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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**JGB PROPERTIES, LLC – PETITION FOR**  
**DECLARATORY ORDER – WOODARD**  
**INDUSTRIAL RAILROAD OPERATIONS**  
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**STB Finance Docket No. 35817**

**COMBINED REPLY OF  
IRONWOOD, LLC AND STEELWAY REALTY CORPORATION  
TO THE PETITION FOR LEAVE AND  
THE SUR-REPLY OF JGB PROPERTIES, LLC**

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June 30, 2014



**I. The Board Should Deny JGB's Petition for Leave.**

As JGB admits,<sup>2</sup> the Board's rules prohibit the Sur-Reply. See 49 C.F.R. § 1104.13(c). Nonetheless, JGB asserts that the Board should grant the Petition for Leave and accept the Sur-Reply "[i]n the interest of fairness and a complete record." Petition for Leave at 2-3. JGB has not made any effort to show that this Board docket, which JGB itself created by filing its Petition for Declaratory Order, is in any way "unfair" to JGB. Similarly, JGB has not pointed to any gaps in the record or otherwise shown that the record is incomplete. Instead, the Sur-Reply represents merely an "effort to have the last word." FMC Wyoming Corp. v. Union Pacific Railroad Co., STB Docket No. 42022, slip op. at 1 (n. 2) (served Jan. 8, 1999). Given that there has been "no persuasive showing" that a waiver of 49 C.F.R. § 1104.13(c) is appropriate, the Board should deny the Petition for Leave. Ocean Logistics Management, Inc. v. NPR, Inc. and Holt Cargo Systems, Inc., STB Docket No. WCC-102, slip op. at 3 (served Jan. 14, 2000).

Examination of the Sur-Reply confirms that the Petition for Leave should be denied. The Board can evaluate for itself the decisions issued by the New York state courts to determine if those courts have intruded on issues where state regulation is preempted.<sup>3</sup> The Board does not need JGB's second attempt to interpret and characterize the state court decisions, nor does it need JGB's statement that it disagrees with the position of Ironwood, Steelway, and CSXT in order to rule on JGB's Petition for Declaratory Order. See Sur-Reply at 3-5.

The bulk of the Sur-Reply is simply a duplication of contentions previously made by JGB in its Petition for Declaratory Order regarding the status of the Sidetracks at issue and the "de facto" and/or "adverse abandonment" theory, with citation to largely the same authorities already

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<sup>2</sup> Petition for Leave at 2.

<sup>3</sup> JGB, Ironwood/Steelway, and CSX Transportation, Inc. have all submitted orders from the New York state courts to the Board.

included in the Petition for Declaratory Order. See Sur-Reply at 6-22. Such a “rehash” of previously-made arguments should be rejected. Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company, STB Docket No. 42068, slip op. at 3 (n. 7) (served April 19, 2002).

**II. If the Board Accepts the Sur-Reply, It Should Also Accept the Remainder of this Combined Reply.**

Nonetheless, if the Board grants JGB’s Petition for Leave and accepts the Sur-Reply into the record, the Board should also accept the response tendered by Ironwood and Steelway in the remainder of this Combined Reply. Under 49 C.F.R. § 1104.13, any party is entitled to respond to a petition for declaratory order. It would be contrary to the intent of § 1104.13 to allow the petitioner in such a situation to have the final word (by filing a sur-reply) and would effectively turn the petition for declaratory order into a self-granted Board proceeding with three rounds of evidence. It would also encourage future petitioners to refrain from making their best case until sur-reply. For these reasons, Ironwood and Steelway respectfully request that the Board accept the remainder of this Combined Reply into the record.

**III. Response to the Sur-Reply.<sup>4</sup>**

**A. The Board Can Evaluate the State Court Proceedings and the Relief Requested By JGB Without JGB’s Repeated Clarifications.**

JGB claims that the “core components” of the 2009 state court complaint (“Complaint”) of Ironwood and Steelway are “[c]learly...directed...at the construction and use of rail lines.” Sur-Reply at 4 (emphasis omitted). In support of this claim, JGB focuses upon the appearance of the words “use” and “maintenance” in the Complaint in a meager attempt to redefine the state court proceeding. Sur-Reply at 4. JGB is grasping at straws here. Ironwood and Steelway never

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<sup>4</sup> Ironwood and Steelway disagree with the Sur-Reply for the reasons set forth herein and also in the May 30th Reply previously filed by Ironwood and Steelway.

asked the court to mandate or regulate “use” of the Sidetracks. Instead, Ironwood and Steelway sought to preserve their rights to benefit from the rail easement after JGB unlawfully removed the Sidetracks on its property. In their Complaint, Ironwood and Steelway merely stated that the purpose of the easement was geared toward railroad tracks as opposed to some other purpose, such as a pipeline or a wireline. See, e.g., Complaint at ¶ 16 (“Pursuant to the Railroad Easements, easements for rail purposes exist across the JGB Property.”).<sup>5</sup> Ironwood and Steelway also requested a “judicial declaration...that the Railroad Easements are valid and entitle Plaintiffs to the continued right to use and benefit of the rights of way over the servient estate.” Complaint at ¶ 40.

JGB apparently interprets the word “maintenance” in the Complaint to refer to repair of a railroad line. However, in the context of a state property law dispute between non-railroads, the word is more appropriately understood at a general level, and Ironwood and Steelway employed the word “maintenance” to mean the right to continue. In Black’s Law Dictionary, the first two definitions of maintenance are “[t]he continuation of something, such as a lawsuit” and “[t]he continuing possession of something, such as property.”<sup>6</sup> Accordingly, the state court proceedings are not about railroad construction, maintenance, or operations on the Sidetracks, but about the underlying property right that makes the Sidetracks possible. Moreover, JGB has still provided no support for its position that preemption can be used to defeat the possibility of rail service.<sup>7</sup>

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<sup>5</sup> The Complaint is attached as Exhibit 3 to the Petition for Declaratory Order.

<sup>6</sup> BLACK’S LAW DICTIONARY 965 (7th ed. 1999).

<sup>7</sup> See, e.g., Island Park, LLC v. CSX Transportation, 559 F.3d 96, 104 (2nd Cir. 2009) (“interference with rail transportation must always be demonstrated” for ICCTA preemption to exist). See also Ironwood/Steelway Reply at 8-16 (filed May 30, 2014).

**B. The Sidetracks Are Not Common Carriage Rail Lines.**

JGB presents a truncated view of agency and court authority in its attempt to show that the Sidetracks at issue are common carrier rail lines. Sur-Reply at 6-20. For example, JGB fails to acknowledge the tenant use test that the Board uses to determine if track is excepted under 49 U.S.C. § 10906.<sup>8</sup> JGB claims that Ironwood and Steelway rely on what JGB calls the “exemption test” set forth in Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266 (1926). Sur-Reply at 14. However, JGB is mistaken because Ironwood and Steelway did not even cite to Texas & Pacific. Instead, Ironwood and Steelway rely on the Board’s current tenant use test as described in cases such as Effingham II, Union Pacific and NYCEDC. See, e.g., Ironwood/Steelway Reply at p. 19-23 (filed May 30, 2014).

JGB also asserts that excepted track can only be built by a common carrier railroad (Sur-Reply at 13 and 16), but JGB has provided no clear authority supporting this assertion. In fact, the excepted track in NYCEDC was built by a non-railroad. See NYCEDC, slip op. at 1 and 7. See also NYCEDC Petition for Declaratory Order, STB Docket No. 34429, at p. 2 (filed Oct. 29, 2003) (stating that NYCEDC would construct the new track). In its May 30th Reply, Ironwood and Steelway cited to two other cases where excepted track was owned by a non-railroad, and there is no evidence in either case that a common carrier railroad built the excepted track and later transferred it to the non-railroad owner. See Ironwood/Steelway Reply at 20 (n. 24) (filed May 30, 2014).

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<sup>8</sup> See, e.g., Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, STB Docket No. 41986, slip op. at 4 (served Sept. 18, 1998) (“Effingham II”); Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, STB Docket No. 34252, slip op. at 3 (served Dec. 5, 2002) (“Union Pacific”); The New York City Economic Development Corporation – Petition for Declaratory Order, STB Docket No. 34429, slip op. at 6 (served July 15, 2004) (“NYCEDC”).

JGB claims that NYCEDC is not relevant precedent because it concerned “extension and reactivation of a line previously operated by the Staten Island Railroad” (Sur-Reply at 18), but fails to explain why these characteristics require ignoring the Board’s decision in that case. The property at issue in NYCEDC was owned by state and city governments, and the Staten Island Railroad (“SIRR”) line was previously abandoned. See NYCEDC, slip op. at 1-2. Once abandoned, a rail right-of-way is simply normal real property.<sup>9</sup> Moreover, NYCEDC was adding new track to the end of the former SIRR line; in other words, it was not simply rebuilding a prior SIRR line. See NYCEDC, slip op. at 1-2. See also NYCEDC Petition for Declaratory Order, STB Docket No. 34429, at Ex. B (p. 2-3) (filed Oct. 29, 2003).

In the Sur-Reply, JGB relies heavily on an older federal district court opinion known as New York Central Railroad Company v. Southern Railway Company, 226 F.Supp. 463 (N.D. Ill. 1964). Sur-Reply at 14-16. To the extent this decision relates to the dispute before the Board, it supports the position of Ironwood and Steelway. The court in New York Central found that certain track built by a shipper and railroad was not an extension of rail line requiring ICC authorization. 226 F.Supp. at 469. The court even hinted that the track at issue might be under Section 1(22) (akin to today’s 49 U.S.C. § 10906), which would contradict JGB’s theory that only common carrier railroads can build § 10906 track. See 226 F.Supp. at 468-469.

In any event, the New York Central opinion shows the obvious limitation of relying on 1964 precedent in this area of law. The court stated that, in determining whether track requires agency authorization, a key question is “whether the expenditure of funds by the carrier would be substantial.” 226 F.Supp. at 473. Additionally, the court stated another important consideration

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<sup>9</sup> See, e.g., Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, 3 STB 646, 652 (1998); Wisconsin Central Ltd. v. STB, 112 F.3d 881, 888 (7th Cir. 1997).

is whether the track construction would enable “destructive competition among carriers.” 226 F.Supp. at 474. JGB has made no effort to address either of these issues for the simple reason that they do not apply to the Sidetracks, which would not be re-built or maintained by CSXT and which would not result in rail competition.<sup>10</sup> These two considerations also reveal the antiquated legal regime on which the New York Central decision rested.

JGB appears to argue that Ironwood and Steelway can be common carriers even though CSXT is the railroad that would operate on the Sidetracks (Sur-Reply at 6), but this position is contrary to the tenant use test used by the Board and the fact that non-railroads can own excepted track.<sup>11</sup> Furthermore, the authority cited by JGB is inapposite. The Riverview Trenton quotation in footnote 4 on pages 6-7 of the Sur-Reply addresses the intermediate nature of the shortline railroad’s operations, where the shortline did not directly serve either the ultimate origin or the ultimate destination of a shipment. The quotation does not support the position advocated by JGB. Moreover, the shortline railroad in Riverview Trenton falls within the Effingham scenario where the shortline is a common carrier because the track on which it operates is its entire line of railroad. This situation does not exist with respect to the Sidetracks. See, e.g., Ironwood/Steelway Reply at 19-20 and 24 (filed May 30, 2014).

**C. Adverse Abandonment is Not Warranted.**

JGB also uses its Sur-Reply to repeat its “de facto” and/or adverse abandonment theory. Sur-Reply at 20-22. The Board should reject these theories. The de facto abandonment doctrine is discredited except for the narrow class of cases where a line has been severed from the

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<sup>10</sup> See, e.g., Ironwood/Steelway Reply at 20-23 (filed May 30, 2014).

<sup>11</sup> See, e.g., Ironwood/Steelway Reply at 20 (n. 24) (filed May 30, 2014).

national rail network by a separate, prior abandonment authorized by the Board.<sup>12</sup> As for adverse abandonment, JGB's position requires assuming that a common carriage rail line exists – which it does not. In fact, the adverse abandonment authority cited by JGB was based on a shortline railroad that fit squarely into the Effingham scenario – the track at issue was its entire rail line, so the track could not be excepted track under today's § 10906 or otherwise beyond the ICC's authorization power. Modern Handcraft, Inc. – Abandonment in Jackson County, MO, 363 ICC 969, 973 (1981). JGB treads no new ground here, and Ironwood/Steelway have already demonstrated that neither the law nor the facts support JGB's extraordinary request for adverse abandonment. See, e.g., Ironwood/Steelway Reply at 25-26 (filed May 30, 2014).

#### **IV. Conclusion.**

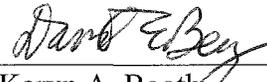
The Board should deny the Petition for Leave because JGB has not shown that a waiver of the relevant regulation is appropriate. The Sur-Reply reveals that JGB simply wants a second “bite at the apple” to try and save its ill-fated Petition for Declaratory Order. Nonetheless, if the Board accepts the Sur-Reply into the record, it is only fair that Ironwood and Steelway should likewise have the opportunity to make a second filing, and the Board should accept this submission of Ironwood and Steelway.

As explained in this Combined Reply and also in the May 30th Reply filed by Ironwood and Steelway, the Board should reject JGB's Petition for Declaratory Order as unwarranted and contrary to law. The New York state courts have appropriately addressed whether a valid easement exists under state property law, an action that is not within Board jurisdiction. Consequently, no preemption exists. The Petition for Declaratory Order should be denied.

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<sup>12</sup> See, e.g., Honey Creek Railroad, Inc. – Petition for Declaratory Order, STB Docket No. 34869, slip op. at 6 (served June 4, 2008).

Respectfully submitted,



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June 30, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of June 2014, I served a copy of the foregoing upon counsel for the parties listed below by U.S. first-class mail, postage prepaid. Additionally, counsel for Petitioner JGB and Respondent CSXT were both served via electronic mail.

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