

October 31, 2000

MARIETTA DAILY JOURNAL

Railyard emerges a winner

Tuesday 10-31-00 page A-1



■ Jurors agree: Norfolk Southern project a nuisance, but necessary

By Jennifer Hafer
Marietta Daily Journal Staff Writer

MARIETTA — A jury decided Monday that Norfolk Southern's train-to-truck transfer facility in Austell will be a public nuisance, but the operation does fall under the "ordinary and necessary" operations of a railroad.

The split decision in Cobb County's lawsuit against Norfolk Southern Railway Co. is a win for the Virginia-based transportation company.

Even though jurors agreed the intermodal facility will be a public nuisance because of the amount of noise, pollution and truck traffic it will bring to the area, an "ordinary and necessary" function of a railroad cannot be stopped by a nuisance verdict under state law.

"Obviously, we're disappointed; we would have preferred to win on both questions," lead county attorney Edward "Skip" Kazmarek said.

"There is a question in this state about how far a railroad can go damaging persons and property merely because they're a railroad.

"The jury said, as I understand it, 'Yes, this will hurt people, but it's the railroad.'"

An appeal is likely.

In a post-verdict conference with attorneys, at least two jurors said if they had known their verdict was a win for Norfolk Southern, it could have gone very differently.

"We thought it was a plaintiff decision," juror Eileen Hilburn said. "Had we known that [the decision was a win for Norfolk Southern], it probably would have been a different verdict."

Attorneys for Norfolk Southern said they were ecstatic with the decision, and they hope the verdict will force opponents of the facility to rethink their strategy of trying to derail it.

"It simply means the county's attempt to stop a legal project has failed, and we hope the county will return to dealing with Norfolk Southern like it did when it encouraged Norfolk Southern to build its facility in Austell," lead Norfolk Southern attorney Keith Reisman said.

"That means working with the railroad on any effects that the facility may have on any of its neighbors and includes stopping its obstructionist behavior against a legal and proper business."

The verdict also cleared former project manager and Cobb County resident Larry Etherton of any wrongdoing.

Etherton, director of engineering for Norfolk Southern, was the only person sued individually by Cobb and Douglas counties, the city of Powder Springs and the Clarkdale Neighborhood Association.

"Larry Etherton never should have been sued

See Railyard, Page 3A

Railyard

Continued from Page 1A

individually and that was evidenced by the jury asking for an individual verdict, so it could exonerate him, but this verdict exonerates all defendants," Marietta attorney Matt Flournoy, of Flournoy & Morgan, said.

Flournoy said Etherton potentially could have been individually liable for any damages.

Following the verdict, Powder Springs Mayor Brad Hulseley vowed to continue fighting the "piggy-

back facility" under construction on 820 acres off Thornton Road.

"[The jury is] saying 'yes, it's going to be a nuisance, but just accept that,' and we don't accept that," Hulseley said.

"I'm the mayor of the city that's been handed a bad deal, but there's nothing we can do except keep fighting. Powder Springs won't stand for this."

The jury resumed its deliberations Monday, after a five-day hiatus granted by the judge earlier in the trial so jurors could deal with personal obligations.

Before being dismissed last Tuesday, jurors told Ms. Staley they were hopelessly deadlocked,

divided 9-3 on the two questions, but in an effort to compromise, jurors said nine of them switched their vote on whether the facility is the "ordinary and necessary" operations of a railroad.

Three jurors changed their mind on the nuisance question.

"The majority of the jury did not think [the freight yard] was 'ordinary and necessary' to the operation of the railroad, but it was a compromise, and we thought ruling it would be a nuisance was going to stop it," juror Christin Farrar said in the post-verdict conference with attorneys.

"My heart is racing now"