

December 11, 2017

JOHN D. HEFFNER
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John.Heffner@strasburger.com**BY E-FILING**Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001**RE: FD 36148, Adrian & Blissfield Rail Road Company-
Petition for Declaratory Relief**

Dear Ms. Brown:

I am writing on behalf of the Adrian & Blissfield Rail Road Company (“ADBF”) in connection with its pending Petition for Leave to File A Reply dated November 29, 2017, in the above-captioned proceedings. Respondent Consumers Energy Company (“Consumers”) has urged the Board to deny ADBF’s request on various grounds which ADBF believes are incorrect and/or specious.

Last Friday the undersigned counsel had the occasion to review a Petition for Declaratory Relief filed by Slover & Loftus, *the very same counsel representing Consumers*, on behalf of the City of Sammamish, WA (“the City” or “Sammamish”). That petition is docket as FD 36161. As relevant to ADBF’s case, the undersigned counsel was surprised to read that Petitioner Sammamish wants the Board to take jurisdiction over preemption litigation initiated by King County, WA, against Sammamish in the Federal District Court for the Western District of Washington. After the federal judge in that matter granted King County’s request to enjoin the City’s efforts to prevent the County from constructing a rail trail inside the City limits without complying with the City’s construction requirements, Sammamish filed its Petition for Declaratory Relief with the Board. Simply stated, the City asserts

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Ms. Cynthia T. Brown

December 11, 2017

Page 2

“[i]ssuance of a declaratory order is necessary here to avoid the far-reaching and absurd results that King County seeks. A declaratory order is also appropriate given the Board’s primary authority to determine the scope of its regulatory authority in an area squarely within its expertise, and in light of the court’s initial findings about the nature and extent of preemption that contradict the Board’s established interpretation, which could have broad-ranging effects and create confusion and error elsewhere.” Sammamish Petition at 2-3. The relevant pages of its Petition are attached for the Board’s review.

Sammamish seeks this relief because it didn’t like that Court’s ruling on the merits. While ADBF takes no position on the merits of the City’s litigation, it brings the Sammamish petition to the Board’s attention – to show that Consumers’ counsel there is doing what it complains that ADBF is doing here: to correct what it perceives is an erroneous interpretation of preemption law. ADBF wants the Board to understand that the federal court’s ruling in its proceeding was supposed to be on purely jurisdictional grounds. In denying ADBF’s request, the federal judge went beyond the narrow issue of jurisdiction and concluded, based on a very limited evidentiary record, that ADBF was not entitled to assert preemption. Accordingly, his ruling was *dicta* and therefore entitled to no precedential value.

Furthermore, how ironic that Consumers faults ADBF for filing the present Petition without a court referral, while its attorneys obviously feel in reality, it is a proper thing to do.

Consumers makes one other assertion that demands correction. It distinguishes precedent cited by ADBF as allowing it to file a reply to a reply as “unopposed.” That is not true. In at least one of the cases cited by ADBF, the Board accepted the rebuttal reply despite opposition by a couple of parties. *See, Chesapeake And Indiana Railroad Company--Petition For Declaratory Relief*, FD 36076, slip op. at 3 (STB served Aug. 23, 2017). It should do so here.

Ms. Cynthia T. Brown

December 11, 2017

Page 3

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John D. Heffner', with a long, sweeping horizontal line extending to the right.

John D. Heffner

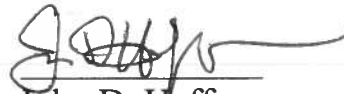
cc: All parties of record

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that on December 11, 2017, I served a copy of the foregoing letter on behalf of the Adrian & Blissfield Rail Road Company, on the following by email and US Mail:

Adam C. Smith
Aaron L. Vorce
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

Kelvin J. Dowd
Katherine F. Waring
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1224 Seventeenth St., N.W.
Washington, D.C. 20036


John D. Heffner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CITY OF SAMMAMISH, WASHINGTON –
PETITION FOR DECLARATORY ORDER

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)
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) Finance Docket No. FD 36161
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)
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**CITY OF SAMMAMISH, WASHINGTON –
PETITION FOR DECLARATORY ORDER**

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Dated: December 7, 2017

*Attorneys for Petitioner
City of Sammamish, Washington*

order, the trial court has made expansive legal categorical findings that, “like any active railroad line, state and local attempts to control a railbanked corridor are preempted by the ICCTA” and that the City of Sammamish “does not have the authority to regulate” trail corridor and crossing activities to protect the public health and safety of its citizens.¹ Such findings that a railbanked corridor enjoys even more expansive preemption rights than an active line of railroad fly in the face of established Board precedent.² Moreover, the Board has issued declaratory orders previously where courts have misconstrued the Board’s preemption authority over state and local law.³

Issuance of a declaratory order is necessary here to avoid the far-reaching and absurd results that King County seeks. A declaratory order is also appropriate given

¹ Exh. 1, Order Granting King Cnty.’s Mot. For Prelim. Inj., *King Cnty. v. City of Sammamish*, No. 2:17-cv-00921-JCC (W.D. Wash. Aug. 8, 2017) (“Order”) at 5-6.

² E.g., *Maumee & W. R.R. Corp. and RMW Ventures, LLC – Pet. for Declaratory Order*, STB Finance Docket No. 34354 (STB served March 2, 2004) (“*Maumee*”); *Lincoln Lumber Co. – Pet. for Declaratory Order – Condemnation of a R.R. Right-of-Way for a Storm Sewer*, STB Finance Docket No. 34915, slip op. at 3 (STB served Aug. 13, 2007) (“*Lincoln Lumber*”); *Mid-Am. Locomotive & Car Repair, Inc.—Pet. for Declaratory Order*, STB Finance Docket No. 34599 (STB served June 6, 2005) (“*Mid American Locomotive*”).

³ *City of Milwaukee – Pet. for Declaratory Order*, STB Finance Docket No. 35625 (STB served Sept. 10, 2012) at 2 (decision instituting a declaratory order proceeding); *Chadwick’s of Boston, Ltd. – Pet. for Declaratory Order – Certain Rates & Practices of United Parcel Serv., Inc.*, 2017 WL 3424972, at *2 (June 16, 1995) (“*Chadwick’s*”) (“we will exercise our broad discretion to institute the requested proceeding on a limited basis in order to assist the court in resolving the issues it faces”); *Ill. State Toll Hwy. Auth. – Pet. for Declaratory Order*, STB Finance Docket No. 36075 (STB served Jan. 17, 2017) (“*Illinois State Toll*”) (Board institutes a declaratory order proceeding on ICCTA preemption while District Court’s § 10501(b) preemption determination is on appeal before the Seventh Circuit).

the Board's primary authority to determine the scope of its regulatory authority in an area squarely within its expertise, and in light of the court's initial findings about the nature and extent of preemption that contradict the Board's established interpretation, which could have broad-ranging effects and create confusion and error elsewhere.

The City of Sammamish is submitting this Petition as its case-in-chief in support of the relief requested.

In further support of its Petition, the City of Sammamish states as follows:

I. FACTUAL BACKGROUND

The City of Sammamish, incorporated in 1999 within the confines of King County, is a medium-sized community with a population of approximately 61,250, located in the greater metropolitan Seattle, Washington area adjacent to Lake Sammamish. A regional area map reflecting the location of the City is as follows:

