

ENTERED
Office of Proceedings
November 29, 2017
Part of
Public Record

November 29, 2017

JOHN D. HEFFNER
(202) 742-8607
Direct Fax (202) 742-8697
John.Heffner@strasburger.com

BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: FD 36148, Adrian & Blissfield Rail Road Company-
Petition for Declaratory Relief**

Dear Ms. Brown:

Pursuant to my telephone call with Scott Zimmerman of the Board's staff just before Thanksgiving, I am enclosing for filing on behalf of Petitioner Adrian & Blissfield Rail Road Company ("ADBF") a Petition for Leave to File a Reply to the Reply submitted by Consumers Energy Company. Consumers' Reply contains so many mistakes and inaccuracies that ADBF's Reply should be accepted as a matter of fairness and in order to give the Board a complete record for its decision. In view of the fact that the Board may require several days to review and rule on this Petition, ADBF requests that its deadline for filing its Reply be extended to December 21, 2017.

Sincerely yours,



John D. Heffner

Attachment

cc: Adam C. Smith, Esq.
Kelvin J. Dowd, Esq.

9526897.2/SP/25127/0102/112817

Strasburger & Price, LLP

1025 Connecticut Ave., NW Suite 717 | Washington, DC 20036 | 202.742.8600 tel | 202.742.8699 fax | www.strasburger.com
Austin | Beaumont | Collin County | Dallas | Houston | San Antonio | New York, N.Y. | Washington, D.C. | Mexico City - Strasburger & Price SC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36148

**ADRIAN & BLISSFIELD RAIL ROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

PETITION FOR LEAVE TO FILE REPLY

Submitted by
John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607
Its counsel

Dated: November 29, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36148

**ADRIAN & BLISSFIELD RAIL ROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

PETITION FOR LEAVE TO FILE REPLY

**I.
INTRODUCTION**

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. §§1321 the Adrian & Blissfield Railroad (“ADBF”), a Class III short line railroad operating in the State of Michigan, submitted a Petition for Relief Declaratory Relief to the Board in the above-captioned proceeding on October 30, 2017. Specifically it sought a ruling that the initiation of a Michigan state court condemnation proceeding by Consumers Energy Company (“Consumers”) is preempted under the ICC Termination Act (“the ICCTA”). Consumers filed a lengthy reply on November 20, 2017, urging denial on the grounds that ADBF’s petition would “frustrate Consumers’ exercise of its lawful rights under Michigan law to secure a non-exclusive, routine public utility easement” to support power lines that have been in place since 1996.

Because Consumers’ reply contains numerous inaccurate assertions and cites for support precedent that is either inapplicable or distinguishable, ADBF should

be allowed to respond as a matter of simple fairness. Moreover, allowing ADBF to respond would give the Board a full record on which to base its decision.

Accordingly and as directed by a member of the Office of Proceedings staff, ADBF files this request in advance of and separate from its proposed reply. ADBF also requests that the Board give it up to 10 additional days (or until December 21) to file its reply.

II. ARGUMENT

Although the Board's rules state that a "reply to a reply" is not allowed, the Board has frequently waived that rule to allow parties to submit a rebuttal in the interest of compiling a complete record. *See, e.g., City of Woodinville, Wash.-Petition for Declaratory Order*, FD 35905 (STB served Oct. 7, 2015); *Chesapeake And Indiana Railroad Company--Petition For Declaratory Relief*, FD 36076, slip op. at 3 (STB served Aug. 23, 2017); and *City of Alexandria, Va.—Petition for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).¹ Such is the case here. Furthermore, ADBF stated in its Petition for Declaratory Relief that it seeks the right to file a rebuttal to whatever Consumers' might submit. So this request should come as no surprise to Consumers. Consumers' reply contains so

¹ In fact, the Board allowed the filing of a reply to a reply in one of the cases cited by Consumers in its Reply at page 16, *Petition of Union Pacific Railroad Company for Declaratory order*, FD 35960 (STB served Sept. 30, 2016).

many inaccurate statements that ADBF urges the Board to accept this filing to set the record straight.

In support of its request to submit a response, ADBF identifies the following assertions by Consumers as illustrative of statements that are inaccurate, misleading, or otherwise incorrect. Accepting ADBF's reply will better equip the Board to resolve this dispute. Here are a few of the many examples of misstatements or inappropriate citations and the page references to them in Consumers' Reply with more to come later in ADBF's Reply.

- Consumers seeks a “non-exclusive, routine public utility easement” (Consumers' Reply at 1).

ADBF response. ADBF has searched the four corners of the easement document and cannot find any wording describing the easement as “non-exclusive.” Moreover, the proposed easement has language which allows Consumers to dictate what structures can be built on 20% of 2.5 miles of the ADBF's right-of-way: “Owner [ADBF] agrees not to build, create, construct, or permit to be built . . . any other type of structure over, under, or on said Easement Area, whether temporary or permanent, natural or man-made, *without the express authorization of Consumers* [emphasis supplied], which may be withheld in Consumers' sole discretion.” This type of language is far

from “non-exclusive” or routine. A copy is attached hereto for the Board’s reference.

- “That Consumers’ power lines have ‘co-existed’ with ADBF operations for over 20 years” (Consumers’ Reply at 2).

ADBF response. While technically true, this statement does not reflect the fact that the railroad’s needs have changed while those of Consumers have not. As ADBF will demonstrate in detail in any reply that it is authorized to file, the railroad has increased its carloadings significantly since 1996. Moreover, it is being required by its connecting carrier, Norfolk Southern Railroad, to handle grain traffic in unit trains that cannot be accommodated without adding storage tracks and lengthier interchange tracks. Consumers’ power lines and poles prevent construction of those facilities as the plans submitted with ADBF’s Petition amply illustrate. Finally, as Judge Manion stated in his opinion in *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011), a case cited by Consumers involving an effort by a transit authority to condemn an easement on active rail line, there is a major difference between a lease and an interest in land taken by condemnation. The lease that ADBF assumed from the State of Michigan reflects an arms-length

negotiation between those parties whereas an easement obtained by condemnation is something forced by one party upon another. A lease can be terminated in accordance with its terms (here on 30 days' notice). A permanent easement is forever. *Id.* At 684.

- Clear language in the proposed easement would obligate Consumers to relocate its lines if necessary to avoid interference with future railroad operations (Reply at 2).

ADBF response. Under the terms of the easement Consumers would control those bases upon which ADBF would be permitted to use the Easement Area. In essence the easement states that if Owner [ADBF] has a “reasonable” (undefined) need for Consumers to relocate some or all of its facilities to another location within the Easement Area or another portion of Owner’s land or adjoining property *provided* [emphasis supplied] that Owner grants equivalent additional rights to any necessary land outside the Easement Area to accommodate Owner’s existing or actually planned railroad operations, such relocation will be performed at Consumers’ cost *provided* [emphasis supplied] that Owner’s work that required the relocation is actually undertaken or performed. But page two of the easement contains the very important language quoted before constraining ADBF’s

opportunities to expand its facilities: “Owner [ADBF] agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation of any other type of structure over, under, or on said Easement Area, whether temporary or permanent, natural or man-made, *without the express authorization of Consumers* [emphasis supplied], which may be withheld in Consumers’ sole discretion.”

- Consumers’ state court condemnation action affects only about 2.6% of ADBF’s railroad property (Reply at 5).

ADBF response. This absurd statement contradicts what Consumers previously said at page 4 of its Reply: “...the right-of-way acquired by ADBF is about 100 feet wide, so the 20-foot strip of land on which Consumers’ power lines are located constitutes about 20% of the 2.5 mile corridor affected by the Consumers-MDOT lease.” A comparison of the easement length to the rest of ADBF’s line is irrelevant. The fact that the easement would occupy land needed for switching, storage, and servicing of railroad equipment or trains is the relevant inquiry.

- “Consumers’ condemnation action does not involve a ‘case of first impression’ as the Board has previously dealt with condemnation actions involving public utilities on numerous occasions.”
(Consumers’ Reply at 9).
- “Consumers’ power lines are hardly unique and their usage is that of a typical ‘non-invasive’ utility.” (Consumers’ Reply at 9).

ADBF response. These two statements represent other falsehoods by Consumers. Consumers does not cite and, ADBF believes, cannot cite a Board case involving this fact situation because none exists. The only case that it identifies as precedent is a federal district court ruling from Pennsylvania involving the Reading, Blue Mountain & Northern Railroad and a pipeline crossing. ADBF also notes that unlike the Reading, Blue Mountain & Northern Railroad case, this case does not involve a simple crossing of railroad property, but instead involves a longitudinal condemnation of 20% of the railroad’s right-of-way over 2.5 miles. In contrast, the Seventh Circuit in dealing with a case that involved the condemnation of 40% of the railroad’s right-of-way over 2.8 miles (and also emanating from an terminated lease agreement) that “[t]he parties have not presented, and

we are unaware of, any case law describing a similar scenario.” *Id.* at 681.

- “Though ADBF makes a half-hearted suggestion that Consumers’ state court action could be categorically preempted, the law is to the contrary” (Reply at 11).

ADBF response. As the Board can tell by reading precedent such as *Union Pacific R. Co. v. Chicago Transit Authority* and *Soo Line Railroad Company v. City of St. Paul*, 827 F. Supp. 1017 (D. Minn. 2010), Consumers inaccurately describes the state of the law. ADBF faults Consumers for failing to bring the *Soo Line* case to the Board’s attention. Simply stated, *Soo Line* declared that condemnation constitutes a form of regulation and is therefore *per se* preempted. As such, the Court found it unnecessary to evaluate the facts under an applied preemption standard. In *Union Pacific R. Co. v. Chicago Transit Authority*, Judge Manion analyzed the transit authority’s actions under both the categorical and as applied standards and found them preempted. Consumers’ heavy reliance on the Federal District Court ruling remanding to state court the ADBF/Consumers preemption litigation is misplaced. That decision just concerned whether or not federal jurisdiction existed (the judge concluded it did

not). ADBF believes the judge wrongly decided the case and his analysis of the facts went beyond the required ruling and is therefore *dicta*. Moreover, under 28 U.S.C. §1447, ADBF was not entitled to appeal the decision and therefore the case is of no precedential value.²

- ADBF's assertion that the easement would "give Consumers an absolute veto over how ADBF could use its right of way is incorrect as the easement requires Consumers to accommodate all of ADBF's existing or actually planned railroad operations" (Reply at 15).

ADBF response. See the discussion about the easement language at pages 5-6 above.

- A railroad must demonstrate a future need for its right of way by submitting blueprints, construction plans, construction contracts, or other documentary evidence (Reply at 15).

ADBF response. Consumers would have the Board believe that

ADBF's future needs have no basis because it has not presented any

² An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [involving federal officers or agencies sued or prosecuted and not relevant] or 1443 [civil rights cases and not relevant] of this title shall be reviewable by appeal or otherwise. [emphasis added]. This is true "no matter how plain the legal error in ordering the remand," *Briscoe v. Bell*, 432 U.S. 404, 413-414, n. 13, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977); and *Kircher v Putnam Funds Tr.*, 547 US 633, 641-42; 126 S Ct 2145, 2153-54; 165 L Ed 2d 92 (2006).

detailed documentation. ADBF has reviewed such “future use” precedent and has found no basis for Consumers assertions.

- Typically when parties have approached the Board for a declaration as to preemption without a court referral, the Board has denied the request (Consumers’ Reply at 18-9).

ADBF response. ADBF is unaware of any Board decision holding that a referral by a court is a prerequisite to filing a petition seeking a ruling that federal law preempts the application of a state or local law.

See, e.g., San Luis & Rio Grande Railroad—Petition for a

Declaratory Order, FD 35380 (STB served July 25, 2010) (where the Board without a prior court referral instituted a declaratory relief proceeding as to whether the I.C.C. Termination Act preempted local regulation. The Board dismissed the petition as premature because another federal agency had not prepared an environmental impact statement).

III. CONCLUSION

ADBF believes that Consumers’ Reply contains so many inaccurate statements, incorrect descriptions of its easement language, and mischaracterizations of legal precedent that it should be given an opportunity to file a reply to Consumers’ Reply.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607
Its counsel

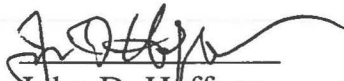
Dated: November 29, 2017

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that on November 29, 2017, I served a copy of the foregoing Petition for Leave to File a Reply to a Reply, on the following counsel for Consumers' Energy Company by email and US Mail:

Adam C. Smith
Aaron L. Vorce
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

Kelvin J. Dowd
Katherine F. Waring
Slover & Loftus, LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036


John D. Heffner

EASEMENT FOR ELECTRIC FACILITIES

ADRIAN & BLISSFIELD RAIL ROAD COMPANY, a Michigan corporation, 38235 North Executive Drive, Westland, Michigan 48185 (hereinafter "Owner")

for good and valuable consideration [exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter Owner's land (hereinafter "Owner's Land") located in the City of Adrian, County of Lenawee, and State of Michigan as more particularly described in the attached Exhibit A to construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a single line of poles or pole structures (or any combination of same) supporting a line or lines of electric facilities in, on, over, under, across, and through a portion of Owner's Land (hereinafter "Easement Area") as more fully described in the attached Exhibit B, together with any wires, cables, conduits, crossarms, braces, guys, anchors, transformers, electric control circuits and devices, location markers and signs, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities, whether above or below grade, useful or incidental to or for the operation or protection thereof, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity.

Notwithstanding Consumers' ability to exercise the rights granted in this easement to their fullest extent otherwise allowed by law, Consumers agrees that (1) it will not construct any permanent, above-ground structures that are materially closer to Owner's existing tracks than the existing line of poles supporting Consumers' lines of electrical facilities on Owner's Land, without first obtaining Owner's express, written consent; (2) Consumers will only use the portion of the Easement Area that lies between (a) the existing line of poles supporting Consumers' lines of electrical facilities on Owner's Land, and (b) the closest edge of Owner's existing railroad tracks, for temporary above-ground facilities or other non-permanent uses in connection with Consumers' electrical facilities (such as, but not limited to, access, maintenance, inspection, surveying, replacement, reconstruction, improvement, removal, relocation, modification or vegetation management); and (3) so long as any relocation of Consumers' existing above-ground facilities would not violate any law, code or regulation applicable to Consumers' facilities, if Owner has a reasonable need for Consumers to relocate some or all of its facilities to another location within the Easement Area (or another portion of Owner's Land or adjoining property, provided that Owner grants equivalent additional rights to any necessary land outside the Easement Area) to accommodate Owner's existing or actually planned railroad operations (because all other reasonable alternatives have been exhausted), such relocation will be performed at Consumers' cost provided that Owner's work that required the relocation is actually undertaken or performed.

Access: Consumers shall have the right to unimpaired access, to the extent said access does not interfere with the safety of Owner's railroad operations and follows generally accepted safety guidelines for railroad property, to said line or lines, and the right of ingress and egress on, over, and through Owner's Land for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder. Although Consumers reserves the right to install any new structures

that are allowed by this easement, Consumers agrees that it will not erect any fence, barrier or other similar permanent structure that would unreasonably impair Owner's lawful access to or use of the Easement Area.

Trees and Other Vegetation: Owner shall not plant any trees within the Easement Area. Consumers shall have the right from time to time hereafter to enter Owner's Land to trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area. Consumers shall have the right from time to time hereafter to enter Owner's Land to trim, cut down, and otherwise remove and control any trees, brush, or other vegetation located outside of the Easement Area which are of such a height or are of such a species whose mature height that in falling directly to the ground could come into contact with or land directly above Consumers' facilities.

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, or on said Easement Area, whether temporary or permanent, natural or man-made, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned. Notwithstanding the foregoing, Owner may install minor structures related to railroad operations within the Easement Area, provided said structures do not cause Consumers to be in violation of the National Electrical Safety Code as adopted by the Michigan Public Service Commission or any other applicable law, code or regulation, and further provided that said structures do not unreasonably interfere with Consumers' access to its facilities located within the Easement Area. Owner may also install communications facilities (such as wires, cables, antennas or other similar items), which are reasonably necessary for Owner's railroad operations that occur on Owner's Land, on Consumers' poles or pole structures upon execution of Consumers' standard form of attachment or pole-license agreement, or other similar agreement acceptable to Owner and Consumers. If Consumers' then-existing poles, pole structures and/or related facilities would be impaired or interfered with following the addition of Owner's proposed communication facilities, then Owner will only be able to add its communication facilities upon paying for Consumers' actual cost of improving Consumers' facilities as necessary to accommodate Owner's new facilities.

Ground Elevation: Owner shall not materially alter the ground elevation within the Easement Area without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Flagging: Except in case of emergencies or service restoration, Consumers shall notify Owner (in writing to the address above or by phoning (734) 641-2300 or other number provided in writing by Owner) at least 3 business days in advance of the commencement of work activities within the Easement Area, and Owner will then arrange for appropriate flagging services during such activities, at Consumers' expense.

Restoration: Consumers shall reasonably restore disturbed areas of Owner's Land to the condition existing before Consumers' work following completion of work on Owner's Land.

Exercise of Easement: Consumers' nonuse or limited use of this easement shall not preclude Consumers' later use of this easement to its full extent.

Severability: Whenever possible, each provision of this easement shall be interpreted in such a manner as to be effective and valid under applicable law and to provide for the safe and reliable operations of both parties hereto, but if any such provision of this easement is held to be prohibited by or invalid under applicable law or puts either party into a violation under any applicable law, code or regulation, such provision shall be ineffective only to the extent of such prohibition, invalidity, or violation, without invalidating the remainder of such provision or the remaining provisions of this easement; and the parties shall negotiate in good faith to replace such prohibited, invalid, or violated provision with the intent of preserving the original business intent thereof and ensuring the safe and reliable operations of the facilities of both parties hereto.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

Date: _____

Adrian & Blissfield Rail Road Company ("Owner"):

By: _____
Its: _____

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Michigan,
on _____ by _____
Date Print Name and Title
an authorized representative of Adrian & Blissfield Rail Road Company.

Notary Public

County, Michigan
Acting In _____ County
My Commission expires: _____

Prepared By: Adam C. Smith (P69790)
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Debra Dennis, EP7-473
Business Services
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201