

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

April 6, 2020

300524

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 6, 2020
Part of
Public Record

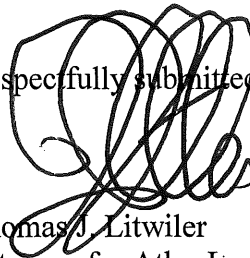
Re: **Docket No. FD 36380**
Atlas Land and Building Corporation and Atlas Materials
Recycling Corporation – Petition for Declaratory Order –
Industry Spur Track in Pittsburgh, PA

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Petition of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation for Leave to File Surreply**, dated April 6, 2020.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Atlas Land and Building Corporation
and Atlas Materials Recycling Corporation

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36380

ATLAS LAND AND BUILDING CORPORATION AND
ATLAS MATERIALS RECYCLING CORPORATION
– PETITION FOR DECLARATORY ORDER –
INDUSTRY SPUR TRACK IN PITTSBURGH, PA

**PETITION OF ATLAS LAND AND BUILDING CORPORATION
AND ATLAS MATERIALS RECYCLING CORPORATION
FOR LEAVE TO FILE SURREPLY**

Thomas J. Litwiler
Thomas J. Healey
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR ATLAS LAND AND
BUILDING CORPORATION and ATLAS
MATERIALS RECYCLING CORPORATION**

Dated: April 6, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36380

ATLAS LAND AND BUILDING CORPORATION AND
ATLAS MATERIALS RECYCLING CORPORATION
– PETITION FOR DECLARATORY ORDER –
INDUSTRY SPUR TRACK IN PITTSBURGH, PA

**PETITION OF ATLAS LAND AND BUILDING CORPORATION
AND ATLAS MATERIALS RECYCLING CORPORATION
FOR LEAVE TO FILE SURREPLY**

Pursuant to 49 C.F.R. § 1117.1, Petitioners Atlas Land and Building Corporation (“Atlas Land”) and Atlas Materials Recycling Corporation (“Atlas Recycling” and, collectively with Atlas Land, “Atlas”) hereby seek leave to file the accompanying Surreply in response to the Reply of CSX Transportation, Inc. (“CSXT”) filed in this docket on March 16, 2020. CSXT requests that the Board hold Atlas’ Petition for Declaratory Order filed February 11, 2020 in abeyance or, alternatively, deny the Petition “without prejudice as premature.” CSXT Reply at 19. Substantively, the CSXT Reply uses carefully-crafted assertions to make it appear that CSXT’s use of the 400-foot Spur¹ on Atlas’ property and immediately adjacent to the Atlas Warehouse has been far in excess of what it actually has been. As the petitioner in this declaratory order proceeding, Atlas is entitled to address these requests and arguments, and to close the record on its petition. *See Soo Line Railroad Company – Petition for Declaratory Order*, Docket No. FD 33350, slip op. at 2 (STB served June 23, 1997) (recognizing that in a declaratory order proceeding, petitioner’s responsive filing is not a prohibited reply to a reply, but rather a permissible rebuttal that is “reasonable and necessary to develop a complete

¹ Unless otherwise noted, capitalized terms used herein are as defined in Atlas’ Petition.

record”); *see also, e.g., Illinois State Toll Highway Authority – Petition for Declaratory Order*, Docket No. FD 36075, slip op. at 1, n.1 (STB served Jan. 17, 2017) (surreply accepted in the “interest of compiling a more complete record”).

Perhaps more fundamentally, allowing Atlas to file the Surreply is consistent with the process that would govern if the track at issue was regulated main line track and this proceeding had arisen as an adverse abandonment under 49 U.S.C. § 10903, the closest corollary to the declaratory order process the Board prescribed in *Pinelawn*² to authorize removal of the Board’s jurisdiction from ancillary track. In abandonment proceedings, the Board’s regulations specify an orderly filing process, in which responsive pleadings to an application (such as protests) must be filed with the Board no later than forty-five days after the filing of the application. *See* 49 C.F.R. § 1152.25(c)(1). The applicant is then allowed to file replies and rebuttal material to address all responsive pleadings, and that filing by the applicant closes the record. 49 C.F.R. § 1152.25(c)(3). Because the procedures set out in Section 1152.25(c) are limited to abandonment and discontinuance proceedings, they do not facially apply directly to declaratory order dockets such as this one. Nonetheless, given the strongly analogous nature of adverse abandonment proceedings involving regulated track and petitions for declaratory order to remove the Board’s jurisdiction from ancillary track, it is appropriate to allow the petitioner in the latter circumstance (here, Atlas) to address opposition and close the record. As much was recognized in *NewVistas Property Holdings, LLC – Petition for Declaratory Order*, Docket No. FD 36040 (STB served June 23, 2016), where the Board, in accepting a petition for declaratory order seeking relief under *Pinelawn* and setting a briefing schedule, provided for the petitioner to make a rebuttal filing to close the record. *NewVistas*, slip op at 2.

² *Pinelawn Cemetery – Petition for Declaratory Order*, Docket No. FD 35468 (STB served Apr. 21, 2015).

WHEREFORE, Atlas respectfully requests that the Board grant it leave to file the accompanying Surreply in this proceeding.

Respectfully submitted,

By: _____

Thomas J. Litwiler

Thomas J. Healey

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 800

Chicago, Illinois 60606-3208

(312) 252-1500

**ATTORNEYS FOR ATLAS LAND AND
BUILDING CORPORATION and ATLAS
MATERIALS RECYCLING CORPORATION**

Dated: April 6, 2020

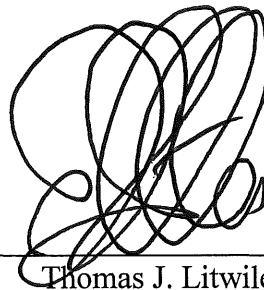
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2020, a copy of the foregoing **Petition of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation for Leave to File Surreply** was served by electronic mail and first-class mail, postage prepaid, upon the following:

Matthew J. Warren
Hanna M. Chouest
Morgan B. Lindsay
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Louis E. Gitomer
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(202) 466-6532

Kim Bongiovanni
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

A handwritten signature in black ink, appearing to read 'Thomas J. Litwiler', is written over a horizontal line.

Thomas J. Litwiler