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December 27, 2022

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Norfolk Southern Railway Company – Abandonment Exemption – In The City Of Greensboro, North Carolina, AB-290 (Sub-No. 404X)

Dear Ms. Brown:

Attached hereto is the “Reply Of Norfolk Southern Railway Company” to the “Petition Of The City Of Greensboro, North Carolina For Clarification Of Notice Of Interim Trail Use” filed on December 7, 2022. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-290 (Sub-No. 404X)

**NORFOLK SOUTHERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN THE CITY OF GREENSBORO, NORTH CAROLINA**

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO THE PETITION OF
THE CITY OF GREENSBORO, NORTH CAROLINA FOR CLARIFICATION OF
NOTICE OF INTERIM TRAIL USE**

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December 27, 2022

SUMMARY OF ARGUMENT

There is no dispute over the basic facts of this proceeding. The issue, and one that is ignored by the December 7, 2022 Petition Of The City Of Greensboro, North Carolina For Clarification Of Notice of Interim Trail Use (“Petition”) is whether the City of Greensboro, North Carolina (“City”) can, over the objection of Norfolk Southern Railway Company (“NSR”), remove NSR’s residual common carrier obligation through a “petition for clarification” rather than through an adverse abandonment proceeding. The clear answer is “no.”

There is not a single case supporting the notion that a party can use a “petition for clarification” to invoke 49 U.S.C. §10903 so as to remove any portion of a railroad’s residual common carrier obligation over a railbanked line over the objection of the railroad holding that residual common carrier obligation. The proper procedure for the City to follow is to file an adverse abandonment petition. This process allows all parties—railroads, public entities, environmental groups, reversionary landowners, and potential future shippers—with a full opportunity to comment on whether the portion of the right-of-way that the City seeks to remove from railbanking and remove from NSR’s residual common carrier obligation is permitted by the public convenience and necessity test of the statute. 49 U.S.C. §10903(d).

ARGUMENT

As the Petition sets out, NSR obtained abandonment authority to abandon an approximately 3.1-mile rail line in the City of Greensboro, NC, extending between milepost CF-65.6 and milepost CF-68.7 (the “Line”). Pursuant to a Notice of Interim Trails Use (“NITU”) that was issued in this proceeding, rather than consummate its abandonment authority, NSR entered into a trails use agreement and sold the underlying right-of-way to Greensboro (“ROW”) for use as a trail. As the City acknowledges, NSR retained the right to reactive rail service at any

time. Petition at 8. NS also retained the right to buy back all or any portion of the entire ROW. Id.

It is well established that railbanking a line does not remove the underlying common carrier obligation and does not remove the line from the Surface Transportations Board's ("STB" or "Board") exclusive jurisdiction. Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990). At no time has NSR "consummated" its abandonment authority for any portion of the ROW that was sold to the City for use of a trail.¹ As such, NSR retains a common carrier obligation over the entire ROW and Line, albeit a residual obligation. NSR also has the right to reacquire the entire ROW at any time and to reactivate rail service.

The City now seeks to remove a portion of the trail from the NITU. This would, in turn, eliminate NSR's residual common carrier obligation over that portion. NSR objects to the removal of the portion from its residual common carrier obligation and from its right to reacquire that portion for future rail service. The City purportedly seeks to sell the removed portion for the development of a grocery store and parking lot. The City has several hurdles it must overcome to accomplish this objective. It must: (1) remove NSR's residual common carrier obligation over the portion of the railroad right-of-way to be removed; (2) remove that same portion from the NITU; and (3) avoid breaching its Purchase and Sales Agreement.

NSR agrees with the City that whether the attempted removal of the portion of the ROW that the City seeks to remove from the NITU for development of a grocery store violates the Purchase And Sales Agreement is a matter of contract law and is not properly the subject of STB

¹ The agency retains jurisdiction over rail properties until abandonment authority has been consummated. Hayfield N. R.R. Co. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633-34 (1984). Here, there was no consummation of any portion of the right-of-way. As such, NSR may not be relieved of its common carrier obligation to provide rail service over that line and dispose of the property for non-rail use without express permission from the Board. Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321-22 (1981).

review. Petition at 8. To accomplish the removal of NSR’s common carrier obligation and the subsequent modification of the NITU to reflect the portion that has been removed, the City is using the process that was recently set forth in Missouri Pac. R.R. Co. -Abandonment Exemption - In Red River and Bowie Counties, Tex., AB-3 (Sub-No. 137X) (STB served July 29, 2021) (“MP-Red River”). NSR does not agree that the process set forth in MP-Red River is the proper process in an adverse situation, such as here.² The proper process is to file an adverse abandonment application.³

The MP-Red River process, which is recent precedent, was developed to set forth a standard process, where all parties consent, by which a portion of a railbanked corridor could be removed from the NITU and the residual common carrier obligation over that portion extinguished—and without the need for the Board to issue a replacement NITU. Prior to the issuance of that decision, the Board had employed differing approaches in cases where a trail sponsor proposed to narrow the width of a right-of-way subject to a NITU. MP-Red River, slip op. at 3-4. In MP-Red-River, the Board clarified that in cases where a trail sponsor proposed to narrow the width of a right-of-way subject to a NITU/CITU, the Board will find it unnecessary to vacate a NITU/CITU and issue a replacement NITU/CITU if the trail sponsor had demonstrated with adequate specificity that the remaining width of the right-of-way would be sufficient to support the reactivation of rail service. In such cases, the Board will issue a decision clarifying that the width of the right-of-way that the trail sponsor has demonstrated is not needed to reactivate rail service is no longer part of the NITU/CITU. *Id.*, at 4.

² The MP-Red River process may be best suited for instances where the trails proponent is also the holder of the residual common carrier obligation.

³ See Pinelawn Cemetery – Petition For Declaratory Order, FD 35468 (STB served Apr. 21, 2015) and the cases cited in n. 4, *infra*.

In all of the cases cited in MP-Red River, the entity holding the residual common carrier obligation, usually the railroad, did not object to the removal of the trail portion from its right to reactivate rail service. It did not object because it was in agreement that removal of the portion of the right-of-way did not interfere with any any future rights to reactivate rail service, nor did it interfere with any other contractual rights.

Here, NSR does object. NSR has a contractual right to buy back the entire ROW, including the portion the ROW that the City seeks to remove, and NSR may have the need to include that portion in its future plans. But more importantly, NSR does not, without further study and a full opportunity to contest the City's request, consent to the removal of its common carrier rights over the portion the City seeks to remove.

In cases where a party seeks to remove a portion of a railroad right-of-way or all of the right-of-way from the STB's jurisdiction so as to extinguish the common carrier obligation, it must file for abandonment authority under Section 10903(c). Here, NSR has obtained abandonment authority, but did not consummate that authority. If NSR consented, it could do so and, in effect, consummate its abandonment authority over the section to be removed and the NITU accordingly modified.⁴ NSR does not consent. As such, the only means by which a third-

⁴ That is exactly what has previously occurred. See e.g., Idaho N. & Pac. R.R., AB 433 (Sub-No. 2X) (STB served May 4, 2021); Greenville Cnty. Econ. Dev. Corp.—Aban. Exemption—in Greenville Cnty., S.C., AB 490 (Sub-No. 2X) (STB served Mar. 25, 2019); Union Pac. R.R., AB 33 (Sub-No. 93X) (STB served July 20, 2018); Union Pac. R.R., AB 33 (Sub-No. 93X) (STB served Jan. 27, 2016). NSR would submit that such a process is a better process, more cost effective and less burdensome on the Board, than that articulated in MP-Red River. That process avoids the need to hire an expert to “confirm” that rail operations could occur in the future. Presumably, with the railroad's consent, the railroad (or holder of the residual common carrier obligation) has already made a determination that it could reactivate rail service in the corridor even if the portion is removed and there is no need to hire a third-party expert. The MP-Red River process also seems inconsistent with the Board's policies and regulations adopted in National Trails System Act and Railroad Rights-of-Way, EP 702, at 6 (STB served April 30, 2012) and Rails-To-Trails Conservancy – Petition for Rulemaking, EP 753 (STB served December 4, 2019).

party may extinguish the common carrier authority over the objection of the railroad is to file an adverse abandonment application.⁵

This makes sense as a matter of law and policy. An adverse abandonment proceeding allows for the full development of the record, including the opportunity to take discovery and depose opposing witnesses. It provides an opportunity for all potentially involved parties, shippers, public bodies, landowners, trail sponsors, etc., to have a seat at the table and to present their evidence and argument on the essential legal question: It allows for a determination of whether it is in the public convenience and necessity consistent with Section 10903 to remove the common carrier obligation (and thus the Board's jurisdiction) over the portion that a third party seeks to condemn, acquire, or develop over the objection of the party holding the common carrier obligation.

In contrast, the process set forth in MP-Red River, while adequate for the situation where the holder of the railbanked real property and the holder of the common carrier obligation consent, it is wholly inadequate in an adverse situation. If allowed, it would mean that NSR, as the residual common carrier holder, would receive the petition, analyze the expert's statement that removal would not interfere with the future reactivation of rail service, conduct an analysis of its future common carrier needs, develop its own expert opinion, and then file its evidence –

⁵ See also, Modern Handcraft, Inc. – Abandonment – in Jackson County, Mo., 363 I.C.C. 969, 972 (1981); Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine; Canadian National Railway – Adverse Discontinuance – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, AB-124 (Sub-No. 2); AB-279 (Sub-No. 3) (STB served May 3, 2004); Union Pacific Railroad Company – Abandonment Exemption – In Rio Grande and Minerals Counties, CO, AB-33 (Sub-No. 132X), slip op. at 3-6 (STB served May 3, 2005) SMS Rail Service, Inc. – Adverse Discontinuance of Service Exemption – Gloucester County, NJ, AB-1095X (STB served March 2, 2012); and Alloy Property Company, LLC – Adverse Abandonment – Chicago Terminal Railroad In Chicago, ILL, AB-1258 (STB served April 30, 2018).

all within 20 days. In contrast, the filer of the petition would have had unlimited time to develop its case. Under the MP-Red River process, there is no opportunity for NSR to challenge the conclusions of the City's expert. No opportunity to take discovery. No opportunity to depose the witness, if necessary. No opportunity to develop its own case in opposition. Such a process is not consistent with the due process rights of NSR or with the precedents requiring the filing of an adverse abandonment proceeding.

Without the full development of the record, which use of the adverse abandonment process provides, the Board cannot make the conclusion, as the City urges, that "opposition here by NSR should not change the outcome as it still will clearly be able to reactive rail service if the need does arise at any point in the future." Petition at 7, n. 6. Development of a full record, with NSR having an opportunity to present its own evidence and argument, may in fact change the outcome. It could in fact show that removal of the requestion portion of the ROW would indeed not be consistent with Section 10903.

Use of the MP-Red River "petition for clarification" process in an adverse situation is also bad policy. This would mean that anytime a trail sponsor and holder of the right-of-way determines that it wants to remove a portion of the right-of-way, and in turn eliminate the railroad's right to restore rail service over that portion, it merely needs to show one thing: that removal of the portion would not eliminate enough of the right-of-way so as to prevent reactivation of rail service. But—what the Board would not know, and the railroad would not have time to assess—is whether the railroad had future plans to reactivate rail service over that portion or whether the railroad may use that portion for a future storage yard, siding, or communication tower. Whether there are other easements, property rights, and contractual rights that may be adversely affected by the removal. As such, the Board would not have adequate data to determine whether Section 10903 has been met. Granting the petition with a simple showing

from only one party would lead to a situation where the trail holder could eliminate portions of the right-of-way for the entire corridor regardless of a railroad's future plans for that corridor—the only showing being whether the corridor is wide-enough to accommodate future rail operations. That is not the standard under Section 10903, nor should it be.

CONCLUSION

The City's attempt to remove NSR's common carrier obligation over the objection of NSR so as to secure the property in question for the use of a third party through a "petition for clarification" is procedurally improper and would establish bad policy. For the foregoing reasons, the City's request should be denied.

Respectfully submitted,

/s/ William A. Mullins

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Attorneys for Norfolk Southern Railway
Company

December 27, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing “Reply Of Norfolk Southern Railway Company” to the “Petition Of The City Of Greensboro, North Carolina For Clarification Of Notice Of Interim Trail Use” by mailing copies of the same to all parties via prepaid first-class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 27th day of December, 2022.

/s/ William A. Mullins

William A. Mullins
Attorney for Attorney for Norfolk Southern
Railway Company