



KAPLAN KIRSCH ROCKWELL

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January 24, 2017

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

Re: *The Atlanta Development Authority D/B/A Invest Atlanta and Atlanta BeltLine, Inc. –
Verified Petition for a Declaratory Order*, Finance Docket No. 35991

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding the Reply of The Atlanta Development Authority, d/b/a Invest Atlanta, and Atlanta BeltLine, Inc., to the Flagler Owners' Motion for Reconsideration of the Board's December 15, 2016, Decision.

Please do not hesitate to contact me if you have any questions. Thank you very much for your assistance in this matter.

Sincerely,

Allison I. Fultz

Counsel for The Atlanta Development Authority and Atlanta BeltLine, Inc.

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35991

**THE ATLANTA DEVELOPMENT AUTHORITY
D/B/A INVEST ATLANTA and
ATLANTA BELTLINE, INC.**

**REPLY OF THE ATLANTA DEVELOPMENT AUTHORITY
D/B/A/ INVEST ATLANTA AND
ATLANTA BELTLINE, INC.
TO FLAGLER OWNERS' MOTION FOR RECONSIDERATION**

Communications with respect to this pleading should be addressed to:

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Counsel for The Atlanta Development
Authority d/b/a Invest Atlanta and Atlanta
BeltLine, Inc.

Dated: January 24, 2017

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SURFACE TRANSPORTATION BOARD**

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Pursuant to 49 C.F.R. § 1115.3 and 49 C.F.R. § 1104.13, The Atlanta Development Authority (the “Authority”) d/b/a Invest Atlanta and Atlanta BeltLine, Inc. (“ABI”) (collectively, the “Atlanta Parties”), file this Reply to the Motion for Reconsideration filed by Cynthia Vick Ragan, Gordon B. Ragan, Jr., Elizabeth A. Albert, Michael Loving, Dawn Smith, Roderick Smith, Jason Godwin, Steven R. Green, Stacey E. Clay, Sandy Flores, Christopher Draper, Dennis Sabo, Jr., Laura M. Shepard, Angela Heredia, Hannibal Heredia, Patricia S. Jones, Donna M. Fitzmaurice, Patrick J. Fitzmaurice, Samantha C. Bontrager, Dewayne M. Bontrager, Molly Taylor, Josh B. Taylor, Thomas R. Markovic, Megan Cochard, Matthew R. Cochard, Amanda K. Sapra, Neil K. Sapra, Margaret N. Corbett, Nicolas Albano, Eric Bymaster, Fulton D. Lewis, III, S. Neil Rhoney, Tome Philpot, Anna L. Lentz and Kurt Lentz (collectively, the “Flagler Owners”) on January 4, 2017 (“Motion”), in the above-captioned docket. Flagler Owners’ Petition seeks reconsideration of the Board’s December 15, 2016, decision granting the Atlanta Parties’ January 8, 2016, Petition for Declaratory Order (“Petition”) (a) confirming the validity of the conveyance from Norfolk Southern Railway Company (“NSR”) to a group of affiliated

non-carrier entities of the real property underlying a line of railroad between Milepost 636.56 and 632.42 in the City of Atlanta (the “Line”), and (b) directing certain actions by the Atlanta Parties to rectify the regulatory posture of a 0.25 mile long segment of the Line. *The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta BeltLine, Inc., Petition for Declaratory Order*, FD 35991, slip op. at 9 (Service Date December 15, 2016) (“*December 15 Decision*”).

INTRODUCTION

Flagler Owners’ Petition for Reconsideration fails to identify the basis on which this Board should reconsider the *December 15 Decision*. Pursuant to 49 C.F.R. § 1115.3(b), a petition for reconsideration will only be granted upon a showing that the “prior action will be affected materially because of new evidence or changed circumstances” or that “the prior action involves material error.” In their Motion, Flagler Owners simply attempt to characterize the Board’s analysis in the *December 15 Decision* of NSR’s retained freight rail easement as effectively creating two distinct transactions because the Board determined that STB authority would have been required for the transfer of a portion, but not all, of the Line, as the result of various easement conditions. Motion at 4. Flagler Owners do no more than renew their previous argument that the Board must void the transactions through which the underlying real property interests in the Line have been transferred (Motion at 7), an argument that the Board has already rejected. Flagler Owners fail to identify any new evidence or changed circumstances that would materially affect the Board’s decision or to provide any support for the suggestion that the Board’s rejection of their previously presented arguments constitutes material error. The Board should accordingly decline to reconsider the *December 15 Decision*.

ARGUMENT

As the movants seeking reconsideration, Flagler Owners bear the burden of satisfying the Board's reconsideration criteria at 49 C.F.R. § 1115.3(b). *See Allegheny Valley R.R. Co.—Petition for Declaratory Order*, FD 35239, slip op. at 3 (Service Date July 16, 2013) (denying petition because petitioner failed to meet its burden of proof). This is a heavy burden. Flagler Owners have alleged no new facts, changed circumstances, or material error by the Board to support their Motion.

A. The Board's *December 15 Decision* Does Not Rest On Material Error

The Board has committed no error. The *December 15 Decision* properly analyzes the various segments of the Line and analyzes the regulatory posture of each in accordance with STB rules. As the *December 15 Decision* reflects, much of the Line has been abandoned and is no longer under STB jurisdiction. *December 15 Decision* at 9. The Board also determined that NSR's sale of most of the remaining portion of the line, the Northern Segment from Milepost 632.42 to Milepost 632.84, required no Board authorization because NSR retained "a permanent, exclusive easement and sufficient control to carry out its common carrier obligations over that segment." *Id.* at 10. The Board determined that the remaining 0.25 mile segment of the line, between Mileposts 632.84 and 633.10, would have required Board authority because of limitations on NSR's latitude to determine when to abandon the line, and set out two alternative means by which the Atlanta Parties may seek to cure this procedural defect: the Atlanta Parties, effectively stepping into the shoes of their predecessors in title, may (a) seek retroactive authority for the transaction from this Board; or, (b) execute and record documents removing the limitations imposed in 2007 on NSR's operation and abandonment of the Line. *Id.* at 9. The Atlanta Parties and NSR will execute and provide to the Board a corrective deed in response to

the Board's directive in the *December 15 Decision*. See *Decision Granting Atlanta Development Authority, d/b/a Invest Atlanta (Authority), Atlanta BeltLine, Inc., and Norfolk Southern Railway Company's Request for an Extension of Time until February 16, 2017*, STB Docket No. 35991, slip op. at 1 (Service Date January 17, 2017).

The Board has no authority to determine whether the transactions effecting the transfers of the fee interest associated with the Line were invalid, and therefore no authority to void such transfers. *Gen. Ry. Corp., d/b/a Iowa Northwestern R.R. – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867, slip op. at 4 (Service Date Jun. 15, 2007) (“the authority [to acquire a line] granted by the Board is permissive, not mandatory, and is not dispositive of ownership of the line.”). As the Board explained: “Any [question] regarding . . . ownership of the Line, involves questions of state contract and property law. The Board is not the proper forum to resolve such disputes. Rather, these matters are best left for state courts to decide.” *Id.* The Atlanta Parties have appropriately sought relief in state court, and the *December 15 Decision* acknowledges the pending state proceeding to address Georgia property law matters affecting the Line. *December 15 Decision* at 4, n.4.

In construing language regarding “materiality” in 49 C.F.R. § 1114, whose criteria for reopening an administratively closed matter are identical to those in 49 C.F.R. § 1115.3(b), the Board has explained that “[t]he alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior decision in this case.” *Canadian Nat’l Ry. Co. and Grand Trunk Corp. —Control— EJ&E West Co. [Barrington Petition for Mitigation]*, FD 35087 (Sub-No. 8), slip op. at 8-9 (Service Date Nov. 8, 2012). Flagler Owners have not attempted to present any new argument, or to provide any substantive support for the position that the Board’s

action in the *December 15 Decision* constitutes material error. Failing to make this essential showing, Flagler Owners do not meet the requirements of the applicable rule and their Motion must be denied.

B. Flagler Owners Have Not Presented Any Evidence That Could Materially Affect the December 15 Decision.

Flagler Owners also bear the burden of showing that there is new information that would lead the Board to reach a different conclusion than it did in its *December 15 Decision*. They have not met that burden. They have offered no evidence at all, let alone anything that could remotely be construed as supporting a different result than the Board reached in the *December 15 Decision*.

C. None of Flagler Owners' Additional Arguments Offered Justify Reconsideration of the December 15 Decision

Wholly ignoring any attempt to satisfy the criteria for seeking reconsideration under 49 C.F.R. § 1115.3(b), Flagler Owners assert that the imposition of conditions on NSR's retained easement on a portion of the Line created two separate transactions when NSR sold the Line in 2004. Motion at 4. While creative, this belated attempt to salvage their otherwise unsupported claims completely disregards the record that confirms that the Line was sold in a single transaction in 2004 subject to NSR's retained rail easement, which imposed differing conditions on the two portions of the Line. The Atlanta Parties took fee title to the entire Line in a single transaction in 2007, subject to NSR's easement. Flagler Owners have failed to demonstrate that the Board's determination as to the differing federal regulatory postures of the two remaining portions of the Line (*December 15 Decision* at 9) has any effect on the underlying fee interest described in the undisputed deeds that have been submitted into the record in this matter. See Exhibits A, B and D to the Atlanta Parties' Petition. As set forth above, the STB does not have authority to adjudicate state law property matters. Furthermore, the Board has identified the

means by which the Atlanta Parties may cure any remaining federal regulatory issues, thereby resolving all issues relevant to this proceeding. *Id.*

CONCLUSION

Because Flagler Owners have failed to demonstrate that the Board's December 15, 2016, Decision rested on material error or that new evidence exists that would materially change the Board's Decision, Flagler Owners' Motion should be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Allison I. Fultz", is written over a horizontal line.

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Dated: January 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2017, I have caused a copy of the foregoing Reply of The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta Beltline, Inc. to Flagler Owners' Motion for Reconsideration to be served upon the following individuals via first class mail, postage prepaid:

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