

Before the
SURFACE TRANSPORTATION BOARD

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December 10, 2019
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STB Docket No. AB 1242 (Sub-No. 1)

**HARTWELL FIRST UNITED METHODIST CHURCH
- ADVERSE ABANDONMENT AND DISCONTINUANCE -
THE GREAT WALTON RAILROAD COMPANY, INC., IN HART COUNTY, GA**

**REPLY OF
HARTWELL FIRST UNITED METHODIST CHURCH
TO THE GREAT WALTON RAILROAD COMPANY, INC.
PETITION FOR DECLARATORY ORDER**

(color images included)

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Attorneys for
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Dated: December 10, 2019

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SURFACE TRANSPORTATION BOARD

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On November 20, 2019, The Great Walton Railroad Company, Inc. ("GWRC") filed a Petition for Declaratory Order (the "Petition") that claims to seek "based on the record in AB-1242" a declaratory ruling "to clarify that GWRC's runaround track is a line of railroad subject to the Board's exclusive jurisdiction under 49 USC §10501(d)." Petition at 1. Hartwell First United Methodist Church ("Hartwell First" or "Church") hereby responds¹ to the Petition requesting that the Board either dismiss the Petition as improperly filed, or if the Board does not dismiss the Petition, determine that GWRC's former "runaround track" was always "excepted track" under 49 USC §10906.

REPLY

- 1. The Board should dismiss the Petition as a veiled attempt to challenge decisions adverse to GWRC in ongoing state court proceedings.**

Although the Petition is styled as seeking a declaratory order as to whether the former runaround is a line of railroad, in truth the Petition is a broad attack on the decisions of the

¹ Hartwell First was the applicant in the original adverse abandonment proceeding. Despite this fact, and that GWRC filed the Petition seeking an interpretation based on the record in the adverse abandonment proceeding, GWRC did not serve a copy of the Petition on Hartwell First. (There is no certificate of service attached to the Petition.)

Georgia Public Service Commission (“PSC”) denying GWRC’s attempt to condemn property of the Church where the former “north spur” had been located and the decision of the Fulton County Superior Court that affirmed the decision of the PSC², and to a lesser extent the decision of the Superior Court of Hart County (the “State Court Litigation”) enjoining GWRC from attempting to reconstruct a track where the north spur had been located. *See* Petition at 7-9, 11-15, 15-26.

This is the second time that GWRC has attempted to attack the state proceedings. In January, 2019, in connection with its second status report (and after the PSC had denied GWRC’s application for condemnation), GWRC asked the Board to declare that the PSC’s conclusions were preempted. On its own, the Board dismissed the request for a declaratory order as not having been properly raised. *Hartwell First United Methodist Church – Adverse Abandonment and Discontinuance – The Great Walton Railroad Company, Inc. in Hart County, GA*, Docket No. AB 1242 (decided February 12, 2019) (the “*February 2019 Decision*”). Additionally, the *February 2019 Decision* went on to admonish GWRC that if it were to submit a subsequent petition for declaratory order, it should ensure that it addressed Board precedent that the Board will decline to issue a declaratory order where the dispute is already pending in state court – mentioning specifically the remand in the State Court Litigation, and GWRC’s appeal of the PSC decision. *Id.*, at 2. While referencing the Board precedent (Petition at 12), GWRC, without any citations, summarily dismisses the Board precedent, saying it should not

² On November 27, 2019, GWRC appealed its most recent loss in connection with the condemnation proceedings to the Georgia Court of Appeals. *See* GWRC Notice of Appeal, a copy of which is attached hereto as Exhibit A.

apply in this case³ – even though the Board’s *February 2019 Decision*, by citing to both the State Court Litigation and to the PSC appeal, made clear that its precedent applies here. Accordingly, the Board should dismiss the Petition given the ongoing State Court Litigation and PSC appeals.

2. The Board should strike or ignore facts included by GWRC that are outside the record in AB-1242.

If the Board decides to consider the Petition, it should not consider facts raised in the Petition that are not in the record. Although the Petition states it is asking for a decision based on the record in Docket No. AB 1242, it clearly references facts outside of the record (that have occurred after the *January 2018 Decision*), and moreover has introduced those facts without any supporting verification or verified statement. Accordingly, those facts should be stricken or ignored by the Board in making any decision regarding the Petition.

3. The Board should find that the former runaround track was excepted track subject to 49 USC §10906.

If the Board decides to consider the Petition, then it should limit its consideration to the initial question raised by GWRC, that being whether the former runaround track was a line of railroad (or alternatively whether it was excepted track). GWRC does not address the standards for distinguishing between a line of railroad and excepted track. Those standards, as discussed below, demonstrate that the former runaround was clearly excepted track.

Instead of looking at the Board’s standards, GWRC attempts to link the runaround to the Board’s decision in AB 1242 with respect to the “Line” of railroad that was the subject of the

³ GWRC’s claim that there has been a collateral attack on a decision of the Board is just not correct. The January 31, 2018 decision issued by the Board in *Hartwell First United Methodist church – Adverse Abandonment and Discontinuance – The Great Walton Railroad Company, Inc. in Hart County, GA*, Docket No. AB 1242 (the “*January 2018 Decision*”) denied the requested adverse abandonment of the .25 mile segment of GWRC’s main line, but did not address the former runaround track or make any findings regarding whether the former runaround track was a line of railroad or excepted track.

proceeding. Although the Church did argue in the proceeding that there was no runaround because a portion of the track (the former “north spur”) had been removed in 2008, long before the adverse abandonment proceeding was commenced, those arguments were in response to arguments that GWRC had been making in the State Court Litigation. The Church has never acknowledged, and does not agree that the former runaround was ever part of the Line.

As Hartwell First has continuously maintained, the “Line” in this proceeding involves only the 0.25 miles of the single main line track and associated right of way (varying between 20 feet and 12 feet wide) for which Hartwell First sought adverse abandonment authority. The adverse abandonment application did not reference or include the north spur track that had previously been removed by GWRC (leaving the property for the Church), or the Clinkscals industrial track that had previously been connected to the north spur (and which together GWRC contends constituted a “runaround track”) because at the time of the filing there was no north spur or runaround track. GWRC’s main argument seems to be that if it repeats that the former runaround track is a line of railroad enough times, then it will be true; however that is not the case.

The Board has clearly set out the differences between a line of railroad and excepted track. In *Pinelawn – Petition for Declaratory Order*, Docket FD 35468 (served April 21, 2015) (“*Pinelawn*”), slip op. at 6, the Board explained that rail lines are those “over which railroads provide point-to point ‘common carrier’ line-haul service to shippers.” *See also New Orleans Terminal Company v. Spencer*, 366 F. 2d 160, 165-166, 1966 U.S. App. LEXIS 4960 *13 (5th Cir. 1966) (“If there are traffic movements which are part of the actual transportation haul from shipper to consignee” then the trackage is a line of railroad). On the other hand if the trackage is “additional trackage [used] for loading, reloading, classification, storage and switching

operations that are ‘incidental to, but not actually and directly used’ in the carrier’s line-haul transportation,” they will be considered “excepted track” under 49 USC §10906. *Pinelawn*, slip op. at 6 (citing *Nicholson v ICC*, 722 F.2d 364, 367-368 (DC Cir. 1983) (quoting *Detroit & Mackinac Ry. V. Boyne City*, 286 F. 540, 546 (E.D. Mich. 1923)). Although this incidental trackage may be “necessary” for line-haul service they are still considered excepted track.

The parties generally agree on the history of the former runaround and its component parts. Sometime prior to 1913, the north spur was constructed off of, and outside the right of way of, the railroad’s main line to serve the Farmers Union Warehouse. In 1919, the north spur was extended across Webb Street to serve an additional railroad customer, Clinkscals. The railroad and Clinkscals entered into an industrial track agreement to cover construction and operation of the track. A copy of the Clinkscals industrial track agreement is attached hereto as Exhibit A for convenience of the Board. As shown on the plat attached to the agreement, the extension was a straight piece of track that did not connect back to the railroad’s main line. Under the agreement, the railroad was to construct the track at the expense of Clinkscals, who upon the payment would own the track. Agreement, ¶3. The construction was to occur on the land of Clinkscals outside of the right of way of the railroad. Agreement, ¶¶1,2. The agreement was terminable by either the railroad or Clinkscals on 60 days’ notice. The agreement has not been terminated.

At some point in the 1940’s or so, it is believed that the track along the Clinkscals warehouse was shortened and a connection to the main line was constructed to create a runaround.⁴ Neither party presented any evidence regarding the right of railroad at that time to build the connection to its main line. After the Clinkscals industrial track was shortened and

⁴ See GWRC January 2019 Status Report, p. 6 fn 9.

connected to the main line, a platform appears to have been constructed that would allow Clinkscals to continue to receive traffic. *See* the photo attached hereto as Exhibit B. Accordingly, the Church believes it likely that even after the runaround was created, the tracks continued to be used to serve both the warehouse along the north spur and Clinkscals.⁵

In 1998, all freight service east of Athens Street ended, as did the use of the main line and the runaround track. In 2008, GWRC voluntarily removed the rails (and some crossties) that had been the north spur, leaving unwanted broken ties and debris for the Church to deal with in its landscaping and use of the area.⁶ The connecting tracks across Webb Street were removed by Georgia Department of Transportation (GaDOT) in 2009.⁷

It is clear that when first constructed the north spur and the Clinkscals industrial track were excepted track – used solely to provide service to customers located along the track. Once connected back to the main, the railroad likely also used the track as a runaround for its locomotives, as GWRC claims. But this is also an ancillary function and does not change the status of the track to a “line of railroad.”⁸ The former runaround is too short to be used to handle traffic in line haul or point-to-point service. GWRC does not contend that any line haul traffic would move over the former runaround; rather GWRC acknowledges that it would be used

⁵ The current owner of GWRC only acquired the railroad line in Hartwell in 1990, and its description of the use of the tracks before that time is somewhat conjecture.

⁶ GWRC’s claim that it left the ties in place to be reused to rebuild the north spur does not ring true. When it started to build a new north spur (before being stopped by the state court injunction), GWRC was using all new rail, ties and ballast. *See* the photo attached hereto as Exhibit C.

⁷ GWRC’s claim that that the tracks were not removed is also not accurate. *See* the photo attached hereto as Exhibit D (showing that new tracks were installed across Webb Street in March 2018).

⁸ The Board should note that the successor to Clinkscals still owns the land and track that were part of the Clinkscals industrial siding, and has the right to terminate the agreement to use such track. This alone should negate any claim of GWRC that the runaround is a line of railroad.

solely to reposition locomotives. And while this repositioning might be done in connection with the handling of traffic in line haul service, it is clearly incidental thereto. Thus, there is nothing to suggest that former north spur, the Clinkscates industrial track, or the combined runaround track are anything other than excepted track under 40 USC §10906.

CONCLUSION

For the foregoing reasons, Hartwell First requests that the Board dismiss the GWRC Petition for Declaratory Order. In the alternative, if the Board decides to consider the Petition, then Hartwell First requests that the Board find that the former runaround track, and its component parts (the north spur and the Clinkscates industrial track) were excepted track under 49 USC 10906, and were not a line of railroad.

Respectfully submitted,



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One Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
(215) 640-8500

Attorneys for
Hartwell First United Methodist Church

Dated: December 10, 2019

VERIFICATION

I, Joe M. Whittemore, verify under penalty of perjury that the foregoing Reply is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on December 10, 2019.



Joe M. Whittemore

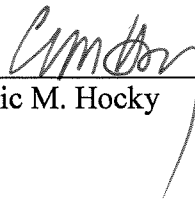
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2019, I served a copy of the foregoing

Reply on the following persons by the method indicated:

By email and U.S. mail, postage prepaid:

Richard H. Streeter
Law Office of Richard H. Streeter
5255 Partridge Lane, N.W.
Washington, DC 20016
rhstreeter@gmail.com



Eric M. Hocky

EXHIBIT A

15
Washington, July 30, 1919. c

Hartwell R.R.

Mr. Foreacre
✓ Mr. Oliver
Mr. Horne
Mr. Herman
Mr. Hungerford
Mr. Buckley
Mr. Harrison (RF)



I send you herewith copy of agreement dated June 28, 1919, with
R. P. Clinkscales, for the construction and operation of an industrial track
at Hartwell, Ga.

Geo. R. Anderson.

#15

AN AGREEMENT, made and entered into this 28th day of June, 1919,
by and between

DIRECTOR GENERAL OF RAILROADS, by E. H. Coepman, Federal Manager,
Hartwell Railroad, hereinafter for convenience styled the Railroad,
party of the first part; and

R. F. OLINGSKALES, of Hartwell, in the State of Georgia, party of
the second part;

W I T N E S S E T H:

THAT the RAILROAD, for and in consideration of the covenants of
the party of the second part, hereinafter expressed, hereby agrees:

1. That it will lay and construct an extension of 356 feet to
the easterly end of that certain existing spur track of the Railroad,
256 feet in length, at HARTWELL, in the County of Hart and State of
Georgia, which springs from the main track of the Railroad, at a point
thereon 4178 feet east of Milepost 1, and extends and with the said
proposed 356 foot extension thereof will extend thence in an easterly
direction for a distance of 614 feet, more or less; and will thereafter,
during the life of this agreement, operate the entire track as extended,
for the purpose of affording unto the party of the second part facilities
for the shipment of his freights, in carload quantities, over the lines
of the Railroad and its connections; ALL being substantially as shown
upon the blue-print map of survey, dated February 19, 1919, revised
March 10th and April 23rd, 1919, hereto annexed and made a part of this
agreement.

AND the PARTY OF THE SECOND PART hereby covenants and agrees, in
consideration of the advantage to be by him derived from the construc-
tion of said extension and the operation of said industrial track as
extended:

2. That the Railroad shall not be obligated to provide or furnish
any right of way necessary for the said extension proposed to be con-
structed hereunder, but the party of the second part hereby specifically
guarantees to the Railroad the right to construct, and operate with its

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

3. That he will, as a condition precedent to any obligation on the part of the Railroad to begin the construction of said extension, provide and furnish on the ground all such first-class cross-ties as may be necessary and required by the Railroad for the construction of said extension; and will, moreover, advance and pay to the Railroad, upon demand, the sum of SIX HUNDRED TEN AND 50/100 DOLLARS (\$610.50); said sum being the estimated cost of said extension, exclusive of the cross-ties furnished by the party of the second part as aforesaid; PROVIDED, however, if the actual cost of said extension, exclusive of the cross-ties, shall, upon completion thereof, be found to be less than, or in excess of, the said estimated cost, then the difference between such actual and estimated cost shall, if the actual cost is in excess of the said estimated cost, be paid to the Railroad by the party of the second part, promptly upon demand, but if such actual cost is less than the said estimated cost, such difference shall be repaid to the party of the second part by the Railroad, after the completion of said extension; it being understood that the party of the second part shall, upon the settlement of his account hereunder with the Railroad, own the said extension.

- 2 -

THE PROVISIONS OF ARTICLES 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

not extend beyond the period of Federal control of railroads, and unless sooner terminated shall, as to him, terminate at the end of such Federal control.

9. That either party hereto may terminate this agreement at any time hereafter, but upon sixty (60) days' notice, in writing, to the other, of the election so to do, in which event, upon the taking effect of such notice, the Railroad may discontinue the operation of said industrial track and remove its property therefrom; and the party of the second part shall have the right to have the track materials in said extension located upon the right of way of the Railroad taken up and delivered to the party of the second part; it being understood that the work of taking up said extension shall be done; if the Railroad so elects, by the forces of the Railroad, but in any event at the expense of the party of the second part.

IN WITNESS WHEREOF, the parties hereto have executed these presents the day and year first above written.

In presence of:
W. A. Mahood,
P. F. Miller,
As to Railroad.

DIRECTOR GENERAL OF RAILROADS,
By
E. H. Soapman,
Federal Manager, Hartwell
Railroad.

In presence of:
E. P. Vickery,
G. H. Norris,
As to party of second part.

R. P. Clinkscales.

W.N.F.
7/7/19.

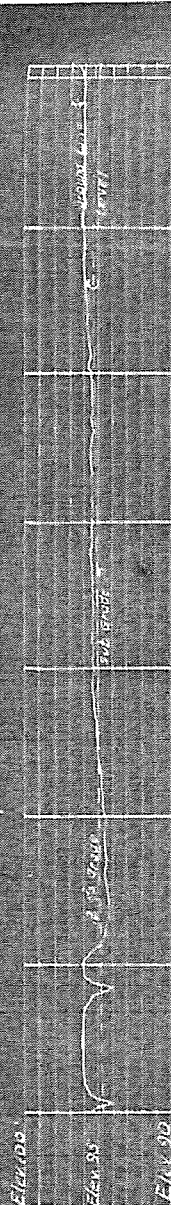
P.H.

15014.

~~A true copy~~
testes:

Washington, D. C.,
July 28, 1919.-B.
1555-2.

HART COUNTY, GEORGIA



DATA ASSUMED
 PROPOSED R.O.W. 160' D.C. 100' TRACK SCALE

PROFILE
 100' D.C. 100'

ADD R.O.W. TO BE ACQUIRED FROM R.P. CLINTON SCALES.

2362 58.75 = 5054.45

New R.O.W. line is 75' from present R.O.W. line and 7' from E. New Street

2362 58.75 3.55

STREET

WEBB

COO CHUTE

HARTWELL MILL

UNITED STATES RAILROAD ADMINISTRATION
 DIRECTOR GENERAL OF RAILROADS
 HARTWELL RAILROAD

HARTWELL, GA.

Sketch showing proposed extension of
 side track for R.P. Clinton Scales
 Feb 12 1919

W. H. Williams
 Resident Engineer

RECEIVED FEB 12 1919

Office of
 Engineer, Bureau of
 Construction, N.C.

NOTE
 50' R.O.W. Rail to be used
 Track line constructed 15' from M.L.

4419' TO MP

4436' TO MP

258'

NEW LINE

BOWLING GREEN

93649-

EXHIBIT B

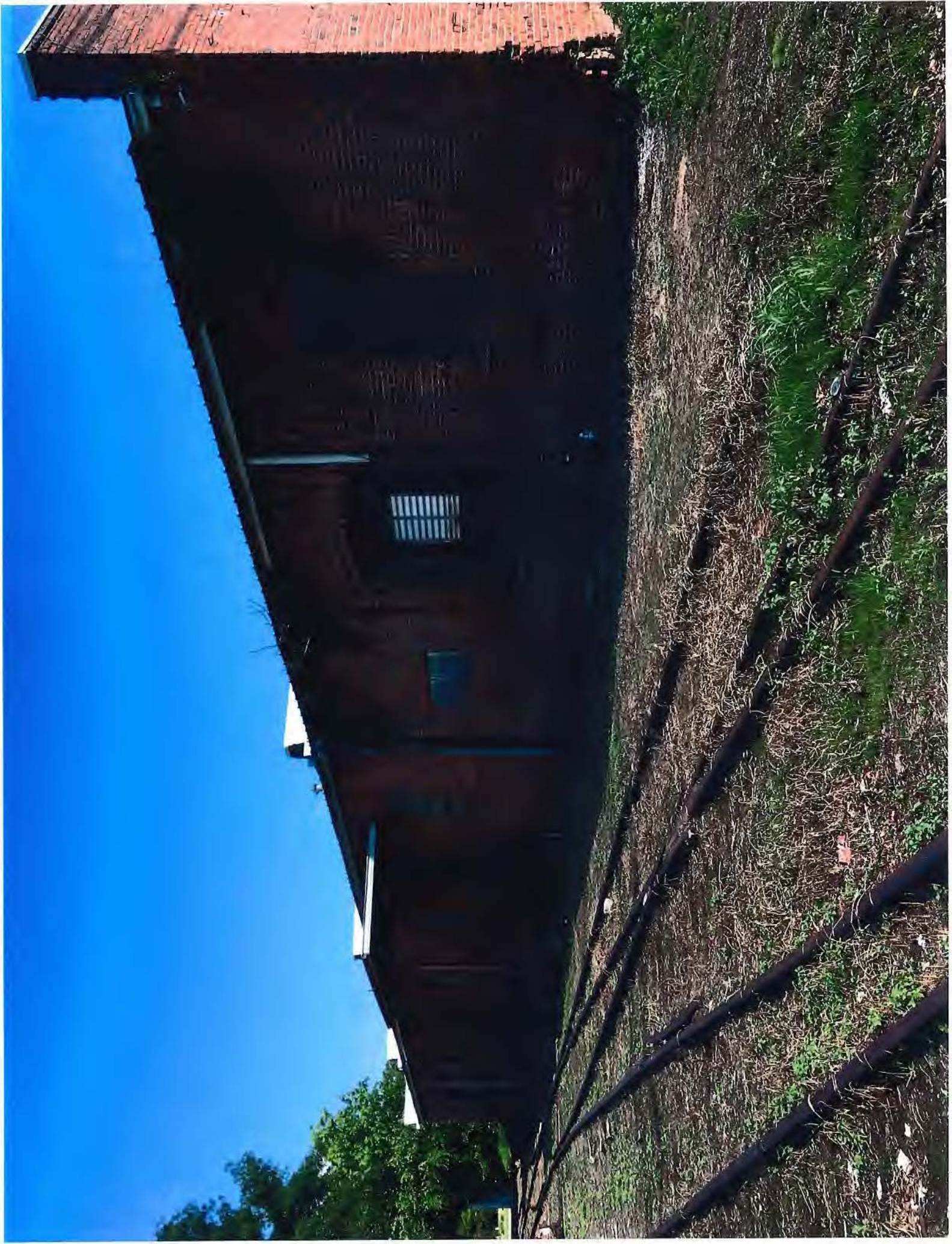


EXHIBIT C



EXHIBIT D

