

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board did not err in its May 2015 decision, which declined to address whether tracks laid in permanent rail easements across a landowner’s property in an industrial park are unauthorized railroad lines. However, in the interest of administrative efficiency—in particular, to avoid the possible need for further action by the parties before the Board on this issue—the Board now determines that the track at issue is excepted track under 49 U.S.C. § 10906 that is served by a rail carrier not affiliated with any of the parties to the land dispute.

Decided: December 7, 2015

Petitioner JGB Properties, LLC (JGB), asks the Board to reconsider one aspect of the agency’s decision served May 22, 2015 (May 2015 Decision), which denied JGB’s petition for declaratory order. In that decision, the Board determined that a lawsuit in the New York state courts, which resulted in a judgment that JGB unlawfully removed tracks from its property in violation of a permanent easement for railroad tracks,² is not preempted by the Board’s exclusive jurisdiction over railroad transportation under 49 U.S.C. § 10501(b). The Board found it unnecessary to determine whether the tracks across JGB’s property are unauthorized railroad lines subject to 49 U.S.C. § 10901, as JGB argued, rather than excepted track under 49 U.S.C. § 10906 or private track outside the Board’s jurisdiction, because a ruling on that issue would have had no bearing on whether the decisions of the New York courts involving the property at issue, including the findings based on state property law, should stand.

JGB claims that the Board committed material error by not determining the status of the tracks across its property. It asserts that the two sets of tracks crossing JGB’s property are lines of railroad under 49 U.S.C. § 10901 that should have been authorized by the agency before they

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See Ironwood, L.L.C. v. JGB Props., LLC, 14 N.Y.S.3d 248 (N.Y. App. Div. 2015) (upholding a punitive damage award of \$300,000 in light of finding that JGB’s conduct in removing the track “rose to the level of a wanton, willful or reckless disregard of plaintiff[’s] rights relative to the easement”).

could be installed or operated and that any attempts to reinstall or operate tracks must be first authorized by the Board.

As discussed below, the Board finds that it did not err, in declining to determine the status of the tracks in the May 2015 Decision. The Board was well within its discretion in focusing on the preemption issue that was at the heart of JGB's petition for declaratory order, as opposed to the track status issue, which appeared to have no immediate practical significance. However, in the interest of administrative efficiency—in particular, to avoid the possible need for further action by the parties before the Board on this issue—the Board now determines that the tracks across JGB's property are excepted tracks under 49 U.S.C. § 10906.

BACKGROUND

This case involves properties located in the Syracuse-Woodard industrial park/commercial complex (sometimes referred to as the “Woodard Industrial District”), located adjacent to CSX Transportation Inc.'s (CSXT) St. Lawrence Subdivision in Clay, N.Y., a suburb of Syracuse. The Woodard Industrial District was developed in the mid-1960s when the St. Lawrence Subdivision was owned by the New York Central Railroad (N.Y. Central).

In the mid-1960s, Woodard Industrial Corporation (Woodard), developer of the Woodard Industrial District, sold two parcels to D. H. Overmyer Company, Inc. (Overmyer), and granted to Overmyer two permanent easements for railroad rights-of-way over the property that Woodard retained. The easements gave Overmyer's northern and southern parcels access across Woodard's retained property to reach the St. Lawrence Subdivision on the other side. The record indicates that Overmyer laid the tracks at issue on the easements in about 1966.

There is no evidence that Overmyer itself conducted any rail operations in the Woodard Industrial District. It is undisputed that the only rail carriers that have served the Woodard Industrial District are N.Y. Central and its successors, most recently CSXT. The record reflects that the tracks on the rail easements were used to move boxcars between warehouses on the Overmyer properties and the St. Lawrence Subdivision, but most of the rail traffic ceased over a decade ago.

Steelway Realty Corporation (Steelway) and Ironwood, LLC (Ironwood) are subsequent purchasers of the Overmyer properties and successors to the rail easements. In 2005, JGB purchased Woodard's retained property, which lies between the CSXT mainline and the properties owned by Steelway and Ironwood and is subject to the preexisting rail easements. The May 2015 Decision describes the properties and track arrangements in detail and includes a map that depicts the configuration of the tracks over JGB's property.

In 2009, JGB removed a section of track that crossed its property, terminating Ironwood's ability to receive CSXT rail service. That event led to litigation in the New York state courts, which resulted in findings that JGB had maliciously removed track and that

Ironwood and Steelway possess permanent right-of-way easements. The state trial court ultimately found JGB liable for compensatory and punitive damages and issued an injunction to prevent JGB from interfering with the easements, and the decision was upheld on appeal. See May 2015 Decision, slip op. at 2-3 (describing New York litigation).

After losing in New York state court, JGB filed a petition for declaratory order with the Board on April 9, 2014. JGB asked the Board to: (1) declare that the tracks on JGB's property are common carrier railroad lines for which approval from the former Interstate Commerce Commission (ICC) should have been sought under the predecessor to 49 U.S.C. § 10901 prior to construction in the mid-1960s; (2) find that any past or present initiatives to construct or operate the trackage, absent authorization from the Board, should be prohibited, subjected to civil penalties under 49 U.S.C. § 11901, and halted through a cease and desist order; and (3) find that § 10501(b) preempts the state court from taking any actions that govern, regulate, or impose penalties or damages associated with the construction, acquisition, operation, or use of the tracks across JGB's property. Alternatively, JGB asked that, if the Board finds that the tracks on JGB's property are authorized under the statute, the Board treat its filing as an application for adverse abandonment (while seeking "exemption from the formal application requirements" for adverse abandonment).

CSXT opposed JGB's petition. In addition to opposing JGB's claim of preemption, CSXT argued that the tracks are excepted from Board licensing under 49 U.S.C. § 10906, rather than railroad lines under § 10901.³ Ironwood and Steelway also jointly opposed the petition. They argued, among other things, that the tracks are either private track not subject to the Board's jurisdiction or excepted track under § 10906.

In the May 2015 Decision, the Board denied JGB's petition for declaratory order. The Board found that the parties' dispute is grounded in state property law, and that JGB's petition was fundamentally an attempt to invoke federal preemption to avoid the consequences of the state court's action. Id., slip op. at 7. Furthermore, the Board concluded that the lawsuit and resulting state court decisions, which upheld the validity of the easements and awarded damages

³ To constitute an extension of railroad line subject to § 10901, the purpose and effect of the trackage must be to "extend substantially the line of a carrier into new territory." Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4 (STB served Feb. 19, 2014). Excepted track under 49 U.S.C. § 10906, on the other hand, consists of spur, industrial, team, switching, or side track; such track augments the capacity of an existing line's operations. The construction, acquisition, operation, abandonment, and discontinuance of spur, industrial, team, switching, or side track are under the Board's exclusive jurisdiction pursuant to 49 U.S.C. § 10501(b)(2) but excepted from the Board's licensing authority under 49 U.S.C. § 10906. Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188-89 (10th Cir. 2008).

and injunctive relief against JGB for wrongfully removing track, did not unduly interfere with rail transportation and were not preempted by § 10501(b). Id.

The Board also concluded that it was not necessary to resolve whether the tracks on JGB's property are unauthorized railroad lines subject to § 10901, excepted track under § 10906, or private track. Id. The Board explained that a determination on the status of the tracks would have no bearing on the state court's finding that Ironwood and Steelway have valid railroad easements across JGB's property. The Board further found that, even if it were to find that the tracks on JGB's property are unauthorized railroad lines, as JGB claimed, that finding would not entitle JGB to resort to self-help by removing the tracks. Id.

On June 11, 2015, JGB filed a petition for reconsideration and clarification, arguing that the Board committed material error in the May 2015 Decision by ignoring what JGB characterizes as the "fundamental question": whether the tracks on its property are properly authorized common carrier lines of railroad, and whether the removed tracks can be reconstructed and used without prior authorization from the Board. (JGB Pet. for Recon 3.)⁴ JGB states that the answer to this question is within the Board's sole jurisdiction and does not require that the agency overrule any state court rulings.⁵

On July 1, 2015, Ironwood and Steelway jointly filed a reply, and CSXT filed its reply, opposing reconsideration. CSXT asserts that there was no material error in the May 2015 Decision and that the Board did not need to rule on the status of the track in this proceeding. CSXT states that Ironwood and Steelway, as property owners, have the right to replace tracks on their legal easements, regardless of the regulatory status of the tracks. CSXT adds that, in any event, JGB failed to demonstrate that the removed track was a railroad line, or that CSXT's predecessor lacked authority to operate over the track. Accordingly, if the Board chooses to provide clarification to JGB, CSXT asserts that the agency should find that the track is excepted track under 49 U.S.C. § 10906 and confirm (1) that reconstruction and repair of the track can take place without Board authorization and in accordance with the New York state court decisions and (2) that, once the track is in place, CSXT can operate over it as its predecessors did. Ironwood and Steelway offer similar arguments opposing reconsideration and assert that

⁴ JGB claims that the Board failed to address other issues it had raised, but all of JGB's requests for a further Board determination arise out of its claim that the tracks on its property are part of an unauthorized common carrier railroad line.

⁵ On November 10, 2015, United States Representative John M. Katko filed a letter asking the Board to give full and fair consideration to JGB's petition for reconsideration. CSXT and JGB responded to Congressman Katko's letter on November 24 and November 30, 2015, respectively.

JGB wants the Board to sanction vigilante track removal and reverse the burden of proof, forcing the harmed easement holder to obtain a Board order to protect its rail easement.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008).

Lack of Material Error. JGB's petition for reconsideration claims material error in the May 2015 Decision. In particular, JGB alleges that the Board had a regulatory obligation to answer its questions regarding the regulatory status of the track on its property and did not provide an adequate explanation for its refusal to do so. We disagree.

The Board did not err by declining to determine the status of the tracks across JGB's property or the questions stemming from such a finding. The Board has broad discretion as to whether to institute a declaratory order proceeding, and to choose not to do so as long as it provides an adequate explanation. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). As the Board explained in the May 2015 Decision, slip op. at 7, the crux of JGB's petition was an attempt to invoke federal preemption to avoid the consequences of the state court's adverse rulings.⁶ The Board decided to address the preemption issue and found that the state court proceeding did not unduly interfere with rail transportation and hence was not preempted.

The Board's decision not to determine the status of the tracks was reasonable and well within its discretion. As the Board explained in the May 2015 Decision, slip op. at 7-8, resolving that issue would have no bearing on the state court's application of state property law to find that valid railroad easements exist over JGB's property. Moreover, even if the tracks were unauthorized rail lines, as JGB claimed, that finding would not entitle JGB to resort to self-help by removing the tracks. Thus, the Board's May 2015 Decision was not a deferral to state courts to decide issues within our exclusive jurisdiction, as JGB claims, but rather was a decision not to address matters that the Board viewed as peripheral to JGB's petition for declaratory order.

Additionally, we need not determine the status of the track before it can be replaced. Track repair or replacement does not require the Board's authorization, even for track that

⁶ JGB objects to the Board's characterization of its actions. However, JGB did not file its petition for a declaratory order until after the New York state courts found it liable for compensatory and punitive damages.

constitutes a rail line under § 10901.⁷ In this case, track replacement will simply restore the status quo to what it was prior to JGB's removal of a track segment, which the New York courts found was unlawful and undertaken in willful disregard of the property rights of Ironwood. To require a showing under these circumstances that track is properly authorized before it can be reinstalled would punish Ironwood for JGB's wrongful self-help in removing the tracks across its property. Such self-help would be inappropriate even if the track were an unauthorized line of railroad, which, as discussed below, it is not. Rather than unilaterally removing the track, JGB should have left it in place while petitioning the Board to determine the status of the track or the need for authority.

Track Status. While the Board declined in the May 2015 Decision to determine the status of the track, we will nonetheless address the track status issue here. As noted above, at the time the Board issued the May 2015 Decision, the Board viewed JGB's attempt to invoke federal preemption to avoid the consequences of the state court's determination as the primary issue raised by JGB's petition. The Board has not changed its view that the status of the track does not affect that issue. The determination of the track status, which is independent from the Board's reasoning in the May 2015 Decision, rests on considerations of administrative efficiency. The Board does not want to waste the parties' time and resources re-litigating an issue from the ground up when the current record already provides an answer; re-litigating this issue under the circumstances here would be unnecessary and inefficient.

For the reasons discussed below, we find that the tracks across JGB's property are excepted tracks under § 10906. As such, the tracks can be replaced and operations over the tracks serving the properties owned by Ironwood and Steelway can occur, all without a Board license.

There is no single test for what constitutes excepted track. In determining whether a particular track segment is railroad line or excepted track, the agency and courts consider the intended use of the track, the track's physical characteristics, its relationship to the rail system,

⁷ See R.J. Corman R.R./Pa. Lines—Constr. & Operation Exemption—in Clearfield Cty., Pa., FD 35116, slip op. at 5 (STB served July 27, 2009) (even where track has not been used recently, the owner of an active line may repair, replace, rehabilitate, or rebuild without obtaining Board authorization and environmental review); see also, e.g., Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal, FD 35424 (STB served June 14, 2011) (upgrading or relocating an existing line does not require Board authorization); City of Detroit v. Canadian Nat'l Ry., 9 I.C.C.2d 1208, 1214-20 (1993) (building a second mile-long rail tunnel 90 feet parallel to an old rail tunnel that it would replace did not require ICC authorization), aff'd sub nom. Detroit/Wayne Cty. Port Auth. v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995) (only additions and extensions to rail lines and relocations and improvements that invade new territory are rail line constructions that need to be authorized under § 10901).

and the history of the track. See ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co. (ParkSierra), FD 34126 et al., slip op. at 5 (STB served Dec. 26, 2001). The Board’s decisions have relied on certain indicia, including: the length of the line; whether it serves more than one shipper; whether it is stub-ended; whether it was built to invade another railroad’s territory; whether the shipper is located at the end of the line; whether there is regularly scheduled service; traffic volume; who owns and maintains the line; whether the line was constructed with light-weight rail; the condition of the line; what the line is used for (i.e., switching, loading, and unloading); and whether there are stations on the line.⁸

JGB asserts that the tracks across its property were contemplated in the mid-1960s to be common carrier lines under § 10901 and, therefore, were constructed and operated without the requisite authority from the agency. JGB argues that the warehouse facilities on the properties now owned by Ironwood and Steelway were designed to provide direct, independent rail access to various shippers/receivers located in the industrial park. As such, it claims the track is not private track outside the Board’s jurisdiction or excepted spur, industrial, team, switching, or side tracks within the meaning of § 10906. According to JGB, because Overmyer laid track with the design and intent that it be used as common carrier rail line, Overmyer became a common carrier and needed agency authority pursuant to Effingham Railroad—Petition for Declaratory Order—Construction at Effingham, Ill. (Effingham), 2 S.T.B. 606 (1997), aff’d sub nom. United Transportation Union-Illinois Legislative Board v. STB, 183 F.3d 606 (7th Cir. 1999).⁹ As such, JGB claims that subsequent owners of the tracks are also carriers. JGB notes that Ironwood maintains track under its agreement with CSXT and asserts that that is sufficient to confer upon Ironwood common carrier status.

We find that JGB has not met its burden of establishing that these tracks are or ever were railroad lines under § 10901. Rather, we find that the tracks are excepted tracks under § 10906.¹⁰

⁸ See ParkSierra; Chi. SouthShore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind., FD 33522 (STB served Dec. 17, 1998); S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty., Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991) (revoking abandonment exemption because trackage was excepted track).

⁹ In Effingham, the Board found that construction by Effingham Railroad Company (ERRC) of a stub-ended track for it to perform switching fell within the agency’s licensing authority, because “the larger purpose and effect of ERRC’s proposal is to construct what will constitute ERRC’s entire line of railroad to serve a new rail shipper.” Effingham, 2 S.T.B. at 609.

¹⁰ The tracks are not private tracks, as suggested by Ironwood and Steelway in their reply to JGB’s petition for a declaratory order (at 17). Private track is non-jurisdictional track that is owned, constructed, and maintained by a shipper to serve its own facility. Such track is used exclusively by the track’s owner for movement of its own goods, either by utilizing its own equipment or by contracting for service. B. Willis, C.P.A., Inc.—Pet. for Declaratory Order,

(continued . . .)

The record indicates that the tracks were constructed by the original property owner in the 1960s to reach the adjacent main line of CSXT's predecessor railroad and that the tracks that remain are owned and maintained by the property owners.¹¹ While JGB argues that the trackage was built with "the design and intent" that it would be used as a common carrier rail line, it offers no evidence to support this claim.¹² The record demonstrates that the tracks were built, not to invade the territory of another rail carrier, but rather to permit N.Y. Central (and later its successors) to reach shippers along the already-existing N.Y. Central main line. The only rail carriers that have ever served the industrial park are N.Y. Central and its successor railroads, most recently CSXT. The tracks are less than a half-mile in length, they are stub-ended, and they end at the warehouses owned by Ironwood and Steelway. There is no through or overhead service on the tracks. There is no evidence of regularly-scheduled service, and there are no stations. The configuration of the tracks makes them incapable of handling large volumes of traffic. These are classic indicia of excepted track.

Furthermore, the tracks here are not railroad lines under Effingham. JGB has offered no evidence that Overmyer, Ironwood, or Steelway ever committed to undertake legal or operational responsibility for the movements of railcars for others over the trackage or performed any rail operations on the trackage. There is also no evidence that CSXT or its predecessors operated under the control or direction of Ironwood, Steelway, or their predecessor, Overmyer, in providing rail service to the businesses at Ironwood's and Steelway's warehouses. In Effingham

(. . . continued)

6 S.T.B. 280, 281 (2002), aff'd, 51 Fed. App'x 321 (D.C. Cir. 2002). Here, however, Ironwood and Steelway would not be using the tracks exclusively for movement of their own goods, either by conducting rail service operations themselves or by contracting with CSXT for private carriage.

¹¹ JGB argues that excepted track can only be built by a rail carrier, but that is incorrect. See N.Y. City Econ. Dev. Corp.—Pet. for Declaratory Order (NYCEDC), FD 34429 (STB served July 15, 2004) (finding that track to be constructed by a third party and operated by a Class I railroad would be excepted track and that Effingham would not apply in that situation). JGB attempts to distinguish NYCEDC on the ground that that case involved an extension and reactivation of an abandoned line. That distinction, however, is irrelevant; the fact that NYCEDC involved reactivation of an abandoned line did not relate to the Board's determination of the track's status in that case.

¹² JGB claims that the trackage cannot be excepted track because it is available to all of the shippers in the warehouse district. But track with multiple shippers can qualify as excepted track under § 10906 if it is ancillary to a main line. Excepted industrial track may serve multiple shippers. Great N. Ry. Aban., 247 I.C.C. 407, 408 (1941); See also S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty, Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991).

and the other cases¹³ JGB relies on to support its argument, the entities that built the tracks took affirmative steps that unambiguously established their intent to undertake or be legally responsible for the movement of rail cars for others. By contrast, JGB has provided no evidence that Overmyer, Ironwood, or Steelway were anything other than owners/developers of portions of an industrial park receiving service from an adjacent main line.¹⁴

Conclusion. The Board did not materially err in declining to initially determine the nature of the track at issue, having reasonably explained the reasons for not doing so. However, in an effort to resolve ultimately the parties' dispute and avoid the possible need for further action by the parties before the Board on this issue, we conclude here that the tracks across JGB's property are excepted track under § 10906. As such, their construction, reinstallation, and operation are under the Board's exclusive jurisdiction, see 49 U.S.C. § 10501(b)(2), but require no Board license. 49 U.S.C. § 10906; Port City, 518 F.3d at 1188-89.

It is ordered:

1. JGB's petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

¹³ Bulkmatic R.R.—Acquis. & Operation Exemption—Bulkmatic Transp. Co., FD 34145 et al. (STB served Nov. 19, 2002); Tex. Cent. Bus. Lines Corp.—Operation Exemption—MidTexas Int'l Ctr., FD 33997 (STB served Sept. 20, 2002); Chi. Rail Link, L.L.C.—Lease & Operation Exemption—Union Pac. R.R., FD 33323 (STB served Sept. 2, 1997).

¹⁴ Ironwood's and Steelway's mere act of leasing their track in the industrial park complex to CSXT so that CSXT could provide rail service to shippers on Ironwood's and Steelway's properties does not confer any common carrier obligation on Ironwood or Steelway. Sierra R.R. v. Sacramento Valley R.R., NOR 42133, slip op. at 4 (STB served Apr. 23, 2012) (citing Wis. Cent. v. STB, 112 F.3d 881 (7th Cir. 1997)).