



**ASSOCIATION OF AMERICAN RAILROADS**  
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November 27, 2013

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Office of Proceedings  
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Part of the Public Record

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: STB Docket No. FD 35781, *Brazos River Bottom Alliance – Petition for Declaratory Order – in Robertson County, TX*

Dear Ms. Brown:

On October 23, 2013, Brazos River Bottom Alliance filed a petition seeking a declaratory order in the above captioned proceeding. Union Pacific Railroad Company replied in opposition on November 13, 2013.

By this letter, the Association of American Railroads seeks leave to file comments in this proceeding. The scope of the Board's licensing authority for the construction of railroad facilities is of significant importance to the freight rail industry. Consideration of the AAR's comments in this matter will not cause any delay or prejudice any party. Attached, please find the AAR's comments for filing.

Respectfully submitted,

Timothy J. Strafford  
Counsel for the Association of  
American Railroads

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35781

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BRAZOS RIVER BOTTOM ALLIANCE  
– PETITION FOR DECLARATORY ORDER –  
IN ROBERTSON COUNTY, TX

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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November 27, 2013

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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**Introduction**

On October 23, 2013, Brazos River Bottom Alliance (“BRBA”) filed a petition seeking a declaratory order that would apply the Surface Transportation Board’s (“Board”) licensing authority to the construction of a classification yard. In so doing, BRBA asks the Board to overturn nearly 100 years of judicial and agency precedent and subject track used for switching freight cars to the prior approval requirements of 49 U.S.C. § 10901. BRBA also seeks discovery and injunctive relief in its petition. Union Pacific Railroad Company (“UP”) replied in opposition on November 13, 2013.

The Association of American Railroads (“AAR”) has a strong interest in the proper application of the Board’s licensing authority under the Interstate Commerce Act, as amended. Consistent application of the law towards the construction of rail facilities provides the certainty necessary to attract capital and allow railroads to invest in the infrastructure necessary for a fluid North American rail system. Accordingly, the AAR submits these comments to express that the law is clear that the construction of classification yards is not subject to the prior approval

requirements of 49 U.S.C. § 10901. Moreover, the AAR submits that the institution of proceedings based on BRBA's petition would unnecessarily create uncertainty and potentially chill investment in the rail infrastructure.

## Discussion

### I. The Law Is Clear That The Construction of Classification Yards Is Not Subject to the Prior Approval Requirements of 49 U.S.C. § 10901

While it is well established that the construction of a railroad line requires Board approval under 49 U.S.C. § 10901, it is equally well established that the construction of yard track does not require such approval pursuant to 49 U.S.C. § 10906. So called "excepted" track – "spur, industrial, team, switching, or side" track – is excluded from the Board's licensing authority. To constitute an extension of a railroad line subject to section 10901 licensing, the purpose and effect of the new trackage must be "to extend substantially the line of a carrier into new territory," *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 278 (1926). That is,

Track segments which are intended to be used to carry *through trains* between points of shipment and delivery, particularly those segments which extend a railroad's service into a new territory, must be approved by the [Board] pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between two points of shipment and delivery are exempted from the requirements of section 10901 (a) by section 10907(b) [now section 10906].

*Nicholson v. I.C.C.*, 711 F.2d 364 (1983) (emphasis added).<sup>1</sup>

Classification yards fall squarely in the latter category of excepted track. Classification yards, like the proposed UP Hearne Yard at issue in this proceeding, are used for switching operations that are incidental to the through movement of trains between two points on a carrier's network. The AAR is unaware of any instance where the construction of a classification yard has

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<sup>1</sup> It should be noted that, in fact, such track is not beyond the Board's jurisdiction. Instead, it is excluded from the Board's licensing authority under Chapter 109 of Title 49 of the U.S. Code.

ever been found to be subject to section 10901. *See, e.g., Nicholson v Missouri Pacific R.R.*, 366 I.C.C. 69, 73-74 (finding “no instance in which the Commission has found that the construction of a classification yard – or of any other yard – to require Commission approval under section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.”). Tracks, such as classification yards like the one proposed by UP,<sup>2</sup> that “do not penetrate or invade a new market, but simply augment the capacity of the existing main line operations” fall squarely within the section 10906 exception. *Union Pacific RR Co. – Petition – Rehabilitation of MO-KS-TX RR*, 3 S.T.B. 646, 651 (1998).

The courts have clearly held for nearly 100 years that Congress intended to include within the prior approval requirements only “so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all that mass of “tracks” (as distinguished from “lines”) naturally and necessarily designed and used for loading, unloading, switching and other purposes connected with and incidental to, but not actually and directly used for such transportation service.” *Detroit & M. Ry. V. Boyne City, G & A.R.R.*, 286 F.540, 546 (E.D.Mich.1923). *See also Georgia S. & Fla. Ry. V. Duval Connecting R.R.*, 324 F.2d 801, 802 (5<sup>th</sup> Cir. 1963) (holding without explanation that ICC approval was not required for the construction of a classification yard).

The fact that classification of freight and switching of rail cars is necessary to build trains and operate a railroad does not somehow pull all yards within the orbit of section 10901. To the contrary, track necessary for such operations are exactly what is intended to be excluded from the Board’s licensing authority by section 10906. *See, e.g., Brotherhood of Locomotive Engineers v.*

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<sup>2</sup> *See* UP Reply at 5-7 (filed Nov. 13, 2013).

*U.S.*, 101 F.3d 718, 730 (1996) (“Although Chicago Central’s operation over Union Pacific’s track is, in a literal sense, necessary to move the cars from their starting point to their destination, the operation is not part of a train’s through movement, but instead is an operation taking place just before or just after the train’s passage.”). *See also Illinois Commerce Comm’n v. ICC*, 779 F.2d 1270, 1273 (7<sup>th</sup> Cir. 1985).

## **II. Institution Of A Proceeding Would Create Uncertainty Where There Currently Is None.**

The Board is authorized to issue a declaratory order “to terminate a controversy or remove uncertainty. “ 5 U.S.C. 554 (e). Opposition to a proposed construction project, without any legal foundation, does not rise to the level of a case or controversy that would satisfy this standard. Instead, where the governing law and its application are clear, the Board should deny a petition for declaratory order without instituting further proceedings. *See, e.g., James Riffin – Petition for Declaratory Order*, FD 34997 (STB served May 2, 2008) (declining to institute a declaratory order proceeding when the law was clear). Doing so would ensure that the Board does not unnecessarily create uncertainty as to the regulatory regime surrounding the construction of rail facilities.<sup>3</sup>

In addition, that uncertainty could chill essential future investments to enhance service to customers. The railroad industry has reinvested \$525 billion dollars back into the North American network since 1980, including \$25.5 billion in 2012, to meet shipper demand for transportation services. This investment is predicated on a consistently applied regulatory framework that allows freight railroads to plan their investments and regulatory compliance

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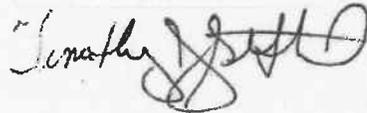
<sup>3</sup> Moreover, as UP has argued in its reply, the Board should not allow its processes be used for fishing expeditions by allowing discovery in instances, such as this one, where there is no legitimate case or controversy. Discovery is not usually available in declaratory order proceedings in any event. *See, e.g., Borough of Riverdale—Petition for Declaratory Order*, FD 35299, slip op. at 5 (STB served Aug. 5, 2010); *City of Alexandria—Petition for Declaratory Order*, FD 35157, slip op. at 2-3 (STB served Feb. 17, 2009).

efforts. Investment into new or expanded classification yards allows railroads to more effectively serve their customers by enhancing fluidity of their networks and reducing delays.

### Conclusion

Based upon the foregoing, the Board should deny BRBA's petition.

Respectfully Submitted,



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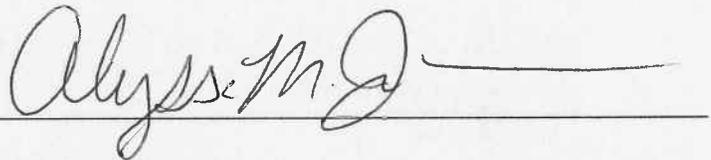
*Counsel for the Association of  
American Railroads*

## CERTIFICATE OF SERVICE

I, Alyssa M. Johnson, hereby certify that on this 27<sup>th</sup> day of November 2013, I served by first-class mail, a copy of the Association of American Railroads' comments on the parties of record at the addresses below:

Jeremy M. Berman  
Union Pacific Railroad Company  
1400 Douglas Street, Stop 1580  
Omaha, NE 68179

James B. Blackburn  
Blackburn & Carter  
4709 Austin Street  
Houston, TX 77004

A handwritten signature in cursive script, reading "Alyssa M. Johnson", is written over a horizontal line. The signature is written in black ink and includes a long horizontal stroke extending to the right.

Alyssa M. Johnson