

Before the
SURFACE TRANSPORTATION BOARD

243985

STB Docket No. AB 1242

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**HARTWELL FIRST UNITED METHODIST CHURCH
- ADVERSE ABANDONMENT AND DISCONTINUANCE -
THE GREAT WALTON RAILROAD COMPANY, INC., IN HART COUNTY, GA¹**

**REPLY OF
HARTWELL FIRST UNITED METHODIST CHURCH
TO MOTION SEEKING LEAVE TO FILE SUR-REBUTTAL
AND MOTION TO STRIKE**

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Dated: July 20, 2017

¹ The Adverse Application originally listed Hartwell Railroad Company (“HRC”) as an additional responding railroad. However, the parties agree that HRC has no interest in the Hartwell Line. The Board granted HRC’s unopposed motion to be dismissed as a party and recaptioned the matter to remove HRC. *See* Board decision served June 2, 2017 at page 1, fn 2.

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On April 14, 2017, Hartwell First United Methodist Church (“Hartwell First” or “Applicant”) filed an application (the “Adverse Application”) seeking authority from the Board for the adverse abandonment and discontinuance of the approximately 0.25 miles of railroad tracks and associated right of way between Athens Street and the end of line at South Forest Avenue, in Hartwell, Hart County, Georgia (the “Line Segment”). The Line Segment is part of the line of railroad between Bowersville and Hartwell, Georgia (the “Hartwell Line”). On May 4, 2017, the Board issued a decision (the “May 4 Decision”) accepting the Adverse Application and setting a procedural schedule which provided for comments and protests (replies) by any interested parties, and provided for Hartwell First, as the applicant, to have the final word in reply (rebuttal) thereto. As permitted under the procedural schedule, The Great Walton Railroad Company, Inc. (“GWRC”) filed a Reply (the “GWRC Reply”) opposing the Adverse Application, and Hartwell First filed a rebuttal (the “Rebuttal”). GWRC has now filed a motion (the “Joint Motion”) seeking to allow it to file a sur-rebuttal, as well as seeking to strike certain

elements of the Rebuttal.² Hartwell First files this reply to the Joint Motion of GWRC and requests that the Board deny both the motion to strike and the motion to allow the filing of sur-rebuttal. If the Board were to allow GWRC to file its proposed sur-rebuttal, then the Board should, in keeping with the original procedural schedule and due process, and in order to provide for a more complete record, allow Hartwell First to have the last word in response thereto as set forth herein.

ARGUMENT

A. Reply to Motion Seeking Leave to File Sur-Rebuttal

By seeking permission of the Board to file sur-rebuttal, GWRC acknowledges that the procedural schedule does not allow for sur-rebuttal, and it can only be filed with the permission of the Board. *See* Joint Motion at 1-2. The Board's regulations which limit the available filings (*see, e.g.,* 49 CFR 1104.13(c)) are meant to control its docket, and to establish an end to filings so that a decision can be issued. *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine (“Waterloo Railway”)*, STB Docket No. AB-124 (Sub-No. 2) (served May 6, 2003), slip op. at 3 (“the pleading process ends with the reply, and replies to replies are not permitted”). While the Board will allow additional replies, and sur-replies if necessary, for “good cause” or when additional information is necessary to provide a complete factual record, *id.*, GWRC's proposed sur-rebuttal adds nothing new or relevant to the record, and accordingly should be rejected. *See Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, *et al* (served April 20, 2011), slip op. at 3 (record not incomplete

² The Joint Motion does not clearly distinguish between what it seeks to strike and what it seeks to have the Board consider as the sur-rebuttal; However, Hartwell First will try to distinguish between the two in this response.

based on representations / alleged misstatements in other party's reply; repetition of same arguments made in Petition rejected). *See also Waterloo Railway, supra.*

GWRC repeats the arguments from the GWRC Reply, without any additional evidence other than the summary statements of B.R. Anderson in his Supplemental Verified Statement, that GWRC never intended to abandon any of its tracks in Hartwell, that GWRC continued to use the Line Segment and the spur tracks / runaround through 2007, and that GWRC is using the Airline runaround track to hold cars awaiting repair instead of for serving Quality. In the Joint Motion, GWRC also reargues, without any additional evidence or documentary evidence that the service for Quality "requires" use of the Line Segment and runaround and the applicability of the Board's decisions in *Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, Ind.*, STB Docket No. AB 290 (Sub-No. 286) ("*St. Joseph*") (Joint Motion at 11 – 14), despite the clear evidence that GWRC has been providing service to Quality for many years without complaint without a runaround in Hartwell. GWRC also argues again that the Clinkscases industrial spur was constructed with a connection to the main line and "was used thereafter" as a runaround track despite the clear language in the Clinkscases Agreement (Adverse Application App. 2 / GWRC Ex. 6³) that the industrial spur was originally designed and built to reach the Clinkscases loading dock at the end of the property and did not connect to the main line, and despite the lack of evidence as to when or how the track was later changed to connect to the main line or when the railroad may have used the track together with the north spur as a runaround. All of these "facts" and arguments have been made before (and responded to by Hartwell First) and add nothing new to the record.

³ Some documents were produced by both parties. For the convenience of the Board, Hartwell First is providing both references separated by a slash.

Other “facts” that GWRC seeks to add to the record have little or no relevance to the issues before the Board. Mr. Anderson in his Supplemental Verified Statement asserts that the storage of cars on the GWRC main line near Bowersville is not long term storage, but rather is a series of shorter term storage. Setting aside that the storage is not directly relevant since it is not on the Line Segment for which abandonment is being sought, Mr. Anderson does not deny that there are a number of miles of storage cars that need to be moved in order to serve Quality (a significant part of GWRC’s cost of service). Most of the proposed sur-rebuttal (Joint Motion at 14-25, Supplemental Verified Statement of Joseph Dorsey, and all of the additional GWRC Exhibits 22-33) addresses the question of whether Hartwell First has title to the 10-foot strip of property where the north spur was located before it was removed by GWRC. This question was addressed in the Rebuttal, but only because the question was raised in the GWRC Reply. However, Hartwell First continues to maintain that title is the province of the State courts, and will be determined by the State court at an appropriate time and in an appropriate proceeding.⁴ The only title issue that is potentially relevant in this proceeding is that GWRC cannot demonstrate that it has any title to the disputed property, and thus has no right to build a new spur track and no ability to recreate a runaround adjacent to the Line Segment.

Since GWRC is merely seeking to repeat previous arguments and to add additional facts to the record that are not relevant to the Board’s decision, the Board should deny GWRC’s motion and should not accept the proposed sur-rebuttal into the record. If the Board were to accept GWRC’s proposed sur-rebuttal, then in the interest of due process, the Board should also accept Hartwell First’s response as set forth in Section C below.

⁴ There is currently an injunction against GWRC prohibiting construction of the spur track based on the State Court’s determination that there is a substantial likelihood that Hartwell First will prevail at trial. *See* Emergency Injunction Order, Adverse Application App. 15.

B. Reply to Motion to Strike

GWRC seeks to strike certain portions of the testimony of Joe Whittemore regarding his observations of the condition of the track, and his recital of impediments to GWRC's claims that restoration of service is or could be imminent. Joint Motion at 2-9. Hartwell First acknowledges that Mr. Whittemore is not a railroad engineer, and his testimony was not presented as expert testimony. He is qualified to report on what he observes and to introduce photographs in his or the church's files. The Board can give these observations the weight that they deem appropriate. The Board can decide whether the 2007 photographs submitted by Hartwell First (Whittemore Rebuttal Verified Statement, Attachment 7) show track that could be, or had been operated over by GWRC through 2007 as GWRC has claimed. The Board can determine from the photographs submitted by Hartwell First whether the switch stand to the north spur is in fact broken and has not been repaired (Whittemore Rebuttal Verified Statement, Attachment 6). The Board can determine whether the various photographs of the Line Segment right of way previously submitted by the parties (Adverse Application App. 10; GWRC Ex. 21) show original lightweight track and ties that are buried in the dirt or refurbished heavier track and ties that are ready for active railroad use.

The other impediments to use of the Line Segment reported by Mr. Whittemore do not require expert testimony, and there is no basis for striking his testimony. For example, he asserted that GWRC would need to file for permits from the Georgia Department of Transportation before a crossing of Webb Street could be reinstalled, and that no permit has yet been sought by GWRC. In his Supplemental Verified Statement, ¶6, Mr. Anderson does not dispute the requirements or that a permit has not yet been sought; rather he can only say that he does not expect there will be a problem getting the authority.

Mr. Whittemore observed that there are miles of storage cars at the Bowersville end of the line, and that there is a runaround track at Airline on which GWRC has cars that are preventing its use. While Mr. Anderson disputes the type of storage (long vs. short term), he does not deny that GWRC is using the main line track near Bowersville for car storage. Anderson Supplemental Verified Statement, ¶5. Similarly, he does not deny that there is a runaround track at Airline, rather he says only that GWRC has elected to place cars on the track while they are awaiting repair (without discussion of whether such cars need to be held on the runaround track for repair as opposed to on adjacent tracks that would keep the runaround available for use). *Id.*

There is also no basis for striking the supporting letters from neighboring property owners to the Board on which Mr. Whittemore was copied. There was evidently some difficulty by the neighbors getting the letters in the record because of service issues, and including them in the Whittemore Rebuttal Verified Statement allowed them to be properly served. As confirmed by those letters, there are no new customer opportunities in downtown Hartwell along the Line Segment. The letter from Glasco Properties (Whittemore Rebuttal Verified Statement Attachment 10 / also docketed separately by the Board) is particularly relevant to the proceeding as it is the successor to the owner of the property and industrial track subject to the Clinkscapes Agreement, and has the authority under the Agreement to terminate the Agreement on 60 days' notice, further jeopardizing the ability of GWRC to recreate a runaround track in Hartwell adjacent to the Line Segment.

GWRC also seeks to strike the Rebuttal testimony of Mr. Whittemore and Mr. Edmunds as it relates to discussions that they had with Mr. Anderson regarding possible abandonment of the Line Segment, and how those discussions related to the crossing license agreements between

Hartwell First and GWRC, and to the 99-year lease between GWRC and TORCH that gave TORCH full use of the right-of-way of the Line Segment for non-railroad purposes. Joint Motion at 9-11. It is not clear on what basis GWRC seeks to strike this testimony. GWRC refers to the testimony as hearsay, and also suggests that it is immaterial and irrelevant.

GWRC includes no discussion of hearsay generally, or to potentially relevant rules such as the Federal Rules of Evidence that might be looked to by the Board for guidance. That is likely, of course, because it is clear that the report of Mr. Anderson's statements would be considered as an exclusion from, or an exception to, hearsay. The reported statements by Mr. Anderson regarding the intentions of GWRC, whether it would work with Hartwell First to facilitate the church's development of its property, and whether GWRC would transfer its rights to Hartwell First in connection with a future abandonment, are statements made by an opposing party in his representative authorized capacity as the President and a controlling shareholder of GWRC. As such, the statements of Mr. Anderson as reported by Messrs. Edmunds and Whittemore would not be considered hearsay under Federal Rule of Evidence 801(d)(2). Moreover, even if the statements were considered hearsay, such statements would be admissible as an exception to hearsay under Federal Rule of Evidence 803(1) and (3) because the reported statements explain the basis for the ongoing discussions between Hartwell First and GWRC regarding the church's development, the entry by the parties into the crossing license agreements and the understanding of Hartwell First that when GWRC removed the north spur, there was no intention by GWRC to rebuild the north spur. Because the statements of Mr. Anderson explain the intentions of the parties, and contradict his statements to the contrary, they are material and relevant.

C. Reply to Sur-Rebuttal (if permitted)

1. Last railroad use of the Line Segment

GWRC has claimed and continues to claim that it continued to use the Line Segment and the spur tracks as a runaround through 2007, while Hartwell First has asserted that there has been no service over the Line Segment since 1996 when the last customers served by the Line Segment closed. Perhaps GWRC continued using the Line Segment for a short period thereafter, but Hartwell First believes that the 2007 photographs demonstrate that the Line Segment was in disrepair and unusable by that time. However, it does not really matter whether the last use was 20 years ago as Hartwell First contends, or 9 years ago as GWRC acknowledges, the north spur was removed in 2008 and there has been no railroad service over the Line Segment in many years. Since that time, the Line Segment has been unused and untouched (until Hartwell First gave notice that it planned to seek adverse abandonment). As noted in the recitals of the Torch Lease (Adverse Application App. 11 / GWRC Ex. 20) the right of way area was declared by the City of Hartwell to be a “slum area” that was “appropriate for an urban redevelopment project.”

2. Intent to stop using the Line Segment for rail service

As demonstrated in the Rebuttal and the Rebuttal Verified Statements of Mr. Whittemore and Mr. Edmunds, Mr. Anderson demonstrated through his words and actions that GWRC had no intention of using the Line Segment for any future rail service. Not only did he express this specifically to Mr. Whittemore and Mr. Edmunds, but GWRC also took actions consistent with that intent. In 2008, GWRC voluntarily removed the north spur to allow Hartwell First to grade and maintain the property next to its new circular driveway without any indication that the railroad would in the future seek to construct a new spur in its place. And then in 2015, GWRC entered into a 99-year lease with TORCH that gave TORCH the exclusive right to use the main

line right of way for development of a park and farmers market, and to purchase the right of way at the end of the term. GWRC did not reserve any rights under the TORCH lease to operate over the tracks.⁵

3. “Necessity” for the Line Segment

GWRC professes that there is a necessity for it to use the Line Segment in order to meet current and future service requirements. However, GWRC has only introduced evidence that it has a customer, Quality, that needs rail service. Hartwell First does not deny this. However, GWRC has not made the leap to showing that the Line Segment that is the subject of this proceeding is necessary to provide service to Quality. GWRC has been providing service to Quality since at least 2009 without using the Line Segment or a runaround, and, as testified to by Quality’s president in the federal court proceedings in Georgia, Quality has been very satisfied with the service GWRC has been providing. *See* Excerpts of Colehower testimony, Adverse Application at 11-12 and Appendix 8 (also reproduced in GWRC Ex. 17). There has been and is no current (or future) need to use the Line Segment in Hartwell (even if there were a runaround) for GWRC to continue to serve Quality. Not having the use of the tracks in downtown Hartwell will not increase the railroad’s costs of serving Quality; rather those costs will remain the same as they have been.⁶ Moreover, Hartwell First still believes that if GWRC wants to utilize a runaround to facilitate its service to Quality, it could do so by moving the cars currently sitting

⁵ Mr. Anderson in his Supplemental Verified Statement, ¶7, seems to disclaim any control over the right-of-way stating that Mr. Chapman should address any complaints that Mr. Chapman has about the storage of the caboose and old passenger car being stored on the tracks, to TORCH.

⁶ Additionally, GWRC will save the substantial costs that it would incur to construct and rehabilitate the Line Segment, the proposed new spur track and the Athens and Webb Street crossings, as well as the ongoing costs of maintenance of all of the above.

on the Airline runaround track to adjacent tracks while they await repairs, and clearing the track to be used as a runaround.

This situation is not like the situation in *St. Joseph* where the tracks in question would have had to be used if a customer on the subject line were to have requested service. In this proceeding, in contrast, no one claims that there is a potential customer on the Line Segment. As the letters from neighbors demonstrate, and as GWRC does not contradict, there are no prospective customers on the Line Segment. While GWRC can point to an actual rail customer (unlike the situation in *St. Joseph*), that customer is not located on the Line Segment, and service has been and can continue to be provided without use of the Line Segment. There is no necessity for the use of the Line Segment to serve Quality.

Additionally, it must be noted that GWRC argues that it needs a runaround to provide service to Quality. GWRC's premise fails because it has not demonstrated that it has rights to tracks that would comprise a runaround adjacent to the Line Segment. The north spur has been removed, and GWRC has not shown that it has any rights to the property on which it would seek to construct a new spur. Additionally, the spur track no longer crosses Webb Street, and GWRC has not obtained the right to install a crossing. And even if the spur were to be rebuilt, GWRC's rights to use the Clinkscapes industrial track are limited and can be terminated at any time on 60 days' notice. *See* Adverse Application App. 2 / GWRC Ex. 6; and the Glasco Properties letter. Since there is no runaround track, GWRC has no way of providing the service that it says it is going to provide, and that it claims is necessary.

4. Title issues

Much of the focus of the proposed sur-rebuttal and of GWRC's Reply is whether Hartwell First has title to the strip of property to the north of the railroad right of way, and to the

west of Webb Street, where the north spur was located. However, this is really a red herring as the church's title to the property is not relevant to the Board's determination of the issues in this proceeding, nor is it within the Board's jurisdiction to determine. GWRC acknowledges this in its proposed sur-rebuttal (Joint Motion at 14) before going on and on about the title to the strip of land in question.⁷

Even title to the Line Segment itself is not an issue in this proceeding (although it is undisputed that GWRC owns only a 20-foot easement where the Line Segment bisects the property of Hartwell First). Adverse abandonment would merely take away the shield of the Board's jurisdiction over the Line Segment, and leave adjacent landowners such as Hartwell First to their State law remedies in seeking to quiet title to the property. *See Stewartstown Railroad Company – Adverse Abandonment in York County, PA*, STB Docket No. AB 1071 (served November 14, 2012), slip op. at 4-5.

Hartwell First does not agree with the various analyses presented by Mr. Dorsey in his Supplemental Verified Statement based on the 12 additional deeds and contract attached to the Joint Motion, or the unsupported suggestion that GWRC's predecessor Southern Railway may have acquired ownership of the land on which the north spur was originally constructed.⁸ Hartwell First does agree with the one relevant finding reiterated by Mr. Dorsey: "I readily admit, however, that I have not been able to find a deed that would confirm the railroad's ownership." Dorsey Supplemental Verified Statement, ¶13. Since GWRC admits that its predecessor railroads never had any title to the property where the north spur was, neither does

⁷ Hartwell First only addressed the issue briefly in its Rebuttal in response to GWRC's claim in the GWRC Reply that Hartwell First must show title to north spur area (although Hartwell First did not agree with the premise.)

⁸ Mr. Dorsey has not presented any qualification as either a surveyor or title abstractor.

GWRC.⁹ Accordingly, GWRC has no right or ability to construct a new spur to connect with the Clinkscapes industrial track.

Moreover, GWRC has not demonstrated that it has an unrestricted permanent right to use the Clinkscapes industrial track located east of Webb Street. The Clinkscapes Agreement only covered the construction and use of a sidetrack alongside of the Clinkscapes property to its loading docks. *See* Rebuttal at 9-10. GWRC has presented no evidence indicating how or when the sidetrack was connected back to the main line or when it may have begun to be used as part of a runaround. GWRC's assertion that it happened shortly after the Clinkscapes Agreement was executed in 1919 (Joint Motion at 8) is not supported by the Agreement or any other documentation (or testimony based on personal knowledge). Additionally, GWRC does not explain how it would be able to use the tracks as part of a runaround if the Clinkscapes Agreement were terminated as permitted under the terms of the Agreement.

GWRC's argument that the presence of the north spur tracks for over a 100 years has not impeded Hartwell First from advancing its mission (Joint Motion at 9), is both factually incorrect and irrelevant. The church of course did not acquire the property under and adjacent to the north spur tracks until June, 2002. Whittemore Rebuttal Verified Statement, Attachment 1. Prior to that, and certainly when first constructed, the tracks did not interfere with use of the property because in fact the spur track was built to serve the owner of the property – Farmers Union Warehouse Company. And it does not matter how long the spur track was used with permission, the fact of the matter is that GWRC voluntarily removed the spur track and it does not have any right or authority to build a spur track in that location.

⁹ GWRC further acknowledged that it does not have any title to the disputed property where the north spur was located when it did not include the property in description of what has been leased to TORCH. *See* TORCH Lease, Exhibit A (Adverse Application App. 11 / GWRC Ex. 20).

5. Other impediments to use of the Line Segment

In addition to the lack of an existing runaround track, there are other impediments that demonstrate that GWRC would not immediately (if ever) be able to use the Line Segment for runaround purposes as GWRC suggests it needs to do.

In its proposed sur-rebuttal, GWRC acknowledges that it cannot install crossings (either on the main line or where the proposed spur track would connect to the Clinkscals industrial track) without the permission of Georgia Department of Transportation. Mr. Anderson can only say (without any confirmation from the Department) that he does not anticipate any opposition, but does not explain why the need to obtain this permission would not delay the reactivation of service that he claims is imminent. Anderson Supplemental Verified Statement, ¶6.

GWRC argues (Joint Motion at 3-4) that the Line Segment is in a condition that could immediately handle rail service. Hartwell First believes the photographs tell another story. *See* Adverse Application Attachment App. 10; GWRC Ex. 21. While there was some recent cosmetic clean up by GWRC, GWRC has certainly not installed new heavier rail and new ties as it was doing with its construction of a new spur.

And most importantly, GWRC has not explained how its proposed use of the Line Segment is consistent with the TORCH lease which gives TORCH the unrestricted right to use the right of way of the Line Segment, and does not reserve any operating rights to GWRC – for a period of 99 years. The Board should view this transfer as a *de facto* abandonment, or at least as evidence that GWRC did not think that it would ever need or use the Line Segment for future rail service.

6. Summary

The only “necessity” asserted by GWRC is for the use of the Line Segment to facilitate service to Quality, although it is clear that service has been and can continue to be provided to Quality without use of the Line Segment. Moreover, the only need and use proposed by GWRC would require use of both the Line Segment and spur and industrial tracks that together would comprise a runaround. But there is no such runaround track that currently exists, and GWRC has not demonstrated that it has or would have the right to construct a new spur or have use of the Clinkscales industrial spur into the future. Without the use of tracks as a runaround, GWRC has not demonstrated any need for the Line Segment to remain as part of the interstate rail system, and abandonment of the Line Segment is justified and in the public interest.

CONCLUSION

For the reasons set forth in the Hartwell First’s Adverse Application, its Rebuttal and this Reply to joint Motion, Hartwell First requests that the Board grant the relief requested in the Adverse Application.

Respectfully submitted,



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Dated: July 20, 2017

VERIFICATION

I, Joe M. Whittemore, verify under penalty of perjury that the foregoing Reply is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on July 20, 2017.



Joe M. Whittemore

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2017, I served a copy of the foregoing Reply to Motion Seeking Leave to File Sur-Rebuttal and Motion to Strike, on the following persons by the method indicated:

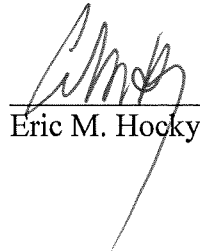
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