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November 6, 2003

via fax 202-565-9004 - 4 pages
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

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Office of Proceedings

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Public Record

Re: STB Finance Docket No. 34415, Ohio Department of Transportation - Petition
for Declaratory Order - Status of Track at Findlay, OH

Dear Mr. Williams:

While we are quite astonished at the gratuitous and unwarranted insults and assumptions in Mr. Kahn's letter to you today, we file this reply simply to correct the obvious errors or misrepresentations in his letter that he could have avoided by a more careful reading of our filing.

NSR did not request an indefinite extension of time to reply to ODOT's petition for declaratory order. In fact, NSR replied to the petition in our combined motion and response. In addition, we did not ask that the Board postpone indefinitely the issuance of a decision on the question presented in the petition. While we asked for the proceeding to be held in abeyance for 60 days in order to permit the parties time to negotiate a potential settlement, we acknowledged, and attached a copy of ODOT's letter, stating that they would support a two-week postponement. We stated our belief that two weeks may not be sufficient time to reach an agreement and it might be inconvenient for the parties to be required to request, and for the Board to have to issue, further extensions of time. Indeed, at this early stage of the proceeding, we must assume that the Board would require at least that amount of time to consider the petition and response and to prepare and issue a decision. We believe that deferring issuance of a decision for 60 days would still be within a reasonable preparation time for the Board to make, write and serve a decision. We also stated our belief and hope that if the parties are making progress on a settlement and report that to the Board, the Board would hold the proceeding in abeyance to permit the parties to conclude a settlement regardless of the amount of time issuance a decision might initially be postponed. This is in line with the Board's policy of encouraging parties

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to settle their disputes. We certainly did not ask, and do not expect, the Board to hold a proceeding indefinitely in a proceeding where a party reported that efforts to settle the dispute or controversy are at an impasse.

We are not ignoring the 6-month postponement granted in the State Court proceeding in order to seek a declaratory order answering certain questions from the Board. The court decision was attached to ODOT's pleading so we could hardly be hiding it. That time period still has four months to run and both parties substantive pleadings have already been placed before the Board. The Board does not have to render a decision in the near future to keep within the court's timetable or its own. Moreover, we are reasonably sure that the court would agree that a further brief postponement for negotiations would be well supported if the parties agreed they were close to a settlement as the period came to a close. It certainly would not be unprecedented for a court or Board proceeding to be held in abeyance if progress toward a settlement were being made. Usually, time periods such as the one in the court's order are established to insure that the parties will proceed diligently and will report on progress or the status of a matter within a reasonable period of time. They are not added to the order to establish an inflexible deadline for reaching a result or settlement or for securing a final decision in another forum. If we had wanted to delay the handling of the proceeding, we would not have filed our substantive reply, and would have asked for a postponement in our filing date until 20 days after the parties had advised the Board that they had reached an impasse in their settlement negotiations. Even that would have been reasonable and would not have resulted in a serious delay in the handling of this matter. It still would have permitted the Board to give the petition substantive review and to reach a decision within the Court's suggested timetable.

Contrary to Mr. Kahn's assertion about NSR's request being unprecedented, Board proceedings are often held in abeyance for reasonable periods of time for good cause, especially for possible settlement discussions. The Board has permitted 60 or 90 day extensions of time for settlement negotiations, or even for other good reasons, in a variety of past proceedings. As recently as October 7, 2003, in Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, the Board granted a request to hold a proceeding in abeyance for 90 days after several previous postponements in the schedule and extensions of time for pleadings had been granted. While all the parties agreed on the exact length of the request in that case, and ODOT is agreeable to a much briefer period of postponement in this case, it shows that holding proceedings in abeyance for somewhat longer, reasonable periods of time than two weeks after the final pleading is filed is not unprecedented. Other postponements or extensions of time for negotiations may be found in relatively recent rate cases and some other proceedings. Moreover, NSR acknowledged that the Board's grant of any lengthy

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postponement in rendering a decision in this proceeding almost certainly would depend on the parties' agreement and report that progress was being made in their negotiations.

Mr. Kahn apparently ignored our statement that we had recently re-evaluated the matter at issue in this proceeding based on a number of factors that we cited in the filing in order to conclude that a settlement should be proposed. We gave reasons for our request. This was a clear indication that we realized that the State proceeding has been pending for a period of time and that we have only recently determined that there was a possible basis upon which ODOT and NSR might reach a settlement. Even if we had given no reason to explain our effort to open settlement discussions, settlements are to be encouraged. Whether the parties appear to be at an impasse will become apparent in a reasonable period of time. While Mr. Kahn may think there is some advantage in questioning our honesty or motivations in the face of these obvious facts, it is difficult to see what it might be. We filed our reply, which we believe is persuasive. We did not ask for extra time to file any pleadings. We also did not ask for an indefinite postponement of the schedule for the Board's issuance of a decision. We certainly acknowledged that the Board would likely base any extended period of abeyance to permit negotiations based on the report of progress by the parties. Anyone who practices before the Board should know that a party could not expect the Board to delay the issuance of a decision for more than a relatively brief period of time to accommodate any unilateral request of a party, no matter how well justified, when that request did not have the other party's concurrence or was not overwhelmingly persuasive.

While Mr. Kahn is certainly entitled to file a reply to NSR's motion to hold the proceeding in abeyance by November 26, we fail to see how he can do much more than report whether the parties are making any progress toward a settlement or in light of ODOT's view of the situation at the time, whether ODOT opposes holding the proceeding in abeyance for any further period of time. We trust he will limit his reply to matters actually contained in NSR's motion. What he is not entitled to do, and which we assume he will not do, is file a reply to our substantive response to ODOT's petition for a declaratory order which was contained in our combined filing. That would be a reply to a reply, which Mr. Kahn is well aware is not permitted by the Board's rules. He has already filed ODOT's substantive case and is not entitled to a second opportunity to make or supplement that substantive case and argument in the guise of replying to our motion to hold the proceeding in abeyance. The fact that the motion is combined in a single document with our substantive reply would be a thin basis indeed for such a reply because the motion is in no way dependent on or related to the substantive reply. Thus, should Mr. Kahn file any pleading that addresses any part of NSR's filing other than the introduction on pages 1-2 and the motion to hold in abeyance on pages 4-5, NSR will file a motion to strike that pleading as an impermissible reply to a reply. While, in the alternative, we would reserve

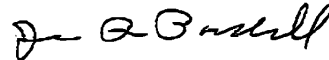
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the right ask for enough time to file a substantive answer to any additional facts or arguments he may present, the proper response would be for NSR to move to strike, and the most appropriate handling by the Board would be to strike the new matter. It is difficult to see how any fact exists that could not have been presented or how anything can be added to the petition presented and the reply that could not have already been filed. As Mr. Kahn states, the matter has been pending before the State Court for more than a year.

ODOT has filed its petition. NSR has filed its reply. The case can be decided on that basis if and when the Board is prepared and believes it appropriate to do so. However, in view of the Board's preference for the settlement of disputes, and NSR's good faith offer to re-evaluate its position and to attempt to reach a settlement within a reasonable period of time, we hope that the Board will not be required to spend the time and effort to issue a decision on the questions presented in ODOT's petition for declaratory order. For that reason, we asked the Board to defer issuance of a decision for a reasonable period of time to permit negotiations that might lead the parties to settle the matter in controversy.

We will send an original and 10 copies of this letter to the Board for filing tomorrow but are faxing this reply this evening so that the Board may promptly have our response to Mr. Kahn's letter. We are serving copies of this letter on Mr. Kahn and Mr. Stokes via facsimile.

Very truly yours,



James R. Paschall

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