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ENTERED

Office of Proceedings

August 18, 2020

Part of

Public Record

August 17, 2020

Ms. Cynthia T. Brown
Chief Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street SW, Room 1034
Washington, DC 20024

Re: Docket No. 36412

Board as Trustees of Joint Drainage District Nos. 6 & 56 – Petition For Declaratory Order

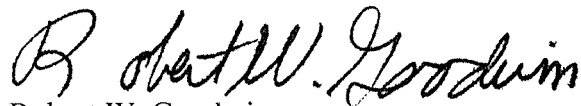
Dear Ms. Brown:

The Petitioner, Board as Trustees of JDD #6 & 56 in the above-referenced matter, hereby submits its Reply To Respondents' Response To Petition For Declaratory Order filed in the docket under board rules.

If you have any questions regarding this filing, please contact me at either goodwinlawoffice@fbx.com or 515-232-7390.

Thank you for your assistance in this matter.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin
Attorney at Law

RWG:jcr

Enclosures

cc: Michael J. Barron, Jr. (via email)
Kimberly P. Knoshaug (via email)

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36412

**BOARD AS TRUSTEES OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56 –
PETITION FOR DECLARATORY ORDER**

**BOARD OF TRUSTEES OF JDD #6 & 56'S
REPLY TO IOWA NORTHERN RAILWAY COMPANY'S
RESPONSE TO PETITION FOR DECLARATORY ORDER**

Filed on Behalf of Board as Trustees of
JDD #6 & 56

By: Robert W. Goodwin, AT0002986
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**ATTORNEY FOR PETITIONER
BOARD AS TRUSTEES OF
JDD #6 & 56**

Dated: August 17, 2020

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36412

**BOARD AS TRUSTEES OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56 –
PETITION FOR DECLARATORY ORDER**

**BOARD OF TRUSTEES OF JDD #6 & 56'S
REPLY TO IOWA NORTHERN RAILWAY COMPANY'S
RESPONSE TO PETITION FOR DECLARATORY ORDER**

The Board as Trustees of Joint Drainage District Nos. 6 and 56 (JDD #6 & 56) (“Board”),
MAKE THE FOLLOWING Reply To Iowa Northern Railway Company’s (INRC) Response To
Petition For Declaratory Order:

The Engineer’s Report for JDD #6 & 56 dated February 6, 2014 found that JDD #6 & 56’s drainage facilities do not provide adequate drainage for the 1,379.8 acres of farm land in JDD #6 & 56. The downstream open ditch is severely silted in; brush and other trees are growing over portions of the ditch and the tile; the tile is very shallow and there are several blowouts of the tile. An improvement project of replacing the inadequate tile line with a new open ditch to increase the capacity of the drainage district was approved on June 24, 2014. See Rode Affidavit in Petition Exhibit D.¹

¹Since the Board was the Defendant in the State action, unfortunately, its Exhibits were marked with letters instead of numbers. The Board apologizes if its marking of Exhibits with letters in this matter causes any confusion.

The increased drainage capacity will result in increased crop production, which in turn gives the landowners more income. A new larger culvert through INRC's embankment is needed to provide for the free flow of water in the new open ditch which is upstream and downstream from the railroad embankment.

The landowners in JDD #6 & 56 have needed the improved drainage capacity that the improvement project will provide since at least 2014. INRC has delayed the construction of the improvement project with its litigation. The Board is convinced that INRC wants to avoid paying for the cost of installing the new larger culvert through its embankment as required under Section 468.112, Code of Iowa. INRC had no objection to installing a new culvert through its embankment using the jack and bore method (as to be used in the JDD #6 & 56 improvement project) on a Hancock County Iowa project where INRC did not have to pay for the cost of the new culvert. See Affidavit of Tracy Holly with Precision Tunneling which is to do the jack and bore installation of the new culvert for the JDD #6 & 56 improvement project. That Affidavit is attached to Defendants' Motion For Summary Judgment filed November 25, 2019 in the Floyd County Case, Petition Exhibit D.

The Board is mindful of the time element, to provide the landowners with the long awaited drainage improvement, before yet another crop season comes and goes. The Iowa District Court, in response to the Trustees' Motion To Reconsider its Ruling dated January 1, 2020 Ruling issued a Writ of Mandamus on April 3, 2020, which stated that the Board shall refrain from installing a culvert through INRC's embankment "Unless And Until They Have Obtained Authority Or Directive Allowing It To Proceed From The Surface Transportation

Board” (STB). The Board was faced with the issue of appealing the Writ of Mandamus to the Iowa Supreme Court which could take twelve (12) months before a decision to be rendered on the propriety of the Writ of Mandamus. If successful on the Writ of Mandamus, the Board could reasonably expect further delays on resolving the issue of federal pre-emption.

As a matter of timeliness, and the duty of providing the landowners in JDD #6 & 56 with adequate drainage, the Board hereby respectfully requests that the STB retain this Petition and render a decision on the issue of federal pre-emption.

INRC attaches Exhibit B, a verified statement of Peter J. Schierloh, which replicates Mr. Schierloh’s Affidavit which was attached to the Plaintiffs’ Resistance To The Defendants’ Summary Judgment Motion And Cross Motion For Summary Judgment filed in Floyd County District Court on December 13, 2019, Petition Exhibit E. JDD #6 & 56’s Engineer, Kent Rode, responded to Mr. Schierloh’s statements in his Affidavit filed with Defendants’ Response To Plaintiffs’ Resistance To Defendants’ Motion For Summary Judgment And Resistance To Plaintiffs’ Cross Motion For Summary Judgment, Petition Exhibit F. Mr. Rode’s Affidavit shows:

- The jack and bore method of installing the 5.5-foot diameter smooth steel culvert will be done in accordance with INRC’s own specifications for jack and bore operations on the railroad’s own property.
- When a train approaches the work area, all work with the jack and bore operation will be stopped until the train passes through the area.

- A laser survey will be in operation, and if it detects more than ¼ inch movement in the track, the jack and bore operation will be stopped.
- The jack and bore operation will be 15 to 16 feet below the rail line. Therefore, it is highly unlikely there will be any movement of the rail line from the jack and bore operation.
- The jack and bore method can bore through any timber or obstructions of which Mr. Schierloh speculates.

The jack and bore operation will be 3.3 feet below the existing 4-feet x 6-feet box culvert and on the south side of it which is on the opposite side from where the timber piles are speculated to potentially exist and some 50 feet away.

- It is highly unlikely that any timber from removal of the timber trestle bridge in 1922 was put in the existing embankment below and past the existing box culvert that was constructed in 1871.
- The railroad line crosses the path of the natural waterway. The installation of the new culvert will keep the railroad embankment free of water collecting against the embankment.
- The existing 4-feet x 6-feet box culvert built in 1871 will remain in place, 2 feet higher than the new 5.5-feet diameter smooth steel culvert. The existing box culvert will serve as an overflow during times of heavy rains.

The Board attaches hereto the verified statement of Kent L. Rode, P.E., Exhibit M, in response to the verified statement of John Furlan, Exhibit F, and INRC's Exhibit D.

Exhibit E and D involve a 245-foot long welded steel pipe, and dewatering on the project where the contractor augered 105-feet beyond the casing which left a void that created a “sink hole”. The JDD #6 & 56’s project involves an experienced jack and bore contractor, where there will be no boring past the casing and no dewatering. The installation of the new smooth steel culvert will have water pass through the INRC’s embankment more quickly without water ponding up against the embankment as presently occurs, which will make INRC’s embankment drier and more stable.

INRC cites the case of Waubay Lake Farmer’s Ass’n v. BNSF Ry. Co., (D.S.D. 2014) which, at page 6, states:

“Plaintiffs seek damages, an injunction, and an order requiring BNSF to replace Culvert 647.802 with a culvert with a higher capacity. This logically would require BNSF to halt use of its tracks to remove the existing culvert beneath the track and indeed beneath the current level of water, which likely would mean some demolition and rebuilding of its railway and roadbed.”

Our present case is clearly distinguishable from the Waubay Lake case. The 4-feet x 6-feet box culvert built in 1871 will remain in place. There will be no excavation to remove the existing 4-feet x 6-feet culvert. The new 5.5-foot diameter smooth steel culvert will be installed east of and below the existing 4-feet x 6-feet box culvert.

The installation of the 5.5-foot diameter smooth steel culvert by the jack and bore method is a standard routine operation that does not interfere with the operation of the rail line as shown by the Affidavits of Kent L. Rode, Tracy Holly, and Scott Dullard, attached to the Defendants’ Motion For Summary Judgment, Petition Exhibit D, filed in the Floyd County District Court on November 25, 2019.

INRC cites the case of Griffoen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273 (Iowa 2018), which was a tort claim action based on the railroad's decision to keep its rail cars laden with rocks on its bridges during flooding which allegedly made the flood damage worse for the Plaintiff. The Iowa District Court in its January 3, 2020 Ruling, Petition Exhibit G, on page 3, stated "This Court does not find Griffoen to be as persuasive as Iowa Northern argues, as the claims and posture of that case were decidedly different from these circumstances."

The Iowa District Court goes on to say "Specifically convincing are the undisputed facts that Iowa Northern will cease rail operation during any proposed construction and the project will involve penetration into the ground supporting the railroad tracks."

The Board challenged the District Court's position that INRC could voluntarily choose to cease rail operations when (1) it has a statutory duty under Sections 468.109 and 468.110, Code of Iowa, which the Iowa Supreme Court has held to be a continuing duty to keep up with changed conditions and increased use demand to build or rebuild the necessary culvert or bridge; (2) the jack and bore method of installing the new 5.5-foot diameter smooth steel culvert is a standard, customary method of installing culverts which does not interrupt the operation of the rail line, and which can be done in accordance with INRC's own specifications, and (3) the jack and bore method will be monitored by a laser survey, and if the rail line moves more than ¼ inch the jack and bore operation will be stopped to ensure that there is no interruption of the operation of INRC's rail line. Petition Exhibit H.

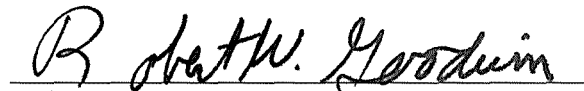
There is no federal pre-emption in this case because the jack and bore installation of the 5.5-foot diameter smooth steel culvert will not interfere with the operation of the INRC's rail

line. Maumee & Western Railroad Corporation & RMV Ventures, LLC – Petition For Declaratory Order, STB Finance Docket No. 34354 slip op. at 2 STB served Mar. 3, 2004 (Maumee & Western); Eastern Alabama Railway LLC – petition For Declaratory Order, FD 35583 (March 8, 2012); Adrian & Blissfield Railroad Company – Petition For Declaratory Order FD 36148 (January 31, 2018); Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d 533, 541 (6th Cir. 2008); and New York Susquehanna v. Jackson, 550 F.3d 238, 254 (3rd Cir. 2007).

RELIEF SOUGHT

WHEREFORE, Petitioners reassert their request that the STB issue a Declaratory Order determining that JDD #6 & 56's installation of the 5.5-foot diameter smooth steel culvert in the embankment of INRC in JDD #6 & 56 pursuant to Sections 468.109 through 468.113, Code of Iowa, is not pre-empted by the provisions of 49 U.S.C. § 10501(b).

Respectfully submitted,
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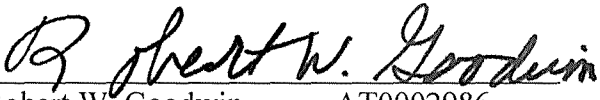
Certificate of Service

I, Robert W. Goodwin, hereby certify on this 17th day of August 2020, that I did serve a true and correct copy with attached Exhibits A through M of the foregoing reply To Respondents' Response To Petition For Declaratory Order upon the following by email and regular mail as set forth below:

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**ATTORNEY FOR PETITIONER BOARD
AS TRUSTEES OF JDD #6 & 56**

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36412

**BOARD AS TRUSTEES OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56 –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT
OF
KENT L. RODE
PROFESSIONAL ENGINEER**

**ON BEHALF OF
BOARD AS TRUSTEES OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56**

Bolton & Menk, Inc.

I am a professional engineer with Bolton & Menk, Inc., serving the Board as Trustees of Joint Drainage District Nos. 6 & 56. In that capacity, I have developed the plans for the improvement project of JDD #6 & 56, which include the installation of a 107 foot long, 5.5-foot diameter smooth steel culvert using the standard jack and bore method.

I have read the testimony of John Furlan, Exhibit D, and the Railroad Accident Report, Exhibit E, both attached to Iowa Northern Railway Company's Response To Petition For Declaratory Order. The situation described in Exhibits E and D are in no way comparable or pertinent to the installation of the 5.5-foot diameter smooth steel culvert in the Iowa Northern Railway Company's embankment.

The WCL matter involved installation of a 36 inch diameter, 245-foot long welded steel pipe that was improperly installed by an inexperienced foreman with extensive dewatering. JDD #6 & 56's improvement project involves installation of a 66 inch diameter, 107-foot long smooth steel pipe. The JDD #6 & 56's improvement project is much shorter in length and dewatering is not expected. The WCL matter had multiple issues but most importantly was that the contractor augered an incredible 105 feet past the end of the casing pipe leaving a large unprotected and unsupported 36" diameter by 105 feet long hole beneath the tracks for many days. It is not at all surprising that a void developed within the embankment.

The contractor involved with the JDD #6 & 56 project is an experienced contractor that will not auger beyond the end of the casing pipe. The contractor will jack or push the casing

pipe in place. They will not use a vibrating pneumatic hammer. Therefore, there can be no “sink hole to form” as occurred in the WCL matter.

The 5.5-foot diameter smooth steel culvert will be installed in the natural waterway. The installation of the new culvert will keep the railroad embankment drier and more stable by having the water pass through more quickly and not pond up against the railroad embankment. The storm water currently builds up and flows around and through the adjacent INRC bridge over a roadway called West Drive. This indicates an undersized existing culvert and creates significant hazards for the traveling public on West Drive.

I note that a statement of Peter J. Schierloh is attached to Iowa Northern Railway Company’s Response at Exhibit B, which replicates his Affidavit filed in the Iowa District Court in Floyd County, Iowa. My Affidavit, attached to the Board’s Defendants’ Response To Plaintiffs’ Resistance To Defendants’ Motion For Summary Judgment And Resistance To Plaintiffs’ Cross Motion For Summary Judgment filed December 20, 2019 in Floyd County District Court is a response to Mr. Schierloh’s assertions. The installation of the 5.5-foot diameter smooth steel culvert will not interrupt the use of Iowa Northern Railway Company’s rail line.

VERIFICATION

I, Kent L. Rode, verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to verify the foregoing Verified Statement.



Kent L. Rode, P.E.

Dated: August 17, 2020.