railroads under the informal trade name "Frontier Rail."

However, as explained in the accompanying affidavit, the undersigned counsel terminated his relationship with Mr. Savage in the summer of 2011 and joined the firm of Strasburger & Price on October 3, 2011. Since joining that firm, the undersigned counsel has performed no work for Lake Railway. While the undersigned counsel represented Lake Railway during the years 2009 through 2010, most of that work was actually performed by Mr. Savage with the undersigned counsel reviewing his work. The vast majority of this work was performed during 2009, some *eight years ago*. Since then, the undersigned counsel has had no substantive contact with Mr. Didelius³ or any of his other employees.

III. ARGUMENT

Lake County responds to Petitioner's motion as it is entitled to under 49 CFR §1104.13, giving a party the right to reply to *any* pleading within 20 days after it is filed. Unable or unwilling to satisfy its obligations to Lake County and the railroad's customers under the lease, Lake Railway does not respond in any substantive way to Lake County's Reply.⁴ More significantly, it made no attempt to cure the events of default under the lease that resulted in Lake County's decision to provide notice of termination. The Board should see this strategy for what it is: a

³ Paul Didelius approached the undersigned counsel at a recent short line industry meeting; however, those discussions were limited to a polite conversation that did not address any substantive matters.

⁴ Of course that reply would have been prohibited as an unauthorized reply to a reply under 49 CFR 1104.13(c).

last chance effort to remain on the line against the wishes of Lake County and the shippers.

Simply stated, there is no basis for disqualification. Lake Railway is not a current client of the undersigned counsel or Strasburger & Price. Moreover, no substantially related matter is involved. The undersigned counsel's involvement of the now terminated lease was nominal. In any event the issue of whether or not Lake Railway breached the lease is in litigation in federal court in Oregon. That termination is a matter that is outside the Board's jurisdiction and is being handled by Lake County's Oregon counsel, James Bailey. Lake Railway's Reply is a preemptive attempt to prevent Lake County from seeking a discontinuance and has nothing to do with the lease itself.

In support of its attempt to disqualify the undersigned counsel from continuing to represent Lake County, Lake Railway cites 49 CFR §1103.16(c). That provision states,

“[t]he obligation to represent the client with undivided fidelity and not to divulge secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

Lake Railway's counsel also cites *Eighteen Thirty Group, LLC, Acquisition Exemption-In Allegheny County, MD*, FD 35438 (STB served April 5, 2012) as prohibiting the undersigned counsel from representing Lake County. But that case

is inapposite. There the undersigned counsel had represented one Gerald Altizer who had sought to acquire the subject rail line from CSX Transportation. When Mr. Altizer was unsuccessful in raising funds with which to acquire the line, he turned to James Riffin to finance that transaction. Later after Messrs. Altizer and Riffin had a parting of the ways and Mr. Riffin was forced into bankruptcy, Mr. Altizer formed a new enterprise, Eighteen Thirty Group, LLC, to acquire the line from the bankruptcy estate with funding provided by a Duncan Smith. The real party in interest there was Gerald Altizer rather than WMS or Mr. Riffin. With all due respect to the Board's decision, there was no conflict as that work involved a different transaction - acquisition of that rail line out of the Riffin bankruptcy - rather than the sale by CSX Transportation.

Lake Railway's present counsel ignores a Board decision directly on point, *Trinidad Railway, Inc., Abandonment Exemption in Las Animas County, CO.*, AB-573X (STB served December 12, 2001) involving a similar situation. There the purchaser of a rail line that was the subject of a pending abandonment notice sought the extraordinary relief of asking the Board to disqualify the counsel representing the party making an offer of financial assistance to acquire the same line citing 49 CFR §1103.16(c). The attorney representing the OFA offeror contended that he had never represented the purchaser but had represented its individual owners in a court appeal of another Board proceeding. The Board

refused to disqualify the offeror's counsel because it found that he had never obtained any confidential information about the business practices of the line's purchaser, its rail carrier affiliates, or its individual owners. Furthermore, the Board noted that the party seeking the attorney's disqualification had not presented any specifics demonstrating that he had access to, much less divulged, secrets or confidences in violation of the Board's Canons of Ethics, or that he was in possession of confidential information could assist or has assisted him in the representation of his client.

Similarly, the undersigned counsel has never had access to any of Lake Railway's confidential business records or even dealt with any of its employees other than Mr. Didelius and, at that, many years ago. Moreover, the prior matter and the current matter are not substantially related. In representing Lake County in the current assignment the undersigned has relied on communications with Lake County and the two principal on-line customers, the lease agreement which is a matter of public record, and Lake Railway's public Board filings.

Taken to its logical extreme, no attorney who had worked for a government agency or a corporation would be able at a future date to represent a party adverse to his or her former employer. High level federal employees with policy making responsibilities such as the Chairman or General Counsel of this agency are

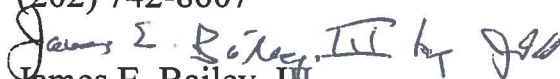
prohibited from practicing before the Board for two years after their employment terminates. Here there is a lapse of 7 to 8 years.

Accordingly, no basis for disqualification exists and the Board should deny Lake Railway's motion as frivolous. Nevertheless, should the Board deem the undersigned counsel's representation in this matter an irreconcilable conflict, Lake County will retain substitute counsel. In that event, Lake County's substitute counsel would ask the Board for leave to resubmit, if necessary, its May 19, 2017, Reply and have that document considered as timely filed.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., NW
Suite 717
Washington, D.C. 20036
(202) 742-8607



James E. Bailey, III
Bailey & Yarmo
780 NW York Drive
Suite 104
Bend, OR 97701
(541)317-9000

Counsel for Lake County, OR

Dated: June 7, 2017

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the Lake County Reply to Motion to Strike was sent by electronic mail to all parties of record in this proceeding.

James Savage
James H.M. Savage, Esq.
22 Rockingham Court
Germantown, MD 20874

David Rossmiller, OSB No. 983395
Betts, Patterson & Mines. P.S.
111 SW 5th Avenue
Suite 3650
Portland, OR 97204

Elissa M. Boyd, OSB No. 111679
Betts, Patterson & Mines. P.S.
111 SW 5th Avenue
Suite 3650
Portland, OR 97204



John D. Heffner

Dated: June 7, 2017

VERIFIED STATEMENT
OF
JOHN D. HEFFNER

John D. Heffner, being duly sworn deposes and states as follows:

I am Of Counsel to the firm of Strasburger & Price, LLP, in the firm's Washington, D.C. office located at 1025 Connecticut Ave., N.W., Suite 717, Washington, D.C. 20036. I have been with the firm since October 3, 2011.

During that time my practice has generally involved representation of short line and regional railroads, public agencies, and railroad industry vendors in railroad-related transactions and regulatory matters before federal, state, and local agencies.

Prior to joining Strasburger, I represented Paul Didelius¹ in several small transactions starting around 2007 or 2008. One of those transactions involved obtaining STB operating authority for LRY, LLC D.B.A. Lake Railway for both a line of railroad owned by Lake County, OR, and a connecting railroad line owned by the Union Pacific Railroad which Lake Railway would be leasing. During that time I shared office space with Lake Railway's current counsel, James Savage. I asked Mr. Savage to assist me in this representation. I terminated my relationship with Mr. Savage around July 2011 shortly before joining Strasburger & Price.

¹ Mr. Didelius appears to own these carriers in his individual capacity, but he markets his carriers' services under the informal trade name "Frontier Rail."

Mr. Savage was involved in connection with the lease drafts tendered by both Lake County and the Union Pacific Railroad for review. My recollection is that Mr. Savage did most of the lease-related work and prepared the STB filings as well with my role being of a supervisory nature.² With the completion of that assignment in 2010, my work for Mr. Didelius and Lake Railway ceased.

During the Fall of 2016, one of the two on-line shippers, Cornerstone Industrial Minerals, contacted me about rail service issues with Lake Railway. I contacted our firm's ethics partner and we concluded that there was no conflict due to the substantial passage of time, as well as Lake Railway not being a current client, and the fact that this work did not entail the railroad's STB authority or the lease, i.e. – the matters were not substantially related. I thereafter represented Cornerstone. In May, 2017, Lake County directly retained me.

My prior work never gave me access to any confidential client documents. Lake Railway is not a current client. Moreover, my representation of Lake County is not substantially related to any work I previously did for Lake Railway.

² The Board decisions show Mr. Savage as the party who filed the documents with John D. Heffner shown as "of counsel."

VERIFICATION

Dist. of Columbia

STATE

OF

CITY OF

SS

John D. Heffner, being duly sworn according to law, hereby
deposes and states that (s)he is holds the position of ATTORNEY with Strasburger Price,
is authorized to make this Verification, has read the foregoing document, and
knows the facts asserted therein are true an accurate as stated, to the best of (her)
his knowledge, information, and belief.

[Signature]

Subscribed to and sworn to before me, a Notary Public, in and for the City of
Washington in the State of DC, this 1st day of June, 2017

[Signature]
Notary Public

My commission expires: 11/30/2020

