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Hon. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street. S.W., Room 100
Washington, D.C. 20423

- Re: (1) 212 Marin Blvd et al - Pet. Dec. Order, F.D. 35825, filed May 8, 2014;
(2) City of Jersey City et al -Pet.Dec. Order, F.D. 34818, filed Jan. 12, 2006
(3) Consolidated Rail Corporation - Aban. Exemp.-in in Hudson County, NJ, AB 167 (Sub-no. 1189X), placed in abeyance by this Board by a decision served April 20, 2010

Dear Ms. Brown:

First, F.D. 35825, F.D. 34818, and AB 167 (Sub-no. 1189X) all involve the same line of railroad, namely, the portion of the Harsimus Branch from Marin Boulevard in Jersey City, New Jersey to roughly Waldo Street (CP Waldo). In addition to being the subject of the three agency proceedings listed above, that line of railroad has now been subject to three visits to the D.C. Circuit, two trips to the U.S.D.C. for D.C., SLAPP¹ suits against the undersigned's clients (and one against the undersigned personally), and a host of burdensome visits to state courts in New Jersey. All this litigation was precipitated by an illegal sale of the portion of the Harsimus Branch containing the Harsimus Embankment (protected at the federal, state and local levels under historic preservation statutes) in 2005 by Consolidated Rail Corporation ("Conrail") to a real estate assembler, d/b/a 212 Marin Boulevard, LLC, et

¹ SLAPP stands for Strategic Lawsuit Against Public Participation. Such suits are often brought by developers to impose a burden on the time and wallets of the individual attorneys and officers sued, and thus to stifle the exercise of First Amendment rights.

al ("the LLCs"), and by the efforts of Conrail and the LLCs to secure to themselves the benefits of that unlawful sale. City et al desire the property at issue for rail, trail, open space and historic preservation, and have been seeking to obtain federal and federally-mediated state remedies ever since.

Second, in order to cut through the thicket behind which Conrail and the LLCs have sought, and continue to seek, to evade federal jurisdiction and any meaningful remedies for City et al, City et al are providing for filing in the above three STB dockets a series of pleadings as follows:

F.D. 35825. Enclosed for filing please find the original and ten copies of a Reply on behalf of City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy ("City et al") to the Petition filed May 8, 2014, on behalf of a group of commonly owned and controlled LLCs ("the LLCs") purporting to seek a declaratory order in F.D. 35825, but in fact attempting to initiate an exempt abandonment proceeding while also endeavoring untimely to reopen F.D. 34818 without compliance with 49 U.S.C. 722(c). The Petition should be summarily denied for the reasons stated in the Reply. Among other things, this Board's precedent does not permit third parties like the petitioners in F.D. 35825 to file so-called adverse exempt abandonment proceedings. In any event, since the petitioners in F.D. 35825 have elsewhere asserted that they acquired the property they seek to have abandoned on the basis of a fraud, and have elsewhere admitted they entered into a contract with Conrail seeking to preserve the benefits to themselves and Conrail of what they now deem a fraud, it is hardly appropriate to grant them an exemption to do so, at the expense of City et al and the public.

F.D. 34818. Since the Petition in F.D. 35825 also contains what amounts to an untimely effort to reopen F.D. 34818, City et al are supplying for filing in F.D. 34818 an original and ten copies of Notice of the filing of our Reply in F.D. 35825. In the Notice, we draw attention to our request that anything not dismissed or denied outright in F.D. 35825 be treated as an untimely petition to reopen F.D. 34818, and denied for failure to meet the requirements of 49 U.S.C. 722(c). Copies of our Reply and other relevant documents are attached to the Notice.

AB 167 (Sub-no. 1189X). We enclose for filing in AB 167 (Sub-no. 1189X) an original and ten copies of supplemental information germane to our earlier motion to rescind the April

20, 2010 order holding that abandonment proceeding in abeyance. As the supplemental information shows, there is no longer any reason to hold AB 167 (Sub-no. 1189X) in abeyance. F.D. 35825 insofar as it seeks abandonment authority is duplicative of AB 167 (Sub-no. 1189X), which is grounds to deny 35825 and lift the abeyance order in 1189X. In addition, City et al wish to file motions for relief against Conrail in the abandonment proceeding from the illegal de facto abandonment involved in all three of the captioned proceedings, and to seek discovery. As shown in our supplemental information, Conrail has indicated that it will not respond until and unless this Board lifts the now moot order holding this proceeding in abeyance. Neither Conrail nor the LLCs should be so permitted to avoid City et al's efforts to obtain relief.

Service list. All three pleadings are being served on current counsel for Conrail and the LLCs. In addition, the pleading in AB 167 (Sub-no. 1189X) is being served on the service list from that proceeding, updated to substitute the LLCs' current counsel for their former counsel. The Board should note that in the four years 1189X has been in abeyance, many parties have changed addresses and the LLCs have changed counsel. The agency service list in 1189X needs to be revised. Based on undelivered mail returns through the end of December 2013 in prior filings in this docket, we have attempted to update the addresses, but we are uncertain as to whether we in fact have a correct set of current addresses, and in some cases feel we do not. In any event, because we are attaching our Reply in F.D. 35825 to our filing in AB 167 (Sub-no. 1189X), it is being served on parties on the service list in 1189X for whom we have valid addresses. When the Board lifts the abeyance order, it also needs to initiate some process to compile an accurate service list.

If you have any questions, please do not hesitate to call. Thank you for your assistance in facilitating this filing.

Very truly,



Charles H. Montange
Counsel for City et al

Encls. (original and ten copies of papers for filing in three proceedings as discussed above)

cc. Service List (with encls, by USPS first class or equivalent)

Before the Surface Transportation Board

212 Marin Boulevard, LLC, et al.)
Petition for a Declaratory Order) F.D. 35825
of Exemption)



Related proceedings:

City of Jersey City, et al. -)
Petition for a Declaratory Order,) F.D. 34818
filed January 10, 2006)

Conrail - Ab. Ex. - in)
Hudson County, NJ) AB 167 (Sub-no. 1189X)

Reply Seeking Dismissal of
Petition insofar as It Seeks Abandonment Authorization
and/or Violates Law of the Case
and
--if anything is left to the Petition --
Consolidation of that Remnant with F.D. 34818,
Treatment as a Tardy Reopening Request for Material Error,
and for Other Relief

This Reply, on behalf of City of Jersey City ("City"),
Rails to Trails Conservancy ("RTC"), and the Pennsylvania
Railroad Harsimus Stem Embankment Preservation Coalition
("Coalition") (collectively referred to as "City et al") is
pursuant to 49 C.F.R 1104.13(a), and is directed at the Petition
for Declaratory Order filed on behalf of eight LLCs (hereinafter

"the LLCs") claiming ownership of portions of the Harsimus Branch, a line of railroad, by reason of eight deeds from Conrail,¹ and NZ Funding LLC ("NZ"), whose presence in the Petition is not explained by the LLCs.² The petition on its face seeks an abandonment authorization under this Board's exemption authority. See page 4 item b and invocation of the exemption statute on page 5, para 3. This is contrary to law. The petition's claim that this agency lacks jurisdiction by reasons of "severance" is contrary to law of the case. In any event, to the extent they have a valid claim (they do not), the relief sought in the Petition is redundant of what Petitioners could otherwise seek by motion in the AB 167 (Sub-no. 1189X) proceeding in which the LLCs have sought formal intervention.

¹The LLCs attached their deeds, issued in 2005, as Exhibit E to the Petition.

² NZ Funding LLC is owned and controlled by the same individuals who own and control the LLCs. The LLCs failed to pay local taxes, tax liens were placed on the property, and tax sale certificate on the properties were purchased by NZ Funding LLC. It appeared to City that the issuance of tax sale certificates was a ruse by the LLCs' owners to achieve an independent chain of title as a means to evade the remedies sought by City, et al before the STB. The City obtained a court order cancelling the tax sale certificates. The order cancelling the tax sale certificates has been stayed pending an appeal by NZ Funding. This is yet more litigation flowing from the illegal 2005 sale and attempts by Conrail and its chosen developer to evade federal remedies and federally-mediated state remedies, like N.J.S.A. 48:12-125.1. Since NZ and the LLCs are effectively one and the same, we will hereinafter refer to the petitioners in F.D. 35825 as "the LLCs."

In addition, anything left of the petition should be consolidated with the record in F.D. 34818, treated as an untimely petition to reopen F.D. 34818, and denied for failure to present new evidence or changed circumstances, much less material error, as required under 49 U.S.C. 722(c). The petition on its face has no merit.

Because the F.D. 35825 petition raises issues more appropriate in other related proceedings [F.D. 34818 and AB 167 (Sub-no. 1189X)], we are filing an original and ten copies of our Reply in those proceedings as well. To the extent not dismissed outright for the various reasons set forth herein, it must be consolidated with F.D. 347818, and denied under 49 U.S.C. 722(c).³

³ This Board's rules do not require City et al to move for formal intervention in this proceeding in order to become parties to it. To the extent any formal intervention were required, City et al clearly qualify for party status. The D.C. Circuit in City of Jersey City et al v. Conrail, 668 F.3d 741 (2012), has already held that City et al have standing to challenge the illegal sale of the Harsimus Branch by Conrail to the LLCs. The D.C.Circuit among other things explained that

"the City ... su[es] under a federal statute that offers it an array of rights and benefits, it seeks to void an allegedly unlawful sale of railroad line that threatens its interests in the historic and environmental value of that property. In that context, the City's refusal to invade federal jurisdiction and engage in unlawful self-help can hardly deprive it of standing. *Cf. Shays v. FEC*, 414 F.3d 76, 89 (D.C.Cir. 2005) ('But because being put to the choice of either violating BCRA or suffering disadvantage in their campaigns is itself a predicament the statute spares them, having to make that choice constitutes Article III injury.'). 668 F.3d at 746.

I. The F.D. 35825 Petition for Exempt Abandonment
Should Be Dismissed

The F.D. 35825 Petition should be dismissed insofar as it seeks an exempt abandonment authorization. The LLCs admit at page 4 of their petition that they are not railroads, that the property allegedly transferred to them in July 2005 by Consolidated Rail Corporation was part of a line of railroad, and that the transfer "was subject to the Board's approval pursuant to 49 U.S.C. 10901 but was made by Conrail without prior Board approval, and without formal abandonment." The LLCs are therefore simply third parties seeking what is called an adverse abandonment authorization.

It is well-established that third parties like the LLCs cannot use exemption proceedings to obtain so-called adverse abandonment authority. E.g., SMS Rail Service, Inc. - Adverse Discontinuance of Service Exemption - Gloucester County, NJ, AB 1095X, served March 2, 2012, slip at 1 & 3 and cases cited

Just as City et al has standing to be heard against Conrail, City et al has standing to be heard against Conrail's chosen developer. City et al continue to seek the benefits of federal statutes and ultimately to void the unlawful sale of the railroad line by Conrail to the LLCs. The LLCs' deficient petition in F.D. 35825 is just another effort by Conrail/LLCs to avoid and to evade the federal remedies applicable when railroads endeavor to sell lines to developers without STB abandonment authority to the detriment of local governments, local communities, and historic preservation and environmental organizations. City et al have standing to participate in this proceeding, and if a formal request were necessary to participate, so request.

therein. The relief sought by the LLCs may be obtained only through an adverse abandonment application.⁴ However, there is no need for such an application since Conrail has already initiated an abandonment proceeding. The interests of judicial economy and the convenience of all parties would be far better served by simply lifting the stay of that proceeding, as previously requested (and now supplemented) by City et al.

II. The Petition Conflicts with the Law of the Case and Is Redundant of, and Must Not Delay, Further Proceedings
in AB 167 (Sub-no. 1189X)

The LLCs conflate their arguments for exempt abandonment with a claim that this agency has no jurisdiction on the theory that the Harsimus Branch was severed from the interstate rail network in or about 2002 by reason of abandonment of the so-

⁴ The LLCs purport to present a host of arguments claiming it is unfair to them to be subjected to STB abandonment jurisdiction. None of this justifies use of exemption procedures. Adverse abandonment must be sought through the application process. SMS, supra, slip at 1. In any event, the LLCs are not innocent purchasers. Among many other things, New Jersey title practice required them to seek proof of an STB abandonment authorization for Conrail property, or proof that none was required. L. Fineberg, Handbook of New Jersey Title Practice, published by the New Jersey Land Title Institute, 3d ed. Revised Sept. 2005, volume II, chapter 98, section 9806. (Earlier editions were similar.) The LLCs did not comply with New Jersey title practice. They instead purported to buy property by quitclaim deed which described the property as part of a line of railroad (see Exhibit A to each of the deeds in petitioners' Exhibit E), even after learning from Conrail that the railroad had not obtained an ICC or STB abandonment authorization, and in the face of the City's interest in the property and inquiries on the abandonment issue, without any proof of abandonment.

called "River Line." This claim is contrary to law of the case. In any event, the LLCs have selected an inappropriate vehicle to present what amounts to a motion to dismiss a pending abandonment proceeding. See Conrail - Ab. Exemp. - in Hudson County, AB 167 (Sub-no. 1189X) (pending since February 2009 and involving the portion of the Harsimus Branch at issue here).

A. The LLCs Waived Severance in 2008-09 by Never Briefing It

In point of fact, the LLCs have already litigated and lost the issue of severance before this agency in City et al, Petition for a Declaratory Order, F.D. 34818. The Board's decisions in F.D. 34818 were vacated on the ground that Conrail and the LLCs claimed that the Harsimus Branch was not conveyed to Conrail as a line of railroad, and that only the U.S. District Court had jurisdiction over that issue. But the LLCs and Conrail flip-flopped on that issue in 2012, and now, after eight years of litigation, the District Court and D.C. Circuit have now conclusively adjudicated that this agency definitely has jurisdiction.

Neither the LLCs nor Conrail contested this Board's finding of no severance when they originally sought judicial review in Conrail v. STB, Nos. 07-1401, et seq. back in 2008-09. (This Board as respondent has copies of the relevant LLC and Conrail briefs in the D.C. Circuit, and can easily verify that neither party raised the severance issue.) Claims not raised on appeal

are waived. Wroblewski v. City of Washburn, 965 F.2d 451, 455 n. 1 (7th Cir. 1992); Bernard v. United Township High School, 5 F.3d 1090, 1093 (7th Cir. 1993); see BNSF v. STB, 453 F.3d 473, 479 (D.C.Cir. 2009). This makes the agency's finding of no severance law of the case.

To be sure, when City et al moved for summary judgment in U.S.D.C. for D.C. No. 09-1900, the LLCs sought to raise again the severance issue which they earlier waived. But despite the urging of the LLCs, neither the D.C. Circuit nor the U.S.D.C. for D.C. at any time overruled this Board's determination of no severance.⁵ This confirms that this Board's ruling rejecting the severance argument is the law of the case and the argument is now beyond resurrection. The LLCs stratagem to re-litigate this long-resolved issue by filing a new petition is a burdensome ruse.

B. The F.D. 35825 Petition Is Redundant of Other Proceedings

1. Redundant of AB 167 (Sub-no. 1189X)

⁵ The LLCs' last gasp on this issue was in their "Opposition to Motion for Summary Disposition" filed Dec. 25, 2013, in D.C. Cir. 13-7175, document 1472583, at pp. 6-7, 14-15 & 18 (claiming summary judgment inappropriate due to severance. City et al. noted that neither the LLCs nor Conrail raised the issue of alleged severance in their original petition for review of this Board's Decisions in F.D. 34818 and had waived the issue. It was now law of the case. See Reply to LLCs' Opposition to Motion for Summary Disposition in that proceeding, pp 2-4.

While pursuing the LLCs/Conrail claims that the Harsimus Branch was not conveyed as a line of railroad in federal proceedings, Conrail filed an abandonment proceeding for the Harsimus Branch, in February 2009, after some initial false starts. Proceedings in that abandonment case were suspended in 2009 when the D.C Circuit vacated the rulings in F.D. 34818 at the behest of Conrail and the LLCs on the basis of their claim that the Harsimus Branch was not conveyed to Conrail as a line of railroad, and their position that STB lacked jurisdiction over that issue until and unless the U.S. District Court for the District of Columbia ruled that the Harsimus Branch was conveyed to Conrail as a line of railroad.

When City et al filed a Complaint and Motion for Summary Judgment initiating a District Court proceeding (docketed as U.S.D.C. for D.C. No. 09-1900) as called for by the D.C. Circuit, this agency issued a Decision served April 20, 2010, in AB 167 (Sub-no. 1189X), formally placing the abandonment proceeding in abeyance pending the outcome.

In 2012, after four years of judicial proceedings, Conrail and the LLCs essentially disavowed their claim that the Harsimus Branch was not conveyed as a line of railroad, with the LLCs stipulating that the line was so conveyed, and Conrail stipulating it would not contest the issue. This seemed to moot the issue of jurisdiction, and City et al moved for summary

judgment. The LLCs resisted on a variety of grounds, including the ground that STB still lacked jurisdiction by reason of an alleged severance. The District Court in No. 09-1900 granted summary judgment in favor of the City in 2013. The LLCs appealed. The D.C. Circuit summarily affirmed the District Court in a decision issued February 19, 2014. The mandate was issued on April 8.⁶

City et al filed a pleading in AB 167 (Sub-no. 1189X) requesting the stay be lifted on November 22, 2013. The LLCs and Conrail opposed this motion on the ground the District Court's ruling had been appealed. In light of the February 19 summary affirmance, this grounds is now moot. The LLCs moved to intervene in AB 167 (Sub-no. 1189X) on December 11, 2013, and reiterated their motion in a paper filed February 21, 2014, when they filed a copy of the D.C. Circuit's order summarily affirming the U.S.D.C. for D.C. summary judgment that this agency has jurisdiction over the Harsimus Branch. No one opposed their intervention.

Although this agency's prior determination that the Harsimus Branch is not severed should be treated as law of the case, if

⁶While we do not believe that a petition for certiorari should delay proceedings in 1189X, we have delayed our reply to this petition until the time for filing petitions for certiorari has expired. That time by our calculation expired on May 20, 2014.

the issue is now re-examined, a new proceeding for that purpose is hardly appropriate. Conrail has already filed for abandonment in AB 167 (Sub-no. 1189X), and since the LLCs have already intervened, the matter if litigated can be litigated there. There is no precedent for intervening property claimants to be allowed to litigate abandonment issues in an adverse exemption proceeding, especially when the railroad has already filed an abandonment proceeding.

2. Subsumed by F.D. 34818

Moreover, AB 167 (Sub-no. 1189X) is not the only other relevant STB proceeding in the event this agency does not treat the issue of severance as resolved against the LLCs under the law of the case doctrine (waived by the LLCs for failure brief it on petitions for review off F.D. 34818 and by implicit refusal of the D.C. Circuit to reverse the U.S.D.C. for D.C. on that ground in D.C.Cir. 13-7175.) The other relevant proceeding in that event is F.D. 34818. If the finding of no severance is not law of the case, then that could only mean that this agency is treating all the issues tendered in F.D. 34818 (other than whether the property was conveyed to Conrail as a line of railroad subject to STB abandonment jurisdiction) as unaddressed.

In the event that this Board does not conclude that this issue, previously decided, is the law of the case, F.D. 34818,

filed in January 2006, is not only fully briefed but also decided on all remaining relevant issues presented in that proceeding, including the severance claim. Since the issues are fully briefed and decided, and no reviewing court has called for further consideration by this Board of any issue, this Board should treat its earlier resolutions as still standing, or readopt them. Once the F.D. 34818 decisions are reinstated to the extent required, then F.D. 35725 (to the extent still alive) should be treated as a petition to reopen F.D. 34818. Treated as a petition to reopen, F.D. 35825 is governed by 49 U.S.C. 722(c), and must be denied for failure to show new evidence (or changed circumstance) or material error, as discussed below.

C. Reopening on Severance Must Be Denied

1. The LLCs' severance argument has been addressed in F.D. 34818. The LLCs claim that the Harsimus Branch at issue here was severed from the interstate rail system solely by reason of an abandonment in Conrail - Weehawken Branch - in Hudson County, NJ, AB 167 (Sub-no. 1067N), dated March 12, 2002. LLCs' Petition at p 4. First, there is no such decision. The Weehawken Branch [AB 167 (Sub-no. 766N)] was authorized for abandonment in conjunction with the River Line [AB 167 (Sub-no. 1067N)] by a decision served Jan. 17, 2002 in both dockets. There are no subsequent decisions in either docket.

Elsewhere in their Petition, the LLCs claim that abandonment of the River Line resulted in the alleged severance, and attach filings from Conrail [Petition, Exhibits C (River Line Abandonment Application) and D (River Line consummation letter)] in support. The LLCs' reference to a March 12, 2002 decision is apparently to a March 2001₁ decision discussing remaining shippers on the River Line, but nothing in March 2001 authorized abandonment. Generally it is not appropriate to give these LLCs the benefit of any doubt, but here they clearly mean to be claiming the River Line abandonment authorized in AB 167 (Sub-no. 1076N) by decision served January 17, 2002, somehow severed the Harsimus Branch from the interstate rail network.

This Board has already rejected the LLCs' argument. In January 2006, City et al filed F.D. 34818 for a determination that the Harsimus Branch at issue here was a line of railroad subject to STB abandonment jurisdiction. In extensive replies to City, neither Conrail nor the LLCs claimed that there was a severance. In a decision issued in August 2007, this agency determined that the Harsimus Branch was a line of railroad subject to its abandonment jurisdiction.

The LLCs, but not Conrail, sought rehearing, contending for the first time that there was a severance arising from the River Line abandonment (the River Line intersected the Harsimus Branch

at CP Waldo).⁷ This Board determined that the Harsimus Branch at issue here was not severed from the interstate rail system by the River Line abandonment. City of Jersey City et al --
Petition for a Declaratory Order, F.D. 34818, slip op. at 6-7, served December 19, 2007, attached as Exhibit A.

In this decision, this Board specifically rejected the LLCs' contentions concerning the River Line abandonment. This Board said: "While the River Line connected with what Conrail now calls the Passaic and Harsimus Branch at Waldo, the abandonment of the River Line would not have severed the Passaic and Harsimus Branch from other lines connecting to the national rail system [footnote omitted], and, based on all of the

⁷The LLCs failed to raise the River Line in their initial reply, as noted by STB in its Decision served December 19 at footnote 12. The LLCs did raise the issue in their petition for rehearing in F.D. 34818 filed August 29, 2007, at p. 5, citing the River Line abandonment decision in AB 167 (Sub-no. 1067N), served Jan. 17, 2002. City et al filed a Reply to the petition for reconsideration on September 18, 2007. City et al noted that the River Line by track charts and other maps connected at CP Waldo, that there was no abandonment of trackage at CP Waldo, and that the issue in F.D. 34818 was the portion to the Harsimus Branch from Marin Boulevard (MP 1.3 in the relevant track charts) to CP Waldo. The River Line abandonment was thus irrelevant. City et al also noted that the LLCs had previously represented that the portion of the Harsimus Branch from Waldo to Marin was appurtenant to the Passaic and Harsimus Branch at CP Waldo, not trackage off the River Branch somewhere else. City et al Reply at 10 n.7. All the relevant track charts showed a continuous Harsimus Branch from Marin (MP 1.3) through Waldo to Karny (MP 7). City et al also observed that the Harsimus Branch intersected an active line of railroad (National Docks Secondary) east of CP Waldo. City et al Reply at 11. Conrail has never heretofore claimed a severance.

valuation maps and Track Charts submitted, would not appear to have severed the Embankment trackage either, regardless of whether the trackage is considered part of the Passaic and Harsimus Branch [footnote omitted].” Slip op. at 6-7.

To be sure, that Decision was vacated on grounds the Board lacked jurisdiction until the U.S.D.C. for D.C. (d/b/a Special Court) found that the property was conveyed to Conrail as a line of railroad subject to STB abandonment jurisdiction. But the LLCs (in another one of their many flip flops) stipulated that the line was so conveyed as a line, the U.S.D.C. for D.C. so found over their objection on summary judgment, the D.C. Circuit over their objection summarily reaffirmed summary judgment. The mandate issued in April 2014. The LLCs should not be permitted to re-litigate an issue they lost, because they initially prevailed on another issue which they later renounced, absent a showing of new evidence, changed circumstances, or material error.

2. This petition improperly seeks to evade reopening requirements. It is improper, duplicative, burdensome and unnecessary to allow the LLCs to develop a new record in a new proceeding on an issue that was fully litigated and resolved seven years ago. City et al should be spared the expense of compiling the record another time on what amounts to an extraordinarily late-filed petition to reopen. The LLCs’

severance contention rests on the 2002 River Line abandonment, which obviously pre-dated the F.D. 34818 proceeding. All the evidence and arguments presented by petitioners in F.D. 35825 could and should have been advanced in the F.D. 34818.

Accordingly, allowing the LLC's to advance this argument on severance in F.D. 35825 would improperly evade the restrictions of 49 U.S.C. 722(c) on reopening proceedings. Those restrictions protect parties such as City et al, as well as STB, from constant churning by entities like the LLCs. 49 U.S.C. 722(c) is appropriately applied here. The standard for reopening in 49 U.S.C. 722(c), like that for rehearing in 49 C.F.R. 1115.4, restricts reopening of proceedings to three grounds: new evidence, changed circumstances, and material error. Of course, rehearings normally must be requested within 30 days of a decision, and F.D. 35825 is therefore vastly out of time, which is why the law governing reopening here is 49 U.S.C. 722, which deals with reopening as opposed to timely rehearing requests. See Friends of Sierra Railroad v. ICC, 881 F.2d 663, 666 (9th Cir. 1989).

The LLCs do not identify any new evidence, changed circumstances, or material error in their Petition justifying even a timely rehearing, much less a request to reopen.

(a) Failure to show new evidence or changed circumstances. The LLCs certainly show no "new evidence." New

evidence for purposes of a rehearing or reopening has to be genuinely new. If it was "reasonably available to the parties before the [original] proceeding," then it "is not new evidence for purposes of the [rehearing] statute." Friends, supra, 881 F.2d at 667. The River Line abandonment was in 2002. The exhibits on which the LLCs now seek to rely relating to River Line all existed well before 2006, or amount to litigation affidavits relying on alleged facts that if relevant at all existed well before 2006. All this River Line evidence was "reasonably available" to the parties well before the 2006 proceedings in F.D. 34818. It is hardly new, and instead was "old" even when the LLCs brought up the issue in their first rehearing petition filed August 19, 2007, not to mention now. It is very old now.

As noted above, in F.D. 34818, this Board considered and specifically rejected the LLCs' argument that the River Line abandonment caused a severance in its Decision in F.D. 34818, served December 19, 2007, and that decision must be treated as law of the case.

Under these circumstances, purported evidence like the new litigation declaration on the severance issue offered by their substitute attorney does not constitute "new" evidence or changed circumstances that would justify rehearing. New arguments do not change old evidence into new. Nor are exhibits

from 2002 somehow "new." For the same reason that the LLCs show no new evidence, they show no relevant "changed circumstances" since 2006. The situation in respect to the River Line has not changed between 2006 and 2014. In any event, City et al have not found the words "new evidence," or "changed circumstances," in the entire F.D. 35825 Petition, and it clearly fails to show any.

(b) No showing of error, let alone material error.

Since there is no new evidence or changed circumstance germane here since the 2006 proceedings, whatever is left of the F.D. 35825 petition/untimely reopening request is a claim that this Board should revisit its rejection of the LLCs' severance argument on grounds of material error. But the LLCs do not identify any error, much less material error, in the Board's earlier decision on the issue. They do not even discuss the earlier decision (other than assert it vacated on jurisdictional grounds they had raised but then later renounced), much less use the term "material error." The Board should deny the out-of-time petition for rehearing/reopening on the ground it simply re-raises an old issue and fails to show material error. As City et al said before, the track charts and maps show an interconnection of the River Line to the Harsimus Branch at Waldo, not that a portion of the Harsimus Branch went into the

River shy of Waldo, and then re-emerged at Waldo. CP Waldo was simply where River intersected with the through line (Harsimus).

The LLCs own documents belie any claim they would make of error, much less material error. The LLCs acknowledge (Petition at p. 2) that the River Line abandonment proceeding [AB 167 (sub-no. 1067N)] was pursuant to 49 U.S.C. 748. That provision sets forth a "unique, expedited" procedure for Conrail to abandon lines for which Conrail filed a Notice of Insufficient Revenue (NIR) prior to November 1, 1985 (previously November 1, 1983, but later extended). According to the decision served January 17, 2002, in AB 167 (sub-no. 1067N), slip op. at p. 1 n.2, Conrail filed a NIR for the River Line on October 31, 1985. But Conrail never filed a NIR for the Harsimus, nor do the LLCs claim otherwise.

Moreover, the only economic analysis that the LLCs attach to their Petition in F.D. 35825 that is germane to whether a NIR may be filed is Conrail's 1985 economic analysis of the portion of the Harsimus Branch at issue in F.D. 34818. That analysis is set forth in the LLCs' Petition as Exhibit I. It shows that Conrail was making a \$1,000,000 (one million) profit on the portion of the Harsimus Branch at issue in this proceeding for 1984. The line obviously did not have "insufficient revenue." That presumably is why Conrail never filed a NIR for it. Interestingly, Petitioners in F.D. 35825 also file as Exhibit J

another old Conrail document dated January 15, 1988, with a January 14, 1988 attachment (these documents are part of the record in F.D. 34818), showing that Conrail was still generating over a half million in profit on the Harsimus Branch in 1986. Conrail even states in Exhibit J that the line did not yet qualify for expedited abandonment procedures.

In short, the LLCs' own exhibits show that the Harsimus Branch was not part of the River Line abandonment, and indeed, did not qualify for any expedited proceedings under 49 U.S.C. 748 prior to the NIR deadline. This analysis of course corroborates this Board's ruling served December 17, 2007, that the River Line abandonment did not sever the Harsimus Branch, and that the property was part of a line of railroad requiring an abandonment authorization from this agency.⁸

When resisting the LLCs severance claims at in U.S.D.C. for D.C. No. 09-1900, City et al also confirmed in a Declaration (by Naomi Hsu) that Conrail still owns all of the allegedly severed property (i.e., the Waldo connection area).⁹ If a railroad still

⁸ Petitioners' Exhibit I is dated January 28, 1985. It is not new evidence, or even newly discovered evidence. City et al obtained it in discovery against Conrail in 2006 and filed it in F.D. 34818 in support of the fact that the Harsimus Branch was a line of railroad. Similarly, Exhibit J is not new evidence but was filed in F.D. 34818.

⁹ See Declaration of Naomi Hsu, at p. 2 para 3, attached hereto as Exhibit B, and originally Ex. A (Document 84-1 in the record) to City et al's Reply in support of Renewed Motion for Summary Judgment in U.S.D.C. for D.C. No. 09-1900.

owns enough land for a connection, under STB precedent there is no severance. BN RR Co. - Ab Ex. - between Klickitat and Goldendale, AB 6 (Sub no. 335X), served June 8, 2005, slip at 3.

Moreover, the connection can be via another rail line (even if owned by another entity),¹⁰ and here the Hsu Declaration also confirms that the relevant portion of the Harsimus crosses the active National Docks line (a Conrail property) between Marin and Waldo. Exhibit B para 2 (and survey). In short, the LLCs show no error, let alone material error, in this Board's earlier determination that there was no severance. Under this Board's precedent, the LLCs simply cannot prevail on this issue.¹¹ The entire F.D. 35825 petition should be summarily denied.

¹⁰ See Norfolk & Western Rwy Co - Ab. Ex. - between Kokomo and Rochester, AB 290 (Sub-no. 168), served May 4, 2005, slip at 8.

¹¹ The LLCs present a litigation declaration by their counsel Horgan and other evidence purporting to show that the Harsimus Branch connected to the Harsimus Branch at CP Waldo only over a portion of the River Line. But the LLCs admit that Conrail engaged in an illegal de facto abandonment of the Harsimus Branch, including tearing out track and structures "in the mid-1990's" (F.D. 35825 Petition at p. 6). Since the Harsimus trackage was (illegally) removed, the subsequent configuration of track observed by the LLCs in their litigation declarations is neither new nor relevant. In any event, as the Hsu Declaration shows, it is still owned by Conrail, so no severance. As a matter of further explanation, CP Waldo stands for "control point Waldo." A control point is an interlocking (or sometimes the location of a track signal or other marker a dispatcher might use for controlling trains). An "interlocking" is a place where two tracks switch or cross. See Wikipedia "Glossary of rail transport terms." River Line was simply abandoned to wherever it connected the Harsimus. The Conrail track chart for 1980 filed with City et al's Petition in F.D. 34818 in January 2006 shows Harsimus Branch as MP 1.3 (Henderson

In addition to all the state court litigation, including SLAPP suits filed by the LLCs against City et al and the undersigned, the issue of the Harsimus Branch has now been litigated in the United States Court of Appeals three times due to the machinations of the LLCs and Conrail. If the Harsimus Branch has to go there a fourth time in this new attempt by the LLCs to rehash old arguments long ago dispositively resolved against them, then it should go up in a fashion that is not subject to judicial review.

The Board should deny any remnant of F.D. 35825 not dismissed as an improper adverse abandonment procedure on the ground that the remnant of F.D. 35825 is an out-of-time petition for rehearing/reopening on the ground that it fails to show material error. Under ICC v. BLE, 482 U.S. 270, 278-80 (1987), and Friends, supra, STB orders denying rehearing are not reviewable in the Court of Appeals except where the request for rehearing was based on new evidence or changed circumstances. The Board should make clear that the LLCs request here was not based on new evidence or changed circumstance, and instead was

St., now Marin Boulevard) to MP 7.0 (near "Karny"), with River Line coming into the Harsimus Branch ("interlocking") in the area of CP Waldo (approximately MP 2.5). Similar track charts (including one for Penn Central dated 1975) showing the same thing were also filed in F.D. 34818. Abandoning the River Line to its point of intersection with Harsimus does not encompass the Harsimus, but only the River Line until it reaches the Harsimus.

apparently filed in a separate docket rather than as a petition to reopen solely to get around the ICC v. BLE preclusion of judicial review for denials of petitions seeking reconsideration on grounds of material error.

3. This Board should not use exemption procedures to promote what the proponent elsewhere declares to be fraudulent misrepresentations. The aberrant and inappropriate petition filed by the LLCs is clearly an attempt by the LLC's to deflect attention away from the pending abandonment proceeding, which is the proceeding deserving of this Board's attention. Since the mandate from the Court of Appeals has issued confirming finality in the judgment that this Board has abandonment jurisdiction, Conrail's notice of exemption proceeding in AB 167 (Sub-no. 1189X) must be brought out of abeyance.

If brought out of abeyance, there is now a clear question whether this Board may even lawfully approve the abandonment requested by Conrail in that case. The LLCs appear to admit that Conrail has engaged in an illegal de facto abandonment, including the removal of track in the early 1990's. As part of this illegal de facto abandonment, Conrail prior to 1999 sought to realize maximum commercial value from the Branch by selling it to the Jersey City Redevelopment Authority for resale to developers.

However, the Harsimus Branch was listed on the State Register for Historic Places in 2000 over the Conrail president's protest that this would interfere with sales to developers via Jersey City's redevelopment agency.¹² Consonant with its view that historic preservation regulation was detrimental to maximizing its profit, Conrail elected to work with developers directly, rather than with parties (including Jersey City) interested in acquiring the Branch for purposes consistent with historic preservation.

In order to avoid dealing with preferential purchase mechanisms available to the City in such situations under STB abandonment regulation, Conrail sought to bypass that regulation entirely. Indeed, Conrail's chosen developer (the LLCs) now complains that Conrail made fraudulent misrepresentations to them relating to this agency's abandonment jurisdiction for the railroad's pecuniary gain.¹³

Further, the LLCs say the fraudulent representations were made not only to them, but also to the City, to this agency and

¹² Letter, Conrail President O'Toole to NJ SHP Office Administrator Guzzo, June 4, 1999 (Conrail objection that history regulation reduces property value); Letter, Guzzo to Conrail, Jan. 25, 2000 (stating that municipalities and their agencies cannot alter Harsimus Embankment without approval from the Commissioner of the Department of Environmental Protection since the Embankment was listed on the State Register as of Dec. 29, 1999). Both letters are attached as Exhibit D.

¹³Exhibit C para 137 & 140.

to the Courts concerning the Harsimus Branch.¹⁴ The LLCs also state that Conrail further induced them to rely on the railroad's "false and misleading" representations concerning the Harsimus Branch by entering into an agreement with them in which the railroad "promised ... that it would take all necessary steps to protect [the LLCs'] interests in their titles in their properties."¹⁵ In response, Conrail has indicated to this agency that the LLCs were complicit in, or indeed the authors of, much of what they now admit is fraudulent.¹⁶ In short, the LLCs and Conrail between them now acknowledge a previously secret written agreement requiring their complicity in what the

¹⁴ See Exhibit C, excerpts of proposed amended answer in USDC for DC No. 09-1900, document 87, as filed by City et al in AB 167 (Sub-no. 1189X) on Nov. 22, 2013. The LLCs allude to Conrail's fraudulent representations to the City at inter alia paragraphs 128 & 133. The LLCs allude to Conrail's fraudulent representations to STB at paragraphs 135 - 140.

¹⁵ Exhibit C para 133. The agreement referenced in paragraph 133 was apparently filed by the LLCs as Document 94-3 on November 8, 2012, in U.S.D.C. for D.C. 09-1900, and is dated in 2007. It appears to propose a cover up rather than compliance with the law. City et al are seeking discovery from Conrail about that document, documents relating to it, and other matters raised by Conrail or the LLCs in connection with that document.

¹⁶ Conrail in filing an opposition to lifting the stay in AB 167 (Sub-no. 1189x), dated December 11, 2013, denied that it had committed fraud on the LLCs on the ground that they knew the relevant facts at the relevant times, and indeed had made the representations of which they now complain themselves. Conrail paper at p. 3 & n. 3. Conrail supplied this agency with its opposition to the LLCs' allegations, filed as document 89 in USDC for DC 09-1900, further detailing its allegations against the LLCs.

LLCs now acknowledge were misrepresentations to City, STB and the courts about the regulatory status of this property. See note 11.

The LLCs upon obtaining the rail line immediately sought to demolish the historic Harsimus Embankment. Conrail joined in the requests for demolition permits. Rather than seek to comply with the law, the developer still maneuvers to avoid abandonment regulation, while seeking to destroy the Embankment. The manager of the LLCs recently offered to donate the Embankment to Hoboken for use as fill for flood control.

The entire sale was an illegal (the LLCs say fraudulent) attempt at an end-run around STB regulation including historic preservation of the Embankment, and the effort at an end-run continues. Conrail's chosen business partner in all this, the LLCs, state that the motivation for the illegal de facto abandonment was to secure more profit,¹⁷ and the contrived litigation since this Board's initial decision in F.D. 34818 in July 2007 was evidently part of an agreement to cover up the illegal de facto abandonment to that end.¹⁸ The Petition in F.D. 35825 is simply more of the same.

Given this Board's statement in Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other

¹⁷ Exhibit C para 140.

¹⁸ Exhibit C para 133.

Environmental Conditions, STB Ex Parte No. 678, served April 23, 2008, indicating that abandonment exemption procedures may be inappropriate when a railroad engages in such conduct, the Board should require Conrail to use application procedures, just as it must so require of the LLCs. No one should be allowed use of an STB exemption to accomplish what they or their chosen business partners tell the world in pleadings filed in the U.S.D.C. for D.C. is a fraud. But the main question must be how to provide meaningful relief to the City, RTC and Coalition against the adverse impacts to them from the illegal sale and continued efforts at cover up. That is better discussed in a valid abandonment proceeding.

IV. Contingent Relief and Other Matters

If the entire F.D. 35825 Petition is not dismissed and/or denied per the above in its entirety, then City et al request this Board to establish a briefing schedule for submission of a reply by interested parties to whatever is left of the petition.

The final sentence in the LLCs' Petition is garbled in the text sent City et al, but appears to say that the LLCs want "full discovery" if anyone raises factual issues.¹⁹ The LLCs are basically seeking to reopen a proceeding (F.D. 34818) seven years after it was originally concluded. The issues in 34818

¹⁹ Petition p. 32.

were the same. The LLCs had, or could have had, as much discovery as they wanted in 2006. They need none now, especially since they have inundated City with OPRA discovery under state law since.

The LLCs have a long history of using litigation tactics to harass, delay, and deflect the parties from addressing the merits of what now has been conclusively determined Conrail's illegal sale of the Harsimus Branch. They should not be permitted to use this meritless Petition as an excuse for a duplicative fishing expedition. If they wish discovery, the proper venue is in AB 167 (Sub-no. 1189X) anyway. No additional discovery by the LLCs is necessary to dispose of the LLCs' inappropriate and meritless petition on one or more of the purely legal grounds set forth above.

V. Conclusion

F.D. 35825 should be dismissed as the wrong procedure for obtaining an abandonment determination. To the extent not fully dismissed, any remnant should be consolidated with F.D. 34818, treated as a petition for rehearing/reopening on grounds of material error, and denied for failure to show material error. There could be no severance of the Harsimus Branch by the River Line abandonment as a matter of law because, among other things, the documents supplied by the LLCs (which were also filed by City et al in F.D. 34818) show that Harsimus did not even

qualify for the 49 U.S.C. 748 procedures used for the River Line at any time relevant to the use of such procedures. Any remnant of F.D. 35825 accordingly should be summarily denied on the merits if not dealt with per the above.

Respectfully submitted,

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Attachments:

Exhibit A - Decision in F.D. 34818, served Dec. 19, 2007
Exhibit B - Naomi Hsu Declaration, document 84-1, in U.S.D.C. for D.C. 09-1900
Exhibit C - LLCs' allegations of fraud by Conrail, excerpts of Document 87 in U.S.D.C. for D.C. 09-1900, as filed in AB 167 (Sub-no. 1189X) on 22 Nov. 2013
Exhibit D - Letters, O'Toole to Guzzo, June 4, 1999; Guzzo to Conrail, Jan. 25, 2000.

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this 21st day of May 2014 addressed to Daniel Horgan, counsel for the LLCs, Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096; and Robert M. Jenkins III, counsel for Conrail, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006-1101.



A handwritten signature in black ink, appearing to be "C. Horgan", is written over a horizontal line.

EXHIBIT A

DECISION IN F.D. 34818, SERVED DEC. 19, 2007

38359
EB

SERVICE DATE – DECEMBER 19, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION,
AND NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO—
PETITION FOR DECLARATORY ORDER

Decided: December 17, 2007

In this decision, we are denying a petition for reconsideration of our decision in this declaratory order proceeding that was served on August 9, 2007 (the August 2007 Decision).¹

BACKGROUND

In this proceeding, the City of Jersey City, NJ (City), the Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Coalition, and State Assemblyman Louis M. Manzo (collectively, petitioners) asked us to determine whether Consolidated Rail Corporation (Conrail) needed prior Board authorization to abandon trackage known as the Sixth Street Embankment (Embankment), extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ. Conrail had recently sold the Embankment to a group of limited liability companies referred to collectively by petitioners (in their filings) and the Board (in the August 2007 Decision) as SLH Properties (SLH)² for development as residential housing without obtaining abandonment authority from the Board.

The Embankment is part of a rail line known as the Harsimus Branch, which was constructed by the United New Jersey Railroad and Canal Company (UNJRCC) and leased to the former Pennsylvania Railroad Company (PRR) together with other UNJRCC-owned lines. The

¹ Petitions for judicial review of the August 2007 Decision have been filed in 212 Marin, LLC et al. v. STB, No. 07-1397 (D.C. Cir. filed Oct. 2, 2007) and Conrail v. STB, No. 07-1401 (D.C. Cir. filed Oct. 4, 2007).

² SLH consists of 212 Marin Boulevard, L.L.C.; 247 Manila Avenue, L.L.C.; 280 Erie Street, L.L.C.; 317 Jersey Avenue, L.L.C.; 354 Coles Street, L.L.C.; 389 Monmouth Street, L.L.C.; 415 Brunswick Street, L.L.C.; and 446 Newark Avenue, L.L.C. By decision served January 24, 2006, SLH was granted leave to intervene in this proceeding.

UNJRCC main line ran between Newark, NJ, and Exchange Place, in Jersey City near the Hudson River. The Harsimus Branch connected with the UNJRCC main line at Waldo Avenue and continued over the Embankment into Harsimus Cove Yard on the Hudson River. PRR used the Harsimus Branch as part of that carrier's main freight route between the Midwest and Harsimus Cove Yard.

As we noted in our August 2007 Decision, the Harsimus Cove Yard contained coal piers, warehouses, grain elevators, stockyards, and other facilities that were used to handle rail-marine traffic. The yard also had piers and float bridges to serve lighters and car floats to transfer cargo to vessels in the harbor and to piers and yards in Manhattan and Brooklyn and for through movement to other Northeast destinations. In addition, local shippers were served from trackage in Harsimus Cove Yard.

During the 1950's and 1960's rail service at Harsimus Cove Yard began to decline. PRR was subsequently merged into the Penn Central Transportation Company (Penn Central) on February 1, 1968.³ Penn Central relocated much of the rail-marine traffic from Harsimus Cove Yard to Penn Central's Greenville facility located several miles to the south, and by the 1970's, parts of the yard were no longer used for rail service.

Penn Central declared bankruptcy in 1970, along with seven other railroads in the Northeast.⁴ In response, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (3R Act). The 3R Act established the United States Railway Association (USRA) to prepare a plan for restructuring the railroads in reorganization into a financially viable, self-sustaining rail system that ultimately became Conrail.

USRA issued its Final System Plan (FSP) on July 26, 1975, describing "rail properties" of the railroads in reorganization that would be conveyed to Conrail. Page 272 of the FSP listed UNJRCC properties to be transferred to Conrail. Included on the list was "Line Code 1420," described as the Harsimus Branch, running between milepost 1.0 in Jersey City and milepost 7.0 at Harrison, NJ. The FSP indicated that yards, spur tracks, and other ancillary facilities associated with the rail lines designated to be acquired by Conrail would be conveyed automatically unless the FSP provided otherwise. Page 262 of the FSP indicated that portions of the Harsimus Cove Yard were also transferred to Conrail.

³ See Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 (1966) (Penn Central Merger).

⁴ The other bankrupt railroads were: The Reading Co., The Erie Lackawanna Railroad Company, Lehigh Valley Railroad Company, Boston & Maine Corp., Ann Arbor Railroad Co., Lehigh & Hudson River Railroad Company, and Central of New Jersey Railroad Company. The Penn Central bankruptcy included the UNJRCC, as a lessor of Penn Central lines.

The property constituting Line Code 1420 was conveyed to Conrail by deed from Fairfax Leary, Trustee of the property of the UNJRCC, dated March 31, 1976.⁵ Exhibit A to the deed described the relevant property that was conveyed as follows:

Situate in the County of Hudson, State of New Jersey, and being The United New Jersey Railroad and Canal Company's line of railroad known as the Penn Central Harsimus Branch and being all the real estate property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Harsimus Cove, passes through Journal Square, and terminates in the County near the junction with the Penn Central New York-Philadelphia Main Line, west of the New Jersey Turnpike Overhead Bridge.

The line of railroad described herein is identified as Line Code 1420 in the records of the United States Railway Association.

On April 1, 1976, Conrail began operating the rail system established in the FSP. It provided service to several shippers located on Hudson Street using the line identified as Line Code 1420, including the Embankment. According to the record, Conrail handled 3,204 cars for shippers on Hudson Street over a 1-year period ending in September 1984. Traffic declined to 637 cars in 1986. Conrail's last customer served by the line of railroad constituting Line Code 1420 was gone by 1992.

In our August 2007 Decision, we determined that Conrail had acquired the Embankment as a line of railroad under Line Code 1420 of the FSP, and that, as such, the Embankment remained subject to Federal abandonment regulation. We also determined that the Embankment property sold to SLH remains part of the national rail system subject to the Board's exclusive jurisdiction until appropriate abandonment authority is obtained.

On August 29, 2007, SLH filed a petition for reconsideration, asserting that the August 2007 Decision contains material error. Petitioners filed a joint reply on September 18, 2007.

⁵ The deed was submitted in Appendix XVI to petitioners' Opening Statement.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), a petition for reconsideration will be granted only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances or (2) involves material error. Here, SLH's petition asserts that our August 2007 Decision contains material error. However, SLH has not shown material error.

Evidence issues. SLH asserts that the Board improperly relied in part on materials outside the record (ICC decisions and Internet sources) in deciding that the Embankment was a line of railroad. However, as explained in the August 2007 Decision, at 8-9, although Conrail and SLH had claimed that Line Code 1420 referred to the "UNJRCC main line" and that the Harsimus Branch was ancillary track that was transferred along with the UNJRCC main line, neither Conrail nor SLH had presented evidence demonstrating where the "UNJRCC main line" was located. Therefore, we properly considered the valuation maps⁶—which are a matter of public record maintained by the Board—and the Track Charts submitted by the parties in determining that the portion of the UNJRCC line that ran on "Railroad Avenue" between Brunswick Street and Exchange Place had been marked as being "sold," prior to the enactment of the 3R Act, meaning that it was excluded from property conveyed to Conrail. We also took official notice of facts contained in relevant ICC decisions that confirm that what petitioners refer to as the UNJRCC main line could not have been the line of railroad transferred to Conrail in 1976 under Line Code 1420, because it had previously been abandoned pursuant to authority granted by the ICC and apparently was used by PRR only for passenger commuter service. See, e.g., United New Jersey R. & Canal Co. Abandonment, 312 I.C.C. 529 (1961) (UNJRCC Abandonment).

SLH argues that we should have provided a true copy of the relevant portions of the ICC's published decision in UNJRCC Abandonment under 49 CFR 1114.5 and 49 CFR 1114.6. But those regulations apply to the use of official records and materials from other Board or ICC proceedings, not to Board or ICC decisions themselves. We may take official notice of this agency's decisions and the facts contained in those decisions.

We cited the Internet sources in our August 2007 Decision to confirm that the line authorized for abandonment in UNJRCC Abandonment was indeed abandoned before it could have been transferred to Conrail. Those sources merely contain historical accounts showing that

⁶ The ICC had been required by the Valuation Act of 1913, Pub. L. No. 62-400, 37 Stat. 701, to establish the value of all property owned or used by railroads subject to its jurisdiction. The statute required each rail carrier to prepare maps to assist the ICC in valuing its property. See former 49 U.S.C. 10781 et seq. (1995). The valuation maps submitted in this proceeding were prepared after detailed surveys during 1915-1920 and were part of the ICC's valuation of the PRR, including UNJRCC, that was published in Pennsylvania R. Co., 22 Val. Rep. 1 (1929).

in the late 1960's the City acquired the elevated structure that carried the UNJRCC line that ran between Brunswick Street and Exchange Place and dismantled it. One source is published by New Jersey City University as part of its Jersey City: Past and Present website.⁷ The other source, which is part of a website containing historical and operating information about the New York City subway system, details the history of the passenger commuter service in Jersey City that had been provided by PRR and the Hudson and Manhattan Railroad Company, and now by the Port Authority Trans-Hudson Corp. (PATH).⁸ And it corroborates the information contained in the New Jersey City University website.

In its petition for reconsideration, SLH does not dispute the accuracy of the materials we cited. That information is sufficiently reliable and probative for us to have considered these sources as part of our analysis of the status of the Embankment. These sources are easily obtainable, and their factual content regarding dismantling the line on which SLH relies as being the UNJRCC main line is readily verifiable.

SLH also questions our decision to include the internet citation for a portion of the valuation of UNJRCC-owned lines that was part of the ICC's valuation of the PRR. However, because the ICC's valuation reports, which were issued primarily in the 1920's, are not widely available to the public, we cited to the internet version of the part of the ICC's valuation report pertaining to UNJRCC simply as a convenience to the parties and the public. SLH has failed to demonstrate how that assistance constituted material error.

SLH also has raised competency objections to the Board's reliance on a Verified Statement by Richard James and historic preservation materials that were submitted as Exhibits E and I to the Petition for Declaratory Order. But SLH did not object to these exhibits in its response to the Petition for Declaratory Order or any other filing it submitted to the Board prior to the issuance of the August 2007 Decision. And the information provided in these materials satisfies our admissibility requirements at 49 CFR 114.1 and has enabled the Board, and subsequently the public, to better understand the physical description and history of the Embankment. Again, SLH has failed to demonstrate material error in our consideration of that evidence.

Location of Line Code 1420. Next, SLH asserts that the August 2007 Decision does not identify where Line Code 1420 is located, citing conflicting milepost numbers for the subject track. In support of its position that the Embankment was part of ancillary track that is excepted

⁷ New Jersey City University, Jersey City Past and Present, Exchange Place, http://www.njcu.edu/programs/jchistory/Pages/E_pages/Exchange_Place.htm (last visited Nov. 20, 2007).

⁸ New York City Subway Resources, Path/Hudson & Manhattan RR, <http://www.nycsubway.org/nyc/path> (last visited Nov. 20, 2007).

from entry and exit regulation under 49 U.S.C. 10906 (formerly 49 U.S.C. 10907(b)), SLH points out that there is no record of any abandonment proceeding involving the portion of Line Code 1420 that extends from milepost 1.0 at the Hudson River to milepost 1.3 near Luis Munoz Marin Boulevard and submits aerial maps showing that the segment between milepost 1.0 and milepost 1.3 has been developed with commercial buildings.⁹

However, our August 2007 Decision properly identified where Line Code 1420 is located: from milepost 1 at the Hudson River to milepost 7 near Harrison.¹⁰ Thus, SLH has not shown that we materially erred in our determination that Line Code 1420 includes the Embankment trackage as a line of railroad.

Severance. SLH asserts that we did not consider whether the Embankment may have been lawfully severed from the national rail system by the abandonment of Conrail's River Line in Conrail Abandonment of the Weehawken Branch—in Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 766N), et al. (STB served Jan. 17, 2002) (Conrail Abandonment). In their response, petitioners note that Conrail's River Line connected to the Harsimus Branch at Waldo, but did not include any portion of the Harsimus Branch. Petitioners further point out that there is another active line of freight railroad that intersects with the Embankment portion of the line.

While not specifically addressed in our August 2007 Decision, we find that SLH has failed to show that the Embankment trackage has been lawfully severed from the national rail system. The Conrail Abandonment decision describes the River Line as extending from “the connection to the Passaic and Harsimus Branch at Controller Point (CP) ‘Waldo’ in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard.” While the River Line connected with what Conrail now calls the Passaic and Harsimus Branch at Waldo, the abandonment of the River Line would not have severed the Passaic and Harsimus Branch from other lines connecting to the national rail system,¹¹ and, based on all of the valuation maps and Track Charts submitted, would not appear

⁹ The aerial photographs—obtained from Google.com—purportedly show the current area around the Embankment. Petitioners object to these photographs, contending that they are cumulative of a photo that they submitted as Exhibit B to their Petition for Declaratory Order. We will accept the photographs submitted by SLH in the interest of a more complete record.

¹⁰ Regarding the segment between milepost 1.0 and milepost 1.3, petitioners point out that neither they nor anyone else have asked the Board to determine the status of that segment, and we have had no occasion to do so.

¹¹ As we noted in the August 2007 Decision, a Conrail Track Chart dated January 1982 showed the “Passaic and Harsimus Branch” as running west from milepost 0 at Waldo to milepost 9 near Kearny.

to have severed the Embankment trackage either, regardless of whether the trackage is considered part of the Passaic and Harsimus Branch.¹²

City's position. SLH asserts that the City's position that STB abandonment authority is required here is inconsistent with its active support for redeveloping the Harsimus Cove area for residential and commercial uses. But the issue of whether there is any inconsistency in the City's positions is immaterial to whether the Embankment is a line of railroad subject to federal abandonment regulation. In any event, as petitioners point out in their response, local governments and planning agencies frequently ask railroads to participate in redevelopment or joint use projects with the understanding that the railroad will obtain appropriate authorization from the Board, if necessary. The Board has authorized a number of abandonment proposals that were submitted by rail carriers to facilitate redevelopment projects.¹³ Support by a local government does not excuse the railroad from seeking abandonment authority prior to removal of a rail line from the national rail transportation system.

No legitimate purpose. SLH next argues that the Board should have refrained from declaring the Embankment to be a line of railroad when the property currently is not used for rail transportation purposes. However, as we noted in our August 2007 Decision, since 1976 Conrail has filed more than 1,100 abandonment proposals. Some of those proceedings have involved short segments of track that, like the Embankment, were no longer used for rail operations when abandonment authority was sought. Moreover, a line of railroad does not cease to be a line of railroad simply as a result of non-use. See The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991). In short, as we explained in our prior decision, Conrail acquired the Embankment as a line of railroad under Line Code 1420 of the FSP. Thus, the Embankment is subject to federal abandonment regulation, and the Embankment property sold to SLH remains

¹² We note that SLH, in its reply filed April 24, 2006, at 4, primarily relied on the sale of the Waldo Avenue Yard to PATH in questioning whether the Embankment could effectively connect to the national rail system. Waldo Avenue Yard, however, is located south of the Harsimus Branch and its sale would not have severed the Embankment from the national rail system.

¹³ See, e.g., The Kansas City Southern Railway Company—Abandonment Exemption in Jackson County, MO, STB Docket No. AB-103 (Sub-No. 17X) (STB served July 27, 2004); Union Pacific Railroad Company—Abandonment Exemption—in Merced County, CA, STB Docket No. AB-33 (Sub-No. 179X) (STB served Sept. 7, 2001); Fox Valley & Western LTD—Abandonment Exemption—in Fond Du Lac and Washington Counties, WI, STB Docket No. AB-402 (Sub-No. 7X) (STB served Jan. 31, 2000); and Norfolk and Western Railway Company—Abandonment Exemption—in Cincinnati, Hamilton County, OH, STB Docket No. AB--290 (Sub-No. 184X) (STB served May 13, 1998).

part of the national rail system subject to the Board's jurisdiction until abandonment authority is obtained and exercised.

Jurisdiction. Finally, SLH questions our jurisdiction to determine the status of Line Code 1420. It contends that the 3R Act authorized the Special Court, and later the United States District Court for the District of Columbia, to interpret orders conveying properties of bankrupt carriers to Conrail, citing 45 U.S.C. 719(e)(2).

Petitioners have asked the Board to determine whether Conrail is obligated to obtain Board authority to abandon the Embankment trackage. That determination falls within the Board's authority to administer Part A of Subtitle IV of Title 49 U.S.Code, including our exclusive authority over railroad abandonments in 49 U.S.C. 10903. In addition, the 3R Act expressly grants the Board authority over Conrail abandonments. 45 U.S.C. 744(g). And we have authority to issue declaratory orders to eliminate controversy or remove uncertainty. 5 U.S.C. 554(e); 49 U.S.C. 721. Thus, our determination to issue our August 2007 Decision regarding the status of the Embankment is an appropriate exercise of the Board's authority.

In sum, SLH has not shown that our August 2007 Decision contained material error. Nor has SLH presented any other justification to warrant reconsideration of our prior decision. Accordingly, we will deny SLH's petition for reconsideration.

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

It is ordered:

1. Petitioners' request to strike aerial photographs submitted by SLH is denied.
2. SLH's petition for reconsideration is denied.
3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

EXHIBIT B

NAOMI HSU DECLARATION IN U.S.D.C. D.C. 09-1900

SHOWING NO POSSIBILITY OF SEVERANCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF JERSEY CITY,)
RAILS TO TRAILS CONSERVANCY, and)
PENNSYLVANIA RAILROAD HARSIMUS)
STEM EMBANKMENT PRESERVATION)
COALITION,)
Plaintiffs)
) C.A. No. 09-1900 (CKK)
v.)
)
CONSOLIDATED RAIL CORPORATION,)
Defendant,)
and)
212 MARIN BOULEVARD, LLC, et al.,)
Intervenor-defendants.)

REPLY MEMORANDUM IN SUPPORT OF RENEWED
MOTION FOR SUMMARY JUDGMENT
ON BEHALF OF
CITY OF JERSEY CITY,
RAILS TO TRAILS CONSERVANCY, and
PENNSYLVANIA RAILROAD HARSIMUS STEM
EMBANKMENT PRESERVATION COALITION

Exhibit A: Declaration of Naomi Hsu

In the United States District Court
for the District of Columbia

City of Jersey City,)	
Rails to Trails Conservancy, and)	
Pennsylvania Railroad Harsimus Stem)	
Embankment Preservation Coalition,)	
Plaintiffs)	1:09-cv-01900-CKK
v.)	
Consolidated Rail Corporation,)	
Defendant.)	

DECLARATION of NAOMI HSU

I, NAOMI HSU, make this Declaration under penalties of perjury in support of the Renewed Motion for Summary Judgment filed by plaintiffs Jersey City, et al, in the above referenced Proceeding, and in particular in reply to suggestions that the Harsimus Branch is somehow "severed" from Conrail's lines at or east of Waldo by reason of lack of ownership of underlying properties.

1. I am the Senior Transportation Planner within the Division of City Planning of the government of the City of Jersey City. I earned a Master of City Planning from the University of Pennsylvania in 2004. I am a certified planner by the American Institute of Certified Planners and a licensed Professional Planner by the State of New Jersey.

2. The gravamen of my job for the City of Jersey City is to manage and participate in the development and implementation of transportation plans for the City of Jersey City. In this role, I assist in identifying necessary or prudent improvements to transportation facilities, including pedestrian, bicycle, rail transit, bus transit, and road infrastructure, to increase mobility for residents and visitors to Jersey City and to eliminate or alleviate congestion and/or safety hazards. On September 11, 2012, as part of my job, I received at a meeting from representatives of

Consolidated Rail Corporation (Conrail) a survey prepared by James C. Weed for Conrail for Conrail's so-called Palisades property, which includes the extension of the so-called Harsimus Branch from where it goes under the New Jersey Turnpike Extension (represented in the survey as the "New Jersey Turnpike") westerly to a terminus with the Conrail mainline. This property also includes a segment of the National Docks Secondary rail line, which is currently in active rail operation. This property also includes a segment of the former River Line. A true and correct copy, reduced in size only, of that survey is attached hereto in three pages.

3. The first page (inscribed in the lower right hand corner as 1 of 3) shows the location of the old abutments for the trestle that carried the trackage of the Harsimus Branch under the Turnpike Extension from the Sixth Street (or Harsimus) Embankment up to grade near Waldo. The survey shows where the Harsimus Branch crosses the active National Docks Secondary trackage (the rail line indicated by track symbology running horizontally) and a remnant of the connection of Conrail's former River Line to Waldo, which also crossed the National Docks Secondary on a bridge still in place. As indicated in the survey and by such other information as is available to me, the final configuration of the connection of the River Line to the Conrail trackage at Waldo appears to converge with the Harsimus Branch in the vicinity of Waldo, where both lines would presumably have joined with other Conrail trackage, still in place. On the basis of Mr. Weed's survey for Conrail, Conrail's representations to the City, and all other relevant information available to me, Conrail continues to own all the property necessary for railroad purposes between (a) Waldo and (b) that property beginning at approximately the Turnpike Extension that Conrail purported to sell to certain Limited Liability Corporations in 2005 without abandonment or other authorization from the Surface Transportation Board and concerning which City of Jersey City has been pursuing federal railroad law remedies basically since that sale. In particular, page one of

three of the survey indicates that Conrail continues to own the portion of the former River Line which is parallel to (or in any sense overlaps) the Harsimus Branch. The survey thus shows no discontinuities in ownership by Conrail of the relevant parcels from Waldo up to the properties on the Harsimus Branch purportedly sold to the Limited Liability Corporations in 2005.

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

Wmami Hm

Executed on 9/12/12.

Attachment (true and correct copy of referenced survey)

EXHIBIT C

LLCS' ALLEGATIONS OF FRAUD BY CONRAIL

EXCERPTS FROM DOC. 87 IN U.S.D.C. for D.C. 09-1900

AS FILED IN AB 167 (SUB-NO. 1189X) on 22 NOV. 2013

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITY OF JERSEY CITY,)	
RAILS TO TRAILS CONSERVANCY, and)	
PENNSYLVANIA RAILROAD HARSIMUS STEM)	
EMBANKMENT PRESERVATION COALITION,)	Civil Action No.
)	09-cv-1900 (CKK)
Plaintiffs,)	
)	
v.)	
)	
CONSOLIDATED RAIL CORPORATION,)	
)	
Defendant,)	
)	
and)	
)	
212 MARIN BOULEVARD, LLC;)	
247 MANILA AVENUE, LLC;)	
280 ERIE STREET, LLC;)	
317 JERSEY AVENUE, LLC;)	
354 COLES STREET, LLC;)	
389 MONMOUTH STREET, LLC;)	
415 BRUNSWICK STREET, LLC; and)	
446 NEWARK AVENUE, LLC,)	
)	
PAULA T. DOW, ATTORNEY GENERAL, STATE)	
OF NEW JERSEY)	
)	
Intervenor-Defendants.)	

AMENDED ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS, CROSS-CLAIMS, AND JURY DEMAND

212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC (collectively, the “LLCs”), by and through their undersigned counsel, hereby make this Amended Answer to the Complaint for Declaratory and Injunctive Relief (the “Complaint”) of Plaintiffs City of Jersey City (the “City”), Rails to Trails

COUNT III

PREEMPTION

112. The LLCs repeat the allegations contained in Paragraphs 1 through 111 as if set forth at length herein.

113. The Plaintiffs have alleged they are entitled to invoke the remedies available under N.J. Stat. 48:12-125.1, which provides that a railroad must first offer former regulated railroad assets for sale to New Jersey state governmental bodies, including the State, its agencies, counties, and municipalities, such as the City.

114. N.J. Stat. 48:12-125.1 violates the exclusive jurisdiction of the STB to set conditions on abandonment and post-abandonment conditions, and is preempted by federal law and this Court's original and exclusive jurisdiction to interpret, alter, amend, or modify the FSP.

WHEREFORE, the LLCs demand judgment as follows:

- A. Declaratory judgment of this Court that N.J. Stat. 48:12-125.1 is preempted by federal law; and
- B. Such other relief as the Court deems equitable and just.

CROSS-CLAIMS AGAINST CONRAIL

COUNT IV

FRAUD

115. The LLCs repeat the allegations contained in Paragraphs 1 through 114 as if set forth at length herein.

116. Conrail was created by Congress pursuant to the 3-R Act in 1973 to take ownership of railroad assets of eight bankrupt railroad companies and to operate rail service along those assets.

117. The USRA was created to determine which assets of the bankrupt railroads should be transferred to Conrail. In 1975, USRA released the FSP, which identified which assets should be transferred to Conrail. The FSP listed lines of rail that were to be transferred to Conrail which lines of rail included additional properties ancillary to those lines, such as spurs, yards, and side tracks, but not specifically identified.

118. The Special Court approved the FSP on April 1, 1976, and the trustee in the bankruptcy matter transferred the assets to Conrail by deeds.

119. Among the many assets transferred to Conrail were two lines that were identified as Line Code 1420 (Harsimus Branch) and Line Code 1440 (Hudson Street Branch). Both Line Code 1420 and Line Code 1440 were transferred as lines of rail, subject to STB (then, the ICC) jurisdiction.

120. Conrail operated these lines of rail for many years subsequent to 1976 until its remaining customers left and the nature of the area changed such that rail freight service was no longer required, feasible or foreseeable.

121. Conrail is required to operate consistent with federal law, including STB regulations.

122. In the 1980's and 1990's, Conrail, in cooperation with the City's redevelopment plans, sold portions of Line Code 1420 east of Marin Boulevard, and either sold, or relinquished to the City and NJ Transit for use of light rail, the entire 1.3 mile length of Line Code 1440.

123. Conrail did not seek STB abandonment authority prior to selling or abandoning those assets.

124. Conrail also ended rail service in downtown Jersey City, in part due to requests from the City, and demolished cross-bridges connecting the segments of the Embankment and tore up tracks and ties. Conrail allowed the City to demolish the bridge connecting the Embankment at Marin Boulevard. Conrail did not seek or obtain STB abandonment authority before ending rail service and removing the railroad improvements.

125. After the installation of the Marion Junction in 1994, Conrail did not use the Harsimus Branch for any purpose. Upon information and belief, Conrail did not (and could not due to the absence of tracks, bridges, trestles, and signals) operate trains along the Harsimus Branch or the old Pennsylvania Railroad main line east of Marion Junction after 1994 (the old Pennsylvania Railroad main line having been demolished and removed from Railroad Avenue in approximately 1964).

126. In 2003, when Conrail entered into a contract of sale with the LLCs, there were no properties still owned by Conrail east of the Embankment in downtown Jersey City that had formed part of Line Codes 1420 and 1440.

127. Conrail internally reclassified the Harsimus Branch as a spur in 1994 without approval by the STB.

128. Conrail, with fraudulent intent and at numerous times, misrepresented to the LLCs that the Embankment was a spur or other, non-regulated railroad improvement, which could be freely conveyed by Conrail without first obtaining abandonment authority from the STB. It also made similar representations to the City to further its sale of properties to the LLCs without the necessity of seeking STB abandonment authority.

129. Conrail made those misrepresentations, through its attorneys, and otherwise with the intent that the LLCs would rely on those statements. The LLCs did rely upon those statements to their detriment, incurring enormous costs, delays and loss of opportunities, as well as being subjected to the wrongful actions of the Plaintiffs.

130. Conrail was aware at the time it sold the Embankment to the LLCs that it had not sought abandonment authority for the Harsimus Branch and that if the Embankment was in fact a line, it would have placed the LLCs into ownership of a line of rail, thereby subjecting their properties to the regulatory jurisdiction of the STB.

131. Conrail knew the Embankment was in fact a segment of Line Code 1420. Conrail fraudulently misrepresented the status of the Embankment to the LLCs to induce them to purchase the Embankment. The LLCs did in fact rely upon the statements and actions of Conrail.

132. Conrail purported to transfer all its "right, title, and interest" in the Embankment lots to the LLCs in July 2005. Conrail could not convey its interest as a common carrier to the LLCs, but no notice of that was given to the LLCs as Conrail did not reserve any residual rights by way of easement to resume rail operations along the Embankment.

133. With an intent to defraud the LLCs in the sale of the properties, but while avoiding the City and Coalition's objections that its properties were still federally regulated, Conrail represented to the City that the properties had been legally abandoned. Among other fraudulent and misleading statements made at the behest of Conrail, one of its attorneys responded to specific City and Coalition inquiries that: "You should be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC now Surface Transportation Board approval." Upon information

and belief, this statement, among others, led the City into a course of litigation on the line of rail issue and challenging the LLCs title and ownership interests. By so doing, a regulatory cloud has been placed on the LLCs' title and has forced them to suffer damages, including, but not limited to the cost of litigating these matters and lost business opportunities.

134. The LLCs reasonably relied on statements by Conrail, believing that Conrail was correctly describing the status of the Embankment. They were not aware of the true nature and history of Conrail's actions with respect to its former properties, and during the preceding twenty-nine years, to the LLCs' knowledge and belief, no property owner in the waterfront area of Jersey City had ever been subjected to any sort of claim arising from Conrail's lack of regulatory compliance. The LLCs also received title insurance binders, and title insurance policies at closing that gave no indication of Conrail's lack of regulatory compliance. Information concerning the status of the Embankment and Conrail's regulatory compliance is to a large degree contained within Conrail's own files, or maintained by the National Archives, and not readily ascertainable to the LLCs prior to the closing.

135. After the purchase, Conrail continued to tell the LLCs, as well as the STB and this Court, the Harsimus Branch was a spur, not that it had been legally abandoned in 1994 without formal ICC action.

136. The LLCs learned the Harsimus Branch was in fact a line years after the sale, and only after reviewing Conrail's filings with the STB and this Court, and in preparation for the potential remand of the case from the Circuit Court of Appeals which did, in fact, reverse the prior dismissal of Plaintiffs' case for lack of standing. Prior to that time, Conrail had further induced the LLCs into a false sense of comfort in its false and misleading statements by an agreement executed between the LLCs and Conrail in which Conrail promised the LLCs that it

would take all necessary steps to protect their interests in their titles to the properties. The LLCs reasonably relied upon Conrail's positions taken before the STB, this court, and in its written and verbal promises of solidarity with the LLCs.

137. In addition to fraudulently misrepresenting the actual status of the Embankment to induce the LLCs to purchase the Embankment, Conrail acted in order to avoid scrutiny of its own illegal, de facto abandonments of lines of rail in Jersey City east of Marin Boulevard, and the de facto abandonment of rail service across the Embankment, accomplished through demolition of the cross-bridges and removal of track.

138. Conrail first misrepresented to the STB, and later to this Court, the Embankment is a spur or side track or yard track of the Harsimus Cove Yard, which was transferred to Conrail as ancillary track, and that the Embankment was not Line Code 1420 when in fact it was Conrail that decided on its own that the Harsimus Branch was a spur in the 1990's, and not USRA in the 1970's. Conrail has identified the Pennsylvania Railroad main line from CP Waldo to Exchange Place along Railroad Avenue as Line Code 1420, notwithstanding the fact that in 1961 passenger service along Railroad Avenue was abandoned, and in 1964 the above-grade, elevated steel trestles were removed from Railroad Avenue. Conrail has thus argued Line Code 1420, as described in the 1976 FSP, was an abandoned former line, despite the fact that it was never conveyed to Conrail and had all the tracks removed twelve years before the formation of Conrail.

139. Conrail has also avoided discussion of Line Code 1440 to avoid disclosure and scrutiny of Conrail's complete de facto abandonment of that line without STB authorization. After initially intending to include Line Code 1440 in the STB abandonment petition, Conrail's actual application, filed in January 2009, does not include Line Code 1440.

140. Conrail has misrepresented the Embankment's actual status to the LLCs, the STB, and this Court for its own pecuniary gain and to avoid examination of its own wrongful conduct beginning in the 1980's. When the City objected in 2008 to the inclusion of the Hudson Street Industrial Track in the proposed Conrail STB filing by an letter from Assemblyman Smith, but later relied upon the traffic from that line which connected to the Harsimus Branch at Marin Boulevard at Mile Post 1.30 to support its initial summary judgment motion before the court in the present matter, neither Conrail nor the City brought the inconvenient fact of the unabandoned Hudson Street Industrial Track to the attention of the court or the LLCs. The City remained silent so that its own complicity in Conrail's history of past regulatory violations (lack of abandonment applications) would not come to the attention of the court or the LLCs.

141. Conrail fraudulently misrepresented its status, resulting in damages to the LLCs, including, but not limited to, cost of acquiring the Embankment, loss of value of the Embankment if it is federally regulated and subjected to restrictions of other federal remedies such as Plaintiffs now seek, loss of opportunity to develop the Embankment, and costs associated with litigating the status of the Embankment before the STB, the Circuit Court, and this Court, including attorneys' fees.

WHEREFORE, the LLCs demand judgment against Conrail as follows:

- A. Damages for the fraudulent misrepresentation of the status of the Embankment, including actual damages, and punitive damages;
- B. Attorneys' fees and cost of suit; and
- C. Such other relief as the Court considers equitable and just.

COUNT V

NEGIGENT MISREPRESENTATION

142. The LLCs repeat the allegations contained in Paragraphs 1 through 141 as if set forth at length herein.

143. In its negotiations with the LLCs, Conrail failed to perform customary diligence necessary and expected of a regulated railroad to assess the true and correct status of assets the railroad intends to sell to third parties. It also failed to properly inform and/or supervise its agents and attorneys with respect to communications with the LLCs and with the City and others in respect to the true status of the properties sold to the LLCs.

144. Conrail negligently maintained its internal records so as to allow the Embankment lots to be reclassified as spur tracks, when in fact the Embankment was part of a line subject to STB abandonment jurisdiction.

145. Conrail negligently failed to pursue STB abandonment prior to selling the Embankment to the LLCs.

146. A reasonable business enterprise, engaged in the business of railroad ownership and operation should have been aware that the Embankment would be considered subject to federal regulations and STB abandonment authority.

147. As a result of Conrail's negligence, the LLCs have received title to property with a cloud on title arising from the regulatory scheme.

148. The LLCs have suffered damages, including lost opportunities and costs of defending title, as a result of Conrail's negligence.

WHEREFORE, the LLCs demand judgment as follows:

- A. Damages for the negligent misrepresentation of the status of the Embankment;
- B. Attorneys' fees and cost of suit; and

C. Such other relief as the Court considers equitable and just.

DEMAND FOR JURY TRIAL

The LLCs hereby demand a jury trial on all issues so triable

Dated: October 4, 2012

Respectfully submitted,

/s/ Daniel E. Horgan

Daniel E. Horgan

Bar No. 239772

Waters, McPherson, McNeill, P.C.

300 Lighting Way

P.O. Box 1560

Secaucus, New Jersey 07096

Tel: (201) 863-4400

Attorneys for 212 Marin Boulevard, LLC, 247

Manila Avenue, LLC, 280 Erie street, LLC, 317

Jersey Avenue, LLC, 354 Coles Street, LLC, 389

Monmouth Street, LLC, 415 Brunswick Street, LLC

and 446 Newark Avenue, LLC

LIST OF EXHIBITS

Exhibit 1: July 26, 1975 United States Railway Association Final System Plan (excerpted)

Exhibit 2: March 31, 1976 Deed from Fairfax Leary, Trustee, to Consolidated Rail Corporation

Exhibit 3: Deeds (eight total) from Consolidated Rail Corporation, to LLCs, dated July 12, 2005

Exhibit 4: Pennsylvania Railroad Track Charts

Exhibit 5: Pictures of P.R.R. Harsimus looking west to receiving yard - main stem (embankment) from the book Jersey City's Hudson River Waterfront, Book One: The Pennsylvania Railroad 1941-1964 by Charles Caldes, Journal Square Publishing 2009

Exhibit 6: Declaration of David B. Dixon of September 6, 2012, with attachments

Exhibit 7: 1985 survey entitled "Map of the Property of Waterfront Associates" showing, in part riparian boundaries

Exhibit 8: 1988 Major Subdivision/Boundary survey by Lange & Surveying and Mapping

Exhibit 9: Conrail's Notices of Exemption Docket No. AB 167 Sub No. 1189X dated January 6, 2009

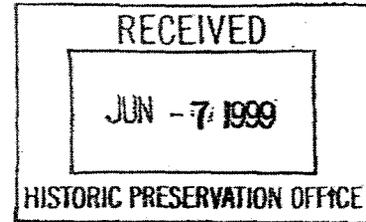
EXHIBIT D

LETTER FROM CONRAIL PRES. O'TOOLE TO SHPO, JUNE 4, 1999
OBJECTING TO HISTORY REGULATION AS CONTRARY TO PROFIT;
LETTER FROM SHPO TO CONRAIL, JAN. 25, 2000,
INFORMING CONRAIL THE HARSIMUS EMBANKMENT NONETHELESS IS SO
REGULATED



TIMOTHY T. O'TOOLE
PRESIDENT AND
EXECUTIVE OFFICER

June 4, 1999



Ms. Dorothy P. Guzzo, Administrator
State of New Jersey
Department of Environmental Protection
Historic Preservation Office
P. O. Box 404
Trenton, NJ 080025-0404

Re: Pennsylvania Railroad Harsimus Branch Embankment
163-351 Sixth Street
June 9th State Review Board Meeting

Dear Administrator Guzzo:

Conrail, the owner of the Pennsylvania Railroad Harsimus Branch Embankment, objects to the listing of the Embankment on the New Jersey and National Registers of Historic Places. Conrail is a joint subsidiary of CSX Corporation and Norfolk Southern Corporation. The railroad occupies Block 21; Block 247, Lot 50A; Block 280, Lot 50A; Block 317.5; Block 345.I, and Block 389.1.

When originally constructed, the Embankment was part of a unified railroad structure that carried freight trains to the Jersey City waterfront. The unified railroad structure consisted not only of the presently existing embankment walls and fill, but steel bridges connecting each individual embankment, tracks or rail and ancillary structures and equipment.

Conrail ceased freight operations along the Embankment years ago. In or about 1996, Conrail removed the steel bridges, tracks and ancillary structures and equipment. Since then, the individual embankment properties have not been physically connected to each another and have served no railroad or other practical or useful function.

Administrator Dorothy P. Guzzo

June 4, 1999

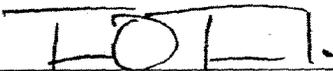
Page 2

Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value. The Company also wishes to be relieved of its obligations as owner of these properties, which includes tax liabilities, the costs of maintenance and any potential liabilities to or caused by third person trespassers or vandals. As a result, it has been our intention to sell all the embankment properties and we are in the process of negotiating a sale of these parcels to the Jersey City Redevelopment Agency (JCRA).

It is our understanding that if a government agency owns a site that has been listed on the New Jersey Register of Historic Places, that agency cannot alter the site without approval from the New Jersey Commissioner of Environmental Protection. Imposition of such a condition on the embankment properties will have the effect of substantially reducing their present value.

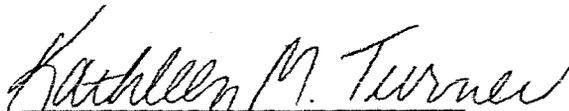
For all these reasons, Conrail, as owner of the Embankment, objects to its listing on the New Jersey and National Registers of Historic Places. Please be advised that CSX Corporation and Norfolk Southern Corporation, the joint owners of Conrail, are in agreement with and support this statement of objections.

Sincerely,

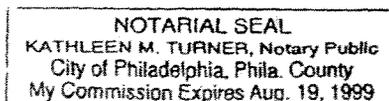


Timothy T. O'Toole

Sworn to and subscribed before
me this 4th day June, 1999



Notary Public



0-40
10-20-11
M



State of New Jersey

Department of Environmental Protection
Division of Parks & Forestry
Historic Preservation Office
PO Box 404
Trenton, NJ 08625-0404
TEL: (609)292-2023
FAX: (609)984-0578

Robert C. Shinn, Jr.
Commissioner

Christine Todd Whitman
Governor

January 25, 2000

Consolidated Rail Corporation
2001 Market Street
P.O. Box 41419
Philadelphia, PA 19101-1419

Dear Property Owner:

I am pleased to inform you that the Pennsylvania Railroad Harsimus Branch Embankment, 163-351 Sixth Street, Jersey City, Hudson County was entered onto the New Jersey Register of Historic Places on December 29, 1999. In accordance with N.J.S.A. 13:1B-15.131, listing of an area, site, structure or object on the New Jersey Register of Historic Places prevents the State, a county, municipality or any of their agencies or instrumentalities from undertaking any project that will encroach upon, damage or destroy the property listed without approval from the Commissioner of the Department of Environmental Protection.

The application for the Pennsylvania Railroad Harsimus Branch Embankment was favorably received by the State Review Board for Historic Sites and was subsequently signed onto the New Jersey Register by the State Historic Preservation Officer. It will now be sent to the National Park Service, U.S. Department of the Interior, Washington, D.C. to be considered for inclusion in the National Register of Historic Places. The Historic Preservation Office will inform you when we receive notification from the National Register Office that the Pennsylvania Railroad Harsimus Branch Embankment has been entered onto the National Register.

Congratulations.

Sincerely,

Dorothy P. Guzzo
Administrator