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February 11, 2010

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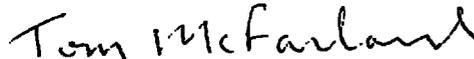
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

Re: Docket No. AB-1036, *The City of Chicago, Illinois -- Adverse Abandonment -- Chicago Terminal Railroad in Chicago, IL*

Dear Section of Administration Chief:

Hereby transmitted is a Reply In Opposition To Motion To Strike And Request For Cease And Desist Order for filing with the Board in the above referenced proceeding.

Very truly yours,



Thomas F. McFarland  
*One of the attorneys for the City  
of Chicago, Illinois*

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cc: (by e-mail)  
John Heffner, Esq.  
Mara Georges, Esq.  
Steven Holler, Esq.  
Mr. Paul Zalmazek  
Mr. Joseph Alonzo  
Mr. Chris Wuellner

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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THE CITY OF CHICAGO, ILLINOIS --     )  
ADVERSE ABANDONMENT --             ) DOCKET NO.  
CHICAGO TERMINAL RAILROAD IN        ) AB-1036  
CHICAGO, IL                             )

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**REPLY IN OPPOSITION TO MOTION TO STRIKE  
AND REQUEST FOR CEASE AND DESIST ORDER**

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THE CITY OF CHICAGO, ILLINOIS  
CITY HALL  
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*Attorneys for Applicant*

DUE DATE: February 11, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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THE CITY OF CHICAGO, ILLINOIS --	)	
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**REPLY IN OPPOSITION TO MOTION TO STRIKE  
AND REQUEST FOR CEASE AND DESIST ORDER**

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Pursuant to 49 C.F.R. § 1104.13(a), the CITY OF CHICAGO, ILLINOIS (the City) hereby replies in opposition to a Motion to Strike and Request for Cease and Desist Order filed by Chicago Terminal Railroad (CTM) on January 14, 2010, and supplemented on January 22, 2010.

**BACKGROUND**

On January 13, 2010, the City filed a Notice of Intent to File an Application for Adverse Abandonment (Notice of Intent) of two unused segments of CTM rail line in Chicago, Illinois.

On January 14, 2010, CTM filed a Motion to Strike the Notice of Intent and a Request for a Cease and Desist Order (Motion-Request). The Motion-Request attached the Verified Statement of John M. Sorrell, (a copy of which is attached hereto). In such statement, Mr. Sorrell made the following false statement: “[t]he City entered upon privately owned property for the purpose of dismantling CTM’s track structure,” without having obtained Board authority to do so.

On January 22, 2010, after the City had advised counsel for CTM that this statement was false, CTM filed a Supplement to the Motion-Request in the form of a Verified Statement of its

President, Edwin E. Ellis (VS Ellis). In the Supplement, Mr. Ellis effectively conceded that Mr. Sorrell's Statement was false, and alleged instead that the City "stood by silently and allowed others to do so (i.e., remove the track)." (VS Ellis at 3).

On February 1, 2010, the City filed the Adverse Abandonment Application that was the subject of the Notice of Intent.

**ACKNOWLEDGMENT OF BOARD  
JURISDICTION OVER ADVERSE ABANDONMENT**

The City notes preliminarily that by virtue of invoking the Board's jurisdiction over the City's Notice of Intent to File an Application for Adverse Abandonment, CTM thereby necessarily acknowledges that the Board has jurisdiction over an abandonment application filed by an interested entity other than the railroad company that owns the rail line that is the subject of the abandonment application.

That being the case, CTM should not be heard to argue at a later time that the Board does not have such jurisdiction. CTM should not be permitted to invoke Board jurisdiction over an adverse abandonment filed by other than the line's owner when it sues CTM to do so, and then later disclaim such jurisdiction if that would appear to further its interests at that time.

**REPLY IN OPPOSITION TO MOTION-REQUEST**

The Motion-Request is legally defective on multiple grounds, any one of which dictates its denial.

**I. THERE IS NO PRIVATE RIGHT OF ACTION TO ENJOIN AN UNLAWFUL ABANDONMENT**

The gravamen of the Motion-Request is that the City unlawfully abandoned, or aided and abetted an unlawful abandonment of, a segment of CTM's line of railroad. The overriding

reason why that Motion-Request should be denied is that there is no private right of action to enjoin an unlawful abandonment. Even if, solely for the sake of this argument, it is assumed that the City unlawfully abandoned the sidetrack in question, or unlawfully aided and abetted such an unlawful abandonment, the Motion-Request must nevertheless be denied.

As stated by the United States Supreme Court in *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), there has been no private right of action to enjoin an unlawful abandonment either in Court or before the Board under the law as it has existed for the past 33 years, viz. (at 322, n.9):

Section 1(20), which was, like 1(18), added by the Transportation Act of 1920, provided that "any court of competent jurisdiction" could enjoin a carrier's abandonment of a line when application for approval has not been made to the Commission. The right of a private party to seek an injunction was repealed by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 127-130. Under the Act as amended and recodified, only the United States, the government of a State, or the Commission itself may sue to enjoin most illegal abandonments. See 49 U.S.C. 11505 (action by state), 11702 (action by the Commission), 11703 (action by the United States) (1976 ed., Supp. III). A private person may seek injunctive relief only to prevent illegal abandonment of a freight-forwarding service. See 49 U.S.C. 11704 (1976 ed., Supp. III) . . .

Consequently, there simply is no private right of action whereby CTM can obtain an injunction against removal of the tracks that are the subject of the City's Abandonment Application under the guise of a Motion to Strike a Notice of Intent to Abandon and/or a Request for a Cease and Desist Order. As the Supreme Court has stated, only the United States, a State Government, or the Board itself is entitled to seek an injunction against an unlawful abandonment. It follows that CTM's Motion-Request should be denied as a matter of law.

**II. THERE HAS BEEN NO SHOWING THAT THE TRACK THAT WAS REMOVED WAS PART OF CTM'S LINE OF RAILROAD**

It is evident from the first and second photographs attached to the verified statement of John M. Sorrel that is attached to the Motion-Request that the trackage that was removed was located beyond CTM's rail right-of-way and beyond the City street. It is clear that the trackage within CTM's right-of-way and the trackage within the City street remain in place.

Thus, the trackage that was removed was located on private property, i.e., on property formerly owned by Peerless and now being developed by Ogden Partners, Inc. That is confirmed in the verified statement of CTM President Ellis, *viz.* at 2-3:

. . . I want the Board to realize that the project for which this track segment was unlawfully removed and which will be included in the City's adverse abandonment application is a privately financed real estate development project rather than one being undertaken for any public purpose . . .

The Motion-Request is required to be denied because CTM has failed to prove that the track that was removed was part of CTM's line of railroad rather than a sidetrack that was privately owned by Peerless, and thus was lawfully removed by Ogden Partners. As the moving party, CTM had the burden of proof in that respect. Ironically, the only evidence on that subject was contained in an e-mail message that is attached to Mr. Ellis's verified statement, and that supports a determination that the trackage was privately owned, *viz.*:

. . . I have also been provided with a copy of a letter from Peerless in which Peerless states that it constructed and maintained such sidetrack for its own use.

**III. THE CITY HAD NO AUTHORITY OVER REMOVAL OF THIS PRIVATELY-OWNED TRACK**

CTM initially alleged that the City removed the Peerless track. Faced with evidence that Ogden Partners removed the track, CTM backpedaled, viz. (VS Ellis at 3):

... While the City may not have actually removed the track itself, the fact is that it stood by silently and allowed others to do so ...

As stated in the previous section of argument, the track under consideration is located on private property being developed by Ogden Partners. The trackage in the City street remains intact, as shown by CTM's photographs. (Motion-Request, VS Sorrel, attachments). The City does not have authority nor any monitoring duty over the private property on which the removed track was located. That being the case, it cannot be successfully alleged that the City "allowed" that track to be removed. Indeed, the City had no legal duty in regard to removal of that track from private property.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for all the reasons stated, the Motion-Request should be denied.

Respectfully submitted,

THE CITY OF CHICAGO, ILLINOIS  
CITY HALL  
121 North LaSalle Street  
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Attorneys for Applicant

DUE DATE: February 11, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2010, I served the foregoing document, Reply In Opposition To Motion To Strike And Request For Cease And Desist Order, on John D. Heffner, Esq., John D. Heffner, PLLC, 1750 K Street, N.W., Suite 350, Washington, DC 20006, *j.heffner@verizon.com*, by e-mail and first-class, U.S. mail, postage prepaid.

*Thomas F. McFarland*

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Thomas F. McFarland