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April 6, 2020

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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

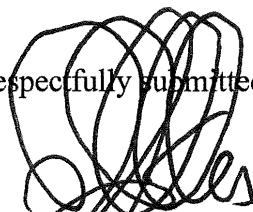
Re: **Docket No. FD 36380**
Atlas Land and Building Corporation and Atlas Materials
Recycling Corporation – Petition for Declaratory Order –
Industry Spur Track in Pittsburgh, PA

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Surreply of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation**, 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

**SURREPLY OF ATLAS LAND AND BUILDING CORPORATION
AND ATLAS MATERIALS RECYCLING CORPORATION**

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Thomas J. Healey
Fletcher & Sippel LLC
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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

**SURREPLY OF ATLAS LAND AND BUILDING CORPORATION
AND ATLAS MATERIALS RECYCLING CORPORATION**

Petitioners Atlas Land and Building Corporation (“Atlas Land”) and Atlas Materials Recycling Corporation (“Atlas Recycling” and, collectively with Atlas Land, “Atlas”) hereby submits this Surreply in response to the Reply of CSX Transportation, Inc. (“CSXT”) filed in this docket on March 16, 2020.¹ In its Petition for Declaratory Order filed February 11, 2020, Atlas seeks a so-called *Pinelawn* determination² removing the Board’s jurisdiction over the Spur, an approximately 400-foot stub-ended section of ancillary track on Atlas’ property that previously served the Atlas paper recycling Warehouse in Pittsburgh, Pennsylvania.³ The CSXT Reply attempts to interpose procedural roadblocks to the Board’s consideration of the Atlas Petition, and uses sleight of hand to obscure the nature of CSXT’s usage of the Spur. CSXT’s arguments are inconsistent with Board precedent and factual reality, and provide no basis to either delay or deny the Atlas Petition.

¹ While the Board’s regulations generally do not contemplate a reply to a reply, 49 C.F.R. § 1104.13(c), Atlas is filing concurrently herewith a petition for leave to file this Surreply.

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

³ Unless otherwise noted, capitalized terms used herein are as defined in Atlas’ Petition.

I. THERE IS NO BASIS TO HOLD THE ATLAS PETITION IN ABEYANCE OR DENY THE PETITION AS PREMATURE

CSXT initially insists that the Atlas Petition cannot proceed at the Board prior to a decision in the concurrent litigation between the parties that was initially filed by Atlas in Pennsylvania state court and subsequently removed by CSXT to federal district court. *Atlas Land and Building Corporation and Atlas Materials Recycling Corporation f/k/a Atlas Waste Paper Corporation v. CSX Transportation, Inc.*, Civil No. 20-cv-00366-CRE (W.D. Pa.). CSXT Reply at 5-6, 12-16. CSXT's argument is ironic, seeing how four days after making that argument to the Board it raised "Federal Preemption," "STB Exclusive Jurisdiction" and "Interstate Rail Operations," among others, as defenses to Atlas' complaint in the federal court litigation. Defendant CSX Transportation, Inc.'s Answer and Defenses to Plaintiffs' Complaint, Civil No. 20-cv-00366-CRE (W.D. Pa.), filed March 20, 2020 (relevant excerpts appended hereto as Attachment B). Indeed, CSXT specifically contended to the federal court that Atlas' claims are "subject to the federal Surface Transportation Board's ('STB') 'exclusive' jurisdiction over 'rail transportation' and the 'construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.'" CSXT Answer at 14, citing – somewhat amazingly – *Pinelawn*. So according to CSXT, the Board can't hear Atlas' Petition because of the pending civil litigation, and the federal district court can't hear the pending civil litigation because of the Board's jurisdiction. Such self-serving and circular reasoning should be given no credence.

Moreover, it is simply not the case that the Board will not decide whether to withdraw its jurisdiction over trackage and allow a party to pursue full state law remedies in state or federal court until the state law issues are decided. The Board recently rejected this precise argument in an analogous adverse discontinuance case. *Port of Benton County, Wash. – Adverse*

Discontinuance of Rail Service – Tri-City Railroad Company, LLC, Docket No. AB-1270 (STB served Oct. 31, 2019). The tenant there argued that the adverse application had to be denied because the validity of the underlying lease agreement was currently being litigated in court. *Port of Benton*, slip op. at 3. The Board nonetheless proceeded to consider and grant the adverse application, explaining that:

[T]he Board makes no findings on the merits of the competing claims concerning the Lease asserted by the Port and Tri-City. However, unless the Board removes its exclusive and primary jurisdiction, a court may not evict or remove a rail carrier under state law. [Citation omitted.] Thus, by filing for adverse discontinuance, the Port properly seeks to have the Board remove its exclusive and primary jurisdiction with respect to Tri-City’s operating authority so that it may pursue eviction under state law.

Port of Benton, slip op. at 5. The Board was clear that further judicial proceedings regarding the validity of the lease agreement of the parties would appropriately come after the Board’s decision on the adverse application:

Granting discontinuance adversely affects Tri-City only to the extent that it allows the Port to pursue eviction of Tri-City in court. Tri-City would be able to defend its interests in the Lease in that forum. To be clear, the granting of the Port’s application for adverse discontinuance alone does not prevent Tri-City from continuing to operate; there would also have to be, for example, an adverse court judgment evicting Tri-City from the Line.

Port of Benton, slip op. at 6 (emphasis added).

In a similar, earlier proceeding, the agency found that the position advocated by CSXT here “would require the court to act when it would be unable to enforce its orders” and would “make the exercise of the Board’s authority subordinate to the actions of a state court.” *Tacoma Eastern Railway Company – Adverse Discontinuance of Operations Application – A Line of City of Tacoma, In Pierce, Thurston and Lewis Counties, WA*, Docket No. AB-548, slip op. at 3-4 (STB served Nov. 13, 1998). The Board was “not persuaded” by the argument that

“the City could still obtain a ruling on the adverse discontinuance in the event that a court were to determine that the operating agreement has been terminated.” *Id.* at 4.

In these and other similar cases, a judicial decision under state law in favor of the tenant would have eliminated the need for a Board decision terminating its exclusive jurisdiction over the trackage or operations involved. That plainly did not matter, however; the Board was clear that it would proceed with the matters before it, and courts could proceed with the matters properly before them. Indeed, the major justification for CSXT’s request that the Board deny or hold in abeyance Atlas’ Petition is that CSXT “is confident that it will prevail on Atlas’s state property law claims in the court proceeding” – the *exact* types of arguments that the Board manifestly will not hear or consider. CSXT Reply at 5; *see Port of Benton, supra; Holland Park Owner, LLC – Petition for Declaratory Order*, Docket No. FD 36308, slip op. at 3 (STB served Jan. 6, 2020) (“The determination of the scope of [an] easement and whether the easement still exists would involve questions of state property law and is the type of issue best left to the courts.”).

CSXT is also wrong in its contention that *Pinelawn* proceedings involve the same agency discretion as regular declaratory order proceedings in determining whether to institute a declaratory order proceeding to terminate a controversy or remove uncertainty. CSXT Reply at 15. *Pinelawn* proceedings are essentially adverse abandonment for spur tracks, and reflect a unique accommodation of the Board’s processes to the context of ancillary trackage that is subject to the Board’s jurisdiction but not its authority. The Board does not have discretion whether to hear a properly-filed adverse abandonment or discontinuance application, and unless spur tracks paradoxically have a level of protection that regulated lines of railroad do not, similar treatment should be afforded to petitions under *Pinelawn*. This streamlined approach to the

controversy/uncertainty question is, in fact, what the Board has adopted. *See NewVista Property Holdings, LLC – Petition for Declaratory Order*, Docket No. FD 36040, slip op. at 2 (STB served June 23, 2016) (“[T]he proper vehicle for removing the Board’s jurisdiction over yard track is through a declaratory order proceeding. . . . Here, a controversy exists as to whether the yard track has been or can be removed from the Board’s jurisdiction. The Board will therefore institute a declaratory order proceeding.”). A similar controversy exists here, and the Board should proceed to consider Atlas’ Petition on its merits.

II. THERE IS NO BASIS TO RETAIN BOARD JURISDICTION OVER THE SPUR.

One could conclude from a casual reading of the Reply that the Spur has been a frequently-used and critical element to effective maintenance of CSXT’s rail network. A casual reading, however, can easily overlook that the vast majority of CSXT’s references to alleged use relate to the “Track” – which CSXT defines to include both the 400-foot segment referred to by Atlas as the Spur (located on Atlas’ property, and the only track at issue in this proceeding) and the 1,200-foot Connecting Track (which connects the dead-end Spur to CSXT’s main line, is not located on Atlas’ property, and is not at issue in this docket). CSXT Reply at 2, n.2. CSXT’s repeated claims that it has used the “Track” do not mean that CSXT has used the Spur (which CSXT refers to as the “Easement Track”). And CSXT’s actual, specific references to the “Easement Track” are far more limited.

The Verified Statement of Carl J. Suedhoff (“Suedhoff V.S.”) supporting CSXT’s Reply, for example, asserts that CSXT has used the “Track” when its system level maintenance production team requires staging, perhaps only one week out of the year, for maintaining 10 to 15 miles of CSXT’s main line. Suedhoff V.S., ¶¶ 10-13. But the only representation regarding the “Easement Track” is that it has been so used for “the past several years” – presumably

meaning since rail service to the Atlas Warehouse via the Spur ended in late 2017. With respect to “earlier years,” the sole cryptic claim, without elaboration or supporting evidence, is that the Easement Track was used “at least on an intermittent basis.” Suedhoff V.S., ¶ 13. CSXT’s Reply itself is similarly circumspect in the scope of its arguments. CSXT Reply at 3 (“For years, CSXT’s system production teams have used the Track to stage on-track machinery and equipment” (emphasis added)); CSXT Reply at 3-4 (“Even prior to the closure of the Atlas facility in 2017, CSXT still used the Track from time to time to stage on-track machinery and equipment for system level production teams working in the area.” (emphasis added)).

As is detailed in the Joint Verified Statement of Lester M. Parker and Lance S. Farber included herewith as Attachment A (“Parker/Farber J.V.S.”), use of the Spur for staging maintenance of way equipment for a week or more’s duration did not occur while the Atlas Warehouse was in operation prior to November 2017, and would have been entirely inconsistent with the daily rail service needs of the Warehouse. Mr. Parker and Mr. Farber were present on a daily basis on the loading dock of the Warehouse, adjacent to and with a clear view of the Spur, and confirm that no CSXT maintenance of way vehicles or other equipment were placed on the Spur during the time that the Warehouse was in operation. Parker/Farber J.V.S. at 2-3. Simply stated, CSXT could not have occupied the Spur for a week or more every year when the Warehouse required boxcar service. And if CSXT and its predecessors managed to adequately maintain their main line past the Atlas Warehouse without parking maintenance-of-way equipment on the Spur for the decades prior to 2017, it is difficult to conjure what compelling and sudden need has arisen for CSXT to do so now.

Nowhere in its Reply does CSXT assert that the Spur is or will be needed to provide service to any rail customer, current or prospective. CSXT does not intend to use the

Spur for transload operations, as was the case in *Pinelawn*, or for through train movements, as was the case in *NewVistas Property Holdings, LLC – Petition for Declaratory Order*, Docket No. FD 36040 (STB served June 23, 2016), or to market service to potential new customers, as was the case in *JGB Properties, LLC – Petition for Declaratory Order*, Docket No. FD 35817 (STB served May 22, 2015). Nothing CSXT has said or done has “exhibited a continuing intent to provide common carrier service to the public on the track,” which is the “key factor” the Board considers in determining whether its jurisdiction over ancillary track should be terminated. *Holland Park Owner, LLC – Petition for Declaratory Order*, Docket No. FD 36308, slip op. at 4 (STB served Jan. 6, 2020). Taken at face value, Mr. Suedhoff’s statement indicates at most that CSXT may find it convenient for one or two weeks a year to use the Spur in lieu of three other identified locations (all within 13 miles of the Connecting Track) where maintenance equipment could be parked. But presumably any railroad could find a reason to hold rail equipment on any otherwise unused rail spur for a miniscule fraction of the time each year. If that were the standard to decide matters brought to the Board under *Pinelawn*, there would never be an instance in which the Board would terminate its jurisdiction over ancillary trackage. That, in turn, would grant greater protection to ancillary trackage than is afforded regulated lines of railroad in adverse abandonments, where the Board “balances the competing benefits and burdens of discontinuance or abandonment on all interested parties.” *Port of Benton*, slip op. at 5.

Here, the continued presence of the Spur on Atlas’ property will effectively preclude the significant residential redevelopment of that property on Pittsburgh’s South Side – a project that is broadly supported by state, county and municipal officials. Parker/Farber J.V.S. at 4; Atlas Petition, Exhibit G. Balanced against the slight asserted convenience to CSXT of a

newfound additional 400 feet of ancillary track – beyond the 1200 feet of the Connecting Track that will remain available to it regardless of the outcome of this proceeding – on which to park maintenance of way equipment for one or two weeks a year, the “totality of the circumstances” plainly warrants the granting of Atlas’ petition. *E.g., NewVistas*, slip op. at 2 n.3

CSXT’s recent actions continue to cast doubt on the legitimacy of its claim to need or desire use of the Spur. On the very day that Atlas filed its Petition, a single CSXT maintenance of way vehicle appeared on the very western end of the Spur, where the Spur adjoins the Connecting Track at South 23rd Street. There the single vehicle sat, unmoved, for the next two weeks. Parker/Farber J.V.S. at 4, Exhibits 1-4. As Exhibits 3 and 4 of the Parker/Farber joint verified statement clearly show, that vehicle could just as easily have been parked across South 23rd Street at any location on the 1200-foot Connecting Track. But as Mr. Parker and Mr. Farber point out, “CSXT apparently deemed it important to ‘occupy’ the Spur with this single vehicle in the period after the Petition was filed.” Parker/Farber J.V.S. at 4. Similarly, CSXT’s recently-discovered motivation to maintain the Spur is suspect at best. Compare Atlas Petition, Exhibit B (photographs of Spur from May 2019) with CSXT Reply, Exhibit 1 (photographs of Spur from March 2020).⁴ And CSXT only now belatedly acknowledges its wholesale, and unauthorized, storage of used railroad ties on Atlas’ property outside of the Easement Track area in recent months. CSXT Reply at 4, n.2.

The Board should look past the conjured actions and arguments of CSXT, and balancing the totality of the circumstances should find that the Spur is no longer needed in

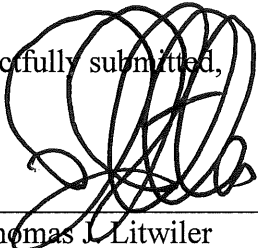
⁴ Atlas believes that those pictures largely speak for themselves, but notes that CSXT’s excuse that the 2019 pictures reflect “natural springtime vegetation regrowth,” CSXT Reply at 4, is strained given that the 2019 pictures were taken only two months further into the season than the 2020 pictures. And if CSXT undertook “vegetation control in advance of system level production team use” in 2020, as it claims, CSXT Reply at 4, n.10, why did it not do so in supposed anticipation of similar usage in 2019?

interstate commerce and no longer needs to be shielded from the processes of state law by the Board's exclusive jurisdiction. Should the Board believe that further development of the record is necessary to reach such a finding, Atlas requests that the Board institute a proceeding in response to the Atlas Petition, allow Atlas to proceed with its pending discovery against CSXT (to which CSXT has refused to respond, *see* CSXT correspondence appended hereto as Attachment C), and set a procedural schedule for further filings by the parties.

WHEREFORE, Atlas respectfully requests that the Board institute a declaratory order proceeding as appropriate and issue an order declaring its jurisdiction over the Spur to be terminated.

Respectfully submitted,

By: _____


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Thomas J. Healey

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

Dated: April 6, 2020

ATTACHMENT A

**JOINT VERIFIED STATEMENT
OF
LESTER M. PARKER AND
LANCE S. FARBER**

**JOINT VERIFIED STATEMENT OF
LESTER M. PARKER AND LANCE S. FARBER**

My name is Lester M. Parker. I am President and Secretary of Atlas Land and Building Corporation (“Atlas Land”) and Atlas Materials Recycling Corporation (“Atlas Materials” and, together with Atlas Land, “Atlas”). I assumed the position of Vice President and Secretary for Atlas Waste Paper Corporation, later renamed Atlas Materials Recycling Corporation, and Atlas Land in the early 1980’s, and accepted the positions of President and Secretary in the 1990’s. I signed a verification of the facts in Atlas’ Petition for Declaratory Order (“Petition”) filed on February 11, 2020 in this matter. Atlas Materials operated a warehouse facility located at 2329 Wharton Street in Pittsburgh, Pennsylvania (the “Warehouse”). I began working at Atlas Materials in April, 1964, and I worked there continually through the closure of the Warehouse in November, 2017. In the course of my employment, I had intimate familiarity with all aspects of Atlas Materials’ operation of the Warehouse. My job responsibilities as President and Secretary included oversight of all Warehouse operations, including management of facilities, budgeting, management of receivables and payables, customer relationships, and interactions with our vendors coming onto Atlas’ property. On a daily basis I was present on the truck loading dock of the Warehouse, adjacent to and in clear sight of the sidetrack on Atlas’ property (the “Spur”) that CSX Transportation, Inc. (“CSXT”) used to spot boxcars at the loading doors along the side wall of the Warehouse. The Warehouse has been closed and has not operated since November 2017. Prior to its closure, Atlas Materials employed between 10 and 20 employees at the Warehouse, on a Monday through Friday schedule, including overtime weekend work when needed.

My name is Lance S. Farber. I worked at Atlas Materials from February, 1995 until 2006 (during the winter months only) and then became a full-time employee at Atlas

Materials from 2006 until the closure of the Warehouse in November, 2017. My initial job title at Atlas Materials was Plant Manager/Plant Supervisor and later changed to Vice President – Operations of Atlas, though my job responsibilities remained the same. These responsibilities involved overseeing the entire Atlas Materials operation, including customer relationships, plant operations, and shipping in and out of the Warehouse. In the course and scope of my work for Atlas, I worked daily at the Warehouse. I developed an intimate familiarity with all aspects of Atlas Materials’ operation of the Warehouse, from the acceptance of materials into the Warehouse, to the processing and packaging of those materials, and the ultimate shipping of those materials out of the Warehouse (often by rail on CSXT, our sole rail service provider). Frequently, I worked with CSXT on such issues as boxcar sourcing, switching frequencies, and operational and other service problems. Like Mr. Parker, I also was present on the truck loading dock of the Warehouse on a daily basis, adjacent to and in clear sight of the Spur.

Collectively, we have 77 years of hands-on experience working for Atlas and managing the operations of the Warehouse. Our jobs put us in a vantage point on the loading dock where we necessarily observed the Spur regularly and daily.

For all of that time that the Warehouse was operational (i.e., until November 2017), we did not witness CSXT ever using the Spur for any purpose other than placement and pickup of boxcars associated with Atlas Materials’ business operations. More specifically, before the Warehouse closed, we do not recall any instance where CSXT placed any maintenance of way (“MoW”) equipment on the Spur. Nor do we recall any Atlas employees ever reporting to us that CSXT MoW equipment was parked on the Spur. CSXT MoW equipment did not appear on the Spur until after the Warehouse was closed, and, more

particularly, until after the August 28, 2019 meeting between Atlas and CSXT in Jacksonville, Florida attended by, among others, Mr. Parker.

CSXT's suggestion that, while the Warehouse was open, it could have used the Spur for storage of MoW equipment for a week or two each year is wholly inconsistent with the operation of the Warehouse. Although operations (including the need for rail service on the Spur) varied over the years, depending on business fluctuations, when Atlas Materials was using CSXT rail service the Warehouse often required the placement and removal of between 15 and 20 boxcars per week at its four rail-served side doors. At any given time, there generally would have been one or more boxcars spotted on the Spur, awaiting loading by Atlas Materials or pick-up by CSXT. The Spur is approximately 400 feet long, and stub-ends at the Warehouse. At its other end, it connects to an additional approximately 1,200 feet of track (what Atlas has called the "Connecting Track") that in turn joins up with the CSXT main line. Given that longstanding configuration, any placement of MoW equipment on the Spur would have interfered with rail service to the Warehouse, requiring the removal of any boxcars spotted on the Spur and preventing the spotting of any new boxcars. When Atlas Materials required shipments by rail cars, we could not have waited a week for the removal of CSXT's MoW equipment for a resumption of rail service. We are well aware of the occasional problems that Atlas Materials had with CSXT rail service, and that situation was never one of them.

We have read the Verified Statement of Carl J. Suedhoff, CSXT's current Director of Track on CSXT's Baltimore Division, dated March 16, 2020 and attached by CSXT to its reply to the Atlas Petition. The words in Mr. Suedhoff's statement appear to be carefully selected to suggest that CSXT's maintenance of way crews require frequent use of the Spur, when that is not the case. On page 2 of his statement, Mr. Suedhoff uses the term "Easement

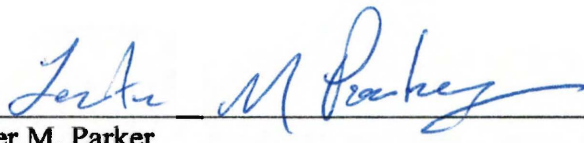
Track” to refer to what we call the Spur. He then defines the “Track” to include both the Easement Track and the remaining 1,200 feet of track connecting the Easement Track to the CSXT main line – what we call the “Connecting Track,” although Mr. Suedhoff does not separately address just the Connecting Track. Thus, when Mr. Suedhoff discusses parking MoW equipment on “the Track,” he could well be referring to a use of the 1,200-foot Connecting Track, and not the 400-foot stub-ended Spur located adjacent to the Warehouse on Atlas’ property.

We also want to note for the Surface Transportation Board that, on the very day that Atlas filed its Petition (February 11th), a single CSXT MoW vehicle appeared on the west end of the Spur, directly adjacent to South 23rd Street, and remained there for the next approximately 15 days. See photographs dated February 11, 2020 and February 26, 2020, attached hereto as Exhibits 1 and 2. This single CSXT MoW vehicle could just as easily have been parked several feet away across South 23rd Street, at the end of the Connecting Track, or anywhere else on the 1,200-foot Connecting Track. See photographs dated February 11, 2020 and February 26, 2020, attached hereto as Exhibits 3 and 4 showing the view from the Warehouse looking down the Connecting Track toward the main line. But CSXT apparently deemed it important to “occupy” the Spur with this single vehicle in the period after the Petition was filed. The timing and motives for that action are suspect.

Finally, we would reiterate that the inability to remove the Spur – which extends over and into the middle of Atlas’ own property and is now unneeded for any customer service purpose – would effectively preclude the residential redevelopment of Atlas’ entire 3.6-acre property holding, covering nearly a full city block on Pittsburgh’s South Side.

VERIFICATION

I, Lester M. Parker, verify under penalty of perjury that I am the President and Secretary of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation, that I have read the foregoing statement and know the facts asserted therein with respect to myself, and that the same are true as stated.

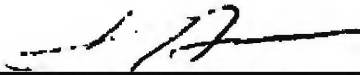


Lester M. Parker

Dated: April 5, 2020

VERIFICATION

I, Lance Farber, verify under penalty of perjury that I am the Vice President – Operations of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation, that I have read the foregoing statement and know the facts asserted therein with respect to myself, and that the same are true as stated.



Lance S. Farber

Dated: April 2, 2020

6:51



Parker/Farber J.V.S.

Exhibit 1

February 11, 2020



Remote Playback



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Parker/Farber J.V.S.
Exhibit 2
February 26, 2020



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Parker/Farber J.V.S.
Exhibit 3
February 11, 2020



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Parker/Farber J.V.S.
Exhibit 4
February 26, 2020



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ATTACHMENT B

**DEFENDANT CSX TRANSPORTATION, INC.'S ANSWER
AND DEFENSES TO PLAINTIFFS' COMPLAINT,
CIVIL NO. 20-CV-00366-CRE (W.D. PA.),
FILED MARCH 20, 2020 (EXCERPTS)**

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

ATLAS LAND AND BUILDING
CORPORATION AND ATLAS MATERIALS
RECYCLING CORPORATION F/K/A ATLAS
WASTE PAPER CORPORATION,

Plaintiffs,

v.

CSX TRANSPORTATION, INC.,

Defendant.

CIVIL NO.: 20-cv-00366-CRE

**DEFENDANT CSX TRANSPORTATION, INC.’S ANSWER
AND DEFENSES TO PLAINTIFFS’ COMPLAINT**

Defendant CSX Transportation, Inc. (“Defendant” or “CSXT”), for its Answer and Defenses to Plaintiffs’ Complaint in Ejectment (the “Complaint”), hereby responds to each correspondingly numbered paragraph of the Complaint and states as follows:

PARTIES, JURISDICTION AND VENUE

I. THE PARTIES

1. Upon information and belief, CSXT admits the allegations in paragraph 1 of the Complaint.
2. Upon information and belief, CSXT admits the allegations in paragraph 2 of the Complaint.
3. CSXT admits that it is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business located at 500 Water Street, Jacksonville, Duval County, Florida 32202.

GENERAL DENIAL

CSXT denies all other allegations that are not expressly admitted herein.

CSXT'S SEPARATE DEFENSES

CSXT asserts the following defenses and avoidances to the Complaint without assuming the burden of proof on any such defense that would otherwise rest with Plaintiffs and reserving the right to amend or supplement its responses to the Complaint, as well as these defenses and avoidances, as additional information is obtained through discovery or otherwise.

First Separate Defense
(Failure to State a Claim)

The Complaint fails to state a claim upon which relief may be granted.

Second Separate Defense
(Federal Preemption)

Some or all of Plaintiffs' claims are or may be barred by the doctrine of federal preemption. Specifically, Plaintiffs' state law claims are or may be preempted, in whole or in part, by Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501, the Federal Railroad Safety Act, 49 U.S.C. § 20106 *et. seq.*, and/or the Supremacy Clause and Commerce Clause of the United States Constitution.

Third Separate Defense
(STB Exclusive Jurisdiction)

Plaintiffs' purported claims seeking to eject and prevent CSXT from conducting railroad operations on the Easement Track are subject to the federal Surface Transportation Board's ("STB") "exclusive" jurisdiction over "rail transportation" and the "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." 49 U.S.C. § 10501(b) (emphasis added); *see also Pinelawn Cemetery, Pet. for Decl. Order*, FD No. 35468, 2015 WL 1813674 (STB Apr. 20, 2015). Alternatively, to the extent the

Easement Track is properly classified as a “rail line” for STB regulatory purposes, the Easement Track may not be abandoned without first obtaining STB authority (or an exemption from that requirement). *See* 49 U.S.C. § 10903; 49 U.S.C. § 10502. Accordingly, this Court currently lacks subject matter jurisdiction to decide Plaintiffs’ ejectment claim.

Fourth Separate Defense
(Express Railroad Operating Easement)

Some or all of Plaintiffs’ claims are or may be barred because CSXT has the legal right and privilege to conduct railroad operations on the Easement Track pursuant to the 1992 Easement Deed and such railroad operations are performed in a lawful and proper manner.

Fifth Separate Defense
(Lawful Railroad Operations)

Some or all of Plaintiffs’ claims are or may be barred because CSXT’s Easement Track is used in the normal and ordinary course of conducting lawful railroad activities.

Sixth Separate Defense
(Interstate Rail Operations)

Some or all of Plaintiffs’ claims are or may be barred because CSXT’s use of its Easement Track is necessary to CSXT’s interstate rail operations, interstate commerce, and/or fulfillment of CSXT’s common carrier obligations.

Seventh Separate Defense
(Express Terms of 1992 Easement Deed)

Some or all of Plaintiffs’ claims are or may be barred in whole or in part by the express terms of the 1992 Easement Deed.

ATTACHMENT C

**CSXT MARCH 16, 2020 CORRESPONDENCE
REGARDING DISCOVERY**

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March 16, 2020

By First Class Mail and Email

Thomas J. Healey
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1505
thealey@fletcher-sippel.com

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

Dear Tom:

CSX Transportation, Inc. ("CSXT") has received the "First Set of Interrogatories," "First Set of Requests for Admission," and "First Set of Requests for Production of Documents" that Atlas Land and Building Corporation and Atlas Materials Recycling Corporation (collectively, "Atlas") sent on February 26, 2020 related to the above-captioned Petition for Declaratory Order (collectively, the "Discovery Requests").

Atlas's Discovery Requests are premature and inappropriate. Atlas has asked the Board to institute a declaratory order proceeding, but the Board has not acted on Atlas's Petition. There is no open proceeding before the Board at this time, and there will be no proceeding unless the Board chooses to exercise its discretion to institute one.

Until the Board exercises its discretion to institute a declaratory order proceeding here, there is no "proceeding" within the meaning of the Board's discovery rules, and thus no basis for Atlas to propound discovery. *See Diana Del Grosso—Petition for Declaratory Order, STB Finance Docket No. 35652, at 3, n.7* (STB served May 8, 2013) (agreeing that there is no proceeding for the purposes of § 1114.21(a)(1) until the Board institutes a proceeding); 49 C.F.R. § 1114.21.

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(permitting discovery only for matters "relevant to the subject matter involved in a proceeding"). Atlas therefore had no basis to issue the Discovery Requests, and CSXT will not respond to them.¹

CSXT also notes that the scope and breadth of the Discovery Requests are far broader than is reasonable or permissible under the Board's rules. Atlas has propounded 81 separate discovery requests, many of which seek information spanning a twenty-eight year period. In the event that the Board were to grant Atlas's request to open a proceeding and were to permit discovery, Atlas would be required to substantially narrow any discovery requests that it were permitted to serve.

For the foregoing reasons, CSXT will not respond to the Discovery Requests at this time. CSXT reserves its rights to assert additional objections to any Atlas discovery requests in the event that the Board chooses to open a proceeding.

Sincerely,

/s/ Matthew J. Warren

¹ Indeed, even if the Board were to choose to institute a declaratory order proceeding, discovery is not automatically granted in declaratory order proceedings. See, e.g., *Town of Babylon and Pinelawn Cemetery Petition for Declaratory Order*, STB Docket No. 35057, at 2 n.4 (served Feb.1, 2008).

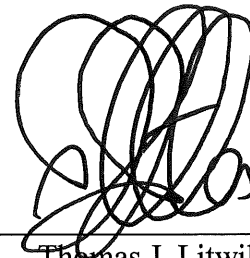
CERTIFICATE OF SERVICE

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

Matthew J. Warren
Hanna M. Chouest
Morgan B. Lindsay
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Washington, DC 20005

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Kim Bongiovanni
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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