

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1242 (Sub-No. 1)

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**THE GREAT WALTON RAILROAD COMPANY, INC. –
PETITION FOR DECLARATORY ORDER**

**HARTWELL FIRST METHODIST CHURCH
REBUTTAL TO
THE GREAT WALTON RAILROAD COMPANY, INC. RESPONSE**

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Dated: November 27, 2024

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On September 26, 2024, Hartwell First Methodist Church (“Hartwell First” or “Church”) filed a Request (the “Church Request”) asking that (1) the Board remove this proceeding from abeyance, and (2) the Board issue a decision addressing the sole remaining issue of whether The Great Walton Railroad Company, Inc. (“GWRC”) exhibited or failed to exhibit a continuing intent to provide common carrier service to the public over the “north spur” or “runaround track” for an extended period of time. GWRC filed its Response (the “GWRC Response”) on October 30, 2024, agreeing that it was appropriate to remove this matter from abeyance. However, the GWRC Response then goes on to address not only the single issue of whether GWRC demonstrated any continuing intent to provide service over the north spur (either before or after GWRC removed the north spur track and track materials in 2008), but also to attempt to relitigate both (1) the State Court issues and decisions finding the Church has fee title to the property underlying the north spur,¹ and (2) the unrelated issue of whether the north spur is “necessary” for GWRC to fulfill its

¹ The State Court litigation (other than GWRC’s failed attempt at condemnation before the Georgia Public Service Commission (“PSC”) and its failed appeals of the PSC decision) is fully summarized in the Church Request at 4-6, with the decisions attached to the Church Request as Exhibits A (Superior Court Trial Court Order), B (Court of Appeals Appellate Decision), C (Court of Appeals denial of reconsideration), and D (Supreme Court denial of petition for certiorari).

common carrier obligations to serve the sole shipper (previously Quality Holdings, now Redline Plastics) on GWRC's Bowersville to Hartwell main line. The Church files this Rebuttal to address why these arguments are superfluous, outside the scope of the issues in this proceeding, and beyond the Board's jurisdiction, and to correct factual misstatements in the GWRC Response.

A. Request to Accept Rebuttal

In removing the petition for declaratory order proceeding from abeyance, the Board could determine to handle the proceeding under its modified procedures pursuant to 49 C.F.R. Part 1112. Under those procedures, the Board would establish a schedule for opening statements, replies and rebuttal. See 49 C.F.R. §1112.2. Although the Board has not issued a schedule following the Church's Request to Remove Proceeding from Abeyance (and GWRC agreeing with the request), given that the Church included its opening statement and arguments in the Church Request, and that GWRC has filed its Response broadening the issues, the Church respectfully requests that the Board accept this Rebuttal.²

B. GWRC's Lack of Intent to Use the North Spur

As set out by the Board in the *June 2020 Decision*, when considering whether a carrier has abandoned spur track, the Board will look at whether the carrier had a "fixed and continuing intent" to use the ancillary track to "provide common carrier service to the public." *June 2020 Decision*,

² If the Board does not accept this filing as a permitted rebuttal, then Hartwell First alternatively requests the Board treat this filing as a motion to accept the Rebuttal as a "reply to a reply." Under the Board's regulations at 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, the Board will permit a reply to a reply in the interest of developing a more complete record as long as the reply does not merely repeat prior arguments. See *Hartwell First United Methodist Church – Adverse Abandonment and Discontinuance – The Great Walton Railroad Company, Inc. in Hart County, GA*, AB 1242, slip op. at 3 n.5 (served Jan. 31, 2018) (the "*January 2018 Decision*") (accepting GWRC's November 3, 2017 filing); *The Great Walton Railroad Company, - Petition for Declaratory Order*, 1242 (Sub-No. 1), slip op. at 5 n.9 (served June 9, 2020, corrected June 23, 2020) (the "*June 2020 Decision*") (accepting GWRC's sur-reply).

slip op. at 11 (citing *Pinelawn Cemetery – Petition for Declaratory Order*, FD 35468, slip op. at 10-11(served April 21, 2015) (“*Pinelawn*”)). As the Board has explained, it will examine all the facts and circumstances (the totality of the circumstances) on a case-by-case basis in making the determination about the carrier’s intent. *NewVista Property Holdings, LLC – Petition for Declaratory Order*, FD 36040 , slip op. at 2 and fn 3 (served March 17, 2017) (“*NewVista*”) (citing *Pinelawn* and *Beaufort R.R. – Modified Rail Certificate*, FD 34943, slip op. at 6-8 (served March 19, 2008) (“*Beaufort R.R.*”)). When considering a railroad’s intent, the Board looks at the railroad’s actions in their entirety. The Church addressed these criteria in detail in the Church Request at 8-13.

By comparison, GWRC begins its Response by citing to the wrong standard equating the “abandonment” of the north spur ancillary track with the abandonment / adverse abandonment of a main line track. See GWRC Response at 3. As noted above and in the Church Request, the Public Convenience and Necessity standard is not the correct standard to apply to ancillary track. GWRC’s focus on whether a new spur /runaround track is “necessary” is not relevant here. See Part D below. GWRC’s Response does very little to dispute the totality of the circumstances presented by the Church which demonstrate that GWRC did not have a fixed and continuing intent to use the former north spur or runaround track to provide common carrier rail service following GWRC’s removal of the north spur track in 2008 and the Church’s exclusive use and occupancy of the property for eight years thereafter.

The claims of Mr. Bishop and Mr. Allen that the removal of the tracks was only “temporary” do not ring true. See GWRC Response, Verified Statement of Charles David Bishop (“Bishop V.S.”), ¶14; Verified Statement of Michael E. Allen (“Allen V.S.”) at 2-3. Mr. Allen’s statement that it is common for railroads to “temporarily remove rail” during the “normal course

of business” may be true; however, he does not explain how the removal of the north spur rail for a period of eight years could be considered “temporary” or in the normal course of business.³

GWRC’s alleged “need” to restore the north spur did not arise until the litigation between the parties over the adverse abandonment of the main line and litigation over the condemnation and then title to the property underlying the litigation. It was only then, beginning in 2016 (after eight years of silence following removal of the north spur track), when Mr. Bishop “repeatedly” stated the need to restore the north spur. GWRC Response at 14; Bishop V.S., ¶6. These statements and claims made only after adverse abandonment was threatened during the eight years of litigation before the Board and in the State Courts, do not demonstrate a continuing intent to use the spur or make up for the previous eight years of silence. Especially where all of the litigation has related to GWRC’s failed claims to condemn the property and to establish that it has title to the spur property and the Church does not (all of which claims failed).⁴

GWRC’s lack of use of the runaround both before and after track was removed in 2008 despite providing service to Quality Holdings and then Redline Plastics demonstrates GWRC had no continuing intent to use the runaround. GWRC’s removal of the track without reserving any

³ Indeed, in 2016, GWRC did not merely seek to replace the rail which was long gone. Rather it clearly was attempting to build a whole new spur. See Church Request, Exhibits F and G.

⁴ This is not a situation where restoration of the ancillary track was blocked by the Church’s action. Compare *JGB Properties, LLC – Petition for Declaratory Order*, FD 35817 (served May 23, 2015) (“*JGB Properties*”) cited in the GWR Response at 14, where the tracks were removed by JGB Properties from a valid easement that CSX and other respondents had a present intent to use, followed by litigation that challenged the easement). Here, GWRC voluntarily removed the tracks and then eight years later sought to build a new track despite having no claim to the property. The Church’s only action to block restoration was the injunction that it was able to obtain to stop the construction. The injunction was not the cause of GWRC’s decision not to use the spur for eight years after removing the track (or from not using the spur for 10 years before that. (Interestingly, the main thrust of the *JGB Properties* decision was that the state court decisions on issues of NY property law on issues of New York property law were not preempted. *Id.*, slip op at 6.

rights to reinstall the tracks and allowing the Church to landscape over and have exclusive use of the property for eight years without a single indication that GWRC had any continuing intent to use a runaround in that location demonstrates GWRC had no continuing intent to use the runaround. GWRC's entry into the original TORCH lease/purchase agreement in 2015 to allow the main line to be developed for public purposes demonstrates GWRC had no continuing intent to use the runaround (or even the adjacent main line).

Despite GWRC's claims to the contrary, the license agreements entered into in July 2008 between GWRC and the Church do not indicate any reservation of a right to use the spur track to resume rail operations. GWRC Response at 19-26. The license agreements merely provided the Church with the right to install two pipelines under, and sidewalks across, both the main line and the north spur track (which still remained in place at the time the license agreements were signed⁵). The "cautionary warnings" as to both tracks were included because both tracks were in place at the time. The railroad obviously used its standard agreements and these warnings had nothing to do with the need for actual "warnings" given at the time that neither the main line track nor the spur track were operable despite Mr. Bishop's contrary claims. *Compare* Bishop V.S., ¶12 (tracks were operational) with Church Request, Exhibit E (2008 photograph showing condition of the tracks). The purpose of the license agreements was to allow the Church to proceed with its construction at a time when the railroad had agreed to remove, but had not yet removed, the north spur tracks; it was not to address restoration of tracks. Mr. Bishop's argument that he would not have bothered to include certain railroad provisions if GWRC intended to abandon the spur track is unsupported. GWRC Response at 25; Bishop V.S., ¶12. Of course, the railroad would have included those same provisions to protect its main line which remained in place. GWRC complains

⁵ The north spur track had been removed before the sidewalk was constructed.

that the Georgia Courts focused on Georgia's rules of contract interpretation because it does not like the result (GWRC Response at 26), but GWRC has done nothing to show that the state courts improperly interpreted the intent of the license contracts (which of course are a matter of state law).

When the north spur tracks were removed a few months after the license agreements were signed, there were no specific reservations or agreements that GWRC could build a new north spur. The GWRC Response at 24 and the Bishop V.S., ¶14, acknowledge that there was no written contractual agreement (including in the licenses drafted by GWRC or independently) that the Church would not oppose construction of a new spur track.

It is hard to fathom how GWRC can argue that the Church "tricked" GWRC into temporarily removing the tracks in October 2008 to create "the illusion" that Mr. Anderson intended to abandon the tracks. GWRC Response at 23-24; Bishop V.S., ¶14.⁶ The Church, perhaps naively, believed in fact that Mr. Anderson, when he removed the north spur tracks, was abandoning those tracks and allowing the Church full control of the property. The Church fully understood that Mr. Anderson and GWRC were retaining the main line and accordingly has honored the license agreements as they related to the main line.

The only "evidence" of "continuing intent" of the railroad is the unsupported statement of Mr. Bishop that the railroad never intended to give up the spur (Bishop V.S., ¶4) despite voluntarily

⁶ The Church and Mr. Whittemore vehemently deny that they ever took any actions to deceive GWRC or Messrs. Anderson or Bishop. As has been argued in the primary adverse abandonment proceeding, The Church was under the impression from discussions with Mr. Anderson that the railroad would be donating its property interests in the both the main line and spur property. Based on those promises, the Church had construction drawings done on the basis that both tracks had been removed. Those drawings were internal and did not indicate any nefarious plan by the Church to remove the tracks. At the time the license agreements were prepared, Mr. Anderson had not followed through on his promised donations and accordingly the plans attached showed the two tracks that were still in place.

not using it for ten years before removal of the north spur, or for the eight years after removal until the Church decided to seek adverse abandonment of the adjacent the main line. Of course, the Church's recollection is much different and it maintains that Mr. Anderson in fact indicated a number of times after the Church acquired additional property in 2006 that he would abandon the tracks and let the Church have the property unfettered by the rails which he stated were valuable and could be used elsewhere. And following the eventual removal of the north spur tracks in October 2008, GWRC and Mr. Anderson allowed the Church to take full control of the underlying property for its development, landscaping, etc.

C. Title Issues Were Fully Resolved by the Georgia State Courts

GWRC acknowledges that it has been unable to locate a deed or a written easement that would support any ownership interest by GWRC. GWRC Response at 4. Nor was GWRC able to obtain title by condemnation – its request was denied by the PSC, and the denial was confirmed on appeal. Nor was GWRC able to establish that it had any property interest via adverse possession or prescriptive easement.⁷ GWRC acknowledges that the Church prevailed on the Church's title claims in the Georgia state courts, and that questions of property law are generally more appropriately decided by the courts. GWRC Response at 17.⁸ *See also JGB Properties, supra*, slip op. at 6. Despite this lack of any evidence of any GWRC title, and the detailed and complete analysis of the Georgia Superior Court, as affirmed by the Georgia Court of Appeal, that confirmed that the Church is the fee owner of the property where the former north spur was located, GWRC

⁷ *See* Church Request, Exhibit B, Court of Appeals Decision, at 14, confirming that GWRC did not challenge the Superior Court's findings on these claims: "[GWRC] does not enumerate as error the Superior Court's rulings that [GWRC] does not have a property interest in the land via adverse possession or prescriptive easement."

⁸ Indeed, the *June 2020 Decision* directed the parties to come back to the Board only at the conclusion of the state court title proceedings. *June 2020 Decision* at 12.

continues to argue that the State Court findings were incorrect. GWRC Response at 4. GWRC spends fully 23 pages of the 36 pages of the GWRC Response (pp 3-11, 15-19, 27-33, 35-36⁹) arguing how GWRC has title and how the Georgia State Courts got the title wrong. But the title issues are clearly state court issues, and the Georgia State Courts have clearly spoken that the Church has fee title to the property where the north spur was located, and GWRC does not, and never had any title or claim to that property.¹⁰

The *January 2018 Decision*, slip op at 5-6, noted that the title issues surrounding the former north spur track were “unresolved state law questions.” And then in the *June 2020 Decision*, slip op at 2, the Board went on to defer ruling on the remaining issues [of whether the former north spur was removed from the interstate rail network] pending the outcome of related state court proceedings. *June 2020 Decision* slip op at 2 (citing *2018 Decision*), 5 and 8.

And so the parties went on to litigate the title issues in the Georgia State Courts for the past six years as GWRC lost in the Superior Court, appealed to the Court of Appeals and lost again, had its request for reconsideration denied by the Court of Appeals, and then had its petition for certiorari to the Supreme Court denied.¹¹ The Board should not allow GWRC to re-litigate any title issues in this proceeding, and the Church will not respond to the title issues improperly raised by GWRC in the GWRC Response. GWRC had six years of litigation to do its title research and present its proposed interpretations to the Georgia State Courts. GWRC’s proposed interpretations of the deeds and chain of title were rejected, and the State Courts determined that Church has fee

⁹ Plus 19 pages of Appendices with copies of deeds, etc.

¹⁰ It is also worth noting that GWRC also has no title to the other half of the runaround, that portion being owned by the successors to Clinkscapes, subject to an agreement with the railroad that can be cancelled with 60 days’ notice.

¹¹ The State Court decisions are attached to and summarized in detail in the Church Request at 4-6 and Exhibits A-D.

title to the property where the north spur was located, and GWRC never had any title to that property.

Despite all of this, GWRC complains that the State Courts did not properly interpret the chain of title. GWRC Response at 4. It does so despite acknowledging that the Board lacks jurisdiction to reverse the state court findings of title in the Church and lack of title in GWRC. GWRC Response at 33-34, fn 28. The Board clearly does not have jurisdiction or authority to tell the Georgia State Courts how to interpret deeds under state law.¹²

And then in yet another “hail Mary” attempt to have the Board act on the title issues, GWRC misstates that the State Court rulings authorized the Church to acquire the rail property to prevent GWRC from (re)constructing the spur. GWRC Response at 37. In actuality, the State Courts (1) found the property was never rail property, and (2) rather than authorizing the Church to acquire the property, found that the Church already holds fee title to the property.

GWRC also requests that the Board find that the Superior Court’s finding that the Church had alternatively established title by adverse possession, is preempted. GWRC Response at 17-18. Whether adverse possession was correctly found by the Superior Court is irrelevant given the findings that the Church established fee title to the property and did not need adverse possession to acquire title. The Court of Appeals Decision noted that GWRC’s appeal of the adverse possession issue was moot:

Adverse Possession by the Church. Given our holding, supra, we need not address [GWRC’s] assertion that the superior court erred in concluding that the Church acquired prescriptive title to the property underlying the spur.

¹² The title decisions have nothing to do with the Board’s reserved right to determine whether GWRC demonstrated a continuing intent to use the former north spur when and after the tracks were voluntarily removed by GWRC. GWRC’s lack of intent was addressed in the Church Request and in Part B of this Rebuttal.

Church Request, Exhibit B, Court of Appeals Decision at 19. The Board should likewise deny GWRC's request as moot.

D. Use of the North Spur Runaround Is not "Necessary" for GWRC to Provide Service

The focus in this proceeding should be on whether GWRC has shown a continuing intent to provide service using the former north spur / runaround as addressed in the Church Request and in this Rebuttal, Part B. Instead, GWRC insists on focusing on whether its proposed use of a north spur runaround track in downtown Hartwell is necessary for GWRC to provide safe, efficient service to the one customer on the Hartwell to Bowersville line (originally Quality Holdings and now Redline Plastics) which is located over one mile west of downtown Hartwell. GWRC is essentially re-arguing what it argued in the original adverse abandonment proceeding (where the question was whether main line track should be abandoned). GWRC continues to claim that the downtown runaround is "needed" to service Quality Holdings. GWRC Response at 21. But even though the Board denied the requested adverse abandonment, the Board did not find that use of the runaround track would improve safety or that it was necessary; rather the Board merely stated that it would not substitute its operational judgment for the railroad's. *June 2020 Decision*, slip op 7, fn 12 (citing *January 2018 Decision*, slip op at 4).

Mr. Bishop acknowledges that before the predicted growth in traffic for Quality Holdings (which in fact has never materialized), GWRC was able to handle the traffic, at times using the Sand Spur located just west of the Quality facility and rolling the cars back onto the main line. Bishop V.S., ¶9. Mr. Bishop asserts that it was only after learning of anticipated growth in traffic in 2016, that GWRC had "no choice" but to build a new spur / runaround (*id.*), and it was only at that time (during the Board and State Court litigation) that GWRC repeatedly stated the "need" for

the runaround.¹³ GWRC thus acknowledges that it had not expressed the need for the spur for the period of eight years after it removed the spur tracks and allowed the Church complete control of the property. A more realistic explanation is that GWRC determined that it “needed” the main line and the runaround only after the Church gave notice that it was going to seek adverse abandonment of the main line which had been inactive and not maintained for 18 years prior to 2016, and the runaround was the only potential need it could come up with.

In addition to the professed “need”, GWRC, through its consultant Mr. Allen, claims that shoving moves are not the preferred method of operations and that a runaround in downtown Hartwell on the Church’s property is essential to the safe and efficient operation of the railroad. Allen V.S. at 9.¹⁴ Besides this not being the relevant question in this proceeding, the GWRC argument is notable for what it does not consider, including:

- The frequency of traffic / service (return of empties). The Church believes GWRC moves one or two empties, once every month or every other month.
- GWRC has provided service to Quality Holdings and then Redline Plastics for over 16 years (since before the removal of the north spur track in 2008), and neither Quality Holdings nor Redline Plastics has indicated that GWRC has ever failed to meet its common carrier service obligations.
- There have been no reported incidents, accidents or injuries related to the shoving service. See Allen V.S. at 11.

While Mr. Bishop argues that the “unsafe” nature of the operations were forced on GWRC by the state court injunction (Bishop V.S., ¶6), this is of course not true. The injunction merely

¹³ GWRC of course ignores that by the time it “needed” the runaround it had already, in 2015, entered into the lease purchase agreement with TORCH giving up its right to use the adjacent main line track.

¹⁴ Mr. Allen appears not to have visited the property and therefore his Verified Statement is based solely on the information fed to him as to specifics of the line and the service being provided. Allen V.S. at 3.

prevented GWRC from forcibly building a new spur on Church property to which GWRC had no title or claim. Neither the main line nor the runaround were in a condition that could be used when the service to Quality Holdings began prior to 2008. *See Church Request, Exhibit E* (2008 photograph prior to removal). Then GWRC voluntarily removed the north spur in 2008 and thereafter allowed the Church full use of the property, clearly indicating GWRC did not believe it had any need for the runaround to serve Quality Holdings. GWRC did not seek to rehabilitate the main line or to build a new north spur / runaround until 2016 following the commencement of adverse abandonment action.

It was GWRC that determined how it could and would operate without a runaround in downtown Hartwell to provide service to Quality Holdings for the 8 years following its removal of the north spur (and for a number of years before that), and for Quality Holdings and then Redline Plastics during 6 years of litigation. If GWRC truly believed it was unsafe and did not want to shove the empty cars, why didn't GWRC do anything to avoid or limit its shoving moves?

GWRC has evidently continued to shove the cars all the way to Bowersville, despite having an available runaround at Airline that would allow for the shove move to be cut in half. *Allen V.S.* at 3, 8. Nor apparently has GWRC taken advantage of the available option acknowledged by GWRC's consultant Mr. Allen of using two locomotives. *Allen V.S.* at 8-9.¹⁵ This lack of effort to reduce or eliminate the shoving moves clearly demonstrate how little necessity or need there is to use the former runaround in downtown Hartwell.¹⁶ Exploring "safer" alternatives would have

¹⁵ Mr. Allen's fears about additional fuel use and wear and tear from using two locomotives is of course likely not significant given the limited number of moves (6-12) per year. It would also seem that GWRC could use one locomotive and a track mobile given that there are only one or two empties being moved at a time.

¹⁶ And this is without even considering the possible construction of a move convenient runaround track where the former Sand Spur (used to serve the Army Corps of Engineers dam project) was located as suggested by the Church's consultant in the PSC proceeding.

been much cheaper than the money spent on useless track improvements and litigation – all because of an apparent animus towards the Church for daring to say that the main line through its property should be abandoned given that there are no longer any freight customers in downtown Hartwell and that the railroad had not used the line for any freight service for over 26 years.

Conclusion

For all of reasons set forth in the Church's Request and the foregoing Rebuttal, Hartwell First Methodist Church requests that the Board (1) remove this proceeding from abeyance, (2) determine that the former north spur was removed from the national transportation system by GWRC, and (3) confirm that GWRC has no right to construct a new spur track on Church property to which GWRC has no title or interest.

Respectfully submitted,

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Dated: November 27, 2024

VERIFICATION

I, Joe M. Whittemore, verify under penalty of perjury that the facts in the foregoing Rebuttal are true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on November 27, 2024.



Joe M. Whittemore

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2024, I served a copy of the foregoing

Rebuttal on the following person by email:

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