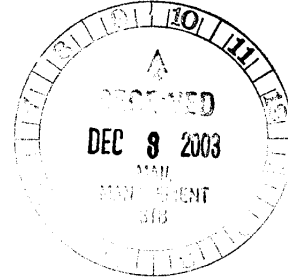


ORIGINAL

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

209554

THOMAS F. MCFARLAND



December 5, 2003

By UPS overnight mail
(Monday delivery)

ENTERED
Office of Proceedings

DEC 08 2003

Part of
Public Record

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34425, *City of Lincoln - Petition for Declaratory Order*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply in Opposition to Motion to Strike Filings Dated November 25, 2003 and December 1, 2003, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

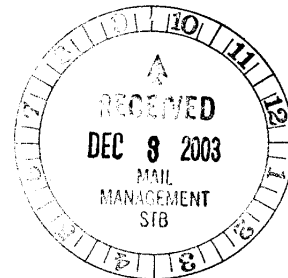
Tom McFarland

Thomas F. McFarland
Attorney for Lincoln Lumber Company

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF LINCOLN - PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34425



**REPLY IN OPPOSITION TO MOTION
TO STRIKE FILINGS DATED
NOVEMBER 25, 2003 AND DECEMBER 1, 2003**

LINCOLN LUMBER COMPANY
P.O. Box 30373
Station A
Lincoln, NE 68503

Replicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Replicant

DATE FILED: December 8, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF LINCOLN - PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34425

**REPLY IN OPPOSITION TO MOTION
TO STRIKE FILINGS DATED
NOVEMBER 25, 2003 AND DECEMBER 1, 2003**

Pursuant to 49 C.F.R. § 1104.13(a), LINCOLN LUMBER COMPANY (LLC), a Class III rail carrier, hereby replies in opposition to a Motion to Strike (Motion) filed by the City of Lincoln, Nebraska (the City) on December 4, 2003. The Motion is directed to filings by LLC dated November 25, 2003 and December 1, 2003 on the ground that they are impermissible replies to replies.

REPLY

As the City well knows, neither filing to which its Motion is directed constitutes a reply to a reply. Instead, the City is misusing Board procedure to comment in response to those filings.

LLC's November 25, 2003 filing is a letter from counsel for LLC to counsel for the City responding to five inquiries made in a letter from counsel for the City to counsel for LLC, dated November 20, 2003. The letter dated November 20, 2003 was not itself a reply to any pleading filed by LLC. In fact, the November 20 letter is an attorney's letter, not a Board pleading. Consequently, LLC's November 25 letter could not have been a reply to a reply because it was not a reply to a Board pleading. Attached to this Reply are copies of the November 20 and November 25 letters, which confirm the foregoing.

LLC's December 1, 2003 filing is a letter to the Board objecting to the City's issuance of discovery before the Board has decided whether or not to institute a proceeding in response to the City's Petition for Declaratory Order. The City's issuance of discovery was not itself a reply to any pleading filed by LLC. In fact, the City's discovery was not a Board pleading at all. Consequently, LLC's December 1 letter could not have been a reply to a reply because it was not a reply to a Board pleading.

LLC's November 25 and December 1 filings are pertinent. The Board should be aware of the significant extent to which LLC has compromised in an attempt to reach a private-sector solution, while the City refuses to budge an inch. The City's attempt to belittle the controversy is unavailing. The issue of whether a chunk of the operating right-of-way of a Board-regulated rail carrier can be taken by eminent domain is of widespread railroad significance whether the railroad right-of-way is one block or 100 miles long. LLC will have plenty to say on that issue when the Board establishes an orderly procedure for notice, discovery and the taking of evidence. The City's posturing is evident in chastising LLC for not having filed discovery or evidence to date at a time when a Board proceeding has yet to be instituted, let alone a procedural schedule adopted. It is apparent that it is the City, not LLC, that is disregarding the Board's Rules of Practice.

WHEREFORE, the Motions to Strike and for Leave to Reply should be denied, and the tendered Reply should be rejected.

Respectfully submitted,

LINCOLN LUMBER COMPANY
P.O. Box 30373
Station A
Lincoln, NE 68503

Replicant

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Replicant

DATE FILED: December 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document, Reply in Opposition To Motion to Strike Filings Dated November 25, 2003 and December 1, 2003, on Charles H. Montange, 426 NW 162nd Street, Seattle, WA 98177, by UPS overnight mail (Monday delivery).

Thomas F. McFarland
Thomas F. McFarland

CHARLES H. MONTANGE

ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739

20 November 2003

Thomas McFarland, Esq.
208 South LaSalle St., Suite 1890
Chicago, IL 60604-1112

Re: Finance Dkt. 34425, City of Lincoln --
Petition for Declaratory Order;
your letter of STB of November 18, 2003

Dear Tom:

City of Lincoln notes that Lincoln Lumber Company, per your letter to STB Secretary Williams of November 18, 2003, for the first time now states that it will agree to the underground storm sewer and to trail use on the north side of the right of way from 19th Street to 22d Street. LLC also for the first time states that it "is prepared to negotiate an agreement with the City for those uses without delay." We are attempting to determine if these statements are mainly posturing or if they have substantive effects on the scope of our Petition pending before STB.

The City needs a right of entry to complete survey work and other incidental inspections for the projects.

1. Does LLC by your letter grant right of entry for these purposes?

2. How and when does the City obtain right of entry if your letter is not to be construed as a right of entry?

If LLC is now prepared to negotiate on the storm sewer and trail between 19th and 22d, then:

3. Does the City have permission to negotiate directly with LLC's owner for the acquisitions?

4. If not, how are we to proceed? Do we communicate with you on proposals?

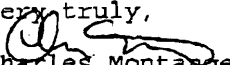
Heretofore LLC has refused to negotiate sale of interests for either the underground storm sewer or the trail at any location on the right of way. As a result, the City has encountered years of delay. Indeed, your letter to STB argues for delay in briefing on the ground that the City has sustained lengthy delays already. But the City is now under severe time constraints, and faces loss of funding for the improvements at issue, due largely to problems in dealing with your client. If

additional efforts to negotiate with LLC do not show reasonable progress or appear to be reaching a prompt conclusion, the City necessarily must reserve the right to institute eminent domain proceedings as to the interests necessary for the storm sewer project, and for the trail between 19th and 22d Street. Indeed, a proceeding may be necessary even if your client were now cooperative, because LLC has leased out essentially all the property from 19th to 22d Street, and LLC may get into a dispute with the tenant on an allocation of the purchase funds. Unless LLC waives all defenses of federal preemption in the event an eminent domain proceeding is instituted as to the storm sewer project and the trail between 19th and 22d Streets, the City must continue to pursue its Petition not only with regard to 22d to 23d but also with respect to the remaining portions of the right of way at issue.

5. Does LLC waive any and all defenses of federal preemption in the event the City institutes eminent domain proceedings for interests necessary for the underground storm sewer and, if the trail is on the north side of the right of way between 19th and 22d Streets, for the trail between 19th and 22d Streets?

We would appreciate a response to these five questions as soon as possible. Thanks.

Very truly,


Charles Montange
for City of Lincoln

cc. Joel Pedersen, Esq.
Assistant City Attorney,
City of Lincoln

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
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mcfarland@aol.com

THOMAS F. MCFARLAND

November 25, 2003

By fax to 206-546-3739

Charles H. Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177

Re: Finance Docket No. 34425, *City of Lincoln - Petition for Declaratory Order*

Dear Charles:

This responds to your letter to me of November 20 about the above proceeding.

Contrary to the statement in the first paragraph of your letter, Mr. Hamill has previously agreed to the underground storm sewer. He has contemporary notes of discussions with City representatives in which he agreed to the sewer. Neither was my letter of November 18 the first time that LLC agreed to a trail on the north edge of the ROW between 19th and 22nd Streets. I did so in a settlement offer to you by telephone on November 17.

When I make statements to the STB, it is not for posturing. The position that I stated to the STB is LLC's position in this matter.

In response to your questions:

- (1) The City is hereby granted a right of entry on the ROW between 19th and 22nd Streets for the purpose of survey work and other incidental inspections for a trail on the northern edge of the ROW between those streets. No right of entry is granted, nor necessary, as to the ROW between 22nd and 24th Streets. LLC has been advised that survey and inspection work for the storm sewer has been completed. A trail has not been agreed to between those streets.
- (2) Not applicable. See number 1.
- (3) The City is hereby given permission to negotiate directly with Mr. Hamill regarding compensation and other details for an underground storm sewer in the ROW and for a trail on the northern edge of the ROW between 19th and 22nd Streets.

THOMAS F. MCFARLAND

Charles H. Montange

November 25, 2003

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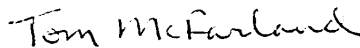
- (4) Not applicable. See number 3.
- (5) If negotiations for compensation and other details associated with the underground sewer and trail (19th- 22nd, northern edge) are not successful after a reasonable period of time, LLC would not assert a defense of federal preemption if the City were to institute eminent domain proceedings to acquire interests in the ROW for those projects.

You have acknowledged to me that LLC's agreement to a trail between 19th and 22nd Streets reflects significant movement toward compromise. So did LLC's agreement to a storm sewer. As reflected in Mr. Hamill's letter to City representatives dated February 12, 2002, copy attached, the sewer will prevent construction of buildings on the property, as earlier planned by LLC, and will result in substantial disruption of LLC's business. LLC's position shows good faith meaningful movement toward compromise.

What about the City? Where is the City's movement toward compromise? Your statement that a commuter bicycle trail must be a straight line is undermined by the City's own proposal to bypass the right-of-way between 23rd and 24th Streets, resulting in out-of-line movement. I know enough about trails to have observed numerous instances where trails bypass railroad right-of-way for short stretches. In other words, a straight-line trail may be desirable, but it is not essential. With LLC having agreed to a trail on three of the four blocks at issue, it is not reasonable for the City to refuse to compromise in regard to the one remaining block.

I am sending a copy of this letter to the Surface Transportation Board only because you filed a copy of your letter to me with the Board. However, as I emphasized in our first conversation in this matter, it is my strong conviction that these kinds of things are appropriately and more effectively handled between the parties in private.

Very truly yours,



Thomas F. McFarland
Attorney for Lincoln Lumber Company

TMcF:kl:wp11\977\ltrchm1

cc: Vernon A. Williams, Secretary, STB
Joel Pederson, Esq.
Don Hamill



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

February 12, 2002

Roger Figard
Mike Merwick
Jim Visger

Dennis Bartels
Larry Worth
Brian Will

Byron Blum
Larry McNeil
Ray Hill

Gentlemen:

Lincoln Lumber as a whole is very concerned about meeting the needs requested of our company by our City over the long-term future of 25 to 30 years. We want to take care of Lincoln's needs the best we can. We have invested our time and our money to a noticeable extent.

Our Lincoln Lumber world really started to turn when UP filed for the abandonment of its track from 18th to 24th St. Next, we have invested our time and money into trying to improve this ground and to make long term plans related to this ground. We have been making plans related to this ground for some time. I verbally told the planning dept., building and safety dept. and public works that our long-term plans were to move the RR tracks to the south side of the land and then build several buildings on this land to house building material. All three departments told me that a sewer easement would not let Lincoln Lumber construct buildings over the top of this storm sewer easement.

The storm sewer project will prevent the above and be very costly to Lincoln Lumber as we won't be able to use the ground as planned. Further, Lincoln Lumber is very concerned about disruption to our daily business and the cost of this interference and disruptions.

Lincoln Lumber also wants to be out front and tell all the departments about our future plans. We plan to apply to:

- Rezoning lot 4, Block 1 Vine Street Addn.; rezoning lots 5, 6 & 7 in Tresters Addn. from R-6 to I-1.
 - Vacate the 23rd St. right-of-way between the north edge of the RR right-of-way and the south edge of lot 4, Block 1 Vine Street Addn.
 - Vacate the alley between 23rd St. and 24th St. in Block 5 of Tresters Addn.
 - To rezone the R-6 zoning that is on railroad land south of A.K. Griffiths Addn.
- As a result of meetings with codes dept., public works, planning and transportation, Lincoln Lumber is becoming prepared to file in the near future.

I realize as of this date the storm sewer route has not been determined. Maybe the above facts will help this determination. The decision is not up to Lincoln Lumber, but if it was the decision would be to route it some other than over Lincoln Lumber railroad land.

First in Quality—First in Service



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

Page 2
February 12, 2002

Lincoln Lumber will want a total and complete release of liability for anything related to this storm sewer construction responsibility and any long-term responsibility. There is a lot of stuff buried in this RR ground and on the surface of this ground.

We plan to ask Mark Hunsaker to help Lincoln Lumber with this complicated overlapping situation as Mark will understand all of this far better than we understand this whole matter. We will do our best to be timely with all of this. We will continue to be upfront as we have expressed above.

The people in all the departments have been very nice, helpful, cooperative, reasonable and just plain decent in every way regarding the zoning, vacations, the storm sewer and just everything. We appreciate very much your being this way. If you have any questions, or if anything comes up that Lincoln Lumber should be informed of, please let us know.

Our copy is not signed, but the copy that went out was signed and sent to all people listed on the front. These are people in City offices that would be involved in this transaction.



First in Quality—First in Service