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December 4, 2008

BY ELECTRONIC FILING

Acting Secretary Anne K. Quinlan
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: STB Finance Docket No. 35196 Petition for Declaratory Order on Referral from the United States District Court for the Northern District of Alabama

Dear Acting Secretary Quinlan:

Enclosed are Norfolk Southern Railway Company's and The Alabama Great Southern Railroad Company's (1) Petition for Leave to File a Reply to a Reply and (2) the Reply.

If you have any questions, please feel free to contact me at 757-629-2831. Thank you for your prompt assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'John M. Scheib'. Below the signature is the printed name 'John M. Scheib'.

John M. Scheib

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35196

PETITION FOR LEAVE TO FILE A REPLY TO A REPLY

**PETITION FOR DECLARATORY ORDER
ON REFERRAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

**Crawford S. McGivaren, Jr.
Cabaniss, Johnston,
Gardner, Dumas & O'Neal
LLP
2001 Park Place North
Suite 700
Birmingham, AL 35203**

**John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Company***

Dated: December 4, 2008

Pursuant to 49 C.F.R. 1117.1, Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company (collectively and for brevity referred to as "NSR")¹ hereby file this Petition for Leave to File a Reply to a Reply ("Petition for Leave") in this proceeding. Although the Board's rules do not permit the submission of a reply to a reply (49 C.F.R. 1104.13(c)) as a matter of right, good cause exists to permit NSR to submit this brief reply.

NSR filed the Petition for a Declaratory Order ("Petition") on November 4, 2008, after both NSR and the City of Birmingham, Alabama, were ordered by a United States Federal District Court to do so. The Court ordered both of the parties to ask the Board to resolve a legal issue within the Board's expertise. In the Petition, NSR asked the Board to declare that the attempt by the City of Birmingham to condemn the NSR railroad property at issue is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. 10501(b).

Permitting this reply will advance the proceeding by clarifying extraneous issues raised by the City of Birmingham and is in the

¹ NSR is a subsidiary of Norfolk Southern Corporation. The property at issue is held in the name of The Alabama Great Southern Railroad Company, a wholly-owned subsidiary of NSR.

interest of a more complete record.² The City of Birmingham filed a reply on December 1, 2008, that has attempted to inject substantial confusion into this proceeding. For example:

- The City of Birmingham attempts to claim that NSR may not have an interest in the property, which is a ludicrous assertion made now, for the first time, after the City has sued NSR in a proceeding to condemn its property and litigated for months against NSR; and
- The City of Birmingham focuses on issues -- such as the extent of NSR's present use of the property or the existence of other parks in Birmingham or elsewhere -- that are irrelevant to the legal inquiry before the Board.
- The City of Birmingham has completely mischaracterized NSR's carefully articulated statement of the law by calling it a request for "blanket" preemption.

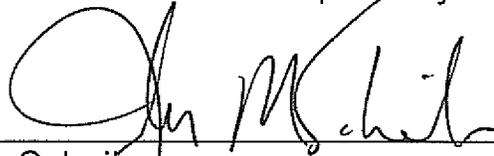
² *Savannah Port Terminal R.R., Inc.—Petition for Declaratory Order--Certain Rates and Practices as Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (May 30, 2008) (permitting a reply to a reply when granting a petition for a declaratory order); *CSX Transportation, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 33388 (Sub-No. 101) (August 27, 2008) (permitting a reply to a reply when denying a petition for a declaratory order).

In the interest of accuracy and completeness, NSR is compelled to respond.

NSR's reply does not raise any new legal issues related to the question presented by the Petition. Nor does NSR's reply provide any new facts. It merely addresses the erroneous or misleading assertions made by the City of Birmingham. Accordingly, permitting NSR to file this reply will not unduly delay the proceeding or prejudice any party, particularly because the Board has not issued any rulings in this proceeding.

Wherefore, NSR hereby respectfully requests that the Board grant this Petition for Leave to File a Reply to a Reply.

Respectfully Submitted,



John M. Scheib
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Three Commercial Place
Norfolk, VA 23510

***Counsel to Norfolk Southern Railway
Company***

Dated: December 4, 2008

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35196

REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY AND
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

PETITION FOR DECLARATORY ORDER
ON REFERRAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Crawford S. McGivaren, Jr.
Cabaniss, Johnston,
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Birmingham, AL 35203

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Three Commercial Place
Norfolk, VA 23510

*Counsel to Norfolk Southern
Railway Company*

Dated: December 4, 2008

Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company (collectively and for brevity referred to as “NSR”)¹ filed the Petition for a Declaratory Order (“Petition”) on November 4, 2008, after both NSR and the City of Birmingham, Alabama, were ordered by a United States Federal District Court to do so. The Court ordered both of the parties to ask the Board to resolve a legal issue within the Board’s expertise.² In the Petition, NSR asked the Board to declare that the attempt by the City of

¹ NSR is a subsidiary of Norfolk Southern Corporation. The property at issue is held in the name of The Alabama Great Southern Railroad Company, a wholly-owned subsidiary of NSR.

² The City of Birmingham makes much of the fact that NSR complied with the Court’s order that both parties file a declaratory order action at the Board and contend that this somehow shifted the burden away from the City, who initiated the underlying legal proceeding, and to NSR. NSR disagrees. *Communications Supply Service Assoc. – Petition for Declaratory Order – Certain Rates and Practices of Jones Truck Lines, Inc.*, No. 41141, 1994 MCC LEXIS 133 (served Dec. 27, 1994) (“We note that respondent, as plaintiff in the underlying court proceeding, has the burden of proof in establishing the legitimacy of its claim. The fact that petitioner, pursuant to court order, has instituted a declaratory order proceeding at the Commission does not relieve respondent from establishing the validity of its claim, either in the court proceeding or in an administrative proceeding before the Commission.”) The burden under Alabama law lies with the City. Alabama Code 18-1A-91 and 18-1A-94.

Birmingham to condemn the NSR railroad property at issue is preempted by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. 10501(b).

The City of Birmingham has adopted a strategy of distraction. After suing NSR in a proceeding to condemn its property and litigating for months against NSR, the City attempts to claim that NSR may not have an interest in the property. But NSR has established pursuant to the Board’s rules that it has an interest in the land. Next, the City of Birmingham focuses on issues -- such as the extent of NSR’s present use of the property or the existence of other parks in Birmingham or elsewhere -- that are irrelevant to the legal inquiry before the Board. Finally, it principally relies on a case that the referring court found does not apply here “at all.”

NSR, on the other hand, has focused on the legal inquiry before the Board. Under ICCTA and relevant precedent, NSR has not argued that there is a blanket rule of preemption. Rather, NSR carefully described existing precedent and showed that this case is uncannily similar to *City of Lincoln—Petition for Declaratory Order*, STB Finance Docket No. 34425, 2004 WL 1802302 (Aug. 11, 2004) (“*City of Lincoln*”), *aff’d*, *City of Lincoln v. Surface Transportation*

Board, 414 F.3d 858, 862 (8th Cir. 2005). Under existing precedent, the City's attempted condemnation is clearly a totally conflicting use that is preempted whether or not the railroad's property is actively being used on a continual basis.

A. Norfolk Southern Clearly Established That It Has a Legal Interest in the Land.

It is interesting that at this stage in the process, the City of Birmingham now claims that NS may not have an interest in the land. This argument is a nonsensical distraction.

First, the City of Birmingham sued NSR seeking to condemn NSR property. NSR did not initiate legal action. In its filing the City of Birmingham even notes that "it could not determine by its title search which, if any of the various Railroads had an ownership interest in the property" and that the other two railroads "disclaimed interest in the property." Petition for Declaratory Order, Reply of the City of Birmingham, STB Finance Docket No. 35196, at 2 (filed Dec. 1,

2008).³ Only NSR retains, and only NSR has not disputed (in court or here before the Board), an interest in any of the property.

Second, the Board rules do not provide for depositions or discovery in this matter. Depositions and discovery are not available in informal proceedings, which are those “not required to be determined on the record after a hearing.” 49 C.F.R. 1114.21(a). Declaratory order proceedings are such informal proceedings for which discovery and depositions are unavailable. *Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) (noting that an ICC declaratory order was the result of an informal adjudication pursuant to 5 U.S.C. § 554(e)). Accordingly, NSR objects to any discovery or deposition requests proffered by the City of Birmingham.

Third, NSR provided verified statements of two of its employees in its real estate department. Those affidavits were submitted pursuant to and in compliance with the Board’s evidentiary rules at 49 C.F.R. 1104.4 and 1104.5. Pursuant to those rules:

“[w]henver any rule of this Board requires or permits matter to be supported, evidenced, established, or proved by sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same

³ The City of Birmingham’s Reply did not include page numbers. References to that Reply herein are numbered by counting the first page of text as page one (excluding the filing’s cover or style sheet).

. . . such matter may, with like force and effect, be supported, evidenced, established, or proven by the unsworn declaration, certificate, verification, or statement in writing of such person which is subscribed by him, as true under penalty of perjury and dated . . .”

49 C.F.R. 1104.5. The affidavits of both Mr. Jerry L. Causey and Mr. Wilfred U. Leaks comply with that regulation. Accordingly, those affidavits establish NSR’s interest in the property and the City of Birmingham has proffered no contrary evidence. There is no need for any deposition or other factual inquiry into NSR’s interest in the property. That interest has been asserted by the City of Birmingham and confirmed with evidence in compliance with the Board’s rules.

B. The Scope of NSR’s Present Use of the Property and the Existence of Other Parks Are Redherrings.

Under ICCTA and legal precedent, whether the rail property is actively being used by the railroad is irrelevant. Also pointless is whether other parks exist near railroad operations.

For all its protestations about whether NS uses the property today or needs it tomorrow – for example, to maintain, to reinforce with fill, or to rebuild the elevated main line or for the Crescent Corridor – the City of Birmingham does not cite a single case to show that that is a relevant inquiry. It can not because the law is clear:

“Many railroad lines have a wider [right-of-way] than might appear to be used, but that does not mean that all of the property is not needed for rail operations. . . Thus, it cannot be said that property at the edge of a railroad’s ROW is ‘not needed for railroad transportation’ just because tracks or facilities are not physically located there now.”

City of Creede, Co – Petition for Declaratory Order, STB Finance Docket No. 34376, at 15 (May 3, 2005) (citing *Midland Valley R.R. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928)). NS has clearly demonstrated an ongoing need for the property.

Similarly, that other parks exist in Birmingham, or elsewhere in the country, near railroad tracks does not factor into the inquiry before the Board. We do not know when those parks were created or that any railroad land was used. In fact, it may be the case that the land used to build those parks was not railroad owned. Moreover, the existence of other parks does not diminish the substantial safety concerns here (particularly with the elevated rail line) that are described by NSR in its Petition. The bottom line is that the existence of other parks is irrelevant to the inquiry whether a City’s effort to take through condemnation railroad property to create a park is preempted by 49 U.S.C. 10501(b).

C. NSR Has Not Advocated a So-Called “Blanket” Rule

What is pertinent is whether the state regulation through condemnation imposes an unreasonable burden as described in the relevant precedent. Contrary to the City of Birmingham’s assertions, NSR never argued that there was a “blanket” rule of preemption. NSR, like the referring court, articulated a rule that is far from a blanket rule of preemption.

As NSR explained in the Petition, when it comes to state or local action to take railroad property by condemnation, *Maumee & Western Railroad Corporation and RMW Ventures, LLC* --Petition for Declaratory Order, STB Finance Docket No. 34354, slip op. at 2 (STB served Mar. 3, 2004), and *City of Lincoln* together are the lodestar.

Maumee clearly holds that “routine, non-conflicting uses” are not preempted. Thus, in *Maumee* the Board said that a locality could insist on an easement for purposes of a wires, grade crossings, and sewer crossings of railroad property – provided each of which would not interfere with railroad operations or pose a safety concern. Indeed, the City of Birmingham accurately quotes and cites this holding. Reply at 17-18. But the City of Birmingham fails to note that what the city in *Maumee* wanted was an easement to install a grade

crossing – not to take the property entirely. Here the City of Birmingham seeks to condemn the property – taking it entirely away from the railroad -- for use as a public park, which is a complete, non-routine, conflicting use.

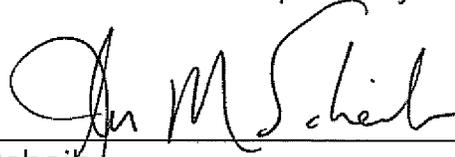
The City of Birmingham admits, as it must, that *City of Lincoln* is a close case to this one. City of Birmingham Reply at 22. It is a case in which the city sought to completely take the railroad's property for a conflicting use. The City of Birmingham's attempt to distinguish the case based on procedural posture falls far short because it ignores the rule of law enunciated in the decision. That rule is that an attempt to take railroad property is preempted when the property is being taken for a complete and conflicting use -- such as a trail or a park – which would unduly interfere with the railroad's operations by, for example, (1) preventing the railroad from constructing on the property in the future; (2) posing a safety hazard; or (3) not leaving sufficient room for equipment used to maintain track and clear derailments. *City of Lincoln*, at *4. All of these factors are present in this case and lead to the conclusion that the City of Birmingham's attempted condemnation is an unreasonable interference and therefore is preempted.

In light of the difficulties *Maumee* and *City of Lincoln* present for the City of Birmingham, the City attempts to rely on *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). However, that excessive reliance on *West Palm Beach* is misplaced. That case did not even involve a condemnation attempt. In *West Palm Beach*, the court's decision that municipal zoning ordinances were not preempted turned on the fact that the zoning ordinances were "existing ordinances of general applicability, which are enforced against a private [non-railroad] entity leasing property from a railroad for non-rail transportation purposes." *West Palm Beach*, 266 F.3d at 1331. This case is not comparable to *West Palm Beach* because this case involves application of a state condemnation statute, enforced against a railroad engaged in rail transportation and needing its property for rail transportation purposes. Thus, the referring court has already found that "[t]o be sure, *West Palm Beach* does not apply to this case at all." Memorandum opinion at 5.

D. Conclusion

The Board should rule that the City of Birmingham's attempted condemnation is preempted by 49 USC 10501(b). The question is ripe for decision on the facts properly presented pursuant to the Board's rules and is clearly resolvable under existing precedent. Moreover, ruling on the matter would greatly assist the referring court.

Respectfully Submitted,



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Company***

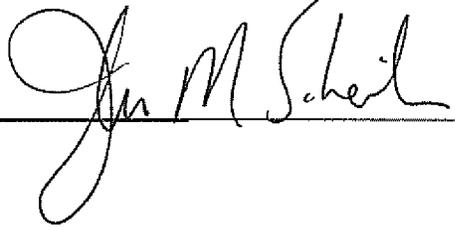
Dated: December 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

Brandy Murphy Lee
Campbell, Gidiere, Lee, Sinclair &
Williams
2100A Southbridge Parkway,
Suite 450
Birmingham, AL 35209

by placing the same in the United States mail, first class postage prepaid and properly addressed this 4th day of December, 2008.



A handwritten signature in black ink, appearing to read "John M. Scheil", is written over a horizontal line. The signature is cursive and stylized.