

April 5, 2023

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 5, 2023
Part of
Public Record

Re: STB Finance Docket No. 36660, *Baylands Development, Inc. – Verified Petition for Declaratory Order*

Dear Ms. Brown:

I am attaching for e-filing in the above-referenced proceeding (1) Baylands Development, Inc.'s Motion for Leave to File a Reply and (2) Baylands Development, Inc.'s Reply to 424 Jessie Historic Properties, LLC's Reply.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Ayelet Hirschhorn

Enclosures

**BEFORE THE
TRANSPORTATION BOARD**

STB DOCKET NO. FD 36660

**BAYLANDS DEVELOPMENT, INC. –
VERIFIED PETITION FOR DECLARATORY ORDER**

BAYLANDS DEVELOPMENT, INC. MOTION FOR LEAVE TO FILE A REPLY

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Dated: April 5, 2023

**BEFORE THE
TRANSPORTATION BOARD**

STB DOCKET NO. FD 36660

**BAYLANDS DEVELOPMENT, INC. –
VERIFIED PETITION FOR DECLARATORY ORDER**

BAYLANDS DEVELOPMENT, INC. MOTION FOR LEAVE TO FILE A REPLY

I. INTRODUCTION

Baylands Development, Inc., a non-carrier California limited liability company (“Baylands”), moves for leave to file a Reply to the Reply to Petition for Declaratory Order filed by 424 Jessie Historic Properties, LLC (“JHP”) in the above-captioned proceeding on March 16, 2023 (“JHP Reply”). JHP’s Reply misstates the effect of applicable law and mischaracterizes both the nature of Baylands’ Petition and the question presented to the Board. In the interest of a clear and complete record, Baylands requests leave to file a concurrently filed Reply to the JHP Reply.

II. BACKGROUND

The relevant facts supporting this Motion are recounted in Baylands’ concurrently filed Reply and for the sake of brevity and efficiency are not repeated here.

III. ARGUMENT

Although the Board’s regulations generally prohibit filing a reply to a reply, 49 C.F.R. § 1104.13, it is the Board’s longstanding practice to waive this prohibition for good cause. *See Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, NOR 42133, slip op. at 1, n. 1 (STB served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, FD 33582, slip op. at 1 (STB

served Oct. 27, 1998). 49 C.F.R. § 1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”). In deciding whether to grant leave to file a reply to a reply, the Board considers whether granting permission will contribute to compiling a full record. *City of Alexandria--Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”). The Board will also consider whether the filing will prejudice another party or broaden the issues raised in the proceeding. *BNSF Railway Company — Abandonment Exemption — In Kootenai County, ID*, AB-6, slip op. at 1 (STB served Nov. 27, 2009) (It is “within the Board’s discretion to permit otherwise impermissible filings” and “because it provides a more complete record, clarifies the arguments, will not prejudice any party . . . it is appropriate to do so here.”).

Here, good cause exists for granting Baylands permission to file its Reply to JHP’s Reply. First, Baylands’ Reply identifies and clarifies JHP’s misapplication of the Board’s legal authority to issue declaratory orders regarding its jurisdiction over excepted track. See JHP’s Reply at 2, 7. Moreover, JHP’s Reply mischaracterizes the dispute before the Board and the question presented by Baylands. As discussed in Baylands’ Reply, JHP cites to parts of the record in the California State Court proceedings involving JHP and Visitacion Investment, LLC, that do not speak to JHP’s (or its predecessors in interests’) intent with respect to continuing to hold out the Spur for common carrier purposes. JHP misleads the Board to revisiting the State Court issues, rather than the question presented by Baylands.

Second, Baylands’ Reply will not prejudice JHP or broaden the issues raised in the proceeding. To the contrary, Baylands’ Reply refocuses these proceedings on the question presented without introducing any additional evidence.

IV. CONCLUSION

For the foregoing reasons, Baylands respectfully requests that this Board grant its Motion for Leave to File a Reply.

Respectfully submitted,



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Counsel for Baylands Development, Inc.

Dated: April 5, 2023

**Before the
Surface Transportation Board
Washington, D.C.
FD 36660**

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2023, I have caused a copy of the foregoing Motion for Leave to File a Reply to be served upon the following individuals via first class mail, postage prepaid:

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STB DOCKET NO. FD 36660

**BAYLANDS DEVELOPMENT, INC. –
VERIFIED PETITION FOR DECLARATORY ORDER**

**BAYLANDS DEVELOPMENT, INC.’S REPLY TO
424 JESSIE HISTORIC PROPERTIES, LLC’S REPLY**

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**BAYLANDS DEVELOPMENT, INC.’S REPLY TO
424 JESSIE HISTORIC PROPERTIES, LLC’S REPLY**

I. INTRODUCTION

Baylands Development, Inc., a non-carrier California limited liability company (“Baylands”), respectfully submits this Reply to 424 Jessie Historic Properties, LLC’s (“JHP”) Reply, which was filed in the above-captioned proceeding on March 16, 2023 (“JHP’s Reply”). JHP’s Reply misstates the effect of applicable law and both mischaracterizes the nature of Baylands’ Petition and the question Baylands presented to the Board. In the interest of a clear and complete record, Baylands files this Reply to rebut these errors in JHP’s Reply.

II. BACKGROUND

On February 24, 2023, Baylands filed a Petition for Declaratory Order with the Board in Finance Docket No. 36660 (the “Petition”) requesting that the Board determine that a railroad spur (“Spur”) located on the former Southern Pacific Railroad’s (“SP”) Bayshore Yard is abandoned and is no longer needed as part of the interstate rail network. JHP purportedly owns a rail access easement on the portion of the Spur located on Visitacion’s, one of the former Bayshore Yard properties’ owners, property, Petition at 4, which it acquired along with vehicular and communications easements over the former Bayshore Yard from SP’s successor, the Union Pacific Railroad Company (“UP”). UP continues to own the portion of the Spur to the south of

Visitacion Investment, LLC's ("Visitacion") property, located on property now owned by Sunquest Properties, Inc. ("Sunquest"), Petition at 4-5. JHP also owns a nearby property located adjacent to Caltrain's Peninsula Corridor railroad right-of-way, north of where the Spur meets the Peninsula Corridor ("JHP Property"). In 2019, Visitacion, sought relief in California State Court ("State Court"), asserting that the JHP easements were abandoned under state law. The State Court determined that JHP had not abandoned the easements. That decision is being appealed.

On March 16, 2023, JHP filed JHP's Reply, raising three arguments against Baylands' Petition. First, JHP argues that the Board "should not intervene to usurp the State Court's Judgment governing Visitacion's and JHP's property rights under state law." Reply at 6. Second, JHP argues that it is not within the Board's "authority" to determine whether the Spur has been abandoned because the Spur is excepted track under 49 U.S.C. § 10906. Reply at 7. And third, JHP argues that the evidence presented in the State Court proceedings indicates that neither JHP nor its predecessors in interest have abandoned the Spur. *Id.* at 8-10.

III. ARGUMENT

The Board should reject JHP's arguments because JHP misinterprets the law and draws improper legal conclusions from the facts it presents.

A. JHP's assertion that the Board has no "authority" over the Spur reflects a fundamental misunderstanding of the law and its implications.

JHP's assertion that the Board lacks the "authority" over the Spur reveals its misunderstanding of the law. In fact, the Spur's status as excepted track has no bearing on the Board's ability to rule on its status and whether it is abandoned.

The exception granted to railroads from the Board’s licensing authority under federal statute does not prevent the Board from issuing declarations regarding their status. *See* 49 U.S.C. § 10906; *Pinelawn Cemetery—Petition for Declaratory Order*, FD 35468, slip op. at 6-7 (STB served Apr. 21, 2015) (“[B]ecause it is part of the national rail system, excepted track is subject to federal regulation.”). Indeed, the Board can and does make rulings regarding the status of track—whether excepted, not excepted, or completely outside of its jurisdiction—as a matter of its inherent power to determine the boundaries of its own jurisdiction. *See id.* at 6 (determining the status of track in order to clarify jurisdiction and preemption questions).

Moreover, the case law cited by JHP simply does not support its position and completely ignores other directly relevant precedent, including the Board’s decisions cited in Baylands’ Petition where the Board has made precisely the sort of determination regarding excepted track that Baylands now asks the Board to make. *See* Petition at 14, *citing NewVista Property Holdings, LLC—Petition for Declaratory Order*, FD 36040, slip op. at 2 (STB served Mar. 17, 2017) (determining that excepted track had been abandoned and was no longer subject to the Board’s jurisdiction); *Oakland Global Rail Enter. —Pet. for Declaratory Order*, FD 36168, slip op. at 8 (STB Served Mar. 15, 2019) (“OGRE”) (making a determination that track was excepted track subject to the Board’s jurisdiction). Accordingly, the Board should reject JHP’s position that the Board has no legal “authority” to determine its jurisdiction over the Spur.

B. Contrary to JHP’s assertions, the State Court did not and could not decide the question presented to the Board regarding the regulatory status of the Spur.

JHP’s argument that the State Court ruling precludes a Board determination ignores that Baylands has not asked the Board to determine a question of State property law. Rather, Baylands seeks a Board declaration as to whether the Spur has been abandoned for the purposes

of common carrier service, thereby removing it from the Board's jurisdiction. This is a question that a State Court does not have the authority to answer. *See* Petition at 21-22, *citing Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 147 (1946) (determining ICC jurisdiction over a rail line remained notwithstanding the railroad retaining no property interest); *OGRE*, slip op. at 8 (determining continuation of Board jurisdiction over rehabilitation of excepted track notwithstanding the contested property rights over the line); *Pinelawn Cemetery*, slip op. at 9-10 (noting that excepted track could still fall within the Board's jurisdiction even if the operating railroad's property rights were terminated).

The independence of the Board's jurisdiction from property issues dealt with in the State Court is precisely the reason why Baylands now seeks the Board's determination. The continuation of the rail access easements asserted by JHP suggests that the Spur could be a rail line subject to the common carrier obligation and the Board's jurisdiction, even though the available evidence in the record indicates that there is no intent to use the Spur for common carrier rail service. The possibility of a common carrier obligation on the Spur would impede Baylands' development of its property and preempt the City of San Francisco's approved plan for the area and associated zoning code. *See* Petition at 20-21.

The Board can, and should, rule on the Petition because the Board is addressing a question solely within its purview and distinct from the issues covered in the State Court proceedings.

C. None of JHP's evidence supports an intent to use the Spur to provide common carrier rail service.

Contrary to JHP's assertions, none of the evidence cited by JHP from the State Court proceedings supports the notion that either JHP or UP intends to use the Spur to provide *common*

carrier rail service. In determining abandonment, the Board must consider the totality of circumstances regarding the conduct of the line's owner or operator to hold out as offering the line for common carrier service. See Petition at 14, *citing Pinelawn Cemetery—Petition for Declaratory Order*, FD 35684, slip op. at 10-11 (STB served Apr. 21, 2015). At most, JHP's evidence regarding SP and UP's conduct reflects a desire by these railroads to sell portions of the derelict Bayshore Yard to developers for the benefit of vehicular access, non-railroad utility access, and other activities that do not facilitate common carrier service. See Reply at 8-9. Notably, UP, the railroad that would serve the Spur through its rights over the Peninsula Corridor, sold the portion of the Spur on Visitacion's Property to JHP's predecessor without any plan for providing service to the Spur. *JGB Prop., LLC – Petition for Declaratory Order*, FD 35817, slip op. at 7-8 (STB served May 22, 2015) (spur owner entered into an agreement between property owner and rail carrier to provide rail service to the property). UP also owns the portion of the Spur on Sunquest's property and has not objected to or commented on the Petition, although notice was served on the common carrier operating the closest mainline. See Petition, Certificate of Service. If UP were interested in continuing rail service on the Spur, it would have done so by commenting on the Petition.

Moreover, regardless of the intent of the former owners of the Spur, the conduct of its current owner JHP, lacks any intent to continue common carrier service. The submission of plans for the JHP Property for mixed-use development that completely precludes rail use clearly signals JHP's intent to not continue common carrier service. Petition at 9 and Exhibit M. None of the record evidence from the State Court case cited in JHP's Reply indicates an intent to continue common carrier service. The best JHP can muster is an assertion that: "the JHP

Property is undeveloped, and no determination has been made as to its development for commercial, residential, or other uses” Reply at 9. This statement does not even assert common carrier service has been considered, let alone substantiated by such a position.

Taken together, JHP’s clear actions towards developing the JHP Property in line with applicable mixed-use development, JHP’s lack of interest in uses of the Spur for common carrier purposes (as demonstrated in the State Court proceedings and record), and the lack of any physical connection between the JHP Property and the Spur in any case, all indicate JHP has no interest in common carrier service on the Spur. If not already abandoned, the Board should declare the Spur abandoned as its continuing common carrier status would serve no purpose other than to interfere with locally approved plans for redeveloping long derelict Bayshore Yard to meet today’s housing and development needs for the area.

IV. CONCLUSION

For the foregoing reasons, Baylands respectfully submits this Reply.

Respectfully submitted,



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