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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**REPLY OF
IRONWOOD, LLC AND STEELWAY REALTY CORPORATION
TO THE SUPPLEMENT OF JGB PROPERTIES, LLC**

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January 16, 2015

I. Investigation Has Revealed That The Track Removal Was Undertaken By Third Parties To Enable Continued CSXT Rail Service To Nearby Warehouse Buildings.

JGB asserts that a small section of rail was removed from the Sidetracks on property owned by National Grid, which is allegedly adjacent to the CSXT right-of-way. See Supplement at 3. JGB further contends that all indications are that CSXT removed the rail. See Supplement at 3 and 6. Investigation by Ironwood and Steelway has revealed that JGB is wrong and that the rail was removed by a third party in order to repair an adjacent spur track, which is constructed of the same grade of rail and used by CSXT to serve nearby warehouse buildings. JGB's witness stated that the rail removal occurred in October 2014⁴, but it actually occurred in July 2014. Berry V.S. at ¶ 17.

In response to the Supplement filed by JGB, the property manager for Ironwood and Steelway, Richard J. Berry, investigated the circumstances surrounding the track removal mentioned in JGB's Supplement. See attached Verified Statement of Richard J. Berry ("Berry V.S."). Mr. Berry learned from his investigation that a CSXT train derailed in July 2014 on a spur track that serves the Steelway Boulevard North warehouse buildings and certain other buildings. Berry V.S. at ¶ 8. The track where this derailment occurred is designated as Track 230 on the map found on page 6 of the JGB Petition for Declaratory Order. Berry V.S. at ¶ 8. As a result of the derailment, one of the rails of Track 230 was split, thereby preventing CSXT service to the buildings of Steelway Boulevard North. Berry V.S. at ¶¶ 8-9.

After the derailment, a meeting was apparently held at the site among a representative for CSXT, Rob Rotondo of Rotondo Warehousing, and Mike Giambatista of Giambatista Rail Contractors ("GRC"). Berry V.S. at ¶ 10. Rotondo Warehousing leases space on Steelway Boulevard North in a building owned by Heritage Properties, and Heritage eventually hired GRC

⁴ See Verified Statement of Dan Pigula at page 2 (item no. 1), attached to JGB Supplement.

to repair the split rail on Track 230. Berry V.S. at ¶ 6 and 10. Both Mr. Rotondo and CSXT were eager to have Track 230 repaired as quickly as possible so CSXT rail service to Rotondo Warehousing could resume. Berry V.S. at ¶ 11.

Apparently, Mr. Rotondo, Mr. Giambatista, and the CSXT representative walked over to Track 232 during their meeting. Berry V.S. at ¶ 13. Track 232 is the track from which JGB removed rails several years ago on the easement that is the subject of the ongoing state and now federal court litigation.⁵ Mr. Berry's investigation revealed that Track 232 was the same weight as Track 230, and, therefore, it was determined that a small section of Track 232 could be used to promptly repair Track 230 in order to continue CSXT rail service to the Steelway Boulevard North buildings. Berry V.S. at ¶¶ 13-15. Therefore, GRC cut out a section of rail from Track 232 to repair Track 230 in July 2014. Berry V.S. at ¶ 17. As repairs to Track 232 were already needed as a result of JGB's unlawful removal of the portion of track that crossed its property, it was anticipated that the small piece of rail removed by GRC on that same track could be readily replaced when future repairs to Track 232 are made. Berry V.S. at ¶ 16.

Although Mr. Berry's Verified Statement is based on his investigation and conversations with third parties who are not parties to this proceeding, the Board is not bound by the same evidentiary rules as the courts and it retains discretion to accept and consider statements that may otherwise be considered hearsay. See, e.g., CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating

⁵ On November 14, 2014, an appeals court in New York State dismissed JGB's consolidated appeals regarding the compensatory damages previously awarded to Ironwood and Steelway. See Ironwood, LLC and Steelway Realty Corporation v. JGB Properties, LLC, Civil Action Nos. 13-01835, 13-01837, and 14-00277 (N.Y. App. Div., Fourth Judicial Dept.). On December 19, 2014, JGB filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Northern District of New York, which essentially reargues the same points dismissed by the New York appellate court. See JGB Properties, LLC v. Ironwood, LLC and Steelway Realty Corporation, No. 5:14-cv-01542 (N.D.N.Y.).

Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, STB Docket No. 33388 (Decision No. 51), slip op. at 2 (n. 4) (served Nov. 3, 1997); Petition for Declaratory Order – Nancy Hall v. Aloha International Moving Services, Inc., et al., STB Docket No. 42048, slip op. at 3-4 (served March 14, 2001); Pennsylvania Railroad Company – Merger – New York Central Railroad Company (Arbitration Review), STB Docket No. 21989 (Sub-No. 4), slip op. at 11 (n. 29) (served Jan. 10, 2011).

Not only is the Supplement based on erroneous facts but the rail removal from Track 232 provides no support for JGB’s preemption and adverse abandonment claims in its Petition for Declaratory Order. In fact, the rail removal for the purpose of expeditiously repairing a nearby spur track to continue rail service shows the fallacy of one of JGB’s main points in this proceeding, i.e., that rail service to warehouse buildings of the type on Steelway Boulevard South is an anachronism that no longer occurs. See, e.g., JGB Petition for Declaratory Order at 27 (“any such initiative to rebuild the lines would only result in the construction of a ‘track to nowhere’”). Moreover, the failure to immediately repair Track 232 after the GRC rail removal has no bearing on either Ironwood’s and Steelway’s desire to preserve their lawful right to the rail easement or CSXT’s desire to provide rail service over such easement as needed. See, e.g., May 2014 Reply at 8-16; CSXT Reply at 3 and 8 (filed May 30, 2014).

II. The Legal Conclusions Drawn By JGB From The Track Removal Are Incorrect.

According to JGB, the track removal is significant because it “demonstrates the complete lack of need and usefulness” of the Sidetracks “for current or future service.” See Supplement at 4. JGB further contends that the recent track removal shows there is no rail service demand to establish the “financial feasibility” of rail operations on the Sidetracks. See Supplement at 7.

The conclusions drawn by JGB from the track removal are legally incorrect. JGB seems

to believe that a railroad line is magically, “de facto” abandoned merely through removal of the tracks. See Supplement at 6-7. This is incorrect. Only the Board grants abandonment authority.⁶ In fact, a railroad may remove track from a common carrier rail line as long as the railroad is willing to re-install the track when a reasonable request for rail service is received. BNSF Railway Company – Petition for Declaratory Order, STB Docket No. 35164, slip op. at 5-6 (served May 7, 2010). See also Honey Creek Railroad, Inc. – Petition for Declaratory Order, STB Docket No. 34869, slip op. at 6 (served June 4, 2008).

JGB’s contention that a de facto abandonment must exist because the Sidetracks were allegedly “severed” by CSXT from the adjacent CSXT rail line is also faulty. First, as already noted, CSXT did not remove the rail as JGB asserts and, thus, it is not reasonable to conclude that CSXT has no intention to perform future rail service. Second, the concept of abandonment does not apply to the Sidetracks because they are not common carrier rail lines.⁷ Third, a severance of tracks only creates a de facto abandonment of other tracks where the severance was itself a lawful abandonment approved by the Board. Honey Creek, slip op. at 6-7. Of course, such a situation does not exist here because the alleged track removal was not on a common carrier line and was not a Board-approved rail line abandonment.

JGB’s request for the Board to order a summary adverse abandonment (Supplement at 6-7) is also plainly erroneous from both legal and equitable standpoints. Like most of JGB’s other arguments, its request for adverse abandonment requires an assumption that the Sidetracks are

⁶ See, e.g., Chicago & North Western Transportation Company v. Kalo Brick & Tile Company, 450 U.S. 311, 320 (1981).

⁷ Excepted spur track can be removed and/or constructed at any time without Board authorization. 49 USC § 10906. Furthermore, the Board has no jurisdiction over construction or removal of private track.

common carrier rail lines, which they are not.⁸ Furthermore, any adverse abandonment action must utilize the full application procedure, and cannot be ordered in response to JGB's Petition for Declaratory Order. See, e.g., 212 Marin Boulevard, LLC, et al. – Petition for Declaratory Order, STB Docket No. 35825, slip op. at 4 (n. 15) (served Aug. 11, 2014). Equitable considerations also counsel against an adverse abandonment finding. If an adverse abandonment were justified merely by the physical severance (without Board authorization) of a track from the remainder of the national rail system, then any party that is opposed to use of a rail line could simply remove sections of track at will, thereby causing an instantaneous abandonment. Obviously, Congress did not intend such a gaping loophole in the regulatory authority given to the Board.

JGB's concern about the "financial feasibility" of the Sidetracks is similarly misplaced. See Supplement at 7. The Board allows the marketplace to determine whether an authorized rail line is financially viable. See, e.g., California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, Cal., STB Docket No. 35724, slip op. at 20 (served June 13, 2013).

III. Conclusion.

JGB's Supplement is factually misleading and fails to provide any support that would justify the grant of its Petition for Declaratory Order. As Ironwood and Steelway have shown herein and in their May 2014 Reply and June 2014 Reply, JGB's Petition for Declaratory Order should be denied.

⁸ See May 2014 Reply at 16-25; June 2014 Reply at 6-8.

Respectfully submitted,

A handwritten signature in black ink that reads "Karyn A. Booth". The signature is written in a cursive style with a horizontal line underneath it.

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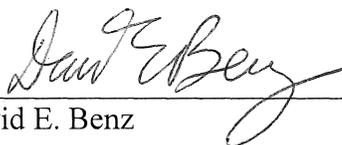
*Attorneys for Ironwood, LLC and Steelway
Realty Corporation*

January 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2015, 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 and Respondent CSXT were both served via electronic mail.

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David E. Benz

**Verified Statement
of
Richard J. Berry**

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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”).

2. I previously provided a Verified Statement in this proceeding as part of the Reply to Petition for Declaratory Order filed by Ironwood and Steelway on May 30, 2014. Background information regarding Ironwood and Steelway, as well as my employment with these two entities, is provided in that earlier Verified Statement, and I will not repeat it here.

3. On December 9, 2014, I was informed that JGB Properties LLC (“JGB”) had filed a “Supplement” in this proceeding. I read through the Supplement, in which JGB asserted that a portion of rail was removed from the track that serves the warehouse property owned by Ironwood at 4530 Steelway Boulevard South.

4. The rail removal was allegedly from Track 232, as numbered on the map found on page 6 of the JGB Petition for Declaratory Order. This same Track 232 crossed JGB's property on an easement, and it is this easement and JGB's illegal removal of these tracks and disregard for Ironwood's easement rights that has been the subject of significant litigation between JGB and Ironwood/Steelway over the past several years. JGB previously removed all of Track 232 that traversed JGB's property.

5. After reading the Supplement filed by JGB, I began to investigate the statements included in the Supplement concerning the rail removal from Track 232.

6. In my investigation, I spoke with Rob Rotondo of Rotondo Warehousing, an entity that leases warehouse space from Heritage Properties on Steelway Boulevard North. Rotondo Warehousing utilizes rail service provided by CSX Transportation, Inc. ("CSXT") via Tracks 230 and 759 as shown on the map at page 6 of the JGB Petition for Declaratory Order. Track 230 also serves our Steelway property.

7. I also spoke with Paul Anderson of Anderson Barney and Mike Giambatista of Giambatista Rail Contractors ("GRC"). Mr. Anderson is the property manager for the Steelway Boulevard North properties owned by Heritage. GRC is a local rail contracting company.

8. During my discussions with Mr. Rotondo, Mr. Anderson, and Mr. Giambatista, I learned that a CSXT derailment had occurred on Track 230 in July 2014 during service to the Steelway Boulevard North buildings. As a result of the derailment, one of the rails of Track 230 was split.

9. The split rail prevented rail service on Track 230, which meant that no rail service was possible to the Steelway Boulevard North buildings or other buildings served from Track 230.

10. Based on my conversations, I learned that, after the derailment and rail split on Track 230, a meeting at the site was held among Mr. Rotondo, a CSXT representative, and Mr. Giambatista. Heritage subsequently hired GRC to perform the needed repair to Track 230.

11. I also learned that both Mr. Rotondo and the CSXT representative desired to get the split rail on Track 230 repaired quickly due to the need for CSXT rail service to the Rotondo Warehouse.

12. Repair of the split rail on Track 230 required a replacement piece of rail of the same weight as the split rail.

13. I was told that, during the meeting, Mr. Rotondo, Mr. Giambatista, and the CSXT representative walked over to Track 232, close to where JGB had removed rail from Track 232 several years ago. Examination of Track 232 revealed that Track 232 was of the same weight as Track 230.

14. Due to the previous track removal from Track 232 by JGB, rail service to the buildings on Steelway Boulevard South is currently impossible. Mr. Rotondo, Mr. Giambatista, and the CSXT representative all decided that it would be quicker and cheaper for the property owner, Heritage, if GRC cut a short piece of rail from Track 232 near where JGB had previously removed track.

15. It was agreed that removal of this short section of rail from Track 232 was the best course of action given the urgency of the situation.

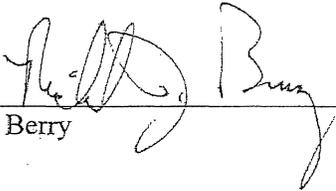
16. Moreover, due to the bent and damaged rail left behind on Track 232 from the prior removal by JGB, that particular rail, from which GRC cut out a small section, would likely need to be replaced anyway if and when Track 232 is reinstalled on the easement across JGB's property.

17. Therefore, GRC cut out a section of rail from Track 232 in order to repair Track 230 in July 2014.

18. The information in this Verified Statement comes from my conversations with Mr. Rotondo, Mr. Giambatista, and Mr. Anderson.

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