

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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DOCKET NO. FD 36710

**RICHMOND WATERFRONT INDUSTRIAL PARK, LLC – PETITION FOR
DECLARATORY ORDER**

PETITION FOR DECLARATORY ORDER

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Dated: July 28, 2023

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Richmond Waterfront Industrial Park, LLC (“Petitioner”), a non-carrier landowner with property located in Philadelphia, Pennsylvania, hereby submits this Petition for Declaratory Order (“Petition”) requesting a declaration by the Surface Transportation Board (“STB” or “Board”) that a purported railroad easement traversing Petitioner’s property (the “Easement”) is not, and has never been, subject to the Board’s jurisdiction. As demonstrated hereinbelow, the Easement is neither a line of railroad imbued with a common carrier obligation subject to 49 U.S.C. §10901 and §10903, nor an excepted “side track” governed by 49 U.S.C. §10906. Rather, prior to all use of the track located within the Easement ceasing approximately 22 years ago, it was constructed and used outside of the national rail system and therefore subject to state and local laws.

This Petition was prompted by a December 6, 2022 ruling by the Court of Common Pleas in Philadelphia, Pennsylvania (“Lower Court”) at Civil Action No. 2022-02872 (“Lower Court Order”) that it did not have subject matter jurisdiction to determine the legal question of whether Petitioner could claim the Easement and any associated rights of the Pennsylvania Belt Line Railroad Company (“PBL”) concerning the Easement can be extinguished by principles of adverse

possession or under any other principles under Pennsylvania law.¹ Specifically, the Lower Court ruled that “Plaintiff must bring the matter to the federal Safety [sic] Transportation Board (“STB”) pursuant to the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. Sec, 10501 *et seq.* The Act completely preempts state action when it comes to determining if a railroad has abandoned its tracks.”²

However, the Lower Court’s dismissal of Petitioner’s complaint was premised upon the erroneous legal conclusion that the mere existence of railroad tracks on the Property, without more, meant they were subject to the Board’s jurisdiction. Moreover, as explained below, while PBL asserted – without presenting any supporting facts – that the Easement and tracks were lines of railroad subject to §10901 which could only be abandoned pursuant to §10903, the Lower Court compounded its initial error by inexplicably classifying the tracks as “excepted tracks” under §10906, which tracks are statutorily excepted from the abandonment rules under §10903.³

On January 5, 2023 Petitioner appealed the Lower Court Order, and that appeal resides with the Superior Court of Pennsylvania at Case No. 1172 EDA 2023. After the appeal was filed, the lower court issued an Opinion expanding on its initial ruling. Despite acknowledging that “PBL has not asserted any rights to the use of the tracks or the right-of-way [and] [f]urther, PBL has not disclosed plans to provide railroad, rail carrier, or rail transportation services even if the right-of-way was fully intact and accessible,” the Lower Court opined that “if an action concerns the abandonment of railroad tracks” then the Board has exclusive jurisdiction over the matter.⁴ The Lower Court then erroneously stated that the Board’s abandonment rules would apply to

¹ A copy of the Lower Court Order is attached as Exhibit A to this Petition.

² Lower Court Order at 1 (citations omitted).

³ *Id.* at 1-2.

⁴ Court of Common Pleas Opinion, No. 02872, 41 CD 2023, dated March 1, 2023 (attached as Exhibit B).

determine the status of the tracks it concluded in its Order were “side tracks.”⁵

On July 21, 2024, Petitioner filed an Application Pursuant to Rule 123 for Stay (“Stay Application”) with the Superior Court asking it to stay further action on Petitioner’s appeal⁶ so that Petitioner could ask this Board to issue a declaratory order concerning the jurisdictional status of the Easement and tracks, or, in the alternative, to issue guidance to the Superior Court on the jurisdictional question that is before it, both for judicial economy and efficiency, but also in order to avoid the establishment of inconsistent precedent.

I. BACKGROUND

A. Identity and Interest of Petitioner

Petitioner is a Pennsylvania limited liability company engaged in the business of industrial leasing.⁷ In 1998 Petitioner acquired⁸ three parcels of land from the Rohm and Haas Company – a large chemical manufacturing company that is now gone - which total 51.6 acres located at 5000-B Richmond St. a/k/a 2950 Kirkbride Street a/k/a 4601 and 4701 Bath Street, City of Philadelphia, Pennsylvania (“Property”). Maps of the Property showing the location of the Easement are attached as Exhibit C to this Petition. The Property is in an area along the Delaware River waterfront in Philadelphia that has a long history of railroad operations dating back to the 1800s. Indeed, the former Kensington and Tacony Railroad right-of-way also ran through the Property from 1884 until it was formally abandoned by Conrail in the mid-1980s.⁹ That former right-of-way is not at issue in

⁵ *Id.* at 4-5.

⁶ Petitioner’s opening brief in that proceeding is currently due August 15, 2023.

⁷ *See* the attached Verified Statement of David Wolf, President of Wolf Investments, the owner of Richmond Waterfront Industrial Park, LLC (“Wolf V.S.”) at 1.

⁸ By the terms of the agreement the purchaser of the property was Wolf Investments “or its nominee,” which was Richmond Waterfront Industrial Park, LLC.

⁹ https://en.wikipedia.org/wiki/Connecting_Railway.

either the Lower Court proceeding or this proceeding. As explained in more detail below, the Easement crosses two of the three parcels making up the Property, and as explained below, was utilized for contract or private rail operations in the 1980s and 1990's, and for several years by Rohm and Haas after Petitioner acquired the Property.¹⁰ However, all railroad operations on the Property ceased soon after Petitioner acquired the Property in 1998.¹¹ The continued presence of the Easement and PBL's claim that it is subject to the Board's jurisdiction and cannot be removed absent a formal abandonment proceeding under 49 U.S.C. §10903, has thwarted Petitioner's efforts to develop the Property for industrial and commercial use.

B. The Philadelphia Belt Line Railroad

PBL is "a quasi-public entity" originally chartered on May 10, 1889, "to construct and operate a terminal railroad in the Port of Philadelphia and to maintain competitive rail services in the port and adjacent areas."¹² At least some of the tracks making up PBL's system, which on information and belief¹³ were constructed with funds from the operating common carrier railroads in Philadelphia in exchange for the rights to the exclusive use of the tracks.¹⁴ Historically, PBL

¹⁰ Wolf V.S. at 4.

¹¹ *Id.*

¹² Finance Docket No. 32802, *Philadelphia Belt Line Railroad Company v. Consolidated Rail Corp., CP Rail System, and CSX Transportation, Inc.* (STB served July 2, 1996)("Conrail") at 1.

¹³ The background of this dispute goes back over 130 years and involves numerous complicated facts and some gaps in the historical timeline of the Easement's creation and the construction, operation, and then cessation of use of the tracks located within it. In this Petition the Petitioner provides the Board with information it has gleaned from research into the history of the PBL, rail operations in Philadelphia, publicly available agreements, and anecdotal evidence. Petitioner believes that this Petition should provide the Board with sufficient information to decide the jurisdictional question that has been presented. However, additional facts relevant to the dispute reside in PBL's possession and control, and to that end, Petitioner requests the Board consider to adopting a procedural schedule that includes a 90-day period for discovery.

¹⁴ Docket No. FD 29517, *Petition of the Philadelphia Belt Line Railroad Company Under 49 U.S.C. 10505 for Exemption of Proposed Transaction from Provisions of 49 U.S.C. 10901*, dated

has owned no railcars or locomotives and has no operating employees or train crews. Pursuant to an 1890 ordinance passed by the Philadelphia City Council and approved by the Mayor of Philadelphia,¹⁵ the tracks making up the PBL system – which reached approximately 16 miles at one point - were made available to the interstate railroads then-operating in the Philadelphia area. These railroads had such access via private arrangements that entailed them paying PBL a fee and contractually committing to adhere to a “Belt Line Principle,” which “mandate[d] equal, non-discriminatory access over the PBL line to all rail carriers” to advance commerce in Philadelphia.¹⁶

While referred to as a Class III rail carrier,¹⁷ on information and belief, PBL has never directly provided any rail service to any rail shipper using the tracks in the Easement or any of its other tracks. For example, *Conrail* involved a complaint by PBL against Conrail that the Board dismissed primarily because it determined PBL was not a common carrier over tracks that included the Easement tracks. In doing so, the Board observed, that “although a rail carrier, PBL never operated the Belt Line. Instead, PBL, from its formation, has made the line and related facilities available, for a charge and subject to the Belt Line Principle. . .”¹⁸ to other railroads, pursuant to private contracts such as haulage agreements or other arrangements that were outside the Board’s jurisdiction.¹⁹

November 18, 1980 at 2 (describing how the Reading Railroad, which originally operated over the Belt Line North tracks in the vicinity of the Property, paid to construct tracks in exchange for exclusive use of the tracks).

¹⁵ See *Id.* at 1, where PBL stated its common stock was held by the Commercial Exchange of Philadelphia and the Philadelphia Chamber of Commerce.

¹⁶ *Id.* See also, page 21, *infra*.

¹⁷ *Conrail* at 1.

¹⁸ *Id.* at 2-3.

¹⁹ See Docket No. FD 35345, *Philadelphia Belt Line Railroad Company – Petition for Declaratory Order* (Served August 4, 2010)(“PBL Declaratory Order”) at 2 (describing how PBL entered into haulage agreements with other carriers to move freight on PBL’s behalf, and explaining how “Board approval is not needed for a haulage agreement as it does not implicate either the control of a line of railroad, the transfer of a common carrier obligation, or the operation

Petitioner did not locate any examples of any instances where the Interstate Commerce Commission (“ICC”) or the Board determined that a railroad track or a right-of-way easement owned by PBL was subject to the Board’s jurisdiction. On the contrary, in addition to the *Conrail* case, *supra*, in *PBL Declaratory Order* the Board rejected a later attempt by PBL to claim a portion of its easement authorized by the 1890 Ordinance was a line of railroad subject to the Board’s jurisdiction.²⁰ Nor was Petitioner successful in locating any instances where another rail carrier sought authority from the ICC or the Board to operate over tracks controlled by PBL, including the Easement tracks, despite the fact that PBL was created by the City of Philadelphia to let other railroads operate over its tracks, and they did conduct such operations. Finally, although rail service over portions of PBL’s original network of tracks constructed after adoption of the 1890 Ordinance have ceased, and the tracks have fallen into disrepair, been removed, or in some cases have been covered by roads, parking areas, and other development, it does not appear that PBL or any other rail carrier has sought formal abandonment or discontinuance authority from this Board prior to the tracks being removed or taken out of service.

C. The Easement and its Prior History

The Easement is an approximately 2,716-foot long, 33-foot wide right-of-way that, on information and belief, is an isolated remnant of PBL’s system referred to as the Belt Line North. In *Conrail* the Belt Line North was described by PBL and the Board as running for approximately three miles from Bridge Street (which is located near the northern end of the Property)²¹ to

of one carrier over the tracks of another.”)

²⁰ *Id.* at 3 (“(1) PBL has not demonstrated that it ever perfected the right to operate as a common carrier over the PBL right-of-way, (2) PBL has neither demonstrated that it was a common carrier over the Penn Street Lines via trackage rights, a lease, or otherwise, nor established that PBL’s status as to those lines is related to the PBL right-of-way; and (3) 49 U.S.C. 10903 does not apply to the PBL right-of-way.”).

²¹ Bridge Street is shown on both maps in Exhibit C.

Allegheny Avenue in Philadelphia, where it connected to tracks owned by Conrail's predecessors.²² The Easement contains the segment of the former Belt Line North, as described in *Conrail*, extending from the northern end of the Property near Bridge Street to the southern boundary of the Property at Buckius Street, which is shown on the maps in Exhibit C.

Petitioner does not know what entity or entities actually constructed the tracks within the Easement. PBL asserted in the Lower Court that “the 1890 Ordinance granted PBL the right to build and operate tracks from Allegheny Avenue north along the Delaware River, including the tracks on the property currently owned by [Petitioner], and extending north into the adjoining property retained by Rohm and Haas (now Dow).”²³ However, it is disputed whether the 1890 Ordinance actually stated this, and in any event, PBL did not also represent to the Lower Court that it constructed the tracks or paid for their construction. As stated earlier, PBL itself had described how the Reading Railroad paid for the construction of PBL's tracks in exchange for exclusive contract rights to use the tracks subject to the Belt Line Principle.

More significantly, it is not clear that all, or *any*, of the tracks within the Easement were constructed pursuant to authority of the 1890 Ordinance as PBL has asserted. As discussed in *Conrail*, after passage of the Regional Rail Reorganization Act of 1973,²⁴ by which Conrail assumed the Philadelphia operations of the bankrupt Reading and Penn Central railroads, Conrail provided service to shippers that were located along the Belt Line North tracks pursuant to the

²² PBL Complaint at 4; *Conrail* at 2. The Belt Line North was described by the STB in *Conrail* in 1996 as follows: “PBL now owns, controls, or has trackage rights over approximately 16.3 miles of rail line and right-of-way along Delaware Avenue on the Delaware River waterfront in downtown Philadelphia. The line is separated into a northern and southern segment. The Belt Line North extends approximately three miles from Bridge Street in the north through the site of Conrail's former Port Richmond Yard to Allegheny Avenue in the south.”

²³ See Exhibit D, Defendants Preliminary Objections to Plaintiff's Complaint (“Preliminary Objections”) page 2, paragraph 6.

²⁴ Pub. L. No. 93-236.

terms of an exclusive 10-year lease arrangement entered into on March 1, 1987 (“1987 Lease”).²⁵ Exhibit A to the 1987 Lease specifies that it covered PBL property and tracks, “within the Belt Line North right-of-way . . . commencing at Engineering Station 0+0 at the South House Line of Allegheny Avenue . . . to its intersection at Buckius Street at Engineering Station 110+00, that being the point of delivery of traffic to the Rohm and Haas Plant.”²⁶ Mr. Wolf explains that there has always been a double locked gate at that location.²⁷ From that point north, the lease covered *property* controlled by PBL, but not the *tracks*, which were subject to three lease agreements between PBL and the Rohm and Haas Company, “with the Belt Line’s interest in these agreements being assigned to Conrail.”²⁸ Consequently, the Belt Line North described in *Conrail* appears to have been comprised of tracks constructed pursuant to the 1890 Ordinance that ended at Engineering Station 110+00 (Buckius Street), and private tracks constructed north of that point pursuant to the three leases with Rohm and Haas. All of the latter track was within the Easement.

Further dispelling the notion that the tracks within the Easement were constructed by authority of the 1890 Ordinance was that there is evidence Conrail did not use the tracks to serve Rohm and Haas, the only user of rail service north of Buckius Street.²⁹ Rather, for the short period of time the tracks were used for rail service after RWIP acquired the Property in 1998, the tracks north of the double gate at Buckius Street running to Bridge Street were used by Rohm and Haas to shuttle tank cars to and from Buckius Street using its own locomotives and employees.³⁰ Specifically, Rohm and Hass would transport tank cars from its facility north of the Property to

²⁵ *Conrail* at 3. A copy of the lease is attached as Exhibit E.

²⁶ 1987 Lease at page 17, Exhibit A.

²⁷ Wolf V.S. at 2.

²⁸ 1987 Lease at page 17, Exhibit A. Petitioner was unable to locate copies of the three leases, which are or should be in the possession and control of PBL.

²⁹ Wolf V.S. at 2.

³⁰ *Id.*

the double gate (on information and belief Engineering Station 100+0) for them to be picked up by Conrail and taken south.³¹ Conversely, Conrail would deliver tank cars to the gate at Buckius Street and leave them for Rohm and Haas to pick up with its locomotive and employees and take back to the plant.³²

In *Conrail*, the Board explained how PBL itself had never provided any service to any of the other rail shippers located on the remainder of the Belt Line North, which were located south of Buckius Street.³³ Instead, any service was originally provided by the Reading Railroad through private agreements with PBL,³⁴ and then by Conrail through the 1987 Lease. There is no evidence that Conrail ever sought authority from the ICC to conduct or discontinue common carrier operations over any of the Belt Line North in conjunction with the 1987 Lease, and the STB in *Conrail* gave no indication that Conrail's arrangement with PBL was anything other than a private contractual arrangement that did not require Board authorization.³⁵

The South Belt Line extended from a point south of the former Port Richmond Yard to interchanges between Conrail and other railroads.³⁶ As discussed in *Conrail*, the connection between the Belt Line North and Belt Line South in the vicinity of the former Port Richmond Yard was severed in the late 1980s due to the transformation of Delaware Avenue from a railroad corridor to a tourist and pedestrian development. This transformation entailed in part the removal

³¹ *Id.*

³² *Id.*

³³ The *Conrail* decision noted that, in 1995-96, there were 10 shippers on the Belt Line North track, totaling 2,894 carloads annually, all served solely by Conrail pursuant to the terms of its 1987 Lease. *Conrail* at 2. On information and belief, the only shipper north of Buckius Street was Rohm and Haas. Wolf V.S. at 2.

³⁴ *Conrail* at 3. There is no evidence that the Reading Railroad ever sought authority from the Interstate Commerce Commission to operate over the Belt Line North.

³⁵ *Id.* at 3, 7.

³⁶ *Id.* at 3.

of track near the former Port Richmond Yard by the City of Philadelphia and Conrail. There is no record of Conrail or PBL seeking abandonment or discontinuance authority in conjunction with this removal.³⁷ As described by PBL in *Conrail*, after the track was removed the Belt Line North became “an isolated rail line between Bridge Street and Allegheny Avenue,”³⁸ and the only remaining connection between the Belt Line South and the Belt Line North was Conrail’s former Port Richmond Yard industrial track. According to the STB’s summary in *Conrail*, at that time the traffic from Belt Line North shippers was transported by Conrail “Milepost 10.4 of its Richmond Industrial Track [at the former Port Richmond Yard] to effect the interchange with CSX and CP Rail in South Philadelphia.”³⁹

PBL’s ill-fated complaint in *Conrail* sought an order from the STB pursuant to 49 U.S.C. §11102 and the agency’s competitive access regulations directing Conrail to permit PBL or its designee to use Conrail’s connecting and industrial tracks around the Port Richmond Yard to connect the Belt Line North to the Belt Line South. The Board dismissed PBL’s complaint in *Conrail* primarily because it declined to recognize PBL as a rail common carrier. Nor did it acknowledge or indicate that any of the tracks of the Belt Line North as described in that decision were common carrier lines of railroad. The STB further concluded that because PBL had never operated the Belt Line it had suffered no harm, stating:

Moreover, PBL does not operate, and never has operated the Belt Line that it now seeks to have ‘reconnected,’ and PBL has not shown any realistic threat or injury to the other carriers that interchange traffic on the Belt Line South. It is possible that PBL may suffer future harm or injury, if it were to become the operator of the Belt Line North,⁴⁰ or if it were to enter into a different lease when its current lease [with

³⁷ See, *Conrail* at 2, 5 (Discussion of track removal by the City and Conrail and PBL’s failure to formally object to it).

³⁸ *Conrail*, Complaint of Pennsylvania Belt Line Railroad Company at 4.

³⁹ *Conrail* at 4.

⁴⁰ This point in the *Conrail* decision was significant because 15 years earlier PBL had obtained exemption authority to operate its lines as a common carrier in Finance Docket No 29517,

Conrail] expires, but at this time the complaint expresses nothing more than a mere desire for something that would be convenient or desirable.⁴¹

Upon information and belief, the 1987 Lease was extended another 10 years from 1997 to 2007, at which time it changed to a month-to-month arrangement.⁴² At no time did Conrail seek operating authority from the Board in conjunction with the lease extensions. Finally, in 2014, Conrail and PBL replaced their month-to-month arrangement with an Operating Lease Agreement with a term that runs to December 2028 (“2014 Lease”).⁴³ Conrail did not accompany this agreement with a request to the Board for authority to conduct common carrier operations over PBL’s tracks. This was consistent with Section 12 of the 2014 Lease, which states “it is the understanding of the parties that *any Conrail operations under this Agreement do not require approval by the STB nor will any STB approvals be sought for Conrail to operate pursuant to this*

Philadelphia Belt Line Railroad Company – Operation in Philadelphia – Exemption Under 49 U.S.C. 10505 from 49 U.S.C. 10901 (ICC served April 10, 1981). See footnotes 5 and 6, *supra*. The ICC initially placed a one-year time limit on the authority for PBL to consummate certain unnamed transactions (*e.g.* to May 10, 1982), which the ICC later extended to May 10, 1986. See Finance Docket No 29517, *Philadelphia Belt Line Railroad Company – Operation in Philadelphia – Exemption Under 49 U.S.C. 10505 from 49 U.S.C. 10901* (ICC served May 28, 1986). In the latter decision, the ICC granted an “indefinite” extension for PBL to “consider different options for providing service over its lines,” including “leasing its line to Conrail.” The ICC added “should PBL decide to hire another party to provide service, that party would be required to obtain our approval under or exemption from 49 U.S.C. 10901.” However, PBL never perfected the rights under the 1986 decision. See *PBL Declaratory Order* at 3-4.

The *Conrail* decision demonstrates unambiguously that (1) PBL never perfected the authority to operate as a common carrier granted to it, and (2) the 1987 Lease to Conrail was considered by both parties to be a private arrangement over non-jurisdictional track, because Conrail did not seek approval from the Board to provide operations over the Belt Line North pursuant to its 1987 Lease, which was entered into one year after the 1986 decision in Docket No. FD 29517.

⁴¹ *Conrail* at 7.

⁴² Exhibit F. As stated previously, soon after 1998 all rail operations ceased on the Easement track, but presumably the lease agreement covered other Belt Line tracks that were still in operation. Nevertheless, PBL and Conrail used the same Exhibit A from the 1987 Lease for each subsequent lease, including the 2014 Lease.

⁴³ *Id.*

Agreement. Moreover, in no event shall Conrail seek approval of this Agreement with the STB without first obtaining written consent of the Belt Line.” (emphasis supplied).

Finally, Conrail did not formally seek authority from the Board to discontinue operations over the Easement tracks when service ceased over them soon after Petitioner acquired the Property. This is consistent with the tracks not being subject to the Board’s jurisdiction, and also consistent with Mr. Wolf’s observations beginning in 1998 that Rohm and Haas operated the tracks on its own behalf. Over the past 22 years or more, the tracks located on the Property have fallen into disrepair and/or have been covered up, and the only maintenance PBL has performed is to occasionally spray to control weeds.⁴⁴ The tracks from Buckius Street running south to Allegheny have also been unused for many years and have also fallen into disrepair.

D. The Lower Court Ruling

In the Lower Court, PBL argued that state law remedies were unavailable to Petitioner because the Easement was a railroad right-of-way that was imbued with a common carrier obligation that could “*only*” be extinguished through formal abandonment proceedings pursuant to 49 U.S.C. §10903.⁴⁵ PBL made these claims despite not claiming to have constructed the track, and never conducting common carrier rail operations for any rail shipper over the Easement tracks, and despite the fact no other railroad or the Board in *Conrail* seemed to consider the Easement

⁴⁴ Wolf V.S. at 3.

⁴⁵ Preliminary Objections, paragraph 4 (emphasis in original), *see also*, Brief in Support of Preliminary Objections (Exhibit G to this Petition) at 5 (“However, railroad line [sic] may only be abandoned through an express statutory process set forth in the Interstate Commerce Commission Termination Act of 1995(“ICCTA”), 49 U.S.C. §§ 10101 *et seq.* By virtue of its ownership of lines of railroad, PBL is a common carrier engaged in interstate commerce subject to the jurisdiction of the STB, and its railroad-related rights and obligations are subject to the exclusive jurisdiction of the STB. A common carrier’s right-of-way, including the right-of-way that crosses the RWIP property, may be abandoned *only* upon the prior authorization of the STB pursuant to 49 USC § 10903”)(emphasis in original).

tracks – or any PBL’s tracks - to be common carrier lines of railroad. PBL’s objections to Petitioner’s complaint were replete with unsupported vague allegations that the Easement is a “rail line,” a “line of railroad,” and a “currently inactive” line of railroad subject to ICCTA, and that PBL had a “freight common carrier obligation” over this segment of track that would require authority from the STB to abandon.⁴⁶ In its Order and subsequent Opinion, the Lower Court, without taking any evidence concerning the historical factual background summarized above or the legal conclusions asserted by PBL, essentially concluded that the mere physical presence of “railroad tracks” on Petitioner’s property meant they were subject to the Board’s jurisdiction.⁴⁷

Additionally, in none of its filings before the Lower Court did PBL claim that the Easement and the tracks on it were other than a line of railroad imbued with a common carrier obligation, which PBL supposedly holds. PBL never claimed that the tracks within the Easement are a “spur, industrial, team, switching or side tracks, or facilities,” under 49 U.S.C. §10906, which are tracks excepted from the licensing authority of the Board in 49 U.S.C §10901 or §10903. Indeed, to raise this claim as a defense would have undermined PBL’s claim that the Easement and alleged associated right could “only” be extinguished through a formal abandonment proceeding. After all, under §10906, the “Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks,” and such tracks are therefore *excepted* from the Board’s abandonment regulations.⁴⁸

⁴⁶ See Exhibit E at paragraphs 9, 21, 29,

⁴⁷ Opinion at 3.

⁴⁸ STB Docket No. 35468, *Pinelawn Cemetery – Petition for Declaratory Order* (Served April 21, 2015) slip op. at 11, note 31. In that case, the STB explained that a determination of whether a carrier has abandoned §10906 tracks is within the exclusive purview of the Board, but this determination must be pursued pursuant to a petition for declaratory order, not a formal abandonment proceeding.

Despite PBL's objections being based solely on its unsupported assertions that the Easement is a line of railroad, the Lower Court, without any explanation, concluded the action before it concerned the operation or abandonment of "side tracks,"⁴⁹ and that "the STB has exclusive jurisdiction over: (2) the construction, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state."⁵⁰ While, as the Board explained in *Pinelawn*, it also has exclusive jurisdiction over the disposition of excepted tracks, the Lower Court was apparently either unaware of §10906 or did not understand the critical distinctions between lines of railroad and excepted tracks in relation the application of §10903.⁵¹ Be that as it may, for all the reasons set forth in this Petition, the Easement is neither a line of railroad under §10901 nor one of the categories of "excepted" track under §10906. Accordingly, the Board should declare that the Easement and tracks within it are not subject to the Board's jurisdiction in either respect and that any disputes over the continued presence of the tracks and the Easement are to be resolved pursuant to state and local law.

II. ARGUMENT

A. The Applicable Standards

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has discretion to issue a declaratory order to remove uncertainty or terminate a controversy.⁵² In questions involving the

⁴⁹ Order at 1.

⁵⁰ *Id* at 1-2, quoting *Cedar Rapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F. Supp. 1005, 1012 (N.D. Iowa 2003).

⁵¹ This is evidenced by the Opinion, which, after the Order ruled the tracks were excepted "side tracks," stated that "abandonment" of those tracks must be pursued under §10903, which is wrong. Opinion at 4.

⁵² See, *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

interplay between state and federal law and preemption under 49 U.S.C. §10501(b), the courts and the Board have concurrent jurisdiction.⁵³ However, the Board has broad discretion to issue a declaratory order, especially if issues are formally referred to the Board by a court, or if the court otherwise seeks the Board’s assistance.⁵⁴ Here, the Lower Court specifically stated that the issue of whether the Easement may be terminated “must” be brought to this Board for resolution, which Petitioner has now done.⁵⁵ Moreover, Petitioner has formally requested the Superior Court of Pennsylvania to stay the appeal there and allow this Board to review the relevant facts and declare the legal status of the Easement by way of this Petition. The Superior Court granting of Petitioner’s application would further justify the Board granting this Petition and issue the requested declaratory order.

Even if the Board is hesitant to exercise its discretionary authority to issue a declaratory order because the Lower Court addressed the preemption issue,⁵⁶ albeit clumsily, this case is still particularly well suited for the Board to provide much-needed guidance to the Superior Court and to the parties to assist them in resolving this dispute on appeal and reaching the correct result based on the relevant facts and legal rules.⁵⁷ In past cases the Board has provided such guidance when a lower court has ruled on the jurisdictional issue and the matter is on appeal.⁵⁸ The Board has also exercised its discretion to provide guidance in situations where the court has not sought the

⁵³ Docket No. FD 36167, *Jimmy Lee Waneck and Starr Swearingen Waneck, et al – Petition for Declaratory Order* (Served May 25, 2018)(*Waneck I*).

⁵⁴ *Id.* at 3.

⁵⁵ Lower Court Order at 1.

⁵⁶ Docket No. FD 36167, *Jimmy Lee Waneck and Starr Swearingen Waneck, et al – Petition for Declaratory Order* (Served October 31, 2018)(*Waneck II*) at 4.

⁵⁷ *Waneck I* at 3.

⁵⁸ *Waneck II* at 4.

Board's input on its own motion,⁵⁹ and even in cases where a court has denied a party's motion to stay an appeal and to refer the jurisdictional question to the Board.⁶⁰

In this case, although the jurisdictional status of the Easement and track is dependent on complex facts and events going back over 130 years involving a unique, city run terminal railroad operation, the Lower Court engaged in no review of the facts or events to support its ruling. Moreover, the Lower Court further clouded the issue by concluding the tracks had a specific legal status that PBL did not even assert, and which by law are exempt from the very rules under §10903 that PBL argued "only" applied, and the lower court agreed. Under such circumstances this matter is ideal for the Board to lend its expertise and provide much needed guidance to the Superior Court.⁶¹

B. The Easement is not a Line of Railroad Subject to the Board's Jurisdiction

The history of the Belt Line North and the Easement at issue clearly demonstrate that the Easement is not, and has never been, a line of railroad subject to the Board's jurisdiction. On the contrary, PBL's tracks were constructed pursuant to local laws and ordinances and used pursuant to private agreements which all had to be subject to the "Belt Line Principle." Carriers other than PBL operated its tracks pursuant to private agreements outside of first, the ICC's, and then the Board's jurisdiction. Consequently, PBL's tracks were and are not part of the national network, and "section 10501(b) preemption does not extend to operations that are not part of the national

⁵⁹ *Waneck I* at 3.

⁶⁰ Docket No. 34052, *Green Mountain R.R.—Petition for Decl. Order*, (STB served May 28, 2002)(where Board provided guidance to court despite the court denying a request for stay and referral).

⁶¹ *Waneck II* at 3-5.

rail network.”⁶² PBL, while technically a Class III carrier, has never conducted any operations over its tracks, and so it had no common carrier operating rights over the tracks within the Easement that were grandfathered or later perfected after passage of the Transportation Act of 1920.⁶³ Nor is there any evidence PBL sought either confirmation that any tracks constructed prior to that Act were subject to the Board’s jurisdiction or authority from the ICC to construct the tracks after passage of that Act.

Moreover, after it sought and received exemption authority beginning in 1981 to operate as a common carrier over the tracks in its system, PBL never perfected those rights by taking actions to be an operating carrier.⁶⁴ Instead, it chose to permit Conrail to use the Belt Line North tracks and the tracks between Buckius Street and Bridge Street pursuant to the private agreements **which both parties intended and agreed would not be submitted to the STB for approval.**⁶⁵

As stated above, the exclusive leases with Conrail starting in 1987 expressly excluded the tracks on the Property north of Buckius Street from the tracks covered by the lease terms, subjecting that track instead to the terms of private lease agreements between Rohm and Haas and PBL, which PBL assigned to Conrail. This raises legitimate questions about whether the tracks within the Easement were even constructed under authority of the 1890 Ordinance, but instead were a private industry track to connect PBL’s tracks to Rohm and Haas’s facility. This conclusion is consistent with the facts that (1) the tracks were constructed on Rohm and Haas’s

⁶² STB Finance Docket No. 34662, *CSX Transportation, Inc. – Petition for Declaratory Order* (served March 14, 2005), at 9.

⁶³ See *PBL Declaratory Order* at 4 (explaining process by which carriers initiating railroad operations, line extensions or line construction after 90 days beyond the Act’s effective date had to obtain prior authorization from the ICC, and that some arrangements that preceded the Act might be grandfathered, but that PBL met none of the criteria).

⁶⁴ *Id.* at 4.

⁶⁵ 2014 Lease, Section 12. See pages 12-13, *supra*.

property which RWIP later acquired; (2) Rohm and Haas was the only shipper north of Buckius Street; and (3) Rohm and Haas used its own locomotives and employees to deliver tank cars to, and pick up tank cars from, Conrail at the double gate at Buckius Street, an arrangement that predated RWIP's purchase of the Property and existed until use of the Easement tracks for rail service ceased shortly after Petitioner acquired the Property in 1998.

Finally, in addition to the foregoing, the "Belt Line Principle" on which Belt Line was founded and the prerequisite for any operations by rail carriers on the Belt Line's tracks, also refutes the notion that the Easement tracks were or are common carrier tracks. As stated in the 2014 Lease, that principle:

is defined as the requirement that the Belt Line be operated (i) to benefit the trade and commerce of the City of Philadelphia, (ii) to provide full and equal facilities upon equal terms for all railroads which now or may hereafter enter the City to use the Belt Line's railroad, without discrimination or favoritism between them and (iii), to assure that the Belt Line and its railroad are free from the exclusive control of any of the railroad companies that use it and will be controlled in the interest of trade and commerce of the City of Philadelphia."⁶⁶

Such a condition, which contractually obligates interstate rail carriers to place the commercial interests of Philadelphia businesses over the needs of the carrier's other customers – many of whom are no doubt located outside of Philadelphia - is contrary to the statutory obligations of rail carriers under 49 U.S.C. §11101(a), to provide transportation or service to shippers on reasonable request. As such, while the Belt Line Principle in a contract would arguably be preempted if the service was by a common carrier over a line subject to the Board's jurisdiction,⁶⁷ it is not necessarily inconsistent with §11101(a) if the carrier is conducting contract service on tracks that

⁶⁶ 2014 Lease at 8-9 (Section 6.A.(7)).

⁶⁷ See, e.g., STB Finance Docket No. 33388, *CSX Corp, et al – Control – Conrail, Inc. et al*, 3 S.T.B. 196, 307 (1998)(Where the STB did not concede that the "Belt Line Principle" had "any valid contractual basis.")

are not subject to the Board's jurisdiction, which were the tracks constructed pursuant to the 1890 Ordinance.

For all the forgoing reasons, the Easement and the tracks within it are not a line of railroad subject to the Board's jurisdiction, and PBL does not have a common carrier obligation attached to the track that must be abandoned pursuant to §10903.

C. The Easement is not a "Side Track" under 49 U.S.C. §10906

As noted above, PBL never argued in the Lower Court that the tracks located on the Property were excepted from the licensing requirements of §10901 and §10903. In fact, PBL argued the exact opposite. Nevertheless, the Lower Court rested its dismissal of PBL's complaint on a finding that the tracks are excepted "side tracks." However, neither the Easement nor the remaining tracks on it are excepted tracks under §10906. First, there is the threshold question of whether the tracks north of Buckius Street were constructed pursuant to the 1890 Ordinance and a part of PBL's system, or instead were private tracks constructed to be used only by the Rohm and Haas facility. The latter seems to be the case. Second, even if they were constructed pursuant to the 1890 Ordinance, the tracks on the Property are not connected to any common carrier lines of railroad owned by PBL.⁶⁸ There is no evidence that the approximately 16 miles of tracks constructed pursuant to PBL's city charter and the 1890 Ordinance were constructed pursuant to, or later made subject to, the Board's jurisdiction. PBL has also never provided common carrier service to any shipper over any of its tracks. Consequently, the tracks within the Easement cannot

⁶⁸ See, Docket No. FD 35819, *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order* (Served August 30, 2016)(Where track was found to be §10906 track because it extended the existing §10901 track owned and operated by carrier).

be considered to have been constructed as an extension of an existing track system licensed by the Board, and so therefore cannot be tracks covered by §10906.⁶⁹

Because the Easement and the tracks were never subject to the jurisdiction of the ICC or the STB, state and local laws entirely govern the disposition of the tracks and the Easement.

III. CONCLUSION

In conclusion, this proceeding presents the Board with issues that are tailormade for the Board's specialized expertise to help resolve. The Board should therefore exercise its discretion and issue an order declaring that the tracks and Easement transversing Petitioner's Property are neither a line of railroad subject to §10901, nor a "side track" subject to §10906, and that the Board therefore has no jurisdiction over the Easement and the parties' dispute. At a minimum, if the Board declines to issue the requested declaratory order, it should provide much needed guidance to the Superior Court of Pennsylvania on the facts and applicable legal principles and policies to help it render a decision on the appeal of the Lower Court Ruling that is consistent with applicable

⁶⁹ *Id.* at 4.

law and precedent. Finally, given the complex factual background of this case, the Board should consider adopting a procedural schedule that includes a modest 90-day discovery period.

Respectfully submitted,

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*Counsel for Richmond Waterfront Industrial
Park, LLC*

Dated: July 28, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36710

**RICHMOND WATERFRONT INDUSTRIAL PARK, LLC – PETITION FOR
DECLARATORY ORDER**

VERIFIED STATEMENT OF DAVID WOLF

1. My name is David Wolf. I am the President of Wolf Investments, which owns Richmond Waterfront Industrial Park, LLC (“RWIP”), with corporate offices at 10901 Dutton Road, Philadelphia, PA 19154. RWIP was incorporated on December 11, 1998 in conjunction with the acquisition of three conjoined parcels of land from the Rohm and Haas Company totaling 51.6 acres along the Delaware River waterfront in Philadelphia (the “Property”). The reason for acquiring the Property was to lease buildings then-located on it and other sections of the Property to industrial tenants.

2. Until it sold its plant to Dow Chemical Company in around 2009 Rohm and Haas owned and operated a large chemical manufacturing facility that was constructed on portions of the Property and other parcels of land owned by Rohm and Haas west and north of the Property.

3. RWIP purchased the Property subject to an existing railroad right-of-way easement in favor of the Philadelphia Belt Line Railroad Company (“PBL”) which is 33 feet wide and runs the length

of two parcels of the Property in a north-south direction for 2,719 feet. The tracks within the Easement begin at the southern border of the Property at Buckius Street where there is a double locked gate that has been in place since before RWIP acquired the property. On the north end of the Property, the tracks within the Easement physically end around 200 feet north of the Property, near Bridge Street. There are tracks extending south from the Buckius Street gate that are in disrepair.

4. I personally have not seen any rail usage of the tracks on the Property for over twenty-one years. The operations I personally observed immediately after RWIP acquired the Property involved Rohm and Haas shuttling tank cars used for its chemical operations to and from the double gate at Buckius Street. The cars were shuttled to and from its chemical plant using a locomotive owned by Rohm and Haas that was operated by its personnel. The gate at Buckius Street would be opened, and the tank cars would be left there for Conrail to pick up and take south, after which the gate would be locked again. Conrail would also deliver cars to the double gate and leave them for Rohm and Haas to open the gate and pick them up with its locomotive and take them north to the plant. My understanding is that Conrail itself did not operate its trains past the point of connection at Buckius Street, and I personally have never seen a Conrail locomotive or a locomotive operated by the PBL on the Easement tracks.

5. Rohm and Haas was the only user of rail service north of Buckius Street after RWIP acquired the property, and so when its use of the tracks in the Easement stopped, the double gate remained locked and any use of the tracks ceased.

6. In 2009 RWIP began leasing a northern portion of the Property to a tenant that was in the business of storing and handling a large amount of tractor trailers and shipping containers. This

tenant's operations blocked the tracks beginning in 2009, and its operations resulted in some of the tracks in the Easement on this parcel being completely covered with gravel and/or asphalt.

7. As it relates to maintenance, the only thing I am aware of PBL doing that could be construed as maintenance is occasionally spraying the tracks with weed killer. Prior to May 18, 2022, PBL never sent a letter to me or RWIP complaining about any encroachment on the Easement boundaries or track.

8. In 2022, the 67-acre parcel immediately north of the Property that was first owned by Rohm and Haas and then Dow Chemical was acquired by DH Property Holdings, Inc. ("DHPH"). That entity is developing it for warehouse distribution facilities that it indicates will be serviced solely by commercial trucks.¹ It has been my understanding from DHPH and the Pennsylvania Department of Transportation that DHPH intends to pave over any residual railroad tracks on its property beyond the terminus of the PBL easement.

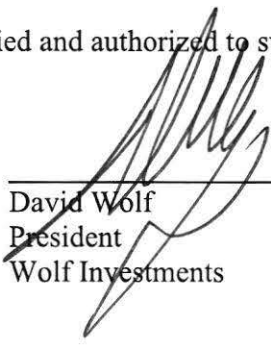
9. Neither RWIP nor any of its current tenants need or require railroad service, and RWIP has no intention of developing or locating any facilities on the Property that would require railroad service. There are no industries north of the Property other than the planned distribution facility, and so there are no other industries for which the tracks on the Property would be needed to serve or potentially serve in the future. Consequently, the Easement is defunct and useless, and it and the tracks within in it are an impediment to the continued operation and development of our Property.

¹ <https://www.bizjournals.com/philadelphia/news/2020/12/18/dh-property-holdings-buys-5000-richmond.html>

VERIFICATION

I, David Wolf, declare under penalty of perjury that the foregoing is true and correct.

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



David Wolf
President
Wolf Investments

July 28, 2023

EXHIBIT A
Lower Court Order

RECEIVED

DEC - 6 2022

ROOM 521

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

DOCKETED

DEC - 6 2022

R. POSTELL
COMMERCE PROGRAM

Richmond Waterfront Industrial Park, LLC,	:	March Term, 2022
Plaintiff,	:	Case No. 02872
	:	
v.	:	Commerce Program
	:	
Philadelphia Belt Line Railroad Company,	:	Control No. 22075066
Defendant.	:	

ORDER

And Now, on this 6th day of December 2022, upon consideration of Defendant Philadelphia Belt Line Railroad Company's Preliminary Objections to Plaintiff Richmond Waterfront Industrial Park, LLC's Amended Complaint, it is hereby **ORDERED** as follows:

1. Objections to Count I, II, and III pursuant to Pa. R. C. P. 1028 (a) (4) – legal insufficiency of a pleading (demurrer) – are **OVERRULED**.
2. Objection to Count IV pursuant to Pa. R.C.P. 1028 (a) (1) – lack of subject matter jurisdiction – is **SUSTAINED** and Plaintiff's complaint is **DISMISSED**. *Strasberg Scooters, LLC v Strasburg Rail Road, Inc.* 210 A.2d 1064, 1069 (Pa. Super. 2019 ("Simply put...if, for example, an action concerns the 'operation or abandonment' of side tracks, the trial court must dismiss the action due to the STB's exclusive jurisdiction over the proceedings").

As this court does not have subject matter jurisdiction, Plaintiff must bring the matter to the federal Safety Transportation Board ("STB") pursuant to the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. Sec. 10501 et seq. The Act completely preempts state action when it comes to determining if a railroad has abandoned its tracks. See *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co.*, 265 F Supp. 2d 1005, 1012 (N.D. Iowa 2003) ("the STB has exclusive jurisdiction over: (2) the construction, abandonment, or discontinuance of spur,

220302872-Richmond Waterfront Industrial, LLC Vs Philadelphia



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industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located entirely in one state”).

Without subject matter jurisdiction, we offer no procedure for Plaintiff to follow if the STB finds the tracks at issue have been abandoned.

BY THE COURT



RAMY I. DJERASSI, J.

EXHIBIT B

Lower Court Opinion

program

FILED

March 1, 2023

2023 MAR -1 AM 9:34

JUDICIAL RECORDS
1ST JUDICIAL DISTRICT

RWIP seeks quiet title to a railroad right-of-way claimed by PBL, a rail terminal switching carrier engaged in transportation-related development and real estate leasing in the Port of Philadelphia. PBL's Preliminary Objection was sustained because federal law grants the federal Surface Transportation Board ("STB") express and exclusive jurisdiction over actions

Likewise, on the southern and western boundaries of the property, RWIP maintains a gate. To the east of the tracks is the west bank of the Delaware River.

PBL has not asserted any rights to the use of the tracks or the right-of-way. Further, PBL has not disclosed plans to provide railroad, rail carrier, or rail transportation services even if the railway right-of-way was fully intact and accessible.

II. Procedural Background

RWIP filed their Complaint on March 28, 2022, and an Amended Complaint on July 7, 2022. The Amended Complaint included the following counts: (I) PBL does not have any right-of-way, easement, or other property right; (II) RWIP owns the land claimed as a right-of-way through adverse possession; (III) PBL has abandoned any rights they may have had; and (IV) in the alternative to Count II (adverse possession), RWIP has acquired a prescriptive easement.

PBL filed Preliminary Objections to the Amended Complaint on May 18, 2022. PBL objected to Counts I, II, and IV based on demurrer under Pa. R. Civ. P. 1028(a)(4). On Count III (abandonment), PBL objected due to lack of subject matter jurisdiction under Pa. R. Civ. P. 1028(a)(1). On December 6, 2022, the Court overruled PBL's objections to Counts I, II, and IV. On Count III, the Court found that if an action concerns the abandonment of railroad tracks, the state trial court must dismiss the action due to the federal Surface Transit Board's express and exclusive jurisdiction over the matter. The Court thus sustained PBL's Preliminary Objection to Count III and dismissed RWIP's Amended Complaint in its entirety.¹ On January 5, 2023, RWIP filed their appeal from the Court's order.

¹ See Court Order dated December 6, 2022.

III. Discussion

Subject matter jurisdiction is “the power of the court to hear cases of the class to which the case before the court belongs, that is, to enter into inquiry, whether or not the court may ultimately grant the relief requested.” *Harley v. HealthSpark Found.*, 265 A.3d 674, 687, 2021 PA Super 205 (2021) (quoting *Lowenschuss v. Lowenschuss*, 579 A.2d 377, 380 n.2, 396 Pa. Super. 531 n.2 (1990)).

With respect to the subject matter of the case here, jurisdiction lies with the Surface Transportation Board. Established by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the STB has express and exclusive jurisdiction over (1) transportation by rail carriers and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C. § 10501(b)(1)-(2) (2018). Section 10501(b) categorically preempts state action with respect to determining if a railroad has abandoned its tracks: “Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.” *Id.* Thus, if an action concerns transportation by a rail company or the operation or abandonment of tracks pursuant to Sec. 10501(b)(1) or (2), the state trial court must dismiss the action due to STB’s exclusive jurisdiction over the proceedings. *Strasberg Scooters, LLC v. Strasburg R.R., Inc.*, 210 A.3d 1064, 1068-69, 2019 PA Super 158 (2019).

The ICCTA sets forth the procedures a rail carrier must undertake to abandon or discontinue operation of a railroad line. 49 U.S.C. § 10903 (2018). Under Sec. 10903(a), a rail carrier who seeks to abandon or discontinue any part of its railroad line must first file an

(“there must be a showing of intent to abandon the property interest together with a showing of external acts by which such intention is carried into effect”). As properly asserted by PBL, the question of whether PBL abandoned its railroad right-of-way is subject to STB certification before a state court may consider the action.

RWIP next asserts that because PBL is not a statutorily defined “rail carrier,” PBL is not subject to STB’s express and exclusive jurisdiction under Section 10501(b)(1). A rail carrier is “a person providing common carrier railroad transportation for compensation[.]” 49 U.S.C. § 10102(5) (2018). RWIP points to a STB Order from 2010 to support this claim. There, PBL properly petitioned the STB for an order declaring that PBL retained a rail right-of-way on a former Philadelphia street struck from a new city plan.⁴ The STB found that because PBL failed to demonstrate its status as a common carrier, STB did not have jurisdiction over PBL’s claim to the right-of-way, and STB denied the petition.

Yet RWIP’s use of this 2010 Order to explain why the SBT lacks jurisdiction here is misleading. The STB determined that PBL was not a rail carrier not because PBL failed to meet the statutory definition of a rail carrier, but because the STB found no evidence that the right-of-way at issue was ever, in fact, used for rail purposes. PBL conceded that it never constructed or operated a railroad over the particular right-of-way or took an action on the relevant right-of-way that would have met the ICC’s minimum requirement for operation, extension, or construction of a railroad line.⁵ The STB thus concluded that it lacked jurisdiction over the matter because PBL could not claim to be a rail carrier over a rail that did not, in fact, exist.

⁴ PBL filed its petition for declaratory order from STB under 5 U.S.C § 554(e) and 49 U.S.C. § 721(b)(4) [renumbered to § 1321].

⁵ Belt Line Ry. Co. – Petition for Declaratory Order, S.T.B. Docket No. FD 35345 (Aug. 3, 2010).

Also, STB's finding in the 2010 Order that PBL was not a rail carrier subject to STB jurisdiction has no bearing on the facts here. Recall that Section 10501(b) grants the STB express and exclusive jurisdiction over two classes of matters, the second of which – (b)(2) – concerns the abandonment of tracks, the issue here. RWIP seeks quiet title to the right-of-way on the claim that the tracks – which visibly exist and occupy the right-of-way – have been abandoned. PBL does not address the merits of RWIP's claim of abandonment; PBL asserts only, and properly, that RWIP's claim of abandonment in state court fails because the claim is subject to express and exclusive federal STB jurisdiction under Sec. 10501(b)(2). Accordingly, the proper course of action for this matter is for either party to first petition the STB to determine if PBL has abandoned the tracks. Once the STB decides, a state trial court may thereafter take subject matter jurisdiction on whether RWIP may has quiet title on the right-of-way property under review in this dispute.

IV. Conclusion

This court properly sustained PBL's Preliminary Objection to Count III (abandonment) for lack of subject matter jurisdiction. 49 U.S.C. § 10501(b)(2) grants the STB express and exclusive jurisdiction to decide whether railroad tracks are abandoned, the threshold issue in this case. Under 49 U.S.C. § 10903, a rail carrier who intends to abandon or discontinue any part of its railroad line must first file an application with the STB. Once the STB reviews and grants or denies a certificate of abandonment---or makes a ruling as in 2010 that the right-of-way in question was never used by a common rail carrier, then this trial court may apply applicable state law to the applicable quiet title action raised by complaint.

For the reasons set forth above, we, respectfully, request that our order sustaining preliminary objections for lack of subject matter jurisdiction be affirmed.

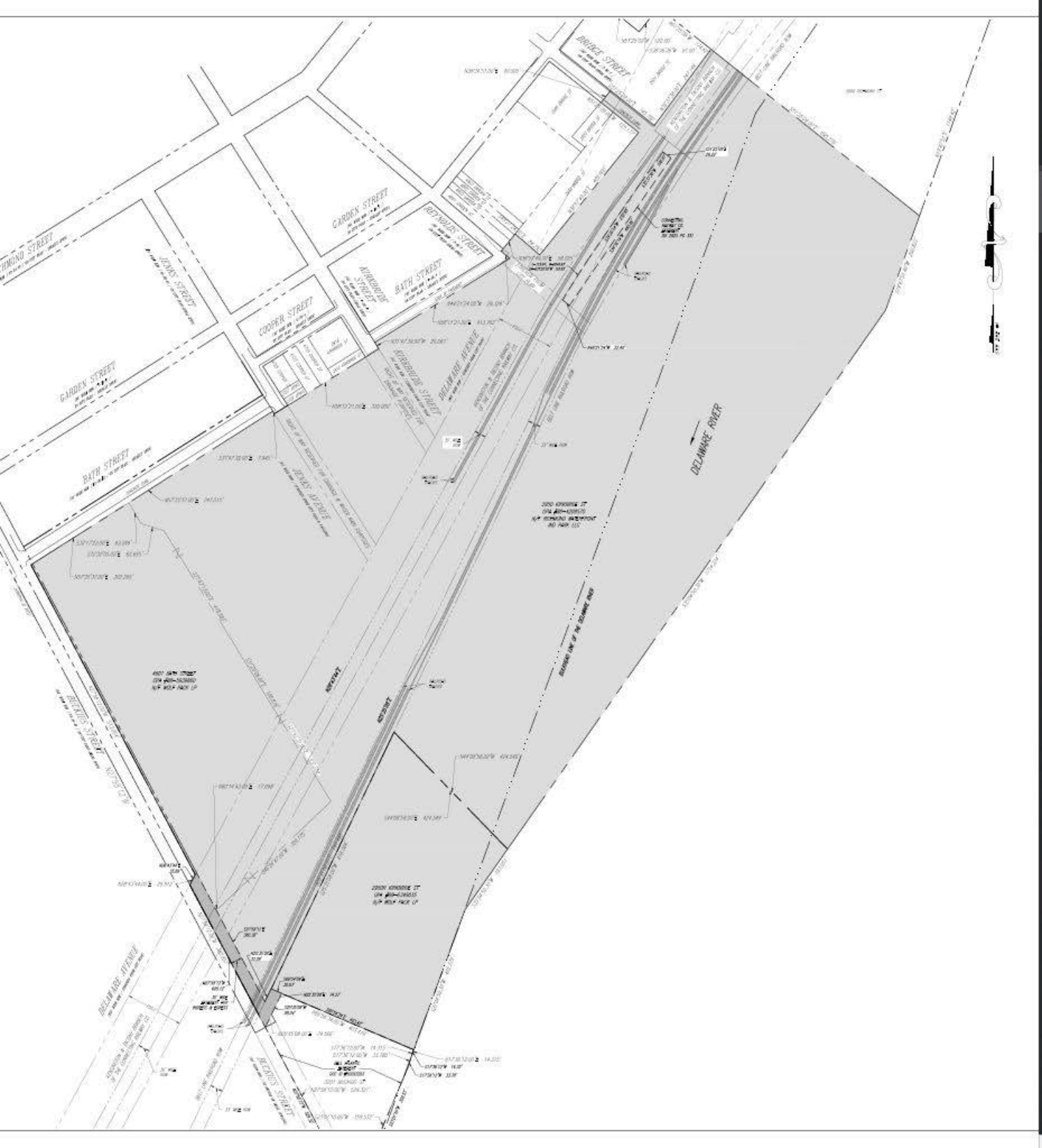
BY THE COURT,



RAMY I. DJERASSI, J.

EXHIBIT C

Maps





St

Boys & Girls Club (BGC Phila)

Advansix phenol terminal

Delaware

Kirkbride St

St

Bridesburg Elementary School

Bridesburg Park
Recreation Center

Balm St

Philadelphia Parking Authority

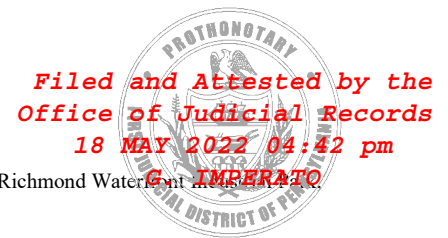
Vintage Tech Recyclers

St

Buckius St

EXHIBIT D

Defendant's Preliminary Objections to Plaintiff's Complaint



To: Plaintiff, Richmond Waterfront Industrial Park LLC

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days of service hereof or a judgment may be entered against you.

/s/ Lisa Carney Eldridge, Esquire
Attorneys for Defendant

CLARK HILL PLC

Lisa Carney Eldridge – PA ID #062794

Eric M. Hocky – PA ID #034560

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Philadelphia, PA 19103

215-640-8500

ehocky@clarkhill.com; leldridge@clarkhill.com

Counsel for Defendant

RICHMOND WATERFRONT
INDUSTRIAL PARK LLC,

Plaintiff

v.

PHILADELPHIA BELT LINE
COMPANY,

Defendant.

COURT OF COMMON PLEAS

PHILADELPHIA COUNTY

MARCH TERM 2022

NO. 002872

DEFENDANT’S PRELIMINARY OBJECTIONS TO PLAINTIFF’S COMPLAINT

Defendant Philadelphia Belt Line Railroad Company (the “Railroad” or “PBL”) submits these Preliminary Objections to the Complaint filed by Plaintiff Richmond Waterfront Industrial Park LLC (“RWIP”).

1. PBL asserts a demurrer as to Count I (adverse possession) as it is black letter law as expressed by both the Pennsylvania Supreme Court and Superior Court that a plaintiff may not assert ownership of a railroad right-of-way through adverse possession.

2. PBL further asserts that this Court lacks subject matter jurisdiction over Count 2 of the Complaint (abandonment) as the Surface Transportation Board (“STB”) has exclusive jurisdiction to determine if rail lines have been abandoned.

3. In 1998, RWIP acquired from the Rohm and Haas Company certain real property known as 2950 Kirkbride Street in the City of Philadelphia (the “Property”). *See* Complaint, attached hereto as Ex. 1 at ¶¶ 3-4.

4. As reflected in the Special Warranty Deed (the “Deed”) attached to the Complaint, RWIP acquired the Property subject to a railroad right-of-way easement held by PBL for the length of the Property parallel to the Delaware River. *See* Exhibit 1-A, Deed at 3, 4 (referencing the “Thirty-Three foot wide (33.000’ wd.) Right-of-Way of the Philadelphia Belt Line Railroad”).

5. The railroad right-of-way easement at issue here came to be as a result of an ordinance passed by Philadelphia City Council, and approved by the Mayor of Philadelphia, that established the PBL franchise in the City of Philadelphia (the “1890 Ordinance”).

6. As relevant here, the 1890 Ordinance granted PBL the right to build and operate tracks from Allegheny Avenue north along the Delaware River, including the tracks on the property currently owned by RWIP, and extending north into the adjoining property retained by Rohm and Haas (now Dow). For the convenience of the Court, the 1890 Ordinance is attached as Exhibit 2.

7. In its Complaint, RWIP claims that it has acquired ownership of PBL’s railroad right-of-way through adverse possession. *See* Complaint, Ex. 1, at Count 1.

8. RWIP also claims that the Railroad has abandoned its right-of-way easement. *Id.* at Count 2.

9. The Complaint does not allege, nor can it, that the Board of PBL authorized abandonment of the segment of rail line or the right-of-way that crosses RWIP's property, nor does the Complaint aver that PBL sought authority from the Surface Transportation Board ("STB"), or its predecessor the Interstate Commerce Commission ("ICC"), to abandon its freight common carrier obligation over the segment of rail line.

**Preliminary objection pursuant to Pa.R.C.P. 1028(a)(4) as to Count I
(adverse possession) for legal insufficiency of a pleading (demurrer)**

10. Preliminary objections in the nature of a demurrer are appropriate when a pleading is legally insufficient on its face. *See* Pa.R.C.P. 1028(a)(4).

11. Although a court is to "accept as true all well-pleaded facts and all reasonable inferences deductible therefrom," a demurrer does not admit a plaintiff's conclusions of law. *See Schuylkill Navy v. Langbord*, 728 A.2d 964, 968 (Pa. Super. Ct. 1999).

12. Dismissal is appropriate when it is "clear the law will not permit recovery" from the factual allegations contained in the Complaint. *Chasan v. Platt*, 244 A.3d 73, 80 (Pa. Super. Ct. 2020).

13. The Pennsylvania Supreme Court and Superior Court have made it clear that Plaintiff cannot, as a matter of law, acquire a railroad right-of-way through adverse possession. *See PA Energy Vision, LLC v. S. Avis Realty, Inc.*, 120 A.3d 1008, 1015 (Pa. Super. Ct. 2015) ("Importantly, one cannot acquire by adverse possession land within a railroad right-of-way."); *A.D. Graham & Co. v. Pa. Tpk. Comm'n*, 33 A.2d 22, 34-35 (Pa. 1943) ("land embraced within a railroad right-of-way cannot be acquired by adverse possession"); *Conwell v. Philadelphia & R. Ry. Co.*, 88 A. 417 (Pa. 1913) (holding no right of occupancy in the right-of-way of a railroad company within its established width can be acquired by adverse possession).

14. One cannot acquire by adverse possession land within a railroad right-of-way because “the right of way of a railroad company, whatever its established width, as soon as acquired is impressed with a public use, it constitutes a public highway. The railroad company holds it in trust for the people of the [C]ommonwealth.” *Pa Energy Vision*, 120 A.3d at 1014 (quoting *Conwell*, 88 A. at 418); see also *Williamstown Borough Author. v. Cooper*, 591 A.2d 711, 715 (Pa. Super. Ct. 1991) (“Even privately owned property which has been dedicated to public use cannot thereafter be claimed by adverse possession.”), *appeal granted*, 602 A.3d 861 (Pa. 1992).

15. With respect to railroads, “[t]he public use [of the right of way] arises as soon as it is acquired, and it continues at all time during the life of the franchise against which no prescription runs.” *Id.* (quoting *A.D. Graham*, 33 A.2d at 31).

16. As *A.D. Graham* emphasized, “land embraced within a railroad right-of-way is held for public purposes and for that reason cannot be acquired by adverse possession.” 33 A.2d at 32.

17. The law is very clear in this Commonwealth that a railroad right-of-way may not be acquired through adverse possession. Thus, PBL’s demurrer to Count 1 should be sustained for failure to state a claim.

**Preliminary objection pursuant to Pa.R.C.P. 1028(a)(1) as to Count 2
(abandonment) due to lack of jurisdiction over the subject matter**

18. Subject matter jurisdiction “relates to the competency of the individual court...to determine controversies of the general class to which a particular case belongs.” *Strasburg Scooters, LLC v. Strasburg Rail Road, Inc.*, 210 A.3d 1064, 1067 (Pa. Super. Ct. 2019) (citing *Green Acres Rehab & Nursing Ctr. v. Sullivan*, 113 A.3d 1261, 1268 (Pa. Super. Ct. 2015)).

19. Lack of subject matter jurisdiction “may be raised at any time, by any party, or by the court *sua sponte*.” *Id.* (citing *Grimm v. Grimm*, 149 A.3d 77, 82 (Pa. Super. Ct. 2016)).

20. Plaintiff attempts to circumvent the clear ban on adverse possession of railway rights of way by claiming that PBL has abandoned its railway right-of-way/easement on the Property. *See* Complaint, Exhibit 1, at Count 2.

21. A railroad line, however, may only be abandoned through an express statutory process set forth in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. §§ 10101 *et seq.*

22. By virtue of its ownership of lines of railroad, PBL is a common carrier engaged in interstate commerce subject to the jurisdiction of the STB, and its railroad-related rights and obligations are subject to the exclusive jurisdiction of the STB.

23. A common carrier’s right-of-way, including the right of way that crosses the RWIP property, may be abandoned **only** upon the prior authorization of the STB pursuant to 49 USC § 10903 (titled, “Filing and procedure for application to abandon or discontinue”).

24. When a railroad carrier subject to the jurisdiction of the STB seeks to abandon or discontinue any part of a railroad line or related right-of-way, the carrier must file an application with the STB and provide information as required by statute and the regulations thereto. *See id.*; *see also* 49 C.F.R. Part 1152; *Friends of Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 251 (3d Cir. 2001).

25. The STB has concluded that the administrative abandonment process must be complete before state property law, including adverse possession, may be invoked. *See Landowners –Motion for Declaratory Order and Injunctive Relief*, No. AB 10656 (STB Jan. 27, 2020).

26. The Plaintiff's claim of abandonment (and of adverse possession) fails because this Court lacks subject matter jurisdiction due to the broad preemption provisions of the ICCTA, which grants the STB exclusive jurisdiction over rail transportation, rail carriers, and rail facilities like the ones at issue here. *See* 49 U.S.C. § 10501(b).

27. The ICCTA provides the STB with "exclusive" jurisdiction over:

transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

the construction, acquisition, operation, **abandonment**, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State [.]

49 U.S.C. § 10501 (emphasis added); *Strasburg Scooters*, 210 A.3d at 1068.

28. The STB has held that the ICCTA preempts such claims even when the property is not currently used for rail purposes or is rail banked.¹ *See Jie Ao and Xin Zhou, Petition for Declaratory Order*, 2012 STB LEXIS 206, at *3 (STB June 6, 2012) (STB rejected claim of adverse possession where portion of the property in the right-of-way had never been used for railroad operations); *see also 14500 Ltd. v. CSX Transp. Inc.*, No. 1:12CV 1810, 2013 U.S. Dist. LEXIS 39806 at *13 (N.D. Ohio Mar. 14, 2013) (preempting adverse possession claim because the taking of the railroad's property would affect railroad transportation in the future.)

29. Because the PBL property at issue is a railroad right of way and line of railroad, even if currently inactive, it is subject to the ICCTA.

¹ "Rail banked" means that the property remains part of the national rail system, albeit temporarily unused for active rail service. *See Jie Ao*, 2012 STB LEXIS 206, at *15.

30. There is no allegation in the Complaint, nor can there be, that PBL has taken any corporate action to authorize abandonment, or that PBL has sought abandonment of the railway right-of-way at issue through the STB.

31. There is also no allegation or evidence that any abandonment of the PBL right-of-way at issue has been authorized by the STB.

32. Lack of use is not the same as “abandonment;” abandonment must be accomplished by a formal petition to the STB, not by simply asserting to a court that railroad operations have long ago ceased. *See* 49 C.F.R. §11152.29(e)(2).

33. As the STB is granted exclusive jurisdiction over railroad abandonment determinations, dismissal of Count 2 by way of preliminary objection is appropriate. *See Strasburg Scooters*, 210 A.3d at 1066.

34. Courts across the country have consistently held that the ICCTA preempts state law claims of adverse possession over railroad property, reasoning that claims of adverse possession unreasonably interferes with railroad operations and divests the railroad of property on which it conducts its operations. *See, e.g. Strasburg Scooters*, 210 A.3d at 1068 (citing *B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252 (E.D. Wash. 2012) (adverse possession claim over railroad’s property dismissed based on ICCTA preemption)); *see also Skidmore v. Norfolk S. Ry. Co.*, No. 19-2482, 2021 U.S. App. LEXIS 17671 (4th Cir. June 14, 2021) (ICCTA preempts adverse possession and prescriptive easement claims).

35. Accordingly, the court must dismiss this action due to the STB’s exclusive jurisdiction over the proceedings.

WHEREFORE, Defendant Philadelphia Belt Line Railroad Company respectfully requests that the Court sustain its Preliminary Objections and that Plaintiff's Complaint be dismissed with prejudice.

Respectfully submitted,

CLARK HILL PLC

/s/ Lisa Carney Eldridge

Lisa Carney Eldridge

Eric M. Hocky

Counsel for Defendant

Philadelphia Belt Line Company

Dated: May 18, 2022

EXHIBIT E

1987 Lease Agreement #1531

LEASE AGREEMENT #1531

THIS LEASE AGREEMENT, made this 1st day of MARCH, 1987, by and between THE PHILADELPHIA BELT LINE RAILROAD COMPANY (Belt Line), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and CONSOLIDATED RAIL CORPORATION (Conrail), a Corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

WITNESSETH:

WHEREAS, Conrail presently conducts rail operations over certain properties owned by Belt Line, pursuant to an operating Agreement dated November 24, 1981, as amended; and

WHEREAS, Conrail and Belt Line desire to provide for continued conduct of rail operations by Conrail over certain Belt Line rail properties pursuant to the terms and conditions of a lease; and

WHEREAS, the parties believe that Belt Line's lease of the described properties to Conrail will enable Belt Line to carry out its obligations to its customers, to the City of Philadelphia, and to other organizations entitled to benefit from its existence;

NOW, THEREFORE, the parties, in consideration of the premises and the mutual promises and covenants hereinafter set forth, agree as follows:

1. PROPERTY LEASED.

Belt Line hereby agrees to lease to Conrail, and Conrail agrees to lease from

Belt Line, those railroad properties of Belt Line North, both real and personal, described in Exhibit A, attached hereto and made a part hereof (together with all property used by Belt Line in replacement of, or in substitution for, and all additions, betterments and improvements to, such property (hereafter the "Property")). Conrail shall have exclusive use of the Property during the term of this lease, subject, however, to operation of the Belt Line Principle, as hereinafter defined, and to the provisions of Section 9B below. If, by application of the Belt Line Principle, another rail carrier(s) is authorized to operate over the Property, then the "RENT AND OTHER COMPENSATION" due under this lease, as set forth in section 4, and "OPERATION, MAINTENANCE AND IMPROVEMENTS", as set forth in section 6, shall be reduced by an amount, or shared on a basis, proportionate to the other rail carrier's operations over said Property. The measure of use by each carrier under this provision shall be the percentage of each carrier's carload traffic to the total carload traffic moving over Belt Line North. This reduction in rental and other compensation and sharing of Maintenance and Improvement costs shall begin on the effective date of the other rail carrier's authorized operation over said Property.

2. TERM OF LEASE.

The term of this lease shall commence on its effective date, as provided in Section 3 hereof, and shall terminate on February 28, 1997, unless sooner terminated in accordance with the provisions of this lease or unless renewed. This lease shall be renewed automatically for succeeding 10-year periods, pursuant to the same terms and conditions as set forth herein, unless either party shall notify the other at least six months

prior to February 28, 1997, or February 28 of any succeeding tenth anniversary, of its decision to terminate this lease, subject, however, to the provisions of section 4B.

3. EFFECTIVE DATE.

This lease shall take effect on March 1, 1987 ("effective date"). Each consecutive 12 calendar month period from the effective date of this agreement shall be deemed a "contract year". While this lease is in effect, it shall automatically suspend the operation of prior operating agreement(s) between the parties, provided, however, that such suspension of any prior operating agreement(s) shall not relieve Belt Line or Conrail of any rights or obligations that arose under the terms of said agreement(s) prior to the suspension of said agreement(s) and, provided further, that, upon termination of this lease, such prior operating agreement(s) and any other agreement(s) shall continue in effect in accordance with their terms as if this lease had never existed, except that nothing in this Agreement shall be deemed an affirmation by Conrail that it is bound by the agreement of May 4, 1891, nor shall it be deemed a negation of the Belt Line's position that all terms of said agreement shall remain in full force and effect upon termination of this agreement. Upon termination of this Agreement, the status of said 1891 agreement shall, effective on the date of termination, be as if this Agreement had never been in effect.

4. RENT AND OTHER COMPENSATION.

A. Conrail shall pay as rent to Belt Line, or for its account, for use of the Property, an annual rental amount of [REDACTED], payable in equal monthly installments of [REDACTED], commencing on the effective date of this lease.

B. If, after the first five years of the initial term of this lease, Conrail's line-haul

traffic volumes to and from the Property, as measured by the number of carloads originating or terminating on said Property, declines to below 500 carloads for each of two successive contract years, Conrail shall have the right to terminate this lease. Conrail shall provide Belt Line notice of such termination within 90 days following the last day of the second of such successive contract years and termination of this lease shall be effective with the conclusion of the 120th day following the last day of the second of such successive contract years.

C. The annual rental amount payable to Belt Line under this section for use of the Property shall not include, and Conrail shall be responsible for, payment of the following:

- (1) All taxes, assessments and governmental charges, ordinary and extraordinary, which are lawfully imposed upon the Property of Belt Line, as defined herein.
- (2) All sums payable by Belt Line under any agreements for the exclusive or nonexclusive use or right of use by Belt Line of any property of another person, firm or corporation, which property shall be part of the Property subject to this lease.

Conrail's responsibility for payments under subparagraphs (1) and (2) shall commence with the effective date of this Agreement, and it shall have no responsibility for payment of any such charges covering a period prior to the effective date of this Agreement.

D. Conrail shall be responsible, at its sole cost and expense (including fees for permits and similar documents), for obtaining all utility services that it requires or

desires, including the installation of meters and submeters if none exist. Conrail shall be responsible for all charges for utility services consumed by, and supplied to, Conrail by the provider thereof.

- E. Except as otherwise provided in paragraphs A and C of this section and in sections 6 and 9 of this lease, Conrail shall have no responsibility for any rents, charges or any other compensation or assessments due on the Property subject to this lease.

5. ESCALATION PROVISIONS

On June 1, 1991, and on June 1 of each five (5) year period thereafter during the term of this lease, the annual rental fee set forth in section 4 shall be increased by the same percentage as the percentage increase in the Consumer Price Index for All Urban Wage Earners, All Items, United States, Base 1967 = 100, issued by the Bureau of Labor Statistics of the United States Department of Labor ("CPI-W"), for the period beginning with the effective date of any subsequent five (5) year period, and ending with the conclusion of the calendar year immediately preceding the particular June 1. If the governmental body issuing the CPI-W ceases to use the 1967 average of 100 as the basis of calculation, the CPI-W shall be adjusted to the figure that would have been arrived at had the manner of so calculating the CPI-W not been so changed. If the CPI-W (or a successor or substitute index) ceases to be published, or ceases to be generally recognized as an index of inflation, the parties hereto shall select and substitute an index which is mutually acceptable, one published by a governmental or other disinterested body with appropriate reconciliation of the base of the substituted index with the base of the CPI-W.

6. OPERATION, MAINTENANCE AND IMPROVEMENTS.

Conrail, at its own expense and without deduction from the annual rent, will:

(a) Except as otherwise provided in this subparagraph and in Section 18, operate and maintain the Property (1) in good order, condition and repair, (2) in the manner required by law, and (3) in accordance with the terms of any existing mortgage or other agreement relating to any of the Property, to the extent such requirements have been made known to Conrail prior to the effective date of this agreement, provided, however, that the provisions of (1) above shall not apply to the following Belt Line segments: (a) (Kettlewell Street Branch west of Bath Street, and (b) any other Belt Line line segment that is, because of track conditions, effectively out of service at the time this Agreement is executed, provided, however, that Conrail shall identify all additional out-of-service line segments, and notify Belt Line thereof, within 90 days of the effective date of this Agreement. With respect to these lines, or portions thereof, Conrail may formally discontinue service to and from industries located on these line segments and may seek to abandon service over said line segments. It shall be Conrail's responsibility to obtain the necessary regulatory approval for such abandonment. Conrail may moreover, terminate service over and seek abandonment of the entire Kettlewell Street branch if the present industries located thereon cease utilizing rail service. Upon abandonment of this branch, Conrail shall have no responsibility to maintain that track. Finally, Conrail shall have no responsibility for any existing soil contamination or other environmental hazard caused by some other person or persons.

(b) Make such additions, betterments and replacements to the Property as Conrail, in its discretion, may consider necessary or desirable. If, upon termination of this lease, Belt Line determines that freight service is no longer required over Property, any

additions, betterments, and replacement made by Conrail to Property may be removed by Conrail, at its sole cost and expense, with the salvage value of such materials accruing to Conrail; provided, however, that if freight service is continued for a period of at least five (5) years following termination, replacement properties which merely permit continuance of service and operations or replace equipment or facilities in existence at the time of execution of this lease shall become the property of Belt Line without any right in Conrail to remove same or to receive payment therefore.

7. COVENANTS AND WARRANTIES.

A. Belt Line covenants and warrants as follows:

- (1) That Belt Line has appropriate authority under its articles of incorporation and by-laws to enter into, execute and perform all of its obligations under this lease, and that it has adhered to all procedures and requirements contained in said articles of incorporation and bylaws prior to execution of this lease.
- (2) That it will take all action, to the extent of its rights and powers and within its control, necessary to maintain and preserve its corporate existence and franchises, provided, however, that if Belt Line, acting in accordance with its by-laws and articles of incorporation, enters into an arrangement to sell any of the Property, it will notify Conrail of the terms of such agreement, and Conrail, for a period of 30 days after such notification, shall have the right to purchase the property involved upon the terms upon which Belt Line has agreed to sell same. If Belt Line should be dissolved and its

assets liquidated, Conrail or its nominee shall be accorded, to the extent the Belt Line is empowered to do so, the same right of first refusal.

- (3) That it will execute and deliver to Conrail all such instruments and documents as may be necessary to confirm Conrail's lease of the Property.
- (4) That it will disclose and make available to Conrail with respect to the Property (a) all tax receipts, assessments and governmental charges for the past three (3) calendar years, including 1986; if payment of taxes, assessments or governmental charges is not required, then a certificate so stating, including a statement of the reasons why payment of such taxes is not required, and (b) all agreements involving the payment of monies for use of property subject to this lease, which payments Conrail has agreed to assume pursuant to section 4C(2).
- (5) That, except for operation of the Belt Line Principle, as defined herein, execution and performance of its obligations under this lease by Belt Line will not violate any agreement binding on Belt Line or property or any law, regulation, etc.
- (6) That Belt Line will not enter into any agreement or arrangement that precludes, reduces or interferes with Conrail's effective use of the Property for railroad operating purposes. This paragraph shall not be construed to prohibit action of the Belt Line required to carry out the Belt Line Principle, nor to prohibit leases, licenses and grants for non-rail uses which do not interfere with Conrail's rail operations on the Property, subject, however, to the provisions of section 1.

- (7) That Belt Line has no knowledge of any litigation pending or threatened or any pending or outstanding Public Utility Commission or Municipal order(s) against Belt Line, which would interfere with Conrail's use of the Property for railroad operating purposes or require the expenditure of substantial monies in order to restore and rehabilitate one or more lines of the Property.
- (8) The Belt Line Principle is defined as a requirement that the Philadelphia Belt Line Railroad Company be operated (a) to benefit the trade and commerce of the City of Philadelphia, (b) to provide full and equal facilities upon equal terms for all railroads which now or may hereafter enter the City to use said Belt Line Railroad, without discrimination or favoritism between them, and (c) to assure that the Belt Line is free from the exclusive control of any of the railroad companies that utilize it and will be controlled in the interest of trade and commerce of the City of Philadelphia.

B Conrail covenants and warrants as follows:

- (1) That Conrail has appropriate corporate authority to enter into and execute this lease.
- (2) That Conrail will utilize the Property for or in conjunction with rail operations, and will maintain said Property in good order, condition and repair in a manner designed to preserve its functional usage and in accordance with applicable laws and

regulations, and with the belt Line Principle, subject, however, to the provisions of sections 6 and 18.

8, INSURANCE/INDEMNIFICATION.

Conrail will, at its own expense and without deduction from the rent, make its self insurance and insurance coverages, in effect at the time this Agreement is executed, applicable to the Property. Conrail self insures for liability exposures, consistent with other Class I railroads, and shall, at the time this Agreement is executed, provide Belt Line with a certification of its commercial excess liability insurance coverage. Further, with regard to any such liabilities, Conrail agrees to indemnify and hold Belt Line harmless from all losses, damages, costs and expenses which Belt Line may incur, or for which Belt Line or any Property may become liable, or which may be claimed against Belt Line or any Property by reason of this lease, or growing out of or arising in connection with the lease, or the use or operation of the Property, except to the extent such loss or damage is caused by the sole negligence of Belt Line..

9. LEASES, LICENSES AND OTHER AGREEMENTS.

A. Belt Line will, during the term of this Agreement, assign to Conrail all of its Interest in the leases, licenses and other agreements listed in Exhibit "B" attached and will deliver to Conrail copies thereof before the effective date of this Agreement. As long as these agreements remain in effect, Conrail shall be responsible for collecting the lease and license rental fees due under said agreements, and shall, in turn, pay to Belt Line only the rental amounts specified in these agreements on the date this lease is executed. Conrail shall have the right to increase these rental charges, insofar as these agreements permit, and retain for itself all rental amounts in excess of the amount

payable to the Belt Line under immediately preceding sentence. Except for agreements covered by paragraph B of the section, Conrail shall be responsible for negotiating new lease and license agreements with any party not now covered by an existing agreement, and shall retain all lease and license rentals received under these new agreement.

B. Nothing in this Agreement shall prevent Belt Line from leasing or licensing portions of Property for signs and billboards, provided that it (a) notifies Conrail, (b) supplies copies of the sign agreements to Conrail, (c) furnishes Conrail with certificates of liability insurance, naming Conrail as an insured, in the amount of \$3 million combined single limit for liability and/or property damage, and (d) requires that the installation, use and maintenance of such billboards not interfere with railroad operations over Property.

10. DEFAULT.

The following events shall be deemed acts of default by Conrail:

- (a) Failure to pay the agreed upon rent and other chargers payable by Conrail when due and payable;
- (b) Failure to perform, in whole or in part, any other covenant or obligation specified in this lease; or
- (c) Any assignment or transfer or attempted assignment or transfer of the Property or of this lease, or any sublease or attempted sublease of Property except as otherwise expressly permitted under this lease, without the written consent of Belt Line, which consent shall not be unreasonably withheld.

If any of the foregoing events occur, Belt Line shall provide Conrail with

written notice of said default and give Conrail 30 days from the date of receipt of Belt Line's notice to correct such default. If such default is not corrected by Conrail, Belt Line may, by written notice, declare this lease terminated and retake possession of the leased Property. Termination of this lease by Belt Line, as provided herein, shall not relieve Conrail of any of its obligations which occurred or arose prior to the termination hereof.

11. FURNISHING OF INFORMATION.

The accounts kept by either Belt Line or Conrail relating to the Property, to this lease, or to the rail operations over the Property shall be subject to n and examination by officers or agents of either party hereto; and each party agrees to furnish to the other party such information relating to its accounts, income, receipts, expenditures and obligations as may reasonable be requested. Conrail shall, during each year that this agreement is in effect, advise Belt Line of the number of carloads that Conrail transported in line haul service, to and from industries located on the Property, during the preceding calendar year.

12. REGULATORY APPROVAL

If it is determined that this lease required the approval or authorization of any regulatory body or authority, Belt Line and Conrail shall cooperate with each other in obtaining such approval or authorization.

13. EXPIRATION/TERMINATION OF AGREEMENT.

Upon expiration or termination of this Agreement, Conrail shall peaceably give up and surrender to Belt Line possession of the Property, subject to the provisions of section 6 hereof, provided however, that termination of this lease for any reason

whatsoever, other than default by Conrail, shall not affect Conrail's right to operate over Belt Line Property, as provided in Section 3 hereof.

14. ARBITRATION.

(a) If, during the term of this lease, any dispute should arise between the parties regarding the interpretation, application or enforcement of any of the terms of this lease, and such dispute cannot be resolved by the parties within thirty (30) days after either party notifies the other of its desire to arbitrate the dispute, then the dispute shall be settled by arbitration in accordance with the then current commercial arbitration rules of the American Arbitration Association. For arbitration, a panel of three arbitrators shall be named, one to be selected by each of the parties and one to be selected by the other two arbitrators. If the two arbitrators cannot agree upon the third arbitrator within fifteen (15) days, then either party may apply to the American Arbitration Association for appointment, in accordance with its procedures, of the third arbitrator. In the alternative, the parties may agree on a sole arbitrator.

(b) Each party hereby consents to the entry of a judgement of any court of competent jurisdiction in accordance with the decision of the arbitration panel. No change in the rules of arbitration shall deprive any party of the right to be represented by counsel, to present evidence, and to cross-examine witnesses presented by the other party in any arbitration proceeding arising out of this lease.

(c) The arbitrators shall have no power to modify any of the provisions of this lease, and their jurisdiction is limited accordingly. The decision of the arbitrators shall be rendered within ninety (90) days after the matter has been submitted.

(d) Each of the parties shall be responsible for the expenses incurred by he arbitrator appointed by said party, and the expenses, fees and cost of the third arbitrator, or sole arbitrator, shall be borne equally between the parties.

15. BELT LINE EMPLOYEE.

Conrail agrees, on the effective date of the lease, to employ and absorb into its labor force the one operating employee employed by Belt Line at its Belt Line North facility. On the date this lease is executed, Belt Line shall furnish Conrail the name and address of the one full-time operating employee.

16. NOTICE.

Every notice, approval, consent or other communication desired or required under this lease shall be effective only if the same shall be in writing and sent postage prepaid by United States registered or certified mail (or a similar mail service available at the time), directed to the below named individual for the other party at the indicated address, or such other person or address as either party may designate by notice given as aforesaid from time to time.

Belt Line

Robert Turner, Secretary
723 Lafayette Building
N. E. Corner 5th &
Chestnut Streets
Philadelphia, PA 19106

Conrail

C. E. Wogan
Contract Administration
Room 801
1528 Walnut Street
Philadelphia, PA 19103

17. SUCCESSORS AND ASSIGNS.

The covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors, heirs, personal representatives, and assigns of the parties hereto, subject, however, to the provisions of Section 10 of this lease.

18. FORCE MAJEURE.

If, due to a force majeure occurrence, including the actions of a person or persons other than Conrail, the Property becomes partially or wholly inoperable and cannot be used for railroad purposes, Conrail's obligations under this lease shall be suspended during the period that such rail operations over the entire property

If the damage caused by a Force Majeure occurrence is of such magnitude that the cost to Conrail of making the necessary repair and restoration would, when considered in light of existing traffic moving to and from shippers and receivers located on Property, make Conrail's entire operation over the Property uneconomical, then Conrail shall have the right to discontinue service over Property and terminate this Agreement.

If Conrail undertakes to restore any or all of the Property to usable condition, Conrail shall use due diligence to eliminate any force majeure occurrence and resume normal railroad operations over Property, and any failure by Conrail to use due diligence in such circumstances shall not suspend Conrail's obligations under this Agreement.

Any dispute arising under the force majeure provisions of this section shall be settled by arbitration, as provided in Section 14.

Force majeure, as used herein, includes, but is not limited to, the following occurrences: Act of God, including floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; Act of public enemy, war, blockade, insurrection, vandalism or sabotage; fire, accident, wreck, derailment, washout or explosion; or governmental laws, order or regulations.

19. ENTIRE AGREEMENT.

The entire agreement between the parties is set forth in this lease, and there are no understandings, agreements, or representations of any kind between the parties, verbal or otherwise, other than as set forth in this lease. No change or modification of any of the covenants, terms or provisions hereof shall be valid unless in writing and signed by the parties hereto.

20. SECTION HEADINGS.

Section headings have been set forth in this lease merely for the convenience of the parties and shall not be used or referred to in construing or interpreting any provision of this lease.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be executed in their behalf as of the date first above written.

Witness:

Philadelphia Belt Line
Railroad Company

/s/ R. F. Turner

By: John J. Gibbons
President

Witness:

Consolidated Rail
Corporation

/s/ Jim W. Brothey
Executive Assistant

By: Charles N. Marshall
Sr. Vice President Marketing & Sales

EXHIBIT A

The Philadelphia Belt Line Railroad Company ("Belt Line") property subject to this Lease Agreement shall consist of all Belt Line property (including land, track, buildings and other real and personal property) within the Belt Line right-of-way located in the Bridesburg Section of Philadelphia, commencing at Engineering Station 0+0 at the South House Line of Allegheny Avenue, extending in a general Northeasterly direction along the West side of relocated Delaware Avenue, and then extending in and along Carbon Street (not opened) to its intersection with Buckius Street at Engineering Station 110+00, the latter being the point of delivery of traffic to the Rohm and Haas Plant. All Belt Line property (including land, buildings and other real and personal property, but not track) within the Belt Line right-of-way extending in a northeasterly direction from Buckius Street at Engineering Station 110+00 to a point 130 feet $\pm$ southwest of the extension of the South House Line of Locust Street (A.K.A. Kennedy Street) at Engineering Station 140+35 shall also be subject to this lease. The tracks within this latter segment are subject to Lease Agreements dated October 31, 1977, August 14, 1973 and January 6, 1967 between the Belt Line and Rohm and Haas Company, with the Belt Line's interest in these agreements being assigned to Conrail. Property also includes the Kettlewell Street Branch from its junction with the above described line to the intersection of Schiller and Allen Streets. The attached map depicts the relative location of the property subject to this lease.

EXHIBIT "B"

<u>PBL AGREEMENT #</u>	<u>INDUSTRY</u>	<u>DATE</u>	<u>AMOUNT</u>
1216-4	Remmey Div.	7/30/30	
1262-7	Unitank Term.		See 1483
1264-21	Bell Telephone	7/15/41	
1280-4	Neatsfoot Oil	8/15/38	
1343-1	Phila. Electric	8/12/49	
1361-2	Phila. Gas Works	9/22/72	
1367	Phila. Coke Co.	10/20/54	
1369	Unitank Term.		See 1483
1383	Unitank Term.		See 1483
1392	Unitank Term.		See 1483
1410	Unitank Term.		See 1483
1413-A	Franklin Smelting	11/1/77	
1418	Rohm & Haas Co.	6/4/63	
1419	Rohm & Haas Co.	6/4/63	
1420	Rohm & Haas Co.	6/24/63	
1433	Unitank Term.		See 1483
1436-A	Rohm & Haas Co.	1/6/67	
1436-D	Rohm & Haas Co.	8/14/73	
1437	Unitank Term.		See 1483
1446	Unitank Term.		See 1483
1453	Phila. Gas Works	5/16/68	
1457	Blumberg & Nicholson	6/6/67	
1467-1	Lumber & Millwork	6/3/74	
1475	Metal Development Co.	4/20/72	
1477	Allied Chemical Co.	2/1/73	
1477-1	Allied Chemical Co.	7/3/73	
1483	Unitank Term.	9/5/73	

Annual amount payable March 1 each year



EXHIBIT F
2014 Operating Lease Agreement

OPERATING LEASE AGREEMENT

THIS OPERATING LEASE AGREEMENT (the "Agreement") is made as of the 1st day of January, 2014, by and between THE PHILADELPHIA BELT LINE RAILROAD COMPANY ("Belt Line"), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and CONSOLIDATED RAIL CORPORATION ("Conrail"), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

WITNESSETH

WHEREAS, Conrail presently conducts rail operations over certain properties owned by Belt Line on a month-to-month basis pursuant to the terms and conditions of that certain lease agreement dated January 1, 2007, by and between Belt Line and Conrail that has since been terminated; and

WHEREAS, Conrail and Belt Line desire to provide for continued conduct of rail operations by Conrail over certain Belt Line rail properties pursuant to the terms and conditions of this Agreement; and

WHEREAS, the parties believe that Conrail's operation of certain Belt Line rail properties will enable Belt Line to carry out its obligations under its Charter, to the City of Philadelphia, and to other organizations entitled to benefit from its existence.

NOW, THEREFORE, the parties, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, agree as follows:

1. PROPERTY SUBJECT TO THE AGREEMENT.

Belt Line hereby agrees to allow Conrail to operate, and Conrail agrees to operate, those railroad properties of Belt Line known as the Belt Line North and described in Exhibit "A" attached hereto and made a part hereof, together with all property used by

Belt Line in replacement of, or in substitution for, and all additions, betterments and improvements to, such property (hereafter the "Property"). Conrail shall have exclusive use of the Property during the term of this Agreement, subject, however, to operation of the Belt Line Principle, as hereinafter defined, and to the provisions of Section 8B and 8C below. For purposes of this Agreement, "Conrail" shall also include Norfolk Southern Railway Company and CSX Transportation, Inc., who will have the right to deliver and pull cars directly to and from customers located on the Property. Such cars will be included in the payment calculation to Belt Line. If, by application of the Belt Line Principle, another rail carrier is, or other rail carriers (excluding Norfolk Southern and CSX) are authorized to, operate over the Property, then the "COMPENSATION" due under this Agreement, as set forth in Section 4, and costs associated with "OPERATION, MAINTENANCE, AND IMPROVEMENTS", as set forth in Section 5, shall be reduced by an amount, or shared on a basis, proportionate to the other rail carriers' operations over the Property. Belt Line shall cause such *pro rata* share to be paid to Conrail upon presentation of quarterly invoices. The measure of use by each carrier under this provision shall be the percentage of each carrier's carload traffic as defined in Section 4A(2) below to the total carload traffic moving over the Property. This reduction in compensation and sharing of maintenance and improvement costs shall begin on the effective date of another rail carrier's authorized operation over the Property.

2. TERM OF AGREEMENT.

The initial term of this Agreement shall commence on the Agreement's Effective Date (as defined in Section 3 hereof) and shall terminate on December 31, 2028, unless sooner terminated in accordance with the provisions of this Agreement. This Agreement shall be renewed automatically for one ten (10) year period under the same terms and

conditions as set forth herein, unless Conrail, on or before June 30, 2028, delivers written notice to Belt Line of Conrail's decision to terminate this Agreement.

3. EFFECTIVE DATE.

This Agreement shall take effect as of January 1, 2014 (the "Effective Date"). Each calendar year during the initial term of this Agreement and any renewal term shall be deemed a "Contract Year."

4. COMPENSATION.

A. Conrail shall compensate Belt Line as follows under the Agreement:

(1) The Fixed Payment. Conrail shall pay Belt Line a fixed payment (the "Fixed Payment") for each Contract Year of the Agreement. The Fixed Payment shall be adjusted for each subsequent Contract Year, and the adjustment shall be effective as of January 1st of that Contract Year. For the initial Contract Year (2014), Conrail shall pay Belt Line the Fixed Payment of [REDACTED]. The Fixed Payment for each subsequent Contract Year will equal the Fixed Payment for the immediately preceding Contract Year multiplied by a factor, the numerator of which is the CPI (as defined below) for the December month for the immediately preceding Contract Year and the denominator of which is the CPI for the December month immediately preceding the December month used in the numerator. In the event the computed factor is less than [REDACTED], the Fixed Payment for the new Contract Year will be the same as the Fixed Payment for the immediately preceding Contract Year; in no event shall the amount of the Fixed Payment be adjusted downward from one Contract Year to the next.

(2) The Variable Payment. For each Contract Year, Conrail shall also pay Belt Line a variable payment (the "Variable Payment") on a per carload basis for all loads or revenue empties that originate, terminate or are switched intra-terminal on the

Property for customers located on or contiguous to the Property (including any carloads that may be delivered or originated by NS or CSX directly to or from the Property ("Carloads")). For the purposes of this Agreement, loaded or revenue empty intermodal platforms transported by rail to or from a terminal or from one terminal to another on the Belt Line North shall each be counted based upon the individual platforms and not upon the individual containers or trailers carried on the individual platforms. The Variable Payment shall be calculated by reference to a base rate (the "Base Rate") and a discounted rate (the "Discount Rate"). The Base Rate shall apply on a per carload basis for annual carload volume from 1 to 10,000 Carloads, provided that the number of Carloads exceeds 3,000 in the Contract Year in question. The Discount Rate shall apply on a per carload basis (i) to all annual Carloads in excess of 10,000 in the Contract Year in question or (ii) to all annual Carloads when annual carload volume does not reach 3,000 Carloads in the Contract Year in question. For the initial Contract Year (2014), the Base Rate shall be set at [REDACTED] per Carload and the Discount Rate shall be set at [REDACTED] per Carload. An example of this calculation is set forth in Exhibit "C" attached hereto and made a part hereof. The Base Rate and the Discount Rate shall be adjusted for each subsequent Contract Year and the adjustments shall be effective as of January 1st of that Contract Year. The Base Rate and the Discount Rate for each subsequent Contract Year shall be the rate in question for the immediately preceding Contract Year multiplied by a factor, the numerator of which is the CPI (as defined below) for the December month for the immediately preceding Contract Year, and the denominator of which is the CPI for the December month immediately preceding the December month used in the numerator. In the event the computed factor is less than 1.000, the Base Rate and the Discount Rate

for the new Contract Year will remain unchanged from the immediately preceding Contract Year; in no event shall the amount of the Base Rate or the amount of the Discount Rate be adjusted downward from one Contract Year to the next.

(3) Other. For each Contract Year, Conrail shall also pay Belt Line the amounts, and at the time, set forth in Section 4C of this Agreement.

C. Manner of Payment. The Fixed Payment shall be paid in equal monthly installments and shall be payable on the first day of each month in advance without demand or offset. The Variable Payment shall be computed through, and paid, without demand or offset, on a quarterly basis for, the quarters ending March 31st, June 30th, September 30th and December 31st in each Contract Year within thirty (30) days of the end of each quarter. If this Agreement terminates on a date other than December 31st, the Fixed Payment and the Variable Payment shall be payable on a *pro rata* basis through the date of termination. Catch up payments due to any lag in computing the annual CPI-based percentage shall be made promptly. If in any Contract Year the Carloads do not reach 3,000 for that Contract Year, then the fourth quarter payment shall be adjusted to reflect the change in the applicable per Carload rate. Catch up payments due to the Effective Date of this Agreement being earlier than the date the Agreement is executed shall be made promptly after execution of this Agreement by both Conrail and Belt Line.

D. "CPI" shall mean the CPI-U index (found, as of the Effective Date, at <http://www.bls.gov/cpi/cpid1405.pdf>, Table 24). In the event the CPI shall be discontinued, then the index most nearly the same as the CPI shall be used to make the adjustment calculations contemplated by this Section 4.

E. The amounts payable to Belt Line under this Section 4 shall not include,

and Conrail shall be solely responsible for, payment of the following:

(1) All taxes, assessments, and governmental charges, ordinary and extraordinary, which are imposed upon the Property.

(2) All sums payable by Belt Line under any agreements for the exclusive or nonexclusive use or right of use by Belt Line of any property of another person, firm, or corporation, which property shall be part of the Property subject to this Agreement.

F. Conrail shall be responsible, at its sole cost and expense (including fees for permits and similar documents), for obtaining all utility services that it requires or desires to operate on the Property, including the installation of meters and sub-meters if none exist. Conrail shall be responsible for all charges for utility services consumed by, and supplied to, Conrail by the provider thereof.

G. Except as otherwise provided in Sections 4, 5 and 8 of this Agreement, Conrail shall have no responsibility for any rents, charges, or any other compensation or assessments due on the Property.

5. OPERATION, MAINTENANCE, AND IMPROVEMENTS.

A. Conrail, at its own expense and without deduction from the payments made to Belt Line pursuant to Section 4, shall:

(1) Except as otherwise provided in this subparagraph and in Section 16, operate and maintain the Property (i) in good order, condition and repair, (ii) in the manner required by law, and (iii) in accordance with the terms of any existing mortgage or other agreement relating to any of the Property. The parties agree to conduct joint semi-annual inspections of the Property. Belt Line, at its discretion, reserves the right to conduct such other inspections of the Property as it deems appropriate.

(2) Make such additions, betterments, and replacements to the

Property as Conrail, in its discretion, may consider necessary or desirable. Conrail specifically agrees that it will undertake a rehabilitation and subsequent on-going maintenance of the infrastructure of the Belt Line North (from Allegheny Avenue to Frankford Creek) with a new passing siding from Castor to Lewis Streets to include new rail, ties, ballast, drainage, turnouts, grade crossings, and clean-up of the right-of-way. Conrail will provide Belt Line the opportunity to review and comment upon its plans for such rehabilitation and maintenance to a standard comparable to Conrail's current Port Richmond Industrial Track. This rehabilitation project has been estimated by Conrail to cost approximately \$2.5 million and shall be completed within one (1) year following the date of execution of this Agreement by Conrail.

6. COVENANTS AND WARRANTIES.

A. Belt Line covenants and warrants as follows:

(1) That Belt Line has appropriate authority under its articles of incorporation and by-laws to enter into, execute, and perform all of its obligations under this Agreement and that it has adhered to all procedures and requirements contained in said articles of incorporation and bylaws prior to execution of this Agreement.

(2) That Belt Line will take all action, to the extent of its rights and powers and within its control, reasonably necessary to maintain and preserve its corporate existence and franchises, provided however, that if Belt Line, acting in accordance with its by-laws and articles of incorporation, enters into an arrangement to sell any of the Property, it will notify Conrail of the terms of such agreement. Conrail, within thirty (30) days of receiving such notification, shall notify the Belt Line in writing of its intent to purchase the Property and will have an additional forty-five (45) days to close on such purchase upon the terms which Belt Line has agreed to sell same to a third party. If Belt

Line should be dissolved and its assets liquidated, Conrail shall be accorded, to the extent Belt Line is empowered to do so, the same right of first refusal.

(3) That Belt Line will execute and deliver to Conrail all such instruments and documents as may be reasonably necessary for Conrail to operate on the Property.

(4) That execution and performance of its obligations under this Agreement by Belt Line will not violate any agreement binding on Belt Line.

(5) That Belt Line will not enter into any agreement or arrangement that precludes, reduces, or interferes with Conrail's effective use of the Property for rail operating purposes. This paragraph shall not be construed to prohibit any action of Belt Line required to carry out the Belt Line Principle, nor to prohibit leases, licenses, grants, and activities such as those permitted by Sections 8B and 8C of this Agreement.

(6) That Belt Line has no knowledge of any litigation pending or threatened, or any pending or outstanding Public Utility Commission or Municipal order(s), against Belt Line which would interfere with Conrail's use of the Property for rail operating purposes or require the expenditure of substantial monies in order to restore and rehabilitate one or more lines of the Property.

(7) The "Belt Line Principle" is defined as the requirement that Belt Line be operated (i) to benefit the trade and commerce of the City of Philadelphia, (ii) to provide full and equal facilities upon equal terms for all railroads which now or may hereafter enter the City to use the Belt Line's railroad, without discrimination or favoritism between them, and (iii) to assure that the Belt Line and its railroad are free from the exclusive control of any of the railroad companies that use it and will be controlled in the

interest of trade and commerce of the City of Philadelphia.

B. Conrail covenants and warrants as follows:

(1) That Conrail has appropriate corporate authority to enter into and execute this Agreement.

(2) That Conrail shall use the Property for, or in conjunction with, rail operations and will maintain said Property in good order, condition, and repair in a manner comparable to the maintenance standards of Conrail's Richmond Industrial Track as of the Effective Date, in a manner designed to preserve its functional usage and in accordance with applicable laws, regulations and the Belt Line Principle, subject however, to the provisions of Sections 5 and 16 of this Agreement.

(3) That Conrail shall not enter into any agreement or arrangement that precludes, reduces, or interferes with the implementation of the Belt Line Principle or Belt Line's ability to engage in the activities permitted by Section 8B and 8C of this Agreement.

(4) That, without the written consent of Belt Line, and except as otherwise expressly permitted by Section 8A of this Agreement, Conrail shall not assign or transfer this Agreement, or sublease any of the Property.

7. INSURANCE/INDEMNIFICATION.

Conrail shall, at its own expense and without deduction from the payments due Belt Line under Section 4 or Section 8, make its self-insurance and insurance coverages, in effect at the time this Agreement is executed, applicable to the Property. Conrail both self-insures and insures for liability exposures, consistent with or in excess of other comparable railroads and shall, at the time this Agreement is executed, provide Belt Line with a certification of its commercial excess liability insurance coverage. Further, with regard to

any such liabilities, Conrail agrees to indemnify and hold Belt Line harmless from all losses, damages, costs, and expenses which Belt Line may incur, or for which Belt Line or any Property may become liable, or which may be claimed against Belt Line or any Property by reason of this Agreement, or growing out of or arising in connection with this Agreement, or the use or operation of the Property, except to the extent such loss or damage is caused by the sole or gross negligence of Belt Line.

8. LEASES, LICENSES, AND OTHER AGREEMENTS.

A. Belt Line will, during the term of this Agreement, assign to Conrail all of its interest in the leases, licenses, and other agreements listed in Exhibit "B" attached hereto and made part hereof and has delivered to Conrail copies thereof. As long as those agreements remain in effect, Conrail shall be responsible for collecting the lease and license rental fees due under said agreements and shall, in turn, pay annually, on January 1st to Belt Line, the current rental amounts specified in these agreements as of the date this Agreement is executed. Conrail shall have the right to increase those rental charges, insofar as those agreements permit, and retain for itself all rental amounts in excess of the amount payable to Belt Line under the immediately preceding sentence. Except for agreements covered by Sections 8B and 8C of this Agreement, Conrail shall be responsible for negotiating new lease and license agreements (similar in kind as to those types listed in Exhibit "B" and in distinction to the types listed in Section 8B hereof) with any party not now covered by an existing agreement and shall retain all lease and/or license rentals received under such new agreements. In the event Conrail does not exercise its right to terminate the Agreement under Section 2, then, starting as of the 16th Contract Year, Belt Line shall be entitled to the then current rental amounts specified in the agreements referenced in Exhibit "B" hereto and the then current rental

amounts specified in any agreements Conrail has negotiated since the Effective Date of this Agreement.

B. Nothing in this Agreement shall prevent Belt Line from leasing or licensing portion(s) of the Property for signs, fiber optics, pipelines, cell towers, billboards, or any other ancillary business or non-railroad use which rights and revenues from such rights the Belt Line shall retain for its exclusive use, provided that it (a) notifies Conrail, (b) supplies summaries of the agreements to Conrail, (c) furnishes Conrail with certificates of liability insurance, naming Conrail as an insured, in the amount of \$3 million combined single limit for liability and/or property damage, and (d) requires that the installation, use and maintenance of same not unreasonably interfere with rail operations over the Property or the maintenance thereof.

C. Nothing in this Agreement shall prevent Belt Line from engaging in its own industrial development efforts on or about, or in connection with, the Property, and Conrail will work cooperatively with Belt Line to develop opportunities to increase rail traffic to and from customers located on Belt Line's railroad, including but not limited to the parties jointly or separately (upon prior notice to the other party) applying for grant and/or other public funding opportunities.

9. DEFAULT.

The following events shall be deemed events of default by Conrail:

A. Failure to make any of the payments due Belt Line by Conrail pursuant to Sections 4 and 8 when due and payable;

B. Failure to perform, in whole or in part, any other covenant or obligation specified in this Agreement;

C. Any assignment or transfer or attempted assignment or transfer of the

Property or of this Agreement, or any sublease or attempted sublease of Property, except as otherwise expressly permitted by Section 8A of this Agreement, without the written consent of Belt Line; or

D. Without first obtaining the written consent of Belt Line, any filing of, or attempt to file, this Agreement with the Surface Transportation Board ("STB").

If any of the foregoing events of default occur, Belt Line shall provide Conrail with written notice of said default and give Conrail thirty (30) days from the date of receipt of Belt Line's notice to cure such default, or if such default cannot be cured within thirty (30) days, then Conrail shall use all reasonable efforts to complete such cure as soon as practicable. If such default is not cured by Conrail, Belt Line may, by written notice, declare this Agreement terminated and retake possession and operation of the Property, which Conrail shall promptly vacate and surrender upon such an occurrence. Termination of this Agreement by Belt Line, as provided herein, shall not relieve Conrail of any of its obligations which occurred or arose prior to the termination hereof.

10. FURNISHING OF INFORMATION.

The accounts kept by either Belt Line or Conrail relating to the Property, to this Agreement, or to the rail operations over the Property shall be subject to inspection and examination by officers or agents of either party hereto, and each party agrees to furnish to the other party such information relating to its maps, accounts, income, receipts, expenditures, obligations and any other documents as may reasonably be requested as necessary to determine compliance with the parties' respective obligations under this Agreement. Conrail and Belt Line shall each have the right to inspect and make copies of any and all documents each reasonably deems necessary to perform its obligations under this Agreement. Conrail shall, during each year that this Agreement

is in effect, advise Belt Line within thirty (30) days of the end of each quarter of the number of Carloads handled hereunder for the purpose of computing the quarterly per carload payments to Belt Line.

11. RECORDATION.

Conrail shall have the right to record this Lease with the City of Philadelphia's Department of Records.

12. REGULATORY APPROVAL

It is the understanding of the parties that any Conrail operations under this Agreement do not require approval by the STB nor will any STB approvals be sought for Conrail to operate pursuant to this Agreement. Moreover, in no event shall Conrail seek approval of this Agreement with the STB without first obtaining written consent of the Belt Line.

13. EXPIRATION/TERMINATION OF AGREEMENT.

Upon expiration or termination of this Agreement, Conrail shall peaceably give up and surrender to Belt Line possession of the Property. If Conrail or any other party claims that it cannot surrender operation of the Property without regulatory approval from the STB, then Conrail shall, at Conrail's sole cost and expense, submit all necessary applications, petitions and/or notices to the STB or any successor agency, and will make when and where due all related ancillary submissions (including but not limited to environmental reports), required to effectuate a termination of this Agreement and a discontinuance of Conrail's operations hereunder. Such applications, permits and notices, if required, will be filed promptly and taken in sufficient time to, in good faith, request the STB that said filing be effective on the termination or expiration date of this Agreement. In the event that Conrail fails to make such filings in a timely manner, Belt

Line may make such filings as may be appropriate to effectuate discontinuance of Conrail's operations of the Property, with Conrail being responsible for all costs (including but not limited to filing fees and reasonable attorney fees) incurred by Belt Line in making such filings. In the event Belt Line makes such filings, Conrail will not oppose the relief requested in Belt Line's filings. Upon expiration or earlier termination of this Agreement, Belt Line or another party appointed by Belt Line, shall have the right to enter onto and operate the Property during the pendency of any required regulatory proceedings. Nothing in Paragraph 13 will preclude Conrail or any other party from invoking the Belt Line Principle upon expiration or earlier termination of this Agreement.

14. ARBITRATION.

A. With the exception of any dispute specifically related to whether or not Conrail has common carrier rights regulated by the STB, any which such issue shall not be arbitrable, if, during the term of this Agreement, any dispute should arise between the parties regarding the interpretation, application, or enforcement of any of the terms of this Agreement, and such dispute cannot be resolved by the parties within thirty (30) days after either party notifies the other of its desire to arbitrate the dispute, then the dispute shall be settled by arbitration in accordance with the then current commercial arbitration rules of the American Arbitration Association. For arbitration, a panel of three arbitrators shall be named, one to be selected by each of the parties and one to be selected by the other two arbitrators. If the two arbitrators cannot agree upon the third arbitrator within fifteen (15) days, then either party may apply to the American Arbitration Association for appointment, in accordance with its procedures, of the third arbitrator. In the alternative, the parties may agree on a sole arbitrator.

B. Each party hereby consents to the entry of a judgment of any court of competent jurisdiction in accordance with the decision of the arbitration panel. No change in the rules of arbitration shall deprive any party of the right to be represented by counsel, to present evidence, and to cross-examine witnesses presented by the other party in any arbitration proceeding arising out of this Agreement.

C. The arbitrators shall have no power to modify any of the provisions of this Agreement, and their jurisdiction is limited accordingly. The decision of the arbitrators shall be rendered within ninety (90) days after the matter has been submitted.

D. Each of the parties shall be responsible for the expenses incurred by the arbitrator appointed by said party, and the expenses, fees, and cost of the third arbitrator, or sole arbitrator, shall be borne equally between the parties.

E. With the exception of any filings related to the issue of Conrail's common carrier rights before the STB, during the pendency of any such arbitration, neither party shall make any filings with the STB respecting the subject matter of said arbitration. Further, should any matter be pending before the STB that thereafter becomes subject to an arbitration hereunder, and such matter is a proper matter for arbitration under this Agreement, the parties mutually agree to jointly request the STB to stay any such STB proceeding.

14. NOTICE.

Every notice, approval, consent, or other communication desired or required under this Agreement shall be effective only if the same shall be in writing and sent postage prepaid by United States registered or certified mail (or a similar mail service available at the time), directed to the below named individual for the other party at the indicated address, or such other person or address as either party may designate by notice

given as aforesaid from time to time.

To Conrail:

Vice President and Chief Legal Officer
1717 Arch Street, Suite 1310
Philadelphia, PA 19103

To Belt Line:

James Turcich
Philadelphia Belt Line Railroad Company
325 Chestnut Street - Suite 1308
Philadelphia, PA 19106

Mailing Address Only:
James Turcich
Philadelphia Belt Line Railroad Company
P.O. Box 40028
Philadelphia, PA 19106-0028

15. SUCCESSORS AND ASSIGNS.

Except as otherwise provided in this Agreement, the covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

16. FORCE MAJEURE.

If the Property becomes inoperable, in whole or in part, and cannot be used for railroad purposes due to a Force Majeure Event (as defined below), Conrail's obligations under this Agreement to perform rail operations over that portion of the Property rendered inoperable shall be suspended during the period that such rail operations cannot be performed. In the event of such an occurrence, the fixed annual payment shall be reduced, on a *pro rata* basis, by the length of time that the Force Majeure Event results in suspension of rail operations over the affected portion of the Property.

If the damage caused by a Force Majeure Event is of such magnitude that the cost

to Conrail of making the necessary repair and restoration would, when considered in light of existing traffic moving to and from shippers and receivers located on Property, make Conrail's entire operation over the Property uneconomical, then Conrail shall have the right to discontinue operations over Property and terminate this Agreement.

If Conrail undertakes to restore any or all of the Property to usable condition, Conrail shall use due diligence to eliminate any Force Majeure Event and resume normal railroad operations over Property, and any failure by Conrail to use due diligence in such circumstances shall not suspend Conrail's obligations under this Agreement nor result in suspension of the duty to make the payments required by Section 4 of this Agreement.

Any dispute arising under the force majeure provisions of this Section 16 shall be settled by arbitration, as provided in Section 13.

The following are defined as "Force Majeure Events": Acts of God, including floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; Act of public enemy, war, blockade, insurrection, labor dispute, vandalism or sabotage; fire, accident, wreck, derailment, washout, or explosion; and government order or law.

17. ENTIRE AGREEMENT.

The entire agreement between the parties is set forth in this Agreement, and there are no understandings, agreements, or representations of any kind between the parties, verbal or otherwise, other than as set forth in this Agreement. No change, amendment, or modification of any of the covenants, terms or provisions hereof shall be valid unless said change, amendment, or modification is in writing, is signed by the parties hereto, and expressly states that it is being executed pursuant to this Section 17 of this Agreement.

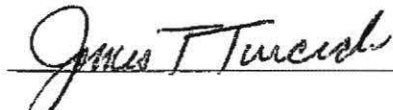
18. SECTION HEADINGS.

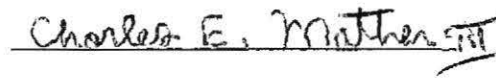
Section headings have been set forth in this Agreement merely for the convenience of the parties and shall not be used or referred to in construing or interpreting any provision of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on their behalf.

Attest:

The Philadelphia Belt Line
Railroad Company

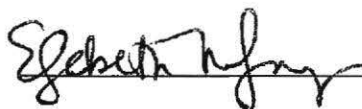

Assistant Secretary

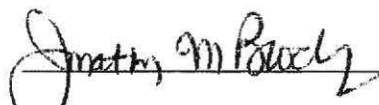

President

Dated: October 17, 2014

Attest:

Consolidated Rail Corporation


Assistant Secretary


Vice President and Chief Legal Officer

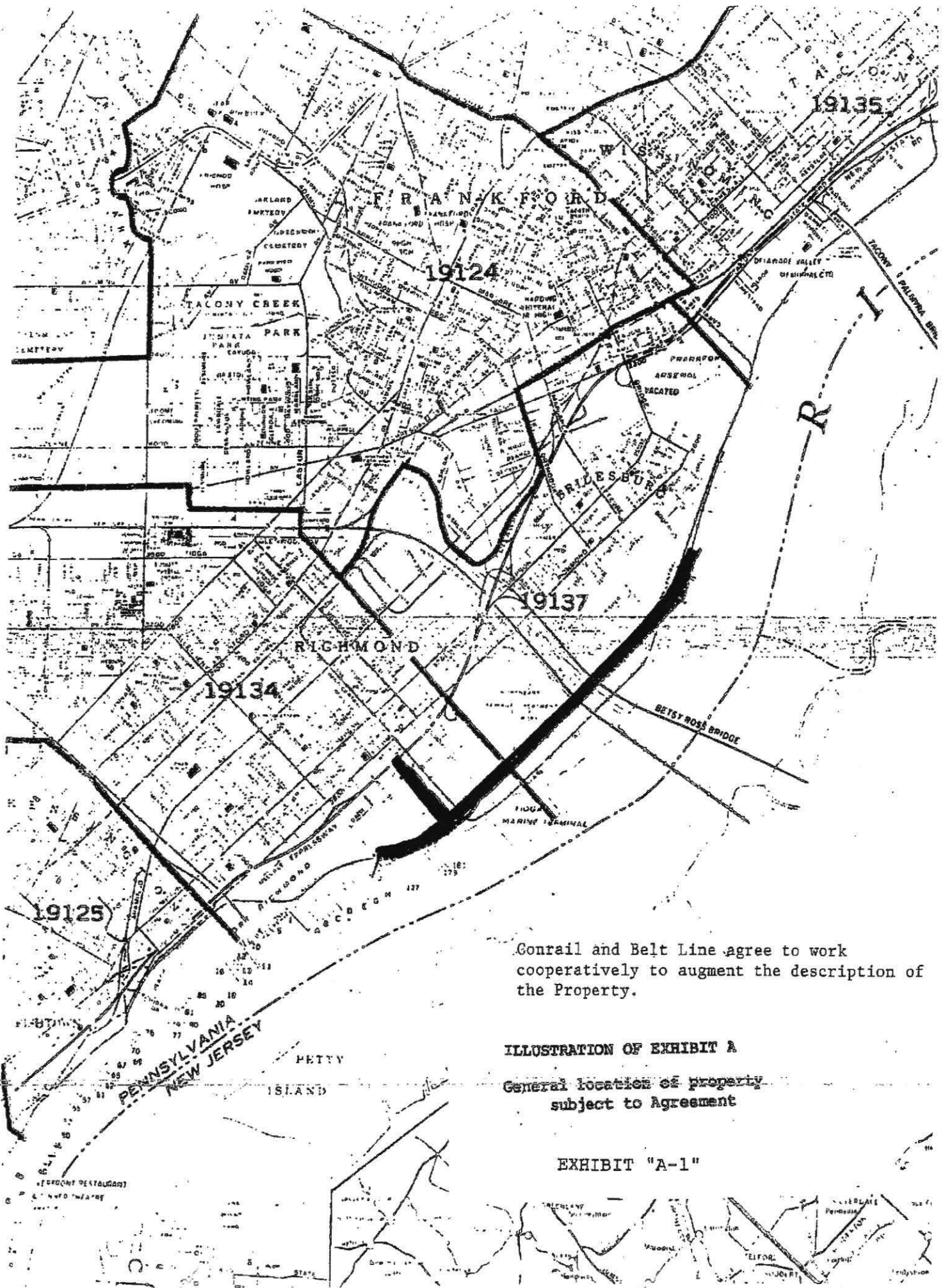
Dated: October 17, 2014

EXHIBIT "A"

[

The Philadelphia Belt Line Railroad Company ("Belt Line") property subject to the Operating Lease Agreement shall consist of all Belt Line rail related property (including rail right-of-way, track infrastructure, buildings and other real and personal property) within the current Belt Line North right-of-way located in the Bridesburg Section of Philadelphia, commencing at Engineering Station 0+0 at the South House Line of Allegheny Avenue, extending in a general Northeasterly direction along the West side of relocated Delaware Avenue, and then extending in and along Carbon Street (not opened) to its intersection with Buckius Street at Engineering Station 110+00, the latter being the point of delivery of traffic to the Rohm and Haas Plant. All Belt Line property (including land, buildings and other real and personal property, but not track) within the Belt Line right-of-way extending in a northeasterly direction from Buckius Street at Engineering Station 110+00 to a point 130 feet + southwest of the extension of the South House Line of Locust Street (A.K.A. Kennedy Street) at Engineering Station 140+35 shall also be subject to this Agreement. The tracks within this latter segment are subject to Lease Agreements dated October 31, 1977, August 14, 1973 and January 6, 1967 between the Belt Line and Rohm and Haas Company, with the Belt Line's interest in these agreements being assigned to Conrail. The attached map depicts the relative location of the property subject to this Agreement.

Note: There are two existing high stand billboards located on land excluded from the Property on the second track right-of-way north of Frankford Creek on either side of the Betsy Ross Bridge.



Conrail and Belt Line agree to work cooperatively to augment the description of the Property.

ILLUSTRATION OF EXHIBIT A

General location of property
subject to Agreement

EXHIBIT "A-1"

PENNSYLVANIA BELTLINE EXISTING AGREEMENTS/LESSEES
EXHIBIT B

CR REGISTRY #	PBL AGMT #	NAME	DATE	AMOUNT
288614	1264-21	BELL TELEPHONE	7/15/1941	\$
288653	1343-1	PHILADELPHIA ELECTRIC	8/12/1949	\$
288662	1361-2	PHILADELPHIA GAS WORKS	9/22/1972	\$
288678	1418	ROHM & HAAS	6/4/1963	\$
288679	1419	ROHM & HAAS	6/4/1963	\$
288680	1420	ROHM & HAAS	6/24/1963	\$
288684	1436-A	ROHM & HAAS	1/6/1967	\$
288685	1436-D	ROHM & HAAS	8/14/1973	\$
288686	1453	PHILADELPHIA GAS WORKS	5/16/1968	\$
288695	1477	ALLIED CHEMICAL COMPANY	2/1/1973	\$
288696	1477-1	ALLIED CHEMICAL COMPANY	7/3/1973	\$

TOTAL

\$

EXHIBIT C

CARLOAD RENT CALCULATION

CARLOADS = X		
IF	X < 3,000	DISCOUNT RATE APPLIES (if annual CLs do not exceed 3000)
IF	1 < X < 10,000	BASE RATE APPLIES
IF	X > 10000	BASE RATE APPLIES TO 10,000, DISCOUNT RATE APPLIES TO THE AMOUNT OVER 10,000

DISCOUNT RATE = [REDACTED]
 BASE RATE = [REDACTED]

CARLOADS = X		
IF	X < 3,000	[REDACTED] x CARLOADS (if annual CLs do not exceed 3000)
IF	1 < X < 10,000	[REDACTED] x CARLOADS
IF	X > 10000	[REDACTED] x 10,000 + [REDACTED] x (CARLOADS > 10,000)

Examples of each scenario (using rates for 2014):

CARLOADS = 1,477		
IF	X < 3,000	[REDACTED] x 1,477 = [REDACTED] (annual CLs did not exceed 3000)
IF	1 < X < 10,000	[REDACTED] x CARLOADS
IF	X > 10,000	[REDACTED] x 10,000 + [REDACTED] x (CARLOADS - 10,000)

CARLOADS = 6,903		
IF	X < 3,000	[REDACTED] x CARLOADS
IF	1 < X < 10,000	[REDACTED] x 6,903 = [REDACTED]
IF	X > 10,000	[REDACTED] x 10,000 + [REDACTED] x (CARLOADS - 10,000)

CARLOADS = 12,677		
IF	X < 3,000	[REDACTED] x CARLOADS
IF	1 < X < 10,000	[REDACTED] x CARLOADS
IF	X > 10,000	[REDACTED] x 10,000 + ([REDACTED] x 2,677) = [REDACTED]

Note: Base rate will apply until 4th Quarter determination of whether annual volume will be below 3000 carloads. If so, adjustments to base rate made in 4th Q payment.

Base and Discount rates are subject to annual escalation described in lease agreement

EXHIBIT G

PBL Brief in Support of Preliminary Objections

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Philadelphia Belt Line Railroad Company

RICHMOND WATERFRONT
INDUSTRIAL PARK LLC,

Plaintiff,

v.

PHILADELPHIA BELT LINE
RAILROAD COMPANY,

Defendant.

COURT OF COMMON PLEAS

PHILADELPHIA COUNTY

MARCH TERM 2022

NO. 002872

DEFENDANT’S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

I. MATTER BEFORE THE COURT

Defendant Philadelphia Belt Line Railroad Company (the “Railroad” or “PBL”) has filed preliminary objections to the Complaint of Plaintiff Richmond Waterfront Industrial Park LLC (“RWIP”), based on the following grounds: (1) demurrer as to Count I (adverse possession) as it is black letter law that a plaintiff may not assert ownership of a railroad right-of-way through adverse possession; and (2) lack of jurisdiction over the subject matter of the action as to Count 2 (abandonment) as the Surface Transportation Board (“STB”) has exclusive jurisdiction to determine if rail lines have been abandoned.

II. STATEMENT OF QUESTIONS INVOLVED

1. Given that the Pennsylvania Supreme Court and Superior Court have repeatedly held that land embraced within a railroad right-of-way cannot be acquired by adverse possession,

should the Court sustain the Railroad's demurrer to RWIP's claim of adverse possession over its right-of-way (Count I)?

2. Given that the STB has exclusive jurisdiction to determine if a rail line has been abandoned, should the Court dismiss Count II of RWIP's complaint (abandonment) for lack of subject matter jurisdiction?

III. FACTS

In 1998, RWIP acquired from the Rohm and Haas Company certain real property known as 2950 Kirkbride Street in the City of Philadelphia (the "Property"). *See* Complaint at ¶¶ 3-4.¹ As reflected in the Special Warranty Deed (the "Deed") attached as Exhibit A to the Complaint, RWIP acquired the Property subject to a railroad right-of-way easement held by PBL for the length of the Property parallel to the Delaware River. *See* Exhibit 1-A, Deed at 3, 4 (referencing the "Thirty-Three foot wide (33.000' wd.) Right-of-Way of the Philadelphia Belt Line Railroad").²

In its Complaint, RWIP claims that it has acquired ownership of PBL's railroad right-of-way through adverse possession. *See* Complaint, Ex. 1, at Count 1. RWIP also claims that the Railroad has abandoned its right-of-way easement. *Id.* at Count 2. The Complaint does not allege, nor can it, that the Board of PBL authorized abandonment of the segment of rail line or the right-of-way that crosses RWIP's property, nor does the Complaint aver that PBL sought authority from the Surface Transportation Board ("STB"), or its predecessor the Interstate

¹ The Complaint is attached to PBL's Preliminary Objections as Exhibit 1.

² By way of background, on December 26, 1890, the Mayor of Philadelphia approved an ordinance passed by Philadelphia City Council that established the PBL franchise in the City of Philadelphia (the "1890 Ordinance"). The 1890 Ordinance granted PBL rights-of-way for the construction of railroad lines along the Schuylkill and Delaware Rivers, with various branches along the way. As relevant here, the 1890 Ordinance granted PBL the right to build and operate tracks from Allegheny Avenue north along the Delaware River, including the tracks on the property currently owned by RWIP, and extending north into the adjoining property retained by Rohm and Haas (now Dow). For the convenience of the Court, the 1890 Ordinance is attached to PBL's Preliminary Objections as Exhibit 2.

Commerce Commission (“ICC”), to abandon its freight common carrier obligation over the segment of rail line.

IV. ARGUMENT

A. Preliminary objection pursuant to Pa.R.C.P. 1028(a)(4) as to Count I (adverse possession) for legal insufficiency of a pleading (demurrer)

Preliminary objections in the nature of a demurrer are appropriate when a pleading is legally insufficient on its face. *See* Pa.R.C.P. 1028(a)(4). Although a court is to “accept as true all well-pleaded facts and all reasonable inferences deductible therefrom,” a demurrer does not admit a plaintiff’s conclusions of law. *See Schuylkill Navy v. Langbord*, 728 A.2d 964, 968 (Pa. Super. Ct. 1999). Dismissal is appropriate when it is “clear the law will not permit recovery” from the factual allegations contained in the Complaint. *Chasan v. Platt*, 244 A.3d 73, 80 (Pa. Super. Ct. 2020). That is the case here.

The Pennsylvania Supreme Court and Superior Court have made it clear that Plaintiff cannot, as a matter of law, acquire a railroad right-of-way through adverse possession. *See PA Energy Vision, LLC v. S. Avis Realty, Inc.*, 120 A.3d 1008, 1015 (Pa. Super. Ct. 2015) (“Importantly, one cannot acquire by adverse possession land within a railroad right-of-way.”); *A.D. Graham & Co. v. Pa. Tpk. Comm’n*, 33 A.2d 22, 34-35 (Pa. 1943) (“land embraced within a railroad right-of-way cannot be acquired by adverse possession”); *Conwell v. Philadelphia & R. Ry. Co.*, 88 A. 417 (Pa. 1913) (holding no right of occupancy in the right-of-way of a railroad company within its established width can be acquired by adverse possession).

One cannot acquire by adverse possession land within a railroad right-of-way because “the right of way of a railroad company, whatever its established width, as soon as acquired is impressed with a public use, it constitutes a public highway. The railroad company holds it in trust for the people of the [C]ommonwealth.” *Pa Energy Vision*, 120 A.3d at 1014 (quoting *Conwell*, 88 A. at 418); *see also Williamstown Borough Author. v. Cooper*, 591 A.2d 711, 715

(Pa. Super. Ct. 1991) (“Even privately owned property which has been dedicated to public use cannot thereafter be claimed by adverse possession.”), *appeal granted*, 602 A.3d 861 (Pa. 1992). With respect to railroads, “[t]he public use [of the right of way] arises as soon as it is acquired, and it continues at all time during the life of the franchise against which no prescription runs.” *Id.* (quoting *A.D. Graham*, 33 A.2d at 31). As *A.D. Graham* emphasized, “land embraced within a railroad right-of-way is held for public purposes and for that reason cannot be acquired by adverse possession.” 33 A.2d at 32.

The law is very clear in this Commonwealth that a railroad right-of-way may not be acquired through adverse possession. Accordingly, the Defendant’s demurrer to Count 1 should be sustained for failure to state a claim even accepting the Plaintiff’s allegations as true.

B. Preliminary objection pursuant to Pa.R.C.P. 1028(a)(1) as to Count 2 (abandonment) due to lack of jurisdiction over the subject matter

Subject matter jurisdiction “relates to the competency of the individual court...to determine controversies of the general class to which a particular case belongs.” *Strasburg Scooters, LLC v. Strasburg Rail Road, Inc.*, 210 A.3d 1064, 1067 (Pa. Super. Ct. 2019) (citing *Green Acres Rehab & Nursing Ctr. v. Sullivan*, 113 A.3d 1261, 1268 (Pa. Super. Ct. 2015)). Lack of subject matter jurisdiction “may be raised at any time, by any party, or by the court *sua sponte*.” *Id.* (citing *Grimm v. Grimm*, 149 A.3d 77, 82 (Pa. Super. Ct. 2016)).

Plaintiff attempts to circumvent the clear ban on adverse possession of railway rights of way by claiming that PBL has abandoned its railway right-of-way/easement on the Property. *See* Complaint, Ex. 1, at Count 2. However, railroad line may only be abandoned through an express statutory process set forth in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. §§ 10101 *et seq.* By virtue of its ownership of lines of railroad, PBL is a common carrier engaged in interstate commerce subject to the jurisdiction of the STB, and its

railroad-related rights and obligations are subject to the exclusive jurisdiction of the STB. A common carrier's right-of-way, including the right-of-way that crosses the RWIP property, may be abandoned **only** upon the prior authorization of the STB pursuant to 49 USC § 10903 (titled, "Filing and procedure for application to abandon or discontinue").

Indeed, when a railroad carrier subject to the jurisdiction of the STB seeks to abandon or discontinue any part of a railroad line or related right-of-way, the carrier must file an application with the STB and provide information as required by statute and the regulations thereto. *See id.*; *see also* 49 C.F.R. Part 1152; *Friends of Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 251 (3d Cir. 2001) ("A rail carrier intending to abandon, and to be released from its obligations to retain or operate, any part of its railroad lines must file an application to do so with the STB and such abandonment must adhere to certain established procedures."). The STB has concluded that the administrative abandonment process must be complete before state property law, including adverse possession, may be invoked. *See Landowners –Motion for Declaratory Order and Injunctive Relief*, No. AB 10656 (STB Jan. 27, 2020). Accordingly, the Plaintiff's claim of abandonment (and of adverse possession) fails because this Court lacks subject matter jurisdiction due to the broad preemption provisions of the ICCTA , which grants the STB exclusive jurisdiction over rail transportation, rail carriers, and rail facilities like the ones at issue here. *See* 49 U.S.C. § 10501(b).

Notably, the ICCTA has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Middlesex Cty. Health Dep't v. CONRAIL*, No. 08-4547 (AET), 2008 U.S. Dist. LEXIS 133040, at *4-5 (D.N.J. Dec. 16, 2008) (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). Specifically, the ICCTA provides the STB with "exclusive" jurisdiction over:

transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

the construction, acquisition, operation, **abandonment**, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State [.]

49 U.S.C. § 10501 (emphasis added); *see also Strasburg Scooters*, 210 A.3d at 1068.

Although the Plaintiff summarily alleges that PBL “abandoned” its railway right-of-way on the Property because it allegedly has not been used recently, even if true, that would be insufficient. The STB has held that the ICCTA preempts such claims even when the property is not currently used for rail purposes or is rail banked.³ *See Jie Ao and Xin Zhou, Petition for Declaratory Order*, 2012 STB LEXIS 206, at *3 (STB June 6, 2012) (STB rejected claim of adverse possession where portion of the property in the right-of-way had never been used for railroad operations); *see also 14500 Ltd. v. CSX Transp. Inc.*, No. 1:12 CV 1810, 2013 U.S. Dist. LEXIS 39806 at *13 (N.D. Ohio Mar. 14, 2013)(preempting adverse possession claim because the taking of the railroad’s property would affect railroad transportation in the future.)

Because the PBL property at issue is not simply another piece of real estate but a railroad right-of-way and line of railroad, even if currently inactive, it is subject to the ICCTA. There is no allegation in the Complaint, nor can there be, that PBL has taken any corporate action to authorize abandonment, or that PBL has sought abandonment of the railway right-of-way at issue through the STB. And there is no allegation or evidence that any abandonment of the PBL right-of-way at issue has been authorized by the STB. Lack of use is not the same as “abandonment;” abandonment must be accomplished by a formal petition to the STB, not by simply asserting to a

³ “Rail banked” means that the property remains part of the national rail system, albeit temporarily unused for active rail service. *See Jie Ao*, 2012 STB LEXIS 206, at *15.

court that railroad operations have long ago ceased. *See* 49 C.F.R. §11152.29(e)(2); *Abandonment & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. §10903*, STB Ex. Parte No. 537, 1997 WL 351419, at *5 (S.T.B. June 18, 1997).

As it is undisputed that the STB is granted exclusive jurisdiction over railroad abandonment determinations, dismissal of Count 2 by way of preliminary objection is appropriate. *See Strasburg Scooters*, 210 A.3d at 1066 (trial court correctly sustained preliminary objections for lack of subject matter jurisdiction because the STB has exclusive jurisdiction over the “operation” and “abandonment” of side tracks and exclusive authority to decide whether the Rail Road abandoned tracks and the manner in which they may be used).

Courts across the country have consistently held that the ICCTA preempts state law claims of adverse possession over railroad property, reasoning that claims of adverse possession unreasonably interferes with railroad operations and divests the railroad of property on which it conducts its operations. *See, e.g. Strasburg Scooters*, 210 A.3d at 1068 (citing *B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252 (E.D. Wash. 2012) (district court dismissed state law adverse possession claim seeking fee simple title over railroad’s property based on ICCTA’s preemption of claim)); *see also Skidmore v. Norfolk S. Ry. Co.*, No. 19-2482, 2021 U.S. App. LEXIS 17671 (4th Cir. June 14, 2021) (affirming district court’s holding that the ICCTA preempts the plaintiff’s adverse possession and prescriptive easement claims); *14500 Ltd.*, 2013 U.S. Dist. LEXIS 39806 (ICCTA preempts the plaintiff’s adverse possession claim).

As the Pennsylvania Superior Court recently stated, “[s]imply put, if an action falls with Section 10501(b)(1) or (b)(2)...the trial court must dismiss the action due to the STB’s exclusive jurisdiction over the proceedings.” *Strasburg Scooters*, 210 A.3d at 1068-69.

V. RELIEF REQUESTED

Defendant Philadelphia Belt Line Railroad Company respectfully requests that its Preliminary Objections be sustained and Plaintiff's Complaint be dismissed.

Respectfully submitted,

CLARK HILL PLC

/s/ Lisa Carney Eldridge

Lisa Carney Eldridge

Eric M. Hocky

Counsel for Defendant

Philadelphia Belt Line Railroad Company

Dated: May 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2022, a true and correct copy of the foregoing Brief in Support of Preliminary Objections has been filed via the Court's CM/ECF system which will send notification to all counsel of record, and was served on Plaintiff's counsel via email, addressed as follows:

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CLARK HILL PLC

/s/ Lisa Carney Eldridge
Lisa Carney Eldridge
Eric M. Hocky

Counsel for Defendant

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MARCH TERM 2022

NO. 002872

ORDER

AND NOW, this ____ day of _____, 2022, upon consideration of Defendant's Preliminary Objections and brief in support thereof, it is hereby **ORDERED** and **DECREED** that Defendant's Preliminary Objections are **SUSTAINED** and Plaintiff's Complaint is **DISMISSED**.

BY THE COURT:

J.