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3 February 2004

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

ENTERED
Office of Proceedings

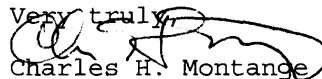
FEB - 4 2004

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Re: City of Lincoln -- Petition for a Declaratory
Order, F.D. 34425

Dear Mr. Williams:

Enclosed for filing please find an original and ten copies of City's Opposition to Lincoln Lumber Company's (LLC's) "motion for leave to file a limited surrebuttal statement." Thank you for your assistance.

Very truly,

Charles H. Montange
for City of Lincoln

Encls.
cc. Counsel (w/encls.)

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket 34425

ENTERED
Office of Proceedings,

FEB -4 2004

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CITY OF LINCOLN --
PETITION FOR A DECLARATORY ORDER

CITY OF LINCOLN'S
OPPOSITION TO
LINCOLN LUMBER COMPANY'S
"MOTION FOR LEAVE TO FILE
LIMITED SURREBUTTAL STATEMENT"



City of Lincoln (City) hereby opposes Lincoln Lumber Company's (LLC's) Motion for Leave to File Limited Surrebuttal Statement."

Preliminary statement. From the inception of this proceeding, City has stressed that it needs an authorization by this Board sufficient to permit the City to employ eminent domain by the end of the month of March for the purpose of acquiring (1) a five block long storm sewer easement and (2) a four block long trail corridor within LLC's 100 foot wide rail corridor. If the decision is delayed, the City will be unable to proceed with construction activities in a timely fashion. City (and affected adjacent property owners) will risk another year of stormwater damage, as well as financial penalties, including loss of funding.¹ The procedural schedule established due dates which are now long past. The procedural schedule did not provide for any "surrebuttals" by LLC. LLC's pleadings

¹ See City's Petition for a Declaratory Order at pp. 3-4.

unnecessarily disrupt, confuse and prolong the proceeding, are thus prejudicial to the City's interests in a timely decision. It is time to call a halt to LLC's replies to replies.²

Background. Under the applicable scheduling order, LLC's "reply" was due on December 29, 2003, and City of Lincoln's "rebuttal" was due on January 8, 2004. There was no provision in the scheduling order for "surrebuttals."

On January 23, LLC purported to file a "motion to for leave to file a limited surrebuttal," along with a proposed Surrebuttal. LLC's proposed "Limited Surrebuttal Statement" (and accompanying Verified Statement by Mr. Hamill) is not authorized under the applicable scheduling order. It is simply a reply to a reply. Under this Board's rules, replies to replies are not permitted. 49 C.F.R. § 1104.13(c). Accordingly, the Limited Surrebuttal and accompanying Hamill statement must be rejected for filing unless this Board grants leave to file the document pursuant to LLC's motion. LLC fails to state a grounds for granting leave to file the "Limited Surrebuttal." Leave to file should therefore be denied.

LLC motion. LLC's motion seeking leave alleges only one ground on which STB may grant leave for LLC to file the "limited surrebuttal." That ground is allegedly that City of Lincoln

² LLC's proposed "Limited Surrebuttal" is not the only filing by LLC outside the scheduling order. LLC also filed an errata to its Reply, a purported clarification of its Reply, and a batch of documents without explanation other than LLC claimed to have produced them to the City. City has already filed a pleading stating its position on these three post-reply filings by LLC.

states it would accept a condition on approval of its petition which would require that the Husker Link Trail be located in the northernmost 20 feet of the railroad right of way. LLC claims it has not previously had an opportunity to respond to that position. This claim is specious.

LLC's motion should be denied. City's Petition for a Declaratory Order specified the northernmost 20 feet of the right of way for the trail between 22d and 23d Streets. Pet. for Dec. Order at 14 and Appendix A thereto (maps). City otherwise proposed to locate the trail on top of existing sidewalks and roadways from 22d Street to 19th Street. See Pet. for Dec. Order at 15 and App. A (maps). Indeed, from 19th to 21st Streets, City proposed to locate the trail (as shown in Pet., App. A, maps) on top of the sewer easement; the City believed this location would be desirable to LLC for the obvious reason that it would allow unrestricted use of more space for buildings, which City understood LLC to wish to construct on the northern side of the right of way. However, on November 18, 2003, LLC filed a letter with this Board saying it would not oppose a trail located on the northern 20 feet of the corridor from 19th to 22d Street. A copy of that letter is attached as Appendix I, and is also attached to Appendix II (Verified Statement of Joel Pedersen). City was concerned that LLC was merely "posturing" and was not sincere in agreeing to a trail on the northern 20 feet of the corridor. City accordingly inquired of LLC's counsel whether it could rely on the November 18

letter. As Mr. Pedersen attests in his Verified Statement at ¶1 set forth in Appendix II, LLC confirmed that it meant what it said. City accordingly agreed to locate the trail on the northern 20 feet. City's agreement to confine the trail to the northern 20 feet was actually manifest in a letter to STB dated November 21 (at p.1 & n.1).³ LLC can hardly claim that it should have leave to reply to City's statement indicating it would locate the trail in the northern 20 feet of the right of way from 19th to 22d Street (City had already so provided for 22d Street to 23d Street) when LLC invited that location on November 18, and City agreed at that time. In short, LLC had five weeks prior notice of City's consent to locate in the northern 20 feet as requested by LLC before LLC made its December 29 filing. Pedersen V.S. ¶1 (Appendix II).

In its Reply filed December 29, LLC (after acknowledging its November 18 letter) flip-flopped, claiming it now again opposed any trail. LLC Reply at 3. In City's January 8 Rebuttal (pp. 3 & 17-18), City did not flip-flop. City simply acknowledged that it would do as it told LLC it would do in order to accommodate LLC: namely, locate the trail on the northern 20 feet of the right of way. In particular, City indicated that it would accept a condition confining the trail

³ In that letter, City stated that the only "remaining issue is whether this Board should lift federal jurisdiction to permit the use of eminent domain on the northernmost 20 feet of the railroad corridor in question between 22d and 23d Streets in Lincoln." Subsequent correspondence between counsel consistently represented that the City agreed to a trail on the northernmost 20 feet of the right of way.

to a corridor on the northernmost 20 feet in order to narrow issues. City Rebuttal at 17-18. LLC is simply engaged in rampant bootstrapping, seeking to turn City's efforts to compose its differences with LLC into opportunities for LLC to file further pleadings, and indeed further pleadings attacking the very things that LLC represented to this Board and to the City that LLC would not contest. LLC's motion should be denied as totally without foundation or merit, as prejudicial, and as disruptive. As a corollary, LLC's proposed Surrebuttal and the accompanying Hamill Verified Statement should be deleted from the record.

The motion is based on misleading, inconsistent, and incorrect claims and assertions. The motion for leave to file should be denied for another reason. The "new" piece of information which LLC alleges is the City's willingness to locate the trail in the northern 20 feet of the right of way between 19th and 22d Streets. But the gravamen of the "Limited Surrebuttal Statement" and especially the accompanying Hamill Verified Statement is not directed at matters between 19th and 22d Streets. Instead, the material which LLC seeks leave to file is devoted almost entirely to replying to City's January 8 Rebuttal concerning the trail location between 22d and 23d Streets. There the City has consistently proposed to employ the northern 20 feet. See Pet. Dec. Order at p. 14 and Appendix A (maps). Mr. Pedersen for the City of Lincoln has carefully examined the Hamill Surrebuttal Verified Statement and

specifically determined that the chief "obstructions" on which Mr. Hamill relies involved the 22d to 23d Street portion of the corridor. See Pedersen V.S. ¶ 2 (Appendix II). This being the case, the alleged "Limited Surrebuttal" is nothing more than a bright and shining reply to a reply.

Much of Mr. Hamill's "Surrebuttal Verified Statement" is difficult to understand, in that it is unclear on the face of Mr. Hamill's remarks where the physical obstructions are located with which he takes umbrage. This contributes to the misleading and contradictory character of the filing. For example, LLC (Hamill) claims that a trail cannot be located on the northernmost 20 feet because of the proximity of an LLC storage shed located between the mainline and the northern perimeter. The shed is between 22d and 23d Streets (see Pedersen V.S. at ¶ 2 and diagram, Appendix II), so LLC lacks any justification for this argument at this time; to the contrary, the whole argument presented by Mr. Hamill is just an effort to reply to a reply. In any event, it is misleading and wrong. City believes enough space exists for its trail between LLC's shed and the northern perimeter, but if not, City would either move the shed or narrow the trail if 20 feet is not available. Pedersen V.S. ¶ 2 & 2(a) (Appendix II). The real point here is that Mr. Hamill is implicitly admitting what City urged before (see City Rebuttal, Appendix A (Schuchmann V.S. at ¶ 10): that LLC has "obstructed" the right of way for rail use with its shed and lumber piles far more than the right of way will be obstructed by the more

distant trail.

LLC (Hamill) also claims a brick building intrudes eight feet into the right of way. The only possible candidate building is a former Textron/Cushman building (located on the east side of 22d Street). Again, this is within the 22d to 23d Street portion of the right of way, where Lincoln all along has proposed use of the northern 20 feet (Pet. Dec. Order at p.14 and App. A (maps), and is thus not a new issue, which makes LLC's argument on this score again a raw reply to a reply. But as shown in Lincoln's various maps and survey documents (Pet. for Dec. Order Appendix A; Lincoln's Rebuttal, Appendix D, maps), the right of way is kinked at the location of the building, and City all along has proposed to deviate around it. See Pedersen V.S. ¶2 & 2(b). Mr. Hamill's claims are misleading, wrong, and belied by the evidence.

To the extent LLC claims or implies some obstruction in the northern 20 feet of the right of way between 19th and 22d Streets, Mr. Pedersen confirms that there are no meaningful obstructions. Appendix II ¶ 2. This is further confirmed in a letter (last ¶) from Lincoln's surveyor to Mr. Pedersen (Appendix III).⁴

⁴ LLC (Hamill) also argues (in yet another reply to a reply in connection with 22d to 23d Street) that a trail on the north 20 feet will cut off access to doors, evidently in reference to this building or other former Textron/Cushman buildings. But the new owner of the buildings does not use the doors and has no right of access because it did not pick up the Textron lease to the rail corridor. City will work on the owner to accommodate access if the owner requests. Pedersen V.S. ¶ 2(b) (Appendix II).

Mr. Hamill claims that the trail will interfere with use of an alleged 400 foot spur. This is evidently a reference to a long unused and abandoned spur, portions of which are removed and paved over, located between the 22d and 23d Streets. The switch for the spur is gone. See Pedersen V.S. ¶ 4 (Appendix II), and attached verified Schuchmann letter ¶4 (hereinafter "Schuchmann letter"). Since the fragment of track lies between 22d and 23d, Mr. Hamill and LLC already have had their opportunity to discuss it; what they now attempt is an unjustified reply to a reply. The fragment of track which remains (itself partly paved over) is shown in the survey attached to Appendix D in the City's January 8 Rebuttal. City's outside expert (Mr. Schuchmann) has already explained that LLC has an ample existing spur and track to the south for all projected uses, and has failed to provide a justification for additional trackage. City's Jan. 8 Rebuttal, Schuchmann V.S. ¶¶ 9-11. It is telling that Mr. Hamill in his Surrebuttal does not contest Mr. Schuchmann's conclusion that LLC has ample capacity already for all the "growth" LLC projects.⁵ The

⁵ See City Jan. 8 Rebuttal, App. A, Schuchmann V.S. ¶¶ 11 & 18. LLC/Hamill's "surrebuttal" rhetoric about a "second terminal" merits no credit for a host of reasons outlined by Mr. Schuchmann, including but not limited to (a) the existence of a long term lease for the property to Textron/Cushman; (b) the proximity of terminal facilities at OL&B, the shortline that provides service to LLC; and (c) LLC's prior representations to the City as manifest in LLC's Reply that it was going to put storage buildings on the north side of the right of way and move track south. E.g., Schuchmann letter ¶ 4 (in Appendix II).

fragment of unused spur at issue here is thus irrelevant.⁶ Mr. Schuchmann has confirmed that nothing in Mr. Hamill's proposed Surrebuttal alters his earlier conclusion that LLC has ample existing track for all its projected uses. Schuchmann Letter ¶4 (in App. II). Mr. Hamill's other replies to replies are likewise without merit for the reasons stated by City's expert.

The other principle thrust of LLC's Surrebuttal is as a vehicle for Mr. Hamill to reply to City's January 8 Rebuttal concerning LLC's claimed need for the northernmost twenty feet of the right of way between 22d and 23d Streets to unload I-joists from centerbeam cars. Mr. Hamill's reply in this connection is belied by his simultaneous representation that LLC's own structures lie between the proposed trail location and the track (i.e., are more of an obstruction to LLC's I-joist unloading than the trail could ever be). In its Rebuttal, City observed that LLC receives at most only one or so partial carloads of I-joists in centerbeam cars per year -- a tiny fraction of LLC's business. LLC, even in its proposed surrebuttal, does not dispute this. See Schuchmann letter ¶ 2 (in App. II). Similarly, on Rebuttal, City's outside rail operation expert (Mr. Schuchmann) stated that there are "many ways to conduct loading and unloading." City's Jan. 8 Rebuttal, App. A, Schuchmann V.S. at ¶5. LLC's Mr. Hamill on surrebuttal does not dispute that expert conclusion either. Instead, Mr.

⁶ It is not even clear it belongs to LLC; it may belong to Textron.

Hamill only contests a couple specific ways suggested by Mr. Schuchmann to unload the partial carload of I-joists which LLC receives per year.⁷ Mr. Hamill misses the point. LLC's own uses of the corridor, and LLC's own representations of what it wishes to do with the corridor, interfere with the unloading method for I-joists upon which Mr. Hamill relies far more than Lincoln's proposed trail corridor would ever do. See Schuchmann letter ¶ 2 (in App. II). In any event, there remain easy solutions. For example, LLC can unload I-joists using Mr. Hamill's method between 23d Street and 24th Street. City does not propose a trail there and LLC controls land on both sides of the rail corridor. See Schuchmann letter ¶3 (in App. II). In short, LLC can unload its I-joists there even using the most constrained method of unloading that Mr. Hamill represents in his surrebuttal.

Mr. Schuchmann confirms that

"in my expert opinion based upon my site inspection and review of the pleadings, statements and relevant documents to date, LLC has not demonstrated a rail need for the northernmost 20 feet of rail line between 19th and 22d Streets."

Schuchmann letter ¶ 6 (in App. II).

Mr. Hamill makes further general replies to replies in his "Surrebuttal Verified Statement" concerning safety or aesthetic issues, alternatives and so on. None of these has merit. Mr. Hamill also requests the City "to show some concern for LLC

⁷ See Hamill Surrebuttal Verified Statement at hand-numbered pages P-1 to P-2.

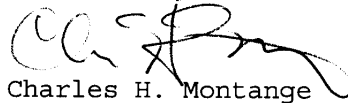
employees and customers." City has. Indeed, as Mr. Pedersen indicates in his Verified Statement attached as Appendix II, City in good faith has attempted to be responsive to Mr. Hamill's sundry claims and rationales. Unfortunately, Mr. Hamill meets the City's good faith efforts to locate the trail where LLC stated it assented to the trail not with dialogue and progress, but with criticism, further controversy, and efforts to create confusion on the part of LLC.

City has run out of time. City needs to move forward with two key public projects, a storm sewer and a trail link. City's outside rail operations expert has concluded that neither of the two proposed projects conflicts with service of the rail needs of LLC, now or as projected into the future by LLC. Accord Schuchmann Letter ¶6 (in App. II). Besides not interfering with rail service or needs, there is no evidence that the storm sewer or the trail will have any adverse impact on LLC, its employees or its customers. To the contrary, both projects will provide multiple benefits for all.

Conclusion

For the reasons stated, LLC's motion for leave to file a surrebuttal should be denied. The proposed surrebuttal is an impermissible reply to a reply. LLC's justification for allowing it is clearly bootstrapping and contrived. Moreover, the information which LLC seeks to convey not only is misleading at best and wrong at worst, but also conflicts with LLC's prior representations.

Respectfully submitted,



Charles H. Montange
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fax: -3739
Counsel for City of Lincoln

App. I -- LLC Nov. 18 letter

App. II -- Joel Pedersen Verified Statement with attachments
(diagram showing LLC shed, Schuchmann letter,
LLC Nov. 18 letter)

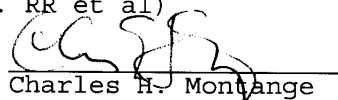
App. III -- Letter, Thomson (surveyor) to Pedersen (City),
2 Feb. 2004

Certificate of Service

I hereby certify that copies of the foregoing Opposition were this 3rd day of February 2004, upon the following representatives of parties or commenters by U.S. Mail, postage pre-paid, first class or equivalent (and by fax to counsel for LLC):

Thomas McFarland, Esq.
208 S. LaSalle St., Suite 1890
Chicago, IL 61604 (for LLC)

Daniel LaKemper, Esq.
P.O. Box 185
Morton, IL 61550 (for Ark-Okla. RR et al)


Charles H. Montange

Appendix I

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ORIGINAL

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THOMAS F. MCFARLAND

November 18, 2003



By UPS overnight mail

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

ENTERED
Office of Proceedings

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

Dear Mr. Williams:

This refers to a Petition for Declaratory Order filed by the City of Lincoln, Nebraska (the City) in the above proceeding on November 6, 2003.

The undersigned represents the owner of the railroad right-of-way in the above proceeding -- Lincoln Lumber Company (LLC). LLC is a Class III rail common carrier. It acquired the rail line pursuant to an offer of financial assistance (OFA) in 1998.

LLC hereby advises the Board and the City that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way.^{1/} Nor does LLC oppose trail use of the right-of-way between 22nd Street and 19th Street, provided that the trail occupy the northern edge of the right-of-way between those points.^{2/} LLC is prepared to negotiate an agreement with the City for those uses without delay.

However, LLC is strenuously opposed to trail use of its operating right-of-way between 22nd Street and 23rd Street, where the full width of the right-of-way is used and required for rail operations, to wit: unloading railroad cars and staging unloaded freight for further movement into shipper facilities, and on which LLC intends to construct additional railroad facilities, to wit: an

^{1/} An underground storm sewer would not be intrusive, nor adversely affect efficient rail operations or safety.

^{2/} LLC takes this position in light of the current extensive non-rail use of this segment of the right-of-way. LLC does not concede that the City's position is meritorious as to this segment.

THOMAS F. MCFARLAND

Vernon A. Williams

November 18, 2003

Page 2

additional railroad spur track on the north side of the right-of-way for holding additional freight cars for the provision of more efficient and economical rail service to the lumber company.³ LLC cannot agree to a nonrail use on the surface of its operating right-of-way where active shipper operations are conducted.

In behalf of LLC, the Board is hereby respectfully requested to publish notice of the filing of the Petition for Declaratory Order in the Federal Register, and to provide an opportunity for filing of public comments on the remaining issue involving trail use of the operating railroad right-of-way between 22nd and 23rd Streets. LLC submits that the requested procedure is warranted because that is an issue of general transportation importance on which public notice and opportunity for comment are warranted. It is likely that many rail carriers, municipalities and other entities have a legitimate interest in the issue of whether a municipality's use of State condemnation law to involuntarily acquire 20 percent of the width of a rail carrier's active operating right-of-way is federally preempted by virtue of 49 U.S.C. § 10501(b). It is submitted that the Board would be likely to benefit from public comments on that issue of widespread railroad importance.

The Board should not be constrained by the procedural schedule proposed by the City in this important matter. All parties -- not just the City and LLC -- should have ample time to prepare and file comments, and the Board should have ample time to prepare and issue a reasoned decision. Particularly in view of the impending Holiday Season in which offices are closed for extended periods (e.g., the shortened Thanksgiving week), the filing dates suggested by the City should be lengthened. LLC suggests the following:

- | | | |
|--------------------------------|---|---|
| <u>Replies to the Petition</u> | - | 60 days after <u>Federal Register</u> publication |
| <u>The City's Rebuttal</u> | - | 20 days after the filing of replies |
| <u>Board decision</u> | - | as deemed appropriate by the Board |

A procedural schedule somewhat lengthier than that proposed by the City would not be prejudicial to the City's interests. The City has not shown that it would lose funding for a trail if the procedural schedule that it has proposed is not adopted. The City has stated much more vaguely that it might be "in jeopardy" of losing funds (Petition, Appdx. D at 5). There should be no sympathy for the City's request for expedition inasmuch as the City did not file the Petition until more than two years after trail funding was committed (*id.* at 4), and 9 months after the City knew that LLC was not agreeable to a trail (Petition, Appdx. E at 2, ¶7). Moreover, it has been

³ LLC would also be opposed to trail use within the operating right-of-way between 23rd and 24th Streets, but it is understood that the City proposes that the trail bypass the railroad right-of-way between those points.

THOMAS F. MCFARLAND

Vernon A. Williams

November 18, 2003

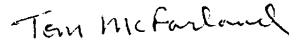
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more than 6 years since LLC acquired the right-of-way for continued rail use under offer-of-financial-assistance (OFA) provisions that were specifically found to take precedence over the City's request for railbanking and trail use (*See Union Pacific R. Co. -- Aband. Exempt. -- in Lancaster County, NE*, STB Docket No. AB-33 [Sub-No. 112X], decision served Jan. 16, 1998).⁴ Now the City wants to apply State condemnation law to undermine that Board-sanctioned rail operation, and wants the Board to aid in its effort by adopting accelerated procedure. The Board should not accede to that unfair request.

An additional reason for adoption of the procedural schedule hereby suggested by LLC is that it would allow for essential discovery, whereas the accelerated schedule suggested by the City would not. The City put together its lengthy Petition at a leisurely pace, but it wants opponents to respond to the Petition on an accelerated basis without an opportunity for thorough investigation of support for the City's position. That procedure would not be consistent with fair process.

Ten copies accompany the original of this filing. Counsel for the City is being served by overnight mail.

Very truly yours,



Thomas F. McFarland
Attorney for Lincoln Lumber Company

TMcF:kl:enc:wp11/9771lrstb1

cc: Charles H. Montange, by UPS overnight mail
Mr. Don Hamill

⁴ The undersigned attorney for LLC takes very strong exception to the blatantly false statement by the City's Assistant City Attorney that the undersigned stated to him that LLC's interest in pursuing the OFA involved a deliberate attempt to block trail use in the corridor regardless of impact on business (Petition, Appdx. E at 2, ¶8). On the contrary, the undersigned has personal knowledge that LLC's acquisition of the rail line was in good faith for continuation of rail service. LLC was a significant rail user in good faith before that acquisition, and has been even a more significant rail user thereafter.

Appendix II

City of Lincoln (NE))
Petition for a Declaratory Order)
Finance Dkt. 34425)

I, Joel Pedersen, make this Supplemental Verified Statement on the basis of personal knowledge, expertise and reliable facts known to me, after reading the Motion for Leave to File and "surrebuttal" papers submitted by Lincoln Lumber Company (LLC) in this proceeding.

- Page 1 of 4

and 23rd streets: (a) LLC's own storage shed, which is roughly 20 feet south of the north perimeter of the right of way (I attach a diagram showing the approximate location of the shed). (b) A brick building at 22^d street, formerly owned by Textron (Cushman) and now owned by B&J. Mr. Hamill does not clearly reference any obstruction to a trail in the right of way between 19th Street and 22nd street. Upon re-examination by the City, there are no significant obstructions that would prevent locating the trail in the northern 20 feet of right of way between 22nd street and 19th street other than a fence and some loading docks and related structures that are no longer in use and are easily moved. There are other obstructions (mainly utility poles and fences) but they are much closer to the centerline of rail in this area than the proposed trail (and would be outside the proposed 20' trail corridor as a result). These other "close obstructions" have no adverse impact on the existing rail operations and would not impact the proposed trail. I will now turn to the possible obstructions between 22nd and 23rd streets which Mr. Hamill discusses in his Surrebuttal.

- a. **LLC's own Storage Shed.** As to LLC's storage shed, the City believes there is room to fit the trail between the LLC storage shed and the north boundary. If the needed 20 feet is not available, City is prepared either to move the shed at City expense, or modify the trail width. The real point here is that the LLC shed is a far more significant obstruction to rail use of the OFA Parcel between 22^d and 23rd street than the trail sought by the City. The shed sits much closer to the centerline of the track than would any trail structure. It also belies Mr. Hamill's claim that LLC needs the full 100 foot width of the corridor to unload material. His own obstructions are much closer to the centerline than the City's proposed trail would be.
- b. **The "brick" building.** The final obstruction alleged by Mr. Hamill is a brick building which he alleges intrudes into the right of way by eight feet. The only brick building which could be involved is the former Textron structure immediately east of 22nd street. According to City's survey (attached to Mr. Thomson's Verified Statement filed with City's Reply), there is a "kink" in the right of way at the location of the brick building. The "kink" also shows up in Appendix A in the City's Petition. The building is located in the kink. The City's proposed trail would bend around the kink as shown in the Petition. There would thus be no intrusion through the brick building. Mr. Hamill also claims that doors to the brick building will be obstructed. Since the building was sold by Textron to B&J, but B&J did not acquire any lease rights from Textron, B&J has no lawful access through the doors at this time, and to City's knowledge does not use them or have plans to use them. Although LLC leased the entire area to Textron, there is no current use of the area since Textron has entirely ceased operation in Lincoln, Nebraska. As with other areas between 22nd and 23rd streets, LLC sometimes has

lumber stored adjacent to the brick building and that may from time to time obstruct the doors. In any event, City is prepared to work with the new owner to accommodate reasonable access, if need be.

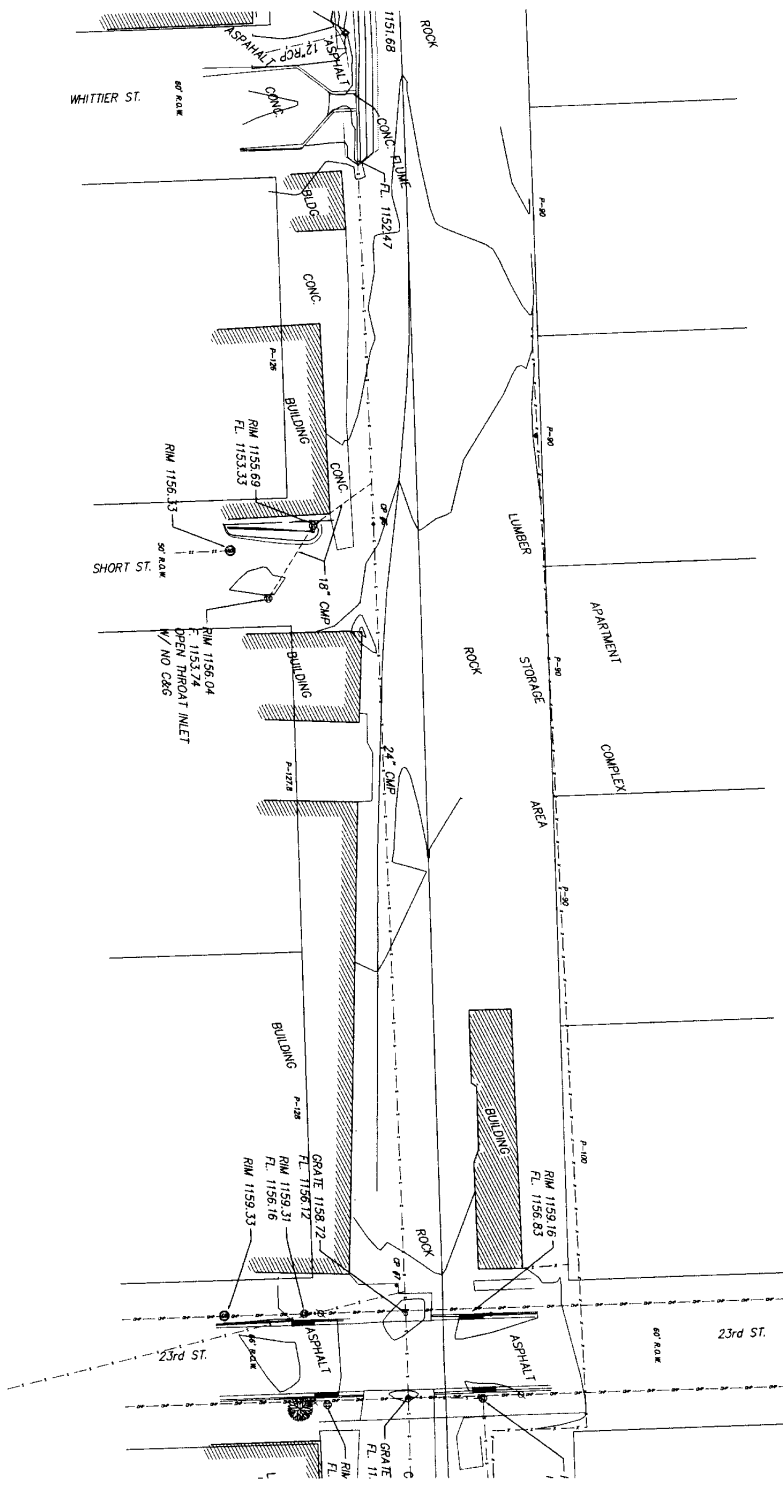
3. **Storage use predominates.** I viewed the corridor again during the week of January 26, 2004. Based on this and my prior observations, I conclude that LLC moved most of its unsheltered inventory out of the northern 20 feet in order to stage the photographs of a forklift on which Mr. Hamill relies in his Reply Verified Statement and which he appears to reference again in his Rebuttal Verified Statement. The important thing is that this movement demonstrates that LLC evidently had no problem moving or storing its lumber elsewhere. While some materials have now reappeared in the northern part of the corridor, it appears that LLC has ample storage space without use of the northern 20 feet of the right of way and can apparently move inventory with relative ease.
4. **No Interference with Rail use.** The City has requested its outside expert on rail operations (Mr. Schuchmann) to evaluate Mr. Hamill's contentions in respect to rail need and operations. Mr. Schuchmann's letter in reply is attached as Exhibit II. Mr. Schuchmann indicates that nothing in Mr. Hamill's latest submission causes any alteration in his conclusions. On this basis and on the basis of the other information set forth herein, Mr. Hamill's "surrebuttal" is irrelevant, immaterial, inconsistent with other statements by Mr. Hamill and entitled to no weight, and the City denies the statements and conclusions otherwise contained therein.
5. **No adverse impact or safety concerns.** City officials have attempted sincerely to analyze all concerns with respect to rail needs and operations and safety brought up by LLC not only with an outside expert but also with all other interested parties including OL&B. Mr. Hamill's general comments about differences or uncertainty in the City's desired location of the trail is best explained by the City's desire to reasonably accommodate LLC's changing wishes in the face of LLC's refusal to allow us on the relevant property for a survey until we filed this action and requested an order to permit entry in this proceeding. Mr. Hamill's vacillation is quite apparent in his own statements to the STB and to us in November that a trail in the northern 20 feet would be acceptable, only to recant that position on December 29, 2003. The City has in good faith attempted to accommodate and provide some flexibility in laying out the precise location of the trail and storm sewer improvements corresponding to the wishes of LLC. To now see this very flexibility reflected back upon the City in some negative light is nothing more than a disappointing confirmation of the ever-changing nature of LLC's purported concerns. The City's proposed trail, either in its configuration as originally proposed in the City's Petition or on the northernmost 20 feet of right of way all the

way to 19th street will comply with all applicable safety standards. In neither case will the trail have any adverse impact on rail operations. As such, it will have no adverse impact on LLC, its customers or employees. Certainly LLC has not identified any real and present adverse impacts.

Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct.


Joel D. Pedersen

Dated: 2-2-2004



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January 28, 2004

VIA FedEx

Joel D. Pedersen, Esq.
Assistant City Attorney
Law Department, City of Lincoln
575 South 10th Street, Suite 4201
Lincoln, NE 68508

Dear Mr. Pedersen:

You have asked me to review the Surrebuttal Verified Statement by Mr. Hamill tendered by Lincoln Lumber Company (LLC) in conjunction with LLC's Motion for Leave to File, and to indicate if the information in the Surrebuttal undercuts any of the conclusions in my Rebuttal Verified Statement or requires any alteration in those conclusions.

As summarized below, I have reviewed Mr. Hamill's Surrebuttal. It does not undercut or require alteration to my conclusions. I have prepared this letter for use by you in your discretion for filing at the Surface Transportation Board.

1. Mr. Hamill does not deny that at most LLC receives only one or two centerbeam cars per year containing I-joists, and those cars carry a mixture of "short lengths" and "long lengths" as shown in Hamill's Exhibit E to his Reply Statement (a purchase order for I-joists of varying lengths) and noted in paragraph 3 of Mr. Hamill's Surrebuttal Statement. Thus, as pointed out in my Rebuttal Statement, the long length I-joists are a tiny fraction of LLC's business. Mr. Hamill's argument concerns a portion of the contents of one annual car, unloaded in one location, using one method and one specific piece of equipment - the forklift whose measurements he includes in his paragraph 2. In fact, LLC has many options. For example, LLC could require shipments on flatcars rather than centerbeam cars, use different unloading methods, or use a different kind of forklift. Thus, even if Mr. Hamill were correct that the particular method he devises in his initial Statement would be inefficient, the fact that one can contrive a method which is inefficient does not mean that there is a rail operations reason against use of the northernmost 20 feet of the right of way for a roadway or trail.

2. Mr. Hamill repeatedly refers to use of a spur track, either reconstruction of a former spur on the north, or a presumably new one on the south if LLC were to go forward with the plan it (LLC) represented to the City (See Hamill Verified Statement, Exhibit G, February 2002 memo) wherein it planned to "...move the RR tracks to the south side of the land and then build several buildings on this land to house building material." These purported plans advanced by LLC shift the track away from center to the north or the south portions of the existing right-of-way, with no apparent misgivings about the ability to unload freight. The plans Mr. Hamill espoused as represented in his first Statement in Exhibit G appear to be in direct contradiction to the alleged plan Mr. Hamill now advances in his Surrebuttal Statement to improve, connect, and use the abandoned spur on the north side of the mainline. He notes at the bottom of page 4 notes that they hope to move center beam cars over the reconstructed "spur". Either way, Mr. Hamill implicitly admits that he can remove I-joists from the cars he receives without the need for 50 feet on each side of centerline, thereby documenting LLC's ability to function with track closer to the edge of the right-of-way than at present. In any event, his claims continues to conflict with (a) his representation in writing to the City that he planned to move his trackage to the south side of the right of way and construct storage sheds on the north side; (b) his use of the northernmost 20 feet for storage (which I personally witnessed in my inspection).
3. Furthermore, there remain easy answers to Mr. Hamill. For example, if he does need additional space, then he can unload the I-joists between 23d Street and 24th Street, where LLC owns the property on both sides of the right of way and where the City proposes no trail.
4. Mr. Hamill refers to a spur on the north. During my inspection, I observed unused track on the north that was not connected to the main track. Indeed, there were no remnants of a switch visible in the main line. The disused track appeared to be paved over in part and materials were stored on top of the rails, filling the space between the utility poles and a red brick building on the north side of the right-of-way. Obtaining and installing new switches is expensive, and in general it would be more economic to shift the switch on the southern spur so as to lengthen the existing spur there than to install another switch and essentially construct a new spur on the north. In any event, as shown in my Rebuttal Verified Statement, LLC has ample track space available for all expansions that it forecasts without construction of additional spurs and sidings. Mr. Hamill, without providing any business justification for it, asserts interest in a "second terminal," evidently in the area which LLC has leased to Textron-Cushman. There is no rail operation need nor business case to be made for a second terminal for the reason stated in my Rebuttal Statement and reiterated above. In any event, OL&B, the shortline that controls shipments to LLC, has ample terminal space to host business of other parties essentially adjacent to LLC property. Thus it is unlikely that a third party shipper would find it economic to pay OL&B a tariff and then to also pay LLC terminal fees. The third party would almost certainly find it more competitive to deal with OL&B for all its rail needs. In

my expert judgment, I see no rail need for a second terminal here. Certainly none has been shown by LLC. Finally, LLC leased out the entire area Mr. Hamill now says LLC contemplates for a terminal on a long-term basis to Textron. LLC's past actions belie Mr. Hamill's unsupported and conclusory hypotheses and arguments.

5. Mr. Hamill's paragraph 2 is based on the premise that the trail is not in the north 20 feet, and rather that it is where Hamill concluded that it would be. Given the City's agreement to use the north 20 feet of the right-of-way pursuant to LLC's November 18, 2003 letter to the Surface Transportation Board indicating it would not oppose a trail in that area, that entire paragraph is of no relevance.
6. In sum, in my expert opinion based upon my site inspection and review of the pleadings, statements and relevant documents to date, LLC has not demonstrated a rail need for the northernmost 20 feet of rail line between 19th and 23d Streets.

Under penalty of perjury, I declare the foregoing is true and correct.

Very truly,



Walter H. Schuchmann
Director, Rail Operations

/whs

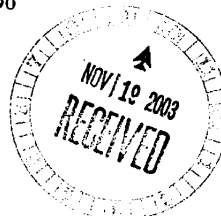
209442

ORIGINAL

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THOMAS F. MCFARLAND

November 18, 2003



ENTERED
Office of Proceedings

NOV 19 2003

Part of
Public Record

By UPS overnight mail

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:

This refers to a Petition for Declaratory Order filed by the City of Lincoln, Nebraska (the City) in the above proceeding on November 6, 2003.

The undersigned represents the owner of the railroad right-of-way in the above proceeding -- Lincoln Lumber Company (LLC). LLC is a Class III rail common carrier. It acquired the rail line pursuant to an offer of financial assistance (OFA) in 1998.

LLC hereby advises the Board and the City that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way.^{1/} Nor does LLC oppose trail use of the right-of-way between 22nd Street and 19th Street, provided that the trail occupy the northern edge of the right-of-way between those points.^{2/} LLC is prepared to negotiate an agreement with the City for those uses without delay.

However, LLC is strenuously opposed to trail use of its operating right-of-way between 22nd Street and 23rd Street, where the full width of the right-of-way is used and required for rail operations, to wit: unloading railroad cars and staging unloaded freight for further movement into shipper facilities, and on which LLC intends to construct additional railroad facilities, to wit: an

^{1/} An underground storm sewer would not be intrusive, nor adversely affect efficient rail operations or safety.

^{2/} LLC takes this position in light of the current extensive non-rail use of this segment of the right-of-way. LLC does not concede that the City's position is meritorious as to this segment.

THOMAS F. MCFARLAND

Vernon A. Williams

November 18, 2003

Page 2

additional railroad spur track on the north side of the right-of-way for holding additional freight cars for the provision of more efficient and economical rail service to the lumber company.³ LLC cannot agree to a nonrail use on the surface of its operating right-of-way where active shipper operations are conducted.

In behalf of LLC, the Board is hereby respectfully requested to publish notice of the filing of the Petition for Declaratory Order in the Federal Register, and to provide an opportunity for filing of public comments on the remaining issue involving trail use of the operating railroad right-of-way between 22nd and 23rd Streets. LLC submits that the requested procedure is warranted because that is an issue of general transportation importance on which public notice and opportunity for comment are warranted. It is likely that many rail carriers, municipalities and other entities have a legitimate interest in the issue of whether a municipality's use of State condemnation law to involuntarily acquire 20 percent of the width of a rail carrier's active operating right-of-way is federally preempted by virtue of 49 U.S.C. § 10501(b). It is submitted that the Board would be likely to benefit from public comments on that issue of widespread railroad importance.

The Board should not be constrained by the procedural schedule proposed by the City in this important matter. All parties -- not just the City and LLC -- should have ample time to prepare and file comments, and the Board should have ample time to prepare and issue a reasoned decision. Particularly in view of the impending Holiday Season in which offices are closed for extended periods (e.g., the shortened Thanksgiving week), the filing dates suggested by the City should be lengthened. LLC suggests the following:

- | | | |
|--------------------------------|---|---|
| <u>Replies to the Petition</u> | - | 60 days after <u>Federal Register</u> publication |
| <u>The City's Rebuttal</u> | - | 20 days after the filing of replies |
| <u>Board decision</u> | - | as deemed appropriate by the Board |

A procedural schedule somewhat lengthier than that proposed by the City would not be prejudicial to the City's interests. The City has not shown that it would lose funding for a trail if the procedural schedule that it has proposed is not adopted. The City has stated much more vaguely that it might be "in jeopardy" of losing funds (Petition, Appdx. D at 5). There should be no sympathy for the City's request for expedition inasmuch as the City did not file the Petition until more than two years after trail funding was committed (*id.* at 4), and 9 months after the City knew that LLC was not agreeable to a trail (Petition, Appdx. E at 2, ¶7). Moreover, it has been

³ LLC would also be opposed to trail use within the operating right-of-way between 23rd and 24th Streets, but it is understood that the City proposes that the trail bypass the railroad right-of-way between those points.

THOMAS F. McFARLAND

Vernon A. Williams

November 18, 2003

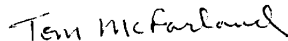
Page 3

more than 6 years since LLC acquired the right-of-way for continued rail use under offer-of-financial-assistance (OFA) provisions that were specifically found to take precedence over the City's request for railbanking and trail use (*See Union Pacific R. Co. -- Aband. Exempt. -- in Lancaster County, NE*, STB Docket No. AB-33 [Sub-No. 112X], decision served Jan. 16, 1998).⁴ Now the City wants to apply State condemnation law to undermine that Board-sanctioned rail operation, and wants the Board to aid in its effort by adopting accelerated procedure. The Board should not accede to that unfair request.

An additional reason for adoption of the procedural schedule hereby suggested by LLC is that it would allow for essential discovery, whereas the accelerated schedule suggested by the City would not. The City put together its lengthy Petition at a leisurely pace, but it wants opponents to respond to the Petition on an accelerated basis without an opportunity for thorough investigation of support for the City's position. That procedure would not be consistent with fair process.

Ten copies accompany the original of this filing. Counsel for the City is being served by overnight mail.

Very truly yours,



Thomas F. McFarland
Attorney for Lincoln Lumber Company

TMcF:kl:enc:wp11977\lrstb1

cc: Charles H. Montange, by *UPS overnight mail*
Mr. Don Hamill

⁴ The undersigned attorney for LLC takes very strong exception to the blatantly false statement by the City's Assistant City Attorney that the undersigned stated to him that LLC's interest in pursuing the OFA involved a deliberate attempt to block trail use in the corridor regardless of impact on business (Petition, Appdx. E at 2, ¶8). On the contrary, the undersigned has personal knowledge that LLC's acquisition of the rail line was in good faith for continuation of rail service. LLC was a significant rail user in good faith before that acquisition, and has been even a more significant rail user thereafter.

Appendix III



02 February 2004

OLSSON ASSOCIATES
ENGINEERS • PLANNERS • SCIENTISTS • SURVEYORS

Mr. Joel Pedersen
Assistant City Attorney
575 South 10th Street, Suite 4201
Lincoln, Nebraska 68508

Re: Husker Trail
Lincoln, Nebraska

Dear Joel:

This is a response to a request from you regarding obstructions as outlined on sheet 'P-3' of the Surrebuttal Statement of Mr. Donald Hamill, and referring to the 150 foot long building located west of 23rd Street. This particular building, from a site visit of January 26, 2004, lies completely within the boundaries of the property owned by Mr. Hamill and does not encroach across the perimeter boundary. We did not measure the distance between the north side of the referenced building and the northern perimeter. It is possible that the distance may be less than 20 feet. If so, the City may wish to consider acquiring a slightly lesser width in this area in order to avoid incurring liabilities that may arise from acquiring a portion of this building. Mr. Hamill alludes to a red brick building that extends into the Lincoln Lumber property between 23rd Street and Whittier Street. There is no red brick building located in the northerly portion of the Lincoln Lumber property in the area from 23rd Street to Whittier Street as stated by Mr. Hamill.

There is a fence located along the common property line between the Lincoln Housing Authority and the Lincoln Lumber property. This fence may cross this common property line, although this has not been verified. The owner of this fence has not been determined. This is, in my opinion, not a critical issue to the location of the proposed easement.

On my reading, Mr. Hamill's statement does not appear to reference any obstruction to a trail on the northern 20 feet of the right of way between 19th and 22nd streets. The only possible obstructions are some fences and loading docks or extension structures leftover from Cushman's/Textron's days as owner of the adjacent property.

Sincerely,

Daniel A. Thomson, RLS

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