

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 36075
THE ILLINOIS STATE TOLL HIGHWAY PETITION
FOR DECLARATORY ORDER**

**REPLY OF THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY
IN OPPOSITION TO THE MOTION TO STRIKE OR ALTERNATIVELY, MOTION
FOR LEAVE TO FILE SUR-REPLY OF THE SOO LINE RAILROAD COMPANY d/b/a
CANADIAN PACIFIC**

The Illinois State Toll Highway Authority (the “Tollway”) respectfully submits this brief reply in opposition to the Motion by the Soo Line Railroad Company, d/b/a Canadian Pacific (“CP”), to strike portions of the Tollway’s Response in Support of its Petition for Declaratory Order, or in the alternative for leave to file a sur-reply.

INTRODUCTION

In its motion, CP asks the Board to ignore any further discussion of the Western Access Interchange and consider instead an additional thirteen pages of argument regarding Bensenville Yard. The Board should reject CP’s attempt to divert attention of the issue raised by the Tollway’s request for a declaratory order: whether standard highway overpass bridges unreasonably interfere with railroad transportation. CP’s tactic merely confirms that it has never had any serious objection to the Western Access Interchange and its primary (unfounded) concerns with the Elgin O’Hare Western Access Project relate to Bensenville Yard, which the Tollway has repeatedly stated it would address completely when its plans are finalized.

The pretext for CP’s motion is an assertion that the Tollway’s Response “impermissibly exceeds the scope permitted by the Board’s January 17, 2017 order” by including an Addendum that analyzed CP’s proffered plans for development of the vacant land adjacent to the Western

Access Interchange. CP argues the Tollway was granted leave to file a response “only on the issue of the potential crossing of Bensenville Yard.” STB Decision, FD 36075, at 1 (STB served Jan. 17, 2017). CP, however, does not limit its proposed Sur-Reply to the Tollway arguments CP believes went beyond the scope of the Board’s Order. Instead, nearly all of CP’s filing (12 of 13 pages) simply rehashes CP’s claims about impacts if the Tollway one day crosses Bensenville Yard. CP’s Motion to Strike or Alternatively for Leave to File a Sur-Reply should be denied.

ARGUMENT

A. The Tollway fully respected the Board’s procedural scheduling order.

In its Response, the Tollway adhered to the Board’s instruction to focus on the potential crossing of Bensenville Yard. The Tollway explained, however, during the parties’ seven years of discussions and negotiations, including through a federal review process, CP never even suggested that the standard highway bridges for the Western Access Interchange would interfere with railroad operations—let alone indicate it had plans for additional tracks or facilities near these overpasses. Upon analysis of the “plans” for a transload facility and inspection tracks revealed in CP’s brief the Tollway recognized they were likely hastily conceived, impractical, and perhaps created solely for these proceedings.

To comply with the Board’s scheduling Order, the Tollway expressly included its analysis of CP’s plans in a separate Addendum to aid the Board in assessing CP’s veracity and pragmatism. *See, e.g., Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order*, 2015 WL 1310043, at *7, FD 35496, (STB Served Mar. 24, 2015) (vague and speculative plans of future use insufficient to justify finding of preemption). When properly considered, the Tollway remains steadfast that its longstanding highway construction plan to merely pass over CP’s tracks will not unreasonably interfere with railroad operations.

Because CP's eleventh-hour disclosure of new plans for the area at issue would be highly prejudicial to the Tollway if accepted at face value, the Tollway respectfully requests that CP's motion to strike be denied.

B. The Board should deny CP's request to file its proffered Sur-Reply.

CP's Sur-Reply, offered as an "alternative," completely end-runs this Board's scheduling Order. There is no need for CP to re-argue issues it already presented to the Board. Briefing in this matter should end with the filing the Board requested from the Tollway.

CP's attempt at a final say is obvious. In Section A, CP reargues its perceived standard for preemption, doubling down on its position that *any* taking of rail operating property, no matter how miniscule, for a different use is categorically preempted. Section B is just regurgitation about "the impacts on Bensenville Yard," exactly what it was instructed to address in its original Reply. Similarly, Section D is CP's attempt to downplay the long history of its collaboration with the Tollway regarding how the highway should cross Bensenville Yard, but again that was for CP to deal with in its proper filing.

Only the page-and-a-half comprising Section C of CP's Sur-Reply takes the discussion back to the Western Access Interchange with CP trying once more to impress that "*it cannot predict how it might use its right of way in the future.*" Sur-Reply at 8 (emphasis added). CP already brought that position to the Board, and there is no need for CP to rehash this issue simply because it wants the final say. The Board should deny CP leave to file the Sur-Reply in its entirety.

CONCLUSION

The Tollway requests the Board deny CP's motion to strike because CP's characterization that the Tollway's Response included arguments outside the allowable scope is

wrong. The Tollway clearly segregated its analysis of the Western Access Interchange into a separate Addendum. In that Addendum, the Tollway sought only to present additional information regarding newly produced plans by the CP. The Board should also deny CP's motion for leave to file its Sur-Reply because it is not limited to the Tollway's Addendum. Instead, most of CP's proffered Sur-Reply is simply additional argument on issues relating to Bensenville Yard, which CP already had an opportunity to address with the Board.

Respectfully Submitted,

The Illinois State Toll Highway Authority,
By: Lisa Madigan
Attorney General of the State of Illinois

/s/ Robert T. Lane
Robert T. Lane
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I have this 5th day of April, 2017 served copies of **Reply of the Illinois State Toll Highway Authority in Opposition to the Motion to Strike or Alternatively, Motion for Leave to File Sur-Reply of the Soo Line Railroad Company d/b/a Canadian Pacific**, upon all parties of record in this proceeding via electronic mail or U.S. First Class Mail.

/s/ Robert T. Lane