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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36809

**NORTHEAST LOUISIANA MULTIMODAL DISTRICT – PETITION FOR
DECLARATORY ORDER**

**DELTA SOUTHERN RAILROAD, INC.'S REBUTTAL TO NORTHEAST LOUISIANA
MULTIMODAL DISTRICT'S REPLY TO A REPLY**

John M. Scheib
Noah Sullivan
Gentry Locke Attorneys
1010 W. Main Street, Suite 750
Norfolk, VA 23510
757-916-3511

Attorneys for:
Delta Southern Railroad, Inc.

Dated: September 12, 2024

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The Northeast Louisiana Multimodal District (“NELMD”) gets one thing right in its reply to a reply – the Board’s rules do not permit a reply to a reply. 49 C.F.R. § 1104.13. Weighing in at 16 pages, NELMD’s impermissible reply is basically the same length as the Petition itself and is a continuation of its wasteful and unmeritorious litigation tactics to which Delta Southern Railroad (“DSRR”) is forced to respond.

No matter how many pages NELMD files, it cannot change the dispositive facts here. The United States District Court for the Western District of Louisiana (“Court”) ruled against NELMD and found the Track Segment to be 10906 track. The Court made that finding after evaluating a complete factual record, which NELMD failed to provide to the Board with its Petition. DSRR placed that record in evidence in this proceeding.¹ Those facts include:

DSRR uses the Track Segment to stage and store rail equipment. See Thrall Declaration at ¶¶ 13-17 and Exs. A, B, C. The rail operations on the Track Segment are incidental to the receipt of shipments by the carrier. *Id.* at ¶ 13. The physical characteristics of the Track Segment include that the track is a short segment, and it does not invade another railroad’s territory. *Id.* at ¶ 7. Additionally, there is not regularly scheduled service over the Track Segment, and it is not used to serve a specific customer’s facility. *Id.* at ¶¶ 8, 9. However, DSRR has continued to use the Track Segment as 10906 track for rail transportation purposes. *Id.* at ¶ 13. In particular, DSRR

¹ Delta South. R.R. Inc.’s Reply, *Northeast Louisiana Multimodal District – Petition for Declaratory Order*, Docket No. 36809 (STB filed September 5, 2024) (Exhibit C, Declaration of Rob Thrall) (“DSRR Reply”).

has stored railcars on the track in recent years, as also shown by the [NELMD's] own expert, and, indeed, there are railcars on the Track Segment even today. *Id.* at ¶¶ 14, 15 and Exs. A, B, C. [NELMD] concedes DSSR has been using the property for rail purposes. Plaintiff's Brief at 6.²

Notably, NELMD does not attempt in the Petition (and now in its impermissible reply to a reply) to plead different facts – it just regurgitates its losing arguments to the Board rather than assert them in an appeal of the Court's decision.

The Court – after reviewing the facts, accepting NLEMD's concession about DSRR's use of the track, and applying both the test of the United States Court of Appeals for the Fifth Circuit and of the Board – resolved the issue of whether the Track Segment at issue is Section 10906 track. DSRR Reply, Exhibit A at 6-7. The Court declined to remand the case to state court because the Track Segment is 10906 track. *Id.* at 7. The Court held that “federal law preempts state law with regards to the Track Segment.” *Id.* at 8. And, the Court decided that it lacked jurisdiction pursuant to 49 U.S.C. §10501(b). *Id.* at 9. In short, NELMD lost and did not appeal. The Court found on a complete record that the Track Segment was 10906 track, which was an essential finding to the Court's conclusions that remand to the state court was improper, that the state expropriation action was preempted, and that it lacked jurisdiction pursuant to Section 10501(b).

The doctrine of issue preclusion does not permit relitigating the Court's finding that the Track Segment is 1906 track (nor its finding that state law was preempted). DSRR Reply at 7-11. The Court's decision was a final order that NELMD failed to appeal, but seeks to collaterally attack through the Petition. DSRR Reply at n.6. The fact that the dismissal was

² DSRR Memorandum, *Northeast LA. R.R. Dev. Dist. V. Delta South. R.R. Inc.*, Case 3:23-cv-01783-TAD-KDM at 4 (filed Feb. 23, 2024) (provided as Exhibit C to DSRR Reply and citing Thrall Declaration).

“without prejudice” is irrelevant to the preclusive effect of the holding that the Track Segment is 10906 track. *Colvin v. Howard Univ.*, 257 A.3d 474 (D.C. Ct. App. 2021) (“Unlike with claim preclusion, whether a dismissal has issue-preclusive effects does not depend on if it was with prejudice.”) (citing 7 Wright & Miller, *Federal Practice and Procedure: Trials* § 2373 (4th ed. 2021) (“A dismissal without prejudice . . . ha[s issue-preclusive] effect for issues actually litigated in the first action.”)).³

The Board understands Congress permitted additional rail use of abandoned rail through 10906. DSRR Reply at 13.⁴

DSRR respectfully requests that the Board expeditiously decline this Petition that seeks to relitigate issue resolved unfavorably to NELMD by the Court.

³ See also, 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4418 (3d ed. 2021) (issue preclusion may arise "from dismissal of a first action on grounds that do not go to the merits of the claim presented and that are not intended to preclude a second action"); see e.g., *Germain Real Estate Co., LLC v. HCH Toyota, LLC*, 778 F.3d 692, 696 (8th Cir. 2015) (Although the state-court action was dismissed without prejudice, the state-court judgment was sufficiently firm to be accorded conclusive effect. As set forth above, the parties submitted briefs and oral argument to the state court. . . Moreover, even though the case was dismissed without prejudice, Germain could have appealed from the judgment.”); *Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) (“It matters not that the prior action resulted in a dismissal without prejudice, so long as the determination being accorded preclusive effect was essential to the dismissal.”).

⁴ See *Joseph R. Fox – Petition for Declaratory Order*, Docket No. 35141 at 5 (STB decided May 13, 2009) (even if abandoned, the segment at issue had been used as “industrial track which is now within the meaning of what is now section 10906”), *aff’d Fox v. STB*, 379 Fed. Appx. 767 (10th Cir. 2010); *ParkSierra Corp. (Successor-in-Interest to Ca. North. R.R. Co. Ltd. Partnership)—Lease and Operation Exemption—S. Pac. Transp. Co.*, STB Finance Docket No. 34126, slip op. at 5-6 (STB served December 26, 2001) (finding that a track that had its abandonment consummated was 10906 track); see also *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress’s adoption of 49 U.S.C. § 10906 “encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked”);

Respectfully submitted,

/s/ John M. Scheib

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Noah Sullivan
Gentry Locke Attorneys
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