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October 17, 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

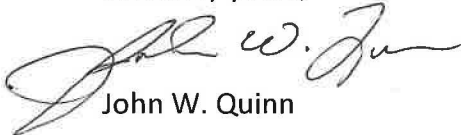
Re: STB Docket No. FD 36619
2nd & Main Response to Petition for Declaratory Order

Dear Chief Brown,

I am attaching two filings. The first is an objection to another filing by North Chicago on September 29, 2022, which is their second reply to a reply.

The second filing is provided in the event that the Board does accept North Chicago's September 29, 2022, filing. In that event, 2nd & Main asks the Board to accept this response to that filing.

Sincerely yours,



John W. Quinn

JWQ/emh
Enclosure
Cc: Thomas DiCianni
Mary Jean Dolan

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF NORTH CHICAGO, ILLINOIS)
-- PETITION FOR DECLARATORY)
ORDER)

**REPLY IN OPPOSITION TO MOTION FOR LEAVE
TO FILE SURREBUTTAL ARGUMENT**

2ND & MAIN, LLC
360 Lake Street
Antioch, IL 60002

Respondent

JOHN W. QUINN
CHURCHILL, QUINN, HAMILTON
& VAN DONSELAAR, LTD.
2 South Whitney Street
Grayslake, IL 60030

Attorney for Respondent

Date Filed: October 17, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF NORTH CHICAGO, ILLINOIS	)	FINANCE DOCKET
-- PETITION FOR DECLARATORY	)	NO. 36619
ORDER	)	

**REPLY IN OPPOSITION TO MOTION FOR LEAVE
TO FILE SURREBUTTAL ARGUMENT**

Pursuant to 49 C.F.R. § 1104.13(c), 2nd & Main, LLC (2&M), a Class III rail carrier, hereby replies in strong opposition to a motion for leave to file surrebuttal argument (Motion) filed by the City of North Chicago, Illinois (the City) on September 29, 2022.

FOREWORD

Less than a month ago, the Board issued a decision that gives strength to its regulation that a reply to a reply is prohibited, when it denied a motion for leave to file surrebuttal argument because that “would unduly burden the Board’s ability to review the extensive record in this proceeding.” *Canadian Pacific Railway, Ltd. et al. -- Control -- Kansas City Southern RR*, STB Finance Docket No. 36500, Decision No. 28, slip op. served on September 29, 2022, at 3. Instead of identifying essential good cause for the procedural privilege of rebuttal and surrebuttal, the moving party in that proceeding, and the City in the present case, seek that relief only to ensure themselves of the last word in argument. The Board’s recent decision makes it clear that getting the last word in argument is not good cause for rebuttal and surrebuttal.

PROCEDURAL BACKGROUND

A number of years ago, the City installed a water main across property owned by a predecessor of 2&M without having obtained an easement for use of the property for that purpose. More recently, the City and 2&M negotiated for issuance of the required easement, but they were unable to agree on its terms.

Thereafter, the City filed an action in Illinois state court seeking to condemn the required easement. As here pertinent, both the state trial court and the Illinois Appellate Court held that the condemnation action is federally preempted by virtue of 49 U.S.C. § 10501(b) because the condemnation action would impede 2&M's current and future railroad operations over the involved property. The Appellate Court vacated the section of the trial court's decision bearing on the remedy for preemption in the circumstances, and directed the City to petition the Board in two respects, i.e.,

- (1) to resolve the parameters of its jurisdiction; and
- (2) to identify any relief compatible with the parties' interests.

Appellate Court decision served on March 21, 2022, at 31.

Inasmuch as there is no reply to a reply under Board rules, the City was required to file its entire case in its Petition for Declaratory Order. Inexplicably, the City's Petition focused primarily on a request that the Board revisit and set aside the holdings of the state courts that the condemnation action is federally preempted, rather than the issues involving relief as directed by the Court.

2&M's Reply to the City's Petition emphasized that by virtue of the election of remedies principle, the Board does not have jurisdiction to set aside the state court rulings because the City elected to pursue judicial relief rather than administrative relief for the condemnation action.

Thereafter, the City moved for leave to file rebuttal, and now surrebuttal, solely on grounds that 2&M's filing contain "new legal issues" and "novel arguments" (Motion at 1-2). This is 2&M's Reply in Opposition.

ARGUMENT

This is not a case in which denial of surrebuttal might prevent admission of material evidence. The City has not proffered any evidence that could be adversely affected by denial of surrebuttal. Instead, the requests for rebuttal and surrebuttal are directed solely for the purpose of additional arguments – namely getting the last word in argument. Rebuttal and surrebuttal are not intended for that purpose.

Rebuttal and Surrebuttal are to be denied when they serve the sole purpose of "unduly burden(ing) the Board's ability to review (an) extensive record". *Canadian Pacific Railway, Ltd., et al. -- Control -- Kansas City Southern RR, supra*, Finance Docket No. 36500, decision No. 28, served on September 22, 2022, slip op. at 3. Where, as here, the focus of requests for rebuttal and/or surrebuttal is solely to get the last word in argument, rather than to proffer meaningful evidence, good cause is lacking for those extraordinary measures of relief. *Id.* See also, STB Ex Parte Docket No. 664 (Sub No. 2), Western Coal Traffic League—Petition to Institute a Rulemaking Proceeding, decision served August 14, 2017, at 2, note 2 (Petition for Leave to File a Reply to a Reply rejected where the Reply "does not provide information necessary to develop a more complete record")

As the Court emphasized in *ICC v. Baltimore & Annapolis R. Co.*, 398 F.Supp. 454 (D,

Md., Balt. Div., 1975), at 470:

Litigation must end somewhere. To allow a plaintiff to shuttle back and forth between the ICC and the courts asserting new claims each time would not only be inequitable to the defendant, but contrary to the purposes of section 9 of the Interstate Commerce Act (now 49 U.S.C. § 11704(c)) . . .

* * *

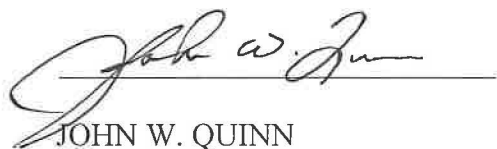
. . .(I)t is in the interest of the parties and of the public that litigation concerning a single set of circumstances should stop at some point (footnote omitted) . . .

Not only does the City want to shuttle from the court to the Board and back, it wants the extraordinary privilege of rebuttal and surrebuttal in the process. However, instead of identifying a persuasive good cause for that privilege, it is evident that the City seeks rebuttal and surrebuttal solely to assure it of the last word in argument. As shown, that is not good cause for an exception to prohibition of a reply to a reply. (49 C.F.R. § 1104.13(c)). Accordingly, the City's Motion should be denied.

Respectfully submitted,

2ND & MAIN, LLC
360 Lake Street
Antioch, IL 60002

Respondent

A handwritten signature in cursive script, appearing to read "John W. Quinn", is written over a horizontal line.

JOHN W. QUINN
CHURCHILL, QUINN, HAMILTON
& VAN DONSELAAR, LTD.
2 South Whitney Street
Grayslake, IL 60030

Attorney for Respondent

Date Filed: October 17, 2022

CERTIFICATE OF SERVICE

I certify that on October 17, 2022, the foregoing document, Reply In Opposition To Motion For Leave To File Surrebuttal Argument, was served by e-mail and U.S. mail, postage prepaid, on Mary Jean Dolan, Esq., Ancel Glink, 140 South Dearborn Street, Suite 600, Chicago, IL 60603, mdolan@ancelglink.com.



JOHN W. QUINN

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36619

2ND & MAIN, LLC'S REPLY TO NORTH CHICAGO'S SEPTEMBER 29, 2022
FILING

Case History

North Chicago voluntarily filed this case in the Circuit Court of Lake County, Illinois. 2nd & Main filed a motion for partial summary judgment on the issue of whether an easement allowing an unreinforced water main was preempted under federal law because the proposed easement unreasonably interfered with 2nd & Main's future use of its property for railroad purposes. The Circuit Court found that it was, granting 2nd & Main's motion for partial summary judgment and the Court ordered North Chicago to replace the existing pipe with one consistent with current railroad standards and set the matter for further hearing to determine what current railroad standards are.

North Chicago appealed to the 2nd District of the Appellate Court of Illinois. The 2nd District affirmed the lower court's grant of summary judgment on the issue of whether North Chicago's unreinforced water main was preempted and specifically found that 2nd & Main's plans for using the property

for railroad operations were sufficiently definite to warrant preemption. The Appellate Court, however, vacated the remedy portion of the Circuit Court's order requiring North Chicago to replace the pipe according to current railroad standards, determining that the Surface Transportation Board would be in a better position to determine the necessary relief. The Appellate Court remanded the matter to the Circuit Court, requiring North Chicago to petition the STB to determine the proper remedy and the parameters of its jurisdiction.

North Chicago's Claim in its most recent filing that this case is only about potential interference with an existing spur line is false

In its most recent filing, North Chicago states that "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." (Response Dated Sept 19, 2022, 1-2) This is false. 2nd & Main never limited its plans to a single new railroad spur. In both the appeal and the underlying motion for partial summary judgment, 2nd & Main proposed several potential uses other than a spur.

2nd & Main has always contended that it sought to use its property in many ways beyond the use of a single existing, even if dormant, spur line. For example, in its motion for summary judgment 2nd & Main stated: "Because of

this, 2nd & Main plans to use the property as a storage area for shipping containers, railroad access and to place additional spur tracks on the property. (Rule 2-1.04 Statement paragraph 7). The property has been leased to Hussey Terminal Railroad Company for those purposes. (Rule 2-1.04 Statement paragraph 8)(Emphases added)

The Appellate Court acknowledged the potential storage uses stating: “Defendant noted that it planned to place additional rail spurs on the property, and to use the site, including the portion that plaintiff sought to condemn, for railroad access and as a storage facility for shipping containers. Defendant has leased the premises to Hussey Terminal Railroad Company (Hussey) for those purposes. Accordingly, defendant argued that the water main as currently constructed interferes with railroad operations because the existing 24-inch diameter, pre-stressed, concrete cylinder pipe is not constructed to support railroad loads and is not built to railroad standards.” *The City of North Chicago v. 2nd & Main, LLC*, 2022 IL App (2d) 210454U (Ill. App. 2022) ¶ 8 (Emphasis added)

The reason that the Circuit Court and the Appellate Court discussed the specific issue of a spur and placement of tracks is because North Chicago’s own expert Devin Moose concluded that tracks could not be placed on areas coinciding with the water main.

The finding of preemption made by the Circuit Court and affirmed by the 2nd District did not limit its finding of preemption as North Chicago seems to imply in its most recent filing. In its appeal, North Chicago never argued that the Circuit Court's preemption finding was too broad in scope and should be limited to only portions of the pipe that intersect with a spur line. As such, this argument, which it now raises for the first time in front of the STB, should be deemed waived and the broad finding of preemption affirmed by the Appellate Court is now law-of-the-case.

The Finding of Preemption is the Law of the Case

The Trial Court found that the existing water main interfered with 2nd & Main's future railroad use, ordering that "The City of North Chicago's water main shall be constructed and or replaced in accordance with current railroad standards." North Chicago appealed this finding, but never argued in the appeal that the Circuit Court erred in not limiting its finding of preemption to potential spur traffic, and that it erred in not limiting its finding of preemption because it contends there is only a single pathway suitable for spur traffic. The Appellate Court expressly affirmed the Circuit Court's preemption finding, stating: "we agree that the record supports the trial court's implicit preemption finding." *City of North Chicago* at ¶52.

The Plaintiff's new theory that only a portion of the main interferes with the tracks, even if true, is raised too late. The finding of preemption and its affirmation by the Appellate Court is the law of the case. In *City of Ozark, Arkansas v. Union Pac. R.R. Co.*, 843 F.3d 1167 (8th Cir. 2016), the District Court entered summary judgment in favor of the City of Ozark, finding that preemption did not apply to a City's attempt to reopen a certain railroad crossing. The City argued that preemption did not apply to the reopening of a rail crossing, when it contended, the crossing had been wrongfully closed. The 8th Circuit reversed this decision, finding that the circumstances under which the crossing was closed did not have a bearing on whether or not the City's actions were preempted. The 8th Circuit vacated the order dismissing the case and remanded the matter to the District Court stating that "[i]n these circumstances, it would be appropriate for the district court to defer entry of a final judicial determination whether the City's claims are preempted if the City requests an opportunity to petition the STB for a declaratory order resolving the issue of its exclusive jurisdiction." *Ozark* at 1173. Thereafter, after a referral to the STB, the Board decided that the reinstallation of an at grade crossing was preempted. Despite that ruling, the City of Ozark, after losing, filed another petition, again advancing the argument that because the railroad wrongfully closed the crossing, reopening the crossing was not preempted. The Surface Transportation

Board rejected the argument outright stating that the 8th Circuit had already ruled that the wrongfulness of the closing of the crossing was not a factor in determining preemption and that the 8th Circuit's decision was now law-of-the-case with respect to the petition in front of the Surface Transportation Board. (Surface Transportation Board Decision Docket No. FD36104 page 3). Simply put, the law of the case doctrine precludes a reexamination in subsequent judicial or administrative proceedings of issues of law decided on appeal, explicitly or by necessary implication. Surface Transportation Board Decision Docket No. 32717 Citing DOE & DOD v. B & O Railroad Co. 10 I.C.2d 112 n.67 (1994).

The Appellate Court has already ruled that 2nd & Main's plans for future use are not too vague and indefinite to justify preemption. Notwithstanding this ruling, North Chicago time-and-time again attempts to use this proceeding in front of the Surface Board to put this issue back on the table. It argues 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 highly unlikely partial preemption in the future." (Response Dated Sept 19, 2022, 1-2) Rejecting this argument, the Appellate Court found "that preemption applies where condemnation would unreasonably interfere with defendant's future use of the property for railroad purposes, which, here, includes the economic impact that defendant's loss of legal advantage would likely entail" and that, "in sum, based upon this record,

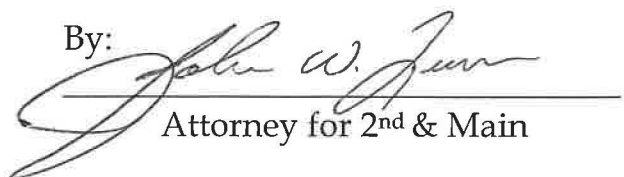
the trial court did not err in finding that, as pleaded, plaintiff's proposed condemnation action is preempted." *City of North Chicago* at ¶33.

Conclusion

The issue of preemption has been decided in the Circuit Court and affirmed in the Appellate Court. Based on the law-of-the-case doctrine it is not to be relitigated in this forum. What is before the STB is the standard to which the offending water pipe should be reconstructed. North Chicago has never offered any evidence that the existing water line is up to railroad standards because it is not. 2nd & Main requests that the Board require that either: 1) North Chicago be required to remove the existing water line and install a new water line all the way across the 2nd & Main property (approximately 435 feet) pursuant to AREMA Guidelines, including a casing pipe which should be installed by boring under the existing buildings and afterwards restoring the property to its original condition, (See Appendix to 2nd & Main's response – Affidavit of Peter Kolb paragraph 12) or 2) North Chicago should be required to remove and relocate its water line restoring the property to its original condition.

Respectfully submitted,

By:

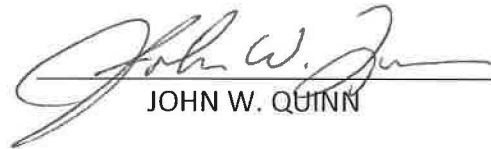


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CERTIFICATE OF SERVICE

I certify that on October 17, 2022, the foregoing document, Reply to North Chicago's September 29, 2022 Filing, was served by e-mail and U.S. mail, postage prepaid, on Mary Jean Dolan, Esq., Ancel Glink, 140 South Dearborn Street, Suite 600, Chicago, IL 60603, mdolan@ancelglink.com.


JOHN W. QUINN