

WATERS, MCPHERSON, MCNEILL  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
300 LIGHTING WAY  
P.O. Box 1560  
SECAUCUS, NEW JERSEY 07096

ENTERED  
Office of Proceedings  
July 18, 2014  
Part of  
Public Record

DANIEL E. HORGAN  
MEMBER OF N.J., N.Y. & D.C. BARS

OFFICE DIRECT DIAL: 201-330-7453  
CELL and VOICE MAIL: 201-926-4402  
E-MAIL [dehorgan@lawwmm.com](mailto:dehorgan@lawwmm.com)

July 18, 2014

**Electronically Filed**

Rachel D. Campbell, Director  
Office of Proceedings  
US Surface Transportation Board  
395 E. Street S.W.  
Washington, DC 20423

**RE: REQUEST FOR STB INQUIRY TO JERSEY CITY**  
**Offer of Financial Assistance by Jersey City**  
**STB Docket: AB=167-1189-X**

Dear Ms. Campbell:

We request that you exercise the authority delegated to you by the Board pursuant to 49 CFR §1011.7(a)(2)(ii) to make certain determinations with respect to whether an offer of financial assistance meets the statutory requirements of 49 USC §10904(d). Specifically, we ask that you formally request that the City of Jersey City provide an affirmation of the City's Notice of Intent to offer Financial Assistance in the above matter. We believe that taking this action now is in the best interest of the Board, the public and our clients who are property owners affected by these proceedings, and by other judicial proceedings which have been stayed pending STB action.

This request deserves and requires an explanation why it is being made at this particular time and why it is time sensitive. Five years ago, on May 26, 2009 you released a decision in this matter addressing a number of procedural requests by the City, including a request to delay a due date for the City filing its proposed OFA. In that decision you pointed out that "The Board may not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic." Thereafter, on April 20, 2010 the Entire Board stayed all proceedings in this matter while the

Board's jurisdiction over the trackage to be abandoned was determined in the District Court.<sup>1</sup> The District Court proceedings, including an appeal, were finally decided in February 2014, but the stay has not been lifted. Unfortunately, the District Court decision as rendered and affirmed did not deal with all of the trackage; neither the City nor Conrail has sought a decision from the District Court on the remainder of the trackage and the case languishes on the Board's docket.

That has not deterred the City from seeking to proceed, and its latest effort in that regard has been the filing of a motion for a scheduling order. That June 17, 2014 filing also criticized your order of May 26, 2009, calling it unusual and unprecedented with respect to the City's proposed OFA, and requesting that the City be permitted even more time to prepare and file its OFA.

We believe that the City of Jersey City has no good-faith intention of ever filing an OFA in this matter. That belief is based on the City's failure to resolve the jurisdictional issue concerning the trackage in the District Court; the complete absence of any need for rail freight service; the complete absurdity of its proposal to build a freight line in an area now devoted to billions of dollars worth of residential and commercial skyscrapers the development of which the City continues to encourage; the impossible financial burden that the proposal would impose on the City's finances; and, the New Jersey statute that prohibits the City from making the financial and operational commitments required by an OFA without an explicit state approval which the City has never sought. And this is not a complete list of the impediments facing the City's proposal, as more fully set out in our reply of July 7, 2014 to the City's latest submission.

No public proposal or public discussion for running rail freight service on the downtown waterfront in Jersey City has ever been put forward, nor has the City Council ever given its approval for the filing of an OFA, or even a notice of intention to file one. The nature and tenor of the June 17, 2014 filing by the City strongly suggest that the only purpose for this City's OFA proposal is to delay these proceedings even further. Nonetheless, we recognize, as you did in your May 26, 2009 decision, that the City should have an opportunity to proceed with an OFA if it has a good-faith intention to do so. Accordingly, we filed a formal petition with the City Council asking it to consider and reject both the OFA and the June 17, 2014 filing by its counsel. We have since appeared at two public meetings of the City Council and told the Council that if it

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<sup>1</sup> The Board's decision stated: "Because the nature of trackage involved in these proceedings is being addressed in the District Court, we will not reach a final decision until that issue is resolved. We will hold these proceedings in abeyance pending a decision or direction from the District Court." The District Court's decision, as affirmed, preserved all issues not decided for future action, but neither the City nor Conrail seem interested in resolving those issues, and probably never will. Our clients claim that there is absolutely no interstate commerce rail interest here and want all proceedings to be dismissed. See: FD 35825.

wishes to proceed in light of the great difficulties and obstacles, it should appropriate the money, take the necessary steps, and proceed with its OFA, but that it must act in good faith and not misrepresent its intentions to the STB. We have also reiterated that an OFA will not get the City fee title to our clients' lands for use as a park or some other non-railroad purpose.

There is no indication, one way or another, whether the City will act on our petition. Its attorneys advised the City Council at both meetings that since the matter was in litigation, it should only be discussed in executive session away from the public. While we agree that the City is entitled to consult with its attorneys privately, the only reason not to have a public discussion would be the lack of any good faith reason for proceeding. In other words, the only purpose of the OFA is to engender further delay, burden, and expense on our clients through an abuse of the Board's proceedings-something not likely to be freely discussed in public.

The courts in New Jersey have stayed several important cases pending between our clients, Jersey City and others, awaiting final decisions by the STB on all matters concerning our clients' properties. The City's failure to proceed to resolve all trackage issues in the District Court, and its apparent lack of good faith in its OFA and other procedural proposals, perpetuate proceedings before the Board. This is both unjust to our clients who are denied relief, and an abuse of the Board's jurisdiction and procedures. We have provided the STB with our reply to the City's June 17, 2014 filing and included with that a copy of our petition to the City Council. We have also filed a related proceeding with the Board on May 8, 2014 under FD 35825 seeking a declaration of non-jurisdiction to end this impasse entirely. No ruling has yet been made on that matter.

We have asked the City Council to take up and vote on our petition at its next meeting scheduled for August 20, 2014. If the City is as ready to proceed as its most recent filings suggest, there should be no reason for the City Council to avoid the issue at its next meeting in August. If the City wants to proceed, it must also be willing to initiate District Court proceedings to resolve the trackage issue that it has so far resisted addressing. We believe that the City should be given an opportunity to make these choices. But it should not be given an eternal license to delay.

Therefore, we respectfully suggest that you have the authority, and the obligation, to place this matter squarely before the City Council. Now that we have brought the issue before the City Council, we ask you to formally advise the City and request that the Council advise you of its intention to proceed with its proposed OFA. The City Council should also be advised of the necessity of filing an action in the District Court to resolve the trackage issue that continues to bar the Board from proceeding in the present matter. Should the City not respond in any

Rachel D. Campbell, Director

US STB

July 18, 2014

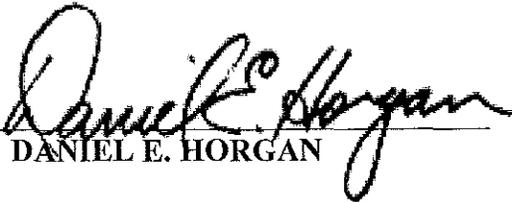
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meaningful way, or fail to follow up on its response in a timely manner, we believe it would then be appropriate for the Board to consider the *ex parte* dismissal of this matter.

Respectfully submitted,

DANIEL E. HORGAN, DC BAR #239772  
WATERS, McPHERSON, McNEILL, P.C.  
300 Lighting Way  
Secaucus, New Jersey 07096  
Telephone: 201-863-4400  
Fax: 201-863-2866  
Counsel for Intervenors

BY:

  
DANIEL E. HORGAN

cc: Members of Jersey City City Counsel  
Robert Byrne, Jersey City Clerk  
Jeremy Farrell, Esq., Jersey City Corporation Counsel  
815594

**CERTIFICATION OF SERVICE**

I, Daniel E. Horgan, an attorney-at-law of New Jersey, New York and the District of Columbia, hereby certify that on July 18, 2014, I caused service of this filing with the Surface Transportation Board to be made upon the Board by Electronic Filing and that all parties on the following service list were served by First Class Mail in accordance with the provisions of 49 C.F.R. §1104.12.

BY:   
DANIEL E. HORGAN

DATED: July 18, 2014

**SERVICE LIST**

Counsel for Jersey City, Coalition, RTC:  
Charles H. Montange  
426 NW 162<sup>nd</sup> Street  
Seattle, WA 98177

Counsel for Rails to Trails Conservancy (RTC)  
Andrea Ferster, Esq.  
General Counsel  
2121 Ward Court NW, 5<sup>th</sup> floor  
Washington, D.C. 20037

Counsel for Conrail:  
Robert M. Jenkins, III, Esq.  
Mayer Brown LLP  
1999 K Street, NW  
Washington, D.C. 20006-1101

Former Counsel for LLCs  
Fritz Kahn, Esq.  
1919 M Street, NW  
7<sup>th</sup> Floor  
Washington, D.C. 20036

And the following self-represented individuals or entities:

Robert Martin  
Daniel D. Saunders  
NJ Department of Environmental Protection  
State Historic Preservation Office  
P.O. Box 420  
Trenton, NJ 08625-0420

Massiel Ferrara, Director  
Hudson County Planning Division  
595 County Avenue  
Bldg. 1, Second Floor  
Secaucus, NJ 07094

Ron Enrich  
Executive Director  
Preservation New Jersey  
310 W. State Street  
Trenton, NJ 08618

Michael D. Selender  
Vice President  
Jersey City Landmarks Conservancy  
P.O. Box 68  
Jersey City, NJ 07303-0068

Eric Fleming  
President  
Harsimus Cove Association  
344 Gove Street  
P.O. Box 101  
Jersey City, NJ 07302

Jennifer Greely  
President  
Hamilton Park Neighborhood Assoc.  
22 West Hamilton Place  
Jersey City, NJ 07302

Jill Edelman  
President  
Powerhouse Arts District Nbd Ass'n  
140 Bay Street, Unit 6J  
Jersey City, NJ 07302

Robert Crow  
Vice President of Communications  
The Village Neighborhood Association  
365 Second Street  
Jersey City, NJ 07302

Dan Webber  
Vice President  
Van Vorst Park Association  
289 Varick Street  
Jersey City, NJ 07302

Gretchen Scheiman  
President  
Historic Paulus Hook Ass'n  
121 Grand Street  
Jersey City, NJ 07302

Gregory A. Remaud  
Conservation Director  
NY/NJ Baykeeper  
52 West Front Street  
Keyport, NJ 07735

Sam Pesin  
President  
Friends of Liberty State Park  
75 Liberty Avenue  
Box 135  
Jersey City, NJ 07306

Daniel H. Frohwirth  
Jersey City Landmarks Conservancy  
P.O. Box 68  
Jersey City, NJ 07303

Eric S. Strohmeier  
Vice President, COO  
CNJ Rail Corporation  
81 Century Lane  
Watchung, NJ 07069

Robert Vivien  
President  
Newport Nbd Ass'n  
ADDRESS UNKNOWN

Delores P. Newman  
NJ Committee for the East  
Coast Greenway  
ADDRESS UNKNOWN

Valerio Luccio  
Civic JC  
ADDRESS UNKNOWN