

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

**John W. Baker, Jr.
Emily L. Herman-Thompson
BAKER, O'KANE, ATKINS & THOMPSON, PLLP
2607 Kingston Pike, Suite 200
Knoxville, TN 37901
(865) 637-5600**

**James A. Hixon
John M. Scheib
Aarth S. Thamodaran
NORFOLK SOUTHERN RAILWAY CO.
Three Commercial Place
Norfolk, VA 23510
(757) 629-2831**

*Counsel for Norfolk Southern
Railway Co.*

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PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR DECLARATORY ORDER

INTRODUCTION

Norfolk Southern Railway Company (“NSR”) hereby petitions the Surface Transportation Board (“Board”) for a declaratory order that the action by James LaMar Dugan, Dugan Professional Building and Rental, LLC, Doctors Dugan and Dugan, LLC, and James L. Dugan, II (collectively, “Plaintiffs”) to recover from NSR damages allegedly related to NSR’s vegetation control and drainage culvert is preempted by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10501(b).¹

NSR submits that governing law and well-established precedent clearly provide that a state law, or legal action pursuant to state law, is preempted if it would have the effect of managing or governing rail transportation, such as by directing a rail carrier in the design, construction, and maintenance of an active rail line. Plaintiffs’ claims against NSR would have this effect. Therefore, NSR respectfully requests that the Board issue a declaratory order that the Plaintiffs’ action to recover from NSR damages allegedly related to NSR’s vegetation control and drainage culvert is preempted by § 10501(b).

¹ Authority for the Board to issue a declaratory order is pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

I. PROCEDURAL BACKGROUND

Plaintiffs initiated legal action on July 31, 2014 by filing a Complaint against the City of Athens, Athens Utility Board, and NSR in the Circuit Court for the Tenth Judicial District of Tennessee at McMinn County, Tennessee. Since that date, Plaintiffs have moved to amend their initial Complaint four times.² A copy of the Plaintiffs' Fourth Motion for Leave to Amend and Supplement Complaint ("Amended Complaint") is attached hereto as **Exhibit A**. To date, the McMinn County Circuit Court has not issued any orders, set matters for hearing, or prescribed scheduling deadlines.

II. FACTUAL BACKGROUND

A. Athens Track Vegetation and Drainage Culvert

NSR's mainline track running through Athens, Tennessee ("Athens Track") currently is in use and is critical for larger NSR rail operations in the Western Region – Central Division, which serves Kentucky and Tennessee. NSR moves approximately 11 trains per day, with a gross tonnage of up to 32 million each year, over the Athens Track to serve both local and interstate customers. Verified Statement of Andrew Koch ("Koch VS") at 2, attached hereto as **Exhibit B**. These trains are primarily mixed freight, to include trains carrying hazardous materials and coal, and intermodal trains. Id.

The Athens Track lies at the base of a 38-acre watershed in Athens. Verified Statement of Ronnie Doss ("Doss VS") at 2, attached hereto as **Exhibit C**. The area in this surrounding watershed is heavily vegetated; and on the north, watershed side of the Athens Track, there is a dense line of trees whose branches can hang over the track if not properly trimmed. Id. at 4. In order to remove vegetation that could impair track safety, track visibility, and overall rail

² The various parties also have filed answers and responses to interrogatories and requests for production of documents.

operations, in May 2012 and July 2012, NSR clear-cut vegetation in the vicinity of Milepost 186.7A and conducted the related clearance of vegetation debris. Id. at 5. NSR's vegetation control for the Athens Track is required by federal and Tennessee state laws, each applying specifically to rail carriers. See 49 C.F.R. § 213.37; Tenn. Code Ann. § 65-6-132. See also Doss VS at 5.

NSR's drainage infrastructure for the Athens Track also is required for rail operations. As the Federal Railroad Administration ("FRA") has noted, one of the most "essential elements of track maintenance" is a comprehensive drainage system, including culverts. FRA Guidance to 49 C.F.R. § 213.33, TRACK AND RAIL AND INFRASTRUCTURE INTEGRITY COMPLIANCE MANUAL (Jan. 2014) ("FRA Guidance"). Similarly, the Board has noted that "[d]rainage . . . control measures would also have to be taken to protect the track structure," when discussing the optimal construction of an efficient rail line. Duke Energy Corp. v. Norfolk Southern Ry. Co., STB Docket No. 42069, 2003 STB LEXIS 713, at *132 (STB served Nov. 5, 2003). Accordingly, the Athens Track has a comprehensive drainage system, consisting of drainage ditches lying parallel to the track and cross-drainage culverts lying perpendicular to the track.

The particular drainage culvert at issue ("Culvert") has been in place since at least 1911, when the surrounding area was largely undeveloped. Doss VS at 2. The Plaintiffs only acquired their property near the watershed and the Athens Track in 1977 and located their dental offices thereon in 1978.

The Culvert is located at Milepost 186.76A. Three photographs providing an aerial view of the Culvert running under the Athens Track, a view of the inlet side of the Culvert, and a view of the outlet side of the Culvert are attached hereto as part of **Exhibit C**. There are public crossings within a few yards to both the east and west of the Culvert. Koch VS at 4.

The Culvert is a 24-inch diameter cast-iron pipe, capable of handling a 100-year storm. Doss VS at 2. The Culvert is embedded in the Athens Track roadbed structure, allowing water to flow under the track to provide adequate drainage. Id. at 2-3. The Culvert has effectively serviced the nearby 38-acre watershed in Athens, without incident, for over 100 years. Id. at 2.

For several reasons, NSR has detailed guidelines regarding the design, construction, and installation of under-track culverts, like the Culvert. First, improper design and inadequate maintenance of culverts can lead to blockages, altered stream flows, and insufficient drainage that cause flooding at the ballast or even track level. Doss VS at 3. Second, improper design and inadequate maintenance of under-track culverts can weaken the culvert's structural integrity over time, in turn weakening the structural integrity of the track roadbed and track itself. See Doss VS at 2-4. Third, proper design and adequate maintenance of culverts are emphasized because repairs present logistical difficulties. Rail operations generally cannot continue as normal while under-track culverts are repaired, because such culverts are embedded in the track roadbed structure. See Koch VS at 3-4; Doss VS at 5-8.

An extension pipe from the outlet end of the Culvert runs toward Plaintiffs' property. The outlet extension pipe is not part of the Culvert and is not the property of, or otherwise the responsibility of or maintained by, NSR. Doss VS at 2. The outlet extension pipe has a larger diameter than the Culvert; and, it crosses under Plaintiffs' property at an approximately 45-degree angle. Id.

B. Plaintiffs' Allegations Against NSR

Plaintiffs complain of various flood events on their property beginning in January 2013. See Amended Complaint at 5-7. With respect to NSR, Plaintiffs allege that these flood events

result from NSR's vegetation control and NSR's design and maintenance of the Culvert, which allowed "a body of water [to] form[]" on NSR's property. See id. at 5, 8-10.

Based on these allegations, Plaintiffs seek monetary damages in the amount of \$2,900,000 and "an injunction requiring Defendants to repair, reconstruct, and redirect the drainage culvert and drainage infrastructure affecting" Plaintiffs' property. Id. at 14-15. Additionally in a letter from Plaintiffs' counsel dated February 26, 2015, Plaintiffs ask NSR to install a grate on the Culvert and to re-angle the Culvert so that any extension pipes do not run under their property, which would require NSR to replace the existing Culvert with a larger culvert. See Letter from John J. Britton, Re: J. LaMar Dugan and James Dugan v. City of Athens, et al., McMinn County Circuit Court, Docket No.: 2014-CV-258 (Feb. 26, 2015), attached hereto as **Exhibit D**. Plaintiffs seek to recover such damages from NSR pursuant to Tennessee common law, temporary nuisance law, and trespass law. Amended Complaint at 12.

In short, Plaintiffs' cause of action arises under state law, and Plaintiffs seek damages from NSR that allegedly result from NSR's lawful operation of a rail line. Accordingly, Plaintiffs' claims against NSR are preempted by ICCTA.

III. LEGAL ARGUMENT

Plaintiffs' alleged damages stem from NSR's vegetation control and NSR's design and maintenance of the Culvert, which are necessary and integral aspects of NSR's rail operations. ICCTA provides that the Board has exclusive jurisdiction over the operation of rail lines. As such, ICCTA preempts Plaintiffs' claims against NSR as a state remedy impermissibly directed at rail transportation.

A. Broad Scope of ICCTA Preemption

The Supremacy Clause of the United States Constitution states that “the laws of the United States . . . shall be the supreme law of the land . . . any thing in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. “[T]he doctrine of preemption – rooted in the Constitution’s Supremacy Clause – permits Congress to expressly displace state or local law in any given field.” Norfolk Southern Ry. Co. v. City of Alexandria, 608 F.3d 150, 156 (4th Cir. 2010) (internal citation omitted). When Congress expressly displaces state or local law in a given field, preemption is mandatory. E.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (noting that preemption “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose”) (internal citation omitted).

ICCTA contains an express preemption clause:

The jurisdiction of the Board over (1) transportation by rail carriers . . . ; and (2) the construction . . . of . . . tracks[] or facilities is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail *transportation* are exclusive and preempt the *remedies* provided under federal or state law.

49 U.S.C. § 10501(b) (emphases added).

First, courts have construed “remedies” to include any and all state law claims for damages, including those arising from an alleged negligence, nuisance, or trespass. See, e.g., Tubbs–Petition for Declaratory Order, FD No. 35792, 2014 STB LEXIS 265, at *17-18 (STB served Oct. 31, 2014) (“Tubbs Petition”) (preempting claims of trespass, nuisance, negligence, and inverse condemnation under Missouri state law); Waubay Lake Farmers, Ass’n, et al. v. BNSF Ry. Co., 2014 U.S. Dist. LEXIS 120160, at *15 (S.D.S.D. Aug. 28, 2014) (preempting a state law tort claim seeking damages and injunctive relief). Courts have reasoned that

“[a]llowing plaintiff to obtain a monetary or injunctive remedy by application of the state’s nuisance law to defendant’s action is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations.” E.g., Suchon v. Wisconsin Central Ltd., No. 04-C-0379-C, 2005 U.S. Dist. LEXIS 4343, at *10 (W.D. Wis. Feb. 23, 2005). Therefore, a plaintiff cannot circumvent § 10501(b) by filing a suit for damages and injunctive relief in order to accomplish what a state would be preempted from accomplishing through regulation.

Second, Congress has broadly defined “transportation” to include a “property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail.” 42 U.S.C. § 10102(9). The Board has specifically stated that “designing, constructing, and maintaining an active rail line . . . clearly are part of ‘transportation by rail carriers’ and therefore subject to the Board’s exclusive jurisdiction.” Tubbs Petition, at *5. As the agency authorized by Congress to administer ICCTA, the Board is best-positioned to determine when state laws are preempted; and, courts give significant weight and due deference to the Board’s interpretation. E.g., Emerson v. Kansas City Southern Ry. Co., 503 F.3d 1126, 1130 (10th Cir. 2007). For example in Waubay Lake Farmers, the court held that the plaintiffs’ suit was preempted by ICCTA because it affected “transportation” by a rail carrier, by alleging that the carrier tortiously failed to reconstruct a trackbed and enlarge an existing drainage culvert. 2014 U.S. Dist. LEXIS 120160, at *21.

In accordance with the expansive definition of “transportation,” interpreting courts have held that ICCTA has a broad preemptive reach. See, e.g., City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581-82 (N.D. Ga. 1996)) (stating that it “is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” and

that it “is clear to the Court that Congress intended the preemptive net of [ICCTA] to be broad by extending jurisdiction to the [Board] for anything included within the general and all inclusive term ‘transportation by rail carriers’”). In fact, the House Report on ICCTA confirms that § 10501(b) reflects a “[f]ederal policy of occupying the entire field of economic regulation of the interstate rail transportation system” and establishes the “direct and complete pre-emption of State economic regulation of railroads.” H.R. REP. NO. 104-311, at 95-96.

It is important to note that ICCTA preemption applies regardless of whether the Board actively regulates the particular activity at issue. See, e.g., Port City Props. v. Union Pacific R.R. Co., 518 F.3d 1186, 1188-89 (10th Cir. 2008) (applying ICCTA preemption to activities on a spur track, which are not regulated by the Board); CSX Transp., Inc. – Petition for Declaratory Order, FD No. 34662, 2005 WL 584026, at *6 (STB served Mar. 14, 2005) (holding that a “state statute restricting a train from blocking an intersection [is] preempted, even though there is no Board regulation of that matter”).

In sum, ICCTA preempts state laws, and claims for damages thereunder, that “have the effect of *managing or governing* rail transportation” or that have the effect of “*unreasonably burdening or interfering* with rail transportation.” E.g., Elam v. Kansas City Southern Ry. Co., 635 F.3d 796, 805 (5th Cir. 2011) (emphases added).

B. Plaintiffs’ Claims Are Preempted By ICCTA

Plaintiffs’ claims against NSR are preempted by ICCTA because they would have the effect of managing and unreasonably burdening rail transportation. In short, Plaintiffs’ claims relate to NSR’s actions in designing, constructing, and maintaining an active rail line. NSR clearly is a rail carrier; and, for the reasons set forth below: (1) vegetation control is necessary for NSR to maintain the Athens Track; (2) proper design and maintenance of the Culvert are

necessary for NSR to maintain the Athens Track; and (3) the damages Plaintiffs seek from NSR, namely, the specified repair, reconstruction, and redirection of the Culvert, prescribe how NSR should design and construct the Athens Track and would unreasonably interfere with NSR's rail operations thereon. Thus, Plaintiffs' claims against NSR under Tennessee state laws are preempted by ICCTA.

1. Vegetation Control Is Necessary for NSR To Maintain the Athens Track

Vegetation control is a necessary component of NSR's maintenance of the Athens Track. As noted above, both federal and Tennessee state laws require NSR, in its capacity as a rail carrier, to conduct appropriate vegetation control. 49 C.F.R. § 213.37 provides that:

Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not— (a) Become a fire hazard to track-carrying structures; (b) Obstruct visibility of railroad signs and signals: (1) Along the right-of-way, and (2) At highway-rail crossings . . . ; (c) Interfere with railroad employees performing normal trackside duties; (d) Prevent proper functioning of signal and communication lines; or (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

Similarly, Tenn. Code Ann. § 65-6-132 requires every "person operating a railroad" to cut down trees which are of sufficient height to reach the track roadbed if they should fall.³ As demonstrated by these federal and state requirements, vegetation control is necessary for NSR to promote the safety, visibility, and proper functioning of the Athens Track.⁴ See Doss VS at 4-5.

³ Tenn. Code. Ann. § 65-6-132 is cited simply to emphasize the importance of vegetation control in maintaining an active rail line. Plaintiffs do not allege that NSR violated or breached any duties pursuant to Tenn. Code. Ann. § 65-6-132.

⁴ Although Tennessee state law regulates vegetation control by rail carriers, this does not affect the Board's preemption analysis under ICCTA. 49 C.F.R. § 213.37 and Tenn. Code Ann. § 65-6-132 both relate to rail *safety*; and, the Federal Railroad Safety Act permits states to "adopt or continue in force an additional or more stringent law, regulation, or order relate to railroad safety" under certain conditions. See 49 U.S.C. § 20106(a). In contrast, ICCTA relates to *economic* aspects of rail operations and completely preempts state regulation on the same. Although this Petition makes reference to both federal and state laws regarding vegetation control, this is intended only to demonstrate the importance of vegetation control for a rail

NSR also has its own program for vegetation control at public railroad crossings, such as the two crossings near the Culvert, to ensure public safety. Id. at 5.

Vegetation control includes the proper clearance of any debris resulting from NSR's clear-cutting or similar actions. Id. at 4. Inadequate clearance of such debris could lead to accumulations on the track or blockages in the drainage infrastructure that cause flooding at the ballast or even track level, compromising the safety, integrity, and operation of the Athens Track. See Doss VS at 3-5. For example, when discussing inspections of drainage openings, the FRA requires "notice [to be] given where debris has accumulated to such an extent that expected water flow cannot be accommodated." FRA Guidance. Thus, vegetation control, to include the proper clearance of related debris, is necessary for NSR to maintain the Athens Track, and as such, is part of "transportation by [] rail carrier[]" subject to the Board's exclusive jurisdiction. See Tubbs Petition, at *5.

Plaintiffs' claims are easily distinguishable from those in Emerson. In Emerson, the Tenth Circuit ruled that "discarding old railroad ties into a wastewater drainage ditch adjacent to the tracks and otherwise failing to maintain that ditch . . . are not instrumentalities 'of any kind related to the movement of passengers or property.'" 503 F.3d at 1130. However in Emerson, the carrier did not establish that proper disposal of railroad ties was a necessary part of its rail operations. See also Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co.—Control and Merger—Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver & Rio Grande Western R.R. Co., FD No.

carrier. Preemption by ICCTA is appropriate in this case, because vegetation control on the Athens Track transcends safety considerations and relates to the economic maintenance and operation of the track. As discussed herein, improper vegetation control can impair the proper functioning of track equipment and the structural integrity of the ballast and track, both of which can disrupt NSR's rail operations.

32760, 1996 STB LEXIS 990, at *318-19 (STB served Apr. 12, 1996) (“UP/SP”) (accepting evidence that the “[r]emoval of rails, ties, and switching assemblies is not anticipated to have any appreciable effect on the railroad roadbed integrity”). Instead in Emerson, the carrier’s action (disposing old ties into a drainage ditch) was characterized as that of a “landowner who happens to be a railroad company.” 503 F.3d at 1130. In contrast, as evidenced by the above-referenced federal and state requirements and the Verified Statement of Mr. Doss, NSR has a particular *transportation-related* interest as a rail carrier in vegetation control, especially with respect to the heavy vegetation surrounding the Athens Track. Unlike the disposal of old ties which has no effect on track integrity, vegetation control has a direct and pronounced effect on track safety, track visibility, track integrity, and overall rail operations.

Therefore, Plaintiffs’ claims and damages allegedly resulting from NSR’s vegetation control are preempted by ICCTA.

2. *Proper Design and Maintenance of the Culvert Are Necessary for NSR To Maintain the Athens Track*

Proper design and maintenance of the Culvert are a necessary component of NSR’s maintenance of the Athens Track. As noted above, the FRA has identified culverts as “essential elements of track maintenance.” FRA Guidance. The Board itself has recognized in various decisions that culverts are necessary to protect the structural soundness of the track and its roadbed. See, e.g., Duke Energy, at *132 (noting that drainage control measures are necessary “to protect the track structure”); Wisconsin Power and Light Co. v. Union Pacific R.R. Co., STB Docket No. 42051, 2001 STB LEXIS 740, at *125 (STB served Sept. 13, 2001) (same). See also UP/SP, at *318-19 (noting that “the maintenance, clean out, and replacement of bridges, *culverts*, and structures . . . has been continuous to protect the integrity of the railroad roadbed”) (emphasis added); Iowa Interstate R.R., Ltd.—Aban. Exemption—in Cass and Audubon

Counties, IA, AB No. 414 (Sub-No. 1X), 1995 ICC LEXIS 202, at *9 (ICC served Aug. 8, 1995) (requiring the carrier to “keep intact the right-of-way underlying the line, including bridges, *culverts*, and similar structures”) (emphasis added). Similarly in Jones Creek Investors, LLC et al. v. Columbia County, 2015 U.S. Dist. LEXIS 44670, at *33 (S.D. Ga. 2015), the court held that the plaintiffs’ claims related to the carrier’s decision to replace its under-track culvert were preempted by ICCTA because the “culvert in question is inextricably linked to rail transportation” as it directly affected track integrity. In Jones Creek Investors, the carrier established that the old under-track culvert needed to be replaced because “continued collapse of the culvert would have further undermined the embankment, which in turn would have undermined the track itself, causing a track misalignment which can result in a derailment.” 2015 U.S. Dist. LEXIS 44670, at *34.

Similarly, the Culvert is inextricably linked to rail transportation by NSR. Improper design and maintenance of the Culvert can lead to blockages, altered stream flows, and insufficient drainage that (1) cause flooding at the ballast or even track level of the Athens Track and (2) weaken the structural integrity of the Culvert. See Doss VS at 3-4. First, such flooding would harm the integrity of the Athens Track, compromise track safety, and disrupt overall rail operations. See id. Second, unlike the culvert and drainage infrastructure in Emerson which only lay “adjacent to” the track, the Culvert is embedded in the roadbed structure of the Athens Track. The distance between the top of the rail tie on the Athens Track and the bottom of the Culvert opening is just 8 feet, demonstrating how the Culvert is a key structural component of the Athens Track roadbed and track itself. Id. at 2-3. Thus, any weakening in the structural integrity of the Culvert directly compromises the structural integrity of the Athens Track, as in Jones Creek Investors. See id. at 2-4. As noted in the Verified Statement of Mr. Doss, if the

Culvert is weakened, this can weaken the track roadbed by eroding its fill material or shifting its ballast rock, which can cause rails and rail ties to deteriorate, misalign, sink, or even collapse, increasing the risk of derailment. Doss VS at 3. See also Koch VS at 2-3.

For example, Plaintiffs complain of a “body of water” which NSR allowed to form on its property. However, this body of water is known as a detention pond; and, it is a normal condition that culverts are designed to create in order for water to move through the culvert at the appropriate speed and volume. See Doss VS at 3. Absent this detention pond, water could rush through the Culvert at excessive speeds and volumes. Id. This rush of water would corrode or weaken the Culvert, thus compromising its structural integrity and that of the Athens Track roadbed and track itself. Id. As such, the design and maintenance of the Culvert are directly related to track integrity, track safety, and overall rail operations on the Athens Track.

Thus, proper design and maintenance of the Culvert are necessary for NSR to maintain the Athens Track, and as such, are part of “transportation by [] rail carrier[]” subject to the Board’s exclusive jurisdiction. See Tubbs Petition, at *5. Therefore, Plaintiffs’ claims and damages allegedly resulting from NSR’s design and maintenance of the Culvert are preempted by ICCTA.

3. Requested Repairs of the Culvert Prescribe How NSR Should Design and Construct the Athens Track and Would Unreasonably Interfere with NSR Rail Operations

As noted above, Plaintiffs request that NSR “reconstruct and redirect” the Culvert, “reroute the angle of the pipe under the railroad tracks,” and install a “grate over the intake of the pipe.” The Plaintiffs’ requested repairs prescribe how NSR should design and construct the Athens Track and would unreasonably interfere with NSR rail operations on the same.

First, installing a grate over the Culvert would increase the likelihood of blockages, altered stream flows, and insufficient drainage that cause flooding at the ballast or even track level and that weaken the structural integrity of the Culvert. See Doss VS at 7-8. As discussed above, this would harm the integrity of the Athens Track, compromise track safety, and disrupt overall rail operations.

Second, because the Culvert is embedded in the roadbed structure of the Athens Track, any repairs to the Culvert necessarily would affect the active mainline track above. NSR currently moves hazardous materials which pose an inhalation risk over the Athens Track, so repairs of the Culvert would have to proceed with extreme caution in order to protect the safety of those working on the Athens Track and the surrounding communities. See Koch VS at 2-4; Doss VS at 7. Reconstructing and redirecting the Culvert would require NSR to issue a slow order and reschedule existing train traffic. See Koch VS at 4. Such slow orders and reschedules would affect not only the approximately 11 trains that move over the Athens Track per day, but also could lead to congestion and delays throughout the larger national rail network. Id. In addition, NSR would need to supply extra personnel in connection with the construction project, and issue curfews, track times, and track usage authorities for such personnel. See Koch VS at 3-4. NSR also would have to man the two public crossings near the Culvert with personnel flagging the pedestrian and motorist traffic in order to serve the public safety. See Koch VS at 4.

Third, redirecting and rerouting the angle of the Culvert would require extensive reconstruction by NSR of the Athens Track roadbed. See Doss VS at 5-6. As described in the Verified Statement of Mr. Doss, this reconstruction would require NSR to (1) seal the original Culvert; (2) commission a topography study and conduct substantial site preparation to assure a downhill flow of water to the new culvert; (3) create a new ditch line to accommodate the new

culvert; (4) raise portions of the Athens Track with a jack to construct a new ballast line to accommodate the new larger 36-inch diameter culvert, as required under current standards; (5) bore through the track roadbed with an auger to insert a steel case to accommodate the new culvert; and (6) install a modern junction box at the new culvert's outlet for the attachment of any other drainage infrastructure. Id. This construction project would be further complicated by the presence of other underground pipes and utility lines, the discovery of solid rock under the Athens Track, adverse weather conditions; and, this construction project would pose substantial safety risks and disrupt normal rail operations over the Athens Track. Id. at 6-7.

Thus, Plaintiffs' claims are similar to those in Waubay Lake Farmers and A&W Properties, Inc. v. Kansas City Southern Ry. Co., 200 S.W.3d 342 (Tex. Ct. App. 2006). In Waubay Lake Farmers, the plaintiffs alleged that the carrier failed to maintain, reconstruct, and upgrade its culvert to accommodate the increased water present in the watershed, and accordingly sought damages and an injunction for the carrier to replace and enlarge its culvert. The court held that the plaintiffs' claims and requests for damages were preempted by ICCTA:

This logically would require BNSF to halt use of its tracks to remove the existing culvert beneath the track and indeed beneath the current level of water, which likely would mean some demolition and rebuilding of its railway and roadbed. By requesting such relief, Plaintiffs seek to "manage or govern" how BNSF constructs its roadbed and operates its tracks by requiring replacement of a submerged culvert beneath the roadbed. Thus, to the extent that Plaintiffs' claims are based on state law, such claims fall squarely within the express terms of the ICCTA's preemption clause. Plaintiffs may not use state common law and a state statute to regulate, and indeed seek to compel, BNSF's reconstruction of its culvert, roadbed, and tracks.

2014 U.S. Dist. LEXIS 120160, at *16-17 (internal citations omitted). Similarly in A&W Properties, the court held that the plaintiff's claims and requests for the carrier to widen its culvert and bridge were preempted by ICCTA:

[T]o remedy the bridge-culvert crossing as A&W requested, the Railroad must:

(i) spend hundreds of thousands of dollars to make a significant capital improvement to its main line rail facility, (ii) temporarily shut down the stretch of track that passes by the Property to perform the construction work to enlarge the bridge, and (iii) operate trains at a dramatically reduced speed during those periods when the track is not shut down completely but while work is being done in the area.

200 S.W.3d at 345. As in Waubay Lake Farmers and A&W Properties, Plaintiffs' requested repairs prescribe how NSR should construct the Culvert and portions of the Athens Track, which fall within the express terms of § 10501(b) as "construction . . . of . . . tracks[] or facilities." Further, Plaintiffs' requested remedies would unreasonably interfere with NSR rail operations by requiring NSR to slow or reroute existing traffic while the Culvert and portions of the Athens Track are reconstructed.

Therefore, the Plaintiffs' requested remedies would adversely affect the economic aspects of NSR's rail operations subject to Board control. As such, Plaintiffs' claims and requests for damages against NSR are preempted by ICCTA.

CONCLUSION

For the foregoing reasons and in accordance with established precedent, Norfolk Southern Railway Company respectfully requests that the Board issue a declaratory order that the Plaintiffs' action to recover from NSR damages allegedly related to NSR's vegetation control and drainage culvert is preempted by § 10501(b).

Respectfully submitted,



John W. Baker, Jr.
Emily L. Herman-Thompson
BAKER, O'KANE, ATKINS & THOMPSON, 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

*Counsel for Norfolk Southern
Railway Co.*

July 30, 2015

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

**PLAINTIFFS' FOURTH MOTION FOR LEAVE TO AMEND
AND SUPPLEMENTAL COMPLAINT**

EXHIBIT A

IN THE CIRCUIT COURT FOR MCMINN COUNTY, TENNESSEE

JAMES LaMAR DUGAN, individually)
and on behalf of DUGAN)
PROFESSIONAL BUILDING AND)
RENTAL, LLC; DUGAN)
PROFESSIONAL BUILDING)
RENTAL, LLC, DOCTORS DUGAN)
AND DUGAN, LLC; and JAMES L.)
DUGAN, II)

No.: 2014-CV-258

Plaintiffs/Petitioners,)

v.)

CITY OF ATHENS, TENNESSEE,)
ATHENS UTILITY BOARD, and)
NORFOLK SOUTHERN RAILWAY)
COMPANY f/k/a SOUTHERN)
RAILWAY COMPANY,)

Defendants.)

PLAINTIFFS' FOURTH MOTION FOR LEAVE TO AMEND
AND SUPPLEMENT COMPLAINT

Pursuant to Rules 8.01 and 15.01 of the Tennessee Rules of Civil Procedure, Plaintiffs move this Honorable Court for leave to amend their Complaint. As grounds for this motion, Plaintiffs state the following:

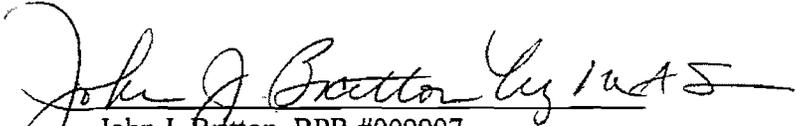
1. Written discovery has just begun; no depositions have been taken; Defendants will not be prejudiced by this early amendment; no trial is set; Defendant Railroad recently amended its Answer by agreement of Plaintiff; and justice so requires. Attached hereto as Exhibit A is Plaintiffs' proposed Fourth Amended Complaint.

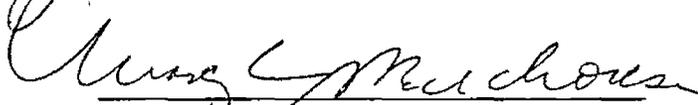
2. Specifically, Plaintiffs seek to add Paragraph 38(c) to read as follows:

38 (c). On March 10, 2015, Plaintiffs experienced a significant and substantial flood event where the water poured into the crawl space, which caused additional damage.

2. Plaintiffs adopt by reference their previously filed and pending Motions to Amend and Supplement the Complaint filed on December 29, 2014, January 13, 2015 and February 18, 2015.

WHEREFORE, THE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant Plaintiffs' motion for leave to amend their complaint and file the proposed Fourth Amended Complaint attached hereto.


John J. Britton, BPR #009907


Mary Ann Stackhouse, BPR #017210

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.
One Centre Square, Fifth Floor
620 Market Street
P.O. Box 2425
Knoxville, TN 37901
(865) 546-4646

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2015, a copy of the foregoing has been delivered to all counsel for parties at interest in this cause by placing a copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by delivering same to each such attorney as follows:

Hand John W. Baker, Jr., Esquire
 Mail Baker, O'Kane, Atkins &
 Fax Thompson, PLLP
 Fed X 2607 Kingston Pike, Suite 200
 EFS P.O. Box 1708
Knoxville, TN 37901-1708

Hand John T. Batson, Jr., Esquire
 Mail Watson, Roach, Batson, Rowell
 Fax & Lauderback, P.L.C.
 Fed X 900 S. Gay Street, Suite 1500
 EFS P. O. Box 131
Knoxville, TN 37901-0131

Hand Bridget J. Willhite, Esquire
 Mail Carter, Harrod & Willhite, PLLC
 Fax P. O. Box 885
 Fed X Athens, TN 37371-0885
 EFS

Mary Madeline

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)

No.: 2014-CV-258

JURY OF TWELVE DEMANDED

Plaintiffs/Petitioners,)

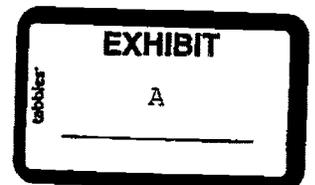
v.)

CITY OF ATHENS, TENNESSEE,)
c/o HAL BUTTRAM, MAYOR;)
815 N. JACKSON STREET, ATHENS,)
TENNESSEE 37303; c/o MITCHELL B.)
MOORE, CITY MANAGER, 815 N.)
JACKSON STREET, ATHENS,)
TENNESSEE 37303; c/o CHRIS TREW,)
CITY ATTORNEY, 20 WASHINGTON)
STREET, ATHENS, TENNESSEE, 37303;)
and)

ATHENS UTILITY BOARD,)
c/o ERIC NEWBERRY, GENERAL)
MANAGER, 100 NEW ENGLEWOOD)
ROAD, ATHENS, TENNESSEE)
37303; and)

NORFOLK SOUTHERN RAILWAY)
COMPANY, f/k/a SOUTHERN)
RAILWAY COMPANY,)
c/o C T CORPORATION SYSTEM,)
800 S GAY STREET, STE 2021,)
KNOXVILLE, TN 37929-9710)

Defendants/Respondents.)



FOURTH AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs/Petitioners (hereinafter "Plaintiffs"), bring this action pursuant to Tennessee common law, temporary nuisance, the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq., and the special duty exception to the public duty doctrine. For Plaintiffs' causes of action against Defendants, Plaintiffs show to the Court as follows:

1. Plaintiff James LaMar Dugan, Sr., is a citizen and resident of McMinn County, Tennessee, and the sole member of Dugan Professional Building and Rental, LLC (hereinafter "Dugan LLC"). Plaintiff James LaMar Dugan, Sr., files this action on behalf of himself individually, as an owner of the Property (described below), as the sole member of Dugan LLC, and on behalf of Dugan LLC, whose current status is inactive-terminated as of April 21, 2014. As the sole member, Plaintiff James LaMar Dugan, Sr., has the right to assert the rights and claims of Dugan LLC. Tenn. Code Ann. § 48-249-614. Plaintiff Dugan Sr. has an interest in Doctors Dugan and Dugan, LLC.

2. Plaintiff Dugan Professional Building and Rental, LLC (hereinafter "Dugan LLC") was a limited liability corporation organized under the laws of the State of Tennessee, whose principal place of business was located in Athens, McMinn County, Tennessee, who was in existence during certain material times referenced in this complaint. Plaintiff Dugan LLC is the owner of property and improvements, (hereinafter "the Property") including, *inter alia*, a dental office, commonly known as 1132 W. Madison Avenue, Athens, Tennessee 37303, where Doctors Dugan and Dugan, LLC, practice dentistry. The Property is more particularly described in the deed book found at Book 19N, Page 195, in the office of the McMinn County Register of Deeds.

3. Plaintiff Doctors Dugan and Dugan, LLC, (hereinafter, "Doctors LLC"), practice dentistry in the office building on the Property, are tenants, and have a possessory interest, leasehold interest and business interest in the Property.

4. Plaintiff James L. Dugan, II is a citizen and resident of McMinn County, Tennessee, has an interest in said Property, an interest in the equipment of the dentistry practice, and an interest in Doctors Dugan and Dugan, LLC.

5. Plaintiffs bring this action on behalf of themselves, as property owners, as business owners, and as persons with interests in Dugan LLC and Doctors LLC.

6. The City of Athens (hereinafter "the City") is a municipality located in McMinn County, Tennessee and at all times material to this litigation was the owner of and in actual possession and/or in control of drainage structures and facilities and had access to easements used for drainage purposes. At all times herein material, the City controlled and had a duty to maintain various drainage structures and facilities, and was responsible for the original construction, modifications, and maintenance of drainage structures and facilities. Service of process is requested upon the City by service on Hal Buttram, the City Mayor, Mitchell B. Moore, the City Manager, each at the principal offices of the City as identified in the caption, and upon Chris Trew, the City Attorney, at his offices as identified in the caption.

7. The Athens Utility Board (hereinafter "AUB") is a utility board and district located in McMinn County, Tennessee, and at all times material to this litigation was the owner of and in actual possession and/or in control of drainage structures and facilities and had access to easements used for drainage purposes. At all times herein material, the Athens Utility Board controlled and had a duty to maintain various drainage structures and facilities, and was responsible for the original construction, modifications, and maintenance of drainage structures and facilities. Service of process is requested upon the Athens Utility Board by service on Eric

Newberry, the General Manager, at the principal offices of the Athens Utility Board as identified in the caption.

8. Norfolk Southern Railway Company, formerly known as Southern Railway Company, (hereinafter "the Railroad") is a for-profit foreign corporation and the owner of land *above* Plaintiffs' property, in McMinn County, Tennessee. Service of process is requested upon Norfolk Southern Railway Company through its registered agent as identified in the caption.

9. The purpose of the drainage structures and facilities owned and/or controlled and/or maintained by the City of Athens and the Athens Utility Board is to channel and direct water runoff and stormwater runoff in a manner that will not cause damage to the property of City residents and property owners and not cause personal injury to the residents.

10. Plaintiff James LaMar Dugan, Sr., acquired the Property in 1977, and built the improvement, the dental office, in 1978, where he has been practicing dentistry continuously since that time.

11. The City of Athens' engineers, planners and planning commission approved the location of the building and improvements on the Property.

12. The Plaintiff Dugan LLC, acquired the Property and improvements, including, *inter alia*, a dental office, located at 1132 W. Madison Avenue, Athens, Tennessee, 37303, on/or about July 2, 2012, and has owned it continuously since that time.

13. James LaMar Dugan has been practicing dentistry on the Property since 1978. James Dugan II has been practicing dentistry on the Property since 2000. The Plaintiff Doctors LLC has been practicing dentistry on the Property since 2006.

14. In the Fall of 2012, the Railroad negligently clear cut property located above and on the opposite side of the rail line from the Plaintiffs' Property, without regard to its foreseeable effect on Plaintiffs' Property and/or business; the Railroad failed to remove the clear cut debris,

allowing the debris to clog the drainage infrastructure and/or stormwater culvert that extended to and under Plaintiffs' property.

15. On information and belief, it is alleged that the Railroad owns and operates a stormwater culvert that is intended to drain stormwater runoff. This stormwater culvert's inlet is on the opposite side of the rail line from the Property, and the stormwater culvert travels under the rail line, across the Property and joins a stormwater system drainage infrastructure in the right of way of State Highway 39/W. Madison Avenue.

16. In January 2013, Plaintiffs experienced a flooding event underneath the building on the Property such that water poured out from under the crawl space of the building and through the mortar. Prior to the Railroad's clear cutting on the opposite side of the rail line from the Property, the Property had experienced no flooding.

17. Plaintiffs inspected their building for water pipe leaks, and found none.

18. Flood events continued to occur.

19. In April, 2013, Plaintiffs discovered that when the Defendant Railroad had clear cut the property located above and on the opposite side of the rail line from the Plaintiffs' Property, a body of water had formed on the Railroad's property.

20. In April, 2013, Plaintiffs contacted the Defendant Railroad, but, received no immediate response.

21. On May 6, 2013, Plaintiffs contacted the City of Athens. City employee Harvel Henry came to the property.

22. The City indicated that the drainage infrastructure, which ran from the property where the Railroad had clear cut and under Plaintiff's Property, was clogged, but the City took no action, and has continued, to this day, to take no action, allowing the defective condition to exist and persist, allowing the flooding events to continue and cause damage to Plaintiffs.

23. The Athens Utility Board was contacted.
24. On information and belief, it is alleged that the drainage infrastructure is owned, operated and maintained by the City and/or AUB.
25. On or about May 6, 2013, the Athens Utility Board conducted some bush-hogging.
26. On May 7, 2013, the City, through City employee Shawn Lindsey, refused to respond further.
27. On May 8, 2013, contact was made with the Railroad.
28. On May 10, 2013, the Railroad conducted additional clearing and dug a trench in the middle of the swell on the property on the opposite side of the rail line from the Plaintiffs' Property.
29. Flood events on Plaintiffs' property continued to occur.
30. Plaintiffs continued to complain to Defendants.
31. On August 7 and 13, 2013, Defendants Railroad and AUB inspected but took no corrective action.
32. On August 19, 2013, AUB marked places in the parking lot but took no corrective action.
33. During the last week of August, 2013, a flood event occurred on Plaintiffs' property.
34. On September 11, 2013, AUB came to the Property, dug a hole and gave the appearance of cleaning out the drainage pipe.
35. On September 11, 2013, AUB performed this work negligently.
36. On October 24, 2013, the Railroad came out to the Property but took no corrective action to alleviate the flooding.

37. Since September 11, 2013, Plaintiffs have experienced flood events on or about the following dates: November 5, 2013; November 26, 2013; November 27, 2013; December 9, 2013; February 21, 2014; April 7, 2014; April 28, 2014; June 2 through 5, 2014; June 29, 2014; June 30, 2014; July 21, 2014. During these flood events, it is common for the water to pour out from the crawl space of the building and mortar; the hearing and air conditioning units were damaged, failed to work, and had to be repaired on multiple occasions; a horrible smell filled up the dental office; interior cracks developed on the walls; the foundation has been damaged; the duct work has been damaged.

38. On June 30, 2014, Plaintiff experienced a significant and substantial flood event where the water poured out of the crawl space, came out the mortar, and flooded the air conditioning units.

38 (a). On December 23/24, 2014, Plaintiffs experienced a significant and substantial flood event where the water poured out of the crawl space, came out the mortar, and flooded the air conditioning units, which caused additional damage.

38(b). On January 3 and 4, 2015, Plaintiffs experienced another significant and substantial flood event which caused additional damage.

38 (c). On March 10, 2015, Plaintiffs experienced a significant and substantial flood event where the water poured into the crawl space, which caused additional damage.

39. This flooding has damaged the foundation of the building, the air conditioning units and the duct work in the crawl space under the building.

40. Plaintiffs allege that this repeated flooding is a repeated temporary nuisance.

41. On information and belief, Plaintiffs allege that the drainage pipe that runs under their property has broken.

42. On information and belief, Plaintiffs allege that this drainage pipe has broken due to debris washing into the pipe from the Railroad's clear cutting on property on the opposite side of the rail line from the Plaintiffs' Property and allowing the debris to wash into the culvert and the drainage infrastructure.

43. In spite of notice to the Defendants, the Defendants have not remedied this problem and have continued to allow this nuisance to exist and persist.

44. Plaintiffs aver that when the employees from the City, AUB and the Railroad came to their Property, the viewing of Plaintiffs' property by the Defendants' employees constituted actual notice to the City, AUB and the Railroad of the conditions affecting Plaintiffs' Property.

45. Plaintiffs aver that other than AUB negligently cleaning out the drainage pipe and the Railroad negligently digging an inadequate, insufficient and defective trench on the property on the other side of the rail line from Plaintiff's Property, Defendants have taken no reasonable, adequate, sufficient or effective action to alleviate or mitigate the flooding conditions and nuisance on Plaintiffs' Property.

46. Plaintiffs aver that Defendants' efforts to clean and/or maintain the drainage infrastructure, drainage culverts, pipes and structures have been unreasonable, inadequate, insufficient, ineffective, negligent and/or grossly negligent. Plaintiffs aver that the Defendants' unreasonable, inadequate, insufficient, ineffective, negligent and/or grossly negligent maintenance and/or repair activities and dangerous and/or defective drainage infrastructure construction have proximately caused and created a condition dangerous to their property.

47. Plaintiffs aver that Defendants have had actual notice of the flooding at Plaintiff's property and the conditions of the stormwater culvert and the drainage infrastructure owned, operated and/or maintained by the City and/or AUB and/or the Railroad. Alternatively, Plaintiffs aver that the Defendants have had constructive notice of the deficiencies, the effects and dangerous conditions of this drainage infrastructure as set forth in this Complaint. Plaintiffs aver that the City, AUB and the Railroad have been guilty of negligence and/or gross negligence and breach of duty toward the Plaintiffs and their Property and have therefore materially caused the damages Plaintiffs have incurred.

48. Plaintiffs aver that the City and/or AUB and/or the Railroad have inadequately and negligently maintained the existing drainage culvert, structures and infrastructures, and have failed to take action to alleviate impediments to drainage in the affected area. Plaintiff avers that these conditions could be alleviated, but that the City and/or AUB and/or the Railroad have failed to take appropriate and necessary action to do so.

49. In the alternative, Plaintiffs aver that the City and/or AUB and/or the Railroad, have assumed the operation, maintenance, repair and cleaning out of the existing drainage culvert, structures and infrastructures, and have done so negligently and inadequately. Defendants have failed to take action to alleviate impediments to drainage in the affected area. Plaintiff avers that these conditions could be alleviated, but that the City and/or AUB and/or the Railroad have failed to take appropriate and necessary action to do so.

50. Plaintiffs aver that the Railroad negligently clear cut the property located on the opposite side of the rail line from the Plaintiffs' Property, negligently failed to remove the debris and negligently clogged the drainage culvert and the drainage infrastructure. The Railroad could have alleviated these conditions, but the Railroad has failed to take appropriate and necessary action to do so.

51. Plaintiffs aver that the Railroad negligently disposed of waste and negligently maintained the drainage ditch or culvert.

52. Plaintiffs aver that the Railroad's actions, inactions, commissions and/or omissions as described in this complaint were not related to transportation by rail carriers and were not related to construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks or facilities.

53. Plaintiffs aver that the actions and/or inactions of the Defendants have created a temporary nuisance condition on Plaintiffs' Property proximately causing them damage.

54. Plaintiffs aver that the City and/or AUB have created and maintained a wrongful condition of the drainage infrastructure over an unreasonable length of time, such that the unreasonable and/or unlawful condition of said infrastructure has proximately resulted in material and/or substantial annoyance, inconvenience, discomfort, harm and/or injury to Plaintiffs, to Plaintiffs' personal comfort and/or to the Plaintiffs' free use, possession or occupation of the Plaintiffs' own Property, and to Plaintiffs' business. The Plaintiffs aver that the affirmative acts, errors, and omissions of the City and/or AUB have created a defective and/or an inherently dangerous condition affecting the value of their Property and business, and damaging their Property and causing injury to Plaintiffs.

55. Plaintiffs aver that the Railroad has created and maintained a wrongful condition on the property located on the opposite side of the rail line from the Plaintiffs' Property over an unreasonable length of time, such that the unreasonable and/or unlawful condition has proximately resulted in material and/or substantial annoyance, inconvenience, discomfort, harm and/or injury to Plaintiffs, to Plaintiffs' personal comfort and/or to the Plaintiffs' free use, possession or occupation of the Plaintiffs' own Property, and to Plaintiffs' business. The Plaintiffs aver that the affirmative acts, errors, and omissions of the Railroad have created a

defective and/or an inherently dangerous condition affecting the value of their Property and business, and damaging their Property and causing injury to Plaintiffs.

56. Plaintiffs aver that the affirmative acts, errors, and omissions of the City, AUB and/or the Railroad as set forth herein have disturbed the free use of Plaintiffs' Property and business and caused Plaintiffs to incur damages related to the costs to alleviate flooding events and have diminished the value of Plaintiffs' property, and have diminished the use and enjoyment of Plaintiffs' property and have caused Plaintiffs' to suffer loss of business and income, and the loss of enjoyment of their property, business and dental practice.

57. Plaintiffs aver that the acts, errors, and omissions of the City and AUB have caused their damages as set forth herein that proximately result from the improper and negligent construction, operation and/or maintenance of public improvements owned and/or controlled by the City and AUB and have produced damages related to the diminished value of their Property and the use and enjoyment of their Property that are temporary in nature. Plaintiffs aver that they are entitled to successive recoveries until the nuisance created and caused by the City and AUB is abated.

58. Plaintiffs aver that the acts, errors, and omissions of the Railroad have caused their damages as set forth herein that proximately result from the improper and negligent clear cutting, digging and other actions upon the opposite side of the rail line from the Plaintiffs' Property, and Railroad's acts, errors and omissions have caused damages related to the diminished value of their Property and the use and enjoyment of their Property that are temporary in nature. Plaintiffs aver that they are entitled to successive recoveries until the nuisance created and caused by the Railroad is abated.

59. Plaintiffs aver that the Defendants have proximately caused their damages.

60. Plaintiffs aver that the actions, inactions and omissions of the City, AUB and the Railroad have proximately caused a direct and substantial interference with their beneficial use and enjoyment of their property and business; the interference has been repeated and not just occasional; the interference has peculiarly affected their property in a manner different than the effect of the interference on the public at large; and the interference has resulted in a loss of market value, loss of value of land, loss of business and loss of business income and damages.

61. Alternatively, Plaintiff avers that the City, AUB and the Railroad have committed trespass on their property, having proximately caused entries upon their land and business without actual or implied permission, and thus, Plaintiffs bring their cause of action for trespass, and seek compensatory and punitive damages for same. Plaintiffs seek punitive damages for gross negligence.

62. In the alternative, the City, AUB and the Railroad have acted negligently and said negligence has proximately cause Plaintiffs' injuries and damages.

63. Plaintiffs also bring their causes of action pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq, on account of the negligent actions and/or inactions and/or omissions of the City and AUB and/or on account of the dangerous and/or defective condition of the drainage infrastructure and facilities, owned and controlled by the City and AUB, which proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

64. Plaintiffs also bring their causes of action under the special duty exception to the public duty doctrine.

65. At all times material hereto, the employees and/or agents of the City, AUB and the Railroad have acted within the scope of their employment.

66. At all times material hereto, the actions and/or inaction and/or omissions of the City, AUB and the Railroad, by and through their employees and/or agents, are the proximate cause of Plaintiffs' injuries and damages.

67. In the alternative, the City, AUB and the Railroad, and their employees and/or agents have acted with gross negligence and said gross negligence has proximately caused Plaintiffs' injuries and damages.

68. Plaintiffs aver that the City and AUB have adopted an ordinance which includes an extensive Stormwater Management Policy ("Policy") for the purpose of protecting and maintaining the health and safety of the citizens of the City as well as property located within the City. Through the Policy, the City and AUB have assumed general regulation and control over the planning, location, construction, and operation and maintenance of all stormwater facilities located within the municipality, whether or not owned and operated by the City.

69. The Policy was implemented to prevent and address the exact problems that the Plaintiffs are experiencing. Via the Policy, the City and AUB owed, and continue to owe, the Plaintiffs the duty to alleviate impediments to drainage in the affected area. Plaintiffs aver that the Policy provides the City and AUB the authority and mandates the obligation to ensure proper drainage in the affected area, but that the City and/or AUB have failed to take appropriate and necessary action to do so, as required by the Policy.

70. The City and AUB's negligent failure to adhere to the standards established by the Policy proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income. The City and AUB's ignoring of the Policy adopted by the City amounts to an operational function for which the City and AUB are not immune.

71. Specifically, the City and AUB have negligently maintained the drainage ways leading into the drainage infrastructure located beneath the Plaintiffs' property. The City and

AUB have further negligently failed to take appropriate action under the Policy to alleviate the drainage problem on the Plaintiff's property after receiving constructive and actual notice of the problem. Such failure has created a dangerous condition on the Plaintiffs' property and has proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

72. The Policy requires all trash, junk, and rubbish to be cleared from all drainage ways and prohibits any discharge that is not composed entirely of stormwater into the municipal storm sewer system. The City and AUB failed to remove all trash, junk, and rubbish from the drainage ways leading to the drainage infrastructure and/or stormwater culvert that extended to and under Plaintiffs' property. The City and AUB further failed to ensure that nothing other than stormwater was entering into the sewer system through the inlet and/or stormwater culvert leading from the Railroad's property and extending underneath the Plaintiffs' property. Such negligent conduct by the City and AUB proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

Wherefore, the premises considered, Plaintiffs pray:

1. That process issue against each Defendant and that each Defendant be served with a Summons/Notice and a copy of this Complaint, and that each Defendant be required to answer this Complaint within the time allowed by law;
2. That Plaintiffs have such damages as are allowed to them by law and equity in the amount of Two Million, Nine Hundred Thousand Dollars (\$2,900,000.00).
3. That Plaintiffs have such damages, costs and fees that are allowed by law, including loss of business and loss of business income.

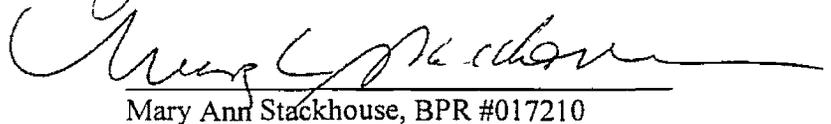
4. That Plaintiffs have and recover punitive damages for trespass in such amount as the Court and Jury deem proper in the amount of Two Million, Nine Hundred Thousand Dollars (\$2,900,000.00).

5. That the Court issue an injunction requiring Defendants to repair, reconstruct and redirect the drainage culvert and drainage infrastructure affecting and damaging Plaintiff's Property.

6. That Plaintiffs have such further and general relief to which they are entitled under the facts of this cause; and

7. That a jury of twelve persons be empanelled to try all issues so triable by law.


John J. Britton, Esq. BPR #009907

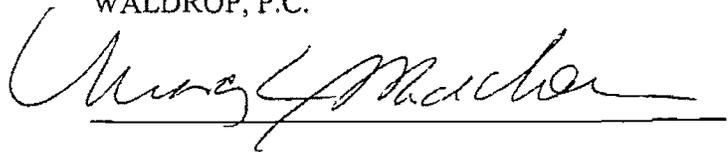

Mary Ann Stackhouse, BPR #017210

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.
One Centre Square, Fifth Floor
620 Market Street
Post Office Box 2425
Knoxville, TN 37901
(865) 546-4646
Attorneys for Plaintiffs

COST BOND

We acknowledge ourselves as surety for all costs, taxes, and damages in this case in accordance with Tenn. Code Ann. § 20-12-120.

LEWIS, THOMASON, KING, KRIEG &
WALDROP, P.C.


Mary Ann Stackhouse

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF ANDREW KOCH

EXHIBIT B

BEFORE ME, the undersigned authority, personally appeared Andrew Koch who by me duly sworn, deposed as follows:

1. I am over the age of eighteen (18) years, and I am competent to make this Statement. The matters set forth in this Statement are true to the best of my knowledge and belief.

2. I am currently the Assistant Division Superintendent of Dispatch for Norfolk Southern Railway Company (“NSR”) in Knoxville, Knox County, Tennessee, and have served in this position since November 2014. My division includes NSR rail traffic and track lines in Tennessee, Kentucky, and western North Carolina. From April 15, 2012 to November 2014, I was the Chief Dispatcher for NSR in Atlanta, Georgia. Prior to that time, and also with NSR, I was the Chief Dispatcher for two years and the Yard Master for one year in Bluefield, West Virginia. By serving in these various positions over the years, I have learned NSR’s rules and practices regarding train dispatch, train movements, track operations, and coordination between operations and other NSR departments regarding track usage. I have extensive experience

trouble-shooting and decision-making in a number of different scenarios relating to train movement and track usage.

3. Dispatchers are responsible for providing track authority, which means authority to move trains or other equipment over or near rail tracks, providing other railroad employees and operators with the necessary permission to work on or near tracks, planning and setting up train routings and movements, and issuing slow orders or other directives for track operations and usage. I have supervisory responsibility over the dispatchers that have direct responsibility for NSR's mainline track running through Athens, Tennessee ("Athens Track"). As such, I am familiar with the Athens Track.

4. The Athens Track is an active mainline track, meaning that NSR transports freight cargo, up to 32 million gross tons each year, on trains running at speeds of up to 40 miles per hour. In a 24-hour period, the Athens Track averages 11 trains. The trains are primarily mixed freight, to include trains carrying hazardous materials and coal, as well as intermodal trains. These trains serve both local customers and industries as well as interstate customers and industries. Other hi-rail vehicles and heavy on-track equipment and machinery also frequently operate over the Athens Track for track inspection and maintenance purposes.

5. The particular drainage culvert at issue ("Culvert") is part of the Athens Track roadbed and is located at Milepost 186.76A, as identified by NSR, in Athens, Tennessee. As a supervisor of dispatchers, I understand that the structural integrity of the track roadbed and track are critically necessary for proper and safe railroad operations. If the roadbed or track are structurally unsound or otherwise damaged, then the operation of trains and other on-track vehicles moving over that track is compromised and unsafe. In the worst case scenario, a damaged roadbed or track can lead to a derailment, endangering the safety and welfare of

railroad employees and surrounding communities. Because some of the trains running over the Athens Track carry hazardous materials, including toxic-by-inhalation hazardous materials, and additionally because the Culvert is located close to a public road-railroad crossing, a derailment would be especially dangerous in this situation.

6. I have been advised that the property owners on the south side of the Athens Track have requested that NSR reconstruct or redirect the Culvert and install a grate over the Culvert's intake. The engineering department would have to coordinate with dispatch for track authority to perform any construction work (such work described in more detail in the accompanying Verified Statement of Ronnie Doss).

7. There are significant operational and safety considerations in coordinating this construction work. I understand that the construction requested for the Culvert will require construction on the Athens Track itself, the supporting roadbed, and areas adjacent to the Athens Track and roadbed. Therefore, any repairs to or reconstruction of the Culvert would necessarily affect the active mainline track above. Since trains carrying hazardous materials run over the Athens Track, construction work would have to proceed with extreme caution to protect the safety of the track, train crews and other railroad employees and operators, and surrounding communities and populations. In order to minimize these safety risks, NSR dispatchers would have to work with the engineering department to carefully coordinate the construction work and operations through the construction area.

8. There are numerous rules that would be invoked by a construction project on this active mainline track to protect the safety of train crews and other railroad employees; and, dispatchers would have to coordinate construction activities and work with the engineering department to ensure compliance with these rules. The coordination for this construction project

would include managing personnel needs and providing curfews, track time, and other track use authority. The engineering department would likely require extra personnel to protect the railroad employees working on or near the track; and, dispatchers would have to process and coordinate the request for additional personnel and track authority for such personnel. Also, there is a signalized public crossing within a few yards to the east of the location of the existing Culvert (at NSR milepost 186.60 A) and within a few yards to the west (at NSR milepost 187.30), and thus near the potential construction area. The crossing at milepost 186.60A would likely have to be protected by personnel flagging the motoring and pedestrian traffic; and, the crossing at milepost 187.30 also may have to be flagged. Train movements would have to be carefully managed so as not to unreasonably disrupt or endanger the public using these crossings.

9. During the construction project, dispatchers would have to issue a slow order, limiting freight traffic and slowing the network velocity to speeds as low as 5 miles per hour. During construction, it may even be necessary to reroute trains and stop traffic on this segment of the Athens Track completely, either for the duration of the construction work or for a portion of it. Such slow orders, re-routings, and suspensions would burden and delay the freight trains running over the Athens Track, resulting in poor service for the receiving customers and industries. Since the Athens Track is part of a larger rail network, used by NSR and other carriers, construction at this location also could lead to congestion and delays throughout the larger regional corridor, disrupting rail operations and negatively affecting customers on a larger scale. Thus, any repairs to and reconstruction of the Culvert would have serious operational and safety implications requiring careful coordination and management by NSR dispatchers.

Further, Affiant sayeth not.

By: *Andrew Koch*
Andrew Koch

STATE OF TENNESSEE)
):ss
COUNTY OF KNOX)

On this 23 day of July, 2015, before me personally appeared Andrew Koch, to me known to be the person described herein and who sworn executed the foregoing instrument for the purpose described therein. Witness my hand and official seal in the State and County aforesaid, this 23 day of _____ July, 2015.

Vicki Lynn Williams
Notary Public

My Commission Expires: April, 2019



SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF RONNIE DOSS

EXHIBIT C

BEFORE ME, the undersigned authority, personally appeared Ronnie Doss who, by me duly sworn, deposed as follows:

1. I am over the age of eighteen (18) years, and I am competent to make this Statement. The matters set forth in this Statement are true to the best of my knowledge and belief.

2. I am currently the Bridge and Building (“B&B”) Assistant Division Engineer for Norfolk Southern Railway Company (“NSR”) in the Central Division, which includes Tennessee and Kentucky. The B&B department of NSR plans, constructs, and maintains certain railroad infrastructure, necessary for railroad operations, including track, supporting track roadbed, and areas within the railroad right of way and adjacent to the track and track roadbed. I have over 34 years of experience in railroad construction and engineering, and I am very familiar with railroad track infrastructure, including drainage culverts. I began my career with NSR in the B&B department in 1981 as an apprentice laborer. Since then, I have held the positions of Assistant Bridge Supervisor in Columbus, Georgia (1 year), B&B supervisor in Atlanta, Georgia (8 years),

and B&B supervisor in Roanoke, Virginia (16 years). I have held my current position as the B&B Assistant Division Engineer since 2013.

3. My territory includes NSR's mainline track in Athens, Tennessee ("Athens Track"), which runs behind the property of James Dugan and James Dugan, II, and their dental building, at 1132 West Madison Avenue. I have been to the site of and am familiar with the pass-through drainage culvert at issue ("Culvert").

4. The Culvert is embedded in the track roadbed structure under the Athens Track near Milepost 186.76A. The Culvert is a 24-inch diameter cast-iron pipe, estimated to have been constructed in 1911. Based on NSR records, the Culvert has successfully serviced the 38-acre watershed to the north of the Athens Track for over 100 years, without incident. I am in a position, as B&B Assistant Division Engineer, to learn of any incidents with this Culvert, and I know of no alleged incidents with the Culvert until the Dugans told NSR in 2013 that they experienced flooding issues on their property. After the Dugans' allegations, I inspected the Culvert and found it to be open and working properly.

5. The Culvert's inlet is on the north side of the Athens Track. The Culvert is embedded in the track roadbed structure and runs under the Athens Track, exiting on the south side. I have actually looked inside the Culvert, and one can see an extension pipe of larger diameter than the Culvert, and not owned or otherwise maintained by NSR, running underground from the Culvert outlet on the south side of the Athens Track, at an angle towards the Dugans' property. I attach hereto three photographs showing an aerial view of the Culvert running under the Athens Track, the inlet side of the Culvert, and the outlet side of the Culvert.

6. The Culvert is an essential structural part of the Athens Track. As noted above, the Culvert is actually embedded in the track roadbed structure beneath the Athens Track. The

roadbed structure consists of ballast rock and fill material supporting the actual track, consisting of rails, ties, signals, and other operating infrastructure. The distance between the top of the rail tie and the bottom of the Culvert opening is approximately 8 feet, demonstrating just how integrally linked the Culvert is to the Athens Track directly above.

7. The Culvert provides adequate drainage for the Athens Track by allowing water from the watershed to flow, at the proper speed and volume, under the track. There is a ditch line on the north side of the Athens Track to (a) direct the flow of water to the Culvert and (b) hold water, as a detention pond, so that the water can move at the appropriate speed and volume so that it does not damage the Culvert and/or track roadbed under the Athens Track. Thus, it is a necessary function of the Culvert to create a pooling of water.

8. Improper design and maintenance of the Culvert can lead to blockages, altered stream flows, and insufficient drainage that can cause flooding at the ballast or track level of the Athens Track. Flooding at such levels can severely damage rails and rail ties, thus compromising the structural integrity and safety of the track itself. Blockages, altered stream flows, and insufficient drainage also can weaken the structural integrity of the Culvert itself. As the Culvert is embedded in the track roadbed structure, any damage to the structural integrity of the Culvert weakens and damages the roadbed, and by extension, the track above. To elaborate, the roadbed is weakened by erosion and softening of the roadbed fill material as well as shifting of the ballast rock, which then can cause rails and rail ties to deteriorate, misalign, sink, or even collapse, increasing the risk of derailment of freight trains and other on-track vehicles and equipment.

9. Accordingly, the Culvert is routinely maintained and inspected for blockages, deterioration, or other damage that could affect its proper functioning and compromise the proper

and safe operation of trains and other on-track vehicles on the Athens Track above. Pass-through culverts are designed to allow the passage of water, vegetation, and other debris under the tracks. But as part of the routine maintenance of the Culvert, when necessary, the ditch line is cleared so that vegetation and other debris cannot block the Culvert opening or the Culvert pipe itself, which could compromise track integrity, safety, and operations. Such clearance of vegetation is necessary with respect to the Culvert's ditch line because the area surrounding the north side of the Athens Track, in the watershed, is heavily vegetated. And, there is a dense line of trees whose branches can hang over the Athens Track absent proper vegetation control. Thus, vegetation control is essential for safe and proper railroad operations along the Athens Track.

10. Vegetation control includes herbicide spraying, actual cutting or trimming, as well as clearing any related debris. I know that freight trains, some carrying hazardous materials, use the Athens Track; that hi-rail vehicles frequently operate on the tracks for routine inspections by railroad employees, the Federal Railroad Administration ("FRA"), and the Tennessee Department of Transportation ("TDOT"); and that heavy machines and on-track equipment also run on the Athens Track for other inspection and maintenance activities. Vegetation control ensures that the surrounding heavy vegetation does not interfere with the safe and proper operation of these freight trains, hi-rail vehicles, and other on-track equipment. Absent adequate control, vegetation could, for example, strike and damage trains and other rail equipment, accumulate on the rails and other track infrastructure, or obscure a clear line of sight along and near the Athens Track. All of these effects could impair railroad employees' or inspectors' ability to perform their duties effectively and safely and to perceive and react appropriately to important information and conditions.

11. In fact, the FRA requires that NSR control vegetation on railroad property that is on or immediately adjacent to the track roadbed so that it does not (a) become a fire hazard, (b) obstruct visibility of railroad signs and signals along the railroad right of way and at highway-rail crossings, (c) interfere with railroad employees performing normal trackside duties, such as inspecting and maintaining the Culvert, (d) prevent proper functioning of signal communication lines, or (e) prevent railroad employees from visually inspecting moving equipment. See 49 C.F.R. § 213.37. NSR also has its own program to clear vegetation at public railroad crossings so that railroad employees can see motorists and other users of the public crossing, and vice versa, so that both parties can act safely and react appropriately to the conditions.

12. Based on NSR records, NSR clear-cut vegetation in the vicinity of Milepost 186.7A in May 2012 and July 2012 and conducted the related clearance of vegetation debris, in order to control vegetation that could impair rail operations, track safety, track integrity, and track visibility.

13. I have been advised that the Dugans have requested that NSR reconstruct and redirect the Culvert as well as install a grate over the Culvert opening. I have analyzed the work that would need to be done in order to satisfy the Dugans' requests. As an engineer with extensive experience in railroad operations and railroad track infrastructure to include drainage culverts, I would not recommend any of the Dugans' requests. Doing so would significantly and unreasonably interfere with NSR's rail operations over the Athens Track.

14. Reconstructing and redirecting the Culvert would require extensive work, to include the following:

- a. Prohibiting water flow through the original Culvert by fully sealing the cast-iron pipe from the inlet end to the outlet end, by filling the Culvert pipe with grout and contouring the track roadbed to seal the pipe itself;
- b. Commissioning a topography study and conducting substantial site preparation on the north side of the Athens Track, including grading and contouring the track roadbed to assure a downhill flow of water to the new culvert.
- c. Creating an entirely new ditch line to accommodate the new culvert, which likely would have to be positioned to the east of the current Culvert;
- d. Raising portions of the Athens Track with a jack to construct a new ballast line in order to accommodate the new larger culvert, as current standards require culverts to be 36-inches in diameter;
- e. Boring through the track roadbed with an auger to insert a steel case that is 36-inches in diameter in twenty foot segments, in order to accommodate the new larger culvert; and
- f. Installing a modern junction box at the new culvert's outlet for the attachment of any other drainage pipe structure and for access to the pipes for inspection and maintenance.

15. The construction mentioned above is particularly complicated because of existing urban development. Based on my experience with this sort of construction project, my site inspection, and my knowledge about the other structures in this location, there likely are other underground pipes and utility lines to the north and south sides of the Athens Track in the location where the new culvert would be placed. NSR would have to dig down to a precise depth and carefully align the new culvert in such a way as to (a) provide a proper downslope, to

(i) ensure that water and natural debris flow effectively to and through the new culvert and (ii) allow proper attachment of other drainage structures to the new culvert so that there is no misjoinder while (b) not interfering with, damaging, or disrupting other underground pipes and utility lines, such as water lines, sewer lines, and gas lines.

16. Further, there would be significant costs associated with this construction project, which likely would interrupt NSR's railroad operations for weeks. For example, the auger bore installation of the 36-inch steel case for the new larger culvert pipe must be done so that NSR can completely install the culvert pipe under the load sensitive area of the Athens Track so that track stability is not compromised. The entire construction project also may be rendered more difficult by, for example, the discovery of solid rock under the Athens Track. Considerations would also have to be made for adverse weather events that may delay the project, risk damage to the track structure, and create conditions that may increase the risks of accident and injury to those working on or near the construction site.

17. Even beyond weather, there are substantial safety risks with such a culvert relocation or reconstruction. Employees, including on-track flagmen, would be working with or near heavy machinery and equipment, which requires careful compliance with safety rules and practices to reduce the risk of an accident and injury. To the extent that it is determined that freight trains can operate over the Athens Track during construction (such operation described in more detail in the accompanying Verified Statement of Andrew Koch), those trains pose a danger to the on-track workers and must be carefully directed, or more likely stopped, and potentially "walked" by on-ground employees through the construction area.

18. In regards to the Dugans' request to install a grate over the Culvert's opening, this would increase the likelihood that natural debris from the heavily vegetated watershed would

attach to the grate, again leading to blockages, altered stream flows, and insufficient drainage that prevent the Culvert from functioning properly. In other words, a grate would clog the Culvert – the very thing the Dugans complain of. As described above, such clogging would not only damage the Culvert, but also the track roadbed and the Athens Track itself.

Further, Affiant sayeth not.

By: *Ronnie Doss*
Ronnie Doss

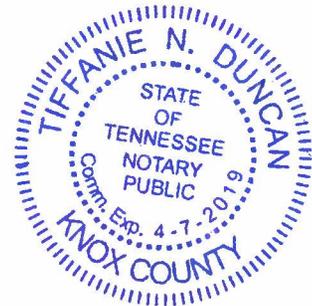
STATE OF TENNESSEE)
):ss
COUNTY OF KNOX)

On this 24 day of July, 2015, before me personally appeared Ronnie Doss, to me known to be the person described herein and who sworn executed the foregoing instrument for the purpose described therein.

Witness my hand and official seal in the State and County aforesaid, this 24 day of July, 2015.

Tiffanie N. Duncan
Notary Public

My Commission Expires: 4/7/19





**AERIAL VIEW OF THE CULVERT (MP 186.76A)
& OUTLET EXTENSION PIPE**

#1) INLET SIDE OF CULVERT

#2) OUTLET SIDE OF CULVERT



ATHENS TRACK

**#1
INLET OF
CULVERT
EMBEDDED
IN TRACK
ROADBED**

ATHENS TRACK



#2
APPROXIMATE
OUTLET OF
CULVERT
EMBEDDED
IN TRACK
ROADBED

09/11/2013 14:03

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

**LETTER FROM JOHN J. BRITTON
RE: J. LAMAR DUGAN AND JAMES DUGAN V. CITY OF ATHENS, ET AL.
MCMINN COUNTY CIRCUIT COURT, DOCKET NO.: 2014-CV-258
(February 26, 2015)**

EXHIBIT D



LEWIS THOMASON

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.
One Centre Square, Fifth Floor
620 Market Street
P.O. Box 2425
Knoxville, TN 37901
T: (865) 546-4646 F: (865) 523-6529

John J. Britton
DL: (865) 541-5206
JBritton@LewisThomason.com

February 26, 2015

John W. Baker, Jr., Esquire
Baker, O'Kane, Atkins & Thompson, PLLP
2607 Kingston Pike, Suite 200
P.O. Box 1708
Knoxville, TN 37901-1708

**RE: J. LaMar Dugan and James Dugan v. City of Athens, et al.
McMinn County Circuit Court, Docket No.: 2014-CV-258**

Dear Jay:

Thank you for taking time to talk with me yesterday about this case.

You and I had previously discussed the possibility of rerouting the pipe that goes under my clients' building. When we discussed this issue, I said that my concern with rerouting the pipe on my clients' property is that, in order to reroute it around the building, you would need to put in two right angles which would make it more difficult for any brush that enters into the pipe to make it on through the pipe. Therefore, in my opinion, the potential for problems of this nature would be increased rather than decreased.

I suggested that your client, the Railroad, reroute the angle of the pipe under the railroad tracks so that it came out onto my clients' property between the two buildings rather than behind the dental office. You have passed that suggestion on to the appropriate people at the Railroad and are awaiting their response.

When you and I talked yesterday, I told you that my clients were considering the possibility of having someone go in and clean out that pipe to try to prevent any more occurrences of water backing up under the building. Of course, this would just be a temporary interim fix while we sorted out the issues of rerouting the pipe on a permanent basis and other liability and damages issues.

However, my clients have asked me to request that, if they were to take the steps to have this pipe cleaned out, would the Railroad be willing to put a "self-cleaning grate" over the intake of the pipe on the Railroad's property? In my clients' opinion, this is a very practical solution to

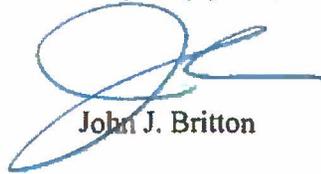
John W. Baker, Jr.
February 26, 2015
Page 2

this part of the problem. However, it makes no sense for my clients to clean out the pipe if the brush is going to wash right back in the pipe the next time it rains.

Accordingly, please discuss this issue with your client and let me know if they would be willing to install such a grate.

I look forward to hearing from you.

Very truly yours,



John J. Britton

JJB/tss
5888623