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To: [Gosselin, Danielle](#); [Reid Nelson](#); [Tabachnick, Alan](#)
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Subject: Conrail abandonment license, AB 167-1189X, CSX discontinuance license, AB 55-686X, NS Railway discontinuance license, AB 290-306X
Date: Tuesday, March 16, 2021 3:20:22 PM
Attachments: [Cityetal110kresponseachpetaldatedmarch15.pdf](#)

On behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, I today filed as "environmental correspondence" the attached letter and exhibits in response to ACHP's March 8 letter to STB, and to recent correspondence by Conrail and its chosen developer with the STB. We support ACHP's request in the March 8 letter that STB address 110(k) before the agency otherwise purports to move forward with the above three dockets.

We show in our attached Letter that there has been a grave and glaring violation of section 110(k) by Conrail and its chosen developer, and a foreclosure of meaningful comment under section 106. We show that Conrail and its chosen developer contracted with each other to subvert any public remedy for destruction of the Embankment well before Conrail initiated the required STB abandonment licensing proceeding. This blatant anticipatory demolition and denial of comment must be remediated, not ignored or rubberstamped.

We have been calling for application of section 110(k) since 2008. The evidence of anticipatory demolition and foreclosure of comment has only become more pronounced since disclosure of the Conrail/developer contract for same some years later, as well as other evidence that has gradually emerged.

Since Conrail (without explanation) has recently withdrawn from settlement negotiations that might have addressed the 110(k) violation, it is now necessary to apply 110(k) and deny the abandonment application, as otherwise discussed and for the reasons set forth in the letter.

Sadly, STB has identified no procedures, staff, or resources to address either 110(k) or foreclosure of comment despite ACHP insistence that it do so. That does not excuse STB from compliance with the law.

Unfortunately, the developer claims to be talking to STB on a regular basis and has repeatedly informed my clients that STB is rushing to allow the Conrail/CSX/NS abandonment to become effective notwithstanding the violation of 110(k) (much less even evaluating 110(k) issues in any meaningful way), and notwithstanding the denial of comment issues under section 106. In short, the developer claims that STB intends to rubberstamp Conrail's unlawful actions and to do so soon. We request STB to comply with law, and ACHP to intervene to stop the apparent failure of STB to comply with the law. Again, we show that Conrail is not entitled to an abandonment license given its knowing violation of STB licensing and NHPA requirements, in which its chosen developer was complicit.

Please feel free to call me (206-546-1936) or email me with any questions.

Thank you for your attention to this matter.

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15 March 2021

Ms. Danielle Gosselin, Acting Director
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Re: STB licensing of unlawful de facto rail abandonment despite section
110(k) violation and foreclosure of comment, ACHP Connect Case 001682

Consolidated Rail Corporation – Abandonment Exemption – in Hudson County,
NJ, STB Docket AB 167 (Sub-No. 1189X) (Harsimus Branch) and related
discontinuance exemption dockets of CSX Transportation and Norfolk Southern
Railway Company [AB 55 (Sub-No. 686X) and AB 290 (Sub-No. 306X)
respectively]

Dear Ms. Gosselin and Messrs. Nelson and Tabachnik:

This letter, on behalf of City of Jersey City (“City”), Rails to Trails Conservancy (“RTC”), and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“Coalition”) (collectively “City et al.”), is in response to recent communications to the Surface Transportation Board (“STB”) and/or its Office of Environmental Analysis (“OEA”) by the Advisory Council on Historic

Preservation (“ACHP”).¹ This letter also responds briefly to recent communications to OEA by the Hyman LLCs² and by Consolidated Rail Corporation (“Conrail”).³ Although this responsive letter relates primarily to National Historic Preservation Act (“NHPA”) section 110(k), 54 U.S.C. 306113 (“anticipatory demolition”) issues arising from Conrail’s unlawful actions (see below), the material is germane to foreclosure of meaningful section 106 analysis generally as a result of Conrail’s unlawful actions.

ACHP in its letter noted that it had long ago requested STB to determine whether section 110(k) is applicable in this proceeding, and reiterates that request, stating that it believes STB by now should have collected information on the subject.⁴ The letter requests STB to determine the applicability of section 110(k)

¹ Assistant Director Loichinger to Deputy Director Gosselin, Letter (Environmental Comment EI-30367) in AB 167-1189X dated March 8, 2021.

² Ms. Donato (Hyman LLCs) to Mr. Tabachnik, Letter (Environmental Comment EI 27089), in AB 167-1189X, dated Feb. 18, 2021.

³ Mr. Rosenthal (for Conrail) to Mr. Tabachnik, Letter (environmental comment EI-30001), in AB 167-1189X, dated Feb. 23, 2001.

⁴ In truth, STB OEA has ignored ACHP guidance on section 110(k). In Letter, ACHP to OEA, August 4, 2016 (EI 25314 in environmental correspondence in AB 167-1189X), ACHP called for STB to halt the section 106 process until a 110(k) determination was made. (Copy attached in Appendix). OEA nonetheless proceeded with 106, apparently claiming to ACHP that there was on-going discovery on 110(k) issues. See email correspondence from Dec. 21, 2016, in EI 25727 in environmental correspondence in AB 167-1189X (also in the Appendix). In EI 25727, STB OEA claims it allowed 110(k) discovery in its decision in AB 167-1189X, served May 22, 2015. City et al. have a different view. Instead of allowing 110(k) discovery in its May 22, 2015 decision, STB cut it off as “overbroad.” STB either denied discovery on 110(k) matters altogether in its May 22 order or eliminated response for the critical period after January 1, 2005. As a result, the only “discovery” going on in 2016 related to a third party (James Riffin) who was purportedly seeking to do an “offer of financial assistance” and the discovery against him was not related to 110(k). In any event, the only issue still open against Riffin was sanctions for failing to respond to discovery in an order in AB 167-1189X. served Oct. 26, 2016. The Order also closed discovery as of December 30, but effective 110(k) discovery had been foreclosed by STB over a year before. City, et al have complained of STB’s utter failure to allow any real discovery on 110(k) issues or to develop a record on 110(k) many times. See, e.g., Letter, City et al to STB OEA, dated 28 July 2017, Comments on Cultural

in consultation with the ACHP before the STB takes further action under section 106. See note 1 supra. The New Jersey State Historic Preservation Officer (“NJ SHPO”) has been calling for the applicability of section 110(k) to be “thoroughly evaluated” since January 2009,⁵ as have City et al.⁶

City et al. demonstrate in this letter (1) that STB’s sole effort to address section 110(k) issues was in a 2009 Environmental Assessment, and that the statements and conclusions therein were entirely based on false assumptions or irrelevant facts, ignored the evidence, misstated the law, and of course does not take into account the evidence subsequently presented in the intervening 12 years; (2) that STB and OEA have developed no procedures or plan to address section 110(k) and foreclosure of comment issues and that OEA has thus not collected evidence on or otherwise sought to address the issue; and (3) that the only possible conclusion based on the evidence in the record is that Conrail subsequent to 2000 engaged in a series of actions that individually and in concert violate section 110(k) and foreclose meaningful section 106 analysis. In conclusion, STB must now find Conrail in violation of section 110(k) for its unlawful actions discussed below that took place after January 2000, and suspend further processing of Conrail’s abandonment application until Conrail fully and completely remediates its unlawful actions.

I. Background: Conrail’s Unlawful Actions at Issue

The Harsimus Branch is the former mainline of the Pennsylvania Railroad. The property was conveyed to Conrail as line code 1420, and pursuant to a deed of a

Resources Identification Report in AB 167-1189X, at pp. 2-6. STB’s claims to ACHP that it permitted 110(k) discovery in an order cutting it off is disturbing, but to the extent the agency represents that it cut discovery off into 110(k), it is certainly correct. It follows that STB not only has failed itself to develop a record on 110(k) but also it has denied reasonable discovery on the part of City et al to explore the issue. STB’s email to ACHP embodied in EI 25727, on which we assume ACHP relied in thinking STB has by now developed a record, was at best misleading. The agency has no more provided a procedural schedule for briefing on 110(k) issues (to which Ms. Kitay hints in EI 25727) than the agency has provided reasonable opportunity for 110(k) discovery.

⁵ Letter, D. Saunders (NJSHPO) to Acting Secretary (STB) Quinlan, in AB 167-1189X, filed Jan. 26, 2009.

⁶ E.g., City et al, Summary Statement Concerning Section 110(k), in AB 167-1189X, filed January 21, 2009.

line of railroad. See Curley V.S. in Exhibit C of Jan. 21 filing, supra, in AB 167-1189X at 4-5. The line was without question a line. It was conveyed as such; another line (Hudson Street⁷) ended in it, making it a through route. Conrail served multiple customers on the rail line and, after analysis, evidently found it too profitable to qualify for an expedited rail abandonment procedure under the 3-R Act section 308, 45 U.S.C. 748.⁸ However, customers gradually left the line in the middle and latter portion of the 1980s (Jan. 21 filing, supra, Exhibit E), and STB has determined that Conrail ceased all rail use by 1992. Decision in F.D. 34818, served Aug. 9, 2007, at p. 4. During this period and thereafter, Conrail began selling off pieces of the line without prior authorization by the Interstate Commerce Commission (“ICC”) or its successor, STB.⁹ Conrail also removed, or suffered to be removed, bridges and trestles connecting elevated portions of the line to the Palisades near Waldo Yard. As this agency has stated, such actions by a railroad with regard to a regulated line are “unlawful.”¹⁰ Conrail also engaged in at least one other unlawful abandonment of a rail line in Jersey City shortly before the Harsimus Branch matter blew up.¹¹ At one point, STB purported to initiate an

⁷ The Hudson Street Branch (line code 1440) intersected the Harsimus Branch east of Henderson Street, now Marin Boulevard, and thus connected to the national rail system via the Harsimus Branch. (The point of intersection is shown on the track chart that is annexed to City et al.’s Petition for Declaratory Judgment as Exhibit A, in F.D. 34818, filed Jan. 12, 2006. It is also shown in Conrail track charts in Appendix IX to City et al.’s Opening Statement in F.D. 34818, filed March 10, 2006.) This Branch was evidently unlawfully “de facto” abandoned by Conrail.

⁸ See City et al. Opening Statement, Appendix I (commencing p. 63, et seq. on STB website) in F.D. 34818, filed March 10, 2006.

⁹ During the course of settlement negotiations, Conrail supplied City et al with a deed which appears to show sales of the Harsimus Branch to Port Authority in the Waldo area as early as June 1987.

¹⁰ STB Policy Statement on Consummation of Rail Line Abandonments..., Ex Parte 678, served April 23, 2008, slip at 4 (“Policy Statement”): “In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.” (Emphasis added.)

¹¹ See Conrail – Ab. Ex. – in Hudson County, NJ, AB 167-1190X, served May 17, 2010. In this decision, STB granted an exemption from OFA for Conrail’s unlawful de facto abandonment of the Lehigh Valley Main Line in Jersey City

investigation of systemic Conrail unlawful abandonments, but the investigation terminated when Conrail's counsel claimed that Conrail was unaware of any more.¹²

In 1999, the NJ SHPO determined that the Harsimus Embankment (hereinafter "Embankment")—six blocks of elevated track on an earthen and stone embankment parallel to Jersey City's Sixth Street and located between Marin Boulevard and Brunswick Street—was eligible for the State Register of Historic Places,¹³ and in 2000 the Embankment was determined eligible for the National Register of Historic Places. Conrail was well aware of these determinations. In fact, Conrail's president (Peter O'Toole) sent a sworn letter, dated June 4, 1999, to Administrator Dorothy Guzzo of the New Jersey Department of Environmental Protection ("DEP") objecting to the listing of the Harsimus Embankment parcels on the State Register of Historic Places because "Conrail wishes to realize their real estate value." Conrail noted that it was seeking to sell the property to the Jersey City Redevelopment Agency ("JCRA") for redevelopment. However, "if a government agency owns a site that is listed on the New Jersey Register of Historic

owing to the OFA's conflict with public uses resulting from prior illegal abandonment. However, STB stated as follows: "A number of serious concerns about Conrail's actions (or inactions) with respect to the Line have surfaced in this proceeding. As a result, in Consolidated Rail Corporation's Sales and Discontinuances, STB Ex Parte No. 695, served concurrently with this decision, we are instituting an investigation into Conrail's conveyance of the Line to NJ Transit in 1996 without seeking or obtaining Board authority and its filing for an abandonment exemption in 2008 without informing the Board that it no longer owned portions of the Line to be abandoned." STB required Conrail to report on illegal sales in Jersey City generally since 1996.

¹² Consolidated Rail Corporation's Sales and Discontinuances, STB Ex Parte No. 695, served May 17, 2010. Conrail filed a report on September 27, 2010 indicating it could find no record of prior unlawful sales from 1996 forward, and was not reporting matters relating to the Harsimus Branch since it was subject to appeals in AB 167-1189X. Had Conrail filed a report including the Harsimus Branch, it would presumably have included its unlawful sales of the Hudson Street Branch as well as other portions of the Harsimus Branch in addition to the Embankment. On the basis of Conrail's cursory claims, STB terminated Ex Parte 695 on January 31, 2011.

¹³ Certification of Eligibility, D. Guzzo (NJ SHPO) to James, dated Feb. 17, 1999, filed with STB in AB 167-1189X on Jan. 21, 2009.

Places, then that agency cannot alter the site without approval from the [New Jersey State Historic Preservation Officer].”¹⁴ The NJ SHPO nonetheless informed Conrail on January 25, 2000, that the Embankment was listed.¹⁵

Because of the listing, Jersey City, through JCRA, withdrew from negotiations with Conrail for redevelopment. The City instead supported preservation of the Embankment parcels, designating them a City Historic Landmark¹⁶, and authorized the use of eminent domain to acquire them. Conrail resisted the City’s efforts.¹⁷ City authorized condemnation and retained eminent domain counsel.

Ironically, Conrail argued that the City could not use eminent domain because the property was regulated by STB.¹⁸ This posture was obviously confusing, because if the line was regulated by STB, then the railroad must seek abandonment authority before it could sell it to developers, as it was threatening to do. More importantly, the fact that it was threatening to sell to developers despite its awareness that the line was regulated by the STB is evidence that the railroad either intended to act unlawfully or already had an abandonment authorization.¹⁹ As the consultant (Mr. Strauss) to the Coalition said at the time, “the Embankment cannot be both railroad property [subject to federal preemption of local

¹⁴ This letter was previously filed, but we provide it again in the Appendix.

¹⁵ This letter was previously filed, but we provide it again in the Appendix. (Owner objection does NOT prevent the listing of a property in the New Jersey State Register; it does prevent listing in the National Register. However, under the NHPA, properties eligible for the National Register are entitled to the same protection as properties actually listed. Thus, Conrail President O’Toole’s objections – entirely based on economic grounds in all events – were legally of no significance.)

¹⁶ The ordinances were adopted in 2002-03, filed with STB on January 21, 2009.

¹⁷ The eminent domain ordinances were adopted 2004-05, filed with STB on January 21, 2009, as part of Exhibit G, along with Exhibit C: Verified Statement by John J. Curley (the City’s outside eminent domain counsel) previously filed in F.D. 34818 noting Conrail’s lack of cooperation.

¹⁸ Verified Statement of the City’s Planning Director Cotter at p. 5 (Exhibit I to filing of January 21, 2009 in this proceeding). Accord, Verified Statement of Andy Strauss at P. 2 (Exhibit H to filing of January 21, 2009 in this proceeding).

¹⁹ See Strauss at p. 2 of his Verified Statement, Exhibit H in filing of January 21, 2009.

condemnation power] and real estate for sale to a private developer.”²⁰ By its own statements, Conrail appeared to be engaged in some sort of confusing negotiation ploy, at best, and, at worst, broadcasting an intent to engage in illegal conduct (unlawful de facto abandonment).

In any event, the consultant determined from extensive inquiries including to STB that there had been no abandonment authorization.²¹ The consultant then noted that, unless the line was a “spur,” Conrail would need abandonment authority, in which case it would have to provide advance environmental notices, and since the Embankment was listed on the State Register and eligible for the National Register, Conrail and STB would have to comply with section 106.²² The City was certainly aware of no evidence that the line was a spur, since it was the former mainline for freight of the Pennsylvania Railroad.

In case of acquisitions of Conrail property, the standard of practice for title examiners and attorneys in New Jersey is actually set out in a Handbook. The Handbook calls for a title examiner to require Conrail to present an abandonment authorization or proof that none is required.²³ Consistent with the Handbook, City’s outside eminent domain counsel then asked Conrail (a) to supply either an abandonment authorization or proof that none was required and (b) for entry for pre-eminent domain inspection.²⁴ Conrail provided nothing: it did not supply an abandonment authorization, or proof that none was required, or entry permission. Instead, Conrail precipitously sold the Embankment parcels plus two blocks immediately to their west that contained old stone stanchions to a developer

²⁰ See Exhibit H, supra, November 17, 2004 Memo at 1.

²¹ Mr. Strauss recounts his extensive efforts to find some basis for Conrail’s claim to still be subject to STB regulation at p. 3 of his November 17, 2004 memo in Exhibit H, supra. He confirms in Exhibit H that there was no evidence of any abandonment authorization.

²² November 17, 2004 memo at p.2, in Exhibit H supra.

²³ L. Fineberg, Handbook of New Jersey Title Practice (3d ed. 2005) at pp. 98-1 to 6 (see Appendix I to City et al.’s Comments filed Sept. 25, 2014 in this proceeding at pp. 34-44). This was in the prior version of the Handbook as well. Fineberg, 2d ed. 2000, at pp. 98-4 to 6.

²⁴ See Curley V.S. at para 4 in Exhibit C of Jan. 21, 2009 filing; Letter, J. Middleton to J. Fiorilla, June 28, 2005, contained in Appendix II of City et al.’s Comments filed Sept. 25, 2014 (p. 69 of STB e-library version).

(referred to herein as the Hyman LLCs).²⁵ Apparently neither the developer (the Hyman LLC interests) nor its title company (Chicago Title) complied with the Handbook. Rather than seeking proof of an abandonment license or that none was required, they elected to rely on an assertion by Conrail's attorney Fiorilla that the line was a "spur" not requiring abandonment authorization.²⁶ They then accepted eight quitclaim deeds that directly contradicted Fiorilla's claim, in that each deed declared that the property in question was a "portion of a line of railroad known as the Penn Central Harsimus Branch and identified as Line Code 1420, situate in City of Jersey City."²⁷ All the deeds bore the signature of Jonathan Broder, Conrail's general counsel.

By filing dated October 6, 2017, City et al. supplied STB with a Verified Statement by an expert on rail abandonments (Robert McFarland) evaluating whether Conrail could have reasonably believed in 2005 that the Harsimus Branch was a "spur" for rail regulatory purposes when it conveyed the property to the developer. Mr. McFarland said "it is my firm opinion that Conrail could not have reasonably so believed." Mr. McFarland noted that the applicable principle is "once a line of railroad, always a line of railroad." Property conveyed to Conrail as a line cannot become a spur by reason of the passage of time. Mr. McFarland noted that there were STB rulings to that effect (including rulings involving Conrail lines) that Conrail must have been aware of in 2005.²⁸

Mr. McFarland examined contemporaneous claims by Conrail's lawyers (Fiorilla) that the Harsimus Branch was a spur and indicated that the Conrail lawyer making the spur claim "surely knew, or had good reason to know that his allegation, that the Embankment was a spur, was false." In particular, "Mr. Fiorella knew or had good reason to know that the allegation, that the Embankment was a spur, was not true." McFarland V.S. at 5. Mr. McFarland's "firm[]" expert opinion is "that when Conrail conveyed the Embankment to the LLCs, Conrail

²⁵ See *id.* at para 5.

²⁶ See Letter, Fiorella to Alampi, Oct. 4, 2005, in Exhibit K to filing of January 21, 2009 in AB 167-1189X.

²⁷ The eight deeds are attached to another Curley V.S. set forth as Exhibit L, in Jan. 21, 2009 filing (exhibit A to each deed).

²⁸ See, e.g., arguments and evidence supplied by letter dated October 6, 2017 (STB OEA "environmental correspondence" in AB 167-1189X, including McFarland V.S.) An additional copy of the McFarland V.S. is attached in the Appendix.

knew, or reasonably should have known that the Embankment was every bit as much a railroad line as the Highline [another Conrail line across the Hudson River in Manhattan] was determined to be only a short time earlier.” *McFarland V.S.* at 6 (contained in the Appendix).

In short, City et al. have established that Conrail knowingly or with willful blindness²⁹ unlawfully sold a line it knew was a section 106 asset to a developer in evasion of STB licensing authority. The developer also acted knowingly, recklessly, and at least with willful blindness in accepting the quitclaim deeds without insisting on an abandonment authorization or proof that none was required as provided in the Title Practice Manual.

The Hyman LLCs immediately, upon the unlawful transfer of the property by Conrail, filed to redevelop the properties for non-rail (residential) purposes, all of which required demolition of the Embankment parcels.³⁰ City et al. responded by filing a declaratory proceeding with STB in January 2006 (docketed as STB F.D. 34818) for a determination that the Harsimus Branch was a line of railroad subject to STB abandonment licensing jurisdiction and requested a stay of demolition activities (at that point, the developer had destroyed one stanchion and was threatening the remainder). The Hyman LLCs responded with a storm of state land use, civil rights claims and SLAPP suits.³¹

²⁹ A party engages in conduct knowingly when it has actual knowledge, or when it is willfully “blind” to the facts. Under the willful blindness doctrine, a party acts knowingly when it recklessly or intentionally does not inquire into what otherwise is obvious. See, e.g., United States v. Jewell, 532 F.2d 697 (9th Cir. 1976); In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) (“[w]illful blindness is knowledge ... in the law generally”). The willful blindness doctrine is especially pertinent to a corporation, which being artificial has no actual mind, and whose intent must be inferred from what it should have known, and what it did.

³⁰ See Exhibit L to Jan. 21, 2009 filing, *Curley V.S.* para 4 & Appendix II thereto containing the developer’s initial plans.

³¹ SLAPP stands for Strategic Lawsuit Against Public Participation. Five of the lawsuits, including the LLCs lawsuit against the undersigned, are summarized by the LLCs (we do not necessarily agree with their version but submit this as a demonstration of portions of their litigation) in a Declaration by Daniel Horgan (the Hyman LLCs’ attorney) in *City of Jersey City v. Conrail*, U.S. D.C. for D.C. 09-1900, filed 11/08/2012, at pp. 9-11, a copy of which was filed by City et al as

STB initially formally determined that the Harsimus Branch was a line of railroad on September 8, 2007, in F.D. 34818. Conrail responded to that STB decision by immediately entering into an agreement pledging itself to thwart all public remedies in any subsequent proceedings and to secure the Embankment parcels in the hands of the developer for redevelopment.³² Conrail also joined in the Hyman LLCs local demolition permit applications aimed at the entire Embankment.³³ All of these actions occurred before Conrail initiated the instant abandonment proceeding.

More specifically pertinent to the NHPA issues, Conrail contracted to thwart historic preservation review and requirements otherwise applicable in an STB abandonment licensing proceeding and actively supported demolition of the Embankment well before it initiated an abandonment proceeding. Not only did Conrail knowingly (or with willful blindness) subvert STB jurisdiction but it pledged itself to subvert public interest regulation in support of redevelopment of the historic Embankment by its chosen developer.

Suffice it to say that by 2014, after three trips to the United States Court of Appeals for the D.C. Circuit, as well as two trips to the United States District Court for the District of Columbia, Conrail and the developer had lost or exhausted all of their procedural challenges. At that point, with nowhere else to hide, they finally acknowledged the incontrovertible. The Hyman LLCs stipulated that the Harsimus Branch was a line of railroad subject to STB abandonment jurisdiction, and accused Conrail of making fraudulent misrepresentations to the developer and government agencies that the Harsimus was an unregulated spur.³⁴ Conrail stipulated it would no longer oppose the determination that the Harsimus was a line of railroad subject to STB abandonment jurisdiction.

Appendix 4 (starts at p. 95 of the STB pagination) to their “Additional Supplemental Comments” in AB 167-1189X, filed Sept. 25, 2014.

³² See Memorandum of Understanding (made Oct. 12, 2007), contained in City et al’s Comments filed Sept. 25, 2014 at pp.108-09.

³³ Letter, City et al to STB, in AB 167-1189X, dated Oct. 6, 2017, pp. 49-55 on STB website (copy of joinders in key part of process).

³⁴ E.g., Exhibit C to City et al “Notice of Decision” filed Nov. 22, 2013, in AB 167-1189X (copy of the LLCs’ allegations of fraud by Conrail are in the Appendix)

In sum, Conrail's actions to demolish and to sell off the Harsimus Branch have been unlawful since the actions started in or about 1988. Conrail knew, or should have known, that its actions were unlawful by 2005. See *McFarland V.S.* (Conrail knew or should have known the line was subject to STB abandonment jurisdiction). Conrail's actions to demolish and/or to sell off what was left in the Branch after June 4, 1999 (and certainly Conrail's actions after January 25, 2000) were also violations of section 110(k) because as of these dates, Conrail was certainly aware that the property was historic, and thus entitled to historic protection (it was expressly so informed by New Jersey SHPO), and that its unlawful actions implicated the National Historic Preservation Act, which STB, as a federal agency, is bound to implement in its abandonment licensing proceedings.

II. The STB 2009 EA Section 110(k) Discussion Is Fundamentally Flawed

City et al. have repeatedly objected to Conrail's anticipatory demolition and asserted the applicability of section 110(k) and foreclosure of meaningful section 106 comment since the inception of this rail abandonment proceeding.³⁵ We have subsequently and repeatedly objected to STB's failure to analyze the applicability of this provision.³⁶

A. The City's Actions Prior to 2000 Are Irrelevant to the Section 110(k) Determination.

The only time that STB or its OEA (we will use the abbreviation OEA also to refer to OEA's predecessor, Section of Environmental Analysis) has addressed section 110(k) is in connection with the agency's Environmental Assessment ("EA") in AB 167-1189X, served 3/23/2009. OEA in its EA dismisses objections by SHPO and City et al. that Conrail engaged in anticipatory demolition in a short paragraph on p. 14 of its EA. OEA there asserts that the "parties ... have not demonstrated any intent on Conrail's part to harm historic sites or structures." EA at 14. OEA said that the City in 1984 began asking Conrail to make the property

³⁵ See, e.g., Letter Comments on behalf of City et al, dated March 28, 2008, in AB 167-1189X, and attached to Opposition on behalf of City et al filed January 15, 2009 (specifically noting 110(k) objections at p. 15 et seq.) in AB 167-1189X).

³⁶ E.g., Reply on behalf of City, et al to Conrail's Supplemental Environmental and Historic Report and Supplemental Comments on Environmental Assessment served 3/23/2009 in AB 167-1189X at 5 et seq.

available for development, and that Conrail permitted the City to remove a bridge in 1994. OEA said that after STB determined it had jurisdiction, Conrail then took steps to comply with section 106. On this basis, OEA feels that Conrail lacked intent to harm historic assets.

This determination completely misstates and misapplies the law. The City's communications to Conrail about bridges or redevelopment in the 1980's or 1990's does not and cannot absolve or relieve Conrail of its responsibility to comply with federal rail regulatory law as a matter of law. The City does not regulate Conrail abandonments, STB does, nor is the City chargeable with knowledge of the regulated status of Conrail's railroad property.³⁷ What the City asks Conrail to do or what the City does or does not do, is not a free pass for Conrail to violate the ICC Termination Act, NEPA, or NHPA. Moreover, the City's actions or inactions provide no basis for STB to rubberstamp Conrail's unlawful actions.³⁸ In any event, the City supplied verified statements that it assumed Conrail had obtained all appropriate federal licenses for whatever it did or allowed on railroad property. In the words of the City's Planning Director, "[w]hile the City was definitely interested in redevelopment of the Hudson River waterfront, the City did not intend to do so by sanctioning illegal abandonments of rail service." Cotter V.S. p. 2 para 4 in Exhibit I of Jan. 21, 2009 filing. Thus, OEA's reliance on City's communications to Conrail in the 1980's and 1990's is misleading, of no legal significance, and otherwise irrelevant.

Any inferences made by OEA arising from the City's inquiries about redevelopment in the 1980's intentionally ignores intervening the relevant evidence. In 1999 – ten years before OEA issued its 2009 EA, the New Jersey SHPO had determined that the Embankment was eligible for the New Jersey State Register of Historic Places. In January 2000, SHPO informed Conrail that the Embankment was actually listed on the State Register and eligible for the National

³⁷ 49 U.S.C. 10501(b) (federal regulation under ICC Termination Act is exclusive, as are STB remedies, and STB remedies exclude state and local remedies); 49 U.S.C. 10903 (STB must preauthorize abandonments).

³⁸ City of Jersey City v. Consolidated Rail Corporation, 668 F.3d 741, 746 (D.C. Cir. 2012) (even if the City could itself have unlawfully purchased the property without an STB abandonment authorization, this would "in no way absolve[] Conrail of its legal duty ... to seek STB authority to abandon the Harsimus Branch before selling it to the LLCs."

Register.³⁹ The 2000 State Register listing is an important intervening fact that OEA inexplicably overlooks. After that listing, the City's support for redevelopment ended. The City instead supported preservation. See Cotter V.S., *supra*, at pp. 3-5.

OEA begrudgingly admits that the City's interest changed. As the EA states at page 5, City and the Coalition expressed interest in acquiring the property in 2003 and 2004. Strangely, OEA failed to take that fact into account when it got around to suggesting, in effect, that Conrail was just doing what the City wanted when the railroad sold the Embankment to a developer. In any event, the City did far more than express an interest in acquiring the property. The City designated the Embankment as a local Historic Landmark, the City authorized eminent domain to acquire the Embankment for preservation purposes, and the City and Coalition made extensive inquiries of STB for proof of abandonment authority and were told there was none. City also formally asked Conrail for abandonment authority or proof that none was required, and received no response. Instead, Conrail had by then sold the property to the Hyman LLCs. City then unsuccessfully spent some months attempting to negotiate a solution. When the Hyman LLCs began bulldozing stanchions associated with the Embankment, City et al responded with a declaratory proceeding with STB (F.D. 34818) and asked for a stay to prevent further demolition. Contrary to the 2009 EA, Conrail (and the developer) were acting to thwart the City's expressed intent in 2003 to 2005 to preserve the Embankment, and have so acted in concert in all the years since.

The 2009 EA offers no other justification for concluding section 110(k) is not applicable. Since OEA in its 2009 EA and in all its subsequent section 106 documentation has treated the Embankment as lawfully beyond STB regulatory jurisdiction, the sale in fact accomplished an intentional anticipatory demolition and also amounted to a foreclosure of meaningful comment, in that it precludes the public from seeking a public use condition under 49 U.S.C. 10904 and implementing remedies against Conrail to preserve the property.

B. Conrail's Actions Were Intentional.

³⁹ City et al supplied this information to OEA (then SEA) in EI 7065, environmental comment by City et al to OEA (then SEA) dated March 28, 2008 in AB 167-1189X, and in other filings well before issuance of the 2009 EA.

STB OEA suggests that the issue turns on “intent” to “significantly adversely affect [historic] property,” claiming that City et al must show that Conrail acted with an intent to evade historic review. We have done so. Intent is generally proved either by a confession or by circumstantial evidence. Since a corporation is not a person, but a legal construct with no actual mind, intent is something imputed to it. In most circumstances, the intent of a corporation is therefore necessarily proved by circumstantial evidence. A key principle in establishing intent of a corporation is what a corporation knowing the law should have done. That is compared to what was done. The trier of fact must assume the corporation knows the law in the field that it is doing business. If a corporation knows, or should have known, key facts that require certain actions (like obtaining a government license) for a course of conduct to be lawful, then if the corporation fails to take those actions, one infers that the corporation knowingly or with willful blindness engaged in illegal conduct.

Here, Mr. McFarland’s Verified Statement, *supra*, succinctly demonstrates that Conrail knowingly or with willful blindness acted unlawfully when it sold the Embankment in 2005 to the developer (Hyman interests) without first obtaining an STB abandonment license required by 49 U.S.C. 10903. To the extent the sale resulted in loss of federal jurisdiction over the Embankment – as contended by Conrail, the Hyman LLCs and OEA – then Conrail’s sale in 2005 amounted to intentional anticipatory demolition of the Embankment before the railroad sought, much less obtained, its license. But the situation is even worse for section 110(k) purposes.

STB initially formally determined that the Harsimus Branch was a line of railroad in its decision in *City of Jersey City, et al – Pet. Declaratory Order*, F.D. 34818, Oct. 9, 2007. In response to this ruling, Jonathan Broder, Conrail’s “VP-General Counsel,” on behalf of Conrail five days later signed a Memorandum with Steven Hyman (the manager for the Hyman LLCs) providing as follows:

“Conrail will seek approval from the STB for abandonment of rail service over the [Embankment]. Conrail will decline any public use or trail use conditions and, as soon as practicable upon the effective date of the abandonment, execute any such documents as may be required to effectuate

and/or confirm the 2005 sale of the [Embankment] to [the Hyman interests].”⁴⁰

Mr. Broder also agreed that

“Conrail will cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop [the Embankment].”⁴¹

In this Memorandum of Understanding, Conrail, through Mr. Broder, continued to take actions to evade any STB relief that might upset development (demolition) of the Embankment, as well as to “cooperate” in destroying the Embankment. This is a pledge to take all actions necessary to thwart any meaningful compliance with the NHPA in the future. The contract Broder signed with the developer in effect commits Conrail to spurn any meaningful consultation under section 106, before any abandonment proceeding or section 106 process had even commenced. The contract is an absolutely clear expression of Conrail’s ongoing intention to engage in anticipatory demolition in violation of section 110(k) prior to commencement of the abandonment proceeding.

Any possible doubt was removed on December 13, 2007, when Mr. Broder as “VP + General Counsel” on behalf of Conrail executed six joinders in efforts by the LLCs to obtain demolition permits for the Embankment.⁴² It is hard to claim Conrail intends something other than destruction when it signs so many documents for that purpose before it seeks, much less receives, abandonment authorization.⁴³

Conrail’s entry into the October 2007 Memorandum of Understanding with the Hyman interests has another important implication: it demonstrates that Conrail was in a conspiracy (an arrangement to accomplish an unlawful end) with the

⁴⁰ Memorandum of Understanding, para 1, attached to Supplemental Comments by City et al, as Appendix 4, Exhibit 2 to Horgan Declaration in USDC DC 09-1900, filed Sept. 25, 2014 in AB 167-1189X. A copy is contained in the Appendix hereto.

⁴¹ Memorandum of Understanding, para 3, *supra*.

⁴² Attached to the end of Letter re: “STB/OEA and NHPA 110(k)” dated Oct. 6, 2017, filed October 17, 2017 as an environmental comment for City et al in AB 167-1189X.

⁴³ Conrail filed a notice of intent to initiate a case several months later on March 12, 2008, but did not actually file a Notice of Exemption formally seeking abandonment authorization until January 6, 2009.

Hyman interests. In a conspiracy, the actions and declarations of one co-conspirator are attributable to the other.⁴⁴ Mr. Hyman made no secret of his intention to destroy the Embankment, a point we have demonstrated over and over with filings of his development plans and so forth.

If more is needed, we have more than supplied that. City et al. attach hereto a Declaration by Stephen Marks (dated June 14, 2014) attesting that the LLCs offered the Embankment (stones and fill) to Hoboken for use to armor its waterfront in response to Hurricane Sandy, and confirmation in postings on a Rebuild by Design website. Mr. Hyman said his wife Vicki owned the Embankment and would donate all the fill and stones contained therein “for reclamation efforts to defend the waterfront.” He said “[t]here are 55,000 CU of big stones and 155,000 of fill that needs to be removed expeditiously....” Copies of these documents are in the Appendix hereto. The many expressions of intent to demolish the Embankment harbored by the Hyman interests must be charged to its co-conspirator Conrail in light of their written entry into a conspiracy to thwart STB remedies and demolish the Embankment.

In addition, subsequent to STB’s 2009 EA, the Hyman LLCs also produced a Declaration under penalty of perjury that Conrail knew, or should have known, that the Harsimus Branch was a line of railroad prior to the 2005 sale to the LLCs. The LLCs’ attorney Daniel Horgan filed a Declaration in U.S. District Court citing aerial photographs from 1976 and 1978, a 1984 survey, a 1988 subdivision map, and a 1983 Agreement for the conclusion that there was no “good faith basis to ... argue that the Embankment was a spur in 1976....”⁴⁵ He also stated that the documents showed that Conrail’s representations to the LLCs in 2005 that the Embankment was a spur were either knowingly or negligently false.⁴⁶ Mr. Horgan for independent reasons on behalf of the LLCs confirms that Conrail acted in knowing or at least negligent disregard of the law.

Since that time, New Jersey SHPO has confirmed that the entire Harsimus Branch is eligible for the State Register and that many other historic assets and districts will be adversely impacted by Conrail’s anticipatory demolition here. Conrail’s unlawful abandonment aborted efforts to protect all those assets, and is

⁴⁴ E.g., Fed. R. Ev. 801(d)(2)(E); McCormick on Evidence p. 645 (West 1972).

⁴⁵ Horgan Dec. at p. 8, para 22, Appendix 4 in Supplemental Comments by City et al filed Sept. 25, 2014, *supra*.

⁴⁶ Id.

an anticipatory demolition of them as well. In a letter dated January 26, 2009, New Jersey SHPO explained that the applicability of section 110(k) must be evaluated as to all historic properties located in the Area of Potential Effects established by STB in this proceeding. City et al concur.

The foregoing evidence demonstrates that Conrail and the LLCs committed themselves to knowing corruption of the STB abandonment process before that process even started. This renders meaningless the section 106 process that STB purported to undertake. A violation of section 110(k) has instead occurred.

In sum, OEA's 110(k) analysis in its 2009 EA, which is the only analysis of section 110(k) by anyone at STB to date, focusses on misleading and irrelevant evidence, ignores the change of status of the Embankment in 2000, ignores the City's subsequent change of position to favor preservation, and certainly ignores all the evidence City et al summarize in Part I as well as the evidence in Part II B. The 2009 EA "determination" is arbitrary and capricious and contrary to the law and the evidence.

III. STB's Lack of Procedures or Resources to Address Section 110(k) Does Not Excuse Conrail's Violation

City et al. have repeatedly objected that OEA (and STB) have failed to seek or analyze evidence on the anticipatory demolition issue. City et al. reiterates what we said in our "Reply" filed in AB 167-1189X on Sept. 3, 2014, at pp. 5-6:

"Before addressing Conrail's supplemental ER/HR, City, et al. wish to underscore their concern that the Section on Environmental Analysis ("SEA") has not developed the procedures or capacity to evaluate how NHPA section 110(k), 16 U.S.C. 470h-2(k), applies to this proceeding. Section 110(k) implicates matters of intent. SEA staff have indicated that they lack resources or capacity for evaluation of intent.

"This is troubling, for the Environmental Assessment (EA) served March 23, 2009, in this proceeding purports to conclude that section 110(k) is not applicable, and the inference from staff statements about lack of resources or capacity to evaluate intent is that STB to date has overlooked or at least only superficially treated section 110(k) issues. While we appreciate environmental staff candor, if SEA indeed lacks resources or capacity to address intent, then SEA cannot conclude, as it purported to do in its March

23, 2009 EA, that section 110(k) is inapplicable. The agency nonetheless has to address the issue meaningfully and not superficially.”⁴⁷

Subsequent to its 2009 EA, OEA has never addressed, or suggested a mechanism to address, section 110(k) and foreclosure issues, or to collect evidence on them. Because of OEA’s lack of resources, it has requested Conrail to pay for a consultant’s assistance in this proceeding. STB is using the same consultant that Conrail selected to prepare its initial Historic Report. Conrail evidently has an ongoing relationship with the consultant and pays this consultant for tasks that it negotiates with OEA and the consultant. City et al. have elsewhere questioned how such a consultant can be considered fair or impartial. City, et al. is aware of no evidence that STB has contracted with the consultant, or any consultant, to collect evidence on or to consider section 110(k) issues. In any event, it is unlikely that Conrail would agree to pay for such an effort, or that an effort to examine unlawful intent on the part of Conrail would be something that a consultant whose fees were paid by Conrail could credibly undertake, much less accomplish.

City et al. have pointed out in comments on STB OEA’s draft Memorandum of Agreement (“MOA”) that the OEA cannot rely on Conrail’s unlawful sale to the developers to dismiss any meaningful alternatives for avoiding adverse effects as being outside of its authority under Section 106. Such tunnel vision is the metaphorical equivalent of the judge who grants mercy to the man who murdered his parents because he is an orphan. STB, by insisting on a limited but prolonged section 106 process, appears to be attempting to back this proceeding into a corner: STB is apparently striving to complete a faulty section 106 analysis with the object of co-opting ACHP and NJ SHPO into agreement with an MOA devoid of meaningful remedy on the ground the agency can do nothing to enhance preservation of the Embankment because Conrail took it out of the agency’s jurisdiction, and then purport to ignore section 110(k) by otherwise rubberstamping not only Conrail’s anticipatory demolition, but also the foreclosure of meaningful

⁴⁷ See also Supplemental Comments by City et al, filed Sept. 25, 2014, supra: “City et al also remains concerned that the Board lacks resources and procedures to address an evasion of this magnitude, and so blatant a violation of section 110(k) of the National Historic Preservation Act, 16 U.S.C. 470h- 2(k). City et al. accordingly is making this submission of supplemental information bearing on the admission by Conrail ’s chosen developer (212 Marin Boulevard, LLC, et al, referred to herein as “the LLCs”) that Conrail made fraudulent misrepresentations to the LLCs, the Board, City, and the Courts to the effect that the Harsimus Branch was not subject to STB abandonment jurisdiction.”

comment manifest in the Conrail/LLC contract/conspiracy to evade remedies and foster demolition before this abandonment licensing process had even begun.

City et al accordingly concur in ACHP's letter of March 8. STB should stop its present march into a corner, and take into account foreclosure of comment and anticipatory demolition for the reasons stated herein and in the many prior letters and pleadings filed by City et al in this proceeding.

IV. Conclusion: Conrail Violated 110(k) and Foreclosed Comment

For the reasons summarized in Part I and discussed further in Parts II and III, the only finding possible on this record is that Conrail knowingly or with willful blindness took actions that adversely affected the Embankment in order to evade the requirements of Section 106. The same conclusion would appear to apply to other historic properties or districts adversely impacted by loss of federal jurisdiction and/or demolition of the Harsimus Branch and its Embankment.

Conrail is a corporation. It is not a person. We have shown that Conrail engaged in an unlawful abandonment of the Embankment with certain knowledge that it was protected under section 106. Conrail, the LLCs and OEA take the position that this removes the Embankment from federal jurisdiction. Conrail and the LLCs did all this with an intent to demolish it. This an anticipatory demolition in violation of section 110(k).

Conrail is not a naïf; it has legal counsel; it is charged with knowing federal law, which requires pre-authorization of abandonments of lines, including sale of lines for non-rail purposes. The Harsimus Branch has been conclusively determined to be a line subject to STB abandonment jurisdiction.⁴⁸ The LLCs stipulated to that. Conrail stipulated not to contest that. The City has supplied expert testimony by an experienced rail attorney (Thomas MacFarland) that no reasonable railroad could conclude the Harsimus Branch was anything other than a line in 2005. He expressly notes that the Conrail lawyer making the spur claims knew or should have known that such claims were false. The Harsimus Branch on its face was conveyed to Conrail as a line, as Conrail's own corporate counsel acknowledged eight times in the deeds to the developer. Once a line, it remains a

⁴⁸ City of Jersey City v. Consolidated Rail Corp., 968 F.Supp.2d 302, 308 (DDC 2013) ("the Court rules that the Harsimus Branch 'was conveyed as 'part of [the rail carrier's] railroad lines' subject to STB's abandonment jurisdiction"), summarily aff'd 2014 U.S.App. Lexis 3067 (D.C. Cir Feb. 19, 2014).

line subject to STB abandonment jurisdiction even if it loses all of its shippers and years pass. The LLC's Attorney Horgan, reviewing additional material, reached the same conclusion. See Part II B, *supra*. It follows that Conrail is chargeable with knowingly violating STB licensing regulations, which include NHPA compliance before any abandonment authority can become effective.

Conrail's President knew the Harsimus Embankment was historic in 1999; he objected to that designation because it would interfere with selling off that property for non-rail development. Nonetheless, the New Jersey SHPO confirmed to the Conrail President in January 2000 that the parcels were historic. The City subsequently designated the Harsimus Embankment an historic landmark and in 2003-05, actively sought to preserve it. Conrail is chargeable with knowledge that STB implements section 106 before allowing an abandonment to become effective. Yet Conrail's General Counsel in 2007, before an abandonment proceeding was started, knowingly committed Conrail to resist any meaningful section 106 or other public process to preserve the Embankment before Conrail even filed an abandonment proceeding. See Part II B. For all these reasons, Conrail knowingly violated NHPA when it evaded STB abandonment licensing.

According to STB's OEA, Conrail's action had the effect of removing the historic Embankment from STB jurisdiction. That itself is an adverse effect. See 36 CFR 800.5(a)(1)(i) and (vii). If the agency claims (as OEA certainly does) that STB does not have the power to void the eight 2005 deeds out issued by Conrail to the Hyman LLCs, or to require reconveyance, then STB is admitting that an adverse effect occurred and that meaningful comment under section 106 was foreclosed. Moreover, anticipatory demolition is short hand for intentionally causing adverse effects to evade Section 106. Conrail has entered into a contract with the developer to secure demolition of the Embankment, through evasion of section 106.

If the agency in fact lacks the power to void the deeds or require reconveyance under its general authority, then under section 110(k), the agency must not authorize the abandonment, and must engage in further consultation with the ACHP. The only way to correct this situation is for Conrail to re-acquire the property so it may be made available to the City as if the unlawful *de facto* abandonment had not occurred or otherwise facilitate its preservation. Anything else is rubberstamping Conrail's unlawful conduct by the agency.

V. Response to Conrail

Conrail's letter of February 23, 2021 asserts that the 2009 EA determination on section 110(k) is sound. The only argument in support by Conrail is a reference to a Superior Court decision dated August 31, 2017, in a third-party claim by Chicago Title Insurance Company against Conrail, which Conrail attaches to its letter.

Conrail had previously submitted this decision to STB making similar contentions. City et al responded to this some years ago, and re-incorporates that response:

[https://www.stb.gov/ect1/ecorrespondence.nsf/UNID/3AFDB67B694DA697852581B1007223A4/\\$file/20171006004751.pdf](https://www.stb.gov/ect1/ecorrespondence.nsf/UNID/3AFDB67B694DA697852581B1007223A4/$file/20171006004751.pdf) In short, City et al were not parties to that proceeding and are not bound by its results and the McFarland V.S. explains how the Superior Court ignored rail law. The 2009 EA is in error for the reasons previously stated in Parts I – III.

VI. Response to Hyman LLCs

The Hyman LLCs letter of February 18, 2021 also adheres to the 2009 EA determination on section 110(k) and urges the position that STB is powerless to order any “mitigation,” which as used by the LLCs means relief to City et al. The 2009 EA is in error for the reasons previously stated in Parts I-III. The LLCs’ contention that STB cannot order any meaningful mitigation under a section 106 MOA underscores the fact that an anticipatory demolition and foreclosure of comment occurred, for the reasons discussed above. If STB is powerless, then the 2005 sale amounts to a foreclosure of comment as well. But a meaningful section 106 process is foreclosed by the 2007 agreement between Conrail and the LLCs anyway. The Hyman LLCs continue to seek reassurance from the agency that they can operate unconstrained by the 106 process, or certainly without worry that it will require them to do anything with respect to the property, or preclude them from doing anything they want with the property. In other words, they request the agency to confirm that they and Conrail have been successful in foreclosing comment per their 2007 agreement with Conrail.

The Hyman LLCs refer to letters by RTC to ACHP (we assume they mean Letters by Andrea Ferster to Reid Nelson dated January 21 and February 2, 2021). The Hyman LLCs ask why RTC would raise concerns when “the other City parties have not.” The “other City parties” requested RTC to write to the ACHP because the author of RTC’s letter is an expert on historic preservation law. City and Coalition support and concur in RTC’s letters, and appreciate the efforts of RTC in this proceeding.

The Hyman LLCs failed to comply with the New Jersey title Handbook (note 23, *supra*) by obtaining from Conrail either directly or through their title company (Chicago Title) either proof of abandonment authorization or proof that none was required before they purchased the Embankment from Conrail. There are two possible explanations. Either they were negligent naïfs (which City et al candidly finds very unlikely), or they thought that they, in league with Conrail, could intimidate the City into ignoring the unlawful sale with a tidal wave of litigation they unleashed (including SLAPP suits against outside legal counsel and the Coalition), that the price they paid justified that risk given their litigation prowess, and that they therefore would profit handsomely from participating in an unlawful transaction with Conrail (especially since they had obtained title insurance that would underwrite their litigation expenses).⁴⁹ Neither explanation constitutes a reason at law for STB or any other federal agency to facilitate Conrail's proposed abandonment license for them. Given the Handbook's clear instructions, the LLCs acted a *mens rea* (intent) at least equivalent to willful blindness when they closed a sale on the Embankment in 2005. Both Conrail and the LLCs are chargeable with knowledge that they knew they were acting in violation of federal rail abandonment law.

It is hard to take seriously any the Hyman LLCs' intimations that Conrail did not engage in intentional misconduct when they themselves have so accused Conrail in a Declaration by their former attorney (see Part II B) as well as in a claim against Conrail for fraudulent misrepresentation filed in federal court. See, e.g., City et al Notice, Exhibit C, in AB 167-1189X, filed Nov. 22, 2013 (excerpts from LLCs' fraud pleading).

Failure to respond to any additional comments in the Hyman LLCs' letter of February 18, 2021 should not be viewed as an admission or agreement with anything said therein.

VII. Other Matters

⁴⁹ According to the case Conrail attached to its February 23 letter (bottom of p. 2 of the decision), Chicago Title paid at least \$5 million in litigation expenses in a settlement with the LLCs. It is not clear how much Chicago Title paid prior to settlement. The LLCs paid \$3 million for the Embankment to Conrail.

City et al understood that STB wished the parties to settle this case.⁵⁰ The parties signed a non-binding term sheet and proceeded to work out a contract, as well as ancillary agreements and documents, deeds and surveys. In December of 2020, Conrail without explanation withdrew from the settlement negotiations. Conrail has refused to speak to the Mayor of Jersey City or to its rail counsel.⁵¹ This not only forecloses settlement, but also consultation under section 106. Foreclosing settlement and cutting off meaningful consultation under section 106 is consistent with the October 12, 2007 contract between Conrail and the Hyman interests. Just as the claim that the Harsimus was a spur proved a ruse, City et al is left to ponder whether Conrail's participation in a negotiation was another ruse to accomplish the goal of the October 12, 2007 Conrail/LLCs contract to promote redevelopment rather than public remedies with respect to the Embankment.

In a perspicacious letter dated May 7, 2009, New Jersey SHPO (then without knowledge of Conrail's deal with the LLCs in 2008 to subvert any STB regulatory process) noted that STB was not truly engaged in a section 106 process, because of limitations on the consultation arising from the following: (1) the party seeking the license (Conrail) no longer owned the property, (2) the agency proposed that Conrail would complete the 106 consultation as a condition of abandonment, suggesting that abandonment approval had already been granted *de facto* before any meaningful consultation had occurred, (3) the actual owner was continuing to pursue development options (demolition) and operated as if unconstrained by the section 106 process, and (4) the STB process on which STB was embarking "did not lead to a full consideration of alternatives; instead, it leads to loss of the historic property at the consummation of abandonment." Saunders to Quinlan, *supra*, at p. 2. As the New Jersey SHPO stated, this is a "Section 106-like review process whose certain outcome is an adverse effect including probable demolition of the historic property." *Id.* As we have shown, the contracts between, and actions of, Conrail and the LLCs to date in fact amount to an intentional foreclosure of meaningful comment under section 106. In light of the foreclosure, section 110(k) should be applied to remediate the anticipatory demolition. There should be no effective abandonment of the Harsimus Branch until and unless

⁵⁰ V. Rutson (Director, STB OEA) to Ms. Donato (developer attorney), Mr. Montagne [sic] (attorney for City et al.), and "other consulting parties," Nov. 16, 2018.

⁵¹ If STB changed its policy to disfavor settlement, the agency should have informed parties other than Conrail.

Conrail re-assembles the corridor and repudiates its commitment to thwart the abandonment licensing process.

Respectfully submitted,



Charles H. Montange
Counsel for City of Jersey City,
Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition

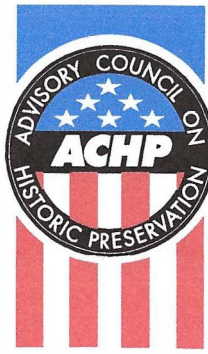
Appendix: ACHP letter to STB OEA, dated August 4, 2016
STB OEA email response to ACHP dated Dec. 21, 2016, making false
and/or misleading claims about discovery on 110(k) issues
Letter, Conrail President to NJ SHPO
Letter, NJ SHPO to Conrail President
McFarland V.S.
Conrail/LLCs Memorandum of Understanding dated Oct. 12, 2007
Conrail Joinders 2007
Declaration of Stephen Marks dated June 10, 2014
Rebuild by Design materials downloaded Feb. 23, 2014
LLCs' allegations of fraud by Conrail in USDC for DC 09-1900

cc. Jaime Loichinger, Assistant Director, Federal Permitting, Licensing,
and Assistance Section, Office of Federal Agency Programs, ACHP
Kate Marcopul, Administrator and Deputy NJ SHPO
Andrea Tingey, Historic Preservation Specialist, NJ SHPO
Elizabeth S. Merritt, Deputy General Counsel, Nat. Trust Hist. Pres.

City (Mayor, City Law Dept., City Planning)
Rails to Trails Conservancy
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition

Appendix

1. Letter, ACHP to STB OEA, August 4, 2016



Preserving America's Heritage

EI-25314

CN

AB 167 (1189X)

August 4, 2016

Victoria Rutson
Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Ref: *Harsimus Branch proposed rail line abandonment*
Jersey City, New Jersey

Dear Ms. Rutson:

The Advisory Council on Historic Preservation (ACHP) has been made aware of consulting party concerns regarding the referenced undertaking's adverse effects on historic properties. Based upon background information provided by the Surface Transportation Board (STB), activities undertaken by the Conrail Railroad Company (Applicant) in advance of complying with the requirements of Section 106 of the National Historic Preservation Act (54 U.S.C. Sections 300101 et seq.) (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), may have resulted in adverse effects to historic properties. As we understand, the Applicant may have abandoned the Harsimus Branch rail line prior to requesting STB's approval of the rail line abandonment. Likewise, this activity occurred before the Section 106 process was initiated by STB. Since numerous local stakeholders are concerned about the applicability of Section 110(k) to this undertaking, we are requesting that STB investigate this matter before it proceeds with the Section 106 consultation.

Section 110(k) of the National Historic Preservation Act (NHPA) prohibits a Federal agency from granting a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid Section 106 of the NHPA, has intentionally significantly adversely affected an historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur. In this case, we understand that STB intends to carry out the four-step Section 106 review so that it can decide on whether or not to approve the Harsimus Branch rail line abandonment. Since the Applicant has already sold the land on which the rail line was laid, this complicates STB's review of effects on historic properties and may compromise STB's ability to comply with the requirements of Section 106.

In accordance with Section 110(k), the agency must consult with the ACHP when determining whether mitigating circumstances justify granting the approval of the rail line abandonment. Should STB conclude that the actions of the Applicant were important and critical to the abandonment that triggered Section 110(k), STB must explain why circumstances may justify granting the approval. STB should provide us with documentation specifying the circumstances, including the degree of damage to the integrity of any historic properties affected. Further, it must clarify if the abandoned Harsimus line is National Register

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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eligible, and what effect has resulted from the abandonment. STB also must explain how it will proceed with the Section 106 review, and comply with Sections 800.3 through 800.6 of our regulations.

Should STB determine that a finding of “no historic properties affected” or “no adverse effect” is appropriate, it will need to consult with the State Historic Preservation Officer (SHPO) and other consulting parties and determine whether they objected to this determination. If no timely objection is filed, STB can complete the Section 106 review. However, should STB determine that this undertaking will result in an adverse effect on historic properties; STB will need to consult with other consulting parties to resolve the adverse effects. This includes developing measures to further avoid, minimize or mitigate adverse effects. Given the widespread public interest in this project, as well as the complexity of addressing the anticipatory demolition, the ACHP will participate in the Section 106 review. Accordingly, we will notify the STB Board that this undertaking invokes Appendix A of our regulations, and we believe our participation is warranted.

We look forward to receiving STB’s response to this matter. If you have additional questions, or require further assistance, please contact Najah Gabriel at (202) 517-0210 or via email at ngabriel@achp.gov.

Sincerely,

A handwritten signature in cursive script, reading "Charlene Dwin Vaughn".

Charlene Dwin Vaughn, AICP

Assistant Director

Office of Federal Agency Programs

Federal Permitting, Licensing, and Assistance Section

Appendix

2. Emails, STB (General Counsel's Office) to ACHP (Dec. 21, 2016)
ACHP to STB (same, Dec. 19, 2016)

From: Najah K. Gabriel <ngabriel@achp.gov>
Sent: Wednesday, December 21, 2016 12:06 PM
To: Kitay, Evelyn
Cc: Rutson, Vicki; Charlene Vaughn; Miller, Barbara
Subject: RE: Follow-up questions

Evelyn,

Thank you. This information is very helpful. I don't think we need to be kept abreast of the ALJ proceedings and decision, as the information you provided is what we wanted to know at this point. If we decide we do later on, I'll let you know.

Happy Holidays to you all, as well.

Najah

From: Kitay, Evelyn [<mailto:Evelyn.Kitay@stb.gov>]
Sent: Wednesday, December 21, 2016 1:55 PM
To: Najah K. Gabriel
Cc: Rutson, Vicki; Charlene Vaughn; Miller, Barbara
Subject: RE: Follow-up questions

Thanks for your questions, Najah. Yes, a FERC ALJ is presiding over discovery, which includes both issues already raised by the litigants and any future discovery-related issues that may arise in the Harsimus rail line abandonment case. One topic on which the parties have already asked for discovery is 110(k). In May 2015, the STB issued a decision that specifically permitted discovery related to Section 110(k) to proceed. That means that, in discovery, the parties were permitted to seek information from other parties (in the form of documents and/or answers to written questions) that is relevant to the proceeding (including 110(k)). The parties then can use the information and documents provided to them during discovery to make their arguments with the STB. For example, Mr. Montange has alleged that Conrail knowingly sold its rail line without seeking abandonment authority from the STB in order to evade the Section 106 process. Therefore, the STB's May 2015 decision permitted him to ask questions and ask for documents during discovery that could support that argument. (At this point, it's not at all clear what, if anything, Mr. Montange has obtained during discovery that would help him make his argument—I'm just using this as an example to explain our process. It's the same process used by all agencies that are "quasi-judicial"). In October, the FERC ALJ ordered (among other things) that discovery close on December 31, 2016. Because the FERC ALJ will continue to have jurisdiction over discovery unless the STB revokes the referral, should any new discovery issues arise (including a party asking for more time for additional discovery), they would be presented to the FERC ALJ.

Right now, one of the parties is seeking to challenge the FERC ALJ's October decision for reasons unrelated to Section 110(k) or the discovery deadline. In response, the STB will review the decision and determine whether the STB will affirm or overturn part or all of the FERC ALJ's decision. That could take some time. Once the STB makes its determination with respect to the ALJ's decision, it would need to establish a procedural schedule for parties to brief the various issues that were the focus of discovery, including Section 110(k). Mr. Montange's brief would likely set forth all his arguments for why Conrail's sale of the Harsimus line constituted a 110(k) violation. It is likely that others would file briefs in opposition of Mr. Montange's arguments. Then, based on the information in the record and the parties' arguments based on that information, the STB would make a decision on whether there was a 110(k) violation in this case.

I know that there are many uncertainties in the timing of all this, starting with whether the STB will uphold the FERC ALJ's decision. We'd be happy to keep you informed with what's happening, if that would be of help.

If you have further questions, please give me or Vicki a call. Vicki's phone number is 202 245-0295; mine is 202 245-0263.

Hope you and Charlene have a great holiday.

Evelyn

From: Najah K. Gabriel [<mailto:ngabriel@achp.gov>]
Sent: Monday, December 19, 2016 2:40 PM
To: Kitay, Evelyn <Evelyn.Kitay@stb.gov>
Cc: Rutson, Vicki <Vicki.Rutson@stb.gov>; Charlene Vaughn <cvaughn@achp.gov>
Subject: Follow-up questions

Hi Evelyn,

I just have a couple of follow-up questions. You mentioned that the FERC Administrative Law Judge (ALJ) was presiding over the discovery process for the Board's Section 110(k) matter and that the discovery period had recently ended. Did I understand you correctly?

Also, just so that we are clear on the next steps of the Section 110(k) consideration, I have a couple of questions:

1. What role going forward will the ALJ play in the Section 110(k) matter going forward?
2. Now that the discovery period has ended, what is STB's next step?

We want to have a general understanding of the Board's procedural steps for addressing the Section 110(k) matter in case we get any questions about correspondence exchanges.

Thank you,

Najah K. Gabriel
Historic Preservation Specialist

Advisory Council on Historic Preservation
401 F Street NW
Suite 308
Washington, DC 20001-2637
Phone: 202.517.0210
Fax: 202.517.6383
ngabriel@achp.gov

e106-online section 106 documentation submittal system
now available to all federal agencies
<http://www.achp.gov/work106.html>

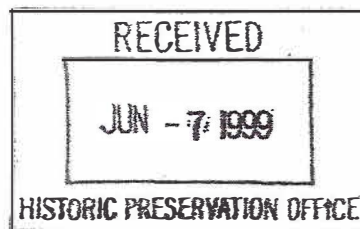
Appendix

3. Letter, T. O'Toole (Conrail) to NJ SHPO, dated June 4, 1999

CONRAIL

TIMOTHY T. O'TOOLE
PRESIDENT AND
EXECUTIVE OFFICER

June 4, 1999



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

Re: Pennsylvania Railroad Harsimus Branch Embankment
163-351 Sixth Street
June 9th State Review Board Meeting

Dear Administrator Guzzo:

Conrail, the owner of the Pennsylvania Railroad Harsimus Branch Embankment, objects to the listing of the Embankment on the New Jersey and National Registers of Historic Places. Conrail is a joint subsidiary of CSX Corporation and Norfolk Southern Corporation. The railroad occupies Block 21; Block 247, Lot 50A; Block 280, Lot 50A; Block 317.5; Block 345.1, and Block 389.1.

When originally constructed, the Embankment was part of a unified railroad structure that carried freight trains to the Jersey City waterfront. The unified railroad structure consisted not only of the presently existing embankment walls and fill, but steel bridges connecting each individual embankment, tracks or rail and ancillary structures and equipment.

Conrail ceased freight operations along the Embankment years ago. In or about 1996, Conrail removed the steel bridges, tracks and ancillary structures and equipment. Since then, the individual embankment properties have not been physically connected to each another and have served no railroad or other practical or useful function.

Administrator Dorothy P. Guzzo

June 4, 1999

Page 2

Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value. The Company also wishes to be relieved of its obligations as owner of these properties, which includes tax liabilities, the costs of maintenance and any potential liabilities to or caused by third person trespassers or vandals. As a result, it has been our intention to sell all the embankment properties and we are in the process of negotiating a sale of these parcels to the Jersey City Redevelopment Agency (JCRA).

It is our understanding that if a government agency owns a site that has been listed on the New Jersey Register of Historic Places, that agency cannot alter the site without approval from the New Jersey Commissioner of Environmental Protection. Imposition of such a condition on the embankment properties will have the effect of substantially reducing their present value.

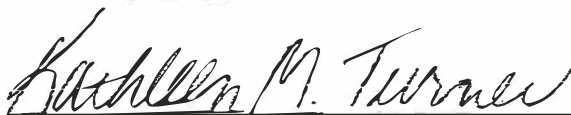
For all these reasons, Conrail, as owner of the Embankment, objects to its listing on the New Jersey and National Registers of Historic Places. Please be advised that CSX Corporation and Norfolk Southern Corporation, the joint owners of Conrail, are in agreement with and support this statement of objections.

Sincerely,

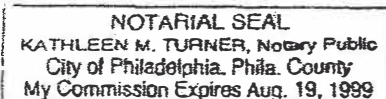


Timothy T. O'Toole

Sworn to and subscribed before
me this 4th day June, 1999



Notary Public



Appendix

4. Letter, NJ SHPO to Conrail, Jan. 25, 2000

0-40
10-20-11
M



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 Rail Corporation
2001 Market Street
P.O. Box 41419
Philadelphia, PA 19101-1419

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

cc: Mr. Richard A. James, Pennsylvania Railroad Embankment Preservation Coalition

Appendix

5. Verified Statement of Thomas F. McFarland, Sept. 27, 2017
and attachments

VERIFIED STATEMENT OF THOMAS F. McFARLAND

My name is Thomas F. McFarland. I am an attorney having an office at 208 South LaSalle Street, Suite 1666, Chicago, IL 60604. I am a sole practitioner and sole shareholder of Thomas F. McFarland, PC, a professional corporation.

I have been requested by the City of Jersey City, N.J., Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively referred to as Jersey City, et al.) to provide an expert opinion on whether or not, when Conrail conveyed the Harsimus Embankment Property, (the Embankment) to a group of limited liability companies (LLCs) for nonrail use in July, 2005, Conrail knew or reasonably should have known that the Embankment was a “railroad line” within the meaning of that term in 49 U.S.C. § 10903(d), rather than a “spur, industrial, team, switching or side track” (collectively referred to as a spur) within the meaning of those terms in 49 U.S.C. § 10906.

For the reasons explained in this statement, it is my firm opinion that Conrail knew or reasonably should have known at that time that the Embankment was a railroad line.

I am qualified to render this opinion by virtue of 52 years of experience in railroad law exclusively, with particular focus on railroad abandonment law, including differentiating between railroad lines and spurs in an abandonment context.

Upon graduation from Loyola University School of Law in 1965, I was employed as a Commerce Attorney in the Law Department of Illinois Central Railroad Company at Chicago, IL. My duties in that position included helping to prepare applications to the Interstate Commerce Commission (predecessor of the Surface Transportation Board (STB)) for authority to abandon

railroad lines, and determining whether particular right-of-way and/or trackage was a railroad line or a spur.

In 1970, I became employed by the Chicago law firm of Belnap, Spencer, Hardy & Freeman (Belnap Firm) as an associate attorney. I became a partner in the Belnap Firm in 1977. The Belnap Firm practiced railroad law exclusively. My specialty in that practice was railroad abandonment law.

I remained in the private practice of railroad law for the next 47 years, to date. Over that period, my partners either retired or died, such that since 2001 I have been a sole practitioner as sole survivor of the Belnap Firm.

During my 52 years of railroad practice, I have litigated over 100 railroad abandonments, representing both applicants for abandonment authority and opposing parties. I am reasonably certain that no other attorney in the United States has nearly that much experience in railroad abandonment.

During the course of my career, I have often been called upon to render opinions as to whether particular railroad right-of-way and track constituted a railroad line or a spur. I have also been involved in litigation in regard to that issue. One such example is *Battaglia Distributing Co., Inc. v. Burlington Northern R. Co.*, 2 S.T.B. 323 (1997), *pet. to reopen den.* 1998 WL 857070.

I am familiar with the issues involved in Docket No. AB-167 (Sub-No. 1189X) and related proceedings as a result of reviewing the STB's decisions in those matters as they appeared on the STB's website. Because the issues in those cases were of general interest to me, I also

read the related Court decision in *City of Jersey City v. Consolidated Rail Corporation*, 968 F.Supp.2d 302 (USDC, DC, 2013).

By virtue of the latter decision, it is judicially settled that the Embankment was conveyed to Conrail in 1976 as a railroad line subject to STB abandonment jurisdiction. Thus, it is clear that in 1976 the Embankment was a railroad line, not a spur. The issue I am to address is whether or not Conrail reasonably could have believed that the Embankment was no longer a railroad line, but instead was a spur, when it conveyed the Embankment to the LLCs in 2005. For the reasons explained below, it is my firm opinion that Conrail could not have reasonably so believed.

There is a widely-known principle in ICC-STB jurisprudence to the effect that “once a line of railroad, always a line of railroad”. Thus, where, as here, railroad property has been determined to constitute a railroad line, such property cannot lawfully be treated as a spur at a later time, even though as a result of passage of time the property may have taken on many of the physical characteristics of a spur.

Thus, in *The Atchison, Topeka and Santa Fe Railway Co. -- Abandonment Exemption -- in Lyon County, KS*, 1991 WL 120344 (Docket No. AB-52 [Sub-No. 71X], decided on June 11, 1991) (*Atchison Topeka* case), the ICC said (at *3):

Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur and the Commission divested of jurisdiction over it solely through the railroad’s unilateral decision to change its use of the track segment over time. To find that this is a spur would be inconsistent with our well-established policy that where a carrier decides to reduce or cease service and/or remove track, the carrier’s common carrier obligation remains until appropriate abandonment authority is obtained . . .

Fully in accord with that ruling is the ICC's decision in *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporations West 30th Street Secondary Track in New York, NY*, 8 ICC 2d 773, 1992 WL 233599 (Docket No. AB-167 [Sub-No. 1094], decided August 28, 1992) (*the Highline case*). There, the ICC said (8 I.C.C.2d at 791, 1992 WL 233599 at *11):

Given the Highline's history as a regulated rail line, we continue to have jurisdiction over it, even though the track in question now possesses many of the characteristics of a spur. We recently addressed the status of a rail line unused for 15 years. In holding that the track's use as part of a line haul rail operation prior to the unauthorized cessation of service made it a railroad line subject to our abandonment regulation, we stressed the well established principle that a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track (citing the *Atchison Topeka case, supra*). . .

It would not be credible for Conrail to contend that it was not aware of the determination that the Highline is a railroad line when it conveyed the Embankment to the LLCs. That determination was made in regard to a Conrail property located in the same general territory as the Embankment in a proceeding in which Conrail was an active party. Like the Embankment proceeding, *the Highline case* generated widespread publicity because it involved an intense dispute over a potentially expensive removal of an elevated Conrail right-of-way. The finding that the Highline is a railroad line was made not long before the dispute involving the Embankment. It is likely that a number of key Conrail personnel participated actively in both the Highline and the Embankment disputes. It is my understanding that Conrail's General Counsel, Jonathan Broder, and Conrail's outside railroad counsel, John Fiorilla, both held similar

positions in 1992 when the *Highline* case was decided and in 2005 when the Embankment was conveyed to the LLCs.

My expert opinion is not at all changed upon consideration of two allegations by Conrail outside counsel John Fiorilla in 2005 that the Embankment was a spur. The first of such allegations was made virtually on the eve of closing of sale of the Embankment to the LLCs in a memorandum to Ms. Bridget McLaughlin dated July 11, 2005, a copy of which is attached as my Appendix TFM-1. The allegation regarding the spur nature of the Embankment is in numbered paragraph 6 of the memo. No legal authority nor reasoning was provided by Mr. Fiorilla in support of the allegation. Mr. Fiorilla is a longtime railroad attorney and representative of Conrail. He was surely familiar with the principle of “once a railroad line, always a railroad line” that was applied in the *Highline* decision, a case with which he undoubtedly was familiar. Mr. Fiorilla surely knew, or had good reason to know that his allegation, that the Embankment was a spur, was false.

The second such allegation was made in a letter from Mr. Fiorilla to Carmine R. Alampi, Esq., an attorney for the LLCs, dated October 4, 2005, a copy of which is attached as my Appendix TFM-2. That allegation was made in response to an “ICC/STB issue”. That allegation, too, was not supported by any citation of legal authority or legal reasoning. For the same reasons as spelled out in regard to appendix TFM-1, Mr. Fiorilla knew or had good reason to know that the allegation, that the Embankment was a spur, was not true.

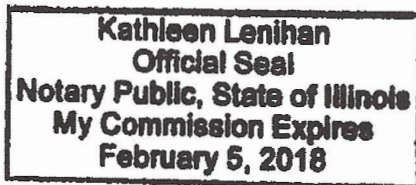
The unsupported allegations of Mr. Fiorilla were the primary support for a determination by the Superior Court of New Jersey in its Docket No. HUD-L-5801-09, *212 Marin Blvd. v.*

Chicago Title Insurance Co., filed on August 31, 2017, that the title insurance company failed to sustain its burden of proof that Conrail fraudulently or negligently misrepresented that the Embankment was a spur not requiring STB approval for its abandonment. Jersey City, et al. were not parties in that case. The result surely would have been different if it were to have been explained to the Court that it is judicially settled that Conrail acquired the Embankment as a rail line and that under settled STB authority, the Embankment remained a rail line requiring STB approval for its abandonment when it was sold to the LLCs without the requisite abandonment authority.

For all the foregoing reasons, I am firmly of the opinion that when Conrail conveyed the Embankment to the LLCs, Conrail knew, or reasonably should have known that the Embankment was every bit as much a railroad line as the Highline was determined to be only a short time earlier.

VERIFICATION

THOMAS F. McFARLAND, being duly sworn, states that he has knowledge of the factual assertions set forth in this Verified Statement; and that all of those assertions are true and correct.



Thomas F. McFarland
THOMAS F. McFARLAND

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

SUBSCRIBED and SWORN to before me
this 27th day of September, 2017.

Kathleen Lenihan
Notary Public

My Commission expires: 2/5/2018

0 59

From: John K. Florilla [mailto:jfflorilla@capehart.com]
Sent: Monday, July 11, 2005 1:27 PM
To: Bridget McLaughlin
Cc: Ryan, Bob; calamp1@alampl-law.com
Subject: July 13 Sale Enbankment Jersey City

Bridget: I spoke to Carmine this morning and after consultation with my client I would appreciate if you would let him know the following:

1. Real Estate transfer tax is NOT exempt from payment since this is not active railroad property. However our agreement with your client indicates that the buyer will pay this tax regardless of what the local custom is.
2. Regarding real estate tax adjustments, we are working on these and should have them by the end of the day.
3. Regarding the tax declarations faxed to us they appear to apply only to individuals and not corporations. Our client indicated that they recently checked the box regarding the fact that it was not an individual, estate or trust and was exempt. I note that we would sign both that form and the non residency form but there is no withholding.
4. We are obtaining copy of the tax bill for Block 446 Lot 18a as Carmine requested.
5. Conrail will NOT provide an affidavit of title since the deeds involved are quitclaim deeds and this is mentioned in the contract for sale.
6. The properties abandoned constituted "Spur tracks" over which the STB and previously the ICC had no authority pursuant to 49 USC§ 10906. Therefore no formal abandonment of the property was ever filed. (I have attached a copy of that section of the 49 USC to this email).
7. Regarding the payment of the moneys owed, we have sent the info regarding wiring the funds to our account. Later this week we will wire to your account \$ 1,000,000 from our client Conrail to your trust account on behalf of Steve Hymun reflecting option funds held by our client Conrail in this matter. Please confirm that we can send a letter with wording like this later in the week. We will also send a check for the amount of the real estate transfer tax which will have been sent to us along with the \$ 3,000,000 from the bank so that your firm can pay those charges on behalf of the buyers pursuant to the agreement of sale.

Let me know if you have any comments regarding this.

John K. Florilla, Esq.
Capehart & Scatchard P.A.
8000 Midlantic Drive, Suite 300
Mount Laurel, NJ 08054

Confidentiality Note

This transmission is intended only for the addressee, and may contain privileged and/or confidential information from the law firm of Capehart & Scatchard, P.A. If you are not the intended recipient, please do not use, disseminate, or copy this material. If you have received this transmission in error, please notify us immediately by telephone, return this transmission, and delete or destroy any copies.

Thank you.



0 60

John K. Fiorilla
856.814.2054
jfiorilla@capehart.com

October 4, 2005

10/16
10/17/05

Via Fax and Regular Mail

Carmine R. Alampi, Esq.
Carmine R. Alampi, L.L.C.
Suite 404
1 University Plaza
Hackensack, NJ 07601

Re: Consolidated Rail Corporation - Jersey City Railroad Embankment
Consolidated Rail Corporation to S.L.H. Holding Company, Inc.
Our File No. 0476.50485

Dear Carmine:

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 upon 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 Surface Transportation Board at this time).

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 legally condemn the property should it so choose. Accordingly, the ICC/STB issue, we respectfully submit, is a red herring.

Please call me if you have any further questions.

Sincerely,
CAPEHART & SCATCHARD, P.A.

John K. Fiorilla

JKF/ajd

cc: Jonathan M. Broder, Esq.
Mr. Robert W. Ryan

AJD\508696

Appendix

6. Memorandum of Understanding between Conrail and Hyman LLCs

12 October 2007

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12th day of October, 2007, between Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation, with its principal offices at Two Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania 19103, SLH Holding Co., LLC ("SLH"), having a mailing address c/o Carmine Alampi, Esq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC and 446 Newark Avenue, LLC (collectively referred to as "LLCs"), "Conrail", "SLH" and "LLCs" collectively referred to as "Parties".

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

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

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

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

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

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

NOW, THEREFORE, Conrail, SLH and the LLCs agree, this 12th date of October, 2007, as follows:

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

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



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

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

5. Conrail agrees that if the proceedings in Docket No. HUD-L-4908-05 in the Superior Court of New Jersey are not dismissed, Conrail will not in that or any other proceeding claim that SLH's or the LLC's failure to seek relief against Conrail precludes them from seeking relief against Conrail in any other proceeding.

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

CONSOLIDATED RAIL CORPORATION

By:

Title:

Date:

Jonathan M. Boock
VP - General Counsel

Oct. 12, 2007

SLH HOLDING CO., LLC

By:

Title:

Date:

A. Hyn
member

Oct. 12 2007

Appendix

7. Conrail Joinders in Application [by various Hyman LLCs]

For Relief

(for demolition of the Embankment)

December 13, 2007

One each for the six Embankment parcels

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

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

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

12/13/07
Date


Consolidated Rail Corporation
JP - General Counsel

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

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

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

12/13/07
Date

Jonathan M. Bonds
Consolidated Rail Corporation
VP + General Counsel

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

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

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

12/13/02
Date

Jonathan M. Proder
Consolidated Rail Corporation
VP + General Counsel

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

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

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

12/13/07
Date

Jonathan M. Buer
Consolidated Rail Corporation
VP + General Counsel

CONSENT TO FILING APPLICATION

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

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

12/13/07
Date

Jonathan M. Burch
Consolidated Rail Corporation
VP + Gen. Counsel

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

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

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

12/13/07
Date

Jonathan M. Beck
Consolidated Rail Corporation

Appendix

8. Declaration of Stephen Marks, dated June 10, 2014
(Hyman offer of Embankment material for
Use by Hoboken for fill and flood protection)

BEFORE THE SURFACE TRANSPORTATION BOARD

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

DECLARATION OF STEPHEN MARKS

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

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

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

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

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

Signature: _____

Executed on: June 10, 2014.

Appendix

9. Rebuild by Design:

Offer by Steve Hyman of Embankment stone walls and fill

On behalf of wife Vicki

For “Reclamation Efforts”

(dated January 19, 2014)

≡ Menu

REBUILD BY DESIGN

An Initiative of the President's
Hurricane Sandy Rebuilding
Task Force

In Collaboration With
NYU's Institute for Public
Knowledge
Municipal Art Society
Regional Plan Association
Van Alen Institute

Lead Supporter
The Rockefeller Foundation

With Support From
Deutsche Bank Americas
Foundation
Hearst Foundation
Surdna Foundation
The JPB Foundation
The New Jersey Recovery
Fund

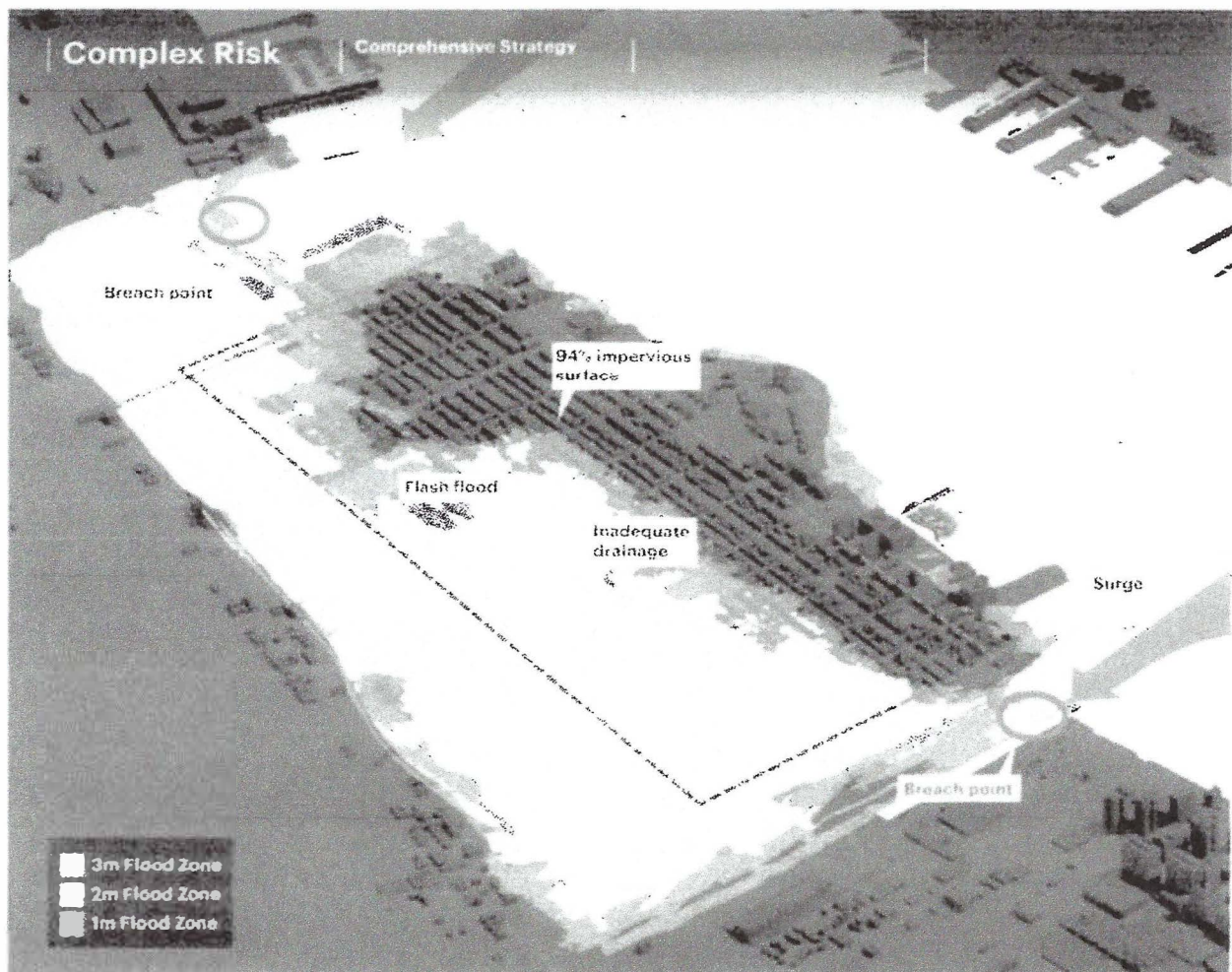
Menu

Resist, Delay, Store, Discharge: a comprehensive strategy for Hoboken

OMA

New Jersey

↓ Updates



 Menu

October 29, 2013 9:09 am
from Mark

This plan is excellent! The north
Hoboken park is a great idea

Reply ↓

October 29, 2013 8:19 pm
from Justin

I don't think making the Hudson
Bergen Light Rail tracks into a park
is going to alleviate flooding.

Reply ↓

October 30, 2013 8:22 am
from Dawn Zimmer

I support this thoughtful approach to
address Hoboken's historic flooding
problems due to storms
overwhelming the combined sewer
system at high tide and the
increasing threats from coastal
flooding due to rising seas and
stronger storms.

Reply ↓

January 19, 2014 2:19 pm
from Steven Hyman

Post a comment

Your email address will not be published.
Required fields are marked *

Your name: *

Your email: *


Please type the letters/numbers above.

Post Comment

Menu

You have possibly been let down by the Government for political reasons. You can not fix the past but you can master the future. My wife Vickie Hyman owns the 6th Street Embankment in Jersey City. If the Government is willing to help you, Vickie will assist.

Vickie will donate six acres of walls and fill to Hoboken and/or Jersey City or any other municipalities that Vickie Hyman selects. All the stones and fill that encumbers the Embankment properties are to be used for reclamation efforts to defend the water front. There are 55,000 CU of big stones and 155,000 of fill that needs to be removed expeditiously in an orderly and safe manner.

All the insurance will be purchased from a AAA credible insurance company but not Chicago Title. A cash bond of \$5M per block will be administered by the Hudson County Superior Judge Barry Sarkisian or Retired Judge Arthur D'Italia.

Mayor Healy, City Councilman Fulop and others passed an ordinance that is self explanatory and enclosed. L. Harvey Smith and others passed an ordinance in the NJ

Menu

Legislature that is illegal and it must be voided. The zoning should change for the Embankment properties should Vickie get the stones and fill removed by Hoboken. Lastly, Vickie should be recognized as the rightful owner of the 6th Street Embankment that has been litigated for almost 10 years.

Steve

October 30, 2013 8:58 am
from Garden Street resident

as the illustration shows, given that the surge came in via a small number of points, it seems like this plan brings huge potential to reduce the flooding risk. Please help us move this forward!

Reply ↓

Appendix

10. Cross Claims by Hyman LLCs against Conrail

For Fraud (Count IV) and

Negligent Misrepresentation (Count V)

As filed by Hyman LLCs

In U.S.D.C. for D.C. in

City of Jersey City v. Conrail, USDC for DC 09-1900

(Oct. 4, 2012)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITY OF JERSEY CITY,	)	
RAILS TO TRAILS CONSERVANCY, and	)	
PENNSYLVANIA RAILROAD HARSIMUS STEM	)	
EMBANKMENT PRESERVATION COALITION,	)	Civil Action No.
	)	09-cv-1900 (CKK)
Plaintiffs,	)	
	)	
v.	)	
	)	
CONSOLIDATED RAIL CORPORATION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
212 MARIN BOULEVARD, LLC;	)	
247 MANILA AVENUE, LLC;	)	
280 ERIE STREET, LLC;	)	
317 JERSEY AVENUE, LLC;	)	
354 COLES STREET, LLC;	)	
389 MONMOUTH STREET, LLC;	)	
415 BRUNSWICK STREET, LLC; and	)	
446 NEWARK AVENUE, LLC,	)	
	)	
PAULA T. DOW, ATTORNEY GENERAL, STATE	)	
OF NEW JERSEY	)	
	)	
Intervenor-Defendants.	)	

**AMENDED ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS, CROSS-
CLAIMS, AND JURY DEMAND**

212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC (collectively, the "LLCs"), by and through their undersigned counsel, hereby make this Amended Answer to the Complaint for Declaratory and Injunctive Relief (the "Complaint") of Plaintiffs City of Jersey City (the "City"), Rails to Trails

COUNT III
PREEMPTION

112. The LLCs repeat the allegations contained in Paragraphs 1 through 111 as if set forth at length herein.

113. The Plaintiffs have alleged they are entitled to invoke the remedies available under N.J. Stat. 48:12-125.1, which provides that a railroad must first offer former regulated railroad assets for sale to New Jersey state governmental bodies, including the State, its agencies, counties, and municipalities, such as the City.

114. N.J. Stat. 48:12-125.1 violates the exclusive jurisdiction of the STB to set conditions on abandonment and post-abandonment conditions, and is preempted by federal law and this Court's original and exclusive jurisdiction to interpret, alter, amend, or modify the FSP.

WHEREFORE, the LLCs demand judgment as follows:

- A. Declaratory judgment of this Court that N.J. Stat. 48:12-125.1 is preempted by federal law; and
- B. Such other relief as the Court deems equitable and just.

CROSS-CLAIMS AGAINST CONRAIL

COUNT IV
FRAUD

115. The LLCs repeat the allegations contained in Paragraphs 1 through 114 as if set forth at length herein.

116. Conrail was created by Congress pursuant to the 3-R Act in 1973 to take ownership of railroad assets of eight bankrupt railroad companies and to operate rail service along those assets.

117. The USRA was created to determine which assets of the bankrupt railroads should be transferred to Conrail. In 1975, USRA released the FSP, which identified which assets should be transferred to Conrail. The FSP listed lines of rail that were to be transferred to Conrail which lines of rail included additional properties ancillary to those lines, such as spurs, yards, and side tracks, but not specifically identified.

118. The Special Court approved the FSP on April 1, 1976, and the trustee in the bankruptcy matter transferred the assets to Conrail by deeds.

119. Among the many assets transferred to Conrail were two lines that were identified as Line Code 1420 (Harsimus Branch) and Line Code 1440 (Hudson Street Branch). Both Line Code 1420 and Line Code 1440 were transferred as lines of rail, subject to STB (then, the ICC) jurisdiction.

120. Conrail operated these lines of rail for many years subsequent to 1976 until its remaining customers left and the nature of the area changed such that rail freight service was no longer required, feasible or foreseeable.

121. Conrail is required to operate consistent with federal law, including STB regulations.

122. In the 1980's and 1990's, Conrail, in cooperation with the City's redevelopment plans, sold portions of Line Code 1420 east of Marin Boulevard, and either sold, or relinquished to the City and NJ Transit for use of light rail, the entire 1.3 mile length of Line Code 1440.

123. Conrail did not seek STB abandonment authority prior to selling or abandoning those assets.

124. Conrail also ended rail service in downtown Jersey City, in part due to requests from the City, and demolished cross-bridges connecting the segments of the Embankment and tore up tracks and ties. Conrail allowed the City to demolish the bridge connecting the Embankment at Marin Boulevard. Conrail did not seek or obtain STB abandonment authority before ending rail service and removing the railroad improvements.

125. After the installation of the Marion Junction in 1994, Conrail did not use the Harsimus Branch for any purpose. Upon information and belief, Conrail did not (and could not due to the absence of tracks, bridges, trestles, and signals) operate trains along the Harsimus Branch or the old Pennsylvania Railroad main line east of Marion Junction after 1994 (the old Pennsylvania Railroad main line having been demolished and removed from Railroad Avenue in approximately 1964).

126. In 2003, when Conrail entered into a contract of sale with the LLCs, there were no properties still owned by Conrail east of the Embankment in downtown Jersey City that had formed part of Line Codes 1420 and 1440.

127. Conrail internally reclassified the Harsimus Branch as a spur in 1994 without approval by the STB.

128. Conrail, with fraudulent intent and at numerous times, misrepresented to the LLCs that the Embankment was a spur or other, non-regulated railroad improvement, which could be freely conveyed by Conrail without first obtaining abandonment authority from the STB. It also made similar representations to the City to further its sale of properties to the LLCs without the necessity of seeking STB abandonment authority.

129. Conrail made those misrepresentations, through its attorneys, and otherwise with the intent that the LLCs would rely on those statements. The LLCs did rely upon those statements to their detriment, incurring enormous costs, delays and loss of opportunities, as well as being subjected to the wrongful actions of the Plaintiffs.

130. Conrail was aware at the time it sold the Embankment to the LLCs that it had not sought abandonment authority for the Harsimus Branch and that if the Embankment was in fact a line, it would have placed the LLCs into ownership of a line of rail, thereby subjecting their properties to the regulatory jurisdiction of the STB.

131. Conrail knew the Embankment was in fact a segment of Line Code 1420. Conrail fraudulently misrepresented the status of the Embankment to the LLCs to induce them to purchase the Embankment. The LLCs did in fact rely upon the statements and actions of Conrail.

132. Conrail purported to transfer all its “right, title, and interest” in the Embankment lots to the LLCs in July 2005. Conrail could not convey its interest as a common carrier to the LLCs, but no notice of that was given to the LLCs as Conrail did not reserve any residual rights by way of easement to resume rail operations along the Embankment.

133. With an intent to defraud the LLCs in the sale of the properties, but while avoiding the City and Coalition’s objections that its properties were still federally regulated, Conrail represented to the City that the properties had been legally abandoned. Among other fraudulent and misleading statements made at the behest of Conrail, one of its attorneys responded to specific City and Coalition inquiries that: “You should 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.” Upon information

and belief, this statement, among others, led the City into a course of litigation on the line of rail issue and challenging the LLCs title and ownership interests. By so doing, a regulatory cloud has been placed on the LLCs' title and has forced them to suffer damages, including, but not limited to the cost of litigating these matters and lost business opportunities.

134. The LLCs reasonably relied on statements by Conrail, believing that Conrail was correctly describing the status of the Embankment. They were not aware of the true nature and history of Conrail's actions with respect to its former properties, and during the preceeding twenty-nine years, to the LLCs' knowledge and belief, no property owner in the waterfront area of Jersey City had ever been subjected to any sort of claim arising from Conrail's lack of regulatory compliance. The LLCs also received title insurance binders, and title insurance policies at closing that gave no indication of Conrail's lack of regulatory compliance. Information concerning the status of the Embankment and Conrail's regulatory compliance is to a large degree contained within Conrail's own files, or maintained by the National Archives, and not readily ascertainable to the LLCs prior to the closing.

135. After the purchase, Conrail continued to tell the LLCs, as well as the STB and this Court, the Harsimus Branch was a spur, not that it had been legally abandoned in 1994 without formal ICC action.

136. The LLCs learned the Harsimus Branch was in fact a line years after the sale, and only after reviewing Conrail's filings with the STB and this Court, and in preparation for the potential remand of the case from the Circuit Court of Appeals which did, in fact, reverse the prior dismissal of Plaintiffs' case for lack of standing. Prior to that time, Conrail had further induced the LLCs into a false sense of comfort in its false and misleading statements by an agreement executed between the LLCs and Conrail in which Conrail promised the LLCs that it

would take all necessary steps to protect their interests in their titles to the properties. The LLCs reasonably relied upon Conrail's positions taken before the STB, this court, and in its written and verbal promises of solidarity with the LLCs.

137. In addition to fraudulently misrepresenting the actual status of the Embankment to induce the LLCs to purchase the Embankment, Conrail acted in order to avoid scrutiny of its own illegal, de facto abandonments of lines of rail in Jersey City east of Marin Boulevard, and the de facto abandonment of rail service across the Embankment, accomplished through demolition of the cross-bridges and removal of track.

138. Conrail first misrepresented to the STB, and later to this Court, the Embankment is a spur or side track or yard track of the Harsimus Cove Yard, which was transferred to Conrail as ancillary track, and that the Embankment was not Line Code 1420 when in fact it was Conrail that decided on its own that the Harsimus Branch was a spur in the 1990's, and not USRA in the 1970's. Conrail has identified the Pennsylvania Railroad main line from CP Waldo to Exchange Place along Railroad Avenue as Line Code 1420, notwithstanding the fact that in 1961 passenger service along Railroad Avenue was abandoned, and in 1964 the above-grade, elevated steel trestles were removed from Railroad Avenue. Conrail has thus argued Line Code 1420, as described in the 1976 FSP, was an abandoned former line, despite the fact that it was never conveyed to Conrail and had all the tracks removed twelve years before the formation of Conrail.

139. Conrail has also avoided discussion of Line Code 1440 to avoid disclosure and scrutiny of Conrail's complete de facto abandonment of that line without STB authorization. After initially intending to include Line Code 1440 in the STB abandonment petition, Conrail's actual application, filed in January 2009, does not include Line Code 1440.

140. Conrail has misrepresented the Embankment's actual status to the LLCs, the STB, and this Court for its own pecuniary gain and to avoid examination of its own wrongful conduct beginning in the 1980's. When the City objected in 2008 to the inclusion of the Hudson Street Industrial Track in the proposed Conrail STB filing by an letter from Assemblyman Smith, but later relied upon the traffic from that line which connected to the Harsimus Branch at Marin Boulevard at Mile Post 1.30 to support its initial summary judgment motion before the court in the present matter, neither Conrail nor the City brought the inconvenient fact of the unabandoned Hudson Street Industrial Track to the attention of the court or the LLCs. The City remained silent so that its own complicity in Conrail's history of past regulatory violations (lack of abandonment applications) would not come to the attention of the court or the LLCs.

141. Conrail fraudulently misrepresented its status, resulting in damages to the LLCs, including, but not limited to, cost of acquiring the Embankment, loss of value of the Embankment if it is federally regulated and subjected to restrictions of other federal remedies such as Plaintiffs now seek, loss of opportunity to develop the Embankment, and costs associated with litigating the status of the Embankment before the STB, the Circuit Court, and this Court, including attorneys' fees.

WHEREFORE, the LLCs demand judgment against Conrail as follows:

- A. Damages for the fraudulent misrepresentation of the status of the Embankment, including actual damages, and punitive damages;
- B. Attorneys' fees and cost of suit; and
- C. Such other relief as the Court considers equitable and just.

COUNT V

NEGIGENT MISREPRESENTATION

142. The LLCs repeat the allegations contained in Paragraphs 1 through 141 as if set forth at length herein.

143. In its negotiations with the LLCs, Conrail failed to perform customary diligence necessary and expected of a regulated railroad to assess the true and correct status of assets the railroad intends to sell to third parties. It also failed to properly inform and/or supervise its agents and attorneys with respect to communications with the LLCs and with the City and others in respect to the true status of the properties sold to the LLCs.

144. Conrail negligently maintained its internal records so as to allow the Embankment lots to be reclassified as spur tracks, when in fact the Embankment was part of a line subject to STB abandonment jurisdiction.

145. Conrail negligently failed to pursue STB abandonment prior to selling the Embankment to the LLCs.

146. A reasonable business enterprise, engaged in the business of railroad ownership and operation should have been aware that the Embankment would be considered subject to federal regulations and STB abandonment authority.

147. As a result of Conrail's negligence, the LLCs have received title to property with a cloud on title arising from the regulatory scheme.

148. The LLCs have suffered damages, including lost opportunities and costs of defending title, as a result of Conrail's negligence.

WHEREFORE, the LLCs demand judgment as follows:

- A. Damages for the negligent misrepresentation of the status of the Embankment;
- B. Attorneys' fees and cost of suit; and

C. Such other relief as the Court considers equitable and just.

DEMAND FOR JURY TRIAL

The LLCs hereby demand a jury trial on all issues so triable

Dated: October 4, 2012

Respectfully submitted,

/s/ Daniel E. Horgan

Daniel E. Horgan

Bar No. 239772

Waters, McPherson, McNeill, P.C.

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Manila Avenue, LLC, 280 Erie street, LLC, 317

Jersey Avenue, LLC, 354 Coles Street, LLC, 389

Monmouth Street, LLC, 415 Brunswick Street, LLC

and 446 Newark Avenue, LLC

LIST OF EXHIBITS

Exhibit 1: July 26, 1975 United States Railway Association Final System Plan (excerpted)

Exhibit 2: March 31, 1976 Deed from Fairfax Leary, Trustee, to Consolidated Rail Corporation

Exhibit 3: Deeds (eight total) from Consolidated Rail Corporation, to LLCs, dated July 12, 2005

Exhibit 4: Pennsylvania Railroad Track Charts

Exhibit 5: Pictures of P.R.R. Harsimus looking west to receiving yard - main stem (embankment) from the book Jersey City's Hudson River Waterfront, Book One: The Pennsylvania Railroad 1941-1964 by Charles Caldes, Journal Square Publishing 2009

Exhibit 6: Declaration of David B. Dixon of September 6, 2012, with attachments

Exhibit 7: 1985 survey entitled "Map of the Property of Waterfront Associates" showing, in part riparian boundaries

Exhibit 8: 1988 Major Subdivision/Boundary survey by Lange & Surveying and Mapping

Exhibit 9: Conrail's Notices of Exemption Docket No. AB 167 Sub No. 1189X dated January 6, 2009