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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36809

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September 5, 2024
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**NORTHEAST LOUISIANA MULTIMODAL DISTRICT – PETITION FOR
DECLARATORY ORDER**

DELTA SOUTHERN RAILROAD, INC.'S REPLY

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Dated: September 5, 2024

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**NORTHEAST LOUISIANA MULTIMODAL DISTRICT – PETITION FOR
DECLARATORY ORDER**

DELTA SOUTHERN RAILROAD, INC.’S REPLY

This petition for a declaratory order (“Petition”) filed by the Northeast Louisiana Multimodal District (“NELMD”)¹ is yet another in a line of vexatious legal actions filed by a small cadre of related entities in Louisiana, and their shared counsel, attempting to seize the property of an active Class III railroad, Delta Southern Railroad (“DSRR”), that is serving customers in the area. Like the proceedings that this cadre has previously filed at the Board and in courts, this one lacks merit.

The basic facts of this case lead to the inevitable conclusion that the Board should decline to issue a declaratory order. NELMD is precluded from raising the issues presented in the Petition after the Federal District Court for the Western District of Louisiana (“Court”) has already conclusively and finally resolved them. Moreover, the Court got it right.

¹ The NELMD was formerly known and proceeded in certain actions at the Northeast Louisiana Railroad Development District. Here, we refer to it by its current name, NELMD.

I. BACKGROUND

A. The Court Litigation

This case began in the state courts of Louisiana when NELMD filed a state law expropriate action to seize a 2.7-mile track owned and operated by DSRR in support of transportation the railroad provides (“Track Segment”). DSRR removed the case to the Court on the grounds that the case presented a federal question. Under federal law, the expropriation action was preempted by 49 U.S.C. 10501(b) because the Track Segment fell within 49 U.S.C. §10906. NELMD then sought to have the case remanded to state court, which required the Court to determine whether the Track Segment was Section 10906 track. A magistrate issued a report and recommendation, which the Court adopted. The Court ruled against NELMD and held that the Track Segment was Section 10906 track and subject to the Board’s jurisdiction, which is the very same issue presented by the Petition. Report and Recommendation, *Northeast La. R.R. Dev. Dist. V. Delta South. R.R. Inc.*, Case 3:23-cv-01783-TAD-KDM at 4-7 (W.D. LA May 24, 2024) (adopted by the Court), provided as Exhibit A (“Court Decision”).

The magistrate found that NELMD admitted that the Track Segment was used to store railcars and that DSRR agreed. *Id.* at 7. The magistrate applied both the test of the Fifth Circuit Court of Appeals and the Board’s test and held that “the Track Segment is Excepted Track.” *Id.* The magistrate therefore recommended that the Court decline to remand the case, find that federal law preempted the state expropriation action, and dismiss the case because the Board has exclusive jurisdiction. *Id.* at 7 and 8-9.

In her Report and Recommendation to the District Court Judge, the magistrate noted that the parties were afforded a fourteen-day period in which to object to the proposed factual findings and conclusions of law after which time an aggrieved party was barred from “attacking

on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge.” *Id.* at 10-11. NELMD filed objections, in which it argued that the Court “either (i) determine that the STB has no regulatory jurisdiction over . . . the ‘ancillary track’ track at issue herein; or (ii) issue a Stay Order in this case and refer a jurisdictional issue to the Surface Transportation Board.” NELMD Objections to Report and Recommendation, Case 3:23-cv-01783-TAD-KDM (filed June 7, 2024), provided as Exhibit B.

The Court expressly rejected NELMD’s arguments declaring that “The Report and Recommendation of the Magistrate Judge [Doc. No. 23] having been considered, together with the Objection [Doc. No. 24] filed by Plaintiff, and, after a *de novo* review of the record, [the Court] find[s] that the Magistrate Judge’s Report and Recommendation is correct and that judgment as recommended therein is warranted.” *See* Exhibit A. The Court therefore adopted in its entirety the magistrate’s Report and Recommendation and entered a judgment of dismissal. *Id.* NELMD then failed to appeal the District Court’s decision, rendering the conclusion as to jurisdiction, which is predicated on the Section 10906 status of the Track Segment, final. In short, NELMD litigated the issues before an appropriate tribunal, lost, and failed to appeal (the “Expropriation Case”).

The Petition omits all the critical evidence that was before the Court when it made its ruling in the Expropriation Case. Curiously, NELMD did not submit as exhibits to its Petition the evidence that was before the Court (nor did NELMD submit to the Board any of its own briefs). DSRR provides the complete DSRR Memorandum in Opposition to the Motion to Remand and in Support of Its Motion to Dismiss filed on Feb. 23, 2024 (“DSRR Memorandum”) and all attachments thereto as Exhibit C, and NELMD’s briefs as referenced *infra*.

B. NELMD and LPPC

The NELMD is little more than the alter ego of the Lake Providence Port Commission (“LPPC”) and involves many of the same players (“Louisiana players”) and the same counsel. The individual who oversaw the creation of the NELMD was the deputy director of LPPC.² Karvan Powell, who is a commissioner of the LPPC, was named as one of the first commissioners and the Vice President of the NELMD on October 26, 2022.³

As the Board is aware, LPPC has sought to take other property, known as the Lake Providence Branch, of DSRR through Board proceedings. *See Lake Providence Port Comm’n – Feeder Line Application – Line of Delta S. R.R. Located in East Carroll and Madison Parishes, La.*, Docket No. 36447 (STB filed Nov. 20, 2020; STB re-filed Jan. 4, 2023). The newer iteration of Docket No 36447 is currently in abeyance after a Louisiana state court ruled that LPPC lacks the authority under Louisiana law to acquire much of that property – a fact LPPC withheld from the Board during that years long proceeding that has cost DSRR substantial sums of money to defend against when that money could have gone to much better use. *See Lake Providence Port Comm’m – Feeder Line Application – Line of Delta S. R.R. Located in East Carroll and Madison Parishes, La.*, Docket No. 36447 (STB decided Aug. 2, 2024). An attorneys’ fees motion against LPPC remains pending in that proceeding as well. Delta South.

² <https://www.waterwaysjournal.net/2024/07/12/40-under-40-awards-greaves-henkemeyer-killen-kuphall/>. The profile of Bryant Killen, deputy director of Lake Providence Port Commission in Lake Providence, La., notes that he “oversaw the creation of the Northeast Louisiana Multimodal District, which covers four parishes, by meeting with each individual parish police jury and garnering support, Port Director William Gilfoil said.” It also notes the interconnected nature of the entities in Northeast Louisiana -- “[b]esides his role with the Lake Providence Port, Killen also assists with the management of the Tensas Port in St. Joseph, La., and the Vidalia Port in Vidalia, La. He is also the primary external affairs manager for four operations . . .”

³ “Commissioners Chosen for Railroad District,” *Concordia Sentinel*, November 2, 2022 (https://www.hannapub.com/concordiasentinel/news/local_state_headlines/commissioners-chosen-for-railroad-district/article_6acf57c8-5ad9-11ed-952c-df58c7b35b2c.html)

R.R., Inc.’s Motion to Dismiss and for Attorneys’ Fees, *Lake Providence Port Comm’n – Feeder Line Application – Line of Delta S. R.R. Located in East Carroll and Madison Parishes, La.*, Docket No. 36447 (STB filed June 27, 2024) (“Attorneys’ Fees Motion”).

But LPPC and NELMD’s actions are not limited. So far, LPPC or NELMD have exhausted agency and judicial resources (not to mention their taxpayers’ money) unsuccessfully in numerous actions against DSRR, filed by the same team of state or Board counsel, respectively, as follows:

- Filed Docket No. 36447 and then refiled years later (with the procedural history summarized in Delta Southern Railroad, Inc.’s Reply to the Lake Providence Port Commission’s Opposition to Motion to Dismiss and for Attorneys’ Fees, *Lake Providence Port Comm’n – Feeder Line Application – Line of Delta S. R.R. Located in East Carroll and Madison Parishes, La.*, Docket No. 36447 at 2-4 (STB filed July 22, 2024)), which after hundreds of thousands of dollars in litigation expenses to DSRR is now being held in abeyance with a attorneys’ fees motion against LPPC pending (see Attorneys’ Fees Motion);
- Lost an objection to Patriot Rail Company acquiring DSRR (*Patriot Rail Co. LLC, Steelriver Transport Ventures LLC; Global Diversified Infrastructure Fund (North America) LP; First State Infrastructure Managers (Int’l) Ltd.; and Mitsubishi UFJ Financial Grp., Inc. —Control Exemption— Delta S. R.R., Inc.*, Docket No. 36642 (STB decided Dec. 16, 2022) (denying request to reject notice of exemption);
- Lost an objection to clarifying mileposts on DSRR (see *Delta S. RR., Inc. – Acquisition and Operation Exemption – Delta S. R.R. Co.*, Docket No. 33802 at 2 (STB decided Sept. 1, 2023) (noting LPPC’s argument and ignoring it));
- Lost a state court action in which a Louisiana court issued a writ of quo warranto that orders LPPC to “cease its ultra vires actions and discontinue its pursuit of ownership or control of property outside of East Carroll Parish in its feeder line application before the United States Surface Transportation Board, STB Docket No. FD 36447” (see Attorneys’ Fees Motion at 1), which resulted in Docket No. 36447 being held in abeyance;
- Filed a lawsuit in Louisiana, which DSRR has now had to seek to join because NELMD failed to serve DSRR, collaterally attacking the writ of quo warranto and claiming that NELMD can transfer to LPPC powers that a court has held the Louisiana legislature did not give to LPPC (see LPPC July 5, 2024, Letter, Attach. B, *Lake Providence Port Comm’n – Feeder Line Application – Line of*

Delta S. R.R. Located in East Carroll and Madison Parishes, La., Docket No. 36447 (STB filed July 5, 2024));

- Lost an attempt to use a state law expropriation action to take the Track Segment, which was removed to the Court that ruled against NELMD (*see* Court Decision); and
- Filed this Petition to collaterally attack the final decision of the Court.

If these actions, losses, and collateral attacks on final decisions were considered in the antitrust context, they may well be classified as sham litigation. *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3rd Cir. 2015). In other contexts, financial penalties and restrictions to access to the forum have been imposed. *See e.g., Lysiak v. Comm'r*, 816 F.2d 311 (7th Cir. 1987).

C. DSRR

While LPPC and now NELMD continue to file vexatious, frivolous, and costly filings in court and at the Board, DSRR continues to focus on serving customers. DSRR is a small Class III railroad. DSRR provides service to its customers, moves about 1,000 cars per year, has invested more than \$400,000 in the Lake Providence Branch, and has received no complaints about adequacy of service since at least Patriot Rail Company acquired it. *See* Attorneys' Fees Motion, Attachment B at ¶4.

II. ARGUMENT

The NELMD had every opportunity to litigate the status of the Track Segment it sought to expropriate and whether the Court had jurisdiction over such track. NELMD lost. The decision of the Court in the Expropriation Case, now final and non-appealable, has res judicata and collateral estoppel effect that precludes this Petition. Having failed to timely appeal the District Court's ruling to the Fifth Circuit Court of Appeals, the NELMD cannot now seek to revisit that holding in this forum. Moreover, on the merits this is a simple case that the Court got

right and that the Board cannot overturn. This Proceeding is another in a line of frivolous and wasteful tactics that should not be countenanced.⁴

A. NELMD Is Precluded from Relitigating Issues and Claims that It Lost in District Court.

The Board should deny the Petition because the parties litigated the issue of the status of the track at issue before an appropriate tribunal – the Court – in the Expropriation Case.

Litigating whether a track is Section 10906 track is not unusual for a court. *See e.g., Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188-1189 (10th Cir. 2008) (“*Port City*”). NELMD lost, failed to appeal, and that ruling is now final. NLEMD just does not like that tribunal’s ruling. Its attempt to relitigate before the Board is precluded.

Res Judicata, or claim preclusion, “embodies the principle ‘that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.’” *SBC Commc’ns v. FCC*, 407 F.3d 1223, 1229 (D.C. Cir. 2005). “Issue preclusion [or collateral estoppel] ‘bars relitigation of an issue by a party that has actually litigated [the] issue.’” *Cal. High-Speed Rail Auth—Pet. for Declaratory Order*, FD 35861, slip op. at 7 n.15 (STB served Dec. 12, 2014) (quoting *SBC Commc’ns v. FCC*, 407 F.3d 1223, 1229 (D.C. Cir. 2005)); *see also St. Louis Southwestern Railway Company Arbitration Appeal*, Docket No. 28799 (Sub-No. 9) (ICC served Aug. 15, 1995) (noting that the doctrine of res judicata or “claim preclusion” forecloses litigation of issues that, although not themselves litigated, could

⁴ Section I.B, *supra*, lists the costly attacks on DSRR made by LPPC and NELMD. As the Board knows, DSRR has spent on Docket No. 36447 alone more than \$150,000, which is a substantial sum for small Class III railroad that could have been available to supplement the more than \$400,000 that Patriot Rail as invested in the Lake Providence Branch since it acquired it. *See Attorney’s Fees Motion*, Attachment B at ¶3. Frivolous actions are prohibited from being brought before the Board. 49 C.F.R. §1103.10 and §1103.11 (incorporating by reference other ethical rules, including The Rules of Professional Conduct 3.1, which for the American Bar Association and most states prohibits the bringing of frivolous actions.); 49 C.F.R. §1130.31.

have been raised in a prior suit between the parties and collateral estoppel or "issue preclusion" forecloses the relitigation of a matter that has been litigated and decided).

The four major policy reasons that lie behind collateral estoppel are informative here as well. First, the doctrine promotes finality, promotes efficiency, prevents harassment of litigants, and fosters reliance on judicial decisions. Second, collateral estoppel conserves litigant and judicial resources by precluding relitigation of issues. Third, collateral estoppel prevents litigant harassment by preventing repetitive and "vexatious" litigation involving the same underlying matter. Finally, by ensuring litigant repose and minimizing the possibility of inconsistent decisions, collateral estoppel fosters reliance on judicial determinations. *See Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line*, 73 Cornell L. Rev. 817, 821-822 (1988) (discussing these four policy reasons).

Under these basic principles of finality, preservation of agency resources, prevention of harassment, and avoidance of inconsistent decisions, NELMD is estopped from litigating the claims and issues in the Petition.

In the Expropriation Case, the *same* parties litigated the exact *same* issue – whether the Track Segment was Section 10906 track and thus exclusively within federal jurisdiction under 49 U.S.C. § 10501(b)(2). NELMD argued to the Court that the Track Segment had been abandoned, as it does here. *See* Petition at 1-4. And NELMD claimed that neither DSRR nor any of its predecessors obtained prior authority to operate the line as ancillary track.⁵ *See Port*

⁵ The Petition is not the first time that NELMD's counsel floated the "lack of subsequent authority" argument as it relates to DSRR properties. Petition at 8-10. The Board ignored that argument when LPPC made it in Docket No. 33802. *Compare* Lake Providence Port Comm'n Reply to Petition to Reopen and Correct Notice, *Delta S. RR., Inc. – Acquisition and Operation Exemption – Delta S. R.R. Co.*, Docket No. 33802 at 1-3 (STB filed Sept. 26, 2022) with *Delta S. RR., Inc. – Acquisition and Operation Exemption – Delta S. R.R. Co.*, Docket No. 33802 at 2 (STB decided Sept. 1, 2023) (noting LPPC's argument and ignoring it).

City, 518 F.3d at 1189 (rejecting the same argument that prior permission was required). DSRR conceded the fact of the abandonment (Court Decision at 6), although the Court expressed some skepticism. Court Decision at fn. 4. DSRR also noted, however, that an abandonment proceeding is not outcome determinative. Under the Interstate Commerce Commission Termination Act (“ICCTA”), Congress permitted additional rail use of abandoned rail through Section 10906. *Glosemeyer v. M-K-T R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress’s adoption of Section 10906 “encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked”) (“*Glosemeyer*”); *The Great Walton R.R. Co. – Petition for Declaratory Order*, No. AB 1241 (Sub-No 1), 2020 STB LEXIS 356 at *19-20 (STB served June 23, 2020) (observing that as long as the railroad can establish a property interest in the land, the railroad “would be free to reconstruct the § 10906 runaround track regardless of whether it had previously been removed from the interstate rail system” through abandonment) (“*Great Walton*”); *Pinelawn Cemetery – Petition for Declaratory Order*, 2015 STB LEXIS 126 (STB decided Apr. 21, 2015). Thus, the Court correctly concluded that “Section 10906 certainly does not foreclose once-abandoned track coming back into use as Excepted Track without STB approval.” Court Decision at 6.

The Court evaluated the facts presented by the parties. DSRR provided evidence, which NELMD omitted from its Petition, related to the use of the Track Segment since that abandonment that showed its Section 10906 status. See Declaration of Rob Thrall and attachments thereto, DSRR Memorandum, attached as Exhibit C (“Thrall Declaration”).

The Court held that “under the test endorsed by the Fifth Circuit, the Track Segment appears to be excepted under Section 10906 as it is used for storage and staging of cars incidental to the receipt of shipments. Another related test utilized by the Board yields the same

conclusion.” Court Decision at 7. Indeed, the Court explained the Board’s test and applied that test to the facts in the case:

Indicia found relevant in determining whether a track is Excepted Track include the length of the track; how many shippers will be served; whether the track is stub-ended; whether the track is built to invade another railroad's territory; whether the shipper is located at the end of the track; whether there is regularly scheduled service on the track; and who owns and maintains the track. *New York City Econ. Dev. Corp. – Petition for Declaratory. Order. No.*, FD 34429, 2004 WL 1585810. at *6 (S.T.B. July 15, 2004). The Track Segment is "a short segment," does not invade the territory of another railroad, does not host scheduled, maintained or regular service, does not serve a specific customer's facilities, and does not host overhead or through traffic.

Court Decision at n. 3 (citing Thrall Declaration). The Court ruled against NELMD finding “that the Track Segment is Excepted Track”. Court Decision at 7.

The Court considered arguments raised by the parties. NELMD argued that cases decided pre-ICCTA governed, including *Hayfield N. R.R. Co., Inc. v. Chicago and N.W. Transp. Co.*, 467 U.S. 622 (1984). See Exhibit D, Plaintiff’s Brief in Support of Their Motion to Remand at page 6 of 7; Exhibit E, Plaintiff’s Reply to Defendant’s Opposition to Motion to Remand at 2.⁶ That is the same case on which the Petition relies. Petition at 5 and 13-14. The Court rejected the argument, NELMD failed to appeal the Court’s ruling, and NELMD now seeks to reprise the rejected claim in the Petition (at 9-10). Court Decision at n. 2.

The Court also rejected NELMD’s position that state law was not preempted. “However, as established *supra*, federal law preempts state law with regards to the Track Segment.” *Id.* at 8. Accordingly, the Court concluded that “Resolution of [NELMD’s] attempt to acquire the Track Segment is within the STB’s jurisdiction and must thus be resolved through that entity’s

⁶ In addition to these briefs, which NELMD did not provide to the Board, NELMD also filed an Opposition to Motion to Dismiss, which does not add anything substantively to the discussion. DSRR is not providing that brief for judicial economy.

processes,” which means NELMD cannot use state expropriation law to seize the Track Segment from DSRR. *Id.* at 9.

In short, the Court has made a finding that the Track Segment is Section 10906 track subject to the Board’s jurisdiction (albeit not its authority) and that state law is preempted with regard to it. Those were all necessary findings to the Court’s order denying remand and dismissing the case.⁷ The Court had all the facts. The Court heard NELMD’s arguments. It just rejected them. And, NELMD failed to appeal the Court’s final ruling -- presumably because it read the Court’s decision and saw how closely it adhered to the facts, statute, and the law of the Fifth Circuit. Court Decision at 5-6. Accordingly, NELMD is barred from relitigating before the Board.⁸ *See Brampton Enter., LLC d.b.a Savannah Re-Load v. Norfolk S. Ry. Co.*, Docket No. 42118 n.6 (STB Decided Mar. 14, 2011).

B. The Track Segment Is, As the Court Found, 10906 Track Subject to the Board’s Jurisdiction.

The issue that was presented to the Court and that was well within its power to resolve was whether the Track Segment was Section 10906 track subject to the Board’s jurisdiction.⁹

⁷ See Court Decision at 8 (“The Fifth Circuit has endorsed dismissal of cases where the STB has exclusive jurisdiction over the matter.”) and at 9 (“Resolution of the Development District’s attempt to acquire the Track Segment is within the STB’s jurisdiction and must thus be resolved through that entity’s processes.”). Dismissal for lack of subject matter jurisdiction was a final order that NELMD failed to appeal. *See e.g., Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (“a dismissal for lack of subject-matter jurisdiction is, in effect, a dismissal of the *action*, and therefore final, even if, as here, it is styled as a dismissal of the complaint.”).

⁸ Unlike, *Ca. High-Speed Rail Auth. – Petition for Declaratory Order*, Docket No. 35861 (STB Decided Dec. 12, 2014), there are no conflicting opinions that warrant a declaratory order. An appeal of a decision of a district court must go to the appropriate court of appeals and not to an administrative agency. 28 U.S.C. §1291.

⁹ DSRR has previously made the Board aware of the existence of this track. *See e.g., Lake Providence Port Comm’n – Feeder Line Application – Line of Delta S. R.R. Located in East Carroll and Madison Parishes, La.*, Docket No. 36447 at n.2 (STB filed Sept. 2, 2022).

The 2.7-mile Track Segment is connected to the Lake Providence Branch by rights granted to DSRR by Kansas City Southern¹⁰ and used to store and stage railcars incidental to rail service provided to customers by DSRR.

The Court's analysis was thorough, fact-based, and correct. The Court applied both the Fifth Circuit Court of Appeals test and the Board's test for evaluating the status of the Track Segment. Court Decision at 6 and n.2. The Court found that "[t]he Development District admits that the Track Segment 'is primarily, if not always, used to store railcars.'" *Id.* at 7 (citing Plaintiff's Reply to Defendant's Opposition to Motion to Remand at 6, provided as Exhibit E). The Court noted that "Delta Southern agrees." *Id.* (citations, including to Thrall Declaration, omitted). The Court concluded: "Thus, under the test endorsed by the Fifth Circuit, the Track Segment appears to be excepted under §10906 as it is used for storage and staging of cars incidental to the receipt of shipments. Another related test utilized by the STB yields the same conclusion." *Id.*¹¹ The Court then held that "the Track Segment is Excepted Track". *Id.*

¹⁰ This fact, which NELMD omitted from the Petition, renders meaningless NELMD's cul-de-sac argument about "physical separation," which argument NELMD also unsuccessfully made to the Court. Petition at 11.

¹¹ Based on these undisputed facts, the Court's conclusion that the Track Segment is Section 10906 track was a straightforward application of Board precedent or the law of the United States Court of Appeals for the Fifth Circuit. The Board and the courts look primarily at the use of a track (the "use test"), and at a track's physical characteristics (the "physical characteristics test"), in making the determination of whether track should be categorized as Section 10906 track. *New York City Econ. Dev. Corp.—Pet. for Declaratory Order*, FD 34429, 2004 STB LEXIS 434 at *14 (STB served July 15, 2004) ("NYCEDC") (citing *Battaglia Distributing Co., Inc. v. Burlington Northern R.R. Co.*, FD 32058, slip op. at 3 (STB served June 27, 1997)). In the Fifth Circuit, "trackage . . . used in the loading, reloading, storage and switching of [rail] cars incidental to the receipt of shipments by the carrier or their delivery to the consignee . . . is 'spur, industrial, team, switching or side tracks'" under Section 10906. *Ry. Labor Exec. Ass'n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988) (quoting *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966)).

The Track Segment is unquestionably Section 10906 track under both tests – as the Court has already held. As to the use test, it is admitted by NELMD that the Track Segment has been

That the Track Segment was previously abandoned is no bar to the finding that the Track Segment is Section 10906 track. Even if track has been abandoned, it can be reestablished as 10906 track without the involvement of the Board, or its predecessor the Interstate Commerce Commission. *Glosemeyer*, at 1117; *The Great Walton*, at *19-20.

As 10906 track, the Track Segment is subject to the Board's exclusive jurisdiction under Section 10501(b)(2). Congress was clear—in language that the Fifth Circuit described as putting the preemption issue “beyond peradventure”—that, among other regulated activities related to “spur, industrial, team, switching, or side tracks,” the “acquisition” of such tracks is exclusively within the Board's jurisdiction. As the Board has explained, “[i]n enacting ICCTA, Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks.” *Allied Indus. Dev. Corp. – Petition for Declaratory Order*, Docket No. 35477, 2015 STB LEXIS 310 (STB decided Sept. 15, 2015) (“... § 10906 track is part of the national rail system. Accordingly, while excepted from the Board's licensing requirements, § 10906 track is nevertheless subject to the Board's

and is used for storing and staging rail cars. Court Decision at 7; *see also* DSRR Memorandum (Thrall Declaration).

As for the physical characteristics test, specific indicia to determine whether a track is a line of railroad or is instead Section 10906 track include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track. *NYCEDC* at *15-16 (citing *ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co.*, Docket No. 34126, slip op. at 5 (STB served Dec. 26, 2001); *Grand Trunk West. R.R.—Pet. for Declaratory Order—Spur, Industrial, Team, Switching or Side Tracks in Detroit, Mi.*, Docket No. 33601, slip op. at 2 (STB served July 30, 1998); *Chicago SouthShore & South Bend R.R.—Petition for Declaratory Order—Status of Track at Hammond, In.*, Docket No. 33522, slip op. at 6 (STB served Dec. 17, 1998)). Here, the physical characteristics include that the track is a short segment; it does not invade another railroad's territory, there is not regularly scheduled service over the Track; and it is not used to serve a customer. DSRR Memorandum (Thrall Declaration).

jurisdiction”); *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.—Construction, Acquisition, and Operation—In Wilmington and Woburn, Ma.*, Docket No. 34797, 2007 STB LEXIS 391 at *26-27 (STB served July 10, 2007); *see also Friberg v. Kansas. City South. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); *United Transp. Union—Il. Legis. Bd. v. STB*, 183 F.3d 606, 612 (7th Cir. 1999); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003).

* * *

In sum, the issues raised by the Petition are estopped because the parties have already litigated them, the Court has ruled on them, and NELMD failed to appeal that final ruling. The Court’s analysis was sound and correct that the Track Segment is Section 10906 track that is within the Board’s jurisdiction. Accordingly, DSRR respectfully requests that the Petition be denied.

Respectfully submitted,

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Dated: September 5, 2024

**EXHIBIT A –
REPORT AND RECOMMENDATION OF THE MAGISTRATE
AND
COURT ADOPTION THEREOF**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIV. ACTION NO. 3:23-01783

VERSUS

JUDGE TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD INC

MAG. JUDGE KAYLA D. MCCLUSKY

REPORT & RECOMMENDATION

Before the undersigned Magistrate Judge, on reference from the District Court, is a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendant Delta Southern Railroad Inc. [doc. #5] and a motion to remand filed by Plaintiff Northeast Louisiana Railroad Development District. [doc. #9]. The motions are opposed. [docs. #12, 14].

For reasons assigned below, it is recommended that the motion to remand be DENIED, the motion to dismiss be GRANTED IN PART and DENIED IN PART, and the suit be DISMISSED WITHOUT PREJUDICE.

Background

Plaintiff Northeast Louisiana Railroad Development District (“the Development District”) filed the instant petition for expropriation against Defendant Delta Southern Railroad Inc. (“Delta Southern”) on November 22, 2023, in the Sixth Judicial District, Madison Parish, Louisiana. Petition for Expropriation [doc. #1-1, pp. 5-7]. Delta Southern removed the action to this Court on December 21, 2023. Notice of Removal [doc. #1]. The Development District seeks to expropriate 2.7 miles of track to facilitate construction of a rail line between East Carroll Parish and Concordia Parish. Petition for Expropriation [doc. #1-1, p. 5].

Delta Southern owns 2.7 miles of track between milepost 498.4 near Tallulah, Louisiana, and milepost 501.1 near Vidalia, Louisiana (“the Track Segment.”). *Id.* (specifying the mileposts as 498.44 and 501.15). The history of the Track Segment relevant to this proceeding dates back to June 29, 1988, when Missouri Pacific Railroad (“MPR”) petitioned the Interstate Commerce Commission (“the ICC”) to abandon the rail line located between milepost 408.9 near McGehee, Arkansas, and milepost 651.6 near Vidalia, Louisiana. Memo in Support of M/Remand [doc. #9-1, p. 3]. The ICC subsequently authorized National Railway Equipment Company (“NREC”) to acquire portions of that track from milepost 408.9 to milepost 498.4 in Tallulah, Louisiana, from MPR. *Id.* NREC later acquired the remaining track – from milepost 498.4 to milepost 651.6 – from MPR. *Id.* On September 30, 1988, the ICC authorized NREC to operate south of milepost 408.9 and north of milepost 498.4. *Id.* Through a series of transactions, ownership and operating rights of the track south of milepost 408.9 and north of milepost 498.4 now rests with Delta Southern. *Id.* at pp. 3-4. Portions of the line south of milepost 498.4 have been sold by Delta Southern, but the company retains ownership of other segments south of that milepost, including the Track Segment. *Id.* at p. 4; Memo in Support of M/Remand [doc. #9-1, p. 3]. Delta Southern has never received operating authority from the Surface Transportation Board (“STB”)¹ concerning any of the line south of milepost 498.4. Memo in Support of M/Remand [doc. #9-1, p. 3].

The Development District now seeks to construct an active rail line between East Carroll Parish and Concordia Parish. Petition for Expropriation [doc. #1-1, p. 5]. The Track Segment is

¹ The STB is the successor agency of the ICC, which was abolished by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). 49 U.S.C. § 10101 *et seq.*

included in the right of way the Development District has determined necessary for completion of this proposed line. *Id.*

On December 29, 2023, Delta Southern filed its motion to dismiss. M/Dismiss [doc. #5]. The Development District filed its motion to remand on January 19, 2024. M/Remand [doc. #9]. Ten days later, on January 29, 2024, the Development District filed its opposition to the motion to dismiss, Opposition to M/Dismiss [doc. #12], to which Delta Southern responded on February 5, 2024. Reply to Opposition to M/Dismiss [doc. #13]. On February 23, 2024, Delta Southern filed its opposition to the motion to remand. Opposition to M/Remand [doc. #14]. The Development District replied on March 13, 2024. Reply to Opposition to M/Remand [doc. #19]. Shortly thereafter, on March 15, 2024, Delta Southern filed a further brief opposing remand and supporting dismissal. Sur-Reply to M/Dismiss and M/Remand [doc. # 20].

Briefing is complete. Accordingly, this matter is ripe.

Analysis

I. Legal Standard

a. Remand to State Court

Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) (citation omitted). As there is a presumption against federal jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“It is to be presumed that a cause lies outside this limited jurisdiction . . .”), the removal statute is to be construed “strictly against removal and for remand.” *Hicks v. Martinrea Automotive Structures, Inc.*, 12 F.4th 511, 514-15 (5th Cir. 2021). The party invoking federal jurisdiction bears the burden of proving the suit lies within the court’s limited jurisdiction. *Howery*, 243 F.3d at 916.

A complaint that seemingly pleads only state-law claims presents a federal question if “a federal statute wholly displaces the state-law cause of action through complete preemption.”

Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 8 (2003); *see also Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009) (“[An action] purporting to rest on state law can be recharacterized as one ‘arising under’ federal law if the law governing the complaint is exclusively federal.”). Federal law may preempt an entire area of law if federal statutes “so forcibly and completely displace state law that [a] cause of action is either wholly federal or [non-existent].” *New Orleans & Gulf Coast Ry. Co. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 544-45 (5th Cir. 2005).

b. Federal Rule of Civil Procedure 12(b)(6)

The Federal Rules of Civil Procedure sanction dismissal where the plaintiff fails “to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). To withstand a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

II. Motion to Remand

The motion to remand raises questions about this court’s jurisdiction over the instant action. *See generally* Memo in Support of M/Remand [doc. #9-1]. It is thus appropriate to resolve the motion to remand before analyzing the motion to dismiss.

Under the ICCTA, the STB’s jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,” even if they are located entirely in one state, “is exclusive.” 49 U.S.C. § 10501(b)(2). This means that the ICCTA completely preempts state law concerning matters enumerated in § 10501(b)(2). Section 10906 of the ICCTA provides that the STB “does not have authority . . .

over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” *Id.* at § 10906. Sections 10501(b)(2) and 10906 taken together create a regulatory gap whereby the STB may have *jurisdiction* over a track but lack regulatory *authority* over it. Indeed, the Fifth Circuit has found that “[a]lthough railroad side tracks are under the exclusive jurisdiction of the STB, rail carriers do not need prior STB approval to construct and operate those tracks.” *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (citing 49 U.S.C. § 10906). Decisions of other circuits confirm that the STB retains jurisdiction over track excepted under § 10906 (“Excepted Track”), *see, e.g., New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011) (indicating § 10501(b)(2) confers jurisdiction over “ancillary activities” that were previously excluded from STB licensing requirements); *United Transp. Union-Ill. Legis. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (“The § 10906 no-authority language means no *authority*, not no *jurisdiction*.”), as do the Board’s own decisions. *See, e.g., Baylands Dev., Inc. – Petition for Dec. Order*, No. FD 36660, 2023 WL 6121079, at *3 n.8 (S.T.B. Sept. 18, 2013) (“Board precedent makes clear that [§ 10906] track is within the Board’s jurisdiction under 49 U.S.C. § 10501(b).”); *Pinelawn Cemetery – Petition for Dec. Order*, No. FD 35468, 2015 WL 1813674, at *1 (S.T.B. Apr. 20, 2015) (“[Section] 10906 track, while excepted from licensing, is subject to the Board’s general jurisdiction under 49 U.S.C. § 10501(b)(2).”). However, the STB’s jurisdiction over a line terminates when a rail carrier abandons the line. *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005) (citing *Preseault v. I.C.C.*, 494 U.S. 1, 5 n.3 (1990) (“Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the [ICC] is empowered to impose conditions on

abandonments . . . as a general proposition [the] ICC jurisdiction terminates.” (citations omitted))).

The Development District asserts that the ICC authorized abandonment of the Track Segment, and neither it nor the STB have been asked to reauthorize interstate transportation on that segment. Memo in Support of M/Remand [doc. #9-1, p. 2]. The Development District further argues that, on this basis, the STB lacks jurisdiction over the Track Segment. *Id.* According to the Development District, because the federal regulator lack jurisdiction over the Track Segment, there is no federal question to grant this Court jurisdiction over the matter. *Id.*

Delta Southern admits that the Track Segment has previously been abandoned. Opposition to M/Remand [doc. #14, p. 16 n.9] (“Because [the Track Segment] was abandoned, it is not a common carrier line of railroad.”). This would seemingly place the track outside the jurisdiction of the STB. However, Delta Southern argues that the Track Segment has been used as Excepted Track subsequent to its abandonment, thus subjecting it to the STB’s jurisdiction, but not its authority. *Id.* at pp. 8-11, 15-18. Section 10906 certainly does not foreclose once-abandoned track coming back into use as Excepted Track without STB approval. *See* 49 U.S.C. § 10906; *see also Pinelawn Cemetery*, 2015 WL 1813674, at *1 (describing § 10906 track as exempt from STB licensing, but subject to STB jurisdiction). Consequently, there exists a federal question as to whether the STB has jurisdiction over the instant matter.

Whether the STB has jurisdiction over the Track Segment turns on whether the segment is Excepted Track. In the Fifth Circuit, track “used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments” is considered Excepted Track. *See Ry. Lab. Execs. Ass’n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988) (citing *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 166 (5th Cir. 1966)), *vacated on different grounds* 492

U.S. 901 (1989).² The Development District admits that the Track Segment “is primarily, if not always, used to store railcars.” Reply to Opposition to M/Remand [doc. #19, p. 6]. Delta Southern agrees. See Declaration of R. Thrall [doc. #14-1, p.3] (“The primary use of the [Track Segment] has been for staging and storing rail equipment necessary to the movement of rail shipments.”). Thus, under the test endorsed by the Fifth Circuit, the Track Segment appears to be excepted under § 10906 as it is used for storage and staging of cars incidental to the receipt of shipments. Another related test utilized by the STB yields the same conclusion.^{3, 4} For the limited purpose of determining jurisdiction, the undersigned finds that the Track Segment is Excepted Track, placing this controversy in the exclusive jurisdiction of the STB.

Accordingly, it is RECOMMENDED that the Development District’s motion to remand be denied.

² Note that *Ry. Lab. Exec.* and *Spencer* were decided before the current statutory scheme governing the STB came into effect. Consequently, those cases indicate that spur, industrial, team, switching, and side track lay outside the ICC’s jurisdiction. See *Spencer*, 366 F.2d at 166. The ICCTA enacted § 10906 to bring such track under STB jurisdiction as described *supra*.

³ Indicia found relevant in determining whether a track is Excepted Track include the length of the track; how many shippers will be served; whether the track is stub-ended; whether the track is built to invade another railroad’s territory; whether the shipper is located at the end of the track; whether there is regularly scheduled service on the track; and who owns and maintains the track. *New York City Econ. Dev. Corp. – Petition for Dec. Order*, No. FD 34429, 2004 WL 1585810, at *6 (S.T.B. July 15, 2004). The Track Segment is “a short segment,” does not invade the territory of another railroad, does not host scheduled, maintained or regular service, does not serve a specific customer’s facilities, and does not host overhead or through traffic. Declaration of R. Thrall [doc. #14-1, p. 2].

⁴ It is also worth noting that the test of abandonment utilized by other circuits and the STB indicate that the Track Segment may not be abandoned. Under this test, when determining whether a line has been abandoned, “the focus is on the carrier’s intent.” *Fox v. Surface Transp. Bd.*, 379 F.App’x 767, 772 (10th Cir. 2010) (citing *Birt v. Surface Transp. Bd.*, 90 F.3d 580, 585 (D.C. Cir. 1996)). “[S]everal concrete actions . . . may indicate an intent to abandon: cessation of operations, cancellations of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way.” *Id.*

III. Motion to Dismiss

As this case presents a federal question, the undersigned now turns to the motion to dismiss. Delta Southern has moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). M/Dismiss [doc. #5].

Delta Southern presents several arguments in support of its motion. First, it asserts that the procedure used by the Development District to expropriate the Track Segment is deficient under Louisiana law. Memo in Support of M/Dismiss [doc. #5-1, pp. 3-6] (arguing the Development District is not empowered to affect a “quick-take” under Louisiana law and did not comply with pre-suit requirements of Louisiana Revised Statutes Title 19). However, as established *supra*, federal law preempts state law with regards to the Track Segment. It is thus inappropriate analyze these state law arguments or to recommend dismissal because of them.

Delta Southern also contends that the ICCTA’s complete preemption of jurisdiction over the Track Segment is an independent basis for dismissal. Reply to Opposition to M/Dismiss [doc. #13, pp. 2, 4]; Opposition to M/Remand [doc. #14, p. 14]. The undersigned agrees that the ICCTA’s grant of exclusive jurisdiction to the STB over acquisition of Excepted Track places this controversy outside this Court’s jurisdiction. The Fifth Circuit has endorsed dismissal of cases where the STB has exclusive jurisdiction over the matter. *See, e.g., Baros*, 400 F.3d at 235 (holding district court finding that STB retained exclusive and plenary jurisdiction over track properly led to conclusion that the court lacked jurisdiction over claims concerning that track).⁵

⁵ “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). “Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Clark v. Tarrant*

Resolution of the Development District's attempt to acquire the Track Segment is within the STB's jurisdiction and must thus be resolved through that entity's processes.⁶

While Delta Southern predicates its motion on the Development District's putative failure to state a claim, it has nonetheless presented arguments that sound in the key of Federal Rule of Civil Procedure 12(b)(1). *See* Reply to Opposition to M/Dismiss [doc. #13, p. 4] ("ICCTA preemption also means dismissal of the expropriation action is appropriate, [and is] a separate and independent basis to dismiss the case."); Opposition to M/Remand [doc. #14, p. 14] ("ICCTA facially, expressly, and completely preempts the [Development District's] expropriation action, which establishes federal removal jurisdiction. It also requires dismissal of this action."). Furthermore, this Court has an ongoing obligation to ensure that it possess subject matter jurisdiction and may raise the issue *sua sponte* at any time. FED. R. CIV. P. 12(h)(3); *Louisiana Sportsmen All. v. Vilsack*, 583 F.App'x 379, 380 (5th Cir. 2014). While it would be improper to grant Delta Southern's motion to dismiss on the basis that the Development District has failed to state a claim, dismissal is appropriate on grounds that this court lacks subject matter jurisdiction over the controversy.

Accordingly, it is RECOMMENDED that Delta Southern's motion to dismiss be denied to the extent it Defendant moves under Rule 12(b)(6), the Court *sua sponte* find it lacks subject

County, 798 F.2d 736, 741 (5th Cir. 1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

⁶ While not entirely relevant at the moment, review of STB decisions is directed to the court of appeals, not the district courts. *See* 28 U.S.C. §§ 2321, 2342.

matter jurisdiction, and the motion to dismiss be granted in part to the extent it seeks dismissal of the suit.⁷

Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that Plaintiff Northeast Louisiana Railroad Development District's motion to remand [doc. #9] be **DENIED**.

IT IS FURTHER RECOMMENDED that the Court *sua sponte* find it lacks subject matter jurisdiction over the instant suit.

IT IS FURTHER RECOMMENDED that Defendant Delta Southern Railroad Inc.'s motion to dismiss [doc. #5] be **DENIED IN PART** to the extent it moves under Federal Rule of Civil Procedure 12(b)(6), **GRANTED IN PART** to the extent it seeks dismissal, and the suit be **DISMISSED WITHOUT PREJUDICE**.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and FED. R. CIV. P. 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS

⁷ If the STB were to determine it does not have jurisdiction over this controversy, the matter may return to this Court to be disposed of in an appropriate manner.

REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

In Chambers, at Monroe, Louisiana, on this 24th day of May, 2024.



KAYLA DYE MCCLUSKY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIV. ACTION NO. 3:23-01783

VERSUS

JUDGE TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD INC

MAG. JUDGE KAYLA D. MCCLUSKY

JUDGMENT

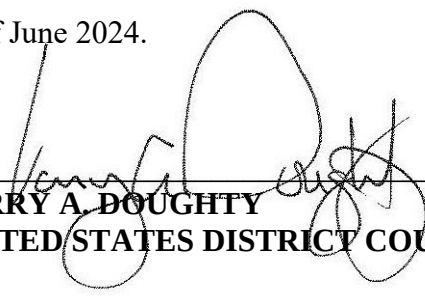
The Report and Recommendation of the Magistrate Judge [Doc. No. 23] having been considered, together with the Objection [Doc. No. 24] filed by Plaintiff, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS ORDERED that Plaintiff Northeast Louisiana Railroad Development District's Motion to Remand [Doc. No. 9] is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court *sua sponte* has found that it lacks subject matter jurisdiction over the instant suit.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Delta Southern Railroad Inc.'s Motion to Dismiss [Doc. No. 5] is **DENIED IN PART** to the extent it moves under Federal Rule of Civil Procedure 12(b)(6), and **GRANTED IN PART** to the extent it seeks dismissal. Therefore, this suit is **DISMISSED WITHOUT PREJUDICE**.

MONROE, LOUISIANA this 10th day of June 2024.



TERRY A. DOUGHTY
UNITED STATES DISTRICT COURT

EXHIBIT B –

NELMD’S OBJECTIONS TO REPORT AND RECOMMENDATION

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIVIL ACTION

CASE NO. 3:23-cv-1783

VERSUS

JUDGE: TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD, INC.

MAG.: KAYLA D. MCCLUSKY

JURY TRIAL

FILED: _____

**BY: _____
CLERK**

OBJECTIONS TO REPORT AND RECOMMENDATION

Plaintiff, Northeast Louisiana Railroad Development District (“the Development District”), by and through its counsel of record, files its objection to the Magistrate Judge’s report and recommendation that the Court should dismiss this case for lack of jurisdiction (See Doc. 23). Rather, the Development District urges the Court to either (i) determine that the STB has no regulatory jurisdiction over what Defendant Delta Southern Railroad, Inc. (“Delta Southern”) refers to as the “ancillary track” track at issue herein; or (ii) issue a Stay Order in this case and refer a jurisdictional issue to the Surface Transportation Board (“the STB”) in accordance with the Doctrine of Primary Jurisdiction.¹

¹ See *United States v. Western Pacific Railroad Co.*, 352 US 59, 62-65 (1956) (explaining when primary jurisdiction applies and noting that “in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.”) See generally Louis L. Jaffe, *Primary Jurisdiction*, 77 Harv L Rev 1037 (1964).

Background: Abandonment of the Vidalia Branch Line

On January 8, 1988, the Missouri Pacific Railroad Company (“MoPac”) filed an application with the Interstate Commerce Commission (“the ICC”) “seeking a certificate of public convenience and authority permitting abandonment and discontinuance of operations over the Lake Providence [and] Vidalia Branches located in the states of Arkansas and Louisiana.” The case was docketed as AB-3 (Sub-No. 72), *Missouri Pacific Railroad Company - Abandonment - In Desha and Chicot Counties, AK, and East Carroll, Madison, Tensas and Concordia Parishes, LA*. On July 11, 1988, the ICC provided notice (53 Fed. Reg. 26,122) that it found the public convenience and necessity authorized the abandonment of the rail line between milepost (“MP”) 408.9 near McGehee in Desha County, AR, and MP 651.6 near Vidalia in Concordia Parish, LA and that a certificate of abandonment would issue, unless a valid offer of financial assistance (“OFA”) was filed. Subsequently, the Lake Providence Port Commission (“LPPC”) filed an OFA for the segment of the line between MP 408.9 and MP 498.4, which the ICC approved.

Shortly thereafter, the National Railroad Equipment Company (“NREC”) filed an OFA seeking to acquire both the Lake Providence Branch Line between MP 408.9 and MP 494.4, and the Vidalia Branch Line between MP 498.4 and MP 501.1. After the ICC initially rejected NREC’s OFA, NREC dropped its effort to acquire ICC authority to obtain the right to own and operate the Vidalia Branch Line. After the ICC approved NREC’s amended offer, LPPC agreed to step aside.

Given NREC’s withdrawal of its OFA to acquire the Vidalia Branch Line, on August 24, 1988, after finding “the time for filing offers of financial assistance has expired

without a *bona fide* offer for a 73.2 -mile portion of the line between milepost 498.4 at Tallulah, LA and milepost 651.6 near Vidalia,” the ICC determined that the present and future public convenience and necessity authorized MoPac to abandon the rail line between MP 498.4 in Tallulah and MP 651.66 and discontinue rail service. Because MoPac proceeded to do so, this deprived the ICC of jurisdiction of the segment of the line between MP 498.4 and MP 501.1. *See Hayfield N.R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S 622, 633, (1984).²

Furthermore, because the Vidalia Branch Line between MP 498.4 and MP 651.6 was unquestionably abandoned by MoPac in 1988, DSRC could not have acquired any operating authority from MoPac to operate over any part of the Vidalia Branch Line and,

² As the Court stated in its May 24, 2024 Report and Recommendation (See Doc. 23 at pp. 5-6), “the STB’s jurisdiction over a line terminates when a rail carrier abandons the line. *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005) (citing *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990) (“Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the [ICC] is empowered to impose conditions on abandonments . . . as a general proposition [the] ICC jurisdiction terminates.” (citations omitted)). In a September 2, 2022 letter (“the September 2, 2022 letter”) to the STB (at p. 1) in *Lake Providence Port Commission – Feeder Line Application – Line of Delta Southern Railroad in East Carroll and Madison Parishes, LA* (at 1), Delta Southern informed the STB that “In early 1988, Missouri Pacific Railroad Company (“Mo[P]ac”) sought to abandon a line of rail from McGehee, AR (milepost 408.9) south to Vidalia, LA (milepost 651.6), of which the Lake Providence Branch was a part. *Missouri Pacific Railroad Company - Abandonment - In Desha and Chicot Counties, AK, and East Carroll, Madison, Tensas and Concordia Parishes, LA*, AB-3 (Sub-No. 72) (“Mopac”). Later in 1988, however, Delta Southern Railroad Company (“DSRC”), a similarly named but unrelated entity, was “authorized to acquire and operate [MoPac’s] 89.5-mile line between [MP] 408.9 near McGehee and [MP] 498.4 at Tallulah.” *MoPac*, (ICC decided Oct. 11, 1988).

therefore, would have had to apply to the ICC for authority to perform rail service over that track. Because it failed to do so, the Court should decide that the so-called “ancillary track” at issue herein is not subject to the STB’s regulatory jurisdiction.

**Delta Southern’s 1999 Notice of Exemption Did Not Mention
the Track That Is Involved in This Case**

At page 3 of its sur-reply filed herein (See Doc 20), Delta Southern argues that, in its 1999 “Notice of Exemption” filed with the STB in *Delta Southern Railroad, Inc. -- Acquisition and Operation Exemption -- Delta Southern Railroad Company*, FD 33802, it was only required to obtain STB authority for main line track and that no authority was required for what refers to as section “10906 Track” (See Doc. 20). However, that assertion is belied by the fact that Delta Southern’s 1999 Notice of Exemption³ specifically stated that the assets being transferred from DSRC include “(2) a rail spur owned and operated by [Delta Southern Railroad Company] and extending from MP 445.53 (where it connects with the Warren Line identified below) for 3 miles (“The Spur”))”. Thus, Delta Southern understood that, to bring a line (including a spur) within the STB’s exclusive regulatory jurisdiction under 49 U.S.C. § 10501, it was necessary to explicitly seek that determination within the Notice of Exemption. There is nothing in the Notice of Exemption that mentions the segment of track that the Development District is seeking to acquire herein, and, therefore, it is not subject to the STB’s regulatory jurisdiction.

³ The STB maintains extensive regulations that permit the withdrawal from, or inclusion within, its regulatory authority, merely by filing a “notice of exemption” in accordance with the STB’s regulations, subject to protest and a determination by the STB that the matter is controversial and that it should not be consummated through a notice filing but, instead, should be subject to an affirmative determination of the STB.

Delta Southern, without providing a page reference, claims that the Development District “acknowledges that in seeking the authority required for the main line tract, [Delta Southern] disclosed (although it was not required to do so) to the STB that it owned 10906 Track as well.” Delta Southern’s current argument with regard to STB regulatory authority over the 1.5 mile spur track south of the KCS track south of the Meridian Speedway (at MP 498.44) must be rejected in light of the fact that DSRC included the 3-mile spur line “extending from MP 445.33” that is discussed above in its 1999 Notice of Exemption filed with the STB. Clearly, by including the 3-mile spur, DSRC acknowledged it to be within the STB’s jurisdiction, whereas the failure to include the 1.5-mile spur at issue herein within Delta Southern’s Notice of Exemption demonstrates that it remains outside the STB’s jurisdiction.

**Delta Southern’s Letter, dated September 2, 2022, Did Not
Address or Resolve the Issue Involved in This Case**

It appears that, to support its litigation position, Delta Southern is referring to footnote 2 in the September 2, 2022 letter, attached hereto as **Exhibit A**, that Delta Southern submitted to the STB in response to the STB’s Order, dated August 23, 2022 in *Lake Providence Port Commission – Feeder Line Application – Line of Delta Southern Railroad in East Carroll and Madison Parishes, LA*, FD 36447, that required Delta Southern, by September 2, 2022, to provide information regarding:

(1) the MPs that correspond to (i) the southern terminus of DSR’s Lake Providence line and (ii) DSR’s point of interchange with KCS;

(2) if the southern terminus of DSR’s Lake Providence line is a point beyond MP 489.44, the basis of DSR’s authority to own and operate the segment between MP 498.44 and the southern terminus; and

(3) if no such authority exists, the action DSR intends to take to rectify the failure to seek and obtain such authority.

In response, Delta Southern explained that the 1999 Notice of Exemption to acquire the Lake Providence Branch Line from DSRC had mistakenly identified one of the rail lines that it had acquired as “extending from MP 408.9 in or near McGehee, AR, to MP 489.44 in or near Tallulah, LA.” In fact, that line extended to MP 498.44 in or near Tallulah, LA, where interchange service with Kansas City Southern Railroad (“KCSR”) is conducted on a KCSR-owned sidetrack located adjacent to KCSR’s main line proximate to DSR MP 498.44⁴. Delta Southern did not address the fact that the 1999 Notice of Exemption did not identify the so-called 2.7 mile “ancillary” track at issue herein as track over which it was seeking authority to acquire from, and operate within the regulatory jurisdiction of, the STB.

Delta Southern, after stating that “the southern terminus of DSR’s Lake Providence Branch is [MP] 498.44, where DSR’s track connects to KCSR,” stated (in footnote 2 of the September 2, 2022 letter) that “DSR also owns roughly 1.5 miles of ancillary track located south of the KCSR main line connection at [MP] 498.44.” Delta Southern did not mention the actual location of the “ancillary track,” or disclose that any track that is located south of the KCSR had to have been track that was abandoned by MoPac in 1988. Thus, there is no way to avoid the conclusion that the track at issue is south of MP 498.44 (which is the southern terminus of the portion of the line over which Delta Southern acquired acquisition

⁴ Delta Southern explained in its September 2, 2022 letter (at 2 n.1) submitted to the STB in FD 36447 that MP 489.44 was a typo and should have been MP 498.44.

and operating authority in 1999) was abandoned in 1988 and which has not thereafter been brought within the regulatory authority of the ICC or STB.

Furthermore, in its September 2, 2022 letter, Delta Southern, clearly admitted that this 1.5 miles of so-called “ancillary track” was “non-regulated” track, which of course means that the track is not subject to the STB’s jurisdiction. The relevance of that comment cannot be ignored. This is so because this track, as shown *supra*, was part of the line that was abandoned in 1988, and it was not one of the lines over which acquisition and operating authority that Delta Southern acquired in 1999 in FD 33802.⁵

That Delta Southern, in the course of obtaining operating authority in 1999 (see September 2, 2022 letter at pp. 1-2), identified the southern terminus of its Lake Providence Branch Line as being MP 498.44 strongly indicates that neither Delta Southern nor its previous owner had made any attempt to alert the STB that it previously had obtained ICC authority to operate over, and was operating over, track that was never part of the Lake Providence Branch Line but was instead part of the Missouri Pacific’s abandoned Vidalia Branch Line.

Furthermore, there is nothing to show that the ICC retained, or the STB obtained, regulatory jurisdiction, after the line segment was abandoned. Nor is there anything to show

⁵ The Interstate Commerce Act specifically provides that all track that qualifies for exempt status under 49 U.S.C. § 10906 is subject to the STB’s jurisdiction under 49 U.S.C. § 10501(b), even though no licensing authority to construct such exempt track is required under 49 U.S.C. § 10901 but, just as with any rail line, exempt track under 49 U.S.C. § 10906 may be abandoned, as was the case here. Once abandoned, a rail line is no longer subject to the STB’s jurisdiction, and thus becomes “non-regulated,” as Delta Southern admitted in its September 2, 2022 letter to the STB.

that Delta Southern has ever advised the STB that the isolated segment of track that is now the subject of Development District's petition for expropriation was ever placed in regulated service by either DSRC or Delta Southern.

**The Situation Herein Is Distinguished from the Cases
on Which Delta Southern Has Relied**

This matter can be distinguished from the cases on which Delta Southern has relied that involve instances where the ICC and the STB reasserted jurisdiction over tracks that had been previously authorized for abandonment. In this instance, however, DSRC, after being authorized to acquire and operate the line between MP 408.9 and MP 498.4 pursuant to the ICC's decision, dated October 11, 1998 and served October 13, 1988, never sought any authority to acquire and operate the track between MP 498.4 and MP 501.15, which the ICC had authorized MoPac to abandon in August 1988.

Instead, in January 1989, after further negotiations with Union Pacific Railroad, which owned and controlled MoPac, DSRC, which did not require the ICC's approval to do so, acquired the real property between MP 498.4 and MP 501.15, a step that also proves that MoPac had no further intent to operate over the abandoned track. However, no record has been discovered that DSRC ever sought any authority to provide any rail service over the track.

Thereafter, in 1999, DSRC sold its assets to Delta Southern, which as noted above, mistakenly gave notice that the Lake Providence Branch Line terminated at MP 489.44. Moreover, in 2022, when it sought the STB's approval, Delta Southern failed to seek any authority from the STB to operate beyond the southern terminus of the Lake Providence

Branch Line which was described by Delta Southern as being MP 498.44. As a result, the STB has never been asked to assert any jurisdiction over the track that the ICC authorized for abandonment (including the segment at issue herein).

Conclusion

The Development District respectfully submits the Court should not dismiss this case, but rather it should (a) determine that, based on the foregoing, the STB does not have regulatory jurisdiction over the ancillary track at issue herein or, (b) issue a Stay Order and by way of the Primary Jurisdiction Doctrine, refer the jurisdictional issue identified herein to the STB for it to determine whether it has regulatory jurisdiction over the segment of the Vidalia Branch Line that the Development District seeks to acquire from Delta Southern.

Respectfully submitted:

/s/ John D. Crigler, Jr.

(Bar #31118)

Bishop Paxton Crigler & Moberley

P.O. Box 97

St. Joseph, LA 71366

(318) 766-4892

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record for all parties via the Court's ECF system on June 7, 2024.

/s/ JOHN D. CRIGLER, JR.

305233

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ENTERED
Office of Proceedings
September 2, 2022
Part of
Public Record

THOMAS J. HEALEY

(312) 252-1505
thealey@fletcher-sippel.com

September 2, 2022

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

Re: **FD 36447**
Lake Providence Port Commission – Feeder Line Application – Line of
Delta Southern Railroad Located in East Carroll and Madison Parishes, Louisiana

Dear Ms. Brown:

As directed by order served in the above-referenced docket on August 23, 2022 (the “Order”), Delta Southern Railroad, Inc. (“DSR”) responds to the Surface Transportation Board’s (the “Board”) three enumerated information requests relating to DSR’s Lake Providence Branch, extending between Lake Providence, LA (at an interchange with the North Louisiana & Arkansas Railroad Company), and Tallulah, LA (at an interchange with The Kansas City Southern Railway Company (“KCSR”)).

Prior to responding to the three questions, DSR offers what it believes would serve as helpful informational background. In early 1988, Missouri Pacific Railroad Company (“MoPac”) sought to abandon a line of rail from McGehee, AR (milepost 408.9) south to Vidalia, LA (milepost 651.6), of which the Lake Providence Branch was a part. *Missouri Pacific Railroad Company – Abandonment – In Desha and Chicot Counties, AK, and East Carroll, Madison, Tensas and Concordia Parishes, LA*, AB-3 (Sub-No. 72) (“Mopac”). Later in 1988, however, Delta Southern Railroad Company (“DSRC,” a similarly named but unrelated entity) was “authorized to acquire and operate [MoPac’s] 89.5-mile line between milepost 408.9 near McGehee and milepost 498.4 at Tallulah.” *MoPac*, (ICC decided Oct. 11, 1988) *1.

In 1999, DSR filed a notice of exemption intended to cover the acquisition of DSRC’s rail assets, including, of course, the entire Lake Providence Branch. *Delta Southern Railroad, Inc. – Acquisition and Operation Exemption – Delta Southern Railroad Company*, FD 33802. A copy of the class exemption filing is attached as Exhibit A (“Filing”). The Filing references the southern milepost of the planned acquisition as “MP 489.44,” well north of the

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

Ms. Cynthia T. Brown

September 2, 2022

p. 2

“milepost 498.4” southern limit of DSRC’s authority. Filing, 3. The 489.44 milepost is also reflected in the draft caption summary. *Id.*, 13. The Filing’s repeated reference to “MP 489.44,” is a drafting error, compounded by incorrect references elsewhere in the filing to total Lake Providence Branch route mileage stemming from the incorrect southern terminus milepost. The Filing was intended to cover the entire Lake Providence Branch, which terminates on its south end at milepost 498.44 at Tallulah, and a connection at that location to KCSR.

A careful reading of the Filing reflects DSR’s clear intent to acquire and commence operations to a southern main line terminus at Tallulah (hence, milepost 498.44).¹ First, the Filing states that DSR will purchase “all of [DSRC’s] assets.” *Id.*, 2. Second, the Filing correctly states that the line’s southern end is “in or near Tallulah, LA,” *Id.*, 3, a statement that would be inaccurate if DSR genuinely intended to obtain common carrier authorization only to milepost 489.44, some nine miles north of Tallulah. Third, the Filing (*Id.*, 3) references operating rights over Madison Parish Port Commission-owned trackage at MP 491, a point that DSR could not access if it truly intended for milepost 489.44 to be the southern limits of its common carrier authorization. Finally, the map appended to the Filing (*Id.*, 10) shows that the main line extended south, to the KCSR connection at Tallulah. Given the context, it is fairly easy to see that the Filing’s reference to “MP 489.44” is internally inconsistent with the balance of the Filing, and that, in all likelihood, a transcription error occurred in the drafting, reversing the “8” and the “9” in the southern milepost identification, an error that, it appears, neither DSR nor its legal counsel at the time had detected.

DSR provides the following information in response to the three specific issues raised in the Order:

(1) the mileposts that correspond to (i) the southern terminus of DSR’s Lake Providence line and (ii) DSR’s point of interchange with KCS;

Based on the facts laid out above, the southern terminus of DSR’s Lake Providence Branch is milepost 498.44, where DSR’s track connects to KCSR.² Interchange with KCSR is conducted on a KCSR-owned sidetrack located adjacent to KCSR’s main line proximate to DSR milepost 498.44.

¹ DSRC has determined that the more accurate designation for the southern terminus of the Lake Providence Branch line (and connection there to KCSR) is milepost 498.44, rather than the truncated milepost 498.4 location given in DSRC’s earlier class exemption proceeding.

² DSR also owns roughly 1.5 miles of ancillary track located south of the KCSR main line connection at milepost 498.44. Despite being non-regulated track, this track appears to be the basis for the inaccurate statement on DSR’s website that DSR operates “29.2 miles of main line track, plus another mile of sidings and right of way...”. DSR is in the process of correcting the website error, as the Lake Providence Branch is comprised of 27.44 miles of main line track.

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

Ms. Cynthia T. Brown

September 2, 2022

p. 3

(2) if the southern terminus of DSR's Lake Providence line is a point beyond milepost 489.44, the basis of DSR's authority to own and operate the segment between milepost 489.44 and the southern terminus;

DSR owns the track located south of milepost 489.44 through quitclaim deeds received from DSRC in the 1999 asset acquisition. To DSR's knowledge, the company has always operated the track between milepost 471.0 (the northern terminus of DSR's Lake Providence Branch) and the connection with KCSR at milepost 498.44 consistent with an understanding (albeit mistaken, given the filing errors and inconsistencies in the Filing) that such operations were fully authorized pursuant to the FD 33802 class exemption.

(3) if no such authority exists, the action DSR intends to take to rectify the failure to seek and obtain such authority.

DSR intends rectify the errors contained in the aforementioned Filing to account for the correct and full length of the Lake Providence Branch to milepost 498.44 by way of a motion to modify the FD 33802 exemption in keeping with similar corrective actions taken in cases such as *Kiski Junction Railroad – Acquisition Exemption – Berkman Rail Services*, FD 34681 (STB served May 24, 2021) (inadvertent milepost error corrected more than 16 years after acquisition authority became effective).

Please let me know if you have any questions.

Respectfully submitted,

/s/*Thomas J. Healey*

James D. Helenhouse
Thomas J. Healey
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

cc: All Parties of Record

Exhibit A

EXHIBIT A

3:23-cv-01783-TAD-KDM Document 24-1 Filed 06/07/24 Page 5 of 19 PageID #: 10195

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LAW OFFICES

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THOMAS M. AUCHINCLOSS, JR.

LEO C. FRANEY

JOHN D. HEFFNER

KEITH G. O'BRIEN

BRYCE REA, JR.

BRIAN L. TROIANO

ROBERT A. WIMBISH



DONALD E. CROSS

BY HAND

ENTERED
Office of the Secretary

October 1, 1999

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street
Washington, D.C. 20423-0001

OCT 04 1999

Part of
Public Record

RE: FD No. 33802, Delta Southern Railroad, Inc. -- Acquisition
And Operation Exemption -- Delta Southern Railroad Company

Dear Mr. Williams:

On behalf of Delta Southern Railroad, Inc., and pursuant to the Board's regulations at 49 CFR 1150.31, I am filing an original and ten copies of a verified notice of exemption for the acquisition and operation of the Delta Southern Railroad Company by Delta Southern Railroad, Inc.

I am also enclosing a check payable to the Board for \$1200 to cover the applicable filing fee and a computer disk formatted in MS DOS WordPerfect 6.0 containing the filing.

Please date stamp and return the additional two copies of this filing for our records.

Sincerely yours,

John D. Heffner

Enclosures

cc: Mr. William P. Wainwright
Richard F. Loritz, Esq.



OCT 01 1999

NON BOARD

EXHIBIT A

195796

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OCT 01 1999

SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33802

ENTERED
Office of the Secretary

OCT 04 1999

Part of
Public Record

DELTA SOUTHERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
DELTA SOUTHERN RAILROAD COMPANY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR 1150.31

NOTICE OF OPERATION OF RAIL LINE
INFORMATION REQUIRED BY 49 CFR 1150.31

FILED

OCT 01 1999

SURFACE
TRANSPORTATION BOARD

FILED

~~OCT 04 1999~~

John D. Heffner
REA, CROSS & AUCHINCLOSS
Suite 570
1707 "L" Street, N.W.
Washington, D.C. 20036
(202) 785-3700

Counsel for
Delta Southern Railroad, Inc.

DATED: October 1, 1999

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33802

DELTA SOUTHERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
DELTA SOUTHERN RAILROAD COMPANY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR 1150.31

NOTICE OF OPERATION OF RAIL LINE
INFORMATION REQUIRED BY 49 CFR 1150.31

Name and Address of Applicant 49 CFR 1150.33(a)

Delta Southern Railroad, Inc.
P.O. Box 1709
Madison Parish Port
Tallulah, LA 71282
(318) 574-5420

Applicant's Representative 49 CFR 1150.33(b)

John D. Heffner
REA, CROSS & AUCHINCLOSS
Suite 570
1707 "L" Street, N.W.
Washington, D.C. 20036
(202) 785-3700

Statement of Agreement 49 CFR 1150.33(c)

Delta Southern Railroad, Inc. ("Delta") anticipates
signing an agreement with Lawrence Beal, 100% of owner of the
this line left blank

- 2 -

Delta Southern Railroad Company ("DSRR"),¹ for Delta to purchase all of DSRR's assets. The parties intend to consummate the transaction on or about October 18, 1999, more than seven days from the date of this notice.

Total Route Miles

49 CFR 1150.33(c)(4)

The lines to be acquired and operated by Delta consist of approximately 132.78 route miles of railroad as well as 11.76 miles of operating rights over other railroad lines.

Operator of the Property

49 CFR 1150.33(d)

In all cases anticipated by this Notice, and as described in the transaction summary provided below, Delta will provide common carrier rail freight service over the subject rail lines.

Brief Summary of Transaction

49 CFR 1150.33(e)

On August 4, 1999, William and Linda Wainright² signed a letter of intent with DSRR's owner Lawrence Beal for the parties to negotiate and execute a purchase and sale agreement for acquisition of the subject rail properties. Mr. and Mrs.

¹ The address for Lawrence Beal and DSRR is as follows:

14400 S. Robey St.
P.O. Box 2270
Dixmoor, IL 60426

² Mr. Wainright has managed DSRR for the past ten years since it was established as a short line railroad in 1989.

- 3 -

Wainright have established Delta as a new corporation and noncarrier to acquire and operate these rail assets. The practical effect of this transaction will be for Mr. Beal to transfer rail properties owned and operated by DSRR to the new company established and solely owned by the Wainrights. There will be no effect on day to day operations, railroad competition, or employees as a result of this ownership change. Railroad operating assets being transferred include:

- (1) a rail line owned and operated by DSRR and extending from MP 408.9 in or near McGehee, AR, to MP 489.44 in or near Tallulah, LA ("The Owned Property");
- (2) a rail spur owned and operated by DSRR and extending from MP 445.53 (where it connects with the Warren Line identified below) for 3 miles ("The Spur");³
- (3) DSRR's leasehold interest in a rail line owned by the Union Pacific Railroad ("UP") and currently operated by DSRR which extends from MP 422.32 at Dermott, AR, to MP 461.74 at Warren, AR ("The Warren Line");
- (4) DSRR's leasehold interest in a rail line owned by UP and currently operated by DSRR which extends from MP 566 at Monroe to MP 556.18 at Sterlington ("The Sterlington Line");
- (5) DSRR's operating rights over certain other rail assets located at MP 491 in Tallulah, LA, and owned by the Madison Parish Port Commission ("The Madison Line"); and
- (6) certain overhead rights over UP's line between MP 415.26 at Dermott, AR, and MP 409.7 at McGehee, AR, ("overhead rights");
- (7) certain overhead rights over UP's line and yard facilities from MP 566 and MP 500.3 to MP 504 at Monroe, LA;
- (8) certain operating rights at MP 472.8 at Lake Providence, LA, owned by the Lake Providence Port Commission.

³ Delta takes no position on whether this line is a spur for the purpose of the spur exemption of 49 U.S.C. 10906.

As noted above, the parties propose to consummate the subject transaction on or about October 18, 1999.

This transaction qualifies for a class exemption under 49 CFR 1150.31, et seq., because it involves the acquisition and operation by a noncarrier and newly-created class III short line rail carrier of an active line of railroad. See, 49 CFR 1150.31 et seq., and Class Exemption - Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985). Issuance of a class exemption under 49 CFR 1150.31 will permit Delta to consummate this transaction promptly.

Map

49 CFR 1150.33(f)

A Map depicting the area to be served is attached as Exhibit A.

Certificate of Carrier Classification **49 CFR 1150.32, 33(g)**

Delta hereby certifies that its projected annual revenues will be less than \$5,000,000, within the Board's ceiling for classification as a class III railroad. A copy of Delta's Certification is attached hereto as Exhibit B.

Caption Summary

49 CFR 1150.34

A caption summary in the prescribed form is attached as Exhibit C to this Notice.

Environmental and Historic Preservation Data **49 CFR 1105**

- 5 -

Pursuant to 49 CFR 1105.6(c)(2), the proposed transaction is exempt from environmental review under 49 CFR 1105(c)(2)(1), because the actions proposed herein will not cause any operating changes that exceed the thresholds established in 1105.7(e)(4) or (5).

In addition, this transaction is exempt from historic review under 1105.8(b)(1). Under this section, a sale, lease or transfer of a rail line is exempt if rail operations will continue. Further Board approval is required for the parties to abandon service, and there are no plans to dispose of or alter the properties subject to Board jurisdiction.

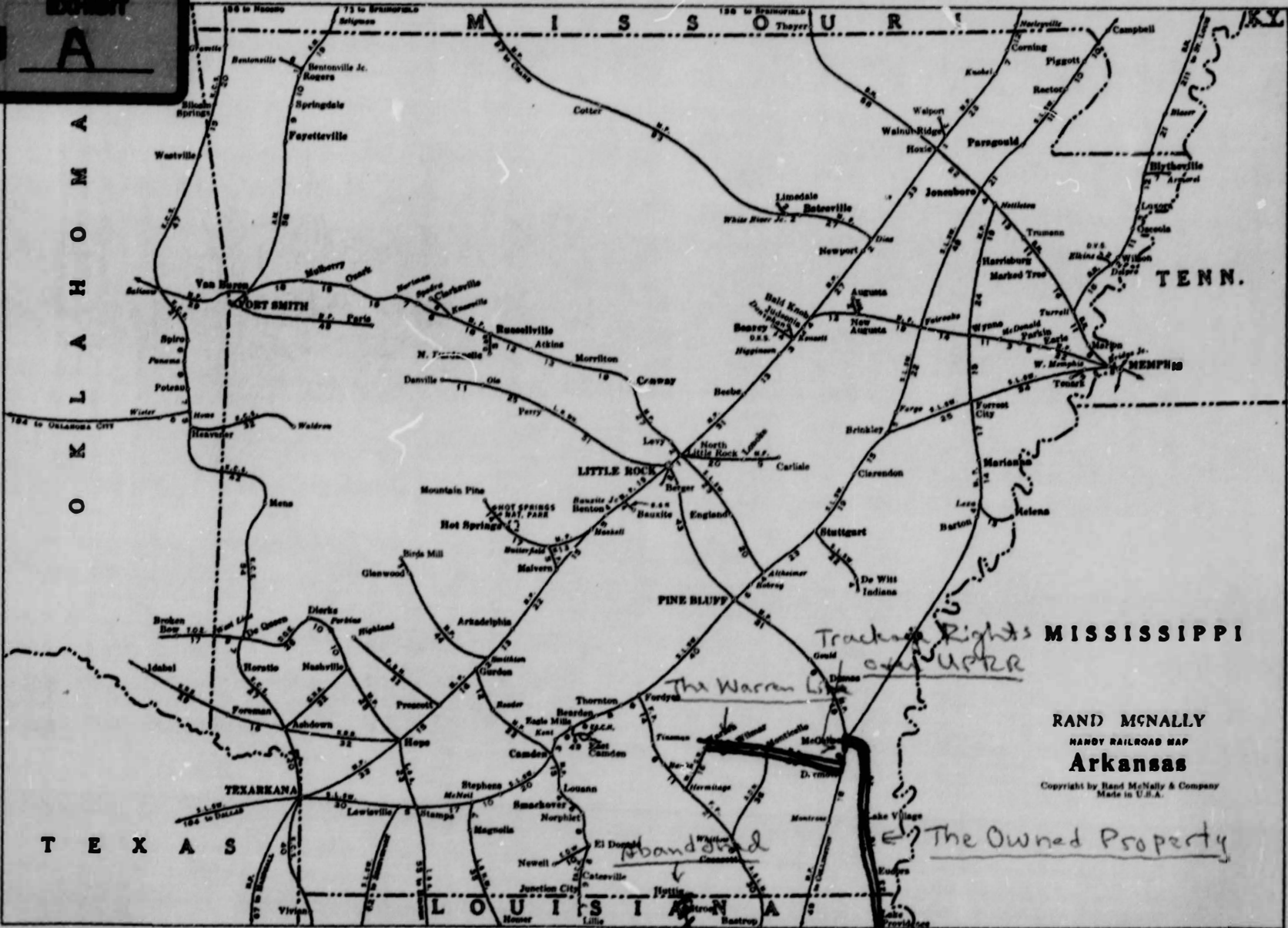
Respectfully submitted,



John D. Heffner
REA, CROSS & AUCHINCLOSS
Suite 570
1707 "L" Street, NW
Washington, DC 20036
(202) 785-3700

Counsel for
Delta Southern Railroad, Inc.

Dated: October 1, 1999



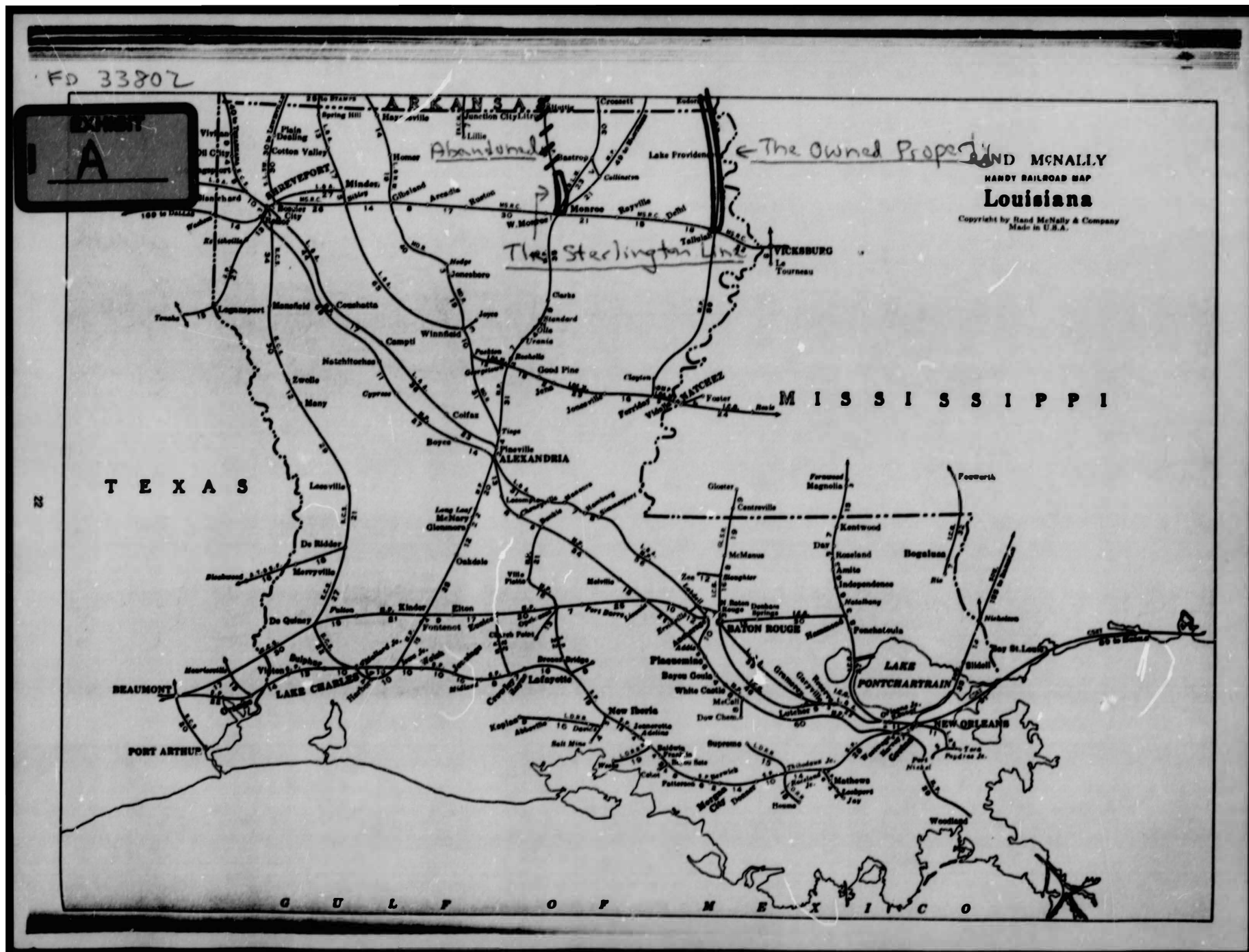


EXHIBIT A

1014 P.02

VERIFICATION

STATE OF Louisiana)
COUNTY OF Madison) ss:

William P. Wainright, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

William P. Wainright
William P. Wainright

Subscribed and sworn to before me this 23rd day of September, 1999.
Notary Public of Madison Parish, La.

My Commission expires:

Lifetim

Carol Dunning

13185744029 P.02

09-22-1999 12:01PM FROM REA, CROSS & RUCHINCLOSS TO

EXHIBIT A

EXHIBIT B

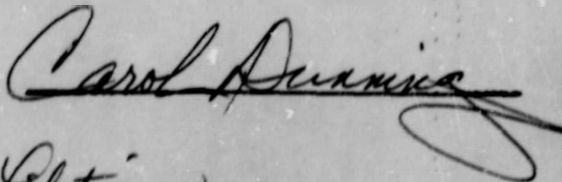
CERTIFICATION

City of Tallulah)
) ss.
State of Louisiana)

I, William P. Wainright, President of the Delta Southern Railroad, Inc. ("Delta Southern") hereby certifies under penalty of perjury that the projected annual revenues of Delta Southern in the aggregate, will not exceed \$5,000,000.00, and, based upon those revenues, that Delta Southern will be a Class III rail carrier as set forth at 49 CFR 1201 (1-1) (a). Further, I certify that I am qualified and authorized to make this certification on behalf of Delta Southern.


William P. Wainright

Subscribed and sworn to before me, a Notary Public, in
and for the State of LA, this 22nd day of Sept, 1999.



My Commission Expires:

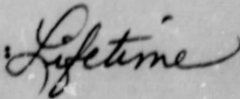


EXHIBIT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33802

DELTA SOUTHERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
DELTA SOUTHERN RAILROAD COMPANY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR 1150.31

NOTICE OF OPERATION OF RAIL LINE

Delta Southern Railroad, Inc. ("Delta"), a newly-created class III short line railroad, has filed a Verified Notice of Exemption under 49 CFR 1150.31 to acquire and operate the following rail properties currently owned or leased and operated by Delta Southern Railroad Company ("DSRR"):

- (1) a rail line owned and operated by DSRR and extending from MP 408.9 in or near McGehee, AR, to MP 489.44 in or near Tallulah, LA ("The Owned Property");
- (2) a rail spur owned and operated by DSRR and extending from MP 445.53 (where it connects with the Warren Line identified below) for 3 miles ("The Spur");
- (3) DSRR's leasehold interest in a rail line owned by the Union Pacific Railroad ("UP") and currently operated by DSRR which extends from MP 422.32 at Dermott, AR, to MP 461.74 at Warren, AR ("The Warren Line");
- (4) DSRR's leasehold interest in a rail line owned by UP and currently operated by DSRR which extends from MP 566 at Monroe to MP 556.18 at Sterlington ("The Sterlington Line");
- (5) DSRR's operating rights over certain other rail assets located at MP 491 in Tallulah, LA, and owned by the Madison

EXHIBIT A

Parish Port Commission ("The Madison Line"); and

(6) certain overhead rights over UP's line between MP 415.26 at Dermott, AR, and MP 409.7 at McGehee, AR, ("overhead rights");

(7) certain overhead rights over UP's line and yard facilities from MP 566 and MP 500.3 to MP 504 at Monroe, LA;

(8) certain operating rights at MP 472.8 at Lake Providence, LA, owned by the Lake Providence Port Commission.

The trackage to be acquired and operated or operated under lease totals approximately 132.78 route miles in length. In addition, Delta will acquire approximately 11.76 miles of operating rights over other railroad lines.

The parties propose to consummate this transaction on or about October 18, 1998.

This notice is filed under 49 C.F.R. 1150.31. If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33802, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1925 K Street, N.W., Washington, D.C. 20423-0001. In addition, a copy of each pleading must be served on:

John D. Heffner, Esq.
REA, CROSS & AUCHINCLOSS
Suite 570, 1707 L Street, N.W.,
Washington, D.C., 20036
Telephone: (202) 785-3700

and

Richard F. Loritz, Esq.
1100 Ravinia Place
Ravinia Place Office Park
Orland Park, IL 60462
Telephone: (708) 403-2555

(seal)

Vernon A. Williams
Secretary

**EXHIBIT C –
COMPLETE DSRR MEMORANDUM
IN OPPOSITION TO THE MOTION TO REMAND
AND IN SUPPORT OF ITS MOTION TO DISMISS,
FILED ON FEB. 23, 2024**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

NORTHEAST LOUISIANA RAILROAD DEVELOPMENT DISTRICT Plaintiff versus DELTA SOUTHERN RAILROAD, INC. Defendant	CIVIL ACTION CASE NO: 3:23-cv-1783 JUDGE: Terry A. Doughty MAG.: Kayla D. McClusky JURY TRIAL
---	--

**DEFENDANT DELTA SOUTHERN RAILROAD, INC.'S
MEMORANDUM IN OPPOSITION TO MOTION TO REMAND
AND IN SUPPORT OF ITS MOTION TO DISMISS**

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<i>Brotherhood of Locomotive Eng’rs v. United States</i> , 101 F.3d 718 (D.C. Cir. 1996)	14
<i>Caterpillar, Inc. v. Williams</i> , 482 U.S. 386 (1987).....	8, 10
<i>Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.</i> , 265 F. Supp. 2d 1005 (N.D. Iowa 2003) ..	13
<i>City of Auburn v. United States</i> , 154 F.3d 1025 (9th Cir. 1998)	18
<i>City of Lincoln v. STB</i> , 414 F.3d 858 (8th Cir. 2005)	18, 20
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<i>Diaz v. Sheppard</i> , 85 F.3d 1502 (11th Cir. 1996)	9
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<i>Friberg v. Kansas City S. Ry.</i> , 267 F.3d 439 (5th Cir. 2001)	11, 12
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<i>Gunn v. Minton</i> , 568 U.S. 251 (2013)	10
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INTRODUCTION

The Northeast Louisiana Railroad Development District (“District” or “Plaintiff”) is attempting to seize by expropriation railroad tracks that are owned by Delta Southern Railroad, Inc. (“DSRR”) and that are subject to the jurisdiction of the United States Surface Transportation Board (“STB”). Pet. for Expropriation ¶ 2, ECF No. 1-1 at 5. DSRR’s tracks, even though abandoned as mainline rail tracks, are still used for rail transportation, including for storage of rail cars in support of DSRR’s rail transportation along the track immediately North of the property the District seeks to seize. Indeed, under Section 10906 of Title 49, DSRR’s tracks are considered auxiliary tracks (spur, industrial, team, switching, or side tracks) often referred to as “10906 track.”¹ The STB has “exclusive” jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks”—exactly the kind of railroad property targeted for acquisition by the District’s expropriation action. 49 U.S.C. § 10501(b)(2). Because the STB has exclusive jurisdiction over the subject matter of the District’s expropriation action, that raises a federal question over which this Court has jurisdiction—making remand improper. *Id.* (“remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law”); *see PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 544-45 (5th Cir. 2005) (upholding removal pursuant to 49 U.S.C. § 10501(b), citing complete preemption doctrine).²

The District’s premise for seeking to remand this action to state court rests on a faulty understanding of the STB and its jurisdiction—erroneously concluding that a prior abandonment proceeding permits open season for state-seizure of railroad property. *See* Pl.’s Br. in Supp. of

¹ “10906” refers to 49 U.S.C. § 10906.

² *See also B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 1252 (E.D. Wash. 2012) (finding federal question jurisdiction under ICCTA preemption and granting motion to dismiss); *14500 Ltd. v. CSX Transp., Inc.*, 2013 LEXIS 39806 (N.D. Ohio 2013).

Mot. to Remand at 2, ECF No. 9-1 (“Plaintiff’s Brief”). But the process by which a track is abandoned for mainline purposes does not automatically eliminate STB jurisdiction over such tracks. While it limits the STB’s regulatory authority, when, as here the railroad continues to use the tracks as 10906 track, that track remains within the STB’s exclusive jurisdiction, pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”), which is a statute Plaintiff omits. The ICCTA provides for the explicit expansion of STB jurisdiction to such track. The District’s attempts to make hay from the subsequent owner’s operation of the line without seeking regulatory authority fail because no such authority was required under Section 10906.

For the reasons set forth more fully below, the District’s expropriation action is completely preempted and properly subject to removal to federal court. DSRR therefore respectfully requests that the Court deny the District’s motion to remand. The Court should retain jurisdiction over this matter and grant DSRR’s motion to dismiss, pursuant to Rule 12(b)(6).

FACTS

A. The Property the District Seeks to Seize is Actively Used for Rail Transportation.

The District seeks to seize a 2.7 mile long rail track that its expert admits “consists of a ROW fifty (50) feet wide, being twenty-five (25) feet on each side of the centerline of the railroad” (“Track Segment”). Pet. for Expropriation Ex. A, ECF No. 1-1 at 12. The District’s expert further admits that “[t]he line is composed of a light weight eighty-five (85) pound rail section with small tie plate.” *Id.*

The Track Segment is owned and operated by DSRR, a rail carrier subject to the jurisdiction of the STB.³ The Track Segment is part of what was a much larger rail line, portions

³ See *Patriot Rail Co, LLC, et al.—Control Exemption—Delta Southern R.R., Inc.*, FD 36642 (STB served Dec. 20, 2022) (“Patriot Rail”).

of which have been formally abandoned with sections of that part remaining in use for rail purposes and other portions being sold. The other part—known as the Lake Providence Branch—is owned and operated by DSRR for common carrier rail service today and is subject to both the STB’s jurisdiction and authority.⁴

The beginning of the Track Segment is located at the terminal point (at Tallulah, Louisiana) of the Lake Providence Branch. The Lake Providence Branch runs North from milepost 498.44. Decl. of Rob Thrall (“Thrall Declaration”) at Ex. A. DSRR’s operations on the Lake Providence Branch (North of milepost 498.44) remain subject to the STB’s jurisdiction and regulatory authority, which is why Patriot Rail was required to file for authority with the STB to acquire DSRR and the Lake Providence Branch (along with another line known as the Sterlington Branch). Patriot Rail received that authority on December 23, 2022. *See Patriot Rail Co. LLC, et al.—Control Exemption—Delta Southern R.R.*, FD No. 36642, 2022 STB LEXIS 314 (STB served Dec. 23, 2022). The Track Segment runs South from milepost 498.44 and remains subject to the STB’s jurisdiction, but not the STB’s authority, as 10906 track. Accordingly, Patriot Rail was not required to file authority to acquire it.

It is undisputed that the Track Segment was subject to abandonment proceedings before the Interstate Commerce Commission (“ICC”), which is the predecessor agency to the STB,

⁴ On December 31, 1987, Missouri Pacific Railroad Company filed a notice of intent to abandon the line, followed 30 days later by an abandonment application in *Missouri Pac. R.R. Co.—Abandonment—In Desha and Chicot Counties, AR, and East Carroll, Madison, Tensas, and Concordia Parishes, LA*, Docket No. AB-3 (Sub-No 72) (1988). Abandonment authority was granted July 11, 1988. The Track was not removed and has been used in rail service since. A subsequent decision, served October 13, 1988, authorized DSRR to acquire and operate the segment between McGehee and Tallulah pursuant to 49 U.S.C. § 10905. *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, FD 31246, 1989 ICC LEXIS 151 (1989). For simplicity, we use the term “active” to mean a rail line subject to the common carrier obligation and both the STB’s jurisdiction and authority. “10906 track” is subject to the STB’s jurisdiction, but not its authority.

through which its abandonment as a mainline track was approved. It appears that National Railway Equipment Company (“NREC”) acquired a portion of the line that included the Track Segment, but did not file for authority from the ICC and instead used it as 10906 track. When NREC transferred its rights to DSRR, DSRR also continued to use the Track Segment to support rail services as 10906 track to support common carrier rail operations, with such use continuing today.

DSRR uses the Track Segment to stage and store rail equipment. *See* Thrall Declaration at ¶¶ 13-17 and Exs. A, B, C. The rail operations on the Track Segment are incidental to the receipt of shipments by the carrier. *Id.* at ¶ 13. The physical characteristics of the Track Segment include that the track is a short segment, and it does not invade another railroad’s territory. *Id.* at ¶ 7. Additionally, there is not regularly scheduled service over the Track Segment, and it is not used to serve a specific customer’s facility. *Id.* at ¶¶ 8, 9. However, DSRR has continued to use the Track Segment as 10906 track for rail transportation purposes. *Id.* at ¶ 13. In particular, DSRR has stored railcars on the track in recent years, as also shown by the District’s own expert, and, indeed, there are railcars on the Track Segment even today. *Id.* at ¶¶ 14, 15 and Exs. A, B, C. The District concedes DSRR has been using the property for rail purposes. Plaintiff’s Brief at 6. *See also* ECF No. 1-1 at 16 (noting District’s desire “for the continued use, and operation of the rail line”) (emphasis added).

B. The Regulatory Background

The STB is the successor to the ICC, and is a federal agency with jurisdiction over railroads created by the ICCTA. Several provisions of its statute are relevant to this Court’s jurisdiction over the District’s expropriation action.

1. The Statutory Scheme under ICCTA Limits STB Authority over 10906 Tracks; However, it Maintains Federal Jurisdiction over Them.

Unlike railroad tracks that are actively used for common carrier service and subject to both the STB’s jurisdiction and authority, 10906 track is within the STB’s jurisdiction but *not* within the STB’s regulatory authority.

Through ICCTA, Congress wrested from the states jurisdiction over 10906 track and put it exclusively within federal jurisdiction, at the STB.⁵ See *PCI Transp. Inc.*, 418 F.3d at 544 (ICCTA changes included ““extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction”” under prior law) (quoting ICCTA House Report). Congress explicitly granted exclusive *jurisdiction* to the STB for 10906 tracks. See e.g., *Baylands Development, Inc.—Pet. for Declaratory Order*, FD No. 36660 at n.8 (STB served Sept. 18, 2023); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD No. 35468 (STB served April 21, 2015). Section 10501(b) of Title 49 grants to the STB exclusive jurisdiction over:

- (1) transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, facilities of such carriers; and
- (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

49 U.S.C. 10501(b). ICCTA further provides that: “Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b).

⁵ Use of 10906 track was never subject to federal licensure. Prior to ICCTA, it was state-regulated. After ICCTA, it was exclusively within the federal domain under § 10501(b), though as excepted from STB authority in 49 U.S.C. § 10906. Thus, the abandonment of a rail line, both before ICCTA at the ICC and after ICCTA at the STB, did not then and does not now define the regulatory status of 10906 track.

Although Congress granted exclusive federal jurisdiction over 10906 tracks, it also strictly limited the STB's authority to control rail carriers' use of 10906 track.⁶ Section 10906 of Title 49 limits the STB's authority over 10906 track. It provides, in pertinent part, that the STB "does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." 49 U.S.C. § 10906. Thus, these tracks are referred to as 10906 track, and regulatory authority is not required to own, operate, contract or sell such tracks. While it is not without controversy, Congress has never acted to change what is known in the industry as a "regulatory gap" for 10906 track in which the STB has exclusive jurisdiction but lacks authority over such tracks.⁷

2. Abandonment Proceedings as Related to Industrial or Spur Track.

Under ICCTA, as with prior law under the Interstate Commerce Act, there is a process for a rail carrier to seek abandonment of its rail lines to remove them from the STB's regulatory authority. *See* 49 U.S.C. §§ 10903 through 10905. Under that process, rail carriers can seek permission to abandon all or portions of their common carrier rail line. With ICCTA, Congress expanded the STB's authority to offer opportunities to use or for others to purchase abandoned common carrier rail lines for rail transportation purposes. *See* 49 U.S.C. § 10905. Congress also

⁶ *See e.g., Baylands Development, Inc.—Pet. for Declaratory Order*, FD No. 36660 at n.8 (STB served Sept. 18 2023); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD No. 35468 (STB served April 21, 2015); *Allied Industrial Dev. Corp.—Pet. for Declaratory Order*, FD No. 35477, 2015 STB LEXIS 310 (STB served Sept. 17, 2015).

⁷ *The New York City Econ. Dev. Corp.—Pet. for Declaratory Order*, FD No. 34429, 2004 STB LEXIS 434 at *27 (STB served July 15, 2004) (Mulvey, dissenting) ("I recognize that the gap in environmental oversight results from the overlay of 49 U.S.C. 10501(b) and 10906: reservation of spur track to the Board's exclusive jurisdiction while simultaneously excepting it from the Board's licensing authority. I believe that this gap, and its real-world impacts, are an unfortunate result of the ICC Termination Act that Congress may want to reconsider in light of the potentially serious consequences of a determination that particular track is a spur"). Congress has not.

permitted additional rail use of abandoned rail through 10906. *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress’s adoption of Section 10906 “encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked”).

LEGAL STANDARD

“A defendant sued in state court may remove the suit to federal court so long as the federal tribunal would have had original jurisdiction over the action.” *Grace Ranch, LLC v. BP Am. Prod. Co.*, 989 F.3d 301, 307 (5th Cir. 2021) (citing 28 U.S.C. § 1441(a)); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A complaint that appears to raise only state-law claims presents a federal question where “a federal statute wholly displaces the state-law cause of action through complete preemption.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003). A complaint “purporting to rest on state law can be recharacterized as one ‘arising under’ federal law if the law governing the complaint is exclusively federal.” *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009).

The party seeking to invoke federal jurisdiction bears the burden of showing it exists. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996). Because federal courts are courts of limited jurisdiction, the removal statute is subject to strict construction, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810 (1986), and “doubt about the propriety of removal must be resolved in favor of remand.” *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007). However, even within the rubric of strict construction, “federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

A claim arises under federal law if the allegations in the plaintiffs' complaint establish that “federal law creates the cause of action asserted” or that the plaintiffs' right to relief necessarily

depends upon the resolution of a substantial question of federal law. *Gunn v. Minton*, 568 U.S. 251, 257 (2013). Under the doctrine of complete pre-emption, once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) Complete preemption arises when the federal statute “so forcibly and completely displace[s] state law that the plaintiff’s cause of action is either wholly federal or nothing at all.” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331 (5th Cir. 2008) (internal quotations omitted).

Under the complete preemption doctrine, “[w]hen a plaintiff has asserted a cause of action under state law that has been judicially declared to be completely preempted by federal law, that claim—no matter how it may have been set out in the complaint or characterized by the plaintiff—is necessarily federal.” 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722.1 (4th ed. 2019). When Congress has completely occupied a field, “federal law does not merely preempt a state law to some degree; rather, it substitutes a federal cause of action for the state cause of action, thereby manifesting Congress’s intent to permit removal.” *Id.* at § 3722.2. If a plaintiff alleges only state law claims in an area where Congress has “occupied the field,” the court will “recharacterize the plaintiff’s cause of action as a federal claim for relief, making removal proper on the basis of federal-question jurisdiction.” *Id.*

Substantial jurisprudence regarding the ICCTA establishes that this is such a case, and was properly removed to federal court.

ARGUMENT

I. Removal Is Proper Because ICCTA Completely Preempts the District's Expropriation Action.

ICCTA completely preempts state law for the matters ICCTA places within the STB's exclusive jurisdiction, pursuant to 49 U.S.C. § 10501(b). This complete preemption includes actions under state law to take railroad property in ways that prevent the railroad from operating, such that those actions present only federal questions that are removable to federal court. *See PCI Transp.*, 418 F.3d at 544 (“the plain language of § 10501 supports our conclusion that Congress intended actions regarding [the matters in § 10501] to be governed exclusively by ICCTA”). The Fifth Circuit has also held that “it is beyond peradventure that” regulation of a rail carrier’s “side tracks”—among the types of 10906 track listed in § 10501(b)—“is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise.” *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) (finding Texas anti-blocking statute could not establish liability for negligent operation of side tracks because § 10501(b) expressly preempts such laws).

As this Court has explained, and as relevant here, ICCTA “establishes that the [STB] has exclusive jurisdiction” over (1) “transportation by rail carriers” and (2) over “acquisition” of “spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely” within one state. *Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, 2018 U.S. Dist. LEXIS 61928, at *14-*15 (W.D. La. 2018) (Doughty, J.) (quoting 49 U.S.C. § 10501(b)). Here, the preemption question is quite plain to answer: the District seeks to expropriate a portion of DSRR’s 10906 track in violation of Section 10501(b). ICCTA facially, expressly, and completely preempts the District’s expropriation action, which establishes federal removal jurisdiction. It also requires dismissal of this action.

A. ICCTA Expressly Preempts the Acquisition of the Track Segment Because It Is 10906 Track.

As 10906 track, the Track Segment is subject to the STB's exclusive jurisdiction under Section 10501(b)(2). Congress was absolutely clear—in language that the Fifth Circuit described as putting the preemption issue “beyond peradventure”—that, among other regulated activities related to “spur, industrial, team, switching, or side tracks,” the “acquisition” of such tracks is exclusively within the STB's jurisdiction. *Friberg*, 267 F.3d at 443; 49 U.S.C. § 10501(b)(2). It is undisputed that the District's expropriation action seeks to *acquire* DSRR's Track Segment.

As the STB has explained, “[i]n enacting ICCTA, Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks.”⁸ *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition, and Operation—In Wilmington and Woburn, MA*, FD No. 34797, 2007 STB LEXIS 391 at *26-27 (STB served July 10, 2007); *see also Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003) (holding that the fact that track at issue was 10906 track did not take them outside the jurisdiction of the STB for purposes of federal subject matter jurisdiction analysis).

The Fifth Circuit has also embraced this history in which ICCTA placed 10906 track *within* federal jurisdiction, removing it from prior state regulatory control. *See PCI Transp.*, 418 F.3d at 544. State laws and regulations effecting a taking of such tracks are therefore also preempted. “The § 10906 exception states that the [STB] ‘does not have authority’ over ‘construction,

⁸ This fact alone renders the District's citation to *Hayfield N. R.R. Co., Inc v. Chicago and N. W. Transp. Co.*, 467 U.S. 622 (1984) obsolete. Plaintiff's Brief at 6. Plaintiff's citations to other cases decided before the current statutory scheme was adopted are equally unavailing. *See* Plaintiff's Brief at 5 (citing *Colorado v. U.S.*, 271 U.S. 153 (1926)). Plaintiff notes in footnote 2 that ICCTA was passed, but does not discuss the statutory scheme that it created.

acquisition, operation, abandonment, or discontinuance of spur ... track,’ but this does not mean that the [STB] lacks jurisdiction over such transactions. That would flatly contradict the unambiguous statutory language providing that the Board has ‘exclusive’ jurisdiction over the ‘construction, acquisition, operation, abandonment or discontinuance’ of spur track.” *United Transp. Union—Illinois Legis. Bd. v. STB*, 183 F.3d 606, 612 (7th Cir. 1999).

Here, the Track Segment that the District seeks to seize is 10906 track. The terms “spur, industrial, team, switching, or side tracks” (collectively also known as “auxiliary” track) are not defined in the statute. *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996). Moreover, there is no single test for determining whether a particular track segment is a “line of railroad,” or is instead simply a spur or other 10906 track. *New York City Econ. Dev. Corp.—Pet. for Declaratory Order*, FD 34429, 2004 STB LEXIS 434 at *12-13 (STB served July 15, 2004) (“NYCEDC”). The agency and the courts look primarily at the use of a track (the “use test”), and at a track's physical characteristics (the “physical characteristics test”), in making the determination of whether it should be categorized as a common carrier line of railroad, or as 10906 track.⁹ *Id.* at *14 (citing *Battaglia Distributing Co., Inc. v. Burlington Northern R.R. Co.*, FD 32058, slip op. at 3 (STB served June 27, 1997)).

The Track Segment is unquestionably 10906 track under both tests. With respect to the use test, tracks that are found to be auxiliary track are typically used for loading, unloading, storage, or switching operations that are incidental to the movement of trains. *Id.* at *14-15 (citing *Nicholson v. ICC*, 711 F.2d 364, 367-68 (D.C. Cir. 1983); *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966)). As DSRR’s supporting declaration makes clear, that is precisely what the Track Segment is used for—it is storing rail cars there at this moment, was storing rail

⁹ Because it was abandoned, it is not a common carrier line of railroad.

cars in March 2023 when the District's expert took pictures, and was storing railcars whenever Googlemaps last updated. *See* Thrall Declaration at ¶¶ 14, 15, 20 and Exs. A, B, C.

As for the physical characteristics test, there is no single criterion, but the Track Segment has all the elements of 10906 track. Specific indicia that have been found relevant in making the determination of whether a track is a line of railroad or is instead 10906 track. They include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track, etc. *NYCEDC* at *15-16 (citing *ParkSierra Corp.—Lease & Operation Exemption—Southern Pacific Transp. Co.*, FD 34126, slip op. at 5 (STB served Dec. 26, 2001); *Grand Trunk Western R.R.—Pet. for Declaratory Order—Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI*, FD 33601, slip op. at 2 (STB served July 30, 1998); *Chicago SouthShore & South Bend Railroad—Pet. for Declaratory Order—Status of Track at Hammond, IN*, FD 33522, slip op. at 6 (STB served Dec. 17, 1998)).

Here, the primary use of the track has been for staging and storing rail equipment¹⁰ and is incidental to the receipt of shipments by the carrier. Thrall Declaration at ¶ 13. The physical characteristics include that the track is a short segment; it does not invade another railroad's territory, there is not regularly scheduled service over the Track; and it is not used to serve a customer. Thrall Declaration at ¶¶ 7, 8, 9. To top it off, the District concedes the Track Segment is used for rail purposes. Plaintiff's Brief at 6; *see also* ECF No. 1-1 at 16.

¹⁰ *See Allied Industr. Dev. Corp.*, 2015 STB LEXIS 310 at *12 (staging and storage of railroad equipment found to be industrial track).

In the Fifth Circuit, “trackage . . . used in the loading, reloading, storage and switching of [rail] cars incidental to the receipt of shipments by the carrier or their delivery to the consignee . . . is ‘spur, industrial, team, switching or side tracks’” under section 10906. *Railway Labor Executives Ass’n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988) (quoting *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966)). In *Spencer*, the court explained that “[i]f, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is ‘spur, industrial, team, switching or side tracks.’”¹¹ 366 F.2d at 166. The Track Segment is squarely 10906 track under these precedents too. See Thrall Declaration at ¶¶ 13, 14, 15.

Accordingly, the District’s attempted acquisition of the Track Segment is expressly within the exclusive jurisdiction of the STB—and thus, completely preempted.

B. ICCTA Expressly Preempts the District’s Expropriation Action Because It Targets Transportation by DSRR, a Rail Carrier Under ICCTA.

The Track Segment is also subject to the STB’s exclusive jurisdiction because it is used for rail transportation by a rail carrier. The key elements to Section 10501(b)(1) are whether there is “transportation” and that it is by a “rail carrier.” The term “transportation” is broadly defined to include: a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and . . . services related to that movement including receipt, delivery, elevation, transfer in transit, refrigeration, icing,

¹¹ The court determined that the agency would not have jurisdiction if the track were “spur or industrial” track. 366 F.2d at 166. Since that decision, ICCTA placed such tracks under the STB’s jurisdiction. See, e.g. *PCI Transp.*, 418 F.3d at 544; *Fox v. STB*, 379 Fed. Appx 767, 770-772 (10th Cir. 2010).

ventilation, storage, handling, and interchange of passengers and property. *See* 49 U.S.C. § 10102(9)(A) and (B). Courts have recognized that Congress intended to give the STB extensive authority in this area. *City of Lincoln v. STB*, 414 F.3d 858, 861 (8th Cir. 2005) (citing *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (reviewing the history of railway preemption, text of the ICCTA, and court decisions to reject the argument that preemption is limited only to economic regulation)).

Here, the Track Segment is both a property and a facility used by DSRR (a rail carrier) to move property by rail and is encompassed by the term “transportation.” *See DesertXpress Enterprises, LLC—Pet. for Declaratory Order*, FD No. 34914, 2007 STB LEXIS 343 at *9-10 (STB served July 27, 2007). Indeed, the District admits as much in acknowledging DSRR’s “subsequent use of the track to perform any rail operations over the track, including the storage of railcars.” Plaintiff’s Brief at 6. The “storage” of railcars is expressly included within the definition of transportation. 49 U.S.C. § 10102(9)(B). Rail rights-of-way and track are also clearly covered by Section 10501(b)(1) and are subject to the STB’s exclusive jurisdiction even when located “entirely in one state.” 49 U.S.C. § 10501(a)(2)(A).

C. Courts Have Found that Condemnation Proceedings Targeting Railroad Property Is Completely Preempted by ICCTA.

The District is clear that it seeks to seize the Track Segment that is used for rail purposes and take it entirely away from DSRR. Attempts to take completely railroad track and property have repeatedly been found to be per se preempted by Section 10501(b). “Both the Board and the courts have found that the Board’s broad and exclusive jurisdiction over railroad transportation prevents the application of state laws, including condemnation of unused railroad property, if those laws would have the effect of foreclosing, or unduly restricting, present or future transportation by rail carrier.” *Grafton & Upton R.R.—Pet. for Declaratory Order*, FD No. 36696, 2023 STB

LEXIS 207 at *7 (STB served Nov. 15, 2023) (citing *City of Ozark v. Union Pac. R.R.*, 843 F.3d 1167 (8th Cir. 2016) (order requiring railroad to restore crossing closed in violation of state law preempted if restoration will unduly interfere with present or future rail operations); *Skidmore v. Norfolk S. Ry. Co.*, 1F.4th 206 (4th Cir. 2021) (holding ICCTA’s complete preemption of quiet title claim seeking to take railroad property from it results in federal court jurisdiction); *Union Pac. R.R. v. Chicago Transit Auth.*, 647 F.3d 675, 681-82 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way not in use by the railroad preempted because it would interfere with current and potential future rail operations); *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (affirming Board’s determination that taking would unduly interfere with present and future railroad operations); *Tri-City R.R.—Pet. for Declaratory Order*, FD 35915, slip op at 7-8 (STB served Sept. 14, 2016) (state law condemnation and acquisition by two cities for an at-grade crossing at location that would unreasonably interfere with a railroad’s present and future operations preempted); *Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35196, slip op. at 4-5 (STB served Mar. 1, 2010) (condemnation action to take property on which the railroad was not actively operating preempted when proposed condemnation would unreasonably interfere with railroad’s future plans); *Matter of Metro. Transp. Auth.*, 32 A.D.3d 943 (N.Y. App. Div. 2006); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W. Dist. Wisc. 2000) (holding that “condemnation is regulation” and omitting references to the as-applied framework). The Track Segment here that the District seeks to take entirely is not unused railroad property; it is track that has long been, and is now, used to provide railroad services—making this a straightforward case of federal preemption. Thrall Declaration at ¶¶ 12-18.

II. ICCTA’s Federal Preemption Applies Even Though the Track Segment Was Abandoned as a Rail Line in 1988 and Part of It Was Sold.

The District’s primary retort is to argue that the prior abandonment of the Track Segment puts it outside of the STB’s jurisdiction. Plaintiff’s Brief at 5-6. But that is a red herring and is wrong because Congress intentionally sought to encourage the continued use of abandoned tracks by adopting Section 10906. *See Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress’s adoption of 49 U.S.C. § 10906 “encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked”). Neither the NREC nor any subsequent user, including DSRR, was required to seek any approval or authority from the ICC or the STB to use the Track as 10906 track. The Track Segment sits squarely within the STB’s jurisdiction but outside its authority—in the regulatory gap described above—without the requirement to obtain STB approval for using the 10906 track. Therefore, the prior abandonment says nothing, whatsoever, about the regulatory status of the Track Segment.

Similarly, DSRR’s sale of some property is also irrelevant. Again, abandonment removed the entire abandoned line from the STB’s authority. DSRR (and NREC before it) could chose to continue to use the entire line or any segment thereof as 10906 track. Or, it could sell off part or all of it. And, it could take all those actions without STB authority pursuant to 10906. That DSRR chose to sell off parts while operating the Track Segment is meaningless.

That the Track Segment was previously abandoned and that a different segment was sold is irrelevant to the Track Segment’s longstanding use or the STB’s exclusive jurisdiction over it. Indeed, the District rests its argument almost entirely on a 1926 and a 1984 case, that were decided by the U.S. Supreme Court *before* ICCTA, in 1995, completely preempted state regulation of 10906 track. *See* Plaintiff’s Brief at 5-6. Those cases are therefore of no consequence. When track is abandoned, a railroad has several options with respect to this track, including continuing

to utilize it as non-mainline track, *e.g.*, as industry, spur, team, switching, or side track (10906 track); or physically removing or selling the track. *See Glosemeyer*, 685 F. Supp. at 1117. The continued use of the Track Segment for railroad transportation and as 10906 track, after formal abandonment as 10906 track, makes the track subject to the STB's jurisdiction. *Fox v. STB*, 379 Fed. Appx 767, 770-772 (10th Cir. 2010).

CONCLUSION

For the foregoing reasons, DSRR respectfully requests that the Court deny the District's remand motion because ICCTA completely preempts the District's attempt to expropriate entirely the Track Segment, which is 10906 Track, from DSRR such that DSRR could not provide rail transportation services over the Track Segment. Because complete preemption establishes both the Court's removal jurisdiction *and* that there is no expropriation cause of action available to the District with respect to the Track Segment, DSRR also requests that the Court additionally grant its motion to dismiss under Rule 12(b)(6).

Respectfully submitted,

/s/ Leila A. D'Aquin

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Attorneys for Delta Southern Railroad, Inc.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

NORTHEAST LOUISIANA RAILROAD DEVELOPMENT DISTRICT Plaintiff versus DELTA SOUTHERN RAILROAD, INC. Defendant	CIVIL ACTION CASE NO: 3:23-cv-1783 JUDGE: Terry A. Doughty MAG.: Kayla D. McClusky JURY TRIAL
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DECLARATION OF ROB THRALL

I, Rob Thrall, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the SVP Business Development at Patriot Rail Company, which owns and operates Delta Southern Railroad, Inc. (“DSRR”). I make this Declaration in support of DSRR’s Response to Plaintiff’s Motion to Remand.
2. I am over the age of eighteen and otherwise competent to make this Declaration. I have personal knowledge of the statements contained herein, which are true and correct to the best of my knowledge, information, and belief.

Background

3. DSRR owns and operates two lines: the first begins at Tallulah, Louisiana and continues to Lake Providence, Louisiana, known as the Lake Providence Branch. The second extends from Monroe, Louisiana to Sterlington, Louisiana.
4. DSRR owns and operates the 2.7 miles of track at issue, from milepost 498.44 to milepost 501.15, located in Louisiana (the “Track”), which connects to the Lake Providence Branch.

5. On July 11, 1988, the Interstate Commerce Commission (“ICC”) approved the abandonment of the Track to remove the common carrier obligation on the line. The ICC consummated the abandonment on October 13 1988, which converted the Track to spur or industrial track status. *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, FD 31246, 1989 ICC Lexis 151 (ICC served June 21, 1989). The October decision authorized DSRR to acquire and operate the segment between McGehee and Tallulah and consummated the abandonment remove the common carrier obligation from the Tallulah-Vidalia segment. As detailed below, DSRR continued (and continues) to use the Track for its railroad operations following the formal abandonment.
6. Patriot Rail Company acquired a controlling interest in DSRR following a decision by the Surface Transportation Board. *Patriot Rail Co., LLC et al. – Control Exemption – Delta Southern R. R., Inc.*, FD 36642, 2022 STB LEXIS 314 (STB Served Dec. 20, 2022).

Relevant Characteristics of the Track

7. The Track is a short segment and does not invade the territory of another railroad.
8. There is no scheduled, maintained, or regular service over the Track.
9. The Track is not used to serve a specific customer’s facility.
10. There is no overhead or through traffic operated on the Track.
11. DSRR owns the railroad line connecting with the Track at milepost 498.44 and running north to milepost 471.0. Appended as **Exhibit A** to the Declaration is a true and correct map of these lines.

Use of the Track

12. The Track is not unused railroad property.

13. To my knowledge, the Track, has been historically and now continues under DSRR to be used to provide rail transportation services that are incidental to line haul movement. The primary use of the Track has been for staging and storing rail equipment necessary to the movement of rail shipments.
14. The Track is (and has been throughout the period since it was abandoned to remove the common carrier obligation on the line) regularly used for railcar storage and other rail services in support of the rail network. Appended as **Exhibit B** to the Declaration are true and correct photographs of railcars being stored on the Track.
15. Indeed, it continues to be used as such even today. The photographs of the tank cars numbered UTLX672122 and UTLX665802 depict those cars as they are presently stored on this track segment.
16. These photos fairly and accurately represent the scene at the time they were taken on January 24, 2024.
17. These cars are only the most recent example of ongoing usage of the track.
18. The proposed expropriation would interfere DSRR's railroad operations, as the Track is critical and necessary for DSRR's storage of railcars and the receipt of shipments.

The District Late-Provided Expert Reports

19. In an effort to cure the fact that the District had not provided information required by Louisiana law before seeing to seize DSRR property, the District provided to DSRR counsel on February 1, 2024, the expert report of RMI Valuation, Inc., which is dated August 15, 2023.

20. That report includes two photographs taken on March 3, 2023. In both photographs, cars are stored on the Track Segment. *See RMI Valuation Report* at pages 11-12 (Frames 115 and 109). True and correct copies of those pages are attached as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 16 day of February, 2024.

A handwritten signature in blue ink, appearing to read "J. Threl", is written over a horizontal line.

EXHIBIT A TO DECLARATION OF ROB THRALL

Track Segment Shown in Red Below the Blue/Green Line.



Track Segment From Google Maps with Rail Cars on the Track Segment.





EXHIBIT B TO DECLARATION OF ROB THRALL



EXHIBIT C TO DECLARATION OF ROB THRALL



CAMERON R. REX, MAI, GISP
CHARLES W. (SANDY) REX III, MAI
CHARLES W. REX IV, MAI, AI-GRS

**APPRAISAL REPORT
VALUATION OF**

*THE DELTA SOUTHERN RAILROAD'S LINE
BETWEEN MILEPOST 498.44 AND MILEPOST 501.16
AND
THE DELTA SOUTHERN RAILROAD'S FORMER LINE
BETWEEN MILEPOST 501.16 AND MILEPOST 512.06
IN MADISON PARISH, LOUISIANA*

PREPARED FOR

*BRYANT KILLEN
DEPUTY DIRECTOR
NORTHEAST LOUISIANA RAILROAD DISTRICT
212 HANCOCK STREET
ST. JOSEPH, LOUISIANA 71366*

**DATE OF VALUE: MARCH 3, 2023
DATE OF REPORT: AUGUST 15, 2023**

PREPARED BY

RMI VALUATION, LLC



643 LANDWEHR ROAD
NORTHBROOK, ILLINOIS 60062

O 847.920.9033
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INFO@RMIVALUATION.COM
WWW.RMIVALUATION.COM

DELTA SOUTHERN RAILROAD LINE FROM MP 498.44 TO 512.06
MADISON PARISH, LOUISIANA

SUBJECT PROPERTY PHOTOGRAPHS



Frame 115. Looking southwesterly from near MP 498.44 from the northern extent. Photographed by Charles W. Rex IV, MAI, AI-GRS on March 3, 2023.



Frame 110. Looking northeasterly from the north side of the crossing at East Scott Street. Photographed by Charles W. Rex IV, MAI, AI-GRS on March 3, 2023.

*DELTA SOUTHERN RAILROAD LINE FROM MP 498.44 TO 512.06
MADISON PARISH, LOUISIANA*



Frame 109. Looking southwesterly at the crossing at East Scott Street. Photographed by Charles W. Rex IV, MAI, AI-GRS on March 3, 2023.



Frame 87. Looking northeasterly from near the intersection of Helen Street and Poplar Street about 840 feet north of MP 499. Photographed by Charles W. Rex IV, MAI, AI-GRS on March 3, 2023.

EXHIBIT D –
PLAINTIFF’S MOTION TO REMAND

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIVIL ACTION

CASE NO. 3:23-cv-1783

VERSUS

JUDGE: TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD, INC.

MAG.: KAYLA D. MCCLUSKY

FILED: _____

**BY: _____
CLERK**

PLAINTIFFS MOTION TO REMAND

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Northeast Louisiana Railroad Development District, who moves this Honorable Court for an Oder remanding this case to the 6th Judicial District Court for the Parish of Madison, State of Louisiana. Despite representations made in the Notice of Removal in this matter (Rec. Doc. No. 1), there is no Federal jurisdiction in this case, and the matter should be remanded.

WHEREFORS, Plaintiff, Northeast Louisiana Railroad Development District request that the Court grant its motion and remand this case to the 6th Judicial District Court for the Parish of Madison, State of Louisiana and requests any such further relief deemed just and appropriate by the Court.

Respectfully submitted:

By: /s/ John D. Crigler, Jr.

JAMES E. PAXTON

JOHN D. CRIGLER, JR. LA#31118

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124 Hancock Street

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Saint Joseph, Louisiana 71366

Phone:(318)766-4892/Facsimile:(318)766-3945

Attorneys for Northeast Louisiana Railroad
Development District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs Motion to Remand has been served upon counsel of record for all parties via the Court's ECF system on January 19, 2024.

/s/ JOHN D. CRIGLER, JR.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT

CIVIL ACTION

CASE NO. 3:23-cv-1783

VERSUS

JUDGE: TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD, INC.

MAG.: KAYLA D. MCCLUSKY

FILED: _____

BY: _____
CLERK

PLAINTIFFS BRIEF IN SUPPORT OF THEIR MOTION TO REMAND

A defendant may remove a state court action to federal district court if the district court has original jurisdiction over the case and Congress has not expressly prohibited removal. 28 U.S.C. § 1441(a). “The burden of establishing federal jurisdiction is placed upon the party seeking removal.” *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Notably, removal jurisdiction is strictly construed because of strict federalism concerns. *Id.* When determining if a federal district court has jurisdiction to hear a case on removal, “[a]ny doubt as to the propriety of removal should be resolved in *favor of remand*.” *Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008) (emphasis added). A presumption against federal jurisdiction exists, and federal courts must carefully guard against the temptation to expand beyond the jurisdictional bounds established by Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

FEDERAL QUESTION JURISDICTION DOES NOT EXIST

This action involves an attempt by Delta Southern Railroad, Inc. (“DSR”) to remove a State Court expropriation action from the Sixth Judicial District Court for the Parish of Madison, State of Louisiana. At the heart of the controversy is a segment of a rail line that was authorized for abandonment and abandoned by the Interstate Commerce Commission (“ICC”) in 1988. Because of that authorized abandonment, the ICC has no jurisdiction over that segment of the rail line. At no point in time thereafter, neither the ICC, nor the Surface Transportation Board (“STB”), was ever asked to authorize renewed authority to provide transportation in interstate commerce over that segment of track. Accordingly, and as explained below, the ICC, the STB nor any Federal Court have jurisdiction over the portion of rail subject to the State Expropriation proceeding filed in Madison Parish, Louisiana pursuant to the Plaintiff’s authority under La. R.S. 33:140.73

While the Defendant argues that the Interstate Commerce Commission Transportation Act (“ICCTA”) preempts all State actions, that is not true. Courts have been split on the broadness of preemption under ICCTA; some have held it preempts all state efforts, *City of Auburn*, 154 F.3d at 1029-103[1030]; [*Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F.Supp2d 1009, 1013 (W.D.Wis.2000)], and others have held it applies only to the regulation of rail transportation. [*Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 561 (8th Cir.2004)]; *Fla. E. Coast R.R. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir.2001). Despite this split, the STB, which is the administrative body that governs railroad operations, has stated that “Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations.” *Maumee & W.R.R. Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, 2004 WL 395835, at *1

(Surface Transp. Bd. Mar. 2, 2004); *see also S.D. v. Burlington N. & Santa Fe R.R. Co.*, 208 F.Supp.2d 919, 931 (D.S.D.2003); *Fla E. Coast R.R. Co.*, 266 F.3d at 1330-31.

As set forth in the facts below, it is clear that the expropriation in the Sixth Judicial District Court does not interfere with interstate rail operations. Thus, this Court has no jurisdiction over this case.

BACKGROUND

The rail line in question was initially owned by Missouri Pacific Railroad (“MP”). On June 29, 1988, MP petitioned the ICC requesting that it be allowed to abandon the rail line located between milepost 408.9 near McGehee, Arkansas and milepost 651.6 near Vidalia, Louisiana. The ICC authorized MP to abandon that line. Subsequently, the ICC authorized National Railway Equipment Company (“NREC”) to negotiate with MP to acquire a portion of the track - the 89.5 miles of track located between milepost 408.9 in McGehee, Arkansas and milepost 498.4 in Tallulah, Louisiana. In connection with the proceedings, NREC stated that if it was successful in acquiring the 89.5 mile line, it intended to negotiate separately with MP for the post abandonment acquisition of the remaining rail line between Tallulah, Louisiana and Vidalia, Louisiana. NREC later acquired this property located from milepost 498.4 near Tallulah, Louisiana to milepost 651.6 near Vidalia, Louisiana. However, NREC never filed for authority from the ICC, nor the Surface Transportation Board (“STB”) to operate over the abandoned track located between Tallulah, Louisiana and Vidalia, Louisiana.

In a decision which was served on September 30, 1988, the ICC authorized NREC to acquire and operate the 89.5 mile line between milepost 408.9 near McGehee, Arkansas to milepost 498.4 located near Tallulah, Louisiana. Sometime later NREC transferred its rights in connection with the acquisition of the rail line of the 89.5 rail line between milepost 408.9 and

milepost 498.4 to its subsidiary Delta Southern Railroad Company (“DSRC”), which was acquired by Delta Southern Railroad, Inc. (“DSR”)

In 1999, DSR, the defendant herein, filed a notice of exemption under 49 C.F.R. Sec. 1150.31 to acquire from Delta Southern Railroad Company (DSRC) and to operate the rail line, extending from milepost 408.9 in or near McGehee, Arkansas to milepost 489.44 in or near Tallulah, Louisiana.¹ Later, through a series of transactions, ownership of and operating rights on the segment from milepost 408.9 to milepost 471.0 were transferred to various other entities and ultimately to the defendant, DSR. Thus, DSR now owns and operates only the segment of rail line from milepost 471.0 to the southern terminus 498.44. As set forth in the opinion of the STB, Docket No. FD33802, DSR acquired the real property and tracks between milepost 498.4 and milepost 651.6 that had been authorized for abandonment in 1988. DSR has admitted that milepost 498.4 accurately identifies the southern terminus of the rail line which has been authorized by either the ICC or STB. Accordingly, the rail line over which DSR acquired ownership and **[operating authority]** ends at milepost 498.44 near Tallulah, Louisiana. Portions of the abandoned line below milepost 498.44 are still owned by DSR, but DSR has never received **operating authority** from the STB on any of it and in fact, DSR has sold portions to third parties. As set forth below, the track at issue in the instant proceeding lies south of milepost 498.44 and is not within the jurisdiction of the STB, nor this Federal Court. See Decision of Surface Transportation Board dated September 1, 2023, attached hereto as Exhibit “A”.

¹The milepost 489.44 was mistakenly used in an application to the Surface Transportation Board. The proper milepost was 498.44 and this mistake was corrected in the decision by the Surface Transportation Board, attached as Exhibit “A”.

LAW AND ARGUMENT

Although the original Interstate Commerce Act (“ICA”) required all rail carriers to obtain a certificate of public convenience and necessity to operate in interstate commerce, the ICA did not subject railroad abandonments to the jurisdiction of the Interstate Commerce Commission (“ICC”). *See* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.² Hence, railroads were free to abandon lines of railroad that were engaged in interstate commerce without seeking authority from the ICC.

However, in 1920, Congress empowered the ICC with broad jurisdiction over abandonments of lines of railroad used for interstate commerce. That jurisdiction includes the abandonment of a branch line operated by an interstate carrier, even if the line is located in only one State. *Colorado v United States*, 271 U.S. 153 (1926). Hence, the 1988 abandonment by Missouri Pacific Railroad Company (“MP”) of its segment of the Lake Providence Branch Line that included from milepost 498.4 at Tallulah, LA moving in a southernly direction to milepost 651.6 at Vidalia, LA was subject to the jurisdiction of the ICC. As the ICC explained in its decision, served September 30, 1988, “[b]ecause the time for filing offers of financial assistance had expired without a *bona fide* offer for the 73.2-mile portion of the line between milepost 498.4 at Tallulah and milepost 651.6 at Vidalia, an appropriate certificate and decision was served August 26, 1988, permitting abandonment of that portion.” The ICC’s decision was not appealed and became final.

Abandonment of that segment of the line terminated the ICC’s jurisdiction over the line and the real property upon which it had been constructed, which in turn removed any possibility of conflict on it creating an issue of Federal Question Jurisdiction. As the Supreme Court has

² Enactment of the ICC Termination Act of 1995, Pub. L. No 104-88, 109 Stat. 803, Dec. 29, 1995, effective Jan. 1, 1996, caused the ICC’s exclusive jurisdiction over abandonments to be assumed by the Surface Transportation Board (“STB”). *See* 49 U.S.C. §§ 10903-10906.

ruled, “unless the Commission attaches post abandonment conditions to a certificate of abandonment, the Commission’s authorization brings its regulatory mission to an end.” *Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company*, 467 U.S. 622, 633 (1984) (“*Hayfield*”).

Delta Southern Railroad Company would later acquire ownership of the real property that is at issue after the line was abandoned. However, neither it, nor Delta Southern Railroad, Inc., which is its successor in interest, ever sought new operating authority pursuant to 49 U.S.C. 10901 from either the ICC or the STB to conduct for-hire rail transportation service in interstate commerce on the rail line in question. As a result, neither the STB nor a federal court has any jurisdiction over the real property that is the subject of the instant expropriation proceeding.

As the Supreme Court further explained in *Hayfield, supra*, at 633:

The proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission’s jurisdiction is strongly buttressed by the Commission’s own interpretation of its regulatory authority. According to the Commission, “the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission’s jurisdiction, and within a State’s reserved jurisdiction. Questions of title to, and disposition of, the property are the matters subject to State law.

The ICC did not attach any post-abandonment conditions on the abandonment of this rail line, and because neither the ICC nor the STB has issued a decision pursuant to 49 U.S.C. § 10901(a) that authorized DSR to provide transportation over the abandoned line, the STB has not reacquired jurisdiction as a result of DSR’s subsequent use of the track to perform any rail operations over the track, including the storage of railcars. Further evidence of DSR’s clear intent to never utilize the track at issue for rail line purposes is obvious in that DSR began selling off portions of the line at issue to private landowners. Attached as Exhibit “B” is an example whereby

DSR sold a large portion of the abandoned line approximately two (2) miles South of the portion of line expropriated in this action.

CONCLUSION

For all the reasons stated herein and the applicable jurisprudence, the state condemnation action will not as a matter of law interfere with or impede any rail operations that have been authorized by the STB. Therefore, no Federal Question Jurisdiction exists and this matter should be remanded to the Sixth Judicial District Court for the Parish of Madison.

Respectfully submitted:

By: /s/ John D. Crigler, Jr.

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Attorneys for Northeast Louisiana Railroad
Development District

51802
DO

SERVICE DATE – SEPTEMBER 1, 2023

SURFACE TRANSPORTATION BOARD

DECISION

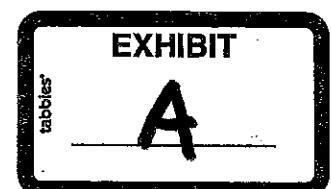
Docket No. FD 33802

DELTA SOUTHERN RAILROAD, INC.—ACQUISITION AND EXEMPTION—
DELTA SOUTHERN RAILROAD COMPANY

Decided: September 1, 2023

In 1999, Delta Southern Railroad, Inc. (DSR) filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Delta Southern Railroad Company (DSRC) and to operate approximately 132.78 miles of rail line, including a line described as extending from milepost 408.9 in or near McGehee, Ark, south to milepost 489.44 in or near Tallulah, La. Notice of the exemption was served and published in the Federal Register on October 20, 1999 (64 Fed. Reg. 56,572) (the Notice), and the exemption became effective on October 31, 1999. Later, through a series of transactions, ownership of, and operating rights on, the segment from milepost 408.9 to milepost 471.0 were transferred to various other entities.¹ Thus, DSR now owns and operates only the segment from milepost 471.0 to the southern terminus.

¹ See Delta S. R.R.—Aban. Exemption—Between Lake Vill., Ark., & Shelburn, La., AB 384 (Sub-No. 1X) (STB served Apr. 7, 2005) (terminating the offer of financial assistance (OFA) process, vacating the decision postponing effective date of authorization to abandon the segment between milepost 433.0 and milepost 463.0, and noting that the previously participating offerors, led by Southeast Arkansas Economic Development District (SEAEDD) and Lake Providence Port Commission (LPPC), intended to pursue acquisition of that segment outside the OFA process). As noted in decisions relating to other transactions involving these parties, SEAEDD thereafter acquired the segment of that former line between milepost 433.0 and milepost 454.8, and LPPC acquired the segment between milepost 454.8 and milepost 463.0, in transactions not subject to Board authorization. See Delta S. R.R.—Aban. Exemption—in Desha & Chicot Cntys., Ark., AB 384 (Sub-No. 3X), slip op. at 1 & n.2 (STB served Mar. 25, 2011); N. La. & Ark. R.R.—Acquis. & Operation Exemption—Line of Lake Providence Port Comm'n, FD 35609, slip op. at 1 & n.1 (STB served Oct. 5, 2012); Verified Notice 3, Sept. 20, 2012, N. La. & Ark. R.R., FD 35609. Acquisitions of the remaining segments of DSR's line between milepost 408.9 and milepost 471.0 were completed through the OFA process in, respectively, Delta S. R.R.—Aban. Exemption—in Desha & Chicot Cntys., Ark., AB 384 (Sub-No. 3X) (STB served May 19, 2011) (authorizing LPPC and Arkansas Shortline Railroads, Inc. (as guarantor for North Louisiana & Arkansas Railroad, Inc. (NLA)) to acquire the segment between milepost 408.9 and milepost 433.0 and authorizing NLA to operate it) and Delta S. R.R.—Aban. Exemption—in E. Carroll Parish, La., AB 384 (Sub-No. 2X) (STB served June 7, 2011) (authorizing LPPC to acquire and operate the segment between milepost 463.0 and



Docket No. FD 33802

In a separate proceeding currently before the Board, issues were identified relating to discrepancies in the description of the southern terminus of the line and DSR's authorization to operate south of milepost 489.44, the southern milepost identified in the Notice. See Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 8-9 (STB served Aug. 23, 2022). The Board directed DSR to address those issues and provide specified information. Id. at 9.

DSR responded to the Board's order in Docket No. 36447,² and thereafter filed a petition in this docket asking the Board to modify the Notice to correct a milepost error. In its petition, DSR states that the verified notice filed in 1999 identified the southern terminus of the line in question as "MP 489.44 in or near Tallulah, LA," when in fact the intended designation was milepost 498.44, the actual southern end and point of connection with Kansas City Southern Railway Company (now Canadian Pacific Kansas City, or CPKC). (DSR Pet. 4.) DSR points out that the verified notice reflects a clear intent to acquire and operate the entire line to Tallulah, at milepost 498.44, and asserts that the reference to "MP 489.44" was a transcription error in which the "8" and the "9" in the southern milepost designation were inadvertently transposed. (Id. at 4-6 (presenting supporting evidence and argument).) DSR asks that the Notice be corrected to reflect that the southern milepost of the line is located at milepost 498.44, and that the total number of route miles acquired and operated by DSR in 1999 pursuant to this proceeding was 141.78 miles. (Id. at 5.)

LPPC, the applicant in Docket No. 36447, filed a reply to the petition on September 26, 2022. LPPC states that DSR's petition to correct the milepost error "fails to consider the fact that [DSRC] never acquired operating authority from the [agency] to operate beyond MP 498.4." (LPPC Reply 1-2.) However, as LPPC notes, DSRC acquired the real property and tracks between milepost 498.4 and milepost 651 that had been authorized for abandonment in 1988, (id. at 2). Additionally, as explained in the petition, DSR has investigated and determined that milepost 498.44 more accurately identifies the southern terminus of the line (DSR Pet. 5 n.3). DSR also notes that no party can claim prejudice from the requested correction, (id. at 6), and relatedly, LPPC states that it will abide by the milepost designation established by the Board, (LPPC Reply 3).

Accordingly, the Notice will be modified to reflect that the southern terminus of the line over which DSR acquired ownership and operating authority is located at milepost 498.44 at

milepost 471.0). In separate proceedings in 2012, NLA was authorized to lease and operate the segments between milepost 433.0 and milepost 454.8 and between milepost 454.8 and milepost 471.0. See N. La. & Ark. R.R.—Lease & Operation Exemption—Line of Se. Ark. Econ. Dev. Dist., FD 35608 (STB served Mar. 28, 2012); N. La. & Ark. R.R.—Acquis. & Operation Exemption—Line of Lake Providence Port Comm'n, FD 35609 (STB served Oct. 5, 2012).

² (See DSR Response to Information Requests, Sept. 2, 2022, Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447.)

Docket No. FD 33802

Tallulah, and that the total number of route miles originally acquired and operated by DSR pursuant to this proceeding was 141.78 miles.

It is ordered:

1. This proceeding is reopened.
2. The request to correct the Notice served and published on October 20, 1999, is granted, and the Notice is modified, nunc pro tunc, to reflect that the correct milepost designation for the southern terminus of the line is milepost 498.44 and the total mileage acquired was 141.78.
3. This decision is effective on its date of service.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Doc 00118684 Blk CV Vol 266 Pg 202

Accepted for Filing in:
Madison Parish
On: Apr 16, 2007 at 02:36P
By:
Deb Gilbert

DELTA SOUTHERN RAILROAD, INC.

TO: QUITCLAIM DEED

ENTRY NO.:

WYOMING LAND COMPANY, LLC

Deb Gilbert
Deputy Clerk

**UNITED STATES
OF AMERICA**

BE IT KNOWN AND REMEMBERED that on the dates hereinafter written, before the undersigned Notaries Public, duly commissioned and qualified in accordance with the law, and in the presence of the undersigned competent witnesses, there personally came and appeared:

DELTA SOUTHERN RAILROAD, INC. (TIN: [REDACTED]) a Louisiana corporation domiciled in Madison Parish, Louisiana, appearing herein through its president, William P. Wainwright, duly authorized by virtue of a resolution of the board of directors, of which is attached hereto;

hereinafter referred to as "Vendors",

who declared to us, Notaries, that for the price and sum of **SIX THOUSAND DOLLARS AND 00/100 (\$6,000.00)**, and other good and valuable consideration, cash in hand paid, receipt whereof is hereby acknowledged, and full acquittance and discharge therefor given, and for other good and valuable consideration and upon the terms and conditions hereinafter expressed, they do hereby sell, transfer, assign, quitclaim, release and relinquish unto:

WYOMING LAND COMPANY, LLC, (TIN [REDACTED]) a Louisiana corporation, domiciled in Tensas Parish, Louisiana, whose mailing address is P. O. Box 97, St. Joseph, Louisiana, appearing herein through its duly authorized Managing Member, James E. Paxton

hereinafter referred to as "Vendees";

all and singular, its interest in and to the following described property situated in the Parish of Madison, State of Louisiana, to-wit:

That certain strip of land 100 feet wide, formerly utilized for railroad purposes by the Memphis, Helena and Louisiana Railroad Company and its successors, situated in Sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Township 16 North, Range 12 East, Madison Parish, Louisiana, and strip distinguishable by the road bed "bump" formerly used as a bed for tracts and the barrow ditches on each side. Said property being acquired by the Memphis, Helena and Louisiana Railroad Company as per right-of-ways recorded in Conveyance Book "N", 243, "N", 210, and "N", 306 found in the records of Madison Parish, Louisiana.

TO HAVE AND TO HOLD the above described property unto the said **WYOMING LAND COMPANY, LLC**, its heirs, and assigns forever, without any warranty, whatsoever, of any nature or description, even for the return of the purchase price, but with full



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substitution and subrogation in and to all rights of actions of warranty which they may have against all preceding owners or vendors whomsoever.

And next to these presents, personally came and appeared WYOMING LAND COMPANY, LLC, Vendee herein, who declared unto me, Notary, that it accepts this Quitclaim Deed in all of its parts and clauses.

IN EVIDENCE WHEREOF, the said appearers have signed this act in the presence of the two undersigned and competent witnesses, who sign as such with me, Notary, on this the 4th day of April, 2007, after due reading of the whole.

WITNESSES

VENDOR:

DELTA SOUTHER RAILROAD, INC.

Kathy McHard

Kathy McHard
Printed Name

William P. Wainwright
William P. Wainwright, President

Tammy Stampky
Tammy Stampky
Printed Name

E. H. Lancaster Jr.
NOTARY PUBLIC

Printed Name

Notary ID

E. H. LANCASTER, JR.
NOTARY PUBLIC, BAR ROLL # 7952
MADISON PARISH, LOUISIANA
MY COMMISSION EXPIRES AT DEATH

Doc
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Vol
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204

**RESOLUTION
OF
DELTA SOUTHERN RAILROAD, INC.**

BE IT RESOLVED, that William P. Wainwright., President of the Corporation be and he is hereby authorized, empowered and directed to enter into and execute a deed under the terms of which Delta Southern Railroad, Inc. will sell, transfer and convey to Wyoming Land Company, LLC for a cash consideration of SIX THOUSAND and NO/100 DOLLARS (\$6,000.00), that certain real estate situated in Madison Parish, Louisiana, to-wit:

That certain strip of land 100 feet wide, formerly utilized for railroad purposes by the Memphis, Helena and Louisiana Railroad Company and its successors, situated in Sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Township 16 North, Range 12 East, Madison Parish, Louisiana, and strip distinguishable by the road bed "bump" formerly used as a bed for tracts and the barrow ditches on each side. Said property being acquired by the Memphis, Helena and Louisiana Railroad Company as per right-of-ways recorded in Conveyance Book "N", 243, "N", 210, and "N", 306 found in the records of Madison Parish, Louisiana.

BE IT FURTHER RESOLVED that William P. Wainwright is authorized, empowered and directed to do all other acts necessary to carry this resolution into effect and all acts done by him in pursuance hereof be and the same are hereby ratified and confirmed and made the acts of this corporation.

C E R T I F I C A T E

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a resolution adopted at a meeting of the Board of Directors of Delta Southern Railroad, Inc., Tallulah, Louisiana on the 4th day of April, 2007, at which meeting a full quorum was present and participating therein throughout, all of which appears from the current minute book of said corporation, and that the said resolution has not been rescinded.

WITNESS my signature as Secretary of said corporation, in Tallulah, Louisiana, on this the 4th day of April, 2007.


SECRETARY

Doc	Bk	Vol	Pa
00118684	CV	266	205

IN EVIDENCE WHEREOF, the said appearers have signed this act in the presence
of the two undersigned and competent witnesses, who sign as such with me, Notary, on this
the 11 day of April, 2007, after due reading of the whole.

WITNESSES

Renee E. Keahy
Renee E. Keahy
Printed Name

Carol J. Guice
Carol J. Guice
Printed Name

VENDEE

WYOMING LAND COMPANY, LLC

James E. Paxton
James E. Paxton, Managing Member

Christy C. Lee
NOTARY PUBLIC
Christy C. Lee 51094
Printed Name Notary ID

Christy C. Lee
Notary Public ID# 51094
Parish of Tensas - State of Louisiana
Commission Expires at Death

Doc Bk Vol Pg
00118684 CV 266 206
RESOLUTION

OF

WYOMING LAND COMPANY, LLC

BE IT RESOLVED, that James E. Paxton, Managing Member of the Limited Liability Company be and he is hereby authorized, empowered and directed to enter into and execute a deed under the terms of which Delta Southern Railroad, Inc. will sell, transfer and convey to Wyoming Land Company, LLC for cash consideration of SIX THOUSAND, DOLLARS and NO/100 (\$6,000.00), that certain real estate situated in Madison Parish, Louisiana, to-wit:

That certain strip of land 100 feet wide, formerly utilized for railroad purposes by the Memphis, Helena and Louisiana Railroad Company and its successors, situated in Sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Township 16 North, Range 12 East, Madison Parish, Louisiana, and strip distinguishable by the road bed "bump" formerly used as a bed for tracts and the barrow ditches on each side. Said property being acquired by the Memphis, Helena and Louisiana Railroad Company as per right-of-ways recorded in Conveyance Book "N", 243, "N", 210, and "N", 306 found in the records of Madison Parish, Louisiana.

BE IT FURTHER RESOLVED that James E. Paxton, is authorized, empowered and directed to do all other acts necessary to carry this resolution into effect and all acts done by him in pursuance hereof be and the same are hereby ratified and confirmed and made the acts of this limited liability company.

C E R T I F I C A T E

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a resolution adopted at a meeting of all of the members of WYOMING LAND COMPANY, LLC, at St. Joseph Louisiana on the 4th day of April, 2007, at which meeting a full quorum was present and participating therein throughout, all of which appears from the current minute book of said limited liability company, and that the said resolution has not been rescinded.

WITNESS my signature as the Managing Member of said corporation, in St. Joseph, Louisiana, on this the 4th day of April, 2007.


Managing Member

EXHIBIT E –

PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO MOTION TO REMAND

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIVIL ACTION

CASE NO. 3:23-cv-1783

VERSUS

JUDGE: TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD, INC.

MAG.: KAYLA D. MCCLUSKY

JURY TRIAL

FILED: _____

**BY: _____
CLERK**

PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO MOTION TO REMAND

Although Delta Southern Railroad, Inc. (“DSRR”) owns some acreage in Madison Parish on which railroad tracks that were once owned and operated over by the Missouri Pacific Railroad Company (“MoPac”) are located, the Northeast Louisiana Railroad Development District (“Plaintiff” or “NLRDD”) is not aware that the Interstate Commerce Commission (“ICC”) or its successor, the Surface Transportation Board (“STB”), ever authorized DSRR to operate over the tracks and real property that is the subject of Plaintiff’s condemnation proceeding. Therefore, the tracks are not part of the national rail network under the authority of the STB, and, as such, federal jurisdiction does not exist.

By way of background, in 1988, MoPac filed an application to abandon its entire line of railroad between milepost 408.9 near McGehee, Arkansas and the end of the Line at milepost 651.6 near Vidalia, Louisiana. The application was accepted by the ICC and docketed as AB 3 (Sub-No. 72), *Missouri Pacific Railroad Company – Abandonment – in Desha and Chicot Counties, AR, and East Carroll, Madison, Tensas, and Concordia Parishes, LA*. The ICC determined that the entire Line could be abandoned. However, before the line was abandoned,

offers of financial assistance (“OFA”) were filed by the Lake Providence Port Commission (“LPPC”) and the National Railway Equipment Company (“NREC”).

The ICC initially accepted LPPC’s OFA to acquire the 89.5 miles of track between milepost 408.9 at McGee, Arkansas and milepost 498.4 at Tallulah, Louisiana. The ICC, however, rejected the OFA filed by NREC. On August 8, 1988, NREC’s attorney appealed the ICC’s decision that had rejected NREC’s OFA. As part of NREC’s appeal, NREC dropped its attempt to acquire the entire line between McGehee and Vidalia. In his letter, counsel stated that “[i]f NREC is successful in acquiring the 89.5 mile portion of the line [between McGehee, Arkansas and Tallulah, Louisiana, [NREC] intends to negotiate separately with MP for a post-abandonment acquisition of the remainder of the line [between Tallulah and Vidalia, LA].” Because MoPac’s operating rights no longer existed by the time that the Delta Southern Railroad Company (“DSRC”) acquired the real property, *it could not have acquired any operating rights from MoPac. Nor could it have thereafter conveyed any operating rights to DSRR in 1999.*

As the Fifth Circuit recognized in *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005):

Once a rail carrier abandons a line, the line is no longer part of the national transportation system, and the STB’s jurisdiction terminates. *See Preseault [v. Interstate Commerce Commission]*, 494 U.S. [1,] at 5 n. 3, 110 S.Ct. 914. Thus, in proceedings in which the STB imposes no conditions on an abandonment, the STB’s decision to authorize the abandonment will end its jurisdiction over the line.

At n. 14 of its decision, the Fifth Circuit supplemented the foregoing by directing the reader to several other cases where the Supreme Court and other Courts of Appeal had also reached the same conclusion regarding the termination of the STB’s jurisdiction over an abandoned line of railroad. *See, e.g., Hayfield N.R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633, 104 S.Ct. 2610, 81 L.Ed.2d 527 (1984); *Lucas v. Township of Bethel*, 319 F3d 595, 602 (3d Cir. 2003) and *Friends of the Atglen-Susquehanna Trail, Inc. v. STB*, 252 F.3d 246, 262 (3d Cir. 2001).

Because the ICC had already unconditionally authorized the abandonment of the segment of the line between Tallulah and Vidalia, and because the ICC's authorization had brought the ICC's jurisdiction over that segment of the line to an end, any post-abandonment *acquisition* of the real property and the abandoned track by NREC or its new subsidiary DSRC would have required the filing of a new application as the ICC's jurisdiction was terminated when the line was abandoned.

In his Declaration, Rob Thrall correctly states that, on July 11, 1988, the ICC approved the abandonment of the Track to remove the common carrier obligation on the Line. His following comments, however, are erroneous. First, the ICC did not consummate the abandonment on October 13, 1988, nor did the certification that the public convenience and necessity permitted the abandonment of the 73.2-mile line of railroad between milepost 498.4 at Tallulah, Louisiana and milepost 651.6 near Vidalia, LA, dated August 24, 1988, convert the track to spur or industrial track. In addition, the ICC decision in *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, FD 31246, 1989 ICC Lexis 151 (ICC served June 21, 1989), did not have any bearing on the abandonment of the line that the ICC unconditionally authorized nearly a full year earlier.

Lastly, the ICC never authorized DSRC to acquire and operate the segment of the Lake Providence Line between McGehee, Arkansas and Tallulah, LA. That approval was only granted by the STB in 1999. While it may be true that DSRC may have used the track prior to its sale to DSRR, DSRC never sought authority from the ICC to perform such operations. Even if DSRR has conducted such operations, DSRR never sought any authority to do so from the STB.

It is uncontested that DSRC, in addition to acquiring the 89.5 Line between milepost 408.9 at McGehee, Arkansas and 498.4 at Tallulah, Louisiana, DSRR was apparently authorized by the ICC to acquire and operate several additional miles of miles of track, including a spur line that

physically extended from milepost 445.53 from the Warren Line,¹ leasehold interests, operating rights, and overhead rights from other entities, including the Union Pacific Railroad Company (“UP”), the Madison Parish Port Commission and the Lake Providence Port Commission.

Thereafter, in 1999, DSRR filed a verified notice of exemption for the acquisition and of operation of DSRC. This petition specifically sought authority from the STB to acquire and operate eight (8) rail properties that were then currently owned or leased and operated by DSRC. DSRR never mentioned the real property that was still owned by DSRC between milepost 498.4 at Tallulah and milepost 651.6 at Vidalia. Nor did it mention the tract of land or the track that it now claims is a spur track, which is to the south of the Kansas City Southern Railroad’s (now “CPKC”)mainline that exists between milepost 498.44 and milepost 498.5. As a result, the tract of land that DSRR acquired from DSRC, which is the property that Plaintiff’s condemnation suit involved, was not mentioned in the Verified Notice of Exemption.

On August 23, 2022, the STB authorized LPPC to file a supplemental application to acquire DSRR’s Lake Providence Line. It also directed DSRR to provide information by September 2, 2022 regarding:

(1) the mileposts that correspond to (i) the southern terminus of DSR’s Lake Providence line and (ii) DSR’s point of interchange with KCS;

(2) if the southern terminus of DSR’s Lake Providence line is a point beyond milepost 489.44, the basis of DSR’s authority to own and operate the segment between milepost 489.44 and the southern terminus; and

(3) if no such authority exists, the action DSR intends to take to rectify the failure to seek and obtain such authority.

¹ It is noted that with respect to a rail spur that connected to the Warren Line, which was included in the Verified Notice, DSRR “took no position on whether this line is a spur for the purpose of the spur exemption of 49 U.S.C. 10906.”

In response, DSRR filed a letter, dated September 2, 2022, that responded as follows;

(1) Based on the facts laid out above, the southern terminus of DSR's Lake Providence Branch is milepost 498.44, where DSR's track connects to KCSR.* Interchange with KCSR is conducted on a KCSR-owned sidetrack located adjacent to KCSR's main line proximate to DSR milepost 498.44.

* As explained in Note 2, DSR also owns roughly 1.5 miles of ancillary track located south of the KCSR main line connection at milepost 498.44.

(2) DSR owns the track located south of milepost 489.44 through quitclaim deeds received from DSRC in the 1999 acquisition. To DSR's knowledge, the company has always operated the track between milepost 471.0 (the northern terminus of DSR's Lake Providence Branch) and the connection with KCSR at milepost 498.44 consistent with the understanding (albeit mistaken, given the filing errors and inconsistencies in the Filing) that such operations were fully authorized pursuant to the FD 33802 exemption.

(3) DSR intends [to] rectify the errors contained in the aforementioned Filing to account for the correct and full length of the Lake Providence Branch to milepost 498.44 by way of a motion to modify the FD 33802 exemption in keeping with similar corrective actions taken in cases such as *Kiski Junction Railroad – Acquisition Exemption -- Berkman Rail Services*, FD 34681 (STB served May 24, 2021) (inadvertent milepost error corrected more than 16 years after acquisition authority became effective).

Thereafter, DSRR filed yet another letter with the STB on September 23, 2022, in which it requested the Board to correct the error in DSRR's October 1, 1999 verified notice of exemption that erroneously terminated the Line between milepost 471.0 and 498.44 at 489.4. As was the case in the 1999 pleading, no mention is made of the segment of track that NLRDD is seeking to condemn. However, NLRDD's operator will require that segment of the track for interchange with both the CPKC and any railroad that holds operating rights between milepost 498.44 at Tallulah, Louisiana and milepost 408.9 at McGehee, AR. This would, of course, mirror the former line that was operated by MoPac until the ICC authorized its abandonment.

DSRR, however, seeks to avoid condemnation by insisting that the parcel of land and the tracks that are placed thereon its so-called "ancillary track," that is subject to the STB's exclusive jurisdiction under 49 U.S.C. § 10501. The history surrounding the Line, as well as DSRR's prior filings at the STB raise serious questions about its current designation. Plainly, DSRR's ownership

of any track, whether it be mainline or ancillary, that is located to the south of milepost 498.44 is located on former railroad right-of-way that was abandoned by MoPac and, therefore, at the time it was acquired by DSRC is no longer subject to the STB jurisdiction which, as explained in *Baros*, ended once the Line between mile posts 498.44 and 651.6 was abandoned.

That being the case, the STB's records do not appear, at least in NLRDD's opinion, to reflect any attempt by either DSRC or DSRR to seek any authority from the Board to perform any for-hire rail operations over the several miles that are the subject of NLRDD's condemnation proceeding. Indeed, given the fact that the track is primarily, if not always, used to store railcars, the conclusion must be reached that DSRR's sole reason to oppose NLRDD's condemnation proceeding is to thwart the public interest in restoring rail service between the ports that are located to the north of Tallulah, Louisiana and near Vidalia, Louisiana that will not only promote economic development along the Mississippi River, but will provide an efficient and economical means of responding to climate change that is adversely affecting the water levels on the Mississippi River that disrupt normal barge operations.

CONCLUSION

The STB has no continuing jurisdiction over the tracks owned by DSRR south of MP 498.44. Nothing demonstrates that the Board has ever exercised its exclusive jurisdiction over this segment of the former Vidalia Branch Line since it was abandoned by MoPac in 1988. That DSRC or DSRR may have acquired ownership of the real property from MoPac from milepost 498.44 to milepost 651.6 has no bearing whatsoever on this case at all. Instead, because neither DSRC nor DSRR ever sought any authority to operate as a rail common carrier to operate over the track that happens to be located on the real property that DSRC or DSRR acquired from MoPac, *i.e.*, the 73.2-mile line of railroad between milepost 498.44 at Tallulah, Louisiana and milepost 651.6 near

Vidalia, Louisiana, which as stated above MoPac obtained authority to abandon in 1988 to abandon, and thereafter did consummate the abandonment, there is no basis to contend that the property at issue is subject to the STB's exclusive authority over the National Rail Transportation System. Stated otherwise, because the former line was unconditionally abandoned in 1988 by MoPac, and the ICC did not impose conditions on that abandonment that otherwise might have caused the ICC to retain jurisdiction over the line post-abandonment, the ICC's regulatory mission came to an end, as set out in the decisions of the Supreme Court in *Hayfield Northern Railroad Company, Inc v. Chicago and Northwestern Railroad Company*, *Preseault v. ICC*, *Baros v. Texas Mexican Railway Company*, and the other cases cited above. While DSRR has dismissed the applicability of these cases in this matter by claiming that ICCTA's enactment has broadened the preemption provision contained in 49 U.S.C.10501(b), the STB continues to adhere to the cases just cited. In short, the statutory changes made by ICCTA do not apply to property that was removed from the ICC's jurisdiction years before ICCTA was enacted. For all of the reasons stated above, this case should be remanded to its proper venue in Madison Parish, Louisiana.

Respectfully submitted:

/s/ John D. Crigler, Jr.

(Bar #31118)

Bishop Paxton Crigler & Moberley

P.O. Box 97

St. Joseph, LA 71366

(318) 766-4892

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record for all parties via the Court's ECF system March 5, 2024.

/s/ JOHN D. CRIGLER, JR.