

1 APPEARANCES:

2 MR. BRIAN VERCRUYSSSE

3 Rail Safety Specialist

4 Illinois Commerce Commission

5 160 North LaSalle Street

6 Chicago, Illinois 60602

7 Phone: 312-636-7760

8 Appearing on behalf of the Illinois Commerce

9 Commission

10

11 MR. DOUGLAS FELDER

12 203 North LaSalle Street

13 Suite 2300

14 Chicago, Illinois 60602

15 Phone: 312-634-3509

16 Appeared on behalf of IDOT

17

18 MR. NEIL FLYNN

19 600 South Second Street

20 Suite 102

21 Springfield, Illinois 62704

22 appeared on behalf of Norfolk Southern Railway Co.

1 JUDGE MONTAQUE: By the power vested in me by
2 the State of Illinois, I now call Docket Number
3 T13-0078. This is in the matter of The Department of
4 Transportation, Petitioner vs. Norfolk Southern Railway
5 Company as Respondent in The Petition Requesting
6 Approval of the Taking or Damaging of Certain
7 Properties Owned by the Transportation Common Carrier
8 In Cook County, Illinois By Exercising The Right Of
9 Eminent Domain.

10 May I have appearances, please, starting
11 with the Illinois Department of Transportation.

12 MR. FELDER: Thank you, your Honor. My name
13 is Doug Felder, F-E-L-D-E-R. I represent the
14 Petitioner in this matter, the Illinois Department of
15 Transportation. My address is 203 North LaSalle
16 Street, Suite 2300, Chicago, Illinois 60602. Phone
17 Number, 312-634-3509. And again with me today at
18 Counsel's table is an engineer from the Department of
19 Transportation, Miss Lyn Li.

20 JUDGE MONTAQUE: Thank you. And for
21 Respondent?

22 MR. NEIL FLYNN: Your Honor, this is Neil

1 Flynn. My last name is F-L-Y-N-N and I'm here with
2 Daniel Flynn, same last name, same spelling. We are
3 appearing on behalf of the Respondent, Norfolk Southern
4 Railway Company, 600 South Second Street, Suite 102,
5 Springfield, Illinois 62704 again appearing today on
6 behalf of Respondent Norfolk Southern Railway Company.

7 JUDGE MONTAQUE: Thank you. Staff?

8 MR. VERCRUYSSSE: Brian Vercruysse,
9 V-E-R-C-R-U-Y-S-S-E, representing the Staff of the Rail
10 Safety Section. Phone Number is 312-636-7760. Thank
11 you.

12 JUDGE MONTAQUE: Okay, Mr. Felder, you have
13 the floor to present the petition.

14 MR. FELDER: Thank you, your Honor. Your
15 Honor, the Department filed a petition in this matter
16 relating to the acquisition of property to construct an
17 improvement in Linwood, Illinois, a grade separation
18 improvement, what's the old EJ&E Railroad and now
19 acquired by a CN pursuant to Service Transportation
20 Board proceedings.

21 Part of the proceedings required a grade
22 separation be constructed at various locations for the

1 EJ&E now the CN, Chicago metropolitan area. One of
2 those locations is in Linwood Illinois at the location
3 of the subject property involved in this proceeding.
4 This proceeding, because it is seeking to acquire
5 railroad property, has been filed with the Illinois
6 Commerce Commission. First, of course, to obtain
7 approval for that acquisition and then subsequently to,
8 if approval is given, to go to Circuit Court, acquire
9 the title that the Department needs to construct the
10 improvement project at this location.

11 However, this is not the CN property.
12 This is the Norfolk Southern Railway property. And by
13 way of background, and Mr. Flynn will if I misstate it,
14 I'm sure he'll correct me. By way of background on the
15 Norfolk Southern Railway property at this location has
16 also been subject to some STB, Service Transportation
17 Board proceedings and actions. There is presently
18 pending abandonment proceedings in the STB relating to
19 this particular section and area of their NS
20 right-of-way. And if all things proceed as
21 contemplated by the order entered by the STB last year,
22 this right-of-way should be in a position to be

1 abandoned -- abandonment could be consummated sometime
2 between October -- within a month or two.

3 That being the case, the Department
4 acquired the property from the NS Railroad to construct
5 the improvement mandated by the Service Transportation
6 Board involving a grade separation. And part of the
7 overall proceeding, as I understand it, with regard to
8 the NS property that's being -- that's currently under
9 abandonment, involves some agreement with the CN
10 railroad as to usage of the CN track in this area for
11 NS purposes, thus facilitating the abandonment of the
12 line and the property that's involved in this
13 proceeding.

14 And also as a manner of cooperation
15 between the parties, the parties being IDOT, NS and CN
16 regarding construction of the improvement, the proposed
17 anticipated improvement will cost much less once the NS
18 right-of-way is abandoned than it would cost if it were
19 not abandoned and the Department had to construct
20 improvement that span two operating railroads rather
21 than one.

22 So with that somewhat convoluted wind up

1 that's generally the procedure that -- the situation
2 that we find ourselves.

3 We are working with the railroad to
4 attempt to agree on an acquisition. However, it has
5 become clear to the Department that because of the
6 nature of the title interest that it needs to acquire,
7 even if we reach an agreement with railroad, we are
8 going to have to consummate that agreement through a
9 condemnation action to clear up all the other interest
10 and title that there may be raised by our title
11 commitment. And those exceptions include, because of
12 the nature of the title the NS acquired include
13 possibilities of reverter that we can only acquire
14 through an action in court where we publish and we
15 default unknown owners and non-record claims.

16 So to wrap up with the NS, we are
17 working towards an agreement. We would like to reach
18 one with the railroad so that we could possibly present
19 to your Honor an order that is acceptable to both
20 parties in this venue for purposes of approval of the
21 acquisition so that we can file our eminent domain case
22 in court. But we are on a very aggressive time

1 schedule. We're trying to meet and have some urgency
2 to meet in November letting at this time. And given
3 the posture, we continue to try to work with the
4 railroads. We have been working with them. We would
5 like, however, to set an early hearing date with the
6 idea that if we don't have an agreement worked out, it
7 would be a date where we present our case to the
8 Commission and ask for the Commission to hear the
9 matter and act as expeditiously as possible given the
10 parameters of the schedule.

11 JUDGE MONTAQUE: Okay. Mr. Flynn, does that
12 accurately reflect what your understanding is at this
13 point in time? Would you like to add anything?

14 MR. NEIL FLYNN: Mr. Felder did a very good
15 job of describing the -- some of the nuances and the
16 details that remain to be addressed. I just want to
17 emphasize, your Honor, that the NS and IDOT, we are
18 working cooperatively and we are working very
19 diligently to accomplish all of the needs so that the
20 acquisition of the title, the appropriate title for
21 IDOT needs to complete the project and move forward is
22 being pursued. We are optimistic that we will get that

1 shortly. But Mr. Felder described it accurately and we
2 are not able to do so, which is not the goal, but we
3 would be back here to present whatever needs to be
4 presented at a subsequent date, your Honor

5 JUDGE MONTAQUE: And you are Neil Flynn,
6 correct?

7 MR. NEIL FLYNN: That is correct, your Honor.
8 I am sorry. That is correct.

9 JUDGE MONTAQUE: Mr. Vercruysse, do you have
10 anything to add or does that accurately reflect what
11 you understand to be happening at the time?

12 MR. VERCRUYSSSE: Your Honor, it does
13 accurately reflect what Staff knows about the project.
14 Staff has no objection to the Department's petition or
15 an agreed order being provided. It is our
16 understanding that IDOT may have questions as far as
17 the title and the reversion clauses. It might have to
18 continue with the condemnation and the eminent domain
19 proceedings. So Staff concurs.

20 JUDGE MONTAQUE: I'm just curious. So is
21 this proceeding with the Commission contingent upon the
22 abandonment issue of -- is the abandonment occurring

1 or -- I know you gave me a summary.

2 MR. FELDER: You touched upon one of the
3 nuances as Mr. Flynn described it involved in what's
4 going on. Would I say that it is contingent? No, I
5 don't think it's contingent. However, it's certainly
6 one of the moving parts or one of the bigger ones.

7 One of the things we've discussed, we
8 filed a petition seeking a fee simple title to the NS
9 land anticipating that it is abandoned or is an
10 abandoned railway and a no longer operating railway.
11 We are now in discussions about possibly to reach an
12 agreement to change that to a permanent easement. And
13 at this point IDOT anticipates that there is a
14 permanent easement acquisition that would likely
15 suffice for their needs. Therefore, we are pursuing
16 it. However, one of the housekeeping matters we have
17 to address would be to amend our petition to change the
18 request from a fee to a permanent easement possibly.
19 And in the event -- it's possible that at some point if
20 we go to a hearing that we may very well get into the
21 issue of the abandonment proceedings and their impact
22 on our acquisition. In other words, we are

1 anticipating constructing based upon all the prior
2 history of the STB proceedings and our negotiations
3 with the CN and NS, we are anticipating constructing a
4 smaller structure at this location, which contemplates,
5 and necessarily assumes the abandonment of the NS
6 Railway. If that becomes a situation that we have to
7 address directly, there is several ways that we may
8 address it. But we are hopeful that it will be part
9 of -- one of those moving parts that gets revolved in
10 an overall global agreement.

11 JUDGE MONTAQUE: I understand. So it sounds
12 like we should set a potential hearing date far enough
13 out for you to either come to an agreement or, you
14 know, at least decide that you need to go to a hearing
15 on the matter. So having said that, we can go off the
16 record right now.

17 (Discussion held off the record)

18 JUDGE MONTAQUE: This matter will be
19 continued to Wednesday, August 28th at 10:00 a.m. here
20 in Chicago and possibly by video and we will reconvene
21 at that time.

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1 (WHEREUPON the hearing was
2 adjourned at 10:22 a.m. to
3 reconvene, August 28, 2013 at the
4 hour of 10:00 a.m.)

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