34215 SERVICE DATE – LATE RELEASE DECEMBER 8, 2003
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34425

CITY OF LINCOLN—PETITION FOR DECLARATORY ORDER

Decided: December 8, 2003

On November 12, 2003, the city of Lincoln, NE (Lincoln) filed and served on Lincoln Lumber Company (LLC) a petition for a declaratory order. Lincoln requests that a proceeding be instituted to determine that its acquisition of a 20-foot wide strip of LLC's rail right-of-way for a five-block distance between 19th Street and 24th Street in Lincoln does not constitute either an acquisition or an abandonment or discontinuance of operations for which prior Board approval is required under 49 U.S.C. 10901-03. LLC acquired the rail line pursuant to an offer of financial assistance. See Union Pacific Railroad Company–Abandonment Exemption–in Lancaster County, NE, STB Docket No. AB-33 (Sub-No. 112X) (STB served Jan. 16, 1998). Lincoln wishes to acquire a portion of the right-of-way for construction and operation of a pedestrian and bicycle commuter trail and for storm drainage system improvements. Lincoln alleges that neither project (trail or storm sewer) will interfere with the continued rail use of the line, and indicates that it intends to acquire the land by a state law eminent domain proceeding if LLC refuses to cooperate in this endeavor.

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. Given the competing claims here – the asserted public need for this 20-foot strip of right-of-way, on the one hand, and the rail owner's asserted need for continued rail use of a portion of that property, on the other – under the Board's authority at 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding will be instituted.

Lincoln has essentially filed its opening statement with its petition. Lincoln has requested an expedited procedural schedule, suggesting that replies be due on December 19, 2003, and that rebuttals be due 21 days later, on January 9, 2004. Lincoln contends that an expedited schedule is necessary because financial, engineering, and construction constraints require that it must secure clear title to the right-of-way for the storm sewer improvements by March 2004, and delay in eminent domain proceedings beyond March 2004 will jeopardize funding for the trail project involved here and related commuter trail projects in the city.

By a letter filed on November 19, 2003, LLC advises the Board that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way or construct a trail on the right-of-way between 19th Street and 22nd Street (as long as the trail occupies the northern edge of

the right-of-way). However, it opposes a trail between 22nd Street and 23rd Street, where LLC asserts that the full width of its right-of-way is used and required for rail operations. Moreover, LLC objects to Lincoln's proposed schedule. It contends that the suggested reply period is inadequate for all parties to prepare and file comments and for essential discovery to be completed. LLC proposes that notice of the filing of the petition be published in the Federal Register, replies be due 60 days after Federal Register publication, and rebuttals be due 20 days after the reply due date.

Neither Lincoln's nor LLC's procedural schedule will be adopted. Requiring LLC and other interested parties to submit replies by December 19, 2003, would not give them sufficient time to compose replies. However, all relevant commercial interests along the rail corridor at issue have been served with copies of Lincoln's opening statement well in advance of this decision. Under these circumstances, a 20-day time period from the date of service of this decision appears to be an adequate amount of time to prepare and file a reply. While LLC has not yet undertaken any discovery, Lincoln has submitted a request for production of documents and to permit entry upon land to LLC. This and any other discovery the parties deem necessary should be able to be completed within the time allotted for replies and rebuttals. The Board urges the parties to work cooperatively to resolve any such issues.

Lincoln's rebuttal will be due 10 days after the reply due date, or 30 days from the service date of this decision. This should provide Lincoln with sufficient time to prepare and file a rebuttal.

In a related matter, on December 4, 2003, Lincoln filed a motion to strike two letters from LLC (the first dated November 25, 2003, which was received at the Board on December 1, 2003, and the second dated December 1, 2003, which was filed at the Board on December 2, 2003). Lincoln argues that the letters are impermissible replies to a reply. In the alternative, Lincoln filed a motion for leave to reply to those letters should the Board deny the motion to strike. The first letter is merely correspondence and was not submitted as a pleading in the proceeding. Thus, it is neither considered by the Board in its deliberations nor posted on the Board's website in the ordinary course. The motion to strike is thus moot as to the first letter. The motion to strike the second letter, which was submitted as a formal pleading, will be denied in the interest of having a complete record (and because allowing the letter into the record will not cause undue delay). For the same reasons, the motion for leave to file a reply to the second will be granted, and Lincoln's tendered reply will be considered to the extent it addresses the second letter.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice, including 49 CFR 1112 and 1114.

2. Replies are due by December 29, 2003.

3. Lincoln's rebuttal statement is due by January 8, 2004.

4. Lincoln's motion to strike the letter filed by LLC on December 2, 2003, is denied, and its motion for leave to file a reply to that letter is granted.

5. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary