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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY OF
IRONWOOD, LLC AND STEELWAY REALTY CORPORATION
TO THE PETITION FOR RECONSIDERATION AND CLARIFICATION
OF JGB PROPERTIES, LLC**

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July 1, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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JGB PROPERTIES, LLC – PETITION FOR DECLARATORY ORDER – WOODARD INDUSTRIAL RAILROAD OPERATIONS)	STB Finance Docket No. 35817
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TO THE PETITION FOR RECONSIDERATION AND CLARIFICATION
OF JGB PROPERTIES, LLC**

Ironwood, LLC and Steelway Realty Corporation (collectively, “Ironwood/Steelway”) hereby submit this Reply to the Petition for Reconsideration and Clarification (“Petition for Reconsideration” or “Pet. for Recon.”) filed by JGB Properties, LLC (“JGB”) on June 11, 2015 in the above-captioned proceeding. This Reply is provided pursuant to 49 C.F.R. §§ 1104.13(a) and 1115.3(d).

In the Petition for Reconsideration, JGB requests that the Surface Transportation Board (“Board” or “STB”) reconsider and clarify its decision served on May 22, 2015 (“Decision”) denying JGB’s Petition for Declaratory Order, based on an unsubstantiated claim that the Decision involved material error. The Board should deny JGB’s request because the Board has broad discretion in deciding whether to grant a declaratory order, and JGB has failed to demonstrate that the Decision involved an abuse of that discretion. In the Decision, the Board unambiguously addressed the preemption issue that was at the heart of JGB’s initial Petition for Declaratory Order, and explained why a decision on the other relief sought by JGB was unnecessary. JGB has not pointed to any material error or new evidence that requires the Board to change its findings or otherwise reconsider the Decision. Rather, JGB seeks to reargue the

same positions previously rejected by the Board. The Petition for Reconsideration should be denied.

I. Standard of Review.

A petition for reconsideration will only be granted upon a showing that (1) the prior action will be affected materially because of new evidence or changed circumstances; or (2) the prior action involves material error. 49 C.F.R. § 1115.3(b). JGB seeks reconsideration only on grounds of material error. Pet. for Recon. at 1. As such, JGB must “do more than simply make a general allegation of material error and repeat its prior arguments; it must substantiate its claim of material error.” Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, STB Docket No. 35557, slip op. at 4 (served May 15, 2015) (citations omitted).

II. The Board Properly Exercised its Broad Discretion in Denying JGB’s Request for a Declaratory Order.

Congress has granted the Board broad discretion in deciding whether to issue a requested declaratory order. In particular, the Board “in its sound discretion, *may* issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e) (emphasis added). See also Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989) (“The Commission has exercised broad discretion under that provision by both granting and denying requests for declaratory order proceedings.”).

The courts narrowly review a Board decision declining to institute a declaratory order proceeding. Intercity Transportation Company v. United States, 737 F.2d 103, 108 (D.C. Cir. 1984) (“Intercity”). See also Merchants Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 916 (5th Cir. 1993) (In reviewing an agency decision involving a request for a declaratory order, court says its “inquiry is limited to whether the agency has abused its discretion.”). In fact, deference to the Decision should be even greater than that in the Intercity case cited above because, there, the

ICC simply denied the request for a declaratory order proceeding without addressing the merits of the underlying dispute. 737 F.2d 103, 105 and 109 (n. 9). In contrast, the Decision *does* address the primary question regarding whether the New York state court actions concerning the rail easement are preempted, and otherwise explains why the other issues raised by JGB are immaterial to the easement dispute.

III. The Board Should Reject JGB’s Attempt to Re-Characterize its Petition for Declaratory Order.

In support of its Petition for Reconsideration, JGB has attempted to re-characterize its original Petition for Declaratory Order as centering on the status of the Sidetracks¹ – meaning whether or not they qualify as common carrier tracks. See, e.g., Pet. for Recon. at 3 (“The Board’s Decision ignored the fundamental question that JGB’s Petition raises – namely, is the track that was removed...a properly authorized common carrier line”). JGB further posits that the Decision was so lacking in impact that it was a “non-decision Decision.” Pet. for Recon. at 3.

The Board should reject this effort to re-cast the Petition for Declaratory Order. The Board correctly focused on preemption as central to addressing the rail easement dispute between the parties and the enforceability of the New York state court actions. JGB itself made this same point in its original petition. See Pet. for Decl. Order at 11-12 (“This Petition...goes to the heart of federal preemption matters that require full and prompt consideration by this Board.”). Indeed, the matter of preemption was also unsuccessfully raised by JGB in both the state and federal courts of New York, further indicating it has been a primary focus of JGB in the

¹ Ironwood and Steelway continue to use the term “Sidetracks” to describe the tracks at issue. See Ironwood/Steelway Reply at 4 (n. 1) (filed May 30, 2014) (“May 2014 Reply”).

easement dispute.² Of course, JGB's attempt to shift the focus of its original petition is ultimately irrelevant because the status of the Sidetracks does not affect the state law property dispute involving the rail easement across JGB's property, as the Board soundly determined within the boundaries of its discretion. See Decision at 7; May 2014 Reply at 8-12. In fact, JGB cites to no authority which mandates a decision on the status of the Sidetracks.

Careful evaluation of the Petition for Declaratory Order also reveals that it focused on only three issues, all of which the Board addressed in the Decision. JGB's argument in the Petition for Declaratory Order consisted of three parts: pages 11 through 20 asserted that the Sidetracks are common carrier rail lines, pages 20 through 25 contended that state court proceedings are preempted, and pages 25 through 32 alleged that, if the Sidetracks are found to be authorized common carrier lines, then they have been *de facto* abandoned.³

In the Decision, the Board addressed all three of these arguments. First, the Board found that determination of the status of the Sidetracks was immaterial to the rail easement dispute between the parties. Decision at 7. Second, the Board decided that the state court proceedings are not preempted. Decision at 7. Third, the Board determined that, regardless of the status of the Sidetracks, no abandonment has occurred. Decision at 7-8.⁴

² See, e.g., JGB Properties, LLC v. Ironwood, LLC, Steelway Realty Corporation, et al., Index No. 2013-3422 and RJI No. 33-13-3612, Memorandum Decision and Order (N.Y. Sup. Ct., County of Onondaga, May 6, 2014), attached as Exhibit 3 to May 2014 Reply; JGB Properties, LLC v. Ironwood, LLC and Steelway Realty Corporation, Case No. 5:14-cv-1542, Decision and Order (N.D.N.Y., Mar. 26, 2015), attached to letter filed April 9, 2015 by Ironwood/Steelway.

³ Pages 1 through 10 of the Petition for Declaratory Order consisted merely of an introduction and background information.

⁴ It is noteworthy that the three main sections of the Petition for Declaratory Order do not exactly correlate with the four requested findings emphasized in the Petition for Reconsideration. The reason for this disconnect should be obvious – there were really only two requested findings (preemption and the status of the Sidetracks) because three of the four requested findings are basically different ways of asking for the same thing: the Sidetracks to be designated as common

Therefore, the Board squarely satisfied the requirement to provide a “rational basis” for the Decision. Intercity, 737 F.2d 103, 110. Moreover, the Board should deny the requested reconsideration because JGB is “merely restate[ing] the arguments it [previously] made...and argu[ing] that the Board should have agreed with its arguments.”⁵

IV. Granting the Relief Requested by JGB Would Create Perverse Incentives, Cast Doubt on Thousands of Tracks Across the Country, and Improperly Shift the Burden of Proof.

JGB’s primary concern is that the Board erred in failing to determine the status of the Sidetracks (i.e., whether the Sidetracks consist of private track, excepted track under 49 U.S.C. § 10906, or common carrier track). See Pet. for Recon. at 3. However, as the Board cogently explained, the status of the Sidetracks is immaterial to JGB’s rights and obligations as the owner of a subservient estate burdened by a rail easement.

Indeed, commencing a proceeding to examine the status of the Sidetracks, as requested by JGB, could have profoundly damaging consequences for the national rail system. Such an outcome would create perverse incentives and could induce a flood of similar self-help track removal actions by disgruntled landowners who own property burdened by rail easements. These disgruntled landowners could disrupt rail service and force easement holders to first seek a Board determination regarding the status of the track that had been wrongfully removed. Effectively, JGB wants the Board to sanction vigilante track removal and reverse the burden of proof, forcing the victimized easement holder to obtain an STB order in order to protect its rail

carrier rail lines. The Board carefully considered both preemption and the track status issue in the Decision and, consequently, responded to all four requested findings.

⁵ Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., STB Docket No. 35081, slip op. at 4 (served May 7, 2009).

easement.⁶ As the proponent of a declaratory order proceeding, it is JGB that has the burden of proof. 5 U.S.C. § 556(d). See also Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 35504, slip op. at 4 (served Dec. 12, 2011) (“UP will bear the burden of proof because it is the party seeking the declaratory order”).

The Board should reject JGB’s attempt to cast a cloud of uncertainty over the very substantial number of sidings, sidetracks, spur tracks, and other similar tracks in or near warehouses, shipper facilities, and port districts in the United States.⁷

V. The Board Should Reject the Requested Clarification.

As an alternative to reconsideration, JGB asks 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.” Pet. for Recon. at 11. The requested clarification is nothing more than a re-stating of the track status issue already discussed above, with an explicit and impermissible attempt to reverse the burden of proof. As the proponent of a declaratory order proceeding, JGB has the burden of proof. 5 U.S.C. § 556(d). See also Eastern Alabama Railway LLC – Petition for Declaratory Order, STB Docket No. 35583, slip op. at 4 (served March 9, 2012). Moreover, if the burden of proof were reversed as requested in the “clarification”, it would create perverse

⁶ See, e.g., Pet. for Recon. at 11 (“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”). See also Pet. for Decl. Order at 2 (JGB requests that the Board “issu[e] an appropriate order for any interested person to show cause why the Board should not grant the relief requested”).

⁷ Ironwood/Steelway have previously cited various precedent showing that tracks similar to the Sidetracks are routinely found to not be common carrier rail lines. See May 2014 Reply at 16-25.

incentives for disgruntled landowners who seek to disrupt rail service and are unhappy about owning property burdened by a rail easement. See Section IV above.

VI. Conclusion.

The fundamental disagreement between Ironwood/Steelway and JGB is a state law property dispute regarding the existence and enforceability of an easement for rail purposes across JGB's property. As such, the dispute is properly resolved by the state courts in New York, not the Board.⁸ It bears repeating that JGB is not the aggrieved party here. JGB only purchased the subject property in 2005 – decades after the easement was created and the Sidetracks constructed. See Pet. for Decl. Order at 3-5. Moreover, the purchase was only a few years before JGB's unlawful removal of part of the Sidetracks, an event which precipitated the start of the state court litigation in 2009. See Pet. for Decl. Order at 8-9.⁹

Reconsideration is not warranted here because the Board properly exercised its discretion in denying JGB's Petition for Declaratory Order. Further, the Board "carefully considered" the issues in its Decision and JGB's reconsideration request "merely rehash[es]...[its] earlier arguments and provide[s] no basis for [the Board] to hold differently."¹⁰ Clarification is similarly unnecessary because the requested clarification is simply a variant of the reconsideration relief and because it would impermissibly shift the burden of proof. The Petition for Reconsideration should be denied.

⁸ See May 2014 Reply at 8-12.

⁹ See also Verified Statement of Richard Berry at ¶ 23, attached to May 2014 Reply; Supreme Court of New York, Decision on Punitive Damages, at page 9-10, Index No. 09-5776 (County of Onondaga, January 27, 2014) (attached at Exhibit 2 to May 2014 Reply).

¹⁰ Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Docket No. 35057, slip op. at 6 (served Sept. 26, 2008).

Respectfully submitted,



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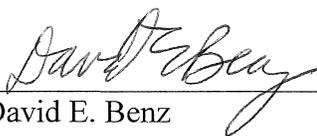
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July 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2015, I served a copy of the foregoing upon counsel for the parties listed below by U.S. first-class mail, postage prepaid. Additionally, outside counsel for Petitioner JGB and Respondent CSXT were both served via electronic mail.

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