



KAPLAN KIRSCH ROCKWELL

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February 8, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *The Atlanta Development Authority D/B/A Invest Atlanta and Atlanta BeltLine, Inc. – Verified Petition for a Declaratory Order*, Finance Docket No. 35991

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding: (1) the Motion of the Atlanta Development Authority and Atlanta Beltline, Inc. for Leave to File a Reply to Interested Parties Response to Petition; and (2) the Reply of the Atlanta Development Authority and Atlanta Beltline, Inc. to Interested Parties' Response to Petition for Declaratory Order by the Atlanta Development Authority D/B/A Invest Atlanta and Atlanta BeltLine, Inc. (collectively "the Atlanta Parties").

Please do not hesitate to contact me if you have any questions. Thank you very much for your assistance in this matter.

Sincerely,

Charles A. Spitalnik

Counsel for The Atlanta Development Authority
and Atlanta BeltLine, Inc.

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35991

**THE ATLANTA DEVELOPMENT AUTHORITY
D/B/A INVEST ATLANTA and
ATLANTA BELTLINE, INC.**

**MOTION OF THE ATLANTA DEVELOPMENT AUTHORITY
AND ATLANTA BELTLINE, INC. FOR LEAVE TO FILE A
REPLY TO INTERESTED PARTIES RESPONSE TO PETITION**

Communications with respect to this document should be addressed to:

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BeltLine, Inc.

Dated: February 8, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35991

**THE ATLANTA DEVELOPMENT AUTHORITY
D/B/A INVEST ATLANTA and
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The Atlanta Development Authority (the “Authority”) d/b/a Invest Atlanta and Atlanta BeltLine, Inc. (“ABI”), which are the public entities charged with executing the Atlanta BeltLine project as a public benefit for the City of Atlanta and the surrounding region, hereby move the Board pursuant to 49 C.F.R. § 1117.1 for leave to file a reply to the *Response of Interested Parties in Opposition to the Verified Petition for Declaratory Order and Request for Expedited Consideration*, filed in this proceeding on January 27, 2016.

Although the rules governing this proceeding generally prohibit the filing of a reply to a reply, *see* 49 C.F.R. § 1104.13(c), the Board has permitted parties to file a reply to a reply when that submission “provides a more complete record, clarifies the arguments, will not prejudice any party, and does not unduly prolong the proceeding.” *BNSF Railway Co. – Abandonment Exemption – In Kootenai County, Id.*, STB Docket No. AB-6 (Sub. No. 468X), slip op. at 1–2 (Service Date Nov. 27, 2009). Granting this motion will not broaden the issues raised in this proceeding, because the Authority and ABI seek only to address misstatements of both law and fact by the Interested Parties and to respond to the Interested Parties’ request for discovery and

oral argument. Accordingly, granting this motion will not extend the time required for the Board to address the issues raised in this proceeding and will not otherwise prejudice any party hereto or prolong this proceeding.

Respectfully submitted,



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Authority d/b/a Invest Atlanta and
Atlanta BeltLine, Inc.

Dated: February 8, 2016

**Before the
Surface Transportation Board
Washington, D.C.**

Finance Docket No. 35991

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 2016, I have caused a copy of the foregoing Motion of The Atlanta Development Authority and Atlanta Beltline, Inc. for Leave to File a Reply to Interested Parties' Response To Petition to be served upon the following individuals via first class mail, postage prepaid:

R. Kyle Williams
Nicholas Bohorquez
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Dated: February 8, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35991

**THE ATLANTA DEVELOPMENT AUTHORITY
D/B/A INVEST ATLANTA and
ATLANTA BELTLINE, INC.**

**REPLY OF THE ATLANTA DEVELOPMENT AUTHORITY
AND ATLANTA BELTLINE, INC. TO INTERESTED
PARTIES' RESPONSE TO PETITION FOR DECLARATORY ORDER**

Communications with respect to this pleading should be addressed to:

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Counsel for the Atlanta Development
Authority d/b/a Invest Atlanta and Atlanta
BeltLine, Inc.

Dated: February 8, 2016

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SURFACE TRANSPORTATION BOARD**

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**THE ATLANTA DEVELOPMENT AUTHORITY
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The attempt by owners of certain property abutting and illegally encroaching upon the underlying real estate (the “Flagler Owners”) to characterize the freight rail easement retained by the Norfolk Southern Railway Company (“NSR”) as anything but permanent and exclusive clearly contravenes well-established Board precedent, as fully set forth in the Atlanta Development Authority’s (the “Authority”) d/b/a Invest Atlanta and Atlanta BeltLine, Inc.’s (“ABI”) Petition for Declaratory Order (“Petition”) and First Supplement thereto, filed in this docket on January 8, 2016, and January 28, 2016, respectively. In their Response,¹ the Flagler Owners seek to further obfuscate and needlessly delay the Board’s resolution of the Petition by including a request for oral hearing to explore wholly irrelevant topics and which does not comport with the Board’s procedural requirements, and also assert a need for the discovery of documents that have no bearing on the *State of Maine* analysis required. The Board should deny these requests and issue a declaratory order as described in the Authority’s and ABI’s Petition and First Supplement with all possible expediency.

¹ Response of Interested Parties in Opposition to Verified Petition for a Declaratory Order and Request for Expedited Consideration, *The Atlanta Development Authority d/b/a Invest Atlanta & Atlanta Beltline, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35991 (Filed Jan. 27, 2016) (“Response”).

1. The Request for Oral Hearing Does Not Comply with the Board's Procedural Rules

The Flagler Owners' request for an oral hearing fails to "include the reasons why the matter cannot be properly resolved under modified procedure." *See* 49 C.F.R. § 1112.10(a). The Response identifies only a series of witnesses that the Flagler Owners wish to cross-examine with respect to the "facts and circumstances of [the] conveyances" described in the Petition and First Supplement, as well as the "facts and circumstances of [ABI's] intended and actual use of the Northeast Quadrant Line²." Response at 13–14. Even if the Board was to accept that these "facts and circumstances" are at all relevant to this proceeding – and it should not, as discussed below – the Flagler Owners make no attempt to explain why such "facts and circumstances" are not readily ascertainable "through submission of written statements," as they are required to do. *See id.*; 49 C.F.R. § 1112.1. Indeed, any such allegation is belied by the Flagler Owners' attachment of a 141-page document purporting to describe the circumstances surrounding the acquisition and use of the underlying real estate, *see* Response at 7, Ex. C, to say nothing of the title documents appended to the Petition evidencing the "facts" of the conveyances at issue in this proceeding.

2. Oral Hearing is Unnecessary to Resolve Any Material Fact

More importantly, the Flagler owners have not demonstrated that the "circumstances" surrounding the conveyances or ABI's intended or actual use of the underlying real estate is in any way material to this proceeding. *See generally* Response; *see also* 49 C.F.R. § 1112.10(b) ("Unless *material* facts are in dispute, oral hearings will not be held.") (emphasis added). The

² The Flagler Owners repeatedly mischaracterize NSR's conveyance as a conveyance of the "Northeast Quadrant Line." *See, e.g.*, Response at 13. In fact, NSR conveyed only the underlying real estate, while retaining title to "all railroad tracks and railroad facilities including, but not limited to, the railroad tracks, roadbed, ballast, culverts, bridges, tunnels, communications and signal facilities, fixtures and all other railroad appurtenances," and a permanent and exclusive freight rail easement over the property. *See* Petition, Ex. A.

“key inquiry” in this proceeding “is whether the selling carrier would retain the common carrier obligation to provide service, as well as the means to do so – namely, a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference.” *Cent. Puget Sound Reg’l Transit Auth. – Acquis. Exemption – Certain Assets of City of Tacoma in Pierce Cty., Wash.*, STB Finance Docket No. 35812, slip op. at 3 (Service Date Feb. 5, 2015). If the selling carrier retains a common carrier obligation to provide service and the means to do so – as NSR did here for the reasons described in the Petition and First Supplement – then “the property that the selling carrier is selling does not amount to a ‘railroad line’ within the meaning of § 10901(a)(4), [and] no Board authority is needed.” *Id.* This analysis is therefore not based, as the Flagler Owners suggest, on the “facts and circumstances” surrounding the conveyances or ABI’s “intended and actual use” of the underlying real estate, *see* Response at 13–14, but rather on the “*specific facts of this particular transaction*” between the NSR and the acquiring non-carrier, *Me. Dep’t of Transp. – Acquis. and Operation Exemption – Me. Cent. R.R.*, 8 I.C.C.2d 835, 838 (1991) (“*State of Maine*”) (emphasis added). Those “specific facts” are evidenced by the transaction’s record controlling documents, which fully describe the rights and property conveyed, and the permanent and exclusive freight rail easement that NSR retained. *See* Petition, Ex. A & B.

3. A Procedural Order For Discovery Subjects This Proceeding to Needless Delay, As No Other Documents Are Relevant to the Subject Matter

For the same reasons, the Board should deny the Flagler Owners’ request for a procedural order and decide this case on the record already before it. A party’s right to discovery is limited to “any matter . . . which is relevant to the subject matter involved in a proceeding” 49 C.F.R. § 1114.21(a)(1). Here, the only relevant documents are those record documents evidencing the “specific facts of [the] particular transaction” between the NSR and the acquiring

non-carrier. *See State of Maine* at 838. Indeed, the Flagler Owners cite to the Corrective Deed from NSR to the Mason Entities as the “relevant conditional and limiting language from the retained easement” that is material to the *State of Maine* analysis, Response at 9, before proceeding to argue that those terms are incompatible with the *State of Maine* doctrine. As fully set forth in the Authority and ABI’s Petition and First Supplement, those arguments are clearly contrary to the Board’s recent precedent addressing similar clauses providing for the acquiring non-carrier’s right to request the commencement of abandonment proceedings or negotiate joint uses of a line to provide passenger service. *See* Petition at 9–12; *N.J. Transit Corp. – Acquis. Exemption – Norfolk Southern Railway Co.*, STB Finance Docket No. 35638, slip op. at 4–5 (Service Date Mar. 27, 2013); *Md. Transit Auth. – Petition for Declaratory Order*, STB Finance Docket No. 34975, slip op. at 6–7 (Service Date Oct. 9, 2007).

Accordingly, the Board should deny the relief requested by the Flagler Owners and issue a declaratory order consistent with that described in the First Supplement.

Respectfully submitted,



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Atlanta BeltLine, Inc.

Dated: February 8, 2016

**Before the
Surface Transportation Board
Washington, D.C.**

Finance Docket No. 35991

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 2016, I have caused a copy of the foregoing Reply of The Atlanta Development Authority and Atlanta Beltline, Inc. to Interested Parties' Response to Atlanta Development Authority and Atlanta Beltline, Inc.'s Petition for Declaratory Order to be served upon the following individuals via first class mail, postage prepaid:

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