

ENTERED
Office of Proceedings
December 1, 2017
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ADRIAN & BLISSFIELD
RAIL ROAD COMPANY –
PETITION FOR DECLARATORY RELIEF

)
)
)
)
)
)
)
)
)
)

Finance Docket No. 36148

**REPLY IN OPPOSITION TO
PETITION FOR LEAVE TO FILE REPLY**

Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1104.13(a), hereby replies in opposition to the November 29, 2017 Petition For Leave To File Reply submitted by Adrian & Blissfield Rail Road Company (“ADBF”) (“Leave Pet.”). ADBF seeks an exemption from the rule prohibiting “replies to replies,”¹ so that it can file additional argument in response to Consumers’ November 20, 2017 Reply To Petition For Declaratory Relief. ADBF’s request should be denied.

The Board’s regulations applicable to ADBF’s original Petition For Declaratory Relief provide that “the pleading process ends with the reply, and replies to replies are not permitted.”² The prohibition serves the interest of promoting expeditious

¹ 49 C.F.R. Part 1104.13(c).

² *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R. R.*, Docket No. AB-124 (Sub-No. 2) (STB served May 6, 2003) at 3.

Board action,³ and will be departed from only upon a showing of new evidence or changed circumstances that give rise to a need for a more complete record.⁴ Here, ADBF argues that “simple fairness” entitles it to respond to what it alleges are “inaccurate assertions and cites for support precedent that is either inapplicable or distinguishable” that are presented in Consumers’ Reply To Petition For Declaratory Relief.⁵ As summarized below, however, the points raised by ADBF are merely arguments in opposition to Consumers’ interpretation of case law, or attempted rebuttals to Consumers’ reasoning and/or application of undisputed facts. They are wholly inadequate to support a departure from the rule against “replies to replies.”⁶

³ *Beaufort R.R. – Modified Rail Certificate*, Finance Docket No. 34943 (STB served July 21, 2009) at 5.

⁴ *See, e.g., Pennsylvania R. R. – Merger – N.Y. Cent. R. R.*, Finance Docket No. 21989 (Sub-No. 4) (STB served Jan. 10, 2011) at 7.

⁵ Leave Pet. at 2-3. ADBF also suggests that it should be permitted to respond to Consumers’ Reply because it stated an intent to seek such a privilege in its Petition For Declaratory Relief. *Id.* at 3. Whether or not Consumers should have expected ADBF’s November 29, 2017 filing is irrelevant to whether it has any merit.

⁶ *See Pennsylvania R. R.* at 7; *Waterloo Ry. Co.* at 3; *Potomac Elec. Power Co. v. CSX Transp., Inc.*, Docket No. NOR 41989 (STB served June 27, 1997) at 1, n. 1. ADBF cites to two decisions (and apparently mis-cites a third) in arguing that it should be allowed to file a “reply to reply” solely in the interest of a “complete record.” Leave Pet. at 3. However, in the cases cited the filing of a surreply was not opposed, so the Board accepted them along with the non-petitioning parties’ responses. *See City of Woodville, Wash. – Pet. for Declaratory Order*, Finance Docket No. 35905 (STB served Oct. 7, 2015) at 4; *City of Alexandria, Va. – Pet. for Declaratory Order*, Finance Docket No. 35157 (STB served Nov. 6, 2008) at 2. Those decisions are inapposite here.

1. Non-Exclusive Easement

ADBF claims that Consumers' reference to the easement now before the Michigan state court as "non-exclusive" is a "misstatement."⁷ However, the form of easement does not describe it as "exclusive," and it specifically proscribes the installation by Consumers of any structure "that would unreasonably impair [ADBF's] lawful access to or use of the Easement Area."⁸ Obviously, the easement is not exclusive if ADBF has rights to access and use the area subject to the easement, as recognized by Michigan law. *See Lee v. Fidelity Life & Income Mut. Ins. Co.*, 2 Mich. App. 82, 86-87; 138 N.W.2d 545 (Mich. Ct. App. 1965) (recognizing that the fee owner "may make any use of his land which does not interfere with a reasonable use of" an applicable easement). As if there were any doubt, Consumers' witness Dwayne Parker openly described the easement as "non-exclusive" in his sworn Verified Statement in this proceeding.⁹ ADBF's suggestion that this fact is not settled is pure invention.

2. The Co-Existence of Consumers' Power Lines and ADBF's Rail Operations

ADBF *admits* that Consumers correctly described the parties' operational relationship over the past twenty (20) years,¹⁰ but refers to future facilities expansion plans as justification for a further submission.¹¹ However, ADBF both had and exercised

⁷ Leave Pet. at 4.

⁸ *Id.*, Attachment at 2 of 6.

⁹ Reply To Petition For Declaratory Relief, V.S. Parker at 1.

¹⁰ Leave Pet. at 5.

¹¹ *Id.*

the opportunity to present its future plans to the Board in the Petition For Declaratory Relief.¹² It bore the responsibility to “include in the opening pleading all arguments supporting the requested action,”¹³ and Consumers has replied to ADBF’s claims.¹⁴ ADBF’s new Petition simply “reiterates facts and arguments that are already of record...,” which does not meet the standard for an exception to 49 C.F.R. Part 1104.13(c).¹⁵

3. Consumers’ Relocation Obligation

ADBF seeks leave to further debate Consumers’ relocation obligation under the proposed easement,¹⁶ a matter previously briefed to and addressed by the U.S. District Court for the Eastern District of Michigan.¹⁷ ADBF had ample opportunity to argue the issue to the Board in its original Petition, as ADBF obviously was aware that Consumers would raise it.¹⁸ There is no “new evidence” or “changed circumstances” presented here, simply a desire on ADBF’s part to “reiterate[] facts and arguments that are already of record.”¹⁹

¹² See Petition For Declaratory Relief at 14-16.

¹³ *Beaufort R.R.* at 5.

¹⁴ See Reply To Petition For Declaratory Relief at 15-17, and authorities cited therein.

¹⁵ *Pennsylvania R.R.* at 7. See also, *CSX Transportation, Inc. – Abandonment Exemption – In Franklin County, PA*, Docket No. AB-55 (Sub-No. 568X) (STB served July 27, 2005) at 4.

¹⁶ Leave Pet. at 6.

¹⁷ See Reply To Petition For Declaratory Relief, Attachment No. 1 at 9-10.

¹⁸ *Id.* at 15-17.

¹⁹ *Pennsylvania R.R.* at 7.

4. The Impact on ADBF's Rail Lines

In its original Petition, ADBF repeatedly argued that the proposed easement would take “more than 20% of the railroad right of way.”²⁰ In response, Consumers showed that the easement actually would affect only 2.6% of ADBF's rail-related property.²¹ In its latest Petition, ADBF seeks leave to argue that Consumers' calculations are “irrelevant.”²² However, Board precedent makes clear that 49 C.F.R. Part 1104.13(c) will not be waived simply because a petitioner wishes to “argue that [the Board] should reject the reasoning submitted in [the] reply.”²³

5. Previous Public Utility Proceedings

ADBF labels as “falsehoods” Consumers' briefly noted points that the Board previously has addressed condemnation actions involving public utilities, and that the Consumers power lines at issue are “non-invasive.”²⁴ In fact, however, the Board *has* considered preemption claims leveled at utility condemnations,²⁵ and ADBF itself admits that at least one federal court has referred to line crossings as “non-invasive utilities.”²⁶

²⁰ Petition For Declaratory Relief at 4, 6.

²¹ Reply To Petition For Declaratory Relief at 5, V.S. Parker at 7.

²² Leave Pet. at 7.

²³ *Potomac Elec. Power Co.* at 1, n. 1.

²⁴ Leave Pet. at 8.

²⁵ See, e.g., *E. Ala. Ry. LLC – Pet. for Declaratory Order*, Finance Docket No. 35583 (STB served Mar. 9, 2012) at 1, 5.

²⁶ *Reading Blue Mountain & N. R. Co. v. UGI Utils., Inc.*, No. 3:11-CV-2182, 2012 WL 251960, at *2 (M.D. Pa. Jan. 25, 2012).

All ADBF is trying to do here is re-argue applicable case law, which cannot support a waiver of 49 C. F. R. Part 1104.13(c).

6. Categorical Preemption

ADBF claims that it should be allowed to file supplemental argument on the question of categorical preemption because Consumers' Reply "inaccurately describes the state of the law," and did not specifically address a single, 2010 Federal District Court decision.²⁷ This is a frivolous argument. The law and Board precedent are clear that state condemnation actions are not categorically preempted under the ICCTA,²⁸ and ADBF itself put the outlier decision in *Soo Line Railroad* before the Board.²⁹ The fact that ADBF disputes Consumers' interpretation of case law is not grounds to lift the prohibition on "replies to replies."³⁰

²⁷ Leave Pet. at 9.

²⁸ *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F. 3d 675, 679-80 (7th Cir. 2011); *Island Park, LLC v. CSX Transp. Inc.*, 559 F. 3d 104-06 (2d Cir. 2009); *DesertXpress Enterprises, LLC – Pet. for Declaratory Order*, Finance Docket No. 34914 (STB served June 27, 2007) at 4-5; *Maumee & W. R. R. v. RMW Ventures, LLC – Pet. for Declaratory Order*, Finance Docket No. 34354 (STB served Mar. 3, 2004) at 1-2.

²⁹ Petition For Declaratory Relief at 8. In its 2016 ruling that Consumers' state condemnation action was not preempted by the ICCTA, the U.S. District Court for the Eastern District of Michigan specifically declined to give precedential value to *Soo Line Railroad*. See Reply To Petition For Declaratory Relief, Attachment No. 1 at 6-7. Consumers relies on the 6th Circuit decision in *Union Pacific R. R.*; it need not discuss a lower court ruling that has not been followed.

³⁰ *Waterloo Ry. Co.* at 3; *Potomac Elec. Power Co.* at 1, n. 1.

7. Future Use

It is unclear whether ADBF wishes to present additional argument related to its potential future use of its rail property, or about how Board precedent treats future use claims.³¹ Whatever the case, ADBF offers no basis for a waiver of 49 C.F.R. Part 1104.13(c). ADBF already exercised its opportunity to offer evidence regarding its possible future projects,³² and Consumers' *actual* argument on Reply was that even if ADBF was to go forward with them, the relocation obligation in the proposed easement would protect ADBF from unreasonable interference, a point that the Board found dispositive in *Petition of Union Pacific Railroad Company for Declaratory Order*, Finance Docket No. 35960 (STB served Sept. 30, 2016) at 8-9.

8. State Court Referrals

Finally, ADBF offers the irrelevant comment that it "is unaware of any Board decision holding that a referral by a court is a prerequisite" to a declaratory ruling on federal preemption.³³ ADBF misses the real point, which is that *typically* the Board will decline to open a declaratory order proceeding where, as here, (a) the underlying dispute already is pending in a state court with concurrent jurisdiction; and (b) the court has not referred the preemption question.³⁴ The veracity of Consumers' position is irrefutable. *See Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for*

³¹ Leave Pet. at 10-11.

³² See Petition For Declaratory Relief at 14-16.

³³ Leave Pet. at 11.

³⁴ Reply To Petition For Declaratory Relief at 18.

Declaratory Order, Finance Docket No. 35819 (STB served Aug. 28, 2014) at 4;
Ingredion Inc. – Pet. for Declaratory Order, Finance Docket No. 36014 (STB served
Sept. 30, 2016) at 3; *Maumee* at 1-2; *Lincoln Lumber Co. – Pet. for Declaratory Order*
– *Condemnation of R.R. Right-of-Way for a Storm Sewer*, Finance Docket No. 34915
(STB served Aug. 13, 2007) at 3.

* * *

The Petition For Leave To File Reply submitted by ADBF does not come
close to meeting the narrow standard for granting an opposed waiver of 49 C.F.R. Part
1104.13(c). It is wholly without merit, and should be denied.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

By: Adam C. Smith
Aaron L. Vorce
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

Of Counsel:

SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036

/s/ Kelvin J. Dowd
Katherine F. Waring
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: December 1, 2017

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that this 1st day of December, 2017, I caused a copy of the foregoing Reply in Opposition to Petition For Leave To File Reply to be served by U.S. First Class Mail or by more expeditious means upon the following counsel for Petitioner:

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., NW
Washington, D.C. 20036

/s/ Katherine F. Waring
An Attorney for Consumers Energy Company