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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY OF JGB PROPERTIES, LLC TO REPLIES OF IRONWOOD,
LLC/STEELWAY REALTY CORPORATION AND CSX TRANSPORTATION,
INC. TO PETITION FOR DECLARATORY ORDER**

Peter A. Pfohl
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036
Telephone: (202) 347-7170
Facsimile: (202) 347-3619
pap@sloverandloftus.com

*Attorneys for Petitioner
JGB Properties, LLC*

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INTRODUCTION

Ironwood/Steelway spend much of their reply engaged in diversionary tactics/creation of a “straw man.” In this respect, in one breath, Ironway/Steelway assert that this Board should not consider the merits of JGB’s Petition because JGB has “deviant motivations” and that JGB’s petition amounts to a “vigilante self-help effort [] to interfere with state law easement rights” by attempting to use the authority of the Board as a means of determining state law property rights/easement validity matters. Ironwood/Steelway Reply at 4, 8-12. However, in the next breath, Ironwood/Steelway candidly acknowledge that, if JGB is right, and the tracks at issue are common carrier rail lines, then “a new common carrier rail line needs to do two separate tasks: obtain Board authorization and obtain the necessary property rights. The two tasks are distinct, and obtaining one does not eliminate the need to obtain the other.” Ironwood/Steelway Reply at 10. In this respect, even CSXT states that the Ironwood/Steelway’s state law actions “are intended to restore railroad transportation.” CSXT Reply at 4. Contrary to Ironwood/Steelway’s assertions (and those of CSXT), JGB’s Petition is directed, not at state property rights matters, but rather at railroad authorization matters (Ironwood/Steelway’s “task 1”). These are matters on which the Board has exclusive and plenary authority.

As JGB has demonstrated, the involved South Steelway Boulevard Line is a common carrier line that is unauthorized, and it seeks a Board determination on that issue, along with other related matters pertaining to the right of construction, acquisition, operation, use, and potential abandonment of the lines. As even Ironwood/Steelway

appear to acknowledge, the Board's determination of these matters is essential in determining the rights and obligations of the parties with respect to the subject lines, and ultimately the continuing encumbrance of JGB's property where there is no reasonable economic or other justification for the provision of current or future rail service. This is especially important here where the underlying property is poised to be utilized and developed for productive (non-rail) use, and where a purported landowner is using the façade of an operating railroad to effectively thwart national policy favoring the use of unused railroad right of ways for other useful public purposes.

I.
IRONWOOD/STEELWAY'S MISCARACTERIZATION OF
THE RELIEF REQUESTED BY JGB

Both Ironwood/Steelway and CSXT assert in their Replies to JGB's Petition that the Petition improperly seeks to interfere with a state court's determination of Ironwood/Steelway's property rights, a matter committed to state law and outside the Board's jurisdiction. Ironwood/Steelway Reply at 3-4 and 8-12; CSXT Reply at 13-14. This manifestly is not the case and is clearly a straw man. JGB is not asking the Board to interfere with property rights determinations; JGB readily concedes that the New York courts have jurisdiction over that issue. However, that does not end the inquiry.

The easement conveyance at issue was for a "right of way for a railroad spur track to be used and enjoyed in common with others."¹ The easement document, by

¹ Copies of the involved easement and deed are reproduced in Exhibits 3 and 4 to the Verified Statement of John F. Betak, Ph.D, ("V.S. Betak") submitted with JGB's Petition, and the easement is also reproduced in Attachment 1 to the Verified Statement of Richard J. Berry ("V.S. Berry") submitted with Ironwood/Steelway's Reply.

its terms, was permissive; it did not *require* the construction of railroad trackage on the property, but merely *authorized* such construction as a permitted use of the property – potentially by multiple users. The easement document says nothing about whether STB (or at the time, ICC) authority for such construction and the conduct of railroad operations thereon was (or is) required.

Additionally, contrary to their reply assertions, Ironwood/Steelway’s state court actions commencing in 2009 were *not* directed solely to property rights/easement validity matters. The involved complaint sought “declaratory judgment and damages based upon the unlawful interference with the *use* of the rights of way,” and further alleged that a declaration be made that Plaintiffs “are entitled to the continued *use and maintenance*” (Complaint ¶¶ 45-46) of the South Steelway Boulevard Line, and damages for “the cost to replace the Railroad tracks.” (Complaint at ¶ 51). *See* Petition at 8-9 and Exhibit 3 thereto. Clearly, these core components of South Steelway’s state court complaint are directed, not at *property rights*, but rather, at the construction and use of *rail lines*.

Under a long line of STB and court precedent (summarized at pp. 12-13 of JGB’s Petition), the STB has exclusive jurisdiction to authorize construction and use of railroad trackage that constitutes a common carrier line or lines. Ironwood/Steelway are misleading the Board when they assert that JGB is seeking to have the Board preempt state property law, and their contentions on reply that their state court action is unrelated to the construction, acquisition, operation, or use of the South Steelway Boulevard Line are belied by their own state court complaint language. Such line construction,

authorization, or use is not committed to state judicial or regulatory jurisdiction.² Thus, it is entirely appropriate for the Board to consider and determine the status of the trackage that crossed JGB's property using the easement for purposes of determining whether a state action mandating such construction (or, as here, reconstruction) and/or related monetary damages, or declaring the rights to use and operate a rail line, is permissible. That is the sum and substance of JGB's Petition – not whether the easement itself is valid.

Ironwood/Steelway further assert that federal preemption cannot be applied in the circumstances involved here because JGB is not a common carrier. Reply at 13-15. However, the issue is not whether JGB is a common carrier, but whether construction of the trackage across its property by Ironwood/Steelway's predecessor made that entity a common carrier, such that it should have sought ICC authority for the construction and subsequent operation thereof (all parties agree that such authority was never sought or obtained). As explained below, JGB submits that the answer to this question is "yes."³

² *Friends of Richards—Gebaur Airport v. FAA*, 251 F.3d 1178, 1193 (8th Cir. 2001) (“[w]hether the construction of track is considered a railroad line subject to the jurisdiction of the Surface Transportation Board (STB), see 49 U.S.C. § 10501(b) (Supp. IV 1998), or an industrial, team, switching, or side track that is not within the STB's jurisdiction, see 49 U.S.C. § 10906 (Supp. IV 1998), is a matter to be considered in the first instance by the STB.”); *Fla. E. Coast Ry., Petition for Declaratory Order*, 360 I.C.C.449, 456 (“any jurisdictional determination by a State court regarding the status of a line of railroad constitutes an intrusion into an area reserved to the Congress, and, from the Congress, to this Commission”).

³ Ironwood/Steelwood also assert that contested state law must cause interference with rail operations for ICCTA preemption to be applied. Reply at 14-15. However, JGB is not alleging interference with authorized rail operations. To the contrary, what is in issue here is interference with the Board's jurisdiction over the certification of

II.

THE TRACKAGE IN ISSUE IS COMMON CARRIER TRACKAGE

Ironwood/Steelway and CSXT dispute that the trackage constructed by Ironwood/Steelway's predecessor is or was common carrier trackage, inserting instead that it is either private trackage exempt from Board jurisdiction under the ICCTA, or excepted track under 49 U.S.C. § 10906 and therefore not subject to Board authorization of its construction or rail operations thereover. Ironwood/Steelway Reply at 16-23; CSXT Reply at 9-11. However, under the authorities cited at pp. 12-16 of JGB's Petition (and in particular the *Effingham* decision), the trackage in issue is neither private nor excepted track because it was designed and constructed to serve multiple shippers in an industrial park in direct service who had and have no ownership interest therein, in new territory by a new carrier, and the track was not merely incidental to an existing common carrier's other trackage.⁴

common carriers and common carrier rail lines. If it is true that Ironwood/Steelway and their predecessors have constructed, used, and operated unauthorized rail lines, for which a federal certificate of public convenience and necessity was required, but was not properly acquired, then JGB's preemption claim obviously has full validity since the Board has complete and exclusive jurisdiction over common carrier rail transportation. *See, e.g., Suffolk & S. R.R. – Lease & Operation exemption – Sills Rd. Realty, LLC*, STB Finance Docket No. 35036 (STB served Oct. 12, 2007) (cease and desist order issued prohibiting use of rail line where “no party has sought authority from the Board to construct any facilities at this site”).

⁴ In this regard, the fact that the entity that constructed the trackage did not intend to conduct the actual rail operations thereover, but rather intended to have the connecting line-haul carrier (CSXT's predecessor, New York Central) conduct the actual operations, does not convert the trackage into excepted track. *Cf. Riverview Trenton R. Co. – Petition for Exemption from 49 U.S.C. 10910 to Acquire and Operate a Rail Line in Wayne Cnty., MI*, STB Finance Docket No. 34040 (STB served May 13, 2003) at 10 (“RTR can be a common carrier even if it neither picks up containers before, nor delivers

A. The Trackage is Not Private Track

Contrary to Ironwood/Steelway's contentions that the South Steelway Boulevard Line "could be private track" (Reply at 17-19), and for the reasons set forth in JGB's Petition (at 12-13, 17-18), the South Steelway Boulevard Line is not a private line. Not even CSXT argues that the line could be private track.

One of the primary indicia of whether rail trackage is common carrier versus private trackage is whether the trackage serves only one shipper who has an ownership interest in the trackage, as opposed to multiple shippers with no ownership interest therein. *Hanson Natural Res. Co. – Non-Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (ICC served December 5, 1994), at 27-29. ("*Hanson*"). Private rail carriage "is performed solely on behalf of one company," and "is typically 'an arm of the owner's [non-transportation] business.'" *Northern Plains R.R. Co. – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, ICC Finance Docket No. 32077, (ICC Decision served Dec. 28, 1992) ("*Northern Plains*") at 2 (quoting *Monsanto Co. v. Alton and S. Ry. Co.*, 339 I.C.C. 319, 371 (1971)).

Thus, a business entity that hauls only its *own* goods over its *own* line, without moving or offering to move freight for others, qualifies as a private carrier, and

containers after, rail shipment. There is no statutory requirement that a common carrier railroad must itself pick up from shippers, or deliver to consignees, traffic transported in intermediate stages of movements in interstate commerce.") ("*Riverview*"). *Accord Bulkmatic R.R. Corp. – Operation Exemption – Bulkmatic Trans. Co.*, STB Finance Docket No. 34145 (STB served Nov. 18, 2002) at 6 ("*Bulkmatic*").

its line qualifies as a private line. It is clear from the record adduced thus far in this proceeding that the trackage on JGB's property was constructed to serve multiple individual shippers in the Woodard Industrial Park at multiple "spots" and that the neither the original owner of the trackage (Overmyer) nor the purported current owner (Ironwood), both operating strictly as developers/ landlords, were/are actual rail shippers operating over their own rail line. See V.S. Betak at 3-4 (the tracks in issue were intended to serve several "unique designated spot locations for the various businesses leasing warehouse space" and were "obviously designed to serve multiple shippers"). Again, the easement conveyance at issue was for a "right of way for a railroad spur track to be *used and enjoyed in common with others.*" *Id.* at 3 (emphasis added).⁵

In arguing that the sidetracks in issue "could be private track," Ironwood/ Steelway cite several cases where it claims "private track was found to exist" where more than one shipper was served. However, these cases are clearly inapposite; none involved any determinative finding of the status of the trackage, and none sought to apply the longstanding governing standards employed by the Board in *Hanson* and its progeny. Specifically, in *Trojan Scrap Iron Corp. v. Boston & Maine Railroad*, 270 ICC 727 (1948) ("*Trojan Scrap*")⁶ the defendant, who owned track and operated as a common

⁵ Neither Ironwood/Steelway nor CSXT contradicted this testimony in their Replies to JGB's petition, and, indeed confirm that Overmyer and Ironwood were/are developers/landlords not shippers (V.S. Betak at ¶¶ 4, 5, 7); V.S. Berry at 1.

⁶ Even if were applicable, which it is not, any reliance on *Trojan Scrap* for any purpose is extremely suspect, as in a later case, *Adequacies – Passenger Serv. – S. Pac. Co.*, 335 I.C.C. 315, 330 (1969), the full ICC (*Trojan Scrap* was itself decided only by three Commissioners comprised as "Division 3") stated that:

carrier, was ordered to provide switching service for a sidetrack owned, not by the shipper, but by the city.⁷ *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – in Roane County, Tenn.*, STB Abandonment Docket No. 290 (Sub-No. 236X) (STB served Dec. 2, 2005) involved a § 10903 common carrier line abandonment, and additionally, unlike here, the actual shipper had an ownership interest in the private track at issue.⁸ *Ohio Valley Railroad Co. – Acquisition & Operation Exemption – Harwood Properties, Inc.*, STB Finance Docket No. 34486 (STB served Feb. 23, 2005) involved a § 10901 acquisition/operation exemption request by a common carrier, and merely involved a track that “previously may have been either switching/industrial track.”⁹ Finally, in *Union Pac. R.R. Co. – Operation Exemption – In Yolo County, CA*, STB Finance Docket No. 34252 (STB served Dec. 5, 2002), the case

The report in *Trojan Scrap Iron Corp. v. Boston & M. R.*, 270 I.C.C. 727 (1948), is of little moment now; it contains an egregious error in the citation of language out of context from *United States v. Pennsylvania R. Co.*, *supra* [242 U.S. 208 (1916)], and as a result totally misconstrues the law of that case.

⁷ The track at issue was installed by the city as a Public Works Administration Project, was installed at the same time as defendant’s track, was never operated as a separate railroad by the city, and the end of defendant’s track was “used as a public delivery track.” *Id.*, 270 ICC at 728 (ICC ordered the defendant to provide switching service over a section of track owned by the city because it was a common carrier).

⁸ *Id.* at 1-2 (sale of a line to a shipper converted the sidetrack from a common carrier line to a private track). This case also appears to implicate, at best, the inapposite issue of non-common carriage contracts for service over the involved rail lines. *See e.g.*, *Consolidated Rail Corp. – Petition for Declaratory Order*, 1 I.C.C.2d 284 (1984); *S. Pac. Trans. Co. – Abandonment Exemption – In Mineral and Lyon Counties, Nev.*, ICC Docket No. AB-12 (Sub-No. 136X) (ICC served March 12, 1991).

⁹ *Ohio Valley R.R. Co. – Acquisition & Operation Exemption – Harwood Props., Inc.*, STB Finance Docket No. 34486, slip op. at 2 (STB served Feb. 23, 2005).

actually involved §10906 excepted track, not private trackage. Further, the Board's decision was not based on the status of the trackage, and the Port which had entered into a new contract for service had an ownership interest in at least part of the track.

Perhaps recognizing their failure to come up with any applicable or controlling authority in support of their private track arguments, Ironwood/Steelway attempt to buttress their argument that the trackage in issue constitutes private trackage by referring to a "Private Sidetrack Agreement" between CSXT and Ironwood dated February 19, 2012, which was "negotiated prior to JBG's assertion of preemption in the New York courts or its Petition."¹⁰ Ironwood/Steelway assert that this agreement "demonstrates that these parties believed that the Sidetracks covered by such agreement qualified as private track" (Reply at 18).

However, the fact that this sidetrack agreement was not entered until 2012 – approximately a decade after the trackage was last used for rail service, and several years after Ironweed/Steelway initiated their litigation in the New York courts to confirm the validity of their easement of JBG's property – indicates that, at best, it was intended to bootstrap Ironwood/Steelway's position that the trackage that crossed JGB's property was private trackage. This is also evidenced by the fact that rail operations over the subject trackage cannot be conducted pursuant to the agreement's terms because a portion

¹⁰ Ironwood/Steelway Reply at 18-19. This sidetrack agreement is appended to Ironwood/Steelway's Reply as Exhibit 4. CSXT also refers in its Reply to a sidetrack agreement allegedly covering the trackage in issue (CSXT Reply at 8), but the sidetrack agreement attached to CSXT's reply as Exhibit B is a different agreement, dated December 2, 2013, that covers different trackage located in the state of Ohio.

of the track has been removed and the remainder is unserviceable (as confirmed by Dr. Betak's unrebutted Verified Statement, at 8-9), and the track clearly has not been maintained in accordance with FRA track safety standards as required by Section 4 of the agreement.

Also, while Section 1 of the sidetrack agreement states that the tracks involved are to be used "for the tender and receipt of freight traffic for the account of industry [Ironwood]," it is clear from Dr. Betak's unrebutted Verified Statement, as now confirmed by Ironwood/Steelway's Witness Berry as indicated, *supra*, that Ironwood, as well as Overmyer, were/are developers/landlords, and neither ever intended to be an actual rail shipper. Instead, the individual lessees of warehouse space with loading spots in the Woodard Industrial Park would be the shippers who received or tendered freight for rail movement in direct service. As discussed above, none of these actual shippers has any ownership interest in the trackage, which is one of the prerequisites to a finding that particular tracks are private tracks rather than common carrier tracks. *See Bulkmatic* (STB served Nov. 18, 2002) at 5 ("BRC has subleased the entire premises, which includes warehouses as well as the transloading facilities. This further indicates that BRC will operate as a common carrier providing service to shippers who may avail themselves of the warehouse space or locate elsewhere on the premises.")¹¹

¹¹ Even CSXT appears to be at a loss as to who Ironwood/Steelway are, and what service this agreement is purported to provide. CSXT describes this agreement at page 17 of its reply as an instrument "in place with Ironwood to provide Ironwood with rail service" – service that Ironwood, as a non-shipper warehouse landlord is not seeking, and neither are any of Ironwood's various existing tenants, who have never requested rail service.

Finally, even CSXT appears to disavow any such private-characterization notions. *See* CSXT Reply at 10 (“It does not matter how Conrail, or CSXT for that matter, classified the tracks for their internal use.”). Of course, the fact that CSXT and Ironwood described the trackage covered by the agreement as “Private Sidetrack” is not dispositive of the status of the trackage as private or common carrier trackage.¹² That status is for the Board to determine based on all relevant factors, notwithstanding characterizations by private parties.¹³

B. The Trackage Is Not Section 10906 Exempt Track

Ironwood/Steelway contend that, if the trackage at issue is not private track, it otherwise is exempt from STB jurisdiction under 49 U.S.C. §10906 because it meets specific criteria.¹⁴ CSXT simply asserts that the tracks were “industry track built by []

¹² *See, e.g., Hanson*, (ICC served Dec. 5, 1994) at 21 n. 12 (“[t]he private line exemption can easily be obscured by misleading terminology. Many private lines . . . if they have any name at all, have “spur” in the name.”).

¹³ The decision as to whether a track is private or common carrier track is reserved to the Board. *See generally Midwest Gen., LLC- Exemption from 49 US.C. 10901-for Constr. in Will Cnty., Ill.*, STB Finance Docket No. FD 34060, slip op. at 4 n. 7 (STB served Mar. 21, 2002) (opposing party argued proposed track would be private, but Board determined it to be a common carrier line) (“ . . . whether or not there are existing shippers waiting for service over the proposed line is not dispositive of whether the track would be private track or a line of railroad. The determinative factor as to that issue is whether Midwest would make the line available as a common carrier line to any shippers that might request service. Midwest clearly has made such a holding out.”).

¹⁴ The factors cited by Ironwood as determinative for finding that the sidetrack is exempt from STB approval include whether it is: “(i) short in length or stub-ended or ends at the shipper’s facility; (ii) does not invade the territory of another railroad; (iii) used merely for drop-off or pick-up service that is ancillary to the carrier’s common carrier service; (iv) used on an ‘as needed’ basis, rather than for regularly scheduled service; (v) not maintained by the common carrier; and (vi) used for low volumes of traffic, among other factors.” Reply at 21.

Overmyer to serve its properties,” and as such, they are §10906 track, and it offers very little other analysis. But the test cited by Ironwood/Steelway on Reply for §10906 exemption only applies where an existing carrier is constructing its own spur ancillary to its own line.¹⁵ As JGB clearly demonstrated in its Petition (at 15-16), the lines at issue cannot be excepted track.

The decisions relied on by Ironwood/Steelway are thus distinguishable from the instant case, where what is essentially a new carrier constructed track that was intended to serve multiple shippers. In this respect, long-established precedent firmly provides that § 10906 is directed *only* at common carrier tracks built by an *existing common carrier railroad* that would otherwise be subject to the Board’s §10901 jurisdiction. *See Cleveland, C., C. & St. L. Ry. Co. v United States*, 275 U.S. 404, 408-09 (1928) (“*Cleveland*”) (former section 1(22) of the Interstate Commerce Act (now § 10906) “by its terms, [] operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 [now §10901] to 21,” they “refer[] to tracks built by the carrier as part of its railroad,” and “[t]hese paragraphs deal with construction and abandonment on the part of the carrier, not with side tracks built by the shipper”); *Hanson* (ICC served Dec. 5, 1994) at 21 (clarifying that current section 10906 serves to

¹⁵ *See Effingham R.R.—Petition for Declaratory Order—Constr. At Effingham, Ill.*, 2 S.T.B. 606, 609-10 (1997) (Board ruled it had jurisdiction, finding “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, Ready-Mix, or additional shippers whose facilities are to be constructed.”). *See also* Ironwood/Steelway Reply at 20 (acknowledging the essential test that “[t]rack that is operated in a manner that is only ‘ancillary’ to a rail carrier’s authorized common carrier line-haul service qualifies as excepted 10906 track.”).

“remove[] from section 10901[] . . . jurisdiction certain lines that would otherwise be subject thereto”). Both Ironwood/Steelway and CSXT flatly deny that the South Steelway Boulevard line could be subject to §10901 authority, but without such an initial jurisdictional “hook,” the §10906 exception rules simply cannot apply.

In fact, Ironwood/Steelway (and CSXT) claim that the §10906 spur or industrial track exemption test first set forth in *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1926), (“*Texas & Pacific*”) and follow-up cases are controlling, but that clearly is not so. As stated, the initial mid-1960s construction of the Woodard Industrial District lines was to a connection with the New York Central Railroad. In fact, just two years before the South Steelway Boulevard trackage was constructed to connect with New York Central, in the leading case *New York Central Railroad Company v. Southern Railway Company*, 226 F.Supp. 463, N.D. Ill 1964), (“*New York Central*”) a case that the ICC/Board have cited with approval many times in this area, the Court specifically rejected the carrier’s argument that “spur or industrial track,” not built by a railroad, can and should be determined to be § 10906 (then §1(22)) industrial track under *Texas & Pacific*, relying on the Supreme Court’s decision in *Cleveland* (written by Justice Brandeis, who also authored *Texas & Pacific*).¹⁶ As the Court found:

¹⁶ CSXT states that “[a] property owner building industry track on its property to connect with a rail carrier would not have sought ICC authorization.” CSXT Reply at 9. However, such authorization was not novel back in the mid-1960’s, and if anything, *New York Central*, again decided shortly prior to Overmyer’s 1966 South Steelway Boulevard Line construction, put Overmyer and New York Central on full notice of the requirement for seeking ICC authorization. In this respect, a private property owner seeking to provide rail service to multiple shippers would still have been found to be a common carrier subject to ICC jurisdiction when the track was first built. The fact that

The difficulty with this theory is that it overlooks certain significant differences between the facts involved in the instant case and the facts involved in *Texas & Pacific*. In the later, the defendant was to construct the projected trackage, own it, and operate it. The only question, therefore, was whether the defendant's construction of track fell within the purview of paragraph 22, excepting from the scope of paragraph 18 the construction of industrial track. The plaintiff cites a number of cases which have followed the *Texas & Pacific* decision, but in none of them was the track involved wholly owned and operated by a party other than the carrier sought to be enjoined. (*Id.* at 468.)

.....

These paragraphs deal with construction and abandonment on the part of the carrier, not with side tracks built by the shipper. (*Id.* at 470.)

.....

[T]he carrier competition test enunciated in *Texas & Pacific* – is appropriate for the court to examine only after it is established that the 'invading' carrier proposes to construct or operate, or is operating, some sort of road: the 'new territory' question then becomes relevant in determining whether the track is within paragraph 18 or 22. (*Id.* at 473.)

.....

The legislative history and the decisions also establish that destructive competition among carriers is a weighty consideration. But it seems to me evident from the scheme of the Act that while carrier competition is a most important consideration where the investment of the carriers' funds is involved, such competition is not determinative where the investment of shippers' funds is involved. (*Id.* at 474.)

.....

Another way of stating this point is that where a carrier serves a shipper over the latter's private track – or at a switch

construction of the track was not challenged back when it was established does not mean it was an industrial spur or should now be viewed as a rail carrier line extension off a main line that is exempt from STB jurisdiction.

connection with the private track – the carrier is not invading the territory of another, because the shipper is in fact ‘located’ on the line of the carrier in question. See *Cleveland, C., C. & St. L. Ry. v. United States*, 275 U.S. 404, 48 S.Ct. 189, 72 L.Ed. 338 (1928). It seems to me more logical, however, to say that the question of invasion is not reached at all where the carrier operation in question does not fall within the terms of paragraph 18. The question arises only when the terms of paragraph 18 apply and the exceptions of paragraph 22 are then invoked. (*Id.* at 473 n.4.)

Ironwood/Steelway and CSXT improperly attempt to turn the controlling *New York Central* guidance on its head.

Ironwood/Steelway and CSXT also stress the nature of the service involved and the fact that service over the South Steelway Boulevard Line was conducted in cooperation with connecting Class I railroads. However, JGB is not contesting that service over the trackage was provided by Conrail or that the track connected to a pre-existing main line of track. Again, the key point is that for track to be excepted track under § 10906 it must be constructed by *an existing carrier* to provide ancillary service to pre-existing track. As explained by the Board in *Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, STB Finance Docket No. 35424 (STB served June 14, 2011), “Board approval under § 10901 is not always necessary for carriers to lay track... pursuant to 49 U.S.C. § 10906, no Board authority is required *for an existing carrier* to construct ancillary ‘spur, industrial, team, switching, or side tracks.’” (emphasis added).¹⁷ Here, it is undisputed that the tracks at issue were

¹⁷ See also *Brazos River Bottom Alliance – Petition for Declaratory Order*, STB Finance Docket No. 35781 (STB served Feb. 19, 2014) (“it is equally well established that *an existing carrier’s construction* of ancillary railroad facilities and yard track is

constructed by Overmyer, the predecessor to Ironwood/Steelway and not by an existing carrier.¹⁸ “Further, CSXT is (and its predecessors were) the owner and operator of the adjacent mainline track.” Ironwood/Steelway Reply at 20. With respect to the South Steelway Boulevard Line, the owner of the mainline track and the alleged spur/industry track were not one and the same. For this reason, it is unnecessary to proceed to the typical fact-based analysis where intended use, length, and number of customers is considered because the sidetrack is not eligible to be excepted track under §10906.¹⁹

excepted from these prior approval requirements pursuant to 49 U.S.C. § 10906”) (emphasis added); *Bulkmatic R.R. Corp. – Acquisition & Operation Exemption – Bulkmatic Transp. Co.*, STB Finance Docket No. 34179 (STB served Nov. 19, 2002) (“[i]n *Effingham*, we held that excepted track was necessarily incidental to a common carrier’s other track, and a common carrier’s only trackage could not therefore be deemed to be excepted within the meaning of 49 U.S.C. 10906.”); *New England Transrail, LLC – Constr., Acquisition & Operation Exemption—In Wilmington & Woburn, Mass.*, STB Finance Docket No. 34797 (STB served July 10, 2007) (“because this would be the only track operated by NET, it would not be ancillary to another NET track.”).

¹⁸ See CSXT Reply at 9 (“[a]ccording to documentation submitted by Ironwood and Steelway in court proceedings, the tracks were believed to have been built by Overmyer. CSXT believes the tracks at issue are industry track built by the Overmyer to serve its properties.”). See also Ironwood/Steelway Reply at 18-19 (Ironwood has contracted with CSXT to provide service over their lines).

¹⁹ Additionally, Ironwood/Steelway and CSXT do not dispute that the track here (with weight typical for the era for sidings and mainlines), was used for direct delivery and shipment of rail cars to shippers, went to individual doors of the warehouses, and it was not used as set-off track, gathering track, or switching track. See V.S. Betak at 4. As such, the track is not a spur or industrial track or track that once qualified as excepted track, and/or now qualifies to be reclassified as regular rail track. See *Nicholason v. I.C.C.*, 711 F.2d 364, 368 (D.C. Cir. 1983) (construction of track did not require commission approval because it was to “be used solely for storage, *switching*, and classification of railroad cars,” however, tracks “which are intended to be used to carry through trains between points of shipment and delivery . . . must be approved by the Commission.”) (emphasis in original).

For example, in support of a track being exempt because it is short in length, Ironwood/Steelway cite *Indiana Rail Road Co. – Petition for Declaratory Order*, STB Finance Docket No. 35181 (STB served Apr. 15, 2009), which involved a petition by a Class II carrier asking the Board to determine whether a new line of track extending from *an existing line* to serve *an existing customer* would qualify as “a spur track exempt from the need to seek Board approval.”²⁰ Likewise, Ironwood/Steelway repeatedly cite to *The New York City Economic Development Corporation – Petition for Declaratory Order*, STB Finance Docket No. 34429 (STB served July 15, 2004), where the track at issue was an extension and reactivation of a line previously operated by the Staten Island Railroad that had been purchased by the states of New York and New Jersey.²¹ Clearly, these cases did not involve the conditions under which the trackage at issue was originally constructed.

Ironwood/Steelway also assert that Board precedent establishes that § 10906 exempt track can serve multiple shippers (Reply at 23), but, again, the cases cited are inapposite and all involved trackage constructed by a rail carrier that was incidental to operations on its existing lines. The trackage in issue here was constructed by a new entity that should have obtained authority to become a rail carrier and to construct the

²⁰ The Board in reaching its decision also stated that the carrier involved (the Indiana Rail Road Company) “has historically served the area that the proposed track will occupy and the track will serve only Peabody.” *Id.*, slip op. at 1-2.

²¹ The Board determined the proposed track was a spur because it was moderate in length, was “built predominantly for the purpose of serving one shipper located at the end of the track,” it was a “stub-ended track,” it would “not invade the territory of another railroad, the shipper will own and maintain it, and service will be provided on an as-needed basis.” *Id.*, slip op. at 7.

tracks, which constituted all of its lines. Thus it constitutes common carrier trackage under the *Effingham* decision, *supra*.

CSXT also maintains that because the rail services were provided by the connecting Class I railroad, the property owners in no way were rail carriers. *See* CSXT Reply at 10. Such a notion is wholly without merit, as discussed *supra* at footnote 4. *See Riverview* (STB served May 13, 2003) at 10 (“RTR can be a common carrier even if it neither picks up containers before, nor delivers containers after, rail shipment. There is no statutory requirement that a common carrier railroad must itself pick up from shippers, or deliver to consignees, traffic transported in intermediate stages of movements in interstate commerce.”). *Bulkmatic* (STB served Nov. 18, 2002) at 6. Also, it was the original property owner, Overmyer, who constructed the track and likely negotiated with the railroad to provide direct service to customers within the Woodard Industrial District. *See* CSXT Reply at 9. Thus, the property owners in fact did have a common carrier obligation to provide service over the track. As explained by the Board in *Big Stone-Grant Industrial Development & Transportation, L.L.C.*, the Board may authorize construction by an entity that will not be operating the line, but “[i]n these cases, [the Board has] determined that the constructing entity holds itself out to fulfill the common carrier obligation that attaches to the line. That obligation remains with the constructing entity even though its fulfillment may be undertaken by operating railroads under

trackage rights, leases, or similar arrangements.”²² Additionally, the entity that was responsible for providing service over the trackage (Ironwood/Steelway and their predecessors) clearly meets the test for a rail carrier for the reasons enunciated in JGB’s Petition at 16-20, which analysis remains largely unchallenged by Ironwood/Steelway or CSXT.²³

III. **THE STANDARDS FOR ADVERSE ABANDONMENT ARE MET HERE**

In its Petition, JGB requested that, if the Board concludes that the trackage in issue constitutes common carrier trackage that was not unlawfully constructed, the Board should approve its abandonment under the “de facto” standard described in *Modern Handcraft, Inc.—Abandonment in Jackson County, MO*, 363 I.C.C. 969 (1981), without the need for compliance with the normal application/informational filing requirements for adverse abandonments. Petition at 25-32. Ironwood/Steelway object to any such grant of adverse abandonment authority (assuming the tracks in issue constitute

²² See *Big Stone-Grant Indus. Development & Transp., L.L.C.—Construction Exemption—Ortonville, Minn. & Big Stone City, SD.*, ICC Finance Docket No. 32645 (ICC served Sept. 26, 1995) 1995 WL 564879, at *2.

²³ Curiously, and without factual or legal support, CSXT also argues that the sidetrack could be viewed as an “expansion” of service that is exempt from STB jurisdiction. CSXT Reply at 9. This argument is a red herring because there has never been any “expansion” and there has not been service over the tracks for over 10 years. Mere use of an unauthorized sidetrack does not equate to an “expansion” making it exempt from STB jurisdiction. This is not construction of connecting track by a railroad, an improvement to existing facilities, or even a relocation project. Instead, this is a property owner who has failed to perform any maintenance on the line. Further, if as suggested by CSXT these “industry tracks originally built to serve Overmyer’s properties” have become a rail line served by a common carrier, then they clearly are not § 10906 excepted track, but rather constitute an unauthorized §10901 common carrier line.

a common carrier line) because restoration of rail service on these tracks is “viable.”
Ironwood/Steelway Reply at 25-26.²⁴

The trackage in issue clearly meets the “de facto” abandonment standard described in the *Modern Handcraft* case, as well as the general standard applicable to adverse abandonments enunciated in subsequent decisions such as *Chelsea Property Owners–Abandonment – Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York*, 8 I.C.C.2d 773 (1992), *aff’d sub-nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994) (“*Chelsea*”): that there is potential for future traffic on the line sufficient to establish the financial feasibility of restored operations and the carrier has taken reasonable steps to attract traffic. As confirmed in the Supplemental Verified Statement of John F. Betak submitted herewith (“Betak Supp. V.S.”), the subject trackage has not been used for rail service in more than ten years, it has not been maintained in a condition that would allow the provision of rail service, in fact, track conditions have been allowed to further deteriorate, and it does not comply with the minimum standards that would allow operations thereover under the 2012 Private Sidetrack Agreement between Ironwood and CSXT. Betak Supp. V.S. at 2-3.

While Ironwood’s Witness Berry states that “Ironwood would repair and upgrade the tracks as necessary if the connection to CSXT were restored” (V.S. Berry at 8, ¶ 29, emphasis in original), it had that opportunity over a decade ago after CSXT spiked all access to its dilapidated line. Additionally, Mr. Berry says nothing about

²⁴ CSXT makes a similar argument, in very general terms, at pp. 16-17 of its Reply.

future use of the tracks. His quoted statement does not come close to meeting the requirement that the carrier demonstrate the track has a future traffic potential sufficient to establish the financial feasibility of restored operations. *Chelsea* at 778-83. The lack of meaningful traffic potential is confirmed by the fact that CSXT and Ironwood did not negotiate their 2012 Sidetrack Agreement until three years after Ironwood's unfruitful negotiations with XPEDX (a potential user of rail service via the subject trackage) were completed. *Betak Supp. V.S.* at 3. The South Steelway Boulevard Line has been spiked for over a decade, and Ironwood/ Steelway have done nothing to seek to restore the spiked trackage to operational condition. *Id.*²⁵

In any event, as stated in its Petition, JGB is prepared to file a formal application or adverse abandonment and request for waiver of certain information requirements in the Board regulations applicable thereto, should the Board conclude that it has jurisdiction over abandonment of the trackage but deem it necessary that the formal application and waiver procedures be followed.

²⁵ While not even CSXT attempts to challenge JGB's assertions as to the lack of future demand for service in the Woodard Industrial Park, in an attempt to bootstrap their arguments about possible future service Ironwood/Steelway counsel cite to the recent purchase of 18,500 boxcars by GATX Corporation (Ironwood/Steelway Reply at 25 and Exhibit 5). As Dr. Betak notes, this purchase amounted to nothing more than a transfer of ownership of an existing (and aging) boxcar fleet, and has nothing to do with future demand for rail service on the South Steelway Boulevard Line which is non-existent. *Betak Supp. V.S.* at 4.

CONCLUSION

In summary, JGB respectfully requests the Board to grant its request for a declaratory order, as set forth in pages 1 and 2 of its Petition. Should the Board believe that additional relevant facts or authorities require supplementation, the Board should institute an appropriate proceeding to allow the parties to submit further comments/develop a more complete record on whatever remaining matters that the Board believes will enable it to reach an informed decision as to the matters addressed herein.

Respectfully submitted,

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Peter A. Pfohl
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036
Telephone: (202) 347-7170
pap@sloverandloftus.com

Dated: June 17, 2014

*Attorneys for Petitioner
JGB Properties, LLC*

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of June, 2014, I served copies of the foregoing Reply by email and First Class United States Mail upon counsel of record for Ironwood LLC/Steelway Realty Corporation and CSX Transportation, Inc., as follows:

Karyn A. Booth
David E. Benz
Thompson Hine LLP
1919 M Street N.W., Suite 700
Washington, D.C. 20036

*Counsel for
Ironwood, LLC and
Steelway Realty Corp.*

Louis E. Gitomer
Melanie B. Yasbin
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204

Kim Bongiovanni
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel for CSX Transportation, Inc.

\s\

Peter A. Pfohl

SUPPLEMENTAL VERIFIED STATEMENT OF

**JOHN F. BETAK, PH.D.
MANAGING MEMBER
COLLABORATIVE SOLUTIONS LLC**

My name is John F. Betak. I am the same John F. Betak who submitted a verified statement ("V.S.") dated March 28, 2014, that accompanied JGB Properties, LLC's ("JGB") Petition for Declaratory Order filed April 8, 2014, in STB Finance Docket No. 35817. My experience and qualifications are set forth in my original V.S. I have been requested by JGB to review and comment on the Reply to JGB's Petition filed by Ironwood, LLC and Steelway Realty Corporation ("Ironwood/Steelway") on May 30, 2014, and in particular the Verified Statement of Richard J. Berry, Property Manager for Ironwood, LLC, submitted with Ironwood/Steelway's Reply.

This supplemental statement is based upon my earlier inspections of the site and trackage involved, as described in my March 28, 2014 V.S., as well as my review of available pertinent materials, including maps, photographs, and the "Private Sidetrack Agreement" included as Exhibit 4 to Ironwood/Steelway's Reply filing.

In his V.S., Mr. Berry acknowledges that both Ironwood and Steelway are in the business of owning, managing and leasing warehouse space to business tenants. Berry ¶¶ 1 and 4. Ironwood/Steelway are landlords who are engaged in leasing their warehouse spaces, they don't manufacture, ship, or receive goods/products. Similarly, Mr. Berry confirms that the original Woodard Industrial Park owner of the Ironwood Property was the Park developer, D.H. Overmyer Company (Overmyer). Berry ¶ 22. Overmyer also developed a number of other properties/warehouse spaces, including in Dallas, TX and in DeWitt, NY, that are currently owned by Overmyer-controlled companies and leased to tenants. Berry ¶¶ 34, 35, 37. There is no indication that Overmeyer ever manufactured, shipped, or received goods/products at any of the Woodard Industrial Park buildings.

Ironwood currently leases its space to multiple businesses/distributors. Berry ¶ 5. The main point of Mr. Berry's V.S. appears to be that, in the past, tenants in the Ironwood/Steelway buildings have received boxcar service and other current shippers in the same general area use boxcar service. See, for example, Berry ¶¶ 13 and 14. Mr. Berry makes no specific reference to any actual use or request for use of the Woodard Industrial District rail lines by any of Ironwood's current/past tenants since Ironwood's purchase of its property in 1996.

Mr. Berry also notes that in 2012 CSXT and Ironwood entered into a new "Private Sidetrack Agreement" under which CSXT could theoretically provide rail service to Ironwood/Steelway tenants whose warehouse facilities are reached via Tracks

232, 764 and 766 (the Ironwood/Steelway tracks that cross JGB's property in the vicinity of the Woodard Industrial Park near Syracuse, NY (Track 232) or are reached via that track (Tracks 764 and 766)). Berry ¶ 16 (these tracks are shown on the area map on page 6 of JGB's Petition). While Mr. Berry appears to acknowledge that Tracks 764 and 766 and the portion of Track 232 that has not been removed are not in a condition satisfactory for the provision of rail service, he claims that some maintenance of these tracks (brush and tree cutting) has been performed (¶ 17) and the tracks could be rehabilitated and restored to service if necessary and the associated shipper boxcar "spots" (including warehouse doors) could be modified to accommodate modern, 60-foot or 86-foot boxcars using 4-axle locomotives.

The fact that some prior tenants in the Ironwood/Steelway buildings may have received boxcar service in the distant past is irrelevant to the question whether there is any need for boxcar service using Tracks 232, 764 and 766 today. As indicated in my March 28 V.S., there has been no rail service, boxcar or otherwise, to any shipper facilities located on/served by Track 232 or Tracks 764 and 766 for more than 10 years. Mr. Berry does not claim otherwise, and again, does not cite any use of the track by Ironwood's tenants since Ironwood's acquisition of its property in 1996. CSXT may be providing rail service to shipper facilities in the Woodard Industrial District reached by other tracks mentioned by Mr. Berry (Tracks 230, 757, 759, 760 and 762), but the existence of rail service to those facilities (and their condition) is irrelevant as those tracks do not serve any warehouse facilities reached via Tracks 232, 764 and 766 which are the tracks serving the Ironwood/Steelway warehouse buildings in issue.

The fact that CSXT and Ironwood now have in place a Sidetrack Agreement under which CSXT could theoretically provide rail service to Ironwood's warehouse space served by Tracks 764 and 766 does not demonstrate any current need for rail service, particularly given the total lack of maintenance of these tracks in recent years. The new sidetrack agreement was not entered until 2012, or more than three years after rail service on these tracks terminated (and more than three years after Ironwood completed negotiations with a possible tenant, XPEDX, which apparently had expressed a desire for rail service using boxcars). Berry ¶¶ 25-26. Why was it that negotiations with CSXT for a new sidetrack agreement did not occur until 2012 if XPEDX needed a facility with rail access in 2009? The tracks in issue have not been properly maintained, and do not comply with the requirements for rail service thereon set forth in the 2012 Sidetrack Agreement. In particular, small trees and brush are growing between the rails,¹ the tracks' curvature (18° or more) substantially exceeds the

¹ Mr. Berry states (¶¶ 16 and 17) that Ironwood has engaged in drainage improvement (including occasional clearing of brush and vegetation and tie replacement) on Track 766), and that since the track was severed from CSXT, brush control efforts have continued. Apparently, Mr. Berry has neither walked Track 766 nor viewed photographic evidence of the track's condition such as that contained in Exhibit 9 to my March 28 Verified Statement. The vegetation currently in the ROW did not appear overnight, and

agreement's requirements, the FRA's minimum safety standards for Class I track are not met, and neither Track 764 nor Track 766 has a bumping post as required by CSXT's "Standard Guidelines and Specifications for the Design and Construction of Private Sidetracks" (see Exhibit 7 to my original V.S.), which are incorporated into the 2012 Sidetrack Agreement by reference.

I find the timing of the 2012 Sidetrack Agreement very suspicious. CSXT spiked the switch to Track 232 a number of years ago, prior to JGB's removal of the portion of Track 232 on its property in late 2008. At that time, CSXT also bent up the end rails of Track 232 and painted them white. If Ironwood really needed rail service via Track 232 in 2009, when it was negotiating with XPEDX and initiated its litigation in the New York state court, why did it wait until 2012 to enter a Sidetrack Agreement with CSXT? It appears to me that Ironwood only evinced an interest in rail service when it believed that money could be obtained from JBG following the instigation of its state court lawsuit – that is, when some indicia of intent to provide rail service was needed to perfect Ironwood's ability to obtain damages in its court case.

It is worth emphasizing that there has been no routine maintenance of Tracks 232, 764 and 766 since long before JGB removed a portion of Track 232. Again, CSXT severed the connection between its tracks and Track 232, and spiked the switch, before JGB took any action to remove the portion of that track on its property (my understanding is that the severance occurred after the derailment of a CSXT locomotive at the switch between Track 230 and Track 232). In addition, approximately 68 feet of Track 232 between the spiked switch and JGB's property line were removed after the switch was spiked. As far as can be gleaned from Mr. Berry's V.S., Ironwood raised no objections to CSXT spiking the switch or removing a portion of the track at that time. It also apparently took no actions at the time, through today, to have the spike removed.

Mr. Berry claims that "Ironwood would repair and upgrade tracks as necessary if the connection to CSXT were restored." Berry ¶ 29. However, that statement cannot be reconciled with Ironwood's long, continuing inactions with respect to addressing the CSXT spiked switch situation, and its long, continuing inactions with respect to undertaking any form of regular maintenance of the involved lines.

I also disagree with Mr. Berry that the warehouse facilities served by Tracks 232, 764 and 766 can accommodate modern, high-cube boxcars without substantial rebuilding. The doors for the warehouse spots were designed for 40-foot boxcars, which are now obsolete, and some of these doors have been filled in with cinderblock construction. These warehouse facilities have been entirely leased to non-rail users, and other potential non-rail tenants (who use intermodal

the visual evidence does not support Mr. Berry's statements concerning brush removal and tie replacements. Further, track 232 (which provides access to Track 766) has a paved-over grade crossing that shows no evidence of preparation for resumption of rail service.

service or trucks) abound in the area. Mr. Berry has not demonstrated that there is any future need for rail service to current or future warehouse tenant/shippers that would justify the cost of modifying these facilities to accommodate modern, high-cube boxcar shipping. This is confirmed by the fact that in early 2009, when a supposed rail-service-demanding tenant (XPEDX) was in the offing, Ironwood apparently did nothing to involve CSXT in discussions with regard to potential boxcar service to that prospective tenant, and nothing was done to modify the warehouse buildings to accommodate high-cube boxcar service.²

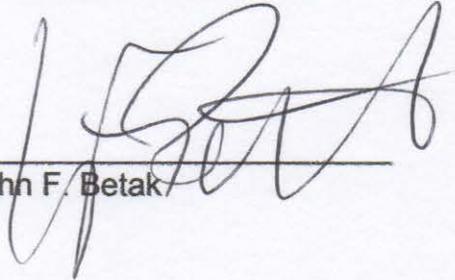
Mr. Berry states that “Ironwood has now successfully leased the entirety of its building to non-rail using tenants” – intimating that that it has had rail-served tenants in recent years. That obviously is not the case. The Ironwood property is and has in recent years been entirely leased to non-rail users, and apparently the lack of rail service has not impeded the spaces from being leased, nor inhibited the value of the property for leasing purposes.

In closing, I address Ironwood/Steelway’s statement on page 26 of their Reply, based on an article in *Trains Magazine*, that a four-axle locomotive can negotiate a 20° curve when coupled with other equipment. (The curvature on Track 232 is a minimum of 18°.) Ironwood/Steelway do not mention the fact that the CSXT locomotive fleet has been moving toward larger, heavier and more versatile six-axle locomotives, such as the GE C44-9W, since 2000. In fact, at the time I last visited the Woodard Industrial Park, it was precisely this latter type of locomotive that was shoving cars on Tracks 230, 760 and 762 (which are not in issue here). Ironwood/Steelway have submitted no evidence that CSXT’s Operating Department is willing to juggle its locomotive fleet serving the Syracuse area so that four-axle units are always coupled to the trains that need to negotiate the tighter curvature on Track 232 – curvature that exceeds the standard for industry tracks approved by CSXT’s Vice President of Engineering (a maximum of 10°, or 12° with the VP Engineering’s permission), as set forth in CSXT’s standard specifications for design/construction of private sidetracks.

² Ironwood/Steelway try to buttress their argument that boxcars continue to be an important part of the railcar fleet by referring to GATX’s recent purchase of 18,500 boxcars from GE Capital Rail Services (Ironwood/Steelway Reply at 25 and Exhibit 5 thereto). However, these are not new boxcars, but simply a transfer of ownership of an existing fleet of 70-ton and 100-ton (i.e., 60-foot and 86-foot) boxcars that average 34 years of age out of a statutory life of 60 years. This shift in ownership of an existing, and aging, group of boxcars does not indicate any kind of boxcar renaissance, and is irrelevant to future demand for rail service on Tracks 232, 764 and 766.

VERIFICATION

I, John F. Betak, verify that I have read the foregoing Supplemental Verified Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Supplemental Statement.



John F. Betak

Executed on June 15, 2014