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August 17, 2023

VIA E-FILING

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

Re: Richmond Waterfront Industrial Park, LLC – Petition for Declaratory Order, FD 36710

Dear Ms. Brown:

The Philadelphia Belt Line Railroad Company hereby provides its Reply in Opposition to Richmond Waterfront Industrial Park, LLC's Petition for Declaratory Order, served July 28, 2023. If there are any questions about this matter, please contact me directly, either by telephone: 202-663-7823 or by e-mail: wmullins@bakerandmiller.com. . If I am unavailable, you may contact Spencer M. Naake, who can be reached at (202) 663-7829, or by e-mail at snaake@bakerandmiller.com.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins
Attorney for The Philadelphia Belt Line Railroad
Company

Enclosures
cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36710

**RICHMOND WATERFRONT INDUSTRIAL PARK, LLC
– PETITION FOR DECLARATORY ORDER**

**REPLY OF THE PHILADELPHIA BELT LINE RAILROAD COMPANY IN
OPPOSITION TO THE PETITION FOR DECLARATORY ORDER**

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August 17, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36170

**RICHMOND WATERFRONT INDUSTRIAL PARK, LLC
– PETITION FOR DECLARATORY ORDER**

**REPLY OF THE PHILADELPHIA BELT LINE RAILROAD COMPANY IN
OPPOSITION TO THE PETITION FOR DECLARATORY ORDER**

On July 28, 2023, Richmond Waterfront Industrial Park, LLC (“RWIP”) filed a Petition for Declaratory Order requesting a declaration by the Surface Transportation Board (“STB” or “Board”) that a purported railroad easement traversing RWIP’s property (the “Easement”),¹ the tracks lying on that Easement (together with the Easement, the “Line”), and the operations over that Line have not, and have never been, subject to the Board’s jurisdiction.² Because the issues raised in the Petition are currently the same issues subject to a state court action filed by RWIP, The Philadelphia Belt Line Railroad Company (“PBL”) requests that the Board dismiss the Petition, or alternatively, if the Board does not dismiss the Petition, hold the Petition in abeyance pending resolution of RWIP’s state court appeal.³

¹ Although RWIP uses the term “easement,” in the underlying state court proceeding it was referred to as the “Right-of-Way.” (“ROW”). PBL believes that it owns some or all of the ROW in fee simple and that it is not an easement.

² See *Richmond Waterfront Industrial Park, LLC – Petition for Declaratory Order*, FD 36710 (filed July 28, 2023) (the “Petition”) at 2.

³ RWIP has filed an appeal in the Superior Court of Pennsylvania at Case No. 1172 EDA 2023 (the “Superior Court Appeal”) appealing a lower court decision issued on December 6, 2022, by the Court of Common Pleas in Philadelphia, Pennsylvania (“Lower Court”) at Civil Action No. 2022-02872 (“Lower Court Order”) dismissing RWIP’s amended complaint.

The Petition is nothing more than forum shopping by RWIP to overcome an adverse decision in the ongoing state court proceedings. The Board should not facilitate RWIP's forum shopping effort. Indeed, as explained below, the Petition should be dismissed because it is (1) untimely and procedurally improper; (2) contrary to precedent; and (3) serves no judicial or STB purpose.⁴

ARGUMENT

A. The Board Should Dismiss the Petition As Untimely And Procedurally Improper At This Stage

Although RWIP's Petition is styled as seeking a declaratory order, the Petition is just an attempt at forum shopping to get a different opinion than that issued by the Lower Court. RWIP could have sought the very same declaratory order that it now seeks before filing its state court action or during the Lower Court proceedings, but it did not. Instead, from the outset of its state court-initiated proceeding, RWIP insisted that the dispute belonged in state court and that the STB had no jurisdiction over the matter.⁵ During the Lower Court proceeding, RWIP could have sought a stay and referral to the STB or requested referral to the STB based upon the doctrine of primary jurisdiction.⁶ RWIP chose not to do so. Only now, after having lost in the

⁴ Alternatively, the Board could hold the proceeding in abeyance pending the outcome of the state court proceedings.

⁵ See *Petition*, Exhibit B, Lower Court Order at p. 6 ("RWIP next asserts that because PBL is not a statutorily defined "rail carrier," PBL is not subject to STB's express and exclusive jurisdiction under Section 10501(b)(1).") In the Court of Appeals proceeding, inconsistent with its position here, RWIP continues to insist in its recently filed brief that this matter belongs in state court, that the case should be remanded to the Lower Court, and a period of discovery and fact finding should be allowed at the state court proceeding. See Exhibit A to this reply, Appellant Brief filed in the Superior Court on 8/15/2023, at pp. 11-12; 19-21 (emphasis supplied).

⁶ The doctrine of primary jurisdiction can be invoked when both a court and an agency, such as the STB, have concurrent jurisdiction and where the expertise of the agency can help facilitate a **lower court's opinion** regarding application of the facts to a particular specialized area of the law. See *Norfolk S. Ry. Co. v. Balt. & Annapolis R.R.*, 715 Fed. Appx. 244, 249 (4th Cir. 2017) (emphasis supplied); citing *Env'tl. Tech Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996)

Lower Court, does RWIP seek the STB's views, but only after it appealed the decision to Pennsylvania's Superior Court.

Rather than waiting for the Superior Court of Pennsylvania to decide its appeal, RWIP has now filed an Application for Stay in the Superior Court Appeal⁷ and filed its Petition with the Board. RWIP does so in hope of getting the answer it wants from the STB, while keeping its options open in the Superior Court Appeal.⁸ Yet, for RWIP to now want to go in front of the very agency that it has consistently claimed did not have jurisdiction risks not only wasting the Board's resources but those of the parties⁹ and the state courts as well.

Granting the Petition at this time risks wasting the resources of both the Pennsylvania Superior Court and the STB. The proper course of action is for the Board to wait for the decision by the Superior Court, which decision will set the path for RWIP's next actions. If the Superior Court reverses or remands, RWIP can then go back to the fact-finding court and in that context, consistent with precedent, request a stay and referral to the Board. If the Superior Court upholds the Lower Court Order, then RWIP can file the appropriate actions under ICCTA. As such, there

("A district court might refer a case to an administrative body to resolve "issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion.") (emphasis supplied). The doctrine is not applicable at the appellate stage, which is another reason the STB should dismiss the Petition at this time. RWIP is simply trying to get around its failure to adequately invoke the doctrine when it was procedurally appropriate to do so.

⁷ PBL is opposing the stay request which has not yet been decided by the Superior Court.

⁸ A stay is not warranted in the Superior Court Appeal as the narrow legal issue on appeal – whether the Lower Court correctly held that the STB has express and exclusive jurisdiction over matters involving the abandonment of railroad tracks – is well within the Superior Court's purview to decide. *See Strasburg Scooters, LLC v. Strasburg Railroad, Inc.*, 210 A.3d 1064 (Pa. Super. Ct. 2019) (upholding as correct trial court's decision sustaining preliminary objections based on lack of subject matter jurisdiction in a case relating to a railroad's use of sidetracks that purportedly interfered with Plaintiff's use of its property).

⁹ It also is a delay tactic that only benefits RWIP to wrongfully use and occupy PBL's right-of-way and tracks without RWIP having any established rights in or to PBL's property.

simply is no need for the Board to act at this time. *See Grafton and Upton Railroad Company – Petition for Declaratory Order*, FD 36518, slip opinion at 3 (STB served November 3, 2021) (“Abeyance would promote efficiency here because resolution by the state court... could moot the need for the declaratory order.”).

During the Lower Court proceeding, and even before that, there was nothing stopping RWIP from commencing a proceeding before the STB, but it chose not to. Instead, it waited until July 28, 2023, seven months after RWIP filed its appeal,¹⁰ to do so. There is no legal basis for RWIP to pursue alternative remedies at the STB at this point.¹¹ Had RWIP followed the “proper course of action”¹² as outlined by the Lower Court and submitted a petition to the STB at the outset, then *arguendo*, there would be a legal basis for a petition for declaratory order. By first appealing the Lower Court’s adverse decision in state court and then filing this Petition after seeking a stay, RWIP is simply forum shopping to hedge its bets. RWIP is clearly trying to gain some form of favorable assertion by the Board to challenge an adverse decision in an ongoing state court proceeding that is at the appellant court level. This is improper and the Board should dismiss the Petition, or alternatively, place this proceeding in abeyance.

The Board should not allow RWIP to have it both ways. Having sought an appeal of the Lower Court Order, there is no basis for STB action at this time. Having appealed, and with the Pennsylvania Superior Court having to base its decision on the record in the Lower Court, which

¹⁰ On January 5, 2023, RWIP filed its appeal from the Lower Court’s Order.

¹¹ Under the doctrine of primary jurisdiction, the Lower Court could have referred the case to the STB to help facilitate its decision, but RWIP did not seek such a referral.

¹² *See Petition*, Exhibit B, Lower Court Opinion at p. 7 (The Lower Court outlined that, “the proper course of action for this matter is for either party to first petition the STB to determine if PBL has abandoned the tracks. Once the STB decides, a state trial court may thereafter take subject matter jurisdiction on whether RWIP has quiet title on the right-of-way property under review in this dispute.”)

record does not and cannot include any extraneous STB orders,¹³ there is no reason for the Board to act at this time. The legal issue for the Superior Court is clear: either the Lower Court was right or wrong when it ruled that the STB had exclusive jurisdiction over the matter. That jurisdictional question should be decided by the Superior Court as that is where RWIP appealed the issue first raised in the Lower Court.

B. Consistent With Precedent, The Board Should Refrain To Act At This Time

RWIP claims that Board precedent supports the STB ruling on its Petition, but it does not. Even the precedent cited by RWIP clearly states that when a case is pending in state or federal court, “[t]he Board is not the proper forum for deciding the extent of a court’s jurisdiction.”¹⁴ The Board has often refused to issue declaratory judgment orders where preemption and other railroad related issues were already pending before a state court. *See Waste Management of Washington, Inc., & Waste Mgmt. Disposal Servs. Of Oregon, Inc.- Petition for Declaratory Ord.*, No. FD 36511 (STB served February 1, 2022) (issues raised in Waste Management's petition were currently pending before a state court, which had concurrent jurisdiction to decide §10501(b) preemption questions; Board denied Waste Management's request for a declaratory order and declined to institute a proceeding.”); *see also CSX Transportation, Inc. Petition for Declaratory Ord.*, FD 35832 (STB served February 24, 2016)

¹³ *See Hart v. Arnold*, 2005 PA Super 328, 884 A.2d 316, 330-31 (Pa. Super. 2005) (The Pennsylvania Superior Court’s standard of review of a court’s decision is “limited to a determination of whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law.”)

¹⁴ *See Jimmy Lee Waneck and Starr Swearingen Waneck, et al – Petition for Declaratory Order*, FD 36167, slip opinion at 4 (STB served May 25, 2018) (“*Waneck I*”); *citing Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (noting that the determination of a court’s jurisdiction is exclusively for the court to decide); *B&H Med., LLC v. United States*, 116 Fed. Cl. 671, 682 (2014) (explaining that an agency does not have expertise to determine a federal court’s subject matter jurisdiction).

(CSX filed a motion to stay the state court action in order to be able to file a petition for declaratory order with the Board and request that the Board find that the state court claims were preempted by 49 U.S.C. 10501(b) of the ICCTA; Board denied the petition as the preemption issue was already pending in state court). There is no reason for the Board not to follow those precedents, especially when the Lower Court Order is on appeal and the Superior Court cannot legally consider any facts outside of the Lower Court's Order.

Moreover, RWIP does not cite a single case where the Board has provided guidance or a declaratory order addressing factual and legal issues when a state case is pending at the appellate level.¹⁵ RWIP purports that “[i]n past cases the Board has provided such guidance when a lower court has ruled on the jurisdictional issue and the matter is on appeal,”¹⁶ but as stated in *Waneck II*, the case was in the lower court when the guidance was provided.¹⁷ RWIP does provide Board precedent where a New York Appellate Court instructed the lower court to seek guidance from the STB,¹⁸ but the case had been remanded back to trial court; whereas; here, the matter is still before the Superior Court and the record cannot be expanded. In addition, RWIP cites to another STB case as an example of where the Board provided input “even where a court has denied a

¹⁵ Although the Board has occasionally issued “guidance” in its decision dismissing a declaratory order petition, such “guidance” decisions have been issued when the state court proceedings are still in the fact-finding stages in a lower court or where an appeals court has remanded the proceeding back to the lower court. Every case cited by RWIP’s counsel involved proceedings that were at the lower court fact finding stage or had been remanded to the lower court. Counsel for PBL have been unable to find a single instance similar to the facts and procedural posture of this case where the Board has issued such a “guidance” decision, yet alone instituted a declaratory order proceeding and allowed discovery, when the underlying state court proceeding was at the appellate stage, and counsel for RWIP has not cited to any such precedent.

¹⁶ *Petition*. at 16; citing *Waneck*, FD 36167 (STB served October 31, 2018) (“*Waneck I*”), slip opinion at 4.

¹⁷ See *Waneck II* at 4.

¹⁸ See *Pinelawn Cemetery – Petition for Declaratory Order*, FD 35468 (STB served April 21, 2015).

party's motion to stay an appeal and to refer jurisdictional issues to the Board.”¹⁹ However, the procedural path in *Green Mountain* could not be more dissimilar to this matter. More significantly that matter was not on appeal.²⁰ Here, RWIP's Petition raises similar if not identical issues already decided by the Lower Court and on appeal with the Superior Court, and it requests similar if not identical relief, i.e., a finding of no STB jurisdiction and a period of discovery and fact finding. *See* Exhibit A. Consistent with the above precedents, there is no basis for the Board to act at this time.

C. Granting The Petition At This Time Serves No Judicial Or Board Purpose

RWIP seeks a declaratory order “declaring that the tracks and Line transversing Petitioner's Property are neither a line of railroad subject to §10901, nor a ‘side track’ subject to §10906, and that the Board therefore has no jurisdiction over the Line and the parties’ dispute,” or alternatively, RWIP requests that “[a]t a minimum... [the Board] should provide much needed guidance to the Superior Court of Pennsylvania on the **facts** and applicable legal principles.”²¹ For several reasons, issuance of either a factual based decision or “guidance” based upon facts submitted in the Petition will serve no policy or legal purpose.

In its Petition, RWIP asserts that the “Lower Court engaged in no review of the facts or events to support its ruling” and that “the Lower Court further clouded the issue by concluding

¹⁹ *See Green Mountain R.R.- Petition for Declaratory Order*, FD 34052 (STB served May 28, 2002) (“*Green Mountain*”).

²⁰ *Id.*, slip opinion at 4 (“On June 5, 2001, GMRC filed with the Board its request for a declaratory order. On June 6, 2001, GMRC filed in the United States District Court for the District of Vermont a complaint for injunctive and declaratory relief. On September 26, 2001, the District Court issued a ruling denying GMRC's motion to stay the court proceedings and to refer the case to the STB.”) Such a procedural record is not even remotely like the procedural status of this proceeding.

²¹ *Petition* at 21 (Emphasis Supplied).

the tracks had a specific legal status that PBL did not even assert.”²² It is important to note that the Lower Court’s decision was on preliminary objections, a Pennsylvania state court practice similar to a motion to dismiss and based solely on RWIP’s Amended Complaint and the attachments thereto. There was no “factual record” to review other than the allegations of the Amended Complaint and its attachments, which are presumed to be true for purposes of the preliminary objections. Whether the Lower Court erred in its assessment of whether the Lower Court had subject matter jurisdiction over the abandonment count in RWIP’s state court complaint is solely a legal question for the Superior Court, not the STB. The STB does not serve as an appellate court for state court decisions and has no authority to overrule the Lower Court. That is the purview of the Superior Court. The Superior Court’s standard of review is limited to the record of the Lower Court and cannot consider facts or legal arguments not raised in the Lower Court Order.²³ As such, issuance of either “guidance” based upon facts set out in the Petition or a decision based upon a new limited factual record cannot even be considered by the Superior Court

RWIP not only requests a legal opinion, but also requests a “modest 90-day discovery” period given the “complex factual background of this case.”²⁴ As noted, the only issue on appeal is whether the Lower Court erred in its decision, which begs the question why does RWIP request a “modest 90-day discovery period”²⁵ in its Petition? PBL is baffled as to how such factual issues, and a decision based upon those facts, can help illuminate the Superior Court,

²² See *Petition* at 17.

²³ See *Hart v. Arnold*, *supra*.

²⁴ See *Petition* at 21-22.

²⁵ See *Petition* at 22.

which by its very nature cannot focus on facts outside of the Lower Court's record, which in this case is solely the Complaint and its attachments.

Even if the Board were to rule entirely in RWIP's favor and the Superior Court were somehow empowered to consider the Board's ruling, the Superior Court would still be free to ignore the Board's decision, even if just in the form of "guidance." As the Board explained in *Waneck II*, "[t]he guidance explains the Board's view of the preemption issue, but it is not binding or controlling, as the preemption issues **are properly before** the district courts (or potentially the relevant courts of appeals) and **those courts have concurrent jurisdiction to determine preemption.**"²⁶ Thus, the Superior Court has complete discretion to ignore any STB guidance, if provided, as both the STB and the courts have concurrent jurisdiction.

This matter does not warrant an STB proceeding. An STB proceeding at this time serves no purpose and wastes the Board's time and resources. A declaratory order or guidance by the STB would be meaningless to the issues presented in the Superior Court Appeal as there are no timely substantial issues for the Board to provide guidance on or decide.

At this time, there is no policy or legal reason to issue any form of a declaratory order. RWIP has cited no precedent where the Board has the authority to reverse or uphold a state court's decision or otherwise influence an appellant proceeding. And even if the STB rules, as noted, the courts can ignore it – whether on the merits or in the form of "guidance." Accordingly, as the STB gives deference to state courts and has no legal authority to reverse or uphold the Lower Court's decision, PBL respectfully requests that the Board dismiss the Petition, or alternatively, hold the proceeding in abeyance, if the Board finds cause.²⁷

²⁶ See *Waneck II* at 4 (Footnote Omitted) (emphasis supplied).

²⁷ PBL respectfully urges that the Board not expand the factual record of a matter on appeal in state court by issuing a declaratory order or by providing guidance. It should either dismiss the

CONCLUSION

RWIP's Petition is nothing more than a veiled attempt by RWIP to challenge an adverse decision in an ongoing state court proceeding. The STB is simply not the proper forum for RWIP's ill-conceived purpose, which goes against the course of action outlined by the Lower Court, Board precedent, and serves no judicial or policy purpose. The proper course of action is for the Board to allow the Court of Appeals to rule before proceeding with any Board action. Only after the Court of Appeals rules will the parties and the Board be able to determine the proper legal path to pursue. Thus, for the foregoing reasons, the Philadelphia Belt Line Railroad Company requests that the STB dismiss Richmond Waterfront Industrial Park, LLC's Petition or, in the alternative, hold the proceeding in abeyance.

Respectfully submitted,

/s/ William A. Mullins

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August 17, 2023

Attorneys for The Philadelphia Belt Line Railroad
Company

Petition, or, alternatively, hold it in abeyance until after the Superior Court rules. However, if the Board is inclined to rule on the merits of the Petition, PBL requests that the Board establish a procedural schedule by which the parties can take discovery and then allow the parties to address the merits. In such a proceeding, PBL will vigorously dispute the argument that the Line is outside of the STB's jurisdiction. If the record is developed, PBL intends to establish that the Line was operated as a 49 U.S.C. §10901 line of railroad and that PBL has a residual common carrier obligation on the Line. At a minimum, PBL will establish that the Line certainly qualifies as a sidetrack or spur track under 49 U.S.C. §10906.

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36710

**RICHMOND WATERFRONT INDUSTRIAL PARK, LLC
– PETITION FOR DECLARATORY ORDER**

**REPLY OF THE PHILADELPHIA BELT LINE RAILROAD COMPANY IN
OPPOSITION TO THE PETITION FOR DECLARATORY ORDER**

EXHIBIT A

**BRIEF FOR APPELLANT
RICHMOND WATERFRONT INDUSTRIAL PARK, LLC
FILED IN IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1172 EDA 2023**

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1172 EDA 2023

**RICHMOND WATERFRONT
INDUSTRIAL PARK, LLC,**

**March Term, 2022
No. 02872**

Plaintiff/Appellant

Commerce Program

v.

**PHILADELPHIA BELT LINE
RAILROAD COMPANY,**

1172 EDA 2023

Defendants/Appellees

**BRIEF FOR APPELLANT
RICHMOND WATERFRONT INDUSTRIAL PARK, LLC**

Appeal from the Order of December 6, 2022 of the Honorable Ramy I. Djerassi,
In the Court of Common Pleas of Philadelphia County at
Civil Action No. 2022-02872

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Dated: August 15, 2023

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ORDER IN QUESTION

And Now, on this 6th day of December 2022, upon consideration of Defendant [Appellee] Philadelphia Belt Line Railroad Company’s Preliminary Objections to Plaintiff [Appellant] Richmond Waterfront Industrial Park, LLC’s Amended Complaint, it is hereby **ORDERED** as follows:

Objections to Count I, II, and III^[1] pursuant to Pa. R.C.P. 1028 (a) (4) – legal insufficiency of a pleading (demurrer) – are OVERRULED.

Objection to Count IV^[2] pursuant to Pa. R.C.P. 1028 (a) (1) – lack of subject matter jurisdiction – is SUSTAINED and Plaintiff’s [Appellant’s] complaint is DISMISSED. *Strasberg*^[3] *Scooters, LLC v. Strasburg Rail Road, Inc.* 210 A.2d^[4] 1064, 1069 (Pa. Super. 2019[]) (“Simply put...if, for example, an action concerns the ‘operation or abandonment’ of side tracks, the trial court must dismiss the action due to the STB’s exclusive jurisdiction over the proceedings”).

¹ The third preliminary objection count, not the fourth preliminary objection count, as the trial incorrectly states in this order, raised the issue of subject matter jurisdiction. In its March 1, 2023 Opinion, however, the trial court has correctly noted that the preliminary objection in question—concerning the absence of subject matter jurisdiction—was addressed in Count III.

² See, n. 1, *id.*

³ “Strasberg” is misspelled—it should be “Strasburg.”

⁴ “A.2d” is a miscite—it should be “A.3d.”

As this court does not have subject matter jurisdiction, Plaintiff must bring the matter to the federal[sic] Safety Transportation Board (“STB”) pursuant to the ICC Termination Act of 1995 (ICCTA), 29 U.S.C. Sec. 10501 et seq. The Act completely preempts state action when it comes to determining if a railroad has abandoned its tracks. See *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F Supp. 2d 1005, 1012 (N.D. Iowa 2003) (“the STB has exclusive jurisdiction over: (2) the construction, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state.”)

Without subject matter jurisdiction, we offer no procedure for Plaintiff to follow if the STB finds the tracks at issue have been abandoned.

BY THE COURT:

/s Ramy I. Djerassi
RAMY I. DJERASSI, J.

This order is hereinafter referred as the “Order”). See, *Appellant’s Reproduced Record* (“RR”) at 224a-225a.

STATEMENT OF JURISDICTION

Subject to certain exceptions not applicable here, a party may appeal from a final order, pursuant to Rule 341. Here, the lower court's order appealed from dismisses the entire case because the lower court has concluded that it lacks subject matter jurisdiction over appellee's state law claims because of its accompanying legal conclusion that the railroad tracks on appellee were subject to the federal jurisdiction of the STB. Accordingly, the order appealed from constitutes a final order and is, therefore, appealable pursuant to Rule 341.

Jurisdiction of this appeal lies in the Superior Court of Pennsylvania pursuant to 42 Pa.C.S.A. § 742.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Appellant, Richmond Waterfront Industrial Park, LLC ("RWIP"), offers the following suggested scope and standard of review:

An appellate court reviews a trial court's ruling on preliminary objections for an abuse of discretion or an error of law. *Lovelace ex rel. Lovelace v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 874 A.2d 661, 664 (Pa.Super. 2005).

Lack of Subject Matter Jurisdiction

The trial court granted Count IV⁵ of appellee's preliminary objection on the basis of a lack of subject matter jurisdiction because it concluded as a matter of law that the railroad tracks on Appellant's property were subject to the STB's federal jurisdiction despite no evidence supporting this conclusion. The scope and standard of review of an order dismissing a complaint for lack of jurisdiction is as follows: "When determining whether a trial court correctly decided the issue of subject matter jurisdiction, this Court will accept as true all facts averred in the complaint." *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289, 291 (Pa. Super. 1997) ("*Fetterman*"), *appeal denied*, 548 Pa. 648, 695 A.2d 786 (1997). When a party raises preliminary objections challenging subject matter jurisdiction, the trial court's function is to determine whether the law will bar recovery because of the lack of such jurisdiction. The action or inaction [***2] of the parties cannot bestow subject matter jurisdiction upon a court that otherwise lacks it...."

Jurisdiction is the capacity to pronounce a judgment of the law on an issue brought before the court through due process of law. It is the right to adjudicate concerning the subject matter in a given case.... Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect. The

⁵ Actually, it was the third count of defendant's preliminary objections to the amended complaint to which appellee preliminarily objected on the basis of lack of subject matter jurisdiction. See, *supra*, n. 1.

trial court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved *sub judice*. Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case. *Bernhard v. Bernhard*, 447 Pa. Super. 118, 668 A.2d 546, 548 (Pa. Super. 1995) (internal citations and quotation marks omitted); *Drafto Corp. v. Nat'l Fuel Gas Distribution Corp.*, 2002 PA Super 241, 806 A.2d 9, 10-11 (2002).

Legal Insufficiency

In the alternative, with respect to Counts I, II, and IV⁶ of the preliminary objections to the amended complaint, raised on the basis of legal insufficiency, which the trial court overruled, a trial court should grant preliminary objections in the nature of a demurrer where the contested pleading is legally insufficient. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa.Super. 2001) (citing Pa. R.Civ.P. 1028(a)(4)). As such, “[p]reliminary objections in the nature of a demurrer requires the court to resolve the issues solely on the bases of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.” *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa.Super. 2007) (quoting *Cardenas*, 783 A.2d at 321). All material

⁶ In the Order, the lower court incorrectly refers to this count as Count III.

facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.*

STATEMENT OF THE QUESTIONS INVOLVED

A) Whether the lower court committed an error of law or abused its discretion in sustaining Count IV⁷ of PBL’s [Appellee’s] Preliminary Objections to Amended Complaint and dismissing the Amended Complaint based upon lack of subject matter jurisdiction?

Short answer: Yes. The lower court incorrectly found a lack of subject matter jurisdiction over Appellant’s state law claims based upon the premise that the railroad tracks on Appellant’s property are subject to the STB’s federal jurisdiction, without any evidentiary basis for reaching this critical threshold legal conclusion.

By simply presuming that the tracks on Appellant’s property were subject to the STB’s jurisdiction, the lower court erroneously ruled that disposition of the tracks must be decided by the federal STB, which has exclusive jurisdiction over lines of railroad under the ICC Termination Act of 1995 (“ICCTA”), Pub. L. No. 104-88, 109 Stat. 803 (1995), 49 U.S.C. § 10101 *et seq.* Specifically, the lower court ruled that any questions of whether Appellee “abandoned” the tracks on Appellant’s property can only be decided by the STB pursuant to the provisions of

⁷ See, note 1—the count concerning lack of subject matter jurisdiction was the 3rd count, not the 4th count, of Philadelphia Belt Line Railroad Corporation’s Preliminary Objections to Richmond Waterfront’s Amended Complaint.

49 U.S.C. §10903 and the agency’s regulations, and that “the proper course of action for this matter is for either party to first petition the STB to determine if PBL has abandoned the tracks.” Order at 6. However, the lower court’s ruling put the “cart before the horse,” because whether the tracks are subject to the STB’s jurisdiction is a strongly disputed threshold issue.

B) Whether the lower court committed an error of law in mischaracterizing the right-of-way at issue as a sidetrack pursuant to 49 U.S.C. § 10501(b)(2), which references “spur, industrial, team, switching, or sidetracks, or facilities”?

Short answer: Yes. “Spur, industrial, team, switching or sidetracks” are specific categories of railroad tracks that are not “lines of railroad” subject to 49 U.S.C. §10901 and §10903. Indeed, 49 U.S.C. §10906 unambiguously states: “The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” The Court’s order concluded that STB jurisdiction was present because the tracks on Appellant’s property were sidetracks, but Defendant [Appellee] never alleged that its right-of-way was a sidetrack, but rather claimed its easement was a railroad right-of-way for a common carrier line of railroad that may only be abandoned upon the prior authorization of the STB pursuant to 49 U.S.C. § 10903.

STATEMENT OF THE CASE

This action began in the Court of Common Pleas of Philadelphia County brought by Appellant herein and Plaintiff in the lower court, against Philadelphia Beltline Railroad (“PBL”), Appellee herein and defendant in the lower court. Appellant commenced this action against Appellant by filing a complaint on March 28, 2022 (“original complaint”) in Action No. 02872, March Term 2022 (“lower court action”). See, Docket, first & second page, *RR* at 003a-004a. Thereafter, Appellee filed a set of preliminary objections on May 18, 2022 to Appellant’s Complaint. See, Docket, second page, *RR* at 004a.

In response to PBL’s preliminary objections, RWIP filed an amended complaint as a matter of course on July 7, 2022 (“amended complaint”). See, Docket, third page, *RR* at 006a. Thereafter, on July 27, 2022, PBL filed preliminary objections to RWIP’s amended complaint and brief in support (“PBL’s Preliminary Objections”). See, Docket, third page, *RR* at 008a (collectively “preliminary objections to amended complaint”). In response, RWIP filed an answer to preliminary objections to amended complaint on August 16, 2022, together with a brief in support (collectively “answer to preliminary objections to amended complaint”). See, Docket, third & fourth pages, *RR* at 008a.

On December 6, 2022, Judge Djerassi, J., entered the Order granting PBL's preliminary objections to the amended complaint as follows: The court overruled the First, Second and Third Counts⁸ of the preliminary objections (all raising legal insufficiency) pursuant to Pa. R. C.P. 1028(a)(4) and sustained the Fourth Count⁹ pursuant to Pa. R.C.P. 1028(a)(1) (for lack of subject matter jurisdiction) so that this matter can be considered by the federal[sic] Safety Transportation Board ("STB") pursuant to the ICC Termination Act of 1995 (ICCTA), 29 U.S.C. Sec. 10501 *et seq.* *RR* at 224a-225a.

On January 5, 2023, RWIP filed a notice of appeal from the Order to the Commonwealth Court of Pennsylvania. On March 1, 2023, Judge Dejerassi's opinion was filed. See, ("Opinion"); *RR* at 229a-236a.

Accordingly, the undersigned filed this brief pursuant to the briefing schedule as determined by the Commonwealth Court of Pennsylvania as amended pursuant to an unopposed application, dated April 5, 2023, to extend the deadline for filing appellant's brief (in the Commonwealth Court) to May 12, 2023, which application the Commonwealth Court granted per the Prothonotary of the Commonwealth Court, pursuant to Rule 3714(c).

⁸ The trial court in its order mistakenly identifies this count as the Fourth Count. The Third Count raised the issue of lack of subject matter jurisdiction, not legal insufficiency. See, n. 1.

⁹ See, n. 8, *id.*

Thereafter, the parties filed a *Joint Application to Transfer Appeal to the Superior Court of Pennsylvania* (“Joint Application”), which the Commonwealth Court granted *per curiam*, on April 26, 2023.

As a result, RWIP submitted a version of this brief pursuant to the original briefing schedule as determined by the Commonwealth Court as extended per the unopposed application dated April 5, 2023, for filing on May 12, 2023, in the Commonwealth Court. This was prompted because the case had not yet been “physically” transferred to the Superior Court, notwithstanding that the Commonwealth Court had already granted the relief sought in the Joint Application and because it was filed in response to a deadline set by the Commonwealth Court.

Submission of that brief, although timely made, was rejected by the Commonwealth Court Prothonotary for a technical reason, but the prothonotary granted Appellant a grace period in which to submit a “corrected” version for filing to correct the technicality. However, before the corrected version could be submitted to the Commonwealth Court Prothonotary for filing, which was well within the grace period, the case was electronically transferred to the Superior Court on or about May 15, 2023, and notice of same, including notice of the Superior Court term and number, was sent electronically thereafter on May 16, 2023. As a result, Appellant could no longer file in the Commonwealth Court.

Accordingly, Appellant submits this brief for filing pursuant to a briefing schedule later issued by this court.

On July 24, 2024, Appellant’s *Application Pursuant to Rule 123 for Stay by Appellant Richmond Waterfront Industrial Park, LLC* (“Application for Stay”) was accepted for filing. This sought a stay of this Appeal to allow the STB to consider a petition for declaratory order concerning the jurisdictional status of the tracks on Appellant’s property to be adjudicated before this Appeal. See, *Richmond Waterfront Industrial Part, LLC—Petition For Declaratory Order*, Docket No. FD 36710 (“Petition for Declaratory Order”) (filed as a submission in this Court on August 7, 2023 as *Verified Statement Pursuant to Rule 123(a) by Appellant Richmond Waterfront Industrial Park, LLC in Support of its Application for Stay*, followed on August 8, 2023 with *Surrebuttal of Appellant Richmond Waterfront Industrial Park, LLC in Support of Its Application for Stay*. Previously, on August 4, 2023, PBL had filed *Appellee’s Opposition to Appellant’s Application for Stay*.

The issue raised in Application for Stay is joined and is pending a ruling by this court as of the date of the filing of this brief.

SUMMARY OF ARGUMENT

The STB does **not** automatically acquire jurisdiction over all railroad tracks that are constructed on parcels of land. Many railroad tracks exist outside of the STB's jurisdiction, and their disposition is subject to state and local property laws. Tracks obtain STB jurisdiction by the constructing and/or operating entity obtaining federal authority to construct and/or operate railroad tracks as a common carrier in interstate commerce. Consequently, the fact that a non-federal agency, such as a city government, has declared, whether that be via the enactment of an ordinance or otherwise, that it has granted an entity an easement and the right to install and operate railroad tracks does not attach federal jurisdictional status to the track.

In many cases, whether a particular segment of track is subject to the STB's jurisdiction is a very fact-specific inquiry. For example, a railroad entity claiming to be the recipient of such a grant must take affirmative action to demonstrate the existence of federal jurisdiction. Specifically, it must actually construct tracks and other structures utilized in the operation of a railroad as a common carrier railroad, or have taken other steps recognized under federal law, any of which will prompt the STB to conclude that such railroad has "perfected" its interest in or otherwise laid claims to the right-of-way, now subject to jurisdiction under federal law.

Here, the City of Philadelphia had granted by enactment of an ordinance a railroad right-of-way easement to PBL. **Appellant disputes whether the tracks on its property were constructed pursuant to the ordinance.** However, there is nothing in the ordinance that states the easements granted to PBL were for the purpose of constructing and operating tracks for which PBL would apply to the STB for federal construction and operating authority, thereby conferring federal jurisdiction over them. Nor did PBL's objections to the complaint supply any evidence of this. Instead, PBL simply offered unsupported conclusory statements. RWIP contends that its amended complaint makes sufficient allegations to establish that the easement and tracks were subject only to state law, and PBL long ago stopped accessing the easement or maintaining the tracks constructed within it.

Legally, the STB has jurisdiction over a "side track," which preempts state laws governing those tracks. However, PBL never made the claim that these tracks in question here were mere sidetracks. Rather, to the contrary, it claimed the track within the easement is a common carrier line of a railroad subject to 49 U.S.C § 10901, a legal position that RWIP disputes.

For all the following reasons, this court should reverse the order of the lower court and remand this matter to the lower court where it must overrule the preliminary objections to the amended complaint and allow the quiet title action commenced there by RWIP to proceed. Should RWIP continue to assert that the

tracks on the property are imbued with a common carrier, federal obligation may only be extinguished by the STB through formal abandonment proceedings under 49 U.S.C. 10903, but the lower court should proceed with discovery and briefing on this factual issue. The lower court simply accepting this critical legal conclusion without any evidentiary basis was erroneous and arbitrary.

ARGUMENT

I. THE RECORDED BASIS FOR THE PBL’S PURPORTED RAILROAD RIGHT-OF-WAY ACROSS THE RICHMOND WATERFRONT PARCEL

Before presenting the argument below, this Court’s understanding of this argument requires a brief summary of what exists as a matter of public record with respect to this purported right-of-way. Not only do all the references below appear as a matter of public record, but they are also all referenced in filings in the lower court, with the possible exception of the *Supplement to the 1890 Ordinance*. All are contained in the reproduced record to this Court.

December 26, 1890 Ordinance

On December 26, 1890, a City of Philadelphia Ordinance was enacted (“1890 Ordinance”),

[t]o authorize [PBL] to construct its railroads and branches upon and across streets, to authorize changes and revisions in the lines and grades of certain streets, the location of a new street, the widening of certain streets

and shifting the tracks occupied jointly by the River Front and the Philadelphia & Reading Railroad Companies, and the entering of security.

See, id., ¶¶ 8 & 9 and Exhibit B, *PBL's Preliminary Objections to Amended Complaint* (“*PBL's Preliminary Objections*”), RR at 149a-157a, filed in the underlying action. Exhibit B of *PBL's Preliminary Objections* is a copy of the entire Ordinance, which is published in a volume entitled “*Ordinances of the City of Philadelphia, From January 1–December 26, 1890 and Opinions of the City Solicitor*,” Dando Printing and Publishing Co. 1890 (“*Dando Reporter*”), which is also a public record.

The *1890 Ordinance* constitutes the legal underpinning for the creation of the purported PBL Right-of-Way. No filing in the court below, including PBL's preliminary objections to either the [original] complaint or amended complaint, suggests that this ordinance is recorded in the Office of the Recorder of Deeds or elsewhere in the records of the City of Philadelphia as evidence of the commencement of a chain of title.

Section 1 of the *1890 Ordinance* makes the following references:

- to a map that is supposed to accompany the ordinance, making reference to points marked C, D, G and I to points marked D, F, H & K. That map is supposed to depict the entire route of the PBL Right-of-Way, including all branches.
- to a second map that depicts the entire route of the PBL Right-of-Way, including all branches, to be filed at the Department of Public Works.

Section 1, *1890 Ordinance*, RR at 149a. But the copy of the Ordinance published in the Dando Reporter attaches no copy of a map nor does any filing below reference such map on record in the Department of Public Works, or elsewhere.

Section 5 of the *1890 Ordinance* provides that PBL procure “such contracts under bonds” between it and the City of Philadelphia (“PBL Shareholders Agreement”), in such form and shall be approved by the City Solicitor, as will make effectual the following conditions:

The Shareholder’s Agreement is to be a stockholders agreement providing that the right-of-way, including its branches, “shall be completed within five years after the passage of this ordinance” “and branches shall be completed each part thereof as rapidly as it shall be constructed...” Section 5, 1890 Ordinance, RR at 154a. No filing in the court below, including PBL’s preliminary objections to either the [original] complaint or amended complaint, suggests that PBL had actually entered into this agreement, a condition precedent to the effectiveness of the purported PBL Right-of-Way.

Section 13 of the *1890 Ordinance* provides that PBL, through its officers, directors and all of its shareholders, execute:

...an agreement (with the city of Philadelphia) (“PBL Officer, Directors and Shareholders Agreement”)¹⁰...

¹⁰ Not to be confused with the “PBL Shareholder’s Agreement” referenced in Paragraph 5 of the 1890 Ordinance above.

providing for the creation of a voting trust for all the stock of the said railroad company.

Id. It also refers to an agreement (which may be one and the same as the PBL Officer, Directors and Shareholders Agreement),

...providing for the gift of fifty-one (51) percent...of the present stock of the said railroad company and fifty-one (51) percent...of all the stock which may hereinafter be issued by it to such corporations (bold and underline added)¹¹ and persons as may be legally competent to act thereunder...to that end that said railroad may forever be maintained for the common use of all railroads upon equal terms, without discrimination.

Id. (bold and underline added). No filing in the court below, including PBL's preliminary objections to either the [original] complaint or amended complaint, suggests that PBL had actually entered into this agreement with the City, also a condition precedent to the effectiveness of the Right-of-Way.¹²

Supplement to the 1890 Ordinance

There is a "Supplement to the 1890 Ordinance," published in the *Ordinances of the City of Philadelphia, From January 1, 1893-December 31, 1893 and Opinions of the City Solicitor*, at 240/15 *et seq.*, Dunlap Printing Company, 1894,

¹¹ Making "corporations" plural here suggests that the "agreement" referenced in the second sentence of this paragraph is intended to be a separate agreement involving a separate corporation than the party opposite to the city in the agreement referenced in the first sentence of this same paragraph. Otherwise, absent that interpretation, "corporations" in plural makes no sense.

¹² This is just one example of the need for discovery to determine whether the Right-of-Way ever went into effect. Other examples of the need for discovery are in bold.

which is a matter of public record. This Supplement modifies the five (5) year deadline per Section 5 of the *1890 Ordinance*. **No filing in the court below, however, including PBL’s preliminary objections to either the [original] complaint or amended complaint, suggests that PBL had actually entered into this agreement with the City.**

The STB 2010 Order

The *STB 2010 Order*, issued by the Surface Transportation Board (“STB”)¹³ at 2, *RR 190a*, makes reference to an “1891 agreement between [the City] and PBL to widen Penn Street and shift the Penn Street Lines to accommodate any line construction the PBL might undertake on its new right-of-way.” *Id.* **No filing in the court below, including PBL’s preliminary objections to either the [original] complaint or amended complaint, suggests that the PBL had actually entered into this agreement with the City.**

II. THE LOWER COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION IN SUSTAINING PBL’S PRELIMINARY OBJECTION, COUNT IV¹⁴ TO RICHMOND WATERFRONT’S AMENDED COMPLAINT BASED UPON LACK OF SUBJECT MATTER JURISDICTION

A) Introduction

¹³ See, *RR* at 189a and *infra*, Argument, II. E.

¹⁴ See, notes 1 & 2 *id.*

Before getting into the details of this argument, there is a fundamental point that the lower court completely missed—RWIP does **not** concede that the legal basis which (according to PBL) supports its argument that the rails that transverse the RWIP real estate were constructed pursuant to the 1890 Ordinance. The amended complaint alleges no facts to support this proposition and, as a consequence, the lower court should have granted RWIP the opportunity to engage in discovery to show that PBL lacks the proof to support this point.

Moreover, PBL's objections contain no proof whatsoever that its tracks are a line of railroad, that is that PBL was operating as a common carrier over those tracks, thus placing it within the STB's jurisdiction. Further, it does not even allege that it constructed those tracks. Instead, PBL simply alleged that it operated as a common carrier, which allegation constitutes a pure conclusion of law, and the lower court simply took its word for it.

To the contrary, the meager record generated in the lower court does **not** support the contention that the tracks are a line of railroad and that PBL had operated as a common carrier. Accordingly, rather than jumping to the conclusion that STB acted as a common carrier, the lower court should have permitted discovery and briefing on the jurisdictional question, and then decide what to do with the case.

“Subject matter jurisdiction,” means jurisdiction over the tracks, which, according to Appellees, then determines whether the state court or the STB has jurisdiction to decide the disposition of the tracks. The lower court has conflated the two, when it held that, because the tracks are subject to the STB’s jurisdiction, then that means the STB has jurisdiction over the dispute as to whether they have been abandoned and removed. The one point does not follow the other.

As previously stated, PBL purports to own a railroad right-of-way (“PBL Right-of-Way”) in the City of Philadelphia, a segment of which runs through a parcel of real estate owned by RWIP (“RWIP Parcel”). That parcel fronts on 5000-B Richmond St.,¹⁵ and where the PBL Right-of-Way is purportedly located, parallels the west bank shore of the Delaware River.

As part of a subdivision process, Rohm and Haas Company (“Rohm and Haas”) conveyed the RWIP Parcel to RWIP via a special warranty deed, dated December 22, 1998, and recorded at D 0928 349 in the Philadelphia Recorder of Deeds Office. This brief references the segment of the purported PBL Right-of-Way that runs across the RWIP Parcel as the “RWIP Segment.”

¹⁵ That parcel is also known as a/k/a 2950 Kirkbride St. a/k/a 4601 and 4701 Bath Street.

B) The Nature of this Dispute

This case presents a dispute between PBL and RWIP with respect to whether PBL presently holds an ownership interest in the RWIP Segment, specifically in the nature of a railway right-of-way. The threshold issue, which must be resolved before any tribunal may resolve the merits of this dispute, concerns whether the right-of-way easement and the tracks within it are subject to state or federal jurisdiction. If the former, then the issue is a state property law matter over which state courts have subject matter jurisdiction (beginning in the Court of Common Pleas and now in a state appellate court). But if the tracks are considered a line of railroad subject to the STB, then that agency has exclusive jurisdiction to determine questions over whether the tracks have been abandoned and can be removed.

As will be discussed below, RWIP believes that state court has subject matter jurisdiction over this dispute, in part because the RWIP Parcel is physically located within the City of Philadelphia. *RR* at 097a. Accordingly, RWIP commenced this matter in the Philadelphia Court of Common Pleas as an action to quiet title. *RR* at 013a; 086a.

The lower court did not get the opportunity to consider the jurisdictional question in response to preliminary objections raised by PBL in response to RWIP's original complaint because RWIP filed an amended complaint as a matter

of course. Thereafter, PBL filed preliminary objections in response to the amended complaint, to which RWIP responded on the merits of the preliminary objections, instead of amending again as a matter of course. *RR* at 166a. Only then could the lower court first consider the question of subject matter jurisdiction on its merits. *RR* at 223a; 224a.

The lower court rejected PBL's argument, *inter alia*, that the allegations in the amended complaint were sufficient to establish subject matter jurisdiction before that court. However, it did so based on factually unsupported, conclusory statements asserted by PBL as to the jurisdictional status of the tracks. In essence, the lower court reached the erroneous legal conclusion that if railroad tracks are present on a parcel of land, then they must be tracks subject to the STB's jurisdiction, which is wrong as a matter of law. RWIP contends that resolution of the critical threshold issue of state versus federal jurisdiction over the easement and tracks require that the lower court allow RWIP at the very least to conduct some discovery to demonstrate PBL's conclusory statements about STB jurisdiction are flatly wrong.

Instead, without allowing any discovery, the lower court entered an order on December 6, 2022, dismissing the amended complaint for lack of subject matter jurisdiction, citing *Strasberg Scooter, LLC v. Strasburg Rail Road[sic], Inc.* 210 A.3d 1064, 1069 (Pa.Super. 2019[]) ("Simply put...if, for example, an action

concerns the ‘operation or abandonment’ of side tracks[sic], the trial court must dismiss the action due to the STB’s exclusive jurisdiction over the proceedings”).’

See, Order of December 6, 2022 at RR 224a.

Had the lower court properly considered evidence on the jurisdictional issue, **RWIP contends that it would have shown the present circumstances do not fall within the STB’s “exclusive jurisdiction” because the STB had never acquired jurisdiction over the right-of-way in the first instance.**

Accordingly, RWIP contends that the amended complaint alleges insufficient facts to establish subject matter jurisdiction in the lower court. The lower court contends that it does. But the lower court’s granting of PBL’s preliminary objection for lack of subject matter jurisdiction precludes discovery of potentially relevant facts that would determine if the lower court in fact does lack subject matter jurisdiction.

C) RWIP Has Filed a Petition Before the Surface Transportation Board to Obtain its Determination of Whether it has Jurisdiction Over the Subject Right-of-Way in Order to Aid the Court

In view of these circumstances, RWIP has filed a petition with the federal Surface Transportation Board—a petition for declaratory order (“declaratory order petition”) pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 and established precedent of referrals of such questions to the STB under the doctrine of primary jurisdiction. The declaratory order petition seeks to determine if the STB **does or**

does not have subject matter jurisdiction over the tracks and easement. As explained in the declaratory order petition, the STB has discretion to grant the petition, and denial of the petition is typically accompanied by informal guidance to trial and appellate courts on the issues presented.

The granting of the declaratory order petition—which constitutes a finding by the STB that it lacks jurisdiction over this dispute—should result in this court remanding this matter to the Court of Common Pleas to consider litigation of this dispute on the merits. **RWIP has filed an Application with this court to seek a stay of this matter pending a complete resolution of those the declaratory order petition pending before the STB.**

D) Law Applicable to Determining Whether Dispute Belongs before State or Federal Tribunal

The federal question presented here concerns whether a state claim is preempted under the Interstate Commerce Commission Termination Act (the “ICCTA”), 49 U.S.C. § 10101, *et seq.*, which, upon application of the principle of complete federal preemption, vests the STB “with exclusive jurisdiction over the construction, **acquisition**, operation, **abandonment**, or discontinuance of railroad facilities.” *See, Watkins v. RJ Corman Railroad*, 2010 WL 1710203, No. Civ.A 7:09-114 KKC (nonprecedential) (E.D. Ky. Apr. 27, 2010) (“Watkins”) (bold added).

However, the issue of whether a federal question has preempted a state claim begins with the following analysis that has been elucidated in *Fetterman*, among other cases in the context of other federal legislation—the Federal Communications Act—as follows:

Appellee’s assertion that the [Federal Communications Act] has preempted the field of interference with radio transmissions is not to be taken lightly. Indeed, the Supreme Court, as well as many of our sister federal courts, has held that **there is a presumption against federal preemption of state law**. See, e.g., *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L.Ed. 2d 407 (1992); *Michael v. Shiley, Inc.*, 46 F.3d 1316 (3rd Cir. 1995). This presumption of dual jurisdiction results from reasons of comity and mutual respect between the two judicial systems that form the framework of our democracy. (Citation omitted). Nonetheless, there are areas of commerce which unquestionably function best if federally and uniformly regulated. See, e.g., *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 2d 248 (1963). For this reason, Congress may, pursuant to the supremacy clause, enact legislation that usurps the ability for certain traditional state common-law statutory causes of action to be sued upon for violations of federal law. See, e.g., *Michael*, 46 F.3d at 1322; *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

Fetterman at 292 (bold added).

To determine which court—state or federal—has jurisdiction, 49 U.S.C. § 1336(a) applies and states instances where the STB has jurisdiction:

Jurisdiction of any civil action to enforce, in whole or in part, any order of the [STB], and to enjoin or suspend, in

whole or in part any order of the [STB) for the payment of money or the collection of fines, penalties, **and forfeitures.**

Id. (bold added).

The *Watkins* court, as did the lower court here in its *December 6, 2022 Order*, cites *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F.Supp. 2d 1005 (N.D.Iowa 2003) with approval in its distinction between federal and state law claims for purposes of determining whether federal law under the ICCTA completely preempts claims involving railroads in a claim where plaintiff sought a finding of **abandonment** of the railway tracks **upon application of state law**. In finding that federal law applies, the court rejected application of state law because, “to the extent that [the plaintiff’s] state law claims seek to force [the railroad operator] to abandon the track in question, such claims are preempted by the ICCTA.” *Watkins* at *2 (citing 265 F.Supp.2d at 1015) (brackets in quotation).

Citing *Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42 (1st Cir. 2008), the *Watkins* court notes:

In determining whether the ICCTA completely preempts a state-law nuisance cause of action, the First Circuit inquired into whether the ICCTA “provides an exclusive substitute federal cause of action that a federal court ... can employ for the ... wrong at issue.” *Id.* at 47. The Court found no STB or court precedent entertaining ICCTA claims seeking redress for railroad conduct akin to “nuisance” because the ICCTA does not automatically immunize railroads from state-law nuisance claims and because it does not provide a federal cause of action

equivalent to nuisance, the First Circuit ordered that the plaintiffs' motion to remand [to the state court] be granted. *Id.* at 48.

Watkins at *3.

In *Watkins*, the court notes a test that the Eleventh Circuit has applied to determine whether preemption applies under the ICCTA:

As stated by the Eleventh Circuit, “Congress narrowly tailored the ICCTA preemption provision to displace only ‘regulation,’ *i.e.*, those state laws that may reasonably be said to have the effect of “manag[ing]” or “govern[ing]” rail transportation, *Black’s Law Dictionary* at 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”

Watkins. at *3 (citing, *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1224, 1331 (11th Cir. 2001)).

E) The Conrail Case Persuasively Shows that the Amended Complaint States a Basis for Subject Matter Jurisdiction in State Court

As discussed below, there was litigation involving PBL several years ago, wherein the existence of a railroad right-of-way was considered. See, *Philadelphia Belt Line Railroad Company v. Consolidated Rail Corporation*, 1996 WL 362996 (S.T.B.), Finance Docket No. 32802 (Service Date: July 2, 1996), a copy of which is attached hereto as Exhibit A. This case involves the same purported right-of-way—per the 1890 Ordinance—but concerns a different

segment than this case involves. There, PBL sought and was declined trackage rights from Conrail. The Board notes as follows:

Although a rail carrier, PBL never operated the Belt Line [footnote omitted]. Instead, PBL, from its formation, has made the line and related facilities available, for a charge and subject to adherence to the Belt Line Principle, to the three major railroads (and their successors) that have provided Philadelphia shippers with competitive linehaul service.

Id. at *2 (bold added). Moreover:

Following passage of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, Conrail assumed the Philadelphia operations that formerly had been provided by the bankrupt Reading and Penn Central, including their operations over the Belt Line North and South. Subsequently, on March 1, 1987, **PBL and Conrail entered into a 10-year lease agreement giving Conrail “exclusive use” of the Belt Line North property** (sole operating authority to serve Belt Line North Shippers), subject to the Belt Line Principle.

Id. (bold added).¹⁶

There, the Board found that the STB never had jurisdiction over the purported right-of-way because it was operated outside of the STB’s jurisdiction and operated by Conrail under private agreements, *i.e.*, leases, with PBL. See, also, e.g., *Philadelphia Belt Line Railroad Company—Petition for Declaratory*

¹⁶ As the Board later notes: “Conrail emphasizes that defendants (Conrail et al) were not responsible for severing PBL’s line, that PBL failed to allege that it never had authority to run trains between the Belt Line North and South, and **that PBL has never run any trains.**” *Id.* at *4 (bold added).

Order (Surface Transportation Board), Docket No. FD 35345, Decided August 3, 2010, *RR* at 189a.

F) Discovery Required to Reinforce Allegations in First Amended Complaint that Subject Matter Jurisdiction Lies in State Instead of Federal Tribunals

In its Amended Complaint, RWIP took the approach that there is no document of record in the Recorder of Deeds Office that establishes that PBL had a railroad right-of-way in effect straddling the RWIP Parcel. *See, Amended Complaint, Quiet Title Action*, at ¶ 11, *RR* at 86a (“Upon information and belief, there is no deed or other document of record which has been filed in RWIP’s chain of title which evidences the existence of a right-of-way, easement or other property right held by [PBL]”). Accordingly, RWIP contends that PBL never “operate[d] a railroad line or any railroad equipment or railroad cars,” “engage[d] directly with customers for rail travel or the transportation of goods” or that it “provide[d] common carrier railroad transportation service.” *Amended Complaint*, at ¶¶ 3 – 5, *RR* at 86a. Moreover, RWIP contends that PBL had “no plan to provide service as a rail carrier” on the RWIP parcel. *Id.* at ¶ 33, *RR* at 89a. Finally, RWIP contends that PBL did not construct the tracks located on the RWIP parcel. *See, Amended Complaint* at ¶ 35, *RR* at 90a. **Discovery would assist in establishing or disproving all of the forgoing allegations, including, by way of example,**

documents evidencing trackage rights, via lease or otherwise, construction agreement, proof of common carrier or perfection.

In short, RWIP has alleged facts to establish that PBL does not meet any of the criteria to establish STB jurisdiction under 49 U.S.C. § 10903(a)(1) as stated in *STB 2010 Order*, such as proof of the construction or extension of its own tracks, operation of its own railroad line, status as a common carrier and any effort to meet the minimum requirement for pre-1920 operation. In granting PBL's preliminary objections and summarily throwing RWIP out-of-court, the lower court has denied RWIP the opportunity to conduct discovery to prove the absence of each of these factors.

Accordingly, if no line of railroad has existed on the property, then the STB (and previously, the ICC) has no jurisdiction over disputes regarding the removal of the track, they are properly in state court, and RWIP's cause of action was properly filed in the lower court because no railroad right-of-way existed from which a railroad could abandon under federal law.

In PBL's preliminary objections to the amended complaint:

- It cites the *1890 Ordinance* but does not allege that it is recorded in the Office of the Recorder of Deeds. *RR* at 104a; 149a.

- It does **not** cite the existence of any map anywhere of record (accompanying the 1890 Ordinance, on record in the Department of Public Works, in the Recorder of Deeds, or elsewhere), that shows where the right-of-way is located, as required, *inter alia*, per language to that effect in Section 1 of the *1890 Ordinance*. See, e.g., *Supra* at 2 (“The route of the said [PBL] and branches thereof shall be shown upon a map to be filed at the Department of Public Works.”). *RR* at 149a.
- It cites the admitted existence of rails located on the RWIP parcel (See, *PBL’s Preliminary Objections, Quiet Title Action*, at ¶¶ 2 & 18), but that is not proof that they were constructed and used by PBL, especially when at least one of the deed descriptions makes reference to another railroad.
- PBL does not state any factual information that it sought approval from the ICC to construct the track.
- PBL does not state any factual information that it sought approval from the ICC to operate over the tracks as a common carrier.
- PBL does not state any factual information that it ever actually conducted any common carrier operations over the tracks for any rail customers.
- PBL does not state any factual information that any other railroads sought and received authority from the ICC or the STB to operate over the tracks as a common carrier.
- Rather than demonstrate any of the above, or any other proof of the existence of a federal railroad right-of-way, PBL merely advanced the conclusory legal position that the STB “has exclusive jurisdiction to determine if rail lines have been abandoned.” *Id.* at ¶ 3.

In response to PBL’s citation to the *1890 Ordinance*, RWIP argues that PBL cites “no facts to support that the conditions for the grant of the easement at the

Property were ever fulfilled.” *See, Plaintiff’s Memorandum In Opposition to Preliminary Objections, Quiet Title Action* at 15, RR at 180a.

PBL also argues that reference can be made to the right-of-way contained in the deed relied upon by PBL to establish the existence of the right-of-way—the Rohm and Haas Deed. Although it predates RWIP’s ownership, it does not prove the right-of-way’s existence because the language is not contained in the habendum clause of the deed.¹⁷ *See, Herr v. Herr*, 957 A.2d 1280, 1286 (Pa. Super. 2008). PBL wrongly argues that RWIP has mischaracterized what *Herr* stands for. *See, Quiet Title Action, Defendant’s Reply Brief* at 2-4, RR 204a-205a.

III. THE LOWER COURT COMMITTED AN ERROR OF LAW WHEN IT RULED THE RIGHT-OF-WAY AT ISSUE IS A SIDETRACK

In its preliminary objections to the amended complaint PBL claimed only that the easement and the tracks on it were a line of railroad imbued with a common carrier obligation, which PBL supposedly holds. Lines of railroad are established pursuant to 49 U.S.C. §10901 and may only be removed pursuant to the abandonment authority of the STB under 49 U.S.C. §10903. Appellant has

¹⁷ HABENDUM. *Lat.* Portion of deed beginning with the words “To have and to hold”. [citation omitted] The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee. [citations omitted].

Black’s Law Dictionary, Revised Fourth Edition, at 838.

demonstrated above that the tracks on its property cannot be categorized as a line of railroad. However, the lower court, without any explanation, compounded its legal error by concluding that the action before it concerned the operation or abandonment of “side tracks,”¹⁸ and that “the STB has exclusive jurisdiction over: (2) the construction, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state.” *Id* at 1-2, quoting 49 U.S.C. §10502(b) and *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F. Supp. 1005, 1012 (N.D. Iowa 2003).

The lower court then went on to rule that that because it had concluded that the tracks and right-of-way were a “side track,” then RWIP’s only course was to file a formal application with the STB to abandon the track under 49 U.S.C. § 10903. Opinion at 5. This is flatly wrong and contrary to specific statutory language and STB precedent. Specifically, under 49 U.S.C. §10906, while the STB has exclusive jurisdiction over side tracks, the “Board does **not** have authority under this chapter over construction, acquisition, operation, **abandonment**, or discontinuance of spur, industrial, team, switching, or side tracks.” Such tracks are therefore expressly *excepted* from the Board’s abandonment regulations, which only apply to lines of railroad under § 10901.

¹⁸ Order at 1.

Moreover, STB precedent is very clear that the disposition of such excepted tracks over the objection of the railroad is not pursued with a formal abandonment application, but by another procedural mechanism before the STB.¹⁹ This failure to recognize the legal distinction of lines of railroad and sidetracks was clear error by the lower court, and if allowed to stand, will create a precedent that is inconsistent with the statutes and procedures utilized by the STB. Specifically, as written the lower court order and opinion hold that the tracks on RWIP's property are not a line of railroad as PBL claimed, but rather sidetracks that are still subject to the STB's exclusive jurisdiction. However, the court has also ruled the disposition of the tracks must still be pursued with a formal abandonment application. Both aspects of the court's actions are legally wrong.

CONCLUSION

For the foregoing reasons, Appellant, Richmond Waterfront Industrial Park, LLC, respectfully requests that this Honorable Court reverse the trial court's order with respect to preliminary objections by Appellee, Philadelphia Belt Line Railroad Company to the amended complaint that overrule three counts on the basis stated by the trial court and granting the preliminary objection of Appellee,

¹⁹ STB Docket No. 35468, *Pinelawn Cemetery – Petition for Declaratory Order* (Served April 21, 2015) slip op. at 11, note 31. In that case, the STB explained that a determination of whether a carrier has abandoned §10906 side tracks is within the exclusive purview of the Board, but this determination must be pursued pursuant to a petition for declaratory order, not a formal abandonment proceeding.

Philadelphia Belt Line Railroad Company with respect to one count as follows:
overruling the objection to Counts I, II, and IV pursuant to Pa. R.C.P. 1028(a)(4),
sustaining the objection to Count III pursuant to Pa.R.C.P. 1028(a)(1) for lack of
subject matter jurisdiction,²⁰ and dismissing the Amended Complaint by Appellant,
Richmond Waterfront.

Respectfully submitted,

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²⁰ Again, this ruling should consider the third count of the preliminary objections, inasmuch as that is the count that considered the issue of subject matter jurisdiction.

WORD COUNT CERTIFICATION

The undersigned certifies that *Brief of Appellant, Richmond Waterfront Industrial Park, LLC*, complies with Pa. R.A.P. 2135(a) because there are 7,040 words herein exclusive of tables and certifications.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Jeffrey P. Lewis
Jeffrey P. Lewis, Esquire

CERTIFICATION OF SERVICE

JEFFREY P. LEWIS, ESQUIRE, attorney for Appellant, *Richmond Waterfront Industrial Park, LLC*, certifies that a true and correct copy of the preceding *Brief of Appellant, Richmond Waterfront Industrial Park, LLC* has been forwarded to all parties identified below by internet on August 15, 2023 as follows:

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EXHIBIT A

1996 WL 362996 (S.T.B.)

SURFACE TRANSPORTATION BOARD (S.T.B.)

PHILADELPHIA BELT LINE RAILROAD COMPANY

v.

CONSOLIDATED RAIL CORPORATION, CP RAIL
SYSTEM, AND CSX TRANSPORTATION, INC.

Decided: June 12, 1996

Service Date: July 2, 1996

SURFACE TRANSPORTATION BOARD¹ DECISION

Finance Docket No. 32802

***1** By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

In complaint filed on November 2, 1995, under [49 U.S.C. 11103\(a\)](#), Philadelphia Belt Line Railroad Company (PBL) seeks to require defendants, Consolidated Rail Corporation (Conrail), CP Rail System (CP Rail), and CSX Transportation, Inc. (CSXT), to grant PBL terminal trackage rights to permit it to “reconnect” two separate segments of track, the Belt Line North and the Belt Line South, in Philadelphia, PA.² The procedural schedule and discovery were suspended in a decision served March 12, 1996, to permit us to rule on the merits of a motion to dismiss filed by Conrail. PBL replied in opposition to the motion, and CSXT responded in support. We have reviewed the record and have decided to grant the motion and dismiss the complaint.

BACKGROUND

PBL, a Class III railroad, is incorporated in Pennsylvania and headquartered in Philadelphia. It describes itself as a quasi-public entity originally chartered on May 10, 1889, to construct and operate a terminal railroad in the port of Philadelphia and to maintain open and competitive rail service in the port and adjacent areas. The Philadelphia ordinance that granted PBL's franchise assertedly required PBL to operate in accordance with “the Belt Line Principle.” That principle mandates equal, nondiscriminatory access over the PBL line to all rail carriers.

PBL now owns, controls, or has trackage rights over approximately 16.3 miles of rail line and right-of-way along Delaware Avenue on the Delaware River waterfront in downtown Philadelphia. The line is separated into a northern and a southern segment. The Belt Line North extends approximately 3 miles from Bridge Street in the north through the site of Conrail's former Port Richmond Yard to Allegheny Avenue in the south. The 10 shippers³ that are served by the Belt Line North account for approximately 2,894 carloads annually, of predominantly chemicals, intermodal containers, and import-export freight.

The Belt Line South's western terminus connects with Conrail in the vicinity of 26th and Penrose Streets, and its eastern terminus extends along the waterfront to the point where its track is missing or dormant as a result of actions taken by the city of Philadelphia. Belt Line South traffic interchanges with Conrail near the latter's Greenwich Yard at either West Falls or South Philadelphia. Interchanges with CP Rail⁴ and CSXT are made at CSXT's East Side Yard in South Philadelphia.⁵ All three defendants currently operate over segments of the Belt Line South and reach various interchanges and shippers.

The connection between the Belt Line North and Belt Line South was severed in the late 1980s when Philadelphia redeveloped a portion of Delaware Avenue along the port area from a rail freight and industrial corridor to a tourist and pedestrian development

with restaurants, galleries, boutiques, and other businesses that depend on pedestrian access. Allegedly over PBL's strong and clearly stated objections, rail freight access was made impossible. As part of a street repair project and redevelopment, connecting track through parts of Conrail's Port Richmond Yard was abandoned and removed, Delaware Avenue was repaved with portions of track removed or paved over, and pedestrian overpasses were constructed.

***2** Although a rail carrier, PBL never operated the Belt Line.⁶ Instead, PBL, from its formation, has made the line and related facilities available, for a charge and subject to adherence to the Belt Line Principle, to the three major railroads (and their successors) that have provided Philadelphia shippers with competitive linehaul service. Belt Line North shippers originally received service from the Reading Company (Reading), a Conrail predecessor, via Reading's Port Richmond Yard and Richmond Branch. Alternatively, Belt Line North shippers seeking access to the former Pennsylvania Railroad (later the Penn Central Transportation Company, a Conrail predecessor) and Baltimore & Ohio Railroad (now CSXT) were routed through Port Richmond Yard and then down the Belt Line South along Delaware Avenue to the respective carriers' rail facilities and interchanges in South Philadelphia.

Following passage of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, Conrail assumed the Philadelphia operations that formerly had been provided by the bankrupt Reading and Penn Central, including their operations over the Belt Line North and South. Subsequently, on March 1, 1987, PBL and Conrail entered into a 10-year lease agreement giving Conrail "exclusive use" of the Belt Line North property (sole operating authority to serve Belt Line North shippers), subject to the Belt Line Principle. The lease agreement apparently coincided with, and presumably was responsive to, the port area reconstruction that severed the Belt Line into north and south segments leaving the Belt Line North isolated and leaving Conrail as the only Class I rail carrier having direct access. The lease agreement is to expire on February 28, 1997.

THE COMPLAINT

PBL states that, under the contractual lease arrangements, Conrail has failed to provide open and competitive rail service consistent with the spirit of the Belt Line Principle. It claims that Conrail does not provide switching access to CP Rail or CSXT at reasonable rates, that other commercial practices are used to discourage interchange with them, and that Conrail has consistently opposed its efforts, as well as those by D & H and CP Rail, to restore effective rail access.

PBL contends that the charge for moving Belt Line North traffic to or from the nearest yard facilities and interchanges used by CP Rail and CSXT in South Philadelphia is significantly higher than other Conrail switch charges in Philadelphia and elsewhere. Relying on Conrail Freight Tariff CR 8001-D, governing switching and accessorial services, it claims that the applicable switch charge for this movement is \$1,435 per car. In contrast, it contends that Conrail's general system-wide intra-terminal and inter-terminal (for railroad-owned cars) switch charges are \$497 and \$688 per car, respectively. Additionally, it notes that Conrail charges only \$336 per car to switch cars between CSXT and Conrail, provided the car moves in Conrail linehaul service.

***3** PBL alleges that Belt Line North shippers have expressed concern about Conrail's refusal to interchange their traffic to CSXT and CP Rail on reasonable and nondiscriminatory terms. Moreover, it states that shippers located at various Philadelphia points, including those on the Belt Line North and South, have stressed the importance of preserving direct access to all three linehaul rail carrier defendants.

In view of Conrail's alleged failure to provide nondiscriminatory switching service consistent with the Belt Line Principle, PBL states that it is prepared to serve both the North and South Belt Lines directly or through an operating contact with another rail carrier.⁷ PBL asserts that in the Northeast Rail Service Act of 1981 (NERSA), Pub. L. No. 97-35,⁸ it was specifically encouraged to apply to the ICC for terminal trackage rights over Conrail to permit it to connect with D & H and thereby restore to Philadelphia the competitive rail service that disappeared in 1976. The requested terminal trackage rights, it argues, would be an essential part of the overall operation. Without them, the carrier serving the Belt Line North would not have direct access to the CSXT or CP Rail interchanges. Traffic would have to be switched to Conrail at milepost 10.4 of its Richmond Industrial Track to effect the interchange with CSXT and CP Rail in South Philadelphia. Thus, PBL argues that its use of the terminal

facilities would restore to Belt Line North shippers direct access to all three of the linehaul carriers that serve Philadelphia, as required by the Belt Line Principle, and would relieve these shippers from being assessed excessive and inappropriate charges to switch movements to and from PBL interchanges on the Belt Line South. According to PBL, it would also relieve the substantial traffic delays inherent in Conrail's intermediate interchange, thereby allowing PBL to provide more competitive and expeditious train service.

Specifically, PBL seeks rights to operate over approximately 10 miles of Conrail's Richmond Industrial Track from milepost 10.4 at the site of the former Port Richmond Yard (where it connects with the Belt Line North) to milepost 2.7 at Falls Interlocking, then over Conrail's Trenton Line from that line's milepost 5.4 at Falls to its milepost 2.4 at the CSXT/Conrail interchange at Park Junction, then over CSXT's Philadelphia-Washington main line from CSXT milepost 1.4 at Park Junction to CSXT milepost 1.7, at the throat of its East Side Yard, and then over the tracks and facilities that connect CSXT's East Side Yard with PBL in the vicinity of 26th and Penrose Streets, in South Philadelphia.

PBL contends that the trackage over which it seeks trackage rights qualifies as a "terminal facility" under 49 U.S.C. 11103(a). Further, it contends that its use of the track is practicable and that defendants' ability to use their own facilities and handle their own business over the same track will not be impaired. It notes that defendants currently operate a maximum of 23 trains daily over the busiest segment of their lines between West Falls and South Philadelphia and only 10 daily trains between West Falls and Nice Junction, to the east. PBL asserts that its use of the track would be restricted to interchanging Belt Line North traffic with defendants at either West Falls or South Philadelphia. Asserting that it asked defendants for an agreement to permit it to operate over the track at issue, and that they declined, PBL states that it will pay fair compensation for any track or access rights prescribed under 49 U.S.C. 11103(a).

THE MOTION TO DISMISS

*4 Conrail has moved to dismiss the complaint contending that, as a matter of law, it fails to state a claim upon which the relief sought may be granted. Based on a paragraph-by-paragraph analysis of the complaint, Conrail argues that it has not been put on notice as to how it allegedly committed, or was likely to commit, any violation of law, any act or actions contrary to the competitive policies of the rail transportation policy of 49 U.S.C. 10101a, or any specific anticompetitive conduct, such as would support an award of forced trackage rights, a competitive access remedy under 49 U.S.C. 11103(a). Citing *Jamestown, N.Y., C. of C. v. Jamestown W. & N.W.R. Co.*, 195 I.C.C. 289, 292 (1933) (*Jamestown*), it argues that the complaint, at best, states a mere desire by shippers and other interested parties for something that would be convenient or desirable.

Responding to PBL's specific allegations, Conrail emphasizes that defendants were not responsible for severing PBL's line, that PBL failed to allege that it ever had authority to run trains between the Belt Line North and South, and that PBL has never run any trains. Further, it questions whether and how PBL opposed the severing of the line and whether PBL sought or received any compensation for the loss of its rights or property.

Conrail observes that the intra-terminal tariff PBL relied on as evidence that Conrail maintains switching charges at an unreasonably high level to dissuade shippers from routing via CP Rail or CSXT is not applicable to traffic interchanged with CP Rail or CSXT and cannot be used for that purpose. Rather, it explains that the tariff applies to the relatively rare shipments that both originate and terminate within the Philadelphia terminal.

Additionally, Conrail notes that the complaint does not allege that it has refused to interchange Belt Line North traffic with CSXT or CP Rail. To the contrary, it notes that traffic to and from all parts of Philadelphia is regularly interchanged among the three defendants, but that given track constraints, the interchanges are generally more efficient outside of downtown Philadelphia. Similarly, Conrail observes that the complaint does not allege that it has failed to provide adequate service or foreclosed any efficient through routes with connecting carriers.

To the extent the complaint relies on shipper allegations, Conrail argues that they are vague and nothing more than hearsay. Further, it notes that these allegations were never adopted by PBL as its own and cannot be treated as allegations of anticompetitive behavior. Moreover, to the extent the allegations may be construed as a desire for lower switching rates, Conrail contends that a rate prescription would suffice. Emphasizing that anticompetitive conduct must be alleged to support a request for terminal trackage rights, Conrail notes that not a single anticompetitive act has been cited. It argues that the fact that direct access to all three linehaul carriers may be convenient and desirable is inadequate to support a grant of terminal trackage rights, and that PBL failed even to allege that direct access is necessary to remedy anticompetitive behavior or deficient service.

DISCUSSION AND CONCLUSIONS

*5 The provisions of [49 U.S.C. 11103\(a\)](#) authorize us to require a rail carrier to make its terminal facilities available for use by another rail carrier if it is practicable and in the public interest, and if the required use will not substantially interfere with the owning carrier's use of the facilities. To make a case for mandatory terminal access, a party must first demonstrate that the facilities to which access is sought are part of a terminal facility. Then, the party must meet the public interest-type criteria of the statute.

There is no dispute over whether the line is in a terminal area. Therefore, in addressing the motion to dismiss, we must look to see whether the allegations, if true, are adequate to satisfy the public interest requirement of the statute. In [Intramodal Rail Competition](#), [1 I.C.C.2d 822 \(1985\)](#) (Intramodal), *aff'd sub nom. Baltimore Gas and Elec. v. United States*, [817 F.2d 108 \(D.C.Cir.1987\)](#), the ICC adopted competitive access rules to govern joint rates, [49 U.S.C. 10705](#), and reciprocal switching, [49 U.S.C. 11103\(c\)](#). It declined, at the time, to extend the rules to terminal trackage rights applications under [49 U.S.C. 11103\(a\)](#), notwithstanding the very similar statutory language that applies both to terminal trackage rights and reciprocal switching.

Nevertheless, in [Midtec Paper Corporation v. CNW et al.](#), [3 I.C.C.2d 171 \(1986\)](#) (Midtec II), *aff'd sub nom. Midtec Paper Corp. v. U.S.*, [857 F.2d 1987 \(D.C.Cir.1988\)](#) (Midtec III), the ICC established competitive access standards to govern cases such as this one. In Midtec II, the ICC determined that the analysis under [49 U.S.C. 11103\(a\) and \(c\)](#) should be "similar," and that "a focus on anticompetitive conduct (or the threat of it) by the carrier possessing the essential rail line is appropriate, but not necessarily exclusive."⁹ Further, in Midtec II, the ICC stated that, under the rules established in Intramodal, it was "attentive to the possibility of classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable forms of monopolization or predation." It also focused on whether there was any evidence of abuse under the competitive standard of the rail transportation policy, as demonstrated by inadequate service or excessive prices. Midtec II, [3 I.C.C.2d at 173-74](#).

As a general rule, a prerequisite to the successful prosecution of a complaint before the Board is a showing of harm. That is clearly the case in a terminal trackage rights proceeding, in which a complainant seeks to enter a defendant's property against the defendant's will. Thus, one element that is common to all of the abuses addressed in Midtec II is harm: the competitive practices on which the ICC focused needed to be remedied because they produced, or at least threatened, competitive harm. Here, assuming for purposes of ruling on the motion to dismiss that PBL's facts and allegations are true, PBL has failed to allege that it has suffered, or is likely to suffer, harm or injury. Although PBL alleges that shippers are being harmed, or may be harmed in the future, no shipper has complained or come forward in support of PBL's complaint.

*6 Moreover, PBL does not operate, and never has operated, the Belt Line that it now seeks to have "reconnected," and PBL has not shown any realistic threat of injury to the other carriers that interchange traffic on the Belt Line South. It is possible that PBL may suffer future harm or injury, if it were to become the operator of the Belt Line North, or if it were to enter into a different lease when its current lease expires, but at this time the complaint expresses nothing more than a mere desire for something that would be convenient or desirable. It has long been established that the public interest requirement of [49 U.S.C. 11103\(a\)](#) requires more.¹⁰ Complaints seeking remedial action cannot be based on speculation about some future injury or event.¹¹

The prescription of terminal trackage rights is an extraordinary remedy, and our power to prescribe them, and to grant other remedies as appropriate, must be reserved for real cases of injury. This is particularly true given our limited resources. By carefully scrutinizing complaints at the outset and eliminating those that are hypothetical, we can conserve our resources and those of the parties and thereby ensure that the public interest is served.

We emphasize that challenges to the reasonableness of Conrail's switching charges or allegations that other Conrail practices are unlawful because they prevent switching to CSXT or CP Rail for linehaul service must be made by the entities actually being injured. The law does provide remedies relating to rate reasonableness [new 49 U.S.C. 107011], joint rates [49 U.S.C. 10705], and the failure to interchange traffic [49 U.S.C. 10742]. But this complaint is not brought by a party that could have been injured by any conduct of Conrail, nor has the conduct complained of been shown to violate any specific provision of the law. Finally, PBL has not demonstrated any efforts to work out its concerns with Conrail, nor has it explained why less intrusive joint rate or reciprocal switching remedies would be inadequate to address any concerns that may arise in the future.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion of Conrail to dismiss is granted; this proceeding is discontinued.
2. This decision is effective on its service date.

Vernon A. Williams

Secretary

Footnotes

- 1 The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11103. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.
- 2 Although PBL named CP Rail as a defendant, it only seeks terminal trackage rights over the Conrail and CSXT lines that connect its Belt Line North with its Belt Line South. PBL acknowledges that CP Rail owns no track in Philadelphia other than the trackage rights it operates, but that it named CP Rail as a defendant to ensure jurisdiction over all parties. Also, PBL states that it may decide to contract out its operating rights to another rail carrier and, therefore, requests that the terminal trackage or access rights it seeks be fully assignable to another rail carrier.
- 3 The shippers include GATX Terminals, Rohm & Haas, Tioga Terminal, Franklin Smelting, Neatsfoot Oil Refineries, Lumber and Millwork, and the city of Philadelphia.
- 4 Canadian Pacific Limited, the corporate parent of CP Rail, was authorized to acquire the Delaware & Hudson Railway Company (D & H), along with D & H's access to Philadelphia, in *Canadian Pacific Ltd—Pur. & Trackage—D & H Ry. Co.*, 7 I.C.C.2d 95 (1990). D & H had acquired rail access to Philadelphia through rights designated in the Final System Plan of the United States Railway Association.
- 5 PBL states that its rights in South Philadelphia are governed by the “South Philadelphia Agreement” dated March 23, 1914.
- 6 PBL states that in *Philadelphia Belt Line Railroad Company—Operation in Philadelphia, PA—Exemption Under 49 U.S.C. 10505* From 49 U.S.C. 10901, Finance Docket No. 29517 (ICC served Apr. 10, 1981), it obtained confirmation of its original “grandfathered”

authority to operate in its own right the entire length of the PBL line from Bridge Street to Allegheny Avenue on the Belt Line North through Port Richmond Yard down or adjacent to Delaware Avenue to South Philadelphia on the Belt Line South. Contending that its right to consummate the exemption was extended indefinitely in a number of subsequent ICC decisions, PBL asserts that it possesses the right to initiate service on the entire length of this route at any time.

7 In this regard, PBL asserts that CP Rail is vigorously promoting itself as a linehaul competitor for Philadelphia traffic, has already become a major rail freight competitor in both Philadelphia and the Northeast, and is anxious to provide competitive linehaul service to PBL's shippers. It states that CP Rail intends to work with the port and the city of Philadelphia to develop marine facilities and contiguous industries as a major traffic hub. On the other hand, PBL contends that Conrail has had a change of direction and appears more interested in focusing on main-line corridors, rather than shippers in the Philadelphia waterfront area.

8 Section 1166 of NERSA is entitled "Trackage Rights" and specifies that:

At any time after the effective date of this subtitle, the Commission may approve, under the provisions of existing law, the grant of trackage rights to any terminal railroad operating primarily in the city of Philadelphia over the individual lines of Conrail located in the city and port of Philadelphia.

9 The ICC confirmed both of these principles in [Shenango Inc. v. Pitts., Chartiers & Yough. Ry. Co.](#), 5 I.C.C.2d 995 (1989) (Shenango), aff'd sub nom. [Shenango Inc. v. ICC](#), 904 F.2d 696 (3d Cir.1990). Additionally, the ICC noted that, because terminal trackage rights are more intrusive in nature, its discretion to order them would be more constrained than its discretion to order reciprocal switching. [Shenango 5 I.C.C.2d at 1002](#) (citing [Midtec III](#), 857 F.2d at 1502). Although the [Midtec II](#) test is not limited to the type of showing typically made under the antitrust laws, it does, at a minimum, require a showing of some behavior, such as the establishment of excessively high rates or the provision of inadequate service, that would tend to indicate competitive abuse.

10 See [Jamestown](#), 195 I.C.C. at 292.

11 Indeed, in reply to the motion to dismiss, PBL seems to have retracted its allegations that Conrail's switching charges are excessive at this time. Instead, as indicated by the following underlined text, reply at 9-10, PBL acknowledges the future, speculative nature of the injury that appears to be the subject of its complaint.

The record when developed here, will show that for now, as long as the lease with PBL continues, Conrail apparently treats a move from one of the shippers on the Belt Line North to the interchange with CSXT or with [CP Rail] as an "inter-terminal switch," governed by Item 12030 of the applicable tariff, Freight Tariff CR 8001-D. Upon expiration of the lease, if PBL hires a third party to operate the PBL independently of Conrail, and if the current situation continues with respect to PBL's inability to use the center portion of its line, PBL and the shippers on the Belt Line North will face the switch charge described in Item 15562 for an intra-terminal switch, that is, a move in which Conrail participates only in the movement from one zone within the Philadelphia switching limits to another. This will have the effect of limiting the choices available to the shippers and requiring them to choose Conrail over [CSXT or CP Rail], thereby violating the Belt Line Principle.

1996 WL 362996 (S.T.B.)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of The Philadelphia Belt Line Railroad Company's Reply in Opposition to Richmond Waterfront Industrial Park, LLC's Petition for Declaratory Order, served July 28, 2023, in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 17th day of August 2023, on all Parties of Record.

/s/ **William A. Mullins**

William A. Mullins

Attorney for The Philadelphia Belt Line Railroad Company