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21 Nov. 2003

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

EX-118-1
Office of Proceedings

NOV 24 2003

Re: Finance Docket No. 34425, City of Lincoln,
Petition for a Declaratory Order
Briefing Schedule

Dear Mr. Williams:

This refers to a letter submitted by Lincoln Lumber Company (LLC), through its attorney Mr. McFarland, dated 18 November 2003. LLC's referenced letter opposes the briefing schedule requested by City of Lincoln (Replies due on Friday, Dec. 19, Rebuttals 21 days later), and advocates that this Board publish a Federal Register notice, allow 60 days from that notice for Replies, and 20 days from the due date of Replies for Rebuttals.

The chief grounds offered by LLC for the lengthy delay which it advocates is that City of Lincoln's petition raises issues of "general transportation importance." LLC suggests that such "issues" are actually only one: whether a municipality may use eminent domain law to acquire "20 per cent of the width" of LLC's rail corridor between 22d and 23d Streets in Lincoln, Nebraska. That would not be much of an issue, but it still is a misstatement of the true issue. City of Lincoln assumes arguendo that a municipality in general may not use eminent domain against a railroad corridor regulated by this Board unless this Board so authorizes in the event of railroad objection. That is why City of Lincoln brought this Petition for a Declaratory Order. Contrary to LLC, the issue is whether this Board should lift federal jurisdiction to permit the use of eminent domain on the northernmost 20 feet of the railroad corridor in question between 22d and 23d Streets in Lincoln.¹

¹ LLC in its November 18 letter states that it will now negotiate a storm sewer easement and a trail on the northern side of the corridor from 19th to 22d, thus ostensibly limiting the dispute between the parties to the single block between 22d and 23d. This itself illustrates that this proceeding does not raise broad issues of "general transportation importance." Incidentally, City of Lincoln has sought immediate negotiations

That is a very site specific inquiry which obviously is of no "general transportation importance" whatsoever, although it is of considerable transportation importance in Lincoln, Nebraska.

All the relevant commercial interests along the rail corridor in question have been served with copies of Lincoln's Petition for a Declaratory Order and are fully apprised that Lincoln has requested Replies by December 19. These are the likely parties of interest with facts germane to this proceeding. None other than LLC so far has objected. In any event, no general Federal Register notice is necessary. Lincoln is not seeking to put at issue the preemptive power of this Board. Lincoln is simply seeking an order lifting federal preemption over a long-unused portion of this corridor for an important public improvement which does not interfere in the least with rail service.

LLC also suggests a longer period of time is needed for discovery. LLC gives no indication what information it seeks from City of Lincoln which it does not already have. City of Lincoln in general is already subject to broad public disclosure requirements under the Nebraska Public Records Act, Neb. Rev. Stat. §84-712. LLC presumably could have obtained any information germane to the City's proposed public improvements, or anything else it lawfully desires in terms of information from the City, long ago. In the circumstances, Lincoln's proposed schedule provides time to LLC for any necessary discovery; LLC simply has sought no discovery.

Next, LLC seems to suggest that Lincoln is under no urgency for a decision (McFarland letter, pp. 2-3), and further suggests that the City has allowed considerable delay already. The City of course did not institute this proceeding lightly, but sought to exhaust negotiation alternatives, because it has seemed obvious to the City that the two public improvements it seeks will have no adverse impact on any rail operations. Unfortunately, LLC refused to negotiate anything until the City filed the Petition instituting this proceeding. But in any event, Lincoln has filed Verified Statements indicating that it will incur financial penalties (Kramer V.S. at ¶3), or jeopardize past and future funding (Genrich V.S. ¶5) if the City cannot acquire the necessary legal interests by end of March, 2004. This necessitates a prompt briefing schedule.

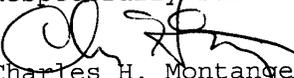
Finally, in its only comment on the merits, LLC suggests that it intends to justify its refusal to negotiate a sale of the northernmost 20 feet of the corridor between 22d and 23d on the ground that it plans to construct a spur there. Nov. 18

(see letter of November 20, attached) with LLC, but has yet to hear back from LLC.

Letter at 1-2. But LLC later notes that 6 years have lapsed since it acquired the property (Nov. 18 Letter at 3), and it has certainly not done any spur construction in that interval. LLC's lumber facility is located on the south side of the track between 22d and 23d Streets. Such switching as occurs is (and logically will continue to be) on the south side of the track at that location (Schuchmann V.S. at ¶ 19). LLC already has a spur there, as well as the proximate mainline. LLC uses the north side (where the City contemplates the trail) for unrelated storage (id. at ¶ 17 and photo 3). Indeed, as Mr. Schuchmann indicates in his Verified Statement, LLC appears to be fouling its tracks, which indicates no need for them for rail car storage, or other rail purpose. This suggests that LLC has ample track space for the limited use it makes of this line, and that it does not need any more. In short, the record shows that LLC's claim in its letter of November 18 is contrived and contrary to what in fact it is doing (and logically would continue to do) with respect to the property in question.

This Board should expeditiously resolve this matter, and adopt any necessary procedural schedule accordingly. City of Lincoln will respond further in accordance with the schedule established by the Board and as needed in response to other developments.

Respectfully submitted,


Charles H. Montange
for City of Lincoln

Att. (letter about LLC's proffer of negotiations)
cc. Mr. Pedersen (City of Lincoln) (w/att.)
Mr. McFarland (for LLC) (by express, next business day
service) (w/att.)

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fixed
20 Nov 03

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Thomas McFarland, Esq.
208 South LaSalle St., Suite 1890
Chicago, IL 60604-1112

Re: Finance Dkt. 34425, City of Lincoln --
Petition for Declaratory Order;
your letter of STB of November 18, 2003

Dear Tom:

City of Lincoln notes that Lincoln Lumber Company, per your letter to STB Secretary Williams of November 18, 2003, for the first time now states that it will agree to the underground storm sewer and to trail use on the north side of the right of way from 19th Street to 22d Street. LLC also for the first time states that it "is prepared to negotiate an agreement with the City for those uses without delay." We are attempting to determine if these statements are mainly posturing or if they have substantive effects on the scope of our Petition pending before STB.

The City needs a right of entry to complete survey work and other incidental inspections for the projects.

1. Does LLC by your letter grant right of entry for these purposes?
2. How and when does the City obtain right of entry if your letter is not to be construed as a right of entry?

If LLC is now prepared to negotiate on the storm sewer and trail between 19th and 22d, then:

3. Does the City have permission to negotiate directly with LLC's owner for the acquisitions?
4. If not, how are we to proceed? Do we communicate with you on proposals?

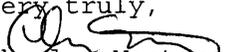
Heretofore LLC has refused to negotiate sale of interests for either the underground storm sewer or the trail at any location on the right of way. As a result, the City has encountered years of delay. Indeed, your letter to STB argues for delay in briefing on the ground that the City has sustained lengthy delays already. But the City is now under severe time constraints, and faces loss of funding for the improvements at issue, due largely to problems in dealing with your client. If

additional efforts to negotiate with LLC do not show reasonable progress or appear to be reaching a prompt conclusion, the City necessarily must reserve the right to institute eminent domain proceedings as to the interests necessary for the storm sewer project, and for the trail between 19th and 22d Street. Indeed, a proceeding may be necessary even if your client were now cooperative, because LLC has leased out essentially all the property from 19th to 22d Street, and LLC may get into a dispute with the tenant on an allocation of the purchase funds. Unless LLC waives all defenses of federal preemption in the event an eminent domain proceeding is instituted as to the storm sewer project and the trail between 19th and 22d Streets, the City must continue to pursue its Petition not only with regard to 22d to 23d but also with respect to the remaining portions of the right of way at issue.

5. Does LLC waive any and all defenses of federal preemption in the event the City institutes eminent domain proceedings for interests necessary for the underground storm sewer and, if the trail is on the north side of the right of way between 19th and 22d Streets, for the trail between 19th and 22d Streets?

We would appreciate a response to these five questions as soon as possible. Thanks.

Very truly,


Charles Montange
for City of Lincoln

cc. Joel Pedersen, Esq.
Assistant City Attorney,
City of Lincoln