

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. FD 36619

THE CITY OF NORTH CHICAGO, ILLINOIS' RESPONSE
TO 2ND & MAIN'S "REPLY IN OPPOSITION TO MOTION FOR LEAVE
TO FILE SURREBUTTAL ARGUMENT" AND TO ITS REQUEST
TO FILE ANOTHER REPLY

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Dated: November 9, 2022

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On October 17, 2022, 2nd & Main, LLC ("2nd & Main") filed two submissions with the Surface Transportation Board ("Board" or "STB"): (1) one that it captioned "Reply in Opposition to Motion for Leave to File Surrebuttal Argument," (2) and the other a "Reply to North Chicago's September 29 Filing." The City of North Chicago ("City") requests the Board to grant its motions to file, described below, and to draw the line at 2nd & Main's most recent reply, which is nothing more than an attempt to get the last word, and submits this brief in support.

Procedural Background and Introduction

In order to understand the problems with 2nd & Main's most recent filings, it is necessary to first describe what has transpired to date in this case. First, on June 21, 2022, at the direction of the state courts, the 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 filed its response to the City's Petition ("Response"). Because that Response 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 (“Reply”) 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 “Second Response”). Unfortunately, this Second Response raised even more new issues. In its Second Response, 2nd & Main tries to change the focus of this case away from the central question of whether and how the water main needs to be reinforced to support any future rail spur it may add to its property, and it also now argues that it need not comply with railroad standards in adding such a rail spur. In order for the Board to have a full understanding of these novel issues, on September 29, 2022, the City requested leave to file a reply (“Reply to Second Response”).

2nd & Main now has submitted a brief in opposition to the filing of what it calls the City’s “Surrebuttal Argument.” (“Opposition Brief”) While the caption of this submission and 2nd & Main’s letter to the Board both suggest that its opposition is limited to the filing of the City’s Reply to Second Response, the Opposition Brief itself appears to argue that the City should not be allowed to file its original Reply either. Thus, this reply (“Reply to Opposition Brief”) shows why both of these filings should be permitted. 2nd & Main has also filed a response to the City’s Reply to Second Response (“Third Response”), which should not be allowed because it breaks no new ground.

Case Law and Analysis

It is true that the Board’s rules generally do not provide for allowing petitioners to file a reply to a response. See 49 C.F.R. § 1104.13(c). Based on a review of Board filings and conversations with Board staff, however, it is clear that there is a general Board practice to allow an exception to that rule where a reply is necessary to assist the Board by addressing new material introduced in the response. As described above, both the City’s Reply and its Reply to

the Second Response are critically important to address the wholly new legal and factual issues 2nd & Main interjected in its responses.

2nd & Main based its opposition to the City's replies (the Reply and the Reply to the Second Response, collectively the "Replies") on two cases decided by the Board.¹ A review of the standards set by those cases shows that this Board should permit the filing of both Replies.

In one, *Canadian Pacific Railway Ltd.*, FD 36500 (Dec. No. 28), STB Sept. 25, 2022, Metra had filed an application regarding a proposed merger and certain applicants filed a response in opposition. Metra requested the Board to allow it to file a reply (what the Board called a "surreply") to respond to allegedly misleading statements and mischaracterizations in the response. The Board decided that it would not make an exception to the general rule against replies for two reasons. First, making an exception to the rule in that case "would unduly burden the Board's ability to review the extensive record in this proceeding." And second, there, "Metra will have an opportunity to clarify, as appropriate, disputed claims regarding RTC modeling in its final brief as well as during the public hearing."

This case is not applicable to the City's Replies because in *Canadian Pacific*, Metra sought only to correct alleged mischaracterizations; there was no claim that the applicants had raised new issues that needed to be addressed. And in *Canadian Pacific*, unlike in this case, Metra had two other opportunities to correct the misleading statements, a final brief and a public hearing. The City has no such ability to address the new issues in alternative means, so that the Replies are essential to the Board understanding this case.

In the other case, *Petition of the Western Coal Traffic League*, EP 664 (Sub-No. 2) (STB

¹ Note that while 2nd & Main also cites to a court case, *ICC v. Baltimore & Annapolis R. Co.*, 398 F. Supp. 454, 470 (D. Md. 1975), Opp. Br. at 4-5, that case is irrelevant because it speaks only to when a party can file something at the Board which has already been litigated in court and says nothing regarding when additional filings at the Board are permitted.

Aug. 10, 2017), the Board denied a motion to file a reply because the reply “repeats its prior arguments, does not provide information that is necessary to develop a more complete record, nor does WCTL attempt to show good cause for waving the Board’s prohibition on replies.” *Id.* at n. 2.

None of the reasons used to deny the reply in *Western Coal* apply here. Instead, here, the City has shown good cause for allowing its Replies. As summarized above and described in detail in the Replies, both Replies are essential for the Board’s ability to decide this case because both respond to wholly new issues raised by 2nd & Main in its Response and Second Response. Without the benefit of the Replies, the Board will only have heard one side of important legal and factual issues that will affect its decision in this case.

This Board should not allow 2nd & Main to file its Third Response

2nd & Main argues, incorrectly, that the City’s Replies are attempts to get the last word. As described above, this is not the case; rather both Replies address only new issues raised by 2nd & Main in its Response and Second Response. Instead it is 2nd & Main’s Third Response, for which it now seeks leave to file, which is the attempt to get the last word. The Third Response breaks no new ground. The City did not raise any new issues in its Reply to the Second Response but merely addressed the new issues raised in the Second Response. Because the Third Response merely continues discussing those same issues, it should be disallowed. Moreover, that the City is not trying to file documents in an effort to get the last word is apparent from its action now. Even if the Board allows filing of the Third Response, the City will not seek leave to file yet another reply. All legal and factual issues raised in this case have now been addressed.

Conclusion

The City respectfully requests the Board to grant its earlier motions for leave to file its Reply and its Reply to the Second Response for good cause because they both address new issues raised by 2nd & Main and thus are necessary to the Board's ability to resolve this case. The City further respectfully requests the Board to deny leave to 2nd & Main to file its Third Response, which merely rehashes the issues and does not meet the standards for allowing additional replies that are found in the Board's cases and standard practice.

Respectfully submitted,



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Certificate of Service

I, Mary Jean Dolan, certify that I served the foregoing **City of North Chicago, Illinois’ Response to 2nd & Main’s “Reply in Opposition to Motion for Leave to File Surrebuttal Argument” and to Its Request to File Another Reply** by emailing a copy of same on the 9th day of November 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