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226394

February 3, 2010

**BY E-FILING**

Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

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Office of Proceedings

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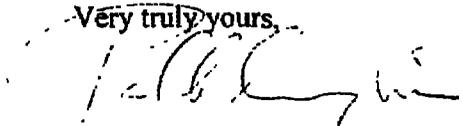
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Re: *Philadelphia Belt Line Railroad Company – Petition for Declaratory Order*  
(STB Finance Docket No. 35345)

Dear Ms. Brown:

Enclosed for filing in the above referenced docket please find the Reply of HSP Gaming, L.P., and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino to Verified Petition of the Philadelphia Belt Line Railroad Company for Declaratory Order.

Very truly yours,

  
Paul A. Cunningham

Enclosure

cc: Charles A. Spitulnik, Esquire

226394

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35345**

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**PHILADELPHIA BELT LINE RAILROAD COMPANY  
- PETITION FOR DECLARATORY ORDER**

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**REPLY OF HSP GAMING, L.P., AND SUGARHOUSE HSP GAMING, L.P.,  
d/b/a THE SUGARHOUSE CASINO, TO VERIFIED PETITION OF THE  
PHILADELPHIA BELT LINE RAILROAD COMPANY FOR DECLARATORY ORDER**

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SugarHouse Casino*

**Dated: February 3, 2010**

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SURFACE TRANSPORTATION BOARD**

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PHILADELPHIA BELT LINE RAILROAD COMPANY FOR DECLARATORY ORDER**

HSP Gaming, L.P., and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino (“HSP”) (“Owner”),<sup>1</sup> hereby reply to the Verified Petition of the Philadelphia Belt Line Railroad Company (“PBL”) for Declaratory Order (the “Petition”), filed in this proceeding on January 14, 2010. PBL asks the Board to declare that it has never abandoned a right-of-way it claims in a city street in Philadelphia. As it is true that the sun does not come up in the west, so is it true that that PBL has never abandoned the subject right-of-way or any related line of railroad. That is, however, beside the point, as PBL does not demonstrate, and does not ask the Board to find, that it ever had a rail line there that could be the subject of an abandonment. PBL’s status as a railroad, based on its ownership of rail property elsewhere than the site of the claimed right-of-way at issue here, is similarly irrelevant to PBL’s claim for relief here. There is therefore no basis for issuance of the declaratory order that PBL seeks.

SugarHouse is developing a multi-phased casino and entertainment project on approximately 25 acres of land on the Delaware River waterfront in Philadelphia. The first phase of this project, currently under construction and projected to open in the summer of 2010,

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<sup>1</sup> HSP and Owner are referred to together as “SugarHouse.”

consists of a permanent building housing 1,700 slot machines, food and beverage venues, surface parking for over 1,300 automobiles, pedestrian amenities including a riverfront walk and appurtenant support facilities. The current phase of the SugarHouse Casino is being built at a cost of hundreds of millions of dollars and, once operational, will employ approximately 500 people. Later phases will include a parking garage structure with approximately 3,000 parking spaces, additional casino space, additional food and beverage venues, and other features. Overall, the project is expected to create 1,100 construction jobs and 1,100 permanent casino jobs.

The property being developed includes the site of the former Penn Street. Until it was vacated and stricken from the City Plan in 2005 pursuant to an ordinance enacted in 2004 (the “2004 Ordinance”), the former Penn Street ran roughly parallel to the Delaware River in Philadelphia, from Ellen Street to Shackamaxon Street. (See map attached as Exhibit A.) The City Council passed an ordinance in 1890 (the “1890 Ordinance”) authorizing the Philadelphia Belt Line Railroad Company (“PBL”) to construct railroad tracks running along the former Penn Street (then known as Delaware Avenue), but there is no evidence or assertion that PBL ever did so.<sup>2</sup>

PBL has asserted in an action in a Philadelphia court that SugarHouse’s development plans infringe on its rights under the 1890 Ordinance. It has asked the court (1) to declare that it continues to have a right-of-way in the bed of the former Penn Street and (2) to enjoin SugarHouse from building its proposed casino on that property.<sup>3</sup> SugarHouse has sought dismissal of PBL’s state court action on a number of grounds. Of significance to PBL’s Petition,

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<sup>2</sup> A copy of the 1890 Ordinance is attached to PBL’s Petition as Exhibit B.

<sup>3</sup> A copy of PBL’s Civil Action Complaint for Declaratory Judgment (“Complaint”), without exhibits, is attached hereto as Exhibit B.

SugarHouse asserts in the state court that any unexercised rights PBL may have had in the former Penn Street under the 1890 Ordinance were extinguished by the vacation of that street pursuant to a subsequent ordinance. PBL has responded, in part, by arguing to the state court that the vacation of the former Penn Street pursuant to that later ordinance could not extinguish PBL's rights, in the absence of an abandonment order from this Board under 49 U.S.C. § 10903. SugarHouse has replied to PBL's arguments with Preliminary Objections opposing PBL's state court position and showing that it is without merit. The state court, responding to a request made by PBL to stay the matter pending a ruling on its Petition to this Board, ordered on January 19, 2010, that a decision on SugarHouse's Preliminary Objections be deferred. The state court is not expected to act until this Board issues its ruling on PBL's Petition.

Although PBL raised its federal law argument before the state court, and although that argument has been fully briefed there, PBL now seeks a declaration from this Board that it "retains its right-of-way over the former Penn Street, and that, unless the STB grants any future application for abandonment pursuant to 49 U.S.C. § 10903, PBL retains that right-of-way" (Petition at 11). PBL has not, however, asked the Board to find that its claimed right-of-way in the former Penn Street formed "any part of its railroad lines." *See* 49 U.S.C. § 10903(a)(1). Unless PBL has or had a rail line there subject to the jurisdiction of the Board (or its predecessor, the Interstate Commerce Commission ("ICC")), section 10903 simply does not apply. PBL has not asked the Board to find the existence of such a rail line, or offered any evidence that such a line ever existed. Accordingly, there is no basis, either in law or on the facts as averred in the PBL Petition, for the Board to issue a declaratory order that presupposes the existence of such a line. PBL's Petition should be denied.

## BACKGROUND

### A. Philadelphia Belt Line Railroad Company

PBL was incorporated in 1889, under the laws of the Commonwealth of Pennsylvania,<sup>4</sup> and it has been recognized by the ICC as a Class III railroad.<sup>5</sup> In the year after PBL's incorporation, the City of Philadelphia enacted the 1890 Ordinance, which among other things authorized PBL to construct a rail line over a right-of-way that would be located, in part, "along Delaware avenue, and property adjacent thereto, nine and one-half feet east of the east rail of the tracks now laid in Delaware avenue [north] to a point at or near Callowhill street; thence with double track northeasterly along Delaware avenue and Beach street to a point at or near the Aramingo Canal" (1890 Ordinance, sec. 1 (Petition, Exhibit B at 426-27)).<sup>6</sup>

At the time the 1890 Ordinance was enacted, the River Front Railroad Company (an affiliate of the Pennsylvania Railroad, into which it was later merged) and the Philadelphia and Reading Railroad Company (predecessor of the Reading Company) already had tracks on Delaware Avenue between Cumberland and Callowhill streets, including the portion of Delaware Avenue that was later renamed Penn Street and that ran through what is now the SugarHouse Casino site. The 1890 Ordinance provided that, at PBL's request, Delaware Avenue between Cumberland and Callowhill Streets would be widened, and the existing tracks shifted on Delaware Avenue to make room for the construction of PBL's tracks there.<sup>7</sup> But as PBL has

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<sup>4</sup> *Philadelphia & R. Ry.*, 32 I.C.C. Valuation Rep. 205, 940 (1930) ("*PBL Valuation Report*").

<sup>5</sup> *Philadelphia Belt Line R.R. v. Consolidated Rail Corp.*, Finance Docket No. 32802, slip op. at 1 (ICC served July 2, 1996).

<sup>6</sup> In 1910, the portion of Delaware Avenue between Ellen Street and Shackamaxon Street was renamed Penn Street (Petition at 4). At the same time, Beach Street, which lay on the northern boundary of what is now the SugarHouse Casino site, was renamed Delaware Avenue.

<sup>7</sup> 1890 Ordinance, sec. 1 (Petition, Exhibit B at 428-29).

conceded in the pending state court litigation, it never exercised its authority to construct a rail line on what was later renamed Penn Street, “because other rail lines had already placed track there that was available for PBL’s use.”<sup>8</sup> PBL does not allege that it ever acquired or exercised any rights to operate its own trains over the existing line in the former Penn Street,<sup>9</sup> but claims that “[t]he former Reading Railroad operated trains for PBL for PBL’s account” on the former Penn Street line (Petition at 3).

Until the early 1980s, Consolidated Rail Corporation (“Conrail”) and its predecessors, Penn Central Transportation Company and Pennsylvania Railroad, continued to operate the line in the former Penn Street as part of the former Delaware Avenue Branch. That Conrail line was abandoned pursuant to authority granted by the ICC in 1986. *Conrail Abandonment in Philadelphia County, PA*, Docket No. AB-167 (Sub-No. 1056N) (ICC served Sept. 10, 1986). Although PBL cites this abandonment (Petition at 2), it does not assert that it had rights to operate over the Conrail line that would have survived the abandonment.

Thus, although PBL was authorized in 1890 by the City to build a rail line in the former Penn Street, it never exercised this right, nor did it in any other way own or operate a rail line there, in the more than 120 years since it received that authorization.

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<sup>8</sup> See Reply Brief Filed on Behalf of the Philadelphia Belt Line Railroad Company to the Preliminary Objections of Defendants HSP Gaming, L.P. and SugarHouse HSP Gaming, L.P., at 9, *Philadelphia Belt Line R.R. v. HSP Gaming, L.P. d/b/a The SugarHouse Casino*, No. 00166, September Term, 2009 (Phila. Ct. Common Pleas filed Dec. 3, 2009) (relevant pages attached as Exhibit C hereto).

<sup>9</sup> It appears that PBL obtained trackage rights over a Pennsylvania Railroad line in Delaware Avenue between Tasker Street north to Callowhill Street, *PBL Valuation Report*, 32 ICC Valuation Rep. at 935, but this portion of Delaware Avenue is approximately six blocks to the south of the property at issue in this case.

**B. SugarHouse Casino and Pending State Court Litigation**

Owner is a Delaware limited partnership and the owner in fee simple of the property at 1001 North Delaware Avenue on which the SugarHouse Casino is being built. This property is located generally between Ellen Street, Delaware Avenue, Shackamaxon Street, and the Delaware River. (A map of the site is provided as Exhibit A hereto.) As noted above, until 2005, the former Penn Street ran from Ellen Street to Shackamaxon Street, across what is now Owner's property. In that year, the former Penn Street was vacated and stricken from the City Plan pursuant to the 2004 Ordinance.

Owner is currently building and plans to operate the SugarHouse Casino,<sup>10</sup> its casino and entertainment project, on the Delaware Avenue property, pursuant to a Category 2 Slot Operator License granted by the Commonwealth of Pennsylvania for operation of the casino and a Plan of Development approved by the Philadelphia Planning Commission.

The ceremonial groundbreaking for construction of the SugarHouse Casino was held on October 8, 2009, at a ceremony that was attended by numerous elected officials, including Mayor Michael Nutter of the City of Philadelphia, and two city councilmen.<sup>11</sup> The Governor of Pennsylvania, the Mayor of Philadelphia, local community leaders, and numerous business, labor, and other groups have expressed strong support for the SugarHouse casino project. The first phase of the casino is expected to be opened during the summer of 2010.

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<sup>10</sup> The SugarHouse Casino is so called because it is located in part on the site of the former Jack Frost Sugar Refinery.

<sup>11</sup> Press Release, SugarHouse Casino, SugarHouse Casino Celebrates Beginning of Construction with Groundbreaking Ceremony: Casino Makes First Contribution to Special Services District at Event, *available at* <http://www.sugarhousecasino.com/assets/files/SugarHouse%20Celebrates%20Start%20of%20Construction%2010.8.09.pdf>.

At the end of 2007 and in early 2008, PBL began efforts to delay development of the SugarHouse Casino. PBL asserted that the casino would infringe illegally on a claimed right-of-way in the former Penn Street, even though PBL had never exercised any such right by operating a rail line there. PBL expressed its willingness to abandon its claimed right-of-way, however, in exchange for monetary consideration (*see* Exhibit B at 5 (Complaint ¶ 16)).

PBL's Complaint, filed in the Court of Common Pleas for Philadelphia County (Exhibit B hereto), seeks a declaration that PBL continues to have a right-of-way, granted by the 1890 Ordinance, in the bed of the former Penn Street, and an injunction against any obstruction of or interference with that claimed right-of-way by SugarHouse. This Complaint raises substantially the same issues as a complaint that PBL filed with the Court of Common Pleas in February 2009 but later withdrew. SugarHouse has filed Preliminary Objections to PBL's Complaint, explaining that, under Pennsylvania state law, any rights PBL may have had under the 1890 Ordinance with respect to the former Penn Street were extinguished in 2005 when the City's Board of Surveyors struck the former Penn Street from the City Plan.

PBL's Complaint does not assert any issues of federal law, and SugarHouse's Preliminary Objections were therefore limited to answering PBL's claims under state law and the 1890 Ordinance. PBL raised a federal law issue for the first time before the state court when, in its response to SugarHouse's Preliminary Objections, it asserted that "[a]n abandonment under [49 U.S.C. § 10903] is an essential element before any extinguishment of PBL rights [under the 1890 ordinance] can take place."<sup>12</sup> In its reply in support of its Preliminary Objections, SugarHouse responded to PBL's federal law arguments, pointing out that 49 U.S.C. § 10903

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<sup>12</sup> Brief in Support of Plaintiff's Answer to Preliminary Objections at 8, *Philadelphia Belt Line R.R. v. HSP Gaming, L.P. d/b/a The SugarHouse Casino*, No. 00166, September Term, 2009 (Phila. Ct. Common Pleas filed Nov. 16, 2009) (relevant pages attached as Exhibit D hereto).

only requires regulatory authority to abandon or discontinue operations over a “railroad line[],” that PBL has never had any such line in the former Penn Street, and that the Board therefore has no jurisdiction over the right-of-way that PBL claims there.

PBL now asserts that when it filed its Complaint, “it did not anticipate that [SugarHouse] would take this position concerning the jurisdiction of the STB.”<sup>13</sup> According to PBL, it filed its Petition for Declaratory Order with the Board on January 14, 2010, in “direct response to [SugarHouse’s] arguments.”<sup>14</sup> In response to PBL’s informal request for a stay of the proceedings before the Court of Common Pleas pending a decision by the Board on the Petition, that court has deferred a decision on SugarHouse’s Preliminary Objections. It is not expected to act on the Preliminary Objections until a ruling by this Board on PBL’s Petition.

#### ARGUMENT

The Board has “broad discretion” in deciding whether to issue a declaratory order pursuant to 5 U.S.C. § 554 and 49 U.S.C. § 721,<sup>15</sup> but there is no rational basis for it to exercise that discretion in this case. In fact, a grant of the relief requested, based upon the assertions PBL has made, would be beyond the reasonable exercise of that discretion under even the broadest view possible under the law. PBL asks the Board to declare that its “right and obligation to provide rail freight common carrier service on the right-of-way including the former Penn Street in Philadelphia has not been abandoned or otherwise extinguished” (Petition at 1). But the Board cannot make such a declaration without first determining whether PBL has or ever had a

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<sup>13</sup> Letter from John B. Taulane, III, to The Honorable Sandra Mazer Moss at 2 (Jan. 15, 2010) (copy attached as Exhibit E hereto).

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g., Town of Babylon – Petition for Declaratory Order*, STB Finance Docket No. 35057, slip op. at 3 (STB served Oct. 16, 2009).

common carrier obligation with respect to the right-of-way in the former Penn Street. PBL has not asked the Board to make such a determination, nor has it provided any evidence or assertion that would support such a determination. Under such circumstances, there is no basis for the Board to issue a declaratory order in this case.

I. IN THE ABSENCE OF ANY SHOWING THAT THERE EVER WAS A PBL RAIL LINE IN THE FORMER PENN STREET, THERE IS NO BASIS FOR A DECLARATORY ORDER RELATING TO ABANDONMENT OR DISCONTINUANCE AUTHORITY.

PBL correctly states that a rail carrier subject to the Board's jurisdiction may only abandon "part of its railroad lines" pursuant to abandonment authority granted under 49 U.S.C. § 10903(a)(1) (Petition at 9).<sup>16</sup> By its terms, then, section 10903 cannot have any arguable relevance to PBL's claimed rights in the land underlying the former Penn Street unless it contains "part of [PBL's] railroad lines." But there is no railroad line now in the former Penn Street,<sup>17</sup> and PBL does not allege that it ever owned or operated one there. Thus, PBL's assertion that "[t]he Penn Street railroad right-of-way has not been in active use by PBL for many years" (Petition at 5) is disingenuous, because PBL does not assert, and it provides no

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<sup>16</sup> It may also abandon its lines pursuant to an exemption, granted under 49 U.S.C. § 10502(a), from the requirements of section 10903. Such an exemption, however, is not available where a party other than the railroad is seeking to terminate the railroad's operating authority. *Milford-Bennington R.R. – Trackage Rights Exemption – Boston & Me. Corp.*, Finance Docket No. 32103, slip op. at 2 n.3 (ICC served Sept. 3, 1993); *Wisc. Dep't of Transp. – Abandonment Exemption*, Finance Docket No. 31303, slip op. at 2-4 (ICC served Dec. 5, 1988).

<sup>17</sup> As noted above, Conrail and its predecessors in interest had a rail line in the former Penn Street, but that line was abandoned pursuant to authority granted by the ICC in 1986. See *Conrail Abandonment in Philadelphia County, PA*, Docket No. 167 (Sub-No. 1056N) (ICC served Sept. 10, 1986).

reason for the Board to conclude, that PBL's claimed right-of-way in the former Penn Street was ever in use by PBL.<sup>18</sup>

PBL admits that it never constructed a line in the former Penn Street (Exhibit C at 9). PBL, moreover, does not allege that it ever acquired an existing line in the former Penn Street, or that it ever operated a line in the former Penn Street. While PBL was authorized by the ICC in 1981 to initiate rail operations over various rail lines in Philadelphia, including a line from "Callowhill Street to Cumberland Street" that potentially could have run down the former Penn Street,<sup>19</sup> there is no evidence that it ever did so. Regulatory authorization to commence rail operations, such as that given in *PBL Operation Exemption*, is permissive only, and the recipient of operating authority is not required to consummate the authorized action by commencing operations. *Arkansas Cent. Ry. – Operation Exemption – Line of Herzog Stone Prods., Inc.*, Finance Docket No. 31405, slip op. at 2 (ICC served Apr. 7, 1995). If that authority is not consummated, as is apparently the case here, then there is no "regulated rail transportation" that can only be abandoned or discontinued with STB authorization. *See id.* at 2-3.

Finally, PBL does not allege here that it ever acquired trackage rights over a line in the former Penn Street.<sup>20</sup> In the absence of any evidence that PBL has such rights, any argument by

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<sup>18</sup> PBL states that "much of the track has been removed over time" (Petition at 5), but since PBL admits it never constructed any track in the former Penn Street, any track that may have been removed almost certainly belonged to the Conrail line that was abandoned pursuant to Board authority in 1986.

<sup>19</sup> *Philadelphia Belt Line R.R. – Operation in Philadelphia, PA – Exemption Under 49 U.S.C. § 10505 from 49 U.S.C. § 10901*, Finance Docket No. 29517, slip op. at 2 (ICC served Apr. 10, 1981) ("*PBL Operation Exemption*").

<sup>20</sup> It appears that when PBL sought the operating authority granted by the ICC in 1981, it claimed that it had trackage rights over the "River Front Railroad" between Callowhill Street and Cumberland Street. Petition for Exemption at 5, *Philadelphia Belt Line R.R. – Operation in Philadelphia, PA – Exemption Under 49 U.S.C. § 10505 from 49 U.S.C. § 10901*, Finance Docket No. 29517 (filed Nov. 14, 1980) (relevant pages attached as Exhibit F hereto). PBL provided no evidence in support of that claim, however, and there is reason to doubt that PBL

PBL that its operating rights must be extinguished by abandonment authority from the STB is “misplaced.” *Wisconsin & S. R.R. – Lease & Operation Exemption – Soo Line R.R., d/b/a CP Rail Sys.*, Finance Docket No. 32706, slip op. at 2 (ICC served Aug. 2, 1995).<sup>21</sup>

In fact, the most PBL has alleged is that it has a “right-of-way” (Petition, *passim*) over the land now owned by SugarHouse, which is not sufficient to constitute a railroad line subject to the STB’s abandonment jurisdiction.<sup>22</sup> There is thus no basis for the Board to conclude that PBL’s unexercised right-of-way in the former Penn Street has ever contained any “part of [PBL’s] railroad lines” within the STB’s abandonment jurisdiction under 49 U.S.C. § 10903, or that PBL retains this right-of-way, as a matter of federal law, until it has been abandoned pursuant to section 10903.

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had any such trackage rights. For example, the ICC’s valuation report on PBL, prepared in 1930 pursuant to the Valuation Act of 1913 and stating the value of property owned or used by PBL, noted that PBL had “trackage rights over about 2 miles of track along Delaware Avenue from Tasker to Callowhill Street, owned by the Pennsylvania Railroad Company,” all well south of the SugarHouse site, but made no mention of any trackage rights between Callowhill and Cumberland Streets. *PBL Valuation Report*, 32 I.C.C. Valuation Rep. at 935. Moreover, the arrangement with the former Reading Railroad that PBL describes in its petition, in which Reading allegedly moved traffic for PBL’s account to and from locations on the former Penn Street (Petition at 3), appears to be one for switching or haulage service; the Board may reasonably conclude that, if PBL instead had trackage rights, it would have said so explicitly.

<sup>21</sup> In any event, even if PBL established that it had the right to operate over another railroad’s tracks in the former Penn Street, that fact would not be relevant to the subject of PBL’s petition, which is its claimed right, under the 1890 Ordinance, to lay its own tracks in that street.

<sup>22</sup> Every one of the cases PBL cites regarding the STB’s abandonment authority (*see* Petition at 9-10) was one in which an actual rail line had been constructed and operated. (While the decision in *Palmetto Conservation Foundation v. Smith*, 642 F. Supp. 2d 518 (S.D.S.C. 2009), speaks primarily of Norfolk Southern Railway Company’s “right-of-way” and “rail corridor,” it also makes clear that the railroad had actually used this corridor to carry rail freight. *See id.* at 521-22 (referring to “Norfolk Southern’s discontinuation of rail traffic on the corridor”). Thus, none of those decisions provides any support for PBL’s assertion that the STB’s abandonment jurisdiction extends to a mere right-of-way, such as a city street on which a railroad claims an unexercised right to lay tracks.

II. PBL's STATUS AS A COMMON CARRIER, BASED ON ITS OWNERSHIP AND OPERATION OF LINES ELSEWHERE IN PHILADELPHIA, IS IRRELEVANT TO PBL's CLAIM TO A RIGHT-OF-WAY IN THE LAND NOW OWNED BY SUGARHOUSE.

PBL asserts that it is a common carrier, on the ground that it "holds itself out to the public as able to provide [rail] service upon request." Petition at 6 (quoting *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 648 (5th Cir. 1967)). SugarHouse has no reason to dispute, and does not dispute, PBL's characterization of itself. The Board and the ICC have recognized PBL as a rail carrier in interstate commerce. *Philadelphia Belt Line R.R. v. Consolidated Rail Corp.*, Finance Docket No. 32802, slip op. at 1 (STB served July 2, 1996) (referring to PBL as "a Class III railroad"); *Philadelphia & R. Ry.*, 32 I.C.C. Valuation Rep. 205, 935-945 (1930) (valuation of PBL pursuant to Valuation Act of 1913).<sup>23</sup> PBL acquired this status by virtue of its ownership and operation of various lines in Philadelphia locations other than the SugarHouse property at issue here.<sup>24</sup> PBL provides neither evidence nor argument, however, to support its further assertion that, simply by "holding itself out as a common carrier," PBL acquired "common carrier status on ... the subject segment of Penn Street" (Petition at 6).

While it is true that a railroad may "establish its common carrier status by providing switching service, among other possible services" (Petition at 7 (citing cases)), PBL provides no evidence that it ever provided such service on the former Penn Street. In fact, PBL appears to assert exactly the opposite; *i.e.*, that the Reading Railroad provided switching or haulage service on the former Penn Street for PBL's account (Petition at 3 ("The former Reading Railroad

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<sup>23</sup> *But see PBL Operation Exemption*, slip op. at 3 (apparently characterizing PBL as "a noncarrier").

<sup>24</sup> For example, PBL's "main line extends along Delaware Avenue from South Street northerly to Vine Street and from Allegheny Avenue in Port Richmond northerly to Bridesburg." *PBL Valuation Report*, 32 I.C.C. Valuation Rep. at 935. (The SugarHouse property is not included within either of these bounds.)

operated trains for PBL for PBL's account"). Such an arrangement, however, does not impose a common carrier obligation, terminable only with abandonment or discontinuance authority under 49 U.S.C. § 10903, on the carrier for whose account traffic is carried.<sup>25</sup>

PBL also points to certain tariff filings it made before repeal of the tariff requirement for rail common carriage (Petition at 5, 8; *id.* Exhibits H, I). These filings may support a claim that PBL is a common carrier, and that "PBL has continuously held itself out as willing and able to provide freight service throughout its system" (Petition at 8), but they do not establish that PBL's system "necessarily include[ed] its right-of-way over Penn Street" (*id.*). If anything, one of those tariffs (Petition, Exhibit H) establishes the contrary. That tariff, publishing PBL's "Local Switching Rates within the City of Philadelphia, Pennsylvania," sets out rates for switching on PBL's Northern Section (north of Allegheny Avenue) and its Southern Section (south of Callowhill Street), but nothing for service at locations, such as the former Penn Street, between Allegheny Avenue and Callowhill Street. If this tariff suggests anything about the former Penn Street, therefore, it is that PBL recognized that it had no common carrier obligation that would require it to provide switching service there.<sup>26</sup>

Similarly, the 1892 Agreement that PBL attaches as Exhibit G to its Petition (not Exhibit H as it claims on page 8) provides no evidence that PBL ever was a common carrier holding

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<sup>25</sup> *Delaware & H. Ry. – Discontinuance of Trackage Rights – In Susquehanna County, PA & Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie, & Genesee Counties, NY*, STB Docket No. AB-156 (Sub-No. 25X), slip op. at 11 (STB served Jan. 19, 2005) ("Board authorization is not required for the initiation or termination of a haulage arrangement, because such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place" (citing *KNRECO, Inc. d/b/u Keokuk Junction Ry. Acquisition & Operation Exemption – Atchison, T. & S.F. Ry.*, Finance Docket No. 30918 (ICC served Apr. 28, 1988), *aff'd sub nom. Simmons v. ICC*, 871 F.2d 702 (7th Cir. 1989)).

<sup>26</sup> The other tariff filing attached to PBL's Petition (as Exhibit I) is a tariff index that refers to other tariffs but provides no information about the locations that PBL held itself out as serving.

itself out to provide rail service on the former Penn Street. And while PBL's annual reports to the ICC for 1977 and 1979 (excerpts of which are attached to the Petition as Exhibits F and J) may support the claim that PBL was recognized as a common carrier by rail, they cast no light on PBL's status as a common carrier on its claimed right-of-way in the former Penn Street, which is the subject of PBL's request for declaratory relief.

#### CONCLUSION

For the reasons stated above, the Board should deny the Verified Petition of the Philadelphia Belt Line Railroad Company for Declaratory Order.

Respectfully submitted,



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Dated: February 3, 2010

**EXHIBIT A**



**EXHIBIT B**

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Attorney for Plaintiff

Filed and Attested, by  
PROTHONOTARY  
05 SEP 2009 03:02 pm  
JL MURPHY

THE PHILADELPHIA BELT LINE  
RAILROAD COMPANY  
Plaintiff,

COURT OF COMMON PLEAS  
FOR PHILADELPHIA COUNTY

v.

SEPTEMBER TERM, 2009

HSP GAMING, L.P. d/b/a  
THE SUGARHOUSE CASINO  
Defendant,

NO:

and

SUGARHOUSE HSP GAMING, L.P.  
Defendant

CIVIL ACTION COMPLAINT  
FOR DECLARATORY JUDGMENT

NOTICE

You have been sued in Court. If you wish to defend against the claim set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you, and judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Case ID: 090900166

Philadelphia Bar Association  
Lawyer Referral and Information Service  
One Reading Center  
Philadelphia, Pennsylvania 19107  
Telephone: (215) 238-6333

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. hace falta ascntar una comparencia escrita o en persona o con un abogado y entregar la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. sea avisado que si usted *no se defiende*. la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. ademas, la corte puede decidir a favor del demandante y require qu usted cumpla con todas las provisiones de esta demanda. usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO IMMEDIATMENT. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

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CIVIL ACTION COMPLAINT  
OF PLAINTIFF AGAINST ADDITIONAL DEFENDANT  
SUGARHOUSE HSP GAMING, L.P.

Plaintiff, by and through its counsel, files this Complaint, and in support thereof.

avers as follows:

1. Plaintiff, The Philadelphia Belt Line Railroad Company, ("PBL") is a Pennsylvania corporation, primarily engaged in the business of operating a railroad in and around the Philadelphia area.
2. Defendant, HSP Gaming, L.P. d/b/a/ SugarHouse Casino ("HSP"), is a limited partnership formed in Delaware. Its primary business purpose is the development, construction, and operation of SugarHouse Casino.

3. Defendant, SugarHouse HSP Gaming, L.P. is a limited partnership formed in Delaware. It owns the property located at 1001 N. Delaware Avenue in fee simple.

4. The PBL came into existence in May 10, 1889. Over the course of time, PBL has owned and possessed various properties and rights-of-way throughout the City of Philadelphia.

5. On December 26, 1890, the Philadelphia City Council enacted an Ordinance granting the PBL a right-of-way. The pertinent part of the Ordinance with respect to the present controversy reads: "thence northwardly with a single track along Delaware avenue, and property adjacent thereto, nine and one-half (9 ½) feet east of the east rail of the tracks now laid in Delaware Avenue to a point at or near Callowhill street; thence with double track northeastwardly along Delaware avenue and Beach Street to a point at or near the Aramingo Canal." A copy of the 1890 Ordinance is attached as Exhibit A.

6. The right-of-way referenced and described in the December 26, 1890 Ordinance passes through the property now owned by Defendant SugarHouse HSP Gaming, L.P., and on the proposed casino site.

7. In 1910, the City of Philadelphia renamed the portion of Delaware Avenue that is the subject of this controversy to Penn Street.

8. PBL has consistently attempted to protect this right of way. Sometime in the late 1990s, a fence was erected through Penn Street, which completely interfered with PBL's interest. PBL immediately notified the City of Philadelphia and LHTW, Inc., the party believed to be responsible for erecting the fence, and demanded its removal. See Exhibit B.

9. On July 1, 2004, the City of Philadelphia, by ordinance, removed Penn Street from the City Plan. This eradication of Penn Street from the City Plan was contingent upon "The Party requesting changes to the City Plan hereunder shall file an agreement or agreements satisfactory to the Law Department, executed by all owners of property affected by this Ordinance, to release the City from all damages and claims for damages that may arise by reason of such City Plan Changes." See Exhibit C.

10. Upon information and belief the party requesting the removal of Penn Street from the City Plan were Defendant SugarHouse HSP Gaming, L.P. and/or Defendant HSP Gaming, L.P. d/b/a/ SugarHouse Casino.

11. PBL never entered into any agreements with respect to any party regarding the PBL right-of-way in Penn Street. In addition, PBL was never provided with any notice regarding this Ordinance either prior to its enactment or any time thereafter, even though such notice was expressly required by the Ordinance.

12. Even though the July 1, 2004 Ordinance purportedly struck Penn Street from the City Plans, nothing in the Ordinance eliminated, changed, or otherwise modified PBL's right-of-way.

13. On August 2, 2007, the City of Philadelphia entered into an agreement that granted Defendant HSP Gaming, L.P. d/b/a/ SugarHouse Casino the right to develop, construct, complete and operate SugarHouse Casino on the property owned by Defendant SugarHouse HSP Gaming, L.P. This location had previously been the site of the Jack Frost Sugar Refinery. This site is adjacent to the right-of-way possessed by PBL.

14. Upon information and belief, it is Defendant SugarHouse HSP Gaming, L.P. intention to enter into a ground lease with Defendant HSP Gaming, L.P. d/b/a/ SugarHouse Casino so that they can open a casino.

15. On or about December 13, 2006, Urban Engineers prepared on behalf of Defendant a Survey and Consolidation Plan for Sugar House Casino Site. In the section entitled, "Exceptions, Conditions and Agreements" the following language was found: "Philadelphia Beltline Railroad right-of-way within the former bed of Penn Street (formerly Delaware Avenue) created by Ordinance of City Council approved December 26, 1890, as amended by Ordinance of City Council approved July 1, 2004 (affects Premises A and C)." Upon information and belief, Defendant is in possession of the survey, and therefore, it is not attached as an Exhibit.

16. At the end of 2007 and in the beginning of 2008, discussions between representatives of PBL and Defendant HSP Gaming, L.P. engaged in discussions regarding compensating the PBL in consideration of an abandonment of its right of way. No agreement was ever reached.

17. During these discussions, representatives from HSP Gaming, L.P. claimed the Belt Line's right-of-way did not exist in Penn Street, and that PBL's property interest did not exist in the proposed area where the casino was to be built.

18. In December of 2008, HSP Gaming, L.P. began making preparation for construction of the Casino on or near the location of PBL's right-of-way. See Exhibit D.

19. Upon information and belief, Plaintiff believes neither SugarHouse HSP Gaming, L.P. nor HSP Gaming, L.P. d/b/a/ SugarHouse Casino recognizes PBL's right-of-way, and construction of the casino will continue until the project is finished, even if

this includes building structure on the land where PBL has its right-of-way, rendering the right-of-way useless for railroad purposes.

20. As per Pennsylvania law, courts are empowered to declare “rights, status, and other legal relations” which are affected by a “statute, municipal ordinance, contract or franchise”, and “may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” 42 P.S. § 7533.

21. This matter is ripe for determination because a final and conclusive judicial affirmation of the PBL’s right-of-way will irrefutably confirm Petitioner’s right-of-way and consequently provide actual notice to SugarHouse HSP Gaming, L.P., and HSP Gaming, L.P. d/b/a/ SugarHouse Casino (“HSP”) that it cannot interfere or obstruct PBL’s right-of-way, generally, and that Defendant has no right to build its proposed casino on the property in question, specifically. Such relief will avert irreparable harm to PBL.

WHEREFORE, Plaintiff requests the Court to enter judgment:

(a) Declaring that Plaintiff has a right-of-way existing in the bed of what was formerly Penn Street, in the vicinity of the area between Shackamaxon Street and Ellen Street.

(b) Permanently enjoining the Defendant from taking any action to interfere, block, obstruct or otherwise prevent Plaintiff from exercising now or in the future its rights to utilize said right-of-way;

(c) Granting such further relief as the Court may deem appropriate.

GILFILLAN, GILPIN & BREHMAN

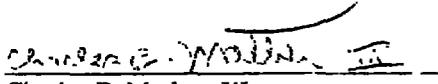
/s/

John B. Taulane, III, Esquire  
John J. Bradley, Esquire  
Attorneys for Plaintiff

**VERIFICATION**

I, Charles E. Mather, III, verify that I am President of the Philadelphia  
Railroad Company and as President, I verify that the facts set forth in the foregoing  
Complaint are true and correct to the best of my knowledge, information and belief; and  
the foregoing Verification is made subject to the penalties of 18 Pa. C.S.A. §4904,  
relating to unsworn falsifications to authorities.

Filed and Attested by  
PROTONOTARY  
08 SEP 2008 03:02 pm  
J. MURPHY

  
Charles E. Mather, III  
President of The Philadelphia Belt Line  
Railroad Company

**EXHIBIT C**

**FILED**  
03 DEC 2009 11:56 am  
**Civil Administration**  
K. PERMSAP

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---

THE PHILADELPHIA BELT LINE  
RAILROAD COMPANY

Plaintiff,

v.

HSP GAMING, L.P. d/b/a  
THE SUGARHOUSE CASINO

Defendant,

and

SUGARHOUSE HSP GAMING, L.P.  
Defendant.

---

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

SEPTEMBER TERM, 2009  
NO. 00166

**REPLY BRIEF FILED ON BEHALF OF THE PHILADELPHIA BELT  
LINE RAILROAD COMPANY TO THE PRELIMINARY OBJECTIONS OF  
DEFENDANTS HSP GAMING, L.P. AND SUGARHOUSE HSP GAMING, L.P.**

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PORTION OF SURVEY AND CONSOLIDATION PLAN  
SUGAR HOUSE CASINO SITE .....EXHIBIT A

Reply Brief, p. 12. Once again, Defendants have chosen to take a very myopic view of the 1890 Ordinance. First, as already demonstrated, PBL did act upon the grant by virtue of the Gift of Stock and the Voting Stock Agreements exercised in accordance with the Ordinance, and other actions described more fully above.

Second, and just as importantly, Defendants have failed to realize that the 1890 Ordinance conveyed to PBL various rights of ways over streets of the City, all of which would ultimately be developed into a continuous, uninterrupted line of rail. So far, during the course of its existence, PBL has utilized some portions of its rights-of-way and not others. With respect to Penn Street, no tracks were ever constructed there by PBL because other rail lines had already placed track there that was available for PBL's use. Accordingly, there was no need for PBL to incur substantial capital expense. Therefore, even though PBL has not recently had the need to use the Penn Street right-of-way, it does not necessarily follow that PBL will not have need for its use in the future.

**II. THE SURFACE TRANSPORTATION BOARD HAS EXCLUSIVE JURISDICTION OVER PBL'S CARRIER STATUS, RIGHTS AND OBLIGATIONS, AND THEREFORE, THE 2004 ORDINANCE CANNOT BE INTERPRETED IN A MANNER SUGGESTED BY DEFENDANTS.**

The Sugarhouse Defendants fervently wishes that PBL's rights and obligations under the Interstate Commerce Commission Termination Act of 1995, *codified at* 49 U.S.C. §§10101. *et seq.*, (the successor statute to the former Interstate Commerce Act) (the "ICCTA") do not stand in the way of its use of the subject property, but wishing does not make it so. PBL was granted the right to use the tracks that formerly existed at this location for the provision of rail service as part of the interstate rail network. Those rights and the obligations attendant to them are governed exclusively by ICCTA and administered by the Surface Transportation Board ("STB"). The statute remains

**EXHIBIT D**

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THE PHILADELPHIA BELT LINE :  
RAILROAD COMPANY :  
Plaintiff, :

COURT OF COMMON PLEAS  
FOR PHILADELPHIA COUNTY

v. :

SEPTEMBER TERM, 2009

HSP GAMING, L.P. d/b/a :  
THE SUGARHOUSE CASINO :  
Defendant, :

NO: 00166

and :

SUGARHOUSE HSP GAMING, L.P. :  
Defendant. :

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**BRIEF IN SUPPORT OF PLAINTIFF'S  
ANSWER TO PRELIMINARY OBJECTIONS**

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2. Even if the City had wanted to terminate the PBL’s right of way in Penn Street, it could not have legally done so ..... 21

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**APPENDIX**

Plaintiff's Complaint with Exhibits ..... Exhibit A

Philadelphia Ordinances referenced in brief ..... Exhibit B

Voting Trust Agreement and Gift of Stock Agreement..... Exhibit C

to file this Complaint seeking to protect its rights and discharge its public duties. Defendants have filed a series of preliminary objections. Defendants' objections are based on Pa. R. Civ. P. § 1028(a)(4) (Lack of Standing) and (a)(5) (Demurrer) are essentially the same. They argue that PBL does not have a property interest in Penn Street, and therefore, it lacks standing to file this Complaint, and that the Complaint is legally deficient as a matter of law. These arguments will be addressed in Part IV, paragraphs A and B, below. Defendants also object on the basis that Plaintiff failed to sue a proper party, and therefore, this Court lacks jurisdiction. See Pa. R. Civ. P. § 1028(a)(1) and (a)(4). Specifically, they claim that Plaintiff must join the City as a party if it wishes to challenge the constitutionality of the 2004 Ordinance. Since Plaintiff is not challenging any ordinance passed by the City, this argument is without merit. This argument is addressed in paragraph C, below.

#### **IV. LEGAL ARGUMENT**

This Court should overrule the preliminary objections of the SugarHouse Defendants. Defendants' arguments have failed to appreciate the legal significance of the 1890 Ordinance, specifically, that the 1890 Ordinance provided PBL with vested rights in the bed of Penn Street, rights that are protected under both state and federal law. Defendants' arguments have ignored a long series of United States and Pennsylvania Supreme Court cases that acknowledge the inviolate nature of the rights of the type bestowed upon the PBL.

In straining to make their arguments, Defendants have contorted the legal significance of the 2004 Ordinance as it applies to the PBL's rights in Penn Street. Contrary to the Defendants' assertions, there is nothing in the 2004 Ordinance that either

expressly or by implication can be read as an attempt to eradicate PBL's rights. On the contrary, the evidence suggests the City had no intention of disturbing the 1890 Ordinance. This conclusion is underscored by the fact that neither the City nor any third party has initiated an adverse abandonment proceeding before the United States Surface Transportation Board (the "STB"), the successor to the Interstate Commerce Commission. An abandonment under federal law is an essential element before any extinguishment of PBL rights can take effect.

Finally, the SugarHouse Defendants have argued that they are merely innocent bystanders in this litigation and that PBL really should be seeking compensation from the City of Philadelphia. Despite Defendants' attempts to pit this as a contest between the City of Philadelphia and PBL, the reality is that the City has not taken any action to interfere with PBL's right-of-way. PBL recognizes that the City of Philadelphia has the power to strike streets from the City Plan, and there is no dispute over SugarHouse's interest in the land in question. However, Defendants' fee interest is subject to the property rights and franchises granted to the PBL by the 1890 Ordinance. Therefore, these objections should be overruled because the correct parties are before the Court. Under these circumstances, declaratory and injunctive relief is entirely appropriate. Defendants' objections should be overruled.

**A. PBL HAS PROPERLY FILED THIS ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF BECAUSE DEFENDANTS ARE ATTEMPTING TO INTERFERE WITH PBL'S PROPERTY RIGHTS ACQUIRED BY VIRTUE OF THE ORDINANCE OF 1890.**

The most important basic principle upon which this entire case is based is the nature of the rights that were granted to PBL by virtue of the 1890 Ordinance. PBL's

whatever private rights” exists). The 2004 Ordinance removed Penn Street as a thoroughfare upon which the City has the obligation to police and maintain. However, as per *Cox' Incorporated* and *Titusville Amusement Co.*, it left in place those rights protected by the 1890 Ordinance.

**2. Even if the City had wanted to terminate the PBL's right-of-way in Penn Street, it could not have legally done so.**

Since there is no language in the 2004 Ordinance on which the Defendants can rely, they have argued that the right-of-way was terminated by operation of law. In other words, even if the City did not express its intention to vacate the right-of-way, it did so by operation of law. See Defendants' Brief, p. 7-9. However, if this Court were to accept this “theory,” it would necessarily have to find that the City's actions were in violation of federal law. As stated above, such an interpretation is not permissible, especially when Plaintiff's position is supportable by both federal and state laws.

There is no dispute among the parties that Ordinance of 1890 granted PBL a right to place tracks in Penn Street. That being the case, in order to “abandon” that right, such action would have had to be initiated by proceedings before the Surface Transportation Board (“STB”). Under the Interstate Commerce Commission Termination Act, 49 U.S.C § 10501(b), Congress vested in the STB “exclusive jurisdiction to regulate “transportation by rail carriers” and “the construction, acquisition, operation, abandonment, or discontinuance” of rail facilities. The abandonment procedure can be initiated by the railroad or, in an adverse abandonment proceeding, it can be commenced by a private party or a government entity. *The City of Chicago, IL—Adverse Abandonment—Chicago Terminal Railroad* 2009 STB 298 (2009 STB); *Modern Handcraft, Inc.*, 363 I.C.C. 969, 971 (1981); *Chelsea Property Owners—Abandonment—*

*Petition of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York*, STB LEXIS 232 (STB 2005).

It is only after the STB's jurisdiction is terminated with an order of abandonment can state property rights be analyzed. *Conrail v. Interstate Commerce Commission*, 29 F.3d 706, 709 (D.C. Cir. 1994) ("Once an abandonment certificate issues, property owners with reversionary rights in the rail line may be able to have the line condemned and their property restored.") This principal has been recognized by the Pennsylvania Supreme Court. In *Buffalo Twp. v. Jones*, 813 A.2d 646, 664 (Pa. 2002), the Pennsylvania Supreme Court wrote: "State law generally governs the disposition of the reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments, and to impose conditions affecting postabandonment use of the property." *Id. quoting Preseault v. ICC et al.*, 494 U.S. 1, 8, (1990); *See also Moody v. Allegheny Valley Land Trust*, 976 A.2d 484 (Pa. 2009).

There have been various occasions where the STB has denied a municipality the right to terminate a railroad's rights. *Salt Lake City Corporation—Adverse Abandonment* 2002 STB (STB 2002). "Because reassembling a right-of-way may be difficult if not impractical, the Board must, before authorizing an abandonment, give weight to its 'statutory duty to preserve and promote continued rail service.'" *N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1187 (D.C. Cir. 2004). *City of S. Bend v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In view of the law, Defendants' entire argument concerning the scope of the 2004 Ordinance is based upon the belief that City either was ignorant or unconcerned with the jurisdiction of the STB jurisdiction. 1 Pa.C.S. § 1922. In other words, Defendants'

interpretation of the law requires this Court to find that 2004 Ordinance is in violation of federal law, and thus, is unconstitutional. The Defendants would have this court construe the 2004 Ordinance in a manner that would involve a very real issue of constitutionality of the 2004 Ordinance. It would require a finding that the pre-emptive jurisdiction of the STB could be circumvented by destroying a railroad right-of-way by the mere vacation of a street by City Ordinance. Conversely, Plaintiff's interpretation of the Ordinance avoids all constitutional issues; i.e. the City lawfully struck Penn Street from the City Plan without interfering with the right-of-way held by the PBL, and existing for the public convenience. Therefore, Defendant's objections should be overruled because the 2004 Ordinance has no impact on Plaintiff's rights under the 1890 Ordinance.

**C. PBL HAS NAMED THE CORRECT PARTY AND THIS COURT HAS JURISDICTION BECAUSE PBL HAS NO INTEREST IN CHALLENGING AN ORDINANCE THAT HAS NO EFFECT ON ITS PROPERTY RIGHTS.**

The SugarHouse Defendants boldly suggest that PBL has sued the wrong defendant because it has not sued the City, and further claim that this Court does not have jurisdiction to strike the 2004 Ordinance. In other words, Defendants have tried to frame the issue as a dispute between PBL and City. However, the underlying foundation of Defendants' position is unsupportable. Defendants' argument is only plausible if you accept the implausible, i.e. that City of Philadelphia took action against PBL in violation of both state and federal laws. PBL's position is not afflicted with such deficiencies. PBL has not sued the City nor has it challenged the 2004 Ordinance because neither the City nor the 2004 Ordinance had any effect on PBL's rights. In fact, if anything, the 2004 Ordinance is further evidence of protected rights of the PBL in Penn Street. It would seem that the predicament of the Defendants, i.e. commencing construction despite

**EXHIBIT E**

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JOSEPH GILFILLAN  
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1922-1958  
\_\_\_\_\_  
JOHN C. GILPIN  
1904-1963  
\_\_\_\_\_  
DUNSTAN McNICHOL  
1941-1989

January 15, 2010

VIA FAX (215-686-9502)

The Honorable Sandra Mazer Moss  
Court of Common Pleas  
City Hall, Rm. 392  
Philadelphia, PA 19107

RE: Philadelphia Belt Line Railroad Co. v. HSP Gaming, L.P.; et al.  
Sept. Term, 2009, NO: 00166  
Control # 09103504 (Preliminary Objections of Defendants)

Dear Judge Moss:

I represent the Plaintiff, Philadelphia Belt Line Railroad Company ("PBL"), in the above referenced matter. Presently before the Court are the preliminary objections of the Defendants in this Declaratory Judgment action.

By way of background, the central issue in this litigation is whether the Defendants are in the process of constructing its casino in a manner that would interfere with Plaintiff's property rights. Specifically, Plaintiff has alleged that it has a right of way in the land that was formerly Penn Street by virtue of the December 26, 1890 City Ordinance. Defendants have taken the position that this right of way was terminated when the City passed an Ordinance in 2004 striking Penn Street from the City Plan.

During the course of the arguments, the parties each asserted arguments in support of and in opposition to the requested relief. A significant portion of one of these arguments was whether the Surface Transportation Board ("STB") had any jurisdiction over the issues presented. Plaintiff has taken the position that *even if* the City had intended to strike PBL's right of way by passing the 2004 Ordinance, it could not do so without first petitioning the STB and requesting that the STB issue an Order formally abandoning PBL's right of way. Defendants have taken the contrary position. They have argued that the STB has no jurisdiction, and therefore, the City could have unilaterally revoked PBL's right of way by passing an Ordinance vacating the street.

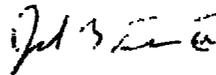
The Honorable Sandra Mazer Moss  
January 15, 2010  
Page 2 of 2

When Plaintiff filed its Complaint, it did not anticipate that Defendants would take this position concerning the jurisdiction of the STB. Accordingly, in direct response to Defendants' arguments, Plaintiff, upon advice of its regulatory counsel, filed a declaratory action with the STB late yesterday afternoon. A copy of the STB filing is enclosed. (The exhibits were not attached as the total over 50 pages). Although the STB is not addressing the separate and distinct state law issues, the STB is being asked to determine the threshold question of whether it has exclusive jurisdiction to determine whether the PBI's right of way is protected under federal law. If the STB does accept jurisdiction, then the 2004 Ordinance cannot have the meaning ascribed to it by the Defendants:

Plaintiff's STB action is designed to narrow the issues before this Court. Plaintiff would respectfully request that this Court stay this matter and place it on the deferred list pending the STB's decision. I have attached a proposed order for the convenience of the Court. If the Court requires a formal motion with respect to this request, please let me know and I will immediately comply.

Thank you in advance for your consideration.

Very truly yours,



John B. Taulane, III

JBT/tmm

Encls.

Cc: The Honorable Idee C. Fox (via fax) (w/ encls.)  
Barbara Brigham Denys, Esquire (via email) (w/encls.)

**EXHIBIT F**

For Mr. Rossi  
from C. H. Kunnert  
Washington, D. C.

FILE IN DOCKET

E.D. 29517

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

PETITION OF THE PHILADELPHIA  
BELT LINE RAILROAD COMPANY  
UNDER 49 U.S.C. §10505  
FOR EXEMPTION OF  
PROPOSED TRANSACTION FROM  
PROVISIONS OF 49 U.S.C. §10901

OFFICE OF THE  
SECRETARY  
RECEIVED  
NOV 20 7 45 AM '80  
PROCESSING  
SERVING STATION

FILED  
NOV 14 1980

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Gilfillan, Gilpin & Brehman  
11th Floor, 1201 Chestnut Street  
Philadelphia, PA 19107

INTERSTATE  
COMMISSION

NOV 14 1980

2  
ADMIN. SERVICES  
MAIL UNIT

Dated: November 14, 1980.

For the year ended December 31, 1979, railway operating revenues paid by tenants amounted to \$180,604.27 and billable expenses totalled \$202,991.45. Had Conrail paid all the bills which were rendered in accordance with its agreement, PBL's revenues would have equalled expenses as intended by its agreement.

10. By this petition from exemption, PBL seeks to confirm its right to perform its own transportation service and to operate totally as an independent common carrier by railroad over the following trackage:

OWNED - Belt Line North - Allegheny Avenue to Bridge Street plus branches.  
Penn's Landing Segment - Catherine Street to Callowhill Street.  
Food Distribution Center - 11th Street to Swanson Street.

TRACKAGE RIGHTS -  
River Front Railroad - Callowhill Street to Cumberland Street; Trenton Avenue connection and branches.  
South Delaware Avenue - Pattison Avenue to Catherine Street (CR & B&O)  
South Philadelphia Agreement -  
Thoroughfare Tracks - STADIUM to Delaware Ave.  
Delaware Extension - STADIUM to PENROSE (CR & B&O)

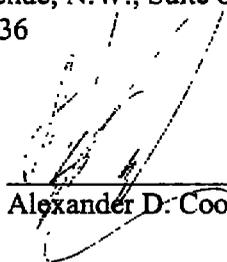
OVERHEAD RIGHTS -  
Port Richmond Yard - Cumberland Street to Allegheny Ave.

11. Section 10505, as amended by §213 of the Staggers Rail Act of 1980, governs PBL's exemption request. Subsection (a) of that section authorizes the Commission, in a matter related to a rail carrier providing transportation subject to its jurisdiction under the Interstate Commerce Act, to exempt a person, class of persons or a transaction or service when the

CERTIFICATE OF SERVICE

I hereby certify that I have this 3d day of February, 2010. served a copy of the foregoing copies of the foregoing Reply of HSP Gaming, L.P., and SugarHouse HSP Gaming, L.P., d/b/a The SugarHouse Casino to Verified Petition of the Philadelphia Belt Line Railroad Company for Declaratory Order by hand delivery upon

Charles A. Spitulnik  
Allison I. Fultz  
Kaplan Kirsch & Rockwell LLP  
1001 Connecticut Avenue, N.W., Suite 800  
Washington, DC 20036



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Alexander D. Coon