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January 16, 2015

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237502

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

ENTERED
Office of Proceedings
January 16, 2015
Part of
Public Record

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

Dear Ms. Brown:

CSX Transportation, Inc. is e-filing a Response to the Supplement filed by JGB Properties, LLC on December 9, 2014.

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

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC. RESPONSE TO JGB PROPERTIES, LLC SUPPLEMENT

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Dated: January 16, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC. RESPONSE TO JGB PROPERTIES, LLC SUPPLEMENT

CSX Transportation, Inc. (“CSXT”) responds to the Supplement filed by JGB Properties, LLC (“JGB”) on December 9, 2014 (the “Supplement”). Contrary to JGB’s claim, the Supplement provides no new information that supports JGB’s erroneous position.

It appears to CSXT, that the only reason for the JGB filing was to repeat its erroneous position for a third time. Regardless of the number of times that JGB repeats its erroneous claim that the preemption provisions of 49 U.S.C. §10501(b) validate JGB’s improper interference with rail transportation, JGB is wrong.

JGB’s new information is that a very short section of track was removed from a spur track. Exhibit DP-2 shows what appears to be the absence of a standard 39-foot section of rail. It is not both rails that have been removed, but only one. Because of the missing rail, JGB now claims that service has been permanently severed to the South Steelway Boulevard Line, the track that is the object of the requested Declaratory Order Proceeding. JGB is both factually and legally wrong.

More egregious than JGB’s claim that service is now permanently terminated, is the inference that CSXT personnel removed the track. CSXT emphatically denies that its employees removed track owned by a third party.

The inconsistency of JGB's position flies in the face of common sense and legal precedent. First, JGB claims that the South Steelway Boulevard Line is a common carrier line. Supplement at 2. Common carrier service cannot be terminated without the consummation of an abandonment that has been approved or exempted by the Surface Transportation Board (the "Board"). See *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981). Since there has been no abandonment sought or authorized for the section of rail removed or the South Steelway Boulevard Line, common carrier service has not terminated.

On the other hand, CSXT, Ironwood, LLC, and Steelway Realty Corporation contend that the South Steelway Boulevard Line is excepted track under 49 U.S.C. §10906 and subject to the Board's jurisdiction under 49 U.S.C. §10501(b)(2). In addition, the track where the section of rail was removed is also excepted track. "[S]pur track can be abandoned at any time under 49 U.S.C. 10907(b)(1) without need for regulatory approval." [footnote omitted]. *Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a Shenandoah Valley Railroad Company*, Docket No. 41068 (served December 11, 1998), slip op. at 13. "When sections 10501(b) and 10906 are read together, it is clear that Congress intended to occupy the field and preempt state jurisdiction over excepted track such as yard track, even though Congress allowed rail carriers to construct, operate, and remove such facilities without Board approval. See ICCTA Conf. Rpt., H.R. Rep. No. 311, 104th Cong., 1st Sess. at 95 (1995)." *Joseph R. Fox-Petition for Declaratory Order*, Finance Docket No. 35161 (served May 18, 2009) slip op. at 4.

Finally, the short section of rail that was removed can be easily replaced and therefore its removal did not sever the South Steelway Boulevard Line from the national rail network. *Id.* at 5. JGB's contention that removal of the short section of rail severs the South Steelway Boulevard Line from the national rail system is wrong as a matter of law.

CONCLUSION

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

Respectfully submitted,

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Dated: January 16, 2015

CERTIFICATE OF SERVICE

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

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

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