

LAW OFFICES OF
LOUIS E. GITOMER, LLC.

LOUIS E. GITOMER
Lou@lgrailaw.com

600 BALTIMORE AVENUE, SUITE 301
TOWSON, MARYLAND 21204-4022

(410) 296-2250 • (202) 466-6532

FAX (410) 332-0885

MELANIE B. YASBIN
Melanie@lgrailaw.com
410-296-2225

May 30, 2014

236130

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

ENTERED
Office of Proceedings
May 30, 2014
Part of
Public Record

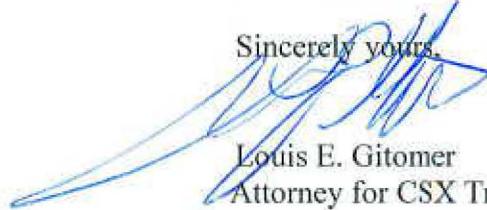
Re: Docket No. FD 35817, JGB Properties, LLC-Petition for Declaratory Order

Dear Ms. Brown:

CSX Transportation, Inc. is efileing a Reply to the Petition for Declaratory Order.

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

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

REPLY TO PETITION FOR DECLARATORY ORDER

Kim Bongiovanni
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1233

Louis E. Gitomer, Esq.
Melanie B. Yasbin, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for: CSX TRANSPORTATION, INC.

Dated: May 30, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

REPLY TO PETITION FOR DECLARATORY ORDER

CSX Transportation, Inc. (“CSXT”) opposes the Petition for Declaratory Order (the “Petition”) filed by JGB Properties, LLC (“JGB”) on April 9, 2014. CSXT respectfully requests the Surface Transportation Board (the “Board”) deny JGB’s request to open a declaratory order proceeding and declare that JGB is proposing to misuse the preemption provisions of 49 U.S.C. §10501(b) to validate JGB’s improper interference with rail transportation. CSXT contends that the Board should confirm without further hearing that JGB cannot use the preemption provisions of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the “ICCTA”) as a sword to interfere with railroad operations, when the purpose of the preemption provisions is to shield railroad transportation from interference.¹

JGB is seeking a declaratory order that would in essence permit it to unilaterally terminate rail service to two shippers that CSXT has agreed to serve. JGB attempts to disguise its true intent by seeking rulings that: a certificate of public convenience and necessity was required to construct and operate tracks that were constructed pursuant to an easement granted over JGB’s predecessor’s property (the “Property”); that the construction and use of the tracks without prior agency approval was unlawful and subject to civil penalties; that the state court

¹ *Eastern Alabama Railway LLC-Petition for Declaratory Order*, Docket No. 35583 (served March 9, 2012), slip op. at 4.

decisions imposing penalties and damages on JGB for removing track from the easement without consent by the owner are preempted; and that a cease and desist order is appropriate. Finally, in the alternative, JGB seeks an order granting an adverse abandonment, without complying with any of the statutory or regulatory requirements.

CSXT asks the Board to deny JGB's requests and determine that the Board has exclusive jurisdiction over the track at issue, regardless of its classification as a line of railroad or excepted track. CSXT strenuously urges the Board to reject JGB's request that the Board preempt the New York Supreme Court decisions because the finding by the Court that a valid easement over the Property exists does not impose permitting or preclearance requirements on a railroad and does not interfere with railroad transportation. In fact the Court's decisions are intended to restore railroad transportation that was wrongfully terminated by JGB.

BACKGROUND

The Property

In two agreements between Woodard Industrial Corporation ("Woodard") and D. H. Overmyer Company, Inc. ("Overmyer") entered in April 1966, Woodard granted Overmyer easements for railroad rights-of-way (collectively "Easements") over Woodard's property at 4560 Steelway Boulevard (previously defined as the "Property") in order to provide access for railroad service to two parcels owned by Overmyer, the Northern Parcel and the Southern Parcel. The Easements were the dominant estate over Woodard's servient estate. The Easements were for the purpose of allowing the New York Central Railroad ("NYC"), a CSXT predecessor, to serve the Northern Parcel and Southern Parcel owned by Overmyer.

Ironwood, LLC ("Ironwood"), is the successor in title to the Overmyer Southern Parcel and the easement over the Property that allows for railroad service to the Southern Parcel, while

Steelway Realty Corporation (“Steelway”), is the successor in title to the Overmyer Northern Parcel, and the easement over the Property that allows for railroad service to the Northern Parcel. JGB is the successor in title to the Woodard property which is subject to the Easements that are needed for railroad service to Ironwood and Steelway. The deed granting an easement over the Property to access the Northern Parcel granted to Overmyer and “its successors and assigns a permanent right of way for railroad spur track to be used in common with others.” The deed granting an easement over the Property to access the Southern Parcel granted to Overmyer and its successors and assigns forever, a “Right of Way for railroad spur to be used and enjoyed in common with others.”

JGB is not a rail carrier and is not subject to the Board’s jurisdiction. JGB purchased the Property known as 4560 Steelway Boulevard from the County of Onondaga by deed dated May 10, 2005. At the time JGB purchased the Property, there were two sets of tracks on the Property, one serving the Southern Parcel/Ironwood’s property and one serving the Northern Parcel/Steelway’s property. Both sets of tracks connect with CSXT’s St. Lawrence Subdivision.² JGB, without the approval or consent of Ironwood or CSXT, removed the track from the Property that served the Southern Parcel.

History of the State Court Proceedings

Over the past 5 years, the New York Supreme Court and the Appellate Division, Fourth Department have issued a series of Orders finding that Ironwood and Steelway have valid easements over the Property. And that JGB wrongfully and intentionally interfered with Ironwood’s property rights by destroying the railroad tracks located on Ironwood’s easement. JGB was ordered to pay compensatory damages for its destruction of the property, as well as punitive damages.

² The St. Lawrence Subdivision runs between Syracuse, NY and Montreal, Quebec.

On August 18, 2009, Ironwood and Steelway filed a complaint with the New York Supreme Court seeking a declaratory judgment and damages based on the unlawful interference by JGB with the use of the rights of way (easements) on JGB's property.

In an Order issued on December 22, 2009, Judge DeJoseph of the New York Supreme Court: (1) found that Ironwood and Steelway have valid easements over JGB's property; (2) enjoined JGB from any further interference with Ironwood's and Steelway's easement rights; and (3) found that JGB unlawfully removed a portion of track on Ironwood's easement.

Ironwood, LLC, et al. v. JGB Properties, LLC, N.Y. Supreme Court Index No. 2009-5776 (Dec. 2, 2009). See Exhibit A. The Court noted that it would hold an inquest to determine damages sustained by Ironwood. JGB filed a Notice of Appeal but failed to perfect its Notice and JGB's appeal was dismissed with prejudice by Order of the Supreme Court, State of New York Appellate Division, Fourth Department dated January 24, 2012.

On July 7th and 8th of 2010, Judge DeJoseph held an inquest to determine damages against JGB. In an Order filed Feb. 3, 2011, the Court denied Ironwood compensatory damages because Ironwood presented evidence measuring damages as the replacement cost not the diminution in rental value of the property caused by interference. The Court also granted Ironwood's motion to amend its complaint to assert a punitive damages claim and found that Ironwood was entitled to punitive damages due to JGB's misconduct by acting with malice in removing, interfering with, and destroying improvements located on Ironwood's easement. Both Parties appealed the decision. On appeal the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, modified the Supreme Court Order to grant Ironwood's claim for compensatory damages and remitted to the Supreme Court. It also concluded that the evidence established that JGB "acted with actual malice when it removed the spur track and that

its conduct rose to the level of a ‘wanton, willful or reckless disregard of plaintiff [‘s] rights’ relative to the easement.” *Ironwood, LLC v. JGB Properties, LLC*, N.Y. App. Div. Fourth Judicial Dept., 875 CA 11-02341 (Oct. 5, 2012) Slip Op. at 3. See Exhibit A.

By Stipulation and Order entered May 2, 2011, the Parties entered a stipulated agreement resolving all issues. JGB agreed to replace the track in a location and manner acceptable to CSXT to connect the new track with existing railroad tracks to provide a complete transition from the existing tracks to the subject tracks. The parties also agreed on a schedule for replacement of the tracks to be completed by September 2, 2011. By motion filed on November 30, 2011 Ironwood sought an order compelling JGB to comply with the Stipulation/Order and by motion filed on August 20, 2012, JGB sought an order vacating the Stipulation/Order. By decision dated October 16, 2012, the Court denied both motions finding that JGB’s delays were because of events out of its control and that there were no grounds to set aside the Stipulation and Order. *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 09-5776 (Oct. 16, 2012). See Exhibit A.

Judge DeJoseph issued a Decision and Order dated June 13, 2013, per the Memorandum and Order of the Appellate Division, Fourth Department, dated October 5, 2012, setting the compensatory damages due to Ironwood from JGB. *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 2009-5776 (June 13, 2013). By Order dated July 10, 2013, the Court vacated the terms and conditions of the Stipulation/Order relieving JGB of its obligation to reinstall the track but noting that JGB must now satisfy the monetary judgment against it. *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 2009-5776 (July 10, 2013). See Exhibit A.

In November of 2013, JGB petitioned the New York Supreme Court to dismiss the action

before it for failure to join indispensable parties or for lack of subject matter jurisdiction. In a Decision date December 3, 2013, and Order entered January 21, 2014, the Court denied the petition. The Court looked at the preemption standards to determine whether the Board had primary jurisdiction over the issues raised. In a reasoned analysis relying on Board precedent the Court concluded that Board preemption did not prevent it from reviewing the case. *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 2009-5776 (Dec. 3, 2013). See Exhibit A.

A hearing on punitive damages was held on January 24, 2014, and an Order granting punitive damages was entered on March 21, 2014. *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 2009-5776 (Mar. 21, 2014). See Exhibit A.

CSXT'S Interest

CSXT is a Class I railroad that provides common carrier services across a network consisting of approximately 21,000 route miles in 23 states, the District of Columbia, and two Canadian provinces. CSXT currently owns the line adjacent to the Easements and has a written agreement with Ironwood to provide rail service should the track removed by JGB be replaced. See Exhibit B. The removal of the tracks prevents and interferes with CSXT providing service to Ironwood's property.

ARGUMENT

Under 5 U.S.C. §554(e) and 49 U.S.C. §721(a), the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. JGB does not present a case or controversy. JGB is attempting to avoid the consequences of its bad actions and the judgments imposed by the state court by wrongly hiding behind the Board's jurisdiction.

In this instance, CSXT urges the Board to deny JGB's declaratory order request and find: that a certificate of public convenience and necessity is not needed to restore or operate over the industry track and that the validity of the easement is governed by New York state law as applied by the New York state courts.

A Certificate of Public Convenience and Necessity is Not Required

According 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.

Just as today, Interstate Commerce Commission ("ICC") authority was not required at the time Overmyer built the industry tracks to serve its properties. *See* 49 U.S.C. §10906 and former 49 U.S.C. §1(22) (1967). A property owner building industry track on its property to connect with a rail carrier would not have sought ICC authorization. If authority was required at the time the tracks were built, that authority would have come from the state public utilities commission. Approval of construction of such tracks was within the jurisdiction of public utilities commissions at that time, but was clearly preempted by the ICCTA.

Because ICC authority was not required at the time the track was built, there is no need to seek Board authority now. The Agency has long held that spur/industry track can become a line of railroad as service over the track is expanded. *See Texas & Pac. Ry. V. Gulf, Etc., Ry*, 270 U.S. 266 (1926). Thus, if the Board does find that the industry tracks originally built to serve Overmyer's properties have become lines of railroad through subsequent use by CSXT's predecessors, such expansion of services does not require Board authorization.

CSXT, however, does not believe that the industry track has become a line of railroad through subsequent use. And therefore, Ironwood and Steelway did not need to seek agency

authority when they acquired their respective properties including the industry tracks serving those properties.

Neither Overmyer nor its successors ever intended to be a railroad or provide common carrier service. There is no record that Overmyer or its successors to the track ever published tariffs for rail service prior to the ICCTA. While Conrail's tariffs were incorporated into its "Side Track Agreement" with the property owners, the tariffs were published and applied to Conrail service. Nor does it appear that Overmyer or its successors held themselves out to the general public to provide rail transportation. They stated that their property was served by rail, specifically stating that Conrail was the rail carrier, not the property owner.³ If they did not publish rail tariffs, did not hold themselves out to the public to provide common carrier service, and did not provide service, they could not have been a common carrier under the ICC's jurisdiction.

Ironwood and Steelway are not rail carriers subject to the Board's jurisdiction. It does not matter how Conrail, or CSXT for that matter, classified the tracks for their internal use. The question is the intent of the owner of the tracks, Overmyer and its successors. The tracks were built with the intent that NYC would operate over them to serve the properties. The track is currently owned by Ironwood and Steelway. Unlike in *Am. Orient Express Ry—Petition for Declaratory Order*, STB Docket No. FD-34502 (STB served Dec. 29, 2005), where the Board found that the railway was holding itself out to the public to provide a transportation service, Ironwood and Steelway do not provide or hold themselves out to provide any type of rail service, much less common carrier rail transportation for compensation.

JGB cites to *Effingham R.R.—Petition for Declaratory Order—Const. at Effingham, IL*, 2

³ See JGB Petition for Declaratory Order Exhibit 3.

S.T.B. 606 (*Effingham*) for the proposition that where the line of railroad is the operator's only line of railroad, that operator becomes a railroad and the track is not excepted track. Unlike in *Effingham*, Overmyer and its successors never intended to operate over the track and do not operate over the tracks. The tracks were built for the purpose of NYC providing service to the Northern and Southern Parcels.

The tracks at issue are clearly excepted track under 49 U.S.C. §10906 and therefore Board authorization is not needed for any potential construction or operation over the track. Even if the Board were to find that the track is no longer excepted track, Board authorization is not required for Ironwood to replace the track unlawfully removed by JGB or repair the existing track. Board authority is not required for repair work on existing track (e.g. a washout). *See Brazo River Bottom Alliance—Petition for Declaratory Order*, STB Docket No. FD 35781 (STB served Feb. 19, 2014) (construction of yard did not require Board authorization) and *Denver & R.G.W.R. Co.-Jt. Proj.—Relocation Over BN*, 4 I.C.C.2d 95 (relocation of existing track did not need Agency authorization).

Civil Penalties are Not Justified

Because a certificate was not required at the time the tracks were built, civil penalties for the construction, acquisition, operation or use of the tracks are inappropriate. Even if the Board finds that the tracks have become a line of railroad and Ironwood and Steelway need Board authority to own the tracks, civil penalties are inappropriate. Under 49 U.S.C. §11901, the Board may impose civil penalties when a “rail carrier providing transportation subject to the jurisdiction of the Board...knowingly violates this part or an order of the Board”. Even assuming that Ironwood and Steelway through acquisition of their respective properties have become rail carriers they have not knowingly violated the Board's authority by owning the

tracks. Nor are civil penalties appropriate against CSXT or its predecessors. At no time has CSXT or its predecessors knowingly operated over the tracks in opposition to any ICC or Board order or regulation.⁴

A Cease and Desist Order is Inappropriate

The Board has authority under 49 U.S.C. §721 to issue appropriate orders to prevent irreparable harm, including cease and desist orders. Here, however, there is no justification for issuing a cease and desist order preventing CSXT, or any other person, from seeking access to or use of the easement for rail services. There will be no irreparable harm to JGB if rail service is returned to the easement. The State Court found that Ironwood and Steelway both have valid easements across JGB's property. Ironwood and Steelway intend to use the easements for the purposes for which they were created, to provide rail service to their respective properties. JGB will not succeed on the merits since the Court has already ruled against JGB. There is no damage to JGB because the easements are still in effect and the public interest weighs in favor of rail service over the easement.

Even though the Board has Exclusive Jurisdiction over the Tracks at Issue, the Court Decisions are Not Preempted in this Case

JGB does not provide rail transportation and it does not claim to be a rail carrier. However, JGB seeks to use preemption under 49 U.S.C. §10501(b) as a sword to invalidate the New York Courts' orders finding that (1) Ironwood's and Steelway's easement interests over the property now owned by JGB are valid and still in effect, and (2) the removal of the track from the Ironwood Easement was improper. JGB's erroneous argument turns the purpose of preemption upside down by proposing that preemption allows self-help interference with railroad transportation.

⁴ However, a separate investigation into JGB's actions may be warranted under 49 U.S.C. §11901(c).

In the ICCTA, Congress granted the Board exclusive jurisdiction over all rail transportation and rail facilities that are part of the interstate rail network, as well as the construction, acquisition, operation, abandonment, or discontinuance of ancillary track such as “spur,” “industrial,” “team,” or “switching,” tracks. Section 10501(b) preempts other regulation that would unreasonably interfere with railroad operations that come within the Board’s jurisdiction, whether or not the Board actively regulates the particular activity involved. The Board has exclusive jurisdiction over the industry tracks even though the Board does not actively regulate this type of ancillary track. However, “the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally.” H. Rept. 104-422, 104th Cong., 1st Sess., 167 (1995).

Whether Board authority was required in the first instance to build the track,⁵ is distinct from whether the necessary state law property interest for an easement exists. See *V&S Railway, Allegheny Valley Railroad Company—Petition for Declaratory Order—William Fiore*, STB Docket No. FD 35388 (STB served Apr. 25, 2011) (“the size and extent of a railroad easement is a matter of state property law and best addressed by state courts”), and *MVC Trans. LLC—Acquisition Exemption—P&LE Prop., Inc.* STB Docket No. FD 34462 (STB served Oct. 20, 2004). JGB presents a question as to whether Ironwood and Steelway have a real property interest over JGB’s property, and a claim for damages, stemming from the real property issue, both of which are best handled by a state court, and were specifically left to the States in the legislative history of the ICCTA. The facts presented by JGB to the Board are the same facts presented to the New York Supreme Court who, as summarized above, has ruled against JGB’s real property claims on multiple occasions.

⁵ CSXT believes that this is industry track and Board approval is not necessary to replace track that was unlawfully removed.

Even assuming *arguendo* that the Board has jurisdiction, the state laws do not unreasonably interfere with railroad operations and would not be preempted here.

There are two types of preemption, categorical preemption and as applied preemption. Under categorical preemption any permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities authorized by the Board is preempted. *See City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) and *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (*Green Mountain*). Because of the Board's exclusive jurisdiction over the tracks in this proceedings, local and state permitting or preclearance requirements that could be used to prevent the replacement of the removed track are preempted. However, the issue before the state court regarding the ownership of an easement and property rights under the laws of the State of New York do not on their face interfere with railroad operations, nor does the Board directly regulate real property rights conflicts.

If a local or state law or regulation is not categorically preempted, the section 10501(b) preemption analysis requires the Board to make a fact specific inquiry to determine if the state or local law or regulations as applied would have the effect of preventing or unreasonably interfering with railroad transportation. *See Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (*Franks*), *Dakota, Minn. & E.R.R. v. State of South Dakota*, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), *aff'd on other grounds*, 362 F.3d 512 (8th Cir. 2004).

The Board has found that state and local regulation is permissible where it does not prevent or unreasonably interfere with interstate commerce, and localities retain police powers to protect public health and safety. *See Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971, slip op. at 9 (STB served

May 1, 2001), *aff'd*, *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass 2002).

In the proceeding in state court, Ironwood and Steelway were seeking to protect their property rights and Ironwood sought money damages for wrongful destruction of its property. The property happens to be railroad track. The state laws as applied in this proceeding do not prevent or unreasonably interfere with railroad transportation. The state court determination that Ironwood and Steelway have valid easements over JGB's property and that JGB unlawfully removed a portion of track on Ironwood's easement does not prevent or unreasonably interfere with interstate commerce. In fact, the state court decisions protect potential railroad operations from the unreasonable interference caused by JGB when it removed the track from Ironwood's easement.

JGB falsely claims that damages were awarded by the Court based on Ironwood's inability to use the track for rail purposes when in reality, the compensatory damages were awarded to allow Ironwood to restore the improvement in order to receive rail service that had been destroyed by JGB. The fact that the improvement was track was inconsequential to the damages decision. *Ironwood, LLC et al. v. JGB Properties, Inc.*, N.Y. App. Div. Fourth Judicial Dept., 875 CA 11-02341 (Oct. 5, 2012) Slip Op. at 2 ("servient estate owner to pay the cost of rebuilding the improvement and restoring the easement to its former condition.") See Exhibit A.

The State Court itself looked at the preemption standards to determine whether it had jurisdiction over the proceeding before it. In a reasoned analysis relying on the *Franks* case the State Court concluded that:

there is no rail carrier or railroad involved in this case. The theory of Plaintiffs' case has always been for money damages relating to Defendant's interference with its easement and the wrongful destruction of its property. The law to be applied to this case is the common law on real property and easements in New

York. The very purpose of New York's real property common law is, of course, not to manage or govern rail transportation. Furthermore, it can hardly be said that any of the laws applied in this case interfere in any way with rail transportation.

Thus, the Court concluded that Board preemption did not prevent the Court from reviewing the case. Order in *Ironwood, LLC, et al. v. JGB Properties, LLC*, N.Y. Supreme Court Index No. 2009-5776 (Dec. 3, 2013). Exhibit A.

An Adverse Abandonment is Inappropriate

In the alternative, JGB asks the Board to grant an adverse abandonment over the Railroad Easement that runs through its property. JGB is using its Petition for Declaratory Order as an attempt to circumvent the State Court decisions requiring it to compensate Ironwood for the track it removed from the Railroad Easement and seeking to prevent railroad service across its property. Simply tacking on an adverse abandonment request on to a declaratory order proceeding is not appropriate.

In this proceeding, the track at issue is not a line of railroad, it is excepted track under Section 10906. Therefore, the Board is explicitly prohibited from acting on an abandonment request by Section 10906. Even if the Board finds that the track at issue has become a line of railroad, and CSXT argues that it has not, a declaratory order proceeding does not provide the same protections or opportunities to comment that are provided by an abandonment proceeding.

In abandonment proceedings, there are procedural requirements that are in place to protect shippers, employees, and railroads. See 49 U.S.C. §§10903-10905. The Board has enumerated and detailed these requirements in its Abandonment Regulations at 49 CFR Part 1152. These requirements include: providing advanced notice of intent to abandon (49 C.F.R. 1152.20); filing environmental and historic reports (49 C.F.R. 1152.22(f), 49 C.F.R. 1105.7, 49 C.F.R. 1105.8); and identifying the rural and community impact (49 C.F.R. 1122 (e)), among

others. While these rules may be modified, they are not waived in adverse abandonment proceedings.⁶ Procedurally an adverse abandonment cannot be allowed to go forward, here, because JGB has not complied with any of the rules.

The standard governing the Board's decision on an adverse abandonment is whether the present or future public convenience and necessity ("PN&C") require or permit the proposed abandonment. *See Denver & Rio Grande Railway Historical Foundation—Adverse Abandonment—in Mineral County, CO*, STB Docket No. AB-1014 (STB served April 27, 2009). In the adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. CSXT has an agreement in place with Ironwood to provide Ironwood with rail service once the tracks removed by JBG have been replaced. JBG has provided no evidence of any interest to be weighed against rail service.

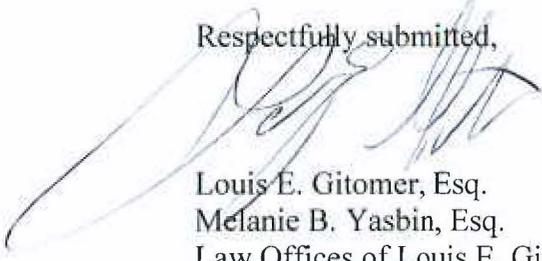
⁶ *See Canadian National Railway Company—Adverse Discontinuance—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, ME*, STB Docket No. AB-297 (Sub-No. 3) (STB served Sept. 25, 2002), *New York City Economic Development Corporation—Adverse Abandonment—New York Cross Harbor Railroad, Inc.* STB Docket No. AB-596 (STB served Dec. 3, 2001)

CONCLUSION

CSXT respectfully requests that the Board deny JGB's request for a declaratory order and find that a certificate of public convenience and necessity is not required to operate over the tracks, civil penalties are not appropriate, and the state law actions are not preempted under ICCTA. CSXT also requests that the Board deny the requests for a cease and desist order and for an adverse abandonment.

Respectfully submitted,

Kim Bongiovanni
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1233



Louis E. Gitomer, Esq.
Melanie B. Yasbin, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(202) 466-6532

Attorneys for: CSX TRANSPORTATION, INC.

Dated: May 30, 2014

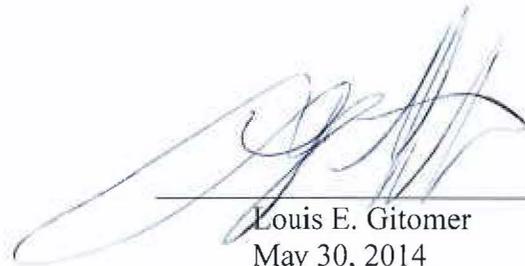
CERTIFICATE OF SERVICE

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

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

Peter A. Pohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Karen A. Booth
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036



Louis E. Gitomer
May 30, 2014

EXHIBIT A – NEW YORK COURT OPINIONS

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and STEELWAY
REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

COPY

DECISION ON MOTION

RJI 33-09-3858

INDEX NO. 09-5776

Decision on motions before the Hon. Brian F. DeJoseph, Justice of the Supreme Court,
on the 10th day of November, 2009.

Appearances:

For the Plaintiffs:

HANCOCK & ESTABROOK, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York 13202
BY: DAVID G. LINGER, ESQ.
Of Counsel.

For the Defendant:

MICHAEL J. KAWA, ESQ.
300 Crown Building
304 South Franklin Street
Syracuse, New York 13202
Of Counsel.

* * * *

Plaintiffs, Ironwood LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”) initiated this action seeking a declaratory judgment and damages based upon the unlawful interference with the use of their rights-of-way by JGB Properties LLC (“JGB”).

By way of background, Ironwood obtained title to the premises commonly known as 4530 Steelway Boulevard South, Clay, New York ("Ironwood property") by deed dated July 29, 1996 (defendant's Exhibit 3). Steelway is the fee owner of the premises commonly known as 4480 and 4490 Steelway Boulevard South, Clay, New York ("Steelway property") by virtue of a deed dated November 27, 1978 (defendant's Exhibit 2). JGB is the fee owner of property located at 4560 Steelway Boulevard South, Clay, New York which it purchased from the County of Onondaga by deed dated May 10, 2005 ("JGB property," defendant's Exhibit 1).

The instant action for declaratory judgment and damages is based upon defendant's alleged unlawful interference with:

(1) Ironwood's right-of-way under a right-of-way agreement between Woodard Industrial Corporation ("Woodard") and D. H. Overmyer Company, Inc. ("Overmyer") dated April 13, 1966 and recorded in the Onondaga County Clerk's Office on May 2, 1966 in Book 2297 at Page 465 (the Ironwood right-of-way, plaintiffs' Exhibit 1 A); and

(2) Steelway's right-of-way under a deed between Woodard and Overmyer dated October 27, 1965 and recorded in the Onondaga County Clerk's Office in Book 2274 at Page 545 (the Steelway Right-of-Way, plaintiffs' Exhibit 1 B).

Plaintiffs' Exhibits 1 A, a right-of-way agreement, and 1 B, a deed of conveyance including a right-of-way, were originally entered into between Woodard and Overmyer for rights-of-way to create and use railroad spur tracks over Woodard's property thus making the Woodard property the servient estate and the Overmyer property the dominant estate. In the Ironwood right-of-way (plaintiffs' Exhibit 1 A), Woodard granted to Overmyer and "its successors and assigns a permanent right-of-way for a railroad spur track to be used and enjoyed in common with others" over the Woodard property. Said right-of-way was more particularly described and

designated on a map attached to the right-of-way agreement. A true and accurate copy of said map is included as defendant's Exhibit 8. The Steelway right-of-way, (plaintiffs' Exhibit 1 B), contained in the deed, granted to Overmyer and its "successors and assigns forever. . . a right-of-way for a railroad spur to be used and enjoyed in common with others . . ." over the servient estate, then belonging to Woodard.

It is undisputed that both Ironwood and Steelway are successors in interest to Overmyer – Ironwood purchased the southern parcel of the property once owned by Overmyer and Steelway purchased the northern parcel of the property once owned by Overmyer. JGB is the successor in title to Woodard, the servient estate. It is further undisputed that subsequent to the transfers from Woodard to Overmyer above mentioned, railroad tracks were installed over both the Ironwood and Steelway rights-of-way (referred to by the parties in their moving papers as the southerly track and northerly track respectively) and that defendant has recently removed all or part of the southerly or Ironwood track.

By Notice of Motion dated October 5, 2009, plaintiffs seek a declaration from the Court that the said railroad rights-of-way are valid and that plaintiffs have a continuing right to use, benefit from and maintain same, as well as an order of partial summary judgment finding defendant liable for the unlawful interference with Ironwood's use of the southerly track. By Notice of Cross-Motion dated November 2, 2009 defendant seeks an order dismissing plaintiffs' complaint.

The Court will first address the so-called Steelway right-of-way and the northern track. As stated above, Steelway contends that its rights emanate from a conveyance of October 27, 1965 from Woodard to Overmyer (plaintiffs' Exhibit 1 B and part of defendant's Exhibit 6). The right-of-way conveyed therein was included in the conveyance to Steelway by deed dated

November 27, 1978 (defendant's Exhibit 2). Defendant's opposition to Steelway's claim centers on the right-of-way agreement between Woodard and Overmyer dated April 13, 1966 (plaintiffs' Exhibit 1 A, defendant's Exhibit 8). Defendant is correct in its assertion that "under no circumstances, therefore, can Steelway claim to have any right-of-way across JGB's property over the upper 40 foot area (the "northern track") under the Indenture or map, since that upper 40 foot area is not "designated in yellow" and Steelway's property is not "outlined in red."

(Paragraph 20 of the Bernhardt affidavit dated November 2, 2009.)

Defendant's reliance on said April 13, 1966 conveyance, however, is misplaced and completely ignores Steelway's rights acquired under the October 27, 1965 Indenture. The Court concludes (as subsequently conceded by defendant in paragraph 6 of the affidavit of Michael Kawa, Esq. dated November 9, 2009) that Steelway possesses a 20 foot wide right-of-way running east - west across the northerly portion of defendant's property.

Defendant further objects to Steelway's position herein by alleging that the 20 foot right-of-way does not include an easement or right-of-way to any railroad company to use the northern track and that Steelway has produced no agreement between itself and any railroad company for rail service across the northern track. Said argument is without merit and disregards the plain language in the 1965 Indenture which states, in relevant part, "together with a right-of-way for a railroad spur to be used and enjoyed in common with others . . . said right-of-way to be 20 feet in width."

With regard to the Ironwood easement and the so-called southerly track, defendant acknowledges that the southern track is located on property "designated in yellow" and the property now owned by Ironwood is one of the parcels "outlined in red" referred to on the April 13, 1966 right-of-way agreement and map attached thereto (plaintiffs' Exhibit 1 A, defendant's Exhibit 8). Defendant contends, however, that the Ironwood easement did not

include the right to use railroad tracks and that the easement was not operative because it was conditioned upon future action which did not occur.

While the 1966 right-of-way agreement does state, in part, "... it is understood and agreed between the parties that party of the first part (Woodard) intends to convey a meets and bounds description of the premises to the New York Central Railroad Company," a reading of the entire agreement is required. The agreement of the parties is to be determined from a reading of the document as a whole, not from one or more distinct phrases or words. *See Abiele Contr. v New York City Sch. Constr. Auth.*, 91 NY2d 1; *Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342. The agreement also clearly states "first party hereby grants and conveys to the party of the second part, its successors and assigns, a permanent right-of-way for a railroad spur track to be used and enjoyed in common with others" This language is clear and unequivocally refers to the use of a railroad spur track, which in fact is in place. Nowhere within the 1966 agreement does it state that the right to use the right-of-way and/or the track was "conditional" and would have to await a future metes and bounds description.

Defendant also argues that Ironwood has effectively abandoned its use of the southern track by its own actions and/or inactions. In support of this claim, defendant asserts that Ironwood has failed to claim that it actually had train service to its property during its 13 years of ownership; that no service agreement between Ironwood and a railroad company has been submitted in support of this claim; that photographic evidence clearly demonstrates that the tracks have not been maintained and are in a deteriorated condition; and that the southern track is not operational because the switch allowing a train to transfer from the main line has been "spiked" by the railroad company preventing its use.

These arguments also fail. In *Gold v. DiCerbo*, 41 AD 3d 1051, the Court held:

"It has long been recognized that an easement created by grant, such as the easement at issue here, may be extinguished by abandonment or adverse

possession (see *Gerbig v. Zumpano*, 7 NY2d 327, 330 [1960]). In order to prevail on her claim of extinguishment by abandonment, plaintiff was required to establish by clear and convincing evidence ‘both an intention to abandon [by Majkut] and also some overt act or failure to act which carries the implication that [Majkut] neither claims nor retains any interest in the easement’ (*id.* at 331; see *Consolidated Rail Corp. v. MASP Equip. Corp.*, 67 NY2d 35, 39 [1986]; *Navin v. Mosquera*, 26 AD3d 556, 557 [2006]; *B.J. 96 Corp. v. Mester*, 222 AD2d 798, 800 [1995]). The non-use of an easement, even of substantial duration, will not establish a claim for abandonment (see *Gerbig v. Zumpano*, *supra* at 331) and ‘acts evincing an intention to abandon must be unequivocal’ (*id.*; *B.J. 96 Corp. v. Mester*, *supra*)”.

In *Rentar Development Corporation v. The City of New York*, 160 AD2d 860, the Court

held:

“The plaintiff’s alleged failure to use the railroad tracks, however, does not demonstrate a clear intention to abandon. Moreover, the owner of the dominant tenement is under no duty to make use of the easement as a condition to retaining its interest therein. [citations omitted]”

Similarly, in *Iacovelli v. Schoen*, 170 AD2d 1044, the Court held, in part:

“To prove abandonment of an easement created by deed there must be evidence not only of cessation of use but also of ‘conduct of the owner of the easement definitively evincing an intention to surrender the right.’”

In the present matter, defendant’s mere allegations of non-use are insufficient to extinguish Ironwood’s rights.

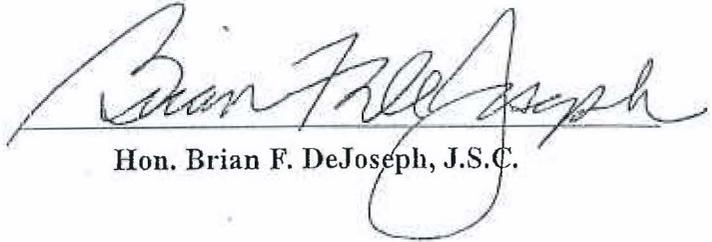
For the reasons stated hereinabove, plaintiffs’ motion is granted and the Court hereby concludes that said railroad rights-of-way are valid; plaintiff Steelway’s right-of-way is 20 feet in width running across the northerly portion of defendant’s property; that plaintiff Ironwood possesses a 40 foot wide easement as set forth on the map attached to defendant’s Exhibit 8.

Defendant JGB’s cross-motion is in all respects denied.

The Court will conduct an inquest to determine monetary damages relating to defendant's removal of and/or unlawful interference with the southerly track.

Plaintiff is directed to submit an order in accord with this decision and upon entry and service thereof, to file and serve a Trial Note of Issue for Inquest on damages herein.

DATED: SYRACUSE, NEW YORK
DECEMBER 2, 2009



Hon. Brian F. DeJoseph, J.S.C.

HANCOCK & ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER I SYRACUSE, NEW YORK 13202

At a Motion Term of the Supreme Court of the State of New York in and for the County of Onondaga at the Onondaga County Courthouse in the City of Syracuse, New York on the 22 day of December 2009.

PRESENT: Hon. Brian F. DeJoseph, JSC
Supreme Court Justice Presiding

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and STEELWAY REALTY CORPORATION,
Plaintiffs,
vs.
JGB PROPERTIES, LLC,
Defendant.

ORDER
Index No. 2009-5776
RJI No. 33-09-3858
Hon. Brian F. DeJoseph, JSC

Plaintiffs Ironwood, LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”) (hereinafter collectively the “Plaintiffs”) having moved for an Order granting declaratory judgment as to Plaintiffs’ rights to certain railroad easements and partial summary judgment pursuant to CPLR §§3001 and 3212 as to Defendant JGB Properties, LLC’s (“Defendant”) liability, and for the Court to set a date for an inquest as to Plaintiffs’ damages and such other and further relief as the Court deems just, proper and equitable; and the Defendant having cross-moved to dismiss the Plaintiffs’ complaint; and

NOW, upon reading and filing the Plaintiffs’ Notice of Motion dated October 5, 2009, together with the Affidavit of David G. Linger sworn to the 5th day of October, 2009 with exhibits annexed thereto in support of said motion; the Affidavit of Eliot Litoff, sworn to the 2nd day of October, 2009 in support of said motion; the Affidavit of Jay Bernhardt, sworn to the 2nd day of November, 2009 with exhibits annexed thereto in support of Defendant’s cross-motion

and in opposition to Plaintiffs' motion; the Affidavit of David G. Linger sworn to the 6th day of November 2009, in further support of Plaintiffs' motion and in opposition to Defendant's cross-motion; and the Reply Affidavit of Michael J. Kawa, sworn to the 9th day of November 2009 in further opposition to Plaintiffs' motion; and the Court having heard the motion and due deliberation having been had thereon; and the Court having issued its written Decision on motion dated December 2, 2009, a copy of which is attached hereto; it is hereby

ORDERED that the Court grants Plaintiffs' motion for declaratory judgment that Steelway possesses a permanent 20 foot wide right-of-way for a railroad spur running generally east-west across the northerly portion of Defendant's property acquired pursuant to an October 27, 1965 Indenture and that Steelway has a continuing right to utilize and maintain same; and it is further

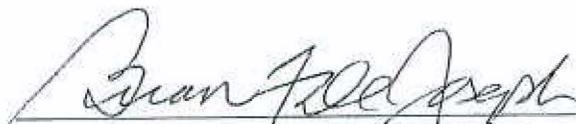
ORDERED that the Court grants Plaintiffs' motion for declaratory judgment that Ironwood possesses a permanent 40 foot wide right-of-way for a railroad spur track running generally east-west across the southerly portion of Defendant's property as identified more particularly in a Right of Way Agreement dated April 13, 1966 and map attached thereto, recorded May 2, 1966 in the Onondaga County Clerk's Office, and that Ironwood has a continuing right to utilize and maintain same; and it is further

ORDERED that Defendant is enjoined from any further interference with the rights of the Plaintiffs to benefit from the aforesaid rights of way as herein determined, including but not limited to, any future removal of railroad tracks, ties, gravel, also known as "ballast", clips, spikes, switches, and all other materials necessary to operate and maintain the railroad spur tracks, and it is further

ORDERED that Defendant's cross motion is in all respects denied; and it is further

ORDERED that a date for an inquest as to the damages sustained by Ironwood in consequence of the actions of JGB and/or its agents in removing the railroad tracks and related improvements will be held by this Court following Plaintiffs' filing of a trial note of issue.

DATED: December 22, 2009



Honorable Hon. Brian F. DeJoseph
Justice of the Supreme Court

ENTER:

HANCOCK & ESTABROOK, LLP COUNSELLORS AT LAW 1500 AXA TOWER 1 SYRACUSE, NEW YORK 13202

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, LLC and STEELWAY REALTY
CORPORATION,

COPY

Plaintiffs,

vs.

**DECISION AFTER
INQUEST**

JGB PROPERTIES, LLC,

RJI 33-09-3858
INDEX NO. 09-5776

Defendant.

Decision after Inquest before the Hon. Brian F. DeJoseph, Justice of the Supreme Court, on the 7th and 8th days of July, 2010.

Appearances:

For the Plaintiffs:

HANCOCK & ESTABROOK, LLP
1500 Axa Tower I
100 Madison Street
Syracuse, New York 13202
BY: DAVID G. LINGER, ESQ.
Of Counsel.

For the Defendant:

MICHAEL J. KAWA, ESQ.
300 Crown Building
304 South Franklin Street
Syracuse, New York 13202

* * * * *

The Court, having conducted an inquest to determine damages as against defendant during a bench trial and based upon the credible testimony, exhibits received and

submissions which included, among other things, the pre-trial and post-trial memorandums of law, and after due deliberate consideration, the Court decides as follows:

Plaintiffs, Ironwood LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”) initiated this action seeking a declaratory judgment and damages based upon the unlawful interference with the use of their rights-of-way by JGB Properties LLC (“JGB”)¹. The issue of JGB’s liability was previously determined by this Court in a Decision dated December 22, 2009 finding JGB liable for the unlawful interference with Ironwood’s easement. This matter was then brought on for an inquest and was heard on July 7th and 8th, 2010.

By way of background, Ironwood obtained title to the premises commonly known as 4530 Steelway Boulevard South, Clay, New York by deed dated July 29, 1996. Steelway is the fee owner of the premises commonly known as 4480 and 4490 Steelway Boulevard South, Clay, New York by virtue of a deed dated November 27, 1978. JGB is the fee owner of property located at 4560 Steelway Boulevard South, Clay, New York which it purchased from the County of Onondaga by deed dated May 10, 2005.

Ironwood is the beneficiary of an easement originally granted to the D.H. Overmeyer Company, Inc. JGB, as successor to Woodard Industrial Corporation, is subject to the rights of Ironwood and its right-of-way easement. More specifically, Ironwood possesses a permanent 40 foot right of way for a railroad spur track running across the southerly portion of JGB’s property.

¹Steelway did not seek any relief during the inquest held on July 7th and 8th 2010.

In or about the Spring of 2009, JGB started removing certain railroad spurs on the subject easement without the consent or permission of Ironwood. As a result, Ironwood contends that they are entitled to compensatory and punitive damages.

COMPENSATORY DAMAGES

With regard to the claim for compensatory damages, Ironwood submits that it is entitled to \$141,572.00 based upon the cost to reinstall the railroad spur less the cost which would have been incurred to return the easement (railroad spur) to a serviceable condition. JGB contends that Ironwood's proposed measure of damages - "replacement cost" - is not proper and the appropriate measure of damages in a case of interference with an easement on rental property is the diminution in the rental value of the property caused by the obstruction. Ironwood did not submit any proof regarding the diminution of rental value, but rather focused its proof exclusively on replacement cost.

Thus, we first turn to the threshold issue of the proper measure of compensatory damages.

In the case of rental property, where the interference of an easement is permanent, the measure of damages to the owner is the diminution in rental value of the property caused by the interference. *Hine v. New York El. R.R. Co.*, 128 N.Y. 571 (1891); *Kernochan v. New York El. Ry. Co.*, 128 N.Y. 559 (1891).

The two above-referenced 19th century cases remain viable in New York. *See* 49 N.Y. Jur 2d Easements §§ 189, 193. As a matter of fact, Ironwood acknowledged diminution in rental value as the proper measure of damages in its Pre-Trial Memorandum of Law, but changed course upon the commencement of the inquest.

The cases cited by Ironwood in its Post-Trial Memorandum all stand for the general proposition that when damage is incurred to real property, a plaintiff may recover the lesser

of diminution in value of its real property or the replacement cost associated with the damaged realty. See *Jenkins v. Etlinger*, 55 N.Y.2d 35 (1982); *Lopez v. Adams*, 69 A.D.3d 1162 (3d Dep't 2010); *Prashant Enterprises, Inc. v. State*, 228 A.D.2d 144 (3d Dep't 1996); *Granchelli v. Walter S. Johnson Building Co., Inc.*, 85 A.D.2d 891 (4th Dep't 1981); and *McDermott v. City of Albany*, 309 A.D.2d 1004 (3d Dep't 2003). All of these cases involve damage to the owner's real property, which was caused by negligence or the intentional acts of others. None of the cases deal with the circumstances in the case at bar, involving interference with an easement by the servient owner (JGB) towards the dominant owner (Ironwood). Therefore, these cases are not applicable to the case at bar.

As a result of Ironwood's failure to submit any proof regarding the diminution of rental value of its property as a result of JGB's obstruction and removal of railroad spurs, Ironwood is not entitled to any compensatory damages.

PUNITIVE DAMAGES

Before addressing the merits of Ironwood's claim for punitive damages, the question of whether punitive damages may be awarded in the absence of compensatory damages must first be determined.

This Court is well aware of the principle set forth by the New York Pattern Jury Instructions - Civil 2:278 ("PJI"):

Punitive damages may not be awarded unless there has been an award for compensatory damages (even nominal).
Citing to: *Hubbell v. Trans World Life Ins. Co. of New York*, 50 N.Y.2d 899 (1980); *Bryce v. Wilde*, 39 A.D.2d 291 (3d Dep't 1972); *Kaiser v. Van Houten*, 12 A.D.3d 1012 (3d Dep't 2004); *Prote Contracting Co., Inc. v. Board of Educ. of New York*, 276 A.D.2d 309 (1st Dep't 2000).

A thorough review of New York case law, however, reveals a conflict on this issue. In *Bryce v. Wilde*, 39 A.D.2d 291, the Third Department affirmed the trial court's setting aside of a punitive award against the purchaser of real property and a third person who acted as a straw man in contracting the purchase with the owner and then assigning the contract to the actual purchaser. *Id.* at 292-293. The Court determined that no actual malice on the part of the defendants had been shown, and that, as to the straw purchaser, there had been no award of compensatory damages. *Id.* at 293. The Court stated that punitive damages are not recoverable alone, although they may be based on an award of nominal compensatory damages. *Id.*

In the following cases, however, the courts took an opposite view, stating that punitive damages may be awarded even in the absence of an award of compensatory damages. *Kent v. City of Buffalo*, 36 A.D. 2d 85 (4th Dep't 1971); *Clark v. Variety*, 189 A.D. 462 (1st Dep't 1919).

In *Kent*, plaintiff commenced an action for libel against a Buffalo, New York radio and television station. *Id.* at 86. The jury returned a verdict for the plaintiff in the amount of \$5,000.00 for punitive damages, but did not award any compensatory damages. *Id.* The defendants appealed and the Fourth Department was presented with three appellate questions: (1) Was the publication false?; (2) May punitive damages be awarded without compensatory damages?; and (3) Does the evidence contained in the record support a finding of malice? *Id.* at 87. The Fourth Department was "unanimous in holding that the publication

was false and that punitive damages may be awarded without compensatory damages.² (emphasis added). *Id.*

With respect to the additional cases cited by PJI, it should be noted that they do not support the stated principle. In fact, those cases provide that an **invalid claim** for compensatory damages and/or a stand-alone claim for punitive damages, will not support an award for punitive damages.

In *Hubbell*, the Court of Appeals noted that “absent a **valid claim** for compensatory damages, there could be none for punitive damages...” (emphasis added). *Hubbell*, 50 N.Y.2d at 901.

In *Kaiser*, the Third Department held that the plaintiff could not seek punitive damages against the defendants following the dismissal of his substantive causes of action. *Kaiser*, 12 A.D.3d at 1015 (punitive damage claim is non-existent in the absence of a substantive cause of action).

In *Prote*, the First Department, citing to *Hubbell*, reiterated the same point - “absent a **valid claim** for compensatory damages, there could be none for punitive damages...” (emphasis added). *Prote*, 276 A.D.2d at 310.

While New York appears to be unsettled on this topic, the Fourth Department supports the position that punitive damages may in fact be awarded in the absence of an award for compensatory damages. Thus, so long as a **valid claim** for compensatory damages is presented, a verdict for punitive damages will survive even in the absence of any award

²The Court of Appeals reversed *Kent v. City of Buffalo* on other grounds, specifically the issue of whether the evidence supported a finding of malice. See *Kent v. City of Buffalo*, 29 N.Y.2d 818 (1971).

for compensatory damages. *Hubbell v. Trans World Life Ins. Co. of New York*, 50 N.Y.2d 899 (1980); *Kent v. City of Buffalo*, 36 A.D. 2d 85 (4th Dep't 1971); *Clark v. Variety*, 189 A.D. 462 (1919).

In the case at bar, despite obtaining no award for compensatory damages, Ironwood presented a valid claim at the inquest. Ironwood was granted summary judgment on the issue of JGB's liability and interference with the subject easement. As a result, Ironwood holds a valid claim for compensatory damages. Although Ironwood failed to present proof on the proper measure of compensatory damages, the underlying claim was valid; and, therefore, we now turn to the merits of Ironwood's claim for punitive damages.

It is well settled that punitive damages may be awarded for the obstruction of an easement if the defendant's conduct is determined to be malicious. *Consolidated Rail Corp. v. MASP Equipment Corp.*, 67 N.Y.2d 35 (1986); *Stassou v. Casini & Huang Construction, Inc.*, 14 A.D.3d 695 (2d Dep't 2005).

The evidence offered at the time of the inquest supports a finding that JGB acted with malice in removing, interfering, and destroying Ironwood's railroad easement and improvements.

* Prior to the removal of the railroad spurs, Ironwood informed JGB that it objected to their removal and/or any interference with the easement. In February, 2006 Richard J. Berry of Ironwood sent JGB a letter setting forth its position and informing JGB that the spurs constituted permanent easements. Subsequent phone conversations between JGB and Ironwood took place. During these conversations, JGB was, again, informed that Ironwood would not acquiesce to the removal of any railroad spurs on its easement.

* In approximately the Fall of 2008, JGB contacted Richard A. Barry of Tartaglia Inc. to remove the railroad spurs on its property. Mr. Barry, on behalf of Tartaglia Inc., declined and refused to remove the spurs

because the spurs serviced surrounding properties and buildings in the area.

* JGB subsequently retained Fisher Companies, specifically John Fisher, to remove the spurs on the railroad easement. It should be noted that John Fisher, CEO and President of Fisher Companies and Jay Bernhardt, owner of JGB, have known each other for 40 years and interact on both a social and professional basis. The Fisher Companies, however, requested and received an indemnification and hold harmless agreement from JGB as a pre-condition to removing the spurs. Despite three decades of working with the Fisher Companies, an indemnification agreement had never been requested prior to JGB's request to remove the spurs. The indemnification agreement was requested by John Fisher of Fisher Companies because he was not confident that JGB had the authority to remove the railroad spurs.

* Despite JGB's actual and constructive notice of Ironwood's rights, a portion of the railroad spur on Ironwood's easement was removed in April, 2009.

JGB's intentional act of removing a portion of the railroad spur on Ironwood's easement against Ironwood's explicit objection and without its consent, exemplifies a malicious disregard for Ironwood's rights. *See e.g., Fareway Heights, Inc. v. Hillcock*, 300 A.D.2d 1023 (4th Dep't 2002). To that end, Ironwood is entitled to punitive damages.

The last issue before the Court is the question of the amount of punitive damages that Ironwood is entitled to.

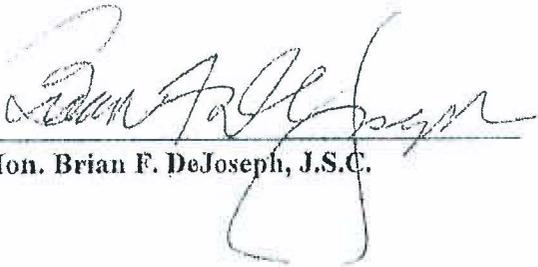
On this issue, the parties will have until **March 15, 2011** to complete discovery in order to collect any additional evidence relevant to the question of the amount of punitive damages that Ironwood is entitled to.

The Court will conduct a hearing on Wednesday, April 6, 2011 at 9:30 a.m. to determine the monetary damages relating to Ironwood's claim for

punitive damages. See *Rupert v. Sellers*, 48 A.D.2d 265 (4th Dep't 1975); *Vollertsen Associates, Inc. v. Nothnagle, Inc.*, 48 A.D.2d 1007 (4th Dep't 1975).

Plaintiff is directed to submit an order, on notice, in accord with this Decision.

DATED: SYRACUSE, NEW YORK
JANUARY 7, 2011



Hon. Brian F. DeJoseph, J.S.C.

PRESENT: Hon. Brian F. DeJoseph, JSC
Supreme Court Justice Presiding

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and STEELWAY REALTY
CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

ORDER

Index No. 2009-5776
RJI No. 33-09-3858

Hon. Brian F. DeJoseph, JSC

The Court having conducted an inquest as to the plaintiff Ironwood, LLC's ("Ironwood") damages on July 7 and 8, 2010 before the Hon. Brian F. DeJoseph, Justice of the Supreme Court, with David G. Linger of Hancock Estabrook representing plaintiff Ironwood and Attorney Michael J. Kawa representing defendant JGB Properties, LLC ("JGB") and the Court having subsequently rendered a Decision After Inquest dated January 7, 2011, a copy of which is attached hereto and incorporated herein,

NOW, after receiving testimony and evidence at the aforementioned Inquest, it is hereby **ORDERED** that Ironwood's claim for compensatory damages is hereby **DENIED**, and it is further

ORDERED that Ironwood's motion to amend its complaint pursuant to CPLR §3025(c) to assert a punitive damages claim is hereby **GRANTED**, and it is further

ORDERED that Ironwood is entitled to punitive damages due to the misconduct by JGB, by acting with malice by removing, interfering with, and destroying improvements located on Ironwood's subject railroad easement, and it is further

{H1489824.2}

SYRACUSE, NEW YORK 13202
1500 AXA TOWER 1
COUNSELORS AT LAW
HANCOCK & ESTABROOK, LLP

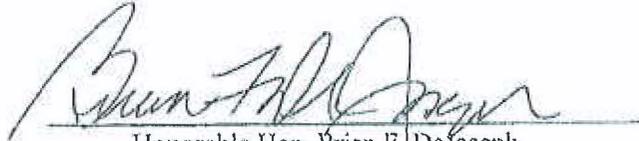
11:09 02/08/11 ONONDAGA COUNTY CLERK OF

ORDERED that the parties have until March 15, 2011 to complete discovery relative to issues concerning the amount of punitive damages to which Ironwood is entitled , and it is further

ORDERED that the Court will conduct a hearing on Wednesday, April 6, 2011 at 9:30 am to determine the amount of monetary relief to be awarded on Ironwood's claim for punitive damages, and it is further

ORDERED that all other relief requested by Ironwood and JGB during the Inquest is in all respects DENIED.

DATED: January 28, 2011


Honorable Hon. Brian F. DeJoseph
Justice of the Supreme Court

ENTER:

HANCOCK & ESTABROOK, LLP COUNSELLORS AT LAW 1500 AXA TOWER 1 SYRACUSE, NEW YORK 13202

11:09 02/03/11 ONONDAGA COUNTY CLERK CP

5-2-11

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and STEELWAY REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

STIPULATION and ORDER

Index No. 2009-5776
RJI No. 33-09-3858

Hon. Brian F. DeJoseph, JSC

HANCOCK & ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER 1 SYRACUSE, NEW YORK 13202

The Court having conducted a judicial settlement conference on February 25, 2011 before the Hon. Brian F. DeJoseph, Justice, with David G. Linger of Hancock Estabrook representing plaintiff Ironwood, LLC ("Ironwood") and Attorney Michael J. Kawa representing defendant JGB Properties, LLC ("JGB") and the parties having agreed to a stipulated agreement to resolve all issues and claims in the above referenced matter upon the following terms and conditions:

1. JGB agrees to reinstall such portion of the railroad tracks and all necessary improvements which it previously had removed from a 40' wide permanent easement area so named, located, shown and designated in yellow on a map attached to an Indenture dated April 13, 1966 made between Woodard Industrial Corporation and D.H. Overmeyer Company, Inc. and recorded in the Onondaga County Clerk's Office on May 2, 1966 in Book 2297 of Deeds at page 465 and which railroad improvements were of benefit to the Ironwood property located at 4530 Steelway Boulevard South, Clay New York (hereinafter, "Ironwood Property"), and which were located between railroad tracks owned by CSX Corporation ("CSX") and remaining railroad tracks which lead to the Ironwood Property (hereinafter "railroad improvements").

10:55:05/04/11 ONONDAGA COUNTY CLERK BH

HANCOCK & ESTABROOK, LLP, COUNSELORS AT LAW 1500 AXA TOWER I SYRACUSE, NEW YORK 13202

- a. JGB will issue a request for proposals to competent third party contractors for bids to install the railroad improvements; and
- b. JGB shall establish a deadline of no later than **April 29, 2011** for JGB to receive written proposals from competent third party contractors to install the railroad improvements; and
- c. No later than **May 16, 2011** JGB shall select a competent contractor for the purpose of installing said railroad improvements; and
- d. JGB shall direct the contractor which it selects to install the railroad improvements to use its best efforts to complete the installation of railroad improvements no later than **September 2, 2011**; and
- e. JGB and the contractor that it selects shall use their best efforts to receive CSX approval of the railroad improvements, as well as confirmation that the installation of said materials is in full conformity with CSX and/or any applicable governmental rules, regulations and guidelines on or before **September 2, 2011**; and
- f. JGB and the contractor which it selects shall use their best efforts to obtain CSX and any other necessary governmental approvals, if any, to permit the utilization of said railroad improvements for commercial railway freight service on or before **September 2, 2011**; and
- g. The parties agree to provide a written status report to the Court on **September 6, 2011** or in response to an inquiry by the Court at an earlier date; and
- h. The parties further stipulate and agree that in the unlikely event that JGB has not fully completed all of its obligations as set forth hereinabove on or before **November 28,**

HANCOCK & ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER 1 SYRACUSE, NEW YORK 13202

2. JGB further agrees that it will install the railroad improvements in such a location and manner acceptable to CSX as to connect with existing railroad tracks on either end of the railroad improvements so as to provide a proper and complete transition from the existing tracks to the subject railroad improvements, and

3. JGB further agrees that defendant, its agents and contractors will install the railroad improvements in a professional and workmanlike manner, and

4. JGB agrees that it will obtain all governmental approvals necessary for the installation of the railroad improvements at its sole expense; and

5. JGB agrees to have the railroad improvements installed at its own cost and expense in accordance with all applicable CSX railway standards, rules and guidelines and in a manner acceptable to CSX for the purpose of allowing CSX to provide freight rail service on the railroad improvements; and

6. JGB agrees to install the railroad improvements in a manner which will permit CSX to enter into a Private Sidetrack Agreement with Ironwood for CSX to provide freight rail service on the railroad improvements; and

7. JGB agrees to provide Ironwood with written confirmation from CSX that the railroad improvements have been installed by JGB, its agents and/or contractors in a manner both acceptable to CSX and in conformity with all CSX and/or governmental requirements that may exist at JGB's sole expense; and

8. JGB agrees to take all steps necessary, including its best efforts, to have the railroad improvements installed based upon the following stipulated and agreed upon schedule:

2011, the parties may, but are not obligated to, undertake all efforts they deem necessary to perfect any and all appeals or cross appeals pending before the Fourth Department Appellate Division with the express understanding that said efforts in no way alter, impair or modify the obligations of JGB set forth hereinabove unless it is eventually determined upon appeal that JGB has no responsibility to reinstall the railroad improvements; and

9. In the event that the railroad improvements cannot be installed within the existing 40' wide permanent easement area referenced in Section I herein, then the parties shall execute a new 40' wide permanent easement agreement properly reflecting the location of the re-installed railroad improvements and Ironwood shall relinquish its rights to the 40' wide permanent easement area referenced in Section I herein.

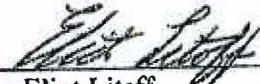
10. JGB agrees to provide, through its counsel, a written status report and update as to its efforts to effectuate the terms of this settlement set forth hereinabove to Ironwood through its counsel upon request.

11. That the parties mutually agree, with the consent of the Court, to hold all proceedings in the captioned litigation in abeyance, including but not limited to a pending motion by Ironwood and cross motion by JGB, an evidentiary hearing on punitive damages and appeals by the parties from the Decision and Order of Judge DeJoseph pending the effectuation of all terms of this Stipulation and Order as set forth hereinabove, and

12. The parties agree to exchange mutual releases and a stipulation discontinuing the pending litigation upon the effectuation of all terms of this Stipulation.

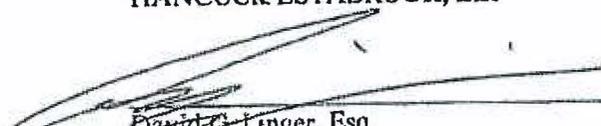
HANCOCK & ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER 1 SYRACUSE, NEW YORK 13202

DATED: April 22, 2011

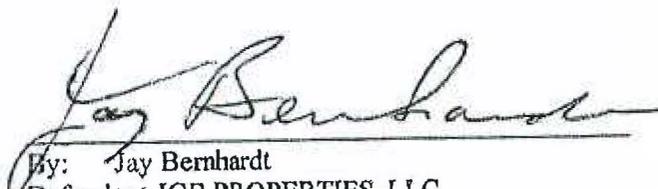

By: Eliot Litoff
Plaintiffs IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION

Dated: April 25th, 2011

HANCOCK ESTABROOK, LLP


David G. Linger, Esq.
Attorneys for Plaintiffs
1500 AXA Tower I, 100 Madison Street
Syracuse, New York 13202

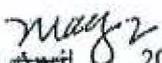
DATED: April 28, 2011

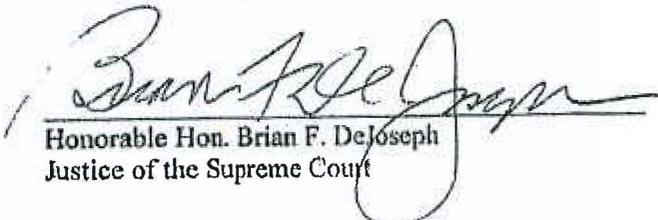

By: Jay Bernhardt
Defendant JGB PROPERTIES, LLC

Dated: April 26, 2011


Michael J. Kawa, Esq.
Attorneys for Defendant
300 Crown Building
304 S. Franklin St.
Syracuse New York 13202

SO ORDERED:

DATED:  April 29, 2011


Honorable Hon. Brian F. DeJoseph
Justice of the Supreme Court

ENTER:

1-24-12

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: SCUDDER, P. J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

DOCKET NO. CA 11-02340

IRONWOOD, LLC AND STEELWAY REALTY CORPORATION,
PLAINTIFFS-RESPONDENTS,

V

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DOCKET NO. CA 11-02341

IRONWOOD, LLC, PLAINTIFF-RESPONDENT-APPELLANT,
AND STEELWAY REALTY CORPORATION, PLAINTIFF,

V

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

Defendant having moved to vacate the dismissal of the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Onondaga on December 28, 2009 (appeal No. 1), and to extend the time to perfect the appeal from an order of the Supreme Court entered in the Office of the Clerk of the County of Onondaga on February 3, 2011 (appeal No. 2), and

Plaintiffs having cross-moved for an extension of time to perfect the cross appeal from the order entered on February 3, 2011 (appeal No. 2),

Now, upon reading and filing the affidavits of Michael J. Kawa, Esq., sworn to November 21, 2011, and November 30, 2011, the affirmation of Janet D. Callahan, Esq., dated November 23, 2011, and the notices of motion and cross motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that defendant's motion insofar as it seeks to vacate dismissal of the appeal from the order entered December 28, 2009 (appeal No. 1), is denied, and

It is further ORDERED that defendant's motion insofar as it seeks an extension of time to perfect the appeal from the order entered February 3, 2011 (appeal No. 2), is granted and defendant shall perfect the appeal on or before March 20, 2012, and, in the event of failure to so perfect, the appeal is hereby dismissed without further order, and

It is further ORDERED that plaintiffs' cross motion insofar as it seeks to extend the time for Ironwood LLC to perfect its cross appeal is granted and Ironwood LLC shall perfect its cross appeal from the order entered February 3, 2011 (appeal No. 2), on or before April 24, 2012, and, in the event of failure to so perfect, Ironwood LLC's cross appeal is hereby dismissed without further order.

Entered: January 24, 2012

FRANCES E. CAFARELL, Clerk

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, FRANCES E. CAFARELL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this

JAN 24 2012

Frances E. Cafarell
Clerk

10-16-12

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

DECISION

RJI 33-09-3858

INDEX NO. 09-5776

Decision on motions before the Hon. Brian F. DeJoseph, Justice of the Supreme Court, on the 7th day of September, 2012.

Appearances:

For the Plaintiffs:

HANCOCK ESTABROOK, LLP

1500 AXA Tower I

100 Madison Street

Syracuse, New York 13202

BY: DAVID G. LINGER, ESQ.

Of Counsel.

For the Defendant:

MICHAEL J. KAWA, ESQ.

300 Crown Building

304 South Franklin Street

Syracuse, New York 13202

* * * *

There are two motions pending before the Court.

The first, brought by plaintiff by Notice of Motion dated November 30, 2011 is seeking an order compelling defendant to comply with the terms of a Stipulation/Order dated May 2, 2011, setting new binding deadlines on defendant and imposing monetary sanctions for defendant's delays in complying with said Stipulation/Order. The second, brought by defendant by Notice of Motion dated August 20, 2012 is seeking an order vacating the Stipulation/Order of May 2, 2011.

The facts of this case have been well established during the course of this litigation and do not require any further recitation.

The Court will begin with plaintiff's motion.

The Court has again reviewed the lengthy history of this matter, including the correspondence between the parties contained in the record.

In the Court's view, the overwhelming majority of the delays in complying with the Stipulation and Order were not caused and/or created by JGB. The parties were simply unaware of all of the procedures involved in effectuating the agreement. The procedures are not detailed in the agreement and were discovered by the parties during their efforts to comply with same.

Moreover, based upon recent submissions by the parties relative to defendant's motion herein, there does not appear to be any dispute that JGB has submitted all necessary paperwork for the site plan approval to the Town of Clay and the approval process to install the subject railway improvement now rests with the Town. Thus, at this time, JGB

has complied and there is nothing more for JGB to do at this time to further effectuate the terms of the agreement.

In support of its motion, defendant, JGB, submits an affidavit of Jay Bernhardt with attached exhibits, including reports of two (2) experts. In sum, these reports opine and conclude that the overall purpose of the Stipulation and Order cannot be achieved and, therefore, due to certain “mutual mistakes” and an overall “frustration of purpose” the Stipulation and Order should be vacated.

A stipulation of settlement may be set aside upon a showing of cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or duress. *McCoy v. Feinman*, 99 N.Y.2d 295 (2002).

Based upon a thorough review of the current record before the Court, including the subject May 2, 2011 Stipulation and Order, this Court identifies no grounds to vacate same.

The Court must clarify an issue raised in JGB’s motion regarding the private sidetrack agreement between CSX and Ironwood. First and foremost, JGB is not a party to said agreement. Second, the execution of a private sidetrack agreement was not a condition to JGB installing the railroad improvements. The plain and unambiguous language of the Stipulation provides in pertinent part the following:

JGB agrees to install the railroad improvements in a manner which will permit CSX to enter into a private sidetrack agreement with Ironwood for CSX to provide freight rail service on the railroad improvements....
(Stipulation and Order ¶ 6)

The Court does not and cannot view this language as a condition. All in all, JGB entered into an agreement to replace the railroad improvements and this Court can identify no basis to disturb this agreement.

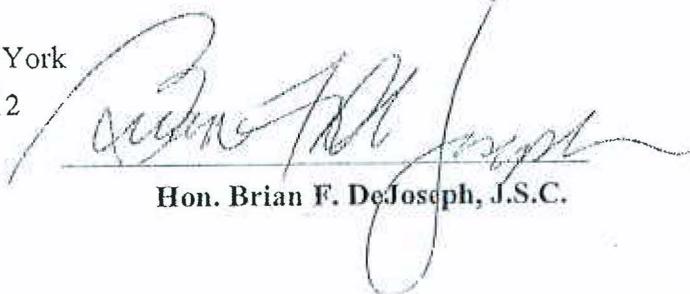
In addition, it must be noted, the two "expert" reports submitted on behalf of JGB are not in admissible form as neither report is submitted in the form of a sworn affidavit. The exception contemplated by CPLR §2106 is not applicable here and as a result, the reports do not constitute competent evidence. *Rameau v. King*, 245 A.D.2d 557 (2d Dep't 1997); *Gill v. O.N.S. Trucking*, 239 A.D.2d 463 (2d Dep't 1997); *Woodard v. City of New York*, 262 A.D.2d 405 (2d Dep't 1999); *Simms v. APA Truck Leasing Corp.*, 14 A.D.3d 322 (1st Dep't 2005).

In view of the foregoing, the two "expert" reports have been disregarded and are hereby stricken from consideration on this motion.

In conclusion, both motions are **DENIED**.

Defendant is hereby directed to submit an Order on notice in accordance with this decision.

Dated: Syracuse, New York
October 16, 2012



Hon. Brian F. DeJoseph, J.S.C.

12-3-13

At a Motion Term of this Court held in and for the County of Onondaga at the County Courthouse located in the City of Syracuse, New York on the 26th day of November, 2013.

PRESENT: Hon. Brian F. DeJoseph, JSC
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

ORDER

Index No: 2009-5776
RJI No: 33-09-3858

Hon. Brian F. DeJoseph

HANCOCK ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER I, 100 MADISON ST., SYRACUSE, NEW YORK 13202

Defendant, JGB Properties, LLC ("Ironwood"), having moved this Court for an Order compelling plaintiffs, Ironwood, L.L.C. ("Ironwood") and Steelway Realty Corporation ("Steelway") (collectively, the "plaintiffs"), to dismiss plaintiffs' action pursuant to CPLR § 3211(a)(10) for failure to join indispensable parties or pursuant to CPLR § 3211(a)(2) for lack of subject matter jurisdiction; and

NOW, upon reading and filing defendant's Notice of Motion dated October 21, 2013, together with the Affirmation of Kevin M. Mendillo, Esq. dated October 21, 2013, with exhibits annexed thereto in support of said motion, served upon opposing counsel on October 30, 2013; the Affidavit of David G. Linger, Esq. sworn to the 19th day of November, 2013 with exhibits annexed thereto, in opposition to said motion; the letter of Attorney Richard H. Sargent dated November 21, 2013; and the Affidavit of Kevin M. Mendillo, Esq. sworn to the 25th day of November, 2013 in further support of the defendant's motion; the Court having heard the

{H2188992.1}

motion, including oral argument by attorney David G. Linger on behalf of Ironwood and by attorneys Joseph A. Camardo and Kevin M. Mendillo on behalf of JGB, and due deliberation having been had thereon it is hereby

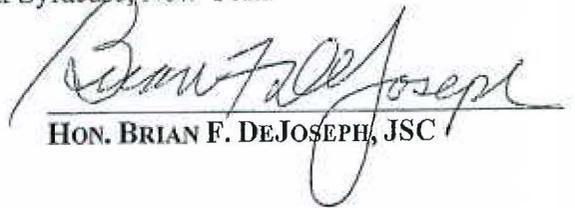
ORDERED, that defendant JGB's motion pursuant to CPLR § 3211(a)(10) is denied; and, it if further

ORDERED, that defendant JGB's motion pursuant to CPLR section 3211 (a)(2) is denied; and, it is further

ORDERED, that a copy of the Court's Decision dated December 3, 2013 be annexed to and made a part this Order.

Signed this 21 day of January, 2014 at Syracuse, New York.

ENTER:


HON. BRIAN F. DEJOSEPH, JSC

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

DECISION

RJI 33-09-3858
INDEX NO. 09/5776

COPY

Decision on motion before the Hon. Brian F. DeJoseph, Justice of the Supreme Court, on the 26th day of November, 2013.

Appearances:

For the Plaintiffs:

HANCOCK ESTABROOK, LLP
1500 AXA Tower 1
100 Madison Street
Syracuse, New York 13202
BY: DAVID P. LINGER, ESQ.
JAMES P. YOUNGS, ESQ.
Of Counsel.

For the Defendant:

CAMARDO LAW FIRM, P.C.
127 Genesee Street
Auburn, New York 13021
BY: KEVIN M. MENDILLO, ESQ.
JOSEPH A. CAMARDO, ESQ.
Of Counsel.

* * * *

Defendant, JGB Properties, LLC (hereinafter "JGB"), brings this motion to dismiss pursuant to CPLR §§ 3211(a)(2) and (10).

On this motion, Defendant contends that this Court cannot proceed in the absence of necessary and indispensable parties that should have been named as parties to the action. More specifically, Defendant argues that the inclusion of certain parties, such as the Town of Clay and 4550 Steel Way Boulevard, LLC ("4550"), would have established that the easement at issue in this matter is void as a matter of law and therefore any punishment for the removal of the tracks by JGB is without merit. The second issue raised by the Defendant pursuant to CPLR §3211(a)(2) is subject matter jurisdiction and specifically the idea that this matter is preempted by federal law.

By way of background, Plaintiffs, Ironwood LLC ("Ironwood") and Steelway Realty Corporation ("Steelway") initiated this action seeking a declaratory judgment and damages based upon the alleged unlawful interference with the use of their rights-of-way/easement by JGB.

Plaintiff Ironwood obtained title to the premises commonly known as 4530 Steelway Boulevard South, Clay, New York ("Ironwood property") by deed dated July 29, 1996.

Plaintiff Steelway is the fee owner of the premises commonly known as 4480 and 4490 Steelway Boulevard South, Clay, New York ("Steelway property") by virtue of a deed dated November 27, 1978. JGB is the fee owner of property located at 4560 Steelway Boulevard South, Clay, New York which it purchased from the County of Onondaga by deed dated May 10, 2005.

The instant action for declaratory judgment and damages is based upon Defendant's alleged unlawful interference with:

(1) Ironwood's right-of-way under a right-of-way agreement between Woodard Industrial Corporation ("Woodard") and D. H. Overmyer Company, Inc. ("Overmyer") dated April 13, 1966 and recorded in the Onondaga County Clerk's Office on May 2, 1966 in Book 2297 at Page 465; and

(2) Steelway's right-of-way under a deed between Woodard and Overmyer dated October 27, 1965 and recorded in the Onondaga County Clerk's Office in Book 2274 at Page 545.

On December 28, 2009, this Court entered an Order granting the above-referenced relief to the Plaintiffs (Ironwood and Steelway) essentially determining that Plaintiffs have viable easements and Defendant interfered with same. Following a trial on the issue of damages and a subsequent modification from the Appellate Division, Fourth Department dated October 5, 2012, this Court awarded compensatory damages in the amount of \$141,572.00. The Court is currently scheduled to commence a punitive damages hearing on December 16, 2013.

NECESSARY PARTIES

First and foremost, the issue of necessary parties may be raised at any time during the litigation. See Weinstein, Korn, and Miller, New York Civil Practice, ¶ 1001.03. This Court and the parties have been unable to uncover any reported case in New York to say otherwise.

CPLR §1001(a) [Parties Who Should Be Joined] provides, in pertinent part, that “persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action....” The movant under this section must demonstrate that a party’s joinder is “necessary to accord full relief to the parties presently joined,” or that the “absent party will be inequitably affected by any judgment that may result in this action.” *CBS Corp. v. Dumsday*, 268 A.D.2d 350, 353 (1st Dep’t 2000); *see also Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

Nevertheless, dismissal for lack of a “necessary party” should be a last resort. *Id. See also Castaways v. Schuyler*, 24 N.Y.2d 120, 125 (1969) (“The conclusion reached below goes squarely against the general policy of the Civil Practice Law and Rules to limit the scope of indispensable parties to those cases and only those cases where the determination of the court will adversely effect the rights of nonparties....”)

In the case at bar, Defendant asserts that two absent entities should be parties - the Town of Clay and 4550.

In short, Defendant argues that the subject railroad easement that this Court deemed valid in 2009 traverses over land owned by JGB and a number of other property owners, including the Town of Clay and 4550, and therefore these entities are “necessary” under CPLR § 1001.

The Court will begin with the Town of Clay as a potential “necessary party.”

Defendant's primary theme as to the Town of Clay goes beyond where the subject easement runs. Instead, it focuses on the theory that the easement obtained by Ironwood was invalid because the original grantor of said easement did not own an interest in a portion of the subject property in order to legally convey any interest in real property.

There is certainly no dispute here that the parties are not looking for this Court to resolve the issue of a valid easement and/or whether the easement was properly conveyed by its original grantor. In the Court's view, the issue of a valid easement was argued and decided by this Court in 2009. The Defendant had an opportunity to appeal said determination and failed to timely perfect it. This background is relevant because Defendant may have presented a meritorious defense, albeit too late for this Court to rule on. The flaw in Defendant's presentation on this point is the question of why Defendant would have needed the Town of Clay in this case in order to assert said defense.

The Court identifies an important distinction between the need for a party to be involved in a case in order for the parties to obtain an effective judgment and allowing the parties a full and fair opportunity to prosecute and defend. In this case, the Defendant had a full opportunity to raise this argument in opposition to Plaintiffs' motion for Summary Judgment on the validity of the easement. It failed to do so and it clearly did not need the Town of Clay in this litigation in order to present said argument.

Moreover, in terms of prejudice - it can hardly be argued that the Town of Clay was hurt by this determination as on October 19, 2012 the Town of Clay Planning Department approved the replacement of an existing railroad spur that was removed by Defendant in 2008. By this

decision, the Court can only assume, based on the current record before it, that the Town of Clay recognizes and acknowledges the validity of the easement as determined by this Court in 2009.

The Court will now address "4550" as a necessary party.

On 4550, Defendant contends that the sidetracks that traverse over 4550's property were, upon information and belief, paved over and rendered incapable of serving any railroad purpose prior to JGB's removal of any tracks. The Defendant further argues that the failure to join 4550 in this action has created a situation where JGB has been forced to bear the burden of incurring liability and paying for damages for interfering with an easement that had already been destroyed.

Defendant's position on this point as it relates to the question of necessary parties is without merit.

First, again, there is no indication as to why Defendant could not have raised this theory, which, in part, goes to the validity of the easement, without 4550 as a party. More specifically, if in fact Defendant wanted to assert that the easement was no longer viable because part of the railroad easement was "destroyed", Defendant could have presented this defense without 4550 and/or without even knowing who was responsible for destroying the easement.

Second, Defendant is wrong in its assertion that it was forced to bear the burden of paying for damages for interfering with an easement that had already been destroyed. The Defendant in this case was and is responsible for the cost to replace the spur track in question; the spur track it removed. It was not held responsible for any additional costs to returning the track to an operable condition. As a matter of fact, the Defendant was credited for those additional costs.

As a final point, with respect to the adverse affect this determination may have on 4550, it should be noted that 4550 has commenced its own action against JGB. This action is an express indication from 4550 that it acknowledges the validity of the easement.

The Court will not address any additional or potential necessary parties as the Defendant has failed to present any evidence or specifics as to who those parties are and why they qualify as necessary per Article 10 of the CPLR.

In conclusion, the Court concedes that this litigation may have proceeded quicker and more efficiently if some or all of the parties eluded to by Defendant were joined. If this matter were still in the pleading or discovery stage, the Court may consider, in its discretion, adding the above referenced parties for purposes of judicial economy. The Court is, however, unwilling to vacate its prior Order(s) and Judgment and erase over four years of litigation to do so. Doing so would be contrary to preserving judicial resources/economy and highly prejudicial to the Plaintiffs. See e.g., Weinstein, Korn, and Miller, *New York Civil Practice*, ¶ 1001.00 (“Joinder is not mandatory simply because claims running in favor of, or against, more than one person have a common origin in fact or law.”).

For all the foregoing reasons, Defendant’s motion to dismiss pursuant to CPLR§ 3211(a)(10) is **DENIED**. *CBS Corp., supra*.

SUBJECT MATTER JURISDICTION

As was the case with necessary parties, subject matter jurisdiction may be raised at any time during litigation. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714 (1997); *Moulden v. White*, 49 A.D.3d 1250 (4th Dep't 2008). Thus, this Court will again get to the merits of Defendant's arguments.

With respect to subject matter jurisdiction, Defendant contends that the relief granted by this Court is expressly preempted by the Interstate Commerce Commission Termination Act of 1995 (hereinafter "ICCTA"). The ICCTA grants exclusive jurisdiction of transportation by railroad to the Surface Transportation Board (hereinafter "STB").

The Defendant relies heavily on the Second Department case of *In re Metropolitan Transp. Authority*, 32 A.D.3d 943 (2d Dep't 2006) for its position on preemption.

In that case, the Metropolitan Transportation Authority commenced a proceeding to acquire an easement by condemnation, which would result in the forced relinquishment of certain railroad tracks and the discontinuance of any rail service over them. *Id.* at 944. In response, a tenant of one of the lots benefitted by this easement commenced a hybrid CPLR Article 78/declaratory judgment action seeking, among other things, a declaration that the proposed condemnation was preempted by federal law, specifically the ICCTA. *Id.* The Second Department determined that the use of state eminent domain law to condemn portions of the subject railroad track constitutes "regulation" and the exercise of control over rail transportation. *Id.* at 946. As a result, the Court held that the ICCTA preempted the proposed condemnation as it has exclusive jurisdiction over railroad matters. *Id.*

This Court finds this Second Department case to be distinguishable from the case at bar. The Court is persuaded by the analysis in two United States Court of Appeals cases from the Fifth Circuit.

The first, *Franks Investment Company LLC v. Union Pacific Railroad Co.*, 593 F.3d 404 (5th Cir. 2010), involved a possessory action brought by a property owner seeking to enjoin a railroad from removing two private crossings. The Fifth Circuit found that the action was neither expressly or impliedly preempted by the ICCTA. *Id.* at 415. The Court stated that, “[f]or an action to be expressly preempted under the ICCTA, it must seek to regulate the operations of rail transportation.” *Id.* at 413 (emphasis added). The Court reasoned that the property owner’s action involved state laws which incidentally affected rail transportation, as opposed to managing or governing rail transportation. *Id.* at 411. As for implied preemption, the Court determined there was no evidence in the record to suggest that the private crossings created an “unusual interference with the railroad.” *Id.* at 415.

The second, *Guild v. Kansas City Southern Railway Company*, 2013 WL 4780516 (5th Cir. 2013), involved certain owners of real property along a railroad line who filed suit against a railroad seeking, among other things, injunctive relief challenging the railroad’s removal of a switch that connected spur track on the owners’ property to the railroad’s main track. *Id.* at 1 - 2. The threshold issue in *Guild* was preemption with the ICCTA. *Id.* The Court in *Guild* dealt with a party who was seeking to compel its adversary to (1) replace the subject “switch” with an

upgraded switch and (2) to maintain the switch so it functioned properly with the main railroad track. *Id.* at 3. The Court determined that this matter was clearly preempted by the ICCTA because the switch claim was seeking to regulate the operations of rail transportation. *Id.* at 3-4.

The Fifth Circuit in *Guild* provided an excellent analysis of the interplay between state laws that are preempted with other state actions that should not be preempted. The crux of the distinction turns on two principles. For express preemption - state laws that have the effect of managing or governing rail transportation shall be preempted. For implied preemption - state laws that would have the effect of unreasonably burdening or interfering with rail transportation shall be preempted. *Franks, supra. Guild, supra.*

In this Court's view, the case at bar falls in line with *Franks*.

There is no rail carrier or railroad involved in this case. The theory of Plaintiffs' case has always been for money damages relating to Defendant's interference with its easement and the wrongful destruction of its property. The law to be applied to this case is the common law on real property and easements in New York. The very purpose of New York's real property common law is, of course, not to manage or govern rail transportation. Furthermore, it can hardly be said that any of the laws applied in this case interfere in any way with rail transportation. Simply put, as opposed to *Guild* and *In re Metropolitan Transp. Authority* this case was not commenced for purposes of seeking to regulate railroad transportation. *See e.g., In re Metropolitan Transp. Authority*, 32 A.D.3d at 946 ("condemnation is regulation").

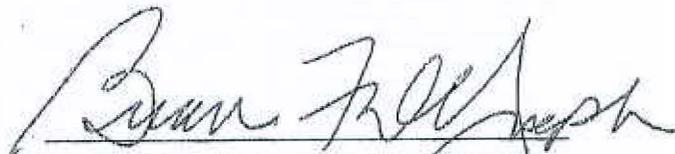
The nature and use of the railway at issue in this case is secondary or incidental to the Plaintiffs' case. As a result, Defendant's argument on preemption and subject matter jurisdiction is misplaced. *Franks, supra; see also New York Susquehanna and Western Railway Corp. v.*

Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (“The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having more remote or incidental effect on rail transportation.”); *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212 (4th Cir. 2009).

Defendant’s motion to dismiss pursuant to CPLR §3211(a)(2) is **DENIED**.

Plaintiffs are hereby directed to submit an Order, on notice, in accordance with this Decision. A copy of this Decision shall be referenced by and attached to said Order.

Dated: Syracuse, New York
December 3, 2013



Hon. Brian F. DeJoseph, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

**AFFIDAVIT
OF SERVICE**

Index No: 2009-5776
RJI No: 33-09-3858

Hon. Brian F. DeJoseph

1500 AXA TOWER I, 100 MADISON ST., SYRACUSE, NEW YORK 13202
HANCOCK ESTABROOK, LLP COUNSELORS AT LAW

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

KATHLEEN A. MERLE, being duly sworn, deposes and says: that your deponent is not a party to the within action, is over 18 years of age, and that your deponent resides in Onondaga County, New York. That on the 29th day of January, 2014 your deponent served the within **ORDER OF THE HON. BRIAN F. DEJOSEPH DATED JANUARY 21, 2014 AND ENTERED IN THE OFFICE OF THE ONONDAGA COUNTY CLERK ON JANUARY 23, 2014** upon the attorneys for the parties hereto at the address(es) listed below by causing a true copy of same, enclosed in a postpaid properly addressed wrapper, to be deposited in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

Joseph A. Camardo, Esq.
CAMARDO LAW FIRM, P.C.
Attorneys for Plaintiff
127 Genesee Street
Auburn, New York 13021


KATHLEEN A. MERLE

Sworn to before me this
29th day of January, 2014


NOTARY PUBLIC

MARIA T. GABRIELLI
Notary Public, State of New York
Qualified in Onondaga County
No. 01GA5073091
My Commission Expires Feb. 18, 15

3-8-14

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, LLC and STEELWAY
REALTY CORPORATION,

Plaintiffs,

COPY

vs.

**PUNITIVE DAMAGES
HEARING**

JGB PROPERTIES, LLC,

RJI 33-09-3858
INDEX NO. 09-5776

Defendant.

Decision on punitive damages hearing before the Hon. Brian F. DeJoseph, Justice of the
Supreme Court, on the 27th day of January, 2014.

Appearances:

For the Plaintiffs:

HANCOCK ESTABROOK, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York 13202
BY: DAVID G. LINGER, ESQ.
JAMES P. YOUNGS, ESQ.
Of Counsel.

For the Defendant:

**SCHLATHER, STUMBAR, PARKS
& SALK, LLP**
200 East Buffalo Street
P.O. Box 353
Ithaca, New York 14851-0353
BY: RAYMOND M. SCHLATHER, ESQ.
Of Counsel.

TULLY RINCKEY, PLLC
504 Plum Street, Suite 103
Syracuse, New York 13204
BY: RICHARD SARGENT, ESQ.
Of Counsel.

CAMARDO LAW FIRM, P.C.

127 Genesee Street

Auburn, New York 13021

BY: JOSEPH A. CAMARDO, ESQ.

KEVIN M. MENDILLO, ESQ.

Of Counsel.

* * * *

The Court, having conducted a hearing to determine the amount of punitive damages as against Defendant during a bench trial and based upon the credible evidence, and after due deliberation thereon, hereby finds and decides as follows:

FACTUAL BACKGROUND

Plaintiffs, Ironwood LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”) initiated this action seeking a declaratory judgment and damages based upon the alleged unlawful interference with the use of their rights-of-way/easement by Defendant JGB Properties, LLC (“JGB”).

Ironwood obtained title to the premises commonly known as 4530 Steelway Boulevard South, Clay, New York (“Ironwood property”) by deed dated July 29, 1996.

Steelway is the fee owner of the premises commonly known as 4480 and 4490 Steelway Boulevard South, Clay, New York (“Steelway property”) by virtue of a deed dated November 27, 1978. JGB is the fee owner of property located at 4560 Steelway

Boulevard South, Clay, New York which it purchased from the County of Onondaga by deed dated May 10, 2005.

The instant action for declaratory judgment and damages is based upon Defendant's alleged unlawful interference with:

(1) Ironwood's right-of-way under a right-of-way agreement between Woodard Industrial Corporation ("Woodard") and D. H. Overmyer Company, Inc. ("Overmyer") dated April 13, 1966 and recorded in the Onondaga County Clerk's Office on May 2, 1966 in Book 2297 at Page 465; and

(2) Steelway's right-of-way under a deed between Woodard and Overmyer dated October 27, 1965 and recorded in the Onondaga County Clerk's Office in Book 2274 at Page 545.

On December 28, 2009, this Court entered an Order granting the above-referenced relief to the Plaintiffs (Ironwood and Steelway) essentially determining that Plaintiffs have viable easements and Defendant interfered with same. Following an Inquest held on July 7 and 8, 2010 regarding the issue of damages and a subsequent modification from the Appellate Division, Fourth Department dated October 5, 2012, this Court awarded compensatory damages in the amount of \$141,572.00. Also as part of the Inquest held in July, 2010, this Court determined the following:

(1) It is well settled that punitive damages may be awarded for the obstruction of an easement if the defendant's conduct is determined to be malicious. *Consolidated Rail Corp. v. MASP Equipment Corp.*, 67 N.Y.2d 35 (1986); *Stassou v. Casini & Huang Construction, Inc.*, 14 A.D.3d 695 (2d Dep't 2005).

(2) The evidence offered at the time of the Inquest supports a finding that JGB acted with malice in removing, interfering, and destroying Ironwood's railroad easement and improvements.

(3) JGB's intentional act of removing a portion of the railroad spur on Ironwood's easement against Ironwood's explicit objection and without its consent, exemplifies a malicious disregard for Ironwood's rights. *See e.g., Fareway Heights, Inc. v. Hillcock*, 300 A.D.2d 1023 (4th Dep't 2002). To that end, Ironwood is entitled to punitive damages.

See Decision Afer Inquest, dated January 7, 2011.

The Appellate Division, Fourth Department, affirmed this Court's decision with respect to punitive damages: The Fourth Department determined, in pertinent part, the following:

[W]e conclude that the evidence establishes that defendant acted with actual malice when it removed the spur track and that its conduct rose to the level of a wanton, willful or reckless disregard of plaintiff's rights....

Plaintiff's property manager testified that defendant's owner contacted him and asked if defendant could remove the spur track. The property manager told defendant's owner that defendant could not remove the spur track under any circumstances. Thereafter, plaintiff sent defendant a letter reiterating that it held a 'permanent easement' in the spur track, that it had not 'relinquished its rights' relative to the easement and that defendant did 'not have the right to remove or obstruct' the easement. Plaintiff enclosed with the letter drawings that were filed in the county clerk's office as part of a right-of-way agreement and that clearly depicted the easement. Defendant's owner admitted that he received plaintiff's letter and that he knew of plaintiff's objections to the removal of the spur track. Further, the initial contractor defendant contacted concerning removal of the spur track refused to perform the work because the track serviced plaintiff and other adjoining property owners, and that contractor warned defendant that it should not remove the track. Defendant's owner then approached a friend about removing the spur track. That individual was likewise concerned about the legality of removing

the spur track and was initially unwilling to perform the work. The friend ultimately agreed to remove the spur track, but only after defendant provided him with a hold harmless agreement.

We thus conclude that the evidence supports the court's determination that plaintiff is entitled to punitive damages in an amount to be determined after a hearing.

See Ironwood, LLC v. JGB Properties, LLC, 99 A.D.3d 1192, 1195-1196 (4th Dep't 2012) (internal quotation marks omitted) (emphasis added).

The punitive damages hearing commenced on January 27, 2014 and concluded the same day.

PRE-HEARING MOTIONS¹

Prior to the hearing, the Court received two motions.

To start, non-party CSX Transportation, Inc. ("CSXT") brought a motion, by way of Order to Show Cause, to quash a Subpoena Duces Tecum pursuant to CPLR §§ 2304 and 3101 for being unreasonably vague, overbroad, burdensome, and untimely.

Plaintiff Ironwood brought a motion to preclude all of Defendant's expert testimony. More specifically, Plaintiff sought to preclude the testimony of John Betak, Ph.D, a transportation systems specialist, Michael O'Neill, a licensed land surveyor and

¹The Court hereby incorporates as Exhibit "A" portions of the transcript regarding oral argument on the pre-trial motions.

licensed professional engineer, Philip R. Rizza, from Terrestrial Environmental Specialists (TES), and John Mako, a commercial appraiser.

The Court will discuss these motions as one as there exists a common theme amongst them.

Plaintiff (and to a lesser extent - non-party, CSXT) contends that the proffered experts are seeking to challenge the validity of Plaintiff's easement and the nature and use of the improvements thereon. Plaintiff argues that these issues are no longer before the Court and the Court, as instructed by the Appellate Division, only needs to resolve the amount due Plaintiff in punitive damages.

Plaintiff and CSXT are correct and their respective motions are granted in their entirety.

The Court is not seeking to relitigate this case.

The Court has determined liability and compensatory damages in the amount of \$141,572.00. The Court has also, as referenced above, determined liability for punitive damages, which was affirmed by the Appellate Division. *See Ironwood, LLC v. JGB Properties, LLC*, 99 A.D.3d 1192, 1195 (4th Dep't 2012) (“[W]e conclude that the evidence establishes that defendant acted with actual malice when it removed the spur track and that its conduct rose to the level of a ‘wanton, willful or reckless disregard of plaintiff’s rights’”).

It appears now, based on the Defendant's expert disclosure and other related submissions that Defendant wants to litigate Defendant's conduct and its apparent "low level" of reprehensibility. This issue has already been determined and the Defendant has clearly had a full and fair opportunity to litigate this question. The Court must agree with Plaintiff. Defendant's experts must be precluded under the doctrines of res judicata and collateral estoppel. See e.g., *Scipio v. Wal-Mart Stores East, L.P.*, 100 A.D.3d 1452 (4th Dep't 2012); *Parker v. Blauvelt Volunteer Fire Company*, 93 N.Y.2d 343 (1999); *Landau, P.C. v. LaRossa, Mitchell, & Ross*, 11 N.Y.3d 8 (2008).

In sum, prior to the hearing, the Court issued its directive. The hearing would only focus on the amount of punitive damages. Under the circumstances of this case, this would only require testimony regarding Defendant's net worth.

FACTUAL FINDINGS

At the commencement of the hearing, Plaintiff called its first witness - Matthew DeKay. Mr. DeKay was introduced as the sole individual utilized by the Defendant in supplying information to prepare the answers to Plaintiff's Interrogatories.

The Court is no longer required to make any factual findings in this hearing as the parties stipulated to the net worth of Defendant.

Defendant's net worth is established at \$3,000,000.00.

ANALYSIS - AMOUNT OF PUNITIVE DAMAGES

[Punitive damages] are intended as punishment for gross misbehavior for the good of the public and have been referred to as a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine. Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which [it] is entitled to reimbursement. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another.

Fordham v. National Fuel Gas Dist. Corp., 42 A.D.3d 106, 114 (4th Dep't 2007) (internal citations and quotations omitted).

The amount of punitive damages must be sufficient to affect the Defendant's behavior and "reasonabl[y] relat[ed] to the harm done and the flagrancy of the [Defendant's] conduct." *Fareway Heights, Inc. v. Hillock*, 300 A.D.2d 1023, 1025 (4th Dep't 2002). Moreover, because "[t]he deterrent effect of a punitive damages award is to some extent dependent upon the wealth of the defendant" the Defendant's financial condition and wealth is relevant on the amount of punitive damages. *Rupert v. Sellers*, 48 A.D.2d 265, 272 (4th Dep't 1975). Above all, the propriety of a punitive award is not "generally susceptible to precise measurement" and should not be disturbed unless it is grossly excessive. *O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488, 492 (4th Dep't 1984).

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor. *BMW of North America, Inc. v.*

Gore, 517 U.S. 559 (1996). The three (3) factors to consider in evaluating whether an award is grossly excessive are:

- (1) the degree of reprehensibility;
- (2) the disparity between the harm or potential harm suffered and the punitive damages award; and
- (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id.

The Court has taken considerable time in reviewing other cases from the Fourth Department and the State of New York as a whole to determine an appropriate and reasonable punitive damages award.

In the case at bar, as noted several times, the Defendant's conduct is established. The evidence offered at the time of the Inquest clearly supported a finding that JGB acted with malice in removing, interfering, and destroying Ironwood's railroad easement and improvements.

* Prior to the removal of the railroad spurs, Ironwood informed JGB that it objected to their removal and/or any interference with the easement. In February, 2006 Richard J. Berry of Ironwood sent JGB a letter setting forth its position and informing JGB that the spurs constituted permanent easements. Subsequent phone conversations between JGB and Ironwood took place. During these conversations, JGB was, again, informed that Ironwood

would not acquiesce to the removal of any railroad spurs on its easement.

* In approximately the Fall of 2008, JGB contacted Richard A. Barry of Tartaglia Inc. to remove the railroad spurs on its property. Mr. Barry, on behalf of Tartaglia Inc., declined and refused to remove the spurs because the spurs serviced surrounding properties and buildings in the area.

* JGB subsequently retained Fisher Companies, specifically John Fisher, to remove the spurs on the railroad easement. It should be noted that John Fisher, CEO and President of Fisher Companies and Jay Bernhardt, owner of JGB, have known each other for 40 years and interact on both a social and professional basis. The Fisher Companies, however, requested and received an indemnification and hold harmless agreement from JGB as a pre-condition to removing the spurs. Despite three decades of working with the Fisher Companies, an indemnification agreement had never been requested prior to JGB's request to remove the spurs. The indemnification agreement was requested by John Fisher of Fisher Companies because he was not confident that JGB had the authority to remove the railroad spurs.

* Despite JGB's actual and constructive notice of Ironwood's rights, a portion of the railroad spur on Ironwood's easement was removed in April, 2009.

"This represents the record on the issue of Defendant's "degree of reprehensibility." On this point the Court must agree with Plaintiff. Some acts may be worse than others, but each reprehensible act is worthy of punitive damages. Otherwise, this Court and the Fourth Department would not have determined that Defendant's actions constituted malice.

In view of the foregoing, and along with this Court's prior determination on the actual harm sustained (compensatory damages) at \$141,572.00, the stipulation on Defendant's net worth at \$3,000,000.00, the Court hereby awards Plaintiff \$300,000.00 in punitive damages.

In formulating this punitive damages figure, the Court reviewed several cases on the issue, including but not limited to: *State Farm Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196 (1990); *Guariglia v. Price Chopper Operating Co., Inc.*, 38 A.D.3d 1043 (3d Dep't 2007); *Solis-Vicuna v. Notias*, 71 A.D.3d 868 (2d Dep't 2010); *Strader v. Ashley*, 61 A.D.3d 1244 (3d Dep't 2009); *Correia v. Suarez*, 52 A.D.3d 641 (2d Dep't 2008); *Rupert v. Sellers*, 48 A.D.2d 265 (4th Dep't 1975); *Western New York Land Conservancy, Inc. v. Cullen*, 66 A.D.3d 1461 (4th Dep't 2009); *Fareway Heights, Inc. v. Hillock*, 300 A.D.2d 1023 (4th Dep't 2002); *O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488 (4th Dep't 1984); *Stassou v. Casini & Huang Construction, Inc.*, 2003 WL 25836670 (2003).

This Court finds the Fourth Department cases of *Western New York Land Conservancy, Inc. v. Cullen*, 66 A.D.3d 1461 (4th Dep't 2009) and *Fareway Heights, Inc. v. Hillock*, 300 A.D.2d 1023 (4th Dep't 2002) to be the most instructive.

In *Fareway Heights, Inc. v. Hillock*, 300 A.D.2d 1023 (4th Dep't 2002), the Supreme Court directed a verdict in favor of the Plaintiff on liability and the jury awarded Plaintiff \$35,000.00 in compensatory damages and \$250,000.00 in punitive damages. On appeal, the Fourth Department determined that the punitive damage award was supported by the evidence as it established that Defendants knew Plaintiff owned the property, intentionally excavated on Plaintiff's property without its consent, and represented to others that they had permission. *Id.* at 1025. The Fourth Department further concluded that "[u]nder the circumstances of this case, the award of punitive damages is appropriate and bears a reasonable relation to the harm done and the flagrancy of the conduct causing it." *Id.* (internal quotations omitted).

In *Western New York Land Conservancy, Inc. v. Cullen*, 66 A.D.3d 1461 (4th Dep't 2009), Plaintiff was awarded \$91,181.00 in compensatory damages and \$500,000.00 in punitive damages. The Fourth Department affirmed the award concluding that the evidence established Defendant acted intentionally and "with no regard for the rights" of Plaintiff. *Id.* at 1463. As was the case in *Fareway Heights*, the Fourth Department focused their determination on the "circumstances" before it, which it again concluded, bore a "reasonable relation to the harm done and the flagrancy of the conduct causing it."

Id. at 1464, citing *Fareway Heights, Inc. v. Hillock*, 300 A.D.2d 1023, 1025 (4th Dep't 2002) (internal quotations omitted).

Analagous to *Fareway Heights* and *Western New York Land Conservancy*, under the circumstances of this case, utilizing the entire record before this Court including the Inquest on Damages, the punitive damages award of \$300,000.00 "bears reasonable relation to the harm done and the flagrancy of the conduct causing it." *Fareway Heights, Inc.*, 66 A.D.3d at 1025; *Western New York Land Conservancy, Inc.*, 66 A.D.3d at 1464.

As a final note, prior to the completion of the hearing, counsel for Plaintiff submitted to the Court a Supreme Court case from New York County, which provides that expenses of litigation, including attorneys' fees, may be considered as element of punitive damages. *Jefferies Avlon, Inc. v. Gallagher*, 149 Misc.2d 552 (1991). Counsel clarified that he was not seeking a separate line item of damages, but rather advising the Court that attorneys' fees may be considered by the Court in formulating its punitive damages award. After receiving said submission, the Court allowed counsel for the Defendant to submit a memorandum to address the issue.

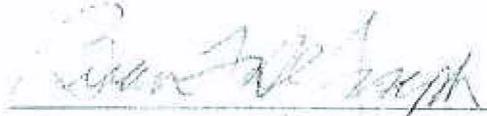
This Court is not bound by the decision in *Jefferies Avlon, Inc.* and is admittedly reluctant to follow its reasoning in light of Defendant's memorandum.

The Defendant is correct - the general principle in New York is that each party pays its own litigation cost, absent a contract or statute providing otherwise. *Matter of Elfriede Green*, 51 N.Y.2d 627 (1980); *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47

N.Y.2d 12 (1979). The Plaintiff here has failed to provide any binding Appellate authority on this issue. This Court is not persuaded by the reasoning and analysis contained in *Jefferies Avlon, Inc.* Thus, in formulating the above punitive damages award, this Court did not consider Plaintiff's litigation costs, including the submitted time sheets and attorneys' fees.

Plaintiff is hereby directed to submit an Order, on notice, in accordance with this Decision. A copy of this Decision shall be referenced and attached to said Order.

Dated: Syracuse, New York
March 6, 2014



Hon. Brian F. DeJoseph, J.S.C.

6-13-13

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and
STEELWAY REALTY CORPORATION,

Plaintiffs,

COPY

vs.

**DECISION and
ORDER**

JGB PROPERTIES, LLC,

RJI 33-09-3858
INDEX NO. 09-5776

Defendant.

Decision and Order per the Memorandum and Order of the Appellate Division,
Fourth Department, dated October 5, 2012, before the Hon. Brian F. DeJoseph, Justice of
the Supreme Court, on the 13th day of June, 2013.

Appearances:

For the Plaintiffs:

HANCOCK ESTABROOK, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York 13202
BY: DAVID G. LINGER, ESQ.
Of Counsel.

For the Defendant:

TULLY RINCKEY, PLLC
507 Plum Street
Syracuse, New York 13204
BY: RICHARD H. SARGENT, ESQ.
Of Counsel.

Court to determine the amount of compensatory damages to be awarded to Ironwood and to conduct a hearing to determine the amount of punitive damages to be awarded to plaintiff Ironwood. Upon review of the trial record, this Court hereby finds and decides as follows:

FINDINGS OF FACT

1. The cost to replace the spur track in question is \$149,500.00².
2. The cost of returning the spur track to an operable condition had it not been removed is \$7,928.00.

While the parties offered differing evidence as to the cost of returning the spur track to an operable condition, the Court finds plaintiffs' estimate of \$7,928.00 to be reliable and credible. Plaintiffs' expert, Richard A. Barry, is the general manager and majority owner of Frank Tartaglia, Inc. – a company exclusively engaged in railroad construction and repairs since 1910. Mr. Barry has been employed at Frank Tartaglia, Inc. since the 1970's and has extensive training and experience in the railroad industry in general and the cost of railroad installation and repairs in particular. Defendant's expert opined that the cost of restoring the track to an operable condition was \$25,000.00. The Court rejects said expert's opinion, however, as not credible and reliable. Defendant's expert and defendant's principal, Jay Bernhardt, have enjoyed a long-standing, close personal relationship, and said expert exhibited a demonstrable bias in favor of defendant.

²As noted by the Appellate Division, said sum represents the only evidence in the record regarding the cost of replacement.

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a judgment in the amount of \$141,572.00 (\$149,500.00 minus \$7,928.00). Judgment in said amount, together with interest calculated from December 22, 2009, together with costs and disbursements as taxed by the Clerk of the Court shall be prepared by plaintiff consistent with the Court's Findings of Fact and Conclusions of Law.
2. Article 31 Disclosure shall be re-opened and must be completed by October 7, 2013.
3. A Hearing on the issue of punitive damages shall be conducted on October 16, 2013 at 9:00 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: Syracuse, New York
June 13, 2013

ENTER:


Hon. Brian F. DeJoseph, J.S.C.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order duly entered in the Office of the Onondaga County Clerk on June 13, 2013.


Patricia J. Delperuto, Secretary to Judge

7-10-13

At a Motion Term of the Supreme Court of the State of New York in and for the County of Onondaga at the Onondaga County Courthouse in the City of Syracuse, New York on the 9th day of July 2013.

PRESENT: Hon. Brian F. DeJoseph, JSC
Supreme Court Justice Presiding

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

IRONWOOD, L.L.C. and STEELWAY REALTY CORPORATION,
Plaintiffs,
vs.
JGB PROPERTIES, LLC,
Defendant.

ORDER
Index No. 2009-5776
RJI No. 33-09-3858
Hon. Brian F. DeJoseph, JSC

Plaintiff Ironwood, LLC ("Ironwood") having moved for an Order vacating the terms and conditions of the Stipulation and Order dated May 2, 2011, requesting an assessment of monetary sanctions for Defendant, JGB Properties, LLC's ("JGB") delays in performance of its obligations pursuant to the Stipulation and Order, and seeking to compel JGB to respond to outstanding discovery demands and such other and further relief as the Court deems just, proper and equitable; and

NOW, upon reading and filing of Plaintiffs' Notice of Motion dated June 27, 2013, together with the Affidavit of David G. Linger sworn to on June 27, 2013, with exhibits annexed thereto in support of said motion; ~~together with a supplemental submission by Ironwood of the Summons and Complaint in a companion action captioned JGB Properties, LLC v. Ironwood, LLC, et al. (Onondaga County Index No. 2013-3422) with exhibits annexed thereto in further support of said motion,~~ and the Affirmation of attorney Richard H. Sargent with exhibit annexed

HANCOCK ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER I, 100 MADISON ST., SYRACUSE, NEW YORK 13202

15:00 07/25/13 2009-5776-3858

HANCOCK ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER I, 100 MADISON ST., SYRACUSE, NEW YORK 13202

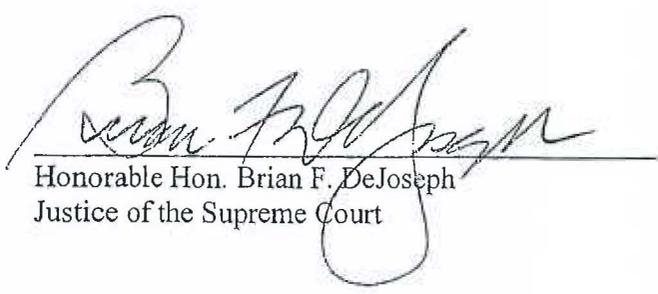
thereto, together with the Affidavit of Jay Bernhardt sworn to on July 5, 2013, in opposition to said motion; and the Court having heard the motion, including oral argument by attorney David G. Linger on behalf of Ironwood and by attorney Richard H. Sargent on behalf of JGB and due deliberation having been had thereon; and a Court Decision After Motion Argument having been issued at Motion Term on July 9, 2013, a copy of the transcript thereof which is attached hereto; it is hereby

ORDERED that the Stipulation and Order dated May 2, 2011, is hereby vacated and JGB and Ironwood are thereby relieved of any and all obligations pursuant to the terms and conditions of the Stipulation and Order; and it is further

ORDERED that the motion by Ironwood for the assessment of monetary sanctions against JGB is denied; and it is further

ORDERED that JGB shall provide full and complete responses to the Plaintiff's first set of document discovery demands and first set of interrogatories, both of which are dated January 24, 2011, within twenty (20) days of the date of service upon Defendant's counsel of a copy of this Order with notice of entry thereon.

DATED: July 17, 2013


Honorable Hon. Brian F. DeJoseph
Justice of the Supreme Court

ENTER:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF NEW YORK:

SUPREME COURT:

COUNTY OF ONONDAGA:

MOTION TERM:

Room No. 318

Index #: 2009-5776
RJI #: 33-09-3858

**IRONWOOD, LLC and
STEELWAY REALTY CORPORATION,**

Plaintiffs,

vs.

**COURT DECISION
AFTER MOTION ARGUMENT**

JGB PROPERTIES, LLC,

Defendant.

Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202
Tuesday, July 9, 2013

BEFORE: HONORABLE **BRIAN F. DeJOSEPH,**
Justice of the Supreme Court,
Fifth Judicial District

APPEARANCES:

For the Plaintiffs: BY: DAVID G. LINGER, ESQ.
Hancock & Estabrook, LLP
1500 AXA Tower 1
100 Madison Street
Syracuse, New York 13202

For the Defendant: BY: RICHARD H. SARGENT, ESQ.
507 Plum Street, Suite 103
Syracuse, New York 13204

Reported By:
Patrick J. Reagan, RDR
Official Court Reporter

- Court Decision - 7/9/13 -

1 THE CLERK: Ironwood versus JGB.

2 MR. SARGENT: Richard Sargent for the defendant
3 JGB Properties.

4 MR. LINGER: David Linger, Hancock & Estabrook,
5 appearing for plaintiff Ironwood.

6 THE COURT: Mr. Linder, this is your application,
7 I believe.

8 MR. Linger: It is.

9 (After Motion argument of Mr. Linger and Mr. Sargent, the
10 following occurred in court:)

11 THE COURT: Thank you.

12 MR. SARGENT: Thank you, Your Honor.

13 THE COURT: I am ready to rule. Plaintiff is
14 bringing this motion to: First, vacate the May 2, 2011
15 stipulation and order. Secondly, to impose sanctions upon
16 defendant for its failure to exercise its best efforts to
17 reinstall railroad improvements pursuant to the stipulation
18 and order. And Thirdly, to compel responses to plaintiffs'
19 outstanding discovery responses.

20 As this Court has noted several times, to the
21 parties and counsel, the facts of this case have been well
22 established during the course of the litigation, and do not
23 require further recitation.

24 The Court will begin with plaintiffs' application
25 to vacate the stipulation and order. Such stipulation and

1 order itself is over two years old. And the deadline to
2 reinstall the subject railroad improvements is just under
3 two years past its date of September 2, 2011.

4 By memorandum and order dated October 5, 2012,
5 the Supreme Court Appellate Division, Fourth Department,
6 modified in part the order of this Court dated January 28th
7 2011, by granting plaintiffs' claim for compensatory
8 damages and as modified, affirmed said order, and remitted
9 the matter to this Court to determine the amount of
10 compensatory damages to be awarded to plaintiff, and to
11 conduct a hearing to determine the amount of punitive
12 damages to be awarded to plaintiff.

13 Despite the fact that the dates of the subject
14 May 2, 2011 stipulation and order were well past, this
15 Court did not immediately issue a decision pursuant to the
16 Appellate Division ruling because the Court continued to
17 see progress in the reinstallation of the railroad
18 improvements. Moreover, counsel for both parties continue
19 to urge the Court to refrain from issuing said decision.
20 This progress, however, ceased upon the commencement of a
21 related action titled: 4550 Steelway Boulevard, LLC v. JGB
22 Property. The Court held a settlement conference on this
23 "new" action and reached out to counsel to attempt to
24 resolve the issues on several occasions. Unfortunately,
25 those settlement negotiations reached an impasse and the

1 Court was advised that the subject railroad improvements
2 could not be reinstalled without a resolution of that
3 action. As a result, counsel for plaintiff requested that
4 this Court issue its decision pursuant to the directives of
5 the October 5, 2012 Appellate Division memorandum and
6 order. Without any objection from the other parties or
7 counsel, the Court issued its decision on June 13, 2013,
8 which set forth the judgment to which plaintiff was
9 entitled and a date for the punitive damages hearing.

10 At this stage and based upon the lengthy history
11 of failed attempts to resolve this matter and its related
12 action, the Court can identify no legitimate reason to
13 maintain the stipulation and order. The parties are well
14 aware that the plaintiff is not entitled to the
15 installation of the railroad improvements and compensatory
16 damages. The June 13th 2013 decision and order of this
17 Court orders payment of compensatory damages. Therefore,
18 defendant is now relieved of the obligation to reinstall
19 the tracks, but instead, must satisfy the judgment.

20 On this point, in the Court's view, the
21 stipulation is vacated by its own terms because the
22 Appellate Division's ruling that the defendant JGB has no
23 responsibility to reinstall the railroad. This is exactly
24 what Paragraph 8 of the subject's stipulation contemplated.

25 Again, the Court has made every possible effort

1 to assist the parties in resolving this matter, which was
2 part of the reason why the Court allowed the deadlines in
3 the stipulation and order to pass. The time has come to
4 move on, to abide by the Appellate Division's directives.
5 Thus plaintiffs' motion to vacate the stipulation and order
6 is hereby granted.

7 The Court will not, however, at this time, issue
8 sanctions against the defendant. As the Court stated in
9 its prior decision of September 7th 2012, the overwhelming
10 majority of the delays in complying with the stipulation
11 and order, were not caused and/or created by JGB. The
12 parties were simply unaware of all the procedures involved
13 in effectuating the agreement. The procedures are not
14 detailed in the agreement and were discovered by the
15 parties during their efforts to comply with same.
16 Moreover, the most recent delay, the Steelway v. JGB
17 action, which effectively ended settlement negotiations and
18 the underlying stipulation and order, was not foreseen by
19 any of the parties and cannot be held against the defendant
20 for the purposes of analyzing whether defendant's conduct
21 should be sanctioned. Thus the motion to impose sanctions
22 upon the defendant is denied.

23 The Court will now address plaintiffs' motion to
24 compel full and complete discovery responses. Defendant
25 does not oppose this portion of plaintiffs' motion. But,

- Court Decision - 7/9/13 -

1 to that end, defendant shall respond to plaintiffs'
2 discovery demands within 20 days of the date of service
3 upon defendant's counsel with a copy of the order to
4 determining this motion, with notice of entry thereon.

5 And I would just like to comment here,
6 oftentimes, when a party fails to abide by discovery
7 demand, you know, the Court may issue an order striking the
8 pleading or precluding certain evidence from coming
9 forward. That would not be an effective remedy here; that
10 would really reward the defaulting party. So I just wish
11 to advise you in open court here, and in the presence of
12 your client, you tell me is here, that I would consider
13 this order compelling disclosure to be punishable by
14 contempt. Because I don't think preclusion or striking an
15 answer is an appropriate response. The liability for
16 punitive damages has already been established. So, just a
17 word to the wise here, that this order I believe is best
18 enforced by contempt. So I would expect this full and
19 complete compliance.

20 As a final point, the Court must take this
21 opportunity to correct an error in its June 13, 2013
22 decision and order. In that decision and order, the Court
23 set the interest commencement date as of December 22, 2009.
24 After reviewing the trial transcript of this matter, the
25 date in fairness should be June 1, 2009. Now I will direct

1 your attention to CPLR 5001.

2 Mr. Linger, I would ask that you submit an order
3 on notice, with notice of this decision. If you attach a
4 copy of the transcript?

5 MR. Linger: I will. Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. SARGENT: Thank you, Your Honor.

8 THE COURT: You're welcome.

9 (End of Court Decision after Motion argument.)

10 * * *

11
12
13
14
15
16 C E R T I F I C A T E

17 I, Patrick J. Reagan, a Senior Court Reporter,
18 Fifth Judicial District, State of New York, do hereby
19 certify that the foregoing is a true and correct transcript
20 of my stenographic notes taken in the above-entitled
21 matter, of the Court's Decision after Motion argument,
22 recorded at the time and place first above-mentioned.

23 Date: 7/10/13

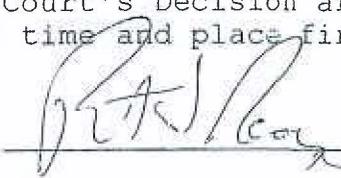
24 
25 Patrick J. Reagan, CSR, RDR
250 Criminal Courts Building
505 South State Street
Syracuse, New York 13202
(315) 671-1086

EXHIBIT B – SIDETRACK AGREEMENT

PRIVATE SIDETRACK AGREEMENT

THIS AGREEMENT, Made and effective as of December 2, 2013, by and between CSX TRANSPORTATION, INC., a Virginia corporation, whose mailing address is 500 Water Street, Jacksonville, Florida 32202, hereinafter called "Railroad," and AIP LOGISTICS, INC., a corporation of the State of Ohio, whose mailing address is 300 Industrial Drive, Wapakoneta, Ohio 45895, hereinafter called "Industry," WITNESSETH:

1. PURPOSE:

1.1 The purpose of this Agreement is to detail the provisions of the construction, maintenance and use of Private Sidetrack No. T-1, which diverges from Intermediate Track No. T-8166B(1) at a point approximately 3521' and reconnects to Intermediate Track No. T-8166B(1) at a point approximately 1904' from its connection to the mainline at Point of Switch (hereinafter "P.S."), Valuation Station 6181+81 = 0+00, Milepost BE-117.09, and Private Sidetrack No. T-4, which diverges from Intermediate Track No. T-8166B(1) at a point approximately 3633' from its connection to the mainline at P.S., Valuation Station 6181+81 = 0+00, Milepost BE-117.09, and Private Sidetrack Nos. T-2, T-3, T-5, T-6, for the tender and receipt of rail freight traffic for the account of Industry. The private sidetracks, which consists of the track structure (rails, ties and fastenings), ballast, grading, drainage structure, turnout, bumping post and other appurtenances (hereinafter, collectively, the "Sidetrack"), is located at or near Wapakoneta, in the county of Auglaize, State of Ohio, as shown on attached drawing labeled JRH11182013, dated November 18, 2013 (hereinafter the "Plan").

2. OWNERSHIP AND CONSTRUCTION:

2.1 Industry agrees to construct and shall own the Sidetrack from Point of Switch as shown on aforementioned Plan.

2.2 The construction shall be done in accordance with the provisions of Railroad's document entitled "Standard Specification for the Design and Construction of Private Sidetracks," as amended, supplemented or superseded (hereinafter the "Specifications"), which details the design, construction, clearance and similar requirements regarding the Sidetrack. Industry acknowledges receipt of a current copy of the Specifications, which are incorporated herein by reference.

2.3 All construction of the Sidetrack will be done by or for Industry at its sole expense. Industry agrees: (A) to supply construction plans to Railroad for its review and approval; and (B) to bear all reconstruction expenses that may be incurred by its failure to follow the Specifications.

2.4 Intermediate Track(s) shall include any trackage owned by a third party that is located between Railroad's switch and turnout and the Sidetrack and which Intermediate Track(s) is used by Railroad in providing rail service to Industry.

2.5 Industry represents to Railroad that Industry has permission or consent (by easement, lease or license) from the owner of any Intermediate Track(s) or property for the continued occupancy of such land and/or Intermediate Track(s), and that said permission or consent allows Industry's maintenance of, and Railroad's unimpeded operation over the same.

2.6 Rail services to Industry is contingent upon continuation of such permission and consent, and Railroad may terminate or cancel the Sidetrack Agreement if Railroad is denied the right to operate over said Intermediate Track(s) or land for any reason. Industry assumes sole risk of any loss, expense or damage incurred as a result of such denial.

2.7 Railroad may also cease operating over said Intermediate Track(s) in the event they are not maintained in condition for Railroad's safe operation thereover.

3. GOVERNMENTAL REQUIREMENT(S):

3.1 Industry agrees, at its sole expense, to comply with all applicable laws and regulations and to obtain all necessary governmental permits, authorizations, orders and approvals (hereinafter collectively "Governmental Requirement(s)") necessary for the construction, maintenance and use of the Sidetrack. Industry agrees to assume the cost of Railroad's defense and to otherwise indemnify and hold Railroad harmless from Industry's failure to comply with or to obtain the Governmental Requirement(s).

4. MAINTENANCE:

4.1 Industry shall inspect, maintain and renew the Sidetrack including the entire turnout as shown on the plan: (A) in accordance with the Federal Railroad Administration's Track Safety Standards, (49 C.F.R. Part 213); (B) Railroad Worker Safety Regulations (49 C.F.R. Part 214); and (C) in a safe condition, consistent with the operating circumstances and amount of use. Prior to each entry of Industry upon the Sidetrack for maintenance or renewal purposes, Industry shall contact local representatives of Railroad's Operating and Engineering Departments and obtain the agreement from those representatives for the dates and amount of time that the Sidetrack will be out of service for such maintenance or renewal purposes. Additionally, Industry agrees to keep the Sidetrack free from debris, weeds, potholes, ice or snow, poles, temporary or permanent structures, other obstructions (Example: parked vehicles), and/or excavations. Railroad shall have the right, but not the duty, to inspect the Sidetrack.

5. CLEARANCES:

5.1 Industry agrees to provide and maintain: (A) the lateral clearance requirements (at least eight feet, six inches [8'6"] from either side of the centerline of the Sidetrack, as increased for flat curves, superelevated curves and approaches thereto); and (B) the vertical clearance requirements (at least twenty-two feet [22'] above the top of the rail), both as detailed in the Specifications, for the entire length of the Sidetrack. Any clearance not in compliance with the foregoing is a "Close" clearance. Each party further agrees to provide and maintain increased lateral and/or vertical clearances, to the extent required by applicable statutes or

regulations. Lateral and vertical clearances for power poles and lines must also comply with the National Electric Safety Code (NESC).

5.2 Notwithstanding the foregoing, Industry may maintain Close clearances if: (A) Industry obtains a waiver from any conflicting Governmental Requirement(s); and (B) plans for such Close clearances have been provided to Railroad and are not rejected within sixty (60) days after the date of receipt. Industry agrees to install, maintain and replace (at its sole expense) any warning signs or lighting or make other adjustments regarding such Close clearances as may be required by Railroad or any Governmental Requirement(s).

5.3 Any gate installed by Industry across the Sidetrack must provide an appropriate clearance, as provided in the Specifications, and must be equipped with a double-end bar hasp so that Railroad may install its own lock. If Railroad is unable to open the gate to deliver or retrieve railcars, Industry shall reimburse Railroad for its costs of making an additional trip to the Sidetrack.

6. RIGHT-OF-WAY:

6.1 Industry is responsible for obtaining all necessary right-of-way (through ownership, easement, permit or otherwise), for the Sidetrack. The width of such right-of-way must be, at a minimum, sufficient to provide for the Sidetrack and clearances, cuts, fills, drainage ditches, walkways or roads, as determined by Railroad.

6.2 Industry shall not construct or allow the construction of any road (public or private), gate, tunnel, bridge, culvert, pit, gas-line, pipe or similar items on, over, under or along the entire Sidetrack or right-of-way without the written permission of Railroad. If Railroad's permission is granted, Industry understands that a separate agreement might be necessary and that Industry shall be responsible for the construction, maintenance, repair and removal costs of the foregoing items and ancillary structures, unless otherwise stated therein.

6.3 Industry shall not block or permit the blockage of the sight view area of any road crossing over the Sidetrack.

7. RAIL SERVICE:

7.1 Railroad agrees, pursuant to the provisions of this Agreement, its tariffs, circulars, rules and rail transportation contracts, to operate over the Sidetrack in the delivery, placement and removal of railcars consigned to or ordered by Industry, at such times established by Railroad. Railroad may also use the Sidetrack for its own general or emergency operating purposes, so long as such purposes do not materially affect the use of the Sidetrack for rail service to Industry. Industry agrees to abide by all applicable provisions of this Agreement and Tariffs CSXT 8100/8200 Series, including, without limitation, those addressing responsibility for and payment of demurrage and other accessorial charges. Railroad reserves the right to cancel the Agreement for any breach of such provisions.

7.2 In the event Railroad delivers to the Sidetrack a railcar which was neither ordered nor tendered by Industry, or Industry's invitee, Industry shall provide written notice to Railroad, and Railroad will use commercially reasonable efforts to remove such railcar. Railroad shall not be liable to Industry for any such delivery or removal.

7.3 Railroad shall be deemed to have delivered any railcar consigned to or ordered by Industry when such railcar has been placed on the Sidetrack, so as to allow access by Industry, and Railroad's locomotive has uncoupled from the railcar. At that time, Railroad shall be relieved of all liability as a common or contract carrier or as a bailee, and possession of the railcar and its contents shall be transferred to Industry. Similarly, any obligation of Railroad as a common or contract carrier or as a bailee shall not begin until it has coupled its locomotive to the loaded railcar and departed the Sidetrack.

7.4 Industry is responsible for all railcars and their contents while in Industry's possession and assumes all responsibility for payment of all damage to any railcar and its contents, including re-railing if necessary, that may occur during that time, even if caused by third parties.

7.5 If Railroad is unable to deliver a railcar on the Sidetrack for loading or unloading due to the acts of Industry or any third party, then such railcar will be considered as constructively placed for demurrage purposes at the time of attempted delivery.

8. HAZARDOUS MATERIALS:

8.1 Sections 8.3 and 8.4 herein shall apply when the Sidetrack is used for the delivery or tender of any dangerous, flammable, explosive or hazardous commodity (hereinafter "Hazardous Materials"), as determined by the U.S. Department of Transportation under the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801, et seq.) and the Hazardous Materials Regulations (49 C.F.R. Parts 170-179) issued thereunder, as amended from time to time.

8.2 Excepting railcar shipments, no Hazardous Materials shall be placed: (A) on the Sidetrack; (B) within the clearance requirements established herein; or (C) within one hundred (100) feet of Railroad's connecting mainline track.

8.3 Industry shall comply with all recommended practices of the Association of American Railroads and all Governmental Requirement(s) regarding the loading, unloading, possession, transfer and/or storage of Hazardous Materials, including but not limited to the installation and use of pollution abatement and control structures and other equipment that is prudent or required under such practices and/or Governmental Requirement(s).

8.4 In the event of a Hazardous Materials leak, spill, or release, Industry shall immediately notify the appropriate Governmental Response Center and Railroad's Operations Center and, at its sole expense, take all appropriate steps to clean, neutralize and remove the spill.

9. ALTERATIONS:

9.1 Industry shall supply Railroad with construction plans of any addition, deletion or modification (hereinafter jointly the "Alterations") to the Sidetrack, and obtain Railroad's written consent (which will not be unreasonably withheld) prior to making any Alterations. The Alterations are also subject to the aforementioned Specifications.

10. SUSPENSION AND TERMINATION:

10.1 Railroad may temporarily suspend its operations over the Sidetrack if, in its sole opinion, the condition of the Sidetrack is unsafe or if such operations would interfere with its common carrier duties. Railroad may impose the suspension orally, but shall also provide a written notice to Industry regarding such temporary suspension.

10.2 Either party may terminate this Agreement upon the default of the other party. The party claiming a default must provide the other party with notice. If the default is not corrected within thirty (30) days of the date of such notice, the party claiming default may terminate this Agreement upon written notice. Use of the Sidetrack by Railroad during any notice period shall not be considered as a waiver of any default claimed by it.

10.3 Industry understands that it must tender and/or receive a sufficient number of railcar shipments over the Sidetrack in order for Railroad to continue to keep Railroad's connection to the Sidetrack in place. Should Railroad determine that the number of railcar shipments is insufficient, Railroad may notify Industry and offer to continue to keep connection to the Intermediate Track(s) in exchange for payment of an annual continuation charge from Industry. The amount of the continuation charge may vary from year to year. Industry shall have a period of thirty (30) days from the date of notice from Railroad within which to either accept or decline payment of the continuation charge. Should Industry decline to pay the continuation charge or not respond during the thirty (30) day period, then Railroad shall have the right to suspend service over the Sidetrack or to terminate this Agreement upon notice to Industry.

10.4 This Agreement will terminate, without the necessity of further notice, upon the abandonment of Railroad's connecting mainline track.

10.5 Either party may terminate this Agreement by extending thirty (30) days' notice to the other party.

10.6 Upon the termination of this Agreement, each party may remove any portion of its Sidetrack that rests upon the right-of-way of the Railroad. If not removed within sixty (60) days after such termination, title to that remaining Sidetrack will pass to the Railroad, who may then remove it and restore the underlying right-of-way at the expense of the Industry.

11. LIABILITY AND INSURANCE:

11.1 Except as otherwise provided herein, any and all damages, claims, demands, causes of action, suits, expenses, judgments and interest whatsoever (hereinafter collectively

"Losses") in connection with injury to or death of any person or persons whomsoever (including employees, invitees and agents of the parties hereto) or loss of or damage to any property whatsoever arising out of or resulting directly or indirectly from the construction, maintenance, repair, use, alteration, operation or removal of the Sidetrack shall be divided between the Railroad and Industry as follows:

(A) Each party shall indemnify and hold the other party harmless from all Losses arising from the indemnifying party's willful or gross negligence, its sole negligence and/or its joint or concurring negligence with a third party.

(B) The parties agree to jointly defend and bear equally between them all Losses arising from their joint or concurring negligence.

(C) Notwithstanding the foregoing, and irrespective of the sole, joint or concurring negligence of Railroad, Industry acknowledges that it is solely responsible for and agrees to indemnify and save Railroad harmless from all Losses arising from: (i) the failure of Industry to properly maintain the Sidetrack; (ii) the construction, alteration or removal of the Sidetrack by Industry; (iii) the presence of a Close clearance on the Sidetrack; or (iv) the explosion, spillage and/or presence of Hazardous Materials on its properties, facility or on the Sidetrack, but only when such Losses would not have occurred but for the dangerous nature of the Hazardous Materials.

(D) Railroad may be the lessee/operator of the mainline track that connects with the Sidetrack. In that event, the indemnities from Industry to Railroad under this section shall also include the lessor/owner of such track.

11.2 Industry at its sole cost and expense, must procure and maintain in effect during the continuance of this Agreement, a policy of Commercial General Liability Insurance (CGL), naming Railroad, and/or its designee, as additional insured and covering liability assumed by Industry under this Agreement. A coverage limit of not less than FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00) Combined Single Limit per occurrence for bodily injury liability and property damage liability is required to protect Industry's assumed obligations. The evidence of insurance coverage shall be provided to Railroad and endorsed to provide for thirty (30) days' notice to Railroad prior to cancellation or modification of any policy. Mail CGL certificate, along with agreement, to CSX Transportation, Inc., Speed Code J180, 500 Water Street, Jacksonville, FL 32202. On each successive year, send certificate to RenewalCOI@csx.com.

If said CGL insurance policy(ies) do(es) not automatically cover Industry's contractual liability under this Agreement, a specific endorsement adding such coverage shall be purchased by Industry. If said CGL policy is written on a "claims made" basis instead of a "per occurrence" basis, Industry shall arrange for adequate time for reporting losses. Failure to do so shall be at Industry's sole risk.

Securing such insurance shall not limit Industry's liability under this Agreement, but shall be security therefor.

11.3 RESERVED

11.4 Specifically to cover construction or demolition operations within fifty feet (50') of any operated railroad track(s) or affecting any railroad bridge, trestle, tunnel, track(s), roadbed, overpass or underpass, Industry shall: (a) notify Railroad; and (b) require its contractor(s) performing such operations to procure and maintain during the period of construction or demolition operations, at no cost to Railroad, Railroad Protective Liability (RPL) Insurance, naming Railroad, and/or its designee, as Named Insured, written on the current ISO/RIMA Form (ISO Form No. CG 00 35 01 96) with limits of FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00) per occurrence for bodily injury and property damage, with at least TEN MILLION AND 00/100 U.S. DOLLARS (\$10,000,000.00) aggregate limit per annual policy period, with Pollution Exclusion Amendment (ISO CG 28 31 11 85) if an older ISO Form CG 00 35 is used. The original of such RPL policy shall be sent to and approved by Railroad prior to commencement of such construction or demolition. Railroad reserves the right to demand higher limits.

At Railroad's option, in lieu of purchasing RPL insurance from an insurance company (but not CGL insurance), Industry may pay Railroad, at Railroad's current rate at time of request, the cost of adding this Agreement, or additional construction and/or demolition activities, to Railroad's Railroad Protective Liability (RPL) Policy for the period of actual construction. This coverage is offered at Railroad's discretion and may not be available under all circumstances.

12. ASSIGNMENT:

12.1 This Agreement may not be assigned without the written consent of either party, but shall be assumed by their successors through merger or acquisition. Industry may sell or assign the Sidetrack and right-of-way upon notice to Railroad, but such transactions shall not affect this Agreement or carry any rights regarding any rail service described in this Agreement.

12.2 Notwithstanding the provisions of Sections 12.1 or 10.4, Railroad may assign this Agreement to any new owner or operator of its connecting mainline track.

13. MISCELLANEOUS:

13.1 Each provision of this Agreement is severable from the other provisions. If any such provision is ruled to be void or unenforceable, the remaining provisions will continue in full force and effect.

13.2 Other documents may also describe and cover a portion of the rail service and other provisions of this Agreement. Should any conflict arise between such other documents and this Agreement, Railroad may designate which provision will control.

13.3 The section captions in this Agreement are for the convenience of the parties and are not substantive in nature. All words contained in this Agreement shall be construed in accordance with their customary usage in the railroad industry.

13.4 The failure of either party to enforce any provision of this Agreement or to prosecute any default will not be considered as a waiver of that provision or a bar to prosecution of that default unless so indicated in writing.

13.5 All notices shall be in writing, shall be sent to the address contained in the introductory section and shall be considered as delivered: (A) on the next business day, if sent by telex, telecopy, telegram or overnight carrier; or (B) five (5) days after the postmark, if sent by first class mail.

13.6 The late payment of any charge due Railroad pursuant to this Agreement will result in the assessment of Railroad's then standard late fee and interest charges at the rate of eighteen percent (18%) per annum, or at the highest lawful rate, until payment in full is received.

13.7 Industry agrees to reimburse Railroad for all reasonable costs (including attorney's fees) incurred by Railroad for collecting any amount due under this Agreement.

14. ENTIRE UNDERSTANDING:

14.1 This Agreement constitutes the entire understanding of the parties, is to be construed under the laws of the state in which the Sidetrack is located, may not be modified without the written consent of both parties, and has been executed by their duly authorized officials.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate
(each of which shall constitute an original) as of the effective date of this Agreement.

Witness for Railroad:

Jonathan Highsmith

CSX TRANSPORTATION, INC.

By: Mark A. Gennette

Print/Type Name: Mark A. Gennette

Director

Print/Type Title: Contract Management

Witness for Industry:

Sharon J. Kell

AIP LOGISTICS, INC.

By: Charles L. Kantner

Who, by the execution hereof, affirms that he/she has
the authority to do so and to bind the Industry to the
terms and conditions of this Agreement.

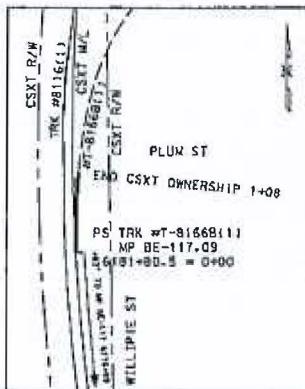
Print/Type Name: Charles L. Kantner

Print/Type Title: Owner

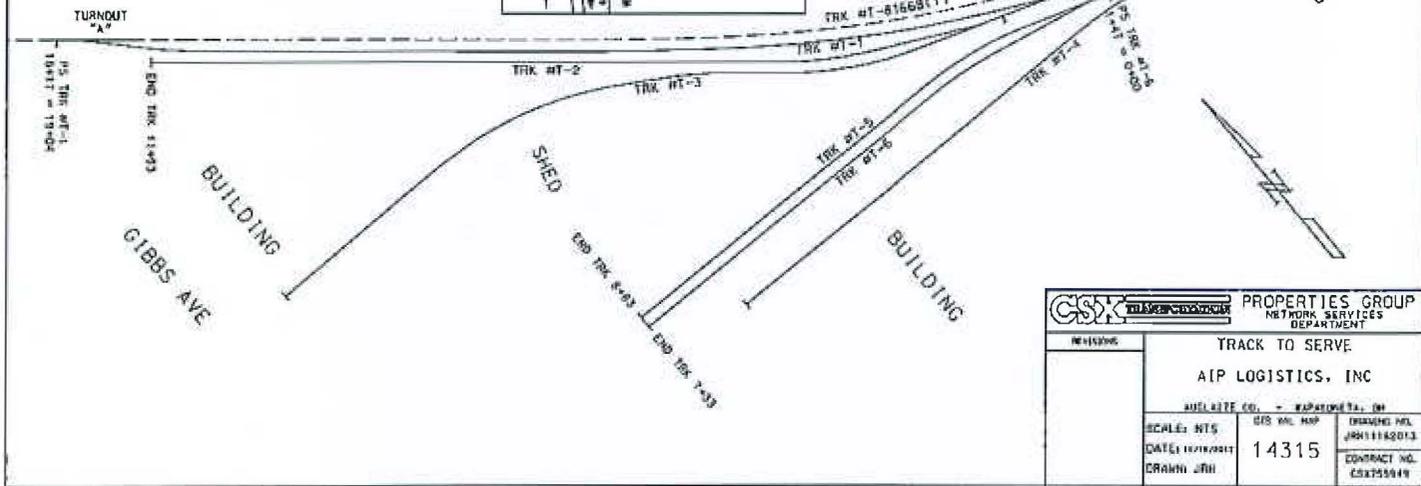
THIS RAILROAD VALUATION EXHIBIT IS A GRAPHICAL REPRESENTATION. IT MAY NOT REFLECT CURRENT "ON THE GROUND" CONDITIONS AND/OR ACTUAL LOCATIONS OF FEATURES. ALL DIMENSIONS, OFFSET DISTANCES AND MEASUREMENT NOTATIONS SHOWN ARE APPROXIMATE.

- L E G E N D -

- CSXT OWNERSHIP TRK #T-9166B(1) = 100'
- INDUSTRY OWNED TRKS
- - - - CSX RIGHT-OF-WAY BOUNDARY
- - - - TRKS OWNED BY OTHERS



3633' WEST TO PS TRK #T-9166B(1) IN M/L
 MP BE-117.09 6181+80.5 = 0+00
 THEN 482' SOUTH TO MP BE-117 6176+99



| | | | |
|-----------------------------------|--|---|---|
| | | PROPERTIES GROUP NETWORK SERVICES DEPARTMENT | |
| | | TRACK TO SERVE AIP LOGISTICS, INC | |
| AUCLARITE CO. - WAPATONOK, TX, TX | | SCALE: NTS DATE: 10/20/01 DRAWN: JPH | DIS. NO. MAP 14315 DRAWING NO. JPH11182013 CONTRACT NO. CSX755649 |