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September 7, 2021

VIA E-FILING

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

ENTERED
Office of Proceedings
September 7, 2021
Part of
Public Record

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 Motion for Leave to File a Sur-reply and Sur-reply of W&P Development Corporation; WW Champion Developments, Inc.; and SJRE – Railroad Series dated September 7, 2021.

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

Respectfully submitted,

R. A. Wimbish

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

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**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**

**MOTION FOR LEAVE TO FILE A SUR-REPLY AND SUR-REPLY 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: September 7, 2021

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

W&P Development Corporation; WW Champion Developments, Inc.; and SJRE – Railroad Series (“SJRE-RS”),¹ the latter a Series within San Jacinto Real Estate, a Series LLC (each a non-carrier) hereby move for leave to file a response (the “Sur-reply”) to the Reply (the “Reply”) of San Jacinto Transportation Company, Inc. (“SJT”) filed in the above-referenced proceedings on August 16, 2021. Following the motion set forth immediately below, the W&P Parties submit a modest Sur-reply that is warranted in light of the substance of, and arguments raised in, the Reply.

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.”

MOTION FOR LEAVE TO FILE A SUR-REPLY

Pursuant to 49 C.F.R. § 1117.1, the W&P Parties hereby request leave to file a Sur-reply in defense of the petitions they have filed in these dockets (the “Petitions”). Among other things, SJT has requested that the Surface Transportation Board (the “Board”) “not act on the Petitions until the District Court of Harris County Texas decides the many factual issues upon which the [W&P Parties] are relying.” Reply, 3. In so doing, SJT baselessly and incorrectly has claimed that resolution of the state court contract dispute somehow would assist the Board. Substantively, SJT has used its Reply to re-hash its case in the aforementioned state court proceeding in an attempt to divert the Board’s attention away from the facts and issues genuinely at issue. In addition, SJT glosses over the deficiency of its notice of exemption, even while tacitly admitting through its blame-shifting efforts that it cannot be a common carrier and that it has never been able to provide common carrier service, as is discussed below.

As the petitioners in both dockets, the W&P Parties are entitled to address SJT’s allegations and arguments to the extent necessary, and to close the record. *See, e.g., Atlas Land and Building Corporation and Atlas Materials Recycling Corporation – Petition for Declaratory Order – Industry Spur in Pittsburgh, PA*, FD 36380 (STB served Aug. 17, 2020); *see also, e.g., Soo Line Railroad Company – Petition for Declaratory Order*, Docket No. FD 33350, slip op. at 2 (STB served June 23, 1997) (in a declaratory order proceeding, petitioner’s responsive filing is not a prohibited reply to a reply, but rather a permissible rebuttal that is “reasonable and necessary to develop a complete record”); *Illinois State Toll Highway Authority – Petition for Declaratory Order*, Docket No. FD 36075, slip op. at 1, n.1 (STB served Jan. 17, 2017). Indeed, the posture of this case is such that analogous agency case law would actually entitle the W&P

Parties to respond to SJT's Reply. *See Pinelawn Cemetery – Petition for Declaratory Order*, Docket No. FD 35468 (STB served Apr. 21, 2015).

WHEREFORE, the W&P Parties respectfully request that the Board grant them leave to file the immediately-following Sur-reply in this proceeding.

SUR-REPLY

The fundamental issue in these proceedings is whether or not SJT is a rail common carrier subject to the Board's jurisdiction. That is a question strictly for the Board to address and resolve. No one has asked the Texas state court to opine on the issue. SJT's jurisdictional status is, however, relevant to the W&P Parties' enforcement of its state law rights, particularly as bears on barring SJT from re-entering into the San Jacinto River and Rail Park (the "Park"), and otherwise from interfering with the W&P Parties' efforts to develop that facility. That is, if SJT were to be found to be a railroad common carrier within the Park, then the W&P Parties could not bar SJT from the Park premises, even if it otherwise was entitled under state law to do so, absent the successful prosecution of an "adverse" discontinuance proceeding against SJT, with all of the resources and time that such an undertaking would consume. The issue, accordingly, is ripe for Board action, because the W&P Parties confront seeking "adverse" discontinuance authorization against SJT pursuant to 49 U.S.C. § 10903 – at considerable expenditure of W&P Parties' and the Board's resources – if the Board were to find that SJT is a carrier, a process that could be avoided entirely depending upon the outcome of these proceedings. Furthermore, if SJT's notice of exemption in the FD 35996 proceeding is false and misleading or fatally deficient, then there is no reason whatsoever for the Board to suborn such abuse of its processes by delaying action on the Petitions.

To address the question of SJT's jurisdictional status, the W&P Parties have presented evidence and argument demonstrating that SJT decidedly is **not** a railroad common carrier because – (a) the notice of exemption that SJT filed in FD 35996 is defective and materially false and misleading (and thus fraudulently-obtained), thereby rendering SJT's purposed common carrier authorization void *ab initio*; and (b) SJT has always lacked the ability to provide common carrier service, due primarily to the fact that the roughly six miles of track over which SJT sought authority to conduct common carrier operations – including connections from the proposed trackage to the interstate network – do not exist. The issue of SJT's jurisdictional status is relevant, and is timely, because the W&P Parties have permanently severed their contractual relationship with SJT, and they have absolutely no interest in re-establishing any relationship with SJT. Unfortunately, SJT has on multiple occasions invoked its asserted common carrier status as a basis to thwart the W&P Parties' plans to develop and operate the Park without SJT, and it has threatened to sue any third party that might coordinate with the W&P Parties to develop and provide railroad service within the Park.

The Board should not suspend action on the Petitions; doing so would not contribute to the resolution of the issued properly before the Board, but would be highly prejudicial to the W&P Parties.

The W&P Parties object to SJT's unnecessary and highly prejudicial request to the Board to suspend action on the subject Petitions pending the outcome of ongoing state court litigation. That litigation, as the parties appear to agree, pertains to SJT's demand for millions of dollars of damages for an allegedly wrongful termination of its agreement to operate within the Park (the "Agreement"). (The W&P Parties contend, on the other hand, that the Agreement was terminated for cause, and, as such, they dispute SJT's damages claim.) Based upon the state court pleadings, the parties appear also to concur that the Agreement *has been terminated*, thus

ending SJT's rights under state law to occupy the Park premises. W&P has absolutely no interest in resuming a relationship with SJT. All that remains, aside from the dispute over damages (if any) for an undisputed contract termination (a state law contract issue beyond the scope of this Board's jurisdictional mandate) is whether SJT is a common carrier that legitimately can invoke its status to interfere with the W&P Parties' future plans for the Park (and thereby attempt to leverage a settlement in litigation).

Again, the issue pending here is very simple – SJT's jurisdictional status (if any). Whether or not SJT is entitled to damages is entirely irrelevant to the issues this Board has been asked to decide. There is no interdependence of facts or issues, SJT's bald assertion notwithstanding. For example, even if it were true (for the sake of argument) that SJT had failed to become a common carrier because of the acts or omissions of the W&P Parties (and the W&P Parties maintain that is not at all the case), that is a factor that is only relevant to the state court proceeding. The fact would remain, regardless of fault or liability as may be assessed under state law, that SJT is not a common carrier. This Board is under no mandate to apportion damages for the alleged contract breach, or to assess fault for the failure of SJT's common carrier service aspirations. Rather, because the Board must protect its processes, and because it has primary discretion to make the requested jurisdictional determination, if SJT's exemption notice is fatally defective or materially false and misleading as the W&P Parties have shown to be the case, then swift, corrective Board action is appropriate. Allowing SJT to hide behind state court litigation, on the other hand, would not be.

For these reasons, the basic premise of SJT's self-serving attempt to evade Board action in these proceedings – specifically, that the outcome of the state court litigation will assist the Board in making a jurisdictional determination – is patently false. If anything, the reverse is

true. The Board's decision may inform whether, or to what extent, the W&P Parties properly terminated the Agreement for cause – a state court issue. SJT is aware of this and the dangers it presents to SJT's state court case, and it is certainly a factor in SJT's feeble request for Board inaction. Also, SJT knows that time is on its side, and that, for so long as these proceedings remain pending, it may continue to threaten to interfere in the W&P Parties' efforts to develop and operate the Park under a different model (for example, as a contract switching facility), and to act on those threats under the guise of its asserted common carrier status and obligation.

SJT does not dispute the deficiencies of its class exemption notice, and admits that it cannot function as a common carrier.

SJT agrees that its FD 35996 class exemption notice involves a proposal to operate as a common carrier over roughly six miles of track, none of which existed at the time of SJT's filing, and none of which has been constructed since. SJT tries to shift the discussion to its view about why the lines involved have not been constructed, seeking, incorrectly, to lay blame on the W&P Parties. But that line of argument has nothing to do with the legitimacy of SJT's exemption authority or its common carrier status, and it only demonstrates that SJT cannot seriously contest that its notice of exemption filing was substantively and procedurally deficient.²

² On a related note, SJT contends that its owners did not need concurrent authorization to continue in control of that railroad alongside an affiliated carrier, Big Spring Rail System, Inc. ("BSRS"). Reply, 7. SJT's assertion is dubious and possibly inaccurate. While it may be true that Baxter Wellmon does not control BSRS and SJT by himself, Exhibit L to SJT's Reply indicates that a consortium of one individual and two limited liability companies – Mr. Wellmon, Team HQ, LLC ("THQ"), and D&S Logistics, LLC ("D&S") – possesses a common, collective ownership interest in BSRC and SJT. That consortium of entities may require Board authorization to control, collectively, BSRC and SJT. In addition, it is unclear whether Mr. Wellmon may have a controlling interest in either THQ or D&S or both. If, as the W&P Parties believe, the aforementioned consortium of owners of BSRS and SJT need, and failed to obtain, STB control authorization (SJT indicates might be the case) to control both SJT and BSRC, then this remains yet another fatal deficiency in SJT's invocation of the Board's operation exemption procedures.

Instead, SJT seems to believe that it is entirely appropriate to seek authorization to commence common carrier service over railroad lines that have not been constructed (and to declare itself to be a common carrier with respect to those as-yet-unbuilt lines) without obtaining authorization to construct the proposed railroad lines themselves. SJT seems not to understand, or perhaps it does not agree with, the proposition that, for SJT to become a carrier, the non-existent railroad lines over which it has sought authority to operate must first be constructed as lines of railroad pursuant to Board authorization under 49 U.S.C. § 10901 (or under an individual exemption from the formal requirements of the statute), and that such railroad line construction authorization cannot be subsumed within the limited scope of SJT's operation exemption.³ While that is astonishing enough, it also appears that SJT believes that it is equally acceptable to indicate to the Board, as it did in its class exemption filing in FD 35996, that the six miles of railroad line that it sought authorization to operate already exists,⁴ when none of it does. That final factor is sufficient by itself to void SJT's class exemption.

SJT has not cited to, and the W&P Parties are unaware of, any Board precedent holding that the would-be common carrier operator of "proposed" trackage would have anything more than permissive authority to become a common carrier *unless and until the lines in question have been constructed pursuant to appropriate railroad line construction authorization processes*. And since the lines over which SJT would operate have not been constructed, SJT's

³ The W&P Parties acknowledge that, if the currently-nonexistent lines that SJT had proposed to operate over in the Park were to be constructed with the intent that common carrier service would be provided over them as SJT had planned to do, then the W&P Parties would need to seek Board authorization for such railroad line construction as part of such a plan.

⁴ See, SJT Notice of Exemption (FD 35996, filed on March 10, 2016), 1 (referring, in the present tense, to a line of railroad "located in" Houston that SJT proposes to operate that SJT incorrectly states "is owned" by SJRE-RS); 3 (stating that SJT will commence operations as soon as SJT "is given the right to operate the line"); 4 (referring, again in the present tense, to "six miles (33,000) feet within" the Park).

authorization to operate over those tracks remains, at best, merely permissive. That permissive authority cannot be effectuated under the circumstances, and so SJT could be nothing more than a prospective (or conditional future) common carrier, but it is not a common carrier.⁵ SJT does not argue, for example, that it advised the W&P Parties that the common carrier service plan it proposed would entail railroad line construction authorization from the Board. It seems never to have contemplated such a thing. Based upon the Reply, perhaps SJT mistakenly assumed that no such authorization under Section 10901 was necessary, or perhaps SJT thought it could bypass the Board's railroad line construction processes altogether by way of its operation exemption, which also would be incorrect,⁶ or maybe SJT's counsel was unaware at the time that the railroad lines in question were merely proposed, and did not exist (although that seems unlikely). For these reasons, favorable action on the Petitions would not only curb SJT's abuse of the Board's processes, but it would properly bar SJT from bootstrapping itself into common carrier-hood.

Finally, in contending that it had taken steps to provide common carrier service, and in offering evidence to demonstrate its willingness to provide such service had a demand ever materialized, SJT ultimately admits, tacitly, to its non-carrier status. SJT concedes that the

⁵ See Petitions at 17-18, and cf. Petitions at 22, n. 35.

⁶ See, e.g., *Joliet Bulk Barge & Rail, LLC – Acquisition and Operation Exemption – CenterPoint Properties*, FD 35875 (STB served Dec. 2, 2014), 1 (“Section 1150.31, under which this notice of exemption was filed, ‘applies to all acquisitions and operations under [49 U.S.C. §] 10901,’ but does not cover construction [of a railroad line]. Based on [the proposed operator]’s characterization, the notice of exemption may involve construction of a line of railroad, in which case Board authorization of the construction, and an environmental review under the National Environmental Policy Act, would be required. Neither [the proposed operator] nor [the owner of the subject facilities] have sought Board authority for this construction . . . If the Board were to accept [the proposed operator]’s verified notice as sufficient and complete at this time, and were to publish the notice of the proposed exemption in the *Federal Register*, the Board’s actions might be seen as tacit approval of the construction of a line of railroad without Board authority . . . As a result, [the proposed operator]’s proposed exemption will not become effective, if at all, until further order of the Board.”) (footnote omitted).

lines over which it had agreed with the W&P Parties to provide common carrier service – the ones that are the subject of SJT’s notice of exemption – were never built.⁷ Moreover, these “proposed” lines never connected to the interstate network. SJT thus admits that it lacked an essential element of railroad common carriage – a railroad line upon which to provide such service. Although SJT attempts to drag this proceeding into an ultimately irrelevant discussion about who is to blame for its predicament (and SJT should accept that blame, given its fundamental misunderstanding of agency law and regulation), the central fact remains that SJT was incapable of providing common carrier service as it had proposed in its exemption notice, and, thus, SJT has failed to become (and is not) a railroad common carrier. The Board should rule accordingly.

WHEREFORE, the W&P Parties respectfully request that the Board either reject SJT’s notice of exemption in FD 35996 as void *ab initio*, or, in the alternative, grant the W&P Parties’ request for a declaratory order as provided in its Petitions.

Respectfully submitted,

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RAILROAD SERIES**

Dated: September 7, 2021

⁷ Reply, 8 (“SJRE failed to build the rail infrastructure”); 10 (“SJRE’s failure to finance and construct the initial portion of the Rail Park”). It merits mention that the subject Agreement refers to the W&P Parties funding the construction of the track, but it says nothing about who would build that track.

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of September, 2021, a copy of the foregoing Motion for Leave to File a Sur-reply and Sur-reply was served by means of electronic mail upon:

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and by USPS First Class postage prepaid upon:

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