

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Public Record

**STB NO. AB 167 (SUB-NO. 1189X)**

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN  
HUDSON COUNTY, NEW JERSEY**

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**STB NO. AB 55 (SUB-NO. 686X)**

**CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON  
COUNTY, NEW JERSEY**

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**STB NO. AB 290 (SUB-NO. 306X)**

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE  
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY**

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**REPLY OF CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION,  
INC., AND NORFOLK SOUTHERN RAILWAY COMPANY  
TO “MOTION ON BEHALF OF CITY OF JERSEY CITY ET AL TO COMPEL  
CONSOLIDATED RAIL CORPORATION ET AL  
TO RESPOND TO DISCOVERY (DOCUMENT) REQUESTS”**

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSX”), and Norfolk Southern Railway Company (“NS”) hereby reply to the Motion to Compel (“Motion” or “Mot.”) filed by the City of Jersey City (“City”), Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, “City Parties”) in the above-referenced proceedings. The Motion seeks an order directing Conrail, CSX, and NS to respond to document requests tendered by the City Parties on or around August 11, 2014.<sup>1</sup>

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<sup>1</sup> The City Parties assert that CSX and NS “made no response at all, by objection or otherwise, to the document requests and thus are in default.” Mot. at 2. This contention, which is unsupported by argument or citations to authority, is meritless. These proceedings primarily address a Conrail abandonment request, and the discontinuance notices filed by CSX and NS are ancillary to the Conrail request. Conrail has been the active railroad party throughout these proceedings.

As set forth in further detail below, the discovery requests seek, among other things, documents and information relating to the sale of the property at issue in this proceeding, a 2007 Memorandum of Understanding (“MOU”) and any other agreements between Conrail and the purchasers of the property at issue here (hereinafter the “LLCs”), Conrail policies relating to the approval of sales and agreements, information identifying Conrail directors and other individuals, documents relating to communications with other entities, documents addressing the constitutionality of statutes of five states, and a litany of other matters.

For the reasons set forth below, the motion should be denied.

### ARGUMENT

Discovery is disfavored in abandonment proceedings. *See Ind. Sw. Ry. Co.—Abandonment Exemption—in Posey & Vanderburgh Counties, Ind.*, STB Docket No. AB 1065X, slip op. at 4 (served Feb. 11, 2011); *Cent. R.R. Co. of Ind.—Abandonment Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Counties, Ind.*, STB Docket No. AB459 (Sub-No. 2X), slip op. at 4 (served Apr. 1, 1998). “Parties seeking discovery in abandonments must demonstrate both relevance and need.” *Ind. Sw.*, slip op. at 4. The City Parties have not carried that burden.

**I. THE CITY PARTIES’ BASELESS ALLEGATIONS OF FRAUD AND VIOLATIONS OF NHPA SECTION 110(K) ARE INADEQUATE TO JUSTIFY DISCOVERY IN THIS PROCEEDING**

As characterized by the City Parties, their discovery is intended to inquire into “matters relating to the fraudulent misrepresentation allegations [made by the LLCs] and . . . the

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The City Parties served the requests upon Conrail’s outside attorney as counsel for all three entities. Conrail’s counsel consulted with counsel for CSX and NS concerning its responses on their behalf, and it was clear that Conrail’s objections were lodged on behalf of all three entities.

agreements to further the fraudulent misrepresentations and to deny meaningful relief to the City.” Mot. at 6.

In a recent letter motion filed with the Board, the City Parties have provided what may be the clearest articulation of their overall position in this matter—a position that forms the ultimate ground for their attempt to obtain discovery from Conrail, CSX, and NS: “City of Jersey City takes the position that [Conrail’s] unlawful sale of a large portion of the Harsimus Branch to the LLCs in 2005 should be voided, and that Conrail should be directed to transfer the property on equivalent terms to the City as a remedy for, inter alia, the violation of NHPA section 110(k) and evasion of STB jurisdiction and remedies that the unlawful sale represents. This Board’s ‘OFA’ remedy would result in similar relief. . . . City is interested in the most expeditious means to achieve meaningful relief as set forth above from the unlawful 2005 sale and subsequent actions aggravating it taken by Conrail and the LLCs.” Letter Mot. for Clarification from Charles H. Montange, Esq. to Cynthia T. Brown, Chief, Section of Administration, Office of Proceedings, STB, at 2 (Sept. 25, 2014).

In its 2009 Environmental Assessment (“EA”) in this proceeding, the then-Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or “OEA”) rejected the City Parties’ arguments that the historic review process should not proceed because Conrail had engaged in “anticipatory demolition” in violation of Section 110(k) of the National Historic Preservation Act (“NHPA”). Far from engaging in intentional wrongdoing, OEA found that Conrail had acted “appropriately and in good faith.” EA at 14. The City Parties now argue that because OEA lacks the resources to conduct its own investigation of the City Parties’ allegations, discovery is needed to establish that Conrail has deceived the City Parties and the Board by illegally selling the property at issue in this proceeding and then misrepresenting the

property's jurisdictional status, and has violated Section 110(k) of the NHPA, 16 U.S.C. § 470h-2(k), by engaging, or conspiring with the LLCs to engage, in intentional anticipatory demolition of the property.

According to the City Parties, Conrail's alleged illegal and fraudulent acts necessitate action by the Board, although we remain puzzled about what the City Parties are in fact seeking. It appears, however, that the principal remedies sought by the City Parties are the voiding of the deeds of sale of the property to LLCs, the reconveyance of the property to Conrail, and an order requiring Conrail to sell the property to the City at the same price that Conrail sold the property to the LLCs in 2005. Alternatively, a grant of a City Offer of Financial Assistance ("OFA") also is clearly within the menu of options presented by the City Parties to the Board. This, at least, seems to be what the City Parties suggest in the September 25, 2014 letter quoted above.<sup>2</sup>

The City Parties cite a number of facts and documents that allegedly support their claims that discovery is needed because of evidence that Conrail has acted illegally and deceptively.

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<sup>2</sup> The City Parties devote several pages of their motion to berating Conrail for misrepresenting their position with regard to whether they really are seeking to have the Board deny the abandonment authorization sought by Conrail in this proceeding. *See* Mot. at 12-15. Even after closely examining this argument, it is not altogether clear whether the City Parties are actually saying that they would be satisfied with a blanket *denial* of the abandonment authorization or are rather arguing that any *grant* of the authorization should be conditioned on various steps, such as the voiding of the deeds and reconveyance of the property to Conrail, together with an order directing "Conrail to convey the property to the City at the same price paid by the LLCs in the illegal abandonment." *Id.* at 13. The City Parties also argue that they have consistently asserted that class exemption notice procedures should not be used for this matter. *Id.* at 14.

Putting aside the fact that the City Parties do not explain the legal basis for an order to convey property to the City in 2014 (or after) at the same price that the property was sold to the LLCs in 2005, Conrail does not believe that it has misrepresented the City Parties' position. As explained below, it is highly doubtful that the City Parties would be satisfied with a simple denial of abandonment authorization.

*First*, the City Parties seem to assume that there simply could not be any good faith controversy about the jurisdictional status of the property.<sup>3</sup> In other words, the City Parties seem to believe that Conrail's disagreement with the City Parties about the jurisdictional status of the property is itself evidence of fraud.

The short answer to this contention is that mere disagreement with a legal position is not evidence of fraud, and certainly could not justify discovery in this proceeding. The somewhat longer answer is that the Board has repeatedly noted that the determination of the jurisdictional status of trackage requires a case-by-case analysis of various factors. *See, e.g., Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, STB Finance Docket No. 35424, slip op. at 3 (served June 14, 2011) (“The terms ‘spur, industrial, team, switching, or side tracks’ (collectively, ‘spur’ track) are not defined in the Interstate Commerce Act, nor does the legislative history of the statute reveal a clear Congressional intent regarding the meaning of these terms. The agency and the courts have adopted a case-by-case, fact-specific approach to make this determination.”) (internal citation omitted); *N.Y. City Econ. Dev. Corp.—Pet. for Declaratory Order*, STB Finance Docket No. 34429, slip op. at 5 (served July 15, 2004) (“Moreover, there is no single test for determining whether a particular track segment is a ‘line of railroad,’ or is instead simply a spur. Rather, the agency and the courts have adopted a case-by-case, fact-specific approach to make this determination.”); *id.* at 6 (“[I]t is well settled that the agency must consider a variety of relevant factors in determining the spur vs. line of railroad issue.”); *Chicago Southshore & South Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind.*, STB Finance Docket No. 33522, slip op. at 4 (served Dec. 17, 1998) (“There

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<sup>3</sup> For examples of how the City Parties treat legal disagreements with its position as evidence of fraud, see the Reply of the City Parties to Conrail's Supplemental Environmental and Historic Report, filed September 3, 2014 (“City Parties’ Reply to Supp. Rep.”) at 8-10, 17 & n.9.

is no single test of what constitutes exempt track under 49 U.S.C. 10906. Our analysis must focus on the disputed track's use, history, and physical characteristics, and we rely on a variety of indicia . . . .").<sup>4</sup>

Conrail's position that the Harsimus Branch was not a line of railroad was based on an analysis of various considerations, and although Conrail may have been incorrect—a conclusion that Conrail has never in fact conceded—its position was not frivolous, much less patently fraudulent, no matter how vociferously City Parties' counsel disagrees with it.

*Second*, the City Parties argue that, in Special Court proceedings to determine the jurisdictional nature of the property, the LLCs "*admitted* that Conrail had fraudulently misrepresented to them, the courts, this agency and the City that the Harsimus Branch was something other than a line of railroad." Mot. at 4 (emphasis added). This is a gross distortion of the record. The LLCs did not "*admit*[]" that Conrail made fraudulent misrepresentations; they *accused* Conrail of fraud in an eleventh-hour bid to forestall summary judgment.<sup>5</sup>

As Conrail showed in the Special Court proceedings, the LLCs' allegations were utterly meritless.<sup>6</sup> They cannot serve to justify discovery in a proceeding where discovery is otherwise disfavored.<sup>7</sup>

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<sup>4</sup> *New York City Economic Development Corporation* underscores the error of assuming that the mere presence of disagreement about a track's status reflects bad faith on the part of one of the parties. There, the Board's members disagreed about whether the track at issue was a spur, with two Board members holding that the track was a spur, and Vice Chairman Mulvey dissenting.

<sup>5</sup> There is nothing inadvertent about the City Parties' conflation of an admission and accusation. The City Parties also characterized the LLCs' accusation as an admission in its reply to Conrail's Supplemental Environmental and Historic Report. See City Parties' Reply to Supp. Rep. at 2-3.

<sup>6</sup> See Resp. of Conrail to City Parties' Notice of Decision & Request for Lifting of Stay of Proceeding, filed herein on December 11, 2013 (attaching Conrail's Special Court memorandum in opposition to the LLCs' motion to amend their answer to add fraud claims against Conrail).

<sup>7</sup> It bears noting that the LLCs also made various allegations against the City Parties in the Special Court, and for largely the same baseless reasons. The City Parties no doubt regard those

The City Parties further argue that, when combined, the LLCs' "admission" and Conrail's *response* to the LLCs' fraud allegations are a "combination of admissions [that] constitute an admission that Conrail and the LLCs intentionally misled the agency, the courts and the City in an effort to evade STB abandonment regulation, including NHPA section 106." Mot. at 4-5. The City Parties state that "Conrail responded in essence that the LLCs were aware of [or] should have been aware of the relevant facts at all times pertinent. If the LLCs were aware or should have been aware, then so should Conrail." *Id.* at 4.

This somewhat convoluted assertion is similar to assertions repeated throughout the City Parties' Reply to Conrail's Supplemental Environmental and Historic Report. *See* City Parties' Reply to Supp. Rep. at 3 ("Conrail's response to this charge boils down to showing that the developer knew or should have known this at all pertinent times. But if the developer knew or should have known, so should Conrail, so both Conrail and its chosen developer in open court in effect have acknowledged their own knowledge or willful blindness to an illegal abandonment."). In its most misleading form, the City Parties claim: "The developer now says the arguments on which Conrail relied for this purpose in the D.C. Circuit were fraudulent misrepresentations. Conrail says the developer knew that the misrepresentations were fraudulent all along and participated in them." *Id.* at 10-11; *see also id.* at 23 n.15 ("Conrail has indicated that the developer was aware at all pertinent times, or should have been aware, that the property was part of a line of railroad requiring STB abandonment authorization"); *id.* at 31, 33 n.24, 36-37.

This, of course, completely misrepresents what Conrail stated in response to the LLCs' fraud allegations. Conrail's responses were made in the context of arguing that the LLCs should

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allegations against them as frivolous, yet the City Parties choose to give credence to the allegations against Conrail for purposes of attempting to obtain discovery here.

not be permitted to amend their Special Court pleadings to add newly-hatched fraud claims against Conrail on the eve of summary judgment. The LLCs had argued that they should be permitted to plead their new claims at the last minute because they had only just discovered the factual predicates for those claims. Conrail argued that the LLCs' claim of a new discovery was an utter fiction. Conrail showed that the facts that the LLCs asserted that they had just discovered were actually aired in the STB proceedings years earlier.

In doing so, Conrail did not, and does not, concede that these facts establish that the property was, in fact, part of a line of railroad. But the significant issue, given the procedural posture of the Special Court proceedings, was whether these facts were, as the LLCs contended, newly discovered, and Conrail showed they were not.

For example, the fact that the Harsimus Branch carried significant amounts of Hudson Street Industrial Track ("Hudson Street IT") traffic was repeatedly adverted to by the City Parties themselves in the Declaratory Order proceedings (STB Finance Docket No. 34818). *See* City Parties' Opening Statement at 5, 18, 22, 31 (Mar. 9, 2006); City Parties' Rebuttal at 4, 12 n.17, 13, 14, 15, 18, 20 (May 9, 2006). Therefore, Conrail argued that the LLCs should not be allowed to amend their pleadings to state claims for fraud based on such facts on the eve of the conclusion of the Special Court proceedings. But Conrail never stated or suggested that the LLCs were aware of a Conrail *misrepresentation*, or that there was any misrepresentation, or that the allegedly newly-discovered facts established that the Harsimus Branch was a line of railroad. To the contrary, in the STB proceedings, Conrail (and the LLCs, for that matter) acknowledged these facts, but argued that they did not prove that the Harsimus Branch was a line of railroad. Conrail made that argument in good faith. The City Parties' blatant and repeated

misrepresentations of Conrail's argument do not justify discovery and should not be countenanced.<sup>8</sup>

*Third*, the City Parties cite a 2007 Memorandum of Understanding (“MOU”) as evidence of a fraudulent conspiracy between the LLCs and Conrail, and argue that this (and other unnamed agreements) “confirm that any section 106 process undertaken at this time is meaningless, and that a section 110(k) . . . anticipatory demolition has transpired.” Mot. at 5. According to the City Parties, the MOU reflected an agreement “to further the fraudulent misrepresentations and to deny meaningful relief to the City.” *Id.* at 6. *See also id.* at 12 (referring to agreements entered into “for intentional evasion of STB jurisdiction, which of course includes section 106, and to circumvent effective remedies”); *id.* at 13 (alleging that “the LLCs and Conrail entered into an agreement in 2007 to circumvent STB remedies”). The City Parties go on to characterize the 2007 MOU as an agreement “providing that the LLCs would not sue Conrail so long as Conrail cooperates with them, and secures the property to them,” and allege that “an agreement by Conrail to cooperate so it is not sued for fraud reflects a motive to evade liability for unlawful or tortious behavior. Such an agreement calls for further evasion of effective remedies for past misconduct and amounts to an agreement to cover up as well.” *Id.* at 16.

Putting to one side the question whether the MOU is even enforceable—a point that Conrail does not concede—the City Parties’ characterization of the MOU is pure fiction.<sup>9</sup> Far

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<sup>8</sup> In the STB proceedings in the 2006-2009 timeframe, the LLCs were represented by former Interstate Commerce Commission General Counsel Fritz Kahn. On behalf of the LLCs, Mr. Kahn conducted his own factual investigation of the history of the property, presented numerous witnesses, including respected former United States Railway Association members, and argued vigorously that the property was not a jurisdictional line of railroad.

<sup>9</sup> For their interpretation of the thrust of the 2007 MOU, the City Parties rely in part on actions undertaken by the LLCs alone. *See* Mot. at 16-17. Conrail, however, is not responsible for the

from reflecting an intent to evade STB jurisdiction, the MOU refers to Conrail's seeking "approval from the STB for abandonment of rail service over the Property." MOU ¶ 1. That it refers to Conrail declining any public use or trail use conditions would certainly not be evidence of any intent to evade STB jurisdiction, either. Nor is there any fraudulent intent evident in the provision stating that Conrail would, "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." *Id.* Similarly, Conrail's assignment of its rights to the LLCs to defend any condemnation proceedings and "to receive all monies obtained either by final settlement or condemnation award or judgment" (MOU ¶ 2) would merely reflect a common commercial arrangement and does not reflect any fraudulent intent.

That Conrail would "cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property" (MOU ¶ 3) clearly does not reflect any intent to evade STB jurisdiction. That such applications were contemplated merely demonstrates the fact, further reflected in paragraph 4, that at the time the MOU was executed, the appeals of the STB's decision in the Declaratory Order proceeding had not yet occurred, and, in any event, any development approvals under city or state law would be contingent on compliance with federal abandonment law and processes. (The apparent belief of counsel for the City Parties that the exercise of appellate rights is an abuse of STB proceedings is, thankfully, not the law of the land.)

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LLCs' legal maneuvers or for the LLCs' principal's alleged abuses of legal process. After all, these are the very entities that have tried to sue Conrail for fraud.

A copy of the MOU is attached to this Reply. It bears noting that the City Parties have the MOU, so they cannot excuse their mischaracterizations of it by arguing that they necessarily have to conjecture about its contents.

Paragraph 5 of the MOU is the only provision dealing with possible litigation between the LLCs and Conrail, and contrary to the City Parties' characterization, nothing in that paragraph reflects an "an agreement by Conrail to cooperate so it is not sued for fraud." Mot. at 16. Far from disclosing an intent to *release* Conrail from possible later-pled claims, paragraph 5 provides that Conrail would not claim (by virtue of the New Jersey "complete controversy" doctrine) that the LLCs' failure to seek relief against Conrail in their pending New Jersey Superior Court proceedings against the City precluded the LLCs from seeking relief against Conrail in other proceedings. As already discussed, the LLCs did subsequently attempt, unsuccessfully, to sue Conrail for fraud in the Special Court proceedings.

Thus, the City Parties' characterization of the MOU is sheer fantasy, and there is no basis for arguing that the MOU is evidence of fraudulent or other unlawful intent, or for inquiring into the MOU through discovery. As Conrail stated in its objections to the City Parties' discovery, "[t]he invocation of the MOU is mere make weight" to justify discovery. Conrail Resp. to Request for Prod. Of Documents at 3 (Sept. 3, 2014).

The other "evidence" that the City Parties cite—in Appendix I to the Motion—to support their admissions-of-fraud theory is equally off the mark. Thus, that Conrail objected to the inclusion of the property in State and National Register listings in 2000—years before Conrail sold the properties to the LLCs—does not reflect fraudulent intent. Many property owners would rather that their property not be so listed. Indeed, *the City itself* also objected at the time to the historical designation.

Similarly, "Conrail's joinder in demolition permit requests signed . . . after this Board concluded in F.D. 34818 that the Harsimus Branch was a line of railroad" (Mot. at 31) also does not reflect an intent to evade Board processes. Even were the Jersey City authorities to waive

their Historic Landmark designation to permit the Embankments to be demolished for development purposes, no such demolition could occur unless and until the Board's processes were satisfied.<sup>10</sup>

Thus, the fundamental premise upon which the City Parties base their arguments for discovery—which is that Conrail has engaged in intentional anticipatory demolition and made misrepresentations in order to evade the Board's jurisdiction and the Section 106 process—is completely baseless. The City Parties have spun a web of innuendo, word play, and fantasy to justify a fishing expedition. That they argue that discovery is needed to preserve the integrity of the Board's processes is ironic under the circumstances. Their rhetoric and distortions of the record pose a far greater threat to the integrity of Board processes than any action Conrail has taken. Their discovery is a blatant abuse of the Board's processes, and is clearly calculated to harass Conrail, NS, and CSX.

## **II. THE DISCOVERY IS IRRELEVANT TO ANY REALISTIC RESOLUTION OF THE ISSUES BEFORE THE BOARD**

As the City Parties have repeatedly stated, they seek discovery to establish that Conrail knowingly sold the property illegally, engaged in misrepresentations about the property, and violated NHPA Section 110(k) by engaging in intentional anticipatory demolition. The ultimate purpose of proving these allegations through discovery is to create the predicate for various forms of relief and sanctions in these proceedings.

As noted above, it remains unclear to Conrail whether the City Parties genuinely want the Board to deny abandonment authority for the properties, but for the purposes of responding to

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<sup>10</sup> The *developer's* offer to Hoboken of the Embankment for fill in January 2014 (Mot. at 31) cannot be cited as evidence against Conrail. Aside from the fact that Conrail does not and has never controlled the actions of the LLCs' principal, the LLCs have stipulated that they will not take any action to alter the Embankment properties without prior authorization from the Board.

the City Parties' motion—especially, in light of their multi-page diatribe about Conrail's "misrepresentation of City Parties' position" on the matter (*see* note 2, *supra*)—we will assume that this is one option that they believe the Board should consider. The principal other two options for Board action, as we understand the City Parties' position, are (1) for the Board to void the deeds of sale for the property, order the reconveyance of the property to Conrail, and order that Conrail sell the property to the City for the same amount for which it sold the property to the LLCs in 2005, and (2) to order the voiding of the deeds and grant an OFA request.

With regard to the latter two, contrary to the City Parties' apparent belief, there is nothing in Section 110(k) that authorizes the voiding of the deeds, much less an order that Conrail convey the property to the City for the same amount for which Conrail sold the property to the LLCs in 2005. By its terms Section 110(k) contemplates that a license may be denied or granted. It does not provide a roving commission for the imposition of various alternative remedies.<sup>11</sup>

Although the Board may have the inherent authority to void the deeds to protect the integrity of Board processes, the Board has never applied such a sanction in a case like this. In their recent submissions to the Board, the City Parties have discussed two cases as precedent for an order that property be reconveyed to a railroad that had previously sold it—*Land Conservancy of Seattle & King County—Acquisition & Operation Exemption—The Burlington N. & Santa Fe Ry. Co.*, STB Finance Docket No. 33389 (served Sept. 23, 1997), and the combined decision in *SF&L Ry., Inc.—Acquisition & Operation Exemption—Toledo, Peoria & W. Ry. Corp. Between*

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<sup>11</sup> In its entirety, Section 110(k) provides, "Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 470f of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant." 16 U.S.C. § 470h-2(k).

*La Harpe and Peoria, Ill.*, STB Finance Docket No. 33995, and *Kern W. Schumacher & Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry, Inc.*, STB Finance Docket No. 33996 (served Oct. 17, 2002).

In both of those cases, unlike this one, the parties to the property transactions filed notices of exemption that, apparently, misrepresented their intent to continue to provide service over the subject lines. Moreover, shipper and/or labor interests were harmed or potentially harmed by the deceptive transactions. Finally, in neither case did the Board purport to grant relief under Section 110(k).

In any event, the voiding of the deeds of sale for the property at issue in this case is wholly unnecessary. Because Conrail retains a constructive easement, an OFA request could be granted regardless of whether the LLCs continue to own the property.<sup>12</sup> Moreover, once the abandonment is approved, the City can use applicable state procedures to obtain the property. Since there is no basis for the City Parties' request that the Board order Conrail to convey the property to the City for the price the LLCs paid for it, the City Parties would suffer no deprivation of a benefit to which they are entitled under federal law if they were forced to avail themselves of State law condemnation procedures. Thus, because voiding the deeds would be unnecessary (to the extent that it is permissible at all), discovery undertaken for the purpose of obtaining the voiding of the deeds and the reconveyance of the property to Conrail cannot be justified.

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<sup>12</sup> This is not the occasion to address the merits of an OFA for the Harsimus Branch property. Suffice it to say that, based on the facts on the ground and prior representations made by the City Parties, any OFA request in this case should be subject to intense scrutiny. The City Parties themselves stressed in the earlier declaratory order proceeding that “[n]o one is pretending that the petitioners in this proceeding are seeking to preserve the Harsimus Branch as an operating freight railroad.” City Parties’ Rebuttal at 25.

As for using the fruits of discovery to justify the denial of the abandonment authorization altogether, that, too, would be a pointless exercise. A denial of abandonment authority would leave the *status quo ante* in place, and, in light of the City Parties' clear desire to acquire the property, a flat denial of abandonment would hardly be a satisfactory end of the matter for the City Parties.

Rather, their goals—as we understand them—can be met only if the property ultimately is abandoned, and STB jurisdiction over the property is terminated. Thus, if the abandonment authority sought by Conrail is denied, it is likely that the City Parties would file for an adverse abandonment, starting much or all of the process all over again from the beginning. This would be a colossal waste of administrative resources. Thus, even if there were some genuine basis for believing that Conrail has willfully violated the law and made misrepresentations, an outright denial of abandonment authority would, under these circumstances, be of no long-term value.

For the foregoing reasons, discovery cannot be justified by the argument that it could provide a basis for voiding the deeds or denying the abandonment authority altogether.<sup>13</sup>

### **III. THE CITY PARTIES' DEMAND FOR A PRIVILEGE LOG SHOULD BE DENIED**

Even if the Board allows some of the City Parties' discovery requests, Conrail, CSX, and NS should not be subjected to the burden of producing privilege logs. A number of the discovery requests relate to matters in which there are likely to be numerous privileged

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<sup>13</sup> Nor can discovery be justified by arguing that it might support various mitigation directives under Section 106 of NHPA. The Board has repeatedly held that the mitigation options available to it under Section 106 are "very limited. . . . [A]s a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us." *Implementation of Env'tl. Laws*, 7 I.C.C.2d 807, 828-29 (1991). Notwithstanding Conrail's sale of the property to the LLCs, Conrail has expressed its willingness to document the historic resources at issue in this proceeding.

communications. The preparation of logs itemizing each of these communications would be extremely burdensome, would impose significant costs on the responding parties, and would unduly delay the completion of discovery.

“The Board does not routinely require the production of privilege logs.” *Canadian Pac. Ry Co.—Control—Dakota Minn. & E. R.R. Corp.*, STB Finance Docket No. 35081 (Sub-No. 2), slip op. at 4 (served Mar. 26, 2014). The Board has done so, however, in cases in which the discovery relates directly to the fulfillment of conditions for transactions to which the party from which discovery has been sought has agreed (*id.*), or where the circumstances of the case suggest a greater than usual likelihood of erroneous designations of evidence as privileged (*Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557, slip op. at 8 (served June 25, 2012).) Neither of those circumstances are present here. Therefore, the City Parties’ burdensome request for privilege logs should be denied.

#### **IV. MANY OF THE REQUESTS ARE UNTIMELY IN WHOLE OR IN PART**

The City Parties have long argued—including throughout the Declaratory Order proceedings (Finance Docket No. 34818)—that Conrail’s sale of the property at issue in this proceeding was illegal. Thus, many of the topics concerning which they are now attempting to obtain discovery—such as matters relating to the sales agreements between Conrail and the LLCs—could, and should, have been inquired into long ago, when discovery was had in the Declaratory Order proceeding, a proceeding in which (unlike this proceeding) there was no presumption against discovery.

Contrary to the City Parties’ claim, there was ample discovery in that proceeding, and the City Parties could have inquired into many of the issues that they seek to probe here. In the Declaratory Order proceeding, the City Parties propounded eleven document production requests to Conrail, resulting in the production by Conrail of a significant number of documents and

maps. The City Parties also served two requests for admission and one interrogatory upon Conrail.<sup>14</sup> Thus, many of the discovery requests are, in whole or in part, untimely.

#### **V. THE CITY PARTIES FAIL TO REBUT CONRAIL'S SPECIFIC OBJECTIONS**

As shown above, there is no basis for discovery at all in this proceeding. Even if there were some grounds for limited discovery, the requests propounded by the City Parties suffer from a host of defects that necessitate the denial of the City Parties' motion to compel.

**Request 1:** The City Parties fail to justify their request for "original sales agreements and amendments thereto." Mot. at 20. The City Parties' belief—which is not explained or justified—"that the original 'sale' agreement was in the nature of an option only, allowing ample time for due diligence" does not establish that the request is "certainly relevant to evasion and intent to evade." *Id.* at 20-21. The City Parties' assertion of relevance is mere *ipse dixit*.

Contrary to the City Parties' claims, this information could have been sought in the Declaratory Order proceeding, in which the City Parties repeatedly asserted that the sale of the property was illegal and in which there was discovery. Moreover, the City Parties' characterization of this document request ignores the broad, vague, and unduly burdensome portion of the request that seeks "[a]ll writings that relate in any way to the foregoing [agreement, letters, and amendment]." *See* Request 1(d).

The City Parties' putative justification of this request is insufficient to overcome the presumption against discovery in abandonment proceedings.

**Request 2:** The City Parties also fail to justify this request, which seeks all versions of the MOU and other "similar agreements." In purporting to explain the relevance of this request, the City Parties again misrepresent the MOU's terms (characterizing it as an agreement for the

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<sup>14</sup> The City Parties separately served document production requests upon the LLCs.

LLCs not to sue Conrail) and simply assert that the “document request is obviously relevant, and anything but overbroad.” Mot. at 21. The City Parties have failed to carry the burden of justifying this request. Rather, as Conrail noted in its objections, this request appears to have been propounded for the improper purpose of intruding upon applicable Joint Interest and Settlement Privileges.

**Request 3:** The City Parties state that this request, which “seeks documents sufficient to show how Conrail approves real estate transactions” is “germane to determining who may have been involved in the illegal abandonment, and also to Conrail’s intentions. A[t] a minimum, [the documents subject to the request] may lead us to possible candidates for a deposition.” Mot. at 21.

This explanation reveals that the City Parties’ intent is to engage in a wide-ranging fishing expedition, the end-result of which will be depositions of Conrail, CSX, and NS present and/or former board members and officers. At a minimum, this request calls into question the City Parties’ protests (Mot. at 19) that they have no motive (or ability) to harass Conrail with needless discovery. The Motion with regard to this intrusive discovery request should be denied.

**Requests 4 and 5.** As the City Parties explain, these requests call for various Board of Director minutes. In purporting to justify these requests, the City Parties (once again) offer only speculation that the requests may lead to admissible evidence (Mot. at 21-22) without explaining how they could do so. The City Parties also misrepresent the 2007 MOU. The City Parties have failed to carry their burden of justifying such discovery in an abandonment proceeding, but rather have offered only innuendo, speculation, and misrepresentations.

**Request 6:** This request seeks “[d]ocuments sufficient to set forth the name and current business address of members of the Conrail board of directors 2002 to the date of this document

request (or a list with relevant dates of service, names, and business addresses).” *See* Request 6. The clear intent of this request is to seek targets for depositions. The City Parties apparently think no justification for this request—or for depositions of Conrail board members—is required. Besides invoking their usual misrepresentations of that 2007 MOU, the City Parties simply assert that they are entitled to this information and to depose the board members. Mot. at 22-23. The City Parties’ intent to harass Conrail and its board and officers and to punish Conrail for having the audacity to oppose the City Parties’ legal position is transparent.

**Request 7:** This request seeks “documents relating to agreements or understandings purporting to toll any statute of limitations defense that may be asserted by Conrail or an attorney representing any party (including but not limited to Conrail) to the Agreement of Sale dated June 24, 2003, as later amended.” *See* Request 7. Nowhere do the City Parties explain the relevance of this request. They merely assert that this request seeks “documents relevant to agreements by Conrail and the LLCs to subvert STB regulation or undermine STB’s remedies.” Mot. at 23. But the City Parties do not explain *how* information, if any, responsive to this request could possibly reveal such an illicit intent. The assertion that information responsive to this request would be relevant is pure *ipse dixit*, and hardly justifies the allowance of this discovery in an abandonment proceeding.

**Request 8:** This request “asks for communications between NJ DOT and Conrail other than pleadings concerning the sale of the Harsimus Branch or STB proceedings.” Mot. at 23-24. The City Parties assert that this request is relevant because they have an “understanding that NJ DOT may have warned Conrail that the Harsimus Branch was a line of railroad during the title insurance process.” *Id.* at 24. This request should be denied. Even were there any responsive documents, the New Jersey Department of Transportation has no special authority with regard to

the regulatory status of rail properties. Any opinion offered by the New Jersey Department of Transportation on the jurisdictional status of the property, therefore, would not be binding on Conrail and would not support an inference of knowing illegal conduct on the part of Conrail. Conrail reached its own conclusions about the jurisdictional status of the property, and did so in good faith. Moreover, as noted above, the determination of a track's jurisdictional status requires a case-by-case, fact-specific inquiry, and is often the subject of reasonable disagreement. That two entities might disagree on such issues does not provide a basis for concluding that one of those entities must be a bad actor.

**Request 9:** This request seeks “[a]ll documents relating to sale or potential sale of land or interests in land containing the portion of the Harsimus Branch between CP Waldo and the portion of the Harsimus Branch purportedly sold to SLH Holding Company and/or the LLCs, including but not limited to proposed sales, proposed brokerage agreements, and any other proposal that might result in non-railroad use of that portion of the Harsimus Branch.” *See* Request 9. The City Parties seek to justify this request by speculating that “[i]f there are any additional sales or contracts for sale and so forth, then they are further evidence of evasion of this Board’s jurisdiction and processes. In addition, the information is potentially germane to claims of severance mounted by the LLCs.” Mot. at 24.

These putative justifications for this request are specious. Conrail is not contesting this agency’s jurisdiction over the Harsimus Branch from CP Waldo eastward. The City Parties do not explain *how* documents relating to the designated sales or potential sales could possibly constitute further evidence, or lead to further evidence, of evasion of this Board’s jurisdiction and processes. As for the LLCs’ severance claims, those claims have been thoroughly briefed, and to the extent that we understand them, they are predicated upon the impact of the

abandonment of the River Line, not on sales or potential sales of property from CP Waldo to the east. The City Parties' reference to the severance issue is mere make weight to justify an unjustifiable discovery request.

**Request 10:** This request seeks “[d]ocuments sufficient to identify (by name, current business address and position during all relevant times at the railroads) all persons advising or taking action for Conrail or recommending action by Conrail in connection with the sale of any portion of the Harsimus Branch from 2000 to date.” *See* Request 10. The City Parties state that “[t]he identity of those persons who advise and act for the corporation is obviously germane to issues of evasion and intention to evade STB jurisdiction and remedies. Conrail must be compelled to respond.” Mot. at 24-25.

Like Requests 3 and 6, this request is clearly being made for the purpose of assembling a list of potential deponents. The City Parties simply assert that they are entitled to this information and that it is relevant, but they completely fail to offer any non-conclusory reasons for their entitlement to the information. The City Parties' motive to harass and punish Conrail and its advisors, officers, and directors is patent. The Board should not assist the City Parties in this endeavor.

**Request 11:** As the City Parties state, Request 11 is similar to Request 10, but it seeks information about the identities of all persons “advising or taking action for *SLH Holding or the LLCs.*” *See* Request 11 (emphasis added). Concededly, the City Parties often have appeared not to understand the distinction between the LLCs and Conrail—hence, their repeated, utterly baseless references to the LLCs as “Conrail’s chosen developer.” But in their argument regarding this request, they eschew such rhetorical gambits, clearly revealing that they do understand that Conrail and the LLCs are distinct entities, but imperiously assert that they are

entitled to seek the LLCs' information from *Conrail*. Mot. at 25. They do not deign to justify this unreasonable request, which appears to have been propounded solely to harass and annoy Conrail. Having failed to offer any justification for such a discovery request in an abandonment proceeding, the motion to compel a response to this request should be denied.

**Request 12:** This request seeks “[a]ll documents reflecting any inquiry by [former] Conrail employee Ryan or Conrail attorney Fiorilla or any other employee or agent of Conrail directed to any other person employed by, retained by, or acting as an agent for Conrail, CSX or NS concerning whether the Harsimus Branch was a line of railroad requiring STB abandonment authorization prior to sale to SLH Holding Company or the LLCs, and all documents responsive thereto.” *See* Request 12. In the motion to compel, the City Parties refer solely to inquiries made by former employee Ryan. Thus, it appears that they no longer are seeking documents reflecting inquiries by attorney Fiorilla.

Be this as it may, the City Parties once again make no effort to explain the relevance of the request, but simply assert that it seeks “clearly relevant” information, imperiously asserting that “Conrail must be compelled to respond.” Mot. at 25. In the context of an abandonment proceeding, where discovery is disfavored, these conclusory arguments are inadequate to justify discovery.

**Request 13:** This request seeks a broad array of documents relating to the Harsimus Branch in the files of CSX or NS. The City Parties seek to justify this request by conjecturing that “it is possible that some of the officers of NS and CSX may have documents relating to the Harsimus Branch which they are keeping in their NS and CSX files” and stating that “[i]t is hardly stunningly overbroad to ask that someone at least look.” Mot. at 26.

This hardly justifies this extremely overbroad request. The request seeks “[a]ll documents . . . relating to the rail regulatory status, historic nature, or sale of [the] Harsimus Branch from 2000 to date” other than pleadings, appeals or petitions from various specified proceedings. *See* Request 13. It seeks this information from all CSX and NS files, “including the files of their attorneys, consultants, agents, employees, officers, and board members.” *Id.* Thus, this request could well require a search of numerous files and the production of large volumes of documents, many of which would be duplicative and few (if any) of which would have any relevance to the matters at issue in this proceeding. As a justification for discovery in an abandonment proceeding, the City Parties’ cavalier discussion of this request is insufficient. The Motion with regard to this request should be denied.

**Request 14:** This request seeks “[a]ll documents (other than pleadings prepared by Conrail seeking to contest the constitutionality of N.J.S.A. 48:12-125.1) showing NS, CSX, or Conrail compliance with, or objection to, any state law that creates a preferential purchase right for public agencies in connection with railroad lines that are subject to STB abandonment proceedings, including but not limited to N.H. Rev. Stat 228:60-b; Vermont Stat. Ann § 3404; Mass. Gen., Law, chap. 161C, § 7; Conn. Stat. 13b-36(c); New York’s Transportation Law § 20.” *See* Request 14. In its objections to this request, Conrail pointed out the irrelevance to these STB proceedings of analyses of *State* laws, especially the State laws designated in the request, since none of the property at issue in this proceeding is located in any of those States, and Conrail, NS, and CSX do not even operate in several of them.

The City Parties devote more than a page to defending this request, but fail utterly to explain why the STB would have any interest in any Conrail, CSX, or NS analyses of such State preferential purchase right statutes. The City Parties assert that the sought-after information is

relevant “to whether Conrail intends to evade not only STB remedies but also STB-mediated state law remedies like preferential purchase rights.” Mot. at 27. But the City Parties do not explain how analyses of these State remedies have any bearing at all on the issue—actually, non-issue—of evasion of STB remedies or why the STB has any concern with the posture(s) of Conrail, NS, and CSX with regard to such State remedies.

Thus, the City Parties fail to justify this request. Rather it appears to have been propounded solely to harass, delay, intrude upon the attorney-client privilege, and punish Conrail for opposing the City Parties in this proceeding.

**Unnumbered Request (1):** This request was made in an August 11, 2014 letter to Conrail’s counsel. The request is similar to, though broader than, Request 9. The request seeks “all documents . . . bearing upon or relating to sales or transfers, or projected sales or transfers, of property interests of Consolidated Rail Corporation to any interest controlled or owned by Steve Hyman or Victoria Hyman, or the Port of Authority of New York and New Jersey (PATH), or any other party (a) in or near the former Waldo Yard in Jersey City, (b) between any portion of the former Waldo Yard in Jersey City and the Harsimus Branch, (c) along the former Pennsylvania Railroad mainline between Journal Square and Newark Avenue in Jersey City, and/or (d) along the former River Line (or connections thereto from National Docks Secondary or the Harsimus Branch) between the Bergen Arches Cut and CP Waldo in Jersey City from January 1, 2006 to the date of response. Conrail is specifically requested to produce all maps relating to such sales or transfers, or projected sales or transfers, in its custody or control.” Letter from Charles H. Montange to Robert M. Jenkins III, enclosing the City Parties’ document requests, at 1-2 (Aug. 11, 2014) (“Montange Aug. 11, 2014 letter”).

The City Parties seek to justify this broad request for information relating to property other than the property at issue in this proceeding by asserting that “[s]ales or deals concerning parcels in the Waldo area may be as unlawful as the 2005 sale to the LLCs, or related to efforts to evade accountability for that unlawful sale. In addition, the information might be relevant to valuation proceedings (e.g., pending OFA). In all events, it is within 49 CFR 1114.21. Conrail must be compelled to respond.” Mot. at 28.

This is a hardly a justification for this intrusive, overbroad, and irrelevant discovery. There is no basis beyond free-floating speculation for inquiring into “sales or deals concerning parcels in the Waldo area,” and the relevance of such information to this proceeding (either with regard to the City Parties’ fraud claims or an OFA) is nowhere explained by the City Parties. Thus, the City Parties have failed to respond to Conrail’s objection that the request appears to have been propounded for purposes of harassment and delay, and to intrude upon matters subject to the settlement privilege. The motion to compel with respect to this request should be denied.

**Unnumbered Request (2):** This request seeks “all documents . . . constituting, reflecting, or arising out of proposed transactions between Conrail and (a) Victoria Hyman, (b) Steve Hyman, or (c) any company owned or controlled by Victoria or Steve Hyman involving (i) any portion of the Harsimus Branch or (ii) any property in Jersey City owned or controlled by Conrail from January 1, 2003 to the date of response.” Montagne Aug. 11, 2014 letter at 2. The City Parties purport to justify this request with the conclusory assertion that “[t]his request would result in production of documents showing the course of dealing between the LLCs and Conrail in regard to the Harsimus Branch, and is germane to issues of evasion of STB regulation as well as cover up of evasion.” Mot. at 28.

The open-ended scope of this request appears calculated to intrude upon the attorney-client and settlement privileges. The request also potentially encompasses a huge number of documents accumulated over an almost twelve-year period. Rather than seeking relevant evidence, or information likely to result in the discovery of relevant evidence, this request—like the City Parties' other requests—appears to have been propounded principally to harass, delay, intrude upon privileged matters, and to punish Conrail for taking positions at odds with the City Parties. The motion to compel a response to this request should be denied.

### CONCLUSION

The fundamental premise of the City Parties' discovery—that there is evidence that Conrail engaged in fraud, knowing illegal conduct, and intentional anticipatory demolition—is false and is itself the product of gross misrepresentations of the record and of Conrail's arguments, and an arrogant conviction that no one who disagrees with the City Parties does so in good faith. There is no reason or legal basis to deny abandonment authority or to void the deeds and order the reconveyance of the property at issue in this case to Conrail, and no authority whatever for the contention that the STB should order Conrail to convey property to the City for same price that it sold the property nearly ten years ago. Thus, there is no basis for any discovery in this matter.

Moreover, in light of the fact that discovery is disfavored in abandonment proceedings, the City Parties cannot rest their arguments for individual discovery requests on *ipse dixit*, non sequiturs, innuendo, and conclusory assertions. Yet this is what they have done.

For the foregoing reasons, the motion to compel should be denied.

Respectfully submitted,

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October 7, 2014

**CERTIFICATE OF SERVICE**

I, Adam C. Sloane, hereby certify that, on this 7th day of October, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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Adam C. Sloane

**ATTACHMENT**

**MEMORANDUM OF UNDERSTANDING**

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12<sup>th</sup> 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 Carmine Alampi, Esq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC and 446 Newark Avenue, LLC (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 12<sup>th</sup> 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 LLCs 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-4908-05 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. Blotz  
Title: VP - General Counsel  
Date: Oct. 12, 2007

**SLH HOLDING CO., LLC**

By: [Signature]  
Title: Member  
Date: Oct 12 2007