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August 31, 2022

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Via E-Filing
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. St. SW
Washington DC 20423

ENTERED
Office of Proceedings
August 31, 2022
Part of
Public Record

Re: STB Docket No. FD 36619
City of North Chicago, Illinois
Petition for Declaratory Judgment Order

Dear Chief Brown,

On June 21, 2022, the City of North Chicago filed a Petition for a Declaratory Judgment, requesting that Surface Transportation Board find that the City's state court condemnation action is not preempted by the Interstate Commerce Commission Termination Act or, in the alternative, that the state trial court lacks any basis to order the City to reinforce its entire water main on the Property immediately as a remedy for a highly unlikely partial preemption in the future. On August 22, 2022, 2nd & Main filed a Response to the City's Petition.

This Response raised two new legal issues that need to be addressed by the City in order to give the Board a complete understanding of this case: (1) the election of remedies, and (2) Union Pacific Railroad's ("UPRR") statutory obligation to provide rail service. The City therefore requests the Board for leave to file the attached reply. As this reply will show, the election of remedies law cited by 2nd & Main is inapplicable in this condemnation context and where the City's Petition is based on a court referral. And a railroad's common carrier obligation extends only to reasonable requests, and the Board is best suited to determine whether it would be reasonable for UPRR to require that 2nd & Main comply with railroad standards in constructing any future rail spurs. Addressing this new issue of common carrier responsibility will show that if 2nd & Main actually ever does add a rail spur in the future, at most that would require reinforcement of a small portion of the water main, which is different than the remedy ordered by the state trial court.

If there are any questions regarding this e-filing, please contact me at the number or email shown above. At your convenience, please email me a file-stamped copy of this Petition.

Sincerely yours,

Mary Jean Dolan

cc: Thomas DiCianni
Adam Simon
John Quinn

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS'
REPLY IN SUPPORT OF ITS
PETITION FOR DECLARATORY ORDER

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Dated: August 31, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS'
REPLY IN SUPPORT OF ITS PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. §554(e), on June 21, 2022, the City of North Chicago, Illinois (the “City”) petitioned the Surface Transportation Board (“Board” or “STB”) to open a declaratory judgment proceeding, hold an evidentiary hearing, and find (A) that the City’s state court condemnation action is not preempted by the Interstate Commerce Commission Termination Act because the 60-year-old water main for which it seeks an after-the-fact easement does not unreasonably interfere with railroad operations or, (B) in the alternative, that the state trial court lacks any basis to order the City to reinforce its entire water main on the Property immediately as a remedy for a highly unlikely partial preemption in the future. On August 22, 2022, 2nd & Main filed a Response to the City’s Petition.

The City submits this reply to address two issues that were raised for the first time in 2nd & Main’s Response: (1) the election of remedies, and (2) Union Pacific Railroad’s (“UPRR”) statutory obligation to provide rail service. As this reply will show, the election of remedies law cited by 2nd & Main is inapplicable in this condemnation context, and also where the City’s Petition is based on a court referral. And a railroad’s common carrier obligation extends only to reasonable requests, and the Board is best suited to determine whether it would be reasonable for UPRR to require that 2nd & Main comply with railroad standards in constructing any future rail spurs. If so, then if 2nd & Main actually ever does add a rail spur in the future, at most that would require reinforcement of a small portion of the water main.

The City respectfully requests the Board to hear its Petition and to find no preemption or alternatively, if there is preemption, then to find that only a small portion of the water main need be reinforced and that such reinforcement only be required in the future if 2nd & Main's speculative plans come to pass.

1. The Election of Remedies Principle Cited by 2nd & Main is Inapplicable Here and the Board Can Decide Preemption.

A. 2nd & Main Relies on Inapplicable Statute and Precedents.

2nd & Main devotes a substantial part of its brief to arguing an election of remedies rule that is clearly inapplicable to this condemnation lawsuit. In support, it quotes from a statute and cases that apply to a wholly different context. The statute, 49 U.S. Code § 11704, is entitled "Rights and remedies of persons injured by rail carriers." It gives injured persons the right to pursue a remedy before either the STB or the courts. This distinguishable context is apparent from the material cited in the Response brief; all of the (very old) cases cited involve suits for damages. See Response at 10-11. The instant situation is not governed by this statute or the cited cases.

B. The Appellate Court Order Allows the Board to Review the Preemption Issue.

In addition, here, the appellate court has specifically directed the parties to seek the advice of the Board on the issues raised in the City's state court condemnation lawsuit. As a threshold matter, the appellate court wants the Board to advise on whether reconstruction of the entire water main, as ordered, is necessary to avoid preemption, so that if the Board found that the water main did not need to be reinforced, in part or in its entirety, to avoid railroad interference, then the trial court's ordered relief would not be appropriate.

While it is true that the appellate court specifically asked for assistance on the remedy, rather than on the trial court's implicit finding of preemption, here the two issues are inherently intertwined. The appellate court itself noted that the trial court's remedy was an attempt to avoid

preemption by removing the potential for interference with railroad operations and stated that the Board was better positioned to determine if and how that was needed. See App. Ct. Op. at ¶50. C926-27.

The Response cites extensively from the appellate court’s opinion to argue that it already has decided that there is preemption, Response at pp. 6-8, and that the only issue for the Board concerns the proper construction standards for reinforcement of the entire water main. Response p. 8 (citing ¶39 of the appellate court opinion). But while it is true that the appellate court found that the trial court did not err in finding preemption, that finding does not limit the scope of its referral to the Board. A full reading of ¶39 shows that the appellate court anticipated that the planned hearing before the trial court would have had to include evidence of what kind of rail tracks 2nd & Main intended to install. See ¶39 (“That hearing would necessarily require evidence as to whether defendant anticipates building rail tracks, rails spurs, or both, as well as the current railroad standards for water mains intersecting with those railroad elements.”)

But more importantly, the appellate court’s directions for referral to the Board were quite broad in scope: It “remand[ed] the case with directions for the trial court to stay proceedings and direct plaintiff to petition the Board *to resolve the parameters of its jurisdiction and any relief compatible with the parties’ interests.*” ¶52 Appellate Court Op. (emphasis added). This directive is broad enough to encompass revising the question of preemption, especially in light of the constraints on constructing railroad tracks on the Property, discussed below, as well as considering what kind of construction must be done if and where reinforcement of the water main is found necessary.

Moreover, as pointed out in the Petition, the appellate court’s extensive discussion and quotation with approval of *City of Ozark, Arkansas v. Union Pacific R.R. Co.*, 843 F.3d 1167 (8th

Cir. 2016) suggests strongly that it was open to the Board’s opinion on the underlying preemption issue. In *Ozark* – which 2nd & Main completely ignored in its response – the Eighth Circuit recognized that the Board should have an opportunity to revisit the trial court’s finding on preemption, given its expertise. Just like in *Ozark*, the Board should be allowed to review the question of preemption and use its expertise to determine whether the easement “‘is preempted or [whether] some accommodation of the parties’ interests may be compatible with sound railroad transportation. . . . ‘“ App. Ct. Op. at ¶51, C927 (quoting *Ozark*, 843 F.3d at 1173).

If the Board does decide to consider whether there is preemption in the first place, it should find that there currently is no interference with any railroad operations and any future interference is too speculative to constitute preemption because 2nd & Main has no concrete plans. See Response at p. 16 (“...it is not certain what the layout will be in the near future and there is no telling what the planned use will be in the distant future.”) And while it is true that in *Union Pacific*, 647 F.3d 675 (7th Cir. 2011), the court found that a condemnation action for an easement was preempted when the railroad defendant had no clear-cut plans for expanding its rail tracks, that case is distinguishable. There, the tracks used by the city transit, for which it sought an easement, were only a few feet beside UPRR’s current and active railroad tracks, so a taking would unreasonably interfere with UPRR’s existing railroad traffic. This was clear because of the UPRR practice of using non-standard procedures to inspect and maintain its right of way because of the closeness of the parallel tracks. *Id.* at 681. Here, unlike in *Union Pacific*, there is no current interference and no fully operational railroad at issue.

2. UPRR’s Common Carrier Obligations Are Not Dispositive on the Questions of Preemption or the Scope of the Remedy and the Board’s Expertise is Required here.

2nd & Main asserts that Union Pacific cannot lawfully refuse requests for service, 2nd & Main could decide to add numerous spurs in any location on the Property, and therefore it is

necessary to reinforce the entire water main in order to avoid potential interference with its unlimited use of the Property. This argument ignores the key point made by the City's expert and is based on a misleading statement of the applicable statute and case law.

To explain this point requires a brief review of the most important information provided by David Johanson, the City's railroad engineering expert, which 2nd & Main failed to mention or address in its response. Johanson explained that Union Pacific Railroad (UPRR) has specific standards requiring that the horizontal degree of curvature for railroad tracks is a maximum degree of curvature of 10 degrees (573.69-foot radius). C933-34 (also explaining that the existing spur on the Property is noncompliant with that railroad standard). As discussed in the Petition and as admitted in the Response, 2nd & Main has no concrete plans for any future railroad spurs on the Property. So Johanson analyzed the possibilities for any new rail spurs and determined that the current railroad design minimum standards (requiring a maximum degree of curvature of 10 degrees) and site constraints (e.g., size of the Property, location of the adjacent existing UPRR railroad line) would significantly limit the length and location of a new rail spur.

Johanson calculated the possibilities and created an exhibit that shows the one practical alignment that would both meet the current UPRR horizontal alignment standards and maximize the possible track length on the Property. C941. Hypothetically, as illustrated in Exhibit 2 to Johanson's Affidavit (C941), the one rail spur that might be possible would be a maximum length of approximately 330' which would store between five and seven rail cars (because different types of rail cars have different lengths). It would cross over the water main at a single point.

As Johanson noted, under applicable railroad standards, if 2nd & Main were ever to install a new rail spur at that location, there would be a requirement to reinforce the water main by providing casing around the existing pipe and "the length of the casing pipe under tracks shall be a minimum distance of 30' from center of outside track (measured perpendicular to the tracks) when

the end of the casing is below ground.” C932-33. Applying this rule and based on applicable railroad standards, if 2nd & Main was to ever install and operate the only permissible new rail spur, only a relatively small portion of the water main running under the Property would require encasement. See C934.

2nd & Main argued that railroads cannot refuse requests for service. Most relevantly, it asserted that a railroad cannot refuse to provide services merely because to do so would be inconvenient or less profitable. Response at 14-15 (citing *GS Roofing Products v. STB*, 13 F.3d. 387, 391 (8th Cir. 1998)).¹ In its Petition, the City made one argument that may be affected by this point. It argued that it is unlikely the Property would receive service from UPRR due to the significant amount of existing rail volumes on the current UPRR North Line (including passenger rail) because it would not be cost effective for UPRR to disrupt this major line connecting Milwaukee and Chicago by providing service to the Property. Petition at 4-5; C934-35.

But the essential point made by the City remains: UPRR would and could refuse service to 2nd & Main if it planned to install railroad spurs that failed to comply with basic railroad safety standards. First, the statutory source of this obligation is limited to “reasonable” requests for service. See 49 U.S.C. § 11101(a) (“A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.”). Second, even the case relied on by 2nd & Main, *GS Roofing*, states that this “common carrier obligation is not absolute.” 13 F.3d. 387, 391 (explaining that it is reasonable to refuse service for a valid embargo, i.e. where a carrier is temporarily unable to perform its duty as a common carrier, for reasons such as weather damage or track deterioration).

¹ 2nd & Main also cites to several cases and a statute for the proposition that a railroad cannot discontinue railroad service without first getting Board approval to abandon a rail line, Response at 15, but as UPRR is not currently providing service to 2nd & Main, those sources appear to have no relevance here.

Third, an Eighth Circuit case, *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903 (8th Cir. 2015), makes clear that interpreting the reasonableness of a refusal of service based on safety reasons is a complex fact-based inquiry and that the Board is in the best position to make such determinations. In *Chlorine Inst.*, the Board found that while, based on the common carrier duty quoted above, a railroad could not refuse to transport a hazardous material altogether, it could impose safety requirements beyond those specified in federal regulations if their conditions were reasonable. *Id.* at 910. “Determining whether a request is reasonable is a complex, fact-intensive inquiry that requires knowledge and consideration of the industry at issue. The task is usually best left to the STB—the agency most experienced in evaluating the particular circumstances of each case.” *Id.* at 911 (holding that referral to the STB to determine the reasonableness of requiring certain safety measures as a condition of agreeing to a request for transportation was appropriate).

Accordingly, 2nd & Main’s argument regarding the common carrier obligation of service does not defeat the City’s argument that UPRR would only provide service to future rail spurs that complied with their safety requirements. Instead, the case law shows that a transportation request must be reasonable to be obligatory, and that the Board is best situated to decide what is reasonable.

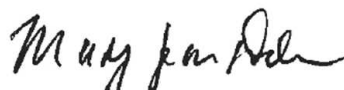
This leads to two conclusions. First, it is likely reasonable, and to be expected, that UPRR would provide service only if 2nd & Main planned to install new railroad spurs that complied with its safety requirements. And, as the affidavit from the City’s expert David Johanson proves, this means that if 2nd & Main were to add a rail spur at some point in the future, at most a small portion of the water main would need to be reinforced. And second, the Board’s expertise is sorely needed here to determine whether it would be reasonable to require that rail spurs comply with railroad standards. And given that 2nd & Main’s argument is that the entire water main must be reinforced

to meet railroad standards, it is hard to see how it could be deemed reasonable for it to intentionally install railroad spurs that did not comply with railroad standards.

Conclusion

The City respectfully requests that the Board issue a declaratory order that the City's condemnation action is not preempted by the Interstate Commerce Commission Termination Act because the 60-year-old water main for which it seeks an easement does not unreasonably interfere with railroad operations. In the alternative, the City requests a declaratory order that the trial court lacks the authority to order the City to reinforce its water main immediately as a remedy for preemption that is unlikely to occur in the future. In the alternative, the City requests a declaratory order that the trial court lacks the authority to order the highly unreasonable remedy of reconstruction of the entire water main on the Property, when the most that could be required in the unlikely event of adding a future rail spur is the reinforcement of a portion of the water main on the Property. Alternatively, if the Board finds that a part of the water main easement may be preempted in the future, an appropriate remedy may be to allow the easement but with the restriction that if in the future, 2nd & Main ever has a specific plan for a new rail spur for which it had a contract for railroad service, then at that time the City would be required to reinforce as much of the water main as was demonstrably required to accommodate the new rail spur. If helpful, the City further petitions the Board to open an evidentiary hearing so that additional facts can developed.

Respectfully submitted,



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Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **City of North Chicago, Illinois'**

Reply in Support of its Petition for a Declaratory Order by emailing a copy of same on the

31st day of August 2022 to:

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A handwritten signature in black ink, appearing to read "Mary Jean Dolan", written over a horizontal line.

Mary Jean Dolan