

306071

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ENTERED
Office of Proceedings
January 30, 2023
Part of
Public Record

WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

January 30, 2023

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 “Motion For Leave To File Rebuttal” filed by The City Of Greensboro, North Carolina on January 9, 2023. 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 MOTION FOR
LEAVE TO FILE A REBUTTAL FILED BY
THE CITY OF GREENSBORO, NORTH CAROLINA**

**Thomas E. Zoeller
Hanna M. Chouest
Julianne C Freeman
NORFOLK SOUTHERN CORPORATION
650 West Peachtree St NW
Atlanta, GA 30308
Tel: (470) 463-6314**

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

**Attorneys for Norfolk Southern
Railway Company**

January 30, 2023

BACKGROUND

On December 27, 2022, Norfolk Southern Railway Company (“NSR”) replied to the “Petition for Clarification” (“Petition”) filed by the The City Of Greensboro, North Carolina (“The City”). The Petition sought to remove a portion of a railbanked right-of-way (“ROW”) over which NSR has a residual common carrier obligation and which portion NSR has the right to acquire and buy back at a certain price if NSR ever decides to reactivate common carrier service. NSR objects to the removal of the portion of the ROW.

On January 9, 2023, The City, knowing full well that replies to replies are not permitted, filed a Motion to file a rebuttal (which, despite its name, is just a reply to a reply)(“Motion”) and filed its rebuttal on the substance. NSR hereby replies to the Motion and the substance of the rebuttal. NSR does not object to The City’s filing of the rebuttal if the Surface Transportation Board (“STB” or “Board”), in the interest of a full record, also accepts this reply to the Motion and NSR’s view on the rebuttal. Otherwise, the Board should strike both the rebuttal and this reply as unlawful replies to reply.

SUMMARY OF ARGUMENT

There continues to no dispute over the basic facts of this proceeding.¹ The issue, and one that The City fails to adequately address, is whether The City can, over the objection of NSR remove NSR’s residual common carrier obligation through a “petition for clarification” and use

¹ Counsel for The City implies that because NSR has previously used this statement that NSR agrees that the removal of approximately 264’ feet of NSR railroad right-of-way and the narrowing the ROW to 50 feet in width in some locations is sufficient for future rail operations in the event NSR seeks to restore common carrier service. NSR does not take concede that removal and narrowing of the ROW would or would not be sufficient for future rail operations. That is not the issue. The issue is whether removal would interfere with NSR’s plans for future common carrier service, which substantive decision can only be made in the context of an adverse abandonment application.

of the precedent established 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”) rather than through an adverse abandonment proceeding. The clear answer continues to be “no.”

The MP-Red River case, which itself was precedent setting, has never been used, nor should it be, 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. Under 49 U.S.C. §10903, there are only two primary means by which the common carrier obligation (whether active or residual) can be removed: either the holder of the common carrier obligation obtains abandonment authority and consummates that authority, or, a third-party may seek to have that common carrier obligation removed through an adverse abandonment proceeding. Here, NSR, the holder of the residual common carrier obligation, has no desire to consummate its abandonment authority over the portion of the ROW that the City seeks. As such, the only legal means by which the City can have that common carrier obligation removed for that portion of the ROW is to file an adverse abandonment petition and have it granted.

ARGUMENT

The City continues to cite the MP-Red River case as the only authority for its request to forcibly remove, over NSR’s objection, a portion of ROW that NSR has both a contractual² and STB legal right to use in the event NSR decides to restore common carrier service. The City believes that because it has shown that a railroad could still provide rail service in the future if the portion of the ROW is removed and narrowed that this is all that it needs to show. Thus, the

² The City glosses over the fact that NSR has a private contractual right to reacquire the entire ROW, including the portion the City seeks to transfer to a private entity for the development of a grocery store. Removal of this portion violates that contract. NSR retained the right to reacquire the entire ROW because NSR specifically wanted the ability to reactivate rail service and restore common carrier service over the entire ROW.

Board should grant its “petition for clarification.”³ This position ignores the central point: it may (or may not be) correct that removal of the portion of the ROW could still theoretically allow the restoration of rail service, but the essential question is not that point, but rather, as is the case with any adverse abandonment proceeding, whether removal of that portion of the ROW is consistent with the public convenience and necessity standard of 49 U.S.C. §10903.

Answering the question of whether rail service could, as an operational and theoretical matter, be conducted in the future⁴ does nothing to address whether it is consistent with Section 10903 to remove that portion of the ROW from the jurisdiction of the STB or to address whether NSR has future plans for use of the ROW that The City seeks to remove for its potential future common carrier service. NSR may need that portion for installation of a siding, storage of rail and rail equipment, or installation of communication towers or equipment. There are a myriad of ways in which a railroad may or may not need a portion of a ROW for use in its common carrier service. The MP-Red River process does not provide the means by which the railroad and the Board can make a determination as to whether the ROW is needed for common carrier service. These questions can only be addressed in the context of an adverse abandonment proceeding.

In contrast, finding the answer to whether the public convenience and necessity of a particular portion of ROW is needed for present or future common carrier service is precisely the focus of the adverse abandonment process. Indeed, given that NSR has not consummated any

³ At this time, NSR takes no position on whether the removal would still leave a sufficient ROW for the restoration of rail service.

⁴ 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, under the Trails Act, 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).

portion of its abandonment authority, the only means by which a third-party, such as The City, may extinguish NSR's common carrier authority over the objection of NSR is to file an adverse abandonment application.⁵ 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 as to whether removal of a portion of a railroad ROW from the jurisdiction of the STB is consistent with 49 U.S.C. §10903 and is not needed for common carrier service.⁶ It should not matter whether the common carrier obligation is residual or active – the principle is the same, i.e., a portion of jurisdictional ROW is being removed and as such the removal must be consistent with Section 10903. Application of MP-Red River to an adverse abandonment situation does not answer that question.

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).

⁶ The MP-Red River process provides none of these protections. Here, for example, the MP-Red River process (and the The City's rebuttal) completely ignores the implications to landowners, easement holders, and others if the ROW is removed from the jurisdiction of the STB. Indeed, depending upon whether the land is held in fee or easement, removal of the STB's jurisdiction could result in numerous implications to easement holders and any potential reversionary landowner interests. All of this is unaddressed by The City. All of it would be addressed in an adverse abandonment proceeding.

The MP-Red River process should not be used, particularly here.⁷ It was adopted without notice and comment and is inconsistent with the majority of prior precedent regarding the removal of a portion of a railroad right-of-way from a railbanked line. NSR suggests that the MP-Red River process should not be expanded or followed. Instead, the Board should continue to follow the precedents set forth in 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. – Abandonment Exemption – Whittier Junction-Colima Junction Line In Los Angeles County, Cal, AB 33 (Sub-No. 93X) (STB served July 20, 2018); Id., (STB served Jan. 27, 2016). Roaring Fork Railroad Holding Authority – Abandonment Exemption – In Garfield, Eagle, And Pitkin Counties, Colo., AB 547X (STB served May 12, 2017). Those precedents require the consent of both the trail user and the holder of the residual common carrier obligation. In those cases, the trails sponsor would file for a replacement NITU (or CITU), removing the relevant portions of the ROW from the trail and the holder of the residual common carrier obligation would concurrently file for consummation of its abandonment authority for the portion that was being removed. The Board’s only role was to issue a replacement NITU/CITU.

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. The prior precedent process avoids the need for the trail user to hire an expert to “confirm” that rail operations could occur in the future. It avoids the Board spending resources to review and confirm the evidentiary presentations by proponents as well as any opponents. The prior precedent is also consistent

⁷ The process set forth in MP-Red River may, if at all, be adequate for the situation where the holder of the railbanked real property and the holder of the common carrier obligation consent, but it is wholly inadequate in an adverse situation.

with the Board's role in the administration of the Trails Act, which is to be ministerial in nature (as opposed to having to make substantive judgements in application of MP-Red River precedent). Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990) (agency has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use"). Md. Transit Admin. v. Surface Transp. Bd., 700 F.3d 139 (4th Cir. 2012); Trevarton v. South Dakota, 817 F.3d 1081 (8th Cir. 2018).

Requiring the holder of the residual common carrier obligation to file an actual consummation notice to effectuate its abandonment authority for the portion of the ROW that is being removed, as the prior precedents required, is also fully consistent with the rules, regulations, and precedents under Section 10903 and the Trails Act. Indeed, under that process, presumably the railroad (or holder of the residual common carrier obligation) has already decided that it could reactivate rail service in the corridor even if the portion is removed and that is why it is willing to consummate its abandonment authority for that portion. There is no need to hire a third-party expert or for the Board to do anything other than act in its ministerial role.

MP-Red River is also inconsistent with the Board's policies and regulations adopted in National Trails System Act and Railroad Rights-of-Way, EP 702 (STB served April 30, 2012) and Rails-To-Trails Conservancy – Petition for Rulemaking, EP 753 (STB served December 4, 2019)(collectively, the "Trails Act Rules" or "Rules"). Under the Trails Act Rules, the holder of the residual common carrier obligation has the right to revoke its consent to the trail and restore rail service. EP 702 at 6 (railroad has the right to restore rail service over "all" or "part" of the entire railbanked corridor and can request revocation of the NITU/CITU at any time). Furthermore, under the Rules, when and if a NITU/CITU is revoked or terminated, the holder of the residual common carrier obligation must consummate its abandonment authority within 60

days. 49 CFR 1152.29(e)(2). If it doesn't, the abandonment authorization expires and the common carrier obligation over any portion of the line not consummated is restored.

The point is that under the Rules and 49 U.S.C. §10903, the holder of the residual common carrier obligation is the exclusive party with both the right to terminate a NITU/CITU and either restore service or consummate its abandonment authority. This is consistent with §10903. Under the statute, to remove the common carrier obligation (whether active or residual) from the jurisdiction of the STB, the holder of that obligation must consummate its abandonment authority. If a third-party seeks to have the common carrier obligation removed, the only means to accomplish that is through an adverse abandonment proceeding.

The City of Greensboro seeks to flip that precedent on its head. It seeks to have the Board give it, not the holder of the common carrier obligation, the right to remove a portion of the common carrier obligation from the Board's jurisdiction and to force the consummation of the abandonment over that portion, even over the carrier's objection. It seeks to do so via a petition for clarification, not an adverse abandonment application. This is contrary to the Rules and precedent. As such, the City's request should be rejected.⁸

⁸ The only factor that makes the MP-River precedent even remotely consistent with the Rules and the statute is that the holder of the residual common carrier obligation consented to the abandonment of a portion of its ROW and thus "consummated" its abandonment authority over that portion (although it did not file an actual consummation notice, which it should have been required to do). As noted previously, the MP-River precedent was inconsistent with prior practice and is contrary to the requirement that parties holding the common carrier authority must consummate their abandonment authority to remove the ROW from the Board's jurisdiction. It is better policy and more consistent with the statute and Trails Act Rules to require the holder of the residual common carrier obligation to take an affirmative action to file an actual notice of consummation. There is no such filing under the MP-River precedent.

CONCLUSION

In the interest of a full record, NSR requests the Board to accept both The City's rebuttal and this reply. As noted here and in NSR's previous reply to the petition for clarification, 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 and precedential improper. Such an approach establishes bad policy and relies on bad precedent that should not be expanded or relied upon in future cases, especially in an adverse situation. If The City desires to remove a portion of NSR's common carrier obligation from the jurisdiction of the Board, it should be required to file an adverse abandonment petition where all stakeholders have an opportunity to participate, and the statutory required findings of Section 10903 can be fully examined.

Respectfully submitted,

/s/ William A. Mullins

Thomas E. Zoeller
Hanna M. Chouest
Julianne C. Freeman
NORFOLK SOUTHERN CORPORATION
650 West Peachtree St NW
Atlanta, GA 30308
Tel: (470-463-6314

January 30, 2023

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telep Phone: (202) 663-7823
Facsimile: (202) 663-7849

Attorneys for Norfolk Southern Railway
Company

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 “Motion For Leave To File Rebuttal” and to the “Rebuttal” filed by The City Of Greensboro, North Carolina, 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 30th day of January, 2023

/s/ William A. Mullins

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