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DEC 15 2003

December 11, 2003

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209609

via Airborne Express
Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34415, Ohio Department of Transportation -
Petition for Declaratory Order - Status of Track at Findlay, Hancock County,
OH - Norfolk Southern Railway Company's Motion to Reject or to Strike
Reply Filed by the Ohio Department of Transportation to NSR's Response to
Petition for Declaratory Order

Dear Mr. Williams:

Enclosed please find the original and ten copies of Norfolk Southern Railway
Company's Motion to Reject or to Strike the Reply Filed by the Ohio Department of
Transportation to NSR's Reply to ODOT's Petition for Declaratory Order. Please verify the
filing of this pleading by stamping and returning the copy of this letter in the enclosed self-
addressed, stamped envelope. Thank you.

Very truly yours,

James R. Paschall

cc w/encl via Airborne Express:
Mr. Michael L. Stokes
Senior Assistant Attorney General
Office of the Attorney General
One Seagate (#2150)
Toledo, OH 43604-1551

Mr. Fritz R. Kahn
Eighth Floor
1920 N Street, N.W.
Washington, D.C. 20036

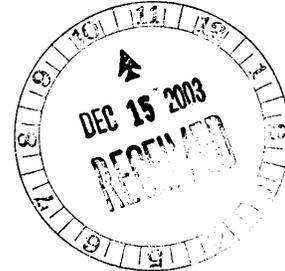
Mr. Roger L. Miller
Betts, Miller & Russo
101 West Sandusky Street
Findlay, OH 45840

Mr. T. W. Ambler

Operating Subsidiary: Norfolk Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

209609



FINANCE DOCKET NO. 34415

OHIO DEPARTMENT OF TRANSPORTATION
- PETITION FOR DECLARATORY ORDER -
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

ENTERED
Office of Proceedings

DEC 15 2003

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NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO REJECT OR TO STRIKE
REPLY FILED BY THE OHIO DEPARTMENT OF TRANSPORTATION
TO NSR's REPLY TO PETITION FOR DECLARATORY ORDER

James R. Paschall
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Attorney for
Norfolk Southern Railway Company

Dated: December 11, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34415

Ohio Department of Transportation
- Petition for Declaratory Order -
Status of Track at Findlay, Hancock County, OH

Norfolk Southern Railway Company's
Motion to Reject or to Strike
Reply Filed by the Ohio Department of Transportation
to NSR's Reply to Petition for Declaratory Order

Norfolk Southern Railway Company (NSR) hereby moves that the Board reject or strike the reply filed on November 26, 2003 by the Ohio Department of Transportation (ODOT) in this matter. ODOT acknowledges that its filing is a reply to NSR's November 5, 2003 reply¹ to ODOT's petition for declaratory order. ODOT does ask for leave to file the reply, but provides a novel and unsupportable justification for its filing. ODOT claims that NSR "misrepresents the holdings of certain of the Board's and court's decisions upon which it relies and distorts completely the position which ODOT has taken in this proceeding." This unfounded accusation provides no basis for ODOT's filing. Parties in adverse proceedings never agree upon the applicability or interpretation of key legal precedent and rarely agree on all of the facts or which facts are relevant. If they did, there would be no proceeding. The Board always must consider the facts and interpret the decisions relied upon by the parties. In effect, ODOT is stating that the Board cannot

¹NSR's filing, styled a response, was filed November 6, 2003.

perform the usual evaluation of a record in a petition case, consisting of a petition and reply, including the interpretation of legal precedents and facts in the record, without an extraordinary further pleading from ODOT. ODOT may not agree with NSR's argument and interpretation, and may even be concerned that it was stated too persuasively for ODOT to prevail without a re-formulation and re-argument of its position. That does not mean that NSR has misrepresented anything, or that the Board needs further pleadings to help it decide the case - unless, of course, the theory of the case is being subtly changed.

ODOT also claims that acceptance of this reply "will not prejudice NSR." This most certainly is not true. ODOT's argument continues to make completely unfounded accusations about NSR's conduct, motives and even about the position NSR takes in this proceeding, which are prejudicial if they stand uncorrected. The reply also allows ODOT to re-cast its case and re-argue many of its points under the guise of correcting misrepresentations by NSR, when the fact is that ODOT is simply trying to strengthen, if not change, its original case and to file a rebuttal. NSR is prejudiced if this new argument is accepted without NSR being allowed the right to reply accorded to respondents to petitions.²

ODOT supports its rationale for the reply by continuing the unwarranted accusations and characterizations of NSR's reply comments, conduct or motives, which began in ODOT's counsel's November 6, 2003 letter to Secretary Williams.³ ODOT mainly repeats

²NSR will be able to correct the record and rectify part of the problem in this motion, but that still does not justify the extra filing by ODOT.

³Our November 6, 2003 reply letter to ODOT counsel's letter to Secretary Williams also of November 6, 2003, reminded ODOT that the broad reply to NSR's response to the petition which ODOT's counsel implied he would file would violate the Rule of Practice against prohibiting replies to a reply. Nonetheless, ODOT's November 26, 2003 reply has

facts and arguments already presented and makes an ordinary reply argument,⁴ but it also has recast that case. Upon close examination and read in context, the NSR statements that ODOT characterizes as misrepresentations are not misrepresentations, or are in fact erroneously characterized by ODOT,⁵ or are simply legal arguments and interpretations with which ODOT disagrees. Thus, ODOT's reply is merely an effort to rebut NSR's

followed.

Our November 6, 2003 reply letter properly responded to ODOT counsel's November 6 letter's characterizations of our response to ODOT's petition, dated November 5 and filed November 6. We note that our cover letter for that filing should not have referred to the response as initial or preliminary and the response probably should have been styled a "reply." Nonetheless, the response does not use the terms "initial" or "preliminary" and neither the cover letter nor the filing state or reasonably imply that NSR intended to file another responsive document. Neither of document justified ODOT's conclusion on this point nor its characterization of the response. We regret any ambiguity that may have been caused by the inadvertent use of the two words in the cover letter, but we still believe that the November 6, 2003 ODOT counsel's letter's broad attack on a this and other points in our response was unjustified. His argument against a non-existent request to the Board to defer our reply was unjustified by and out of proportion to our actual filing. Although it was not the focus of counsel's November 6 letter, if the use of two words in our cover letter caused any ambiguity, a request for clarification, even with a statement that no request to submit further pleadings was actually made, would have been sufficient.

We do not think it would have been improper or novel to request the Board to permit a party to defer filing a pleading for a reasonable period of time, that is, to extend the procedural schedule, or to permit a partial reply as a placeholder, in order to avoid spending unnecessary effort and time on the pleadings while negotiations that might moot the need for such further pleadings are taking place. NSR made no such request here in any event.

⁴To the extent any of the arguments are new, ODOT gives no apparent good reason for not previously presenting them, much less re-presenting old arguments apparently in an effort to improve them. Regardless of whether the arguments are new, or newly presented, or simply repeated, ODOT's justification for their presentation is unpersuasive.

⁵We do not see how we can permit some of these remarks, such as accusing NSR of ignoring Board jurisdiction (apparently literally, and not simply in making its argument), or holding up highway projects that involve abandoned spur tracks "no matter what its motives might be" to go unchallenged or why the Board should accept them at face value as justification for filing a reply to a reply when they are so clearly erroneous or lacking in support.

response, to bolster ODOT's unpersuasive case and to get in the last word. The Board's rules do not allow such replies either directly or by making unwarranted accusations or characterizations of the other party's actions or pleadings as "misrepresentations." NSR's interpretation of and argument concerning the law and the facts are not misrepresentations simply because ODOT does not agree with them,⁶ nor are they so complex or novel that ODOT should be allowed an extra pleading to rebut them. ODOT's November 26, 2003 filing is a reply to a reply, without adequate justification, and contrary to the Board's Rules of Practice at 49 C.F.R. 1104.13. Moreover, ODOT should not be allowed to re-formulate its case or to cast unwarranted allegations at NSR without NSR being allowed the reply it would have gotten had ODOT made the arguments or comments on the facts in its original filing.

The bottom line here is that ODOT is unhappy with, and would like to find a way around, the statutory scheme that gives the Board exclusive jurisdiction over abandonment of excepted tracks, pre-empts State jurisdiction over abandonment of such tracks, but withholds authority from the Board to exercise its jurisdiction. ODOT may find NSR's statement of this statutory scheme, and the necessary conclusion that a railroad is permitted to run that part of its business described in 49 U.S.C. 10906 free of regulation but still under the exclusive jurisdiction of the Board and resulting pre-emption of State regulation, "repugnant to good sense and reasonable regulation." However that may be, ODOT's reaction to the statutory scheme and its desire for greater regulation of railroad

⁶ODOT's desire that NSR produce or comment on facts or documents that are not in the record and that NSR may not have considered relevant also does not make the facts that are in the record, or the comments on them, "misrepresentations." Furthermore, as already noted, the Board does not require further pleadings from ODOT to evaluate NSR's arguments.

property and railroad economics does not make our statement or interpretation of the statute or the case law either wrong or a "misrepresentation."

ODOT can not support its additional attempts to justify circumvention of the statutory scheme in 49 U.S.C. 10501 and 10901, et seq.,⁷ nor should it be given such extra attempts in a reply statement, no matter how the rationale may now be crafted nor how many unjustified aspersions may be cast at the railroad. The exclusion of any STB or State regulation of these tracks, and the consequent freedom of the railroad to decide whether to build, keep or abandon them or their rights-of-way, is supported by the clear language of 49 U.S.C. 10501 and 10906, the legislative history of the ICCTA and cases that have addressed or commented on the subject. ODOT cannot support creation of State or STB jurisdiction or authority over excepted tracks where Congress did not grant it. It should not be permitted to file a reply to a reply simply to make another effort to do so. Its real remedy is to appeal to Congress to change the statutory scheme.

⁷49 U.S.C. 10501 General Jurisdiction, reads in part:

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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. 10906. Exception, reads as follows:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

ODOT states that it is not attempting to force NSR to abandon the subject spur track. ODOT nonetheless argues that NSR should not have the right to determine when a potentially valuable easement or other right to operate over an excepted track right-of-way to an industrial facility that could be reactivated should be retained or abandoned. Instead, ODOT postulates that a State court (or perhaps the Board) should be permitted to decide that some period of non-use of the track constitutes its de facto abandonment. Though this de facto abandonment theory cannot be used to force a railroad to abandon a line of railroad, ODOT again argues that it should be accepted to force a railroad to abandon excepted track.⁸

While apparently recognizing that the Board cannot make an adverse abandonment finding as to spur track, ODOT uses the same facts and precedent applicable to adverse abandonments to argue that in the absence of allowing the State court to make the de facto or adverse abandonment determinations, the Board should make the adverse abandonment determination as to such track. Of course, to do so, ODOT realizes that the Board should call it something else in order to get around 49 U.S.C. 10906. ODOT has essentially presented this argument, but if ODOT thought it could have presented it differently or more persuasively, it should have done so in its petition. There is nothing in NSR's response, other than a reasonable discussion of statute, case law and reasonable conclusions, for ODOT to support an exception to the rule on replies to a reply.

⁸ODOT criticizes NSR for using precedent that may involve abandonment of line of railroad to suggest the governing precedent for abandonment of spur track, now that the abandonment of excepted track is under STB jurisdiction, to reach a separate result. Yet, ODOT has no apparent problem with it trying to use and extend precedent to argue by analogy for an opposite, rather than a consistent conclusion, in order to support State or Board jurisdiction or authority not granted by the governing statute.

NSR's decision to have kept the railroad's access to one of the better potential industrial sites or facilities in the area while there has been a foreseeable chance of future railroad business, either from a potential new company as well as from any renewed use of the plant the existing owner, is not unreasonable and certainly does not result in any misrepresentation. ODOT's reply builds to a crescendo of overstatement when it claims that it is "impossible" for NSR to operate over the track, with some implication that the current situation cannot be changed. The track is undeniably in bad shape past 84 Lumber. Regardless of whether the track can be operated in its current condition, however, ODOT can not state, and we do not interpret it as stating, that it would be impossible to rehabilitate and operate over the track if a business offering enough railroad traffic begins or renews operation at the Michigan Sugars industrial site.⁹

ODOT argues that its petition is not an attempt to force NSR to abandon the spur, or at least part of it, but to have the Board hold that the Board or the court should decide that NSR has abandoned it. ODOT supports its petition and its principal arguments, including this one, with adverse abandonment precedent. In effect, ODOT asks that a determination similar to that in an adverse abandonment proceeding be made, only that it be called a de facto abandonment, something precedents concerning de facto abandonments themselves would not allow. Moreover, even greater problems exist with this proposition. First, the Court has no jurisdiction to make any determination that would

⁹ODOT in fact recognizes that the track could be made operable earlier in its reply, but draws the conclusion that because it is inoperable, it should be considered abandoned. Certainly, future operation of the track is not "impossible." Moreover, the railroad's decision to retain the right-of-way, but not to repair the track until enough traffic is offered to justify the cost of rehabilitation is not impermissible under the statute, inconsistent with NSR's conduct, or imprudent in the current absence of a demand for railroad service.

result in the adverse abandonment or de facto abandonment and condemnation of any type of railroad track or right-of-way. That is what any such determination of de facto abandonment of a track by the court would be as long as the railroad opposes that result, no matter how the determination is characterized. Second, there is nothing in the law, the legislative history, or any precedent to date that states that the de facto abandonment theory that has been rejected as to lines of railroad should be applied to spur, industrial lead or other excepted track. In fact, de facto abandonment determinations made by state courts or agencies would return the jurisdiction over abandonment of such tracks that Congress removed in the Interstate Commerce Commission Termination Act to the States. It also would result in different treatment of de facto abandonments of spur tracks than lines of railroad, and rejection of the most pertinent precedents with respect to de facto abandonments, at the same time that Congress was giving complete jurisdiction over abandonments of all rail lines or tracks to the Board. Moreover, it would lead to the possibility of different standards and results as to de facto abandonments (or adverse abandonments or whatever ODOT wishes to call an abandonment and condemnation of property that the railroad wishes to keep as an excepted track or right-of-way) depending on each jurisdiction's interpretation of what constitutes a de facto abandonment. It would also permit the States to make it difficult or impossible for a railroad to enjoy its common carrier rights to provide service from its active line of railroad.¹⁰ Surely this is contrary to the uniform treatment, and economic freedom of the railroad to determine its use of its

¹⁰Arguably, it might even impede the railroad's ability to perform its common carrier duty to provide service upon reasonable request, although we admit it seems that a prospective shipper could not maintain an argument that it should be provided rail service (at least directly to its facility) when a government entity has made that impossible, or perhaps totally uneconomical.

rights-of-way, that Congress sought and established in the ICCTA. ODOT's reply on this crucial point, and the reformulation of its position, is not required by some "misrepresentation" in NSR's response nor by some newly discovered evidence, but is simply an effort to present a new argument or to present its old argument more persuasively. While its argument still fails to support its conclusion, ODOT should not be allowed to present it in a further reply.

ODOT's reply is not justified in order to argue that precedent cited by NSR relates to line of railroad rather than exempt track. Not only is that point obvious, NSR never stated otherwise. We simply argue that the holdings in these cases should be applied to de facto abandonments of spur tracks, because there is nothing in the law, the legislative history or the cases themselves to distinguish line of railroad from excepted track cases in the application of these principles. All the decisions may not deal with excepted tracks, although some cases omitted by ODOT do deal with them, and all of them provide applicable principles. It certainly goes too far to suggest that these cases provide any basis for reaching the opposite conclusion for excepted track than the one they reach with respect to lines of railroad or that there cases or sections of the statute that support a different conclusion. ODOT certainly could have attempted to distinguish these cases in its petition since its position is largely based on application of a de facto abandonment theory to spur tracks. Not only did it not do so (or do so to its own satisfaction) but it provides no real basis for the distinction in its reply.

At this point in the reply, the argument and assertions degenerate into further puzzling, unsupported and totally unwarranted accusations and aspersions against NSR. These attacks lend no support to the arguments and illogical conclusions that follow. The

reply accuses NSR of ignoring the Board's jurisdiction when it sold part of the Findlay spur to 84 Lumber. The Board is not only without authority to authorize or to regulate the abandonment of excepted tracks under 49 U.S.C. 10906, but it is also without authority to authorize or to review any transaction that might otherwise require approval or review of the Board under Chapter 109 of 49 U.S.C., Subtitle IV, Part A.¹¹ Therefore, there was no reason for NSR to submit any sale of the track or right-of-way of a spur track to the Board for review, much less any reason for the reply to impugn NSR's motive for not doing so.

NSR cited the cases pertaining to dismissal of proceedings concerning the acquisition of the right-of-way and track of lines of railroad, mainly by transit authorities, without the acquiring party also acquiring the common carrier rights or duties related to the transportation of freight for the proposition that the common carrier rights and duties can still exist separately from the ownership of the track or material. There is no reason not to apply this proposition to spur tracks. That means that even if the Board or the court could consider any sale of the track or the right-of-way to 84 Lumber, such a sale would not preclude NSR from continuing to operate over the track. ODOT's reply's apparent effort to cast NSR in a bad light by implying that NSR ignored other applicable authority from these cases is unfounded, off the mark and should be stricken.

The ODOT reply states: "In other words, while going to great lengths to argue that the Board retains jurisdiction over spurs, even though the agency cannot authorize their

¹¹49 U.S.C. 10906. Exception, reads as follows:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

abandonment, NS elected to ignore the Board when it sold the 2,800-foot segment of the Findlay spur to 84 Lumber." This is a complete *non sequitur* and contrary to ODOT's own previous reference to the lack of submission of the 84 Lumber/NSR transaction to the Board. The implication that NSR or 84 Lumber should have submitted any transaction with respect to the spur is without basis in 49 U.S.C. Part 109 in view of 49 U.S.C. Section 10906 and prejudicial to NSR. There is no more reason to submit a transaction with respect to the acquisition or operation of a spur or excepted track for the approval or review of the Board than there is to submit a notice, petition or application for such a track's abandonment. Not only are the facts and governing precedent evident in the submissions already made by the parties, ODOT's unsupported characterization of NSR's actions with respect to its dealings with 84 Lumber to the Board's attention and illogical conclusion cannot be justified as correcting any "misrepresentation" in NSR's response. Indeed, on page 7 of ODOT's petition, ODOT mentions the fact that this transaction was not submitted to the Board as proof that the parties recognized that the track is a spur track for which no submission was required. Now ODOT accuses NSR of ignoring the Board's jurisdiction for the very same course of action as to the same transaction. Surely this does not constitute a "misrepresentation" on NSR's part, or justify a reply casting unwarranted accusations of ignoring the Board's jurisdiction at the railroad.¹²

ODOT attempts to turn the burden of persuasion, if not proof, around in this

¹²If we thought ODOT made this statement simply to show that we were taking inconsistent positions with respect to the application of the statute, we could understand it. However, NSR's position on the application of 49 U.S.C. 10906 is clearly consistent and the statement (which is inconsistent with that made on page 7 of ODOT's petition) certainly appears to accuse NSR of literally ignoring the Board's jurisdiction. Of course, Section 10906 withdraws the Board's authority to exercise that jurisdiction, and NSR's conduct with respect to this track is predicated on that section of the statute.

proceeding by implying that NSR should provide the Board with a copy of the agreement whereby 84 Lumber acquired a portion of the Findlay track in order to determine if NSR has a right to operate over the track beyond the conveyed segment. NSR had no obligation to present any aspect of its transaction with 84 Lumber to the Board either at the time of the transaction or in response to ODOT's assertions because ODOT's presentation simply did not justify its conclusions. ODOT presented a statement from 84 Lumber and could have asked them to present, or could have presented themselves, any evidence that it had with respect to NSR giving up its right to operate in whole or in part over the track. Not only did they not do so, but 84 Lumber made no statement that it considered NSR without rights to rehabilitate the track beyond its facility and to use the track along its facility also to serve the Michigan Sugars site. Moreover, the only document submitted by 84 Lumber that bears on the matter, a 1998 letter from NSR, refers to a sale of the "track," but does not unambiguously state that this is meant to be a sale of the real estate or the easement rather than the track structure. There is no offer in NSR's letter to give up any right to use the right-of-way beyond 84 Lumber or not to reserve that right of use in an operating agreement for the 84 Lumber segment.¹³ That conclusion cannot be drawn

¹³In fact, NSR has found no record of any bill of sale or agreement, much less a conveyance or deed, concerning the proposed transaction with 84 Lumber with respect to the Findlay spur. NSR has not even been able to find any record that 84 Lumber paid the \$5,500 requested in the offer as part of the consideration. There is no doubt that 84 Lumber rehabilitated the track in order to facilitate NSR providing rail service over it and, absent inclusion of the consideration in a different type of agreement, 84 Lumber would have a claim to the salvage value of the material in the event the track were ever removed. A search of our records showed nothing more than that. (We realize that the disposition of the track material or other final agreement concerning the value contributed by 84 Lumber to the track might have been included in a later rate agreement or transportation contract, but this is even less relevant than the agreements under discussion. NSR can not see that it has an obligation to check on this possibility in order to proceed with the handling of this matter, but does not want to raise a concern with 84 Lumber in the event such agreement

either from the 1998 letter in the record or from 84 Lumber's statement and other attachments.

Finally, ODOT accuses NSR of using the Board's processes to shield itself from the processes of State law. NSR is doing no such thing. It is merely asserting the rights given to it by Congress through the pre-emption of State jurisdiction over excepted tracks and the withdrawal of Board authority under Chapter 109 over such tracks. Rather than delay a decision in the matter pending the Board's further interpretation of 49 U.S.C. 10906, we certainly would have preferred that ODOT and the court recognize the requirements of the statutory language and apply the statements already made by the Board on the subject and precedent such as *Columbiana County Port Authority v. Boardman Township Park District*, 154 F.Supp.2d 1165 (N.D. Ohio 2001); *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523; 2002 U.S. App. LEXIS 15405; 2002 FED App. 0259P (6th Cir. 2002); and *Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Company d/b/a Canadian National/Illinois Central Railroad (CN/IC)*, U.S.D.C. N.D. Iowa, 2003 U.S. Dist. LEXIS 9005, decided May 21, 2003, to dismiss this proceeding. However, since ODOT was unwilling to accept this conclusion, a reference to the Board was the next best approach. NSR fully disclosed these on point judicial precedents, two of them decided under Ohio law, in its November 5 response. Despite ODOT's effort to get another pleading on file and to accuse NSR of misrepresentations, however, it is silent concerning the reasoning, holdings and implications of these decisions. It does not try to distinguish or explain them, because it cannot do so. Apparently, without reference to

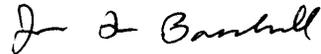
may exist.)

whether their citation and direct, lengthy quotations by NSR are "misrepresentations," ODOT prefers that the Board ignore them and hold to the contrary. This provides no basis on which to file a reply to a reply suggesting that it should be accepted in order to correct "misrepresentations" in the other party's legal argument.

There is nothing in 49 U.S.C. Section 10906, the legislative history, or precedent to suggest that the de facto abandonment theory that does not apply to lines of railroad should be applied to excepted track directly or as a substitute for adverse abandonment proceedings to circumvent the exclusive jurisdiction of the Board and the pre-emption of State regulation of the abandonment of spur tracks in 49 U.S.C. 10501 and to permit every jurisdiction to decide for itself that (or when) a railroad has abandoned a track or right-of-way under varying standards with no apparent parameters, notwithstanding the railroad's desire to keep the track or right-of-way. The adverse abandonment criteria cannot be applied to spur tracks because the State has no jurisdiction to apply them and the Board has no authority to do so. While this may result in a gap in regulation, the Board must simply recognize that fact, as it and several courts have already done, and direct ODOT to Congress for its remedy, not determine the issue now in a different manner that would be

contrary to the plain language of the statute. ODOT's further attempt to justify regulation where no authority to regulate exists, through a re-cast argument in a reply to a reply, should be rejected or stricken.¹⁴

Respectfully submitted,



James R. Paschall
General Attorney
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
(757) 629-2759

Dated: December 11, 2003

¹⁴This debate may be intellectually challenging but NSR still believes it is unnecessary. While ODOT's counsel's provides a rationale for pressing it so vigorously, it makes little sense to us. At the same time that ODOT presses the case, it has responded in writing to NSR's offer to compromise the matter with a counter-proposal. NSR has prepared a response, which ODOT should have received by the time this document is filed, and which represents a further narrowing of the differences between the parties. This seems like the very type of negotiation that the Board usually encourages. Even though NSR did not immediately reassess its position and come up with a compromise proposal until some time after the proceeding was filed, that does not mean it was not entitled to take the position it is taking with respect to the track. It also does not mean that it could not have come up with a proposed resolution after further consideration of the circumstances. NSR believes the parties are seriously negotiating since their differences appear to have been narrowed and they are not yet at an impasse.

CERTIFICATE OF SERVICE

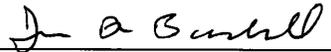
I certify that the foregoing motion was served via Airborne Express, next day

delivery requested upon:

Mr. Michael L. Stokes
Senior Assistant Attorney General
Office of the Attorney General
One Seagate (#2150)
Toledo, OH 43604-1551

Mr. Fritz R. Kahn
Eighth Floor
1920 N Street, N.W.
Washington, D.C. 20036

this 11th day of December, 2003.


James R. Paschall

NORFOLK SOUTHERN CORPORATION
THREE COMMERCIAL PLACE
NORFOLK, VA 23510



James R. Paschall
General Attorney

Direct Dial Number:
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Very truly yours,

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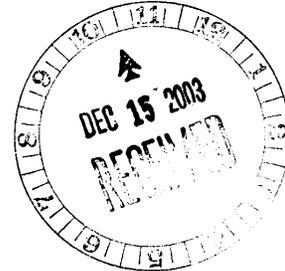
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SURFACE TRANSPORTATION BOARD

209609



FINANCE DOCKET NO. 34415

OHIO DEPARTMENT OF TRANSPORTATION
- PETITION FOR DECLARATORY ORDER -
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

ENTERED
Office of Proceedings

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Part of
Public Record

NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO REJECT OR TO STRIKE
REPLY FILED BY THE OHIO DEPARTMENT OF TRANSPORTATION
TO NSR's REPLY TO PETITION FOR DECLARATORY ORDER

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Dated: December 11, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34415

Ohio Department of Transportation
- Petition for Declaratory Order -
Status of Track at Findlay, Hancock County, OH

Norfolk Southern Railway Company's
Motion to Reject or to Strike
Reply Filed by the Ohio Department of Transportation
to NSR's Reply to Petition for Declaratory Order

Norfolk Southern Railway Company (NSR) hereby moves that the Board reject or strike the reply filed on November 26, 2003 by the Ohio Department of Transportation (ODOT) in this matter. ODOT acknowledges that its filing is a reply to NSR's November 5, 2003 reply¹ to ODOT's petition for declaratory order. ODOT does ask for leave to file the reply, but provides a novel and unsupportable justification for its filing. ODOT claims that NSR "misrepresents the holdings of certain of the Board's and court's decisions upon which it relies and distorts completely the position which ODOT has taken in this proceeding." This unfounded accusation provides no basis for ODOT's filing. Parties in adverse proceedings never agree upon the applicability or interpretation of key legal precedent and rarely agree on all of the facts or which facts are relevant. If they did, there would be no proceeding. The Board always must consider the facts and interpret the decisions relied upon by the parties. In effect, ODOT is stating that the Board cannot

¹NSR's filing, styled a response, was filed November 6, 2003.

perform the usual evaluation of a record in a petition case, consisting of a petition and reply, including the interpretation of legal precedents and facts in the record, without an extraordinary further pleading from ODOT. ODOT may not agree with NSR's argument and interpretation, and may even be concerned that it was stated too persuasively for ODOT to prevail without a re-formulation and re-argument of its position. That does not mean that NSR has misrepresented anything, or that the Board needs further pleadings to help it decide the case - unless, of course, the theory of the case is being subtly changed.

ODOT also claims that acceptance of this reply "will not prejudice NSR." This most certainly is not true. ODOT's argument continues to make completely unfounded accusations about NSR's conduct, motives and even about the position NSR takes in this proceeding, which are prejudicial if they stand uncorrected. The reply also allows ODOT to re-cast its case and re-argue many of its points under the guise of correcting misrepresentations by NSR, when the fact is that ODOT is simply trying to strengthen, if not change, its original case and to file a rebuttal. NSR is prejudiced if this new argument is accepted without NSR being allowed the right to reply accorded to respondents to petitions.²

ODOT supports its rationale for the reply by continuing the unwarranted accusations and characterizations of NSR's reply comments, conduct or motives, which began in ODOT's counsel's November 6, 2003 letter to Secretary Williams.³ ODOT mainly repeats

²NSR will be able to correct the record and rectify part of the problem in this motion, but that still does not justify the extra filing by ODOT.

³Our November 6, 2003 reply letter to ODOT counsel's letter to Secretary Williams also of November 6, 2003, reminded ODOT that the broad reply to NSR's response to the petition which ODOT's counsel implied he would file would violate the Rule of Practice against prohibiting replies to a reply. Nonetheless, ODOT's November 26, 2003 reply has

facts and arguments already presented and makes an ordinary reply argument,⁴ but it also has recast that case. Upon close examination and read in context, the NSR statements that ODOT characterizes as misrepresentations are not misrepresentations, or are in fact erroneously characterized by ODOT,⁵ or are simply legal arguments and interpretations with which ODOT disagrees. Thus, ODOT's reply is merely an effort to rebut NSR's

followed.

Our November 6, 2003 reply letter properly responded to ODOT counsel's November 6 letter's characterizations of our response to ODOT's petition, dated November 5 and filed November 6. We note that our cover letter for that filing should not have referred to the response as initial or preliminary and the response probably should have been styled a "reply." Nonetheless, the response does not use the terms "initial" or "preliminary" and neither the cover letter nor the filing state or reasonably imply that NSR intended to file another responsive document. Neither of document justified ODOT's conclusion on this point nor its characterization of the response. We regret any ambiguity that may have been caused by the inadvertent use of the two words in the cover letter, but we still believe that the November 6, 2003 ODOT counsel's letter's broad attack on a this and other points in our response was unjustified. His argument against a non-existent request to the Board to defer our reply was unjustified by and out of proportion to our actual filing. Although it was not the focus of counsel's November 6 letter, if the use of two words in our cover letter caused any ambiguity, a request for clarification, even with a statement that no request to submit further pleadings was actually made, would have been sufficient.

We do not think it would have been improper or novel to request the Board to permit a party to defer filing a pleading for a reasonable period of time, that is, to extend the procedural schedule, or to permit a partial reply as a placeholder, in order to avoid spending unnecessary effort and time on the pleadings while negotiations that might moot the need for such further pleadings are taking place. NSR made no such request here in any event.

⁴To the extent any of the arguments are new, ODOT gives no apparent good reason for not previously presenting them, much less re-presenting old arguments apparently in an effort to improve them. Regardless of whether the arguments are new, or newly presented, or simply repeated, ODOT's justification for their presentation is unpersuasive.

⁵We do not see how we can permit some of these remarks, such as accusing NSR of ignoring Board jurisdiction (apparently literally, and not simply in making its argument), or holding up highway projects that involve abandoned spur tracks "no matter what its motives might be" to go unchallenged or why the Board should accept them at face value as justification for filing a reply to a reply when they are so clearly erroneous or lacking in support.

response, to bolster ODOT's unpersuasive case and to get in the last word. The Board's rules do not allow such replies either directly or by making unwarranted accusations or characterizations of the other party's actions or pleadings as "misrepresentations." NSR's interpretation of and argument concerning the law and the facts are not misrepresentations simply because ODOT does not agree with them,⁶ nor are they so complex or novel that ODOT should be allowed an extra pleading to rebut them. ODOT's November 26, 2003 filing is a reply to a reply, without adequate justification, and contrary to the Board's Rules of Practice at 49 C.F.R. 1104.13. Moreover, ODOT should not be allowed to re-formulate its case or to cast unwarranted allegations at NSR without NSR being allowed the reply it would have gotten had ODOT made the arguments or comments on the facts in its original filing.

The bottom line here is that ODOT is unhappy with, and would like to find a way around, the statutory scheme that gives the Board exclusive jurisdiction over abandonment of excepted tracks, pre-empts State jurisdiction over abandonment of such tracks, but withholds authority from the Board to exercise its jurisdiction. ODOT may find NSR's statement of this statutory scheme, and the necessary conclusion that a railroad is permitted to run that part of its business described in 49 U.S.C. 10906 free of regulation but still under the exclusive jurisdiction of the Board and resulting pre-emption of State regulation, "repugnant to good sense and reasonable regulation." However that may be, ODOT's reaction to the statutory scheme and its desire for greater regulation of railroad

⁶ODOT's desire that NSR produce or comment on facts or documents that are not in the record and that NSR may not have considered relevant also does not make the facts that are in the record, or the comments on them, "misrepresentations." Furthermore, as already noted, the Board does not require further pleadings from ODOT to evaluate NSR's arguments.

property and railroad economics does not make our statement or interpretation of the statute or the case law either wrong or a "misrepresentation."

ODOT can not support its additional attempts to justify circumvention of the statutory scheme in 49 U.S.C. 10501 and 10901, et seq.,⁷ nor should it be given such extra attempts in a reply statement, no matter how the rationale may now be crafted nor how many unjustified aspersions may be cast at the railroad. The exclusion of any STB or State regulation of these tracks, and the consequent freedom of the railroad to decide whether to build, keep or abandon them or their rights-of-way, is supported by the clear language of 49 U.S.C. 10501 and 10906, the legislative history of the ICCTA and cases that have addressed or commented on the subject. ODOT cannot support creation of State or STB jurisdiction or authority over excepted tracks where Congress did not grant it. It should not be permitted to file a reply to a reply simply to make another effort to do so. Its real remedy is to appeal to Congress to change the statutory scheme.

⁷49 U.S.C. 10501 General Jurisdiction, reads in part:

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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. 10906. Exception, reads as follows:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

ODOT states that it is not attempting to force NSR to abandon the subject spur track. ODOT nonetheless argues that NSR should not have the right to determine when a potentially valuable easement or other right to operate over an excepted track right-of-way to an industrial facility that could be reactivated should be retained or abandoned. Instead, ODOT postulates that a State court (or perhaps the Board) should be permitted to decide that some period of non-use of the track constitutes its de facto abandonment. Though this de facto abandonment theory cannot be used to force a railroad to abandon a line of railroad, ODOT again argues that it should be accepted to force a railroad to abandon excepted track.⁸

While apparently recognizing that the Board cannot make an adverse abandonment finding as to spur track, ODOT uses the same facts and precedent applicable to adverse abandonments to argue that in the absence of allowing the State court to make the de facto or adverse abandonment determinations, the Board should make the adverse abandonment determination as to such track. Of course, to do so, ODOT realizes that the Board should call it something else in order to get around 49 U.S.C. 10906. ODOT has essentially presented this argument, but if ODOT thought it could have presented it differently or more persuasively, it should have done so in its petition. There is nothing in NSR's response, other than a reasonable discussion of statute, case law and reasonable conclusions, for ODOT to support an exception to the rule on replies to a reply.

⁸ODOT criticizes NSR for using precedent that may involve abandonment of line of railroad to suggest the governing precedent for abandonment of spur track, now that the abandonment of excepted track is under STB jurisdiction, to reach a separate result. Yet, ODOT has no apparent problem with it trying to use and extend precedent to argue by analogy for an opposite, rather than a consistent conclusion, in order to support State or Board jurisdiction or authority not granted by the governing statute.

NSR's decision to have kept the railroad's access to one of the better potential industrial sites or facilities in the area while there has been a foreseeable chance of future railroad business, either from a potential new company as well as from any renewed use of the plant the existing owner, is not unreasonable and certainly does not result in any misrepresentation. ODOT's reply builds to a crescendo of overstatement when it claims that it is "impossible" for NSR to operate over the track, with some implication that the current situation cannot be changed. The track is undeniably in bad shape past 84 Lumber. Regardless of whether the track can be operated in its current condition, however, ODOT can not state, and we do not interpret it as stating, that it would be impossible to rehabilitate and operate over the track if a business offering enough railroad traffic begins or renews operation at the Michigan Sugars industrial site.⁹

ODOT argues that its petition is not an attempt to force NSR to abandon the spur, or at least part of it, but to have the Board hold that the Board or the court should decide that NSR has abandoned it. ODOT supports its petition and its principal arguments, including this one, with adverse abandonment precedent. In effect, ODOT asks that a determination similar to that in an adverse abandonment proceeding be made, only that it be called a de facto abandonment, something precedents concerning de facto abandonments themselves would not allow. Moreover, even greater problems exist with this proposition. First, the Court has no jurisdiction to make any determination that would

⁹ODOT in fact recognizes that the track could be made operable earlier in its reply, but draws the conclusion that because it is inoperable, it should be considered abandoned. Certainly, future operation of the track is not "impossible." Moreover, the railroad's decision to retain the right-of-way, but not to repair the track until enough traffic is offered to justify the cost of rehabilitation is not impermissible under the statute, inconsistent with NSR's conduct, or imprudent in the current absence of a demand for railroad service.

result in the adverse abandonment or de facto abandonment and condemnation of any type of railroad track or right-of-way. That is what any such determination of de facto abandonment of a track by the court would be as long as the railroad opposes that result, no matter how the determination is characterized. Second, there is nothing in the law, the legislative history, or any precedent to date that states that the de facto abandonment theory that has been rejected as to lines of railroad should be applied to spur, industrial lead or other excepted track. In fact, de facto abandonment determinations made by state courts or agencies would return the jurisdiction over abandonment of such tracks that Congress removed in the Interstate Commerce Commission Termination Act to the States. It also would result in different treatment of de facto abandonments of spur tracks than lines of railroad, and rejection of the most pertinent precedents with respect to de facto abandonments, at the same time that Congress was giving complete jurisdiction over abandonments of all rail lines or tracks to the Board. Moreover, it would lead to the possibility of different standards and results as to de facto abandonments (or adverse abandonments or whatever ODOT wishes to call an abandonment and condemnation of property that the railroad wishes to keep as an excepted track or right-of-way) depending on each jurisdiction's interpretation of what constitutes a de facto abandonment. It would also permit the States to make it difficult or impossible for a railroad to enjoy its common carrier rights to provide service from its active line of railroad.¹⁰ Surely this is contrary to the uniform treatment, and economic freedom of the railroad to determine its use of its

¹⁰Arguably, it might even impede the railroad's ability to perform its common carrier duty to provide service upon reasonable request, although we admit it seems that a prospective shipper could not maintain an argument that it should be provided rail service (at least directly to its facility) when a government entity has made that impossible, or perhaps totally uneconomical.

rights-of-way, that Congress sought and established in the ICCTA. ODOT's reply on this crucial point, and the reformulation of its position, is not required by some "misrepresentation" in NSR's response nor by some newly discovered evidence, but is simply an effort to present a new argument or to present its old argument more persuasively. While its argument still fails to support its conclusion, ODOT should not be allowed to present it in a further reply.

ODOT's reply is not justified in order to argue that precedent cited by NSR relates to line of railroad rather than exempt track. Not only is that point obvious, NSR never stated otherwise. We simply argue that the holdings in these cases should be applied to de facto abandonments of spur tracks, because there is nothing in the law, the legislative history or the cases themselves to distinguish line of railroad from excepted track cases in the application of these principles. All the decisions may not deal with excepted tracks, although some cases omitted by ODOT do deal with them, and all of them provide applicable principles. It certainly goes too far to suggest that these cases provide any basis for reaching the opposite conclusion for excepted track than the one they reach with respect to lines of railroad or that there cases or sections of the statute that support a different conclusion. ODOT certainly could have attempted to distinguish these cases in its petition since its position is largely based on application of a de facto abandonment theory to spur tracks. Not only did it not do so (or do so to its own satisfaction) but it provides no real basis for the distinction in its reply.

At this point in the reply, the argument and assertions degenerate into further puzzling, unsupported and totally unwarranted accusations and aspersions against NSR. These attacks lend no support to the arguments and illogical conclusions that follow. The

reply accuses NSR of ignoring the Board's jurisdiction when it sold part of the Findlay spur to 84 Lumber. The Board is not only without authority to authorize or to regulate the abandonment of excepted tracks under 49 U.S.C. 10906, but it is also without authority to authorize or to review any transaction that might otherwise require approval or review of the Board under Chapter 109 of 49 U.S.C., Subtitle IV, Part A.¹¹ Therefore, there was no reason for NSR to submit any sale of the track or right-of-way of a spur track to the Board for review, much less any reason for the reply to impugn NSR's motive for not doing so.

NSR cited the cases pertaining to dismissal of proceedings concerning the acquisition of the right-of-way and track of lines of railroad, mainly by transit authorities, without the acquiring party also acquiring the common carrier rights or duties related to the transportation of freight for the proposition that the common carrier rights and duties can still exist separately from the ownership of the track or material. There is no reason not to apply this proposition to spur tracks. That means that even if the Board or the court could consider any sale of the track or the right-of-way to 84 Lumber, such a sale would not preclude NSR from continuing to operate over the track. ODOT's reply's apparent effort to cast NSR in a bad light by implying that NSR ignored other applicable authority from these cases is unfounded, off the mark and should be stricken.

The ODOT reply states: "In other words, while going to great lengths to argue that the Board retains jurisdiction over spurs, even though the agency cannot authorize their

¹¹49 U.S.C. 10906. Exception, reads as follows:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

abandonment, NS elected to ignore the Board when it sold the 2,800-foot segment of the Findlay spur to 84 Lumber." This is a complete *non sequitur* and contrary to ODOT's own previous reference to the lack of submission of the 84 Lumber/NSR transaction to the Board. The implication that NSR or 84 Lumber should have submitted any transaction with respect to the spur is without basis in 49 U.S.C. Part 109 in view of 49 U.S.C. Section 10906 and prejudicial to NSR. There is no more reason to submit a transaction with respect to the acquisition or operation of a spur or excepted track for the approval or review of the Board than there is to submit a notice, petition or application for such a track's abandonment. Not only are the facts and governing precedent evident in the submissions already made by the parties, ODOT's unsupported characterization of NSR's actions with respect to its dealings with 84 Lumber to the Board's attention and illogical conclusion cannot be justified as correcting any "misrepresentation" in NSR's response. Indeed, on page 7 of ODOT's petition, ODOT mentions the fact that this transaction was not submitted to the Board as proof that the parties recognized that the track is a spur track for which no submission was required. Now ODOT accuses NSR of ignoring the Board's jurisdiction for the very same course of action as to the same transaction. Surely this does not constitute a "misrepresentation" on NSR's part, or justify a reply casting unwarranted accusations of ignoring the Board's jurisdiction at the railroad.¹²

ODOT attempts to turn the burden of persuasion, if not proof, around in this

¹²If we thought ODOT made this statement simply to show that we were taking inconsistent positions with respect to the application of the statute, we could understand it. However, NSR's position on the application of 49 U.S.C. 10906 is clearly consistent and the statement (which is inconsistent with that made on page 7 of ODOT's petition) certainly appears to accuse NSR of literally ignoring the Board's jurisdiction. Of course, Section 10906 withdraws the Board's authority to exercise that jurisdiction, and NSR's conduct with respect to this track is predicated on that section of the statute.

proceeding by implying that NSR should provide the Board with a copy of the agreement whereby 84 Lumber acquired a portion of the Findlay track in order to determine if NSR has a right to operate over the track beyond the conveyed segment. NSR had no obligation to present any aspect of its transaction with 84 Lumber to the Board either at the time of the transaction or in response to ODOT's assertions because ODOT's presentation simply did not justify its conclusions. ODOT presented a statement from 84 Lumber and could have asked them to present, or could have presented themselves, any evidence that it had with respect to NSR giving up its right to operate in whole or in part over the track. Not only did they not do so, but 84 Lumber made no statement that it considered NSR without rights to rehabilitate the track beyond its facility and to use the track along its facility also to serve the Michigan Sugars site. Moreover, the only document submitted by 84 Lumber that bears on the matter, a 1998 letter from NSR, refers to a sale of the "track," but does not unambiguously state that this is meant to be a sale of the real estate or the easement rather than the track structure. There is no offer in NSR's letter to give up any right to use the right-of-way beyond 84 Lumber or not to reserve that right of use in an operating agreement for the 84 Lumber segment.¹³ That conclusion cannot be drawn

¹³In fact, NSR has found no record of any bill of sale or agreement, much less a conveyance or deed, concerning the proposed transaction with 84 Lumber with respect to the Findlay spur. NSR has not even been able to find any record that 84 Lumber paid the \$5,500 requested in the offer as part of the consideration. There is no doubt that 84 Lumber rehabilitated the track in order to facilitate NSR providing rail service over it and, absent inclusion of the consideration in a different type of agreement, 84 Lumber would have a claim to the salvage value of the material in the event the track were ever removed. A search of our records showed nothing more than that. (We realize that the disposition of the track material or other final agreement concerning the value contributed by 84 Lumber to the track might have been included in a later rate agreement or transportation contract, but this is even less relevant than the agreements under discussion. NSR can not see that it has an obligation to check on this possibility in order to proceed with the handling of this matter, but does not want to raise a concern with 84 Lumber in the event such agreement

either from the 1998 letter in the record or from 84 Lumber's statement and other attachments.

Finally, ODOT accuses NSR of using the Board's processes to shield itself from the processes of State law. NSR is doing no such thing. It is merely asserting the rights given to it by Congress through the pre-emption of State jurisdiction over excepted tracks and the withdrawal of Board authority under Chapter 109 over such tracks. Rather than delay a decision in the matter pending the Board's further interpretation of 49 U.S.C. 10906, we certainly would have preferred that ODOT and the court recognize the requirements of the statutory language and apply the statements already made by the Board on the subject and precedent such as *Columbiana County Port Authority v. Boardman Township Park District*, 154 F.Supp.2d 1165 (N.D. Ohio 2001); *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523; 2002 U.S. App. LEXIS 15405; 2002 FED App. 0259P (6th Cir. 2002); and *Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Company d/b/a Canadian National/Illinois Central Railroad (CN/IC)*, U.S.D.C. N.D. Iowa, 2003 U.S. Dist. LEXIS 9005, decided May 21, 2003, to dismiss this proceeding. However, since ODOT was unwilling to accept this conclusion, a reference to the Board was the next best approach. NSR fully disclosed these on point judicial precedents, two of them decided under Ohio law, in its November 5 response. Despite ODOT's effort to get another pleading on file and to accuse NSR of misrepresentations, however, it is silent concerning the reasoning, holdings and implications of these decisions. It does not try to distinguish or explain them, because it cannot do so. Apparently, without reference to

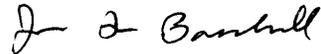
may exist.)

whether their citation and direct, lengthy quotations by NSR are "misrepresentations," ODOT prefers that the Board ignore them and hold to the contrary. This provides no basis on which to file a reply to a reply suggesting that it should be accepted in order to correct "misrepresentations" in the other party's legal argument.

There is nothing in 49 U.S.C. Section 10906, the legislative history, or precedent to suggest that the de facto abandonment theory that does not apply to lines of railroad should be applied to excepted track directly or as a substitute for adverse abandonment proceedings to circumvent the exclusive jurisdiction of the Board and the pre-emption of State regulation of the abandonment of spur tracks in 49 U.S.C. 10501 and to permit every jurisdiction to decide for itself that (or when) a railroad has abandoned a track or right-of-way under varying standards with no apparent parameters, notwithstanding the railroad's desire to keep the track or right-of-way. The adverse abandonment criteria cannot be applied to spur tracks because the State has no jurisdiction to apply them and the Board has no authority to do so. While this may result in a gap in regulation, the Board must simply recognize that fact, as it and several courts have already done, and direct ODOT to Congress for its remedy, not determine the issue now in a different manner that would be

contrary to the plain language of the statute. ODOT's further attempt to justify regulation where no authority to regulate exists, through a re-cast argument in a reply to a reply, should be rejected or stricken.¹⁴

Respectfully submitted,



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Dated: December 11, 2003

¹⁴This debate may be intellectually challenging but NSR still believes it is unnecessary. While ODOT's counsel's provides a rationale for pressing it so vigorously, it makes little sense to us. At the same time that ODOT presses the case, it has responded in writing to NSR's offer to compromise the matter with a counter-proposal. NSR has prepared a response, which ODOT should have received by the time this document is filed, and which represents a further narrowing of the differences between the parties. This seems like the very type of negotiation that the Board usually encourages. Even though NSR did not immediately reassess its position and come up with a compromise proposal until some time after the proceeding was filed, that does not mean it was not entitled to take the position it is taking with respect to the track. It also does not mean that it could not have come up with a proposed resolution after further consideration of the circumstances. NSR believes the parties are seriously negotiating since their differences appear to have been narrowed and they are not yet at an impasse.

CERTIFICATE OF SERVICE

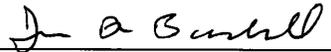
I certify that the foregoing motion was served via Airborne Express, next day

delivery requested upon:

Mr. Michael L. Stokes
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Mr. Fritz R. Kahn
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this 11th day of December, 2003.


James R. Paschall