

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

Docket No. AB-290 (Sub-No. 210X)

**NORFOLK SOUTHERN RAILWAY COMPANY
– ABANDONMENT –
IN ATLANTA, FULTON COUNTY, GEORGIA
– NOTICE OF EXEMPTION –**

**REPLY OF THE ATLANTA DEVELOPMENT AUTHORITY AND
ATLANTA BELTLINE, INC. TO
GEORGIA DEPARTMENT OF TRANSPORTATION'S
PETITION FOR STAY**

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Dated: January 7, 2009

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Pursuant to 49 C.F.R. §1152.25(e)(7)(3), The Atlanta Development Authority (the **“Authority”**) and Atlanta BeltLine, Inc. (**“ABI”**) submit this Reply to the Petition for Stay filed in this proceeding by the Georgia Department of Transportation (**“GDOT”**) on January 2, 2009 (**“GDOT Petition”**).¹ GDOT has not satisfied the well-established requirements for a stay, and no public purpose will be served by granting it. Accordingly, the GDOT Petition should be denied.

The Authority is a public body corporate and politic of the State of Georgia and instrumentality of the City of Atlanta (the **“City”**), and is the current record owner of the property that is the subject of the abandonment in this proceeding (the **“Subject Line”** or the **“Property”**). The Authority acquired the Subject Line from NE Corridor Partners, LLC (**“NE Corridor”**). As Norfolk Southern Railway Company (**“NSR”**) stated in the Notice of Exemption it submitted in this proceeding, NE Corridor acquired the Subject Line from the

¹ The Authority and ABI are filing a Petition for Leave to Intervene in this proceeding concurrently with this Reply. This Reply is tendered to the Board in anticipation of a favorable ruling on that Petition.

seven (7) entities shown in the deed and reserved the easement attached to the GDOT Petition at Exhibit A. In its Reply to the GDOT Petition at pp. 4 – 6, NSR fully explains the nature of the rights conveyed to those 7 entities, describes the terms of the easement retained by NSR and explains the amendment to that easement that further limited the rights of the 7 entities with respect to the retained easement. The Authority and ABI will not burden the record by repeating NSR’s description of that transaction. NE Corridor and its transferee the Authority acquired the Property subject to that easement, as thus limited.

The Authority is the redevelopment agent for the BeltLine Tax Allocation District of the City, which is the primary local funding source for the BeltLine project. The Authority created ABI to be the implementation agent for the BeltLine project, a proposed comprehensive economic development project that combines transit, green space, trails and new commercial, residential and public facility development along a 22-mile ring of current or former rail segments encircling the City’s core. It is the largest such comprehensive redevelopment effort currently underway in the U.S.

There is no basis for issuing a stay of this proceeding. The City, by and through the Authority, has made an investment in and a commitment to the development of the BeltLine project, and this line segment is a key element of that project. GDOT’s speculative hypothesizing that it might someday need or want to use this corridor provides no basis to undermine the public uses already proposed and agreed upon for the corridor. Accordingly, the request for a stay should be denied.

ARGUMENT

I. GDOT cannot satisfy the criteria necessary to grant a Stay.

GDOT cannot demonstrate that (1) it is likely to prevail on the merits; (2) it will be irreparably harmed in the absence of a stay; (3) the issuance of a stay would not substantially

harm other parties; and (4) issuance of a stay would be in the public interest. F.D. 33877, *Illinois Central R. Co. -- Construction and Operation Exemption -- In East Baton Rouge Parish, LA, slip op.* (Service Date February 20, 2002), citing *Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). Absent such a showing, the Board must deny the GDOT Petition.

A. GDOT is unlikely to prevail on the merits.

GDOT is unlikely to prevail on the merits because Board approval of NSR's disposition of the Subject Line was not required and because the public use condition permits but does not require the negotiation of an agreement with a proposed public user. Where, as here, the railroad has already reached an agreement that encompasses public use there is no basis to hold the implementation of the abandonment in abeyance to allow further negotiation to occur.

1. No Board authorization was required in connection with NSR's disposal or NE Corridor's acquisition of the Subject Line.

In accordance with Board precedent, NSR was not required to seek the Board's permission for its disposal of real property over which no freight has traveled in at least nine years and on which NE Corridor acquired no common carrier obligation when it purchased the Subject Line. As a result the Authority could not and did not acquire any such obligation when it became the record owner of the underlying real estate. No approval was required for the transfer to NE Corridor or from NE Corridor to the Authority.

The Board examines "all the factors affecting a vendor's ability to continue to meet its common carrier obligation" and will not rely on isolated aspects of a transaction to determine whether any common carrier obligations are transferred thereby. *See, e.g., Los Angeles Co. Transp. Comm'n — Petition for Exemption — Acquisition from Union Pacific R. Co.*, STB

Finance Docket No. 32374 (Service Date July 23, 1996) (“*LACTC*”), *slip op.* at 2. In acquiring the Subject Line, NE Corridor did not acquire any rights or obligations that would have triggered the Board’s jurisdiction over the transaction. As a result, no regulatory approval was required for NE Corridor to acquire the Subject Line, or for NE Corridor to transfer its interest to the Authority.

The Board will exempt a transfer from Board regulation even in cases where the acquiring entity retains a degree of control over maintenance of the track and the ongoing freight operations of the carrier. *See, e.g., Maryland Transit Administration – Petition for Declaratory Order*, STB Finance Docket No. 34975 (Service Date October 5, 2007) (“*MTA*”), *slip op.* at 5-7. Here, NE Corridor acquired the real property, period. NSR retained an easement for all freight and passenger operations along with all the railroad facilities, equipment and appurtenances associated with the right-of-way. *See* GDOT Petition at Exhibit A, p. 2. NE Corridor acquired no right to determine the schedule of freight operations, no dispatching responsibility, no right or obligation to maintain the Subject Line, and no right to disturb the right-of-way or make any improvements to the Subject Line without NSR’s consent. *Id.* at Exhibit B – Reserved Railroad Easement. The *only* rights NE Corridor acquired were the rights to negotiate joint use of part of the right-of-way for rail passenger services, to approve NSR’s negotiation of other uses of the easement areas and to request that NSR institute abandonment or discontinuance proceedings before the Board. *Id.* Even that limited right to request NSR to seek abandonment, as NSR explains in its Reply to the GDOT Petition being filed today, has been further limited to a point where NSR has the right to determine that it wishes to file a Notice of Exemption for abandonment of the corridor if there has been no rail traffic on it for two or more years. Consequently, the rights NE Corridor obtained were even narrower than those acquired by the

Maryland Transit Administration in *MTA*, where the Board found that no approval of the agency's acquisition of a line of railroad was required.

Furthermore, in similar acquisitions where a public body is acquiring a line of railroad, the public entity will not acquire a common carrier obligation merely because it obtains the right to require the railroad to seek abandonment or discontinuance authority if there is no traffic on the line for an extended period of time. In *LACTC* and *MTA*, the Board determined that a condition requiring the operating railroad to request abandonment authority if the railroad conducted no freight rail operations for sixty consecutive months would have no effect on the freight railroad's ability to meet its common carrier obligations, and would therefore not constitute a degree of control over the railroad's operations sufficient to trigger a common carrier obligation in the real property owner. *LACTC*, *slip op.* at 3; *MTA*, *slip op.* at 7.

In contrast to *LACTC* and *MTA*, where freight rail operations were ongoing at the time of the transfer of the real property, the Subject Line has been out of service for nine (9) years. See NSR NOE at Exhibit 2, p. 14. There are no ongoing freight rail operations that would be affected by any action of the Authority, and the cessation of service that served as a condition precedent to a request that the railroad seek abandonment in *LACMTA* and *MTA* has already occurred. The facts here are therefore consistent with those in prior cases in which the Board has determined that its approval was not required to transfer a line of railroad to a public entity for public purposes, and that the acquiring entity took on no common carrier obligation by virtue of the transfer. Accordingly, GDOT's reliance on *Maine DOT – Acquisition and Operation Exemption – Maine Central R. Co.*, 8 I.C.C.2d 835 (1991) is misplaced to the extent that it disregards this Board's decisions in the intervening years, and the Board should therefore deny the GDOT Petition.

2. There is no alternative basis for Board jurisdiction because NE Corridor was not a common carrier at the time of the acquisition and neither it nor the Authority has held itself out to be a common carrier.

The only entity that has held itself out to be the common carrier on this corridor is NSR. Neither NE Corridor nor the Authority has ever made any representation to anyone at any time that it intends to provide common carrier service.

In addition to examining whether common carrier obligations were contractually transferred, the Board considers whether the acquirer of a line “holds itself out” to be a common carrier. *See, e.g., Dallas Area Rapid Transit—Acquisition Exemption—Certain Assets of Regional Rail Right of Way Co.*, STB Finance Docket No. 34346 (Service Date: Nov. 12, 2003). Nothing in the transaction documents transferred common carrier obligations from NSR to NE Corridor’s predecessors in interest or subsequently to NE Corridor, and NE Corridor accordingly could not transfer any such obligations to the Authority. Indeed, NSR reserved to itself all railroad facilities within the right-of-way along with an easement for the operation of all passenger and freight railroad purposes. *See* GDOT Petition at Exhibit A, p. 2. The respective obligations of the parties were matters of public record. Because neither NE Corridor nor the Authority has ever held itself out as a common carrier as to this line, and because neither entity acquired any of the attributes of common carrier status, the acquisition of the Subject Line did not fall within the jurisdiction of the Board at the time of the transaction.

3. GDOT can not demonstrate that NSR will be required to negotiate a public use agreement with respect to the corridor.

GDOT would have this Board grant a stay for the purpose of allowing it to negotiate a public use agreement with NSR. However, GDOT has not shown and can not show that NSR can be required to enter into such negotiations with GDOT. Even if the Board were to grant a stay, the Board is not authorized to force parties to negotiate a public use condition. *See CSX*

Transportation, Inc. – Abandonment Exemption – Between Athens and Little Hocking, In Athens and Washington Counties, OH, STB Docket No. AB-55 (Sub-No. 342X) (Service Date October 3, 1990), *slip op.* at *2. Where, as here, an agreement that contemplates public use of the corridor is already in place, GDOT can not succeed with respect to this aspect of its request.

B. GDOT will not be irreparably harmed if the stay is not granted.

GDOT will not be irreparably harmed if the stay is not granted because it cannot demonstrate an interest that will be harmed by the abandonment and exemption from public use conditions. Furthermore, a stay would not enhance any opportunity GDOT has to negotiate for shared use of the corridor. The Authority and ABI propose to use the corridor for public purposes and have already begun implementing BeltLine Redevelopment Plan. Although GDOT asserts that it has “a plan for passenger rail service in the Atlanta area [that] requires access to the [] Line” (GDOT Petition at 7), GDOT provides no detail about the status of any such plans and gives no indication that it is ready to implement its anticipated service. In any event, the use contemplated by GDOT does not require that the Property remain subject to this Board’s jurisdiction. GDOT’s opportunity to negotiate with the owner of the Subject Line, whoever that party may be, for shared use of the corridor will not be compromised by allowing NSR’s requested abandonment to go forward. Because a stay would not place GDOT in any better position than the one it is in currently, GDOT’s assertion that it will be irreparably harmed if a stay is not granted must fail.

C. Issuance of a stay will substantially harm other parties.

Issuance of a stay will substantially harm the public. NE Corridor and now the Authority have already acquired the real property associated with the Subject Line and have incurred the significant expenditure of public funds. Removal of the Subject Line from this Board’s

jurisdiction to permit the planning for the other proposed uses to go forward is essential to the development of public uses along the BeltLine. As NSR describes in the NSR Petition, the BeltLine project represents the culmination of many years of coordinated transportation, land use planning and zoning efforts by the City of Atlanta to establish the framework within which the BeltLine will develop.

Contrary to GDOT's assertion that "the BeltLine project proposed by NE Corridor is still in its nascent stages" (GDOT Petition at 8), the Authority, ABI and the City have already begun implementing the BeltLine Redevelopment Plan by enacting the revisions to the City's comprehensive development plan necessary to encourage development along the BeltLine and acquiring and developing parks along the proposed corridor. Significant public benefits have already begun to accrue as a result.² The planning for this project, the required environmental reviews for the construction of the transit and other public uses all depend upon confirming that the abandonment has been consummated. The issuance of a stay would therefore delay the development of a significant public use component of the BeltLine project.

The Board has denied requests for stays in abandonment proceedings where development intended to benefit the public would be delayed. *See CSX Transportation, Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub-No. 562X) (Service Date December 30, 1999), *slip op.* at *3. Because the imposition of a stay would cause substantial harm to the ongoing development of the BeltLine project, the Board should conform to its precedent and deny the stay GDOT requests.

² In her State of the City address on January 5, 2009, the Mayor of Atlanta identified the BeltLine as one of the cornerstones of Atlanta's ongoing long-term efforts to improve infrastructure and quality of life for its residents. Eric Stirgus, *Mayor Says Atlanta Poised for Greatness*, ATLANTA JOURNAL-CONSTITUTION, January 6, 2009, available at http://www.ajc.com/search/content/metro/atlanta/stories/2009/01/06/atlanta_mayor_speech.html.

D. Issuance of a stay will be contrary to the public interest.

The imposition of a stay would not be in the public interest because of the interruption a stay would cause to the current efforts to develop the BeltLine, as discussed above. Furthermore, although GDOT claims that Amtrak “is interested” in working with GDOT, NSR and NE Corridor to use the Subject Line for intercity rail service (GDOT Petition at 8), GDOT has not described what service is anticipated, the schedule for implementing such service, or what facilities Amtrak would require. Nor has Amtrak come forward to protect that putative interest described by GDOT. Accordingly, GDOT has not demonstrated that the issuance of a stay will advance any public interest that GDOT represents. As discussed above, the Board has no authority to require parties to negotiate a proposed public use, and the imposition of a stay would not give GDOT any more latitude to engage the Authority in voluntary negotiations than it has already. A stay would, however, be contrary to the public interest and should therefore be denied.

III. The Board should grant NSR’s request for a waiver from offer of financial assistance and public use conditions.

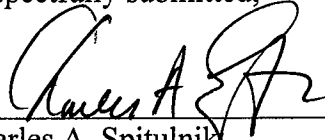
The NSR Petition and this Reply demonstrate that, contrary to GDOT’s assertion, there is no “significant jurisdictional issue.” GDOT Petition at 8. There was no need for Board oversight of NSR’s disposition, or NE Corridor’s or the Authority’s acquisition, of the Subject Line; no common carrier obligations have been transferred; and no basis exists on which the Board may grant a stay. Accordingly, the Board should grant the exemption from requirements governing offers of financial assistance and public use conditions, as NSR requests in its Petition.

CONCLUSION

WHEREFORE, in light of the foregoing, the Authority and ABI respectfully request that the Board deny the GDOT Petition.

Dated: January 7, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

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Certificate of Service

I hereby certify that on this 7th day of January, 2009, I caused to be served a copy of the foregoing REPLY OF THE ATLANTA DEVELOPMENT AUTHORITY AND ATLANTA BELTLINE, INC., TO GEORGIA DEPARTMENT OF TRANSPORTATION'S PETITION FOR STAY to be served by first class mail, postage prepaid, upon:

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