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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 6, 2025
Part of
Public Record

DOCKET NO. FD 36710

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

**REBUTTAL STATEMENT OF
RICHMOND WATERFRONT INDUSTRIAL PARK, LLC**

Stephen Foxman, Esquire
Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place, 22nd Floor
50 South 16th Street
Philadelphia, PA 19102
215-851-8400
sfoxman@eckertseamans.com

Thomas W. Wilcox, Esquire
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW Suite 300
Washington, DC 20006
202-508-1065
tom@twilcoxlaw.com

*Counsel for Richmond Waterfront Industrial
Park, LLC*

Dated: January 6, 2025

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**REBUTTAL STATEMENT OF
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Pursuant to the procedural schedule adopted in this proceeding, Petitioner, Richmond Waterfront Industrial Park, LLC (“RWIP”), hereby submits this Rebuttal Statement in response to the Reply of Philadelphia Belt Line Railroad Company (“PBL”) to RWIP’s Opening Statement. (“*December 6, 2024 Reply*”).¹ PBL’s *December 6, 2024 Reply* falls well short of demonstrating that the Surface Transportation Board (“STB” or “Board”) has jurisdiction over the approximately 3,000 feet of tracks at issue in this proceeding (“Easement Tracks”).²

¹ This is not to be confused with a different filing in this matter entitled Reply of the Philadelphia Belt Line Railroad Company in Opposition to the Petition For Declaratory Order, dated August 17, 2023.

² Before the Pennsylvania courts below, PBL asserted that the Easement Tracks were part of a “railroad right-of-way easement held by PBL for the length of the Property parallel to the Delaware River.” *See, e.g., Defendant’s Preliminary Objections to Plaintiff’s Complaint, Richmond Waterfront Industrial Park, LLC v. Philadelphia Belt Line Railroad Company*, No. 02872 March Term, 2022 (Commerce Program), In the Court of Common Pleas of Philadelphia County (“Common Pleas Action”), Exhibit D to RWIP’s Petition for Declaratory Order, at 2, paragraph 4. In this proceeding, however, PBL has raised for the first time that it “believes in good faith that it owns some or all of the ROW Tracks in fee simple and that it is not an easement.” *See, December 6, 2014 Reply* at 2, n. 5. RWIP strongly disputes this claim, as none of the relevant deeds support it. As such, and to avoid confusion, RWIP continues to refer to the tracks at issue as the Easement Tracks. In any event, as PBL acknowledges, the legal category of the land on the

I. Introduction

PBL's *December 6, 2024 Reply* confirms that despite the passage of well over a century, and in spite of several agency proceedings specifically involving the Easement Tracks, neither the STB nor the Interstate Commerce Commission ("ICC") before it has ever issued a decision holding that the Easement Tracks, which were constructed prior to the creation of the ICC, are tracks subject to either agency's jurisdiction. In the absence of such authority, PBL instead attempts to convince the Board that jurisdictional status should be presumed to have been established for the Easement Tracks in 1891. However, other than its about-face on its prior repeated denials that §10906 has any application to this proceeding, PBL's *December 6, 2024 Reply* is, at its core, simply a repackaging of the failed arguments PBL made to the ICC in Docket No. 29517, *Petition of the Philadelphia Belt Line Railroad Company Under 49 U.S.C. § 10505 for Exemption of the Proposed Transaction from Provisions of 49 U.S.C. § 10901* ("PBL Exemption Action"), namely that federal jurisdiction over the Easement Tracks and PBL was established simply by the tracks being constructed by a third party in 1891, and these federal rights and obligations have laid "dormant" or "latent" for over 134 years while parties other than PBL have used the Easement Tracks pursuant to private contracts. PBL's claim in response to the Petition for Declaratory Order ("Petition") and RWIP's Opening Statement is that this alleged dormant federal jurisdiction exists and can only be extinguished pursuant to 49 U.S.C. §10903 even though PBL has no intention of using the track for common carrier or any other purposes. All of PBL's claims concerning the status of the Easement Tracks flow from its previously rejected argument, and so they are all fundamentally flawed.

Property making up PBL's "right-of-way" is irrelevant to the jurisdictional determination before the Board. *Id.*

II. The “Inception” Argument PBL Now Makes is Identical to Its “Latent” Argument Twice Rejected by the ICC in the *PBL Exemption Action*

Notably, PBL’s *December 6, 2024 Reply* and its other filings in this proceeding contain no citations confirming it is a Class III rail carrier and that the Easement Tracks are a line of railroad under §10901. For example, PBL has never cited any authority supporting the claim upon which its entire case rests: that the Easement Tracks were common carrier tracks and PBL was a common carrier when the tracks were constructed in 1891.³ That is because no such authority exists, and in fact, as summarized in RWIP’s Petition and Opening Evidence, precedent involving PBL has consistently found a lack of federal jurisdiction over PBL’s operations and rights-of-way. *Philadelphia Belt Line Railroad Company—Petition for Declaratory Order*, Docket No. FD 35345 (served August 4, 2010) (“*Sugarhouse*”); Finance Docket No. 32802, *Philadelphia Belt Line Railroad Company v. Consolidated Rail Corp., CP Rail System, and CSX Transportation, Inc.* (STB served July 2, 1996) (“*Conrail*”).

Moreover, as explained in RWIP’s Opening Statement, nearly 90 years after the Easement Tracks were constructed the ICC twice affirmatively *rejected* PBL’s attempts in the *PBL Exemption Action* to have the agency “confirm” that PBL was legally a common carrier when the Easement Tracks were constructed. First, in 1980, when the ICC ruled that because PBL had never operated as a railroad none of the applicable grandfathering statutes that could have excused PBL from seeking authority from the ICC. Opening Statement at 15-16. And second, in 1982, when the ICC again rejected PBL’s attempt to have the ICC “confirm” this status based on a claim that PBL’s status as a common carrier (and by extension the Easement Tracks’ status as line of railroad)

³ While RWIP’s Petition and Opening Statement recognize that PBL has been called a “Class III carrier” in several STB decisions, RWIP simply notes here that it was unable to locate any ICC or STB proceedings or decisions formally granting PBL this legal status.

were “dormant” and “latent” while the Philadelphia and Reading Railroad Company (“Reading”)⁴ and perhaps Conrail conducted contract switching operations on the Easement Tracks. Conrail’s use of the Easement Tracks is highly doubtful since PBL began leasing the Easement Tracks to Rohm & Haas Company (“R&H”) for its plant operations using its own equipment in 1967 – nine years prior to Conrail acquiring Reading’s assets. *Id.* at 16-17. RWIP’s Petition and Opening Evidence explain how PBL’s leases with Conrail excluded the Easement Tracks from their coverage. Petition at 9; Opening Evidence at 19-20. PBL fails to address this very important fact in its *December 6, 2024* Reply, instead repeatedly stating erroneously that Conrail operated over the Easement Tracks. In any event, PBL did not disclose its transactions with R&H to the ICC in the *PBL Exemption Action*.

More importantly for purposes of the question before the Board in this proceeding, PBL also does not cite any decision or authority affirmatively holding that the Easement Tracks became a line of railroad subject to the Board’s jurisdiction when they were constructed. Nor does PBL attempt to reconcile the ICC’s rejection of PBL’s attempt to claim “dormant” federal status in the *PBL Exemption Action* because no grandfathering statutes applied to PBL with PBL’s claim that the tracks themselves nevertheless possessed a “dormant” common carrier obligation when they were constructed. Instead, PBL’s summation of its grounds for claiming the Easement Tracks are a line of railroad subject to the Board’s jurisdiction as of 1891 are: “The ROW Track was constructed at PBL’s direction [in 1891], financed by PBL, owned by PBL, and used by at least

⁴ See, *Opening Statement* at 13. After the Easement Tracks’ construction no other railroads sought to utilize the Easement Tracks by contributing to the maintenance and operating costs, so Reading had the exclusive contractual rights to use the Easement Track via its contract with PBL until 1976, when the railroad entered bankruptcy and its assets were conveyed to Conrail. *id.* at 13. Conrail assumed all of Reading’s rights and obligations under the *1891 Use Agreement*. *Id.*

two regulated carriers throughout its history.” *December 6, 2024 Reply* at 3. This assertion is not supported by the facts or precedent.

First, the track construction was *not* financed by PBL. The entire \$102,000 cost to construct the Easement Tracks was “contributed” by the Reading Railroad in exchange for its exclusive use of the tracks for contract switching service. Opening Statement, Exhibit 3 (*1891 Use Agreement*) at 2. Second, as stated above, it is highly doubtful that Conrail used the Easement Tracks at all, and PBL has offered no proof to the contrary in response to RWIP’s Opening Evidence. Third, even accepting that PBL owned the Easement Tracks in 1891, the ICC held twice in the *PBL Exemption Action* decisions PBL did not hold itself out to perform common carrier service over the Easement Tracks when they were constructed, which is a necessary prerequisite for a segment of railroad track to be subject to the Board’s jurisdiction. STB Finance Docket No. 33862, *Public Service Company of Colorado – Construction Exemption – Pueblo County, CO* (Served August 23, 2000); STB Finance Docket No. 34013, *B. Willis, C.P.A – Petition for Declaratory Order* (Served October 3, 2001)(“*Willis*”).

Fourth, PBL admits that it never perfected or consummated its exempt authority to conduct operations as a common carrier over the Easement Tracks granted to PBL by the ICC in the *PBL Exemption Action*. See, *December 6, 2024 Reply* at 12 (“The fact that PBL did not consummate this authority so that PBL itself could operate over them as § 10901 common carrier tracks...”). Accordingly, PBL’s assertion that “The ROW Track is owned by PBL, controlled by PBL, *and was and is part of PBL's operation as a common carrier* subject to the Board's jurisdiction,” *id.* at

7 (emphasis supplied), is false, as PBL has never, in its 134-year history, held out to conduct any railroad operations over the Easement Tracks.⁵

Finally, the fact that Reading may have used the Easement Tracks to provide contract switching service until the Easement Tracks were leased to R&H does not bootstrap it into being a common carrier line of railroad, either at its inception or subsequently. After all, common carrier railroads operate on tracks outside of the Board's jurisdiction all over the United States without the tracks or the railroad's operations becoming subject to the Board's jurisdiction. See, e.g., *Willis* at 2 ("as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board's jurisdiction."). In the case of the Easement Tracks, they were used by Reading pursuant to contract switching arrangements until 1967 when PBL began leasing the Easement Tracks to R&H use in conjunction with its plant operations.

PBL makes no attempt to address these sprawling gaps in its overall position. Instead, its *December 6, 2024 Reply* necessarily requires the Board to simply presume jurisdictional status of PBL and the Easement Tracks from their inception. This presumption is the underpinning of all the other assertions in PBL's *December 6, 2024 Reply*. RWIP has demonstrated that there are no grounds to support this presumption. Moreover, if PBL truly believed it and the Easement Tracks had possessed this legal status, then there would have been no need for PBL to ask the ICC to either "confirm" or to grant PBL common carrier operating authority in 1981. Rather, if Reading

⁵ See, e.g., *PBL's December 6, 2024 Reply* at 10 ("[F]act that PBL never operated over the ROW Track itself..."); *id.* at 11 ("...PBL itself has not operated over the ROW Tracks..."); *id.* at 16 ("The fact that PBL itself may not have operated over the ROW Track itself as a common carrier..."); *id.* at 17 ("...PBL itself never operated over the ROW Track as common carrier track..."); and *id.* at 18 ("Here, the ROW Track was never used by PBL for movement of PBL's own goods.").

(and Conrail if it actually used the Easement Tracks) had ceased using the Easement Track to provide contract service, PBL could have simply commenced common carrier operations to meet rail service requests without asking permission from the ICC. This well-established principle is exemplified in Docket No. AB 853 (Sub-No. 4X), *Kansas & Oklahoma Railroad, LLC – Discontinuance of Service Exemption – In Crowley, Pueblo, Otero, and Kiowa Counties, Colo.* (served July 28, 2022). There, a railroad corporation acquired a common carrier line of railroad and contemporaneously hired another short line railroad to provide operations over the line. When the parties’ agreement expired, the underlying common carrier obligations of the track owner to provide service requested by shippers re-emerged, without the owner having to seek any “confirmation” or approvals from the Board. *Id.* at 2.

In the case of the Easement Tracks, PBL obviously doubted the jurisdictional status of itself and the Easement Tracks 90 years after their construction, and PBL’s attempt to convince the ICC to presume federal jurisdiction came to be upon such construction was rejected twice in the *PBL Exemption Action*. The Board should follow that prior precedent in this proceeding.

In addition to the foregoing, PBL’s summation of its grounds for finding jurisdiction is misleading and fails to mention, let alone attempt to rebut, the facts that: (1) the City of Philadelphia in 1890 created PBL as a corporate entity to assist Philadelphia businesses subject to the City’s control and numerous conditions, (2) the Easement Track was constructed pursuant to the 1890 Ordinance and Pennsylvania state law to fulfill those parochial objectives, (3) the only use of the Easement Tracks (by Reading) was pursuant to a private contract with PBL and neither Reading nor Conrail sought operating authority from the ICC, and (4) no rail carrier provided even contract switching over the Easement Tracks starting in 1967 because PBL began leasing the

Easement Tracks to R&H for its own use, which it did exclusively until approximately 2001, when all use of the Easement Tracks ceased altogether. See, Petition, Verified Statement of David Wolf.

III. PBL Belatedly and Incorrectly States Claims that the Easement Tracks Could be § 10906 “Excepted” Tracks

Before the Pennsylvania state courts PBL exclusively argued that the Easement Tracks constitute a line of railroad under §10901. See, *e.g.*, Petition, Exhibit D, *Defendant’s Preliminary Objections to Plaintiff’s Complaint*, Common Pleas Action (“*PBL’s Preliminary Objections*”) at ¶ 9:

The Complaint does not allege, nor can it, that the Board of PBL authorized abandonment of the segment of rail line or the right-of-way that crosses RWIP’s property, nor does the Complaint aver that PBL sought authority from the [STB] or [ICC] to abandon its freight common carrier obligation over the segment of rail line.

See also, *id.* at ¶ 23: “A common carrier’s right-of-way, including the right of way that crosses the RWIP property, may be abandoned **only** upon the prior authorization of the STB pursuant to 49 USC § 10903 (titled, “Filing and procedure for application to abandon or discontinue”)” (emphasis in original); *id.* at ¶ 24: “When a railroad carrier subject to the jurisdiction of the STB seeks to abandon or discontinue any part of a railroad line or related right-of-way, the carrier must file an application with the STB and provide information as required by statute and the regulations thereto” (citing 49 C.F.R. Part 1152); and *id.* at ¶ 32: “Lack of use is not the same as “abandonment;” abandonment must be accomplished by a formal petition to the STB, not by simply asserting to a court that railroad operations have long ago ceased. See 49 C.F.R. §11152.29(e)(2).”(sic).

The only reason that §10906 became relevant to this dispute is because in the Lower Court decisions dismissing RWIP’s complaint it conflated the rules concerning lines of railroad under

§10901 with “excepted track” under §10906, which conflation RWIP argued supported a finding the Lower Court had erred in its purely legal conclusion concerning STB jurisdiction. Until the Petition for Declaratory Order was filed by RWIP raising this point PBL had never asserted the Easement Tracks were excepted tracks. Nevertheless, in this proceeding PBL now argues for the first time that the Easement Tracks – 134 years after they were constructed - have “characteristics that support the conclusion that it is excepted track.” *December 6, 2024 Reply* at 24. PBL cites no authority where it has ever previously made this claim for any of its tracks in the Philadelphia area.

PBL’s belated rationalization fails. First, and foremost, as with its arguments for §10901 jurisdiction, PBL’s arguments for alternative §10906 status require the Board to simply presume that starting in 1891 PBL was a common carrier and the Easement Tracks were common carrier tracks. See *Id.* at 24 (“If the Board finds that the ROW Track is not §10901 track, then, being jurisdictional tracks owned and controlled by PBL, an STB regulated carrier, the ROW Track must then be §10906 track.”). As explained in RWIP’s Opening Statement and in this Rebuttal, there is no basis for that assumption.

In addition, there is no evidence or language in the 1890 Ordinance or the *1891 Finance Agreement*⁶ that any of the tracks constructed thereunder were intended to be “spur, industrial, team, switching, or side tracks” owned or operated by a common carrier railroad. 49 U.S.C. §10906. For example, the 1891 Finance Agreement refers to the tracks as “line” or “road or line.” See, e.g., Opening Evidence, Exhibit 2, paragraphs 2, 4.

⁶ See Opening Statement at 11, note 2 (this is the agreement between PBL and Charles Campbell, which is Exhibit 2 to RWIP’s Opening Statement)

Finally, the fact that beginning in 1967 the Easement Tracks were used by R&H exclusively for its plant switching operations using its own equipment lends additional credence to a conclusion that the Easement Tracks possessed more of the characteristics of a private industry track than an “excepted track.” As to this latter point, PBL seeks to bolster its contentions for jurisdictional status by claiming through a process of elimination that the Easement Tracks must be either § 10901 or § 10906 tracks because the only other possible category of railroad tracks is private industry tracks, and the Easement Tracks allegedly do not meet the criteria for private industry tracks. *December 6, 2024 Reply* at 17-18.

The most obvious rebuttal to this argument is that there are *not* just three categories of railroad tracks. While those three are certainly the primary categories for the vast majority of railroad tracks in the United States, it is also true that railroad tracks can exist outside of the Board’s jurisdiction and not be “private industry tracks” as typically defined in agency precedent. One common example is a former of line of railroad under §10901 that has been formally abandoned but not yet salvaged or removed and remains intact. Such railroad track doesn’t fall into any of the three primary categories, but it nevertheless exists and the use of such track is not subject to the Board’s jurisdiction until new operating authority is requested. *See* Docket No. FD 36616, *Savage Tooele Railroad Company – Construction and Operation Exemption – Line of Railroad in Tooele County, Utah* (served April 1, 2024); Docket No. FD 36741, *Union Pacific Railroad Company – Operation Exemption – In Tooele County, Utah* (served February 13, 2024).

Moreover, when determining the jurisdictional status of a particular segment of railroad track “the agency and the courts have adopted a case-by-case, fact-specific approach” that is typically confined to the particular precise segment of track at issue. *See. e.g.,* STB Finance Docket No. 34429, *The New York City Economic Development Corporation – Petition for Declaratory Order* (served July 15, 2004) at 5. In *Sugarhouse, supra*, for example, the Board was

asked (by PBL) whether it had jurisdiction over a particular segment of PBL's alleged right-of-way, and ultimately the Board found it did not for many of the same reasons it should not find the Easement Tracks to be subject to its jurisdiction. See *Sugarhouse* at 3 (“(1) PBL has not demonstrated that it ever perfected the right to operate as a common carrier over the PBL right-of-way; (2) PBL has neither demonstrated that it was a common carrier over the Penn Street Lines via trackage rights, a lease, or otherwise, nor established PBL's status as to those lines is related to the PBL right-of-way; and (3) 49 U.S.C. §10903 does not apply to the PBL right-of-way.”); See also, Opening Statement at 20-21; Petition at 7, 12, and 18.

Thus, this proceeding is only about the legal status of the Easement Tracks on RWIP's property. The status of other tracks PBL owns in Philadelphia is not at issue, or relevant. PBL's attempt to lump the Easement Tracks into the factual circumstances of other tracks it owns is therefore improper. See, *December 6, 2024 Reply* at 5. In this proceeding the Board must take into account the extremely unique relevant underlying facts surrounding the Easement Tracks, which include but are certainly not limited to: (1) the creation and purpose of PBL to serve commercial interests in Philadelphia, (2) the control over PBL exerted by the 1890 Ordinance, (3) PBL's historically lacking any indicia of an operating carrier railroad, (4) the lack of any evidence that the Easement Tracks were imbued with a common carrier obligation when constructed in 1891, (5) the fact that all use of the Easement Tracks by Reading (and maybe Conrail) was pursuant to private contracts and neither ever sought authority to conduct common carrier service over the Easement Tracks, and (6) that for the 34 years prior to all use ceasing in 2001, the Easement Tracks were used and maintained by R&H as a private industry track using R&H's railroad equipment and personnel. Opening Statement at 14, and Exhibit 6.

IV. RWIP Presents Evidence, both Relevant and Unrebutted, that No Present or Future Demand for Rail Service Exists

RWIP demonstrated in its Opening Statement that PBL has no present or future use for the Easement Tracks for any railroad purposes, let alone for common carrier operations. No shipper is asking for rail service, and nor will any do so into the indefinite future. PBL did not dispute or even attempt to rebut any of RWIP's assertions. PBL's complete silence is not insignificant, as it calls into question PBL's motivation for continuing to claim that these clearly deteriorated and useless railroad tracks are subject to the Board's jurisdiction. Because the Board lacks jurisdiction over the Easement Tracks, there is no need for RWIP to utilize the relevant procedures under 49 U.S.C. §10903 to seek an official determination from the Board that abandonment has occurred. But RWIP submits that the fact there is clearly no present or future use for the Easement Tracks in interstate commerce should factor into the Board's consideration of RWIP's Petition for Declaratory Order.

V. Conclusion

For all of the forgoing reasons and the reasons set forth in RWIP's Petition and the Supplement to the Petition, the Board should issue an order declaring that the Easement Tracks transversing Petitioner's Property are neither a line of railroad subject to § 10901, and nor are they "excepted track" subject to § 10906, and that the Board therefore has no jurisdiction over the Easement Tracks and the parties' dispute.

Respectfully submitted,

/ss/ Stephen Foxman

Stephen Foxman, Esquire

Eckert Seamans Cherin & Mellott, LLC

Two Liberty Place, 22nd Floor

50 South 16th Street

Philadelphia, PA 19102

215-851-8400

sfoxman@eckertseamans.com

/s/ Thomas W. Wilcox
Thomas W. Wilcox, Esquire
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW Suite 300
Washington, DC 20006
202-508-1065
tom@twilcoxlaw.com

*Counsel for Richmond Waterfront Industrial
Park, LLC*

Dated: January 6, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2025, copies of the foregoing Rebuttal Statement were served by electronic mail on the parties of record on the official service list for Docket No. FD 36710.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox