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Print
Name: [illegible]

3 December 2003

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

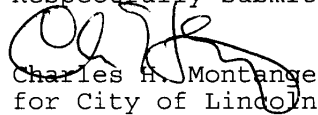
Re: Finance Docket No. 34425, City of Lincoln,
Petition for a Declaratory Order
Motion to Strike

Dear Mr. Williams:

Enclosed please find an original and copies of a motion to strike for filing in the above captioned proceeding.

I enclose an extra copy and a stamped self-addressed envelope. Please return the extra copy, after date-stamping, so I may verify receipt for my records.

Respectfully submitted,


Charles H. Montange
for City of Lincoln

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Office of Proceedings

DEC 4 2003

Part of
Public Record

Encls.

cc. Thomas McFarland, Esq. (for LLC) (w/encl.)

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket 34425

CITY OF LINCOLN

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Office of Proceedings

PETITION FOR A DECLARATORY ORDER

DEC 4 2003

Part of
Public Record

Motion to Strike,
and, in the Alternative,
Motion for Leave to Reply and Reply

I. Motion to Strike

This motion to strike, on behalf of petitioner City of Lincoln, is directed at (a) a letter dated November 25, 2003, from Thomas McFarland (counsel for Lincoln Lumber Company (LLC)) to Charles Montange (counsel for City of Lincoln), showing a copy to Vernon Williams, STB Secretary, and attachments, and (b) a letter from Thomas McFarland (LLC) to Vernon Williams (STB) dated December 1, 2003.

Pursuant to 49 C.F.R. § 1104.13(a), a party may file a reply or motion directed at any pleading within 20 days after the pleading is filed with this Board. Pursuant to 49 C.F.R. § 1104.13(c), replies to replies are not permitted.

City of Lincoln seeks a small portion of a five block rail corridor owned by Lincoln Lumber Company (LLC) in the City of Lincoln for use as a bicycle and pedestrian commuting trail, and for an underground storm sewer. LLC previously has refused any negotiations unless City of Lincoln agreed not to construct the proposed trail. LLC stated that it would assert a preemption

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defense pursuant to this Board's regulatory authority should Lincoln institute eminent domain proceedings under state law for either project.

In response to LLC's unreasonable position, City of Lincoln accordingly prepared and served a Petition for a Declaratory Order on November 5, 2003, upon all commercial businesses, including Lincoln Lumber Company (LLC) along the five block rail corridor in question. The substantive portion of the Petition sought a declaration from this Board sufficient to allow the City to employ eminent domain to secure a interests sufficient for the trail and the storm sewer from LLC.

As part of the City's Petition, the City requested that if this Board should institute a proceeding, that this Board employ modified procedures and establish a briefing schedule requiring LLC and other interested parties to file their replies by December 19, 2003, with a rebuttal by LLC due 21 days after the due date for replies.

LLC responded by Letter dated November 18, 2003. LLC appeared to withdraw its objections to the storm sewer in its entirety, and to the trail between 22d and 19th Streets. On the face of LLC's letter, the only remaining dispute concerns the location of the trail on the northernmost 20 feet of the rail corridor between 22d and 23d Streets, which is currently covered with piles of lumber and is not being, and to Lincoln's knowledge, never has been used for rail purposes.

Notwithstanding the apparent narrowing of the dispute, LLC

nonetheless claimed that the issue was of major import, and requested that this Board publish a Federal Register notice inviting national comment, and also issue an extensive briefing schedule.

City of Lincoln replied to LLC's proposal for a proceeding of national scope by Letter dated November 21, noting that LLC's own submission showed the contrary.

Since that time, LLC has tendered two additional letters to this Board. The first (dated November 25, 2003) was addressed to counsel for the City, with a copy listed as provided to Vernon Williams, STB's Secretary. In this letter, counsel for LLC erroneously claims, among other things, that City of Lincoln has failed to "compromise" on routing for the trail. So far that letter is not listed on this Board's website as a "filing." If this Board has not received the November 25 letter, or does not intend to treat it as filed, then this motion to strike the letter is moot.

The second letter, dated December 1, 2003, is listed at this Board's website as filed as of December 2, 2003. The second letter purports to contain further argument for delays in the briefing of this Petition for a Declaratory Order.

LLC's letters of November 25 (if filed) and December 1 clearly run afoul of this Board's bar to replies to replies set forth in 49 C.F.R. § 1104.13(c). The Letters should be stricken from the record. If LLC feels the letters or information in them is important, LLC can present the letters or

the information with its Reply, should this Board institute a proceeding. LLC should not be permitted to induce procedural chaos through a barrage of duplicative "reply" letters in what is otherwise a straightforward matter now apparently involving only a sliver of land along the extreme northern boundary of one block of a right of way.

II. Motion for Leave

Should this Board not strike LLC's Letters, City of Lincoln pursuant to 49 C.F.R. § 1117.1 and other applicable authority moves for leave to reply.

III. Reply

Should this Board grant leave to City of Lincoln to reply, City of Lincoln replies as follows:

1. City of Lincoln relies upon its Petition and sworn statements to date to demonstrate any requisite need for action by this Board to issue a determination adequate to override an assertion by LLC of federal preemption with respect to the trail and storm sewer project set forth in Lincoln's Petition. City of Lincoln continues to note that LLC has yet to provide any actual evidence of any rail need for the property in question, and by its letter of November 18, 2003, LLC appears to concede most of the relief for which the City has petitioned. LLC similarly has failed to demonstrate any reasonable basis for prolonging proceedings.

2. As to LLC's letter of November 25, which although copied to the STB board is not recorded on the STB website as

filed, this letter seems directed primarily to posture LLC as offering a "compromise" and to suggest that the City is refusing to "compromise" but should do so. This LLC Letter on its face references (but mischaracterizes) conversations between LLC's counsel and City's counsel in a conference which, at the request of LLC's counsel, was a confidential settlement conference, not to be employed as evidence of anything. LLC's astonishing breach of the confidentiality it itself sought is ample grounds to exclude the entire letter as related to settlement. In any event, LLC mischaracterizes what was said and who said it in the apparently ill-fated settlement conversation. City of Lincoln reserves the right to move to strike the letter on the foregoing grounds should it be deemed filed (the November 25 letter so far is not on the STB website and if the letter is not filed, this motion to strike as to it is moot), or should it be tendered with another LLC pleading for filing. City of Lincoln reserves the right to respond on the merits to any substantive issues raised in the letter in accordance with the briefing schedule adopted by the Board should this Board institute a proceeding.

3. LLC's Letter of December 1 seems to argue for more time because City of Lincoln has served LLC with a document request and a request for entry pursuant to this Board's discovery regulations. In its letter, LLC claims it is unfair for LLC to be subject to discovery if LLC does not have time for discovery against City of Lincoln. LLC does not show that it has any need

for discovery; indeed, LLC utterly fails to indicate what information City of Lincoln has (or might have) which if discovered would assist LLC. Since the basic issue is whether LLC has a bona fide rail need for the sliver of property remaining at issue in this case, it is hard to see how there could be any need by LLC for discovery against the City. The City already has shown it has no evidence that there is any rail need.

Assuming arguendo that the City has something discoverable that would benefit LLC, LLC nonetheless has had ample time to seek it. For one thing, City of Lincoln is a municipality subject to broad transparency requirements. See Neb. Rev. Stat. §84-712 (disclosure of public records). LLC could seek documents under Nebraska's public records statute, and has long been able to do so, wholly apart from this Board's discovery regulations. In any event, the City on November 5 served LLC's attorney and its president with copies of the Petition and has not received any informational requests at all from LLC to date.

If there is any evidence germane to this proceeding which is not on the table, it is under the control of LLC, not Lincoln. Thus while it is reasonable for Lincoln to seek discovery against LLC, it is not clear what purpose other than harassment would be served by an LLC request to Lincoln.

After ascertaining that LLC intended to oppose the City's Petition at least in part, the City prudently prepared and served LLC with a document request and request for entry for

survey and inspection that (a) correlates to the briefing schedule sought by the City and (b) is designed to equip the City to rebut claims by LLC. This does not equate to unfair treatment of LLC. LLC had ample notice of the briefing schedule sought by the City; rather than prepare its case (assuming it has one), LLC evidently has elected to procrastinate and to seek delays. But the delay LLC seeks is contrary to national rail transportation policy, which calls for "expeditious handling and resolution of all proceedings required or permitted to be brought under [the applicable statutes]." 49 U.S.C. § 10101(15).

If this Board decides not to institute a proceeding, then of course the City's discovery requests, like any requests which LLC files, will be moot.

Conclusion

Unless LLC retracts the concessions it made in its November 18, 2003, letter (i.e., LLC's concession that it would not object to the storm sewer or, between 19th and 22d Streets, the trail), this case is very straightforward. This proceeding effectively involves only whether the City may employ eminent domain to secure a 20 foot wide corridor on the extreme north side of one block of 100 foot wide railroad right of way, which property has not been used by LLC for any rail purpose, as demonstrated by verified statements and photographs supplied by the City. If LLC has a case to present to the contrary, LLC should already have been in command of the basic facts to prove

up that case. So far, LLC has provided no evidence rebutting the verified statements and documents submitted by the City.

City of Lincoln reaffirms its request that this Board expeditiously take the action necessary to allow the City to employ eminent domain to acquire the interests necessary from LLC in the rail corridor for the storm sewer and trail projects. At this point, it is unclear a proceeding is necessary as the unrebutted evidence shows no rail need for the property in question, let alone a need merits defeat of the City's need.

Respectfully submitted,


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fax: -3739
Counsel for City of Lincoln

Certificate of Service

I hereby certify that a copy of the foregoing Motion was served by ~~US Mail, postage pre-paid, first class or equivalent,~~ this 31 day of December, 2003, upon Federal Express, next day delivery.

Thomas McFarland, Esq.
208 South LaSalle St., Suite 1890
Chicago, IL 60604-1194

