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September 8, 2020

VIA ELECTRONIC FILING

301049

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

ENTERED
Office of Proceedings
September 8, 2020
Part of
Public Record

Re: FD 36412

Board of Trustees of JDD 6 & 56 – Petition for Declaratory Order

Dear Ms. Brown,

Iowa Northern Railway Company (“INRC”), the respondent in the above-referenced matter, hereby submits its Motion to Strike and, in the alternative, its Response to the Sur-Reply in the docket.

If you have any questions regarding this filing, please contact me at either mbarron@fletcher-sippel.com or 312-252-1511.

Thank you for your assistance in this matter.

Respectfully submitted,

/s/Michael J. Barron, Jr.

Michael J. Barron, Jr.

Attorney for Iowa Northern Railway Company

cc: Robert W. Goodwin (via email)
Kimberly P. Knoshaug (via email)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36412

**TRUSTEES OF JOINT DRAINAGE DISTRICTS NOS. 6 & 56 —
PETITION FOR DECLARATORY ORDER**

**IOWA NORTHERN RAILWAY COMPANY'S MOTION TO STRIKE
AND, IN THE ALTERNATIVE, RESPONSE TO THE SUR-REPLY OF THE
TRUSTEES OF JOINT DRAINAGE DISTRICTS NOS. 6 & 56**

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**ATTORNEYS FOR
IOWA NORTHERN RAILWAY COMPANY**

Dated: September 8, 2020

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Motion to Strike

Iowa Northern Railway Company (“INRC”) hereby requests that the Surface Transportation Board (the “Board”) strike the Sur-reply (the “Sur-reply”) of the Trustees of Joint Drainage Districts Nos. 6 and 56 (“JDD”), filed as of August 18, 2020, as an impermissible reply to a reply in violation of 49 C.F.R. § 1104.13(c). Should the Board decline to strike the Sur-reply, INRC requests that the Board accept into the record its response to the new evidence and argument contained in JDD’s recent filing.

As background, on June 19, 2020, JDD tendered to the Board a petition for declaratory order (the “Petition”), in which JDD has asked the Board to find that 49 U.S.C. § 10501(b) (“ICCTA”) does not prevent JDD from invoking Iowa law to compel INRC to – (a) allow for the installation of a new drainage culvert through an INRC railroad embankment; and (b) fund the costs of the culvert installation and related drainage improvements. In so doing, JDD has asked the Board to override the decision of an Iowa state court that had concluded that ICCTA preempted JDD’s proposed enforcement action. Following an extension of the reply deadline, INRC filed its reply (the “Reply”) on July 30, 2020. Thereafter, on August 18, 2020, JDD filed its Sur-rebuttal, which JDD had styled as a “reply” to INRC’s July 30 Reply, and in

which JDD appears intent to rebut arguments INRC raised in its Reply, and to introduce new evidence and argument in support of its Petition.

The Board's rules of procedure are very clear and blunt: "A reply to a reply [otherwise known as a sur-reply] is not permitted." 49 C.F.R. § 1104.13(c). The prohibition applies to a variety of actions before the Board, including declaratory order proceedings. *See, e.g., California High-Speed Rail Authority – Petition for a Declaratory Order*, FD 35861 (STB served Dec. 12, 2014), 5.

In disregard of Section 1104.13(c), JDD filed its Sur-reply, which is clearly a substantive response to INRC's reply filing. It did so without requesting leave of the Board to tender a response to the Reply, or supplying justification for why the Board should deviate here from its rules of procedure. Worse, the Sur-reply is largely redundant of evidence and argument presented in JDD's Petition, and, to the extent that it offers new evidence and argument, that evidence and argument could, and should, have been presented in JDD's case-in-chief – its Petition. In short, JDD has attempted to bolster its case in support of its request for the Board to overrule the state court, by simply augmenting its Petition through the vehicle of an impermissible (and unexcused) Sur-reply.

For these reasons, the Board should not sanction JDD's abuse of the agency's rules of procedure, particularly where a Sur-reply was unnecessary and where JDD did not attempt to seek permission to file it or explain why its efforts to augment its case were warranted. Accordingly, the Sur-reply should be stricken from the administrative record.

Response

Should the Board elect to overlook its procedural rule in this case and accept JDD's Sur-reply, then, as a matter of fairness, reciprocity and due process, the Board must also accept and consider the following response of INRC, which addresses the issues and arguments raised (many for the first time) in the Sur-reply.

Before responding to the substance of JDD's Sur-reply, it may be helpful, for purposes of context, to encapsulate relevant case background and the positions of the parties to this point. As a general matter, this case involves proposed upgrades to a drainage system intended to support the flow of water along a natural watercourse that, at a location relevant here, traverses INRC's railroad right-of-way and passes through a railroad embankment (the "Embankment" – used as an approach to a railroad overpass of a public roadway) by way of a box culvert. The record to this point reflects the following:

- JDD is responsible for maintaining existing drainage system infrastructure, but it has largely neglected the drainage system in and around the Embankment over the past several decades (INRC Reply, 4) – a point that JDD has not disputed. INRC believes that the effects of this longstanding neglect have prompted JDD to conclude that remedial action is now necessary.
- JDD has retained a consultant to offer recommended drainage remediation. That consultant offered three remediation options, initially recommending Option 1 (as described in INRC's Reply). Id., 5. JDD selected "Option 2" that would, among other things, require boring through the Embankment to install a new culvert. Unlike Option 1, JDD's preferred Option 2 would pass project costs to INRC. It appears that JDD selected Option 2 in order to pass project costs to INRC – another point that JDD has not disputed.
- INRC opposes Option 2 remediation because the specific characteristics of this Embankment (which INRC engineering records indicate contains concealed bridge timbers) make JDD's proposed culvert installation unreasonably risky, endangering the integrity of the Embankment and, in turn, rail operations over it. Id., 6-7. INRC has explained that it would be opposed to Option 2 even if JDD were responsible for the costs due to aforementioned safety concerns. Id., 14.

- INRC is not opposed to the Option 1 remediation. In fact, Option 1 remediation could commence essentially immediately if JDD wished. Option 1 is much less risky from a railroad engineering and operating perspective – another point that JDD does not dispute.
- JDD has already pressed for Option 2. The matter has been litigated in Iowa state court, including whether JDD’s invocation of state law to force INRC to permit the installation of the new culvert is preempted under 49 U.S.C. § 10501 (“ICCTA”). Following an examination of pertinent ICCTA jurisprudence, the court concluded that JDD’s effort to to compel culvert installation was preempted.
- Disappointed with the state court’s ruling, JDD urged the court to allow it to ask the Board for a second opinion on the ICCTA preemption issue. The court, in response, ordered that JDD must “refrain from installing a culvert” within INRC’s embankment “unless and until it has obtained authority or directive allowing it to proceed [with the installation of the culvert] from the Surface Transportation Board.” *Id.*, 7.
- Having considered the substance of INRC’s Reply questioning the propriety of Board intervention under the circumstances, JDD admits in its Sur-reply that it could have sought judicial review of the court’s decision under applicable state rules of procedure. JDD explains that it hopes to seek an opinion of the Board overruling the state court instead of pursuing an appeal “[a]s a matter of timeliness” (Sur-reply, 4) indicating that JDD expects Board intervention as a substitute for the usual state court appellate process.

JDD’s Sur-reply is largely redundant of its Petition, but it does raise at this inappropriate juncture new evidence and argument which it appears JDD hopes will shore up the Petition’s deficiencies. Notably, JDD explains that it is seeking a Board-issued ICCTA preemption ruling in order to bypass contesting the court’s decision through the usual state appellate court process due to an alleged urgency that is self-inflicted and entirely avoidable. In urging the Board to act, JDD ignores Board practice and precedent that disfavor the agency’s intervention. In addition, JDD impermissibly attempts through its Sur-reply to bolster its evidence in support of Option 2. As explained below, neither the Petition nor JDD’s impermissible attempts to shore up the Petition’s evident weaknesses support a Board decision overruling the state court.

The Board has long explained that it has discretionary authority to issue a declaratory order. *See, e.g., City of Sammamish, Wash. – Petition for Declaratory Order*, FD 36161 (STB served Mar. 29, 2018); *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, FD 35819 (STB served Aug. 28, 2014). It has also acknowledged that courts are free (and indeed are “well-equipped”) to render ICCTA preemption holdings “once the facts have been developed.” *CSX Transportation, Inc. – Petition for Declaratory Order*, FD 35832 (STB served Feb. 29, 2016) (“CSXT”), 5. The Board has consistently declined to intrude upon ICCTA preemption disputes that, as here, a court has opted to adjudicate itself. Indeed, the Board extends considerable deference to courts that have permitted the parties to a dispute to develop the facts relevant to ICCTA preemption, and then have adjudicated the issue – as was done here.

JDD asks the Board to ignore such practice and to eschew its deference to the courts, arguing that the Board should instead take the initiative in this case to overrule the court, all while relying on the same evidence presented in the state court proceeding. JDD offers no support for the proposition that the Board should intervene and overrule a state court on ICCTA preemption matters, and INRC is unaware of any precedent supporting such Board intrusion. Simply put, were the Board to accept JDD’s invitation to consider overruling (or otherwise second-guessing) the state court’s preemption ruling, it would, in turn, encourage increased, and unnecessary, future recourse to the Board as, essentially, the preferred arbiter of all ICCTA preemption disputes. Acting as JDD has requested would signal to the courts that the Board should be regarded as the preeminent authority on ICCTA preemption, which undercuts the Board’s oft-repeated view that courts are equally competent to adjudicate such matters. *See, e.g., CSXT, 14500 Ltd. – Petition for Declaratory Order*, FD 35788, (STB served Jun. 5, 2014), 2 (questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the

courts applying existing precedent); *CSX Transp., Inc. – Petition for Declaratory Order*, FD 34662, (STB served May 3, 2005), 8.

While it is troubling enough that JDD is intent on having the Board sweep aside its deference to the courts, and assume primacy on ICCTA preemption matters, JDD explains for the first time in its Sur-reply that it is looking to the Board to serve as a convenient bypass to otherwise-applicable Iowa state law appellate processes. The notion that the Board should serve as a surrogate for the ordinary state court judicial review is unjustified and unprecedented. But it is more troubling still that JDD has attempted to excuse its appeals bypass strategy by claiming the existence of an urgent situation that is entirely of JDD's own making.

JDD points to an allegedly failing drainage system proximate to the Embankment, and the need for remedial action before the next harvest season as justification for its resort to the Board. Yet, JDD has not disputed that the source of the problem is its own failure to maintain that drainage system. JDD well knows that, in insisting that INRC should foot the bill for remediating the consequences of JDD's neglect, it is purposely overlooking readily-available remediation – the so-called Option 1 discussed INRC's Reply – to which INRC has never objected, and that JDD's own consultant initially had favored. The Board should not act to relieve JDD of an entirely artificial and avoidable "emergency" situation, particularly where JDD is asking for the Board to take the extraordinary step of substituting its review for that of the appropriate appellate court.

Over INRC's evidence to the contrary, JDD continues to insist that its proposed culvert installation is not unsafe, will not risk Embankment failure, and will not jeopardize railroad operations. Its Sur-reply is largely a re-hash of its characterization of the record evidence in the state court proceeding as presented in the Petition. Expanding upon its arguments on the subject, JDD insists that, because INRC's engineering standards contemplate

the use of the jack and bore process that JDD wants to use to install the proposed drainage culvert, and because that process has been used in another railroad embankment located elsewhere without incident, that is basis enough for the Board to conclude that the installation of a culvert in this Embankment poses no risk to railroad operations or safety here. JDD once again discounts INRC's clearly-articulated and Embankment-specific safety concerns. INRC would only add that it has never argued that the jack and bore process is inherently unsafe. Rather, it has pointed out that the use of this process is an especially risky undertaking here, given the physical characteristics of this Embankment.

Finally, JDD surely would have been better served under a Sur-reply (if one had been permitted under the Board's rules) to offer additional testimony on – (1) the issue of the risk to the Embankment posed by JDD's culvert installation objectives; (2) why it has opted against Option 1 remediation; and (3) why, from a railroad engineering and safety perspective, JDD's pursuit of Option 2 is comparatively preferable to Option 1. Instead, JDD has tendered a new, supplemental Verified Statement of Kent L. Rode, intended to address anecdotal evidence concerning a major derailment in Plainfield, Illinois, that INRC offered in its Reply to illustrate the dangers inherent in subterranean excavation beneath and within railroad rights-of-way. Mr. Rode has mistaken the purpose of the discussion of the Plainfield event, assuming that INRC intended to equate the events that precipitated the Plainfield derailment with the culvert installation in the Embankment. INRC acknowledges that the specific activities at Plainfield and those JDD proposes at the Embankment differ in their particular details. Rather, INRC intended to reinforce that if the Board were inclined to second-guess the state court, it should be very careful under the circumstances not to dismiss INRC's site-specific safety concerns due to the potentially catastrophic consequences and expert estimates as to the level of risk that a culvert

excavation under the Embankment could place upon INRC specifically, and the flow of interstate commerce generally.

WHEREFORE, JDD has failed in its Sur-reply to justify Board intervention into state court adjudicatory (and appellate) processes or to second-guess the state court. Even if the Board were to repudiate longstanding precedent disfavoring such intervention, the Board should nevertheless deny JDD's petition for a declaratory order for reasons INRC has offered in its Reply to the Petition.

Respectfully submitted,

By: /s/Michael J. Barron, Jr _____

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ATTORNEYS FOR IOWA NORTHERN RAILWAY

Dated: September 8, 2020

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a copy of the foregoing response of Iowa Northern Railway Company was served via email upon Robert W. Goodwin, attorney for the Petitioner, this 8th day of September, 2020.

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