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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

***THE BURLINGTON NORTHERN AND SANTA FE RY. CO.—
ABANDONMENT EXEMPTION—IN KING COUNTY, WA***

STB DOCKET NO. AB-6 (Sub-No. 380X)

RAYMOND SPENCER AND LAEL SPENCER

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**REPLY TO MOTION OF KING COUNTY, WASHINGTON
TO HOLD PROCEEDINGS IN ABEYANCE**

STEPHENS & KLINGE LLP

Richard M. Stephens, WSBA #21776
Charles A. Klinge, WSBA #26093
10900 NE 4th Street, Suite 2300
Bellevue, WA 98004
(425) 453-6206
Email: stephens@sklegal.pro
Email: klinge@sklegal.pro

*Attorneys for Petitioners Raymond Spencer
and Lael Spencer*

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Petitioners Raymond Spencer and Lael Spencer file this Reply to the Motion of King County, Washington to Hold Proceedings in Abeyance (Motion).

Response to Background

The only part of King County's Background section of its motion to which the Spencers object is the description of the various claims for relief made in their complaint filed in the District Court in Seattle. Motion, at 4. King County fails to disclose that the Spencers' first claim in the District Court is for a declaratory order as to their right to use the right of way is "a protective measure *only if the STB declines* to exercise jurisdiction over this issue." Exhibit 2 to King County's Motion, at 16, ¶ 72 (emphasis added). This issue includes whether the easement granted by virtue of the Trails Act, 16 U.S.C. § 1247(d), is exclusive and whether a banked railroad easement gives King County rights "as if it were the owner of the right of way in fee simple absolute" as King County asserts. *Id.*

Furthermore, the Spencers reiterate in their complaint in District Court that they seek declaratory relief "*only to the extent that this issue is not resolved by the STB* proceeding currently pending there. *Id.* at 17, ¶ 78 (emphasis added). As addressed below, the Board should exercise jurisdiction over and resolve the issues in the Petition as to the exclusivity of the easement conferred by the Board's implementation of the Trails Act and whether a railroad easement banked under the Trails Act gives King County the right to operate as a railroad. None of the other claims for relief in federal court will resolve the issues in the Spencers' Petition to this Board.

Argument

I. The Board should deny King County's Motion to hold the Spencers' Petition in abeyance pending outcome of the court case.

The pending Motion does not dispute that the Board has jurisdiction to issue a declaratory order to terminate an active controversy or remove uncertainty. *See Jie Ao and Xin Zhou*—Petition for Declaratory Order, STB Docket No. FD 35539, 2012 WL 2047726, at *3 (service date: June 6, 2012). Nor is there any dispute that there is an active controversy between the parties or uncertainty that the Board could resolve.

At issue here is whether the Board should exercise its discretion to hold this proceeding in abeyance. Abeyance is appropriate only to promote efficiency when there is no fundamental unfairness. *Atlas Land and Building Corp. and Atlas Materials Recycling Corp.*—Petition for Declaratory order—Industry Spur Track in Pittsburgh, PA, Fed. Carr. Cas. P 37445 (S.T.B), at *3 (service date: August 17, 2020). For the following reasons, discretion should not be exercised to hold this matter in abeyance.

A. Abeyance in this case does not promote efficiency.

The Spencers' Petition asks the Board to rule on essentially three questions—(1) does King County have the right exercise its railroad easement which is banked, beyond ensuring there is no permanent interference with potential rail reactivation; (2) does the Spencers' use of the right of way interfere with potential railroad reactivation; and (3) is the federal trail easement created under the Trails Act, unlike

other Trails Act easements,¹ exclusive and, thereby, allowing the trail sponsor to prohibit the Spencers from any use of the right of way without the permission of (and payment to) King County?

As to those three questions, the Spencers' Petition contends the railroad easement is banked pursuant to federal law and, therefore, King County does not have jurisdiction to restrict usage or require fees as if it were an operating railroad. The Spencers are not arguing in this Petition that the County has violated the scope of a state law-based railroad easement. Rather, the Spencers' Petition argues that the state law-based railroad easement is banked, dormant and not currently in effect other than to preserve potential rail reactivation. The status of the railroad easements is determined by federal law—the Trails Act—a subject of which the Board has jurisdiction. Furthermore, whether the Spencers' actions permanently interfere with potential rail reactivation is a question within the Board's exclusive jurisdiction.

Finally, the Board has jurisdiction over the construction of the new federal trail easement created under the Trails Act because this is a statute which the Board uniquely administers and uniformity is important, not in how individual trails are built or operated, but as to whether the easement granted under the Trails Act is exclusive.

¹ See *United States Forest Service v. Cowpasture River Preservation Association*, 590 U.S. 604, 613 (2020).

1. The Spencers' Petition seeks resolution of whether their actions would interfere with the Nation's transportation system which is within the Board's exclusive jurisdiction.

As to whether Petitioners' use interferes with a railroad easement—banked or not—and created under federal law, or not—is a question not only within the Board's jurisdiction, but within its *exclusive* jurisdiction over rail transportation. There is no efficiency in holding up this proceeding when only this Board can resolve these issues.

Even though King County's railroad easement arose under state law in regard to the Spencers' property, this Board has exclusive jurisdiction to determine whether the application of state law conflicts with present or future railroad use, questions which this Board has exclusive jurisdiction. *See Tri-City Railroad Co.—Petition for Declaratory Order*, STB Docket No. FD 35915, 2016 WL 5904750 (service date: September 14, 2016); *see also* 49 U.S.C. § 1321 and 5 U.S.C. § 554(e). Specifically, the Board also has jurisdiction to review whether an underlying or neighboring landowner's *actions* conflicts with a railbanked railroad easement. *See Jie Ao and Xin Zhou*, 2012 WL 2047726; *Sunflower Rails-Trails Conservancy, Inc.—Petition for Declaratory Order—Sale of Railbanked Right-of-Way*, STB Docket No. 36034, 2017 WL 5639666, at *1 (service date: October 19, 2017).

The Board's authority over the abandonment of rail lines that are part of the interstate rail network is exclusive and plenary. See 49 U.S.C. §§ 10501(b)(2), 10502, 10903. If the Line, or any portions of it, was *properly railbanked* under the Trails Act, it is not abandoned, and *it remains under the Board's exclusive jurisdiction as part of the interstate rail network*. See 16 U.S.C. § 1247(d) (properly invoked interim trail use of rights-of-way under the Trails Act “shall

not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”)

Kansas & Oklahoma Railroad, Inc.—Abandonment Exemption in Hodgeman, Comanche, Kiowa, and Pratt Counties, KS, STB Docket No. AB 583 (Sub-No. 1X), 2020 WL 2093755, at *3 (service date: April 30, 2020) (emphasis added). *See also Norfolk Southern Railway Company—Petition for Declaratory Order*, STB Docket No. FD 35701, 2013 WL 5891582 (service date: November 4, 2013) (state law claims under exclusive jurisdiction of Board because of potential undue burden on interstate commerce).

The Board’s exclusive jurisdiction over interference with the rail network is the reason the Spencers’ complaint in district court does not ask the Court to determine whether their actions interfere with potential railroad uses. *See* Exhibit 2 to Motion. Only this Board can decide that issue.

The Spencers’ Petition seeks a ruling whether their actions conflict with potential rail reactivation which is exclusively within the Board’s purview and whether King County can use a “banked” railroad easement under the Trails Act to exact fees and prohibit nonpermanent actions in the “banked” easement. This is a question uniquely within the Board’s purview.

2. Whether the Spencers’ action are prohibited by the federal trail easement King County acquired under the Trails Act is within the Board’s purview and efficiency is promoted by having the Board resolve these issues rather than sending them to numerous courts.

The Board has jurisdiction to determine what is permissible under the Trails Act regarding railbanked lines. *King County, WA—Acquisition Exemption—BNSF*

Railway Co., Fed. Carr. Cas. P 37322 (STB Finance Docket No. 35148), at *3 (service date: September 18, 2009). The Board’s jurisdiction over these matters is important because there is no single court to resolve these issues which affect the national transportation system and the federal Trails Act. Rather, there are 94 federal district courts and far more state courts that could issue inconsistent decisions affecting the nation’s rail transportation system.² The need for uniformity is paramount and the Board is the entity designated to speak with a consistent voice on these questions. *See See Tubbs*—Pet. for Declaratory Order, STB Docket No. FD 35792, at *5 (served Oct. 31, 2014), *aff’d* 812 F.3d 1141 (8th Cir. 2015). Like the need to avoid a patchwork of state and local regulation interfering with interstate commerce, the same concern exists with a potential patchwork of judicial decisions around the country as to what does, or does not, interfere with potential future rail reactivation.

3. King County has mischaracterized the nature of the Spencers’ Petition.

King County argues that the Spencers’ claims of misuse of the easement in “implementing and managing trail use and enforcement of local regulations concerning trail use are matters of state law best left for a court to determine.” Motion at 6 (citing Spencers Pet. at 4). King County’s argument is unfounded for several reasons. First, the Spencers are not asking the Board to rule that the County’s construction or operation of the trail violates local or state regulation. Nothing on page

² Further consolidation of review of the Board’s decisions exists by review which bypasses the numerous District Courts and provides for review by the federal Courts of Appeals. *See* 28 U.S.C. 2342 (5).

4 of their Petition suggests that. Rather, the Spencers are claiming that King County has overstated the significance of its easement by asserting it has exclusive control and can prohibit uses, or charge fees, for actions that do not interfere with trail or future railroad use. Second, the Spencers contend *they* are not misusing the land burdened by the easement. This is not a case where a petitioner is claiming that the operation of the trail violates state law as in local environmental laws on trail construction, as noted in King County’s motion that “trail use must comply with State and local land use plans, zoning ordinances and public health and safety legislation.” Motion at 6 (quoting *Idaho N. & R.R.—Abandonment & Discontinuance Exemption – In Washington & Adams Counties, ID*, 3 S.T.B. 50, 59 (1998)). And the Board’s role is understandably not to ensure all these local laws are followed in the implementation of trail use. *See, e.g., Trevarton v. South Dakota*, 817 F.3d 1081, 1085 (8th Cir. 2016) (Board does not have exclusive jurisdiction over conflicts between owners and trail operators unrelated to potential conflict with rail reactivation).

The Spencers’ Petition is about the scope of King County’s trail easement which arises solely from federal law—the Trails Act—which the Board implements, and in this case did implement, with the issuance of the NITU. While it is completely understandable that the Board would not want to be overseeing the management of trails under state law, the question here is more fundamental and applies to every trail easement created under the Trails Act. It is an easement created under federal law which the Board implements and has nothing to do with state law regarding the railroad easement or easements generally under state law. There is a strong need for

uniformity on the nature of the easement created under the Trails Act in contrast to relegating the issue potentially to numerous different federal courts around the country decide the scope of this easement created under the Trails Act.

4. Efficiency is not promoted by potential mootness.

The Board concluded in *Atlas Land* that abeyance in that case promoted efficiency because resolution of state property law disputes could “moot the need for a declaratory order.” Fed. Carr. Cas. P 37445, at *3. That is not the situation regarding the Spencers’ Petition. The federal court action makes the following claims for relief: (1) as a protective measure under the Trails Act only if the Board decides not to rule, a declaratory relief claim regarding the status of the railroad easement and scope of the trail easement under federal law; (2) a claim to quiet title to settle questions as to who owns what; (3) declaratory relief as to the applicability of a settlement agreement regarding adjacent property owners’ rights, such as the Spencers’, to use the banked railroad right of way; and (4) relief for the County’s discriminatory treatment of the Spencers. Only the first claim for relief could possibly moot the need for the pending petition to the Board, but that very claim is triggered only on a potential decision of the Board not to decide the questions within its jurisdiction. King County has not argued, nor could it, that the Board cannot decide these questions. Regarding the other claims in court, quiet title, construction of a settlement agreement or relief from discriminatory treatment would not moot the need for a Board decision requested by the Spencers’ Petition.

As evidenced by the Reply of King County, Washington to Petition to Reopen and Petitions for Declaratory Order in this case, King County is not asserting that the Spencers do not have any property interest at stake. Instead, it argues that property interests are a matter of state law. *Id.* But whether a railroad easement banked under federal law allows the Trail Sponsor to possess the easement exclusively, charge fees, and prohibit uses that do not interfere with either potential railroad use or a trail use is matter of federal law within the Board's jurisdiction.

This is conceptually analogous to the Board's decision in *Jie Ao and Xin Zhou*, 2012 WL 2047726, in answering on the merits whether an adverse possession claim would unreasonably interfere with rail reactivation. *See also* Exhibit 10 to Spencers' Petition ("If a dispute concerning rights or activities within a railbanked corridor, including the presence of structures or improvements, is formally brought to it in the future, the Board could, as it has done in the past, hold a proceeding to examine the facts and circumstances in the context of its existing precedent.") The Spencers seek that relief from the Board.

Also instructive on the requirement that abeyance promote efficiency is the decision in *Lowe's Companies, Inc. v. Rebel Motor Freight, Inc.*, ICC Docket No. 40287, 1991 WL 59341 (1991). The Commission denied the request to hold a matter in abeyance because "our jurisdiction in this matter is not dependent upon the disposition of the court proceeding." *Id.* at *1. That is clearly the case here. Nothing in the Spencers' Petition for Declaratory Orders renders the Board without jurisdiction to decide the issues because of another court action. The Board should not cede its

exclusive jurisdiction over questions as to interference with rail transportation simply because the Spencers have asked a court to decide an issue, if and only if, the Board chooses not to.

5. King County’s assertion of concurrent jurisdiction is incorrect.

King County relies on *Brookhaven Rail Terminal—Pet. for Declaratory Order*, STB Docket No. FD 35819, 2014 WL 4253048, at *4 (service date: Aug. 28, 2014), for the notion that the Board and federal courts have “concurrent jurisdiction to hear such issues.” Motion at 7. The petitioner in *Brookhaven* sought a ruling that certain proposed construction was preempted from state and local permitting. *Id.* at *1. A third party—the Town of Brookhaven—instituted a lawsuit. *Id.* at *2. The Board noted that “Petitioners and the Town continued to litigate their dispute in federal court while simultaneously seeking resolution of their dispute in this proceeding.” *Id.* That is not the case here. The Spencers have presented to District Court an issue before the Board only as a protective measure and conditional on the Board’s decision to not decide. The Spencers do not anticipate “simultaneously” litigating any issue and, for that reason, *Brookhaven* does not apply to the present situation.

But as to concurrent jurisdiction, courts have recognized conflicting statutory language. *See Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195 (1st Cir. 2000). However, these issues should be first resolved by the Board because of the Board’s expertise and need for uniformity, both underlying the doctrine of primary jurisdiction. *Id.* at 205-06. *Cf. DeBruce Grain, Inc. v. Union Pacific R. Co.*, 149 F.3d 787 (8th Cir. 1998); *Rushing v. Kansas City Southern Ry. Co.*, 194 F.Supp.2d 493, 500-

01 (S.D. Miss. 2001) (Board has exclusive jurisdiction over claims involving the operation of a switch yard).

B. King County's argument as to unfairness is unfounded.

Finally, as addressed above, the lack of unfairness is a criterion for holding a matter in abeyance. On this point, King County asserts:

Both Waverly and the Spencers argued that the County's easement is held "in abeyance" and cannot prevent either Petitioner from using the respective properties in question as they wish. ... This is a question of state law involving the interpretation of the validity of an easement that will impact both parties, which will provide the Board with a more complete and accurate adjudication of any preemption dispute.

Motion at 8. King County is seriously mistaken. The Spencers' Petition seeks no interpretation of state law. While the railroad easement in the case of the Spencers arose under state law, the Spencers' position is that only federal law that prevents King County from enforcing those easement rights beyond preserving potential future rail use and, as addressed above, this Board's exclusive jurisdiction is what is at issue.

Regardless of the scope of that state law-based railroad easement, the question to the Board presented by the Spencers' Petition is whether a railroad easement is fully in effect when that railroad is banked under federal law. Even if allowed under state railroad easement law, this Board is asked to determine whether under the Trails Act, which provided for the banking of the easement in the first place, allows the possessor of a banked railroad easement to operate as if the railroad were still functioning. That is not a question of state law, but one within the purview of the Board because it potentially affects the nation's rail system, and the banking of that easement arises

solely from the operation of a provision of federal law which this Board solely implements.

It would be unfair for the Spencers to be required to wait for this Board to determine whether their use of the right of way interferes with potential rail use because that issue is not pending in court, and this Board has exclusive jurisdiction over that question.

Conclusion

The Spencers respectfully urge the Board to deny King County's motion to hold their petition in abeyance.

Respectfully submitted this 24th day of March 2025.

STEPHENS & KLINGE LLP

/s/ Richard M. Stephens

Richard M. Stephens, WSBA #21776
Charles A. Klinge, WSBA #26093

10900 NE 4th Street, Suite 2300
Bellevue, WA 98004
(425) 453-6206
Email: stephens@sklegal.pro
Email: klinge@sklegal.pro

*Attorneys for Petitioners
Raymond Spencer and Lael Spencer*

CERTIFICATE OF SERVICE

I hereby certify that I have on the 24th day of March 2025, caused to be served a copy of the foregoing Reply to the Motion of King County, Washington to Request to Hold Proceedings in Abeyance upon all parties of record in this proceeding by email.

/s/ Richard M. Stephens

Richard M. Stephens, WSBA #21776