

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

**CONRAIL'S OPENING SUBMISSION
REGARDING APPLICABILITY OF SECTION 110(K) OF NHPA**

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- Ex. C Letter from Gerald McCann, Mayor of Jersey City, to L.S. Crane, Chairman of Conrail, dated Dec. 18, 1984.
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- Ex. H Letter from Gerald J. Nissen, Jersey City Director of Engineering, to J.D. Cossel, Conrail Chief Engineer, dated Apr. 5, 1995.
- Ex. I Letter from Bret Schundler, Mayor of Jersey City, to Robert Tracy, Conrail Property Manager, dated Apr. 21, 1997.
- Ex. J Letter from Bret Schundler, Mayor of Jersey City, to James Hall, New Jersey Department of Environmental Protection, dated July 7, 1999.
- Ex. K Letter from Dorothy P. Guzzo, New Jersey Department of Environmental Protection, to Conrail, dated Jan. 25, 2000.

- Ex. L Letter from Robert W. Ryan, Conrail Director of Real Estate, to Jerome M. Killeen, Jersey City Redevelopment Agency, dated Dec. 21, 2001.
- Ex. M Letter from Robert W. Ryan, Conrail Director of Real Estate, to Executive Director, Jersey City Redevelopment Agency, dated Oct. 24, 2002.
- Ex. N Jersey City Redevelopment Agency Inter-Office Memorandum Regarding 6th Street Embankment, dated Oct. 28, 2002.
- Ex. O Letter from John K. Fiorilla, Counsel for Conrail, to Jersey City Redevelopment Agency, dated Jan. 13, 2003.
- Ex. P Letter from Glenn D. Cunningham, Mayor of Jersey City, to Robert Ryan, Conrail Director of Real Estate, dated Oct. 27, 2003.
- Ex. Q *212 Marin Boulevard v. Chicago Title Ins. Co.*, No. HUD-L-5801-09 (N.J. Sup. Ct. Aug. 31, 2017).

Introduction

The Surface Transportation Board’s decision served May 19, 2021, invites parties to file arguments and evidence “so the Board can determine the applicability of Section 110(k)” of the National Historic Preservation Act (NHPA) to these proceedings, which involve abandonment of “a line of railroad known as the Harsimus Branch.”¹ Section 110(k) applies when an applicant for federal assistance has “intentionally significantly adversely” affected a historic property to which the assistance would relate “with intent to avoid” the historic review process required under Section 106 of NHPA.² Section 106’s requirements apply when the Board is asked to authorize abandonment of a rail line.³

Section 110(k) does not apply to these proceedings. The Board’s decision says certain parties “have alleged that Conrail violated Section 110(k) with regard to historic resources on the Harsimus Branch.”⁴ The Board’ is apparently referring to allegations addressed in the Board’s 2009 Environmental Assessment (2009 EA) that Conrail permitted the City of Jersey City to remove one bridge on the portion of the Harsimus Branch known as the Embankment in 1994 and Conrail later removed the remaining bridges and track “[a]t the urging of the City.”⁵

Section 110(k) does not apply to the bridge and track removal because Conrail did not act with intent to avoid Section 106’s requirements. Conrail believed the Harsimus Branch was spur track, which can be abandoned without Board authorization and thus without triggering Section 106. In fact, Conrail believed it had abandoned the Harsimus Branch in April 1994, before the

¹ Decision at 1, 3.

² 54 U.S.C. § 306113.

³ *See* 49 C.F.R. § 1105.8.

⁴ Decision at 2.

⁵ 2009 EA at 14.

bridges and track were removed. In short, Conrail believed Section 106 did not apply, so there were no requirements to avoid.

Conrail's later conduct confirms its lack of intent to avoid Section 106's requirements. Years after the bridges and track were removed, Conrail sold what remained of the Embankment to a group of limited liability companies (the LLCs). After the sale closed, Jersey City asked the Board to determine whether Conrail needed Board authority to abandon the Harsimus Branch. When the Board said its authority was required, Conrail promptly instituted the Section 106 process. Conrail retained a consulting firm specializing in historic preservation analysis and began working with Board environmental staff and the New Jersey State Historic Preservation Office (SHPO). Conrail later agreed to fund the consulting firm's work when the Office of Environmental Analysis (OEA) hired the firm to assist in conducting the Section 106 review. Throughout this proceeding, Conrail has worked to comply fully with Section 106.

Section 110(k) also does not apply to these proceedings because Conrail did not intend to harm historic properties. Conrail simply acquiesced to the City's requests to remove bridges and track on the Embankment to support the City's redevelopment efforts. The City did not believe the properties were historic—it objected to placement of the Embankment on the State Register of Historic Places, arguing that the site lacked historic significance. And, as discussed above, after the Board said abandonment authority was required, Conrail acted promptly and in good faith to comply with the Board's historic review regulations. In fact, the Board has previously rejected claims by the City and other parties that Conrail violated Section 110(k), concluding: “the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures.”⁶ The record fully supports that conclusion.

⁶ 2009 EA at 14.

I. Background

These proceedings involve a short segment of track in the City of Jersey City historically known as the Harsimus Branch.⁷ When Conrail actively operated the Harsimus Branch, the track was approximately 1.36 miles long, branching off a connection to a Conrail mainline near Waldo Avenue, then running under the New Jersey Turnpike Extension, over a structure known as the Embankment, across Marin Boulevard, and ultimately terminating near Washington Street.⁸ The track originally terminated in the Harsimus Cove Yard on the Hudson River.⁹ The Embankment is an elevated portion of the Harsimus Branch between Marin Boulevard and Brunswick Street.¹⁰ It consists of six segments, each approximately 400 feet long and 100 feet wide, joined by plate girder bridges that spanned north-south streets.¹¹ The segments were constructed on masonry-enclosed earthen structures.¹² Conrail acquired the Harsimus Branch and portions of the Harsimus Cove Yard when it was formed from the remnants of a number of bankrupt northeastern railroads.¹³

Conrail last used the Harsimus Branch for rail service in the early 1990s. Even before then, as demand for rail service diminished, Jersey City asked Conrail to remove its tracks and

⁷ A copy of a diagram of the Harsimus Branch contained in the Board's Draft Supplementary Environmental Assessment dated September 10, 2020 (2020 DSEA), is attached as Exhibit A.

⁸ See 2020 DSEA at 3 & App. A.

⁹ See *id.* at 3; see also Reply Statement of Consolidated Rail Corporation, Verified Statement of Robert W. Ryan at 2, *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (filed Apr. 24, 2006). Mr. Ryan's verified statement is attached as Exhibit B and cited as "Ryan VS."

¹⁰ See 2020 DSEA at 3.

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*; see also Ryan VS at 2.

make its underutilized railroad property available for redevelopment.¹⁴ After the last shipper left the area in the late 1980s, the only impediment to selling off the Embankment was that Conrail used it to provide turnaround space for trains moving to one of its customers in Kearney, New Jersey.¹⁵ In response to pressure from the City to remove the Embankment, Conrail agreed to abandon and sell the property after completing a new track connection at Marion, New Jersey, that would eliminate the need to use the Embankment for turnaround space.¹⁶

In February 1994, as Conrail was constructing the new track connection, Conrail's law department was asked to confirm whether Interstate Commerce Commission authority would be required before the Harsimus Branch could be abandoned. The law department confirmed that the Harsimus Branch was spur track, rather than a line of railroad.¹⁷ Conrail's view was shared by counsel for National Bulk Carriers, Inc.—a developer to whom Conrail had sold a property east of Marin Boulevard containing a reserved rail easement that was to be extinguished once Conrail abandoned the Harsimus Branch.¹⁸

¹⁴ See Ryan VS at 2, 11; *see also* Ex. C (Letter from Gerald McCann, Mayor of Jersey City, to L.S. Crane, Chairman of Conrail, dated Dec. 18, 1984) (“With the development of New Jersey’s Hudson River Waterfront, the demand for freight railroads is dwindling. . . . At the same time, however, underutilized railroad property and trackage which services the remaining industrial facilities has become an impediment to the redevelopment of entire development tracts along the Hudson River.”).

¹⁵ See Ryan VS at 11.

¹⁶ See *id.* at 11–12; *see also* Ex. D (Letter from C.F. Morey, Conrail Assistant Division Engineer, to Michael J. Barnes, Jersey City Municipal Engineer, dated July 28, 1989) (“The remaining active track will be abandoned once the new Marion Junction Connection is in service. . . . At the completion of the Marion Connection the Harsimus Branch will be sold and dismantled.”).

¹⁷ See Ryan VS at 13–14; *see also* Ex. E (record of spur decisions made by Conrail Law Department).

¹⁸ See Ryan VS at 13; *see also* Ex. F (Letter from Edward A. McDermott, Jr., President of National Bulk Carriers, Inc., to J.D. Cossel, Conrail Chief Engineer, dated Mar. 30, 1994) (“[O]ur counsel advise that no ICC approval of the abandonment is required. Please let me know as soon as possible when the easement will be surrendered as a matter of record.”).

In April 1994, Conrail completed the new track connection at Marion and abandoned the Embankment, but budget constraints delayed the demolition of the unused bridges and tracks.¹⁹ In July 1994, Jersey City itself, “in a joint venture with National Bulk Carriers, Inc. demolished and removed the Harsimus Cove Bridge spanning over Luis Munoz Marin Blvd. (Henderson Street).”²⁰ The City continued to pressure Conrail to demolish the remaining bridges on the Embankment, describing them as “hazardous structures which should be removed as soon as possible.”²¹ It characterized the Embankment (which it called the Harsimus Cove Viaduct) as “abandoned,” and it urged Conrail to “cooperate with Jersey City by removing the abandoned Harsimus Cove Viaduct for the benefit of all parties involved.”²² Responding to the City’s requests, Conrail completed the removal of the bridges and remaining track from the Embankment in 1997.²³

After the rail infrastructure was removed from the Embankment, Conrail offered to sell the underlying property to Jersey City. In 1997, the Jersey City Redevelopment Agency entered into negotiations to acquire the property.²⁴ However, in 1999, a group of citizens petitioned the

¹⁹ See Ryan VS at 12; *see also* Ex. G (Letter from John K. Fiorilla, Counsel for Conrail, to John J. Curley, Counsel for Jersey City, dated June 17, 2005) (“You should also be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch, was abandoned in April, 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC (now Surface Transportation Board) approval.”).

²⁰ Ex. H (Letter from Gerald J. Nissen, Jersey City Director of Engineering, to J.D. Cossel, Conrail Chief Engineer, dated Apr. 5, 1995).

²¹ *Id.*; *see also id.* (“[T]his abandoned Harsimus Cove Viaduct” should be removed “not just for aesthetics but more importantly for safety.”).

²² *Id.*

²³ See Ryan VS at 14.

²⁴ See *id.*; *see also* Ex. I (Letter from Bret Schundler, Mayor of Jersey City, to Robert Tracy, Conrail Property Manager, dated Apr. 21, 1997) (“The City of Jersey City would like to formalize its interest in acquiring property owned by Conrail in the Sixth Street corridor.

State to designate the Embankment as an “historic place.”²⁵ Later that year, over the objections of the City, which sent an expert to testify “as to the lack of historic significance of [the] site,”²⁶ the Embankment was listed on the State Register of Historic Places.²⁷ The City and the Redevelopment Agency then stopped talking to Conrail about acquiring the property.²⁸

In December 2001, Conrail notified various parties it was putting the property up for bid, and it formally put the parcels out for bid in October 2002.²⁹ Conrail sent the notice and the bid package to the Redevelopment Agency.³⁰ The Redevelopment Agency and Jersey City reviewed the bid package, but they expressed no interest.³¹ In January 2003, the City passed an ordinance designating the Embankment an “historic landmark” under municipal law, and Conrail informed

Specifically, the City is interested in the elevated right-of-way from Newark Avenue to Marin Boulevard.”).

²⁵ See Ryan VS at 14.

²⁶ Ex. J (Letter from Bret Schundler, Mayor of Jersey City, to James Hall, New Jersey Department of Environmental Protection, dated July 7, 1999).

²⁷ See Ryan VS at 14–15; *see also* Ex. K (Letter from Dorothy P. Guzzo, New Jersey Department of Environmental Protection, to Conrail, dated Jan. 25, 2000) (“I am pleased to inform you that the Pennsylvania Railroad Harsimus Branch Embankment, 163-351 Sixth Street, Jersey City, Hudson County was entered into the New Jersey Register of Historic Places on December 29, 1999.”).

²⁸ See Ryan VS at 15.

²⁹ See *id.*

³⁰ See *id.*; *see also* Ex. L (Letter from Robert W. Ryan, Conrail Director of Real Estate, to Jerome M. Killeen, Jersey City Redevelopment Agency, dated Dec. 21, 2001) (“It is the purpose of this letter to clarify whether you are still interested [in purchasing the Embankment property]”); Ex. M (Letter from Robert W. Ryan, Conrail Director of Real Estate, to Executive Director, Jersey City Redevelopment Agency, dated Oct. 24, 2002) (providing bidding instructions).

³¹ See Ryan VS at 15; *see also* Ex. N (Jersey City Redevelopment Agency Inter-Office Memorandum Regarding 6th Street Embankment, dated Oct. 28, 2002) (“I know the JCRA is not interested in bidding on the property. I presume that the City has no interest either at this point but felt you should see the attached.”).

all the prospective bidders that the ordinance would require a successful bidder to obtain consent from the Jersey City Historic Preservation Commission to proceed with development.³²

In October 2003, Jersey City sent Conrail a letter proposing to “open up a dialogue” with regard to maintaining the integrity of the Embankment.³³ But by then, Conrail had entered into a contract to sell the property to the only bidder that had met Conrail’s minimum bid requirements, SLH Holding Company, LLC (SLH).³⁴ In July 2005, Conrail closed the transaction by selling the Embankment property to the LLCs, which SLH created for the purpose of acquiring the individual parcels of property at issue.³⁵

On January 12, 2006, Jersey City and other parties petitioned the Board to declare that the Harsimus Branch was a line of railroad requiring abandonment authorization. In decisions served August 9 and December 19, 2007, the Board agreed with the City.³⁶ Conrail and the LLCs appealed the Board’s decisions to the U.S. Court of Appeals for the D.C. Circuit.³⁷

³² See Ryan VS at 15–16; *see also, e.g.*, Ex. O (Letter from John K. Fiorilla, Counsel for Conrail, to Jersey City Redevelopment Agency, dated Jan. 13, 2003).

³³ See Ryan VS at 16; *see also* Ex. P (Letter from Glenn D. Cunningham, Mayor of Jersey City, to Robert Ryan, Conrail Director of Real Estate, dated Oct. 27, 2003) (“At this time, I would like to open up a dialogue with Conrail as well as the Embankment Preservation Coalition regarding the maintenance of the integrity of the remaining embankment.”).

³⁴ See Ryan VS at 16.

³⁵ See *id.* at 2.

³⁶ See *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (STB served Aug. 9, 2007), *petition for reconsideration denied*, STB served Dec. 19, 2007.

³⁷ The D.C. Circuit vacated the Board’s decision, finding that jurisdiction to determine the status of the trackage fell within the jurisdiction of the Special Court created under the Regional Rail Reorganization Act of 1973 to interpret the Final System Plan pursuant to which Conrail was created. Additional litigation followed in the D.C. District Court (which inherited the Special Court’s jurisdiction and functions) and the D.C. Court of Appeals, until the City and the LLCs jointly stipulated that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to the Board’s abandonment authority. Conrail neither joined nor opposed the stipulation. See *generally Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (STB served Aug. 11, 2014).

On March 6, 2008, in an effort to ensure the matter could be promptly resolved, regardless of the outcome of the appeal, Conrail instituted abandonment proceedings by filing an Environmental and Historic Report with the Board.³⁸ In preparing the report, Conrail consulted with numerous agencies, including the SHPO, as required by Board regulations.³⁹ To address comments received on the report regarding historic preservation issues, Conrail retained Richard Grubb & Associates, Inc. (RGA), a New Jersey consulting firm specializing in cultural resource investigations. In September 2008, RGA prepared a detailed “Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation” (APE Report).⁴⁰ In October 2008, Conrail invited the SHPO and Board environmental staff on a site visit to see both the Embankment and the surrounding area.⁴¹

On February 26, 2009, Conrail filed a Verified Notice of Exemption to abandon the Harsimus Branch.⁴² It also filed a Supplemental Environmental and Historic Report.⁴³ The supplemental report incorporated the APE Report, which (i) delineated the area of potential effects for a cultural resources investigation required by Section 106, and (ii) outlined proposed methods for conducting the investigation and engaging in the consultation process required for the Board to comply with Section 106. Although the Board had previously determined it could

³⁸ See Environmental and Historic Report, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Mar. 12, 2008).

³⁹ See *id.*

⁴⁰ See 2009 EA at 6.

⁴¹ See *id.*

⁴² See Verified Notice of Exemption, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Feb. 26, 2009).

⁴³ See *id.*, Ex. B (Supplemental Environmental and Historic Report), App. A (Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation).

impose historic preservation conditions only to the extent a particular property is owned by a carrier,⁴⁴ Conrail was willing to cooperate in a Section 106 review and to provide appropriate mitigation to moot any claim that it had improperly tried to avoid any historic preservation obligations by selling the property to the LLCs.

On April 20, 2010, before the Section 106 process had advanced beyond the initial stages, the Board issued a stay while the courts addressed the status of the Harsimus Branch.⁴⁵ On August 11, 2014, after judicial proceedings had been concluded, the Board lifted the stay and ordered the resumption of the environmental and historical review process.⁴⁶ In July 2015, OEA retained RGA as OEA's third-party contractor to assist in completing the Section 106 process, and Conrail agreed to fund RGA's work.⁴⁷ Since July 2015, the Section 106 process has moved forward with Conrail's full cooperation. Although Conrail believes that no historic preservation conditions are justified because no post-abandonment adverse effects on historic properties are "reasonably foreseeable" within the meaning of Section 106,⁴⁸ it has repeatedly made clear its willingness to provide reasonable documentation of the Harsimus Branch,⁴⁹ which is the only non-voluntary mitigation requirement the Board may impose in a Section 106 proceeding.⁵⁰

⁴⁴ See *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828–29 (1991).

⁴⁵ See *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (STB served Apr. 20, 2010); see also note 37, *supra*.

⁴⁶ See *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X), AB-167 (Sub-No. 1189X) (STB served Aug. 11, 2014).

⁴⁷ See Memorandum of Understanding Among the Surface Transportation Board, Consolidated Rail Corporation, and RGA, Inc. (docketed as EO2639).

⁴⁸ See, e.g., Comments of Consolidated Rail Corporation on Cultural Resources Effects Assessment Report at 2–3, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Apr. 29, 2019).

⁴⁹ See, e.g., *id.* at 6.

⁵⁰ See *Implementation of Environmental Laws*, 7 I.C.C.2d at 829 (“[A]s a practical matter, documentation of the historic resources involved in the proposal under review (before they are

II. Argument

Section 110(k) of NHPA does not apply to this proceeding. Section 110(k) applies when an applicant for federal assistance has “intentionally significantly adversely” affected a historic property to which the assistance would relate “with intent to avoid” the historic review process required under Section 106 NHPA.⁵¹ Conrail’s actions in removing bridges and track from the Embankment were not done with intent to avoid the Section 106 process or intent to adversely affect historic property.

A. Conrail had no intent to avoid the requirements of Section 106.

Section 110(k) encourages agencies not to grant assistance to applicants that engage in anticipatory demolition of historic properties with intent to avoid the Section 106 review process. *See, e.g., Committee to Save Cleveland’s Hewletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 793 (N.D. Ohio 2001) (Section 110(k) “works to punish those who would seek to manipulate the § 106 process by denying them access to post-demolition permits”); *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 82 (D.D.C. 2000) (agency’s job under Section 110(k) is to determine if the applicant “intended to avoid the requirements of Section 106”).

The anticipatory demolition at issue in this proceeding is the removal of bridges and track from the Embankment between 1994 and 1997 without Board approval to abandon the Harsimus Branch. However, the record contains no evidence that Conrail believed any such approval was required. To the contrary, the record shows that before Conrail permitted Jersey City to remove the first bridge on the Embankment, and more than a decade before the City turned around and

altered or removed) is the only form of nonconsensual mitigation available to us.”); *see also* OEA, Cultural Resources Effects Assessment Report at 1-2, 1-6, 5-2, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (Mar. 29, 2019).

⁵¹ 54 U.S.C. § 306113.

accused Conrail of anticipatory demolition, Conrail concluded the Harsimus Branch was a spur track and thus abandonment approval was not required.⁵² The record also shows that Conrail's view was shared by National Bulk Carriers, which removed the bridge as part of a joint venture with the City.⁵³ The City's active involvement in removing the Marin Boulevard bridge and its repeated requests that Conrail remove the remaining bridges on the Embankment suggest the City also believed abandonment approval was not required before Conrail could abandon the Harsimus Branch.⁵⁴ Absent a requirement for Board approval for abandonment, which could trigger the Section 106 process, Conrail had no reason to be concerned about the Section 106 process. Because the record provides no basis for a finding that Conrail believed Section 106 would be triggered by its abandonment of the Harsimus Branch, the Board could not find that Conrail acted with specific intent to avoid the requirements of Section 106.

In this proceeding, Jersey City has argued that Conrail could not have genuinely believed Board authority was not required to abandon the Harsimus Branch. However, the record shows Conrail, National Bulk Carriers, and the City itself came to the same conclusion long before this proceeding began. In addition, Conrail's belief regarding the regulatory status of the Harsimus Branch was put to the test in a trial with live witnesses subject to cross-examination before the Superior Court of New Jersey in 2017.⁵⁵ In addressing a \$5 million claim against Conrail by

⁵² See Ryan VS at 13–14; *see also* Ex. E (record of spur decisions made by Conrail Law Department).

⁵³ See Ryan VS at 14; *see also* Ex. F (Letter from Edward A. McDermott, Jr., President of National Bulk Carriers, Inc., to J.D. Cossel, Conrail Chief Engineer, dated Mar. 30, 1994).

⁵⁴ See Ryan VS at 11–12; *see also* Ex. C (Letter from Gerald McCann, Mayor of Jersey City, to L.S. Crane, Chairman of Conrail, dated Dec. 18, 1984); Ex. H (Letter from Gerald J. Nissen, Jersey City Director of Engineering, to J.D. Cossel, Conrail Chief Engineer, dated Apr. 5, 1995).

⁵⁵ See *212 Marin Boulevard v. Chicago Title Ins. Co.*, No. HUD-L-5801-09 (N.J. Sup. Ct. Aug. 31, 2017). The Court's decision is attached as Exhibit Q.

Chicago Title Insurance, the LLCs' title insurer, the Court rejected the claim that Conrail had acted fraudulently by telling the LLCs that the Embankment was spur track for which Board abandonment authority was not required. The Court determined that Conrail "believed in the truth of that opinion":

Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track. Similarly, and to that end, Conrail continued to maintain that position permitting the determination that it believed in the truth of that opinion. Despite arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion.⁵⁶

The Court also found no evidence that Conrail even acted negligently in concluding that the Embankment was spur track:

Chicago Title has similarly failed to provide this Court with evidence of negligence on the part of Conrail when it made the statements about the nature of the Embankment. It has not been established, at all, that the representations were, at the time that they were made, incorrect. Instead, as noted previously, Conrail's statements were learned predictions stemming from a reasoned analysis of the historical treatment and regard of the parcel by Conrail. They were rendered by an individual who was most experienced in the field of railroad law. . . . The record does not bear out the contentions that Conrail's representatives failed to act properly in their determinations.⁵⁷

⁵⁶ Ex. Q at 21; *see also id.* at 19 (explaining that Robert Ryan, the Director of Real Estate for Conrail, "testified consistently, directly, and credibly, that it was his belief at the time of closing that the premises at issue was a spur track rather than a rail line for which it was his belief that no abandonment authorization would be necessary."); *id.* at 18 (describing the "credible testimony provided by Mr. Fiorilla," Conrail's outside counsel for the sale of the Embankment parcels, "that he believed that the conveyance was legally permissible without the necessity to secure abandonment permission and specifically that the properties abandoned constituted spur tracks.").

⁵⁷ *Id.* at 23–24.

In sum, the Court recognized that, even though the Board ultimately disagreed with Conrail's belief regarding the regulatory status of the Harsimus Branch, Conrail genuinely believed its position and developed its position through reasoned analysis. The Court's decision was affirmed on appeal.⁵⁸

Conrail's lack of intent to avoid Section 106's requirements is further demonstrated by its actions to comply with those requirements after the Board said Conrail needed Board authority to abandon the Harsimus Branch. As the record shows, Conrail instituted the Section 106 process even as it appealed the Board's decision.⁵⁹ Conrail retained RGA, a firm specializing in historic preservation analysis, to advance the process by preparing a detailed APE Report.⁶⁰ Conrail also agreed to fund RGA's work when OEA hired the firm to assist it in conducting the Section 106 review process.⁶¹ Finally, Conrail stated its willingness to provide reasonable documentation of the Harsimus Branch, even though it believes that no historic preservation conditions are legally justified under Section 106.⁶² In sum Conrail never tried to avoid Section 106's requirements—it has complied with and exceeded those requirements.

⁵⁸ See *212 Marin Blvd. v. Chicago Title Ins. Co.*, No. A-0774-17T2, 2019 WL 287215 (N.J. App. Div. Jan 23, 2019). The court described the issue of the Harsimus Branch's regulatory status as involving "a question so Byzantine that it confounded the federal courts for more than a decade and was only resolved when some combatants stipulated the facts and others, including Conrail, agreed not to dispute the stipulated fact." *Id.* at *4.

⁵⁹ See Environmental and Historic Report, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Mar. 12, 2008).

⁶⁰ See Verified Notice of Exemption, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Feb. 26, 2009), Ex. B, App. A.

⁶¹ See Memorandum of Understanding Among the Surface Transportation Board, Consolidated Rail Corporation, and RGA, Inc. (docketed as EO2639).

⁶² See, e.g., Comments of Consolidated Rail Corporation on Cultural Resources Effects Assessment Report at 6, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Apr. 29, 2019).

B. Conrail had no intent to adversely affect a historic property.

The record also contains no evidence that Conrail intended to adversely affect any historic property by removing the Embankment's bridges and track. As the Board recognized in its August 9, 2007, decision regarding abandonment authority, removal of the bridges and track was part of a long-standing Jersey City redevelopment initiative. "Even before Conrail began operating in the Jersey City area, the City had begun redevelopment efforts to replace the few remaining industrial operations in the area with office buildings, real estate complexes and other high-end commercial developments."⁶³ "In 1984 and afterwards, the City asked Conrail to make available for redevelopment [Conrail's] underutilized railroad property and trackage."⁶⁴ The City specifically "urged Conrail to remove the Embankment."⁶⁵ City never suggested to Conrail that the Embankment might be a historic property. To the contrary, the City joined with National Bulk Carriers to remove the Marin Boulevard bridge in 1994.⁶⁶ Additionally, in 1999, after the Embankment's bridges and track had been removed, the City actively opposed efforts to place the Embankment on the New Jersey State Register of Historic Places. Indeed, the City sent its historic consultant to the State Review Hearing Board to testify "as to the *lack of historic significance of [the] site*."⁶⁷

⁶³ See *City of Jersey City—Pet. for Declaratory Order*, FD 34818, slip. op. at 4 (STB served Aug. 9, 2007).

⁶⁴ *Id.*, slip op. at 5.

⁶⁵ *Id.*

⁶⁶ See Ex. H (Letter from Gerald J. Nissen, Jersey City Director of Engineering, to J.D. Cossel, Conrail Chief Engineer, dated Apr. 5, 1995).

⁶⁷ Ex. J (Letter from Bret Schundler, Mayor of Jersey City, to James Hall, New Jersey Department of Environmental Protection, dated July 7, 1999).

Given the City's expressed position that the Embankment lacked historic significance, the Board cannot find that Conrail intended to adversely affect historic property by removing bridges and track from the Embankment. In fact, the Board previously rejected claims by the City and others that Conrail violated Section 110(k) for precisely that reason. In the 2009 EA, prepared by OEA⁶⁸ under authority delegated by the Board, the Board concluded: "This argument fails because the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures."⁶⁹ The Board found that the context in which the bridge and track removal occurred, together with Conrail's later efforts to comply with the Section 106, negated any suggestion that Conrail intended to harm historic properties:

The SHPO and others, including the City, argue that the historic review process should not proceed because Conrail has engaged in "anticipatory demolition" in violation of Section 110(k) of NHPA. Section 110(k) permits an agency to suspend processing of an application when "an applicant who, with intent to avoid the requirements of [Section 106], has intentionally significantly adversely affected a historic property." 16 U.S.C. 470h-2(k). In support of their anticipatory demolition argument, these parties assert that Conrail should have known that the Harsimus Branch was a "line of railroad" requiring abandonment authority from the Board and that by removing bridges and track structure, Conrail demonstrated intent to harm the Embankment.

This argument fails because the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted

⁶⁸ At the time, the OEA was called the Section of Environmental Analysis.

⁶⁹ 2009 EA at 14.

appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board’s environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts.⁷⁰

The Board should not need to revisit its conclusion in its 2009 EA. If the Board does revisit the issue, its conclusion should be the same: Conrail has not violated Section 110(k) because it had no intent to adversely affect historic properties.

III. Conclusion

For the reasons discussed above, Conrail asks the Board to find that Conrail neither intentionally avoided the requirements of Section 106 nor intentionally adversely affected a historic property with regard to the Harsimus Branch, and thus Section 110(k) has no applicability to this proceeding.

Respectfully submitted,

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June 18, 2021

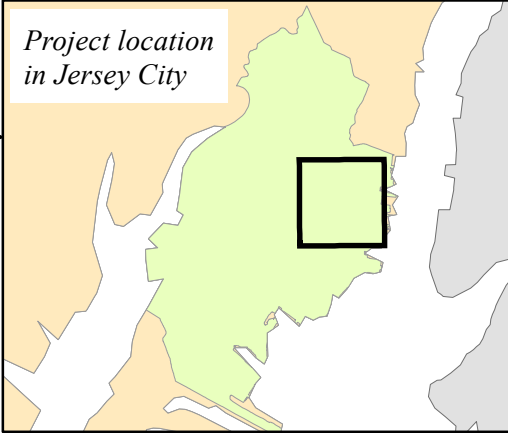
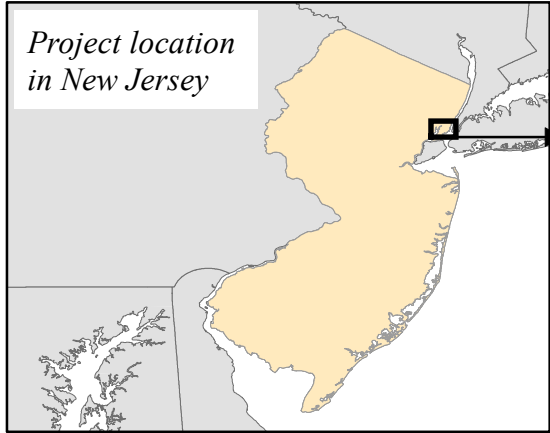
⁷⁰ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2021, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Docket No. AB 167 (Sub-No. 1189X), Docket No. AB 55 (Sub-No. 686X), and Docket No. AB 280 (Sub-No. 306X).

/s/ Michael L. Rosenthal

Exhibit A



Docket No. AB 167 (Sub-No. 1189X)
Abandonment Exemption
Jersey City, Hudson County, New Jersey

— Harsimus Branch
— Harsimus Branch Embankment
— Other rail lines

0 0.1 0.2 0.4 Miles

W E
S

Exhibit B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34818

**CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION, AND NEW JERSEY STATE ASSEMBLYMAN
LOUIS M. MANZO—PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT
OF
ROBERT W. RYAN**

Introduction

1. My name is Robert W. Ryan. I am Director, Real Estate, Consolidated Rail Corporation, 405 Division Street, Suite 215, Elizabeth, NJ 07201. I began working for the Pennsylvania Railroad in January, 1965 in the Real Estate Department. I joined the Real Estate Department of Consolidated Rail Corporation ("Conrail") soon after its formation. Except for three years in the Navy and four years attending college (University of New Haven, B.S. Economics, 1975), I have worked my entire career on Pennsylvania Railroad, Penn Central Railroad, and Conrail real estate matters. Since joining Conrail at its inception, I have had extensive experience and increasing levels of responsibility for managing Conrail's property holdings across its system, including sales in the area of Jersey City, New Jersey, and the properties in and around Harsimus Cove and the Harsimus Cove Yard.

2. Conrail was formed in the mid-1970s from the remains of a number of bankrupt northeastern railroads. It began operations on April 1, 1976. Along with a number of other rail yards, Conrail acquired portions of the Harsimus Cove Yard and the elevated lead (the “embankment lead”) into that yard. From the beginning, the Harsimus Cove Yard and embankment lead served only a switching function for a handful of shippers, as well as providing storage and turnaround space for cars and trains. For operating purposes, Conrail at the outset designated “CP Waldo”—which is west of the point where the embankment lead split off into the Harsimus Cove Yard—as Milepost 0 for the branch line serving the area. That branch line ran westward from Milepost 0 to connections with other lines on Conrail’s system.

3. The already small number of shippers switched out of the Harsimus Cove Yard had either gone out of business or moved away by the mid-1980s. They were encouraged to do so in significant part by the City of Jersey City and the Jersey City Redevelopment Agency, which wanted to see the tracks removed and the property redeveloped. Conrail worked with the City to remove the tracks and sell off various parcels to the Redevelopment Agency and to private developers. Over time, almost 90% of the acreage was sold off in a half dozen different transactions. All that remained by the late 1990s was the embankment lead property—which, at the City’s urging, had years before been stripped of all of its rail infrastructure. Conrail first negotiated to sell the property to the City. When the City expressed no interest in pursuing those negotiations, Conrail put the property up for bid. The City and the Redevelopment Agency decided not to bid on the property. In July 2005, Conrail sold the property to entities created by a private developer, SLH Holding Co., LLC, which was the only bidder that had met Conrail’s minimum bid requirements.

4. Throughout the entire process of Conrail's disposition of the various properties in the Harsimus Cove Yard area, neither the City nor anyone else claimed that Conrail needed to seek abandonment authority from the Interstate Commerce Commission (ICC) or the Surface Transportation Board (STB) to dispose of these properties. Conrail always treated these yard properties as subject to liquidation without federal regulatory approval. Now, as I understand it, the City is claiming in this case that the embankment lead is a "line of railroad" that cannot be liquidated without STB abandonment authority. The City argues that the United States Railway Association ("USRA") in the Final System Plan ("FSP") intended to convey the embankment lead and yard track as a "line of railroad." Alternatively, regardless of whether the property was conveyed as a "line of railroad," the City argues that it should still be considered a "line of railroad" because a railroad is not permitted to "downgrade" track that at any point in its prior history had been a "line of railroad." I address each of these contentions below. I also discuss the City's long-standing efforts to have Conrail sell off all of the Harsimus Cove Yard properties for development, and the City's specific actions with respect to the embankment lead.

The Nature of the FSP Transfers to Conrail

5. In the late 1960s and early 1970s many of the major railroads operating in the Northeastern United States declared bankruptcy. Congress responded to the resulting rail transportation crisis by creating USRA and tasking it with deciding which of the rail properties belonging to the bankrupt railroads should be acquired by a new entity, Conrail, which would build a new rail system out of the pieces of the bankrupt railroads that USRA designated in the FSP. USRA first prepared a Preliminary System Plan ("PSP") discussing its preliminary views regarding lines that should or should not be acquired by Conrail, and then in the FSP specified the lines that were to be acquired by ("designated to") Conrail. The FSP provided that yards

associated with rail lines designated to Conrail would transfer automatically with those lines, unless the FSP provided otherwise. (Exh. C at 261.)

6. The FSP line designation relied on by the City in this case is one of a number from the United New Jersey Railroad and Canal Company ("UNJRCC"), which had leased its lines years before to the Pennsylvania Railroad. Under the heading "TRANSFEROR: UNITED N. J. R. R. & CANAL CO.," the FSP provides for the transfer to Conrail of Line Code 1420, Jersey City to Harrison, Mileposts 1 to 7, the "Harsimus Branch." (Exh. C at 272.) The City argues that this designation must refer, at least in part, to the Harsimus Yard and embankment lead. (Opening Statement at 14-16.)

7. It is immediately apparent from the designation in the FSP that the "Harsimus Branch," which extends for six miles, cannot be synonymous with the Harsimus Cove Yard track and embankment lead. Altogether, that track never extended further than approximately one and one-half miles, east to west, from the bulkheads on the Hudson River to the switch onto the UNJRCC main line near CP Waldo. (Exh. E.) Accordingly, the City argues that USRA in the FSP intended to transfer the Harsimus Cove Yard track and embankment lead as the first part of a UNJRCC line extending from Harsimus Cove to Henderson. The City relies on track charts showing the track in the area designated as Line Code 1420, including the Harsimus Cove Yard track and embankment lead, to support its argument. (Opening Statement at 17-18, Appendix IX.) There are several problems with the City's position.

8. First, Line Code 1420 refers to a complex of trackage in the Harsimus Cove area centered around the old UNJRCC main line that ran from the bulkhead on the Hudson River in Harsimus Cove to the intersection with the old New York Bay Railroad near Harrison (which continued from there as Line Code 1421, the "Passaic Branch"). The valuation maps that were

attached to the deed transferring the line make this clear. (Exhs. BB and CC.) The old UNJRCC main line is shown on six valuation maps—all designated as V-2.1 and Line Code 1420, beginning with number ST-1 at the bulkhead on the Hudson River and running through ST-6 to the “cut” with Line Code 1421. (Exh. BB.) Line Code 1420 also included the sidetracks, running tracks, spurs, yard tracks, leads, and other ancillary trackage associated with the old UNJRCC main line. However, the Harsimus Cove Yard track and embankment lead were set forth on separate valuation maps, designated as V 1.01, ST-1 and ST-2. (Exh. CC.)¹ There is no doubt that the Harsimus Cove Yard property and tracks (to the extent the tracks still existed) transferred to Conrail, but USRA’s intention appears to have been to transfer this property as property ancillary to the old UNJRCC main line.

9. It also bears emphasizing that while the separate valuation maps for V-1.01, ST-1 and ST-2, do not show milepost numbers, they do show station and bridge numbers that start at Waldo Avenue (CP Waldo), which is designated 0+0, and move eastward toward the Hudson River. The bridge numbers move upward as they move eastward, from U.G. Br. No. 0.15 near Waldo Avenue to U.G. Br. No. 0.88 at Henderson Street. (Exh. CC.) The station numbers also move upward as they move eastward, from 0+0 at CP Waldo to 52+80 east of Henderson Street (the “cut” point between ST-1 and ST-2) to 78+03 at the bulkhead on the Hudson River. (Exh. CC.) These station numbers are used as locators on the lower right-hand corner of ST-1 and ST-2. (Exh. CC.) The fact that the station numbers and the bridge numbers move upward from CP Waldo shows that the embankment lead and Harsimus Cove Yard track shown on these two valuation maps were regarded as separate track from the UNJRCC main line shown on V-2.1,

¹ For the reasons discussed in the Verified Statement of Victor Hand, submitted by the Intervenor, V 1.01 map ST-1 was not attached to the deed transferring Line Code 1420. For the Board’s convenience, we have reproduced that map from Conrail’s files and included it with the other relevant valuation maps.

ST-1 to ST-6. They also show that the City's effort to assign mileposts to this track running from east to west is not only wrong directionally, but also wrong numerically. Station 52+80 marks 5280 feet (one mile) eastward from CP Waldo, and Station 78+03 marks 7803 feet (1.48 miles) eastward from CP Waldo. If the old "Harsimus Branch" had milepost numbers, this is what they would be. And the bridge numbers confirm this reading of the valuation maps. The bridge numbers correspond to fractions of a mile from CP Waldo. Thus, U.G. Br. No. 0.88 at Henderson Street marks 0.88 miles from CP Waldo, which is exactly where it should be in relation to Station 52+80 (Milepost 1), just east of Henderson Street. (Exh. CC.)

10. The track charts relied on by the City actually support Conrail's position. Those track charts are both Penn Central track charts and early (pre-1982) Conrail track charts. (Citing Appendix IX.) They show Milepost 1 as the bulkhead on the west bank of the Hudson River, which is consistent with a convention followed originally by the Pennsylvania Railroad. (Under this convention, Milepost 0 was New York City's Pennsylvania Station.) The early Conrail track charts followed this same convention, and the entirety of the property encompassed by Line Code 1420, including the old UNJRCC main line property, is shown on those charts. (Exh. E.) The City cannot credibly claim that, simply because the Harsimus Cove Yard track and embankment lead are included among the lines on that track chart, USRA must have intended to transfer that particular track as a "line of railroad." More importantly, the "U.G." bridge numbers on the track charts, which move upward west to east, are the same numbers that appear on the valuation maps. (Citing Appendix IX; Conrail Exh. E.) The City cannot credibly claim that the track charts support its view that mileposts on the old "Harsimus Branch" moved east to west when the track charts show separate mile measurements for that track that move west to east. The proper reading of the charts is that Milepost 1 was the beginning of the old UNJRCC

main line at the bulkhead on the Hudson River, and that the mileposts moved westward on that line through CP Waldo and on to Harrison. This is supported by the fact that the track charts show bridge numbers starting at 2.54 in CP Waldo and moving upward from there toward Harrison. (Citing Appendix IX; Conrail Exh. E.) The City's effort to use 2.54 as the mile marker for the supposed continuation of the old "Harsimus Branch" has it exactly backward. The 2.54 designation measures the distance to CP Waldo from the Hudson River (Milepost 1) along the old UNJRCC main line.

11. Further support for this reading of the FSP is proved by the "Exceptions and Additions" to the FSP, which spelled out that some yards belonging to the transferring railroads were not transferred to Conrail, and some yards were transferred in part. The Harsimus Cove Yard was among those that was transferred in part. (Exh. C at 262.) Nothing in the Exceptions and Additions referred to the Harsimus Cove Yard or the embankment lead into the Yard as part of the "Harsimus Branch" line specified in the FSP. It was simply one of a number of yards that were transferred to Conrail as ancillary facilities.

12. Thus, I believe that the City's witness John J. Curley is wrong when he concludes that USRA in the deed by which Conrail acquired the "line of railroad described herein" and "identified as Line Code 1420" intended to convey the Harsimus Cove Yard and embankment lead as a "line of railroad." Curley VS at 4-5. The heart of Line Code 1420 was the old UNJRCC main line, which is evident from the valuation maps attached to and incorporated in the deed. (Exhs. BB and CC.) As recited in the deed, that line "originates in the County at Harsimus Cove, passes through Journal Square, and terminates in the County near the junction with the Penn Central New York-Philadelphia Main Line, west of the New Jersey Turnpike Overhead Bridge." (Exh. AA at A-2.) The Harsimus Cove Yard and embankment lead, as well

as all of the other auxiliary track and structures associated with the line, were also included in Line Code 1420, and were also conveyed to Conrail as part of the deed. But that certainly does not demonstrate that USRA intended to convey the Harsimus Cove Yard as a “line of railroad,” or as a segment of a “line of railroad,” any more than USRA intended in the FSP to convey the numerous other yards and auxiliary track that were not specifically excluded from the various conveyances as “lines of railroad” or segments of “lines of railroad.”

13. Further evidence that USRA could not have intended to transfer the Harsimus Cove Yard track and embankment lead as a “line of railroad” is provided by a Conrail Timetable, originally dated May 19, 1974, that set forth the various branch lines that would constitute Conrail’s New Jersey Division. (Exh. A.) The “Passaic and Harsimus Branch” was the “line of railroad” that Conrail created out of the track contained in Line Codes 1420 and 1421, and which Conrail began operating on April 1, 1976. It began at CP Waldo, west of the embankment lead and Harsimus Cove Yard track, and continued westward to Lane. (Exh. A at 17.) Neither the embankment lead nor the remnants of the Harsimus Cove Yard track and the old UNJRCC main track east of CP Waldo was included in the Passaic and Harsimus Line. CP Waldo was designated for operating purposes as milepost 0.0—the end of the line. In General Order No. 1, effective April 1, 1976, Conrail reiterated that the Passaic and Harsimus Branch ran “between CP Waldo (MP 0.0) and Lane (MP 9.3).” (Exh. D at 1.) The embankment lead and Harsimus Cove Yard track were not part of the line. Thus, from Day One, the embankment lead and Harsimus Cove Yard track were not a “line of railroad,” or a segment of a “line of railroad” on Conrail’s system, and they were never planned to be.

14. Although the track charts that Conrail inherited from the Penn Central continued to reflect the old Pennsylvania mileposts for the first few years of Conrail’s existence, they were

soon modified to reflect the fact that the Passaic and Harsimus Branch “line of railroad,” which Conrail had operated from its inception between Jersey City and Lane, began at CP Waldo. Conrail’s 1982 track charts show the Passaic and Harsimus Branch beginning a Milepost 0.0 at CP Waldo. (Exh. F.) None of the trackage east of CP Waldo, including the embankment lead and Harsimus Cove Yard track, appears on the track charts after that point. (Exh. F.) This does not mean that there was no switching activity or other yard work done on those tracks. At that point (1982) a small portion of the trackage was still used for switching a few shippers in the area and for storage and turnaround operations. But that trackage was treated, as it had been from the beginning of Conrail’s existence, as nothing but yard and switching track. (Conrail’s “ZTS” maps also showed the Passaic and Harsimus Line as Track 211, with the “Harsimus Cove Elevation” shown as separate Track 215. (Exh. DD.) Clearly, Conrail always treated the embankment lead and Harsimus Cove Yard track as separate from and auxiliary to the “line of railroad” that served the area.

The Nature of Conrail’s Start-Up

15. As I understand it, the City argues in this case that, regardless of what Conrail used the Harsimus Cove Yard track for, it could not “downgrade” that track from whatever status it had years before on the UNJRCC or the Pennsylvania Railroad. The City’s implicit assumption appears to be that Conrail was (and is) a “successor” to those railroads, and that it was required to treat properties it received the same as any other railroad that purchased another railroad or its property. Conrail is not, however, a “successor” to the multitude of railroads whose properties were winnowed by USRA to put together an entirely new rail system. Conrail started from scratch. This is not a case like those cited by the City for the proposition that a railroad may not downgrade a line from a “line of railroad” to a “spur” and then abandon it without seeking STB

approval. (Opening Statement at 23.) Conrail did not “downgrade” the status of the embankment lead or what remained of the rest of the Harsimus Cove Yard track. That trackage was already “downgraded” long before Conrail began its operations.

16. The City makes much of the “Highline” case, in which the ICC determined that Conrail’s line in lower Manhattan remained a line of railroad, although it had not carried any traffic for 15 years, because it had historically carried substantial traffic. (Opening Statement at 29-30.) What the City ignores, however, is that the Highline was transferred to Conrail as a line of railroad by USRA in the FSP, and Conrail never took the position that it could abandon that line without ICC or STB authorization. The Preliminary System Plan examined at some length the question of whether the Highline should be transferred to Conrail. USRA’s recommendation, in light of projections of close to 30,000 carloads per year of traffic and New York City’s support for the transfer, was that the “30th Street Branch” should be transferred to Conrail. (Exh. B at 639.) The FSP adopted that recommendation and transferred the line to Conrail as a line of railroad. (Exh. C at 281.) Despite repeated efforts by the City of New York and developers to have Conrail tear down the track, Conrail consistently refused to do so absent abandonment authorization from the ICC or STB. In contrast, in this case, Conrail consistently cooperated with requests by the City and local developers to tear down the tracks and sell off, parcel by parcel, the Embankment lead and Harsimus Cove Yard tracks. At no point did Conrail or the City take the position that any authorization was required from the ICC or the STB for such abandonment.

The City’s Development Efforts

17. Even before Conrail began operations in the Jersey City area, the City had begun redevelopment efforts designed to replace the few remaining industrial operations in the

Harsimus Cove area with office buildings, real estate complexes, and other high-end commercial developments. As noted earlier, the FSP did not convey all of the Harsimus Cove Yard property to Conrail, and what was not conveyed was retained by the trustees in bankruptcy of the railroads that owned the property for development purposes. The City adopted detailed redevelopment plans for the area and the Jersey City Redevelopment Agency condemned some properties that were not in active rail service. When Conrail took over rail operations in the area, the City and Redevelopment Agency began working with Conrail to have it sell off additional parcels, and by the mid-1980s Conrail had sold off most of the Harsimus Cove Yard track to several developers, as well as the Redevelopment Agency. Conrail did not seek, and no one suggested it should seek, authorization from the ICC to sell off this track or the underlying property. Conrail only retained easements where it was necessary to be able to switch the few remaining shippers in the area.

18. The City was still not satisfied with the pace of redevelopment. In December 1984, the Mayor of Jersey City wrote the Chairman of Conrail acknowledging that Conrail had "sold several surplus parcels to facilitate Jersey City's waterfront development activities" but complaining that "underutilized railroad property and trackage which services the remaining industrial facilities has become an impediment to the redevelopment of entire development tracks along the Hudson River." (Exh. G.) Conrail continued to juggle the needs of the few remaining shippers and the City's redevelopment objectives until the last shipper left the area in the late 1980s. At that point, the only impediment to selling off the last significant remaining piece of property, the embankment lead, was that Conrail still used part of it to provide turnaround space for trains moving to one of its customers in Kearny, New Jersey. When the City began to dun Conrail to tear down the tracks, Conrail in 1989 agreed to dismantle the track and sell the

property once it had completed a track connection west of CP Waldo (the “Marion Connection”) that would eliminate the need to use the embankment lead for turnaround space. In the interim, Conrail agreed to work with the City to dismantle the tracks and bridges on the lead that were not needed for the turnaround operation. (Exh. H.)

19. Conrail budget constraints delayed the demolition of the unused bridges and tracks on the embankment lead. In 1994, the City itself—in a joint venture with a developer, National Bulk Carriers, Inc., that had earlier bought a large block of property from Conrail east of Henderson Street—demolished and removed the bridge that spanned Henderson Street. (Exh. J.) Having finally completed the Marion Connection, Conrail also in 1994 began to make plans for demolishing the remaining infrastructure on the embankment lead and selling off the property.

20. During none of this time did the City, the Redevelopment Agency, or anyone else dealing with Conrail suggest that abandonment authorization from the ICC was required for Conrail to demolish and sell off the line. The City in its opening statement here attempts to argue from handwritten notes taken by a City engineer of two conversations in 1994 with Conrail engineers that the City had reason to believe that Conrail had sought and obtained abandonment authorization from the ICC. (Opening Statement at 9, 33.) But those notes in fact demonstrate exactly the opposite. In the first, dated March 29, 1994, the Conrail engineer reportedly told the City engineer that “[i]f it is a stub or branch line abandonment, it doesn’t need approval [from the ICC].” (City Appendix II.) In the second, dated June 13, 1994, the Conrail engineer reportedly told the City engineer that “the demolition project for the 6th St. bridges is currently out to bid” and that once bids were received “Conrail will file an IFE? to retire the track.” (City Appendix II.) Counsel for the City suggests that “the term ‘IFE?’ makes sense only if understood to refer to ‘ICC’” (Opening Statement at 9), but anyone familiar with railroad

demolition or construction projects knows that what the Conrail engineer was talking about was an "AFE" or "Authorization for Expenditure." Until the bids came back, the Conrail engineers could not file an AFE with their superiors to get budget authorization for the demolition project. Obviously, that does not suggest that Conrail had determined that abandonment authorization from the ICC was necessary for Conrail to liquidate the property. On the contrary, it shows that no intermediate regulatory step was required for Conrail to proceed.

21. The City also asserts that "[t]he National Bulk Carriers project manager has reiterated numerous times to the City's legal representatives that he always believed Conrail obtained an abandonment authorization for the Harsimus Cove portion of the Harsimus Branch (i.e., MP 1.3 to end of line at MP 1.0)." (Opening Statement at 10 n.15, 36.) But that assertion is belied by a letter from National Bulk Carriers to Conrail dated March 30, 1994, which National Bulk Carriers faxed to the City in April 1994, which the City still has in its files, and which Conrail obtained from the City in discovery. (Exh. I.) In that letter, the President of National Bulk Carriers reminds Conrail that when the Marion Junction project was complete, the easement Conrail had retained through National Bulk Carriers' property could be extinguished. Further, he observes, "our counsel advise that no ICC approval of the abandonment is required." (Exh. I.) It is impossible to credit any supposed "belief" by the National Bulk Carrier project manager that Conrail obtained abandonment authorization for this or any other Harsimus Cove property when National Bulk Carrier's own President expressly recognized that no ICC approval was required.

22. Conrail also turned over to the City in discovery a listing of "Spur Decisions Made by [Conrail] Law Department." (Exh. FF.) It shows that from Milepost 0 (CP Waldo) eastward to Milepost 1.36 (which was all the track left at that point of the embankment lead and yard

track) the law department had confirmed in April 1994 that the "Harsimus Br." track as a legal matter was spur track. (Exh. FF.) That is the same conclusion that was reached in 1994 by counsel for National Bulk Carriers. Particularly in light of these coincident determinations, it is highly unlikely that anyone at Conrail gave anyone at the City reason to believe that Conrail required ICC authorization in order to proceed with demolishing the rail infrastructure and selling off the property.

23. Removing the remaining track and bridges constituting the embankment lead was an expensive project, and Conrail did not complete it until 1997. The City repeatedly pressed Conrail to finish the job and begin negotiations for sale of the underlying property. In anticipation of redevelopment of the property the City in 1977 authorized the Jersey City Planning Board to conduct a redevelopment study, which the Planning Board Completed in March 1998. (Exh. L.) This was followed in July 1999 by an exhaustive study prepared for the City by Louis Berger & Associates, Inc., in association with Li-Saltzman Architects, P.C., which laid out a number of redevelopment alternatives. (Exh. P.) At the same time, the Jersey City Redevelopment Agency was in active negotiations with Conrail to acquire the property for redevelopment. Pursuant to those negotiations, the Redevelopment Agency conducted extensive surveying, soil boring, demotion/clearance estimating, property appraisal, and other planning work, and held discussions with Conrail about the general terms of a sale of the property. (Exh. K.)

24. In the midst of these negotiations, a group of citizens petitioned the State of New Jersey to designate what was left of the embankment lead as an "historic place." The City and Conrail both opposed that designation, because it would restrict the City's ability to implement the development plans proposed in the Berger study. (Exhs. N and O.) Despite the City's strong

opposition, in 1999 the embankment lead was listed on the State Register of Historic Places. (Exh. Q.) After that, the City and the Redevelopment Agency stopped talking to Conrail about acquiring the property and moved on to other projects. Since the City and Redevelopment Agency were no longer interested in the property, Conrail in December 2001 notified numerous parties that it was putting the property up for bid. Conrail was careful to include the Redevelopment Agency among those receiving that notice, just in case the City or the Redevelopment Agency still had an interest in the property. (Exh. R.) Furthermore, when Conrail in October 2002 sent out the bid package to potentially interested parties, it again included the Redevelopment Agency. (Exh. S.) Conrail, however, received no bid from the City, the Redevelopment Agency, or any other governmental entity on the property.

25. Conrail was not surprised by the City's and Redevelopment Agency's lack of interest in the bid package, since they had made clear to us that they no longer had any interest in acquiring the property. In discovery, the City turned over a memorandum from the Redevelopment Agency to the City's Department of Housing, Economic Development, and Commerce ("HEDC"), dated October 28, 2002, regarding "6th Street Embankment (Conrail ROW)," that confirmed exactly what we believed at the time:

As mentioned in our Staff Meeting of this morning, attached for your information and perusal is the bid solicitation letter received from Conrail with regard to the above property. Minimum bid price is \$3,000,000. I know the JCRA is not interested in bidding on this property. I presume that the City has no interest either at this point but felt you should see the attached. Should you wish to see the balance of the package referred to in the letter, just let me know.

(Exh. T.)

26. In January 2003, the City Council of Jersey City proposed an ordinance to designate the embankment part of the embankment lead as an "historic landmark" under municipal law.

Conrail accordingly informed all of the prospective bidders on the property that if the ordinance were adopted, it would require a developer to obtain the consent of the Jersey City Historic Preservation Commission to proceed with development. (Exh. U.) The ordinance passed in January 2003.

27. Only one private developer, SLH Holding Co., LLC, submitted a bid that met Conrail's minimum requirements. Conrail accordingly began negotiations for a sale of the property to the individual companies created by SLH to purchase each of the eight parcels Conrail had offered. In October 2003, Conrail received a letter from the City proposing to "open up a dialogue" with Conrail to having a public entity acquire those parcels. (Exh. V.) By then, Conrail had been attempting to dispose of the embankment property since 1997 and had entered into a contract to sell to SLH Holding Co., LLC, as a result of the bidding process. It had already spent years in good faith negotiations with the City and the Jersey City Redevelopment Agency, which had ultimately determined not to bid on the property, and Conrail had agreed on a good faith bid from a private developer upon terms and for the amount it was seeking. Conrail determined to proceed with its contract with SLH, while remaining open to any concrete proposals from other entities in the event the contracted sale was not completed.

28. Conrail never received any concrete proposals from other entities. What it received instead were periodic overtures to meet to talk about the possibility of the City or some other public entity acquiring the property instead of Conrail selling the property to the only bidder that had met Conrail's terms. Conrail in fact did sit down on March 16, 2004, with the Mayor and other representatives of the City, as well as representatives of the Embankment Coalition, to discuss their interest in the property. Conrail was represented by me and John Fiorilla, counsel to Conrail. The City suggests that at that meeting Mr. Fiorilla and I told the City that it could not

condemn Conrail's embankment property, because "City use of eminent domain was preempted." (Opening Statement at 33.) The City attached to its original Petition for a Declaratory Order a statement by an Embankment Coalition representative, Andrew Strauss, which the City argues supports its position. (Petition, Exh. D.)

29. Mr. Fiorilla and I said no such thing, and there is nothing in Mr. Strauss's notes of the meeting, which are attached to his statement, that supports Mr. Strauss's statement. There is no possibility that we could have suggested that the embankment property could not be condemned, because we are both well-versed in railroad property law, and we both knew full well that once spur property has been removed from rail service, it can be condemned under state law. Any doubt about whether the embankment property had been removed from rail service was erased when Conrail years earlier removed the track and tore down the bridges that made rail service possible. To the extent the meeting raised an issue about condemnation, it was whether the City could condemn the property from Conrail or must condemn it from SLH—because, as Mr. Strauss's own notes reflect, we advised the City that Conrail had a "legally binding" obligation to SLH's owner, "[Steven] Hyman," to negotiate a sale of the property in good faith. (Petition, Exh. D.)

30. Curiously, at the same time the City asserts it was misled by Conrail into thinking that the City could not acquire the property by eminent domain, the City notes that it adopted an ordinance in September 2004 declaring that the property was needed for public use, and that it hired a eminent domain lawyer, John Curley, to pursue acquisition of the property. (Opening Statement at 37-38, Curley VS at 2.) The City says that he "put Conrail on notice by letter dated February 18, 2005," of the City's desire to acquire the property and asserts that Conrail in July 2005 "closed its transaction with the developer while denying the City's experts access to the

property to complete an appraisal.” (Opening Statement at 38.) But Conrail never denied the City access to the property. The City had multiple opportunities for access to the property—and actual access to the property for appraisers, urban planners, environmental experts, surveyors, and architects—over the preceding eight years, and Conrail was always cooperative. The City’s desire for access to the property earlier in July 2005 was inconvenient for Conrail because Conrail was moving offices. (Exh. Z.)

31. Moreover, it would have made no difference if the City had had access to the property earlier in July. Conrail had put the property out for bid in October 2002 and had been working with SLH since it submitted its conforming bid to close the sale in 2003. Conrail never represented to the City or anyone else that it would, or could, hold up the sale to SLH while the City, once again, considered whether to acquire the property. If and when the City decided to exercise its eminent domain power, it could exercise it against either Conrail or SLH—whichever owned the property at the time. Conrail had already gone out of its way to negotiate with the City and the Jersey City Redevelopment Agency at length, beginning in 1997, about acquiring the property. When Conrail finally put the property up for bid, the City and the Redevelopment Agency had no interest. Conrail cannot fairly be criticized for proceeding to sell the property to the only bidder that met its minimum bid conditions.

32. Finally, the City claims that Assemblyman Manzo inquired of the New Jersey Department of Transportation whether they had received notice of an abandonment relating to the branch and that by letter dated March 1, 2006, the Department responded that it was required to receive such notices, but had not. (Opening Statement at 3 n.5.) If that is what the Department said, it is mistaken. I sent a detailed letter to Mr. Thomas M. Scholtis of the Department of Transportation on April 12, 2005, explaining in considerable detail Conrail’s plan

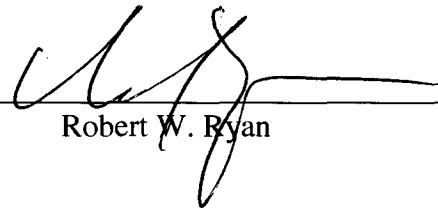
to sell the property at issue to SLH Holding Corp. and requesting waiver of the formal state regulatory filing and publication requirements governing sales affecting railroad property. (Exh. W.) I received back a letter dated June 10, 2005, from James L. Badgley of the Department of Transportation, confirming that it had reviewed Conrail's request that that "NJDOT has no regulatory interest in this transaction as it pertains to rail freight movement." (Exh. Y.) In short, contrary to the City's representation, the Department was given thorough and timely notice and determined that it had no interest in the transaction.

Verification

I, Robert W. Ryan, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

Executed on April 17, 2006.



Robert W. Ryan

Exhibit C

CITY OF
JERSEY CITY

GERALD McCANN
Mayor



CITY HALL
JERSEY CITY, N.J. 07302
(201) 547-5200

December 18, 1984

L.S. Crane, Chairman
Consolidated Rail Corporation
1838 #6 Penn Center
Philadelphia, Pennsylvania 19104

Dear Mr. Crane:

With the development of New Jersey's Hudson River Waterfront, the demand for freight railroads is dwindling. Investors purchasing outmoded industrial facilities have begun their redevelopment into higher-use offices and residential complexes. This is a phenomena with which Conrail is intimately familiar as you have sold several surplus parcels to facilitate Jersey City's waterfront development activities. At the same time, however, underutilized railroad property and trackage which services the remaining industrial facilities has become an impediment to the redevelopment of entire development tracts along the Hudson River.

As Conrail is well aware through its current negotiations, this is the present case with the P&H Branch and the Sixth Street trestle serving the Hudson Street tracks in Jersey City. Although the majority of the property at this location is under contract to the ASH Development Company, the remaining active tracks cut a diagonal line through a forty acre waterfront development site. The line then runs at street grade bisecting two major office projects to the south: the Harborside Financial Center, a two million square foot rehab project where the Bankers Trust Company is already leasing almost one-half million square feet of office space, and a seventeen story, 325,000 square foot office building under construction by an affiliate of the Evergreen Shipping Lines.

The line continues along Hudson Street at grade, crossing both Christopher Columbus Drive and Montgomery Street which will serve as main arteries to the imminent commercial developments at Exchange Place.

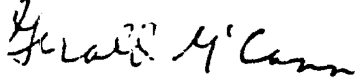
Because of the dramatically changing land uses in the area, I believe you will agree that the time of the freight line service on this line has passed. I suggest we meet in the near future to discuss the discontinuance of this impediment and to select an alternate means of serving your remaining customers.

Page Two
December 18, 1984
L.S. Crane, Chairman

Because of the dramatically changing land uses in the area, I believe you will agree that the time of the freight line service on this line has passed. I suggest we meet in the near future to discuss the discontinuance of this impediment and to select an alternate means of serving your remaining customers.

My office will be in contact immediately after the Holidays to arrange a date.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Gerald McCann".

Gerald McCann
Mayor

GMCC:AH:vp

Exhibit D

CONRAIL



RECEIVED

89 AUG -1 AM 9:55

CITY OF JERSEY CITY
ENGINEERING

cc: Jerry N.
John M.
Sue M.
orig: MJB
I need to
write back &
schedule a
site mtg.
MJB

July 28, 1989

Mr. Michael J. Barnes, P.E., P.P.
Municipal Engineer
Division of Engineering
280 Grove Street
Jersey City, New Jersey 07302

Re: Harsimus Branch, Jersey City, NJ

Dear Mr. Barnes:

Please reference your letter of May 12, 1989 in regard to bridge conditions along the Harsimus Cove Branch. All bridges and retaining walls between Henderson Street and Newark Avenue were inspected on June 6, 1989. At the time of this inspection there was no immediate danger or evidence of loose material falling from these bridges.

We will continue to inspect and monitor bridge conditions along this line and remove any loose material as necessary.

Also, you may be aware that only one track is in service along this six (6) track line segment. The remaining active track will be abandoned once the new Marion Junction Connection is in service. This project, in cooperation with the State of New Jersey, is scheduled for completion in late 1992. At the completion of the Marion Connection the Harsimus Branch will be sold and dismantled.

In the interim, I have initiated the retirement of the six (6) inactive tracks and the removal of the bridge superstructures between Henderson Street and Brunswick Avenue, inclusive. I will keep you advised as to when this retirement project has been finalized and funded.

Very truly yours,

C. F. Morey, P.E.
Assistant Division Engineer
Conrail
Philadelphia Division

10th Floor-15 N. 32nd Street
Philadelphia, PA 19104-2849

Exhibit E

Spur Decisions Made by Law Department
(DO NOT REQUIRE IDC/STB FILING)

Line Name	Type	LC	MP 1	MP 2	Rt. MI.	Att'y	Decision Date	Requested by
Arlington Ave. I.T. (Indianapolis, IN)	Line	60-8342	-0.90	0.70	1.60	JJP	5/1/95	F. R. Stapleton
Athol Br. (Athold, MA)	Spur	unknown				JJP	6/24/93	R. C. Krafty
Avonmore I.T. (Avonmore, PA)	Spur				1.90	JJP	11/15/95	F.B.Gossic
Axle Works I.T. (Homestead, PA)	Spur				0.60	JJP	11/1/89	M. A. Hutchinson
Beaver I. T. (Lovett, PA)	Spur	20-2144				JJP	6/1/93	J. W. Fallon
Bens Creek (Portage Dump Trk)	Spur	20-2149	0.00	0.68	0.68	JJP	4/26/93	J. W. Fallon (04/12/93)
Bloodgood Br. (Union County, NJ)	Spur	10-0532	19.91	20.05	0.14	JJP	5/6/94	Z. Drzewiecki
Bloomfield / Belleville, NJ	Spur	unknown				JJP	5/12/93	Z. J. Drzewiecki
C-A-P Br. (Scranton, PA)	Spur				0.00	JJP	11/7/95	G. Smith
Claremont R.T. (Baltimore, MD)	Spur	20-			1.10	JKE	11/7/95	G. Comstock
Dad's Dog Food Lead (Meadville, PA)	Line	40-6501			0.50	JJP	5/10/96	F. B. Gossic
Dillsburg Br.	Spur				0.50	JJP	6/15/95	J. Ahonen
Edgemoor I. T. (Edgemoor, DE)	Spur	10-1252	0.00	1.00	1.00	JJP	8/2/93	M. C. Rosamilia
Engleside I. T. (Phila, PA)	Spur	10-1183	0.00	0.30	0.30	JJP	6/4/93	Richard Cross
Enola Branch (Marysville, PA)	Jt. Project	xx-1326	74.00	74.40	0.40	JJP	6/6/96	A. T. Bankson
Exon Lead (Sharonville Yard Lead)	Spur	60-8211	0.00	0.67	0.67	JJP	1/4/96	F. R. Stapleton
Former Beech Creek	Spur	unknown				JJP	5/12/93	J. W. Fallon
Fort Wayne, Ind. Lead	Spur	unknown				JJP	6/24/93	R. D. Threlkeld (land sale)
Frankford St. I. T. (Trenton Ave. Ln)	Spur	10-1174				JJP	8/24/95	N. J. Prosperi (track lease)
Franklin I. T. (Franklin, OH)	Spur	60-8258	3.60	4.20	0.60	JJP	5/7/93	M.S. Scime
Gettysburg I. T. (Carlisle, PA)	Spur	20-0315	0.00	0.80	0.80	JJP	11/4/93	J. W. Fallon
Grand Jct. (East Boston I. T.)	Spur	30-4132	7.67	9.50	1.83	JJP	10/9/95	J. H. Ahonen
Greencastle I. T.	Spur	unknown				JJP	6/3/93	J. W. Fallon
Harsimus Br. (Jersey City, NJ)	Spur	10-1420	0.00	1.36	1.36	JJP	4/14/94	J. R. Beard (02/16/94)
Hastings Branch (Hastings Jct., PA)	Spur	20-xxxx	0.00	2.60	2.60	JJP	8/2/93	J. W. Fallon
Herkimer Spur (Herkimer, NY)	Spur				0.00	JKE	10/26/95	J. Hindman
Hudson Sec. (Maybrook, NY)	Spur	30-0101	0.00	2.10	2.10	unknown	no letter on file	
Hudson St. I. T. (Jersey City, NJ)	Spur	10-1440	0.00	1.30	1.30	JJP	4/29/93	T. P. Dwyer
Hurley Lumber Ld (Perth Amboy)	Spur	unknown				JJP	1/20/93	Z. J. Drzewiecki (12/15/92)
Indian Run Ind. Track (Kensington, PA)	Spur	40-2288	1.10	1.30	0.20	JJP	11/9/94	F. B. Gossic
Johnstown I.T. Johnstown, PA)	Line		1.10	1.60	0.50	JKE	11/10/95	G. R. Comstock
Kalamazoo Br. (Grand Rapids, MI)	Spur	50-5341	94.00	94.45	0.45	JJP	5/15/96	J. Kelly
Kennedy Valve Spur (Elmira, NY)	Spur	30-6304	246.90	249.10	2.20	JJP	6/12/96 - JJP	
Lancaster Mills I. T.	Spur	30-4182	0.60	1.50	0.90	JJP	5/14/93	M. G. Peterson
Langhorne Team Track / Ind. Lead	Spur	unknown				JJP	12/16/93	M. C. Rosamilia (land sale)
Mardella I. T. (Salisbury, MD)	Spur	10-1239	39.40	40.80	1.40	unknown	no letter on file	
Marginal Branch	Spur	40-22JJ			0.49	JJP	6/27/97	Brian Harrison
Middle Canal/Lumber (Williamsport, PA)	Spur	20-2316	217.90	218.10	0.20	JJP	11/22/94	A. K. Robbins / G. L. Smith
Millbrook Siding (Elmira, NY)	Spur	unknown				JJP	8/2/93	M. B. Phillips (land sale)
Muncy Br. (Muncy, PA)	Spur	unknown	0.00	0.60	0.60	JJP	2/23/95	C. A. Archer (Fallon, 02/02/94)

Spur Decisions Made by Law Department

Line Name	Type	LC	MP 1	MP 2	Rt. Mi.	Att'y	Decision Date	Requested by
Niles IT (South Bend, IN)	Spur	50-5346	9.90	10.60	0.70	JJP	7/30/97	R. Dietz (Asset Opt. Dept.)
Oberlin Ind. Lead (Harrisburg, PA)	Spur	unknown	0.00	1.04	1.04	JJP	3/19/96	K. Robbins (Harrisburg Div.)
Pappas Lead (Washington, DC)	Spur	unknown				RSN	1/27/95	Donald Shappel
Perth Amboy Br.	Spur	10-0510	17.00	18.00	1.00	JJP	4/26/93	Z. J. Drzewiecki (04/13/93)
Red Key I.T. (Sweetser, IN)	Line	xx-3107	162.05	163.20	1.15	JJP	5/14/92	W. Schoelwer
S. Canton Br. (Canton, OH)	Spur	40-2402			0.00	JJP	10/5/95	F. Gossic
S. Chester Tk. (Marcus Hook, PA)	Exempt	unknown	Market St.	Green St.		JJP	4/26/94	P. Killani
Speedway I.T. (Indianapolis, IN)	Spur	60-8584	4.18	4.70	0.52	JJP	5/31/94	
Thoroughfare Track (Phila, PA)	Spur	unknown				JJP	7/2/93	P. H. Killani
Toms River I. T. (Toms River, NJ)	Spur	10-0219	4.62	5.00	0.38	JJP	6/24/93	M. C. Rosamilia
Union Belt (Marion, OH)	Spur	unknown				JJP	11/4/93	W. A. Schoelwer (request to remove track)
Weirton Secondary (Collier, WV)	Line		35.70	38.40	2.70	JKE	2/28/96	F. B. Gossic
Westland Br. (Houston, PA)	Spur	40-	0.00	0.97	0.97	JJP	11/9/94	F. Gossic

Exhibit F

National Bulk Carriers, Inc.

Edward A. McDermott, Jr.
PRESIDENT

March 30, 1994

To: <i>T. Leane</i>	From: <i>E. McDermott</i>
Co.	Co.
Dept.	Phone #
Fax # <i>201-714-7614</i>	Fax #

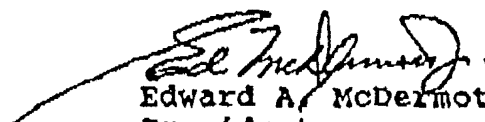
VIA FAX (215) 209-3788

Mr. J. D. Cossel
Chief Engineer, Design and Construction
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19101-1417

Dear Mr. Cossel:

In the course of a site visit, I learned that Conrail will be hooking up Marion Junction on April 6 or thereabouts. As my letter to Mr. Hagen of December 22, 1993 indicated, National Bulk Carriers would like to have the quit claim deed extinguishing the easement at Harsimus Cove filed on April 6 as well. Although I have not heard from you since your January 5 letter, our counsel advise that no ICC approval of the abandonment is required. Please let me know as soon as possible when the easement will be surrendered as a matter of record.

Yours very truly,


Edward A. McDermott, Jr.
President

/kom

hcc: W. Crabtree
T. Leane ✓

Exhibit G



John K. Fiorilla
856.914.2054
jfiorilla@capehart.com

June 17, 2005

Via Fax and Regular Mail

John J. Curley, Esq.
John J. Curley, L.L.C.
Suite 320
5 Marine View Plaza
Hoboken, NJ 07030

Re: Consolidated Rail Corporation – Jersey City Railroad Embankment
Your File No. 319.9405
Our File No. 0476.50485
6th Street Embankment Project

Dear Mr. Curley:

This letter is in response to yours of June 7, 2005 regarding the Jersey City Railroad Embankment which is owned by my client, Consolidated Rail Corporation.

Please note that, although my client is still the fee owner of this property, SLH Holding Corporation has an option to purchase the property and that option includes enhanced authority regarding condemnation, zoning, and development approval. SLH Holding Corporation is represented by Edward D. McKirdy, Esq. of Morristown, New Jersey and Carmine Alampi, Esq. of Hackensack, New Jersey.

Regarding a convenient date for appraisal inspections, Conrail's real estate offices are currently being moved from Edison, New Jersey to Elizabeth, New Jersey and the boxing and moving of records, including the valuation maps you requested, is currently underway. Our client would like to set up a convenient date for the appraisal inspections after July 15, 2005 when the moving and adjustments involved in the move (and vacations of some of the involved employees) will be concluded. Please call me about this.

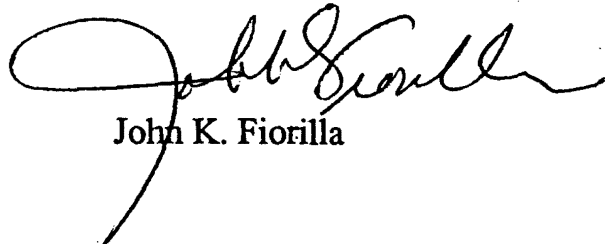
John J. Curley, Esq.
Our File No. 0476.50485
June 17, 2005
Page 2

You should also be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch, was abandoned in April, 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC (now Surface Transportation Board) approval. Please also note that Conrail has no title insurance commitments regarding the property which it obtained from the Trustees of the Penn Central Transportation Company at Conrail's creation in April, 1976 pursuant to the Regional Rail Reorganization Act and the orders of the Special Court of Rail Reorganization.

I look forward to hearing from you regarding the appraisal inspection date so that we may set mutually convenient times.

Sincerely,

CAPEHART & SCATCHARD, P.A.

A handwritten signature in dark ink, appearing to read "John K. Fiorilla", is written over the typed name. The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

John K. Fiorilla

JKF/ajd

cc: Edward D. McKirdy, Esq.
Carmine Alampi, Esq.
Mr. Robert W. Ryan

AJD/S02005

Exhibit H

File

CITY OF
JERSEY CITY
DIVISION OF ENGINEERING



GERALD J. NISSEN, P.E., P.P.
DIRECTOR OF ENGINEERING

April 5, 1995

280 GROVE STREET
JERSEY CITY, NJ 07302
(201) 547-4412

Conrail
2001 Market Street
PO Box 41410
Philadelphia, PA 19101-1410

Attention: J. D. Cossel, P.E., Chief Engineer
Design and Construction

SUBJECT: Removal of Conrail's 6th St. Viaduct (abandoned Harsimus Cove Branch) JC Project No. 92-008

Dear Mr. Cossel:

On April 13, 1994, Conrail's Northern Branch was connected to the P & H Branch at Marion Junction. During the summer of 1994, a private contractor National Salvage and Service Corporation hired by Conrail removed all rail and ties from the now abandoned Harsimus Cove Branch. The only exception to this was that the larger ties on the bridges connecting the elevated earth embankments were not removed.

In July 1994, Jersey City in a joint venture with National Bulk Carriers, Inc. demolished and removed the Harsimus Cove Bridge spanning over Luis Munoz Marin Blvd. (Henderson Street) at no cost to Conrail. At that point, Conrail solicited demolition bids and selected a low bidder, thus we were led to believe that the remaining Harsimus Cove Bridges from Grove Street west to Newark Avenue and beyond to CP Waldo would be removed during the winter of 1994/95. In August 1994, we performed a survey of all underbridge lighting and overhead wires at each bridge that would have to be disconnected, removed or relocated and alerted the various utility companies of the proposed demolition project. Please refer to the attached sketches.

Unfortunately, when we contacted Conrail in mid December 1994, we were advised that no funding had been budgeted for the first 6 months of 1995 and that the project had been put on hold.

At this time, we are requesting a schedule when Conrail will remove these bridges and what are the long term plans for the removal of the masonry stone/earth filled embankments as well as the future use of the Harsimus Cove Right-of-way.

We feel these bridges are hazardous structures which should be removed as soon as possible. Some of these bridges have very low underclearances which have resulted in trucks striking the bridges.

The latest incident occurred on September 13, 1994 when a garbage container truck struck the Erie Street Bridge significantly moving and buckling two large plate girders and raining debris on the road and sidewalk below. Fortunately, no pedestrians were walking under the bridge when the incident occurred. Some of these bridges are so old that large flakes of rust are lying on the bottom flanges, not to mention other miscellaneous debris.

This elevated viaduct is also an eyesore which divides the downtown section of Jersey City. Recently, Conrail reconstructed the National Docks Secondary Branch in downtown Jersey City and the design selected placed an emphasis on aesthetics. We feel that same type of emphasis should now be placed on this abandoned Harsimus Cove Viaduct by removing it not just for aesthetics but more importantly for safety.

Jersey City cooperated with Conrail and the NJDOT on the new Marion Junction connection for many years which as we mentioned at the beginning of this letter culminated on April 13, 1994. We hope that Conrail will now cooperate with Jersey City by removing the abandoned Harsimus Cove Viaduct for the benefit of all parties involved.

Very truly yours,


John Mucha, P.E.
Principal Engineer


Gerald J. Nissen, PE, PP
Municipal Engineer

tb

cc: Councilman Jaime Vasquez
Barbara Bieber, Director, JC Redevelopment Agency
Cheryl Allen-Munley, Director, Bureau of H&T
Pat Nelan, Traffic Engineering
Tom Leane, NBC
Francois LeBrun
Liz Jeffrey, Director, Economic Dev.

Exhibit I

2

CITY OF JERSEY CITY

BRET SCHUNDLER
MAYOR



CITY HALL
JERSEY CITY, NJ 07302
(201) 547-5200

April 21, 1997

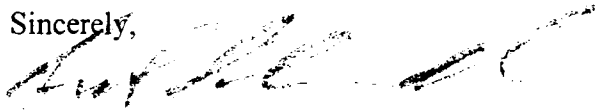
Robert Tracy
Property Manager
Conrail
510 Thornall Street
Edison, New Jersey 08837

Dear Mr. Tracy:

The City of Jersey City would like to formalize its interest in acquiring property owned by Conrail in the Sixth Street corridor. Specifically, the City is interested in the elevated right-of-way from Newark Avenue to Marin Boulevard. We consider this to be an integral part of Jersey City's downtown neighborhood and toward that end would like to maximize its reuse benefits for Jersey City. There are several different development proposals envisioned by the City, most of which would require utilizing all of the right-of-way. As a result, the City is interested in acquiring the right-of-way in its entirety.

Upon your consideration of my request, please contact Elizabeth Jeffery, Director of the Economic Development Division to discuss further actions necessary to advance this proposal. On behalf of the citizens of Jersey City, I thank you for your continued relationship with the City and efforts to assist us in enhancing the quality of our neighborhoods.

Sincerely,



Bret Schundler,
Mayor

cc: Ervin L. Haynes, Director, Department of Housing and Economic Development
Elizabeth Jeffery, Director, Division of Economic Development
Gerald Nissen, Director, Division of Engineering
Cheryl Allen-Munley, Assistant Director, Division of Engineering
Joanne Monahan, Assistant Corporation Counsel
Robert Cotter, Director, Division of Planning
Colleen Yewaisis, Division of Economic Development

CONRAIL®

T. O' Toob-

17-N



Ms. Dorothy P. Guzzo, Administrator
State of New Jersey
Department of Environmental Protection
Historic Preservation Office
P. O. Box 404
Trenton, NJ 080025-0404

Exhibit J

CITY OF
JERSEY CITY

BRET SCHUNDLER
MAYOR



CITY HALL
JERSEY CITY, NJ 07302
(201) 547-5200

July 7, 1999

Jarnes Hall
Department of Environmental Protection
State of New Jersey
Assistant Commissioner for Natural and Historic Resources
P.O. Box 402
Trenton, New Jersey 08625

Re: State Review Board Hearing on the Sixth Street Embankment

Dear Mr. Hall:

Please accept this letter as a formal objection by the City of Jersey City to the nomination of the Sixth Street Embankment to the State Historic Register by the State Review Hearing Board on June 9, 1999. It is my understanding that the Board's jurisdiction is limited to determine historic eligibility of a site, yet during the hearing there was no specific discussion of eligibility criteria, nor was there any discussion of the presentation of the City's consultant, Dr. Michael Alterman of Louis Berger Associates, as to the lack of historic significance of this site.

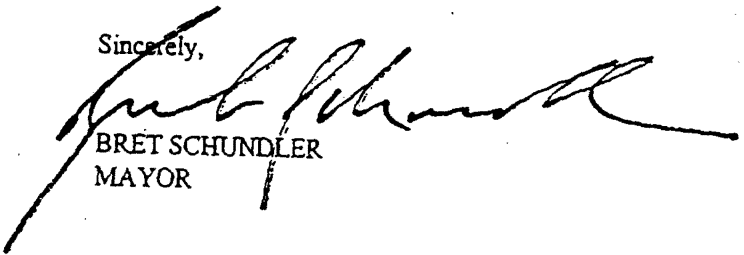
Dr. Alterman's extremely detailed presentation specifically addressed the issue of historic significance of this site. We fail to understand why the Board seemed to completely disregard the merits of the points he raised. In fact, according to my staff, there was no discussion at all relative to Dr. Alterman's presentation on behalf of the City. The attached summary represents the City's specific concerns as to what occurred at the hearing.

As you know, Jersey City celebrates its rich history and has worked hard to preserve significant structures which represent our history, including: the Apple Tree House, P.S. #2, and the Loews Theater. However, we respectfully disagree with the Board's opinion regarding the eligibility of this site. At a minimum, the Board should have considered alternatives to wholesale preservation of the embankment, including: partial preservation of the structure, or the creation of a historic park, as suggested by Jersey City. The fact that Board members were impressed with the preservation sentiment expressed by a select group of residents is irrelevant as to whether the embankment is legally "eligible" to be placed on the Historic Register.

James Hall
Page 2
July 7, 1999

After reviewing these facts, I am confident you will agree that the Sixth Street Embankment should not be placed on the State and National Historic Registers due to its ineligibility under the National Register Criteria for Evaluation. Thank you for your consideration of this request. If you would like to discuss this matter in further detail or visit the site, please contact me at (201) 547-5500.

Sincerely,



BRET SCHUNDLER
MAYOR

BS:TG:jmt
Enclosure
cc: Dorothy Guzzo

OBJECTIONS

1. Pursuant to the Public Comment Guidelines, Dr. Michael Alterman, the City's consultant, gave a photographic slide presentation and expert testimony regarding facts that were not included in the nomination application. Dr. Alterman explained to the Board how the Embankment no longer serves its function to support a freight line; tracks and connecting bridges have been removed and the Harsimus Cove freight yards have been replaced by the flourishing Newport development. He stressed the fact that over the past thirty years, the Embankment has suffered from lack of maintenance and intrusive vegetation. He showed photographic slides of some portions of the remaining Embankment that are severely deteriorated and which show evidence of vandalism on the stonework and trespassing on the top of the Embankment. Photographic slides of other railroad embankments within Jersey City and surrounding communities demonstrated the Sixth Street Embankment's lack of distinction as an architectural feature. Despite this expert testimony and photographic slide presentation, the State Review Board did not ask any questions of Dr. Alterman or discuss his presentation, as they had stated that they would do prior to the Hearing.
2. The nomination application indicated that the Embankment forms a connection between two historic districts, Harsimus Cove and Hamilton Park. Yet historically this is incorrect. Rather than forming a link with either the Harsimus Cove or Hamilton Park Historic Districts, the Embankment was built with total disregard for the surrounding residential neighborhoods, its purpose being to transport freight as efficiently as possible through this area to the waterfront yards. Construction of the Harsimus Branch freight line and the Embankment specifically created a barrier, rather than a link, between the historic residential neighborhoods.
3. Prior to the commencement of the Hearing, the staff of the State Review Board distributed Public Comment Guidelines to everyone who attended the Hearing. Pursuant to Paragraph Two of the Guidelines, public comment must only address issues within the Board's jurisdiction in evaluating nominations. Subjects which the Board may not consider in its evaluation are economic issues or any other issue that does not directly address the National Register Criteria for Evaluation. Despite this language, the State Review Board allowed members of the Embankment Preservation Coalition to discuss economic issues and other issues which did not address the Criteria for Evaluation. For example, a member of the Coalition tainted the hearing by inaccurately stating that the study by Louis Berger & Associates, Inc. dealt solely with redevelopment of the Embankment.
4. In their report, Louis Berger & Associates, Inc. included a conclusions and recommendations section that deals with the project area on a block-by-block basis. Based upon an evaluation of an array of historic resource, architectural and aesthetic, engineering, environmental, socioeconomic, and development economic factors, this section concludes on a block-by-block basis what should be the major goals and preferred design choices for any redevelopment activity. For example, Block 212, which runs from Luis Munoz Marin Boulevard to Manila Avenue, contains the smallest and most seriously deteriorated section of the six-block embankment. It was determined that reconstruction of the embankment on this block was neither feasible nor prudent from many perspectives, including historic preservation. Photographic slides of the severe deterioration of this block were shown to the Board. Despite this block-by-block analysis of the Embankment and the photographic slides of the deterioration of this portion of the Embankment, there was no discussion among members of the Board regarding possible boundaries of the Embankment for placement on the State and National Historic Registers.
5. The City of Jersey City requested that Louis Berger & Associates, Inc. examine the feasibility of

6. The Deputy Attorney General (DAG) at the Hearing was Valerie Gray. She serves as the DAG for both the Historic Preservation Office (HPO) and for the State Review Board. We were informed by Sue Pringle of the HPO that Valerie Gray does not serve as a member of the Board, but is present at such meetings in purely an advisory capacity. At the Hearing, the DAG commented that she lived near the Embankment in her youth and made several improper comments to the Board regarding her opinion that the Embankment was a great structure and worthy of preservation
7. The National Register of Historic Places Registration Form was principally prepared by Richard A. James, who resides at 226 Fifth Street, Jersey City, New Jersey, which borders the embankment. He prepared the Form with the assistance of Bob Craig, a Historic Preservation Specialist with the New Jersey Historic Preservation Office (HPO). Mr. Charles Scott, a Principal Historic Preservation Specialist from the HPO, made the presentation before the State Review Board. A possible explanation as to why he made the presentation, rather than Mr. James, could be that a conflict of interest exists because Mr. James owns a residence within two hundred feet of the Embankment.

Exhibit K



State of New Jersey

Christine Todd Whitman
Governor

Department of Environmental Protection
Division of Parks & Forestry
Historic Preservation Office
PO Box 404
Trenton, NJ 08625-0404
TEL: (609)292-2023
FAX: (609)984-0578

Robert C. Shinn, Jr.
Commissioner

January 25, 2000

Consolidated RR
P.O. Box 8499
Philadelphia, PA 19101-8499

Dear Property Owner:

I am pleased to inform you that the Pennsylvania Railroad Harsimus Branch Embankment, 163-351 Sixth Street, Jersey City, Hudson County was entered onto the New Jersey Register of Historic Places on December 29, 1999. In accordance with N.J.S.A. 13:1B-15.131, listing of an area, site, structure or object on the New Jersey Register of Historic Places prevents the State, a county, municipality or any of their agencies or instrumentalities from undertaking any project that will encroach upon, damage or destroy the property listed without approval from the Commissioner of the Department of Environmental Protection.

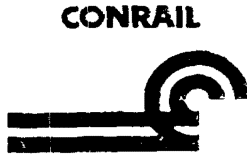
The application for the Pennsylvania Railroad Harsimus Branch Embankment was favorably received by the State Review Board for Historic Sites and was subsequently signed onto the New Jersey Register by the State Historic Preservation Officer. It will now be sent to the National Park Service, U.S. Department of the Interior, Washington, D.C. to be considered for inclusion in the National Register of Historic Places. The Historic Preservation Office will inform you when we receive notification from the National Register Office that the Pennsylvania Railroad Harsimus Branch Embankment has been entered onto the National Register.

Congratulations.

Sincerely,

Dorothy P. Guzzo
Administrator

Exhibit L



510 Thornall St., Suite 390
Edison, NJ 08837
(732) 906-3015 - voice
(732) 549-7926 - fax

December 21, 2001

Jerome M. Killeen
Jersey City Redevelopment Agency
30 Montgomery Street
Jersey City, NJ 07302

Re: Case 72931, Jersey City, Hudson County, NJ – Proposed sale of former
Conrail Right of Way along 6th Street from just west of Newark Avenue
to Luis Munoz Marin Boulevard

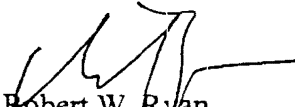
Dear Mr.Killeen:

Consolidated Rail Corporation is considering sale of 6.2 acres, more or less, of property described on the attached Exhibit A and shown on the accompanying Case Plan dated December 21, 2001. Our records indicate that you have previously expressed an interest in purchasing this property. It is the purpose of this letter to clarify whether you are still interested, and if so, whether you are willing to proceed under the terms and conditions to follow. If we have no affirmative response from you by January 31, 2002, we will assume you are no longer interested in the property.

We will recommend sale of the 6.2 acres, more or less, to the qualified buyer who is willing to submit its highest and best offer, at a minimum consideration of \$3,000,000., in a sealed bid which must be received by close of business on February 28, 2002. Conrail, in its sole judgment, reserves the right to reject any and all offers. Conrail will quitclaim whatever right, title and interest we have in this property, with all expenses of sale, including survey and title costs, being the responsibility of Purchaser. The property will be sold "as is" using our standard sale document package. A due diligence period of 60 days will be permitted for the successful bidder to perform any necessary due diligence activities it may deem necessary. The property sale will be subject to Conrail Board of Directors final approval and must close by June 30, 2002.

If you are interested in proceeding along the lines outlined above, please advise and we will arrange to produce the sale document package and send it to you for execution and submission of your bid. We expect the document packages to be mailed out during the week of January 7, 2002. If you have any questions, please do not hesitate to let us know.

Sincerely,



Robert W. Ryan
Director, Real Estate

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Bob Ryan
Lennell
510 Tindall St * 3910
Edison NJ

7002 0320 0000 0548 6251

Exhibit M



510 Thornall St., Suite 390
Edison, NJ 08837
(732) 906-3015 - voice
(732) 549-7926 - fax

October 24, 2002

Office of the Executive Director
Jersey City Redevelopment Agency
30 Montgomery Street
Jersey City, NJ 07302

Re: Case 72931, Jersey City, Hudson County, NJ – Proposed sale of former
Conrail Right of Way along 6th Street from just west of Newark Avenue
to Luis Munoz Marin Boulevard

Dear Executive Director:

Consolidated Rail Corporation is considering the sale of 6.2 acres, more or less, of land and any improvements thereon, as described on the attached Exhibit A and shown on the accompanying plan dated October 18, 2002 (the "Property"). Our records indicate you have previously expressed an interest in purchasing this Property.

We will recommend sale of the 6.2 acres, more or less, to the qualified buyer who is willing to submit its highest and best offer, at a minimum consideration of \$3,000,000, in a sealed bid which must be received by close of business on January 21, 2003. Conrail, in its sole judgment, reserves the right to reject any and all offers. The successful bid will be subject to final review and approval by Conrail's Board of Directors and, if approved, must close by June 30, 2003.

Conrail will quitclaim its right, title and interest in this Property, with all expenses of sale, including survey, title, and due diligence costs, being the responsibility of the successful bidder. The Property will be sold "as is" using Conrail's standard sale document package, which is enclosed. A reasonable due diligence period will be permitted for the successful bidder to perform any necessary and agreed upon due diligence activities following signature of an Agreement of Sale by Conrail. The successful bidder will be required to execute Conrail's standard temporary license prior to entering upon Conrail's Property for such purposes.

Attached you will find instructions for submitting a sealed bid for our review and consideration. Please follow the instructions carefully and return your sealed bid in the envelope provided therefor. If you have any questions, please do not hesitate to let us know. Thank you for your interest in Conrail's Property.

Sincerely,

Robert W. Ryan
Director, Real Estate

UPS 2nd Day Air[®]
Shipping Document

See instructions on back. Call 1-800-PICK-UPS (800-742-5877) for additional information.

TRACKING NUMBER 1Z 083 34X 37 1000 145 9

SHIPMENT FROM
SHIPPER'S UPS ACCOUNT NO. 08334X
REFERENCE NUMBER Case # 71431 #201
NAME Robert Ryan TELEPHONE 732-906-3010
COMPANY CONRAIL/REAL ESTATE
STREET ADDRESS 510 THORNALL ST STE 390
CITY AND STATE EDISON NJ ZIP CODE 08837

2 DELIVERY TO
NAME Robert Ryan TELEPHONE (732) 906-3015
COMPANY Conrail
STREET ADDRESS 510 Thornall St DEPT. FLR #390
CITY AND STATE Edison N.J. ZIP CODE 08837

0201911252609 11/00 W

3 WEIGHT DIMENSIONAL WEIGHT
ENTER 'LTR' IF LETTERS
ENTER 'PKG' IF PACKAGE
LTR

SHIPPER'S COPY 2

4 2ND DAY AIR CHARGE \$

5 OPTIONAL SERVICES
☐ SATURDAY PICKUP See instructions \$
☐ INSURED VALUE \$ AMOUNT \$
☐ C.O.D. \$ AMOUNT \$
An Additional Handling Charge applies for certain items. See instructions.

6 ADDITIONAL HANDLING CHARGE \$
TOTAL CHARGES \$

7 METHOD OF PAYMENT
BILL SHIPPER ☐ BILL RECEIVER ☐ BILL THIRD PARTY ☐ CREDIT CARD ☐ American Express ☐ Discover ☐ MasterCard ☐ Visa ☐ CHECK ☐

8 RECEIVERS / THIRD PARTIES UPS ACCT. NO. OR MAJOR CREDIT CARD NO. EXPIRATION DATE
THIRD PARTY'S COMPANY NAME
STREET ADDRESS
CITY AND STATE ZIP CODE

9 SHIPPER'S SIGNATURE X DATE OF SHIPMENT

UPS 2nd Day Air[®]
Shipping Document

See instructions on back. Call 1-800-PICK-UPS (800-742-5877) for additional information.

TRACKING NUMBER 1Z 083 34X 37 1000 164 6

SHIPMENT FROM
SHIPPER'S UPS ACCOUNT NO. 08334X
REFERENCE NUMBER Case # 71431 #201
NAME Robert Ryan TELEPHONE 732-906-3010
COMPANY CONRAIL/REAL ESTATE
STREET ADDRESS 510 THORNALL ST STE 390
CITY AND STATE EDISON NJ ZIP CODE 08837

2 DELIVERY TO
NAME Executive Director (201) 547-4876
COMPANY Jersey City Redevelopment
STREET ADDRESS 30 Montgomery St. DEPT. FLR
CITY AND STATE Jersey City N.J. ZIP CODE 07302

0201911252609 11/00 W

3 WEIGHT DIMENSIONAL WEIGHT
ENTER 'LTR' IF LETTERS
ENTER 'PKG' IF PACKAGE
PKG

SHIPPER'S COPY 2

4 2ND DAY AIR CHARGE \$

5 OPTIONAL SERVICES
☐ SATURDAY PICKUP See instructions \$
☐ INSURED VALUE \$ AMOUNT \$
☐ C.O.D. \$ AMOUNT \$
An Additional Handling Charge applies for certain items. See instructions.

6 ADDITIONAL HANDLING CHARGE \$
TOTAL CHARGES \$

7 METHOD OF PAYMENT
BILL SHIPPER ☐ BILL RECEIVER ☐ BILL THIRD PARTY ☐ CREDIT CARD ☐ American Express ☐ Discover ☐ MasterCard ☐ Visa ☐ CHECK ☐

8 RECEIVERS / THIRD PARTIES UPS ACCT. NO. OR MAJOR CREDIT CARD NO. EXPIRATION DATE
THIRD PARTY'S COMPANY NAME
STREET ADDRESS
CITY AND STATE ZIP CODE

9 SHIPPER'S SIGNATURE XLPD DATE OF SHIPMENT 10/24/02

Exhibit N



JERSEY CITY REDEVELOPMENT AGENCY

October 28, 2002

Inter-Office Memorandum

TO: Mark Munley, Director HEDC

FROM: Barbara A. Netchert, Acting Executive Director 

SUBJECT: 6th Street Embankment (Conrail ROW)

As mentioned in our Staff Meeting of this morning, attached for your information and perusal is the bid solicitation letter received from Conrail with regard to the above property. Minimum bid price is \$3,000,000. I know the JCRA is not interested in bidding on this property. I presume that the City has no interest either at this point but felt you should see the attached. Should you wish to see the balance of the package referred to in the letter, just let me know.

Thanks.

cc: Sandy Greenberg
Bob Cotter

Exhibit O

WSFR®

WATSON, STEVENS, FIORILLA & RUTTER, LLP

Attorneys At Law

Representing clients with vigor and integrity.

*File
6th St. Embankment*

JAN 14 2003

January 13, 2003

Office of the Executive Director
Jersey City Redevelopment Agency
30 Montgomery Street
Jersey City, NJ 07502

Re: *Prospective Bidders on Conrail Right of Way along 6th Street west of Newark Avenue to Luis Munoz Marin Boulevard in the City of Jersey City, County of Hudson, New Jersey*

Dear Sir or Madam:

This firm represents the Consolidated Rail Corporation which recently sent you sealed bid instructions for making an offer to purchase the above captioned Conrail property.

Please be advised that on January 8, 2003, the Jersey City, New Jersey City Council proposed an Ordinance which was given its first reading which would provide that six of the eight parcels which comprise the property which Conrail is selling would be declared a historic landmark. A copy of the proposed ordinance is enclosed herewith. If the ordinance is adopted it would require a developer to obtain the consent of the Jersey City Historic Preservation Commission to proceed with development.

John K. Fiorilla
JFiorillo@WSFR.net
Michael K. Rutter
MRutter@WSFR.net
Mark Stevens
MStevens@WSFR.net
Carol A. Stevens
CStevens@WSFR.net
Member also NY Bar

David P. Brook
DBrook@WSFR.net
Member also PA Bar
Christine A. Roy
CRoy@WSFR.net
Irene M. Zancos
IZancos@WSFR.net
Member also NY Bar

Of Counsel
Joseph Stevens
JStevens@WSFR.net

Russell E. Watson (1909-1970)
A. Dudley Watson (1917-1990)
Edward L. Webster, Jr. (1950-1987)

Page Two
January 13, 2002

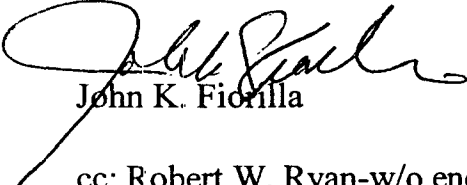
Please note that a public hearing on this ordinance is now scheduled for the evening of February 11, 2003.

Conrail will cooperate with the successful bidder in its efforts to obtain development rights of the property in question and will participate at any hearings with the City if requested by the successful bidder.

If you have any questions regarding this matter, please call the undersigned or Robert Ryan at Conrail at 732-906-3015 or fax your questions to Mr. Ryan at 732-549-7926.

Thank you for your time and attention.

Sincerely,



John K. Fiorilla

cc: Robert W. Ryan-w/o enclosures

City Clerk File No. Ord. 03-010
 Agenda No. 3.3 * 1st Reading
 Agenda No. 2nd Reading & Final Passage

ORDINANCE OF JERSEY CITY, N.J.



COUNCIL AS A WHOLE
 offered and moved adoption of the following ordinance:

CITY ORDINANCE 03-010

TITLE: ORDINANCE OF THE MUNICIPAL COUNCIL OF THE CITY OF JERSEY CITY ADOPTING AMENDMENTS TO THE CITY CODE CHAPTER 345, LAND DEVELOPMENT ORDINANCE, ARTICLE 30, HISTORIC PRESERVATION (EMBANKMENT)

WHEREAS, the "Pennsylvania Railroad Harsimus Branch Embankment" was built in 1901-1905 on the site of an earlier 19th century freight way to facilitate the Pennsylvania Railroad in establishing a major freight yard on the Hudson River which contributed greatly to the growth of the Port of New York and New Jersey; and

WHEREAS, the embankment, as part of the largest transportation system in the country, facilitated the dedication of most of the Jersey City Waterfront to rail and rail related uses; and

WHEREAS, the monumental stone and earth structures comprising the embankment, although lacking their connecting iron plate bridges, are rare survivors of the age of railroad transport and are especially deserving of protection; and

WHEREAS, the "Pennsylvania Railroad Harsimus Branch Embankment" deserves recognition as a series of historically significant structures which played an important part in the social and economic development of downtown Jersey City; and

WHEREAS, the designation of the "Pennsylvania Railroad Harsimus Branch Embankment" as a historic landmark would protect and preserve the structure from demolition or alteration without review by the Jersey City Historic Preservation Commission; and

WHEREAS, the subject property is currently located at the following blocks and lots:

Block: 212	Lot: A
247	50.A
280	50.A
317.5	50.A
354.1	50.A
389.1	A

and

WHEREAS, the subject property is currently owned by the Consolidated Rail Corporation otherwise known as Conrail; and

WHEREAS, Chapter 345, Article 30, Section F, "Procedure for Nominating Sites, Landmarks and Districts for Local Designation" provides that "Any interested party may nominate a site, landmark or district for local designation. The nomination may originate at either the Historic preservation Commission, the Planning Board or City Council; however in any case, it shall be reviewed by all these bodies;" and

WHEREAS, a petition for local landmark designation for the "Pennsylvania Railroad Harsimus Branch Embankment" was submitted to the Historic Preservation Commission on July 8th 2002; and

WHEREAS, at the July 8th 2002 regular meeting of the Jersey City Historic Preservation Commission, the Commission did review the petition and recommend its approval; and

WHEREAS, at the December 16, 2002 regular meeting of the Jersey City Planning Board, the Planning Board did review the recommendation of the Historic Preservation Commission dated August 6th 2002 and the State and National Registers of Historic Places Nomination and recommended submission to the City Council for approval;

Not Required

JAN-06 03 11:03 FROM: JC CLERK

2015475461

TO: 732 549 7926

0000/000

PAGE: 05

SUMMARY

**ORDINANCE OF THE MUNICIPAL COUNCIL OF THE CITY OF JERSEY CITY
ADOPTING AN AMENDMENT TO THE CITY CODE CHAPTER 345, LAND
DEVELOPMENT ORDINANCE, ARTICLE 30, HISTORIC PRESERVATION
(ALL LANDMARKS)**

This ordinance would officially adopt an amendment to the City's Land Development Ordinance to list Municipal Historic Landmarks and Municipal Historic Districts (Chapter 345, Article 30, Section G.) that will provide an essential and accurate record of Landmarks and Historic Districts and ensure protection for Historic Landmarks and Districts.

Date Submitted to B.A. _____

ORDINANCE FACT SHEET

1. **Full Title of Ordinance:**
ORDINANCE OF THE MUNICIPAL COUNCIL OF THE CITY OF JERSEY CITY
ADOPTING AMENDMENTS TO THE CITY CODE CHAPTER 345, LAND DEVELOPMENT
ORDINANCE, ARTICLE 30, HISTORIC PRESERVATION
2. **Name and Title of Person Initiating the Ordinance:**
Mark Munley, Director, HEDC
3. **Concise Description of the Program, Project or Plan Proposed in the Ordinance:**
This ordinance adopts an amendment to the City's Land Development Ordinance recognizing the
"Pennsylvania Rail Road Harsimus Branch Embankment" as a locally designated Historic
Landmark.
4. **Reasons (Need) for the Proposed Program, Project, etc.:**
The "Pennsylvania Rail Road Harsimus Branch Embankment" is a series of structures spanning
six blocks along Sixth Street, which once carried freight through downtown Jersey City to the
railroad's Harsimus Yards. The structures, once joined by plate girder bridges, are mainly
constructed of massive masonry retaining walls and earthen fill and measure approximately 400
feet long by 100 feet wide.

In 1997, local preservationists began the process of achieving landmark status in order to preserve
these historically significant structures. The State Historic Preservation Office has listed the
structures on the State Register of Historic Places. The Jersey City Historic Preservation
Commission and the Jersey City Planning Board have formally recommended Municipal
Landmark Designation.
5. **Anticipated Benefits to the Community:**
The proposed amendments will protect the structures from demolition or significant alteration
without review by the Jersey City Historic Preservation Commission and the City's Historic
Preservation Specialist. The structures, which are a significant reminder of the role of railroads in
the history of downtown Jersey City, are important to complete the interpretation of the adjoining
historic districts of Harsimus Cove and Hamilton Park.
6. **Cost of Proposed Project (Requirement):**
\$0.00 There are no new costs to the City.
7. **Date Proposed Requirement will commence:**
Immediately upon adoption
8. **Anticipated Completion Date:**
Immediately upon adoption
9. **Person Responsible for Coordinating Proposed Program, Project, etc.:**
Robert D. Cotter, Director of City Planning 547-5050
10. **Additional Comments:**
None

I Certify that all the Facts Presented Herein are Accurate.

Robert D. Cotter
Division Director Signature

12/31/02
Date

(Achrj) Chk [Signature]
Department Director Signature

12/10/02
Date

Exhibit P

CITY OF
JERSEY CITY

GLENN D. CUNNINGHAM
MAYOR



CITY HALL
JERSEY CITY, NJ 07302
TEL: (201) 547-5200
FAX: (201) 547-4288

October 27, 2003

Robert Ryan, Real Estate Director
Conrail
510 Thornall Street, Suite 390
Edison, New Jersey 08837

**Re: Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition, Sixth Street Jersey City**

Dear Mr. Ryan:

I am writing in response to your communication of March 13, 2003 regarding the Pennsylvania Railroad Harsimus Stem Embankment, Sixth Street Jersey City.

At this time, I would like to open up a dialogue with Conrail as well as the Embankment Preservation Coalition regarding the maintenance of the integrity of the remaining embankment. Perhaps a way to keep the property intact would be to look at public or private funding or grants. I would appreciate if you would be kind enough to contact my office to schedule an appointment to discuss the matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Glenn D. Cunningham", is written over a horizontal line.

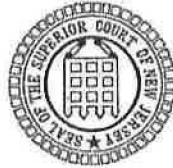
MAYOR GLENN D. CUNNINGHAM

bcc: Maureen Crowley, President
Embankment Preservation Coalition

Exhibit Q

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JEFFREY R. JABLONSKI
JUDGE



BRENNAN COURTHOUSE
583 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306
(201) 795-6660 (TELEPHONE)
(201) 795-6762 (TELEFAX)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Thursday, August 31, 2017

William Wallach, Esq.
McCarter & English
4 Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

FILED

AUG 31 2017

John Piskora, Esq.
Loeb & Loeb
345 Park Avenue
New York, New York 10154

JEFFREY R. JABLONSKI, J.S.C.

Re: 212 Marin Boulevard v. Chicago Title Insurance CO.
Docket No. HUD-L-5801-09

Dear Counsel:

This is the Court's decision and order following the two-day, non-jury trial that was held on April 3 and 4, 2017.

Procedural history:

This litigation began when certain entities that are designated as the LLCs for this opinion¹ sued Chicago Title

¹ The LLCs include: Consolidated Rail Corporation (Conrail) SLH's assignees, 212 Marin Boulevard, LLC, 247 Manilla Avenue, LLC, 280 Erie Street LLC, 280 Erie

requesting that Chicago Title defend the LLCs from a perceived title defect after the LLCs purchased premises in Jersey City that included a parcel that is colloquially known as the Embankment. Conrail sold the entire parcel to the LLCs on July 13, 2005. After the purchase, Jersey City challenged the LLCs' title arguing that abandonment of the Embankment by the Surface Transportation Board (STB) had not been obtained and that this lack of action rendered the transfer invalid. Chicago Title challenged the LLCs' request to defend title, and the LLCs ultimately moved for summary judgment as part of the litigation seeking a determination of that responsibility. The law division judge concluded that Chicago Title was responsible to defend its insureds and to reimburse the LLCs for the legal fees that those entities incurred to obtain this coverage. The Court, however, did not reach the question of Conrail's obligation to indemnify Chicago Title.

The coverage determination was appealed. In May 2015, the Appellate Division affirmed the law division judge's conclusions. However, the Appellate Division remanded the matter to the trial court to consider additional fees that might be due to the LLCs. Ultimately, the LLCs and Chicago Title settled their dispute for \$5 million.

Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue LLC,

The present litigation before this Court concerns the third party claim that Chicago Title filed against Conrail seeking indemnification and contribution toward any monetary responsibility assumed by Chicago Title. Specifically, Chicago Title seeks to recoup the \$5 million settlement proceeds plus interest that it paid to the LLCs under the theory that Conrail made false representations of material facts pre-closing. Conrail disagrees and argues that there were no material factual misrepresentations about the nature of the Embankment and that there were any damages that were proximately caused by Conrail.

The Court, after reviewing the pleadings, and considering both the testimony of the witnesses who appeared and the documentary evidence admitted, makes these findings of fact:

Findings of fact:

1. The premises that are at issue are located on Sixth Street in Jersey City, New Jersey. The premises measures 6.2 acres and includes 8 separate parcels.
2. The premises were conveyed to Conrail by deed on March 31, 1976 from Fairfax Leary, the trustee of the property of the United New Jersey Railroad and Canal Company.
3. The premises included a former railroad facility known as the Sixth Street Embankment (the Embankment).

4. The Embankment consists of a series of elevated structures made of earth-filled stone retaining walls and connected by bridges.
5. Conrail used part of the embankment as a turnaround space for trains until 1994, according to Robert Ryan, the Director of Real Estate for Conrail.
6. As noted by Mr. Ryan, "Conrail acquired portions of the Harsimus Cove Yard and the elevated lead (the "embankment lead" into that yard. From the beginning the Harsimus Cove Yard and embankment lead served only a switching function for a handful of shippers, as well as providing storage and turnaround space for cars and trains."
7. "Conrail always treated these yard properties as subject to liquidation without federal regulatory approval", according to Mr. Ryan.
8. Mr. Ryan noted that the description of the premises is not consistent with a line of railroad determination. Specifically, the area in question was characterized as "CP Waldo" and designated as milepost 0.0 or the end of the rail line.
9. The branch described by General Order #1, the embankment lead and Harsimus cove Yard track was not part of the line since the line of railroad was deemed to be between CP

Waldo (MP 0.0) and Lane (M.P 9.3). The branch was, therefore, spur track because to Conrail:

- The yard was always treated as a "yard and switching track."

- Conrail considered the embankment lead and Harsimus Cove Yard track as separate from any auxiliary to the "line of railroad" that served the area.

- Conrail did not downgrade the status of the Embankment lead nor what remained of the rest of the Harsimus Cove Yard Track. That trackage was already downgraded before Conrail began its operations.

- On March 29, 1994, discussions took place between the City Engineer and the Conrail engineer regarding an "authorization for expenditure vis-à-vis the need for abandonment and that, according to Mr. Ryan, included discussion about different concepts concerning the demolition at the premises did not require any intermediate regulatory steps.

- Conrail disclosed to the City a list of spur decisions made by the Conrail Law Department that revealed that in April 1994, that the Harsimus Br. Track was a spur track.

- National Bulk Carriers reached a similar conclusion in 1994.

10. By 1997, all tracks and bridges on the Embankment were removed and the Embankment was no longer used. After the removal "the individual embankment properties have not been physically connected to each other and have served no railroad or other practical or useful function."
11. In the late 1990's Conrail opened discussions with the Jersey City Redevelopment Authority (JCRA) about developing the Embankment to "realize [the Embankment's] real estate value" and specifically for residential housing.
12. These efforts ceased, however, when a group of citizens was successful in having the State of New Jersey designate the Embankment as a "historic place" over the objection of Conrail as noted in its June 4, 1999, letter to the Department of Environmental Protection.
13. On December 17, 2002, Conrail expressed its intentions to sell all of the Embankment properties.
14. In 2003, Conrail put the premises out for bid.
15. Soon thereafter, Conrail opened negotiations with SLH Holdings Company to sell the Embankment to the separate LLCs that SLH Holdings created for development purposes.
16. These negotiations occurred after Conrail sought other bidders for the project as noted in the Bid Tracking Report.

17. Conrail sent twenty-three bid packages between October 24, 2002, and January 2, 2013.
18. The first bid package, designated bid package #201, was sent directly to the Jersey City Redevelopment Agency (JCRA). This bid package was sent on October 24, 2002. However, the City never demonstrated any interest in making a formal bid to purchase the property in response to it.
19. On January 13, 2013, John Fiorilla, Esq., the attorney for Conrail, wrote to the JCRA to follow up on the bid request. There was no response.
20. Following the enactment of the Jersey City ordinance declaring the Embankment as historic property, Mr. Fiorilla followed up with the JCRA again. There was no response.
21. SLH Holding Co, LLC was the only bidder that had met Conrail's minimum bid requirements.
22. On June 24, 2003, Conrail agreed to sell and SLH agreed to purchase the entirety of the parcel, including the Embankment. The contract was modified on October 27, 2004.
23. In paragraph 12 of the original contract, the parties agreed that Conrail had not made any representations nor warranties to the Purchaser concerning the property,

including any representation or warranty as to the condition of the property or the quality of Conrail's title to the property.

24. Further, the parties agreed that in the event that the conveyance was contrary to any law, regulation or other of any governmental authority, the agreement would be terminated and all parties released from liability.

25. In contract paragraph 15(n), it was agreed that Conrail would not have any obligation to provide the Purchaser to the title insurance company or to any party whatsoever an affidavit of title or any similar document that may be customarily used at closing on a sale of real property.

26. After the sale, the LLCs began to improve the property. This action prompted Jersey City to petition the Surface Transportation Board (STB) to declare that Conrail's sale of the Embankment to SLH was void because Conrail did not obtain abandonment authorization from the STB. Substantial collateral, but related, litigation ensued in the District of Columbia District Court and the United States Court of Appeals for the D.C. Circuit since the appeals taken from the STB by the aggrieved parties before that board were venued in the District of Columbia. Specifically;

- In January 2006, Jersey City, Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Coalition and State Assemblyman Louis M. Manzo petitioned the Surface Transportation Board (STB) for an order declaring that Conrail was required to obtain authorization from the STB to abandon the Embankment.

- Conrail had not obtained abandonment authorization from the STB before selling the Embankment to the LLCs.

- In August 2007, the STB concluded that the Embankment property sold to the LLCs remained part of the national rail system subject to the STB's exclusive jurisdiction until appropriate abandonment authority is obtained.

- Conrail appealed this determination to the United States Court of Appeals for the D.C. circuit.

- On June 26, 2009, the Court of Appeals vacated the Board's orders and held that the STB's orders were jurisdictionally infirm. Conrail v. Surface Transportation Board, 571 F.3d 13, 20 (D.C. Cir. 2009). Specifically, the Court ruled that the STB did not have authority to determine whether a railroad track is a "line" or a "spur" for purposes of abandonment authorization. Id. That analysis and decision was exclusive to the District Court. Id. On the other hand, the

decision to authorize an abandonment was determined to be exclusive to the STB. Id.

- In separate litigation, City of Jersey City v. Consolidated Rail Corp., 968 F. Supp.2d 302 (D.C. Dist. 2013), the District Court noted that the City of Jersey City, Conrail, and 212 Marin LLC stipulated that the Harsimus Branch was conveyed to Conrail as a line and not as a spur. Id. at 308. Therefore, the decision as to whether to authorize the abandonment was subject to STB's jurisdiction. Id. The Court of Appeals affirmed this decision in 2014. City of Jersey City v. Conrail, 2014 U.S. App. LEXIS 3067 (2014).

- The regulatory proceedings before the STB remain Open to date.

27. SLH was represented in the transaction by Carmine Alampi, Esq., and Conrail, by Mr. Fiorilla.

28. On May 30, 2004, Vested Title, as agent for Chicago Title, issued a title commitment to SLH for the properties.

29. In correspondence dated August 30, 2004, Robert Narucki, Agency Counsel for Chicago Title, indicated to Vested Title that he had "reviewed the commitment in the captioned matter and find the same to be in order except" for the completion of a policy approval form and the inclusion of an insurance description of the premises.

30. That letter concluded with authorization "to take whatever steps are necessary, consistent with sound underwriting practices, to close the title and to issue the policy or policies, notwithstanding the fact that the amount thereof may exceed your agency's contractual limit."
31. Chicago Title used the Handbook of New Jersey Title Practice that was authored by Lawrence Fineberg, Esq. for guidance as to address the issues that arise from the conveyance of property from a railroad.
32. Section 9806(4) of that treatise notes that in order to insure a conveyance from a railroad, one should require, "approval by the STB pursuant to 40 USC Sec. 1 et seq. or, in the alternative, proof that such approval is not required."
33. Section 9806(5) notes that "if STB approval is required, proof of compliance with the ninety (90) day notice provisions of N.J.S.A. 48:12-125.1, et. seq. with respect to the state of New Jersey, the County of ____ and the [municipality] of ____." In the comments section, it is noted as to sections 3 and 4 of Sec. 9806, "if approvals are not required, a letter or affidavit from the railroad is normally sufficient."

34. On July 8, 2005, Mr. Ryan e-mailed SLH's principal and attorney regarding the "possibility of closing this transaction next week in order to accommodate a like-kind exchange and that a decision is imminent from you as to whether or not you desire to take this route."
35. On July 10, 2005, Bridget McLaughlin, a legal assistant, e-mailed Vested Title and noted that "we must close these properties on Wednesday-July 13, 2005!! (morning closing)."
36. On July 11, 2005, Mr. Fiorilla responded with a list of points of information. Included in that list was item #6 that noted: "the properties abandoned constituted "spur tracks" over which the STB and previously the ICC had not authority pursuant to 49 USC Sec. 10906. Therefore, no formal abandonment of the property was ever filed."
37. Vested Title relied on that representation, and issued the title insurance policies.
38. The closing occurred on July 13, 2005, and the LLCs took title, by quitclaim deed, to the 8 parcels including the Embankment property.
39. On October 4, 2005, Mr. Fiorilla wrote to Mr. Alampi:
Recently, I met with our clients and reviewed with them the status of the abandonment of the

line that formerly traversed the Jersey City Embankment parcels. Based on this review, the line at issue was reviewed and we continue to be confident that it was properly abandoned under the governing criteria for spur lines under the applicable federal statute and that no filing was required before the Interstate Commerce Commission at that time (nor would there be any requirement to file before the Subsurface transportation Board at this time).

40. In that same letter, Mr. Fiorilla wrote that:
- In any event, since the City of Jersey City and the State of New Jersey were given the opportunity to purchase the parcels and specifically decided not to purchase same, the sale to your client should not be disturbed. Neither the City nor the State has been disadvantaged in any way by Conrail's abandonment of the property. It was offered for sale to the City and the City chose not to bid. The City still has the right to equally condemn the property should it so choose. Accordingly, the ICC/STB issue, we respectfully submit, is a red herring.

41. On January 31, 2006, Carmine Alampi, Esq., on behalf of the LLCs, wrote to Vested Title and noted "as you may know, the issue of whether or not Conrail was required to submit a formal application for abandonment with the Federal Surface Transportation Board, has been raised as a challenge to the transfer of title."
42. Immediately, in response, Vested Title wrote back to Mr. Alampi and noted that the "Embankment has been the subject of historical interest in the City of Jersey city for many years, but this is the first time that I have heard of a suit or petition being filed."
43. Vested considered the letter from Mr. Alampi as a claim based upon the claim to the title and consequently corresponded with Mr. Fineberg, State Counsel to Chicago Title to inform him of this development.
44. That letter notes the following:
- this was the sale of a former freight spur in Jersey City that is known as the Embankment because it sat for years at the top of an embankment that ran 7 or 8 blocks. For years, residents have been begging jersey City to buy the property from Conrail so that it would not be developed. Last year, Conrail sold the property to a developer and residents went

bonkers because of the development threat. While no one is sure of the exact date, it seems to be accepted fact that Conrail used the embankment occasionally into the early 1990s. Conrail considers the property exempt from the reach of the current Surface Transportation Board by virtue of 49 U.S.C. 10906.

45. Following a determination that Chicago Title had a duty to defend its insureds, and appellate affirmance of that decision, Chicago Title settled its claims with the LLCs for \$5 million on December 21, 2015.

46. Payment of this sum was made on the same date.

In light of these facts, and following consideration of the concurrently submitted summations, the Court makes these legal conclusions:

Conclusions of law:

In Counts 5 and 6 of its third-party complaint, Chicago Title seeks contribution and indemnification from Conrail alleging that they were joint tortfeasors. To that end, Chicago Title seeks compensation from Conrail premised on two legal theories: (1) that Conrail's representations were fraudulent and

either in addition or alternatively, (2) that Conrail negligently misrepresented that abandonment was unnecessary when, in actuality, it was. Chicago Title (through Vested Title) detrimentally relied on those assertions that Chicago Title characterizes as "knowingly false and material pre-closing representations" This resulted in damages in the form of the settlement proceeds paid for which Chicago Title now seeks recoupment.

For the reasons that follow, Chicago Title has not proven either than the statements made pre-closing by Conrail were fraudulent, nor has it proven that those statements were made negligently.

Chicago Title has not established by clear and convincing evidence that the statements as to the nature of the Embankment were fraudulent.

To recover damages on the basis of fraud, Chicago Title must prove, by evidence that is clear and convincing, that 1. Conrail made a false representation of fact to Chicago Title; 2. Conrail knew or believed the representation was false; 3. Conrail intended to deceive Chicago Title; 4. Chicago Title believed and justifiably relied upon the statement and was induced by it to take certain action; and 5. as a result of Chicago Title's reliance upon the statement, Chicago Title sustained damage. See Model Jury Charge (Civil) 3.30E, Fraud-

Deceit (1992); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 611 (1997); Stochastic Decisions v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)

Clear and convincing evidence is evidence that "produces in [a factfinder's mind] a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause [a factfinder] to come to a clear conviction of the truth of the precise facts in issue." See Model Civil Jury Charge 1.19, Burden on Proof- Clear and Convincing Evidence (2011). The "clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes [a factfinder] to be convinced that the allegations sought to be proves are true." Id. Evidence is "clear and convincing when it produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Jobes, 198 N.J. 394, 408 (1987) (citing State v. Hodge, 95 N.J. 369, 376 (1984)).

In this case, Chicago Title has failed to provide any evidence that the statements made by Conrail were fraudulent and

that Chicago Title was induced to enter the agreements through any willful misrepresentations as to the status of the subject rail lines and whether abandonment approval was required. Although substantial arguments are made as to the perceived knowledge of the character of the premises, the record evidence suggests that although Conrail was aware of the distinction between rail lines and spur tracks, there was no credible proof (and certainly not clear and convincing evidence) that Conrail made a false representation about the nature of the Embankment that detrimentally and prejudicially induced Chicago Title to rely on those statements.

Central to this Court's conclusion was the credible testimony provided by Mr. Fiorilla. The Court observed Mr. Fiorilla as he testified and noted that his testimony was both reasoned and logical, and was also entirely consistent with the documentary evidence that he believed that the conveyance was legally permissible without the necessity to secure abandonment permission and specifically that the properties abandoned constituted spur tracks "over with the STB and previously the ICC had no authority under 49 U.S.C. Sec. 10906." He later followed up on that opinion and confirmed that the parcel was a spur track and no additional governmental action was necessary to abandon it.

Supportive of this testimony, and further confirming Conrail's knowledge as to the nature of the Embankment as a spur track, was the similarly-credible testimony of Robert Ryan, the Director of Real Estate for Conrail. As did Mr. Fiorilla, Mr. Rayan similarly testified consistently, directly, and credibly, that it was his belief at the time of the closing that the premises at issue was a spur track rather than a rail line for which it was his belief that no abandonment authorization would be necessary. Mr. Ryan testified that Conrail used and treated the parcel as a yard and switching track. The portion of the parcel at issue, according to Mr. Ryan, was separate from any line of railroad that served the area. Conrail never downgraded the area, since the area had already been downgraded. As early as March 29, 1994, when discussions took place about demolition in the area and the need for governmental approval for those actions, none was necessary. Conrail provided to Jersey City in April 1994, that the Harsimus Dr. Track was a spur track.

Despite cross examination that revealed only that these two individuals were aware of the distinction between spur track and a rail line, no credible proof exists that either party knew that the parcel was a designated rail line and, nevertheless, represented otherwise. The opinions expressed by Mr. Fiorilla, in his pre-closing notification were just that-- an opinion. As noted, quite clearly in the Model Jury Charge governing Fraud-

Deceit, this statement made by Conrail and its representatives, is a "statement of opinion rather than a statement of fact. [As such], a defendant cannot be held responsible, for opinions are matters of judgment for which . . . the law does not impose liability" Model Jury Charge (Civil) 3.30E, Fraud-Deceit (1992).

In its summation, Chicago Title notes that another Court, in proceedings that took place approximately 8 years after the closing of title in this matter, "squarely held" that that premises "was conveyed . . . as 'part of [the rail carrier's] railroad lines" subject to the STBs abandonment jurisdiction." Pl. Brief at 6 citing City of Jersey City v Consolidate Rail Corp, 968 F.Supp 2d. 302, 308 (D.D.C. 2013). However, this ruling was not reached following an analysis of the facts in this case, and only reflects a stipulation of the status of the Embankment by the parties. This fact notwithstanding, Chicago Title now seeks to use this later determination to establish the fact that the representation made by Conrail in 2005 was "false", and that its counsel knew that the representation was false at the time that it was made." This determination is not supported by the record as established at trial. Rather, the opposite is true- that Conrail reasonably believed that the Embankment was spur track and not subject to abandonment authority and so informed the pertinent parties.

Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track. Similarly, and to that end, Conrail continued to maintain that position permitting the determination that it believed in the truth of that opinion. Despite the arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion. The action was certainly not made with the intention to deceive the Plaintiff, but was only made as would be necessary pursuant to the Handbook of New Jersey Title Practice, to insure the title since approval would not be required and that a letter or affidavit from the railroad would be sufficient.

Chicago Title has not established that the statements made by Conrail as to the characterization of the Embankment were negligently made by Conrail.

To prevail on a claim for negligent misrepresentation, Chicago Title must prove to prove that Conrail breached a duty of care owed to Chicago Title and that Chicago Title suffered damages proximately caused by that breach. Highlands Ins. Co. v. Hobbs Group 373 F.3d 347, 351 (3rd Cir. 2004) (citing Weinberg v. Dinger, 106 N.J. 469 (1987)). Negligent misrepresentation is

an "incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance." Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000) (quoting H. Rosenblum, Inc., v. Adler, 93 N.J. 324, 334 (1983) superseded by statute on other grounds. To prove a claim of negligent misrepresentation, Chicago Title must prove by a preponderance of the credible evidence that (1) Conrail negligently provided false information; (2) Chicago Title was a reasonably foreseeable recipient of that information; (3) Chicago Title justifiably relied on the information; and (4) the false statements were a proximate cause of the plaintiff's damages. McCall v. Metropolitan Life Ins., 956 F.Supp. 1172, 1186 (D.N.J. 1996). Negligent misrepresentation does not require scienter as an element. Kaufman, supra, 165 N.J. at 110.

Although Chicago Title retains the burden of proof as to this point, it must still prove its claim by a preponderance of the credible evidence. To sustain the burden, the evidence supporting Chicago Title's claim must weigh heavier and be more persuasive than the contrary evidence. If, however, the evidence is of equal weight, then the burden of proof has not been carried and the party with the burden is not entitled to a verdict.

In this case, it is apparent that Conrail intended that Chicago Title rely on the statements that it made regarding its belief as to the nature of the Embankment. All parties to the transaction certainly wanted to close the transaction. However, reliance upon the representations is not the issue presented here. Whether those statements on which reliance was based, however, was negligently made, is.

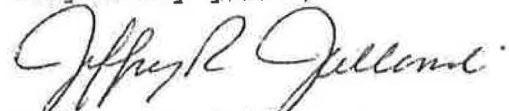
Considering the pertinent standard to support the cause of action, Chicago Title has similarly failed to provide this Court with evidence of negligence on the part of Conrail when it made the statements about the nature of the Embankment. It has not been established, at all, that the representations were, at the time that they were made, incorrect. Instead, as noted previously, Conrail's statements were learned predictions stemming from a reasoned analysis of the historical treatment and regard of the parcel by Conrail. They were rendered by an individual who was most experienced in the field of railroad law. At worst, these statements appear to be nothing more than predictions of the future and mere opinion rather than statements of fact. At best, they represent that which Conrail acknowledged the Embankment to be based on the historical use of that property. In either scenario, the statements were made after a considered analysis and historical consideration of their own parcel. Negligence must always be proved and is not

generally presumed. Although Chicago Title again attempts to interject some nefarious purpose to highlight the purported carelessness of the parties, proof of this carelessness is not established in this record. The record does not bear out the contentions that Conrail's representatives failed to act properly in making their determinations. The Plaintiff has failed to meet its burden of proof that Conrail's representatives so far deviated from the standard expected in making their statements in order to meet its obligations to close this transaction as required between the parties.

Judgment, therefore, is entered in favor of the Defendant, and the Plaintiff's complaint is dismissed with prejudice.

IT IS SO ORDERED.

Very truly yours,


Jeffrey R. Jablonski, J.S.C.

JRJ:ms