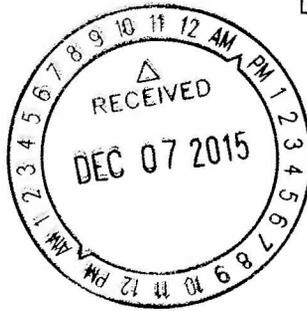




LEWIS THOMASON

— 55<sup>TH</sup> ANNIVERSARY —



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December 1, 2015

239678  
ENTERED  
Office of Proceedings  
December 7, 2015  
Part of  
Public Record

Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street, S.W.  
Washington, DC 20423

**RE: Finance Docket No. 35950, Supplemental Filing of James LaMar Dugan;  
Dugan Professional Building and Rental, LLC; Doctors Dugan and Dugan,  
LLC; and James L. Dugan II.**

Dear Sir/Madam:

Enclosed for filing in the above referenced matter is an original and ten (10) copies of the First Supplement To James LaMar Dugan; Dugan Professional Building and Rental, LLC; Doctors Dugan and Dugan, LLC; and James L. Dugan II's Reply and Opposition to the Petition of Norfolk Southern Railway Company for Declaratory Order. We have included an additional copy of the pleading, which we request to be stamped "filed" and returned to us via the enclosed self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter. If you have any questions, please contact me at (865) 546-4646.

Very truly yours,

Jared Garceau

Enclosures

Cc (via mail): John W. Baker, Jr.  
Emily L. Herman-Thompson  
James A. Hixon  
John M. Scheib  
Aarthy S. Thamodaran



**SURFACE TRANSPORTATION BOARD**

---

**FINANCE DOCKET NO. 35950**

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**FIRST SUPPLEMENT TO JAMES LaMAR DUGAN; DUGAN PROFESSIONAL BUILDING AND RENTAL, LLC; DOCTORS DUGAN AND DUGAN, LLC; AND JAMES L. DUGAN, II'S REPLY AND OPPOSITION TO THE PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR DECLARATORY ORDER**

---

**John J. Britton  
Mary Ann Stackhouse  
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*Attorneys for James LaMar Dugan;  
Dugan Professional Building and Rental, LLC;  
Doctors Dugan and Dugan, LLC; and  
James L. Dugan II.*

**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35950**

---

**FIRST SUPPLEMENT TO JAMES LaMAR DUGAN; DUGAN PROFESSIONAL BUILDING AND RENTAL, LLC; DOCTORS DUGAN AND DUGAN, LLC; AND JAMES L. DUGAN, II'S REPLY AND OPPOSITION TO THE PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR DECLARATORY ORDER**

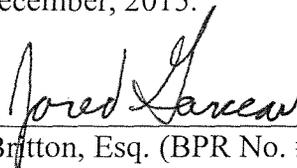
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Norfolk Southern Railway Company ("Railroad") filed a Petition requesting this Board to enter an order declaring that the Tennessee state court action filed by James LaMar Dugan, Dugan Professional Building and Rental, LLC, Doctors Dugan and Dugan, LLC, and James L. Dugan, II (collectively, "Dugans") is preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501(b). The Dugans filed a Reply and Opposition brief with this Board, arguing that their Tennessee action is limited to claims involving land use, police powers of the state, and damage to the Dugans' property from the Railroad's disposal of detritus and negligent failure to properly manage drainage ditch vegetation, none of which would have the effect of managing, governing, or interfering with rail transportation.

As previously disclosed to the Board by the Railroad, the Railroad filed a Motion to Stay the state court proceedings on October 2, 2015. On November 16, 2015, the state court judge entered an Order denying the Railroad's Motion. (See Exhibit A). Although the state court judge held that he would not entertain a trial or dispositive hearing on the Dugans' claims against the Railroad until the Board renders a decision on the Railroad's Petition, the judge held that he did "not see that there would be any prejudice today by allowing this to go forward" and that he "think[s] it's [his] duty to keep this thing moving." (Exhibit A at p. 3, ll. 11-12, 22).

The Dugans reiterate that the state court in this case is particularly well suited to determine the preemption determination because “whether a state regulation is preempted ‘requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.’” *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133(10th Cir. 2007). The Board has previously shown reluctance to issue declaratory orders where a preemption determination “will likely depend on how the facts and circumstances [are] determined in the state court action.” *CSX Transportation, Inc. – Petition for Declaratory Order*, 2015 STB LEXIS 260, at \*11 (Surface Transp. Bd. July 31, 2015). Because the facts and circumstances of this case will continue to develop through discovery, and the state court has retained control over the discovery and development of such facts and circumstances, the Dugans respectfully request the Board to decline to issue a declaratory order.

Respectfully submitted this the 1<sup>st</sup> day of December, 2015.



John J. Britton, Esq. (BPR No. #009907)  
Mary Ann Stackhouse, Esq. (BPR No. #017210)  
Jared S. Garceau, Esq. (BPR No. #033304)

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*Attorneys for the Dugans*

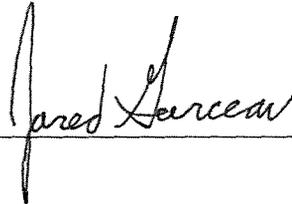
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed, first class, postage prepaid to:

John W. Baker, Jr.  
Emily L. Herman-Thompson  
Baker, O’Kane, Atkins & Thomspson, PLLP  
2607 Kingston Pike, Suite 200  
Knoxville, TN 37901  
(865) 637-5600

James A. Hixon  
John M. Scheib  
Aarthy S. Thamodaran  
Norfolk Southern Railway Co.  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2831

This the 15<sup>th</sup> day of December, 2015.

  
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IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL DISTRICT OF  
TENNESSEE AT McMINN COUNTY, TENNESSEE

JAMES LaMAR DUGAN, individually and on )	)
behalf of DUGAN PROFESSIONAL )	)
BUILDING AND RENTAL, LLC; DUGAN )	)
PROFESSIONAL BUILDING AND RENTAL, )	)
LLC; DOCTORS DUGAN AND DUGAN, )	)
LLC; and JAMES L. DUGAN, II, )	)
Plaintiffs, )	)
v. )	) No. 2014-CV-258
CITY OF ATHENS, TENNESSEE, )	)
and )	)
ATHENS UTILITY BOARD, )	)
and )	)
NORFOLK SOUTHERN RAILWAY )	)
COMPANY, f/k/a SOUTHERN RAILWAY )	)
COMPANY, )	)
Defendants. )	)

\* \* \* \* \*

EXCERPT OF PROCEEDINGS

Before: Honorable J. Michael Sharp, Judge

Thursday, October 29th, 2015

=====

Allison L. Gossett  
 Licensed Court Reporter  
 P.O. Box 50182  
 Knoxville, Tennessee 37950  
 (865) 696-6323  
 tennreporter@gmail.com

**CERTIFIED  
ORIGINAL TRANSCRIPT**

EXHIBIT   A

10-29-15 DUGAN, ET AL V. CITY OF ATHENS, ET AL

1 APPEARANCES:

2  
3 FOR THE PLAINTIFFS:

4 John J. Britton, Esq.  
5 --and--  
6 Jared Garceau, Esq.  
7 Lewis Thomason  
8 P.O. Box 2425  
9 Knoxville, Tennessee 37901-2425

10 FOR DEFENDANT CITY OF ATHENS, TENNESSEE:

11 Courtney W. Read, Esq.  
12 Watson Roach  
13 P.O. Box 131  
14 Knoxville, Tennessee 37901-131

15 FOR DEFENDANT ATHENS UTILITY BOARD:

16 Bridget J. Willhite, Esq.  
17 Carter, Harrod & Willhite, PLLC  
18 P.O. Box 855  
19 Athens, Tennessee 37371-0885

20 FOR DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY:

21 John W. Baker, Jr., Esq.  
22 --and--  
23 Emily L. Herman-Thompson, Esq.  
24 Baker, O'Kane, Atkins & Thompson  
25 2607 Kingston Pike, Suite 200  
Knoxville, Tennessee 37919

---

1 (Begin Excerpt of Proceedings.)

2 THE COURT: Counsels, let me say --  
3 well, let me say again, you all did a  
4 way-better-than-normal job in briefing and getting me  
5 the information. I appreciate it. Just from the  
6 lawyer's perspective, it was interesting. I haven't  
7 had this before, so -- at least not with the railroad.  
8 I've had many city drainage cases before, but not quite  
9 like this.

10 Here is where I'm at, respectfully, to  
11 all of you all: I do not see that there would be any  
12 prejudice today by allowing this to go forward because  
13 I believe -- given where discovery is in this matter, I  
14 believe the discovery can continue. I believe that it  
15 should continue. I believe that everything that the  
16 lawyers would normally do can be continuing on in the  
17 normal course of business by not granting the stay.  
18 Knowing full well, though, counsel -- let me say this,  
19 and I read a lot, and I can read of all of this -- I  
20 think I've got a pretty good grasp on what I'm supposed  
21 to do depending on what the STB says. But until they  
22 say it, I think it's my duty to keep this thing moving.

23 So, respectfully, I'm going to deny  
24 the motion, but I'm going to deny the motion to stay  
25 with the extra added piece to the puzzle: We wouldn't

1 have any hearing as far as this -- we wouldn't have a  
2 trial in this case until we get the STB's direction and  
3 directive. So that's -- that's where I'm at.

4 So I think we're going to go forward.  
5 I'm not going to grant the stay. We've got to -- let's  
6 keep this thing moving. You guys do your discovery,  
7 ladies and gentlemen, whatever you all can work out.  
8 We're -- I think -- well, in about a month we're set to  
9 be heard, I guess, on your motions. I think you all  
10 set it for Polk County; is that right?

11 MS. READ: Yes, Your Honor.

12 THE COURT: Okay. Well, I'm ready to  
13 go and will be ready on that day. But there's no -- to  
14 me, there's nothing to be gained and there's a fair  
15 amount to be lost by granting the stay today. So let's  
16 keep moving. So, respectfully, the motion is denied  
17 subject to my little addition there at the end. Okay?

18 MR. GARCEAU: Thank you, Your Honor.

19 THE COURT: Any other -- any  
20 questions?

21 MS. THOMPSON: Your Honor, do you want  
22 me to prepare the order and then circulate?

23 THE COURT: If you would, counsel.  
24 And it's okay with me if you want to just attach --

25 MS. THOMPSON: The ruling?

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THE COURT: -- the memo from -- it

doesn't --

MS. THOMPSON: Absolutely.

THE COURT: Whatever works. But yeah.

MS. THOMPSON: Okay. Thank you, Your Honor.

(End of Excerpt of Proceedings.)

C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Allison L. Gossett, Licensed Court Reporter, do hereby certify that I reported in machine shorthand the foregoing proceedings; that the foregoing pages, numbered 1 to 6, inclusive, were typed by me using computer-aided transcription and constitute a true and accurate record of said proceedings.

I further certify that I am not an attorney or counsel of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand this the 29th day of October, 2015.

*Allison L. Gossett*

Allison L. Gossett, LCR  
TN Licensed Court Reporter No. 028