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July 1, 2015

238738

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
July 1, 2015
Part of
Public Record

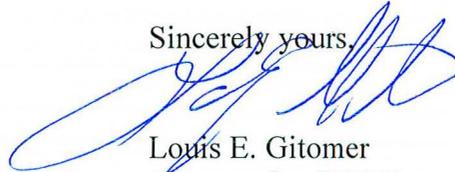
**Re: Docket No. FD 35817, JGB Properties, LLC-Petition for Declaratory
Order**

Dear Ms. Brown:

CSX Transportation, Inc. is efileing a Reply in opposition to the Petition for Reconsideration and Clarification filed by JGB Properties, LLC on June 11, 2015.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

REPLY TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF JGB
PROPERTIES, LLC

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Attorneys for: CSX TRANSPORTATION, INC.

Dated: July 1, 2015

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SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

REPLY TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF JGB
PROPERTIES, LLC

CSX Transportation, Inc. (“CSXT”) opposes the Petition for Reconsideration and Clarification (the “Petition”) filed by JGB Properties, LLC (“JGB”) on June 11, 2015. CSXT respectfully requests the Surface Transportation Board (the “Board”) deny JGB’s request for reconsideration/clarification of the Board’s May 22, 2015 decision (“May Decision”) which denied JGB’s request for a declaratory order and confirmed that the New York State Court decisions are not preempted. If, however, the Board chooses to provide clarification to JGB on the May Decision, the Board should confirm that reconstruction of the track can take place in accordance with the New York State Court decisions and that the once the track is replaced CSXT can operate over the easement to serve the properties as its predecessor did.

ARGUMENT

Under 49 CFR 1115.3, a petition for reconsideration can only be granted upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances, or (2) involves material error.

JGB claims that there was material error in the May Decision. JGB asserts that the Board did not address three of the issues JGB sought guidance on in its Petition for Declaratory Order and that failure to address these issues was material error. Specifically, JGB sought rulings that:

more than 50 years ago a certificate of public convenience and necessity was required to construct and operate tracks that were constructed by non-carriers pursuant to an easement granted over JGB's predecessor's property; the construction and use of the tracks without prior agency approval was unlawful and subject to civil penalties; and that a cease and desist order is appropriate to prevent the tracks that were removed by JGB, without permission or agreement, from being reinstalled. JGB argues that these issues must be addressed before Ironwood L.L.C. ("Ironwood") and Steelway Realty Corporation ("Steelway") can proceed with reinstalling track on their lawful easement. JGB was and is trying to use the Board's preemption as a shield for JGB's own bad actions in unlawfully removing the track and to circumvent the State Court decisions imposing liability on JGB.

Under 5 U.S.C. §554(e) and 49 U.S.C. §721(a), the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. *See InterCity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). It stands to reason, that if the Board has discretionary authority in determining whether to issue a declaratory order, then the Board is not be obligated to provide guidance on every issue raised, especially if those issues do not need to be resolved in order to address the crux of the request – here the preemption issue. The controversy before the Board was whether the New York State Court decisions were preempted by the ICCTA. The Board fully addressed the controversy and concluded that the status of the track and the Board's jurisdiction over the track, would not affect whether the State court decisions were preempted. By not addressing the nature of the track at issue, the Board did not cede its exclusive jurisdiction to regulate acquisition and construction to the State. Rather the Board acknowledged that the State Court decisions requiring

JGB to compensate for its improper removal of the track, were not preempted by the Board's jurisdiction regardless of the status of the track located on the easement.

Whether Board authority was required in the first instance to build the track,¹ is distinct from whether the necessary state law property interest for an easement exists. See *V&S Railway. Allegheny Valley Railroad Company—Petition for Declaratory Order—William Fiore*, STB Docket No. FD 35388 (STB served Apr. 25, 2011) (“the size and extent of a railroad easement is a matter of state property law and best addressed by state courts”), and *MVC Trans. LLC—Acquisition Exemption—P&LE Prop., Inc.* STB Docket No. FD 34462 (STB served Oct. 20, 2004).

The Board need not determine the status of the track within the easement to acknowledge that the State Court decisions were not preempted by the Board's jurisdiction. JGB asserts that the Board must determine whether authority was required in the first instance before Ironwood can proceed with replacing the tracks illegally removed by JGB. JGB's assessment is not accurate. JGB labors under the false assumption that Ironwood and Steelway are rail carriers rather than property owners with tracks that serve their properties. As property owners, under the State Court decisions, Ironwood and Steelway have the right to replace improvements (in this case tracks) on their legal easement that were removed by JGB. JGB's actions alone caused the need to replace the track within the easement. Indeed, when natural disasters destroy railroad property, the railroads are allowed to rebuild the lines without Board authority.

Even if JGB were correct that the Board needed to determine the status of the track, it is clear from the history of the track, as fully explained in CSXT's Reply, that CSXT's predecessor did not need authority to operate over the track in the past and CSXT does not need authority to

¹ CSXT believes that this is industry track and Board approval is not necessary to replace track that was unlawfully removed.

operate over the track now. If Ironwood or Steelway choose to become common carriers and operate over the track,² they must come to the Board for authority but they do not need authority to replace track.

As the moving party, JGB has the burden to show that the track at issue was a railroad line within the Board's jurisdiction and that CSXT's predecessor did not have authority to operate over the railroad line. JGB did not meet its required burden. As discussed fully in CSXT's Reply, a certificate of public convenience and necessity is not required to operate over the tracks within the easement. The tracks at issue are clearly excepted track under 49 U.S.C. §10906 and therefore Board authorization is not needed for any potential construction or operation over the track. Even if the Board were to find that the track is no longer excepted track, Board authorization is not required for Ironwood to replace the track unlawfully removed by JGB or repair the existing track. Board authority is not required for repair work on existing track (e.g. a washout). *See Brazo River Bottom Alliance—Petition for Declaratory Order*, STB Docket No. FD 35781 (STB served Feb. 19, 2014) (construction of yard did not require Board authorization) and *Denver & R.G.W.R. Co.-Jt. Proj.—Relocation Over BN*, 4 I.C.C.2d 95 (relocation of existing track did not need Agency authorization).

Through the Petition, JGB continues its attempt to use the Board's jurisdiction as a shield for its bad behavior in unlawfully removing track from an existing easement. No matter the status of the track under the Board's jurisdiction, JGB violated the Board's rules by failing to seek Board authority to remove the track from its property. *Pinelawn Cemetery-Petition for Declaratory Order*, Docket No. FD 35468 (served April 21, 2015), slip op. at 11. The Board need not determine when or if the track requires authorization for operations to determine that

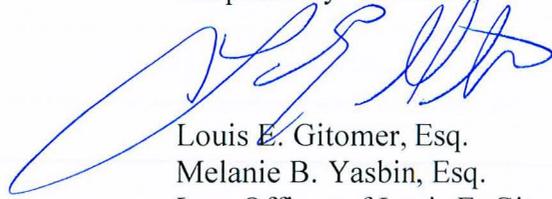
² CSXT does not believe that Ironwood or Steelway are common carriers or that they or their predecessor intended to provide rail service themselves.

the state court decisions (requiring JBG to compensate Ironwood because JBG unlawfully removed track from Ironwood's easement) are not preempted under the Board's jurisdiction.

CONCLUSION

CSXT respectfully requests that the Board deny JGB's Petition.

Respectfully submitted,



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Dated: July 1, 2015

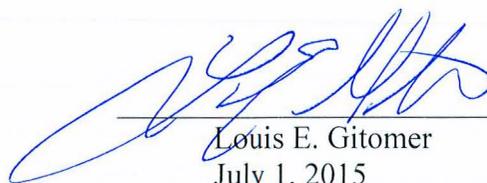
CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response in Docket No. FD 35817, *JGB*

Properties, LLC-Petition for Declaratory Order to be served electronically on:

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July 1, 2015