

SERVICE DATE – JUNE 23, 2020

SURFACE TRANSPORTATION BOARD

CORRECTED DECISION*

Docket No. AB 1242 (Sub-No. 1)

THE GREAT WALTON RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Digest:¹ The Board determines that the track at issue is ancillary track and defers ruling on whether it has been removed from the interstate rail system, pending the outcome of related state court proceedings.

Decided: June 23, 2020

On November 20, 2019, The Great Walton Railroad Company (GWRC) filed a petition for declaratory order requesting, among other things, that the Board issue a decision clarifying the status of a “runaround track” that it plans to use to reposition locomotives. For the reasons discussed below, the Board concludes that the runaround track is ancillary track (also known as excepted track) under 49 U.S.C. § 10906; however, there remains an open question over whether the runaround track was removed from the interstate rail system. The Board will defer ruling on that question and will place this proceeding in abeyance pending the outcome of related state court proceedings.

BACKGROUND

GWRC’s present petition relates to a previous adverse abandonment application filed by Hartwell First United Methodist Church (Hartwell First) in Hartwell First United Methodist Church—Adverse Abandonment & Discontinuance—Great Walton Railroad Company, Inc. in Hart County, Ga., Docket No. AB 1242. In that docket, Hartwell First had requested that the Board authorize adverse abandonment and discontinuance of approximately 0.25 miles of rail

* This decision corrects footnote 19 of the decision served on June 9, 2020. That footnote incorrectly stated that a copy of a verified notice of exemption that was submitted to the ICC in 1990 had not been “received or processed.” As corrected herein, “received or” has been deleted. In addition, the last sentence of the footnote has been revised to properly characterize certain 1990 filings and how they relate to the question of the regulatory status of certain track at issue. The decision remains unchanged in all other respects.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

line (the Line)² owned by GWRC in Hartwell, Ga. The Line is located at the tail-end of a rail line known as the Hartwell Line, which runs from Bowersville, Ga., to Hartwell. Hartwell First Appl. 1, Apr. 14, 2017, Hartwell First, AB 1242. Hartwell First explained that it owns property on both sides of the Line and that it sought adverse abandonment and discontinuance in order to quiet title to the property underlying the Line (which it claims to own) and pursue its development plans on the property. Hartwell First, AB 1242, slip op. at 1.

GWRC opposed the application, asserting that it needs the Line to perform a runaround operation that would allow it to more safely and economically serve Quality Holdings, LLC (Quality), its lone customer on the Hartwell Line. Id. at 2. To conduct this runaround operation, GWRC would use both the mainline and an approximately 614-foot track parallel to the mainline and connected to the mainline on both ends. Hartwell First, AB 1242, slip op. at 2; see also GWRC Opp’n 14, 30, May 30, 2017, Hartwell First, AB 1242. This parallel track is referred to as “the runaround track.” GWRC would use this runaround track to reposition locomotives to the front of the train for the return trip from Quality’s facility to Bowersville. GWRC Opp’n 14, 31, May 30, 2017, Hartwell First, AB 1242. GWRC also disputed a claim by Hartwell First that GWRC lacked title to the property underlying the runaround track. Hartwell First, AB 1242, slip op. at 5.

By decision served in that docket on January 31, 2018, the Board denied the application for adverse abandonment. Hartwell First, AB 1242. With respect to Hartwell First’s contention that GWRC did not have title to the property underlying the runaround track, and therefore could not utilize the runaround track to accomplish a runaround operation, (see Hartwell First Appl. 13-14, Hartwell First, AB 1242), the Board held that Hartwell First’s “presentation of unresolved state law questions” was not sufficient to meet its burden of showing that adverse abandonment was warranted. Hartwell First, AB 1242, slip op. at 5-6. However, the Board required GWRC to file a status report every six months “describing its progress with respect to rehabilitation and utilization of the Line.” Id. at 5.

Since that time, GWRC has submitted four status reports in Docket No. AB 1242. GWRC submitted its first status report on July 26, 2018, stating that it had spent approximately \$144,640 on rehabilitation efforts and had refurbished most of the mainline. However, GWRC also stated that it had been unable to complete restoration of the runaround track because of the ongoing state litigation.³ GWRC Status Report 1-2, 4, July 26, 2018, Hartwell First, AB 1242.

² There, the Board defined “the Line” as the approximately 0.25 miles of rail line and associated right-of-way subject to the adverse abandonment application. See Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Great Walton R.R. in Hart Cty., Ga. (Hartwell First), AB 1242, slip op. at 1 (STB served Jan. 31, 2018). The parties dispute whether the runaround track was included in the Board’s decision and the definition of the Line. As discussed in more detail below, the Board clarifies in this decision that the Line did not include the runaround track.

³ The dispute over ownership of the property underlying the runaround track has been the subject of two state proceedings. First, after GWRC began conducting repair work on the runaround track, Hartwell First filed a trespass action against GWRC in Hart County Superior

GWRC submitted its second status report on January 31, 2019, informing the Board that its request to condemn the property underlying the runaround track had been denied by the PSC.⁴ GWRC Status Report 3 n.3, Jan. 31, 2019, Hartwell First, AB 1242. GWRC stated that it had filed a petition for review of the PSC decision before the Fulton County Superior Court. Id. at 5.⁵ GWRC filed its third status report on July 31, 2019, informing the Board that its appeal of the PSC's denial for condemnation was still pending before the Fulton County Superior Court and that, because of that litigation, it was still unable to complete work to restore the remaining gap in the runaround track. GWRC Status Report 2-3, July 31, 2019, Hartwell First, AB 1242. GWRC submitted its fourth status report on January 31, 2020, informing the Board that the Fulton County Superior Court had affirmed the PSC's decision denying condemnation,⁶ and stating that GWRC had appealed that decision. GWRC Status Report 2 n.3, Jan. 31, 2020, Hartwell First, AB 1242.

GWRC filed its present petition for declaratory order on November 20, 2019. GWRC reasserts the argument, previously raised in its second status report, that the Board has exclusive jurisdiction over the runaround track and, therefore, efforts to block GWRC's restoration of the track are preempted. (Pet. 26-27.) Specifically, GWRC claims that, in denying the application for adverse abandonment in Hartwell First, the Board also effectively determined that "GWRC is

Court. The state court issued a preliminary injunction that barred GWRC from continuing the repair work. See Hartwell First Appl. 12-13 & Appendix 15, Apr. 14, 2017, Hartwell First, AB 1242. Second, GWRC filed an eminent domain petition for the property underlying the runaround track before the Georgia Public Service Commission (PSC). See GWRC Surreply 6 & Ex. 34, Nov. 3, 2017, Hartwell First, AB 1242. Both of these disputes are still being litigated in the Georgia state courts. In the earlier docket, the question of whether Hartwell First owns the property underlying the mainline was not relevant to the Board's denial of Hartwell First's adverse abandonment application. It appears from the parties' filings before the Board that the issue of ownership of the property underlying the mainline is not being litigated in the two state court proceedings.

⁴ See Petition of the Great Walton R.R. Co., Inc. for Approval to Acquire Real Estate by Condemnation, Ga. Publ. Serv. Comm'n, Docket No. 41607 (Aug. 24, 2018). A copy of the PSC's decision is attached as Exhibit 6 to GWRC's petition.

⁵ As part of the second status report, GWRC asked the Board "to enter an Order in an expedited fashion that would declare that the PSC's conclusions . . . are preempted." GWRC Status Report 7, Jan. 31, 2019, Hartwell First, AB 1242. By decision served on February 12, 2019 in Docket No. AB 1242, the Board denied GWRC's request, finding that it had been improperly raised in a status report and instead would need to be made in a petition for declaratory order. Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Great Walton R.R. in Hart Cty., Ga., AB 1242, slip op. at 2 (STB served Feb 12, 2019). The decision also stated that if GWRC did submit a petition for declaratory order, it would need to address Board precedent in which the agency has declined to issue declaratory orders on preemption matters that are already pending in state court. Id.

⁶ See Great Walton R.R. v. Georgia Pub. Serv. Comm'n, No. 2019-CV-316156 (Ga. Super Ct. Nov. 1, 2019) (GWRC v. GA-PSC). A copy of the court's decision is attached as Exhibit 8 to GWRC's petition.

entitled to reconstruct the sole remaining segment of its runaround [track].” (*Id.* at 26 (emphasis omitted).) Similarly, GWRC argues that the Board effectively held in Hartwell First that the runaround track is a regulated rail line subject to 49 U.S.C. § 10901 and, as such, it can only be abandoned upon GWRC receiving abandonment authority from the Board, which GWRC has neither sought nor obtained. (*Id.* at 6-7, 9.)

GWRC asserts that a Board decision is now necessary because here, unlike the previous cases in which the agency declined to rule on preemption issues that are already pending before state courts, Hartwell First and the PSC have engaged in a “collateral attack” on the Board’s decision in Hartwell First. (*Id.* at 12; *see also id.* at 9-13.) GWRC claims that Hartwell First repeated to the PSC arguments that the Board rejected, and that the PSC then relied on those arguments in its denial of GWRC’s condemnation request. (*Id.* at 11, 20.) GWRC also argues that the Fulton County Superior Court decision affirming the PSC’s decision is contrary to Hartwell First and impinges on the Board’s exclusive jurisdiction over the runaround track. (*Id.* at 15-16.) GWRC states that it anticipates that Hartwell First will make the same arguments it has made to the Board and the PSC in the ongoing state court litigation on the trespass claim, so a Board decision clarifying these issues is needed. (*Id.* at 9.)

Hartwell First filed a reply to the petition on December 10, 2019.⁷ It argues that the Board should dismiss GWRC’s petition as an improper attempt to have the Board intrude upon ongoing state court proceedings, and that GWRC has not sufficiently demonstrated why the Board should ignore its precedent declining to intercede in cases where preemption matters are already pending in state court. (Hartwell First Reply 2-4, Dec. 10, 2019.)⁸

Hartwell First argues that, if the Board decides not to dismiss the petition, it should find that the runaround track is ancillary track under 49 U.S.C. § 10906, and not a rail line subject to Board licensing authority under 49 U.S.C. § 10901, as claimed by GWRC. Hartwell First disputes GWRC’s assertion that the Board ruled on that issue in Hartwell First, arguing that the decision does not reference or include the runaround track. (Hartwell First Reply 4-5, Dec. 10, 2019.) Further, Hartwell First claims that, based on its history and use, the runaround track is ancillary track. (*Id.* at 6-8.) While Hartwell First acknowledges that the runaround track has been used to reposition locomotives in the past, it claims that this is an “ancillary function” and does not change the status of the runaround track into a regulated line of railroad. (*Id.* at 7.)

⁷ On December 11, 2019, Hartwell First filed errata to its reply.

⁸ Hartwell First also argues that the Board should ignore facts included by GWRC that are outside the record in Docket No. AB 1242. According to Hartwell First, GWRC states in its petition that it is seeking a decision based on the record in Docket No. AB 1242, yet the petition references facts outside of the record in that docket or lacking supporting verification. (Hartwell First Reply 4, Dec. 10, 2019.) Hartwell First’s argument is without merit, as the facts cited by GWRC are relevant to the issues in this docket and its filings contain the proper attestation under 49 C.F.R. § 1104.4.

GWRC filed a petition for leave to reply to the reply on December 13, 2019.⁹ GWRC claims that its reading of Hartwell First as addressing the runaround track is supported by specific language in the decision, as well as the fact that the Board required GWRC to submit status reports on the rehabilitation and utilization of the Line. (GWRC Surreply 2-3.) GWRC also challenges Hartwell First’s argument that the runaround track is ancillary track under 49 U.S.C. § 10906. Specifically, GWRC argues that using the track to reposition locomotives is not an ancillary function, but rather, a movement that is “an integral component” of GWRC’s line-haul operations. GWRC claims that, as a result, the runaround track—while perhaps at one time ancillary track—was converted into a regulated rail line that could only be abandoned upon approval by the Board. (GWRC Surreply 4-5.)

Hartwell First responded to GWRC’s submission on January 2, 2020, arguing that GWRC is misinterpreting the language in Hartwell First. (Hartwell First Reply 4-5, Jan. 2, 2020.) Hartwell First also disputes that GWRC’s use of the runaround track to reposition locomotives is integral to its line-haul operations and therefore has been converted to a regulated rail line. (*Id.* at 5-7.) Instead, Hartwell First reiterates that the runaround track is ancillary track and therefore could be removed from the interstate rail system without prior Board approval, which Hartwell First claims that GWRC did through its actions beginning in 2008—specifically, pulling up the track (which GWRC claims was done at Hartwell First’s request, (*see* Pet. 5)) and allowing Hartwell First to use the property “without objection for a period of over 8 years.” (Hartwell First Reply 4-5, Jan. 2, 2020.)

DISCUSSION & CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. *See Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 675 (1989). The Board finds that it is appropriate to resolve certain issues raised in the petition for declaratory order, as a controversy exists and there is uncertainty over the regulatory status of the runaround track. However, as noted, the Board will defer ruling on the remaining issues pending the outcome of related state court proceedings.

In its petition, GWRC requests that the Board “issue a declaratory ruling to clarify that GWRC’s runaround track is a line of railroad subject to the Board’s exclusive jurisdiction under 49 U.S.C. § 10501(b).” (Pet. 1.) GWRC’s petition is premised on two overarching arguments. The first is that the Board ruled in the related adverse abandonment docket in Hartwell First that GWRC is entitled to use the runaround track. The second is that the runaround track is part of its mainline track under 49 U.S.C. § 10901, as opposed to ancillary track under § 10906. The Board will address each of those arguments in turn.

The Scope of the January 2018 Decision in Hartwell First.

⁹ While the Board’s regulations generally do not permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept GWRC’s surreply. The Board will also accept Hartwell First’s reply in response to GWRC’s surreply.

The parties disagree on whether the Board in Hartwell First authorized GWRC to restore the runaround track. GWRC claims that, because the Board denied Hartwell First's adverse abandonment application on the basis that there was a potential need for the runaround track, the Board held that "GWRC is entitled to reconstruct the sole remaining segment of its runaround [track]." (Pet. 26 (emphasis omitted).) As GWRC states, "in denying [Hartwell First's] adverse abandonment application, the Board pointedly noted that GWRC 'intends to use the Line as part of a runaround track.' This comment unquestionably demonstrates that 'the Line' is but one part of the runaround track and that the two parts must be viewed in tandem." (GWRC Surreply 2 (footnote omitted); see also Pet. 25 ("By denying [Hartwell First's] adverse abandonment, the Board . . . required GWRC to restore service in order to stave off another adverse abandonment application.").)

Contrary to GWRC's claim, the Board in Hartwell First did not hold that the railroad was entitled to reconstruct the runaround track. Hartwell First argued in its application and subsequent filings that the runaround track was no longer in existence, and Hartwell First did not include the runaround track as the target of its adverse abandonment application in that proceeding.¹⁰ The Board's denial of Hartwell First's adverse abandonment request was limited to the track identified in Hartwell First's application, which did not include the runaround track. Although the decision discussed the runaround track in connection with GWRC's explanation of its potential locomotive repositioning operations, that discussion was in support of the denial of the adverse abandonment request concerning the line identified by Hartwell First; it was not a finding with respect to whether GWRC was entitled to reconstruct the runaround track.

It is true that the parties debated the regulatory status of the runaround track in their filings in Hartwell First.¹¹ The Board's decision in Hartwell First, however, was silent on the regulatory status of the runaround track, because addressing that question was not necessary to resolve the petition for adverse abandonment at issue in that case. Indeed, as noted above, the runaround track was not included in Hartwell First's adverse abandonment application. The Board did not, as GWRC argues, implicitly find that the runaround track was part of the interstate system as § 10901 mainline track. Had the Board intended to answer the question of whether the runaround track was § 10901 mainline track or § 10906 ancillary track, it would have engaged in the requisite analysis—one based on the track's intended use, physical characteristics, relationship to the rail system, and history. See, e.g., Tri-City R.R.—Pet. for

¹⁰ See Hartwell First Appl. 13-14, Apr. 14, 2017, Hartwell First, AB 1242 ("This 'need' also ignores that there is no existing [] 'run-around track' connected to the Line Segment given that the north spur [of the runaround track] was voluntarily removed by the Railroad and the Railroad has no title to the property where it seeks to build. . . . Since there is no run-around track associated with the Line Segment, there is no need for the Railroad to use the Line Segment."). See also id. at 24-25 ("[T]here is no existing track in place that can be used for a run-around, with the former north spur segment having been removed by the Railroad in 2008, and the crossing at Webb Street having been removed in 2009. Moreover, it is not clear that the Railroad has sufficient title or rights to be able to use the remaining track that previously might have been used [as] a run-around.").

¹¹ See, e.g., GWRC Opp'n, 30-31, May 30, 2017, Hartwell First, AB 1242; Hartwell First Rebuttal, 13-14, June 13, 2017, Hartwell First, AB 1242.

Declaratory Order, FD 36037, slip op. at 4 (STB served June 1, 2017). Hartwell First includes no such analysis. And although the Board did discuss the ongoing state proceedings involving the property underlying the runaround track (both the trespass litigation and the PSC condemnation proceeding), Hartwell First, AB 1242, slip op. at 5-6, that in no way indicates the Board intended to find GWRC was entitled to reconstruct that track.

GWRC also claims that by imposing a requirement that GWRC provide a status report on its efforts to rehabilitate and utilize the Line, “the Board unquestionably anticipated that both parts of the runaround track would be reconstructed.” (GWRC Surreply 3.) However, simply leaving open the possibility that the runaround track might be reconstructed does not constitute an affirmative entitlement to do so, and there is no inconsistency between the Board asking to be kept apprised of any rehabilitation efforts regarding the Line and the lack of a determination by the Board as to whether GWRC has an affirmative entitlement to reconstruct the runaround track.

GWRC also argues that the PSC’s denial of GWRC’s condemnation request is a collateral attack on the Board’s decision in Hartwell First and is preempted by 49 U.S.C. § 10501(b) (specifically, the Board’s exclusive jurisdiction over rail construction and abandonment). (Pet. 7, 9-13, 25-26.) However, as discussed above, the Board in Hartwell First did not affirmatively grant GWRC the right to reconstruct the runaround track. Therefore, the PSC’s decision cannot be considered a collateral attack on the Board’s decision in Hartwell First.¹²

Nor is the PSC’s decision preempted. The Board notes that GWRC has argued to the state court that the PSC’s decision was preempted by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, and that the state court correctly rejected this argument. Specifically, the state court held that ICCTA “does not preclude the [PSC] from denying [GWRC] the statutory right to condemn property under state law. . . . A railroad must acquire property under state law—by purchase, lease, or to the extent permitted by condemnation.” (Pet. Ex. 8 at 20.) This is consistent with prior court and agency decisions as well. See Tongue River R.R.—Construction & Operation—W. Alignment, FD 30186 (Sub-No. 3) et al., slip op. at 16 n.50 (STB served Oct. 9, 2007) (“Eminent domain proceedings are governed by state law. In rail construction cases, the Board determines whether the proposed line is consistent with the [public convenience and necessity]. The applicant is responsible for acquiring the land necessary to build the line.”). See also Dakota, Minn. & E. R.R. v. S. Dakota, 236 F. Supp. 2d 989, 1009 (D. S.D. 2002), aff’d in part, vacated in part, remanded, 362 F.3d 512 (8th Cir. 2004) (stating

¹² Moreover, the Board disagrees with GWRC’s claim that the PSC’s conclusions that (1) the runaround track was not essential for safety and (2) the runaround track is unnecessary because of alternative locations are in conflict with the Board’s decision in Hartwell First. (Pet. 18-21.) The Board did not make findings as to whether use of the runaround would improve safety or was necessary; rather, the Board merely stated that it would not substitute its operational judgment for the railroad’s. Hartwell First, AB 1242, slip op. at 4. Ultimately, if GWRC believed the arguments raised before the PSC collaterally attacked the Board’s decision in Hartwell First, it could have raised a collateral estoppel argument before the PSC and the reviewing state courts.

that Board approval does not carry any federal power to take land). Cf. Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore, FD 35388, slip op. at 4 n.4 (STB served Apr. 25, 2011) (proof of ownership cannot be inferred from Board authority to acquire and operate); MVC Transp., LLC—Acquis. Exemption—P&LE Props., Inc., FD 34462 et al., slip op. at 6 (STB served Oct. 20, 2004) (acquisition authorization from the Board does not convey property rights to the carrier).

Finally, GWRC raises several arguments about how the PSC’s decision-making process was procedurally flawed and unfair. (Pet. 15-24.) These arguments involve issues that are beyond the scope of the Board’s jurisdiction. Accordingly, they need not be addressed here.

The Status of the Runaround Track.

The second overarching argument made by GWRC in its petition is that the runaround track was and remains part of the mainline and, as such, GWRC is free to resume use of the track. Hartwell First counters that the runaround track was ancillary track under § 10906 and was abandoned by GWRC around 2008 when it removed the track. For the reasons explained below, the Board finds that the runaround track is ancillary track but will defer ruling on whether it was removed from the interstate rail network until the state-level proceedings are concluded.

A regulated rail line is within the Board’s exclusive jurisdiction and can only be abandoned upon the carrier receiving abandonment authority from the Board. Ancillary track is also within the Board’s exclusive jurisdiction, 49 U.S.C. § 10501(b), but, under § 10906, Board authorization is not required for the construction, operation, abandonment, or discontinuance of such track. Tri-City R.R., FD 36037, slip op. at 4; Jersey Marine Rail—Pet. for Declaratory Order, FD 36063, slip op. at 2 n.3 (STB served Jan. 31, 2017). If the runaround track is part of the mainline, the fact that GWRC pulled up physical pieces of the track structure¹³ and may not have a property interest in the underlying right-of-way is immaterial,¹⁴ as it would still be part of the interstate rail system. If the runaround track is ancillary track, GWRC could have, and might have, removed it from the interstate rail system by its conduct and intent without needing to seek Board authority to do so.

The Board did not address the regulatory status of the runaround track in Hartwell First, as the only issue to be determined there concerned adverse abandonment of the Line. Here, GWRC has specifically requested in its petition that the Board resolve the issue of whether the runaround track is a regulated rail line or ancillary track. (Pet. 9.) Accordingly, the Board will address the issue in this decision.

¹³ See Holland Park Owner, LLC—Pet. for Decl. Order, FD 36308, slip op. at 4 n.4 (STB served Jan. 6, 2020) (“If track previously located on the Property were rail line under § 10901, it would still be subject to the Board’s jurisdiction, even though it has since been removed, because abandonment authority has never been obtained for such rail line.”)

¹⁴ See Thompson v. Tex. Mexican Ry., 328 U.S. 134, 144-145 (1946) (even if a contract for use of trackage were terminated, a rail carrier’s operations licensed by the Board’s predecessor agency could not be abandoned without the agency’s authorization).

GWRC acknowledges that the runaround track began as two separate ancillary track segments: the north spur (which comprises the west end of the runaround track) and the Clinkscals industrial track (which comprises the east end of the runaround track). (Pet. 4-5, 21 n.50; GWRC Surreply 6.) According to GWRC, at some point in its history, these two ancillary tracks were combined to create a runaround track. (Pet. 4-5, 21 n.50.) GWRC claims that the runaround track was then used to reposition locomotives (just as GWRC proposes to do now) and that this action “is an integral component of GWRC’s linehaul operations.” (GWRC Surreply 5.) GWRC claims that the runaround track was therefore “converted” from ancillary track into a regulated rail line and, as such, would require abandonment authority to be removed from the interstate rail network. (*Id.*) Hartwell First argues that the runaround track was and always remained ancillary track and was abandoned by GWRC as a result of its actions taken in and after 2008. (Hartwell First Reply 4-7, Jan. 2, 2020.)

In assessing whether a particular track is a railroad line subject to § 10901 or excepted track under § 10906, the Board has adopted a case-by-case approach that analyzes the track’s intended use,¹⁵ physical characteristics,¹⁶ relationship to the rail system,¹⁷ and history.¹⁸ See Tri-City R.R., FD 36037, slip op. at 4; JGB Props. LLC—Pet. for Declaratory Order, FD 35817, slip op. at 6-7 (STB served Dec. 10, 2015). The Board considers and weighs the various indicia as appropriate in light of the particular evidence and circumstances of each case. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 15 (STB served Jan. 31, 2018); cf. Norfolk S. Ry.—Pet. for Exemption—in Balt. City & Balt. Cty., Md., AB 290 (Sub-No. 311X), slip op. at 10 (STB served Jan. 27, 2012) (discussing the Board’s discretion in weighing evidence submitted by the parties). Given the typical connection between the track’s relationship to the rail system, its physical characteristics, and its intended use, the various indicia generally relate to one another, and evidence regarding some indicia may be sufficient for the Board to make a determination on the overall legal status of the track without evidence to analyze all potential indicia. See Oakland Global, FD 36168, slip op. at 8.

¹⁵ With respect to intended use, the Board has considered whether the track will be used for certain ancillary operations (e.g., switching, loading, and unloading); whether it serves more than one shipper; whether the shipper is located at the end of the track; whether there are stations on the track; whether there is regularly scheduled service; who owns and maintains the track; and the volume of traffic moving over the track. See, e.g., Oakland Global Rail Enterprise—Pet. for Declaratory Order, FD 36168, slip op. at 8 (STB served Mar. 15, 2019); Tri-City R.R., FD 36037, slip op. at 4-5.

¹⁶ With respect to physical characteristics, the Board has considered the length of the track; whether it is stub-ended; and whether the track was constructed with light-weight rail. See, e.g., Oakland Global, FD 36168, slip op. at 8; Tri-City R.R., FD 36037, slip op. at 4-5.

¹⁷ With respect to relationship to the rail system, the Board typically has considered whether the track was built to penetrate new markets or territory. See, e.g., Oakland Global, FD 36168, slip op. at 8; Tri-City R.R., slip op. at 4-5.

¹⁸ With respect to history, the Board may look to see whether the track was subject to a grant of operating authority or other agency licensing. See, e.g., Naval Nuclear Propulsion Program—Pet. for Declaratory Order, FD 36298, slip op. at 4-6 (STB served Oct. 15, 2019); Oakland Global, FD 36168, slip op. at 8.

The Board finds that, contrary to GWRC's claim, the runaround track is ancillary track that never became part of GWRC's regulated rail line. GWRC's primary argument in support of its position is that the runaround track is "integral" to its linehaul operations. (GWRC Surreply 4-5.) Despite GWRC's characterization, the record shows that the runaround track has generally been used for activities associated with ancillary track, such as loading, unloading, and storage, or to reposition locomotives. These are activities generally considered to be incidental to linehaul service.

The track's physical characteristics and relationship to the rail system also indicate that the runaround track is ancillary track and was not constructed to penetrate new markets or territories. The runaround track was built parallel to the mainline and was less than 700 feet in length, only providing GWRC and its predecessors access to already-existing shippers.¹⁹ See JGB Props., FD 35817, slip op. at 8 (half-mile "tracks were built, not to invade the territory of another rail carrier, but rather to permit N.Y. Central (and later its successors) to reach shippers along the already-existing N.Y. Central main line"); Tri-City R.R., FD 36037, slip op. at 4-5 (almost two-mile track built off a mainline to reach a new industrial park in Richland, Wash., did not extend into a new territory because the mainline had served the Richland area for decades). While not stub-ended, the runaround track also was located near the end of the mainline. The location and short length of the track indicates that the runaround track was not able to accommodate through or overhead service.²⁰ Instead, given the physical characteristics,

¹⁹ As noted above, the agency also analyzes the track's history in making its determination. Here, there is no evidence that the Board or its predecessor, the Interstate Commerce Commission (ICC), ever granted GWRC or its predecessors operating authority specifically over the runaround track. In Docket No. AB 1242, the parties disputed whether GWRC had obtained agency authority to acquire and operate the Line. See Hartwell First, AB 1242, slip op. at 6 n.6. GWRC submitted as an exhibit to its reply a copy of a verified notice of exemption it purportedly filed with the ICC in 1990, and surmised that the ICC had inadvertently failed to publish the notice. See GWRC Opp'n Ex. 16, May 30, 2017, Hartwell First, AB 1242. The Board has reviewed its records and finds no indication that that document was processed by the ICC. Regardless, that purported notice and related filings provide town names and mileposts indicating the endpoints of the line being acquired (Bowersville and Hartwell), but no detail regarding the regulatory status of the runaround track.

²⁰ GWRC itself concedes that the runaround track did not extend rail service into a new territory. (GWRC Surreply 5.) Instead, GWRC previously argued in Docket No. AB 1242 that the runaround track was akin to a double track along this portion of the mainline. See GWRC Opp'n 31, May 30, 2017, Hartwell First, AB 1242 ("Because the extension and joinder of the existing tracks did not extend [GWRC's] service into a new territory, the creation of the runaround system is analogous to double-tracking—where a carrier adds a second track to an existing right-of-way."). But even assuming, for the sake of argument, that the runaround track could be viewed as double track, the outcome here would be no different. Just as a carrier can construct double track without Board authority, so too can it remove double track without Board authority. City of Stafford, Tex. v. S. Pac. Transp. Co., FD 32395 (ICC served Nov. 8, 1994), aff'd, 69 F.3d 535 (5th Cir. 1995). And the Board would have to make the same

it appears that the only use of the runaround track (aside from repositioning locomotives) would have been for loading, unloading, and switching, which are ancillary functions. See, e.g., Oakland Global, FD 36168, slip op. at 8. In its filings in Docket No. AB 1242, GWRC provides the names of different entities that may have been served using the runaround track; based on the record, it appears that GWRC or its predecessor carriers were serving one or two shippers at a time.²¹ Even if GWRC or its predecessors were serving more than one or two shippers, track serving multiple shippers can qualify as excepted track under § 10906 if it is ancillary to a mainline, see JGB Props., FD 35817, slip op. at 8 n.12. Based on the indicia, the Board finds that the runaround track is ancillary.

Having made such a determination, the next question would be whether the runaround track was removed from the interstate rail system. In Pinelawn Cemetery—Petition for Declaratory Order, the Board looked to whether the carrier had a “fixed and continuing intent” to use the ancillary track to “provide common carrier service to the public” to determine if the track “is still within the system.” FD 35468, slip op. at 10-11 (STB served Apr. 21, 2015). The Board further stated that “[f]or the Board to remove its jurisdiction, [one] would need to demonstrate that the [ancillary track] is no longer needed for the interstate rail system.” Id. at 11; see also NewVista Property Holdings, LLC—Pet. for Declaratory Order, FD 36040, slip op. at 2 (STB served Mar. 17, 2017).

GWRC argues that, despite removing the runaround track in 2008 at Hartwell First’s request, GWRC never intended to permanently abandon it. (Pet. 5-6); GWRC Opp’n 5, 16-23, May 30, 2017, Hartwell First, AB 1242. GWRC further argues, among other things, that the language in various contracts and the fact that it left certain track materials in place demonstrates that physical removal of the track was intended to be temporary. GWRC Opp’n 5, 16-23, May 30, 2017, Hartwell First, AB 1242. Hartwell First disputes this contention, claiming that GWRC gave no indication that it intended to use the runaround track in its discussions or documents with Hartwell First and that GWRC actually left the track materials because they had little value. Hartwell First Rebuttal 13, June 13, 2017, Hartwell First, AB 1242. In addition, GWRC continues to assert that the runaround track is necessary to the runaround operations it seeks to perform. (See Pet. 6.)

After careful consideration, the Board will defer issuing a determination on this issue. As noted above, the state proceedings regarding ownership of the property underlying the runaround track have not yet been resolved, and the outcome of either of those proceedings could render the question of the track’s status moot.²² In particular, if GWRC is able to establish a property

determination—whether the track remains part of the interstate rail network—as it would if this were ancillary track. As explained below, the Board declines to rule on that issue at this time.

²¹ See GWRC Opp’n 27, May 30, 2017, Hartwell First, AB 1242 (runaround track was originally built to serve Farmers Union Warehouse Co.); GWRC Surrebuttal 14-25, July 3, 2017, Hartwell First, AB 1242 (discussing prior owners of various parcels of property near the Line without stating whether they were shippers on the Line).

²² See Allied Indus. Dev. Corp.—Pet. for Declaratory Order, FD 35477, slip op. at 6 (STB served Sept. 17, 2015) (declining to address regulatory status of track until state court ruled on the issue of ownership).

interest in the land underlying the runaround track in either state proceeding, GWRC would be free to reconstruct the § 10906 runaround track regardless of whether it had previously been removed from the interstate rail system.²³ However, if GWRC is not able to establish such a property interest, the Board then may need to determine whether the runaround track remains part of the interstate rail system. See Pinelawn Cemetery, FD 35468, slip op. at 11.

Accordingly, the Board will hold this proceeding in abeyance. In the status reports that GWRC is required to file in Docket No. AB 1242, GWRC should continue to provide the Board with updates on the two state proceedings. If, at the conclusion of those proceedings, GWRC has not been able to demonstrate that it possesses a property interest in the land underlying the runaround track, the parties can request that this proceeding be removed from abeyance for consideration of any remaining issues.

It is ordered:

1. A declaratory order is issued, as discussed above.
2. GWRC's petition for leave to file a surreply is granted. GWRC's surreply and Hartwell First's reply to GWRC's surreply are accepted into the record.
3. The docket is held in abeyance.
4. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

²³ GWRC states that it believes it will be able to demonstrate a property interest in the trespass action that is pending before the Hart County Superior Court based on a new survey and chain of title evidence, as well as claims of adverse possession and an implied easement. (Pet. 8-9, 13-14.)