

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 27, 2020
Part of
Public Record

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

STB FINANCE DOCKET NO. 36380

**REPLY OF CSX TRANSPORTATION, INC. TO ATLAS’S PETITION FOR
LEAVE TO FILE SURREPLY**

According to Atlas,¹ the Board has no choice but to grant its petition for leave to file a reply to reply, because Atlas is supposedly “entitled” to submit a reply to reply as a “rebuttal” to its Petition for Declaratory Order.² And according to Atlas, the Board also has no choice but to open a declaratory order proceeding immediately, because supposedly the Board “does not have discretion” to wait to see whether its views will actually be needed to resolve Atlas’s claims that CSXT’s rail easement should be terminated.³

Atlas is wrong on both counts. It is not “entitled” to an exception to § 1104.13(c)’s prohibition on replies to replies—particularly not for a pleading that

¹ Terms that were defined in CSXT’s March 16, 2020 Reply to Petition for Declaratory Order have the same meanings here.

² Atlas Petition for Leave to File Surreply at 1, STB Fin. Docket No. 36380 (filed April 6, 2020) (“Reply to Reply Petition”). Atlas styles its proffered new filing as a “surreply,” but under the Board’s rules the proper denomination for such a filing is a “reply to reply.” 49 C.F.R. § 1104.13(c).

³ Atlas Surreply at 4, STB Fin. Docket No. 36380 (filed April 6, 2020) (“Reply to Reply”).

primarily consists of testimony and arguments that could have been submitted in Atlas's initial Declaratory Order Petition.⁴ And the Board's statutory discretion over whether to grant a petition for declaratory order applies to Atlas just as surely as it does to any other petitioner. As CSXT explained in its Reply to Atlas's Declaratory Order Petition,⁵ that discretion counsels the Board to dismiss the petition without prejudice or to hold it in abeyance pending the outcome of court litigation over the threshold state law property issue, *i.e.*, whether CSXT's continued use of the Easement Track for railroad purposes is permitted under the broad language in the 1992 Easement Deed.

Other than its spurious claim of an "entitlement" to rebuttal, Atlas gives no justification for its decision to wait until now to submit testimony from Atlas officials and to submit new arguments, including the extraordinary claim that the Board is required to open a declaratory order proceeding immediately. Atlas has not demonstrated good cause for the Board to accept its Reply to Reply, and the Board would be well justified in rejecting it. But if the Board chooses to permit Atlas to supplement its Declaratory Order Petition with the Reply to Reply, then CSXT should be permitted to reply to Atlas's new evidence and arguments and to correct its misstatements of the record.

⁴ Petition for Declaratory Order, STB Fin. Docket No. 36380 (filed Feb. 11, 2020) ("Declaratory Order Petition").

⁵ CSXT Reply to Petition for Declaratory Order, STB Fin. Docket No. 36380 (filed Mar. 16, 2020) ("Declaratory Order Reply").

Section I below rebuts Atlas’s claim that it is entitled to file a reply to reply, and demonstrates that there is no good cause for the Board to accept evidence and arguments that could have been presented on opening. In the event that the Board chooses to accept the Reply to Reply, Section II provides a response limited to three issues.

First, Atlas seriously misstates the status of the district court litigation and CSXT’s arguments in that litigation. In particular, Atlas incorrectly claims that CSXT is asking the Board to defer action on Atlas’s petition while simultaneously arguing that “the federal district court can’t hear the pending civil litigation because of the Board’s jurisdiction.”⁶ As Atlas well knows, CSXT filed an Answer to its Complaint, not a motion to dismiss or stay arguing that the court “can’t hear” the case. Indeed, CSXT and Atlas recently conducted a Rule 26 case management conference and have been conferring for the past two weeks about the submission of a joint case management report due on May 1, 2020 that will set forth proposed deadlines for mediation and discovery. CSXT’s consistent position before the court and before this Board is that the federal district court should decide Atlas’s fundamental claim that CSXT’s state law easement is no longer valid. Only if Atlas were to prevail on that claim would any decision by the Board be necessary.

Second, CSXT responds to Atlas’s new argument that the Board does not have discretion over whether to open a declaratory order proceeding to determine the status of unregulated track, and that it instead is required to consider such

⁶ Reply to Reply at 2.

petitions on the merits. That argument has no basis in the statute, which explicitly gives the Board discretion over whether to open any declaratory order proceeding.

Third, CSXT briefly addresses the new joint testimony submitted by Atlas officials, which does not materially change the facts before the Board. Atlas's new statement primarily focuses on recollections of Atlas personnel about CSXT's use of the Easement Track before November 2017 while the Atlas facility was actively receiving rail service, which Atlas asserts are inconsistent with CSXT's evidence about periodic use of the Easement Track for rail maintenance purposes during that same time period. But Atlas is unable to rebut any of the testimony about:

(i) CSXT's *present* use of the Easement Track to support its critical railroad maintenance activities in the Pittsburgh area, or (ii) CSXT's *current and future need* to continue using the Easement Track for these railroad purposes as expressly permitted under the 1992 Easement Deed. As set forth below, nothing in this new joint Verified Statement challenges the uncontroverted evidence from Mr. Suedhoff establishing CSXT's current and continuing need to use the Easement Track.

I. Atlas Is Not Entitled to File a Reply to Reply and Has Not Demonstrated Good Cause for the Board to Allow It.

Atlas asserts in the Reply to Reply Petition that it is "entitled" to file a reply to CSXT's March 16, 2020 Reply by virtue of having filed the Petition for Declaratory Order in this case. Reply to Reply Petition at 1-2. That is not the law, and Atlas seriously mischaracterizes the cases upon which it relies. Atlas rather must meet the same "good cause" standard that any other litigant must meet in order to justify an exception to section 1104.13(c)'s prohibition against replies to

replies. Atlas has not met that test, particularly for new arguments and testimony that could have been submitted with its initial Petition for Declaratory Order.

Atlas's claim that declaratory order petitioners may file rebuttals to their petitions as a matter of right is at odds with the Board's rules and precedents. As a matter of rule, section 1104.13(c)'s bar on replies to replies does not contain any exception allowing declaratory order petitioners to file such pleadings. And as a matter of precedent, declaratory order petitioners have not been permitted to file replies to replies without leave from the Board—leave that is not always granted.⁷ Indeed, just last month the Board held that a declaratory order petitioner could not file a reply to reply without obtaining leave to do so.⁸

Atlas nevertheless asserts that *Soo Line Railroad Company—Petition for Declaratory Order*, Finance Docket No. 33350 (served June 23, 1997) stands for the proposition that the Board has “recogniz[ed] that in a declaratory order proceeding, petitioner's responsive filing is not a prohibited reply to a reply, but rather a permissible rebuttal....” Reply to Reply Petition at 1. *Soo Line* decidedly does not support that notion, because there the Board had already opened a declaratory order proceeding and adopted a procedural schedule in which the petitioner was provided a rebuttal filing. *Soo Line* thus is inapposite here, where the Board has

⁷ See, e.g., *Adrian & Blissfield R.R. Co.—Pet. for Declaratory Order*, STB Fin. Docket No. 36148 (served Jan. 30, 2018) (denying declaratory order petitioner's motion for leave to file reply to reply); *California High Speed Rail Auth.—Pet. for Declaratory Order*, STB Fin. Docket No. 35861 (served Dec. 12, 2014) (same).

⁸ See *Ulster & Delaware Ry. Revitalization Corp.—Pet. for Declaratory Order*, STB Fin. Docket No. 36164 (served Mar. 12, 2020).

not yet decided whether to institute a proceeding or adopt any future procedural schedule.⁹

Similarly inapposite is Atlas's assertion that permitting the Reply to Reply would be "consistent with the process" for an adverse abandonment proceeding. This is not an adverse abandonment proceeding,¹⁰ or any other proceeding in which the Board's standard procedural schedule provides for rebuttal as a matter of course. Atlas rather has filed a petition asking the Board to exercise its discretion to open a proceeding, and the Board's rules do not provide for rebuttal filings for those petitions. Atlas's citation of *New Vistas* is not to the contrary. There, the Board decided to open a declaratory order proceeding and set a procedural schedule to give the petitioner a rebuttal filing.¹¹ That provides no precedent for allowing petitioners to file a reply to reply on petitions for declaratory order before any proceeding has been opened.

Far from being entitled to special treatment, therefore, Atlas's Reply to Reply must meet the same "good cause" standard that must be satisfied for the Board to

⁹ Atlas also cites *Illinois State Toll Highway Authority—Petition for Declaratory Order*, STB Fin. Docket No. 36075 (Jan. 17, 2017), but that is a case where the Board found that waiver of section 1104.13(c) was appropriate under the circumstances to ensure a complete record. It is not precedent for an automatic right of rebuttal.

¹⁰ Indeed, if this were an adverse abandonment proceeding, Atlas would be required to submit its entire case in chief with its opening application, and would not be allowed to use its rebuttal as an opportunity to raise new arguments. 49 C.F.R. § 1152.24(e).

¹¹ *New Vistas Property Holdings, LLC—Pet. for Declaratory Order*, Fin. Docket No. 35468 (served Apr. 21, 2015).

accept any reply to reply. But here, Atlas uses its Reply to Reply not to respond to unexpected issues or fill important gaps in the record, but rather to shore up its Declaratory Order Petition with evidence that should have been included on opening. For example, Atlas includes a new verified statement from Atlas officials presenting new evidence about their observations of past CSXT use of the Easement Track. While this new statement adds little information to change the facts before the Board, it is plainly the sort of evidence that was available to Atlas on opening and that ordinarily should have been included in its initial Petition for Declaratory Order. Similarly, Atlas's new argument that the Board has no discretion to refuse to open a declaratory order proceeding regarding the status of spur track plainly could have been raised on opening, not saved for a "rebuttal" filing.

For these reasons, CSXT urges the Board to deny the Reply to Reply Petition.

II. If the Board Accepts the Reply to Reply, CSXT Should Be Permitted to Correct the Record and Respond to New Evidence.

CSXT recognizes that the Board sometimes waives the prohibition in section 1104.13(c) to allow for a more complete record. In the event that the Board chooses to accept Atlas's Reply to Reply, CSXT asks that the Board permit CSXT to respond so that it can correct one significant misstatement in the Reply to Reply and address new evidence and arguments raised for the first time in Atlas's Reply to Reply. In the interest of efficiency, CSXT's response is below.¹²

¹² CSXT will not reiterate any of the arguments and evidence presented in the March 16, 2020 Declaratory Order Reply, which explains why the Board should either find the Declaratory Order Petition to be premature (and dismiss it without prejudice or hold it in abeyance) or, if it reaches the merits, find that the Board

A. The Concurrent Federal Court Litigation Addressing Atlas's State Law Claims Concerning the 1992 Easement Deed Is Progressing.

Perhaps the most significant misstatement in the Reply to Reply is Atlas's assertion that CSXT has taken inconsistent positions here and in the pending federal court litigation, supposedly arguing that "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."¹³ That assertion is flatly untrue.

As CSXT explained in the Declaratory Order Reply, a ruling by the Court that CSXT's use of the Easement Track is permitted under the broad language in the 1992 Easement Deed will fully resolve this dispute without the need for a ruling by the Board. Accordingly, the Board should allow the Court to decide the threshold issue of the scope of the 1992 Easement Deed before the Board opens any declaratory order proceeding. Consistent with this position, CSXT did not move to stay or dismiss the federal court litigation. Rather, CSXT timely filed an Answer and Affirmative Defenses to Atlas's Complaint and has since sought to facilitate a prompt judicial resolution of the easement interpretation issue.

By way of example, on April 14, 2020, CSXT's counsel participated in a Rule 26(f) telephonic meet and confer with Atlas's counsel to discuss a proposed case management schedule governing mediation and discovery in the federal court

should not withdraw its jurisdiction over the Easement Track in light of CSXT's continuing need to use the Easement Track for maintenance purposes.

¹³ Atlas Reply to Reply at 2.

litigation. Under the proposed schedule, which must be submitted to the Court by May 1, 2020, the parties have jointly proposed to: (i) exchange Rule 26(a)(i) initial disclosures by April 29, 2020; (ii) conduct mediation no later than July 30, 2020, subject to travel and/or scheduling availability in light of the continued uncertainty concerning the COVID-19 pandemic; and (iii) complete fact discovery by November 30, 2020. Accordingly, Atlas's assertion that CSXT is arguing that the federal court "cannot hear" the litigation is patently false.

Atlas's only support for its claim that CSXT is taking inconsistent positions is the fact that a few of the 21 affirmative defenses that CSXT raised in the Answer cited ICCTA preemption.¹⁴ But the plain language of CSXT's defenses makes clear that CSXT is challenging the federal court's subject matter jurisdiction solely with respect to one of Atlas's six separate claims (*i.e.*, Atlas's purported ejectment claim, Count 2 in the federal court complaint), not the lawsuit in its entirety. As CSXT explained in the Declaratory Order Reply, Atlas must prevail on two distinct questions in order to remove CSXT from the Easement Track. First, it must prove that the 1992 Easement has somehow been terminated and thus that CSXT no longer has a state law property right to use the Easement Track.¹⁵ Second, even if Atlas proves that CSXT's state law rights no longer exist, Atlas cannot eject CSXT from the Easement Track unless and until Atlas shows that the Board no longer has

¹⁴ Atlas only included three selected pages to the Answer in its Reply to Reply. CSXT has included the entire Answer as Exhibit 1.

¹⁵ See Declaratory Order Reply at 5.

jurisdiction over the Easement Track because it is not a necessary part of the rail transportation network.¹⁶

In the context of Atlas's Complaint, Atlas must prevail on both Count 1 (a declaration that the easement has terminated) and Count 2 (ejectment). Count 1 is purely a matter of state property law. But as to Count 2, under *Pinelawn* the Court cannot eject CSXT from the Easement Track unless the Board withdraws its jurisdiction. For this reason, CSXT's Answer specifically and correctly raised the defense of exclusive STB jurisdiction solely with respect to Atlas's "claims seeking to eject and prevent CSXT from conducting railroad operations on the Easement Track"—not to all of Atlas's claims (and obviously not to Atlas's assertion that the easement has terminated as a matter of state law).¹⁷ This defense is entirely consistent with CSXT's position that the Court should first decide the separate and distinct easement interpretation issue (Count 1 in the federal court complaint), which will resolve the dispute without any ruling by the Board.

In short, the federal court litigation is progressing along a normal track, and CSXT fully expects that Court to rule that the easement remains in full force and effect under state law. That ruling will moot any need for a Board decision. As CSXT explained in its Declaratory Order Reply, the Board should allow the federal

¹⁶ *See id.*

¹⁷ *See* Ex. 1, CSXT Affirmative Defense No. 3 ("STB Exclusive Jurisdiction") at 14. Atlas's citation to CSXT's Affirmative Defense No. 2 ("ICCTA Preemption") is irrelevant as it is undisputed that federal courts have concurrent jurisdiction with the Board to decide federal preemption issues. *City of Sammamish, WA—Petition for Declaratory Order*, STB Fin. Docket No. 36161, 2018 WL 1556888, at *3 (served Mar. 29, 2018).

court litigation to progress, and it should either dismiss the Declaratory Order Petition without prejudice or hold it in abeyance until it is clear whether or not the Board's views will be needed to resolve this dispute.¹⁸

B. The Board Always Has Discretion Over Whether to Open Declaratory Order Proceedings.

Atlas's Reply to Reply argues that the Board "does not have discretion whether to hear" a petition concerning the status of spur track because such petitions should be treated the same as applications for adverse discontinuance or abandonment. This has no basis in the statute.

The Board's decision on whether or not to open a declaratory order proceeding is always committed to the agency's discretion.¹⁹ This is not a Board-created rule of practice—it is a statutory command. The source of the Board's authority to issue declaratory orders is the Administrative Procedure Act, which provides that an agency "*in its sound discretion*, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (emphasis added). Thus, every declaratory order request made to every agency governed by the Administrative Procedures Act is committed to the agency's "sound discretion."²⁰ Atlas's argument that declaratory order petitions about the status of

¹⁸ Declaratory Order Reply at 15-17.

¹⁹ See, e.g., *Landowners—Motion for Declaratory Order and Injunctive Relief*, STB Fin. Docket No. 35982 (Sub-No. 1), at 3 (served Apr. 24, 2020) ("The Board has broad discretion in determining whether to issue a declaratory order.").

²⁰ *Id.*; see also *Association of American Railroads—Petition for Declaratory Order*, at 1, STB Fin. Docket No. 36369 (served Feb. 19, 2020) ("The Board has discretionary

unregulated track constitute a special category for which the agency has no discretion cannot be reconciled with this clear statutory language.

Atlas does not acknowledge the language of 5 U.S.C. § 554(3). Instead, it cites cases where the agency considered adverse discontinuance applications despite parallel state litigation, and asserts that it would be “paradoxical[]” for the agency to have discretion over whether to grant a declaratory order for the status of unregulated spur track, when it has no discretion over whether to consider an application for the adverse discontinuance or abandonment of regulated track.²¹ But Congress made a specific and intentional division between the way the agency is to approach regulated track and the way in which it is to approach unregulated spur track. When a complete application for abandonment or discontinuance of regulated track is filed, the agency is required by statute to act on the application by approving or denying it.²² Spur track, in contrast, is specifically exempt from section 10903 regulations, as part of an intentional congressional decision to remove unnecessary regulation of these tracks. *See* 49 U.S.C. § 10906. There is no “paradox” in the agency carrying out this congressional command. Indeed, for the agency to hold that declaratory order petitions related to spur track are nonetheless

authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty.”).

²¹ Atlas Reply to Reply at 4.

²² 49 U.S.C. § 10903(e); *cf.* 49 U.S.C. § 1152.24(e)(1) (Board may refuse to accept application that does not comply with Board rules).

subject to the same procedural requirements as adverse abandonment and adverse discontinuance applications would flagrantly disregard the purpose of § 10906.

For these reasons, the Board plainly retains its statutory discretion over whether to open a declaratory order proceeding. As CSXT explained in its Declaratory Order Reply, the Board's exercise of its discretion commonly considers practical factors such as "the ripeness of the controversy, and whether a proceeding is necessary to terminate an active controversy."²³ These factors counsel the Board to not open a declaratory order proceeding at this time, and to either dismiss the Declaratory Order Petition without prejudice or hold it in abeyance until it is clear that the Board's views are needed.²⁴

C. Atlas's New Joint Verified Statement Does Not Affect the Result.

The Verified Statement attached to the Reply to Reply does not materially change the relevant facts before the Board. Atlas reasserts that CSXT does not need to use the full Easement Track and that CSXT should be forced to relocate maintenance of way staging to another location in the area. Mr. Suedhoff has already explained why each of these arguments is incorrect, and CSXT will not

²³ *Union Pac. R.R. Co.—Pet. for Decl. Order—Imposed Interchange Charges*, at 3–4, STB Docket No. 42052 (served June 13, 2000).

²⁴ See Declaratory Order Reply at 12-16, 19; see, e.g., *JGB Properties, LLC—Petition for Declaratory Order*, STB Fin. Docket No. 35817 at 7 (served May 22, 2015) (declining to open declaratory order proceeding to determine status of tracks where that determination would have no bearing on state court's decision); *Ballard Terminal Railroad Co.—Petition for Declaratory Order*, at 4, STB Fin. Docket No. 36261 (served June 27, 2019) (deciding to hold request for declaratory order in abeyance pending outcome of state court litigation, which "would possibly moot" the need for Board action).

repeat all his points here.²⁵ CSXT instead makes three brief points to respond to the more significant misstatements in the new Verified Statement.

First, Atlas wrongly asserts that “CSXT’s repeated claims that it has used the ‘Track’ do not mean that CSXT has used the [Easement Track],” and suggests that CSXT’s use of the Easement Track is “limited.”²⁶ Contrary to Atlas’s assertions, Mr. Suedhoff’s Verified Statement expressly defined the “Track” *as specifically including the Easement Track*. Suedhoff V.S. ¶ 6. Accordingly, Mr. Suedhoff’s myriad references to CSXT’s continued use of the “Track” throughout the Verified Statement necessarily include the 400-foot Easement Track that is the subject of Atlas’s Petition. *Id.*, Suedhoff V.S. ¶¶ 10-20. Mr. Suedhoff specifically explained that: (i) “the Easement Track” was an important staging location for CSXT’s system level maintenance programs, and that one advantage of the Easement Track was that its “location and configuration provides sufficient clearance from the double mainline so that CSXT employees and non-rail vehicles can directly access equipment stored on the Easement Track without fouling the mainline tracks,” *id.*, Suedhoff V.S. ¶¶ 14, 17; and (ii) “CSXT’s system level production teams often utilize 20 or 30 pieces of ontrack machinery to perform their maintenance activities,” and thus “CSXT’s use of the Easement Track is necessary to safely and efficiently stage/store all of the required on-track rail maintenance equipment,” *id.*, Suedhoff V.S. ¶ 12.

²⁵ See Declaratory Order Reply, V.S. Suedhoff at ¶¶ 16-20.

²⁶ Reply to Reply at 5.

Moreover, CSXT made clear in its Declaratory Order Reply that its use of the 1600-foot “Track” to support rail maintenance work included the 400-foot

“Easement Track” portion of Atlas’s property. For example, CSXT explained that:

CSXT has in the past required, and continues to require, the use of the entire 1600 feet of the Track, including the last 400 feet of the Easement Track. The large production teams often have twenty to thirty on-track vehicles and pieces of equipment that require the use of the entire Track to stage and store them all. ... Given the large size of the system level production teams, the 400 feet of the Easement Track are also essential to CSXT’s vital rail maintenance activities in the area.

Declaratory Order Reply at 9-10 (emphasis added) (citing *Suedhoff V.S.* ¶¶ 10-12, 16-17). Atlas’s suggestion that CSXT’s Declaratory Order Reply only established a general need to use portions of the Track—and not a specific need to use the Easement Track portion—is simply not accurate.

Second, Atlas focuses much of the statement on arguments about how often CSXT used the Easement Track for maintenance while Atlas’s warehouse was in operation. In the first place, the pre-2017 usage of the track is largely irrelevant to the question before the Board, which is whether Atlas can prove that the Easement Track is “no longer needed for the interstate rail system.”²⁷ The “no longer needed” standard is inherently forward-looking, since the issue is whether a railroad needs to use the track in the future, not how the railroad used the track in the past.

Regardless, Atlas does not rebut any of CSXT’s evidence about its historical use of the Easement Track. Atlas’s new witnesses argue that the “use of the [Easement Track] for staging maintenance of way equipment for a week or more’s

²⁷ Declaratory Order Reply at 17 (quoting *Pinelawn* at 9).

duration did not occur while the Atlas Warehouse was in operation prior to November 2017.”²⁸ But Mr. Suedhoff did not testify that CSXT used the Easement Track to stage equipment “for a week or more” while the Atlas facility was receiving rail traffic. Rather, he testified that the Easement Track was used for railroad maintenance staging “on an intermittent basis,” *i.e.*, on nights and other times when CSXT did not need to use the Track for rail service to the Atlas facility.²⁹

Third, Atlas’s speculation that CSXT is only using the Easement Track as a pretext is wholly unsupported. Indeed, Atlas’s suggestion that a maintenance of way vehicle was parked on the Easement Track between February 11 and February 26, 2020 as some sort of retaliation for Atlas’s Declaratory Order Petition is disproven by its own exhibit. While the vehicle coincidentally may have been parked on CSXT’s easement right of way on the day Atlas filed its petition, CSXT was not aware of the Declaratory Order Petition until February 12.³⁰ The photo of the vehicle on February 11 in Exhibit 1 to the Parker/Farber Verified Statement is thus definitive proof that CSXT’s actions were not prompted by Atlas’s filing, and instead were part of CSXT’s ordinary usage of the Easement Track to support maintenance activities.

In short, as Mr. Suedhoff’s Statement explained, the Track (including the Easement Track) is now “the most efficient location to facilitate and stage CSXT’s

²⁸ Reply to Reply, at 6 (emphasis added).

²⁹ Declaratory Order Reply, Suedhoff V.S. ¶ 13.

³⁰ See Declaratory Order Petition at Certificate of Service (showing that CSXT was served via overnight delivery).

system level production teams” in the vicinity.³¹ Because Atlas has not proven otherwise, the Petition should be denied.

III. CONCLUSION

For the above reasons and those set forth in the Declaratory Order Reply, the Board should deny Atlas’s Petition for Declaratory Order without prejudice as premature, or, in the alternative, hold any decision on the Petition in abeyance pending a final decision from the federal court. If the Board instead chooses to address the merits now, it should find that, even assuming that the Easement Track is ancillary track, it is needed for CSXT’s continued interstate rail operations and is therefore within the Board’s jurisdiction, and thus the Board’s jurisdiction over the Easement Track will not be terminated.

Respectfully submitted,

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Dated: April 27, 2020

³¹ Declaratory Order Reply, Suedhoff V.S. ¶¶ 17-20.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2020, I caused a copy of the foregoing Reply to Atlas Land and Building Corporation and Atlas Materials Recycling Corporation's Petition for Leave to File Surreply to be served by first class mail or more expeditious means upon:

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/s/ Morgan B. Lindsay
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EXHIBIT 1

CSXT Inc.'s Answer to Plaintiffs'
Complaint (W.D. PA. 03/20/20)

**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.

II. JURISDICTION AND VENUE

4. CSXT admits that it conducts railroad operations in and through Allegheny County, Pennsylvania, including on and over approximately 400 feet (the “Easement Track”) of the approximately 1,600-foot track (collectively, the “Track”) at issue in this lawsuit and connected to CSXT’s mainline double tracks at approximately CSXT railroad milepost PLY 1.5 in Pittsburgh, Pennsylvania. CSXT further states that paragraph 4 of the Complaint alleges legal conclusions to which no response is required. To the extent a response is required, CSXT admits that jurisdiction and venue are proper in the United States District Court for the Western District of Pennsylvania. *See* Notice of Removal (D.E. 1). CSXT further denies that it has caused any harm to the Plaintiffs or that Plaintiffs are entitled to any of the relief requested in the Complaint. CSXT denies the remaining allegations in paragraph 4 of the Complaint.

II. FACTS

A. Introduction

5. Upon information and belief, CSXT admits that one or both Plaintiffs own certain parcels of real property with a street address located at 2329 Wharton Street in Pittsburgh, Pennsylvania. CSXT further admits that a warehouse-type building is located on the subject property adjacent to the Easement Track at issue. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 5 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 5 of the Complaint.

6. CSXT admits that the Easement Track property is and has been subject to a broad railroad operating easement pursuant to the terms of the Easement Deed dated September 11, 1992 between Pittsburgh and Lake Erie Railroad Company (“P&LE”), as Grantor, and CSXT’s predecessor, The Three Rivers Railway Company, as Grantee (the “1992 Easement Deed”). Upon

information and belief, CSXT admits that one of the Plaintiffs subsequently acquired the underlying Easement Track property from P&LE, subject to the existing 1992 Easement Deed. Prior to 2018, CSXT further admits that the Plaintiffs' adjacent warehouse facility had been rail-served using the Easement Track. CSXT denies Plaintiffs' unsupported legal conclusion that the operating railroad easement granted by the 1992 Easement Deed was "for the sole purpose of servicing" the Plaintiffs' warehouse facility. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 6 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 6 of the Complaint.

7. Upon information and belief, CSXT admits that one of the Plaintiff entities acquired the underlying Easement Track property from P&LE in 1993, subject to the 1992 Easement Deed. CSXT further admits that the Easement Track property is and has been subject to CSXT's railroad operating easement rights pursuant to the express terms of the 1992 Easement Deed. CSXT denies Plaintiffs' unsupported legal conclusion that the Easement Track "cannot be used to serve any entity other than Atlas." CSXT further states that the aerial photograph attached as Exhibit 1 to the Complaint appears to generally depict the Easement Track area, but CSXT denies that Exhibit 1 is a "survey" or other legal depiction of the Easement Track. CSXT denies the remaining allegations and legal conclusions in paragraph 7 of the Complaint.

8. CSXT admits that CSXT ceased providing rail service to Plaintiffs' facility adjacent to the Easement Track in approximately late 2017. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 8 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 8 of the Complaint.

9. CSXT denies the allegations and legal conclusions in paragraph 9 of the Complaint.

10. CSXT is without sufficient knowledge or information to admit or deny the allegations in paragraph 10 of the Complaint at this time, and, therefore, CSXT denies the allegations in paragraph 10 of the Complaint.

11. CSXT denies Plaintiffs' unsupported legal conclusion that the broad railroad operating easement granted by the 1992 Easement Deed has been terminated and further denies that CSXT's easement rights pursuant to the 1992 Easement Deed have "reverted back" to Plaintiffs. CSXT further denies that CSXT's continued use of the Easement Track for railroad purposes pursuant to the 1992 Easement Deed has caused any purported harm to Plaintiffs. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 11 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 11 of the Complaint.

12. CSXT denies the allegations and legal conclusions in paragraph 12 of the Complaint.

B. The Easement at Issue

13. Upon information and belief, CSXT admits that one of the Plaintiffs currently owns the subject real property underlying the Easement Track subject to CSXT's existing railroad operating easement rights pursuant to the express terms of the 1992 Easement Deed. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 13 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 13 of the Complaint.

14. CSXT states that Exhibit 2 to the Complaint appears to be a true and correct copy of the 1992 Easement Deed. CSXT states that the 1992 Easement Deed speaks for itself and

denies any allegations in paragraph 14 of the Complaint inconsistent therewith. CSXT denies the remaining allegations and legal conclusions in paragraph 14 of the Complaint.

15. CSXT states that the 1992 Easement Deed speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations and legal conclusions in paragraph 15 of the Complaint.

16. Upon information and belief, CSXT admits that one of the Plaintiffs acquired the underlying Easement Track property from P&LE in 1993. CSXT states that the referenced August 3, 1993 Deed speaks for itself and denies any allegations inconsistent therewith. CSXT further admits that the August 3, 1993 Deed conveyance was made subject to CSXT's existing railroad operating easement rights pursuant to the express terms of the 1992 Easement Deed. CSXT denies the remaining allegations and legal conclusions in paragraph 16 of the Complaint.

17. CSXT admits the allegations in paragraph 17 of the Complaint.

18. CSXT denies the allegations and legal conclusions in paragraph 18 of the Complaint.

19. CSXT denies the allegations and legal conclusions in paragraph 19 of the Complaint.

20. CSXT states that the 1992 Easement Deed speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations and legal conclusions in paragraph 20 of the Complaint.

21. CSXT admits that CSXT ceased providing rail service to the Plaintiffs' facility adjacent to the Easement Track in approximately late 2017. CSXT is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 21 of the Complaint at this time, and, therefore, CSXT denies the remaining allegations in paragraph 21 of the Complaint.

22. CSXT denies the allegations in paragraph 22 of the Complaint.

23. CSXT denies the allegations in paragraph 23 of the Complaint.

24. CSXT denies the allegations in paragraph 24 of the Complaint with respect to the continued use of the Easement Track for current and future railroad purposes. CSXT denies the remaining allegations and legal conclusions in paragraph 24 of the Complaint.

C. Plaintiffs Allege that CSX Improperly Failed to Acknowledge the Termination of the Atlas Rail Access Operating Agreement in the Easement Deed

25. CSXT states that the photographs attached as Exhibit 3 to the Complaint purport to show the condition of the Easement Track in May of 2019. CSXT denies the remaining allegations in paragraph 25 of the Complaint regarding the condition and functionality of the Easement Track.

26. CSXT admits that it received the June 6, 2019 correspondence attached as Exhibit 4 to the Complaint. CSXT further states that such correspondence speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations in paragraph 26 of the Complaint.

27. CSXT states that the June 6, 2019 correspondence attached as Exhibit 4 to the Complaint speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations in paragraph 27 of the Complaint.

28. CSXT states that the referenced June 11, 2019 email communication speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations in paragraph 28 of the Complaint.

29. CSXT states that the referenced June 11, 2019 email communication speaks for itself and denies any allegations inconsistent therewith. CSXT further states that the 1992 Easement Deed speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations in paragraph 29 of the Complaint.

30. CSXT admits that representatives of the Plaintiffs and Greystar met with CSXT representatives at CSXT headquarters in Jacksonville, Florida on or about August 28, 2019. CSXT denies the remaining allegations in paragraph 30 of the Complaint.

31. CSXT admits that representatives of Plaintiffs and Greystar referenced their purported plans for a potential future residential development in the vicinity of the Easement Track during the meeting at CSXT headquarters in Jacksonville, Florida on or about August 28, 2019. CSXT denies the remaining allegations in paragraph 31 of the Complaint.

32. CSXT admits that representatives of the Plaintiffs and Greystar met with CSXT representatives at CSXT headquarters in Jacksonville, Florida on or about August 28, 2019. CSXT admits that during the meeting: (i) representatives of Plaintiffs and Greystar referenced their purported plans for a potential future residential development in the vicinity of the Easement Track; (ii) representatives of Plaintiffs asserted that the 1992 Easement Deed had been or should be terminated due to the alleged cessation of rail service to the Plaintiffs' facility; and (iii) CSXT representatives reiterated at the meeting that the Easement Track continued to be used by CSXT for essential railroad purposes and that the 1992 Easement Deed remained in full force and effect. CSXT denies the remaining allegations in paragraph 32 of the Complaint.

33. CSXT denies the allegations and legal conclusions in paragraph 33 of the Complaint.

34. CSXT admits that used railroad cross ties were temporarily and inadvertently stored on Plaintiffs' property by a CSXT contractor in the vicinity of the Easement Track in late 2019 or early 2020. CSXT further admits that the used cross ties were promptly removed and relocated after CSXT was notified by Plaintiffs that the used cross ties were on Plaintiffs' property. CSXT denies the remaining allegations and legal conclusions in paragraph 34 of the Complaint.

35. CSXT admits that the 1992 Easement Deed remains in full force and effect. CSXT denies the remaining allegations and legal conclusions in paragraph 35 of the Complaint.

36. CSXT denies the allegations in paragraph 36 of the Complaint.

37. CSXT denies the allegations in paragraph 37 of the Complaint.

38. CSXT denies the allegations in paragraph 38 of the Complaint.

39. CSXT denies the allegations in paragraph 39 of the Complaint.

40. CSXT denies the allegations in paragraph 40 of the Complaint.

41. CSXT denies the allegations and legal conclusions in paragraph 41 of the Complaint.

42. CSXT admits that representatives of Plaintiffs and/or Greystar referenced their purported plans for a potential future residential development in the vicinity of the Easement Track during the summer of 2019, but denies that CSXT was provided with a copy of any purported agreement between Plaintiffs and Greystar. CSXT denies the remaining allegations and legal conclusions in paragraph 42 of the Complaint.

ANSWERING COUNT I - DECLARATORY JUDGMENT
(Atlas Land v. CSX)

43. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

44. CSXT states that Pennsylvania's Declaratory Judgment Act speaks for itself and denies any allegations inconsistent therewith.

45. CSXT states that the 1992 Easement Deed speaks for itself and denies any allegation in paragraph 45 of the Complaint inconsistent therewith.

46. CSXT denies the allegations and legal conclusions in paragraph 46 of the Complaint, including the allegation that the Easement Deed has terminated.

47. CSXT states that paragraph 47 of the Complaint alleges legal conclusions to which no response is required. To the extent a response is required, CSXT admits that a dispute exists between the parties concerning the 1992 Easement Deed. CSXT denies the remaining allegations and legal conclusions in paragraph 47 of the Complaint.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count I of the Complaint, including subparts (a) through (c), and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

ANSWERING COUNT II — EJECTMENT
(Atlas Land v. CSX)

48. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

49. Upon information and belief, CSXT admits that one of the Plaintiffs acquired the subject property from P&LE in 1993. CSXT states that the above-referenced August 3, 1993 Deed speaks for itself and denies any allegations inconsistent therewith. CSXT further admits that the August 3, 1993 Deed conveyance was made subject to CSXT's existing railroad operating easement rights pursuant to the express terms of the 1992 Easement Deed. CSXT denies the remaining allegations and legal conclusions in paragraph 49 of the Complaint.

50. CSXT denies the allegations and legal conclusions in paragraph 50 of the Complaint.

51. CSXT admits that CSXT continues to use the Easement Track pursuant to the express terms of the broad railroad operating easement granted by the 1992 Easement Deed. CSXT denies the remaining allegations and legal conclusions in paragraph 51 of the Complaint.

52. CSXT denies the allegations and legal conclusions in paragraph 52 of the Complaint.

53. CSXT denies the allegations and legal conclusions in paragraph 53 of the Complaint.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count II of the Complaint and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

ANSWERING COUNT III — TRESPASS
(Atlas Land v. CSX)

54. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

55. CSXT denies the allegations and legal conclusions in paragraph 55 of the Complaint.

56. CSXT denies the allegations and legal conclusions in paragraph 56 of the Complaint.

57. CSXT denies the allegations and legal conclusions in paragraph 57 of the Complaint.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count III of the Complaint and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

ANSWERING COUNT IV — BREACH OF CONTRACT
(Atlas Land v. CSX)

58. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

59. CSXT states that the 1992 Easement Deed speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations and legal conclusions in paragraph 59 of the Complaint.

60. CSXT states that paragraph 60 of the Complaint alleges legal conclusions to which no response is required. To the extent a response is required, CSXT denies the remaining allegations and legal conclusions in paragraph 60 of the Complaint.

61. CSXT denies the allegations and legal conclusions in paragraph 61 of the Complaint.

62. CSXT denies the allegations and legal conclusions in paragraph 62 of the Complaint.

63. CSXT denies the allegations and legal conclusions in paragraph 63 of the Complaint.

64. CSXT denies the allegations and legal conclusions in paragraph 64 of the Complaint.

65. CSXT denies the allegations and legal conclusions in paragraph 65 of the Complaint and demands strict proof thereof.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count IV of the Complaint, including subparts (a) through (c), and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

**ANSWERING COUNT V — TORTIOUS INTERFERENCE WITH CONTRACTUAL
RELATIONS
(Plaintiffs v. CSX)**

66. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

67. CSXT is without sufficient knowledge or information to admit or deny the allegations in paragraph 67 of the Complaint at this time, and, therefore, denies the allegations in paragraph 67 of the Complaint.

68. CSXT admits that representatives of Plaintiffs and/or Greystar referenced their purported plans for a potential future residential development in the vicinity of the Easement Track during the summer of 2019, but denies that CSXT was provided with a copy of any purported agreement between Plaintiffs and Greystar. CSXT denies the remaining allegations in paragraph 68 of the Complaint.

69. CSXT denies the allegations and legal conclusions in paragraph 69 of the Complaint.

70. CSXT denies the allegations and legal conclusions in paragraph 70 of the Complaint.

71. CSXT denies the allegations and legal conclusions in paragraph 71 of the Complaint and demands strict proof thereof.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count V of the Complaint, including subparts (a) through (d), and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

ANSWERING COUNT VI (in the alternative) — INVERSE CONDEMNATION
(Plaintiffs v. CSX)

72. CSXT hereby adopts and incorporates by reference its responses to the preceding paragraphs of the Complaint as if fully set forth herein.

73. CSXT admits that it is a railroad company operating in the Commonwealth of Pennsylvania. CSXT states the Pennsylvania Eminent Domain Code speaks for itself and denies any allegations inconsistent therewith. CSXT further states that the remaining allegations in paragraph 73 of the Complaint constitute legal conclusions to which no response is required.

74. CSXT states that the referenced June 11, 2019 email communication speaks for itself and denies any allegations inconsistent therewith. CSXT denies the remaining allegations and legal conclusions in paragraph 74 of the Complaint.

75. CSXT denies the allegations and legal conclusions in paragraph 75 of the Complaint.

76. CSXT admits that it has not instituted eminent domain proceedings for the property subject to the 1992 Easement Deed as the 1992 Easement Deed remains in full force and effect. CSXT denies the remaining allegations and conclusions in paragraph 76 of the Complaint.

77. CSXT denies the allegations and legal conclusions in paragraph 77 of the Complaint.

78. CSXT denies the allegations and legal conclusions in paragraph 78 of the Complaint and demands strict proof thereof.

WHEREFORE CLAUSE

CSXT denies the allegations and legal conclusions in the WHEREFORE clause to Count VI of the Complaint, including subparts (a) through (c), and further denies that Plaintiffs are entitled to any of the relief requested in the Complaint.

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.

Eighth Separate Defense
(Compliance With Applicable Laws)

Some or all of Plaintiffs' claims are or may be barred in whole or in part because CSXT's conduct at all times complied with all applicable laws, rules, regulations, and property instruments, including the railroad operating easement rights granted by the 1992 Easement Deed.

Ninth Separate Defense
(No Duty to Cease Railroad Operations)

Some or all of Plaintiffs' claims are or may be barred in whole or in part because nothing in federal law, Pennsylvania law, and/or the terms of the 1992 Easement Deed create a duty for CSXT to cease conducting its rail transportation operations or otherwise refrain from conducting rail transportation operations on its Easement Track.

Tenth Separate Defense
(Plaintiffs' Lack of Control Over Easement Track)

Some or all of Plaintiffs' claims are or may be barred because Plaintiffs do not have any legal, equitable, contractual or statutory right, title or other ownership interest with respect to CSXT's Easement Track.

Eleventh Separate Defense
(Lack of Physical Invasion or Injury)

Plaintiffs' claims based on trespass are or may be barred because Plaintiffs cannot establish any actual or physical invasion or injury to any property owned by Plaintiffs.

Twelfth Separate Defense
(Justifiable CSXT Conduct)

Plaintiffs' claims for purported tortious interference with contractual relations are or may be barred because Plaintiffs cannot establish any purposeful or unjustified action on the part of CSXT specifically intended to harm any existing and known contractual relationship. At all

relevant times, CSXT had a legitimate business purpose for continuing to utilize the Easement Track for railroad operations pursuant to the express terms of the 1992 Easement Deed.

Thirteenth Separate Defense
(Failure to Mitigate)

Plaintiffs' claims are or may be barred in whole or in part because Plaintiffs have failed to mitigate their alleged damages.

Fourteenth Separate Defense
(Lack of Damages)

Some or all of Plaintiffs' claims are or may be barred in whole or in part because Plaintiffs have not suffered any actual damages and/or the Plaintiffs' purported damages are impermissibly speculative and/or remote.

Fifteenth Separate Defense
(Waiver and Estoppel)

Some or all of Plaintiffs' claims are or may be barred in whole or in part by the doctrines of waiver and/or estoppel.

Sixteenth Separate Defense
(Time-Bar Defenses)

Some or all of Plaintiffs' claims are or may be barred in whole or in part by the applicable statute of limitations and/or the doctrine of laches.

Seventeenth Separate Defense
(Lack of Causation)

Some or all of Plaintiffs' claims are or may be barred in whole or in part for lack of causation.

Eighteenth Separate Defense
(Lack of a Taking of Plaintiffs' Property)

Some or all of Plaintiffs' claims are or may be barred because CSXT has not damaged or taken Plaintiffs' property sufficient to constitute an inverse condemnation or a "taking" under any applicable constitutional or statutory provision.

Nineteenth Separate Defense
(No Lawful Basis for Punitive Damages)

To the extent Plaintiffs' Complaint purports to assert that Plaintiffs are entitled to recover punitive or exemplary damages, CSXT asserts the following defenses:

a. Plaintiffs' claims for CSXT's purported breach of its 1992 Easement Deed, an express conveyance of property rights, cannot give rise to punitive damages as a matter of law;

b. Plaintiffs' claims for punitive damages violate, and are therefore barred by, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America on grounds including the following:

i. It is a violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to impose punitive damages, which are penal in nature, against a civil defendant upon the plaintiff satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;

ii. The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against Defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

iii. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

iv. The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts, and thus violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

v. The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes upon the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amended of the United States Constitution;

vi. The procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution;

vii. The award of punitive damages to the Plaintiffs in this action would constitute a deprivation of property without due process of law; and

viii. The procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine and penalty.

c. Plaintiffs' claims for punitive damages violate and are therefore barred by the provision of the Constitution of the Commonwealth of Pennsylvania on grounds including the following:

i. It is a violation of the Due Process and Equal Protection Clauses to impose punitive damages, which are penal in nature, against a civil defendant upon the plaintiff satisfying a burden of proof which is less than the “beyond reasonable doubt” burden of proof required in criminal cases;

ii. The procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against Defendant;

iii. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages;

iv. The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts;

v. The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct;

vi. The procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines;

vii. The award of punitive damages to the Plaintiff in this action would constitute a deprivation of property without due process of law; and

viii. The procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine and penalty.

Twentieth Separate Defense
(No Underlying Breach of Contract)

Plaintiffs fail to allege an independent breach of contract claim underlying its claim for a breach of the implied duty of good faith and fair dealing.

Twenty-First Separate Defense
(Reservation of Rights/Investigation Continues)

CSXT reserves the right to add and to rely on any and all defenses that may hereafter be disclosed through investigation, discovery, or otherwise.

WHEREFORE, Defendant CSXT Transportation, Inc. hereby requests that this Court deny all of the relief requested in the Complaint, enter judgment in favor of Defendant, award Defendant costs and fees, and enter such other relief as this Court deems just and proper.

Respectfully submitted,

Dated: March 20, 2020

/s/ Branden P. Moore
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon all counsel of record via the Court's CM/ECF Notification System, this 20th day of March 2020.

/s/ Branden P. Moore