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September 29, 2022

Via E-Filing
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. St. SW
Washington DC 20423

305406
ENTERED
Office of Proceedings
September 29, 2022
Part of
Public Record

Re: STB Docket No. FD 36619
City of North Chicago, Illinois
Petition for Declaratory Judgment Order

Dear Chief Brown,

On June 21, 2022, the City of North Chicago filed a Petition for a Declaratory Judgment, requesting that Surface Transportation Board find that the City's state court condemnation action is not preempted by the Interstate Commerce Commission Termination Act or, in the alternative, that the state trial court lacks any basis to order the City to reinforce its entire water main on the Property immediately as a remedy for a highly unlikely partial preemption in the future. On August 22, 2022, 2nd & Main filed a Response to the City's Petition, which raised two new legal issues, the election of remedies and Union Pacific Railroad's ("UPRR") statutory duty to provide rail service. North Chicago asked this Board for leave to file a reply on August 31, 2022 for the sole purpose of addressing these two new issues.

2nd & Main has now filed an additional response to North Chicago's reply. This additional response raises new issues that have nothing to do with anything in North Chicago's reply and, for that reason alone, should be stricken. If it is nonetheless allowed to stand, an additional reply is required to address these radically new points.

In essence, this case has always involved a single question: whether the court can and should require North Chicago to reinforce its existing water main to railroad standards in order to support possible new railroad tracks 2nd & Main may install in the future. In its additional response, 2nd & Main tries to dramatically overhaul the focus of this case by arguing that it does not need to comply with railroad standards in laying new railroad track on its property and that the entire water main must be reinforced (to UPRR railroad standards) for the additional purposes of supporting buildings and container stacks that may be stored on the property in the future. These novel arguments, which are outside the scope of the court's referral, must be addressed, and so North Chicago seeks leave to file the attached reply.

Sincerely yours,

Mary Jean Dolan

Cc: John Quinn
Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS' REPLY
TO 2ND & MAIN'S ADDITIONAL RESPONSE REGARDING
THE CITY'S PETITION FOR DECLARATORY JUDGMENT

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Dated: September 29, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS' REPLY TO 2ND & MAIN'S
ADDITIONAL RESPONSE REGARDING THE CITY'S PETITION FOR A
DECLARATORY JUDGMENT

On June 21, 2022, the City of North Chicago ("City") filed a Petition for a Declaratory Judgment, requesting that the Surface Transportation Board ("Board" or "STB") find that the City's state court condemnation action is not preempted by the Interstate Commerce Commission Termination Act or, in the alternative, that the state trial court lacks any basis to order the City to reinforce its entire water main on the Property immediately as a remedy for a highly unlikely partial preemption in the future. On August 22, 2022, 2nd & Main, LLC ("2nd & Main") filed a Response to the City's Petition, which raised two new legal issues, the election of remedies and Union Pacific Railroad's ("UPRR") statutory duty to provide rail service. The City asked this Board for leave to file a reply on August 31, 2022 for the sole purpose of addressing these two new issues.

On September 16, 2022, 2nd & Main filed an additional response to North Chicago's reply (the "Additional Response"). This Additional Response raises even more new issues that are not related in any way to the issues addressed in the City's reply and, for that reason alone, should be stricken. If it is nonetheless allowed to stand, an additional reply is required to address these radically new points.

In essence, this case has always involved a single question: whether the court can and should require the City to reinforce its 60-year-old existing water main to railroad standards in order to

support a speculative new railroad spur 2nd & Main may install in the future.

In its Additional Response, 2nd & Main tries to radically overhaul the focus of this case by arguing that (1) it does not need to comply with railroad standards in laying new railroad track on its property and (2) the entire water main must be reinforced (to railroad standards) for the additional purposes of supporting buildings and container stacks that may be stored on the Property in the future. These novel arguments, which are outside the scope of the court's referral, must be addressed, and so the City submits this reply to the 2nd & Main's Additional Response.

1. 2nd & Main Is Wrong to Claim that UPRR Standards are Irrelevant or Incorrect

In its Petition, the City showed that (a) because UPRR could refuse service to 2nd & Main if it failed to comply with basic railroad safety standards, such as limits on track curvature, (b) and current UPRR standards require a maximum curvature of 10 degrees; (c) given this rule and site constraints of the Property, there is only one practicable location for a possible new railroad spur. See Petition at 5-6. Thus, the very most that should be required is reinforcement of a small portion of the City's water main, not the entire length inside the Property.

In response to this claim in the City's original Petition, in its Additional Response, 2nd & Main makes two related arguments – neither of which are actually in response to the limited points the City raised in its reply. See Additional Response at 7.

First, 2nd & Main wrongly argues that UPRR standards for the location of tracks are irrelevant because UPRR will not be conducting any rail activities on the Property; instead, it would be bringing any rail containers to the Property and dropping them off. *Id.* This is wrong for two reasons. First, as discussed in the City's Reply, UPRR could refuse service to 2nd & Main if it failed to comply with basic railroad safety standards, such as limits on track curvature. See Reply at 7-8 (and cases discussed therein). Second, as shown below, 2nd & Main's entire focus in this

case has been to insist that the City's water main located on the Property be compliant with UPRR standards of construction. It makes no sense to say that the City must comply with UPRR standards for its use on the Property but that UPRR standards are irrelevant to 2nd & Main's possible new construction on the Property.

In its second argument, 2nd & Main claims that the City is wrong about UPRR standards of a 10-percent maximum curvature because there are railroads in the metropolitan area with curvatures that exceed 10 degrees. See Additional Response at 7 (providing two examples in its Supplemental Appendix). These examples do nothing to undercut the City's expert's opinion. See David Johanson Opinion, C0931-935. Not only is it not clear that these examples are even UPRR railroads, but even if they are, the fact that some railroads built in the past exceed 10 degrees curvature does nothing to suggest the City's expert is wrong about UPRR's *current* standards which will apply to a potential new spur. See C0933 (setting forth UPRR's current standard).

2. 2nd & Main Cannot Change the Issue to Reinforcement Below Buildings and Container Stacks

In its Additional Response, 2nd & Main brings up another topic that has nothing to do with anything in the City's Reply: It now argues that the entire water main must be reinforced because reinforcement is required not only where it plans to add railroad tracks, but also below all buildings and any place where it may stack containers in the future. See Additional Response at 8. Because this was not a topic discussed in the City's Reply, this argument should not be considered now by the Board.

Not only is this argument not responsive to the City's reply, it is also an attempt to radically change the focus of this case and it is beyond the scope of the courts' referral to this Board.

Reviewing the trial court transcript and the appellate court opinion shows that, throughout the trial court and appellate court proceedings, the focus of this case has always been on whether

and how the City should be required to reinforce its existing water main in places where 2nd & Main may in the future install a new railroad spur. See, e.g., Appellate Court Opinion at ¶¶36-40, C0920-22 (focusing exclusively on whether existing water main could support additional rail lines). See also Trial Court Proceedings Transcript at C0626-27, C0632 (focusing on what railroad standards prescribe for construction of water mains so that they can support rail spurs). Facilitating the construction of new rail spurs was the point of the trial court's remedy requiring reinforcement of the water main and thus the subject matter of the appellate court's referral. 2nd & Main cannot now bring up new reasons for reinforcement of the water main.

Moreover, even if it was within the scope of the referral, which it is not, 2nd & Main has not provided any evidence that reinforcement of the water main would be required underneath buildings or any future container stacks. In addition, as discussed by the appellate court, see, e.g., C0920-921, the City's other engineering expert, Devin Moose, opined clearly that reinforcement would not be necessary for commercial activities separate from the operation of a new track, including storage of railroad cars. See, e.g., C0213-215, C0220-221. It is also important to keep in mind that the regulation of the storage of goods is subject to local control since it is unrelated to railroad safety. For all these reasons, the Board should not give any credit to 2nd & Main's new argument that the entire water main must be reinforced because it runs underneath buildings and may in the future someday be located beneath railroad storage areas.

3. 2nd & Main is Wrong on the Election of Remedies

There are two arguments made by 2nd & Main that do relate to the City's Reply, those relating to the possibility of the Board opinion on preemption, which also fail to persuade. 2nd & Main argues that the court's referral order does not purport to confer jurisdiction on the Board to decide preemption because of the doctrine of primary jurisdiction. Additional Response at 5. Further, 2nd

& Main argues that the 8th Circuit's decision in *City of Ozark, Arkansas v. Union Pacific R.R. Co.*, 843 F.3d 1167 (8th Cir. 2016) is not relevant because there the 8th Circuit had reversed the trial court's finding of no preemption while the appellate court did not do so here. See Additional Response at 9.

Both arguments merit the same response. In this case, like in *Ozark*, the appellate court gave a very broad referral to the Board. Specifically, it directed the plaintiff to "petition the Board to resolve the parameters of its jurisdiction and any relief compatible with the parties' interests." Appellate Court Opinion at ¶52, C0929. Like in *Ozark*, the Board should find here that its jurisdiction includes the authority to consider the entire case, including whether there is preemption, because that issue is so inextricably intertwined with the issue of relief. See *City of Ozark, Arkansas*, FD 36104 (STB July 26, 2017)(after city petitioned Board for declaratory judgment following 8th Circuit remand to district court for that purpose, Board found preemption in contrast to district court's earlier holding of no preemption).

In addition, reference to the doctrine of primary jurisdiction does not change the fact that 2nd & Main's election of remedies argument is based on a faulty premise, that this case is governed by a statute, 49 U.S. Code § 11704. As explained in the City's reply, that statute is entitled "Rights and remedies of persons injured by rail carriers" and it gives injured persons the right to pursue a remedy before either the STB or the courts. See also Additional Response at 5 (case it cites in support of election of remedies argument states only that an injured party cannot pursue damages first in court and then before Board). Not only are the statute and cited cases inapplicable, but election of remedies simply has no place in a situation where the court has referred the case to the Board for its expert opinion.

Conclusion

2nd & Main's Additional Response should be stricken because, for the most part, it introduces novel arguments that are not responsive to any points raised in the City's reply and the one point that does relate to the City's Reply does not break new ground. If the Board does consider 2nd & Main's Additional Response, then, as shown above, it should find that 2nd & Main's new focus on reinforcement of the water main to support buildings and any future container storage is both beyond the scope of the court's referral and factually unsupported. Moreover, as shown above, UPRR standards do apply to any railroad spurs 2nd & Main may construct in the future, and so if the Board were to find partial preemption, only a small portion of the water main would need to be reinforced. Finally, the Board has the authority to reconsider the court's finding of preemption and should do so here.

Respectfully submitted,



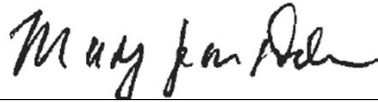
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Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **City of North Chicago, Illinois'**
Reply to 2nd & Main's Additional Response by emailing a copy of same on the 29th day of
September 2022 to:

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A handwritten signature in black ink, appearing to read "Mary Jean Dolan", written over a horizontal line.

Mary Jean Dolan