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May 23, 2014

236084

U.S. Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
May 23, 2014
Part of
Public Record

RE: PETITION ON JURISDICTION UNDER 49 USC §10502
STB DOCKET NO.: FD-35825

Dear Members of the Board,

On May 20, 2014 we submitted a corrected copy of our Petition filed on May 8, 2014 under the above STB Docket number. The electronic file submitted through E-Filing on May 8, 2014 was defective and this resulted in the copy received and filed with the Board dropping approximately 50 words from various places in the document. We apologize for any inconvenience or confusion and request that the corrected version be re-filed to ensure that the corrected version appears on the STB website/library under filings.

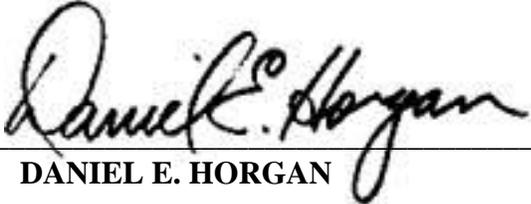
We have already provided corrected papers copies of the petition to all those who received copies on May 8th with a cover letter that has been provided to the Board. This was done to ensure that the unfortunate errors were corrected as soon as we became aware of them. The Appendix documents previously filed and mailed were not affected by this error.

We apologize for any inconvenience that this may have caused and have taken steps to correct the error. If there is anything else that the Board wishes us to do to address this matter, we will do so promptly. Thank you for your consideration in this.

Very truly yours,

WATERS, McPHERSON, McNEILL, P.C.

BY:



DANIEL E. HORGAN

CC: Service List

**BEFORE THE SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Docket Number FD-35825

**Petition for Declaratory Order of Exemption
Pursuant to 5 U.S.C.A. § 554, 49 C.F.R. § 1117.1, and
49 U.S.C.A. § 10502**

PETITIONERS:

**212 Marin Boulevard, LLC
247 Manila Avenue, LLC
280 Erie Street, LLC
317 Jersey Avenue, LLC
354 Cole Street, LLC
389 Monmouth Street, LLC
415 Brunswick Street, LLC
446 Newark Avenue, LLC
NZ Funding, LLC
Limited liability companies of New Jersey.**

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Counsel for Petitioners

DATED: May 8, 2014

Filing Contains Color Exhibits

BEFORE THE SURFACE TRANSPORTATION BOARD

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Limited liability companies of the State of New Jersey,**

As PETITIONERS:

PETITIONERS' REQUEST FOR RELIEF

1. The Board last considered the status of Consolidated Rail Corp.'s ("Conrail") Harsimus Branch of the former Penn-Central Railroad in 2007 in City of Jersey City—Petition for Declaratory Order, STB Fin. Docket No. 34818, 2007 WL 2270850 (Aug. 9, 2007), reconsideration denied, 2007 WL 4429517 (Dec. 19, 2007). The Court of Appeals vacated those proceedings for lack of jurisdiction. Consolidated Rail Corp. v. Surface Transp. Bd., 571 F.3d 13 (D.C. Cir. 2009). Extensive litigation followed that decision in the United States District Court for the District of Columbia sitting as the Special Railroad Court pursuant to 45 U.S.C.A. § 719 (the "Special Court"), including a published Special Court decision on standing, City of Jersey City v. Conrail, 741 F. Supp.2d 131 (D.D.C. 2010), a published decision of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") reinstating

the action, City of Jersey City v. Conrail, 681 F.3d 741 (D.C. Cir. 2012), a final judgment of the District Court, and a decision affirming that judgment by the Court of Appeals. In the District Court action, the original petitioners¹ and the intervenors² before the Board stipulated the location of that portion of the Harsimus Branch in dispute between CP Waldo and Marin Boulevard, and that this portion had been conveyed to Conrail in 1976 as a line of rail subject to the Board's jurisdiction. Conrail refused to join in the stipulation, but did not contest it either. Numerous other issues concerning the continuing jurisdiction of the Board over the Harsimus Branch were then in dispute, but the Special Court declined to address them and specifically left them for resolution in another forum. The Court of Appeals summarily affirmed and specifically stated that the remaining disputes were preserved for future resolution in an appropriate forum. The decisions and orders of the respective courts are attached as **Exhibit A-1, and A-2**. The only issue now resolved in this matter is the location of the relevant portion of the Harsimus Branch between CP Waldo and Marin Boulevard and that it was transferred to Conrail in 1976 as a regulated line of rail, as stipulated to by the 2006 petitioners and the present Petitioners. The court orders arising from that stipulation (and Conrail's unwillingness to contest them) now vest the Board with the initial jurisdiction it lacked in the proceedings of 2006 and 2007. The Board is the appropriate forum for adjudication of those remaining disputes now raised by Petitioners in this request to the Board for a binding adjudication.

¹ The petitioners in the 2006 petition were City of Jersey City, Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and State Assemblyman Louis Manzo.

² The first eight listed Petitioners in this Petition were the intervenors in the 2006 STB proceedings.

2. By and through their undersigned counsel, Petitioners request that the Board issue a Declaratory Order that:

- a. The July 2005 transfer of lands formerly utilized as a line of rail known as the Harsimus Branch by Conrail to Petitioners was subject to the Board's approval pursuant to 49 U.S.C.A. §10901, and was made by Conrail without prior Board approval, and without formal abandonment. Petitioners took title from Conrail for non-railroad use on Conrail's representation that the properties were not regulated lines of rail, and without conditions in their deeds reserving any rights by Conrail to operate a railroad. Because these properties are no longer needed or suitable for railroad use, and Petitioners had no knowledge of Conrail's regulatory obligations, the circumstances do not require the Board to continue jurisdiction over Petitioners' right, title or interest in said properties.
- b. There is no present or future need for the use of Petitioners' properties for rail service, and the Board therefore declares that jurisdiction no longer exists over Petitioners or their properties pursuant to 49 U.S.C.A. § 10502.
- c. After the Board's final decision and rulings in Consolidated Rail Corporation - Abandonment of the Weehawken Branch—in Hudson County, NJ, Docket No. AB-167 (Sub-No. 1067N), pursuant to 45 U.S.C.A. § 748(c), dated March 12, 2002, and the subsequent consummation of that abandonment by Conrail on May 1, 2002, all lines of rail that connected to Petitioners' properties were severed from the national rail network by such abandonment. Petitioners are neither a railroad nor railroad customers, and no residual interests of interstate commerce remain in these areas such that the Board must exclude them from its jurisdiction.

See, Coal Exporters Association of the U.S., Inc. v. U.S., 745 F.2d 76, 82 (D.C. Cir. 1984). The aforesaid abandonment by Conrail also divested the Board of jurisdiction over Petitioners' properties. See, RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999).

AUTHORITY

3. This request is made pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C.A. § 554, 49 U.S.C.A. §10502, and the regulations of the Board (49 C.F.R. § 1117.1), for a declaratory order exempting Petitioners and their properties from the Board's jurisdiction as they are private property owners not operating any railroad in an area in which there are no interests of interstate commerce relating to rail freight service.

STATEMENT OF CLAIM

4. The reasons for this request are that Petitioners' real property interests on which a former line of rail was located, which are more fully described below, have been challenged in the courts of the State of New Jersey, and those courts have deferred resolution of those claims until the jurisdiction of the Board has been resolved. Issues involving the post-abandonment status of real estate are governed exclusively under state law. Preseault v. I.C.C., 494 U.S. 1, 8-9 (1990). Where all of a railroad's interests have been extinguished, basic common law property principles arising under state law control, and reserved government interests are not implied. See, Marvin M. Brandt Revocable Trust v. United States, --- S.Ct.--- , S.Ct. No. 12-1173, (March 10, 2014) (rejecting implied reservations and restrictions involving railroad rights-of-way over private property that has been freely conveyed or otherwise abandoned). The declaration sought by Petitioners would resolve whether they must continue to litigate these matters under federal jurisdiction, including a now pending Conrail abandonment petition AB 167 (Sub-No. 1189X),

or whether these real estate disputes can be returned to the courts of the State of New Jersey, thereby ending further federal proceedings. These disputes have been before the Court of Appeals on three separate occasions (once on direct appeal from a Board decision which was vacated), and the Special Court, spanning a period of eight years. Claims against Petitioners' title and other interests in their real estate pending in state court have been unjustly delayed by these proceedings.

5. The facts upon which this petition is based are provided in greater detail in the following sections and in its Exhibits. In 1976, Conrail acquired several lines of rail serving the Jersey City waterfront and other areas. During the 1980's, the need for freight service along the line of rail that ran over Petitioners' properties (referred to as the "Harsimus Branch") was quickly losing customers, and in 1988, the last rail customer closed. Conrail was under pressure from the City of Jersey City (the "City") to eliminate its rail operations in downtown Jersey City in favor of commercial, residential, and mixed-use development. See, Exhibit B. With no customers on the Jersey City waterfront, the track on Petitioners' property, which served as the sole connection for waterfront rail customers in Jersey City to the national rail network, was dismantled in the early to mid-1990's by both the City and by Conrail without seeking or receiving regulatory authority from the Board. This removal of railroad infrastructure included all of Petitioners' properties and continued to the point where the line over Petitioners' properties connected to the only active line of rail on the waterfront known as the River Line, which itself had only two customers to the north of Jersey City in Hoboken and Weehawken. See, Consolidated Rail Corporation - Abandonment of the Weehawken Branch—in Hudson County, NJ, AB-167 (SUB-NO. 1067N) (March 13, 2002). The River Line was then a part of the national rail network. Conrail filed Notices of Insufficient Revenue pursuant to the North East Rail

Service Act 45 U.S.C.A. § 748 (“NERSA”) in 1983 and 1985, and in 2000, it applied for abandonment of the River Line (and the connecting Weehawken Branch), which it then described as running from “the connection to the Passaic and Harsimus Branch at Controller Point (CP) Waldo in Jersey City (approximately MP 0.00).” **Exhibit C.** The location of CP Waldo is well-established along the Harsimus Branch and is conclusively established by Conrail track maps, charts and other documents as being at the point where the Waldo Avenue bridge passes over the railroad. It is the common point in Conrail’s descriptions as MP 0.00 for both the River Line and the Harsimus Branch on Conrail records from the time. See, *ibid.*

6. The Board granted the request on March 13, 2002, and Conrail consummated the abandonment shortly thereafter on May 1, 2002. **Exhibit D.** The Special Court in 2012 (Exhibit A) ruled that the Harsimus Branch over Petitioners’ properties ran to the same point, CP Waldo. With this resolution of the location of the regulated Harsimus Branch line of rail running to CP Waldo (Line Code 1420), it becomes clear that the only track on which both the River Line and the Harsimus Branch ran was a single track connecting both the River Line and the Harsimus Branch to CP Waldo because there was only one such track from 1976 until Conrail removed it in connection with its 2002 abandonment of the River Line. Three years later in 2005, Petitioners acquired title to their properties from Conrail without any reservation for railroad operations. See, Petitioners’ deeds from Conrail, **Exhibit E.**

7. Petitioners have raised the Board’s potential for jurisdiction over other Jersey City waterfront properties in the District Court and elsewhere in response to the disparity of treatment by Conrail and Jersey City between those other properties, and Petitioners’ properties. There is no continuing need for the regulation of any of these properties, but Petitioners seek no relief for any properties other than their own. In that context, other lines of rail are identified later in this

petition solely for the purpose of illustrating the absence of any need or potential for rail service over lines formally connected to Petitioners' properties.

1. FACTS IN SUPPORT OF PETITION

a. Petitioners' Property

8. Eight of the limited liability companies now petitioning the Board acquired title to properties located in Jersey City, Hudson County, New Jersey from Conrail on July 12, 2005 by deeds, without any reservation for railroad operations or activities.³ **Exhibit E.** Conrail had acquired these properties in 1976 by a conveyance ordered by the Special Court under the Regional Railroad Reorganization Act. 45 U.S.C.A. § 743(b) (also known as the "3-R Act"). The properties conveyed to the Petitioners were formerly utilized for a portion of the Harsimus Branch of the Pennsylvania Railroad,⁴ identified in Conrail's deeds from the bankruptcy trustee of the Penn Central Railroad as Line Code 1420. **Exhibit F.**

9. The relevant portion of the Harsimus Branch acquired by Conrail in 1976 and deeded to Petitioners in 2005 lies to the east of a railroad benchmark identified as Control Point Waldo ("CP Waldo"). In the deed of conveyance, it was described as a line that ran for approximately six miles beginning on the western shore of the Hudson River at Mile Post 1.00, to Kearny, New Jersey (Mile Post 7.00) along a route that took it past CP Waldo. CP Waldo is a prominent feature located in Zone 17 on Conrail's New Jersey Division track maps, which were revised for this area in 1985. See, Exhibits G-1, G-2, and G-3. On these Conrail maps, which

³ Petitioner NZ Funding, LLC was not one of the original eight entities purchasing title to eight separate parcels of land, respectively. It later acquired its interests in all of those other lands by way of liens, which are also now subject to litigation in the courts of New Jersey. For convenience, and except where the context may otherwise require specificity, all Petitioners are referred to collectively as "Petitioners" and without regard to their individual, respective interests. **Exhibit E.**

⁴ The Harsimus Branch was also sometimes referred to as the "Passaic and Harsimus Branch."

were current ones at the time the River Line was abandoned, CP Waldo was sited at MP 0.00 on both the Passaic & Harsimus Branch and the River Line. **Exhibit G-1.**

10. When Conrail filed for abandonment of the River Line in 2000, it did not consider the track running from CP Waldo to Marin Boulevard over Petitioners' property to be a regulated line of rail. This is the position it took before the Board in 2006 and in the Special Court by never having conceded the regulated nature of the track, and by never joining in the stipulation in the Special Court between Petitioners and others. Conrail therefore considered that the Harsimus Branch ended at CP Waldo, which was MP 0.00 for both the River Line and the Harsimus Branch. There is no indication that Conrail intended to abandon only some of the River Line, or that the River Line ended at a point to the east of CP Waldo approximately 750 feet (0.142 miles) distant at the switch where the River Line and the Harsimus Branch came together. Any such speculation is conclusively rebutted by the fact that Conrail must have considered the River Line to connect to the national rail network at CP Waldo. That conclusion is confirmed by the fact Conrail removed track for the River Line to CP Waldo. **Exhibit H.**

11. Also in 1976, Conrail acquired other rail lines on the Hudson River waterfront that connected to CP Waldo. Those included the River Line, also known as Line Code 1412, and the Hudson Street Industrial Track, also known as Line Code 1440. These lines connected to the national rail network through CP Waldo over a single track that Conrail's 1985 track maps designate as track "215," or the "Harsimus Cove Elevation Track" in Zone 17, in New Jersey. **Exhibit G-1.** The specifics of the locations and connections of these lines to CP Waldo, as they were transferred to Conrail under the 3-R Act, and as pertinent to this petition for declaratory judgment, are more specifically described later in this petition and in various Exhibits hereto.

b. Prior Actions by the City and Conrail

12. Rail service from waterfront areas to the east of Marin Boulevard (formerly known as Henderson Street) (between Marin Boulevard and the Hudson River) rapidly diminished by the mid 1980's. In 1985, Conrail prepared an internal analysis of its customers on both the Harsimus Branch and the Hudson Street Industrial Track. **Exhibit I.** Conrail's analysis noted that the two lines served Colgate Palmolive Corporation and several other shippers, all of which had facilities on the Hudson River waterfront. At that time, the City was considering condemnation of the properties of two customers; Colgate was closing within three years; and, the Hudson Street Industrial Track and the Harsimus Branch were facing diminishing returns to Conrail. The memo ended with a discussion envisioning remaining customers diverting to truck transport in lieu of rail.

13. By 1988, rail service on these same two lines (the Harsimus Branch and the Hudson Street Industrial Track) was again surveyed by Conrail. **Exhibit J.** With respect to these lines, only six carloads were generated in 1987 by remaining shippers other than Colgate. Colgate was scheduled to close the following year—1988. The memo concluded, “This suggests that an expedited abandonment may be possible if the remaining active customer(s) discontinue rail service or relocate.” **Exhibit J.**

14. Petitioners believe that sometime in or around 1988 when the last train left the Colgate factory on Hudson Street, any remaining customer(s) relocated in the face of rising real estate values and redevelopment pressures. By 1992, the Harsimus Branch running over Petitioners' properties was in serious dis-repair and causing alarm in Jersey City for the safety of the public using the streets under the several bridges connecting between the blocks of Petitioners' properties. The City Council had become involved in pressing Conrail to make

repairs and in May 1992, Conrail's engineers advised the City that the bridges had been inspected and that certain deficiencies would be remedied and conditions monitored "every six months." **Exhibit K-1, K-2, and K-3.**

15. Conrail continued to use the line on Petitioners' properties for turn-arounds until a connection to its Northern Branch known as the Marion Junction was completed and put into service. This occurred in or about April 1994. See, Exhibit L.

16. Prior to that, a member of the City's engineering department reported to the City Engineer and his deputy in a project memorandum of a telephone call with one Jim McLaughlin of Conrail. The memorandum reported that once the Marion Junction connection was made:

...Conrail will seek to abandon service on the 6th Street Viaduct [i.e., the properties now owned by Petitioners] according to ICC rules. If it is a main line abandonment, it must be reviewed and approved by the ICC. If it is a stub or branch line abandonment, it doesn't need approval. Right now Conrail is assuming it is a branch line abandonment and are expecting a ruling by their Law Department shortly. If it is a branch line, then it will be abandoned immediately, retired and sold.

Exhibit M.

17. Whether or not the Harsimus Branch and the Hudson Street Industrial Track were regulated lines of rail or branch, spur, or something else, it becomes clear that there were no remaining rail customers to be served because the "6th Street Viaduct," (Petitioners' properties) could be immediately retired and sold without consequence to any customer, at least in the view of Conrail and the City.

18. The same memo (**Exhibit M**) also documents that Conrail had solicited bids and anticipated the "...demolition of all the bridges and the removal of all rail by the summer."

However, it appears that the City itself was responsible for the removal of the first bridge, the one over Marin Boulevard. **Exhibit L.**

c. STB Abandonment of River Line

19. As a result of the loss of customers and a significant diminution in freight traffic from the Hudson River waterfront, in 1983, and again in 1985, Conrail filed Notices of Insufficient Revenue under NERSA for the River Line (Line Code 1412) and the adjacent Weehawken Branch.⁵ Conrail then entered into a sale agreement with the New Jersey Department of Transportation to sell, and subsequently abandon the River Line so that substantial portions of it could be used for light rail passenger service consistent with the transformation of the Hudson River waterfront from an industrial area to a business, commercial, residential, and mixed-use component of Jersey City and other waterfront municipalities in Hudson County.⁶ (Substantial portions of Line Code 1440 were also to be devoted to the same New Jersey Transit light rail system and the construction of a new city Street (Greene Street), but Line Code 1440 was never subjected to any abandonment by Conrail. **Exhibit N.**) On November 14, 2000, Conrail filed an application for expedited abandonment of the River Line under NERSA. Consolidated Rail Corporation, supra, STB No. AB-167 (SUB-NO.1067N) (March 13, 2002) (hereafter referred to as “River Line Abandonment”). **Exhibit C.** This was the first filing by Conrail for permission to abandon or terminate service on any rail line connecting to CP Waldo.

⁵ These notices are specifically referred to in the River Line Abandonment proceedings. Consolidated Rail Corporation, supra, AB-167 (SUB-NO. 1067N)(March 13, 2002). **Exhibit C.**

⁶ Conrail’s River Line Abandonment petition in STB No. AB-167 (Sub-No. 1067N) at **Exhibit C.**

20. After significant and extensive procedural objections by Cognis, one of the two only remaining industrial rail users on the Hudson River waterfront between Jersey City and Weehawken, several miles to the north, the Board authorized the abandonment of the River Line. Ibid. This abandonment, as more fully explained below, terminated rail service to the entire waterfront area, abandoned the line of rail extending eastward from CP Waldo, and ended further jurisdiction of the Board over that area, including portions of the Harsimus Branch now owned by Petitioners, the entirety of the Hudson Street Industrial Track, and the remainder of the Harsimus Branch that ran eastward to the Hudson River. Petitioners will refer to these other lines of rail and the other railroad tracks, yards, and whatever they may have been classified for regulatory purposes as “Waterfront Rail Lines.”

21. Any objection to the termination of rail freight service through CP Waldo from the Hudson River waterfront should have been made in connection with the River Line Abandonment proceedings. Those objections that were raised were adjudicated at that time by the Board in favor of abandonment without condition. In fact, Congress had enacted NERSA to streamline and expedite the abandonment of unused and unnecessary railroad lines by Conrail in recognition that the needs of interstate commerce did not justify delay or conditions upon abandonment, with the singular exception of offers of financial assistance.

22. Congress has also enacted 49 U.S.C.A. § 10502, granting the Board the power to exempt a “person, class of persons, or a transaction or service” from its jurisdiction in circumstances where rail service is of a limited nature and not needed to protect shippers. Petitioners and their interests in their respective properties fall within the purview of this statute, as do all other owners of property on the Hudson River waterfront. For purposes of exemption from the Board’s jurisdiction, Petitioners are identically situated to all other purchasers of land

from Conrail, and make this point specifically to establish that they are not a “class within a class” that can be singled out for regulation of their properties. That larger class includes owners of property interests transferred by Conrail since it acquired the Harsimus Branch (Line Code 1420) and the Hudson Street Industrial Track (Line Code 1440) in 1976. This point arises because discriminatory arguments have been made by the City, and Conrail has failed to act with consistency on these properties. Conrail has not sought authorization from the Board for either abandonment or exemption for Waterfront Rail Lines properties before selling property to Petitioners and others. As a result, the Board has been presented with petitions by the City and by Conrail seeking the exercise of jurisdiction only over Petitioners; anyone else similarly situated has been ignored.

d. Waterfront Rail Lines – No Railroad and No Customers

23. Pertinent to the present petition for a declaration of exemption from jurisdiction is the location and status of the three relevant lines of rail conveyed to Conrail in 1976 by order of the Special Court, by virtue of their relationship to Petitioners’ properties and CP Waldo. Those relationships are described below.

- a. **Harsimus Branch.** Conveyed to Conrail as Line Code 1420, it ran from the Hudson River, across Petitioners’ properties, through CP Waldo, to Kearny, New Jersey for a distance of approximately six miles. It is sometimes identified as the Passaic & Harsimus Branch, abbreviated as “P&H Br.” The specific portion of the Harsimus Branch in the vicinity of CP Waldo is illustrated on Zone 17, Page 1, of Conrail’s New Jersey Division map attached as **Exhibit G-1**. To the immediate west of CP Waldo it ran on two tracks, identified on that map as “211” and “212,” which are described in the key to the map as “17 211 00 00 Passaic & Harsimus

Line #1” and “17 212 00 00 Passaic & Harsimus Line #2,” respectively. Immediately to the east of Waldo Avenue, where CP Waldo is located as shown on the map, these two tracks joined into one, identified as track “211,” which then splits again. The continuation of track “211” running in the same general easterly direction is indicated to be “215,” which is identified on the map key as “17 215 00 00 Harsimus Cove Elevation Track.” At the point where the drawing of this line “215” ends there appears the notation: “TO COLGATE See Zone 17 Page 2.” “Colgate” refers to the Colgate Palmolive factory that closed in 1988 as the City redeveloped its waterfront in the areas where the Waterfront Rail Lines were formerly located.

- b. **River Line.** Conveyed to Conrail as Line Code 1412, it consisted of two segments running from CP Waldo to Weehawken for approximately five miles, then through a tunnel to North Bergen where it joined other lines of rail, including the Weehawken Branch. The specific relevant portion of the River Line in the vicinity of CP Waldo is illustrated on Conrail’s New Jersey Division map in Zone 18, page 15, attached as **Exhibit G-2**. On this map it is identified as “206,” which runs in a generally north/south direction from the vicinity of CP Nave before it crosses Newark Avenue where it turns toward CP Waldo. At that point the Zone 18 map references “Zone 17 Page 1,” which is the previous sheet (**Exhibit G-1**) on which track “206” does not appear. Instead, that map shows an unnamed track switching off track “211” before it becomes track “215,” which is the “Harsimus Yard Elevation Track” leading across Petitioners’ properties toward “Colgate.” The same mapping illustration of showing tracks not specifically identified on

that particular map as a narrow, solid line is used on the Zone 18, Page 15 sheet where a single, unlabeled track is accompanied by an arrow and the words: “To Harsimus Cove.” As track 206, the River Line approached CP Waldo where it intersected in Zone 17 with track “215” (the “Harsimus Cove Elevation Track”) and continued on the track labeled “211” for a short distance on the Passaic & Harsimus Line #1 to CP Waldo. This intersection and its relationship to CP Waldo is more fully described and further documented hereafter.

- c. **Hudson Street Industrial Track.** Conveyed to Conrail as Line Code 1440, it connected to the Harsimus Branch at a point just to the east of Marin Boulevard and extended approximately 1.3 miles southward to serve industrial areas entirely within Jersey City. Except for its connection to the Harsimus Branch, it had no other connection to any other line on the national rail system. It is illustrated on Conrail’s New Jersey Division map, Zone 18, Page 2, attached as **Exhibit G-3**. On this map it is identified as track “210” which is described in the keyed to the map as “17 210 00 00 Hudson St. Industrial.” The notation on the map for Zone 17, Page 2 after track 210 connects to track 215 reads: “TO SOUTH KEARNY See: Zone 17 Page 1” indicating its connection through Petitioner’s properties.

24. All three of these lines were shown on “Exhibit B” to Conrail’s abandonment petition of 2000, a copy of that petition and its “Exhibit B” is attached to this Petition, as **Exhibit C**. The three references are highlighted on the Exhibit so that they may be more readily identified.

25. Before the Special Court, Petitioners submitted a declaration of a licensed surveyor and professional planner that established the location of this portion of the Harsimus

Branch consistent with the routing of tracks “215” and “211,” as well as the location of the switch where the Harsimus Branch diverged to the east from the River Line, over Petitioners’ properties, toward Marin Boulevard. A copy of that declaration by David Dixon and its attachments is annexed at **Exhibit O** (the “Dixon Declaration.”).⁷

e. Inconsistency and Non-Compliance Concerning ICC and STB Regulation

26. Conrail commenced formal abandonment of the River Line in 2000 and consummated it in 2002. It is the only abandonment to date of lines of rail connected to the national rail network through CP Waldo. In 2006 Jersey City commenced proceedings before the Board to declare that a portion of the Harsimus Branch was a regulated line of rail, but selected only that portion beginning at Marin Boulevard because its sole purpose was to subject Petitioners to the Board’s abandonment jurisdiction and impose conditions detrimental to Petitioners’ property interests. In 2008 Conrail filed a Notice of Intent to proceed with an expedited abandonment of the Harsimus Branch and the Hudson Street Industrial Track. **Exhibit P.** In that 2008 filing with the Board, the Harsimus Branch is described as beginning at MP 0.00 at CP Waldo and heading east across Petitioners’ properties, then turning south-east through the former Harsimus Cove Yard for a distance of 1.36 miles. The Notice of Intent described the Hudson Street Industrial Track as an isolated track 0.72 miles long that is not connected to the Harsimus Branch. In that filing, Conrail left a gap between the Hudson Street Industrial Track and the Harsimus Branch due to a “prior conveyance.” That conveyance was made

⁷ The Dixon Declaration was filed in the litigation in the US District Court for the District of Columbia. It consists of text and digital graphic exhibits, as more fully explained in the text, which are best viewed electronically as layered PDF documents. Copies of a DVD with Dixon’s Certification and all sub Exhibits will be separately provided to the Board and upon request, to any interested person. They can also be found as Document ECF #82 in Docket CV-09-1900 (DDC) through PACER.

approximately ten years earlier in or about 1988 and consisted of the property shown on a subdivision map, dated May 1, 1988 which coincides exactly with Conrail's gap between the two lines of rail. See, Dixon Declaration, paragraph 8 e. and Attachments B and C, which show the locations of both lines of rail (Harsimus Branch and Hudson Street Industrial Track) according to Conrail's own records, aerial photography and other sources. **Exhibits O, O-2, and O-3.** Petitioners' surveyor, Dixon, establishes in his Declaration that the Hudson Street Industrial Track actually included Conrail's "gap"; that the line did connect to the Harsimus Branch; and, that Conrail's location of the Harsimus Branch is also incorrect based upon multiple data sources.

27. The City strenuously opposed virtually all of Conrail's positions in the 2008 Notice of Intent, and stating that seeking abandonment for the Hudson Street Industrial Track together with the Harsimus Branch would be "confusing to attempt to deal with them in the same proceeding, much less the same ER/HR. Conrail should seek separate abandonment authority in a different proceeding for each." And then, "Commenters object to processing the Hudson Street Industrial Track in the same proceeding as the Harsimus Branch. The lines per Conrail's "Exhibit A" are not even connected." **Exhibit Q, at 16.** Of course, the City was well aware that the Hudson Street Industrial Track ,which served Colgate, connected to the Harsimus Branch because it had made that very argument to the Board in the City's 2006 petition for declaratory ruling that the Petitioners' properties were regulated because they carried trains from Colgate to CP Waldo.

28. Conrail thereafter filed its petition to abandon only the Harsimus Branch as it had, incorrectly, in the view of Petitioners, identified it in its Notice of Intent. Conrail has yet to file anything further with respect to the Hudson Street Industrial Track. The absence of any portion

of the Hudson Street Industrial Track, or for that matter, the remainder of the Harsimus Branch between Marin Boulevard and MP 1.0 at the Hudson River, seeks to selectively focus the Board upon the Petitioner's properties which they purchased in good faith, for non-railroad use, and with no reservation of railroad rights in their deeds. At the same time both Conrail and the City have diverted attention from the course of their conduct that either ignored or outright violated Board regulations.

29. Conrail has been unable, or unwilling, to identify which lines of rail running to CP Waldo remain subject to the Board's jurisdiction. By pursuing abandonment of the Harsimus Branch from Marin Boulevard, across Petitioners' properties, to CP Waldo over the same track abandoned as the last 750 feet of the River Line, Conrail would apparently abandon the same track twice. The Board has described the need to abandon the same track twice as "nonsensical" and "irrational." Allegheny Valley Railroad Company – Petition For Declaratory Order, STB Docket FD 35239, (June 15, 2010.) The contrary position, that it never abandoned the River Line to CP Waldo at all, would contradict its own letter consummating abandonment, and is equally non-sensical. Petitioners should not be subjected to the burdens of such arguments and questions when it is clear that there is no present purpose served by subjecting them to Board jurisdiction. That is exactly why they seek exemption.

30. In a matter entitled Consolidated Rail Corporation's Sales and Discontinuances, STB Docket EP 695, decided May 13, 2010, Conrail was ordered by the Board to "disclose to the Board all of its line or partial line sales and all of its discontinuances of service since January 1, 1996, for which no Board authority was sought and no exemption notice was filed along with an explanation of why Board authority was not sought and no exemption notice was filed." **Exhibit R.** In its response to the Board dated September 27, 2010, **Exhibit S**, Conrail excused

itself from reporting on the parcels “that it sold on the ‘Harsimus Branch,’ which were subject of the Board’s proceeding in Docket No. AB 167 (Sub-No. 1189X).” **Exhibit S, footnote 1.** That matter is the initial proceeding filed by the City concerning Petitioners’ properties, supra, and has now been vacated for lack of jurisdiction. Past activities and conduct by Conrail and the City have not demonstrated anything like clarity or certainty concerning the Harsimus Branch and the Hudson Street Industrial Track. That is not a problem of Petitioners’ making and they should not be subjected to further proceedings involving these issues when they played no part in any actual or perceived violation of ICC or Board regulations.

f. Severance of the Harsimus Branch from CP Waldo

31. The recent order of the Special Court, as affirmed by the Court of Appeals for the District, established only that the Harsimus Branch between CP Waldo and Marin Boulevard was conveyed to Conrail as a line of rail in 1976 subject to the regulation of the Interstate Commerce Commission, now this Board. **Exhibits A-1 and A-2.** As noted, Petitioners submitted the Dixon Declaration, prepared by a licensed surveyor and professional planner, which illustrated the locations of the relevant lines based on review of Conrail records. **Exhibit O.** For purposes of this petition, the area of the Dixon Declaration pertinent to the present matter is excerpted and highlighted as **Exhibit T** to show the River Line. As confirmed by the Dixon Declaration, the River Line met the Harsimus Branch at a switch that was located approximately 750 feet to the east of CP Waldo. **Exhibit O, paragraph 19, and Exhibit O-4.** That switch and CP Waldo are two distinct locations. As established by the Dixon Declaration, the underlying aerial photographs taken in 1976 and 1979 clearly show that between CP Waldo and the switch where the River Line met the Harsimus Branch there was only one track. This is the track that was identified in Conrail’s petition under NERSA in 2000, and the same track that was abandoned to

CP Waldo in 2002 under NERSA by the authority of the Board. It was also the same track and switch location identified as track “211” and “215” on Conrail’s 1985 track map. See, **Exhibit G-1**. In connection with Conrail’s consummation of the River Line Abandonment (2002) that track was removed and no longer exists. See, **Exhibit H**. In its River Line Abandonment, Conrail described the point at which the River Line connected to the Harsimus Branch as being at CP Waldo. This was entirely consistent with the reality that the Waterfront Rail Lines had long ago given way to intense urban redevelopment and there was absolutely no need to stop the abandonment at the switch where track “215” from Petitioners’ properties and the waterfront intersected with the River Line. Doing so would have left useless track on property owned in fee by Conrail to no rational purpose. An illustration of Conrail’s position in the River Line Abandonment is shown superimposed on an aerial photograph at **Exhibit U**, which utilizes Attachment D to the Dixon Declaration as its base drawing. After extensive proceedings and numerous decisions issued by the Board on Conrail’s River Line Abandonment, the Board in 2002 authorized Conrail to abandon the River Line to CP Waldo. On May 1, 2002, Conrail filed a written notice of consummation of abandonment with the Board. **Exhibit D**.

32. As established by the Dixon Declaration (**Exhibit O, paragraph 19**) and as also shown on **Exhibits O-1 and T**, this abandonment to CP Waldo included approximately 750 feet of the single track running between CP Waldo and the switch where the Harsimus Branch diverged to the east and continued toward Marin Boulevard across Petitioners’ properties, and beyond to the Hudson River, along with its connection to the Hudson Street Industrial Track. In its petition of 2000, Conrail included both the Hudson Street Industrial Track and the Harsimus Branch on the required map filed with its petition, and noted the Harsimus Branch and its connection to CP Waldo. Also, when Conrail’s River Line Abandonment petition was filed, there

was, and had been for many years, no freight traffic over the Harsimus Branch from CP Waldo eastward or on the Hudson Street Industrial Track. In fact, in 1983 and 1985, Conrail had given the required statutory notice of insufficient revenues from rail operations under NERSA. These steps were reflected in the Board's decisions in the River Line Abandonment proceedings.

2. REASONS FOR DECLARATORY RULING

33. Petitioners now face unfounded claims that an arbitrarily selected segment of the Harsimus Branch, which formally ran across their properties, must be subjected to the Board's jurisdiction and abandoned again, this time under 49 U.S.C.A. § 10903. The concept that a single track carrying a line of rail must be subjected to successive abandonment procedures has been declared by the Board to be "nonsensical" and "irrational." Alleghany Valley Railroad Company – Petition For Declaratory Order, *supra*, STB Docket FD 35239. The claim for multiple abandonments so that there could never be certainty that the Board's jurisdiction over a particular parcel had come to an end is so without merit that Petitioners have found only this one other instance where it has been necessary to address it. *See, ibid.* By contrast, the principle that the Board's jurisdiction terminates once a railroad consummates abandonment is well-settled. Equally well-settled is the principle that former lines of rail that have been isolated from the national rail network by a properly authorized abandonment are themselves abandoned de facto. RLTD Railway Corp., *supra*, 166 F.3d 808.

34. Such claims as have been made against Petitioners' property interests are all the more unfounded and unsupportable because the Board in 2002 granted abandonment approval under NERSA, which Congress enacted in full recognition that Conrail should be able to divest itself of regulatory obligations in a timely and expeditious manner. Claims made and pending thirty years after Conrail filed its first Notice of Insufficient Revenue, and which argue that an

abandonment consummated under the provisions of NERSA should again be reviewed under 49 U.S.C.A. § 10903, fly in the face of congressional intent as to how the Board regulates abandonments. NERSA contains an explicit provision stating, “Any such application [for NERSA abandonment] shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of Title 49 [now codified as 49 U.S.C.A. § 10903].” 45 U.S.C.A. § 748.

35. A declaratory ruling that the Board has no further regulatory jurisdiction over Petitioners’ property interests, is sought for the following reasons:

- a. Petitioners have a right to a resolution of jurisdictional claims for regulatory authority over their property and to petition for a declaratory ruling pursuant to 5 U.S.C.A. § 554.
- b. Conrail now has a pending, but stayed, petition for abandonment under 49 U.S.C.A. § 10903 (STB No. AB-167 (Sub No. 1189X)) that should not proceed if the Board lacks jurisdiction.
- c. A declaration by the Board that it has no remaining regulatory jurisdiction over Petitioners’ properties should eliminate clouds on title and impacts upon the use and enjoyment of numerous other properties of other owners on a large portion of the Hudson River waterfront that currently comprises Jersey City’s downtown financial district and “Gold Coast” that Conrail has never subjected to regulatory review.⁸ These properties were described in the Special Court litigation in a Declaration submitted by, Dean Marchetto, a New Jersey architect familiar with

⁸ Conrail’s pending abandonment petition does not address the remaining portions of these waterfront areas except for a few lightly developed parcels.

the area, who explained why there is no continuing need for freight service. He also explains why these properties do not require rail service. The Declaration (“Marchetto Declaration”) is attached as **Exhibit V** to this petition.

- d. Numerous cases in the courts of the State of New Jersey have been stayed for as much as eight years, pending a resolution of federal regulatory matters. Recently, the New Jersey Supreme Court has refused an application by Petitioners to lift those stays of proceedings.⁹ Petitioners believe and assert that the role and function of the Board has been misrepresented to those courts, and that further delays in these matters constitutes a denial of Petitioners’ right to due process and an abuse by others of the Board’s processes and jurisdiction.¹⁰
- e. It is appropriate for the Board to declare Petitioners’ property exempt pursuant to 49 U.S.C.A. § 10502 because no remnant of interstate commerce associated with rail freight remains, and Petitioners are not railroads, nor railroad customers. This matter is now ripe for decision because Petitioners, through years of litigation with the Special Court and associated appeals, have established that a regulated portion of the Harsimus Branch once ran from CP Waldo to a point at Marin Boulevard as Conrail acquired it in 1976. All other issues raised in the courts, including claims by Petitioners that they have been unjustly singled out for

⁹ 212 Marin Boulevard LLC et al., v. City of Jersey City et al., Docket No. HUD-L-4908-05, NJ Supreme Court docket number 073380. **Exhibit W.**

¹⁰ The state court cases presently stayed are 212 Marin Boulevard LLC et al., v. City of Jersey City et al., Docket No. HUD-L-4908-05 (Civil Rights Claim); 212 Marin Boulevard LLC et al., v. City of Jersey City et al., Docket No. HUD-L-4683-05 (Challenge to Planning Board Action); and 212 Marin Boulevard LLC et al., v. City of Jersey City Historic Preservation Commission et al., HUD-L-2451-08 (challenge to Zoning Board Action).

disparate regulatory treatment, have been preserved for further adjudication in an appropriate forum. **Exhibit A-2.** The Board is the appropriate forum to adjudicate the issue of the Board's jurisdiction over Petitioners' properties.

- f. Selectively targeting Petitioners for regulatory oversight of their real estate would be contrary to the common sense and common law treatment of real estate where there is no vestige of railroad interest, and none can be justified by convoluted arguments for special treatment under provisions of railroad law. See, Marvin M. Brandt Revocable Trust, supra, --- S.Ct.---, S.Ct. No. 12-1173 (March 10, 2014).
- g. There is no overriding interest in interstate commerce as a matter of law. Under the Rail Transportation Policy ("RTP") 49 U.S.C.A. § 10101, in regulating the rail industry, it is the policy of the United States to "minimize the need for Federal regulatory control over the rail transportation system and "provide for the expeditious handling and resolution of all proceedings." Further proceedings involving Petitioners and affecting their property interests are neither necessary nor appropriate to resolve issues of past violations of Board regulations because Petitioners played no part in such actions. No such exception need be made for Conrail or Jersey City, but Petitioners are not necessary parties in such matters. The interests of the RTP would be furthered by granting the present petition and preserving the resources not only of the Petitioners and others, but most importantly, those of the Board.
- h. A declaratory ruling by the Board is the most expeditious and economical means of resolving numerous disputes that have consumed enormous regulatory, private, and judicial resources over many years.

36. Beyond the easterly end of Petitioners' properties at Marin Boulevard and the easterly point of the Special Court's adjudication, the Harsimus Branch continued to its terminus at the Hudson River. The Hudson Street Industrial Track connected to the Harsimus Branch at a point east of and close to Marin Boulevard and proceeded for approximately 1.3 miles to its terminus within Jersey City. See, Dixon Declaration, **Exhibit O**. Conrail's pending abandonment petition includes the portion of the Harsimus Branch from CP Waldo to Marin Boulevard and some of the Hudson Street Industrial Track to the east of Marin Boulevard, although it incorrectly identifies it as a portion of the Harsimus Branch. As such, Conrail's petition neither fully nor accurately identifies the locations of the remaining portion of the Harsimus Branch as it runs to the Hudson River, nor does it identify any of the Hudson Street Industrial Track. Leaving this issue open and unresolved, or to be resolved in further regulatory proceedings involving private or public property owners who purchased land from Conrail, will create the possibility of even further contention on this issue and a reprise of the litigation. The issue should be settled now.

37. Conrail, and other parties to state court litigation with Petitioners have taken the position that once any portion of a line of rail connecting the remainder of that, or other lines of rail to the national rail network undergoes an abandonment process that is properly consummated by the railroad, the remaining portions of those lines of rail are also abandoned de facto. The Board is divested of jurisdiction and proceedings involving those former lines may not be reopened, particularly not for the imposition of conditions. Cf., Alleghany Valley Railroad Company, supra, STB Docket FD 35239. In any event, reopening the prior abandonment would serve no purpose as the River Line Abandonment under NERSA does not admit of the imposition of conditions. Petitioners in this matter agree that the jurisdiction of the Board is

terminated upon the consummated abandonment of a line of rail, and that jurisdiction also terminates over any other line of rail that is severed from the national rail network by such consummated abandonment. This is particularly true when, as here, there remains no overriding interest in the maintenance of interstate commerce upon such consummated abandonment.

3. NO BASIS FOR CONTINUED BOARD JURISDICTION

38. There is no present or foreseeable need for freight service on the downtown Jersey City waterfront. The Harsimus Branch east of CP Waldo and the entire Hudson Street Industrial Track have been out of service since at least 1994, and are not needed for reactivation of regulated rail service. 49 U.S.C.A. § 10502(a). Indeed, when Conrail's River Line Abandonment was filed in 2000, there was, and had been for many years, no freight traffic over the Harsimus Branch, which is today Petitioners' property. The sale of property without reservation of any railroad operating rights to Conrail after the River Line Abandonment in 2002 simply confirmed these realities.

39. As early as the 1980's, aware of the decline of the importance of rail related activities, the City undertook an active program of urban revitalization and redevelopment in its downtown waterfront area. See, Marchetto Declaration, **Exhibit V**. In those places where trains had formerly run, luxury condominiums and rental apartments, high-end retail stores, restaurants, and Class A office uses have entirely displaced railroad uses. Literally billions of dollars have been invested in the development of Jersey City's "Gold Coast," including user occupied buildings of Wall Street giants such as Goldman Sachs. Also, the State of New Jersey's public transit agency, New Jersey Transit, has invested hundreds of millions of public transit dollars in the Hudson Bergen Light Rail system, which today utilizes much of the former right of way of the River Line and other areas formally occupied by freight tracks.

40. None of these properties have been abandoned or otherwise subjected to the Board's regulatory review by Conrail, and the City now argues that once any portion of a line of rail connecting the remainder of that or other lines of rail to the national rail network undergoes an abandonment process that is properly consummated by the railroad, the remaining portions of those lines of rail are also abandoned de facto. This is the argument of the parties who are, or were, in litigation against Petitioners in both state and federal courts. Petitioners agree that the jurisdiction of the Board terminates upon the consummated abandonment of a line of rail, and that jurisdiction also terminates over any other line of rail that is severed from the national rail network by such consummated abandonment. Such severance is perhaps the best evidence that no overriding interest in the maintenance of interstate commerce remains upon such consummated abandonment, and the exercise of Board jurisdiction in such a case would be imprudent. However, the jurisdiction of the Board cannot be manipulated to create an exception to these rules for the contrived purpose of advancing private disputes. There is no difference between the abandonment of Petitioners' properties and the same abandonment de facto of the rest of the Harsimus Branch or the Hudson Street Industrial Track by virtue of the River Line Abandonment. If the River Line Abandonment left Petitioners subject to the Board's jurisdiction, it left the remainder of Jersey City's downtown waterfront also subject to the same jurisdiction. Petitioners do not argue for this result; they just note it to underscore the impropriety and futility of any proceeding to subject any of these areas to the Board's jurisdiction under the facts of the case. Selectively targeting Petitioners for regulatory oversight of their real estate would be contrary to the common sense and common law treatment of real estate where there is no vestige of railroad interest, and none can be justified by convoluted arguments for special treatment under provisions of railroad law. See, Marvin M. Brandt Revocable Trust, supra, ---

S.Ct.--- , S.Ct. No. 12-1173 (March 10, 2014). While the Board has an essential interest in not allowing Conrail or the City to flout its jurisdiction and proceedings for any reason, the Board should not allow Petitioners to be burdened by the misdeeds of others or proceedings to correct them.

41. Petitioners' primary position that its properties are no longer subject to Board jurisdiction is settled in law and precedent. Once a line is abandoned, either de facto or de jure, the Board no longer has jurisdiction, and title issues are matters of state law. Preseault, supra, 494 U.S. at 5-6 n. 3. Conrail's failure to formally include any portion of the Harsimus Branch or the Hudson Street Industrial Track in its 2000 River Line Abandonment application cannot be taken as evidence that it believed or intended that the Harsimus Branch would remain part of the national rail network once the abandonment of the River Line was consummated. In past ICC and Board abandonment proceedings, in determining whether abandonment was consummated, the intention of the railroad, and factors such as discontinuing service, cancelling tariffs, and removing rail improvements all indicate intent to abandon. See, Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995); Britt v. STB, 90 F.3d 580 (D.C. Cir. 1996); and Becker v. STB, 132 F.3d 60 (D.C. Cir. 1997). Conrail had no revenues or any customers on the Harsimus Branch or Hudson Street Industrial Track when it sought the abandonment of the River Line. In fact, the tracks, bridges, and other railroad equipment on the Harsimus Branch east of CP Waldo had all been removed years before, and its former rail customers had all been swept away by extensive real estate development and commuter light rail use. See, Marchetto Declaration - **Exhibit V**. Conrail made no mention of the Harsimus Branch or the Hudson Street Industrial Track in the River Line Abandonment. It sold the properties to Petitioners in 2005 without reserving any railroad operating rights of any kind, and on the representations that the property was not

regulated. It would be unwarranted and unjust for the Board to subject Petitioners to the burdens of further regulatory proceedings, including the pending Conrail abandonment petition or any proceedings initiated by the Board ex parte to address other issues.

42. In RLTD Railway Corp., supra, 166 F.3d 808, a portion of a former line of rail known as the Leelanau Line had been severed from the national rail network by prior, intervening abandonments. The Court recognized that an abandonment de facto occurs when the line is no longer “linked to and part of the interstate rail system” citing the STB decision below. Id. at 812. The court then went on to state: “Although the parties cite to no case that deals specifically with a track that has fallen outside the STB’s jurisdiction because it has been severed from the national transportation system in some manner other than abandonment, once a line of track has been properly abandoned, the STB loses jurisdiction and cannot issue a trail condition. . . . It is reasonable for the STB to conclude that it loses jurisdiction when a track is no longer part of the interstate rail network” Id. at 814 (citations omitted). As established by Conrail’s own records, matters of record in prior related Board proceedings, historical photographs and the Exhibits submitted with this petition, the River Line Abandonment left the Harsimus Branch outside of the jurisdiction of the Board.

43. The “overriding interests of interstate commerce” discussed in RLTD certainly do not apply to the Hudson River waterfront, and it would be imprudent for the Board to impose its jurisdiction on such properties twelve years after the River Line Abandonment in which no one had even attempted to request any public use or trail conditions, voluntary or otherwise. Becker, supra, 132 F.3d at 62-63 (Board lacked jurisdiction to issue NITU after abandonment had been consummated). Regardless, as a matter of fact, there is no “overriding interest of interstate commerce” implicated here by a finding that Board jurisdiction has ended. Conrail’s 2000 River

Line Abandonment disclosed all then-existing rail traffic on the waterfront; none of the then-existing traffic would have involved any portion of the Harsimus Branch east of CP Waldo or the Hudson Street Industrial Track. In addition, as described, despite years of litigation on the issue of whether or not the Harsimus Branch is a line of rail as it crosses over Petitioners' properties, there is absolutely no evidence of the need for continued rail service

44. Nor is there any overriding interest in interstate commerce as a matter of law. Under the RTP, in regulating the rail industry, it is the policy of the United States "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required," and "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 U.S.C.A. § 10101(2) and (15). Those proceedings were concluded in 2002 and should not be reopened, particularly piecemeal when the matter involves real estate disputes under state law. Those are simply not the business of the Board. The interests of the RTP would be furthered by granting the present petition and preserving the resources not only of the Petitioners and others, but most importantly, those of the Board

45. There is simply no interest in interstate commerce or any RTP interest in requiring a second abandonment of the same track. This is not a question of whether there were two separate tracks; there was only one. As noted, the Board has recognized that the argument that multiple abandonments of the same track is both "irrational" and "nonsensical." See, Alleghany Valley Railroad Company – Petition For Declaratory Order, STB Docket FD 35239, Service Date June 15, 2010, at p. 8.

4. EXEMPTION UNDER 49 U.S.C.A. § 10502

46. The Board should therefore declare the Harsimus Branch exempt from further regulation under 49 U.S.C.A. § 10502. Under section 10502, the Board must exempt a person, class of persons, transaction, or service from a provision of law when it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C.A. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power. The imposition of any regulation or condition upon Petitioners or their properties is not necessary to carry out the rail transportation policy of 49 U.S.C.A. § 10101 – there is absolutely no rail activity in downtown Jersey City and no reasonable present prospect of anyone taking steps to resume such service. Without any chance that rail service is even possible—the City’s zoning does not envision industrial, much less rail, uses—such an exemption is of the most limited possible scope. As noted, the only connection with the national rail network has been dismantled. The exemption would simply confirm reality. Certainly there are no “shippers” that need or will foreseeably need protection.

47. The interests of the Board and its jurisdiction are best protected by declaring its jurisdiction over the Harsimus Branch to have ended, and over railroads are best protected by declaring the Harsimus Branch to have ended, rather than to open the door to contrived attempts to have the Board assert jurisdiction where there is no impact on interstate commerce. Magner O. S. Railway v. Interstate Commerce Com., 692 F.2d 441, 444 (6th Cir. 1982). (The STB “enjoys considerable discretion in its determination of jurisdictional facts).

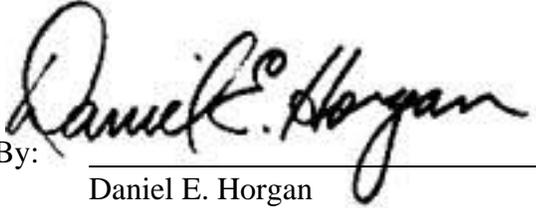
SUMMARY

48. The 2002 River Line Abandonment by Conrail was opposed by the last two remaining, and isolated, rail freight users on the Hudson River waterfront between Jersey City and Weehawken New Jersey. Those were Dykes Lumber Company, which operated in Weehawken, and Cognis, which operated in Hoboken. They represented the last vestige of interstate commerce through rail freight service to be served by a connection to CP Waldo, all remaining industrial uses having been replaced by urban redevelopment served by a state operated public transit system. The Board's 2002 abandonment authorization, consummated by Conrail, was proper in all respects and terminated the Board's jurisdiction over the River Line, and over Petitioners' properties, reflecting the long-standing reality that there is no need or justification for the Board to exercise its jurisdiction here. Arguments to the contrary are an abuse in violation of the Board's jurisdiction and administrative process, and should not be tolerated.

49. Petitioners respectfully request that the Board issue a declaratory order terminating all jurisdiction of the Board over the former rail lines to the east of CP Waldo on Petitioners' properties. Petitioners are neither railroads, nor railroad customers. They are property owners who purchased land, in fee, for purposes of non-industrial, commercial development. There is no basis for the Board to regulate their activities or to become part of contrived arguments of railroad law to be used as leverage in state court property disputes. And there is certainly no basis that any final Board abandonment authority, consummated twelve years ago by the railroad, should be re-opened to the detriment of Petitioners or anyone similarly affected or situated.

50. If any factual issues are raised in opposition to this Petition, Petitioners request full discovery on such issues. 49 C.F.R. § 1114.21, et seq.

WATERS, McPHERSON, McNEILL, P.C.

By: 
Daniel E. Horgan

Dated: May 8, 2014

LIST OF EXHIBITS TO PETITION

Exhibit A-1: Order and Memorandum Opinion in City of Jersey City et al. v. Conrail et al., U.S. District Court, District of Columbia, docket number 09-1900 (ABJ), dated September 30, 2013 (11 pages)

Exhibit A-2: Order, United States Court of Appeals for the D.C. Circuit, granting summary disposition, dated February 19, 2014 (2 pages)

Exhibit B: Letter from Jersey City Mayor McCann to Conrail Chairman L.S. Crane, December 18, 1984 (2 pages)

Exhibit C: Conrail's Application for Abandonment of River Line, dated November 13, 2000, including: (a) cover letter, (b) service list; (c) Application; (d) verification; (e) certificate of service; and (f) Exhibit B, thereto: Location Map, River Line (14 pages)

Exhibit D: Conrail Letter to Vernon A. Williams, Secretary of Surface Transportation Board, May 1, 2002, confirming Conrail abandonment of River Line and Weehawken Branch, Hudson County, New Jersey

Exhibit E: Petitioners' deeds from Conrail, dated July 12, 2005 (eight total)

Exhibit F: Deed, Fairfax Leary as Trustee for United New Jersey railroad and Canal Company, to Conrail, recorded October 12, 1978 (excerpted)

Exhibit G-1: Conrail Track Map, Zone 17, page 1 (1985)

Exhibit G-2: Conrail Track Map, Zone 17, page 2 (1985)

Exhibit G-3: Conrail Track Map, Zone 18, page 1 (1985)

Exhibit H: Declaration of Daniel E. Horgan filed on September 6, 2012 in matter captioned City of Jersey City et al. v. Conrail et al., U.S. District Court, District of Columbia, docket number 09-1900 (ABJ), with exhibits and original cover sheet (14 pages)

Exhibit I: Conrail memorandum, dated January 28, 1985

Exhibit J: Conrail memorandum, dated January 15, 1988

Exhibit K-1: City of Jersey City City Council memo, dated February 14, 1992

Exhibit K-2: Letter from Engineer of the City of Jersey City to Conrail, dated February 19, 1992

Exhibit K-3: Letter from Conrail letter to Construction Official of the City of Jersey City, dated May 11, 1992

Exhibit L: Internal Jersey City Memorandum dated April 14, 1994 re: Conrail Marion Junction Project 89-032

Exhibit M: Internal Jersey City Memorandum dated March 29, 1994 re: Removal of Conrail 6th Street Viaduct Project No. 92-008

Exhibit N: New Jersey Transit Hudson-Bergen Light Rail map (retrieved from http://www.njtransit.com/pdf/LightRail/sf_lr_hblr_map.pdf on May 8, 2014)

Exhibit O: Declaration of David B. Dixon, PLS, consisting of:

- Cover sheet filing document as Document ECF #82 in U.S. Dist. Ct. (D.C.); Docket CV-09-1900 (CKK)
- Declaration pages 1 through 12; paragraphs 1 through 20

Exhibit O-1: Attachment A to Dixon Declaration

Exhibit O-2: Attachment B to Dixon Declaration

Exhibit O-3: Attachment C to Dixon Declaration

Exhibit O-4: Attachment D to Dixon Declaration

NOTE: The four Attachments to the Dixon Declaration, A through D, are layered PDF documents as described in the Declaration. Those are being provided to the Board in DVD format and will be provided to anyone on the service list in that format upon request.

Exhibit P: Conrail's Notice of Intent to file for an Exemption for Abandonment and Discontinuance of Service STB Docket No. AB 167 Sub No. 1189X, dated March 6, 2008

Exhibit Q: Correspondence of Charles Montange, Esq., to the Surface Transportation Board in of March 28, 2008, in the matter In Re Consolidated Rail Corporation Abandonment - in Hudson County, NJ AB-167 (Sub No. 1189x) and related proceedings

Exhibit R: Decision, Surface Transportation Board, docket number EP 695, dated May 13, 2010 (4 pages)

Exhibit S: Conrail's Report Regarding Line Sales and Discontinuances since January 1, 1996, STB docket number EP 695, dated September 27, 2010 (4 pages)

Exhibit T: Attachment B to Dixon Declaration viewed as:

- Aerial 1976 Robinson
- Line 1420 - 1976-1979 per Analysis
- Line 1440 - 1976-1979 per Analysis
- Line Former Penn RR Mail Line
- Line River Line – Weehawken Branch

Exhibit U: Aerial Photo, base image Robinson 1979, as copied from Dixon, Attachment D, and annotated to show River Line (green), switch in River Line connecting Harsimus Branch to waterfront (white), and old Pennsylvania R.R. main line (yellow). The highlighting also shows the River Line (green) running with the Harsimus Branch (red) on a single track between C.P. Waldo and the Switch (both circled in white).

Exhibit V: Declaration of Dean Marchetto, consisting of:

- Cover sheet filing document as Document ECF #81-26 in U.S. Dist. Ct. (D.C.); Docket CV-09-1900 (CKK)
- Declaration pages 1 through 8 paragraphs 1 through 16

Exhibit W: 212 Marin Blvd., LLC et al. v. City of Jersey City et al., Supreme Court of New Jersey, docket number 073380, order (denying motion for leave to appeal), dated February 4, 2014 (1 page)

VERIFICATION OF PETITION

Daniel E. Horgan, Esq., hereby verifies as follows:

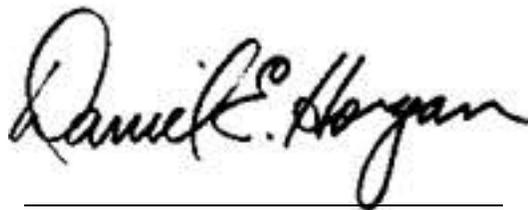
1. I am an attorney-at-law admitted to practice before the United States District Court for the District of Columbia and the State of New Jersey and that I am lead counsel for the nine Limited Liability Company Petitioners in this matter. I make this verification in support of the Petitioners' Petition appended hereto based on my knowledge and as the attorney for the Petitioners.

2. The facts and representations set forth in the aforementioned Petition are true and correct to the best of my knowledge, information and belief.

3. The exhibits attached to the aforementioned Petition hereto as Exhibits A-1 through W are true and correct copies of the documents they purport to the best of my knowledge, information and belief.

4. I am qualified and authorized to file this petition

I verify under penalty of perjury that the foregoing is true and correct.



By: _____
Daniel E. Horgan

Dated: May 8, 2014

CERTIFICATE OF SERVICE

I, Daniel E. Horgan, an attorney-at-law of New Jersey, New York, and the District of Columbia, hereby certify that on May 8, 2014, I caused service of this filing with the Surface Transportation Board to be made upon the Board by Electronic Filing and that all parties on the following service list were served by First Class Mail in accordance with the provisions of 49 C.F.R. §1104.12.

By: 
Daniel E. Horgan

Dated: May 8, 2014

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