

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**PETITION FOR RECONSIDERATION AND
CLARIFICATION OF JGB PROPERTIES, LLC**

Pursuant to 49 C.F.R. § 1115.3, JGB Properties, LLC (“JGB”) petitions the Board to reconsider and/or clarify its decision served in this proceeding on May 22, 2015 (“Decision”).

INTRODUCTION AND SUMMARY

JGB requests that the Board reconsider and/or clarify its Decision on grounds of material error. JGB filed a Petition for Declaratory Order (“Petition”), addressing the construction, acquisition, operation, and use of railroad lines on the property of JGB. Nearly fourteen (14) months after JGB submitted its Petition, the Board’s May 22, 2015 Decision erroneously concluded that it did not need to address the critical commerce law issues raised by JGB’s Petition. In so doing, the Decision misstated the law and erroneously ceded its exclusive authority to regulate the acquisition, construction, and use of railroad lines to the New York state courts.

Specifically, JGB's Petition asked for four (4) separate declarations relating to the rail tracks that were removed from JGB's property:

(1) [the rail lines] are common carrier lines that are unauthorized, and for which a certificate of public convenience and necessity was required, but not properly acquired, before any such rail lines could be constructed, acquired, operated or used; (2) any past or present initiatives by interested parties to construct, acquire, operate or use such rail lines for rail service absent prior agency approval were and are prohibited and subject to continuing penalties for each day the violation continues under 49 U.S.C. §11901; (3) any state law initiatives to govern, regulate, or impose penalties or damages associated with the construction, acquisition, operation, or use of such facilities are preempted pursuant to 49 U.S.C. § 10501(b); and (4) any entities seeking a right of access or use of the facilities for rail service should cease and desist in any actions or initiatives (individually, or through others).

Petition at 1.

Rather than address each of the requests that JGB set forth in its Petition, and which were clearly presented and fully argued by the parties, the Board mischaracterized JGB's Petition and recast it as "an attempt to invoke federal preemption to avoid the consequences of the state court's action." Decision at 7. Having set up this straw man, the Board then reasoned that the state court was not preempted because the court's ruling on the property issues "in no way interferes with the provision of rail service, but helps preserve it." *Id.* However, this reasoning only serves to bring the matter back to the central issue raised in JGB's petition, and whether there is anything to "preserve" when

the line construction and service in question undisputedly has never been authorized by the agency in the first instance.

The Board's Decision ignores the fundamental question that JGB's Petition raises – namely, is the track that was removed (and that presumably will be reconstructed with the damages awarded by the state court) a properly authorized common carrier line of railroad, and can that line of railroad be constructed, or reconstructed post-judgment, and used without prior authorization from the STB? JGB's Petition, accordingly, does not require that the Board overrule or avoid the consequences of the state court rulings; it asks the Board to perform functions within its sole jurisdiction and authority and clarify the nature of the track in question to ensure that there is no further construction, operation, and use of rail facilities without a ruling that the rail facilities and operations are properly authorized.

As explained more fully below, the Board's non-decision Decision is decidedly in error. Resolution of these issues is of crucial importance to the parties and their ongoing business interests, and, if left unresolved, could have serious, and unintended, adverse consequences here and elsewhere. Accordingly, JGB asks that the Board reconsider its Decision and render a ruling on each of the requests raised by JGB's Petition. Alternatively, JGB asks that the Board, at a minimum, clarify that no reconstruction, operation, or use of any rail facilities can take place on the easement until the Board rules on the nature of the track in question.

ARGUMENT

As the Board has noted, under 49 U.S.C. §722(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, (STB served Dec. 19, 2013) at 3. Here, reconsideration and/or clarification are warranted because the STB's Decision materially errs by entirely failing to consider critical issues clearly raised by JGB's Petition that are solely within its jurisdiction. *See, e.g., N. Carolina v. EPA.*, 531 F.3d 896, 906 (D.C. Cir. 2008) *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (an action is "arbitrary and capricious" if it has "entirely failed to consider an important aspect of the problem").

Further, the Board's generalized ruling deferring to the state court rulings casually ignores its regulatory obligation to answer the questions concerning the status of the rail line that was constructed, and may be reconstructed, on the easement on JGB's property without any reasoned analysis of why the Board was not required to resolve the issues. Therefore, the Decision fails to provide an "adequate explanation" to allow the STB to ignore factors and reasoning that are controlling. *See, e.g., Consol. Rail Corp. v. STB*, 93 F.3d 793, 799 (D.C. Cir. 1996) (holding that the STB must provide an adequate explanation); *see Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable

departure from the essential requirement of reasoned decision making.”) (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency must supply “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”).

I. THE BOARD ERRONEOUSLY CONCLUDED THAT JGB’S REQUESTS FOR DECLARATORY RELIEF WERE “GROUNDING IN STATE PROPERTY LAW”

The ultimate basis for the Board’s choice to avoid ruling on all of the issues raised by JGB’s Petition is stated at page 7:

We find that the suit brought by Ironwood and Steelway and the resulting state court orders do not unduly interfere with rail transportation. Based on its application of state property law, the court found that JGB had acted unlawfully in removing track and subsequently awarded damages for JGB’s destruction of property. The court’s ruling in no way interferes with the provision of rail service *but helps preserve it*. JGB asks us to apply § 10501(b) in such a way as to shield it from the consequences of removal of trackage, *which has prevented restoration of rail service to Ironwood*. Under these circumstances, a determination that federal preemption applies to a court’s decision to award damages for removal of trackage in violation of a permanent easement would stand the purpose of § 10501(b) on its head. JGB has failed to demonstrate that we should disturb the New York state court proceedings *or preclude Ironwood and Steelway from proceeding with the relief that they seek here*.

Decision at 7 (emphasis added). Lost in the Board’s effort to defer to the state court process is the reality that the Decision serves to shield Ironwood/Steelway from the

consequences of constructing and offering to provide rail service over an unauthorized and illegal line of railroad. It matters not that the ruling sought by JGB relates to an easement that the state courts have deemed valid. The *use* of that easement is permissive, and questions relating to whether a property owner may use an easement to construct and/or use a rail line to provide common carrier service are not questions for state courts. See *Railroad Ventures, Inc. v. Surface Trans. Bd.*, 299 F.3d 523, 563 (6th Cir. 2002) (state law actions are preempted by ICCTA to the extent that they intrude upon the STB's exclusive jurisdiction over rail transportation).¹

Instead, the Board's ruling erroneously promotes the "preservation" and "restoration" of rail service, despite the fact that serious questions remain, chiefly whether the line of railroad should have ever been on JGB's property, or elsewhere along its route, in the first place. These questions were clearly and fully presented in JGB's Petition and fully argued by the parties, yet left unaddressed by the Board.

This error is then compounded by the Board's suggestion that the Board is powerless to preclude Ironwood and Steelway "from proceeding with the relief that they seek here." Decision at 7. As a consequence, the Board's deferral to the state court allows Ironwood and Steelway to pursue the construction and use of rail lines (as funded

¹ Further, the Board's ruling fails to recognize that the questions relating to whether the rail line and facilities at issue were ever properly authorized for construction or use are important, relevant questions that extend beyond the limited portion of the rail line that is located on JGB's property. This rail line extends through several non-JGB properties, none of whom have had any property rights issues decided by the prior New

with the damages awarded by the New York state court) despite the fact that the STB has failed to address the questions raised by JGB's Petition as to whether the line of railroad has previously received proper regulatory authority, or whether such authority is needed before any construction and operational activities can be pursued.

Furthermore, even if one accepts the Board's conclusion with respect to JGB's request for a declaration that the state court actions were preempted, it does not follow that the three other issues on which JGB sought guidance are "grounded in state property law." On the contrary, as JGB explained in its Petition, each of the issues raised in JGB's Petition relating to whether, and to what extent, the easement can be used for railroad purposes involve questions that are not governed by state law, but rather are issues over which the STB has exclusive jurisdiction. See Petition at 22, citing 49 U.S.C. §§ 10901, 11901(a) and (c); *Suffolk & S.R.R. – Lease & Operation Exemption – Sills Realty, LLC*, Finance Docket No. FD 35036 (STB served Oct. 12, 2007); *Honolulu Freight Serv. v. Haw. Express Serv., Inc.*, 346 I.C.C. 18, 24 (1973) (Div. 1); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 117, 129-30 (1962); *Ass'n of P&C Docket Longshoremen*, 8 I.C.C.2d 280, 295 (1992).

York state court rulings, and the validity of easements across these properties remains in question.

II. ANSWERING THE QUESTIONS RAISED BY JGB WILL NOT DISTURB THE NEW YORK STATE COURT PROCEEDINGS, EVEN IF THE STB FINDS THAT THE LINE IRONWOOD/ STEELWAY WISH TO RESTORE IS AN UNAUTHORIZED COMMON CARRIER LINE OF RAILROAD

Moreover, answering the questions raised by JGB's request for declaratory relief would not "disturb the New York state court proceedings" as the Board erroneously concluded at page 7 of the Decision. Rather, this request for relief goes to the heart of the next part of the Board's Decision, wherein it appears to endorse the notion that the Board should not "preclude Ironwood and Steelway from proceeding with the relief that they seek here." Decision at 7. It is precisely this conclusion that must be reconsidered. The Board, and only the Board, has the authority to decide whether Ironwood and Steelway can proceed with the construction and use rail lines on the subject property. *See, e.g., Suffolk & S.R.R. – Lease & Operation Exemption – Sills Realty, LLC*, Finance Docket No. FD 35036 (STB served Oct. 12, 2007) (STB issues cease and desist order prohibiting further rail line activities or use where "no party has sought authority from the Board to construct any facilities at this site"); *Honolulu Freight Serv. v. Haw. Express Serv., Inc.*, 346 I.C.C. 18, 24 (1973) (Div. 1) (same); *See* JGB Petition at 20-24 (citing additional relevant authorities).

The Board would not be interfering with the New York state court if it were to enter a declaratory judgment addressing JGB's requests relating to the questions of whether: (1) the line of railroad JGB removed from the easement was authorized to be

constructed, or used, in the first place; (2) any past, or present, initiatives to construct, acquire, operate, or use such lines for rail service absent regulatory approval are prohibited and subject to civil penalties under 49 U.S.C. § 11901; and (3) any entities seeking a right to access or use the facilities for rail service should cease and desist in any actions or initiatives.² Each of these three issues is within the exclusive jurisdiction of the Board, prompt resolution is necessary to remove continuing uncertainty pertaining to the parties' ongoing business activities and interests, and resolution has nothing to do with state property law.

The Board appears to justify its non-adjudication of JGB's Petition based on its conclusion that even if the line was not properly authorized, "that would not entitle JGB to resort to self-help by removing the tracks." Even if this conclusion is accepted for purposes of this Petition for Reconsideration, that conclusion does not render moot the crucial unanswered requests for declaratory order in JGB's Petition that relate to whether Ironwood/Steelway have proper authority to construct, reconstruct, or use, the rail line on the easement running through JGB's property. Importantly, these questions turn on whether Ironwood/Steelway are authorized to use their easement for railroad purposes going forward, regardless of JGB's actions related to the tracks that may have been placed without authorization. Indeed, a decision on this issue is not a decision on New

² As noted, *supra*, these issues affect all of the property owners through which the rail line was constructed. The Board is the only entity that has the authority to clarify the status of this line of railroad and whether it has been previously authorized for construction and use.

York state property law – it is clearly, and unequivocally, a matter that is within the STB’s exclusive jurisdiction.

By suggesting that the Board is powerless to enter judgment on the question of whether Ironwood and Steelway are authorized to construct the rail track and/or commence rail use and operations, it is the Board, and not JGB, that stands § 10501(b) on its head. The Board (and the ICC) have been licensing rail-carrier entry (and exit) for almost a century. The Board’s ruling appears to presuppose that Ironwood/Steelway (and presumably other developers elsewhere) do not need STB authorization to “proceed with the relief that they seek here” and that they can construct and/or use the easement for purposes of providing or receiving rail service, without any Board authority. JGB respectfully submits that such a decision would contravene longstanding Board precedent and could have significant, and unintended, adverse consequences here and beyond.

Ironwood/Steelway’s own filings in this proceeding confirm the error in the Board’s conclusion in this regard. As Defendants themselves admitted in their Reply filing before the STB, the state court never considered the issues before the STB – *i.e.*, the issues on which JGB asked the Board for declaratory rulings. Ironwood/Steelway Reply at p. 10 (filed May 20, 2010) (noting that “[a]ny common carrier railroad constructing or operating on a new common carrier rail line needs to do two separate tasks: obtain Board authorization and obtain the necessary property rights.”). As Defendants further admitted, the state courts did not consider these issues in rendering the

judgments on the underlying property issues. *Id.* at 12-13. Accordingly, a declaratory ruling from the Board on these issues would not undermine or overrule any issue that was resolved by the New York state courts.

CONCLUSION

For all of the foregoing reasons, JGB asks that the Board clarify and/or reconsider its Decision and provide the requested declaratory orders as it pertains to clearly presented issues left unaddressed by its initial Decision. Alternatively, JGB requests that the Board clarify that no party can construct, reconstruct, or operate any railroad service on the subject easement without first obtaining an answer to all of the questions raised in JGB's Petition relating to the nature of the track at issue and whether Ironwood/Steelway are either required or exempt from the need to obtain authority to construct and/or operate as a common carrier railroad.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 11th day of June, 2015, I served copies of the foregoing by First Class United States Mail and/or more expedited means upon counsel of record for Ironwood, LLC/Steelway Realty Corporation and CSX Transportation, Inc., as follows:

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