

Before the
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB 1242 (Sub-No. 1)

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

**REBUTTAL OF
HARTWELL FIRST UNITED METHODIST CHURCH
TO REQUEST OF THE GREAT WALTON RAILROAD COMPANY, INC.
TO FILE REPLY TO REPLY**

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On November 20, 2019, The Great Walton Railroad Company, Inc. (“GWRC”) filed a Petition (“Petition”) for Declaratory Order asking for a determination of the status of the former runaround track. Hartwell First United Methodist Church (“Hartwell First” or “Church”) filed a Reply (“Reply”) on December 10, 2019. On December 13, 2019, GWRC has, as it has done previously in the primary proceeding, filed a request to make yet another “reply to reply” not permitted under the Board’s rules. GWRC introduces no additional facts, and its arguments in the proposed reply to reply are either re-arguments of its Petition or arguments that could have been included in its Petition. The proposed reply to reply does nothing to create a more complete record, and is merely another attempt to muddy the waters before the Board by attacking Georgia state agency and court decisions on state law issues that are outside the Board’s jurisdiction. Accordingly, GWRC’s proposed reply to reply should be rejected; however, if the Board were to accept the proposed reply to reply, then the Board should also accept this further rebuttal of Hartwell First.

ARGUMENT

A. The proposed sur-rebuttal should be rejected.

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 reply to reply 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 based on representations / alleged misstatements in other party’s reply; repetition of same arguments made in Petition rejected). *See also Waterloo Railway, supra.* As GWRC has not introduced any additional facts or any new arguments, there is no reason to accept the proposed reply to reply.

B. If the Board accepts the proposed GWRC reply to reply, then it should also accept the following as a rebuttal thereto.

In the Petition, GWRC stated that its Petition was based on the record in the adverse abandonment proceeding. Petition, p. 1. GWRC in its proposed reply to reply, p. 4, now states that consideration of its Petition requires an expanded evidentiary record. However, as the Church argued in its Reply, p. 4, GWRC has provide no verified statements or verifications to support “an expanded evidentiary record,” and therefore, the Board should strike or ignore facts

that are outside the record in the primary proceeding. GWRC's proposed reply to reply does not address this deficiency, or propose any procedures for creating an expanded evidentiary record.

GWRC argues again that the Board's January 31, 2018 decision in the main proceeding (the "*January 2018 Decision*") found that the proposed runaround track is part of the "Line"; however, Hartwell First believes the language of the decision suggests just the opposite. While the Board repeats GWRC's arguments that the proposed runaround would be used together with the Line, consistent with the Church's Adverse Abandonment Application, the Board never uses the term "Line" to include the former north spur or the Clinkscales industrial siding.

In referring to the runaround track as if it still exists, GWRC ignores that it abandoned the former north spur track by removing the track and allowing the Church to landscape and control the area without objection for a period of over 8 years. GWRC gave no indication that it intended to use the former north spur or had any need for a runaround track. (As noted in the primary proceeding, GWRC also sought to give up its use of the Line by leasing it to TORCH.)

Because the track was removed by GWRC, GWRC in order to rebuild the track must now establish that it has title to the underlying property. GWRC's argument about whether the Church has title to the property is merely an attempt to distract the Board from the fact that GWRC has not been able to demonstrate that it has title that would allow it construct a new spur, or that it has the right to obtain such title under state condemnation law.¹ The title issues are clearly state law issues that are already in litigation, and as noted in the Reply, the Board should not be involved. *See Reply*, pp. 2-4.

¹ The Church believes that its title to the property will be confirmed in the State Court Litigation. Further, the Church believes that the Public Service Commission ("PSC") decision denying condemnation will continue to be upheld in the current appeal as it has been in the prior appeals at the PSC and in the state courts.

The *January 2018 Decision* did not in any way suggest that a new north spur and the runaround were required to be constructed; rather, the *January 2018 Decision* suggested only that GWRC's stated need or use of the Line was dependent on GWRC's ability to have a runaround. GWRC acknowledges, p.3, that the Board's decision does not require construction of a new north spur – it is up to GWRC to determine if it wants to construct a new north spur, and if so, how it will obtain title to the property necessary for such construction.² As noted in the required status reports, GWRC has rehabilitated the Line, but has not been able to construct a north spur (because of its lack of title) or to re-create a runaround. Thus, GWRC's "use" of the Line has been limited to the storage of three cars (sometimes flat cars; currently boxcars) directly behind the Church, despite the fact that there are four empty miles of track between Airline (where the rest of GWRC's car storage ends) and the Church.

GWRC's continued claims, pp. 4-5, that the movement of locomotives over the proposed runaround track is "an integral component of GWRC's linehaul operations" is misleading on two counts. First, no service has been provided over the Line (or over the former runaround) since 1998, so the former runaround has not been a component, integral or not, of GWRC's operations for over 20 years. Second, the repositioning of locomotives over the former runaround track does not make the movement part of the linehaul operations – GWRC does not and cannot claim that the former runaround track, or any newly constructed runaround track will be used for the through movement of any freight traffic. *See Reply*, pp. 5-6.

The Church does not disagree with the assertion by GWRC, p.5, that excepted tracks under 49 CFR 10906 are subject to the Board's jurisdiction; however, what GWRC ignores in

² It is GWRC that has said that a runaround is necessary for its proposed use of the Line, and of course, there is no runaround unless and until GWRC is able to construct a new north spur.

making this argument is that no Board approval is required for the removal of such excepted tracks. Accordingly, GWRC did not require any Board approval to remove and abandon the former north spur when it did so in 2008. Once that was done, the former north spur and the property underlying the spur were removed from the Board's jurisdiction. Thus, it was GWRC's own actions (not any actions of the Church) that severed the runaround track, and that, because GWRC has no title or interest in the underlying property, meant that GWRC could not build a new north spur.

GWRC, p.5, misunderstands the Church's argument that GWRC has not shown that the predecessor railroad had the right to create the runaround by connecting the Clinkscates industrial track to the railroad's main line. The Church does not dispute that the railroad would have the right to connect tracks to its main line by installing a switch in its own main line.³ What is missing is any agreement between the railroad and Clinkscates to amend the original Clinkscates industrial track agreement to shorten the Clinkscates's track and to rearrange the track to connect to the railroad's main line. Without such an agreement, the terms governing the rearrangement of Clinkscates's track are not known. GWRC, p.6, also misunderstands the Church's reference to the platform along the Clinkscates industrial track. The Church did not argue in its Reply that the platform would have prevented the use of that track as part of a runaround by the railroad; rather the Church argued that the presence of the platform meant that even after the track was connected to the main line, it was likely still used as an industrial track to provide service to the Clinkscates warehouse. *See Reply*, pp. 6-7.

³ The mere fact that a track is connected to a main line track does not make it a line of railroad as well. Spur and industrial tracks are generally connected to a main line, and that connection does not convert the tracks into lines of railroad.

The Church does not understand GWRC's reference to and reliance on *Texas & Pac. Ry. Co. v. Gulf, C. & S.F. Ry Co.*, 270 U.S. 266, 278 (1926). The decision is focused on the construction of track and whether the track was an "extension" requiring prior ICC approval, or an "industrial track" which would not require prior ICC approval. The decision does not speak at all about the right to connect track to a main line – but rather about the construction of approximately 7.5 miles of track and whether the track at issue required prior ICC approval. First, it should be noted that in this case the only "construction" described by GWRC is the connection of the Clinkscapes industrial track to the railroad's main line, and not the construction of a runaround track. At the time the connection was constructed, there was nothing additional to be constructed – the Clinkscapes industrial track and the north spur were already constructed (as excepted tracks) and in place. Further, the Supreme Court's decision suggests that if the track is not an extension that requires prior ICC authority, then the track is "industrial track." "Industrial track" was the term used by the Court as a summary term for Paragraph 22 of the then applicable Transportation Act of 1950 that provided in full:

The authority of the Commission (so) conferred *** shall not extend to the construction *** of spur, industrial, team, switching or side tracks, *** to be located wholly within one state. ***

Id. at 270. This language is of course almost identical to the current language of 49 USC §10906. Thus, GWRC's reliance on this decision suggests for the proposition that the connection to the runaround was not an "extension" that required ICC approval, supports the Church's argument that former runaround track is and always was a combination of spur and

industrial tracks,⁴ and the Board should so find. As such, GWRC had authority to remove and abandon the former north spur without prior Board authority.

Although not relevant to the determination of whether the runaround track is a spur or a line of railroad, GWRC continues to argue in its proposed reply to reply, pp. 2-3, about the “need” for a runaround track, citing the claims that it made to the Board. However, GWRC fails to inform the Board about the changes in the service to Quality Holdings, LLC (“Quality”) that have occurred since GWRC made its claims to the Board in the primary proceeding. GWRC originally argued that the need for use of the Line (and the runaround track), were driven by the increase (although modest) in traffic anticipated by Quality as attested to by Jonathan Talbot Colehower, the President of Quality. GWRC fails to update the Board on the facts that Mr. Colehower left Quality in July 2018, and that instead of an increase in traffic, Quality did not require or receive any rail service between June 2018 and December 2019. Although the Petition indicates that Quality plans to resume receiving rail service, p. 7, it does include any verification regarding the resumption of service or the volume that is anticipated. Additionally, GWRC does not mention that since the cars have been stored behind the Church, its locomotive no. 136 has been kept in Hartwell, east of the cars. In connection with the recent spotting of a car to Quality (and in connection with the last spotting of cars in June 2018 before service stopped), GWRC has been able effectively to use locomotive no. 136 to pull empty cars out of the Quality spur; this allows GWRC, using a second locomotive to pull loaded cars to Quality, push them into the spur, and then hook up to the empty cars and pull them back to Bowersville – eliminating the need (and alleged danger) of pushing the empty cars.

⁴ As such, GWRC had authority to remove and abandon the former north spur without prior Board authority.

CONCLUSION

For the foregoing reasons, the Board should deny the request of GWRC and reject the proposed reply to reply as it adds nothing of substance to the factual record, and merely repeats its prior arguments. Moreover, the proposed reply to reply continues to ignore the central issue GWRC raised in its own Petition, as well as Board precedent, about what constitutes a line of railroad and what constitutes excepted track. However, if the Board accepts the reply to reply, it should also accept the rebuttal of Hartwell First set forth herein.

Whether the Board accepts the additional pleadings or not, the Board should issue a decision based on all of the accepted pleadings (1) dismissing the GWRC Petition for Declaratory Order as a collateral attack on ongoing state court proceedings, or (2) finding that the former runaround track, and its component parts (the former north spur and the Clinkscates industrial track) were excepted track under 49 USC 10906, and were never a line of railroad.

Respectfully submitted,


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Dated: January 2, 2020

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 January 2, 2020.



Joe M. Whittemore

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2020, I served a copy of the foregoing

Rebuttal on the following person by the method indicated:

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