

Consolidated Rail Corporation -)
Abandonment Exemption -) AB 167 (Sub-no 1189X)
in Hudson County, NJ)

ENTERED
Office of Proceedings
April 7, 2015
Part of
Public Record

Reply on behalf of
City of Jersey City, Rails to Trails Conservancy and
PRR Harsimus Stem Embankment Preservation Coalition
To
Intervener LLCs' "Motion for Determination that Documents Filed
with Board
as 'Confidential' and 'Highly Confidential' Should Be Sealed"

This is the Reply on behalf of City of Jersey City, Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") to the "motion for determination" filed by nine commonly owned and controlled LLCs (212 Marin Boulevard LLC, et al, or "the LLCs").¹ City et al oppose the motion.

LLCs' motion. The LLCs state that they seek to disclose information involving a shipper that is designated as "highly

¹ The LLCs are nine commonly owned and managed LLCs. Eight of the LLCs illegally purported to purchase a railroad line regulated by the Surface Transportation Board (STB) from Consolidated Rail Corporation in 2005. The eight LLCs failed to pay taxes on the property in question, and the ninth LLC (NZ Funding) purported to acquire a claim on the property by tax sale certificates. City challenged this maneuver in state court as part of an effort, inter alia, to evade this agency's jurisdiction.

confidential" under the protective order ("protected information") issued by this Board, for use in state court litigation. The LLCs claim the shipper statement is "fanciful" and they wish to demonstrate this in support of their claim that the City's Ordinance authorizing an Offer of Financial Assistance ("OFA"), and use of the OFA remedy, is "arbitrary and capricious" in yet another state court suit.² The LLCs should not be permitted to abrogate reasonable orders issued by this Board as means of advancing their strategy of filing vexatious and harassing litigation against the City consisting of claims that are contrived, illogical and false. Further, these claims are preempted from being considered in state court in any event.

The real issue before this agency is not the LLCs' motion for a determination to have more litigation in state court, but instead is City's pending motion to compel Conrail to supply the 1152.27(a) valuation information to City so that City can prepare and file a meaningful OFA. Successful use of the OFA process will bring this decade-long controversy over Conrail's illegal sale of the Harsimus Branch to a close. The LLCs' motion is a distraction.

² If one counts amended complaints, the LLCs have filed at least two dozen state court lawsuits against City, including sometimes RTC, Coalition, and their attorneys and officers, since 2005 in connection with the LLCs' illegal acquisition of the Harsimus Branch.

I. The Shipper Statement Is Irrelevant to the LLCs' Contrived State Court Complaint

The LLCs' claims in their latest Complaint are directed against the City's adoption of an Ordinance on September 23, 2014³ authorizing the City to submit an OFA to acquire the Harsimus Branch in this proceeding, and purport to advance several theories to the effect that the City lacks power to acquire a line for freight rail.

The claims in the Complaint fall into three categories.

First, Count I charges that the City Council violated laws relating to open public meetings because it held a closed session to receive legal advice on the pending proceeding before it adopted the ordinance. This claim has nothing to do with the protected information, nor is a closed session for privileged and confidential attorney-client communications illegal in New Jersey.

Second, Counts II to V charge that a successful OFA would violate state law. The violations charged in Counts III to V (bonding law, fiscal affairs law and public contract law) all

³ The Ordinance is Exhibit B to City's December 23, 2014 motion to compel Conrail to supply 1152.27(a) information for use in an OFA in this proceeding. The City did not need to pass an ordinance to authorize the filing of an OFA, but the City did so in order to demonstrate public support of the City's use of OFA to this Board, and also to silence insinuations by the LLCs and perhaps Conrail that the City was misrepresenting its position in filings before this agency.

appear to hinge on the assumption that a successful OFA would violate Count II.⁴ We show below that Count II is frivolous, and that the protected information which the LLCs seek to make public is irrelevant to any issue in the Complaint in any event.

Count II charges that City needs State consent under NJSA 40:9C-1 to make an OFA. This is simply wrong. Among other things⁵ and as the pertinent published legislative history⁶ makes clear, NJSA 40:9C-1 relates to annual subsidy payments for continued rail service under the old 3-R Act. But City is not invoking OFA to provide a subsidy, much less a 3-R Act subsidy. City is seeking to purchase. The legislature adopted a different statute for purchase.

In particular, NJSA 40:9-2.1 provides that any New Jersey municipality (including City) is expressly authorized to "acquire ..., maintain, improve, equip and operate any existing public transportation passenger or freight rail line, including its appurtenant lands and ancillary structures and facilities."

⁴ E.g., Complaint Count III para 112 & Count IV para 118. In any event, what City indicates below concerning Count II applies to the other Counts as well.

⁵ Even if NJSA 40:9C-12 applied to a successful OFA, the consent would only be required, at the very earliest, prior to acceptance of terms and conditions once set by this agency. Since the OFA process has not yet even started, Count II is thus vastly premature.

⁶ Introductory Statement, Assembly, No. 3119-L.1977 C. 411.

The published legislative history for the statute is particularly revealing. It states that this statute was expressly intended to facilitate "local governments" in making OFAs when Conrail uses "expedited abandonment procedures." It was evidently precipitated by multiple abandonment filings by Conrail under the Northeast Rail Service Act of 1981, for which the OFA remedy was the only available federal remedy to keep the lines intact. See Introductory Statement, Assembly, No. 949-L.1982, c.15. In short, New Jersey adopted 40:9-2.1 to encourage and to empower cities like Jersey City to do precisely what Jersey City is seeking to do here: use an OFA in an expedited STB abandonment proceeding to secure a rail line from Conrail.

In the event City acquires the Branch, City is further expressly authorized (a) to lease such lines, or portions thereof, to a "common carrier or carriers for the conduct of their business ... for the transportation of freight," (b) to enter into "an appropriate lease or contract ... for the conduct of other commercial activities [for the convenience] of the traveling public or the transportation of freight" and (c) to lease the property "to any person willing and able to maintain and operate the passenger or freight rail lines on such terms and conditions as [City] deems desirable." NJ Rev Stat. 40:9-2.2. In short, the State has ensured that Jersey City is

provided excellent flexibility to make contracts to provide for rail and related commercial operations in the event of successful acquisition.

In all events, Counts II - V have nothing to do with the protected information.

Third and finally, Count VI of the LLCs' complaint alleges that the City is acting arbitrarily or capriciously in seeking to OFA. Read closely, this is the only Count in their Complaint for which the LLCs claim that they need the protected information in order to support their claim.

The first hurdle for the LLCs is that their syllogism just does not work. A shipper statement attesting to ample rail need, and supporting an OFA, hardly supports the LLCs' claim that an OFA is arbitrary and capricious. The second hurdle is that the shipper statement was executed well after the City Council adopted the ordinance, and thus had no direct relevance to that adoption. Moreover, the Board's protective order as currently framed bars the City's attorneys from allowing City staff or elected officials access to the protected information such as the shipper statement. The LLCs fail to explain, and cannot explain, how litigation in state court over a document which, although supportive of rail, has never been, nor could be, before the City Council is relevant to a showing that the Ordinance is arbitrary. In any event, the LLCs admit that the

protected information indicates that there is a potential demand for over 1400 carloads per year. How this is going to show that the OFA is, in the words of the LLCs, "fanciful" is simply contrary to reality. In short, the LLCs are seeking this Board's permission to make public protected information which destroys their state law case. The more likely explanation for the LLCs' desire to publicize the shipper statement is to threaten the shipper with litigation and to drive off other shippers from participating in the OFA proceeding before this agency, much less in supplying information they regard as confidential.

But the key point about the LLCs' effort to publicize the shipper statement is that the LLCs wish to litigate in state court whether City meets the requirements to invoke the OFA remedy under federal transportation law. They want the state court to decide if there is sufficient shipper demand to warrant an OFA. In this the LLCs err. STB regulates OFAs. Under 49 U.S.C. 10501(b), STB regulation and remedies, like OFAs, are exclusive and preemptive of state law. State courts simply do not determine whether shipper statements in support of an OFA are "fanciful"; that is STB's job. It is for STB to determine if an OFA is arbitrary and capricious. This is especially the case since New Jersey's statutes specifically encourage local governments to use the federal OFA remedy in STB-expedited

abandonment proceedings relating to Conrail lines. It is hardly arbitrary and capricious at either state or federal law for the City to seek to acquire the last remaining underutilized transportation corridor into downtown Jersey City. Accord, Reed v. Meserve, 487 F.2d 648 (1st Cir. 1973) (agency charged with designing part of transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations).

Count VI in the LLCs' Complaint also says it is arbitrary for the City to seek to "confiscat[e]" the LLCs' alleged property interests using the OFA remedy. Complaint at 26, para 134. The LLCs have stipulated that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to STB abandonment jurisdiction. Any unlawful sale by Conrail to the LLCs was accordingly subject to STB remedies, including the OFA remedy, in the course of the required STB abandonment proceeding. The LLCs cannot exempt or otherwise immunize themselves or Conrail from STB regulation by private contract. See Columbia v. STB, 342 F.3d 222, 235 (3d Cir. 2003) (OFA not a taking, citing cases). Wholly apart from this federal rule, New Jersey does not contemplate an OFA exemption for developers who contract to buy railroad property subject to this Board's jurisdiction. NJSA 40:9-2.1 (empowers cities to use OFA in

expedited Conrail abandonment cases); NJSA 48:12-125.1 (voiding developer deeds in advance of STB abandonment proceedings at the behest of local government). Since the LLCs contend that Conrail fraudulently misrepresented the regulatory status of the line, and since Conrail contends that the LLCs knew the pertinent facts all along, the unlawful sale was clearly an intolerable evasion of this agency's jurisdiction, and not something that merits any protection by exemption or otherwise. In any event, the shipper statement is not relevant to the LLCs' confiscation argument.

In conclusion, the LLCs show absolutely no need for the protected information for purposes of litigating their contrived claims against the City in their state court complaint attacking the City's ordinance authorizing an OFA in AB 167-1189X.

II. STB Protective Orders Ordinarily Provide that Protected Information May Not Be Used in Non-STB Proceedings, and the LLCs Offer No Basis to Do Otherwise Here

A key reason for a protective order in an STB proceeding is to encourage shippers and railroads to make otherwise confidential commercial information available to the agency by removing the fear that the information will be used, much less publicly disclosed, in litigation elsewhere, or that the shippers and railroads seeking information protection will be dragged into such litigation. That is why STB protective orders

customarily provide that the protected information may only be used in STB proceedings and judicial review of STB proceedings. The protective order in this proceeding so provides. The LLCs did not object to this requirement when the protective order was proposed or entered.

In their motion, the LLCs have shown no legitimate reason to burden shippers or others with use of their protected information in state court proceedings that the LLCs have brought to prevent City from pursuing its remedies at STB. If the LLCs wish to litigate over the shipper statement, the shipper, or CNJ Railroad, they have already demonstrated that they can do so in this abandonment proceeding, pursuant to this agency's rules and the protective order. If they seek further discovery on the matter, it should be through STB (and not in state court). However, if they did seek further discovery, that would be inconsistent with the claims of Conrail, and the LLCs' own claims, that any discovery is inappropriate in this proceeding. If they seek further discovery, they should first be compelled to answer all of City's discovery requests to them first.

The LLCs clearly want to pick at the shipper statement. They filed a specious sealed document fussing on the subject. The shipper statement is equivalent to statements on which this Board has relied to permit OFAs to proceed against lines for

which abandonment authority even when the OFA would upset a public project. But trying to raise doubts about the statement in state court is unavailing. The shipper is clearly bona fide. The record to date shows that the shipper is seeking (and obtaining) requisite land use approvals and projects a need for rail, and by its statement, obviously not only supports the City's proposed OFA, but projects more use than Conrail found profitable on the line. Neither City nor the shipper needs to make some sort of guarantee concerning future use in order to pursue the OFA remedy successfully. Under applicable precedent, the OFA remedy is available to preserve otherwise unused lines for possible future cost-effective operations: "a party filing an OFA does not need to prove in advance that its efforts to revive a failing line will without question succeed." Columbia v. STB, supra, 342 F.3d at 234 quoting 1411 Corp. -- Ab Ex - in Lancaster County, PA, AB-81X, slip op. at 5 n.9, served Sept. 6, 2001. Moreover, the LLCs are implausibly assuming that the City intends to rely only on one shipper if, in order to invoke OFA, the City has to make the sorts of showings needed when an OFA is sought against, rather than, as here, in support of a public project. City is concerned that other shippers will fail to come forward before this agency for fear of retaliation by the litigious LLCs outside of the STB proceeding, just as the LLCs are threatening the shipper which supplied the statement here.

I. The LLCs' Motion and State Court Proceedings Are Part and Parcel of a Strategy of Burdensome Frivolous Litigation and Delay

This abandonment proceeding for the Harsimus Branch has become the longest running, or at least one of the longest running, abandonment sagas in STB history because eight of the blocks in the line in question were illegally sold by Conrail to eight of the nine LLCs in 2005 (see note 1, *supra*) based on what the LLCs now state were fraudulent and negligent misrepresentations by Conrail, concerning which Conrail states that the LLCs were at all relevant times aware of the relevant facts. The surprisingly convoluted history of this case is summarized in note 2.⁷ The LLCs acquired the property not for

⁷City et al challenged the LLCs' illegal purchase and transfer by means of a petition for a declaratory order in January 2006 (F.D. 34818), as recommended by this agency's staff. After losing in a decision served in June of 2007, the LLCs, in league with Conrail, specifically contested this agency's jurisdiction on rehearing, commencing in 2007. The LLCs abandoned their legal theories in Special Court some five years later, stipulating to this agency's jurisdiction. Conrail stipulated no contest. Since that time, the LLCs again challenged this agency's jurisdiction, namely, in F.D. 35825. In that proceeding, they claim that this agency lacks jurisdiction by reason of a "severance." This agency rejected this theory both in F.D. 34818 in 2007, and most recently in F.D. 35825 (Decision served August 11, 2014). The LLCs continue to pursue their never-ending quest to prevent this agency from exercising jurisdiction through petitions for reconsideration and supplemental reconsideration. In the meantime, the LLCs have also acknowledged to Special Court that their purchase of the line in 2005 was based on fraudulent (i.e., intentional) misrepresentations by Conrail to them, the City, this agency and

any public purpose, but to devote it for non-rail, private for-profit activities. Conrail clearly sold the historic property

the courts that the property was not a regulated line. Conrail has explained that the LLCs were aware of the pertinent facts at the relevant times. Copies of the relevant Special Court pleadings are on file with this agency in this proceeding.

In the meantime, the LLCs have brought multiple administrative actions and state court proceedings against the City, including some SLAPP (strategic lawsuits against public participation) suits against RTC, the Coalition, and attorneys for RTC, Coalition and the City. The manager of the LLCs has acknowledged on the record that he has threatened to bankrupt the members of the Coalition and their attorney.

Although the LLCs, using contradictory and shifting legal theories, have delayed any relief to City et al for over ten years, the LLCs ironically charge this agency with a regulatory taking of their claimed property interest in the Harsimus Branch in a letter addressed to this agency's General Counsel e-filed with this agency on or about March 4, 2015, but not appearing on this agency's website under either AB 167-1189X or F.D. 35825. The LLCs' claims are misbegotten.

As City et al have frequently indicated, the deeds to the LLCs should be voided by this agency as contrary to the integrity of this agency's processes and regulations, and as part and parcel of an intentional evasion of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, in violation of section 110(k) of that statute, 16 U.S.C. 470h-2(k). City et al have filed discovery, to which Conrail and the LLCs have refused to provide response, on issues relevant to this relief. City et al have filed appropriate motions to compel. City et al have repeatedly noted that in all events, the transfer of parcels subject to an STB abandonment proceeding is void under state law unless offered to the City as provided under NJSA 48:12-125.1. Fear of 48:12-125.1 and this agency's jurisdiction to void the deeds or to order sale on OFA is presumably why the LLCs have resisted STB jurisdiction since 2005 and still resist it. The LLCs appear to draw funding from Chicago Title, the insurer of their title, for some or all of their litigation against City and this agency. As previously shown, Chicago Title violated New Jersey title practice standards in issuing insurance for the LLCs' title, and has filed claims against Conrail for misrepresentation and against its local agent for maladministration.

to the developers without STB authorization in order to evade this Nation's environmental and historic preservation laws. In all events, the LLCs immediately sought to demolish the six-block-long Harsimus Embankment, which is protected under section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, without the compliance with that statute required before rail abandonments may be effectuated. The manager of the LLCs recently offered to donate the Embankment to anyone who would demolish it. The LLCs in league with Conrail have been contesting and attacking STB processes ever since the illegal 2005 acquisition.

As already noted, New Jersey law encourages cities to use the OFA remedy in Conrail expedited abandonment proceedings. Before Conrail's belated expedited abandonment proceeding in AB 167-1189X was placed in abeyance, the City on March 27, 2009, timely filed a notice of intent to file an "offer of financial assistance." A third party, CNJ Rail, also independently filed an OFA. Both City and CNJ sought 1152.27(a) information from Conrail. Conrail sought an exemption from OFA. In a decision served May 26, 2009, this Board denied the exemption request, and tolled the time to submit an OFA until Conrail supplied the 1152.27(a) information. For many years, this proceeding was inactive or formally in abeyance while the LLCs and Conrail contested STB jurisdiction in court. However, the proceeding

became active again on August 11, 2014, but Conrail continued to fail to provide the 1152.27(a) information that is a predicate to an OFA.⁸ On December 23, 2014, City moved to compel Conrail to supply the information so the OFA process hopefully could begin. City asked for expeditious treatment of its motion to compel because it learned that a shipper (which had previously been introduced to the City) had prepared a verified statement in cooperation with the other party invoking OFA (namely, CNJ Rail). Since the statement not only indicated support for an OFA but also a need for service in the near future, City filed a motion to compel Conrail to provide 1152.27(a) information so the OFA process could get off the ground.

Part of the LLCs' litigation strategy in the ten years the Harsimus Branch has been pending before this agency is to attempt to misuse state court proceedings to collaterally attack this Board's jurisdiction and prevent the City from pursuing federal remedies before this agency that the LLCs disfavor. The LLCs have so far been unsuccessful.⁹ However, lack of success

⁸After the May 26, 2009 decision, this proceeding went into de facto abeyance (de jure after this Board's April 20, 2010 order formally so providing) while the LLCs and Conrail contested this agency's jurisdiction in various courts. This agency lifted the April 20, 2010 abeyance order in its Decision served August 11, 2014 in this proceeding.

⁹ E.g., 212 Marin Blvd. LLC et al v. Montange, et al, HUD - L - 2196-11, mem op. filed July 1, 2011, at 5-6 [State Superior Court Judge Gallipoli rejects LLCs attempt (a) to prevent City

does not deter the LLCs from their abusive litigation tactics. The LLCs latest state court lawsuit, for which they now seek the disclosure of the shipper statement subject to this Board's protective order, is another attempt to prevent the City from pursuing its OFA remedy.

The LLCs' latest state court suit seems to be precipitated by the City's adoption of an ordinance on September 23, 2014 specifically authorizing the filing of an "offer of financial assistance" ("OFA") in this proceeding. On or about November 7, 2014, the LLCs launched a state court proceeding in New Jersey to bar the City from pursuing federal OFA remedies at STB.¹⁰

Although the LLCs' attorneys have a copy of the shipper statement under seal, they now seek public disclosure of a shipper statement filed under seal with this agency pursuant to a protective order ostensibly to facilitate their campaign of instituting baseless state court litigation. Their sole argument is that they wish to show in state court that the City's ordinance is "arbitrary and capricious" because the LLCs'

from contending STB has jurisdiction and from pursuing the OFA remedy or NJSA 48:12-125.1 (which depends on STB jurisdiction), (b) to disqualify Montange from representing City at STB, and (c) for damages from Montange for the audacity of suggesting that Conrail and its chosen developer should act in accordance with preemptive federal law].

¹⁰ LLCs' Motion at p. 6, citing 257 Manila Ave v. City, HUD-L-4954-14 (filed Nov. 7, 2014).

claim to have "serious concerns" about the shipper statement. The LLCs argue that the City is "attempting to use the OFA process for ulterior purposes, specifically, to acquire a park." LLC's Motion at 9. The LLCs state that the LLCs will "address" their "serious concerns" "supra." The only explanation in their memorandum concerning their "serious concerns" is that the City has identified only one shipper. The City did not state that this shipper was the only entity that had approached the City in support of the OFA. The City simply represented, based on the shipper statement, that this shipper had approached the City in support of the OFA and in search of near-term rail service. The LLCs' assumption that there is only one prospective user for the Branch is unsubstantiated and itself "fanciful." LLCs' motion at 9-10.

Litigating in state court about the showings needed to make an OFA and the intentions of the City is simply another one of the LLCs' efforts to burden, delay and thwart the exercise of STB jurisdiction and the City's lawful pursuit of the public's rights to federal remedies. This litigation amounts to an attack on the integrity of this agency's processes. That in the end explains why this ostensibly expedited abandonment proceeding was started five years too late, and has now gone on for an additional six years. City requests this agency not to fuel the fire by granting the LLCs' frivolous motion to drag the

shipper into yet more frivolous state court proceedings in order to litigate issues that are within this agency's exclusive jurisdiction.

After years of litigation, City as well as RTC and the PRR Harsimus Stem Embankment Preservation Coalition of course seek the most cost-effective and efficient means to obtain relief against Conrail and the LLCs. On its face, the OFA statute allows persons interested in preserving a rail corridor consistent with rail use an efficient means to acquire it on terms and conditions set by this agency compatible with the minimum constitutional value. This approach is encouraged by New Jersey state law. NJSA 40:9-2-1.

II. The LLCs' Argument about Commercial Need Does Not Justify Disclosure

In their motion at p. 8 and elsewhere, the LLCs allude to the May 26, 2009 decision (which the LLCs note was by the Director of the Office of Proceedings) indicating that any party making an OFA must show commercial need for rail service, community support, and operational feasibility. The Director based this ruling on Los Angeles County Metropolitan Transportation Authority ("LACMTA") - Ab. Ex. - in Los Angeles County, CA, AB 409-5X, served June 16, 2008, slip at 2-3. However, LACMTA and all three cases cited therein involved instances in which an OFA was attempted against a line that was

owned by a public entity, or which was sought by a public entity, for public purposes.¹¹ The Board basically indicated it would impose additional showings on entities seeking to OFA a line to thwart public use.

The City is not seeking to make an OFA to thwart a public use, but to secure the line for rail, open space, trail and historic preservation - all public purposes. STB has never heretofore ruled that a municipality seeking a line for public use, including as here rail use, has had to make special showings of commercial need, community support, and operational feasibility. In addition, the LACTMA decision served June 16, 2008 on which the Director relied was superseded by the Board's decision in AB 409-5X, served July 17, 2008, dismissing the entire proceeding as moot because the Board had granted a "blanket exemption" (including from OFA) to the LACMTA in connection with the line in 1992.

There is no justification for requiring special showings in the tight time frame prescribed for OFA procedures when a municipality is seeking a line for public use and the railroad is resisting OFA in order to facilitate a prior unlawful sale of the line to rip out rail structures (including an historic

¹¹ Ironically, the party seeking to file an OFA in LACTMA was a Mr. Riffin. This apparently is the same Mr. Riffin who is currently seeking to advise the LLCs in connection with efforts to defeat the City's efforts to obtain relief.

embankment designated as a City Landmark) in favor of townhouses and/or skyscrapers. The Board's precedent is that a railroad cannot justify avoidance of the OFA process unless a right of way is needed for a valid public purpose. The Board has recognized that Congress otherwise expects that an OFA opportunity will be made available. E.g., CSX Transportation - AB. Ex. - Chesterfield and Darlington Counties, S.C., AB 55-703X, slip op. at 3, served January 19, 2011. In the referenced case, the railroad sought the exemption from OFA in order to facilitate sale of the line to a shipper (PEC) as a spur or private line. Even in that case, where a public purpose was not involved, the Board declined to burden the OFA process, although it did require an OFA applicant to "provide evidence" how it would turn the property into a viable common carrier line serving shippers other than PEC. Even that requirement is not applicable here because, inter alia, Conrail is purporting to transfer the line to a developer for non-rail purposes, not a shipper for spur track.

In any event, the leading case on the OFA statute is Chicago & NW Transp. Co. v. ICC, 678 F.2d 665 (7th Cir. 1982). In that case, the Geneva Lake Area Joint Transit Commission successfully filed an OFA to acquire C&NW's otherwise-to-be-abandoned Lake Geneva Line for "commuter rail service." 678 F.2d at 666. Congress has not changed anything in the OFA

statute that suggests that OFA may not continue to be used for acquisition of lines for commuter rail service. Since the City desires the line for, inter alia, commuter rail service, the City should not be required to make any showing concerning freight under the leading case dealing with valuation of property on OFA.

City timely appealed that portion of the Director's May 26, 2009 ruling, and this Board has not yet taken action on this appeal. The Board needs to clarify whether it wishes to continue to impose unprecedented preconditions on the City's access to the OFA process.

III. Other Matters

The LLCs make a variety of representations in their motion that are false or misleading. City et al have already dealt with some of the LLCs' mischaracterizations, and will list a few of those here -

1. The LLCs claim that CNJ Rail is a non-party. Motion at 2. CNJ timely filed a notice of intent to OFA and asked to be made a party. It is listed as a party of record per the STB e-library service list.
2. The LLCs claim that the City notice of intent to OFA and the CNJ notice of intent to OFA were "clearly related to each other." Motion at 3. They most certainly were not. To the contrary, so far as City is aware based on

discovery from CNJ, CNJ apparently was advising the LLCs on how to defeat the City from roughly the inception of the Conrail abandonment proceeding. City's notice of intent to OFA, while meritorious in its own right, also serves to protect the City from the LLCs' manipulation of CNJ.

3. The LLCs claim that "CNJ Rail would be the City's designated operator of the line." LLCs Motion at 3. City has not contracted with or committed to CNJ for that purpose, and instead believes it would be premature to choose an operator until and unless City's OFA is successful. City understands that CNJ has concluded, evidently relatively recently, that the LLCs have no rail interest, and CNJ wishes to support the City's OFA. City currently believes that CNJ wishes to be considered as operator for the line.
4. The LLCs claim that City must show community support and imply that the City cannot because the community is "kept in the dark." LLC Motion at 9. Leaving aside City's demonstration that there are no basis in law for burdening the OFA process with special showings, the LLCs' assertion is self-serving propaganda with no basis in fact. First, the City adopted an ordinance and has supplied letters from officials showing OFA support. Second, the community

is hardly in the dark. The City serves all of its filings in AB 167-1189X on the host of local community organizations that are parties to this proceeding, and for which accurate addresses are available on the STB service list or could be obtained through reasonable research efforts. City, RTC and the Coalition have insisted that the LLCs (notwithstanding their resistance) and Conrail do so as well. The ordinance authorizing OFA was adopted on public notice in accordance with law, after a hearing in which witnesses could speak to its meaning and implications. The only thing that is "dark" is the commercially sensitive information that one or more parties designate as confidential, but that was not relied upon by the City in adopting the ordinance. Indeed, the ordinance was adopted before the shipper statement was prepared. Third, there are a plethora of comments and submissions in the record of F.D. 34818 and AB 167-1189X indicating opposition by the public to the illegal sale of the Harsimus Branch to the LLCs and support for public acquisition. Fourth, the simple fact is that the interested parties in Jersey City (other than the LLCs) to date wish to bring this decade-long and highly litigious controversy to a close through an efficient means that secures the property in public hands.

Failure to address any of the remainder of the LLCs' motion, or the portion of the motion filed under seal, should not be taken as agreement to any of the assertions in the LLCs' motion. Indeed, on balance, they should all be treated as denied, or as an attempt to debate the merits of an OFA before the issue is ripe, or as tantamount to an effort to reopen this Board's decision served May 26, 2009 refusing to exempt the Harsimus Branch abandonment from the OFA process without meeting the requirements for reopening a decision out of time. The kinds of issues the LLCs seek to debate will be ripe, if ever, only when Conrail supplies the 1152.27(a) information required by the May 26, 2009 decision, and City makes an OFA. In addition, the standards for filing an OFA will be within the jurisdiction of this agency, not a state court.

CONCLUSION

This Board is charged with protecting the public's interest in preservation of our Nation's irreplaceable freight rail system, not advancing the parochial concerns of private developers seeking to profit from illegal sales of STB-regulated property through a campaign of frivolous state court proceedings. The LLCs' motion ostensibly to facilitate more frivolous state court litigation should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, on or before the 7th day of April 2015 addressed to the parties or their representatives per the service list below, unless otherwise indicated.

CHARLES H MONTANGE

Service List

[AB 167 (Sub-no. 1189X)]

- with address corrections as of August 2014 -

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