

236131

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**JGB PROPERTIES, LLC – PETITION FOR
DECLARATORY ORDER – WOODARD
INDUSTRIAL RAILROAD OPERATIONS**

STB Finance Docket No. 35817

**REPLY OF IRONWOOD, LLC AND STEELWAY REALTY CORPORATION
TO PETITION FOR DECLARATORY ORDER**

Karyn A. Booth
David E. Benz
THOMPSON HINE LLP
1919 M Street N.W., Suite 700
Washington, D.C. 20036
Phone: (202) 331-8800
Fax: (202) 331-8330

*Attorneys for Ironwood, LLC and Steelway
Realty Corporation*

May 30, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**JGB PROPERTIES, LLC – PETITION FOR
DECLARATORY ORDER – WOODARD
INDUSTRIAL RAILROAD OPERATIONS**

STB Finance Docket No. 35817

**REPLY OF IRONWOOD, LLC AND STEELWAY REALTY CORPORATION
TO PETITION FOR DECLARATORY ORDER**

Ironwood, LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”) hereby submit this Reply in opposition to the Petition for Declaratory Order (“Petition”) filed by JGB Properties, LLC (“JGB”) on April 9, 2014. This Reply is provided pursuant to 49 C.F.R. § 1104.13(a) and the decision of the Surface Transportation Board (“Board” or “STB”) served on April 28, 2014 extending the time for Replies until May 30, 2014.

In this Reply, Ironwood and Steelway show that JGB misapplies the preemption doctrine and inappropriately seeks to use the Board as a “court of last resort” in attempting to overturn certain New York State court decisions affirming a rail easement that crosses JGB’s property in an industrial park in Clay, New York. JGB’s contortion of the preemption doctrine warrants a denial of the Petition without even deciding the merits of JGB’s claims that certain spur tracks in the industrial park are subject to Board regulation. However, should the Board decide to evaluate such matters, Ironwood and Steelway show that the structure, length, and possible use of the spur tracks are far more consistent with the characteristics of private track or track excepted from the Board’s jurisdiction under 49 U.S.C. § 10906. Accordingly, the Petition should be denied.

In support of this Reply, Ironwood and Steelway submit the attached Verified Statement of Richard Berry, the property manager for the Ironwood and Steelway properties that are located in the Woodard Industrial Park in Clay, New York, where the subject rail easement and spur tracks are located (hereinafter “Berry V.S.”).

I. INTRODUCTION.

By filing its Petition, JGB seeks to involve the Board in a long-standing dispute over a rail easement that has been the subject of multi-year litigation in the courts of New York. The dispute arose in 2009 after JGB wrongfully ripped up existing spur track that transversed its property in the industrial park, thereby severing a rail connection between Ironwood’s warehouse (and other buildings) and the CSXT main line which is adjacent to the industrial park. In an apparent effort to override certain decisions of the New York courts confirming the validity of the rail easement, JGB filed this Petition asserting that the series of short and stub-ended spur tracks located in the Woodard Industrial Park are actually common carrier rail lines subject to the Board’s jurisdiction. Assuming JGB overcomes this high hurdle and convinces the Board to assert its jurisdiction, it then requests that the Board authorize the adverse abandonment of the rail line on its property to permit the property to be “developed for non-rail use and without encumbrance.” Petition at 2. Thus, JGB seeks to use the Board’s rules and powers to effectively extinguish a rail easement found to be valid by the courts of New York.

It is clear that JGB’s resort to the Board is nothing more than a “Hail Mary” after losing on the merits in state court and facing orders to pay both compensatory and punitive damages based on its unlawful conduct. The Board should reject JGB’s improper attempt to use the Board as an appellate court of last resort for state law property disputes. The Board’s jurisdiction does not extend to such disputes, and the Petition should be denied.

Moreover, federal preemption over rail transportation does not exist to protect vigilante self-help efforts to interfere with state law easement rights and to *prevent* the possibility of rail service to shippers located on the subject rail line. However, these are precisely the objectives underlying JGB's Petition.

Indeed, the status of the Sidetracks¹ at issue in this proceeding is irrelevant to the question of whether an easement exists under state law. Whether or not a lawful easement exists under state property law does not depend on the character of the railroad track upon such an easement. Unequivocal precedent from this Board and the courts holds that real property law issues are to be decided by the courts under state law and not by the Board.

Finally, notwithstanding JGB's deviant motivations, it is clear that the short, stub-ended Sidetracks within the industrial park near Syracuse, NY are not common carrier rail lines, but rather qualify as private track or at least excepted track under 49 U.S.C. § 10906. Because the Sidetracks are not subject to STB regulation, the Board cannot order an adverse abandonment.

II. BACKGROUND.

Since 2009, certain property owners in the Woodard Industrial Park, including Ironwood and Steelway, have been engaged in litigation before New York state courts regarding whether such owners are the beneficiaries of a permanent rail easement across JGB's property. The subject easement was created in the mid-1960's for the express purpose of facilitating the establishment of railroad tracks long before JGB, Ironwood, or Steelway became owners of the relevant parcels. Real property records establish that the easement was created as a "permanent

¹ Ironwood and Steelway use the term "Sidetracks" in this Reply to refer to Tracks 232, 764, and 766, plus the small section of Track 230 necessary to reach Track 232. See map at page 6 of the JGB Petition. However, the preemption and track characterization issues should equally apply to the other similar spur tracks (Tracks 230, 757, 759, 760, and 762) shown on the map at page 6 of the JGB Petition. Factual background regarding the Sidetracks is provided in the Berry V.S.

right of way for a railroad spur track to be used and enjoyed in common with others.” Berry V.S. at ¶ 22. The litigation in the courts of New York was necessitated by JGB’s removal of a portion of the Sidetracks that crossed JGB’s property in the industrial park.

A. The Ironwood Property and the Sidetracks.

Ironwood is in the business of owning warehouse space that it then leases to various tenants. Berry V.S. at ¶ 1. Ironwood owns a warehouse of just over 160,000 square feet at 4530 Steelway Boulevard South in Clay, New York, which is located within the Woodard Industrial Park. Berry V.S. at ¶ 1. This warehouse is served by a short, stub-ended railroad spur track or sidetrack numbered as Track 766 on the map at page 6 of the JGB Petition. Berry V.S. at ¶ 8. The Ironwood warehouse is parallel to and just to the south of Track 766. Berry V.S. at ¶ 8. Before JGB removed the track on its property (i.e. part of Track 232 on the JGB map; see Petition at 6.), CSXT trains could access Track 766 and the Ironwood warehouse by using Tracks 230 and 232. Berry V.S. at ¶¶ 6, 11, 16, and 19.

The western end of Track 766 terminates at the edge of the Ironwood warehouse, and the eastern end of Track 766 connects to Track 232. Berry V.S. at ¶¶ 10-11. Track 766 is approximately 1,152 feet long. Berry V.S. at ¶ 15. Before its partial removal, Track 232 was approximately 1,280 feet long. Berry V.S. at ¶ 15. To reach Track 232 (and, eventually, Track 766), CSXT trains would veer from the main line onto Track 230 for a very short distance. Berry V.S. at ¶¶ 11 and 15. Therefore, the total distance from the western end of Track 766 to the CSXT right-of-way property line is a little less than one-half mile. Berry V.S. at ¶ 15.

The Ironwood warehouse is divided into four units, which are currently leased to entities that use their leaseholds for distribution of various products. Berry V.S. at ¶¶ 4-5. The four tenants are: Dunk & Bright Furniture, 3PD, Dealers Supply, and Packaging Corporation of

America. Berry V.S. at ¶ 5. Due to the removal of part of Track 232 by JGB, the Ironwood warehouse has been severed from CSXT rail service, and Ironwood has been forced to market its property solely to potential tenants that do not need rail service. Berry V.S. at ¶¶ 24 and 30. The lack of current rail service has limited the pool of potential tenants who might be interested in the Ironwood property. Berry V.S. at ¶ 30.

At the time of JGB's removal of part of Track 232 in 2009, Ironwood was in negotiations with XPEDX, a large paper company, for leasing part of the Ironwood warehouse. Berry V.S. at ¶ 25. XPEDX required rail service for its operations. However, these negotiations broke down after JGB removed the track and Ironwood could not guarantee to XPEDX when rail service would be restored. Berry V.S. at ¶ 26. XPEDX eventually leased a rail-served property elsewhere in the Woodard Industrial Park, and XPEDX currently receives boxcar service at that location. Berry V.S. at ¶ 26.

B. The New York State Easement Litigation.

As a consequence of JGB's removal of the track, Ironwood and Steelway commenced an action in August 2009 in the Supreme Court of Onondaga County, New York asserting unlawful interference with the rail easement.² In an order issued on December 22, 2009, the Supreme Court for the County of Onondaga decided that Ironwood and Steelway possessed "permanent" right-of-way easements for railroad tracks and that JGB's conduct was unlawful.³ Following this liability determination, the parties entered into a stipulated agreement to settle the issue of damages, with Ironwood and Steelway agreeing to accept JGB's re-installation of track as the

² See Index No. 2009-5776, Ironwood, L.L.C. and Steelway Realty Corporation v. JGB Properties, LLC. The complaint was filed August 18, 2009 and is attached as Exhibit 3 to the JGB Petition.

³ See Exhibit 1 (Supreme Court order, dated Dec. 22, 2009).

sole measure of damages.⁴ However, after lengthy delays in JGB's re-installation of the tracks, the stipulation was vacated.⁵ Ultimately, the New York Supreme Court determined that JGB's conduct warranted payments to Ironwood and Steelway of both compensatory and punitive damages.⁶ The awarding of punitive damages was affirmed by the Appellate Division, which stated 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."⁷

In mid-2013, JGB commenced a separate action in the Supreme Court for the County of Onondaga against nine entities, including Ironwood, Steelway, CSXT, and the Town of Clay, New York, claiming that the easement is "invalid and extinguished" for a variety of reasons, and claiming that the Supreme Court lacked jurisdiction and its prior rulings were subject to preemption.⁸ JGB then filed this Petition for Declaratory Order at the Board on April 9, 2014.

Soon after filing this Petition, JGB filed a Motion for Stay of its recently-filed court case, asserting that court action should wait until the Board acts on this Petition and the New York Appellate Division acts on its appeal of the Supreme Court decision issued in the initial

⁴ The stipulation was entered by the Supreme Court in Index No. 2009-5776 on May 2, 2011.

⁵ The Supreme Court vacated the stipulation in Index No. 2009-5776 on July 17, 2013.

⁶ See Exhibit 2 (Supreme Court order, dated March 21, 2014). The Court's order was based partially on an earlier determination of the Appellate Division, Fourth Judicial Department (dated October 5, 2012) in CA 11-02341 finding that compensatory damages were appropriate based on interference with the rail easement.

⁷ See Exhibit 2 at page 4 (quoting Appellate Division, Fourth Judicial Department). After it became clear that punitive damages would be assessed, JGB sought to dismiss the Supreme Court action in Index No. 2009-5776, alleging, among other arguments, that the New York court lacked subject matter jurisdiction over the rail line based on ICCTA preemption, but this effort was rejected. See Supreme Court order (dated Jan. 21, 2014) at 10 (finding that the plaintiff's case is for money damages for interference with the rail easement and "[t]he nature and use of the railway at issue in this case is secondary or incidental to the Plaintiff's case").

⁸ See JGB Properties, LLC v. Ironwood, LLC et al., Index No. 2013-3422 (filed July 30, 2013). Ironwood and Steelway have moved to dismiss the new action by JGB as barred by principles of res judicata and collateral estoppel, and otherwise contrary to law. See Motion to Dismiss (filed March 7, 2014) in Index No. 2013-3422.

litigation.⁹ The Supreme Court rejected the stay request in an order issued May 14, 2014, finding that “JGB is seeking in State Court and before the STB to extinguish easements” and “[t]he Court determines that it does have authority to retain jurisdiction.”¹⁰

III. FEDERAL PREEMPTION DOES NOT APPLY.

JGB argues that the state lawsuits pertaining to construction and use of common carrier rail lines are preempted, and that the subject rail line on its property was intended to be common carrier track. Petition at 12, 21 and 24. This argument lacks merit for several reasons. First, JGB mischaracterizes the nature of the state court actions, which are focused on the existence and enforceability of a rail easement and not rail line construction or operations. The former, which deals with a real property interest, falls squarely within the jurisdiction of the state courts and not the Board. Second, JGB has provided no support (because there is none) for its position that a non-railroad may use preemption to authorize the tearing up existing tracks to deny rail service to adjoining shippers, thereby frustrating rather than promoting interstate commerce. Third, as shown in Section IV below, JGB fails to establish that the Sidetracks in the Woodard Industrial Park qualify as common carrier lines that are subject to the Board’s jurisdiction, or that this Board should order an adverse abandonment of Sidetracks.

A. The Validity of an Easement Must Be Determined By State Courts, Not the Board.

It is evident that JGB’s real objective is to prevent rail service over the easement to adjoining land owners, such as Ironwood, so that it can redevelop its property for a different purpose. JGB does not really care whether the tracks are common carriage or not; JGB simply is searching for some method by which to extinguish the rail easement. JGB ignores the fact that

⁹ See JGB Motion for Stay (filed April 18, 2014) in Index No. 2013-3422.

¹⁰ See Exhibit 3 (Supreme Court order, dated May 14, 2014).

whether the tracks are common carriage, excepted track, or private track has no bearing on the jurisdiction of New York state courts to determine the extent of the underlying property interest.

Matters involving whether and to what extent a property interest exists are governed entirely by state law, and no preemption exists.¹¹ Even a cursory glance at the authority granted to the Board by Congress reveals that the Board has no role to play in determining whether an easement or a property right exists. Congress has stated that the Board has “exclusive” jurisdiction over “transportation by rail carriers” and the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501(b). Notably, Congress said nothing about property rights that make the existence of railroad tracks possible. Indeed, such property rights arise under and are governed entirely by state law.

JGB fails to recognize that whether or not a party has a property right under state law is a distinct issue from whether authorization exists from the Board to construct a common carrier rail line on that property, operate common carrier rail service on that property, or engage in any other regulated rail activity. The Board made this distinction clear just a few months ago:

Whether a party has regulatory authority to acquire a line, or operate it, or both, is distinct from the question of whether it obtained the necessary state law property interest or contractual right to exercise that Board-granted authority. The observation that V&S operated on the Line or even received the regulatory authority to operate on the Line does not resolve the question of

¹¹ In a recent dispute about the extent of a rail easement, the Board declined to institute a declaratory order proceeding, finding that “the size and extent of a railroad easement is a matter of state property law and best addressed by state courts.” Allegheny Valley Railroad Company – Petition for Declaratory Order – William Fiore, STB Docket No. 35388, slip op. at 3 (served April 25, 2011). In another recent case, the Norfolk Southern Railway Company contended that ICCTA preemption barred a plaintiff landowner’s breach of easement covenant claim. PCS Phosphate Company, Inc. v. Norfolk Southern Corp., 559 F.3d 212, 215 (4th Cir. 2009). The court disagreed, finding the easement covenant to be a “voluntary agreement” that, by definition, does not unreasonably interfere with rail operations or warrant preemption. Id. at 221.

whether it obtained the necessary state law property or contractual rights. This is a question of state law and is precisely the issue being addressed in the district court.

V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan.,

STB Docket No. 35459, slip op. at 5 (served Jan. 14, 2014).¹²

Even if the Sidetracks are common carrier rail lines (which they are not as shown in Section IV below), there is still no cause for preemption. Any 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. The two tasks are distinct, and obtaining one does not eliminate the need to obtain the other. V&S, slip op. at 5 (served Jan. 14, 2014). Both steps are equally necessary, since grants of authority from the Board are “permissive only.” V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan., STB Docket No. 35459, slip op. at 6 (served July 12, 2012). To exercise any authority granted by the Board, a railroad must separately “obtain[] the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line.” Id.

¹² See also City of Milwaukie – Petition for Declaratory Order, STB Docket No. 35625, slip op. at 3 (served March 25, 2013) (“Before we can reach the preemption issue presented here, however, it is appropriate for a state or municipal court to resolve the parties’ property law dispute relating to Oregon’s appropriation law. The court may also resolve the preemption issue in the first instance, by applying existing Board and court precedent.”); New Orleans & Gulf Coast Railway Company v. Barrois, 2006 U.S. Dist. Lexis 65740 at *36 (E.D. La., Sept. 14, 2006) (“[T]he language of the ICCTA provides no indication that Congress intended a statute governing railroads to preempt the fundamental rights granted by state property law. Section 10501(b) relates to the construction and operation of railroad lines and their economic regulation; despite the broad application of ICCTA preemption, the plain language of § 10501(b) does not substantially subsume state property law.”); Allied Erecting & Dismantling, Inc. and Allied Industrial Development Corp. – Petition for Declaratory Order – Rail Easements in Mahoning County, Ohio, STB Docket No. 35316, slip op. at 11 (n. 59) (served Dec. 20, 2013) (“To the extent Allied asks the Board to determine whether Ohio Central has any state law property rights associated with those tracks, we defer to the state court to answer that question.”).

As such, the entire premise of JGB's Petition, i.e. that the existence of common carrier tracks inevitably results in preemption of all state court action, is false.

In determining the validity of the rail easement at issue in the Woodard Industrial Park, the New York state courts have only applied state property laws, which clearly fall within the traditional state police power and are not preempted. There is no evidence that Congress intended to preempt the states' traditional power to determine property rights and protect those state law property rights when they are infringed. CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573, 1582 (N.D. Ga. 1996) (citation omitted) ("the overriding principle which should guide any preemption analysis is whether Congress intended to preempt state law").

Where, as here, a generally applicable state law exists, there is a presumption against preemption and JGB bears the burden of establishing that preemption is warranted. New Orleans & Gulf Coast Railway Company v. Barrois, 533 F.3d 321, 334 (5th Cir. 2008) (citations omitted).¹³ The failure of Congress to expressly state that ICCTA preempts state property law means that Congress intended no such preemption. Dakota, Minnesota & Eastern Railroad Corporation v. South Dakota, 236 F.Supp.2d 989, 1012 (D.S.D. 2002), affirmed in part and vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004) (preemption of a basic state power would be expressly provided by Congress). The Second Circuit has stated that "states and towns may exercise traditional police powers over the development of railroad property,"¹⁴ and there is little that is more fundamental to the police power than protection of a person's property interest. As such, the New York State courts have properly undertaken to resolve the easement dispute.

¹³ See also Franks Investment Company LLC v. Union Pacific Railroad Company, 593 F.3d 404, 407 (5th Cir. 2010) (there is a presumption against preemption in areas of law traditionally reserved for the states, such as property law).

¹⁴ Green Mountain Railroad Corporation v. State of Vermont, 404 F.3d 638, 643 (2nd Cir. 2005).

JGB's thinly-veiled attempt to involve the Board in a state court easement dispute must be rejected.

B. The New York State Court Actions Do Not Involve Rail Line Construction or Operations and Are Not Preempted.

JGB emphasizes that the Board's jurisdiction over rail transportation is "exclusive." Petition at 11-12. While the Board's jurisdiction admittedly is broad, it does not cover every issue that may touch upon railroad tracks in any fashion. The Board's exclusive jurisdiction preempts "two broad types of state regulation."¹⁵ First, preemption bars "permitting or preclearance requirements that...could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized."¹⁶ Second, preemption bars attempts to regulate matters that are reserved to the Board, such as construction, operation, and abandonment of rail lines.¹⁷ Additionally, preemption can bar state actions on an "as applied basis" if the state actions "would have the effect of unreasonably burdening or interfering with rail transportation."¹⁸

Obviously, the first type of preemption does not exist here, because New York state law is not being used to prevent rail operations. Indeed, it is precisely the opposite, since Ironwood, Steelway and other property owners desire to exercise state law to preserve the possibility of rail service. Similarly, the second type of preemption does not apply because the state of New York is not attempting to regulate construction, operation, or abandonment of rail lines. Rather, the

¹⁵ Norfolk Southern Railway Company – Petition for Declaratory Order, STB Docket No. 35701, slip op. at 3 (served Nov. 4, 2013).

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. State action is also preempted where a private party cannot comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of Congressional purposes. Buddy and Holley Hatcher – Petition for Declaratory Order, STB Docket No. 35581, slip op. at 5 (served Sept. 21, 2012).

New York courts have only attempted to determine the validity of an easement under state property law.

JGB tries to assert that the New York state court proceedings have addressed “use” of the tracks and “re-construction” of the tracks. Petition at 20 (“All State Law Actions Aimed at the Construction and Use...Are...Preempted”). See also Petition at 24. Of course, JGB does not point to any state court order that requires construction or use of the tracks, because there is none.¹⁹ In other words, there is no improper state action for the Board to preempt. Cf. Guild v. Kansas City Southern Railway Company, 2013 U.S. App. Lexis 18730 at *10-12 (5th Cir., Sept. 9, 2013) (finding no preemption of state law negligence claim asserting damage to spur track where purpose of the state law “is not to manage or govern rail transportation”).

Even if the New York easement dispute could somehow be construed to require re-construction of railroad tracks (for which there is no evidence whatsoever), preemption does not apply because JGB is not a common carrier. See New York & Atlantic Railway Company v. STB, 635 F.3d 66, 71-72 (2nd Cir. 2011) (preemption does not apply to construction of a rail-related facility by an entity that is not a Board-authorized common carrier). See also Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC, STB Docket No. 35036, slip op. at 4 (served Aug. 27, 2008).

Preemption also has never been used to shield vigilante removal of railroad tracks in order to prevent rail service to adjoining landowners. Obviously, preemption is not meant to reward unlawful behavior in this manner. Cf. Medtronic, Inc. v. Lohr, 518 U.S. 470, 487 (1996)

¹⁹ Ironwood, Steelway, and JGB did enter into a voluntary stipulated settlement agreement on May 2, 2011 whereby JGB voluntarily agreed to re-install the tracks that it had illegally removed. This agreement was entered by the Supreme Court, County of Onondaga in Index No. 2009-5776. This stipulated settlement was later vacated by that same Court, at the request of Ironwood and Steelway, on July 17, 2013 in Index No. 2009-5776. Therefore, no such stipulation currently exists.

“It is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct, and it would take language much plainer...to convince us that Congress intended that result.” (internal quotation and citation omitted). Cf. Emerson v. Kansas City Southern Railway, 503 F.3d 1126, 1132 (10th Cir. 2007) (“If the [Interstate Commerce Act] preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street.”).

Accordingly, if preemption were applied to insulate JGB’s actions in this way, it would create perverse incentives of the worst kind. See, e.g., Emerson 503 F.3d at 1132 (criticizing a preemption claim that had “no obvious limit, and if adopted would lead to absurd results”).

C. Preemption Exists to Protect Interstate Commerce, Not Defeat It.

JGB’s attempted use of preemption to validate the *denial* of rail service to shippers turns the preemption doctrine on its head. The Board has stated that “[t]he purpose of federal preemption... is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.” Borough of Riverdale – Petition for Declaratory Order, STB Docket No. 35299, slip op. at 2 (served Aug. 5, 2010) (citation omitted). See also Suffolk & Southern, STB Docket No. 35036, slip op. at 3 (served Aug. 27, 2008) (“preemption... does not prevent state and local governments from...exercising their police powers in a manner that is non-discriminatory and does not unreasonably interfere with interstate commerce”).

Here, JGB seeks to use preemption to overturn the New York court decisions and to prevent the possibility of rail service to Ironwood’s tenants. However, JGB’s analysis is seriously flawed because the contested state law must cause interference with rail operations for ICCTA preemption to be applied. Island Park, LLC v. CSX Transportation, 559 F.3d 96, 104 (2nd Cir. 2009) (“although ICCTA’s pre-emption language is unquestionably broad, it does not

categorically sweep up all state regulation that touches upon railroads – interference with rail transportation must always be demonstrated”); City of Milwaukie, STB Docket No. 35625, slip op. at 4 (Stating that § 10501(b) only “prevent[s] states or localities from intruding into matters that are directly regulated by the Board...[and also] from imposing requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized.”).²⁰

The preemption decisions cited by JGB do not warrant a different result. Those decisions show that preemption was invoked because state law interfered with rail operations. See, e.g., Norfolk Southern, STB Docket No. 35701, slip op. at 4 (subjecting NS to nuisance lawsuits under state law for normal rail operations would “significantly hinder NSR’s ability to function as a rail carrier”); Green Mountain Railroad, 404 F.3d at 643-644 (state law preempted because its application would mean “the railroad is restrained from development until a permit is issued”); New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, STB Docket No. 34797, slip op. at 13-14 (served July 10, 2007) (storage, loading, baling, and wrapping of solid waste and C&D debris is integrally related to transportation and, therefore, entitled to federal preemption of state law).

In contrast to the proper application of preemption of state laws that interfere with interstate commerce, JGB seeks to use preemption to prevent the possibility of rail service to Ironwood and others because it now prefers that its property be “productively utilized and developed for non-rail use.” Petition at 2. Such an interpretation of ICCTA is novel to say the

²⁰ See also Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Docket No. 33466, slip op. at 6 (served Sept. 10, 1999) (“state or local regulation is permissible where it does not interfere with interstate rail operations”).

least and would establish an extremely dangerous precedent if endorsed by the Board.

Preemption does not (and should not) exist to exonerate the removal of rail tracks by private citizens who desire to develop their easement-burdened property in a manner that is inconsistent with the provision of rail service to adjoining land owners. JGB's Petition should be denied.

IV. EVEN IF THE BOARD CONSIDERS THE MERITS OF THE PETITION, A DECLARATORY ORDER PROCEEDING IS NOT NECESSARY.

As demonstrated above, the Board can and should deny JGB's Petition without even addressing whether the Sidetracks in the Woodard Industrial Park are common carrier track subject to the Board's jurisdiction. Nevertheless, if the Board decides to address the merits of such an argument, the Board should still deny JGB's request to institute a proceeding because the Board has previously determined that short, stub-ended spur tracks are not common carrier rail lines when they are operated by a railroad with adjacent common carrier lines. As it has in other clear-cut situations, the Board can answer the question put forth while simultaneously declining to institute a declaratory order proceeding. See, e.g., H&M International Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34277, slip op. at 2 (served Nov. 12, 2003).

A. The Sidetracks Are Not Common Carrier Rail Lines, But Rather Qualify As Private or Excepted Track.

Ironwood and Steelway agree that the Board has jurisdiction over rail tracks used to provide common carrier service, and over certain spur, industrial, team, switching or side tracks that qualify as "excepted" track under 49 U.S.C. § 10906. Although excepted track is subject to STB jurisdiction, such track may be constructed, operated, or abandoned without STB approval. 49 U.S.C. § 10906. The Board does not have jurisdiction over private track. Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC, STB Docket No. 35036, slip op. at 1 (n. 1) (served Nov. 16, 2007).

1. The Sidetracks Could be Private Tracks.

JGB contends that the Sidetracks cannot be private track because the intent was for the tracks to be “used in common with others” while rail service on private track can only be “performed solely on behalf of *one* company.” Petition at 17-18. However, JGB only focuses on cases favorable to its position and ignores cases to the contrary. While Ironwood and Steelway agree that certain Board precedent states that private track usually is established to serve a single shipper,²¹ other precedent shows that private track can be used by multiple shippers under certain circumstances.

For example, private track was found to exist where the track served three shippers and was owned by a local city government. Trojan Scrap Iron Corporation v. Boston & Maine Railroad, 270 ICC 727 (1948) (describing 2850-foot long private track owned by City of Troy and used by three shippers). In another case, the Cincinnati, New Orleans and Texas Pacific Railway (“CNOTP”) sought an abandonment exemption in order to allow sale of the line to shipper Franklin Industries. The Cincinnati, New Orleans and Texas Pacific Railway Company – Abandonment Exemption – in Roane County, TN, STB Docket No. AB-290 (Sub-No. 236X) (served Dec. 2, 2005). After the abandonment, it was proposed that CNOTP would continue to serve Franklin on the now-private track. A second shipper, Horsehead Corporation, was also served by CNOTP on the line, and negotiations were ongoing regarding how CNOTP would serve Horsehead after abandonment. The Board refused the abandonment exemption until CNOTP and Franklin reached an agreement with Horsehead regarding how Horsehead would be served after the abandonment. Thus, the Board implied that both Horsehead and Franklin would be served via the private track.

²¹ See, e.g., B. Wills, C.P.A., Inc. – Petition for Declaratory Order, STB Docket No. 34013, slip op. at 2 (served Oct. 3, 2001).

In yet another case, the Board stated that track at or near the Port of Sacramento in Docket No. 34252 was either § 10906 track or private track. See Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc., STB Docket No. 34486, slip op. at 5 (served Feb. 23, 2005). In Docket No. 34252, the Board had made clear that multiple shippers were served from the Sacramento track. Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, STB Docket No. 34252, slip op. at 2, 3, and 5 (served Dec. 5, 2002). All of these cases demonstrate that rail service to more than one shipper does *not* disqualify track as being private track as JGB contends.

Furthermore, JGB's contention that the Sidetracks were always intended to be used in common carrier service is directly contradicted by a "Private Sidetrack Agreement" negotiated recently between CSXT and Ironwood for maintenance and use of Tracks 232 and 766. This Agreement, dated February 29, 2012 and negotiated prior to JGB's assertion of preemption in the New York courts or its Petition, demonstrates that these parties believed that the Sidetracks covered by such agreement qualified as private track. See Exhibit 4. The Agreement expressly refers to Sidetracks 232 and 766 as private track: "The purpose of this Agreement is to detail the provisions of the maintenance and use of Private Sidetrack No. 232, 766 and a portion of Track 764 for the tender and receipt of rail freight traffic for the account of industry." See Exhibit 4 at Art. 1.1. The Agreement also defines the "private sidetracks" as consisting "of the track structure (rails, ties and fastenings), ballast, grading, drainage structure, turnout, bumping post and other appurtenances (hereinafter, collectively, the "Sidetrack")...." Id. Further, in clarifying the obligations of the rail carrier, Article 7.3 of the Agreement states: "any obligations 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." These provisions make clear that at

least Ironwood and CSXT believed that the Sidetracks qualified as private track and they certainly did not intend for rail operations over the Sidetracks to qualify as common carrier service.²²

2. If the Sidetracks Are Not Private Track, They Clearly Qualify As Excepted Track Under 49 U.S.C. § 10906.

JGB claims that the Sidetracks cannot be excepted track under 49 U.S.C. § 10906 because they were allegedly “created and established by a non-railroad with the design and intent that [they] be used as...common carrier rail line[s].” Petition at 15. JGB has provided no evidence of the alleged “intent” surrounding the construction of the Sidetracks. Indeed, JGB never discloses who built the Sidetracks, and if the builder is unknown, then how can that builder’s intent be divined? JGB nonetheless contends that its position is supported by certain Board decisions which supposedly show that the Sidetracks are not excepted track under § 10906, based on the establishment and use of the track. Petition at 15-16. This contention is erroneous, as shown below.

a. *The Sidetrack Operations Are Only Ancillary to CSXT Service Over Its Adjacent Main Line.*

Board decisions set forth the factors used to determine the status of rail track. In this regard, the use of the rail line is a significant factor that has been widely used to determine the character of rail track. Union Pacific, STB Docket No. 34252, slip op. at 3 (served Dec. 5, 2002) (“Whether a track segment is excepted from our licensing authority by section 10906 or, alternatively, fully subject to the rail licensing provisions of the statute is determined by

²² Another Private Sidetrack Agreement negotiated between Conrail and Pioneer Warehouse and Distribution, dated October 5, 1987, similarly evidences that the rail operator and business owners believed the Sidetracks to be private track (See Private Sidetrack Agreement attached as Exhibit 6 to the JGB Petition for Declaratory Order).

examining the intended use of the track.”).²³ Track that is operated in a manner that is only “ancillary” to a rail carrier’s authorized common carrier line-haul service qualifies as excepted 10906 track. *Id.* at 4.

There is no evidence in this proceeding that anyone other than CSXT and its predecessors-in-interest (Conrail, New York Central, etc.) have operated on the Sidetracks, a point conceded by JGB. Petition at 6 and 14; *Betak V.S.* at 3-4. Further, CSXT is (and its predecessors were) the owner and operator of the adjacent mainline track. Thus, any operations on the Sidetracks have only been (and would continue to be) “ancillary” to CSXT’s already-authorized operations on the adjacent mainline. It makes no difference that the Sidetracks may not be owned by CSXT. Excepted track can be owned by a shipper or another non-railroad, as the Board has often found.²⁴

b. The Sidetracks Qualify As Excepted Track Under the Board’s Fact-Based Standards.

The Board has also applied multiple factors to determine if track is excepted from regulation under 49 U.S.C. § 10906.²⁵ In general, the Board has found track to be excepted if the

²³ See also United Transportation Union – Illinois Legislative Board v. STB, 183 F.3d 606, 613 (7th Cir. 1999); United Transportation Union – Illinois Legislative Board v. STB, 169 F.3d 474, 479 (7th Cir. 1999); Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, STB Docket No. 41986, slip op. at 4 (served Sept. 18, 1998) (“Effingham II”).

²⁴ See, e.g., The New York City Economic Development Corporation – Petition for Declaratory Order, STB Docket No. 34429, slip op. at 7 (served July 15, 2004) (shipper owned track will be excepted as to operations by Conrail, CSXT, and NS) (“NYCEDC”); Effingham II, STB Docket No. 41986, slip op. at 1 and 5 (Conrail operations on Agracel-owned track were excepted); Union Pacific, STB Docket No. 34252, slip op. at 1 and 4-5 (served Dec. 5, 2002) (Port track is excepted as to UP operations on it).

²⁵ The test for what constitutes excepted track under § 10906 has been described in cases such as Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Co., STB Docket No. 32058, slip op. at 3 (served June 27, 1997).

track is (i) short in length²⁶ or stub-ended²⁷ or ends at the shipper's facility²⁸; (ii) does not invade the territory of another railroad;²⁹ (iii) used merely for drop-off or pick-up service that is ancillary to the carrier's common carrier service;³⁰ (iv) used on an "as needed" basis, rather than for regularly scheduled service;³¹ (v) not maintained by the common carrier;³² and (vi) used for low volumes of traffic,³³ among other factors. Here, the Sidetracks qualify as excepted track because they satisfy all of these standards:

²⁶ The Board has found that § 10906 applies to tracks of greater length than the Sidetracks at issue here. See, e.g., Indiana Rail Road Company – Petition for Declaratory Order, STB Docket No. 35181, slip op. at 1-2 (April 15, 2009) (5 miles); NYCEDC, STB Docket No. 34429, slip op. at 7 (served July 15, 2004) (just under 1.3 miles)

²⁷ See, e.g., Grand Trunk Western Railroad Incorporated – Petition for Declaratory Order – Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI, STB Docket No. 33601, slip op. at 2 (served July 30, 1998) ("collection of short, stub-ended tracks" found to be excepted); Transco Railway Products Inc. – Acquisition and Operation Exemption – D&W Railroad LLC, STB Docket No. 35688, slip op. at 2-3 (served March 4, 2013) ("a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1 mile in length" were found to be excepted tracks).

²⁸ See, e.g., NYCEDC, STB Docket No. 34429, slip op. at 7 (served July 15, 2004) (tracks ending at shipper facility found to be excepted track).

²⁹ See Big Stone-Grant Industrial Development and Transportation, L.L.C. – Construction Exemption – Ortonville, MN and Big Stone City, SD, ICC Docket No. 32645, 1995 ICC Lexis 254 (served Sept. 26, 1995) (new track designed to provide competitive rail service to an industrial park is common carrier track).

³⁰ See Texas Central Business Lines Corporation – Operation Exemption – MidTexas International Center, STB Docket No. 33997, slip op. at 3 (n. 4) (served Sept. 20, 2002) (referring to court decision where "pickup and delivery service inside a port facility was deemed excepted switching when performed by a line-haul carrier ancillary to its already authorized common carrier line-haul service"). See also Union Pacific, STB Docket No. 34252, slip op. at 4 (served Dec. 5, 2002).

³¹ See ParkSierra Corp. – Lease and Operation Exemption – Southern Pacific Transportation Company, STB Docket No. 34126, slip op. at 6 (served Dec. 26, 2001).

³² NYCEDC, STB Docket No. 34429, slip op. at 7 (served July 15, 2004).

³³ Battaglia, STB Docket No. 32058, slip op. at 3 (served June 27, 1997).

(i) The Sidetracks Are Short in Length, Are Stub-Ended, and End at the Shipper's Facility.

The Sidetracks are less than one-half mile in length and are stub-ended. See Berry V.S. at ¶¶ 10 and 15. The Sidetracks also do not extend beyond the end of the shipper facilities. See Berry V.S. at ¶ 10. These factors show the Sidetracks are akin to excepted track.

(ii) The Sidetracks Were Not Built to Invade the Territory of Another Railroad.

No railroad other than CSXT and its predecessors-in-interest has served the Ironwood Property or the other nearby warehouses along Tracks 230, 232, 764, and 766. See Berry V.S. at ¶¶ 18-19. With no other railroad available to serve the businesses in the Woodard Industrial Park, clearly the Sidetracks were not built to invade the territory of another railroad.

(iii) The Sidetracks Would Be Used Only For Pickup and Drop-off Service That is Ancillary to Service on Carrier's Mainline Track.

The Sidetracks would be used for dropping off and picking up rail cars from the warehouses. See Ex. 4 at Art. 7.1 (showing that CSXT will use the Sidetracks for “delivery, placement and removal of railcars”) (2012 Sidetrack Agreement). Further, as noted above, CSXT's operations over the Sidetracks are “ancillary” to its adjacent mainline operations. See Berry V.S. at ¶¶ 6, 11, 16, and 19. See also Ex. 4 at Art. 7.3 (showing that CSXT will have no contract or common carrier obligation until it has “departed the Sidetrack”) (2012 Sidetrack Agreement).

(iv) The Sidetracks Would Be Used On An As-Needed Basis.

Currently, no service can occur on Tracks 232, 764, and 766 due to JGB's removal of part of Track 232. However, it is anticipated that any future use would be similar to service that is currently taking place on other sidetracks in the industrial park. Specifically, nearby tracks

(230, 757, 759, 760, and 762) are currently being used to serve warehouses similar to the warehouses along Tracks 764 and 766. As far as Ironwood knows, there is no regularly scheduled service occurring on Tracks 230, 757, 759, 760, and 762. See Berry V.S. at ¶ 20.

(v) The Sidetracks Are Maintained By Ironwood and Not CSXT.

The Sidetracks that serve the Ironwood warehouse are not maintained by a common carrier railroad, i.e. CSXT. Rather, track maintenance is Ironwood's responsibility. See Berry V.S. at ¶ 16. As noted above, maintenance of track by a shipper is another indicia that the Sidetracks are not common carrier lines.

(vi) The Sidetracks Are Used For a Modest Volume of Traffic.

The Sidetracks cannot handle unit trains or large numbers of cars at once. Instead, they handle modest numbers of boxcars on an as-needed basis. See Berry V.S. at ¶¶ 15 and 33. The modest level of traffic suggests that the Sidetracks are excepted track.

B. JGB's Other Assertions Regarding the Character of the Sidetracks Lack Merit.

JGB also contends that the Sidetracks cannot be excepted track because they would be available to all shippers in the warehouse district (Petition at 12-13), but JGB ignores Board precedent establishing that § 10906 track can serve multiple shippers.³⁴

JGB claims that the design of the Sidetracks shows that they are common carrier rail lines (see, e.g., Petition at 6 and 14-15). However, as shown immediately above, a collection of very

³⁴ See, e.g., Grand Trunk Western, STB Docket No. 33601, slip op. at 2; Union Pacific, STB Docket No. 34252, slip op. at 1-2; Effingham II, STB Docket No. 41986, slip op. at 5.

short, stub-ended tracks in a warehouse district have routinely been found to constitute excepted spur, switching, and side tracks, rather than regulated lines of railroad.³⁵

In support of its view that the Sidetracks are not excepted, JGB relies heavily upon the Effingham case and its progeny (see, e.g., Petition at 15-16), but those decisions are inapposite. In Effingham and cases like it, a shortline railroad operates on a small segment of track (sometimes industrial or plant track) and that small segment constitutes its entire rail operation. In these cases, the track at issue is not “ancillary” to the shortline railroad’s operations on other, adjacent track because the short track segment is the shortline’s entire rail line. See, e.g., Effingham II, slip op. at 5. Hence, the scenario is inapplicable to the Sidetracks. See also Rock River Railroad, Inc. – Acquisition and Operation Exemption – Rail Lines of Renew Energy, LLC, STB Docket No. 35016, slip op. at 2 (served May 10, 2007) (plant tracks would be common carrier tracks because they constituted the new operator’s “entire line of railroad”). The Effingham scenario is qualitatively different from CSXT’s ancillary operations on the Sidetracks in the Woodard Industrial Park.

Finally, despite JGB’s claim to the contrary, the lack of evidence regarding regulatory approval for the Sidetracks actually supports the view that they are not common carrier rail lines. See, e.g., Raritan Central Railway, L.L.C. – Operation Exemption – Heller Industrial Parks, Inc., STB Docket No. 34514, slip op. at 4 (served June 25, 2004) (“a 1970s construction date, combined with petitioners’ failure to establish that either Lehigh or Conrail ever sought

³⁵ See, e.g., Grand Trunk Western, STB Docket No. 33601, slip op. at 2 (finding that § 10906 applies to “a collection of short, stub-ended tracks used to switch cars to and from local businesses”); Transco, STB Docket No. 35688, slip op. at 2-3 (“a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1 mile in length” were found to be excepted tracks). See also Port City Properties v. Union Pacific Railroad Company, 518 F.3d 1186, 1189 (10th Cir. 2008) (determining that tracks in industrial park serving several businesses are excepted).

regulatory approval...for the construction or operation of these tracks, undermines petitioners' claim that these tracks are railroad lines").

V. OTHER RELIEF REQUESTED BY JGB SHOULD BE DENIED.

A. The Board Should Reject JGB's De Facto Abandonment Assertion.

JGB reveals its true objectives at the end of its Petition where it asks the Board to order that a *de facto* abandonment has occurred. Petition at 25-30. Such an order would allow JGB to achieve through the Board what it has thus far been unable to achieve in the New York courts, i.e. an order effectively extinguishing the rail easement across its property. JGB's request must be denied for several reasons.

First, as demonstrated above, the Sidetracks are not common carrier rail lines and, thus, the Board has no authority to order an adverse abandonment. JGB asserts that Modern Handcraft supports the claim of "de facto abandonment," but this assertion must fail. In Modern Handcraft, there was no disagreement regarding whether the relevant track was common carrier track. The parties all accepted that the track was common carrier and the ICC found that common carrier status was preventing state law condemnation. See, e.g., Modern Handcraft, Inc. – Abandonment in Jackson County, MO, 363 ICC 969, 971-972 (1981).

Second, JGB asserts that an adverse abandonment is warranted because rail service on the Sidetracks is not viable because: (1) boxcars are becoming obsolete due to broader freight marketplace changes; (2) the warehouse design is incompatible with modern railroads; (3) the Sidetracks are in poor condition; and (4) the curvature of Track 232 is too great. Petition at 6-8 and 25-29. None of these assertions withstands scrutiny as shown immediately below.

- There are tens of thousands of boxcars in service throughout the United States. Just two months ago, GATX spent \$340 million to purchase 18,500 boxcars from GE Capital Rail Services, a very clear indication that one of the largest railcar lessors in the United States finds value in boxcar transportation. See Exhibit 5 (March 24, 2014 press release).

More significantly, CSXT is currently providing boxcar transportation to the Rotondo Warehouse on Tracks 759 and 760. See Berry V.S. at ¶ 33.

- Regarding the warehouse design, Ironwood's witness, Mr. Berry, spoke with Mr. Rotondo in January of this year about the boxcar service received at the Rotondo Warehouse on Tracks 759 and 760. See Berry V.S. at ¶ 33. The Rotondo Warehouse is similar to the building on the Ironwood property, as are numerous other warehouses in the Woodard Industrial Park that are currently receiving rail boxcar service. See Berry V.S. at ¶ 32. Ironwood's owner, the Litoff family, owns other similar warehouse properties in DeWitt, New York and the Dallas area, and these other warehouses are also receiving boxcar transportation service. See Berry V.S. at ¶¶ 34-35.

- As to the condition of the tracks, the Sidetracks can be refurbished as necessary to facilitate rail service. At this time, there is no point to refurbishing the Sidetracks because JGB is blocking all efforts to re-establish the connection to CSXT. See Berry V.S. at ¶¶ 27-29.

- The curvature of Track 232 can be addressed, as the parties have done in the past. See Exhibit 4 at Art. 7.6 (2012 Sidetrack Agreement). In any event, at least one source states that a common four-axle diesel locomotive can take a curve up to 20 degrees when coupled to other rolling stock. See Exhibit 6 (Trains magazine article, dated May 1, 2006). See also Union Pacific Railroad Company v. California Public Utilities Commission, 346 F.3d 851, 859 (9th Cir. 2003) (referring to mainline track curves of 14 and 16 degrees in some mountainous areas).

Accordingly, there is no justification whatsoever for the Board to order an abandonment of the Sidetracks. Furthermore, JGB's own actions and the years of ongoing litigation in New York indicate that, if there were ever a proceeding where the Board should require strict adherence to the abandonment application filing and notice requirements, this is such a case. Summary approval of an abandonment of the Sidetracks at issue would be highly prejudicial and sanction JGB's malicious conduct in tearing up the tracks. Thus, JGB's request for a waiver of the abandonment application requirements must be denied.

B. This is Not a "Show Cause" Proceeding and JGB Has Failed To Meet Its Burden of Proof.

By asking the Board to treat this case as a "show cause" proceeding, JGB attempts to reverse the applicable burden of proof. Petition at 2. However, as the petitioning party seeking a

declaratory order, JGB clearly has the burden. See, 5 U.S.C. § 556(d) (proponent of petition for declaratory order has burden of proof). 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.”). As demonstrated herein, JGB has sought to turn the preemption doctrine on its head, has misconstrued Board precedent regarding the status of rail track, and seeks to extinguish a legitimate rail easement using the Board’s adverse abandonment concept. Thus, JGB has come woefully short of meeting its required burden and its Petition must be denied.

VI. CONCLUSION.

For the foregoing reasons, Ironwood and Steelway respectfully request that the Board deny the Petition for Declaratory Order. To the extent the Board addresses the merits as to the status of the rail lines within the Woodard Industrial Park, the Board should determine that the Sidetracks are not common carrier rail lines, and that it will not authorize an adverse abandonment.

Respectfully submitted,



Karyn A. Booth

David E. Benz

Thompson Hine LLP

1919 N Street, N.W., Suite 700

Washington, D.C. 20036

(202) 331-8800

*Attorneys for Ironwood, LLC and Steelway
Realty Corporation*

May 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2014, I served a copy of the foregoing upon counsel for the parties listed below by U.S. first-class mail, postage prepaid. Additionally, counsel for Petitioner JGB was served via electronic mail.

Peter A. Pfohl
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

pap@sloverandloftus.com

Attorney for JGB Properties, LLC

Robert M. Germain, Esq.
Germain & Germain
314 East Fayette Street
Syracuse, New York 13202

Attorney for Town of Clay, New York

David G. Linger
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison St.
Syracuse, NY 13202

*Attorney for 4550 Steelway Boulevard, LLC;
Plainville Farms, LLC; JSF Services, LLC*

Terence A.J. Mannion, Esq.
Mannion Copani
306 Syracuse Building
224 Harrison Street
Syracuse, New York 13202

*Attorney for Tri-Martin IV, LLC; 550BSA III,
LLC*

Terence L. Robinson, Jr.
Nixon Peabody, LLP
1300 Clinton Square
Rochester, New York 14604-1792

Attorney for CSX Transportation, Inc.



David E. Benz

APPENDIX TO REPLY

	APPENDIX ITEM
VS Berry	Verified Statement of Richard J. Berry
Attach. 1 to VS Berry	Indenture between Woodard Industrial Corporation and D.H. Overmyer Company, Inc. (dated April 13, 1966)
Exh. 1	Supreme Court (County of Onondaga) order in Index No. 2009-5776 (dated Dec. 22, 2009)
Exh. 2	Supreme Court (County of Onondaga) order in Index No. 2009-5776 (dated March 21, 2014)
Exh. 3	Supreme Court (County of Onondaga) memorandum decision and order in Index No. 2013-3422 (dated May 14, 2014)
Exh. 4	Private Sidetrack Agreement CSX697595 between CSX Transportation, Inc. and Ironwood, LLC (dated Feb. 29, 2012)
Exh. 5	GATX press release (dated Mar. 24, 2014)
Exh. 6	Robert S. McGonigal, "Grades and Curves" from <u>Trains</u> magazine (dated May 1, 2006)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

)
)
**JGB PROPERTIES, LLC – PETITION FOR
DECLARATORY ORDER – WOODARD**)
INDUSTRIAL RAILROAD OPERATIONS)

)
)

STB Finance Docket No. 35817

**IRONWOOD, LLC’S AND STEELWAY REALTY CORPORATION’S
REPLY TO PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF RICHARD J. BERRY

I. Introduction.

1. My name is Richard J. Berry. I am the property manager for Ironwood, LLC (“Ironwood”) and Steelway Realty Corporation (“Steelway”). Ironwood and Steelway are separate corporate entities, but they are both organized under the laws of the State of New York and headquartered at 4851 Keller Springs Road, Suite 222, Addison, Texas 75001. Ironwood is in the business of owning, managing and leasing the warehouse property at 4530 Steelway Boulevard South in Clay, New York. Steelway is in the business of owning, managing and leasing the warehouse properties at 4480 and 4490 Steelway Boulevard South in Clay, New York.

2. In my role as the property manager for Ironwood and Steelway, I am responsible for the leasing and management of the relevant properties. I work for West Rock Properties which was set up as the managing entity for Ironwood, Steelway, and all of the other properties

that are owned by the Litoff family. I have worked for the Litoff family via West Rock and a predecessor entity since October of 1986, and have served as the property manager of Steelway since that date. I have served as the property manager of Ironwood since its inception on July 9, 1996.

3. I am submitting this Verified Statement (“V.S.”) in support of the Reply of Ironwood and Steelway to the Petition for Declaratory Order filed by JGB Properties, LLC (“JGB”) on April 9, 2014. The purpose of this V.S. is to provide factual background to the Surface Transportation Board regarding certain Ironwood property located in an industrial park near Syracuse, New York and the railroad spur tracks that serve its property and other surrounding warehouses.

II. Ironwood Property in the Woodard Industrial Park.

4. Ironwood owns a property at 4530 Steelway Boulevard South in the Town of Clay, New York (the “Ironwood Property”). The Ironwood Property is approximately 8.49 acres in size. Ironwood purchased the Ironwood Property in 1996 from the Carrolls Corporation, a large Burger King franchisee that had used the building for warehousing. The total size of the building is approximately 162,687 square feet. This Property consists of a large warehouse and distribution building that is divided into four units, each of which is currently leased to a tenant.

5. The four tenants of the Ironwood Property are (1) Dunk & Bright Furniture, a large furniture retailer in Syracuse that uses its leasehold as a distribution center; (2) 3PD, an appliance distributor; (3) Dealers Supply, a flooring distribution company; and (4) Packaging Corporation of America, a company that specializes in cardboard boxes and other corrugated products. All four tenants use their leaseholds of the Ironwood Property for distribution of their products.

6. The Ironwood Property is located in a light industrial area of Clay, New York, which is just a few miles north of Syracuse. The area immediately surrounding the Ironwood Property consists largely of other warehouses, distribution buildings, and light manufacturing facilities. The area is generally referred to as the Woodard Industrial Park. The buildings and warehouses in the Woodard Industrial Park have access to a number of short railroad spur tracks that connect to the CSXT mainline that runs between Syracuse to the south and Oswego, Watertown, and Montreal to the north.

7. The Ironwood Property is served on the south side by Steelway Boulevard South, a public street that connects to the local street network. The building on the Ironwood Property has numerous cargo bay doors on the south side, fronting on a parking lot connected to Steelway Boulevard South, where commercial trucks can load or unload materials and products at the warehouse.

III. Description of Spur Tracks.

8. On the north side, the Ironwood Property is served by a railroad spur track or sidetrack numbered as Track 766 on the map at page 6 of the JGB Petition for Declaratory Order. Most of Track 766 (approximately 870 linear feet) is on the Ironwood Property and immediately adjacent and parallel to the warehouse building on the Ironwood Property. The Ironwood building is just to the south of Track 766.

9. Immediately adjacent to (and on the north side of) Track 766 is a parallel and similar sidetrack (known as Track 764 on the map at page 6 of the Petition for Declaratory Order) that serves two buildings on its north side.

10. Tracks 764 and 766 are stub-ended tracks that end immediately at the western edge of the Ironwood building and the two buildings on the north side. They do not extend past

the Ironwood building to the west. In this respect, the page 6 map is somewhat incorrect because it shows Tracks 764 and 766 extending slightly beyond the western edges of the buildings.

11. To the east, Tracks 764 and 766 merge into a single track known as Track 232, and that single track curves to the northeast as it crosses property owned by JGB. Track 232 then intersects with Track 230 and connects to the north-south mainline of CSX Transportation, Inc. (“CSXT”).

12. As mentioned in the JGB Petition for Declaratory Order, JGB has removed part of Track 232 as it crosses the JGB property, and such action has been the subject of on-going multi-year litigation in the courts in New York State. Prior to removing part of Track 232, JGB also illegally removed a switch from Track 232 and a spur track that went northward from this switch onto the private property of 4550 Steelway Boulevard, L.L.C. Subsequently, 4550 Steelway Boulevard, L.L.C. has also initiated litigation against JGB in the New York state courts.

13. There is also a set of spur tracks to the north known as Tracks 230, 757, 759, 760, and 762. Track 230 crosses a corner of the JGB property before it splits into several parallel spur tracks (Track Nos. 757, 759, 760, and 762). The buildings served by Track 762 are owned by Steelway. Currently, the Steelway buildings are leased to three separate businesses that use the property largely for distribution purposes. In the past, tenants in the Steelway buildings have received boxcar rail service.

14. Track 230 has not been removed by JGB. In fact, rail service is still provided on Track 230 to one or more of the entities that operate out of buildings that are adjacent to Tracks 757, 759, 760, and/or 762. One such entity currently receiving rail service is Rotondo Warehousing (“Rotondo”) on Tracks 759 and 760.

15. The total distance from the end of the Tracks 764 and 766 (at the west edge of the Ironwood building) to the CSXT right-of-way property line is approximately 2,500 to 2,550 linear feet. Track 764 is approximately 1,181 linear feet and Track 766 is approximately 1,152 linear feet. After those two tracks merge, Track 232 continues for approximately 1,280 linear feet before it connects to Track 230. From this connection point to the CSXT right-of-way property line is in the neighborhood of 100 feet. CSXT has provided a scale map of the relevant tracks on the last page of the 2012 Sidetrack Agreement between Ironwood and CSXT. See Exhibit 4 to Reply (2012 Sidetrack Agreement).

IV. Track Maintenance.

16. To my knowledge, maintenance of Tracks 230, 232, 757, 759, 760, 762, 764, and 766 has always been by the property owners and never by CSXT. When Steelway and the previous owners of the buildings on Tracks 759 and 760 had rail users in the buildings, we regularly worked together to maintain the separate tracks behind our respective buildings as well as Track 230 going eastward to CSXT's main line. In fact, after Ironwood acquired its property at 4530 Steelway Boulevard South, Ironwood engaged in a drainage improvement project along Track 766 adjacent to the Ironwood building, cleared brush and debris, and replaced a number of ties in Track 766. In 2012, CSXT and Ironwood agreed upon terms of a new Sidetrack Agreement to govern CSXT operations on Tracks 232, 764, and 766. See Exhibit 4 to Reply. Under this 2012 Sidetrack Agreement, Ironwood would be responsible for maintenance of the tracks necessary to serve the Ironwood Property, except for the short segment of Track 230 within the CSXT right-of-way. See Exhibit 4 to Reply at Art. 4.1.

17. In the years since the purchase in 1996, Ironwood has occasionally engaged in clearing of brush and vegetation along Track 766. Since the track has been severed, Ironwood's brush control efforts are more limited, but have continued.

V. Historical Rail Service.

18. Other than CSXT and its predecessors (Conrail, New York Central, etc.), I am unaware of any other railroad ever serving the area of Steelway Boulevard. In other words, as far as I know, the warehouses that make up the area of Tracks 230, 232, 757, 759, 760, 762, 764, and 766 have only ever received rail service from CSXT and its predecessor railroads.

19. I am not aware of anyone other than CSXT (and its predecessors) operating on Tracks 230, 232, 757, 759, 760, 762, 764, and 766. All rail operations have been by CSXT and its predecessor railroads on these tracks.

20. To the best of my knowledge, rail operations on Tracks 230, 232, 757, 759, 760, 762, 764, and 766 have only occurred on an as-needed basis. I am not aware of any regularly scheduled rail service occurring on any of these tracks.

21. Ironwood does not own any locomotives, switch mobiles, or rail cars. Ironwood does not engage in (and has never engaged in) any rail operations on Track 230, 232, 764, 766, or any other track in the area.

VI. JGB's Track Removal.

22. JGB purchased its property 2005. Soon thereafter, JGB began inquiring about removing the railroad tracks that transverse its property. Ironwood and Steelway sent a letter to JGB in early 2006, describing the permanent easement across the JGB property that was originally granted on April 13, 1966 and was specifically designed to benefit the properties currently now owned by Ironwood, Steelway, and others. The easement was granted by

Woodard Industrial Corporation, the developer of the park, to D. H. Overmyer Company, who developed a number of buildings in the park including the Ironwood and Steelway buildings, and “its successors and assigns.” The easement was described as a “permanent right of way for a railroad spur track to be used and enjoyed in common with others.” See Attachment 1 to this V.S. (Indenture dated April 13, 1966).

23. At some point, JGB removed that portion of Track 232 that crossed its property. JGB did not notify Ironwood of the removal. We were informed of the removal by Richard Barry of our long time rail contractor, Frank Tartaglia, Inc., in the early Spring of 2009. As a consequence of JGB’s interference with the permanent easement, Ironwood and Steelway filed a complaint under state law in the Supreme Court of Onondaga County, New York on August 18, 2009. The New York courts have determined that the easement remains valid today for the benefit of the current property owners and that JGB’s actions were unlawful. See Exhibit 1 to Reply (court order Dec. 22, 2009). JGB has been found liable for both compensatory and punitive damages in the protracted lawsuit, and continues to appeal the rulings.

24. I will not describe the New York State litigation in detail in this Verified Statement, but I will discuss how the track removal and loss of rail access via Track 232 have adversely impacted Ironwood’s business and the value of its property.

25. During the 2009 time period, Ironwood was in negotiations with two potential tenants interested in leasing a portion of the Ironwood building. One of the potential tenants was XPEDX, a large multi-national paper company for which rail service was absolutely necessary. The second potential tenant was also a large corporation for which rail service was of interest.

26. Due in part to JGB’s removal of the track, and the fact that Ironwood could not guarantee when rail service would be available, the 2009 negotiations failed. XPEDX eventually

leased property elsewhere. In fact, XPEDX is now operating from a nearby building in the Woodard Industrial Park served by a different sidetrack, and using CSXT rail service on a regular basis. This rail service is via boxcar.

VII. Condition of the Spur Tracks.

27. I understand that JGB has emphasized the poor condition of Tracks 232, 764, and 766 in its Petition. Given that JGB removed part of Track 232 over five years ago, thereby cutting off the Ironwood building and other nearby buildings from potential rail service, it should come as no surprise that Tracks 232, 764, and 766 have not undergone routine maintenance. It is not likely that these three tracks will be refurbished until the pending New York and STB litigation is completed and the connection to CSXT is restored. Consequently, the Ironwood Property remains severed from CSXT.

28. Under the circumstances, Ironwood has no current incentive to invest in the repair or maintenance of any track because its property is severed from CSXT and current rail service is impossible. Given this impossibility, Ironwood has had no alternative but to rent its property to entities that do not currently need rail service. JGB's illegal actions over the past several years have eliminated the possibility of current rail service to the Ironwood Property.

29. Ironwood would repair and upgrade tracks as necessary if the connection to CSXT were restored. As mentioned earlier, Ironwood was in negotiations with XPEDX in 2009 that definitely needed rail service. If Track 232 had not been severed prior to those negotiations, and if those negotiations had been successful, Ironwood would have repaired Tracks 232 and 766 as necessary as part of a lease arrangement with XPEDX.

VIII. The Lack of Rail Service Limits the Potential Tenant Pool.

30. Due to the lack of rail service, Ironwood has been forced to market its space entirely to potential tenants who have no need for rail service. Ironwood has now successfully leased the entirety of its building to non-rail using tenants. However, those leases will expire at different points in time and the need to identify new tenants will occur at some point in the future. The lack of rail service undoubtedly reduces the pool of potential tenants, makes the building less attractive to potential tenants, and otherwise reduces the value of the property for leasing purposes.

31. Since Ironwood purchased its property at 4530 Steelway Boulevard South in 1996, no tenant of the Ironwood building has used rail service. However, rail service is currently being provided to other similar warehouses in the vicinity, such as those served via Track 230. As mentioned above, Ironwood has been prevented from marketing its property to an entire class of potential tenants since early 2009 due to JGB's removal of part of Track 232.

IX. Boxcar Service.

32. I understand that JGB contends in its Petition that boxcar service is obsolete and that there is no current demand for boxcar service in the area. These contentions are false. There are many current users of boxcar service in the Woodard Industrial Park area. As I mentioned earlier, XPEDX specifically declined to continue negotiations with Ironwood in 2009 at least in part due to JGB's severing of Track 232. XPEDX is now receiving boxcar service elsewhere in the Woodard Industrial Park.

33. I visited the Rotondo Warehouse space on Tracks 759 and 760 in January of this year and spoke with Rob Rotondo. Rotondo Warehouse previously leased space from us in our Steelway property served by Track 762 for many years, and received boxcar service to the

building then. At the time of my visit in January of this year, there were boxcars on Tracks 759 and 760 adjacent to the Rotondo Warehouse, and Rob Rotondo told me that they receive several hundred boxcars per year at their warehouse.

34. Through a different corporate entity, we own, lease, and manage a 240,000 square foot warehouse facility in Dallas that was developed by Overmyer (this is the same Overmyer that developed the Ironwood and Steelway Realty buildings in the Woodard Industrial Park). Of the 240,000 square feet in this facility, 200,000 square feet is leased to tenants that receive boxcar rail service.

35. We also have another entity that owns another 240,000 square foot warehouse property in DeWitt, New York on the east side of Syracuse. This property was also developed by Overmyer in the 1960's. The rail spur to this warehouse has more severe curvature than Track 232 had prior to JGB's removing it, and the DeWitt spur was also in worse condition than Track 232 until a few years ago, when one of our tenants requested boxcar rail service. We walked the spur track with representatives of CSXT and Frank Tartaglia, Inc. (our rail contractor). We cleared brush, made the repairs requested by CSXT, executed a Sidetrack Agreement, and were very quickly able to get boxcar rail service to our tenant.

36. In 1996, during Ironwood's pre-purchase inspection of the property, Ironwood noticed that boxcar service was occurring to the two buildings just to the north of the Ironwood Property. These two buildings were receiving boxcar service on Track 764 at that time.

X. Warehouse Design.

37. I understand that JGB contends that design of warehouses in the Woodard Industrial Park is no longer conducive for rail service. This, too, is not true. Both our Dallas and DeWitt warehouse properties were similarly developed by Overmyer in the 1960's. We have

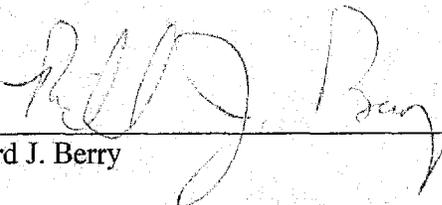
never had to modify the existing rail door sizes or spacing in either property, yet the tenants there have been, and are, receiving boxcar service. The Woodard Industrial Park buildings occupied by Rotondo and XPEDX referenced earlier in my V.S. also have similar design characteristics, yet still receive boxcar service.

38. In any event, the Ironwood Property building in the Woodard Industrial Park has a concrete “tilt wall” construction, and it is relatively simple to enlarge existing doors or cut new doors in a building of this type of construction.

39. I understand that JGB believes that lower ceiling heights make the Woodard warehouses impractical for rail service. However, the ceiling height of both the Ironwood building and the Steelway Realty buildings is 28-feet – which is the same as the Dallas warehouses and the DeWitt warehouses, both of which receive boxcar service. In fact, the Rotondo Warehouse has a ceiling height a few feet lower.

VERIFICATION

I, Richard J. Berry, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.


Richard J. Berry

Attachment 1

To

Verified Statement

of Richard J. Berry

①

THIS INDENTURE made the 13th day of April 1966, between
WOODARD INDUSTRIAL CORPORATION, a New York Corporation with its
principal office at 2011 Lodi Street, Syracuse, New York, party
of the first part, and D. H. OVERMYER COMPANY, INC., a New York
Corporation with its principal office at 201 East 42nd Street, New
York, New York, party of the second part.

W I T N E S S E T H :

That the party of the first part in consideration of
ONE \$ no/100 DOLLAR (\$1.00) and other good and valuable considera-
tion, receipt whereof is hereby acknowledged, 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, upon, over and across the
following described premises:

ALL THAT TRACT OR PARCEL OF LAND situate in the Town
of Clay, County of Onondaga and State of New York,
being part of Farm Lot 33 in said Town and more
particularly described and designated in yellow on
the map attached hereto and made a part hereof.

It is the intent of the parties that said railroad right
of way herein granted shall be for the benefit of the two parcels
of land outlined in red on the attached map; the northerly parcel
being conveyed to the party of the second part simultaneously with
the delivery of this instrument and the southerly parcel intended
to be conveyed to the party of the second part by a subsequent
conveyance, and shall be for the benefit of premises owned by the
party of the first part north and south of said right of way. It
is understood and agreed between the parties that party of the
first part intends to convey a metes and bounds description of
these premises to the New York Central Railroad Company.

2297 465

15:00 11-11-66 AM 11-02

277
BOX
MAP
15

2297 466

TO HAVE AND TO HOLD said easement and privileges herein granted unto the party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its duly authorized officer the day and year first above written.

WOODARD DEVELOPMENT CORPORATION

By Robert J. [Signature]

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.

On this 29th day of April, 1966 before me personally came Robert G. Small

to me personally known, who, being by me duly sworn, did depose and say that he resides in Syracuse, N.Y. that he is the Treasurer of WOODARD DEVELOPMENT CORPORATION, the corporation described in, and which executed the within Instrument; that he knows the seal of said corporation; that the seal affixed to said Instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

[Signature]
Notary Public.
Qualified under the
Economic Opportunity Act

RIGHT OF WAY AGREEMENT

between

WOODARD INDUSTRIAL CORPORATION

and

D. N. OVERMYER COMPANY, INC.

Dated: April 13, 1966

RECORDED IN CLERK'S OFFICE
this 13th day of April
1966 at York, Pa. 15701
and attested.
Clyde L. Lansing, Clerk

WOODARD INDUSTRIAL CORP.
CORPORATION OF PENNSYLVANIA
INCORPORATED IN PENNSYLVANIA
INCORPORATED IN PENNSYLVANIA

Law Offices
Boris Scheraga & Sons
STATE STREET, YORK, PA.
15701

BOOK 2297 PAGE 457

157
3

Exhibit 1

HANCOCK & ESTABROOK, LLP COUNSELORS AT LAW 1500 AXA TOWER 1 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,
vs.
JGB PROPERTIES, LLC,
Plaintiffs,
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

STATE OF NEW YORK ONONDAGA COUNTY CLERK OF

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

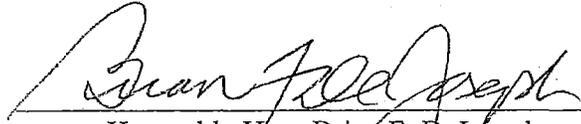
ORDERED that Defendant is enjoined from any further interference with the rights of the Plaintiffs to benefit from the aforesaid rights of way as herein determined, including but not limited to, any future removal of railroad tracks, ties, gravel, also known as "ballast", clips, spikes, switches, and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

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

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:

Exhibit 2

At a 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 27th day of January, 2014

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

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

0710 03/26/14 ONONDAGA COUNTY CLERK MN

The Court having conducted a hearing as to the plaintiff, Ironwood, LLC's (the "plaintiff" or "Ironwood"), punitive damages on January 27, 2014 before the Hon. Brian F. DeJoseph, Justice of the Supreme Court, with David G. Linger, Esq. and James P. Youngs, Esq. of Hancock Estabrook, LLP representing Ironwood and Raymond M. Schlather, Esq. of Schlather, Stumbar, Parks & Salk, LLP, Richard Sargent, Esq. of Tully Rinckey, PLLC and Joseph A. Camardo, Esq. of Camardo Law Firm, P.C. representing defendant, JGB Properties, LLC (the "defendant" or "JGB"), and the Court having subsequently rendered a Decision dated March 7, 2014, a copy of which is attached hereto and incorporated herein,

NOW, after receiving testimony and evidence at the aforementioned hearing, it is hereby

ORDERED, that the Order to Show Cause by non-party CSX Transportation, Inc. to quash the Subpoena Duces Tecum served upon it pursuant to CPLR §§ 2304 and 3101, said motion having been joined by plaintiff Ironwood, LLC, is hereby granted; and, it is further

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

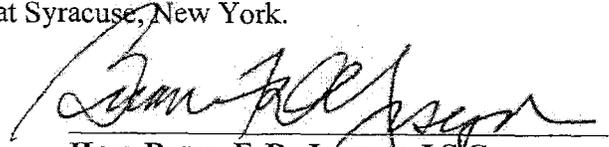
ORDERED, that plaintiff Ironwood's motion to preclude the testimony of John Betak, Ph.D., Michael O'Neill, Philip R. Rizza and John Mako is granted and the defendant JGB is thereby precluded from offering the testimony of Mr. Betak, Mr. O'Neill, Mr. Rizza and Mr. Mako at the aforementioned January 27, 2014 punitive damages hearing; and, it is further

ORDERED, that the Court awards the plaintiff punitive damages in the sum of Three Hundred Thousand Dollars (\$300,000) against JGB; and, it is further

ORDERED, that a copy of the Court's Decision dated March 7, 2014, with Exhibit A, is annexed hereto and is made a part this Order.

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

ENTER:


HON. BRIAN F. DEJOSEPH, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IRONWOOD, LLC and STEELWAY
REALTY CORPORATION,

Plaintiffs,

vs.

JGB PROPERTIES, LLC,

Defendant.

COPY

**PUNITIVE DAMAGES
HEARING**

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

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).

Analogous 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.

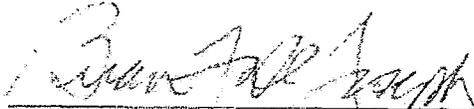
This Court is not bound by the decision in *Jefferies Avlon, Inc.* and is admittedly reluctant to follow its reasoning in light of Defendant's memorandum.

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.

Exhibit 3

At a Term of Supreme Court held in
and for the County of Onondaga,
in the City of Watertown, New York
on the 6th day of May, 2014.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF ONONDAGA

JGB PROPERTIES, LLC,

Plaintiff,

MEMORANDUM
DECISION AND ORDER

Index No. 2013-3422
RJI No. 33-13-3612

-vs-

IRONWOOD, LLC,
STEELWAY REALTY CORPORATION,
TOWN OF CLAY, NEW YORK,
4550 STEELWAY BOULEVARD, LLC,
PLAINVILLE FARMS, LLC,
TRI-MARTIN IV, LLC,
550BSA III, LLC,
JSF SERVICES, LLC &
CSX TRANSPORTATION, INC.,

Defendants.

Bypassing chronological order, we begin our legal journey in the
Nation's capital where on April 8, 2014, JGB Properties, LLC files a thirty-two page
Petition for a Declaratory Order with the Surface Transportation Board, "STB".
There is a conclusion that prior multi-year State Court litigation was unauthorized

H
A
G
with STB's "exclusive authority over rail construction and use, as any State claims for damages or injunctive relief over the construction, operation, or use of common carrier lines are categorically pre-empted "by 49 U.S.C. §10501(b). (Page 24). JGB petitions the STB for an Order declaring that the railroad lines on the property of JGB in the "Woodward Industrial District" are unauthorized because no "certificate of public convenience and necessity" was acquired before any such rail lines were constructed and used. (Page 1).

Back on July 30, 2013, JGB commenced this State civil lawsuit as a successor in interest to property once owned by Woodward Industrial Development Corporation. This action is brought pursuant to Article 15 of the Real Property Actions and Proceedings Law of the State of New York and Section 3001 of the New York Civil Practice Law and Rules for a Judgment to compel the determination of claims to real property located in Onondaga County, New York.

On or about March 7, 2014, Defendants filed a motion to dismiss that Complaint based upon the doctrines of collateral estoppel, res judicata, laches, and JGB's lack of standing to assert the legal arguments and claims set forth in its Complaint.

On or about April 21, 2014, JGB files a motion to stay these legal

proceedings based upon the filing of a Petition for a declaratory Order with the Federal Surface Transportation Board, which purportedly under applicable law pre-empted both Federal and State Court jurisdiction pending its determination. Oral argument was conducted on May 6, 2014.

Oversimplified, there is a history of New York State judicial proceedings finding that by ripping up railroad track after acquiring title, JGB was liable for monetary damages to owners of previous easements on that land. The Court is persuaded by the arguments, verbal and written, of the Defendants. JGB is seeking in State Court and before the STB to extinguish easements, some or all of which have previously been addressed in civil litigation. JGB is the Plaintiff in this civil lawsuit. The Court determines that it does have authority to retain jurisdiction and will exercise its discretion to do so.

THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the motion for a stay is respectfully denied; and it is further

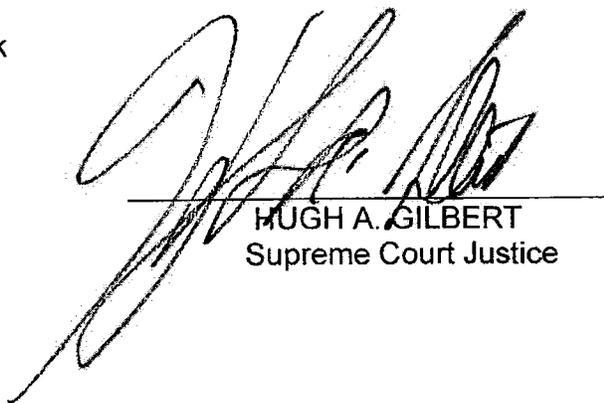
ORDERED, ADJUDGED AND DECREED that the parties shall submit all papers regarding the motion to dismiss by **Tuesday, May 27, 2014**; and

it is further

ORDERED, ADJUDGED AND DECREED that **ORAL ARGUMENT**, if requested, shall be conducted **Friday, June 6, 2014**, at **1:30 p.m.** at the Onondaga County Courthouse, 401 Montgomery Street, Syracuse, New York.

Dated: May 14, 2014
at Watertown, New York

ENTER



HUGH A. GILBERT
Supreme Court Justice

Exhibit 4

PRIVATE SIDETRACK AGREEMENT

THIS AGREEMENT, Made and effective as of February 29, 2012, by and between CSX TRANSPORTATION, INC., a Virginia corporation, whose mailing address is 500 Water Street, Jacksonville, Florida 32202, hereinafter called "Railroad," and IRONWOOD, L.L.C., a limited liability company of the State of New York, whose mailing address is 4851 Keller Springs Road, Suite 222, Addison, Texas 75001, hereinafter called "Industry," WITNESSETH:

1. PURPOSE:

1.1 The purpose of this Agreement is to detail the provisions of the maintenance and use of Private Sidetrack Nos. 232, 766 and a portion of Track 764 for the tender and receipt of rail freight traffic for the account of Industry. The private sidetracks, which consist of the track structure (rails, ties and fastenings), ballast, grading, drainage structure, turnout, bumping post and other appurtenances (hereinafter, collectively, the "Sidetrack"), are located at or near Liverpool, in the County of Onondaga, State of New York, as shown on attached Drawing No. C120001, dated January 24, 2012 (hereinafter the "Plan").

2. OWNERSHIP AND CONSTRUCTION:

2.1 The Sidetrack, as shown on the Plan, have been constructed, excepting that portion passing over property known to be owned by JGB Property, LLC (hereinafter "JGB") which shall be constructed in accordance with the Stipulation and Order known as Index No. 2009-5776, RJI No. 33-09-3858, marked as Exhibit A and attached hereto. Railroad owns that portion of Track No. 230 from Point of Switch (hereinafter "P.S.") in Railroad's connecting track No. 228 at Milepost QM-6.58, Track Station 347+21 = 0+00, to Track Station 1+70 (hereinafter called "Railroad's Segment"). Industry owns Track No. 232 from Track Station 1+21 to Track Station 12+90, the first 120 feet of Track 764 and all of Track No. 766 (hereinafter, collectively, called "Industry's Segment").

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 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 Railroad and Industry, at their own expense, shall inspect, maintain and renew their respective Segments of the Sidetrack: (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 Industry's Segment of the

Sidetrack for maintenance or renew 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 Industry's Segment will be out of service for such maintenance or renewal purposes. Additionally, both Industry and Railroad agree to keep their respective Segments 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 Industry's Segment.

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 [22'0"] above the top of the rail), in accordance with the provisions of the Railroad's document entitled "Standard Guidelines and Specifications for the Design and Construction of Private Sidetracks," as amended, supplemented or superseded (hereinafter 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 its Segment of the Sidetrack that is not located on Railroad's right-of-way. 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 Industry's Segment of 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 Industry shall not permit the use of the Sidetrack by or for the account of third parties without the written consent of Railroad. If such use occurs without such consent, Industry assumes the same responsibilities, as stated in this Agreement for such use as if for its own account. Railroad shall not be required to provide rail service to such third parties.

7.3 Railroad shall be deemed to have delivered any railcar consigned to or ordered by Industry when such railcar has been placed on Industry's Segment, 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.

7.6 Industry acknowledges that the curvature in the Sidetrack may be too excessive (> 12 Degrees) to allow operation of railroad equipment and railcars of certain size and/or characteristics thereon. Industry, therefore, assumes all risks of loss, and all cost(s) of delay or nondelivery of any consignment, and agrees to make no claim against Railroad if Railroad is unable to operate any particular equipment or rail cars on Sidetrack because of said

curvature. Industry also recognizes that such degree of curvature may enhance the possibility or likelihood of derailment, and Industry also assumes all risk of loss, cost(s), damages or expenses resulting from such derailment.

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 Industry's Segment of 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 Industry's Segment 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 Reserved

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 Segment that rests upon the right-of-way of the other party. If not removed within sixty (60) days after such termination, title to that remaining Segment will pass to the other party, who may then remove it and restore the underlying right-of-way at the expense of the prior owner.

10.7 Railroad provides transportation service to Industry over the Sidetrack. Railroad may make changes in its signal and switching technology in response to changes in regulation. Railroad may invoice, and Industry shall pay, amounts Railroad deems necessary, in its reasonable discretion, for the installation of switch, signal and other upgrades associated with the Sidetrack which Railroad deems appropriate to meet Federal, State or local laws or regulations. Railroad will have the right to discontinue shipments over the Sidetrack or terminate this Agreement upon thirty (30) days advance written notice if Industry does not pay any amount invoiced by Railroad for upgrades pursuant to this paragraph.

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 its Segment of the Sidetrack; (ii) the construction, alteration or

removal of the Sidetrack by Industry; (iii) the presence of a Close clearance on Industry's Segment; or (iv) the explosion, spillage and/or presence of Hazardous Materials on its properties, facility or on Industry's Segment, 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 during periods of survey, installation, maintenance and continued occupation, 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 its Segment of 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.

Witness for Railroad:

CSX TRANSPORTATION, INC.

Richard Powers

By: Robbie League

Print/Type Name: Robbie League

Director

Print/Type Title: Corridor Development

Witness for Industry:

IRONWOOD, L.L.C.

Richard J. Berry
RICHARD J. BERRY

By: Eliot D. Litoff

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: Eliot D. Litoff

President of Steelway Realty
Corporation
Managing Member

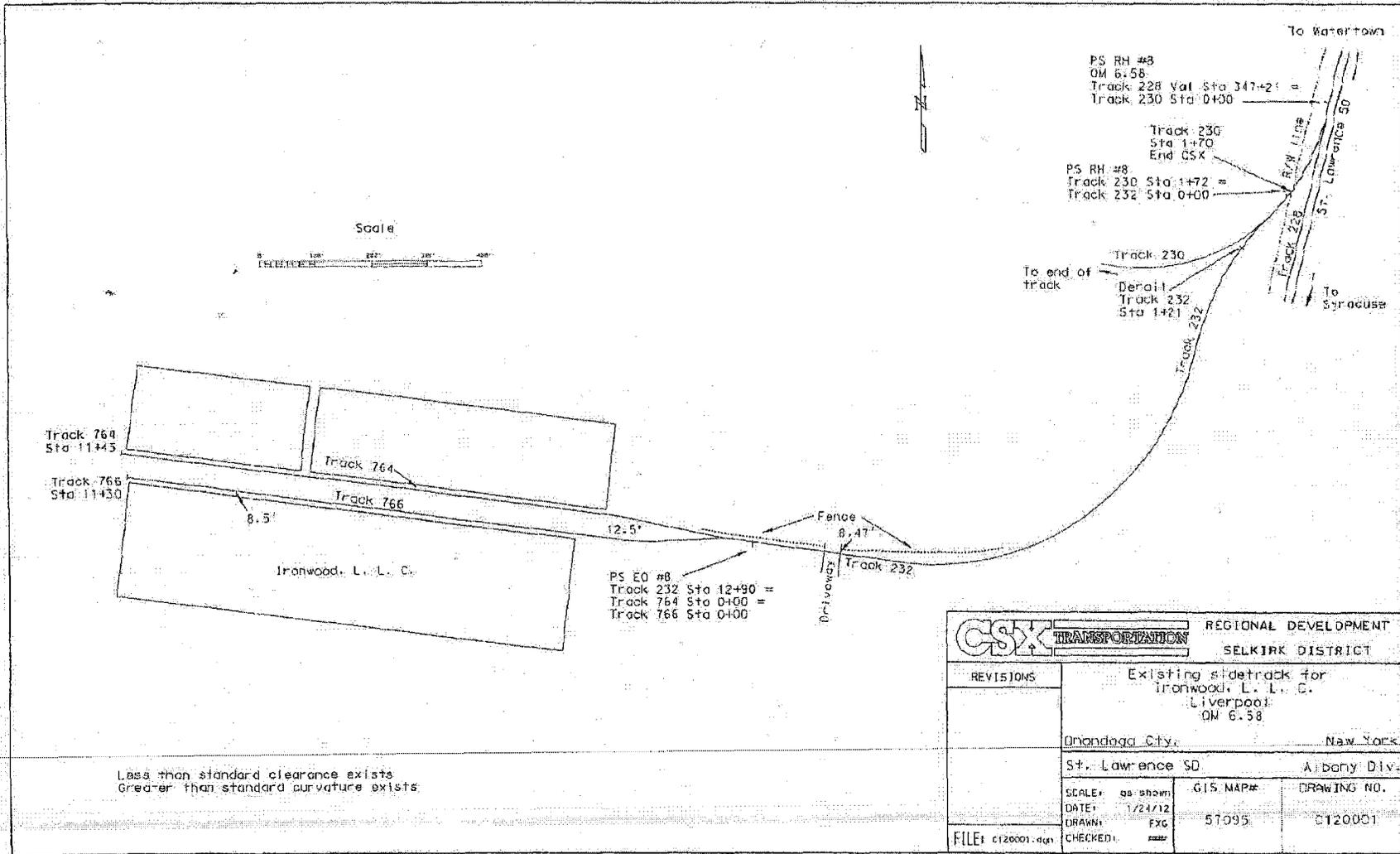


Exhibit 5



Press Release

<< Back

GATX Corporation Announces Acquisition of More Than 18,500 Railcars from GE Capital Rail Services

CHICAGO--(BUSINESS WIRE)--Mar. 24, 2014-- GATX Corporation (NYSE:GMT) announced its purchase of GE Capital Rail Services' North American per diem boxcar fleet, consisting of more than 18,500 boxcars. The purchase price was approximately \$340 million.

Brian A. Kenney, president and chief executive officer of GATX said, "This fleet acquisition establishes GATX as the leader in the boxcar leasing market and adds a significant number of railcars to our fleet that are critical-use assets for certain important sectors of the North American economy. Many of the customers utilizing this fleet are existing GATX customers, and this acquisition enhances our ability to meet these customers' broad rail transportation needs. The transaction is expected to be immediately accretive, although at this point we are not adjusting our previously announced 2014 earnings guidance."

GATX expects the acquired fleet to generate approximately \$70 million in annual revenue. The average age of the fleet is 34 years relative to the statutory life of 50 years.

COMPANY DESCRIPTION

GATX Corporation (NYSE: GMT) strives to be recognized as the finest railcar leasing company in the world by its customers, its shareholders, its employees, and the communities where it operates. Controlling one of the largest railcar lease fleets in the world, GATX has provided quality railcars and services to its customers for more than 115 years. GATX has been headquartered in Chicago, Illinois since its founding in 1898. For more information, visit the Company's website at www.gatx.com.

FORWARD-LOOKING STATEMENTS

Certain statements in this document may constitute forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended, and are subject to the safe harbor provisions of those sections and the Private Securities Litigation Reform Act of 1995. These statements refer to information that is not purely historical, such as estimates, projections and statements relating to our business plans, objectives and expected operating results, and the assumptions on which those statements are based. Some of these statements may be identified by words like "anticipate," "believe," "estimate," "expect," "intend," "plan," "predict," "project" or other similar words. Investors are cautioned that any such forward-looking statements are not guarantees of future performance and involve risks and uncertainties, including those described in our Annual Report on Form 10-K for the year ended December 31, 2013 and other filings with the SEC, and that actual results or events may differ materially from the forward-looking statements.

Specific risks and uncertainties that might cause actual results to differ from expectations include, but are not limited to, (1) changes in regulatory requirements for tank cars in crude, ethanol and other flammable liquid commodity service; (2) competitive factors in our primary markets, including lease pricing and asset availability; (3) weak economic conditions, financial market volatility and other factors that may negatively affect the rail, marine and other industries served by us and our customers; (4) inability to maintain satisfactory lease rates or utilization levels for our assets, or increased operating costs in our primary operating segments; (5) changes to the laws, rules and regulations applicable to us and our rail, marine and other assets, or failure to comply with those laws, rules and regulations; (6) operational disruption and increased costs associated with compliance maintenance programs and other maintenance initiatives; (7) operational and financial risks associated with long-term railcar purchase commitments; (8) deterioration of conditions in the capital markets, reductions in our credit ratings, or increases in our financing costs; (9) unfavorable conditions affecting certain assets, customers or regions where we have a large investment; (10) risks related to our international operations and expansion into new geographic markets; (11) inadequate allowances to cover credit losses in our portfolio or declines in the credit quality of our customer base; (12) impaired asset charges that may result from weak economic or market conditions, changes to the laws, rules or regulations affecting our assets, events related to particular customers or asset types, or portfolio management decisions we implement; (13) environmental remediation costs or a negative outcome in our pending or threatened litigation; (14) our inability to obtain cost-effective insurance; (15) operational and financial risks related to our affiliate investments, particularly where certain affiliates may contribute significantly to our consolidated operating profit; (16) reduced opportunities to generate asset remarketing income; and (17) failure to successfully negotiate collective bargaining agreements with the labor relations with unions representing a substantial portion of our employees.

Given these risks and uncertainties, readers are cautioned not to place undue reliance on these forward-looking statements, which reflect our analysis, judgment, belief or expectation only as of the date hereof. We have based these forward-looking statements on information currently available and disclaim any intention or obligation to update or revise these forward-looking statements to reflect subsequent events or circumstances.

Investor, corporate, financial, historical financial, photographic and news release information may be found at www.gatx.com.

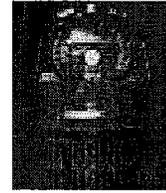
Source: GATX Corporation

For Further Information Contact:

GATX Corporation
Jennifer Van Aken
Director, Investor Relations
312-621-6689
jennifer.vanaken@gatx.com

Exhibit 6

BIG BOY: ON THE ROAD TO RESTORATION



Complete coverage,

Home » Railroad Reference » ABC's of Railroading » Grades and curves

ABC'S OF RAILROADING



Grades and curves

Railroading's weapons in the battle against gravity and geography

By Robert S. McGonigal

Published: May 1, 2006

Given a choice, railroads will always follow a straight, level path. Trains use less energy, speeds are higher, and there's less wear on equipment when railroads can build on an arrow-straight line. But the land rises and falls, obstacles must be avoided, and the ideal is more the exception than the rule. That requires grades to compensate for changes in elevation and curves to reorient the direction of the tracks.

Grades: uphill and down

In North America, gradient is expressed in terms of the number of feet of rise per 100 feet of horizontal distance. Two examples: if a track rises 1 foot over a distance of 100 feet, the gradient is said to be "1 percent;" a rise of 2 and-a-half feet would be a grade of "2.5 percent." In other parts of the world, particularly Britain and places with heavy British influence, gradients are expressed in terms of the horizontal distance required to achieve a 1-foot rise. This system would term the above examples "1 in 100" and "1 in 40," respectively.

On main lines, grades are generally 1 percent or less, and grades steeper than about 2.2 percent are rare.

The steepest grade on a major railroad's main track (as opposed to industrial spurs) was historically said to be on the Pennsylvania Railroad north of Madison, Ind. Now operated by short line Madison Railroad, the track rises 413 feet over a distance of 7012 feet - a 5.89-percent grade. The title for steepest main-line grade long rested with Norfolk Southern (and predecessor Southern Railway) for its 4.7-percent grade south of Saluda, N.C. With Saluda's closing in 2002, BNSF's 3.3-percent Raton Pass grade in New Mexico became the steepest main-line grade in North America.

The effect of grades on train operations is significant. For each percent of ascending grade, there is an additional resistance to constant-speed movement of 20 lbs. per ton of train. This compares with a resistance

on level, straight track of about 5 lbs. per ton of train. A given locomotive, then, can haul only half the tonnage up a .25-percent grade that it can on the level. Descending grades carry their own penalties in the form of equipment wear and tear and increased fuel consumption.

The term "ruling grade" is used to describe the limiting grade between two terminals. It determines the maximum load that can be pulled over that portion of line by a given locomotive. The concept is analagous to that of the weakest link in a chain; no matter how many lesser grades a train can handle, if it can't make the ruling grade, it won't be able to complete the run.

A ruling grade is not necessarily the absolute steepest grade between two endpoints; it is assumed that trains will surmount certain steeper grades with momentum from descending grades or with the aid of helper locomotives.

For grades that are short relative to the total length of a train's run, helper engines - extra locomotives added to the front, rear, or even middle of a train - are employed. While the superior power of diesel locomotives has eliminated many helper districts, dieselization has brought helpers for use on trains going downhill, where dynamic braking is used to control speed on the descent.

If a train cannot make a grade, and no helpers are available, it may have to "double the hill," a practice in which the train is taken up the grade in two separate pieces. On some hills, "tripling" is necessary.

When a grade is steep enough to render the conventional "adhesion" system unworkable, a rack (or cog) or cable system may be used. Though there are some isolated examples, such alternative methods of negotiating hills are not found in the U.S. rail network.

Watch those curves

Railroad track is either "tangent" (straight) or curved.

Curves are best thought of as portions of circles. Curvature on railroads is not expressed in terms of radius, as it is on model layouts. (It would be impractical to strike such a large arc in the field.) Rather, it is given as the angle between two lines drawn from the center of the circle of which the curve is a part to two points on the circumference 100 feet apart. Since curve measurement is the description of an angle, the units used are the familiar ones from geometry class: degrees, minutes, and seconds. (Remember from geometry class that a circle contain 360 degrees.)

Curvature can be expressed in terms of the number of degrees traversed by 100 feet of track. For example, a relatively gentle 5-degree curve encompasses 5 degrees of a circle for each 100 feet of track; a sharper 15-degree curve covers 15 degrees in each 100 feet. The radius (distance from center point to edge) of a curve is obtained with the following conversion equation: radius in feet = 5729 divided by the degrees of curvature. This is known as the "arc" definition of curvature, which is normally used by highway designers.

Railroad designers use the "chord" definition of curvature, which is based on the degrees encompassed by a 100-foot line segment whose endpoints fall on the arc described by the curved track. An approximate method of determining curvature this way involves stretching a 62-foot-long string between two points on the inside face of the outer rail head. The number of inches between the center point of the string and the rail corresponds to the degrees of curvature: 1 inch equals 1 degree, 2 inches equals 2 degrees, and so on.

For the purposes of the casual observer, the difference between the arc and chord methods of measurement are small: the radius of a 15-degree arc-definition (highway) curve is approximately 382 feet, while the radius of a 15-degree chord-definition (railroad) curve is about 383 feet.

Curves of 1 or 2 degrees are the most common on mainline railroads; the sharpest curve a common four-axle diesel can take is about 20 degrees when coupled to other rolling stock, more than 40 degrees when by itself. Mountainous territory, however, generally dictates curves of 5 to 10 degrees, or even sharper. Branch lines and minor spurs may have an even greater number of sharper curves.

Just as grades impose additional resistance on trains, so do curves. However, wheel- and rail-wear are more significant (in terms of cost) than added fuel consumption. While it may seem that a long, gentle curve is preferable to a short, sharp one, the resistance is in fact the same as long as the central angle is the same, regardless of the radius.

In addition to reducing severe grades, many line relocations have reduction of total degrees of curvature as their goal.

Because of the resistance produced by curves, they pose an added difficulty when located on grades. To keep the combined resistance of grade and curve from overwhelming trains, grades are often "compensated" by being reduced on curves so resistance remains constant. A grade so treated would be termed, say, "1.7 percent, compensated."

Curves are often used to avoid undesirably heavy grades. By stretching out a given rise in elevation over a longer distance of track, loops and horseshoe curves (among other, less extreme, examples) keep grades manageable.

An important feature of a railroad curve is the extent to which it is "superelevated," or banked. To counteract centrifugal force as a train rounds a curve, the outer rail is raised to a higher level than the inner one. The difference in elevation between the two rails - called the "cross-level" - is how civil engineers measure superelevation. On main lines, the maximum difference in "cross-level" between the two rails can be as much as 6 inches, which is a superelevation good for 95 mph on a 1-degree curve, 45 mph on a 5-degree curve.

Since a train traversing a heavily superelevated curve at a relatively slow speed tends to cause excessive wear on the low rail, many railroads reduced curve superelevation when their passenger trains disappeared. This practice has worked against the reinstatement or speeding up of passenger service.

Curves aren't just portions of circles with tangents at each end; instead, a smooth transition in the form of a spiral is used. In a spiral, curvature and superelevation are gradually increased until the amounts needed for the curve itself are reached. Spirals may be more than 600 feet long in high-speed territory.