209442

ORIGINAL

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

November 18, 2003

By UPS overnight mail

ENTERED
Office of Proceedings
NOV 19 2003
Part of
Public Record

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34425, *City of Lincoln - Petition for Declaratory Order*

Dear Mr. Williams:

This refers to a Petition for Declaratory Order filed by the City of Lincoln, Nebraska (the City) in the above proceeding on November 6, 2003.

The undersigned represents the owner of the railroad right-of-way in the above proceeding -- Lincoln Lumber Company (LLC). LLC is a Class III rail common carrier. It acquired the rail line pursuant to an offer of financial assistance (OFA) in 1998.

LLC hereby advises the Board and the City that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way.[1] Nor does LLC oppose trail use of the right-of-way between 22nd Street and 19th Street, provided that the trail occupy the northern edge of the right-of-way between those points.[2] LLC is prepared to negotiate an agreement with the City for those uses without delay.

However, LLC is strenuously opposed to trail use of its operating right-of-way between 22nd Street and 23rd Street, where the full width of the right-of-way is used and required for rail operations, to wit: unloading railroad cars and staging unloaded freight for further movement into shipper facilities, and on which LLC intends to construct additional railroad facilities, to wit: an

---

[1] An underground storm sewer would not be intrusive, nor adversely affect efficient rail operations or safety.

[2] LLC takes this position in light of the current extensive non-rail use of this segment of the right-of-way. LLC does not concede that the City's position is meritorious as to this segment.

additional railroad spur track on the north side of the right-of-way for holding additional freight cars for the provision of more efficient and economical rail service to the lumber company.[3/] LLC cannot agree to a nonrail use on the surface of its operating right-of-way where active shipper operations are conducted.

In behalf of LLC, the Board is hereby respectfully requested to publish notice of the filing of the Petition for Declaratory Order in the Federal Register, and to provide an opportunity for filing of public comments on the remaining issue involving trail use of the operating railroad right-of-way between 22nd and 23rd Streets. LLC submits that the requested procedure is warranted because that is an issue of general transportation importance on which public notice and opportunity for comment are warranted. It is likely that many rail carriers, municipalities and other entities have a legitimate interest in the issue of whether a municipality's use of State condemnation law to involuntarily acquire 20 percent of the width of a rail carrier's active operating right-of-way is federally preempted by virtue of 49 U.S.C. § 10501(b). It is submitted that the Board would be likely to benefit from public comments on that issue of widespread railroad importance.

The Board should not be constrained by the procedural schedule proposed by the City in this important matter. All parties -- not just the City and LLC -- should have ample time to prepare and file comments, and the Board should have ample time to prepare and issue a reasoned decision. Particularly in view of the impending Holiday Season in which offices are closed for extended periods (e.g., the shortened Thanksgiving week), the filing dates suggested by the City should be lengthened. LLC suggests the following:

Replies to the Petition	-	60 days after Federal Register publication
The City's Rebuttal	-	20 days after the filing of replies
Board decision	-	as deemed appropriate by the Board

A procedural schedule somewhat lengthier than that proposed by the City would not be prejudicial to the City's interests. The City has not shown that it would lose funding for a trail if the procedural schedule that it has proposed is not adopted. The City has stated much more vaguely that it might be "in jeopardy" of losing funds (Petition, Appdx. D at 5). There should be no sympathy for the City's request for expedition inasmuch as the City did not file the Petition until more than two years after trail funding was committed (*id.* at 4), and 9 months after the City knew that LLC was not agreeable to a trail (Petition, Appdx. E at 2, ¶7). Moreover, it has been

---

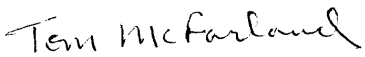
[3/] LLC would also be opposed to trail use within the operating right-of-way between 23rd and 24th Streets, but it is understood that the City proposes that the trail bypass the railroad right-of-way between those points.

more than 6 years since LLC acquired the right-of-way for continued rail use under offer-of-financial-assistance (OFA) provisions that were specifically found to take precedence over the City's request for railbanking and trail use (*See Union Pacific R. Co. -- Aband. Exempt. -- in Lancaster County, NE*, STB Docket No. AB-33 [Sub-No. 112X], decision served Jan. 16, 1998).[4/] Now the City wants to apply State condemnation law to undermine that Board-sanctioned rail operation, and wants the Board to aid in its effort by adopting accelerated procedure. The Board should not accede to that unfair request.

An additional reason for adoption of the procedural schedule hereby suggested by LLC is that it would allow for essential discovery, whereas the accelerated schedule suggested by the City would not. The City put together its lengthy Petition at a leisurely pace, but it wants opponents to respond to the Petition on an accelerated basis without an opportunity for thorough investigation of support for the City's position. That procedure would not be consistent with fair process.

Ten copies accompany the original of this filing. Counsel for the City is being served by overnight mail.

Very truly yours,



Thomas F. McFarland
Attorney for Lincoln Lumber Company

TMcF:kl:enc:wp11\977\ltrstb1

cc: Charles H. Montange, *by UPS overnight mail*
Mr. Don Hamill

[4/] The undersigned attorney for LLC takes very strong exception to the blatantly false statement by the City's Assistant City Attorney that the undersigned stated to him that LLC's interest in pursuing the OFA involved a deliberate attempt to block trail use in the corridor regardless of impact on business (Petition, Appdx. E at 2, ¶8). On the contrary, the undersigned has personal knowledge that LLC's acquisition of the rail line was in good faith for continuation of rail service. LLC was a significant rail user in good faith before that acquisition, and has been even a more significant rail user thereafter.