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August 30, 2019

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August 30, 2019
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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423-0001

Re: *Holland Park Owner, LLC - Petition for Declaratory Order*, Finance Docket No. 36308

Dear Ms. Brown:

I am enclosing for filing in the above-referenced proceeding the following two documents:

1. Petitioner's Motion for Leave to File Reply to Reply; and
2. Petitioner's Reply to Reply of Consolidated Rail Corporation.

Thank you very much for your attention to this matter.

Sincerely,



Charles A. Spitulnik

cc (w/attachments):

Jonathan Broder, Esq.
Kevin Sheys, Esq.

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36308

**HOLLAND PARK OWNER, LLC - -
PETITION FOR A DECLARATORY ORDER**

PETITIONER'S MOTION FOR LEAVE TO FILE REPLY TO REPLY

Communications with respect to this
document should be addressed to:

Charles A. Spitulnik
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1634 I Street NW, Suite 300
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(202) 955-5600
Email: cspitulnik@kaplankirsch.com

Counsel for Holland Park Owner, LLC

Dated: August 30, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36308

**HOLLAND PARK OWNER, LLC - -
PETITION FOR A DECLARATORY ORDER**

PETITIONER'S MOTION FOR LEAVE TO FILE REPLY TO REPLY

Holland Park Owner, LLC ("Holland Park") respectfully moves for leave to file the attached Reply to the Reply submitted by Consolidated Rail Corporation ("Conrail") in response to Holland Park's Petition for Declaratory Order.

The Board will permit a reply to a reply for "good cause."¹ Allowing Holland Park to file this response will not broaden the issues raised in the proceeding and will not delay the Board's consideration of the issues raised because it is being filed shortly (in this case 11 days) after the Reply to which it is responding. Holland Park's Response corrects the erroneous assertions by Conrail with respect to the relief that the Petitioner is seeking in this proceeding.

Allowing Holland Park to submit its Reply clarifies the Record as to the specific relief that it is seeking from this Board, confirms the judicial confirmation of the Board's authority to enter the relief requested, and will facilitate the Board's decision-making process as it addresses the Petition for Declaratory Order.

¹ Although 49 C.F.R. § 1104.13 (c) indicates that "[a] reply to a reply is not permitted," the Board has frequently waived that provision for good cause. *See, e.g., Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, STB Docket No. NOR 42133, at 1, n. 1 (served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 33582, at 1 (served Oct. 27, 1998). See generally 49 C.F.R. §1100.3 ("The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.").

CONCLUSION

For the foregoing reasons, Holland Park respectfully requests that the Board grant this Motion for Leave to File a Reply to Reply.

Respectfully submitted,



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Counsel for Holland Park Owner, LLC

Dated: August 30, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August 2019, I caused a copy of the foregoing Motion for Leave to File Reply to Reply to be served on all parties of record electronically or by first class mail, postage prepaid.



Charles A. Spitznik

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36308

**HOLLAND PARK OWNER, LLC - -
PETITION FOR A DECLARATORY ORDER**

**PETITIONER'S REPLY TO REPLY OF
CONSOLIDATED RAIL CORPORATION**

Communications with respect to this
document should be addressed to:

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Counsel for Holland Park Owner, LLC

Dated: August 30, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36308

**HOLLAND PARK OWNER, LLC - -
PETITION FOR A DECLARATORY ORDER**

**PETITIONER'S REPLY TO REPLY OF
CONSOLIDATED RAIL CORPORATION**

Petitioner Holland Park Owner, LLC ("Petitioner" or "Holland Park") hereby submits this Reply to the Reply of Consolidated Rail Corporation ("Conrail"), filed in this proceeding on August 19, 2019.¹ By misstating the relief that Holland Park seeks in this proceeding, Conrail constructs an argument seeking denial of the Petition. To be clear, as Holland Park stated in its Petition:

Although the Board does not have jurisdiction to settle the state law property rights question as to whether the easement is valid, the Board, can determine that it lacks jurisdiction over any track that may have formerly crossed the Property because it has been abandoned. To be clear, Holland Park is not asking this Board to make any statement about the continuing validity or viability of the easement itself. That is a matter that Holland Park will refer to the appropriate state court. Holland Park is asking only for a declaration that as a matter of fact Conrail's actions and all of the facts and circumstances surrounding the various properties near or adjacent to the Property confirm that Conrail has abandoned the freight easement.

Holland Park Petition for Declaratory Order, at 11.

While it is true, as Conrail suggests, that important questions regarding the respective property rights of the parties remain to be settled in another venue, the Board retains the

¹ Petitioner is filing a Motion for Leave to File a Reply to Reply simultaneously with this Reply. In anticipation of a favorable ruling on that Motion, Petitioner submits this Reply for the Board's consideration.

authority to answer the limited question posed by Holland Park here – whether the right to provide freight service subject to the jurisdiction of the STB has been terminated.

ARGUMENT

A. This Board has jurisdiction and authority to address the narrow question posed by Holland Park.

Conrail is correct that if Holland Park were asking this Board to determine the continuing validity of the easement that Conrail purports to hold on the Holland Park property, another forum has the authority to resolve that matter. As noted above, Holland Park has acknowledged that from the outset of this proceeding. However, notwithstanding the many authorities cited by Conrail, those cases address a proposition different than the one that Holland Park poses here.

In 2009, the D.C. Circuit clearly set forth the line that divides matters that this Board can resolve with respect to properties that Conrail received as part of the conveyances under the Final System Plan (“FSP”). Although Conrail cites to this case, in its Reply at 5, it omits any reference to the text where the Court specifically drew that line between the authority of this Board and the purview of the Special Court (now the U.S. District Court for the District of Columbia). The Court stated the following:

Only in proceedings in which the Board’s authority is challenged and an interpretation of the FSP or the Special Court’s conveyance order under 49 U.S.C. §719 (e)(2) is required does the Board lack jurisdiction to resolve the question of the nature of the trackage sought to be abandoned. In such a case, as here, we see no conflict between 49 U.S.C. §719 (e)(2) and 49 U.S.C. §§ 10903 and 10906. The Board retains its authority under sections 10903 and 10906 to approve or deny an abandonment application. Under 49 U.S.C. §719 (e)(2), however, the Special Court retains exclusive jurisdiction to decide the antecedent question if it arises, namely, whether the trackage was conveyed by the FSP “as part of [the rail carrier’s] railroad lines.” 49 U.S.C. §10903(a)(1)(A).

Conrail v. STB, 571 F.3d 13, 20 (D.C. Cir. 2009). Here, the “antecedent question” to which the Court refers does not arise. Holland has not asked, nor is there a need to determine, whether the trackage was conveyed by the FSP as part of Conrail’s railroad lines.

Conrail seeks to color this proceeding with arguments concerning the Board’s authority to determine the “scope of the easement” (Conrail Reply at 2) and “whether it [that is, the easement] has been abandoned (*id.*), and that “to grant the declaratory relief requested by Petitioner, the STB would need to determine the scope and meaning of the rights conveyed to Conrail under the FSP on what is now the Holland Property before determining the status of what those rights might be.” (*id.* at 6). Conrail misstates the question Holland Park has posed here. To be clear, again, Holland Park is not asking this Board to address the validity of the conveyances that occurred. Holland Park is not asking this Board to determine the continuing viability of the easement that encumbers the Property or to address all of the questions Conrail raises about its continuing property rights. Holland Park is not asking this Board to address validity of the sale or the underlying transaction in the Hudson County Deed or the reservation of rights in those deeds. Holland Park is not asking this Board to adjudicate a dispute about the description of the properties or the scope of the rail lines included in those conveyances. *See* Conrail Reply at p.7 and cases cited there. As a result, the cases cited by Conrail in its Reply do not bear on the question here and do not compel denial of the relief Holland Park seeks here.

The question presented here, as Holland Park has stated repeatedly, is whether freight service on and to the Holland Park property has been abandoned. Petitioner Holland Park has provided this Board with evidence of the abandonment of all of the rights to provide service on the lines that could potentially lead to the Property and may at one time in history have allowed

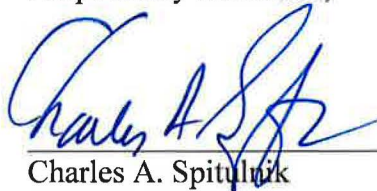
delivery of freight to that Property. Petitioner has confirmed the absence of any track on the Property it now owns.

The DC Circuit has confirmed that this Board retains authority to approve or confirm abandonments under Sections 10903 and 10906. *Conrail v. STB, supra* at 20. Petitioner has asserted that the track, if any existed on the Property would have been spur track. A request to this Board for a decision that makes a determination as to whether (a) it was (or would have been) spur track, and (b) that track has been abandoned within the meaning of 49 U.S.C. §§ 10903 and 10906 does not either challenge this Board's authority or question the interpretation of a conveyance order. *Conrail v. STB, supra* at 20.

Accordingly, this Board has the authority to and should now address the limited question raised by Holland Park's Petition and grant the relief Holland Park requests. By issuing that order, this Board addresses the issue that rests within its jurisdiction and will allow the parties to proceed to resolution of the broader property issues in the appropriate forum.

WHEREFORE, and in view of all of the foregoing, Holland Park respectfully requests this Board to grant its Petition for Declaratory Order.

Respectfully submitted,



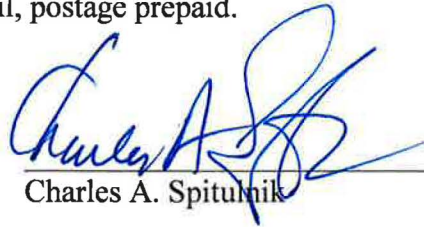
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Counsel for Holland Park Owner, LLC

Dated: August 30, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August 2019, I caused a copy of the foregoing Petitioner's Reply to Reply of Consolidated Rail Corporation to be served on all parties of record electronically or by first class mail, postage prepaid.



Charles A. Spitulnik