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ENTERED
Office of Proceedings
June 25, 2021
Part of
Public Record

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June 25, 2021

VIA OVERNIGHT DELIVERY

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20006

Re: **FD 35996, San Jacinto Transportation Company, Incorporated – Operation
Exemption – SJRE Railroad Series**

and

**FD 36473, W&P Development Corporation; WW Champion Developments, Inc.;
and SJRE – Railroad Series – Petition for Declaratory Order**

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is a Verified Petition to Reject and Petition for Declaratory Order of W&P Development Corporation; WW Champion Developments, Inc.; and SJRE – Railroad Series dated June 25, 2021. Payment in the amount of \$1,400, representing the appropriate fee for a Petition for Declaratory Order, has been made electronically.

Should any questions arise regarding this filing, please contact me. Thank you for your assistance on this matter. Kind regards.

FILED

June 25, 2021

SURFACE TRANSPORTATION
BOARD

FEE RECEIVED

June 25, 2021

SURFACE

TRANSPORTATION BOARD

RAW:ah
Enclosure

cc: San Jacinto Transportation Company, Incorporated

Respectfully submitted,

R. A. Wimbish

Robert A. Wimbish

Thomas J. Healey

Attorneys for W&P Development Corporation; WW
Champion Developments, Inc.; and SJRE – Railroad
Series

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

**VERIFIED PETITION TO REJECT AND VERIFIED PETITION FOR
A DECLARATORY ORDER OF W&P DEVELOPMENT CORPORATION;
WW CHAMPION DEVELOPMENTS, INC.; AND SJRE – RAILROAD SERIES**

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**ATTORNEYS FOR W&P DEVELOPMENT
CORPORATION; WW CHAMPION
DEVELOPMENTS, INC.; AND SJRE –
RAILROAD SERIES**

Dated: June 25, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

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**VERIFIED PETITION TO REJECT AND VERIFIED PETITION FOR
A DECLARATORY ORDER OF W&P DEVELOPMENT CORPORATION;
WW CHAMPION DEVELOPMENTS, INC.; AND SJRE – RAILROAD SERIES**

W&P Development Corporation (“W&P”); WW Champion Developments, Inc. (“WWCD”); and SJRE – Railroad Series (“SJRE-RS”),¹ the latter a Series within San Jacinto Real Estate, a Series LLC (“SJRE”) – each a non-carrier – hereby petition the Surface Transportation Board (the “Board”) to – (A) reject as void *ab initio* (and as otherwise procedurally deficient) the class exemption filed by San Jacinto Transportation Company, Incorporated (“SJT”) in *San Jacinto Transportation Company, Incorporated – Operation Exemption – SJRE Railroad Series*, FD 35996 (STB served March 25, 2016) (“*SJT-Exemption*”); or, in the alternative, (B) issue an order pursuant to 5 U.S.C. § 554(e) declaring that – (i) SJT has not consummated its permissive operating authority under *SJT-Exemption*, and thus is not a rail

¹ W&P and WWCD will be referred to, collectively, as the “Owners.” W&P, WWCD and SJRE-RS will be referred to, collectively, as the “W&P Parties.”

common carrier; and (ii) SJT cannot become a common carrier by virtue of *SJT-Exemption* if SJT no longer possesses sufficient rights under applicable state law to operate over property owned by the Owners and administered by SJRE-RS. If necessary, the W&P Parties request that a proceeding be instituted pursuant to the schedule offered herein to facilitate the development of the record and permit for a swift disposition of the issues presented.

The W&P Parties have filed this Petition for two reasons. First, the W&P Parties have discovered with the assistance of regulatory counsel that SJT's notice of exemption in FD 35996 is materially false and misleading, particularly with respect to the scope and location of the supposed "railroad lines" that SJT sought Board authority under that class exemption to operate as a rail common carrier, thus rendering SJT's exemption void *ab initio*. (Additionally, SJT's common carrier authorization in *SJT-Exemption* should be rejected on the basis of an alarming procedural oversight also discussed herein.) Second, if the Board were to uphold the FD 35996 notice of exemption despite SJT's material misrepresentations, then the record demonstrates that SJT nevertheless is a non-carrier outside of the scope of the Board's jurisdiction for a number of reasons set forth below.

If the Board were to reject *SJT-Exemption* as void, or rule that SJT is not a common carrier, then the Owners could forego initiating an "adverse" discontinuance against SJT pursuant to 49 U.S.C. § 10903 to enforce of the Owners' state law rights to prevent SJT from accessing their property. If, on the other hand, the Board were to deny the W&P Parties relief under this Petition, and were instead to find that SJT is a carrier, then the Owners would have to prepare and pursue an adverse discontinuance application enabling the W&P Parties to make arrangements for alternative rail service without the prospect of SJT's interference.

BACKGROUND

Transaction Background

The W&P Parties are interrelated entities. W&P and WWCD are affiliates, commonly-controlled by the same individuals. W&P controls SJRE, and SJRE, in turn, controls SJRE-RS. At present, W&P and WWCD (the Owners) each own portions of a facility located in Harris County, Texas, known as the San Jacinto River and Rail Park (the “Park”). The Park, located approximately 17 miles northeast of downtown Houston, is the site of a paper mill that was decommissioned in 2002. The Park is bisected by a railroad line known as the Lafayette Subdivision (the “L-Sub”), which is jointly owned by Union Pacific Railroad Company (“UP”) and BNSF Railway Company (“BNSF”). Although roughly 3.5 miles of track that formerly had supported paper mill operations remains within the Park north of the L-Sub, that track has been inactive since at least 2013 (three years before the *SJT-Exemption* notice was filed), owing to a number of circumstances, including the absence of any customers and any operable physical connection between the Park trackage and the L-Sub. The trackage located within the boundaries of the Park traverses the portions of the Park that W&P and WWCD each owns.

In 1965, Champion Paper completed construction of a paper mill on the property that is now the Park and commenced operations. When operating at full capacity, the mill ran 24 hours a day, producing primarily newsprint and employing roughly 1,000 people. Every step of the paper manufacturing process was handled within the mill, including production of paper from locally-sourced pulp, paper storage, paper recycling, power generation, and waste disposal. The mill closed in 2002, and some of the plant infrastructure has been removed. W&P purchased the paper mill property, including the tracks located within it, in 2012. W&P subsequently transferred certain of the land and assets located to the south of the east-west-aligned L-Sub to

WWCD. SJRE-RS was formed as a non-owner Park manager to identify and contract with an operator that could provide railroad transportation services for prospective industrial tenants that the Owners intend to attract. To the best of the W&P Parties' knowledge, the track within the Park historically has existed as private industrial track supporting paper mill activities,² and, accordingly – (a) neither W&P nor any of the other Owners needed Board authorization to acquire that trackage; and (b) the Owners have not become rail common carriers by virtue of their respective ownership of the subject track assets within the Park.

W&P purchased the mill site in 2012 because of the geographic proximity to Houston, the wealth of existing infrastructure located within the site and proximate to it, and access to competitive rail service from two Class I rail carriers operating over the adjacent L-Sub. The Park contains roughly 3.5 miles of track that had supported mill production, and includes significant warehouse space that would support new railroad customers. The facility's stormwater and wastewater treatment infrastructure will support new businesses that SJRE-RS hopes to attract to the Park. Beaumont Highway (Business 90) and nearby four-lane Crosby Freeway (U.S. Route 90) allow for convenient truck access, and the adjacent, navigable San Jacinto River affords the potential for barge service to prospective Park customers.

In furtherance of the W&P Parties' plans, SJRE-RS executed a license agreement with SJT on September 28, 2015, subsequently amended and superseded by an agreement executed on March 3, 2016 (the "Agreement"). The Agreement permitted SJT to establish and

² *Devens Recycling Center, LLC – Petition for Declaratory Order*, FD 34952 (STB served Jan. 10, 2007), slip op. at 2 ("Private track is typically built by a shipper (or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve the public at large") (citing to *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, FD 34013 (STB served Oct. 3, 2001), slip op. at 2; and *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, FD 32248 (ICC served Dec. 5, 1994) ("*Hanson Natural Resources*"), slip op. at 20-21.

offer rail common carrier rail service within the Park. The W&P Parties envisioned that SJT's rail service would facilitate development of the Park as a viable commercial asset. The Agreement provided that SJT would be the exclusive provider of rail operations, and that SJT would assume responsibility for track maintenance, rail service, and Park rail service marketing. The Agreement also provided that SJT would be paid an administrative fee for the services it would render under that Agreement.

SJT invoked the Board's class exemption procedures, seeking authorization to provide common carrier service over what it described as six miles of Park trackage located on W&P-owned portions of the Park located on the north side of the L-Sub (a detail discussed further below).³ Thereafter, SJT did little, if anything, to implement rail service, and it has no discernible presence within the Park. SJRE-RS, in turn, has reconsidered the wisdom of contracting with SJT, and is re-assessing whether the Park trackage should be operated in common carriage. SJRE-RS still plans to coordinate with the Owners to develop the Park into a regional multi-modal logistics hub, but it no longer wants or needs the services that SJT originally was selected to provide (but hasn't).

SJT's Fatally-flawed and Procedurally-deficient Notice of Exemption Filing

As indicated, the Park has roughly 3.5 miles of extant trackage north of the L-Sub, all of which has been disconnected from the L-Sub (and from the interstate rail network) for many years.⁴ The map supplied as Appendix 1 to the V.S. Blackburn (also offered as Exhibit A) shows the location and scope of the trackage that is known to exist within the Park. In its class exemption filing, however, SJT stated that it sought authority to operate over a "six mile line of

³ *SJT-Exemption* (notice of exemption at unnumbered pages 3 and 4 and Exhibit A).

⁴ See Exhibit A, and Verified Statement of Diron L. Blackburn ("V.S. Blackburn"), 4.

railroad” within the Park, repeated its stated intent to operate as a common carrier over “six miles (33,000) feet” of track, and offered an engineering diagram evidently prepared by or at the direction of UP that, as best the W&P Parties can tell, depicts in green lines the trackage (all north of the L-Sub) that, ostensibly, is the subject of SJT’s class exemption filing.⁵

Upon a careful comparison of – (1) the actual Park trackage configuration at this time north of the L-Sub (the same that existed as of the date of *SJT-Exemption*), and (2) the UP engineering map offered as Exhibit A to SJT’s exemption notice filing in FD 35996 (all depicted on the map offered as Exhibit C), irreconcilable discrepancies emerge. To begin with, SJT states that it will operate as a common carrier over roughly six miles of railroad line (again, all of which is identified as being located north of the L-Sub), when SJRE-RS has only been able to locate roughly 3.5 miles of extant Park trackage on that side of the L-Sub. Furthermore, the trackage that appears to comprise the “lines” that SJT proposes to operate from the map included with its notice of exemption amount to roughly 5.1 miles of track, as best the W&P Parties can determine. The map that SJT filed with the Board depicts “proposed” tracks (under the abbreviation “PROP”), and does not depict any of the track that currently exists within the Park (north or south of the L-Sub) as among those that SJT would operate. Put more plainly, SJT’s class exemption encompasses the construction and operation of entirely new trackage – none of which has been built⁶ – and involves none of the roughly 3.5 miles of track within the Park.⁷

⁵ *SJT-Exemption*, notice at unnumbered pages 3 and 5 and Exhibit A, and see Exhibit B.

⁶ V.S. Blackburn, 4.

⁷ In the interest of full disclosure, SJRE-RS’s notice of exemption filed in *SJRE-Railroad Series – Exemption Under 49 C.F.R. § 1150.31 – Rail Line in Harris County, Tex.*, FD 36279 (filed March 7, 2019) (“*SJRE-RS-Exemption*”), which the Board rejected on other procedural grounds, suffered many of the same defects. It, like SJT’s notice of exemption filing, stated, mistakenly, that SJRE-RS owns the subject railroad properties (it doesn’t – W&P does), and that the “Line” that SJRE would operate within the Park is roughly 6 miles in length. SJRE-
(footnote continued)

SJT's class exemption filing correctly observes that neither SJRE nor SJRE-RS (the latter of which SJT incorrectly offers as the owner of the Park and the subject railroad track within it) is a carrier subject to the Board's jurisdiction.⁸ SJT added, however, that it would lease the "line" from SJRE-RS, which SJT identifies as the line's owner.⁹ As SJT should know, the Agreement had extended to SJT a license to operate within the Park, and does not convey a leasehold interest, and W&P owns the subject trackage, not SJRE-RS. Although SJT proposes to operate as a common carrier over tracks owned by a non-carrier, it did not provide the Board with a copy of the Agreement that would govern SJT's railroad operations within the Park. This is concerning, given precedent requiring exemption filers in SJT's circumstances to supply a copy of the agreement that would govern the exemption filer's operations, thereby allowing the Board to ascertain whether the railroad property owner (as a non-carrier) could, under the terms of the contract, exert undue control over the provision of common carrier service.¹⁰

Finally, SJT misleadingly states in its exemption notice that it will commence operations no later than May 31, 2016, falsely adding that non-existent "shippers have advised that they will use the new railroad" as soon as SJT obtains Board authorization to commence

(footnote continued)

RS included with its class exemption notice a map that, like SJT's map, depicted the Line as consisting of non-existent trackage. SJRE-RS's class exemption filing was modeled after SJT's, which is why it contained the same defects as SJT's exemption does.

⁸ *SJT-Exemption*, notice of exemption at unnumbered page 1 and appended draft caption summary.

⁹ *Id.*

¹⁰ *Anthony Macrie – Continuance in Control Exemption – New Jersey Seashore Lines*, FD 35296 (STB served Aug. 16, 2010) ("*Macrie*"), 3, and its progeny, including, *e.g.*, *Leavenworth, Lawrence and Galveston Railroad – Operation Exemption – Midland Railway Company*, FD 36300 (STB served May 31, 2019); *Elizabethtown Industrial Railroad LLC—Operation Exemption—Rail Holdings, Inc.*, FD 35902 (STB served Mar. 6, 2015); *Cleveland Harbor Belt Railroad – Operation Exemption – Cleveland-Cuyahoga County Port Authority*, FD 35624 (STB served May 24, 2012).

common carrier service.¹¹ In fact, as of at least December 2017, no shipper had committed to using SJT rail service. SJT was unable to secure customer contracts or commitments. At most, SJT secured emails from potential customers expressing an interest in using rail service at some future point. Indeed, SJT has no discernible presence at the Park. For example, it has no personnel or motive power stationed there, and it thus has no ability, for this and other reasons, to move traffic were such a demand to materialize (and it appears that SJT may never had such an ability to move traffic).

As if that were not enough, the W&P Parties have been informed that SJT is under common control with an operating rail common carrier located elsewhere in Texas – Big Spring Rail System, Inc. (“BSRS”). An investigation of records available from the Board reveals that BSRS obtained common carrier authorization through the Board’s class exemption procedures in 2011, at which time BSRS’s representative for purposes of the class exemption proceeding was given as Mr. Baxter Wellmon, located at 1554 Paoli Pike, # 179, West Chester, PA 19380. *Big Spring Rail System, Inc. – Operation Exemption – Transport Handling Specialists, Inc.*, FD 35553 (STB served Oct. 13, 2011), 2 (attached as Exhibit D-1). As it happens, SJT, on June 10, 2019, filed a reply in the *SJRE-RS-Exemption* proceeding (attached as Exhibit D-2), which copies Mr. Wellmon, and lists SJT’s business address as 1554 Paoli Pike, # 179, West Chester, PA 19380, the same as the address given for BSRS in 2011. SJT’s class exemption filing, at unnumbered page 2, also supplies the same West Chester business address.

Counsel for SJT has recently explained that, consistent with the foregoing evidence, Mr. Wellmon (or a consortium of individuals led by Mr. Wellmon) commonly controls, indirectly (through an undisclosed corporate entity), BSRS and SJT. If SJT’s counsel is

¹¹ *SJT-Exemption*, notice at unnumbered page 3.

correct, then it is a concerning revelation that Mr. Wellmon or the aforementioned consortium failed to obtain Board authorization to continue in control of SJT (alongside BSRS) at such time as SJT might become a federally-regulated common carrier. *SJT-Exemption* makes no mention of SJT's affiliation with BSRS. If indeed BSRS and SJT are commonly controlled, then this was a critical fact that should have been disclosed in *SJT-Exemption*, and Mr. Wellmon (or those who commonly control BSRS and SJT) should have simultaneously invoked the class exemption procedures at 49 C.F.R. 1180.2(d)(2) to continue in control of SJT at the time that *SJT-Exemption* was filed. The W&P Parties are confident that, had it known of the interrelationship between BSRS and SJT at the time *SJT-Exemption* had been filed, the Board would not have allowed SJT's class exemption to take effect absent the usual, corresponding common control authorization under section 1180.2(d)(2).

SJT's Post-Exemption Inaction and SJRE-RS's Termination of the Agreement

SJT has taken insufficient steps to be able to hold itself out to the public as a rail common carrier, and, consequently, it is not a common carrier. Among other factors that point to SJT's ongoing non-carrier status, the track north of the L-Sub that SJT depicted in its notice of exemption filing – which would have consisted of less than six miles of track – was never built¹² (and such line construction would have needed Board construction authority under 49 U.S.C. § 10901 in the first place). The Park hosts no rail shippers (no freight traffic has moved to or from the Park since well before the effective date of *SJT-Exemption*, possibly since the closure of the paper mill in 2002), SJT has no presence at the Park, and the roughly 3.5 miles of track within the Park (north of the L-Sub) that does exist is isolated from the balance of the interstate rail network due to missing operable switch connections, a situation pre-existing *SJT-Exemption*.

¹² V.S. Blackburn, 4.

It appears that, historically, the paper mill trackage north of the L-Sub connected to the L-Sub at the Park's east and west ends, but no viable connection exists at either end today. Aerial images show that the eastern connection turnout was removed as of approximately January 2010,¹³ and that the western track connection linking the north side of the Park and the L-Sub was taken out of service by way of the removal of a frog¹⁴ sometime in 2013.¹⁵ The W&P Parties have no records concerning the frog removal, and they do not know why it was removed, but it was missing when SJRE-RS and SJT executed the Agreement. Thus, SJT interchange with BNSF and UP has been impossible since the filing of *SJT-Exemption*, and that remains the case.

Following execution of the Agreement, SJT did not place any on-track equipment (locomotives, rail cars, or maintenance-of-way equipment) on the Park track, nor could it, for reasons supplied above. The W&P Parties are unaware of SJT's hiring of any railroad operating personnel, including licensed locomotive engineers¹⁶ or conductors¹⁷ to effectuate service, as would be required to lawfully conduct railroad operations. SJT has undertaken no track work (laying rail, or maintaining or rehabilitating existing track) within the Park – and did not construct the entirely new track that is the subject of *SJT-Exemption*. The W&P Parties believe

¹³ See maps attached as Exhibit E, showing the eastern connection in January 2010 and December 2019, and illustrating that the turnout has not been in place for over a decade.

¹⁴ A frog is “a track structure used at an intersection of two running rails to permit wheels on either rail to cross the other.” *Central Illinois Railroad Company – Discontinuance of Service Exemption – in Cook County, Illinois*, AB 1066 (Sub-No. 2X), (STB served Nov. 16, 2010). The frog is located in a turnout where one rail from the diverging route crosses over a rail on the other. A frog is essential for safe operation through a turnout onto diverging track.

¹⁵ See maps attached as Exhibit F, depicting the western connection in October 2012 (turnout intact), October 2013 (frog missing) and December 2019 (frog still missing).

¹⁶ See 49 U.S.C. § 20135 and 49 C.F.R. § 240 *et seq.*

¹⁷ See 49 U.S.C. § 20163 and 49 C.F.R. § 242 *et seq.*

that SJT has not executed any railroad transportation contracts with any prospective user of railroad service within the Park, and that SJT has not published any tariffs or rate sheets. SJT has no customers, has never moved freight traffic in interstate commerce, has no presence at the Park, and could not handle traffic in interstate commerce even if a need had arisen due to the absence of essential track connections. SJT is not a common carrier.

SJT has been unable – and perhaps unwilling – to commence rail service to and from the Park, and it has failed to satisfy its contractual obligations to SJRE-RS. SJT was required to inspect, repair and maintain both existing and new Park trackage to a condition satisfying FRA Class I track safety standards, and to keep that track in “good order and condition,” but it has not fulfilled any of those obligations. Indeed, it could not have, since the track that is the subject of *SJT-Exemption* does not exist. Incidentally, SJT has also failed to inspect, repair or maintain the existing Park trackage. SJT’s failure even to begin to fulfill its obligations has led SJRE-RS to terminate its agreement with SJT, and to look for another railroad transportation services partner. In the process, SJRE-RS is re-evaluating (with the assistance of regulatory counsel) whether such service should be conducted strictly as private carriage (under private contracts), or as common carriage as SJT originally had insisted.

Board Action Will Facilitate the W&P Parties Plans for Park Development and Operation, which no Longer Include SJT

SJRE-RS has invoked its state law rights to end its contractual relationship with SJT. SJRE-RS served SJT with notice of termination of the Agreement effective December 5, 2017. In response, SJT has opted for protracted litigation, alleging wrongful termination and seeking outlandish damages despite SJT’s inaction under the contract, and its materially false

and misleading class exemption filing in FD 35996.¹⁸ While SJT seeks damages for what it falsely alleges was an improper termination, it has not sought specific performance or argued for the continued existence of the agreement beyond the termination date. SJRE-RS is re-evaluating its plans to arrange for railroad service within the Park, including the installation of a new service provider, which may or may not operate as a rail common carrier.¹⁹ SJT has refused thus far to withdraw its *SJT-Exemption* notice or to cooperate in a transition to another rail service provider as was reflected in proceedings before the Board in 2019.²⁰ In fact, SJT's counsel very recently advised that SJT would sue any third party entity that the W&P Parties might seek to contract with to provide railroad transportation services within the Park in place of SJT.

¹⁸ The Board does not need to, and should not, address the contract issues underlying SJRE-RS' Agreement termination. Such matters are properly the subject of state court litigation. It is critical, however, that the Board rule either – (1) that SJT's exemption is void *ab initio*, or, if not void (2) that SJT is not a common carrier within the Park, and that SJT cannot become one if, as a matter of state law, SJT lacks any continuing right to occupy the Park trackage. A ruling on SJT's non-jurisdictional status would assist with the progress of the state court litigation, and would be within the scope of the Board's exclusive and primary jurisdiction. See *V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kansas*, FD 35459 (STB served Jul. 12, 2012), 4 (the Board provided “guidance regarding the legal status of the Line and which entities may conduct operations on it,” a matter involving the Board's “special expertise...and thus . . . within the Board's exclusive and primary jurisdiction to decide”); *Staten Island Rapid Transit Operating Authority – Petition for a Declaratory Order*, FD 30879 (I.C.C. decided September 21, 1987) 1987 WL 99501, *3, n.8 (“Clearly, our jurisdiction to find that a party is a carrier implies jurisdiction to find the contrary. While the [National Mediation Board] will not consider itself bound by the latter, it may defer to our expertise”).

¹⁹ The W&P Parties understand that the Park trackage need not be operated in common carriage, but that service could be provided strictly as private carriage. There are not now, and have not been, any rail shipping customers within the Park, and so the W&P Parties' counsel has advised that the option for common carrier versus private carrier service may yet be available. The W&P Parties acquiesced in *SJT-Exemption* because the W&P Parties relied upon SJT's (mis)guidance that operations within the Park *had* to be conducted as Board-authorized common carriage when they did not. See V.S. Blackburn, 2-3.

²⁰ See SJT's one-sentence filing of June 10, 2019 in *SJRE-RS-Exemption*.

Although the W&P Parties may install a new railroad service provider at any time to operate within the Park (or SJRE-RS may undertake such service itself), the alternative holdings that they seek here would allow SJRE-RS to effectively re-set the situation at the Park and proceed without the regulatory entanglement, uncertainty, and potential operational interference that would arise if SJT were to insist that – (a) it is a common carrier within the Park, and (b) its alleged common carrier status cannot be ended absent the successful prosecution of a costly and time-consuming “adverse” discontinuance of service application proceeding. To that end, the W&P Parties request that the Board find either that – (a) SJT’s FD 35996 class exemption filing is materially false and misleading and, accordingly, void *ab initio*; or, if SJT’s exemption is not void, then (b) that SJT has not become a common carrier, and that, by virtue of the termination of the Agreement, SJT cannot attempt to become a carrier on the Park trackage, thus permitting SJRE-RS to arrange for alternative railroad service without SJT interference.

ARGUMENT

I. PETITION TO REJECT: SJT’S NOTICE OF EXEMPTION CONTAINS MATERIALLY FALSE AND MISLEADING INFORMATION AND IS THUS VOID AB INITIO, AND IT IS ALSO PROCEDURALLY DEFECTIVE

“Under 49 C.F.R. § 1150.32(c), an exemption is void *ab initio* if the party’s verified notice contains materially false or misleading information. In applying this standard, the Board examines each allegedly false or misleading statement to determine if it is material to the exemption sought. *U.S. Rail Corp. – Lease & Operation Exemption – Shannon G., a N.J. LLC*, FD 35042 (STB served Oct. 8, 2008).”²¹ Additionally, “[a]uthority sought pursuant to a notice of exemption found void *ab initio* is considered as never having taken effect. *See S.F. Bay R.R.-*

²¹ *Utah Southern Railroad Company, LLC – Change in Operators Exemption – Iron Bull Railroad Company, LLC*, FD 35558 (STB served Sep. 21, 2012) (“*Utah Southern*”), 4.

Mare Island – Operation Exemption – Cal. N. R.R., FD 35304, slip op. at 2 n.5 (STB served Dec. 6, 2010).”²² SJT’s FD 35996 exemption filing contains materially false and misleading information regarding the alleged railroad “lines” that SJT sought authority to operate as a common carrier. As such, the STB must find that SJT’s exemption is void. It is also materially incomplete as a matter of agency practice for lacking a copy of the operating agreement as would have been required under *Macrie*, and could have been rejected at the outset for that reason, also. And, finally, SJT-Exemption is procedurally deficient due to SJT’s failure to disclose that it is commonly controlled with BSRS, and due to the failure of the controlling individual(s) or entity to seek and obtain common control authority.

SJTs’ notice of exemption sought authorization to operate as a common carrier over nonexistent track that SJT apparently planned to install and operate at a later date, but never did. Moreover, while SJT stated in its notice filing that it intended to operate roughly six miles of railroad lines within the Park north of the L-Sub, the portion of the Park north of the L-Sub contains only about 3.5 miles of extant trackage, all of which is located and aligned differently than the tracks depicted on the map SJT included with its filing with the Board as shown in detail on the map attached as Exhibit C.²³

Tellingly, many of the tracks that SJT had indicated would serve as lines of railroad, are designated as “proposed” (under the abbreviation “PROP”) on its notice of exemption map, which also shows that all of the supposed “lines” were to be located on the north side of the L-Sub. The scope and location of the lines that an entity such as SJT seeks to operate

²² *Id.* at 4, n. 7.

²³ See also V.S. Blackburn, Appendix 2.

are central to the Board’s authorization procedures,²⁴ are essential to the Board’s class exemption proceedings (as is an accurate map of the lines to be operated),²⁵ and thus are material facts upon which the Board must rely in issuing an exemption. Accordingly, SJT’s statements that it sought to operate over six miles of track and SJT’s map suggesting the location of *existing* trackage to be operated in common carrier service are materially false and misleading. Had the Board known at the time that SJT’s “proposed” railroad lines did not exist, and that those allegedly six miles of railroad lines – which appear by measurement to be closer to 5.1 miles in the aggregate – did not match up to any of the roughly 3.5 miles of track within the relevant portion of the Park, the Board very likely would have rejected SJT’s notice filing. At the very least, SJT should have addressed these material discrepancies in its exemption filing, but it did not. Accordingly, the Board was misled into allowing SJT’s exemption to take effect. Similarly, SJT’s notice of exemption implicitly and misleadingly represents that SJT is not commonly controlled alongside any existing common carriers, and, for that reason, also, SJT’s class exemption filing is void *ab initio*, and must be rejected as such.

²⁴ See, e.g., *R. J. Corman Railroad Company/Luzerne & Susquehanna Line, LLC – Change in Operators, Lease and Operation Exemption – Luzerne and Susquehanna Railway Co. and Luzerne County Rail Corporation*, FD 36429 (STB served Sep 17, 2020) (suspending Board processing of an exemption notice due to discrepancies in the track mileage involved and the line descriptions, pending the provision of supplemental information); *Saratoga and North Creek Railway, LLC – Acquisition and Operation Exemption – Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific*, FD 35500 (STB served Jun. 1, 2011) (notice of exemption filer supplemented its original filing to address a discrepancy between the total track mileage and the terminal mileposts supplied); and *cf. Lake County, Oregon – Adverse Discontinuance of Rail Service – Modoc Railway and Land Company, LLC and Modoc Northern Railroad Company*, AB-1035 (STB served Jun. 15, 2009), 2, n. 5 (applicant must explain “the discrepancy in mileage and milepost numbers”).

²⁵ 49 C.F.R. §§ 1150.31(e)(3)-(4) and (f); *cf. Indiana Hi-Rail Corporation, Debtor – Abandonment*, AB-336 (Sub-No. 5) (STB served Apr. 17, 1997) (rejecting an abandonment application due to an inadequate map supplied by the applicant, among other deficiencies).

The W&P Parties – non-carriers – have no prior Board experience. They did not grasp the significance of the false and misleading content of SJT’s class exemption filing until recently-retained regulatory counsel examined and compared maps showing the tracks located at the Park today and those depicted in the map offered in *SJT-Exemption*. Had the W&P Parties understood the significance of the track location and scope discrepancies and appreciated the significance of those discrepancies as a matter of Board procedure, they would not have sanctioned the filing of *SJT-Exemption*, and SJRE-RS would not have filed the admittedly equally-flawed *SJRE-RS-Exemption*.

If the Board agrees that SJT’s notice of exemption filing is void *ab initio*, then the Board need read no further. By virtue of such a holding, SJT would not have secured authorization to be a common carrier over the Park tracks, and SJRE-RS would be entitled to enforce its rights under state law by ensuring that, as a matter of federal law, SJT has no rights (or obligations) to access the Park. Such a holding would protect against SJT’s non-interference with Park operations going forward, and avoid a costly and time-consuming “adverse” discontinuance proceeding pursuant to 49 U.S.C. § 10903, which the W&P Parties would have to consider initiating in the absence of favorable Board action here.

II. PETITION FOR DECLARATORY ORDER: SJT IS NOT A COMMON CARRIER AND CANNOT NOW BECOME ONE

Under 5 U.S.C. § 554(e), the Board may issue a declaratory order to remove uncertainty or terminate a controversy. Questions concerning the scope of the Board’s jurisdiction, and its jurisdiction over specific entities and railroad properties, may be addressed under its declaratory authority.²⁶ If the Board does not deem SJT’s exemption to be void *ab*

²⁶ See *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 105 (1st Cir. 2015) (the Board may issue a
(footnote continued)

initio for the reasons set forth in the previous section of this petition, then it should, in the alternative, issue a declaratory order finding that SJT is not a common carrier by virtue of its inability to hold itself out to the public to prove common carrier service upon reasonable request.

A. SJT is not a common carrier.

The Board repeatedly has affirmed in a variety of contexts that exemption authority is permissive, not mandatory.²⁷ So, also, the authority to operate as a common carrier over the property of a non-carrier third party entity is permissive.²⁸

Mere Board service of a permissive exemption to operate over currently private track does not make the exemption holder a common carrier. The exemption holder must demonstrate that it has effectuated the permissive authority that it has invoked, and it must possess both the right and ability to hold itself out to the public to provide common carrier service upon reasonable demand. “A railroad is a common carrier railroad if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic

(footnote continued)

declaratory order to resolve a jurisdictional issue); *see also, e.g., Los Angeles Metropolitan Transportation Authority – Petition for Declaratory Order*, FD 36112 (STB served Oct. 27, 2017); *Jersey Marine Rail, LLC – Petition for Declaratory Order*, FD 36063 (STB served Jan. 31, 2017); *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013); *SMS Rail Service, Inc. – Petition for Declaratory Order*, FD 34483 (STB served Jan. 24, 2005) (“SMS Rail Service”); and *American Orient Express Railway Company, LLC – Petition for Declaratory Order*, FD 34502 (STB served Dec. 29, 2005).

²⁷ *See, e.g., Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, Ind.*, AB 1065 (Sub-No. 2), 2 (STB served Dec. 7, 2020) (abandonment authority is permissive); *Railroad Ventures, Inc. – Acquisition and Operation Exemption – Youngstown & Southern Railroad Company*, FD 33385 (STB served Jul. 15, 1997) (purchase authority is permissive).

²⁸ *See Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, FD 35984, slip op. at 3 (STB served April 1, 2016) (“...the Board’s grant of authority to operate under a notice of exemption is permissive only”).

for the public for hire. The principal test is whether there is a bona fide holding out coupled with the ability to carry for hire.”²⁹

The Board has looked to several factors to determine whether an entity has effectuated its permissive authorization to become a carrier over non-carrier-owned track. For example, in *Arkansas Central Railway Co., Inc. — Operation Exemption — Line of Herzog Stone Products, Inc.*, FD 31405 (ICC decided March 2, 1989) (“*Arkansas Central*”), Arkansas Central Railway Company, Inc. (“ARCR”), a newly-formed non-carrier affiliate of Herzog Stone Products, Inc., obtained an exemption to operate over existing, private track as a common carrier, just as SJT had proposed to do in *SJT-Exemption*.³⁰ Six years after receiving its exemption authority, however, ARCR petitioned to have the Interstate Commerce Commission (the “ICC” – the Board’s regulatory processor) revoke its exemption on the grounds that ARCR had never commenced operations, and thus was not a carrier.

The ICC explained in its decision that revocation would be warranted only if ARCR had actually commenced rail operations and thereby had become a federally-regulated common carrier. In turn, the ICC held that, since ARCR had not commenced common carrier operations, it was not a carrier, ARCR’s exemption authority notwithstanding. The ICC noted that, among other factors it considered leading to its jurisdictional finding, ARCR did not hire

²⁹ *Hanson Natural Resources*, slip op. at 14.

³⁰ The fact that the track over which SJT had sought to commence common carrier operations is, and has been, private track (as was the case in *Arkansas Central*) is an important factor. This case, like *Arkansas Central* and *C&C Railroad* (discussed below), does not involve SJT’s lease or purchase of a currently-regulated line of railroad already subject to Board jurisdiction. Accordingly, unlike in the case of the transfer of a leasehold or ownership interest in a regulated line of railroad, where common carrier status may attach upon mere consummation of the sale or lease transaction, here the focus must be on the actions of the entity seeking to introduce common carrier service over track assets to which Board jurisdiction and regulatory oversight previously had not extended.

employees, purchase equipment or assets, file tariffs or enter into contracts to provide service. The ICC added that ARCR's non-carrier status (despite its exemption authority) obviated the need for revocation, and rendered formal discontinuance of ARCR's non-existent operations under what is now 49 U.S.C. § 10903 unnecessary and impossible.

Similarly, the Board has found that an entity authorized to function as a common carrier nevertheless has not become a common carrier where, for example:

- The holder of an exemption has not commenced railroad service. *See Mohall Central Railroad, Inc. – Abandonment Exemption – In Nelson, Ramsey, and Cavalier Counties, ND*, AB 1003X (STB served Oct. 29, 2007), slip op. at 1, n. 1 (“because operating authority is permissive, and NPR did not appear to begin service, MCR does not need NPR to obtain discontinuance authority” as a prerequisite to line abandonment);
- the exemption holder did not hold itself out to the public to provide common carrier service. *Port of Ivory, LLC – Operation Exemption – Line of Railroad in Tulare County, Cal.*, FD 35475 (STB served Jun. 27, 2011);
- the exemption holder did not acquire the line segment that was the target of the applicable Board proceeding. *Rocky Mountain Railcar and Repair, Inc. – Acquisition and Operation Exemption – Line of Railroad in Tooele County, Utah*, FD 35478 (STB served Apr. 13, 2018); and
- the exemption holder leased track that did not connect to the balance of the interstate railroad network, thereby thwarting the authority holder's ability ever to provide common carrier service. *C&C Railroad, Inc. – Operation Exemption – Centerpoint Properties, L.L.C.*, FD 33990 (STB served Nov. 22, 2019) (“C&C Railroad”).

Jackson County Port Authority a/k/a Port of Pascagoula – Petition for Declaratory Order, FD 35994 (STB served July 28, 2016) (“Pascagoula”) also is instructive. There, the Port of Pascagoula had received two grants of regulatory authority – one to construct a new railroad line, and the other to operate over portions of those tracks and others as a common carrier. But the Port never constructed the new line, and never assumed rail operations on its property. The Board granted the Port's petition for a declaratory order, finding that the Port had not become a common carrier subject to the Board's jurisdiction because it did not act in

furtherance of either grant of authority. *Pascagoula*, 2. The Board added that although the Port's permissive authority to construct and operate remained in place, the Port could withdraw its construction petition at any time to eliminate concerns about its status. *Id.*, 3. In keeping with *Pascagoula* and other cases discussed above, the W&P Parties do not need to seek revocation of SJT's exemption to establish SJT's non-jurisdictional status before the Board.³¹

Because Board-issued exemption authority is permissive, SJT would have had to **act** on its exemption in this case in order to become a common carrier. In the case of operations over currently private track, SJT must have held itself out to the public to provide common carrier service, possess both the wherewithal and the property rights to do so, and actually move freight traffic. SJT has never functioned as a common carrier, nor could it. The private track over which it had intended to operate pursuant to *SJT-Exemption* had no customers during SJT's tenure (likely not since the paper mill closed, in fact), and it lacks any serviceable connection to the interstate rail network. And even if the track within the Park were not isolated, SJT has no motive power or operating personnel on-site, if it has any personnel anywhere. The W&P Parties do not know whether SJT has executed interchange agreements with BNSF or UP (as peculiar as interchange agreements wanting functional interchange facilities would be), and understand that SJT employs no staff to operate trains or to maintain track. The W&P Parties have never been supplied with, and are unaware of, any SJT tariff rates schedule intended to govern prospective transportation services. The W&P Parties do know, however, that no

³¹ Whether SJT *could have been* (or could have become) a rail common carrier had it implemented service in keeping with its exemption – or if it had been presented with the opportunity to perform as one – are irrelevant considerations. Rather, what is relevant is that SJT could not, and did not, function as a carrier prior to termination of the Agreement.

customer has obtained railroad transportation service at any time following the effective date of SJT's exemption.

Collectively, these facts applied to agency case law discussed above support the requested declaration that SJT could not, and did not, become a carrier subject to the Board's jurisdiction. To resolve any confusion over SJT's legal status and to avoid – (1) a costly and unnecessary adverse abandonment proceeding, and (2) the potential that SJT might try to interfere with the W&P Parties' future plans for the Park, the Board should find that SJT never became a railroad common carrier, and, as discussed below, that SJT cannot become a common carrier absent sufficient rights under state law to operate within the Park.

B. SJT may not at this point become a common carrier within the Park absent appropriate property rights.

As discussed above, SJT has not taken actions sufficient to qualify it as a Board-jurisdictional common carrier. SJRE-RS terminated the Agreement over three years ago, thereby ending SJT's contract rights to occupy Park trackage. Nevertheless, SJT could attempt after this Petition to invoke *SJT-Exemption* in a last-ditch effort under 49 U.S.C. § 10501(b) to override enforcement of SJRE-RS's state law contract rights. Such an unwarranted maneuver would purposely complicate the W&P Parties' future plans for rail operations in the Park. Others in a similar position as SJT have attempted comparable, fruitless maneuvers in the past in an equally self-serving to thwart state law processes that otherwise would divest that entity of a contract-based presence on a track segment, as the Board has witnessed.³² In order to eliminate

³² See, e.g., *Rail Switching Services, Inc. – Operation Exemption – Pemiscot County Port Authority*, FD 35686 (STB served Jan. 8, 2013) (invocation of the Board's class exemption procedures rejected where the class exemption appeared designed to allow the incumbent non-carrier rail services provider to evade replacement by another services provider); *Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA*, FD 34252 (STB (footnote continued)

uncertainty,³³ and to clarify the law as to the issues presented in this Petition,³⁴ the W&P Parties ask the Board to declare that, if SJT is not now a rail carrier, it cannot now claim, well after termination of the Agreement, to be entitled or obligated to provide common carriage within the Park – to attempt hereafter to become a rail carrier over the W&P Parties’ objection – based only on SJT’s unexercised exemption authority.

The preceding section of this Petition addressed the Board’s repeated recognition that – (a) authorization to undertake a transaction that would cause a non-carrier to become a carrier is permissive; and (b) exemption authority alone does not confer common carrier status on the exemption holder over private track. But an adjunct to that frequently-cited concept is that an exemption, by itself, neither entitles the exemption holder to undertake the actions contemplated in the exemption, nor mandates that it must do so. For SJT to be present within the Park and to initiate rail common carriage now or hereafter, SJT also would have to possess state law-recognized rights to operate within the Park, which it lacks.³⁵

(footnote continued)
served Dec. 5, 2002).

³³ Section 554(e).

³⁴ *James Riffin – Petition for Declaratory Order*, FD 34997 (STB served May 2, 2008), slip op. at 1; *rev’d on other grounds, James Riffin v. Surface Transportation Board*, 592 F.3d 195 (D.C. D.C. 2010).

³⁵ *See, e.g., Oakland Global Rail Enterprise – Petition for Declaratory Order*, FD 36168 (STB served Mar. 15, 2019), 11, n. 12 (“if the Board were to grant operating authority in the future, [the exemption holder] would need to obtain the necessary property or contract rights in order to exercise that authority”); *Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, FD 35984 (STB served Apr. 6, 2016), 3; *James Riffin – Petition for Declaratory Order*, FD 35245, slip op. at 6 (STB served Sept. 15, 2009), 3, *aff’d Riffin v. Surface Transportation Board*, No. 09-1277, 2010 WL 4924719 (D.C. Cir. Nov. 30, 2010) (*per curiam*), (Board “authorization is permissive, not mandatory, and [exemption authority] did not give [the exemption holder] a legal property interest in the line. [The exemption holder] would have to acquire some suitable legal interest that would give him the ability to exercise his authority and hold himself out as a common carrier before he

(footnote continued)

In keeping with longstanding precedent, the Board should therefore declare that SJT is not a carrier, and that SJT cannot invoke its exemption authority now to become a carrier and thereby “install itself” on the Park trackage without appropriate property rights. SJT first would have to demonstrate that it possesses the right or interest under state law to be present on the track and to conduct railroad operations within the Park.

**REQUEST FOR INSTITUTION OF PROCEEDING AND
ADOPTION OF PROCEDURAL SCHEDULE IF NECESSARY**

By way of this Petition, the W&P Parties have tendered their case in chief in favor of the requested Board declarations. Although the facts are straightforward, it may be that the Board would determine that additional development of the record is warranted to permit it to address the merits of either portion of the W&P Parties’ Petition. If that is the case, then the W&P Parties request that the Board institute a proceeding by appropriate order, and, in so doing, to adopt the following procedural schedule:

Day 0:	Board initiates a proceeding and adopts a procedural schedule
Day 45:	Replies and comments on the Petition are due
Day 65:	W&P Parties’ rebuttal due

(footnote continued)

could qualify as a rail carrier”) (footnotes omitted); *General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, FD 34867 (STB served Jun. 15, 2007), slip op. at 4; *V&S Railway LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kansas*, FD 35459 (STB served Jan. 14, 2014), 5 (“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 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.”); *Eighteen Thirty Group, LLC – Acquisition Exemption – in Allegany County, MD*, FD 35438 (STB served April 5, 2012) (“...the Board’s grant of acquisition and/or operation authority is permissive, and not mandatory; it neither determines ownership of, nor creates a real property interest in, a line”); cf. *SMS Rail Service*, slip op. at 7-8.

WHEREFORE, the W&P Parties respectfully request that the Board either reject *SJT-Exemption* as void *ab initio*, or, in the alternative, grant the W&P Parties' request for a declaratory order as provided herein.

Respectfully submitted,

By: *R. A. Wimbish*

Robert A. Wimbish
Thomas J. Healey
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEYS FOR W&P DEVELOPMENT
CORPORATION; WW CHAMPION
DEVELOPMENTS, INC.; AND SJRE –
RAILROAD SERIES**

Dated: June 25, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBIT A

CURRENT PARK TRACK CONFIGURATION

Existing Rail Lines

Legend



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBIT B

MAP

**NONEXISTENT LINES OF RAILROAD
DEPICTED IN SJT’S NOTICE OF
EXEMPTION FILING**



UNION PACIFIC
RAILROAD
FES 30102
Office of Assistant Vice President
Engineering Design/Construction
LOCATION & DESIGN
PROJECT 344-348 HOUSTON/ARLINGTON
TRACED TO BEING MAP DEVELOPMENT
DRAWN BY XX
CHECKED BY 06
DATE JAN 2016
SHEET NUMBER
1 of 1

c:\p\0516\10546\075\dm\3885\GENERAL\CEL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

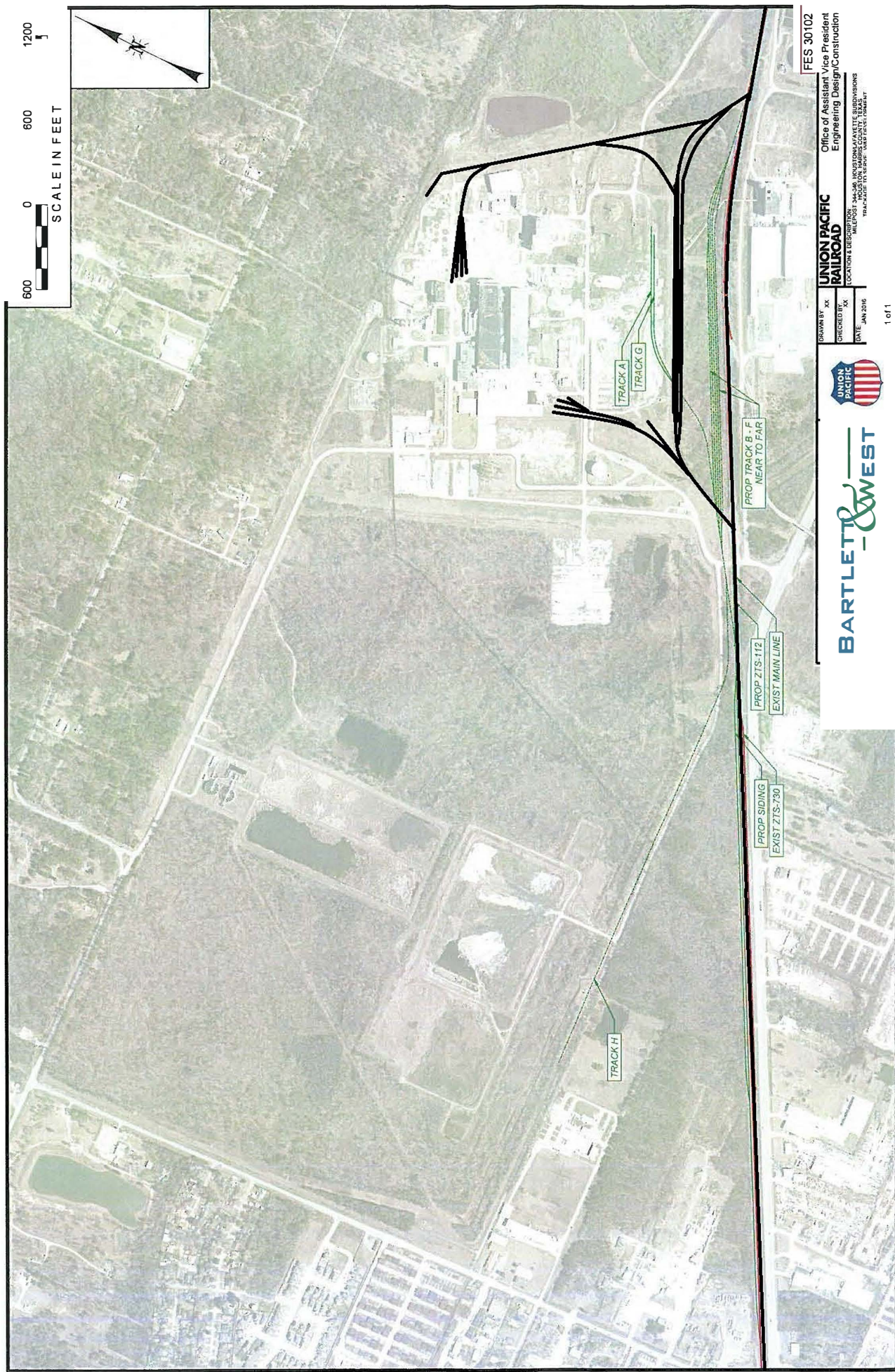
FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBIT C

**MAP
CURRENT PARK TRACK CONFIGURATION
VS.
NONEXISTENT LINES OF RAILROAD
DEPICTED IN SJT’S NOTICE OF
EXEMPTION FILING**

Black Lines = Current Park Track Configuration
 Green Lines = Nonexistent Lines of Railroad Depicted
 in SJT's Notice of Exemption Filing



UNION PACIFIC RAILROAD
 Office of Assistant Vice President
 Engineering Design/Construction
 LOCATION & DESIGN
 PROJECT 344-248 HOUSTON/ARLETTE SUBDIVISIONS
 DATE JAN 2016
 TRACK MADE TO SJOE AND RAILWAY TREATY



1 of 1
 c:\p\ds\to\top\46-401\view\0075\dms03885\GENERAL\CEL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBITS D-1 and D-2

**STB RECORDS INDICATIVE OF A CORPORATE
FAMILY RELATIONSHIP BETWEEN BIG SPRING
RAIL SYSTEM, INC., AND SAN JACINTO
TRANSPORTATION CO., INC.**

41924

SERVICE DATE – OCTOBER 13, 2011

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35553]

Big Spring Rail System, Inc.—Operation Exemption—Transport Handling Specialists, Inc.

Big Spring Rail System, Inc. (BSRS), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate over approximately 2.07 miles of rail line between mileposts 0.0 and 2.07± in Howard County, Tex., owned by the City of Big Spring, Tex. (City). BSRS will be operating the line for Transport Handling Specialists, Inc., a nonoperating carrier, which is leasing the line from the City. BSRS states that it intends to interchange traffic with Union Pacific Railroad Company at milepost 0.0.

The transaction may be consummated on or after October 27, 2011 (30 days after the notice of exemption was filed).

BSRS certifies that its projected annual revenues as a result of this transaction would not exceed those that would qualify it as a Class III rail carrier and further certifies that its projected annual revenues will not exceed \$5 million.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay

must be filed no later than October 20, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35553, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Baxter Wellmon, 1554 Paoli Pike, #179, West Chester, PA 19380.

Board decisions and notices are available on our website at WWW.STB.DOT.GOV.

Decided: October 5, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

ENTERED
Office of Proceedings
June 10, 2019
Part of
Public Record

San Jacinto Transportation Co., Inc.

1554 Paoli Pike, #179 West Chester, PA 19380
610-701-0629 610-701-0659 Fax



June 6, 2019

Surface Transportation Board
395 E Street SW
Office of Proceedings
Washington, DC

RE: FINANCE DOCKET NO. 36279

Gentlemen:

Enclosed herewith is a response to Railroad Series, A Series within San Jacinto Real Estate, A Series LLC.

Sincerely,
San Jacinto Transportation Company, Inc.

CC: Baxter Wellmon
Ronald A. Bowes
David Lee
Charlotte Oschman
Andrew McKinney

SURFACE TRANSPORTATION BOARD NOTICE OF EXEMPTION

OFFICE OF PROCEEDINGS

FINANCE DOCKET NO. 36279



RESPONSE TO:

**RAILROAD SERIES, A SERIES WITHIN SAN
JACINTO REAL ESTATE, A SERIES LLC**

San Jacinto, Transportation, Company, Inc. ("SJT") does NOT withdrawal SJT as operator of the line and does NOT agree to SJT being replaced as operator of the line by SJRE Railroad Series – a series within San Jacinto Real Estate, a series LLC.

BY:

Date: 6-6-19

Signature: 

San Jacinto Transportation Company, Inc.

1554 Paoli Pike #179

West Chester PA 19380

BEFORE THE
SURFACE TRANSPORTATION BOARD

247256

FD 36279

ENTERED
Office of Proceedings
March 7, 2019
Part of
Public Record

VERIFIED NOTICE OF EXEMPTION

OF

SJRE – RAILROAD SERIES, A SERIES WITHIN SAN JACINTO REAL ESTATE, A
SERIES LLC

PURSUANT TO 49 C.F.R. §1150.31



Submitted By:

R. Blake Runions
Mary Anna H. Rutledge
PORTER HEDGES LLP
1000 Main Street, 36th Floor
Houston, Texas 77002-6341
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

ATTORNEYS FOR SJRE – RAILROAD
SERIES, a series within SAN JACINTO
REAL ESTATE, a series LLC

Dated: March 7, 2019

FILED
March 7, 2018
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
March 7, 2019
SURFACE
TRANSPORTATION BOARD

7236277

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2019, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon all parties of record in this case as follows:

Name R. Blake Runions

Address Porter Hedges LLP
1000 Main Street
36th Floor
Houston, Texas 77002-6341

Name: Mary Anna H. Rutledge
Porter Hedges LLP
1000 Main Street
36th Floor
Houston, Texas 77002-6341

Printed Name: C. F. Oschman

Signature: 

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBIT E

AERIAL MAP

**DEPICTION OF CURRENT ABSENCE OF PARK
TRACKAGE CONNECTION TO THE L-SUB
EASTERN END**

FD 36473

Eastern Connection
January 2010

Missing Track



- 39-

Google Earth

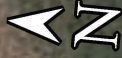


90 ft

FD 36473

Eastern Connection
December 2019

Missing Track



100 ft

Google Earth

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

EXHIBIT F

AERIAL MAP

**DEPICTION OF CURRENT ABSENCE OF PARK
TRACKAGE CONNECTION TO THE L-SUB
WESTERN END**

FD 36473

Western Connection
October 2012

- 42 -

Intact Frog



80 ft

Google Earth

FD 36473

Western Connection
October 2013

Missing Frog



80 ft

Google Earth

FD 36473

Western Connection
December 2019

Missing Frog



80 ft

Google Earth

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF
DIRON L. BLACKBURN**

VERIFIED STATEMENT OF DIRON L. BLACKBURN

My name is Diron L. Blackburn, and I am the President of W&P Development Corporation (“WPC”), WW Champion Developments, Inc. (“WWCD”), and SJRE-Railroad Series (“SJRE-RS”). (Collectively, WPC, WWCD, and SJRE-RS will be referred to herein as the “W&P Parties”). I have held the above positions since May 2017.

I hereby verify that the facts set forth in the Petition to Reject and in the Petition for Declaratory Order filed together in the STB proceedings docketed under FD 35996 and FD 36473 (collectively, the “Petition”) and as set forth herein are true and correct to the best of my information and belief to the extent such facts relate to my tenure with each of the above-referenced entities. I also hereby verify that I am authorized to offer this verified statement on behalf of the W&P Parties.

In particular, however, I am offering this verified statement to discuss certain specific issues discussed at some length in the Petition, including – (1) the W&P Parties’ unfamiliarity with railroad regulatory and legal issues, such as the substantial distinctions in law between regulated common carriage and unregulated private carriage, and Surface Transportation Board (the “STB”) processes; and (2) my observations upon the significant discrepancies between the railroad track assets that are located within the San Jacinto River and Rail Park (the “Park”) (and the configuration of that trackage), and the supposed “railroad lines” that San Jacinto Transportation Company, Incorporated (“SJT”) has proposed to construct and operate within the Park in its notice of exemption filing in FD 35996 (and the configuration of those alleged railroad lines).

The W&P Parties are still actively pursuing the development and promotion of the Park as a logistics facility with advantages of access to water, rail and highway transportation.

As to the Park's railroad transportation element, to this point, the Park does not host, and has not hosted, any industries that depend on railroad transportation. We had expected that SJT would be instrumental in attracting such customers, given its alleged railroad transportation expertise, but SJT's efforts (such as they may have been) did not bear fruit.

I was not an officer of the companies comprising the W&P Parties at the time that SJRE-RS began negotiations with SJT concerning plans to develop the Park as a logistics facility that would, among other things, cater to rail-shipper industries. But I am aware that the plan for the Park has all along contemplated the development of a robust track network that would support industries that the W&P Parties expect to attract to the facility, particularly in light of the Park's access to rail service from both Union Pacific Railroad Company ("UP") and BNSF Railway Company ("BNSF"). I know that those who preceded me at the W&P Parties were not, and that I myself am not, expert on railroad service matters or railroad law. The W&P Parties had in the past relied upon SJT's guidance on such issues, which guidance, we now understand through legal counsel, was self-serving, inaccurate, and misleading.

For example, I have learned that SJRE-RS can arrange for railroad transportation service within the Park as private, contracted for carriage, whereas I understand that SJT had, intentionally or unintentionally, misguided the W&P Parties into understanding that railroad operations within the Park had to be conducted by an STB-authorized railroad common carrier. Had SJT been forthcoming about the option of private carriage within the Park, or had the W&P Parties been aware of the option of non-federally-regulated contract service, I am confident that the W&P Parties would have carefully weighed that option. The W&P Parties did not know, for example, that it could be difficult as a matter of federal law to remove a rail carrier from within

the Park if that carrier (which SJT hoped to become) were to prove unsatisfactory. In retrospect, it is likely that SJT was aware of that, and that it factored into SJT's negotiation strategy.

With the aid of recently-retained railroad legal counsel, the W&P Parties are looking to start afresh with its plans to develop and promote railroad service within the Park. We have not yet decided whether to proceed with a common carrier service provider (in place of SJT) or with a private carrier whose service is rendered strictly pursuant to contract.

As indicated in the Petition, the railroad facilities within the Park consist of trackage that was used in the past to support the former paper mill operations at the site, and it is configured accordingly. That track has been out of service since WPC acquired the property, and I don't believe that any track renovation has taken place since the paper mill closed. SJRE-RS had expected that SJT would renovate the track – indeed it was obligated to do so under SJT's agreement with SJRE-RS – and we had discussed track reconfiguration as part of the plan to develop the Park. In fact, SJRE-RS's contract with SJT contemplates such renovation.

Regarding the Park trackage, I am familiar with conditions at the Park, including the scope, general condition and location of the track within it. I have personally walked and observed portions of the Park trackage from time to time, and I have examined aerial images and maps of the park trackage as it now exists. On the basis of that information and experience, I estimate that there is roughly 3.5 miles of extant trackage within the Park north of the Lafayette Subdivision (the "L-Sub") operated jointly by UP and BNSF, configured as is shown in the map offered as Appendix 1 to my verified statement. The Appendix 1 map shows the scope and location of Park trackage in keeping with my own inspection of the Park facilities.

I see that SJT has advised the STB that SJT intended to operate roughly six miles of railroad lines within the Park, all located north of the L-Sub. As indicated above, the Park

does not have six miles of extant trackage north of the L-Sub – it has roughly 3.5 miles of track – and none of the track that SJT proposes to operate, based upon the track configuration offered as Exhibit A to SJT’s notice of exemption filing, is consistent with track that I know is on the ground in the Park. The map attached as Appendix 2 compares the location of track as it exists within the Park north of the L-Sub to the track that SJT intends to construct and operate. That map shows no overlap between the existing and proposed railroad infrastructure. What is more, SJT has not installed or reconfigured any of the Park trackage to resemble the track schematic offered as Exhibit A to SJT’s notice of exemption in FD 35996.

Finally, the Petition notes that the Park trackage north of the L-Sub lacks functional switch connections to the L-Sub. Aerial maps included with the Petition show the absence of such switch connections. I can state that the aerial images accurately depict the current absence of functional track connections between the trackage that is the subject of SJT’s filing with the STB and the L-Sub, and that it is my understanding that the subject connections have been missing since before SJT obtained authorization to operate the Park trackage.

A handwritten signature in cursive script, reading "Diron L. Blackburn", written in black ink on a white background.

Diron L. Blackburn

Dated: 06/24/2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF
DIRON L. BLACKBURN**

APPENDIX 1

Existing Rail Lines

Legend



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35996

**SAN JACINTO TRANSPORTATION COMPANY, INCORPORATED
– OPERATION EXEMPTION –
SJRE RAILROAD SERIES**

AND

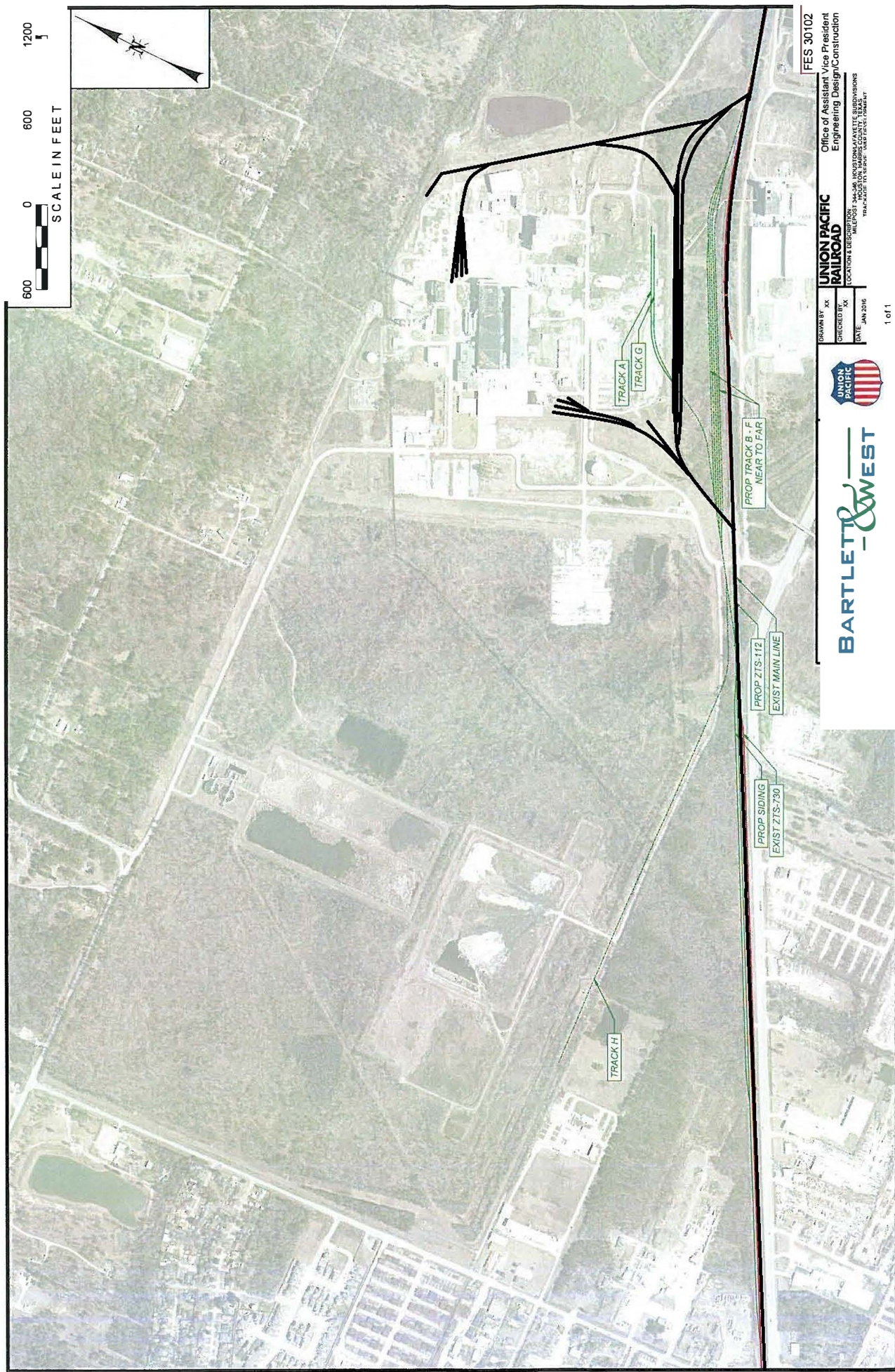
FD 36473

**W&P DEVELOPMENT CORPORATION; WW CHAMPION DEVELOPMENTS, INC.;
AND SJRE – RAILROAD SERIES – PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF
DIRON L. BLACKBURN**

APPENDIX 2

Black Lines = Current Park Track Configuration
 Green Lines = Nonexistent Lines of Railroad Depicted
 in SJT's Notice of Exemption Filing



UNION PACIFIC RAILROAD
 Office of Assistant Vice President
 Engineering Design/Construction
 LOCATION & DESIGN
 PROJECT 344-248 HOUSTON/ARLETTE SUBDIVISIONS
 WILLIAMS COUNTY, NE
 TRACKS TO BE CONSTRUCTED BY THE STATE
 FES 30102
 DRAWN BY: XX
 CHECKED BY: XX
 DATE: JAN 2016



1 of 1

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CERTIFICATE OF SERVICE

I hereby certify that, on this _25th day of June, 2021, a copy of the foregoing
Petition was served by means of electronic mail upon:

John K. Fiorilla
Dyer & Peterson, P.C.
jfiorilla@dyerpetererson.com

and by USPS First Class postage prepaid upon:

San Jacinto Transportation Company, Inc.
1554 Paoli Pike, #179
West Chester, PA 19380

Thomas J. Healey
Thomas J. Healey