

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
June 17, 2014
Part of
Public Record

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

Motion for a Scheduling Order

For the reasons stated below, City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") move this Board to establish a scheduling order for further proceedings in this case, in the event this Board lifts the abeyance order in this proceeding.

City et al have already moved this Board to lift the abeyance order in this proceeding,¹ and, consistent therewith, have indicated that they wish to take some discovery against at least Consolidated Rail Corporation and to file a motion to void the deeds illegally issued by Conrail to the eight commonly owned "LLCs" d/b/a 212 Marin Boulevard, et al., otherwise known as Conrail's chosen developer for the Harsimus Branch.² Conrail declines to respond to discovery and it and the LLCs evidently feel they need not respond to anything in this proceeding until

¹ Pleading filed November 22, 2013.

² Supplemental Information filed May 22, 2014 in AB 167 (Sub-no. 1189X) .

and unless this Board lifts the abeyance order. In the meantime, the LLCs have filed a petition for exempt abandonment (F.D. 35825) of the Harsimus Branch on which the LLCs and Conrail rely as grounds to delay this abandonment proceeding.³ City et al have opposed this gambit: under this Board's precedent, developers may not rely on exemption procedures to obtain abandonment authorizations.⁴

Conrail is (and the LLCs are) fond of arguing that that the City should simply forget about STB regulations and relief, and likewise ignore federal environmental and historic preservation statutes, and instead rely upon state eminent domain procedures to acquire the Harsimus Branch. On the one hand, they tell us they will continue to litigate so that City et al will run out of funds or will power before obtaining relief. On the other hand, they pretend that the outcome will be the same even if City et al obtains relief; that is, that federal rail regulation is meaningless and the City will end up acquiring the property under state law on the same terms and prices as under the federal law that Conrail and its chosen developer view as so

³ On February 21, 2014, the LLCs acknowledged that the D.C. Circuit had summarily affirmed judgment that this Board had jurisdiction, and moved to intervene in this abandonment proceeding. Their more recent position that this Board should do nothing in this proceeding pending resolution of F.D. 35825 is another one of their flip-flops.

⁴Reply filed May 22, 2014, in F.D. 35825.

irrelevant or unenforceable. Suffice it to say that the Conrail/LLC position has been rejected in the New Jersey courts. As noted in the LLCs' SLAPP suit against the undersigned (212 Marin Boulevard LLC et al v. Montange, et al., NJ Superior Court Hudson County HUD-L-2196011, filed July 18, 2012, slip op. at 5-6,

"The abandonment strategy being pursued by [City et al] seeks the benefits of NJSA 40A:12-125.1, which provides that notice must be provided to the state, county and municipality of abandoned rails, so that they may enjoy a 90 day right of first refusal to any offers made for the land by private entities. A determination that Conrail's sale to the [LLCs] is void and subsequent STB abandonment authorization necessary would entitle Jersey City to acquire the [Harsimus] Embankment at substantially lower cost, suggesting vastly different fiscal implications for all parties involved, rather than the alternative, a condemnation involving Jersey City and the LLCs. The abandonment scenario would negate any compensation due to [LLCs] from the City, a fact surely not lost on the LLCs.

"Additionally, STB abandonment would also trigger the City's right to make an Offer of Financial Assistance ("OFA") under 49 U.S.C.A. 10904, which permits any person to purchase the line under the stipulation that they continue to operate the rail line for at least two years. Relevant here is that case law had determined that the OFA provision would also allow purchase of the property for an amount otherwise set by the railroad with a third party. Iowa Terminal Railroad v. ICC, 853 F.2d 965 (D.C. Cir. 1998)."

In short, City does not know if it can ever successfully eminent domain the property at issue under the vicissitudes of state law. However, City is convinced it can acquire the property at issue if allowed access to STB remedies and procedures, and New Jersey courts that have looked at the matter

so far agree with the City. To this end, City et al seek an orderly restart of AB 167 (Sub no. 1189X).

Assuming this Board eventually lifts the abeyance order in this proceeding, City et al accordingly hereby moves that the Board also issue a scheduling order providing for an orderly restart of the abandonment proceeding. In particular, City et al move for a procedural schedule providing that, after resolution of discovery disputes by this Board, motions to void the deeds will be due 30 days after Conrail and the LLCs have responded to discovery requests served (or re-served), within 10 business day of restart of proceedings.

City et al also move that the Board reopen the comment period on the environmental assessment for that period as well.

City et al also move for the granting of a fee waiver for any invocation of OFA procedures by the City, and for this Board to rule on City's pending appeal of novel requirements imposed on the City at the behest of Conrail obstructing the City's access to the OFA remedy.

Background

Pursuant to petitions for review by Consolidated Rail Corporation ("Conrail") and its chosen developer (the eight "LLCs" d/b/a 212 Marin Boulevard, et al) contending that the Harsimus Branch was not conveyed to Conrail as a rail line, and that only the United States District Court for the District of

Columbia could decide whether it was or was not, the D.C. Circuit in Consolidated Rail Corporation v. STB, 571 F.3d 13 (2009), vacated this Board's determinations in F.D. 34818 (decided in 2007) that the Harsimus Branch was a line of railroad subject to this Board's abandonment jurisdiction.

While the D.C. Circuit appeal was pending, Conrail filed this abandonment proceeding. Upon issuance of the D.C. Circuit's decision, no further action was taken by STB in this proceeding, and the Board, taking note that City et al had filed a proceeding in U.S.D.C. for D.C., formally placed this abandonment proceeding in abeyance by order served April 20, 2010, pending a determination by the United States District Court whether STB had jurisdiction.

After the LLCs changed their position and admitted that the Harsimus Branch was conveyed to Conrail as a line of railroad, Conrail stipulated that it would assert no facts or arguments to the contrary.⁵ The United States District Court for the District of Columbia, over the LLCs' continued objections, granted summary judgment that the property was conveyed to Conrail as a

⁵ Copies of the relevant stipulation are attached as an exhibit to City et al's pleading in this docket filed November 22, 2013.

line,⁶ and this was summarily affirmed, over the LLCs' continued objections, by the D.C. Circuit.⁷

New Developments

During the course of the litigation in the United States District Court (USDC for DC 09-1900), important new evidence emerged both germane to this proceeding and not yet taken into account by this Board or the parties, either in connection with the environmental assessment prepared for the Board or in connection with procedural or substantive questions relating to this proceeding. Indeed, under this Board's policy statements, the evidence calls into question the propriety of an exemption proceeding in the first instance.

To take but one example, the LLCs filed an "Amended Answer" containing cross-claims against Conrail asserting that Conrail made fraudulent misrepresentations to the LLCs, the City, this Board and the Courts.⁸ Conrail responded by asserting that the

⁶ A copy of the U.S.D.C. for D.C. decision is attached as an exhibit to City et al's pleading in this docket filed November 22, 2013.

⁷ The LLCs included a copy of the summary affirmance with their pleading filed in this docket on February 21, 2014.

⁸ City et al filed with this Board in this docket on November 22, 2013, a copy of the most germane portions of the "complaint" portion of the LLCs' Amended Answer as Exhibit C to our request that the abeyance order be lifted.

LLCs independently participated in the misrepresentations they now claim to be fraudulent.⁹

This Board follows general evidentiary rules. 49 C.F.R. 1114.1. Under general rules of evidence, the allegations of fraud and complicity in fraud in the pleadings of the LLCs and Conrail constitute judicial admissions,¹⁰ or at the very least evidentiary admissions,¹¹ by Conrail and the LLCs against each other.

⁹ Conrail filed a response in this docket on December 11, 2013, opposing lifting the abeyance order, but acknowledging that it took the position the LLCs knew the facts behind the alleged misrepresentations all along. Conrail filed as an exhibit its pleading **in** U.S.D.C. for D.C. 09-1900 so showing. Because all these materials are now of record, we will not attach them hereto again.

¹⁰ "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. Where made, a judicial admission may not be contradicted **in** a motion for summary judgment or at trial. The purpose of the rule is to remove the temptation to commit perjury." *Elliott v. Industrial Commission*, 303 Ill. App.3d 185 (Ill. App. Ct. 1999). Judicial admissions conclusively bind a party. *Id.*

¹¹ Parties are bound to their pleadings (judicial admissions) unless the pleadings are superseded. If the pleadings are superseded, then the admissions are not conclusive admissions, but are still admissions for evidentiary purposes. That is, the superseded pleading is competent evidence of the facts stated. *In re Initial Public Offering Sees. Litigation*, 544 F.Supp. 2d 277 (S.D.N.Y. 2008) citing *U.S. v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) and quoting *Kunlig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929). The allegations by the LLCs and Conrail have not been superseded and are better viewed as judicial admissions. Even if Conrail and/or the LLCs now seek to disavow them, they are evidentiary admissions of fraud and negligence.

There is a widespread consensus on the elements of civil conspiracy under the federal common law. It generally requires: (1) an agreement between two or more parties, (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act in furtherance of the conspiracy, and (4) the overt act was done pursuant to and in furtherance of the common scheme. See *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C.Cir. 1983); *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir. 1986); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F.Supp.2d 539, 554 (S.D.N.Y. 2005) ("Conspiracy and aiding and abetting are varieties of concerted-action liability; conspiracy requires an agreement to commit a tortious act....aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoers ... In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct").

Here the evidence, including new evidence, clearly meets the criteria for civil conspiracy. Conrail and the LLCs manifest their conspiracy not only in written contract for sale of parcels to the LLCs in and before 2005, but also in the 2007 agreement (not disclosed by the conspirators until the LLCs

filed it in U.S.D.C. for D.C. in 2012) .¹² The scheme was to effectuate an illegal de facto abandonment and to pocket the economic benefits the parties secured, or hoped to secure, thereby, to the economic and environmental detriment and cost (injury) to the City as well as Coalition and RTC, manifest in a host of overt acts, including the sale, the follow-on agreement to take whatever actions were required to secure the benefits of the illegal sale, followed by a spurious appeal to the D.C. Circuit, a host of lawsuits in state courts, including one or more SLAPP suits, against City et al and their attorneys, and continued resistance to AB 169 (Sub-no. 1189X) even to this very day.

When two parties such as Conrail and the LLCs are in conspiracy, their statements are admissible against each other. F.R.Ev. 801(d) (2) (E). In 2012, the LLCs filed in U.S.D.C. for D.C. 09-1900 copies of a written contract in which they entered with Conrail in 2007 binding both parties (Conrail and the LLCs) to accomplish for mutual benefit the goals of the illegal abandonment. ¹³

¹² In their pleadings the LLCs also alleged there were other oral or written agreements. In discovery, City et al wish to obtain those.

^u A copy of that contract as filed by the LLCs as an exhibit in USDC for DC 09-1900 is attached hereto as Exhibit A.

Since Conrail and the LLCs are undeniably in written conspiracy with each other to accomplish the objective of the fraud the LLCs assert in which Conrail shows the LLCs complicit, it follows under the general law relevant to conspiracies to commit fraudulent actions that the admissions of the LLCs are admissible against Conrail, and the admissions of Conrail are likewise admissible against the LLCs. In short, Conrail and the LLCs have admitted to making fraudulent misrepresentations to this Board, the courts and the City. City et al have sustained enormous losses due to this fraudulent conspiracy in the form of attorneys' fees, court costs, and diversion and delay in efforts to preserve the Harsimus Branch for railroad, historic preservation, open space, trail and other compatible public purposes.

In addition, a conspirator is liable for the acts of his co-conspirators if they are reasonably foreseeable consequences of an unlawful scheme. Halberstam, supra, at 487. Here Conrail is responsible for the actions of its chosen developer. Conrail's chosen developer is seeking to demolish the Harsimus Embankment without compliance with section 106 of the National Historic Preservation Act. That was clearly reasonably foreseeable to Conrail. But one hardly needs to apply conspiracy law or take any logical leap to reach that conclusion: Conrail is co-applicant with its developer on

demolition permits for the Harsimus Embankment.¹⁴ The developer as of the end of 2012 claims to have expended more than \$5 million to force demolition.¹⁵ The developer continues vigorously to litigate to achieve that end. In the past few months, Conrail's chosen developer, evidently confident of success, has offered to donate the historic Harsimus Embankment, a portion of the property at issue here, as fill to Hoboken.¹⁶ Since Conrail is a co-applicant with the LLCs in permits to

^m See Exhibit B. Conrail repeatedly claims (most recently in a letter filed in this proceeding on May 28, 2014, which should be stricken as a reply to a reply) that since the City has denied demolition permits, the Embankment is not at risk of demolition. This is spurious. John Curley, the City's eminent domain counsel, and counsel on a host of the LLCs' suits against the City in state court, has authorized me to state as follows: "*As indicated in the attached Historic Preservation Commission resolutions, Conrail joined in the applications filed to obtain demolition permits. Jonathan Broder [Conrail Associate General Counsel] signed consents on behalf of Conrail to the LLCs' applications. See M Donato letter dated 12.14.07 [contained in Exhibit B). The ultimate denial of demo permits by the Zoning Board of Adjustment is on appeal in the Superior Court and is stayed until the federal issues have been litigated. Once there has been an abandonment of the federal regulatory interest, the appeal will be heard and decided. The outcome may be the issuance of demo permits.*" It is inconsistent for Conrail to claim that demolition permits will never be issued, while it at the same time is co-applicant for same, its chosen developer claims to be spending millions of dollars litigating the City to obtain the permits, and its chosen developer offers to donate the Embankment as fill to a neighboring city.

¹⁵ See 212 Marin Boulevard LLC et al v. Chicago Title Insurance Company, Superior Court of NJ, Docket No. HUD-L-5801-09, decision filed Jan. 8, 2013 (LLCs seek over 5.5 million for "title" defense from Chicago Title).

¹⁶ Declaration of Stephen Marks (Municipal Manager, Hoboken) Exhibit C.

demolish this section 106-protected asset, and in any event is in a written conspiracy with the LLCs to accomplish their purposes, this effort deliberately and illegally to destroy the historic rail structures on the Harsimus Branch must be charged against Conrail as well as Conrail's chosen developer. F.R. Ev. 801(d)(2)(E); Halberstam, supra.

Moreover, once a civil conspiracy is established, the actions of one conspirator are the actions of all. E.g., D. Dobbs, Law of Torts p. 936 (2000). "[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action." Halberstam at 482.

In general, to be liable for a civil conspiracy, the conspirators must have knowledge of the illegal conspiracy. The LLCs own allegations of fraudulent misrepresentations constitute an admission of knowledge by Conrail. Conrail's allegations that at all relevant times, the LLCs had independent knowledge of the facts is an admission against the LLCs. At the very least, Conrail and the LLCs acted with willful blindness to the facts, and willful blindness under federal law is equivalent to knowledge.

Conrail has known since at least 1999 that the Harsimus Branch at issue here is protected under section 106 of the National Historic Preservation Act.¹⁷ It is a violation of section 110(k) of the National Historic Preservation Act (barring this agency from allowing the abandonment to go forward) for Conrail and the LLCs in conspiracy to put the Embankment beyond this Board's reach for purposes of demolishing it, much less seek to donate it to Hoboken for landfill. To add insult to injury, Conrail and the LLCs seek to gift the historic asset as landfill at the same time they press this Board to delay even lifting the order allowing this abandonment proceeding to begin.

Procedural Implications

The Board should afford interested parties a formal opportunity to challenge the propriety of use of exemption procedures for an abandonment that involves fraudulent misrepresentations to the Board, the Courts and to parties litigant.

The environmental assessment prepared for this Board did not take into account the unlawful conspiracy to destroy a

¹⁷Letter, D.Guzzo, Administrator NJDEP to Conrail, dated Jan. 25, 2000, congratulating Conrail on listing of the Harsimus Branch Embankment on the New Jersey Register of Historic Places as of Dec. 29, 1999, and thus eligible for listing on the National Register, attached as Exhibit D.

section 106 asset, in part because Conrail and the LLCs had suppressed the evidence. The comment period on the EA must be reopened to submit the relevant evidence and argument, preferably after City et al has had an opportunity to take some relevant discovery. In all events, the Section on Environmental Analysis needs to start over, on the basis of the admissions by Conrail and the LLCs that they engaged in a series of fraudulent misrepresentations to cover up an illegal de facto abandonment involving the destruction of historic assets and the disassembly of a transportation corridor desired by the City of Jersey City. At the very least, a supplemental environmental assessment should be issued that considers the necessity of an environmental impact statement in light of the conspiracy to demolish for private on-rail ends a section 106-protected asset in the middle of Jersey City even though it is demonstrably desired by state and local government authorities for continued and important public use, including rail use.

The civil conspiracy¹⁸ to illegally abandon the Harsimus Branch renders the section 106 process meaningless. No one can

¹⁸ The conspiracy is also criminal in nature. Under 49 U.S.C. 11907 (punishment of corporation for actions of individuals), "willful" violations by individuals acting on behalf of corporations of statutes like 49 U.S.C. 10903 render the corporations liable for criminal penalties. "Willfulness" as a mens rea is satisfied by "willful blindness" to facts that would put an ordinary person on notice that they are knowingly engaged in an unlawful activity, and Conrail certainly had sufficient

mitigate loss of the Harsimus Branch if Conrail has alienated the property to a party that clearly seeks its destruction and volunteers it for free for use as landfill. The illegal deeds furthering the illegal abandonment must be voided before a bona fide historic review process under section 106 can even begin to take place.

City et al seek an opportunity to file a motion to void the deeds. As we have elsewhere indicated, we desire some discovery against Conrail first. We may ask similar questions of the LLCs that we pose to Conrail, based on the 2007 written agreement between Conrail and the LLCs pledging to accomplish the illegal abandonment for their mutual economic benefit. City et al did not obtain the 2007 agreement until the LLCs made it available as an exhibit in their 2012 filings in United States District Court. The LLC pleadings, as well as the 2007 agreement, refer to other contracts and agreements, none of which have heretofore been produced to us, and all of which may shed relevant light on the fraudulent misrepresentations alleged between Conrail and the LLCs against this Board, the City and the Courts.

This Board voids deeds on its own motion when this Board determines that a sale of rail property is without requisite

facts at all times relevant herein to know that it was engaged in unlawful activity when it purported to abandon the Harsimus Branch without STB authorization.

authority even when parties have obtained authority for the transfer. Here, there was unquestionably a sale of rail property without any authority, let alone proper authority. The evidence we will present will show that the parties engaged in the sale either knew, or were willfully blind (the equivalent of knowledge and willfulness) that they were acting illegally.

For the reasons stated above, City et al move for a procedural schedule providing that, after resolution of discovery disputes (Conrail has already stated it may object) by this Board, motions to void the deeds will be due 30 days after Conrail and the LLCs have responded. City et al also move that the comment period on the environmental assessment be reopened for the same period since discovered information will be relevant to environmental and historic preservation issues as well.

OFA

City has made no secret of its desire to invoke the OFA remedy in this proceeding. In an unprecedented procedural ruling, this Board by Decision served May 26, 2009, slip op. at 3, stated that in order to file an OFA, the City had to "address" one or more of the following: "whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need;

whether there is community support for rail service; and whether rail service is operationally feasible." Under cover letter dated June 12, 2009, the City submitted, along with a request for fee waiver, an appeal of that ruling. The fee waiver was granted and the Notice of Appeal formally "entered" on June 23, 2009, just three days before the D.C. Circuit suspended this agency's exercise of jurisdiction pursuant to the LLC/Conrail petition for review in *Conrail v. STB*, 573 F.2d 13 (2009). Conrail seeks to avoid the appeal, and filed an opposition. This Board has not addressed the appeal.

Under this Board's May 26, 2009 decision, slip op. p. 3, item 1, the City will have only ten days to prepare evidence responsive to the May 26, 2009 decision once Conrail supplies required economic information and in the event the Board does not grant the City's appeal. A municipality or other governmental entity in general addresses the kinds of issues raised by the Board's order with consultants. City estimates that it will cost at least \$50,000 and that it ordinarily would require some months to identify available experts, for them to study the situation, and then to prepare reports or studies formally to "address" the issues presented by the Board. This is not feasible during the short period (ten days) available under this Board's decision for the OFA process in an exemption proceeding. This kind of impediment was not contemplated by the

Board or by Congress when the OFA process was established.¹⁹ Even were it feasible to obtain experts, prepare and submit reports and so forth within 10 days, that kind of requirement would impose an extraordinary financial burden on a City desperately seeking to keep the last underutilized transportation corridor into its downtown intact despite the illegal abandonment by Conrail and the millions of dollars in litigation mounted by Conrail and its developer against the City. In general, the statutory requirement that a successful OFA applicant keep a corridor in rail use for at least two years before itself seeking to abandon it, and precluding a transfer to any party other than that from whom it acquired the corridor for five years,²⁰ has been viewed as adequate protection against misuse of the statute, and special showings have been required only when a private party seeks to use the OFA provisions to prevent an important public use of an inactive line, or to prevent conversion of the line to a private rail line by the shipper it serves.

This point bears emphasis: in essentially all prior cases, this agency has recognized an obligation to permit OFA's in

¹⁹ The relevant regulations, for example, provide only for review of OFA's for the applicant's financial responsibility, 49 C.F.R. 1152.28(e), which generally is assumed in the case of a city the size of Jersey City.

²⁰ 49 U.S.C. 10904 (f) (4) (A).

light of the Congressional intent that rail service be preserved wherever possible. This Board has required showings of the sort set forth in the 2009 decision in this case only when a private OFA applicant sought to use OFA procedures to acquire property that otherwise was sought for "public use" or for "an important private undertaking." E.g., Norfolk Southern Railway- Abandonment Exemption - in Orange County, NY, AB 290 (Sub-no. 283X), served May 2, 2007, slip at 3, citing Cincinnati, N.O. & T.P. Rwy. Co. Abandonment Exemption- in Cumberland and Roane Counties, AB 390 (Sub. no. 208X), served Nov. 25, 2000 (exemption from OFA for sale of line to shipper for rehabilitation to operate as private track). Conrail/LLC demolition of the Harsimus Branch for conversion into townhouses is hardly a "public use" or "an important private undertaking."

Even in those instances where an exemption was granted, the Board placed the burden of proof on the party seeking the exemption (that is, the proponents of the interest of the public agency seeking the line for a public purpose). Here, the Board appears to be requiring the party opposed to the exemption to make a showing, as well as to be requiring that party to show a compelling private shipper need for the line. With respect, that turns this Board's precedent on its head and upends congressional policy to preserve rail service where possible. Not only is the Board shifting the burden of proof for an

exemption, but it is also requiring special showings to protect a private developer seeking to destroy a section 106-protected asset from a corridor-preserving publicly-sponsored rail effort. If private shippers are now required to make the kinds of showings the Board's 2009 decision under appeal would now require, then there would be no OFAs on inactive lines because by definition, there is no shipper with a compelling enough need to be using them. Yet the Board has not heretofore indorsed such logic. In sum, to now say, as the 2009 decision says, that when a private developer illegally acquires property in an unlawful de facto abandonment, the public cannot use OFA unless the public agency shows a compelling need, much less an "immediate and significant commercial need," is inconsistent with prior precedent, inconsistent with congressional intent, inconsistent with the statute, is not consistent with federal rail policy, and does not support any public purpose.

In addition, there is nothing in the OFA statute that limits the use of the statute to freight rail needs. The City legitimately may use the statute for passenger commuter rail as well as freight purposes. City makes no secret it wishes to retain this corridor for commuter rail, and that freight use would be permitted along with the passenger rail.

If this Board is concerned about the expense of replacing rail structures illegally removed by Conrail, then all it need

do is require Conrail (or the developer, which removed one structure) to restore all the bridges and trestles illegally removed from the Branch without prior authority of this agency.

Again, the Harsimus Branch was here illegally sold to a private developer who seeks to tear it out for conversion to townhouses and skyscrapers. This is not a case where New Jersey Transit has contracted to buy the line for transit use and is seeking to avoid an OFA by a developer.

It is unlikely that any person, private or public, could ever reliably make the showings the Board now purports to require as preconditions to making an OFA in two-year out-of-service abandonment proceedings, particularly on ten days' notice.

It is deeply ironic that when the principal of the LLCs (Mr. Hyman) filed an OFA against Conrail on one of its other Hudson County lines, Conrail did not seek an exemption from OFA, nor did this Board's predecessor state that the developer needed to make some kind of special showing to invoke it. Conrail Abandonment of the Edgewater Branch in Hudson County, NJ, in the matter of an Offer of Financial Assistance, ICC dkt. AB 2167 (Sub-no. 1036N), served Feb. 18, 1986 (allowing OFA to go forward); id. served May 21, 1987 (terminating OFA when request for terms not timely filed). If Mr. Hyman and Conrail could abide an OFA when they do it between themselves in response to a

lawful abandonment proceeding, then this Board should allow it when those two parties have engaged in an unlawful de facto abandonment to thwart keeping the corridor intact. It is insupportable to permit property developers to file OFAs but to preclude public entities seeking to preserve corridors for rail and other compatible purposes from using the remedy. The law should not, and need not, be "bent" to protect Conrail and its chosen developer in their conspiracy to commit an illegal abandonment, nor to otherwise protect them from their blunders and unlawful conduct, but instead should be available to preserve rail service and to protect the public whether Conrail blunders or not, and regardless whether it acts lawfully or not.

City requests that this Board rule in favor of its appeal, and in all events rule on the appeal before City is required to expend funds to make the showings required in the May 26, 2009 decision.

Exemption from OFA Fees

For the same reasons that this Board granted the City an exemption from fees for its administrative appeal of the May 26, 2009 OFA decision, the City requests an exemption from any requirement to pay a fee to make an "offer of financial assistance" [49 C.F.R. 1002(f) (25)] or to request the Board to set terms and conditions [49 C.F.R. 1002(f) (26)]. Those amounts are currently \$1600 and \$24,300 respectively. These amounts are

extraordinary burdens to impose on a City that has already endured eight years of litigation by Conrail and the LLCs on claims they now say were based on fraud or negligence of one or the other or both.

49 C.F.R. 1002.2(e) (1) provides for waiver of fees "for an application or other proceeding which is filed by a ... state or local governmental entity." City is a local governmental entity. City requests an advance ruling that the fees are waived so that it may be in a position timely to file its OFA and its request for terms and conditions without tendering a check to make certain the filing is accepted.

Conclusion

For the reasons stated, City et al seeks a scheduling order. City further requests that the Board grant its appeal against preconditions for use of the OFA remedy against Conrail. City also requests a waiver of filing fees for the OFA process.

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426 NW 162d St.

Seattle, WA 98177

(206) 546-1936

Fax: -3739

Counsel for City of Jersey City,

Rails to Trails Conservancy,

And Pennsylvania Railroad Harsimus

Stem Embankment Coalition

Of counsel: Andrea Ferster

General Counsel

Rails to Trails Conservancy

The Duke Ellington Building

2121 Ward Court, NW

5th Floor

Washington, D.C. 20037

Attachment:

Exhibit A - LLC/Conrail 2007 Agreement

Exhibit B - Conrail co-application per J. Broder for demolition
of Section 106 asset

Exhibit C - Declaration of Stephen Marks (Hoboken)

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 \!_th day of June 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 and other parties on the attached service list with known addresses.



A handwritten signature in black ink, appearing to read 'D. Horgan', is written over a horizontal line.

Service List

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

- with address corrections as of Jan 2014 -
Robert Jenkins III, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006-1101
For Conrail

Daniel Horgan, Esq.
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096
For 212 Marin et al

And the following self-represented individuals or entities:

Daniel D. Saunders
State Historic Preservation Office
Mail Code 501-04B
NJ Dept. Environmental Protection
P.O. Box 420
Trenton, NJ 08625-0420

Massiel Ferrara, PP, AICP, Director
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Janice Armstrong
Sr. Program Director
Preservation New Jersey
310 W. State St.
Trenton, NJ 08618

Justin Frohwith, President
Jersey City Landmarks Conservancy
54 Duncan Avenue
Jersey City, NJ 07303

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

President
Hamilton Park Neighborhood Association
PMB 166
344 Grove Street
Jersey City, NJ 07302

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

President
The Village Nbd Ass'n
365 Second Street
Jersey City, NJ 07302

President
Van Horst Park Association
91 Bright Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

Dennis Markatos-Soriano
Exec. Director
East Coast Greenway Alliance
5315 Highgate Drive, Suite 105
Durham, NC 27713

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

Sam Pesin, President
Friends of Liberty State Park
580 Jersey Ae., Apt. 3L
Jersey City, NJ 07302

Aaron Morrill
Civic JC
64 Wayne St.
Jersey City, NJ 07302

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

Exhibit# 2

Exhibit to Declaration of Daniel E. Horgan submitted with reply to Defendants-Intervenors' Motion for Leave to File Amended Pleading

Nature of Exhibit: Memorandum of Understanding dated October 12, 2007 between Consolidated Rail Corporation and SLH Holding Co., LLC and the Defendants-Intervenors LLCs

In the matter:

City of Jersey City et al. v. Consolidated Rail Corporation. et al.

C.A. No. 09-cv-1900 (CKK)

Daniel E. Horgan, Esq.
Bar No. 239772

Eric D. McCullough, Esq.
Admitted Pro Hac Vice

WATERS, McPHERSON, McNEILL, P.C.
300 Lighting Way
P.O. Box 1560
Secaucus, New Jersey 07096
Tel: (201) 863-4400
Fax: (201) 863-2866
Counsel for Intervenor-Defendants- 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

Dated: November 8, 2012

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU"), is made this 1st day of October, 2007, between Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation, with its principal offices at Two Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania 19103, SLH Holding Co., LLC ("SLH"), having a mailing address c/o Cannine Alampi, Bsq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Brie Street, LLC, 317 Jersey Avenue, LLC, 384 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, 446 Newark Avenue, LLC (collectively referred to as "LLCs"), "Conrail", "SLH" and "LLCs", collectively referred to as "Parties..."

Whereas, Conrail and SLH entered into an Agreement of Sale dated June 24, 2003, with respect to 6.2 acres of property ("Property") in Jersey City, New Jersey, which Agreement was amended by letters dated September 22, 2003, May 7, 2004 and September 15, 2004 and by Amendment to Agreement of Sale dated October 27, 2004 (collectively referred to as "Agreement"); and

Whereas, SLH assigned its rights under the Agreement to the LLCs; and

Whereas, on July 13, 2005 Conrail conveyed title to the Property to the LLCs; and

Whereas, after the sale, LLCs obtained a number of approvals for development of the Property from local governmental authorities; and

Whereas, on August 9, 2007, the Surface Transportation Board ("STB") issued a decision finding that the Property sold to LLCs remains part of the national rail system until appropriate abandonment authority is obtained.

Whereas, Conrail, SLH and the LLCs desire to maintain the benefit of the 2005 sale of the Property for all Parties.

NOW, THEREFORE, Conrail, SLH and the LLCs agree, this date of October, 2007, as follows:

1. Conrail will seek approval from the STB for abandonment of rail service over the Property. Conrail will decline any public use or trail use conditions and, as soon as practicable, upon the effective date of the abandonment, execute any such documents as may be required to effectuate and/or confirm the 2005 sale of the Property.

2. If any governmental entity commences condemnation proceedings with respect to the Property Conrail will assign to LLCs its rights to defend any condemnation proceedings and to receive all monies obtained either by final settlement or condemnation award or judgment



3. Conrail will cooperate with the ILCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property.

4. The Parties agree to file timely appeals of the STB's August 9 decision pursuant to 28 U.S.C. § 2321(a).

5. Conrail agrees that if the proceedings in Docket No. HUD-L-4908-0S in the Superior Court of New Jersey are not dismissed, Conrail will not in that or any other proceeding claim that SLH's or the LLC's failure to seek relief against Conrail precludes them from seeking relief against Conrail in any other proceeding.

6. The Parties agree that implementation and enforcement of the foregoing terms is subject to negotiation of any mutually agreeable documents as are necessary to carry out the terms of this Memorandum of Understanding, and its approval by Conrail's Board of Directors.

CONSOLIDATED RAIL CORPORATION

By: *Jonathan M. Boatz*

Title: *VP - General Counsel*

Date: *12(t, 12.") Uu:Fl=*

SLH HOLD!!- LLC

By: *d -*

Title: *J/1,1-eYVZh<.IL-*

Date: *tOd. l)...).. ()Q'*

Exhibit B

Michele R. Donato

A Professional Corporation
Attorney at Law

P. O. Box 145
106 Grand Central Avenue
Lavallette, NJ 08735

Phone:(732)830-0777
Telefax: (732) 830-0778
Email: mdonato@MicheleDonatoEsq.com

December 14, 2007

BY EMAIL TRANSMISSION AND FEDERAL EXPRESS

Daniel Wrieden
Historic Preservation Officer
Division of City Planning
City of Jersey City
30 Montgomery Street, Suite 1400, 14th Floor
Jersey City, NJ 07302

Re: Applications for Certificates of No Effect and
Appropriateness and for Certificates of Economic
Hardship:
247 Manila Avenue, LLC
212 Marin Boulevard, LLC
354 Cole Street, LLC
280 Erie Street, LLC
317 Jersey Avenue, LLC
389 Monmouth Street, LLC

Dear Mr. Wrieden:

In connection with the applications for Certificates of Appropriateness pending before the Historic Preservation Commission on December 17, 2007, I am attaching the executed consents to the applications signed by Consolidated Rail Corporation. The original signed documents will be delivered at the time of the hearing.

We will be prepared on December 17, 2007 to present our witnesses. The reports were previously delivered to your office.

If you have any questions or problems, please do not hesitate to contact me.

December 14, 2007

I thank you for your courtesies and cooperation.

Very truly yours,

Michele R. Donato

MRD:dp

Encs.

cc: (with encs.)

Carmine Scarpa, Esq.

(by email transmission only)

Mrs. Vickie Peslak Hyman

(by email transmission only)

Mr. Robert Whyte

(by email transmission only)

Carmine Alampi, Esq.

(by email transmission and regular mail)

Jeffrey Lewis, Esq.

(by email transmission only)

Joseph H. Burgis, PP, AICP

(by email transmission only)

Steven J. Kurtz

(by email transmission only)

Dean Marchetto, AIA

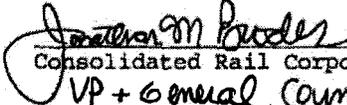
(by facsimile transmission only 201-795-0171)

JOINDER AND CONSENT TO APPLICATION FOR REVIEW FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 354 COLE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date


Consolidated Rail Corporation
VP + General Counsel

JO:nmD. Aim CONSJDn' TO APPLICA.TJ:ON J'OR :RBLIBi' JI'ROM THB
JBRBY CITY HISTORIC PRBSBRVATJ:ON COMMISSION

The undersigned hereby joins in and consents to the pending application of 280 BRIE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

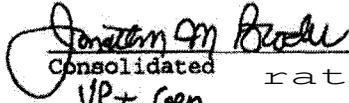
ctn -----:
ted Rail Corporation
VP+ (o

CONSD' TO JILING APPLICATION

The undersigned hereby joins in and consents to the pending application of 317 JERSEY AVENUE, LLC for Certificate of Appropriateness and a Certificate of Economic Hardship for Demolition of portion of the Sixth Street Embankment on this tract, and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

JJ./tJlot
Date

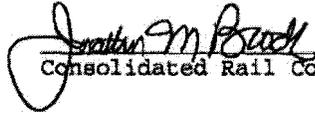

Consolidated ration
VP + Gen.

JOINDER AND CONSENT TO APPLICATION FOR RBLIBP FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 247 MANILA AVENUE, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date


Consolidated Rail Corporation

JOINT AND CONSENT TO APPLICATION FOR REDEMPTION FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 212 MARIN BOULEVARD, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

'Yl:-do::t
Date


Consolidated Rail Corporation
JP + General Counsel

JODIDD AND CONSBHT" TO APPLICM":tON FOR RBL:tBI' J'ROM THE
n:RSE:f C/n' KIS:IORIC PDSERVATION COMMSBIOIf

The undersigned hereby joins in and consents to the pending application of 389 MONMOUTH STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

lt/13/fft
Date

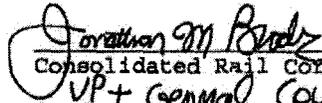

Consolidated Rail Corporation
VP + General Counsel

Exhibit C

BEFORE THE SURFACE TRANSPORTATION BOARD

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

DECLARATION OF STEPHEN MARKS

I, Stephen Marks, declare and testify, pursuant to 28 U.S.C. 1746, as follows:

1. I am the Municipal Manager of the City of Hoboken, New Jersey, which is a neighboring municipality immediately adjacent to Downtown Jersey City.
2. I make this Declaration on the basis of my personal knowledge at the request of counsel for City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition for use in the above-captioned proceeding.
3. The City of Hoboken sustained serious flood damage as a result of Hurricane Sandy.
4. On November 18, 2013 I received an email from Joanne Buonarota, Secretary to Hoboken Mayor Dawn Zimmer.
5. Ms. Buonarota forwarded an email to me which she had received from SHYMAN@SHYMAN.NET purporting to be Steven Hyman and having a mailing address of 245 East 63rd Street, Apt. 35E, New York, NY 10065.
6. The email was entitled "6th Street Embankment" and stated: *"Thanks for passing this info along. If you want any more details please contact me. I thing (sic) that there could be 60,000 lineal feet of huge stones that could be used to protect the waterfront. "*
7. Attached to the email was a 36 page document entitled "Free Stones and Fill.PDF" with background information on the Harsimus Stem Embankment.
8. On or about January 23, 2014, Mr. Steven Hyman, whom I understand to be the manager of 212 Marin Boulevard LLC and other LLCs which claim ownership of the Harsimus or Sixth Street Embankment in Jersey City, attended a public meeting in Hoboken's "Multi-Service Center (Community Center) related to the U.S. Department of Housing and Urban Development's "Rebuild By Design" competition introduced himself to me.
9. I had met Mr. Hyman many years ago and easily recognized him.

10. At the community meeting, Mr. Hyman offered to donate to City of Hoboken the rock walls and fill comprising the Harsimus Embankment for use as fill and for flood protection.

11. I informed Mr. Hyman that the City of Hoboken was not interested in use of the Harsimus Embankment for that purpose.

12. I declare under penalty of perjury and in accordance with 28 U.S.C. 1746 that the foregoing is true and correct.

Signature: . *Ofl*

Executed on: June 10, 2014.