

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

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City of Philadelphia – Petition for a Declaratory Order

**READING INTERNATIONAL, INC.'S OPPOSITION TO
THE CITY OF PHILADELPHIA'S MOTION FOR LEAVE TO FILE REPLY AND
MOTION TO STRIKE SAME**

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Reading International, Inc.¹ files this Opposition (“Opposition”) to the City of Philadelphia’s (“City”) Motion for Leave to File Reply (“City’s Reply”) to the Reply (“Motion”) and Motion to Strike Same (“Motion to Strike”), and respectfully states as follows:

I. INTRODUCTION

With its Motion and Reply, the City continues its transparent attempt to improperly wrest control of Reading’s property for the City’s benefit. *See* City Reply at 3 (“The City intends to turn the dilapidated Viaduct² into a park to benefit the community. Reading, having retained only ownership over the physical viaduct and the land underlying the lines, cannot invoke the Board’s jurisdiction to stop that transformation.”). The Surface Transportation Board (“STB”) should deny the City’s Motion for at least three reasons. First, the City seeks to take another bite at the apple to

¹ As noted in Reading’s Reply, RCPA, LLC, formerly the Reading Company, is a subsidiary of Reading International, Inc. The proper party to this action is RCPA, LLC, formerly known as Reading Company, a subsidiary of Reading International, Inc. For simplicity, Reading refers to Reading throughout, however, Reading reserves and does not waive any argument that Reading International, Inc. is not a proper party to this action and that a necessary party to an action involving the STB is RCPA, LLC.

² Contrary to the City’s suggestion that Reading has abandoned the Viaduct leaving it dilapidated, Reading has fenced and maintained the property, and Reading has done material remediation work over the past several years.

have the last word and avoid the limitations of 49 C.F.R. § 1104.13(c), which prohibits a party from filing a reply to a reply. The rule is in place for a reason—to place limitations on parties’ briefing so that the STB can efficiently decide and issue an opinion regarding a dispute. Second, and tellingly, although the City makes sweeping, conclusory, and bold-faced assertions about certain historical facts regarding Reading’s evidence and arguments, it fails to support any of its statements with a sworn declaration that refutes Reading’s sworn evidence. The City also drops in the record a 74-page exhibit without sufficient context or explanation and cites two excerpts, claiming they show Reading transferred all of its interests in the Viaduct to Conrail. The City, however, misses the mark, as this same exhibit was in the record and part of the arguments in *Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.*, which the United States Federal District Court judge relied on when he concluded: “Conrail only had an easement over the line. Conrail’s abandonment simply does not affect the STB’s current jurisdiction over the 9th Street Branch and the rights of its owner, Reading.” *See* No. CV 21-563, 2023 WL 7646535 at *4 (E.D. Pa. Nov. 14, 2023). Third, the City does not introduce new arguments; rather, it repeats arguments in its Reply that are cumulative of its arguments in its Petition for a Declaratory Order (“Petition”). That defeats the purpose of 49 C.F.R. § 1104.13(c). In short, the STB should deny the City’s Motion and should strike the City’s Reply.

II. ARGUMENT AND AUTHORITIES

Under the guise of “correct[ing] the record,” the City seeks to advance an improper rebuttal to Reading’s reply without sworn evidence. Yet, the City fails to challenge the merits of the sworn declaration of an over 40-year former Conrail employee that accompanies Reading’s Reply.³ Although the City contends its Reply is warranted because Reading’s Reply allegedly

³ The City only half-heartedly challenges the admissibility of the declaration.

“mischaracterizes the record,” and raised arguments that “would have been impossible for the City to foresee and address in its Petition,” City’s Reply at 2, Reading only responded to the issues, evidence, and arguments the City raised its Petition. Contrary to the City’s contention that Reading raised “red herrings,” its brief was based on (1) the conclusion that Reading did not transfer its property rights in the Viaduct to Conrail, (2) that Conrail did not abandon the entirety of the interests in the Viaduct, and (3) the STB maintains jurisdiction over the property—all three conclusions that co-existed as the centerpiece of the decision of the Federal District Court in *Scioli Turco, Inc.*, No. CV 21-563, 2023 WL 7646535. The *Scioli Turco* decision rejected in its entirety the City’s argument here albeit raised by an economic development organization there anxious to get its hands on the Viaduct. As such, the City is out of bounds with its attempt to have the last word in an argument that was squarely rejected in prior litigation proceedings.

A. There is no reason to allow the City to circumvent the limitations of 49 C.F.R. § 1104.13(c).

According to 49 C.F.R. § 1104.13, a “reply to a reply is not permitted.” Yet, the City seeks to summarily set aside that rule to get the last word in its attempt to usurp Reading’s ownership interests in the Viaduct, which is still subject to STB’s jurisdiction. Although the STB permits replies to replies in certain circumstances, it denies them when they would slow the consideration of petitions and when they are not warranted (i.e., when they only seek to repeat arguments).⁴

⁴ See *Canadian Pac. Ry. Limited; Canadian Pac. Ry. Company; Soo Line R.R. Company; Cent. Maine & Quebec Ry. Us Inc.; Dakota, Minnesota & E. R.R. Corporation; & Delaware & Hudson Ry. Co., Inc.-Control-Kansas City Southern; the Kansas City S. Ry. Company; Gateway E. Ry. Company; & the Texas Mexican Ry. Co.*, 2022 WL 4494182, at *1–2 (S.T.B. Sept. 27, 2022) (noting in response to a request to file a reply to a reply “to clarify or correct Applicants’ claims and to present a complete record,” that “[t]he Board’s rules generally do not permit the filing of surreplies,...and an exception to that rule here would unduly burden the Board’s ability to review the extensive record in this proceeding.”); *Adrian & Blissfield Rail Rd. Company Petition for Declaratory Order*, 2018 WL 659160, at *3 (S.T.B. Jan. 30, 2018) (rejecting petition for leave to file a reply to a reply, noting the arguments in the reply were “all...rebuttals to the arguments made

Here, the City does not introduce any new arguments or evidence sufficient to rebut Reading's evidence and only reasserts its positions from its Petition. The City's Motion should be denied.

B.J. Alan Co., Inc., et al. v. United Parcel Serv., Inc., et al. is instructive and supports denying the City's Motion. There, the Interstate Commerce Commission ("ICC"), the predecessor of the STB, rejected complainants' attempt to file a reply to a reply. Complainants argued that portions of UPS's reply were "patently false and which deliberately twist[ed], distort[ed] and misrepresent[ed] the meaning and content" of the verified statements submitted in support of the [complainants] petition to reopen." *See* 1990 WL 287495, at *1, n.4 (I.C.C. June 1, 1990). Complainants also argued that UPS electively took portions of the statements in the petition out of context and has thus distorted their meaning. *See id.* The ICC responded:

The verified statements speak for themselves, and the reply to the reply is nothing more than unauthorized argument by counsel. Moreover, the motion to strike and the reply to the reply seek simply to present complainants' counsel's view of why UPS has mischaracterized the verified statements. The Commission is capable of reading and understanding the statements. Accordingly, no good cause has been shown to permit the reply to the reply to be filed, or to strike anything from UPS's reply. The reply to the reply will be rejected...

by Consumers and none of which [were] necessary to develop a more complete record."); *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.*, 2015 WL 5174202, at *2 (S.T.B. Sept. 3, 2015) (rejecting TPI's argument that its filing was necessary to address misrepresentations and denying motion for leave to file a reply to a reply, noting "[a]cceptance of additional filings would slow the Board's consideration of the petition."); *Verterra Ltd. Complainant, v. D.b. Group America Ltd. and D.b. Group India Ltd. Respondents.*, 2020 WL 728250, at *2 (denying surreplies as neither advanced the record necessary to determine the issue, and noting "[s]urreplies are disfavored in Federal Court practice, as well."); *B.J. Alan Co., Inc., et al. v. United Parcel Serv., Inc. (an Ohio Corp.), United Parcel Serv., Inc. (A New York Corp.), & Roadway Package Sys., Inc.*, 1989 WL 237899, at *1 (I.C.C. Feb. 8, 1989) (rejecting reply to a reply because replies to replies are not permitted under the rules); *Petition of the W. Coal Traffic League to Inst. A Rulemaking Proceeding to Abolish the Use of the Multistage Discounted Cash Flow Model in Determining the R.R. Indus.'s Cost of Equity Capital*, 2017 WL 3482296, at *2, n.2 (S.T.B. Aug. 10, 2017) (rejecting a reply to a reply, which "repeat[ed] its prior arguments, [did] not provide information that [was] necessary to develop a more complete record, nor [did] WCTL attempt to show good cause for waiving the Board's prohibition on replies to replies.").

Id.

In addition, in *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)-Springfield Terminal Ry. Co., Boston & Maine Corp., & Portland Terminal Co.*, the STB rejected B&M's motion for leave to file a reply to a reply. B&M contended that Amtrak's reply raised "issues that could not have been previously addressed and that new facts have developed after Amtrak filed its reply." *See* 1997 WL 222240, at *4 (S.T.B. May 5, 1997). The STB disagreed, noting "[t]o the contrary, we find B & M's submission to be cumulative. Its assertions regarding the negotiators' meeting of the minds as to the substantive issues and the veracity of Amtrak's senior managers are argumentative." *Id.*

Similarly, the City's Reply is cumulative and simply reiterates the same arguments based on subjects and issues in its Petition. The City's Motion should be denied and its Reply stricken.

B. The City does not submit any evidence to support its assertions.

Not only is the City's Reply improper and unjustified, but through it, the City attacks Reading's responses by making conclusory statements without any sworn support. Reading supported its statements with a sworn declaration from Anthony DiArenzo. As set forth in detail, *see* DiArenzo Decl. at ¶¶ 1-3, 9, 12, Mr. DiArenzo's declaration is founded on personal knowledge and impressive expertise, contrary to the City's conclusory assertion, *see* City's Reply at n.3.

While the City disputes Reading's positions related to ownership interests, *see* City's Reply at 1-6, n.4; the scope of Conrail's abandonment, *see id.* at 6; and the status of the STB's jurisdiction over the Viaduct, *see id.* at 6-8, it does so without supporting any of its statements with sworn evidence. The City's conclusory statements of purported facts are just that—statements lacking any support. Simply because the City makes certain sweeping conclusions about what ownership

interests remain in the Viaduct, what interests in the Viaduct were abandoned, and whether the STB retains jurisdiction does not make them correct.

The City also strikes out with its attempt to rely on selective language from a 74-page deed (“Deed”), which the City summarily contends demonstrates that “Reading conveyed fee ownership, not an easement, of the Viaduct, leaving Reading with no residual rail interest.” *See* City’s Reply at 3. The City does not provide any foundation for the document, and without proper context and explanation, the excerpts the City cited do not elucidate the issues in dispute here. In fact, the Deed supports Reading’s position and demonstrates that residual rights in the Ninth Street Branch including the Viaduct reside with Reading. *See* Deed at B-13, *et seq.*

In addition, and more importantly, the Deed was introduced in evidence in the *Scioli Turco* action and was part of the record in that case, which was relied upon by the District Court when it concluded that Conrail only possessed an easement through the conveyance under the Regional Rail Reorganization Act (“3R Act”), and that Conrail’s abandonment of its operations did “not affect the STB’s current jurisdiction over the 9th Street Branch and the rights of its owner, Reading.” *See Scioli Turco, Inc.*, 2023 WL 7646535, at *4 (citing Reading’s Resp. in Opp. to Pls.’ Motion to Remand, Dkt. No. 16, at ECF pages 12, 14-15, citing Exhibit C (the Deed)). There is no need for the STB to parse the language of this Deed to decide the issues presented by the City’s Petition.

C. The City’s Reply only restates its arguments from its Petition, and a Reply on the same grounds is not warranted.

The City’s Reply does not address any new issues or raise arguments that would provide a more complete record for the STB. The first paragraph of the City’s Reply illustrates its cumulative arguments. The City contends—again—that: Reading conveyed all of its rail property and its rights to conduct operations to Conrail, Conrail abandoned its interest, the STB should find it no longer

has jurisdiction, and the *Scioli Turco* decision has no preclusive effect. *See* City’s Reply at 2-3. But those are the issues the City raised in its Petition to which Reading responded. *See generally* Pet.; Reading’s Reply. That the parties disagree on what interests were transferred, what interests were abandoned, and whether the STB retains jurisdiction over the Viaduct are not grounds for the City to avoid the limitation of 49 C.F.R. § 1104.13 to rehash its arguments and rebut Reading’s responses. *See Application of the Nat’l R.R. Passenger Corp.*, 1997 WL 222240, at *4; *B.J. Alan Co., Inc., et al.*, 1990 WL 287495, at *1, n.4.

The City reasserts four main areas it already addressed in its Petition to which Reading responded. First, the City reiterates its positions related to the scope of ownership interests surrounding the Viaduct. The City contends Reading’s argument that it retained property subject to the STB’s jurisdiction “is based on multiple flawed premises and a misreading of the factual record.” *See* City’s Reply at 3. The City then provides its unsworn and unsupported interpretation of language in the Deed, but as addressed, its assertions do not change the fact that Reading retained its interest in the Viaduct. *See generally* Reading’s Reply; *see also* City’s Pet. at 1, 7; *Scioli Turco, Inc.*, 2023 WL 7646535, at *4.⁵ *See* City’s Reply at 5. In any event, the subject of ownership interests was one of the primary bases of the City’s Petition to which Reading responded. A reply is not justified for the City to rehash its opinions regarding what interests were transferred and what interests Reading retains. *See Application of the Nat’l R.R. Passenger Corp.*, 1997 WL 222240, at *4.

⁵ Excerpts from unrelated court cases do not “confirm...as a matter of law” that Reading conveyed to Conrail all of rights related to rail operations, and therefore, all the rights that were subject to the Board’s jurisdiction.” The City’s suggestion that Reading somehow admitted that it has admitted it conveyed all of its ownership interests in the Viaduct in a position Reading took in unrelated court case that was not about ownership of the Viaduct is misplaced.

Second, the City also re-argues the scope of Conrail's abandonment, *see* City's Reply at 5-8, which the City itself clearly limited to Conrail's operations in its Petition. *See* Pet. at 2-3 ("Conrail applied to the ICC 'for abandonment of [operating rights...]..."). Although the City claims Reading tried to "invent a distinction between [3R and 49 U.S.C. § 10903] abandonments that is not grounded in any statute, regulation, or court or Board precedent," *see* City's Reply at 5, Reading was only responding to the City's suggestion that the *Scioli Turro* court got it wrong when it made such a distinction. *See* Pet. at 6; Reading's Reply at 9-10. Moreover, Reading did in fact support its argument with ample authority. *See* Reading's Reply at 9-10. The City's rebuttal regarding abandonment is cumulative of its positions in the Petition and do not warrant leave to file a reply. *See Application of the Nat'l R.R. Passenger Corp.*, 1997 WL 222240, at *4.

Third, the City seeks to re-argue whether the STB has jurisdiction over a non-carrier who has no rail infrastructure. *See* City's Reply at 6-8; Pet. at 1, 8-10. Contrary to the City's misrepresentation that Reading argued the Board can assert jurisdiction over a non-carrier who has no rail infrastructure, *see* City's Reply at 6, it is Reading's position that the STB maintains jurisdiction over the Viaduct because Conrail's abandonment of its operations did not serve to abandon all of the interests in the Viaduct, *see, e.g.*, Reading's Reply at 1, 14-18. To be sure, the STB's continued jurisdiction does not require that the owner of the property is a rail carrier. *See, e.g., Fox v. Surface Transp. Bd.*, 379 Fed. Appx. 767, 770 (10th Cir. 2010) ("Under the ICCTA, the Board has exclusive jurisdiction over 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.'"); *Scioli Turco, Inc.*, 2023 WL 7646535 at *3 ("First, while Section 10501(b)(1) provides the STB with exclusive jurisdiction over 'transportation by rail carriers' (emphasis added), Section 10501(b)(2) simply provides the STB exclusive jurisdiction over 'the ... abandonment ... of ... facilities,' but does not

mention ‘rail carriers.’ 49 U.S.C. § 10501(b). Accordingly, the ICCTA does not on its face restrict the STB’s jurisdiction...”). The issue here is that the *property* is subject to the jurisdiction of the STB because the entirety of interests was not abandoned. *See id.* Try as the City does to limit STB jurisdiction to solely over rail carriers who intend to use the track for interstate travel, City’s Reply at 6-7, the Board’s jurisdiction is not so limited, *see Fox*, 379 Fed. Appx. at 770; *Scioli Turco, Inc.*, 2023 WL 7646535 at *3.

The City’s view that because certain equipment and lines have been removed and trains are not operating on the property are sufficient to remove the property from the STB’s jurisdiction is misplaced, and the cases Reading cited say otherwise. *See* Reading’s Reply at 14-15. It is the City, not Reading, who now seeks to “muddy the waters” with its reformulations and reiterations of arguments in its Petition to which Reading simply responded. Moreover, the issues in this case are whether Reading retained interests in the Viaduct (a facility subject to the STB’s jurisdiction, *see* 49 U.S.C. § 10501(b)(2)) and whether Conrail’s abandonment of its operations served to remove the entirety of the Viaduct from the STB’s jurisdiction—not whether “Reading retained any rail interests, or whether Conrail acquired all of Reading’s rail interests...” City’s Reply at 8.⁶

Fourth, the City spent a significant portion of its Petition arguing that the *Scioli Turco* Court was wrong in an attempt to somehow separate itself from the Court’s findings in the opinion. *See* Pet. at 4, 6, 7, n.2. Indeed, it attached the entire opinion to its Petition. As such, it should have come as no surprise that Reading would have argued that the District Court’s findings that Reading retained interests in the Viaduct, that Conrail abandoned only its operations, and that the STB still

⁶ The City also completely misunderstands Reading’s reliance on *Pinelawn Cemetery – Petition for Declaratory Or.*, FD 35468, 2015 WL 1813674 (STB served Apr. 21, 2015), which Reading relied on for the proposition that simply because non-rail activity is occurring on a property does not remove it from the STB’s jurisdiction.

maintains jurisdiction over the Viaduct are instructive in the STB's determination of the exact same issues in this action.

Further, the application of *res judicata* and collateral estoppel are not necessarily limited to cases involving the exact same parties. *See, e.g., Sauers v. Oak Prop. Mgmt.*, No. 23-5146, 2024 U.S. Dist. LEXIS 103307, at *8-9 (E.D. Pa. June 10, 2024) (examining claims under *res judicata* instead of collateral estoppel because the same claims were brought against the same parties, noting *res judicata* requires the “same parties or their privies”); *In re Woodbridge Grp. of Cos.*, No. 20-2347, 2022 U.S. App. LEXIS 4779, at *5-6 (3d Cir. Feb. 23, 2022) (finding a party in privity for purposes of *res judicata*, describing the party's involvement with the entity in the previous action, and noting that his financial interests and those of the entity in the prior case were intertwined). The plaintiffs in *Scioli Turro* sought to use a state law to declare the property blighted to take control of the property for economic development purposes in the City of Philadelphia. The purpose of *Scioli Turco* was community development through the remediation of blight and blighted properties in Philadelphia. *See Scioli Turco, Inc.*, 2023 WL 7646535, Pet. for the Appointment of a Conservator at ¶ 17. Although a decision on whether these doctrines would apply is not necessary for the STB's decision at this point, the City most certainly had an interest in the outcome of the *Scioli Turco* case for purposes of preclusion analyses. Indeed, had the *Scioli Turco* plaintiffs prevailed, the City would never have had a reason to bring this action to have the STB decide the same issues that the District Court decided.

The City flounders by now contending by filing its Petition it is “in essence complying with the court's ruling, which directed the neighborhood organizations to bring their case to the Board.” *See City's Reply* at 9. The City then summarily contends—without any authority or support—that the court's suggestion that the plaintiffs should submit the issue to the STB through

a petition for adverse abandonment “was based on a flawed understanding of NERSA and the 3R Act, and the court has no authority over Board jurisdictional determinations.” *See id.* But whether the City or any other party could petition the STB for adverse abandonment of the entirety of the Viaduct now under 49 U.S.C. § 10903 has nothing to do with NERSA and the 3R Act.

In sum, the City’s attempt to reassert the same arguments captured in its Petition should be denied.

III. CONCLUSION

Accordingly, for the foregoing reasons, Reading respectfully requests that the STB deny the City’s Motion and strike the City’s Reply because the City’s Reply raises no new arguments or evidence and therefore has not shown good cause for circumventing the rule against filing a reply to a reply. The City seeks to continue to relitigate ownership, abandonment, and jurisdictional issues that the parties fully briefed (and that a United States District Court already decided).

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Dated: June 24, 2024

CERTIFICATE OF SERVICE

I, Jennifer Bartlett, hereby certify that a copy of the foregoing Opposition and Motion to Strike dated June 24, 2024, was sent by electronic mail and overnight delivery to all parties of record in this proceeding:

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