

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

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City of Philadelphia – Petition for a Declaratory Order

**READING INTERNATIONAL, INC.'S REPLY TO
CITY OF PHILADELPHIA'S PETITION FOR A DECLARATORY ORDER**

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The Surface Transportation Board (“STB”) should deny the City of Philadelphia’s (“City”) Petition for a Declaratory Order (“Petition”) for two overarching reasons—(1) a United States District Court recently concluded that Consolidated Rail Corporation (“Conrail”) relinquished only an easement for its operating interests on the 9th Street Branch, and Reading International, Inc., through its subsidiary RCPA, LLC, formerly known as Reading Company¹ (collectively “Reading”), never abandoned and still owns the real property at issue in Center City Philadelphia, Pennsylvania that formerly supported portions of the 9th Street Branch of the Philadelphia & Reading Railroad Company (“Reading Railroad”) (collectively the “Viaduct”); and (2) therefore, the STB continues to retain jurisdiction over the “ownership, control, [and] use of the Viaduct...” and has jurisdiction to deny the City’s Petition for good cause.

Regardless, as the District Court found, Reading never abandoned and still owns its interests in the Viaduct. The City is simply trying to circumvent the requirements under 49 U.S.C. § 10903 related to abandonment to obtain ownership and control of the entire Viaduct property based on an application Conrail made to the Interstate Commerce Commission (“ICC”) in 1983,

¹ See Reading International, Inc. Form 10-K (Dec. 31, 2022), <https://investor.readingrdi.com/static-files/fb320a00-7f5e-41b8-b58c-dd36433021b4>.

wherein Conrail only relinquished its easement consisting solely of operating rights—which is the only interest it owned in the Viaduct. The City seeks—essentially in the capacity of a private developer—to usurp private ownership of real property for its own interests by avoiding the formal procedure required for the STB to declare a rail line abandoned. It should not be allowed to do so.

The City seeks a declaration that: (1) the right to operate a railroad line “was and remains abandoned” pursuant to Conrail’s 1983 application to the ICC to abandon its operations related to the Viaduct; (2) the “STB has no remaining jurisdiction over the ownership, control, or use of the Viaduct because the railroad line the Viaduct supported is abandoned, the tracks have been removed and portions of the viaduct have been demolished at either end;” and (3) Reading, “the owner of the Viaduct” “cannot claim a right to use the Viaduct for railroad purposes because it is not and never has been a rail carrier and possesses no authority to operate a rail line.” *See* Pet. at 1.

The City’s request for declaratory relief should be denied. *First*, the City, acting as a developer, is trying to obtain former rail property it does not own and over which it has no authority. Although Conrail applied to the ICC for abandonment in 1983, Conrail only applied for “approval of the abandonment of [Conrail’s] operation of the lines of rail...” *See id.*, Ex. A at ¶ 4 (emphasis added). Stated differently, Conrail’s “proposed abandonment” related “only to Conrail’s operation of the lines” because Conrail did not own the lines. *See id.*, Ex. A at ¶¶ 4, 6. Neither Reading nor any third party ever applied to abandon the Viaduct line, and Reading still owns it, which the City admits. *See* Pet. at 1, 7. That some tracks have been removed and certain structures now exist upon portions of the Viaduct have nothing to do with whether this property was abandoned pursuant to 49 U.S.C. § 10903. The City should not be permitted to circumvent the requirements of 49 U.S.C. § 10903 by suggesting Conrail’s abandonment of its operations in 1983

was sufficient for the STB to now declare the entire property more generally abandoned by all owners of interests. *Second*, the City should not be allowed to relitigate issues that the District Court in *Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.*, No. CV 21-563, 2023 WL 7646535 (E.D. Pa. Nov. 14, 2023) already decided. In short, an abandonment, if it occurred, was limited to Conrail’s easement for its operations as the *Scioli Turco* Court recognized. *Third*, Conrail’s authorized abandonment of its rights from an easement to operate on the railroad line the Viaduct supported does not equate to abandonment under 49 U.S.C. § 10903 or a lack of jurisdiction by the STB. It is similarly irrelevant that some tracks have since been removed and that portions of the Viaduct have been demolished at either end. In addition, whether Reading, “the owner of the Viaduct” currently is not a rail carrier is irrelevant to whether the STB maintains jurisdiction over this property.

The City’s Petition should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Over forty (40) years ago, Reading Railroad operated and utilized railroad tracks on top of the Viaduct supporting the 9th Street Branch of the Reading Railroad that crosses over Spring Garden Street in Philadelphia. *See* Pet. at 2. In approximately 1976, Reading Railroad transferred certain operational rights related to freight—but not all rights—to Conrail under the Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. § 701 *et seq.* (“4R Act”).² *See* Exhibit A, Declaration of Anthony DiArenzo (“DiArenzo Decl.”) at ¶ 9. Reading Railroad, however, retained interests in the Viaduct, and Conrail only took over operations of the freight services. *See id.* at ¶¶ 9-12, 14-15.

² The City states that Reading transferred its railroad assets to Conrail under the Regional Rail Reorganization Act of 1974...(“3R”) Act, Pet. at 2, however, the 4R Act was the culmination of the Final System Plan that addressed the transfer of certain interests.

As background, the United States has a nationwide network of railroads that operate in the stream of interstate commerce. *See id.* at ¶ 4. Initially, the ICC regulated the operations of railroads. *See id.* The STB succeeded the ICC in regulating rail issues after the Interstate Commerce Commission Termination Act terminated the ICC. *See id.* The STB has exclusive jurisdiction over rail-related issues, including line abandonments. *See id.* (citing 49 U.S.C. § 10501).

In 1974, Congress enacted the 3R Act, which established the basic regulatory structure over the railroad industry and provided transitional operating funds following the bankruptcy of Penn Central, the largest railroad transportation company at the time. *See id.* at ¶ 5. Congress then passed the 4R Act, in part, to salvage freight operations from failing rail lines in the northeast, mid-Atlantic, and midwestern regions. *See id.* Pursuant to the Acts, Congress provided funding to bankrupt railroads and authorized the creation of Conrail, which was a privately owned, for-profit company that originally operated under a board comprised of governmental appointees. *See id.* Conrail began operations April 1, 1976. *See id.*

Under the 3R Act, the United States Railway Association (“USRA”) was tasked with creating a “Final System Plan” to detail which lines should be included in the new Conrail. *See id.* at ¶ 6. Unlike other railroad consolidations, only the designated lines were to be taken over. *See id.* The others were to remain with the former companies along with the non-rail related properties. *See id.* The Final System Plan was published on July 26, 1975. *See id.* at ¶ 6. The Final System Plan was the initial document related to the conveyances associated with the bankruptcies occurring the 1970s. *See id.* at ¶ 6.

“Of necessity, the Final System Plan’s designations were often general and were therefore ambiguous.” *See The Conveyance Process, A Supplement to the Final Report of the United States Railway Association* at 2 (Dec. 1986). As such, the USRA published a supplemental report in 1986

(“Supplemental Report”), which provided additional guidance and detail related to the disposition of the affected rail lines and related properties. *See* DiArenzo Decl. at ¶ 7.

The Supplemental Report addressed “retained parcels” and directed that the USRA could only designate properties which were “used or useful” for rail transportation. *See id.* at ¶ 8 (citing Supplemental Report at 17). Stated differently, “while rail line segments and all adjacent property had been designated for conveyance by general reference, there was considerable property adjacent to these designated segments which was not ‘used or useful,’ such as abandoned stations and yards no longer used for transportation purposes. Therefore, a designation could not necessarily include all property adjacent to a line segment.” *See id.* The USRA reviewed potential parcels of the bankrupt estates’ properties, and bankrupt estates retained certain property. *See id.* This process reduced the number of conveyed properties. *See id.* Parties confirmed and clarified the conveyed interests for years after the Final System Plan was published in 1975. *See id.*

In 1976, through the 4R Act, Reading transferred certain operational rights related to freight to Conrail for the 9th Street Branch, a railroad line along the Viaduct. *See id.* at ¶ 9 (citing *Scioli Turco, Inc.*, 2023 WL 7646535, at *1). The Final System Plan did not convey the entirety of Reading’s interests in the Viaduct to Conrail. *See id.* at ¶ 14. Reading retained its pre-existing interests in the Viaduct. *See id.* at ¶ 9.

On March 10, 1983, Conrail applied to the ICC for “approval of the abandonment of [Conrail’s] operation of the lines of rail...” *See* Pet., Ex. A at ¶ 4; *see also* Pet. at 2-3. Conrail’s “proposed abandonment” related “only to Conrail’s operation of the lines” because Conrail did not own the lines. *See id.*, Ex. A at ¶¶ 4, 6. After Conrail abandoned its easement consisting of operations on the 9th Street Branch, trains stopped running on the tracks shortly thereafter, while passenger service continued. *See* DiArenzo Decl. at ¶ 10. Conrail’s application to the ICC was

brought pursuant to the 3R Act. *See id.* Under Section 308(c) of the 3R Act, Conrail had until November 1985 to file with the ICC a notice of insufficient revenues for any line which was part of the Conrail system, after which Conrail could file an application for abandonment of its easement consisting of its operations, which is what Conrail did. *See id.* The Conrail petition is the only abandonment process that was ever conducted related to the Viaduct pursuant to the provisions of federal laws governing railroads.

In November 2023, in an action under state law against Reading under the Abandoned and Blighted Property Conservatorship Act, 68 Pa. Stat. § 1101 *et seq.*, the United States District Court, Eastern District of Pennsylvania confirmed that: Reading had only transferred to Conrail and Conrail only abandoned “an easement to operate on the 9th Street Branch,” Reading retained ownership of the Viaduct and it had never been abandoned, and the STB retained jurisdiction in the Viaduct property. *See Scioli Turco, Inc.*, 2023 WL 7646535, at *1-4; *see also* DiArenzo Decl. at ¶ 11.

In addition to the Viaduct, Reading retained numerous parcels surrounding or adjacent to the 9th Street Branch. *See* DiArenzo Decl. at ¶ 12. After the Final System Plan, a commuter tunnel project, and various corrective deeds, Reading Company retained parcels from the Reading Terminal to Fairmont Avenue. *See id.* Reading also retained air rights above and subsurface rights below the trackage as well as other street grade parcels. *See id.* Reading retained all of its pre-existing property interests in the Viaduct. *See id.* at ¶¶ 9-12, 14-15.

Despite the fact that Conrail relinquished only operations related to freight on the Viaduct line—which is all that Conrail had, the City now contends Conrail’s 1983 relinquishment of its limited interest is sufficient to wrest jurisdiction from the STB regarding the Viaduct property, which Reading still owns and which has never been abandoned with the STB. Conrail’s application

to the ICC related to its easement for its operations of the Viaduct did not operate to abandon the entire Viaduct property or affect Reading's ownership interests in the Viaduct, over which the STB retains jurisdiction. *See id.*

II. ARGUMENT AND AUTHORITIES

The City's Petition should be denied because: (A) despite the City's contentions and representations, as the records of the ICC clearly show, Conrail only abandoned its easement of its operating rights, but nothing else; (B) the City is trying to relitigate jurisdictional issues already decided by a United States District Court; and (C) the STB retains jurisdiction in the Viaduct.

A. Conrail Only Relinquished an Easement Consisting of Its Operating Rights, but the Remainder of the Viaduct Interests Were Never Abandoned Under 49 U.S.C. § 10903.

Acting as if it is a private developer, the City seeks to circumvent the STB's jurisdiction and avoid the abandonment process set forth in 49 U.S.C. § 10903. The City requests that the STB declare that the entire Viaduct was and remains abandoned based solely on Conrail's limited abandonment application regarding its operating rights to the ICC in 1983. But Conrail only relinquished its easement for operations—that abandonment proceeding did not serve to abandon all of the interests related to the Viaduct.

While it is true that once a carrier abandons the entirety of a rail line pursuant to authority granted by the ICC, including any operating rights thereon, the line is no longer part of the national transportation system, that proposition does not apply to the situation here where Conrail filed an application relinquishing only an easement consisting of its freight operations, and where neither Reading nor any other party ever abandoned Reading's retained interests in the Viaduct under 49 U.S.C. § 10903.

First, the Viaduct property was never abandoned under 49 U.S.C. § 10903. Abandonment is within exclusive jurisdiction of the STB. *See* 49 U.S.C. § 10901. Before a rail line can be

“abandoned,” a party must satisfy the requirements for abandonment, after which the STB issues a decision granting the abandonment. *See* 49 U.S.C. § 10903; *Nat’l Ass’n of Reversionary Prop. Owners v. STB*, 158 F.3d 135, 137 (D.C. Cir. 1998) (“A railroad may no longer abandon or discontinue use of a railroad corridor without the STB’s approval.”) (citing 49 U.S.C. § 10903(a)(1), (d)). The process requires rigorous notice requirements and other procedural requirements. *See Nat’l Ass’n of Reversionary Prop. Owners*, 158 F.3d at 138 (citing 49 C.F.R. § 1152.20(a)(3), (4); 49 C.F.R. § 1152.21).

The term “‘abandon’ has a precise meaning in this regulatory scheme. An abandoned railroad corridor is one that is no longer used for rail service and is removed from the national transportation system. A line that is no longer in use, but has not been officially abandoned, may be reactivated later and is termed ‘discontinued.’” *See id.* at 137 (citing *Preseault v. ICC*, 494 U.S. 1, 5-6, n.3 (1990)). For example, when a railway is inoperable or equipment is removed, but the owner has not applied for abandonment pursuant to 49 U.S.C. § 10903, it is better identified as a “discontinuance.” *See Preseault*, 494 U.S. at 6 (“There is an important distinction in the Interstate Commerce Act between ‘abandonment’ of a rail line and ‘discontinuance’ of service. Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the Commission is empowered to impose conditions on abandonments, as a general proposition ICC jurisdiction terminates. In contrast, ‘discontinuance’ authority allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.”) (citing *Hayfield Northern R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633–634 (1984); 54 Fed. Reg. 8011–8012 (1989); 49 U.S.C. § 10903; 49 U.S.C. §§ 10905(f)(4), 10906 (1982 ed.)). But a property must be abandoned through the proper procedures to remove it from the jurisdiction of

the STB. *See, e.g., Norfolk & W. Ry. Co.--Abandonment Exemption--Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., in*, No. AB-2190 (SUB 168X), 2005 WL 1030535, at *15 (S.T.B. May 3, 2005) (explaining that the phrase “now abandoned” was a drafting error and “was intended only to refer to the fact that service of the line had ceased,” but it was not enough to demonstrate that the property was no longer part of the national transportation system); *Nat’l Ass’n of Reversionary Prop. Owners*, 158 F.3d at 137 (noting that it is only when abandonment approval is given that federal jurisdiction ends). Discontinuance alone, as is the case in the Viaduct, does not constitute abandonment.

Second, the *Scioli Turco* Court was correct when it explained there was a distinction between abandonment under the 3R Act and abandonment filed under 49 U.S.C. § 10903 because the two regimes involve different requirements. Unlike the notice periods and safeguards of the § 10903 abandonment process, earlier applications to abandon an interest under the 3R Act involved a more simplified process than the requirements with which a party applying for abandonment under § 10903 must comply. *See, e.g., Ulster & Delaware Ry. Revitalization Corp. Petition for Declaratory Order*, No. FD 36164, 2018 WL 3209656, at *4 (S.T.B. June 28, 2018) (explaining simplified notice procedures for abandonment pursuant to the 3R Act, noting certain rail properties may be abandoned upon thirty (30) days’ notice in writing to any person required to receive notice under § 744(a)(1)(C), and under § 304(c)(1) of the 3R Act, abandonment through these simplified notice procedures was authorized for a two-year period after the effective date of the Final System Plan); *Lucas v. Twp. of Bethel*, 319 F.3d 595, 601–02, n.7 (3d Cir. 2003) (noting § 308 “substantially” limited the ICC’s involvement in abandonment proceedings as opposed to the standard abandonment method under 49 U.S.C. § 10903, which requires lengthier abandonment proceedings, and noting “§ 308 does not subject abandonments to the notice requirements and

public convenience and necessity findings that apply to the more common abandonment proceedings under 49 U.S.C. § 10903.”). Conrail filed an application with the ICC in 1983 to abandon Conrail’s operations, which arguably ended federal jurisdiction over Conrail’s easement for its operations, however, this was not a general abandonment under 49 U.S.C. § 10903. The City’s attempt to conflate these two different standards and processes is legally misplaced.

Third, the Final System Plan did not convey the entirety of the Viaduct property to Conrail as the City suggests. *See* DiArenzo Decl. at ¶¶ 9-12, 14-15. The conveyances in the Final System Plan were “general and were therefore ambiguous,” as evidenced by the fact that a Supplemental Report was issued. *See The Conveyance Process, A Supplement to the Final Report of the United States Railway Association* at 2 (Dec. 1986); *see also* DiArenzo Decl. at ¶¶ 7-8. As the Supplemental Report explains, parties “retained parcels,” like Reading did here. *See* DiArenzo Decl. at ¶¶ 8-9. Reading retained its property interests in the Viaduct. *See id.* at ¶¶ 9-12, 14-15. Conrail only took over operations of the freight services. *See id.* at ¶ 9.

Moreover, the *Scioli Turco* Court concluded that Reading retained its ownership interests in the Viaduct and that Conrail only abandoned its easement. *See Scioli Turco, Inc.*, 2023 WL 7646535, at *1, 4. The City did not participate in that litigation. *See id.*; *see also* DiArenzo Decl. at ¶ 14. In any event, the Final System Plan did not convey the entirety of Reading’s interests in the Viaduct to Conrail. *See Scioli Turco, Inc.*, 2023 WL 7646535 at *1, 4; DiArenzo Decl. at ¶¶ 9-12, 14-15. The Final System Plan was the initial document related to the conveyances associated with the bankruptcies occurring the 1970s and was not intended to express clear, final dispositions of property. *See* DiArenzo Decl. at ¶ 6, 14; *see also The Conveyance Process, A Supplement to the Final Report of the United States Railway Association* at 2 (Dec. 1986).

While Conrail relinquished its easement consisting of its operations related to the Viaduct, that relinquishment did not operate to abandon the entirety of the Viaduct property consisting of Reading's ownership interests as well. The City cites *Nat'l Wildlife Fed'n v. ICC* for the proposition that "[o]nce the rail line was transferred to Conrail, Reading was left with no interest on the Viaduct for rail operations and Reading's interest in the underlying property could not prevent Conrail from consummating the abandonment of the rail line and taking the entire property out of the STB's jurisdiction." Pet. at 7. But *Nat'l Wildlife Fed'n v. ICC* actually discusses the different types of railroad interests that may be involved (which, like here, may only be an easement) and also explains that, absent a valid certificate of abandonment from the STB, no interest reverts. *See Nat'l Wildlife Fed'n*, 850 F.2d at 703–04. Therefore, where there is a decision authorizing abandonment, it only applies to the specific interest abandoned.

In the railroad industry, as the Board knows well, it is normal to have varied ownership interests, with some railroads—like Conrail did here—only owning an easement for operating rights, while other parties own the underlying property in fee simple. *See, e.g., Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 137 (noting "often a railroad company holds a lesser interest in the land such as an easement or a fee simple determinable.") (citation omitted); *see also* DiArenzo Decl. at ¶ 13. But unless a party applies for abandonment of the ownership interest through the STB and until the STB makes its determination, the property interest remains under the exclusive jurisdiction of the STB, and state and local laws seeking capitalize on that property are preempted.

B. The City Seeks to Relitigate Issues That a Federal District Court Already Decided.

In seeking a declaration that Conrail's application to abandon its easement operated to abandon the entirety of the Viaduct interests and removed the entire Viaduct property from the

STB's jurisdiction, the City tries to avoid the implications of the *Scioli Turco* Court's decision, which found that: Conrail only abandoned its operations, Reading still owned the Viaduct property, and the STB had jurisdiction over the Viaduct property. *See Scioli Turco, Inc.*, 2023 WL 7646535, at *1, 4-5. Conrail's abandonment of the Viaduct was limited to an easement—merely the operations of rail lines by Conrail. The STB should deny the City's Petition as it need not relitigate these issues, which the Court certainly had authority to decide.

In the United States District Court action against Reading under the Abandoned and Blighted Property Conservatorship Act, 68 Pa. Stat. § 1101 *et seq.*, the District Court confirmed that Reading had only transferred to Conrail “an easement to operate on the 9th Street Branch.” *See id.* at *1. The Court also confirmed that Reading retained “the fee interests in various parcels related to its historic railroad operations, including the 9th Street Branch.” *See id.* (internal marks omitted). The Court concluded that the plaintiffs' suit was preempted by 49 U.S.C. § 10501(b), and that the STB had jurisdiction. *See id.* at *2-4. The Court found that Conrail's application for abandonment “relate[d] only to Conrail's operation of” the 9th Street Branch as Conrail only had an easement over the line. *See id.* at *4. Further, “Conrail's abandonment simply does not affect the STB's current jurisdiction over the 9th Street Branch and the rights of its owner, Reading.” *See id.* No appeal was taken.

If the City wants to act, it must seek “adverse abandonment” at the STB and may have challenges with res judicata or collateral estoppel because the *Scioli Turco* Court has already concluded that Reading, the “owner,” had not abandoned the Viaduct line. As the United States Supreme Court held in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979), “parties cannot seek to relitigate the same issue they previously had a full and fair opportunity to litigate.” *See 212 Marin Boulevard, LLC, et al. -- Petition for Declaratory Order*, No. FD 35825, 2014 WL 3906942,

at *3, n.15 (S.T.B. Aug. 8, 2014). “Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 326 (citation omitted).

212 Marin Boulevard, LLC, et al. -- Petition for Declaratory Order is instructive. There, the STB denied the request of property owners (certain LLCs) for a declaratory order that the STB did not have authority over certain rail property because a federal district court had already found that the trackage at issue was conveyed as a railroad line requiring abandonment authority from the STB, which the appeals court affirmed. *See* No. FD 35825, 2014 WL 3906942, at *1 (S.T.B. Aug. 8, 2014). Petitioners requested that the STB issue a declaratory order terminating all jurisdiction over the LLCs and the trackage at issue, known as the Harsimus Branch. But an appeals court had previously affirmed a decision by a district court that had already decided the entire Harsimus Branch was transferred as a line of railroad to Conrail in 1976. Accordingly, the STB found no controversy or uncertainty warranting a declaratory order and denied the property owners LLCs’ petition. *See id.* The STB explained that “the question that the LLCs ask the Board to address in this proceeding—whether the Harsimus Branch is subject to the Board’s jurisdiction and requires abandonment authority—has already been decided.” The STB concluded “the LLCs, as parties to both the District Court and D.C. Circuit cases, [were] bound by those rulings and [could not] seek to relitigate before the Board the *same issues already decided.*” *See id.* at *3 (emphasis added). The STB concluded the declaratory order sought by the LLCs “would be duplicative of the jurisdictional issues that have already been decided. Therefore, there is no controversy or uncertainty here warranting institution of a declaratory order proceeding.” *See id.* at *2–3.

Similarly, here, the *Scioli Turco* Court has already decided the questions the City now seeks to relitigate with the STB. The *Scioli Turco* Court has decided: whether and what interests in the Viaduct were “abandoned,” whether a party’s Act 135 action (“Abandoned and Blighted Property Conservator Act”) to appoint a conservator over a property to rehabilitate it was preempted, and whether the fact that Reading was no longer a railroad and that the property was not currently used for rail impacted the STB’s jurisdiction. The Court: (1) concluded that only Conrail’s easement consisting of its operating rights were abandoned, *see Scioli Turco, Inc.*, 2023 WL 7646535, at *4, and Reading still owned its interest in the property, *see id.* at *1, 4; (2) concluded plaintiffs’ Act 135 action to declare the property blighted under local law was preempted, *see id.* at *2-3; and (3) rejected plaintiffs’ argument that because Reading was not a railroad and the property had not been used for rail operations since the mid-1980s, Section 10501(b) did not apply to their action and the STB did not have jurisdiction over the property, *see id.* at *3. There is no need to relitigate those exact issues here.

C. The STB Has Jurisdiction Over the Ownership, Control, and Use of the Viaduct, and Whether Reading May Claim a Future Use of the Viaduct for Rail Purposes Is Irrelevant to Whether the City Is Entitled to the Relief It Seeks.

The City also contends that: (1) because the railroad line the Viaduct supported is abandoned, the STB has no remaining jurisdiction over the ownership, control, or use of the Viaduct; and (2) Reading cannot claim a right to use the Viaduct for railroad purposes because it is not and never has been a rail carrier and possesses no authority to operate a rail line. *See* Pet. at 1. The City’s arguments are misplaced and unsupported by authority.

First, a rail line—even one that does not have tracks, a station, rail, etc. and could conceivably support rail service in the future—is not “abandoned” under 49 U.S.C. § 10903 until the STB pronounces it so. *See, e.g., Joseph R. Fox—Petition for Declaratory Order*, No. FIN

35161, 2009 WL 1383503, at *2 (S.T.B. May 13, 2009), *aff'd sub nom. Fox v. STB*, 379 Fed. Appx. 767 (10th Cir. 2010) (noting abandonment does not occur “without advance authorization from the Board,” and finding the fact that a switch was removed did not constitute abandonment); *Norfolk & W. Ry. Co.*, 2005 WL 1030535, at *5-6 (removal of some rails and other materials was not dispositive in determining whether a rail-line segment had been abandoned); *Trustees of Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985) (affirming dismissal of an action based on a lack of jurisdiction because the ICC had not authorized abandonment of a route where all railroad equipment (including switches, bridges, and track) had been removed by the right-of-way claimed by plaintiffs and therefore still exercised exclusive jurisdiction over it).

That tracks and railroad equipment have been removed and structures have built on certain parts of the Viaduct is not dispositive as to whether rail could operate on the property in the future. To be sure, certain portions of the Viaduct could still support rail services in the future. *See, e.g., DiArenzo Decl.* at ¶ 15. Until a property is officially “abandoned” by STB pronouncement, rail service is conceivably possible into the future. *See Preseault*, 494 U.S. at 9 (noting the railway stopped using the route more than a decade before, removed all equipment including switches, bridges, and track, but the lower courts held that they lacked jurisdiction because the ICC had not authorized abandonment and still authorized jurisdiction over it, and finding it was not abandoned).

This proposition is illustrated by the Trails Act, which “is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.” *See Norfolk & W. Ry. Co.*, 2005 WL 1030535, at *9 (citing *Preseault*, 494 U.S. at 5). Under the Trails Act, the STB “must preserve established railroad rights-of-way for future reactivation of rail service by prohibiting abandonment where a trail sponsor agrees to assume full managerial, tax, and legal liability for the right-of-way for use in the interim as a trail.” *See id.* at *9-10 (citing

16 U.S.C. 1247(d); *Citizens Against Rails to Trails v. STB*, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001)). The STB has made clear that, “even if some rails and other materials were removed before that time, such action would not necessarily mean that the line segment had been abandoned....[A] railroad may discontinue rail service and salvage track materials while preserving the rail right-of-way for possible reactivation of rail service in the future.” *See id.* at *15-16 (citing *Preseault*, 494 U.S. at 5-6 n.3).

Second, the *Scioli Turco* Court rejected an argument similar to the City’s that Section 10501(b) did not apply to plaintiffs’ action and the STB did not have jurisdiction over the property because Reading was not a railroad and the property had not been used for rail operations since the mid-1980s. *See* 2023 WL 7646535, at *3. As the Court noted:

First, while Section 10501(b)(1) provides the STB with exclusive jurisdiction over “transportation *by rail carriers*” (emphasis added), Section 10501(b)(2) simply provides the STB exclusive jurisdiction over “the ... abandonment ... of ... facilities,” but does not mention “rail carriers.” 49 U.S.C. § 10501(b). Accordingly, the ICCTA does not on its face restrict the STB’s jurisdiction, and therefore the scope of the preemption provision, to the abandonment of rail facilities by *rail carriers*. Second, it is well established that someone other than a rail carrier may apply to the STB to have a rail line declared abandoned. *See Howard v. Surface Transp. Bd.*, 389 F.3d 259, 261 (1st Cir. 2004) (citing *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 708–09 (D.C. Cir. 1994)). Therefore, an abandonment remedy is available to Reading (and to Plaintiffs), and Section 10501(b) still preempts Plaintiffs’ Act 135 action.

See id. (emphases in original); *see also, e.g., Pinelawn Cemetery Petition for Declaratory Order*, No. FD 35468, 2015 WL 1813674, at *1–10 (S.T.B. Apr. 20, 2015) (denying petition for declaratory order, finding in part the property still within the jurisdiction of the STB even though it was used by a party who was not a rail carrier).

Pinelawn Cemetery -- Petition for Declaratory Order is instructive. In *Pinelawn*, the STB determined a portion of a rail yard remained part of the national rail system even though certain activity that occurred on the property was not rail related. *See* No. FD 35468, 2015 WL 1813674,

at *1–10 (S.T.B. Apr. 20, 2015). Pinelawn first tried to evict two railroads (“Railroads”) who had leases with Farmingdale Yard, a rail facility located in New York. *See id.* at *1. Years prior, one of the Railroads entered into an agreement with a third party, Coastal, who constructed a structure for transloading construction and demolition debris on a portion of the Yard. *See id.* at *2. State courts rejected Pinelawn’s efforts to evict the Railroads from the Yard, concluding the attempts were preempted by the Interstate Commerce Act and, therefore, Pinelawn was required to obtain STB permission before proceeding in state court. The courts found that Coastal’s actions were not rail related and were not preempted.

Pinelawn then filed a petition for declaratory order with the STB asking the STB to declare that: (1) rail track in the Yard, was not, nor had it ever been, a “railroad line” over which the Board has exclusive jurisdiction; and (2) Pinelawn therefore need not seek STB permission to evict railroads from the property under state law. *See id.* at *1. The STB agreed with the courts that the matter was preempted—in other words, if the lease had terminated giving rise to Pinelawn’s eviction claim, Pinelawn could not force the lessee Railroads off the property unless it sought and receiving a ruling from the STB that the property was not needed as part of the national rail system and abandoned. *See id.* at 1, 3. The STB rejected Pinelawn’s argument that, because a state court previously found Coastal’s activities were not that of a rail carrier, the STB should find the track in the Yard was not a railroad line that the STB must authorize for abandonment under § 10903. *See id.* at *6. The STB explained that the state court decisions only dealt with Coastal’s activities—not to the track on the property. *See id.* The STB found that the Yard was a railroad facility and that it and its tracks were subject to the STB’s jurisdiction. *See id.* The fact that Coastal began using a portion of the rail property for non-jurisdictional (i.e., non-rail) transloading operations

pursuant to an agreement entered into with one of the Railroads did not convert the Yard and its track to private track outside of the jurisdiction of the STB. *See id.* at *6.

Likewise, simply because Reading is not operating rail on the property does not automatically remove the property from the STB's jurisdiction. Reading's interests are interests that are tied to a former railway. As explained above, despite the fact that equipment has been removed and the railway is no longer operating does not render it abandoned under 49 U.S.C. § 10903 or automatically remove it from the STB's jurisdiction. *See, e.g., Norfolk & W. Ry. Co.*, 2005 WL 1030535, at *15-16 (explaining that "even if some rails and other materials were removed before that time, such action would not necessarily mean that the line segment had been abandoned," and "a railroad may discontinue rail service and salvage track materials while preserving the rail right-of-way for possible reactivation of rail service in the future."). The City suggests that only rail activities bring a property under the jurisdiction of the STB and warrant preemption protection from local and state laws. Pet. at 8-9. But, as in *Pinelawn Cemetery*, that non-rail activities were taking place on a property did not remove the property from STB jurisdiction. *See id.* Moreover, the Viaduct could conceivably support rail transportation at some point in the future. *See DiArenzo Decl.* at ¶ 15. Rather, the dispositive question is whether the Viaduct property has been abandoned by the ICC or the STB, which has not occurred here.

III. CONCLUSION

Accordingly, for the foregoing reasons, Reading respectfully requests that the STB deny and dismiss the City's Petition because: Conrail only abandoned an easement of its operations; Conrail's abandonment of its operations did not operate to abandon the entire Viaduct property under 49 U.S.C. § 10903; the City seeks to relitigate abandonment and jurisdictional issues that a

United States District Court already decided; and there is no question that the STB continues to have jurisdiction over the Viaduct.

Respectfully submitted,

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Attorneys for Reading International, Inc.

Dated: June 3, 2024

CERTIFICATE OF SERVICE

I, Jennifer Bartlett, hereby certify that a copy of the foregoing Reply dated June 3, 2024, was sent by electronic mail and overnight delivery to the following in this proceeding:

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EXHIBIT A

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

City of Philadelphia – Petition for a Declaratory Order

DECLARATION OF ANTHONY DIARENZO

1. My name is Anthony DiArenzo. I am over twenty-one (21) years of age and have been a railroad employee for over forty (40) years. I am fully competent to testify, have personal knowledge of the facts set forth herein, and those facts are all true and correct.

2. I worked as a railroad employee for a total of forty-three (43) years, first with Penn Central Transportation Company (“Penn Central”) from 1974 through 1976 and then with Consolidated Rail Corporation (“Conrail”) from April 1976 through May 2017. For over twenty-five (25) years, from May 1974 through June 1999, I was Manager of Property Taxes for Penn Central and Conrail. In June 1999, I became Director of Property Taxes for Conrail. In approximately January 2005, I assumed the role of Director of Real Estate Assets for Conrail, where I focused on rail operations, rail transport, property management, site selections, and corporate real estate issues related to rail. I retired from Conrail in approximately May 2017. I have continued to provide rail consulting services on an independent basis since 2017.

3. My roles with Penn Central and Conrail required that I was familiar with the structure of the rail regulatory industry, including the regulations related to, and the authority of, the Interstate Commerce Commission (“ICC”) and its successor, the Surface Transportation Board (“Board” or “STB”). Given my positions, I was also knowledgeable about the Regional

Rail Reorganization Act of 1973 (“3R Act”) and the factual background related to the transfer of certain rail interests beginning in the mid-1970s under the Railroad Revitalization and Regulatory Reform Act of 1976 (“4R Act”), which was the culmination of the Final System Plan.

4. As background, the United States has a nationwide network of railroads that operate in the stream of interstate commerce. Initially, the ICC regulated the operations of railroads. The STB succeeded the ICC in regulating rail issues after the Interstate Commerce Commission Termination Act terminated the ICC. The STB has exclusive jurisdiction over rail-related issues, including line abandonments. *See* 49 U.S.C. § 10501.

5. In 1974, Congress enacted the 3R Act, which I learned established the basic regulatory structure over the railroad industry and provided transitional operating funds following the bankruptcy of Penn Central, the largest railroad transportation company at the time. Following the bankruptcy, under the Rail Passenger Service Act, Congress created Amtrak to take over Penn Central’s intercity passenger train service. Congress then passed the 4R Act, in part, to salvage freight operations from failing rail lines in the northeast, mid-Atlantic, and midwestern regions. Pursuant to the Acts, Congress provided funding to bankrupt railroads and authorized the creation of Conrail, which was a privately owned, for-profit company that originally operated under a board comprised of governmental appointees. Conrail began operations April 1, 1976.

6. Under the 3R Act, I understood that the United States Railway Association (“USRA”) was tasked with creating a “Final System Plan” to detail which lines should be included in the new Conrail. Unlike other railroad consolidations, only the designated lines were to be taken over. The others were to remain with the former companies along with the non-rail

related properties. The Final System Plan was published on July 26, 1975. The Final System Plan was the initial document related to the conveyances associated with the bankruptcies occurring in the 1970s.

7. The USRA published a supplemental report in 1986 (“Supplemental Report”), which provided an overview of, and additional guidance and detail related to, the disposition of the affected rail lines and related properties. As it pertained to real estate and property taxation, my job required that I was familiar with material contained in the Final System Plan and the Supplemental Report.

8. The Supplemental Report addressed “retained parcels” and directed that the USRA could only designate properties which were “used or useful” for rail transportation. *See* Supplemental Report at 17. Stated differently, “while rail line segments and all adjacent property had been designated for conveyance by general reference, there was considerable property adjacent to these designated segments which was not ‘used or useful,’ such as abandoned stations and yards no longer used for transportation purposes. Therefore, a designation could not necessarily include all property adjacent to a line segment.” *See id.* The USRA reviewed potential parcels of the bankrupt estates’ properties, and bankrupt estates retained certain property. This process reduced the number of conveyed properties. *See id.* Parties confirmed and clarified the conveyed interests for years after the Final System Plan was published in 1975.

9. Later, through my roles, I became aware that in 1976, through the 4R Act, Reading transferred certain operational rights related to freight to Conrail for the 9th Street Branch, which was a railroad line along a viaduct (“Viaduct”). *See also Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.*, No. CV 21-563, 2023 WL 7646535, at *1 (E.D. Pa. Nov. 14, 2023). Reading retained all of its pre-existing property interests in the Viaduct. At this time,

Conrail freight service has discontinued, and Conrail has no further property interest in the Viaduct.

10. In 1983, Conrail abandoned its freight operations on the 9th Street Branch, and freight trains stopped operating on the tracks shortly thereafter, while passenger service continued. Conrail's application to the ICC was brought pursuant to the 3R Act. Under Section 308(c) of the 3R Act, Conrail had until November 1985, to file with the ICC a notice of insufficient revenues for any line which was part of the Conrail system, after which Conrail could file an application for abandonment of its freight operations, which is what Conrail did. *See id.* at *4. Reading did not participate in Conrail's ICC abandonment proceedings, and therefore did not abandon any of Reading's interests in the Viaduct.

11. A Federal District Court in the Eastern District of Pennsylvania recently confirmed that Conrail never owned the Viaduct; Conrail only acquired an easement for rail freight operations, and Reading still to this day maintains ownership of the Viaduct. The Court concluded that Reading maintained the fee interests in various parcels related to its railroad operations, including the 9th Street Branch. *See id.* at *1. Conrail only had an easement over the line, and its abandonment of that easement to the ICC in 1983 "simply does not affect the STB's current jurisdiction over the 9th Street Branch and the rights of its owner, Reading." *See id.* at *4.

12. Upon a review of the Final System Plan, Supplemental Report, and various deeds, Reading Company retained the Viaduct and numerous parcels surrounding and adjacent to the 9th Street Branch. With respect to the 9th Street Branch, after the Final System Plan, a commuter tunnel project, and various corrective deeds, Reading Company retained parcels from the Reading Terminal to Fairmont Avenue. The Reading Company also retained air rights above and

subsurface rights below the trackage as well as other street grade parcels. I believe that the interests as I have described them accurately describe the final retention of property interests after the Final System Plan agreed upon between Conrail and the Reading Company.

13. In my experience, this type of situation where one company (Conrail) owns an easement consisting of certain operating rights, but another company (Reading) owns the underlying fee property rights, for example, is common to the rail industry.

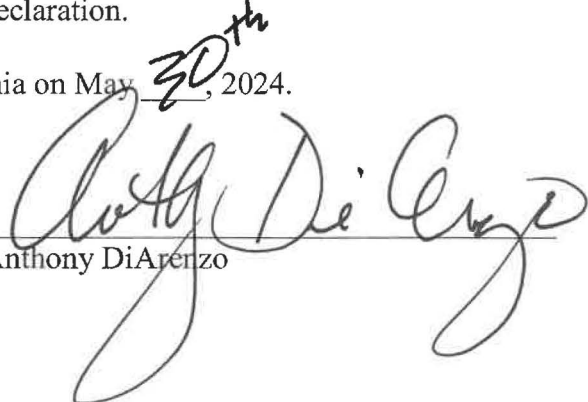
14. I reviewed the City of Philadelphia's Petition to the STB, and I disagree with the City's statement that the District Court was wrong because Conrail contends "the Final System Plan designated the rail line at issue to Conrail," citing to the Final System Plan. The City then states that "[o]nce the rail line was transferred to Conrail, Reading was left with no interest on the Viaduct for rail operations..." The City is incorrect. As the *Scioli Turco, Inc.* Court concluded, Reading maintained its property interests in the Viaduct. *See Scioli Turco, Inc.*, 2023 WL 7646535, at *1, 4. Moreover, the City chose not to participate in the District Court litigation or raise that argument there. In any event, it is clear after a review of the associated documents and deeds, including the Final System Plan and the Supplemental Report, that the Final System Plan did not convey the entirety of Reading's interests in the Viaduct to Conrail.

15. Based on my experience, Reading retained its property interests associated with the Viaduct. That tracks and railroad equipment have been removed and structures have been built on certain parts of the Viaduct is not dispositive as to whether rail could operate on the property in the future. To be sure, certain portions of the Viaduct could still support rail services in the future provided geo-technical studies confirmed such operations, which is beyond the scope of my expertise and experience. Conrail's application to the ICC in 1983 only related to its

freight operations on the Viaduct did not affect Reading's residual interests and retained parcels of the Viaduct, over which the STB retains jurisdiction.

16. My name is Anthony DiArenzo, my date of birth is October 31, 1951, and my address is 342 Ashwood Road, Springfield, Pennsylvania 19064. I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I further certify that I am qualified to submit this Declaration.

Executed in Delaware County, Pennsylvania on May ^{30th}, 2024.


Anthony DiArenzo