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ENTERED
Office of Proceedings
August 1, 2024
Part of
Public Record

Dated: August 1, 2024

Ms. Cynthia T. Brown
Chief, Section of Administration

Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: STB FD 36768 *City of Philadelphia - Petition for Declaratory Order*

Dear Ms. Brown,

Please find attached for filing in the above referenced proceeding my Notice of Intent to Participate, Reply, and Motion to Dismiss. Also note, that I am filing this particular pleading *pro se* (which is a departure from previous filings I have made with the Board, and is unique to this proceeding only).

If you have any questions or concerns, feel free to contact me at any time.

Sincerely,

Eric S. Strohmeyer / s /

Eric S. Strohmeyer – *Pro se*
Tel: (908) 361-2435 (direct line)

Before the
SURFACE TRANSPORTATION BOARD

CITY of PHILADELPHIA

PETITION FOR A DECLARATORY ORDER

STB Docket No. FD 36768

NOTICE OF INTENT TO PARTICIPATE,
REPLY, and
MOTION TO DISMISS
(without prejudice)

ERIC S. STROHMEYER
(In his individual capacity)

Eric S. Strohmeyer – *Pro se*
81 Century Lane
Watchung, NJ 07069
Tel: (908) 361-2435 (*direct line*)
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Dated: August 1st, 2024

Before the
Surface Transportation Board
FD No. 36768

Now comes Eric S. Strohmeier (“Movant”), an interested party in the above captioned proceeding, who provides herein his Notice of Intent to Participate as a Party of Record in this proceeding, and pursuant to 49 C.F.R. § 1104.13 respectfully submits his Reply¹, and Motion to Dismiss the proceeding, without prejudice, because the Surface Transportation Board (“Board”) lacks the requisite subject matter jurisdiction to address a pivotal question raised by the parties which is at the heart of this proceeding, specifically:

Did the Reading Company (“RDG-Co”) retain a legal interest in certain lines of railroad sufficient enough to maintain, or perhaps create anew, a residual common carrier obligation, despite being expressly relieved of any common carrier obligations on said segments by virtue of the conveyance of a portion of RDG-Co’s rights and common carrier obligations to the Consolidated Rail Corporation (“ConRail”) as prescribed in the Final System Plan (“FSP”), and as accomplished pursuant to a conveyance order of the Special Court of the Regional Rail Reorganization Act of 1973 (“Special Court”), and thus triggering the continuing jurisdiction of the Interstate Commerce Commission (“ICC”), and subsequently Board jurisdiction, over both the RDG-Co., its successor companies, and the rail property(s) in question when the Special Court’s conveyance order **bifurcated the legal interests** in said line(s) of

¹ Pursuant to 49 C.F.R. § 1011.7 (a)(2)(vi) , the Board has delegated to the Office of Proceedings the authority to initially determine “whether to institute requested declaratory order proceedings under 5 U.S.C. 554(e).” To date, no decision has yet to be served indicating the Board will, in fact, initiate such a proceeding or not, nor has a procedural schedule been published. It is generally understood that jurisdiction may be challenged at any time; thus, the Notice of Intent to Participate, as well as the Motion to Dismiss, are timely filed. However, 49 C.F.R. § 1104.13 governs submissions of replies. To the extent that portions of the pleading may rightly be viewed as a Reply, then leave to file out-of-time is respectfully sought.

railroad which then remained as an **active** part of the national rail network post conveyance?

The questions regarding the extent and nature of the RDG-Co.'s retained legal interests flow directly out of both the **FSP**, see 45 U.S.C. § 702 (8) and § 716, and a Conveyance Order(s) of the **Special Court** made pursuant to 45 U.S.C. § 719 (b)(1) and § 743(b). While the Board, as the successor agency to the ICC, can likely address the effect of ConRail's 1983 abandonment application in *Consolidated Rail Corporation – Abandonment Application under N-E.R.S.A. for Portions of the 9th Street Branch and City Branch - In the City and County of Philadelphia, PA* Docket No. AB 167 (Sub No. 479) upon the property with respect to ConRail's own operations, the Board **cannot** address the questions regarding what the exact nature of the legal interests that the RDG-Co.'s bankruptcy estate may have **retained** in the property without invading the Special Court's original and exclusive jurisdiction. See 45 U.S.C. § 719 (e)(1), 45 U.S.C. §§ 743 *et seq.*, 45 U.S.C. § 719 (e)(2).

In 1996, Congress abolished the Special Court, but specifically vested the Special Court's exclusive and original jurisdiction in the US District Court for the District of Columbia ("D.D.C. *qua* the Special Court") for "... any proceedings that arise or continue after the date on which the Special Court is abolished, ..." See 45 U.S.C. § 719 (b)(2). Such proceedings have arisen, from time to time.

In 2007, a dispute emerged between ConRail and the City of Jersey City, NJ regarding the conveyance of the Harsimus Cove rail line from the bankruptcy estate of the Penn Central Transportation Co. ("PC") to ConRail. The Board was asked to resolve the matter because the issue was germane to a larger dispute, and resolution of the issue was needed to determine the regulatory status of the rail line in question. See *City of Jersey City, et.al. – Petition for Declaratory Order*,

STB Finance Docket No. 34818 (decided Aug 8, 2007, recon. denied, Dec 17, 2007), and hereinafter referred to as *Jersey City – Pet. for Dec. Ord.*

The Board’s jurisdiction was challenged by several parties with respect to whether the Board could determine if the rail line was conveyed to ConRail as a regulated line of railroad, or an unregulated spur-track. The Board held that it could decide the issue. ConRail sought judicial review of the Board’s adverse decision.

The United States Court of Appeals for the District of Columbia circuit ruled that the Board **lacked the requisite jurisdiction** to make such a determination and vacated the Board’s decision(s). See *Consolidated Rail Corp. v. Surface Transportation Board*, 571 F.3d 13 (D.C. Cir. 2009) and hereinafter referred to as *Conrail v. STB*.

In 2023, the Board correctly acknowledged the extent of its jurisdiction when it rejected a Notice of Exemption (“NOE”), in part², where an issue involving interpretation of the FSP, and the associated conveyance instruments were once again presented to this agency. See *James Riffin – Acquisition and Operation Exemption – In York County, PA* Docket No. FD 36548 recon. denied, STB served March 28, 2023, and hereinafter referred to as *Riffin - Campbell Rd. NOE*.

I. BACKGROUND INFORMATION

Beginning in the late 1960’s, and continuing for nearly two decades, the United States faced an unprecedented crisis when no less than eight major railroads

² The Board cited numerous justifications for rejecting Mr. Riffin’s NOE. While the primary reason the Board rejected the NOE was quite clear; specifically, the agency felt that the use of an NOE was an inappropriate method for seeking acquisition authority due to concerns stemming from Mr. Riffin’s previous proceedings before the Board; the agency nevertheless correctly recognized that there was likely an issue which the Board lacked the jurisdiction to decide. See: *Riffin – Campbell Rd. NOE* at 7-8.

(six Class I railroads³, and two Class II railroads⁴) that provided rail services in many north-east and mid-west states all went into reorganization nearly simultaneously. To deal with the crisis which the bankruptcy of so many rail carriers caused, Congress passed the Regional Railroad Reorganization Act of 1973 (“3R Act”). The legislation paved the way for the Federal government to reorganize the railroads by the creating of a new, government-owned railroad, ConRail.

To facilitate the government’s objectives, Congress created a new non-profit governmental organization, called the United States Railway Association (“USRA”), which was tasked with crafting a plan of reorganization (the FSP), and then was empowered to act as the primary advocate for the plan. Each of the various railroads in reorganization were carefully evaluated, and certain properties of each bankrupt rail carrier were designated for conveyance to ConRail. See 45 U.S.C. §§ 702 (1) and (8), §§ 711 - 712, §§ 716 - 717, and § 725.

During the initial period of the 3R-Act, the role of the ICC was heavily altered. The Commission’s role in approving rail line sales, abandonments, and other types of acquisition and consolidation transactions was largely suspended or transferred to either the USRA and the Special Court with regards to transactions proposed in the FSP, and/or to the various Bankruptcy Courts with concurrent jurisdiction to address certain matters not covered by the FSP. See 45 U.S.C. § 791 (b)(4). However, the ICC was given the chance to comment on the FSP, and

³ The list of **Class I** railroads in reorganization included: 1. Penn Central Transportation Company (“PC”), 2. Erie Lackawanna Railroad (“EL”), 3. Boston and Maine Railroad (“BM”), 4. Central Railroad Co. of New Jersey (“CNJ”), 5. Lehigh Valley Railroad (“LV”), 6. Reading Railroad (“RDG-RR”).

⁴ The list of **Class II** railroads in reorganization included: 1. Ann Arbor Railroad (“AA”) and Lehigh and Hudson River Railroad (“LHR”)

did retain some very limited jurisdiction to address a few small issues, if those issues arose. See 45 U.S.C. § 744 *et. seq.*

To facilitate the approval of the plan, and to order and oversee the various conveyances, Congress created the Special Court. See: 45 U.S.C. § 719 (b)(1). The Special Court was a unique multi-jurisdictional court which was established to oversee and adjudicate the implementation of the FSP; to efficiently adjudicate the complicated multi-jurisdictional issues which arose due to the many competing interests and claims (which were created in large part due to the interconnected nature of the national rail network) with so many rail carriers in reorganization; and to swiftly and equitably resolve conflicts between the different Bankruptcy Courts that arose as a result of the implementation of the FSP as well.

The Special Court was presided over by a three-judge panel. It had the combined authority of both a US District Court (an Article III court), and a Court of Reorganization (a court with limited jurisdiction). See: 45 U.S.C. § 719 (b)(1). More importantly, it was (and its designated successor remains) the sole venue in which any dispute regarding a conveyance that was made pursuant to the FSP was (and still is) to be litigated, so long as the dispute touches upon the Court's central functions.

There are four key cases (in three different Courts), that firmly establish the jurisdiction and validity of the Special Court, and thus form the primary precedent and justification for this motion.

The first case, *In the Matter of Reading Company, Debtor* Bky. 71-828, 378 F. Supp. 481 (E.D. Pa. 1974), set into motion the RDG-Co's reorganization pursuant to the 3R-Act.

In its decision, the Court stated, in part:

“ ... Finally, RRRA provides for a comprehensive series of checks and approvals prior to any transfer to Conrail. All three branches of government become involved. First, USRA must suggest a preliminary system plan which will be submitted to interested government agencies, the states, the public, and the reorganization courts. Following an opportunity for public hearings, a final system plan will be presented for the consideration of both houses of Congress together with an evaluation by the I.C.C. Unless Congress rejects the plan, it will be submitted to a special court created to pass on issues that will arise in connection with RRRA. This court is empowered to review matters concerning the value of rail properties to be conveyed under the final system plan and the value of the consideration to be received for these properties. RRRA provides ample process. I have no basis on which to find it will not be duly utilized to produce a constitutional result.

Hobbled as it may be by the decision in *Connecticut General Insurance*, supra, RRRA may still be beneficial to Reading by providing interim assistance and a simplified procedure for abandonment of unprofitable service. Furthermore, Reading might be more attractive to a profitable railroad that would be interested in purchase because RRRA provides federal funds for employee protection.

For these reasons, I cannot find RRRA does not provide a process which is fair and equitable to Reading's estate.”

Id. at 484

With the Court's decision cited above, the RDG-Co. was committed to reorganization under the 3R-Act. However, there remained continuing concerns. Not all the creditors were convinced that the 3R-Act was legally sound. There

was also disagreement between the various Bankruptcy Courts as well. Several of the Bankruptcy Courts reached different conclusions.

The conveyance of certain segments of a railroad's properties to ConRail would now become compulsory. Since these now mandatory transfers of rail properties also had to be "free and clear of any liens or encumbrances," the consideration to be received by the railroad debtors' estates became extremely significant to the now unsecured creditors. The Special Court had to address these issues, as well as the conflicts between the various courts.

In *re Penn Central Transportation Company, et.al.*, 384 F. Supp. 895 (Sp.Ct.R.R.R.A. 1974), the Special Court, in resolving the conflicting Bankruptcy Court decisions, began its decision by noting the differing opinions, and commenced the process of resolving the conflicts.

The Special Court said, in part:

“ ... In the first five cases in the caption — those dealing with the Penn Central, the Penn Central secondary debtors, the Lehigh Valley (LV), the Central Railroad of New Jersey (CNJ), and the Lehigh & Hudson River Railway (L&H) — the respective judges concluded that the Act "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization" In the cases of the Reading and the Ann Arbor, Judge Ditter in the District Court for the Eastern District of Pennsylvania and Judge Pratt in the District Court for the Eastern District of Michigan took a contrary view and ordered that reorganization should proceed under the Act. ...”

Id. at 901

In a separate concurring opinion, Judge Thomsen noted the following, when he wrote, in part:

“... After giving full consideration (a) to the argument of MHTCo. that Reading is in such hopeless shape despite the relief offered by RRRA that its reorganization proceeding should be dismissed, and (b) to the argument of the Commonwealth that Reading is in such good shape that despite potential competition with a revitalized PC, it can reorganize on an income basis within a reasonable period of time under § 77, we agree with the conclusions reached by Judge Ditter. ...”

Id. at 991

The Special Court went on to rule, in part:

“ ... 2) The orders in the matters of Reading Company and The Ann Arbor Railroad Company directing that reorganization shall proceed under the Regional Rail Reorganization Act of 1973 be and they hereby are affirmed; ...”

Id. at 955

The secured creditors, especially those with interests in properties belonging to the former PC system, were decidedly unhappy. They took serious issue with being forced to relinquish their security interest in the actual property by statutory dictate. The main contention of the secured creditors was that no justification existed for extinguishing their liens and limiting the source of their recovery primarily to ConRail securities which were of unproven value without their first having the right to either withhold their approval from the FSP, or to obtain prior judicial scrutiny of its fairness.

They further argued that the compulsory continuation of operations further eroded the value that might have been realized if liquidation occurred sooner. Therefore, they argued that the Government was essentially taking property for the public's benefit without providing adequate compensation in violation of the

Fifth Amendment of the United States Constitution. While sympathetic to some of the arguments raised, the Special Court disagreed with the creditors' positions.

Shortly thereafter, the United States Supreme Court was asked to review the Special Court's decision. In *Regional Rail Reorganization Act Cases* 419 U.S. 102 (U.S. 1974), the Supreme Court upheld the constitutionality of the 3R-Act, and except for a few minor issues, upheld most the Special Court's ruling, including all those portions of the decision which related to both the establishment of the Special Court, and those specific issues related to the RDG-Co.

The law regarding the RDG-Co's reorganization under the 3R-Act, and the Special Court's establishment and exclusive jurisdiction, has now long been well-settled.

The fourth and final case that supports the Movant's position that the Board lacks the requisite jurisdiction to address the City's request is one of the very last cases that the Special Court heard before it was abolished. In *Consolidated Rail Corporation v. U.S, et.al* 883 F. Supp 1565 (Sp.Ct.R.R.R.A. 1995), and hereinafter referred to as *Conrail v. U.S.*, the Special Court once again enunciated its position regarding the court's jurisdiction. More importantly, the Board should take careful note of all the parties, and the subject matter of, this particular proceeding before the Special Court.

In addition to the United States of America, two of the others defendants included both the **RDG-Co.**, and the **City of Philadelphia**, ("City") in addition to several other defendants⁵.

⁵ The other defendants included the National Railroad Passenger Corporation ("Amtrak"), Southeast Pennsylvania Transportation Authority ("SEPTA"), County of Bucks, PA, County of Chester, PA, County of Delaware, PA, and the County of Montgomery, PA

The case dealt with liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) and the effects of that legislation with regards to the 3R-Act. At issue was ConRail’s potential liability for clean-up costs; the extent and impact of the indemnification clauses contained within the conveyance instruments used to convey properties pursuant to the FSP; required terms and conditions of the transfers contained in the statutory language of the 3R-Act; and other issues related to the general discharge of debts and obligations of the debtors in bankruptcy.

Furthermore, the case dealt with potential CERCLA liability at two **specific locations**; namely, 1. the former Paoli commuter rail yard in Paoli, PA, and, 2. the former RDG-Co’s main passenger rail terminal in center-city Philadelphia. The Reading Terminal encompasses **a portion** of the **same** line of railroad at issue in this proceeding. This motion is not the first time that questions surrounding the exclusive jurisdiction of the Special Court of been raised with respect to disputes involving the same segment of the former RDG-RR’s Ninth Street branch.

Before delving into the merits of the case, the Special Court clearly defined its jurisdiction once again.

The Special Court stated, in part:

“... Before considering the merits of Conrail's claims, this Court must determine whether it has jurisdiction to decide all the claims presented in Conrail's complaint, as well as the counterclaims and cross-claims asserted by the various defendants. The Special Court is a court of limited jurisdiction acting within the jurisdiction granted it by Congress. Section 209(e)(2) of the Rail Act provides in pertinent part:

“ The original and exclusive jurisdiction of the special court shall include any action, whether filed by an

interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 303(b) of this Act in order to effect the purposes of this Act or the goals of the final system plan. ...”

This Court has long said that not every claim "relating to the Rail Act" is within our exclusive jurisdiction. Rather, we have said, "this Court has exclusive jurisdiction where resolution of the dispute involves the court's central functions".

Here, Conrail, in most of its claims, asks this Court to interpret the FSP, provisions of the Rail Act and NRSA, the Court's conveyance orders, and conveyance documents transferring ownership of rail properties designated by the FSP. Similarly, Amtrak's counterclaim against Conrail relies on the Rail Act and certain conveyance documents and SEPTA's cross-claim against the United States is based on a specific provision in the Rail Act. We have consistently held that the interpretation of conveyance orders, the FSP, the statutes creating the FSP, and conveyance documents is within our jurisdiction. ...”

Id. at 1572, (footnotes omitted for brevity)

The Special Court then provided further clarification as to what the court considered its “central functions.” The decision went on to further state, in part:

“... After reviewing the jurisdictional grant of Section 209(e)(2) and its legislative history, this Court concluded that it did have jurisdiction to interpret the agreement along with the FSP designations and the conveyance order. We recognized that the interpretation of agreements entered into pursuant to a conveyance order did not appear to be within our jurisdiction on the face of Section 209(e)(2). We held, however, that

[i]t suffices to sustain our jurisdiction here that ConRail's complaint raises substantial questions with respect to the interpretation of the FSP and our

conveyance orders themselves and not merely of the operating rights grant and the implementing agreement.

In other words, jurisdiction was present since the issues relating to the private agreement raised the same questions of interpretation as the issues relating to the FSP designations and the conveyance order. This Court, however, referring to a proposed broader grant of jurisdiction which was not adopted by Congress, noted that not all claims seeking interpretation of agreements executed pursuant to the FSP would be within our jurisdiction:

On the other hand, a reading of § 209(e)(2) that would give us original and exclusive jurisdiction to determine every controversy that may arise over the interpretation of the thousands of instruments executed pursuant to our conveyance orders would seem to run counter to the desire of the Conference Committee to confine us to our 'central functions', and to render its paring down of § 209(e)(1) as contained in the Senate and House bills somewhat an exercise in futility.

Thus, we limited our conclusion that there was jurisdiction over the private agreement to cases in which interpreting a private agreement would relate directly to interpreting the FSP and the conveyance orders. ...”

Id. at 1572, (footnotes omitted for brevity)

And finally, the Special Court concluded its jurisdictional analysis by stating, in part:

“... As we noted in our recent decision in *Penn Central v. United States*, “[t]his Court is the final arbiter of the correct interpretation of the conveyance documents, Rail Act, and FSP. ... We do not conduct conventional trials. Our rules and procedures are, in many respects, unique.” ...”

Id. at 1574

To date, the pleadings of both the City of Philadelphia (“City”) and Reading International (“RDG-Int”) suggest that Reading International (“RDG-Int.”) is a direct lineal descendant of the Reading Railroad (“RDG-RR”), a former Class 1 rail carrier which was subject to the ICC’s jurisdiction. RDG-RR was one of the many bankrupt Railroads in Reorganization that created the regional crisis which caused Congress to enact the Regional Railroad Reorganization Act of 1973. See 45 U.S.C. § 701 *et. seq.*

While the record in this proceeding is not exactly clear on the precise corporate evolution of the RDG-RR to RDG-Int., the historical record found in the bankruptcy proceeding appears to make clear that the RDG-RR and the RDG-Co. are, in fact, the same legal entity. It appears the first corporate name change and amended articles of incorporation were done during the bankruptcy proceedings to reflect the reorganized debtor’s new role as a real estate company comprised of former railroad rights-of-way and other real estate interests, as well as **active** railroad right-of-ways which were conveyed, **in part**, to ConRail.

In *Stanley Schweitzer v. Consolidated Rail Corporation and the Reading Company, et.al* 65 B.R. 794 (E.D.Pa. 1986), the Bankruptcy Court stated, in part:

“ ... Reading, the reorganized, next suggests that, as a matter of state law, it is a wholly distinct entity from Reading, the debtor. This argument fails to withstand scrutiny.

Under Reading's plan of reorganization, the corporation's capital was restructured and its articles of incorporation and bylaws were amended. However, as Conrail correctly observes, Reading's corporate identity continues. Section III of the Plan of Reorganization, pertaining to the description of the reorganized company, provides in part: "For purposes of convenience, simplicity and economy in carrying out the provisions of the Plan and to provide for continuity in the

operations of the Debtor, the Reading Company shall continue to exist as the Reorganized Company with appropriate amendments to its Articles of Incorporation and By-Laws."

The amendment of corporate articles and by-laws neither created a new corporate entity nor absolved the corporation of pre-amendment liabilities. As one leading commentator has noted:

"Where the charter of a corporation is merely amended, either by a special act, or under a general law, there is no change in the identity of the corporate body — no dissolution of one corporation and creation of another — and the corporation, under the amended charter, is liable for all debts contracted by it before amendment. The same is true when the charter of a corporation is newly extended or revived, or the corporation reorganized, without creating a new corporation. . . . Thus, where a company is merely reincorporated, the new company is liable for the debts of the old. . . . 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7329 (1983). Cf. *In re Penn Central Securities Litigation*, 335 F.Supp. 1026, 1033 (E.D.Pa.1971) (corporation's decision to relinquish its 1846 charter and file articles of incorporation under amended state law did not affect continuous corporate existence of the company). Therefore, Reading cannot be freed from its undischarged claims by being considered a new legal entity." ...

Id. at 803

In their June 4th, 2024 response to the City's petition, RDG-Int. stated that it "is a new entity created to purchase the assets of the Reading Co.'s estate as part of the final stage of the bankruptcy proceedings." However, it is unclear from the historical record whether there was, in fact, a sale of assets, as is typically done

pursuant to 11 U.S.C. § 363, or if RDG-Int. simply acquired the stock of the reorganized debtor and renamed the reorganized debtor once again.

Before beginning his Arguments, the Movant wanted to end this section with one final quote from Judge Ditter in the forementioned decision since it captures the spirit of this proceeding so well. The Court stated, in part:

“... Reading has zealously pressed novel arguments that provide a tempting invitation to achieve the result which I originally reached. However, to accept the invitation and reach that result would be to torture fundamental principles of reorganization law, successor liability, and federal tort law. This I am quite unwilling to do, as the damaging effect of accepting the invitation could be felt far beyond the confines of these cases. ...”

Id. at 807

It should be noted that RDG-Int, like its predecessor before it, has once again taken a very novel position with regards to this proceeding. However, tempting as it might be for the Board to entertain this petition and address the merits of the parties’ arguments, the Board nevertheless lacks the jurisdiction to address the matter for the reasons argued herein.

II. PRELIMINARY MATTERS

On June 21, 2024, the City submitted two pleadings; a Motion for Leave to file a Reply to a Reply, and a Reply. The Board should grant the City’s request and permit the City’s pleading into the record. 49 C.F.R. § 1100.3 states, in part, that the Board’s rules “... will be construed liberally ...”. Since its inception in

1996 to the present day, this Board has often accepted replies to replies in order to develop a complete record.⁶ This proceeding should be no different.

It is the City that is now seeking to enter into the record a document (a Deed) which is clearly a **conveyance instrument** made pursuant to the FSP. That exhibit is highly germane to the arguments being advanced by all the parties in this proceeding. The Deed's entry into the record is appropriate since it will bring this proceeding swiftly to an end; albeit, not in the way the City expected.

The City's decision to place the conveyance instrument into the record unfortunately requires the Movant to reluctantly raise an uncomfortable and delicate issue. Mindful of the Board's regulation which require parties⁷ to always be respectful of the Board and the important work the agency does, and to always maintain a professional decorum with respect to the Board; I respectfully bring to the Board's attention a genuine concern regarding a potentially serious conflict of interest which has now clearly emerged due to the introduction of the Deed into the record.

To be clear; the Movant does not, in any way possible, suggest that there is any impropriety by the Board; nor does he seek recusal of the affected Board member. Rather, he simply asks the agency to address how it will handle the appearance of a very serious ethics conflict in a transparent and open manner.

The introduction of the Deed into the record provides prima facie evidence that a potentially interested party in this proceeding could be the Southeast

⁶ The City has cited a number of proceedings to support their position as to why the Board should accept their pleading. In actuality, the Board has permitted Replies to Replies in so many proceedings that listing them all would produce a voluminous book containing just citations where this Board has granted such relief.

⁷While 49 CFR § 1103.12 specifically applies to all practitioners, both attorneys and authorized non-attorney practitioners, the Board has stated on numerous occasions that the regulation applies to ALL persons who submit pleadings to the Board.

Pennsylvania Transportation Authority (“SEPTA”). According to the brief biography found on the Board’s website, one of the Board’s members, the Hon. Michelle A. Schultz Esq., is admittedly a former Deputy General Counsel of SEPTA.

The biography of Ms. Shultz, as it appears on the Board’s website⁸ states, in part:

“... She is regarded as a leading lawyer and policy professional in the public transportation space. Most recently, Michelle served as SEPTA’s Deputy General Counsel, where her responsibilities included: representing the agency before the Federal Railroad Administration and Pennsylvania Public Utility Commission; serving as lead counsel on a major railroad reconstruction project; overseeing compliance, regulatory, and legislative issues; and, serving as lead counsel on real estate transactions and contract negotiations. ...”

The very next paragraph in the biography states, in part:

“ ... During her time with SEPTA, Michelle also served as the Director of Legislative Affairs where she managed a team of public policy professionals who advocated for SEPTA on the local, state and federal level. She was also responsible for reviewing legislation and regulations at the local, state and federal level for impact to SEPTA ...”

Turning now to the Deed itself; while the City has directed the Board’s attention to language in the Deed found in Exhibit A of that document⁹, there is also critical language which is germane to this proceeding found in what appears

⁸ The URL for the relevant webpage is <https://www.stb.gov/about-stb/board-members/>

⁹ In the top righthand corner of each page, there appears to both a Book and Page number, which is typical of recorded document. However, the City did not cite the location where the document is recorded. In addition, the City did not number the pages of the exhibit, making easy references to the document a challenge. See 49 C.F.R. § 1114.7 . Each page has two pages numbers already, and the City cites to pages in the Deed as if there is a third set of numbers which clearly do not exist.

to be referred to as Exhibit B. Beginning with the page that is identified as D-0036-163 (top right corner) and B-13 (bottom center) and continuing consecutively for the next three pages until the page marked D-0036-166 (top right corner) and B-16 (bottom center); those four key pages of the document contain several critical references to both the Grantor, Grantee, and SEPTA, as well as to the USRA and the FSP.

Ms. Shultz's publicly acknowledged role at SEPTA, and her prior legal representation of SEPTA as its Deputy General Counsel (and specifically her role regarding real estate transactions); combined along with the City's effort to have the Board essentially interpret that Deed in which SEPTA is clearly a party; is what directly leads to the Movant's cause for concern. While SEPTA is not currently a party in this proceeding, it has been a party to previous litigation wherein the Special Court has asserted jurisdiction, and then addressed disputes regarding this same section of railroad. See *Conrail v. U.S.*

Given that an attorney does retain a continuing duty to his or her former client upon the conclusion of whatever matter he or she was asked to represent the client in; there is no disputing that it is reasonable for the parties to respectfully inquire of the Board about the impartiality of the member, and her ability to participate in this proceeding. See: American Bar Association, Model Rules of Prof'l Conduct, R 1.7, 1.9, and 1.11 (2024)

Notwithstanding the Board's lack of jurisdiction to interpret the Deed, (which would clearly encroach upon the Special Court's central functions), there is now an additional issue of whether there is a conflict / ethics issue if Member Shultz participates in this proceeding. Until the City elected to voluntarily proffer the Deed as evidence, there was nothing in the record which would have clearly

given any party (including the Board itself) reason to believe that there was a potential for a serious conflict of interest and ethics issue.

This leads the Movant to ask the following question:

If a serious conflict of interest emerges midway into a proceeding due to the introduction of evidence into the record which reveals there is indeed a potential conflict for a member of the Board; and, the member had already begun to participate in proceeding; and, shared his or her thoughts and concerns with other members prior to the introduction of the evidence into the record (thus potentially contaminating the decision making process); how does the Board address this issue if there is indeed a recusal or disqualification mid-proceeding?

To be clear, the Movant does not believe there is any maleficence of any kind in the proceeding with respect to the Board itself. No party should interpret the Movant's concern as an allegation of such. To put the issue into plain, simple English; A conflict has now emerged. How should the issue be best addressed in a fair and transparent manner for all? Nothing more, nothing less. As I stated above, and will argue further below, the Movant is **not** seeking a recusal, nor a disqualification, of the member.

From 1996 to the present day, members of the Board have not participated in proceedings from time to time. In all those proceedings, there is usually just one single solitary sentence near the end of the decision (and often buried in an end note) which announces a member's lack of participation. There is never any explanation given as to why the decision was made by the member to not participate, nor is there any indication as to when the recusal and / or

disqualification occurred during the course of the proceeding. In the absence of an explanation within the decision itself, neither the parties, nor the public, ever know the reason as to why a Board member did not participate, nor how the member's lack of participation may, or may not, have affected their proceeding.

In researching this issue, it became clear that the decision-making process regarding a Board member's recusal and / or disqualification from participating in a proceeding is not transparent to the parties, or the public, in any meaningful way. To date, the Movant has not located any case law that is unique¹⁰ to the Board which would provide the public with an explanation of how a decision to recuse or disqualify is reached. A small portion of the regulations covering the conduct of the Board's members (and the agency's other employees) were easy enough to locate. See 49 C.F.R. § 1019 and 5 C.F.R. § 5001. However, unless one knew both the history¹¹ of the Board, and the applicability of 5 U.S.C. §§ 13101 – 13146; and, the appropriate corresponding regulations in the Code of Federal Regulations which are applicable to the Board, its members, and its employees; the public would have no idea how conflicts of interests are dealt with when they emerge in a proceeding before the Board.

¹⁰ An effort was undertaken to see if any case law existed that pertained to either the Board, the ICC, or any of the other Federal agency tasked with regulating common carriers of any kind and where the provisions of 49 C.F.R. § 1019 or 5 C.F.R. § 5001 were either cited or litigated in the proceeding. None were found. The only case which was found that barely had any relationship to transportation or a common carrier was a case that dealt with FOIA and the US Postal Service. See: *Ctz. for Resp. and Ethics v. US Postal Service*, 557 F. Supp. 3d 145 (Dist. Court, Dist. of Columbia 2021). The issues presented appeared to have little in common with this proceeding, but would be germane in a larger rulemaking proceeding in the event the Board elected to update its ethics regulations.

¹¹ For reasons unknown, 5 C.F.R. § 5001 is still titled "Supplemental Standards of Ethical Conduct for Employees of the Interstate Commerce Commission". In 1995, the Interstate Commerce Commission was terminated by Congress, and a significant portion of the ICC's functions were transferred to the Board. In January of 1996, in its very first act, the then-new Board swiftly adopted the regulations of the former I.C.C. See: *Transfer of Regulations from the I.C.C. to the S.T.B pursuant to the I.C.C.T.A. of 1995* EP 525, 1 S.T.B. 1 Served January 18, 1996. Over the ensuing 28 years, the Board has eliminated nearly all the references to the former ICC in its regulations. It is not clear if the Board, or the Office of Government Ethics ("OGE"), is responsible for amending the references to the ICC in 5 C.F.R. § 5001, one of the very last places where there continues to be a reference to the defunct agency.

The Movant acknowledges that some of the issues raised above are better dealt with in an appropriate rulemaking proceeding. Nevertheless, a serious conflict of interest has emerged in this proceeding, and the Board should address the issue¹² in a fully transparent and open manner within its decision.

A. Perpetual Conflict, or Resolvable Conflict?

As noted above, the Movant is not seeking recusal of Member Shultz. Granted, recusal or disqualification may well occur in this proceeding, but it is not being sought by the Movant. The Movant's main concern is not necessarily the result itself, but rather, the thought process that was used to reach the result.

In many ways, a proceeding before the Board is very similar to a civil proceeding before a court. Indeed, the Board's regulations governing the conduct of practitioners appearing before the Board acknowledges that reality. See: 49 C.F.R. § 1103.11 and § 1103.12 (a). While the Board requires parties to observe the same high standards of ethical conduct which are routinely applied in courts of the United States, doing so creates a few conflicts. The Board is an Article II administrative agency, not an Article III court. Board Members are, in many respects, like judges¹³. However, they are, in fact, employees of the executive branch. This leads one to ask the obvious question:

Are the Canon of Ethics for Federal decision-making executive branch personnel different from Federal judges, and if so, how?

¹² As noted previously, while the Board's regulations at § 1103.12(b) deal with practitioners, the Board has often stated that all parties should abide by the Board's regulations as well. The Movant was very mindful of the delicate nature of raising a conflicts-of-interest issue. Since there really is no other way for the public to raise a conflicts issue, except to raise it within the proceeding in which the conflict arises, it is being done so herein in the most considerate manner possible. The Movant respectfully hopes that the Board does not take offense at the issue being raised.

¹³ The Board, like a Bankruptcy Court, or an Immigration Court, has limited jurisdiction. Since Board members are Senate-confirmed, while Bankruptcy and Immigration judges are not, the Board's members have more in common with an Article III judge than do other Federal judges presiding in other limited-jurisdiction Federal courts.

While the Supreme Court has addressed when due process requires recusal, those cases make clear that much of the conflict-of-interest resolution is left either to legislation to address, or otherwise resolved by long-established professional codes of conduct. In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), the Supreme Court touched briefly on a few of the issues present in this proceeding. While the opinion of the majority in the Court's decision (which was decided 5 to 4) is the law of the land, it is within the dissent of the Court's minority that one can find commonality with many of the issues present in this proceeding.

The Board's Ethics regulations are relatively sparse, but do appear to flow directly from legislation. While there is no specific statutory language found in 49 U.S. Code regarding the conduct of Board Members, there is appropriate statutory authority in 5 U.S. Code that deals directly with ethics and conflicts of interest for all government employees. The Board's regulations appear to permit each individual Board member to make their own determination with respect to their participation in a proceeding. See: 5 C.F.R. §§ 5001.103 and 2635.502 (d) Said determination is supposed to be made in consultation with the Board's General Counsel, the agency's Designated Agency Ethics Official. See. 49 C.F.R. § 1019.2

What the regulations do not appear to indicate is the standard by which a Member is to be guided by when making their own determination. Do they use the standard which is applied to lawyers? Perhaps the standards that apply to judges? The applicable standard is not clear for the parties to a particular proceeding (or the general public) to easily see, and feel comfortable that the Member acted with impartiality in a proceeding, if the standard which is used is never revealed.

Since the Board's regulations permit the individual members to make their own impartiality determination, the Movant is neutral regarding the decision by

member Shultz to either recuse herself or not. What the Movant is very concerned over would be a failure to disclose on the record how the determination was made.

Finally, the Movant remains deeply torn over having to raise a conflict-of-interest issue in this proceeding. While there is no doubt that the integrity of the Board is above reproach, the Movant has deep concerns regarding the motives of others. Both the City and RDG-Int are well aware of the Special Court and the critical roll it played in creating the current controversy which, for some unknown reason, the parties are now asking the Board to resolve. Neither party has taken any effort to bring their respective cases in the only venue which has the appropriate jurisdiction and can actually address their matter. This led the movant to ask the obvious question: Why have both parties declined to do so thus far?

While it is never prudent to ask a question in a legal proceeding that one does not know the answer to beforehand, the answer seemed kind of obvious to the Movant. As one who often subscribes to the theory outlined in Ockham's Razor, it simply struck me that the City chose a venue which put RDG-Int in the worst possible position without RDG-Int realizing that there was even an issue.

RDG-Int's counsel is based in the western United States. The City's counsel is based in the City of Philadelphia. It strains credibility to think that the attorneys for the City would not have previously interacted with SEPTA's former Deputy General Counsel (who was in charge of overseeing SEPTA's vast real estate holdings all over Philadelphia) over a 14 year period. The Movant cannot help but feel that the City's decision (to forego initiating litigation in the D.D.C. *qua* the Special Court, and instead chose the Board to address the issue presented) certainly took into consideration the unique makeup of the Board's current members (and opposing counsel's likely naivety regarding the same as well) when they were deciding on a venue. It seemed to the Movant that in bringing the

matter before the Board and not timely revealing the legal interest that SEPTA had (and might still have) in the property in question, the City might have been engaged in a lack of candor and fairness in dealing with other litigants. See 49 C.F.R. § 1103.27 (a), (b)

III. ARGUMENTS

The Board's adjudication of this proceeding begins, and then quickly ends, with the submission of the Deed, a document which is clearly a conveyance instrument made pursuant to the FSP and a conveyance order of the Special Court. The document was voluntarily entered into the record by the City itself. The Board lacks the jurisdiction to interpret the document, and as a result, cannot reach a decision as to the merits of the City's arguments regarding the regulatory status of the rail line in question. See: *Conrail vs. STB*

A. Lack of jurisdiction

In its Reply to a reply, the City attempts to mislead the Board by cherry-picking those paragraphs in the Deed which it believes supports its position, while ignoring others which clearly do not support their position. One key paragraph, located on the page marked D-0036-164 in the upper right corner, and further marked B-14 on the bottom center, undercuts the City's position to such an extent that the Board need not go any further in its deliberation of the City's petition.

The paragraph states:

“Reading Terminal to Fairmount Avenue. The Final System Plan designates the transfer to Grantee of an option under which Grantee will have the right to acquire on behalf of the Southeastern Pennsylvania Transportation Authority (SEPTA) the fee or any lesser interest in this segment. (All references herein to the transfer of interests to SEPTA contemplate the exercise of such option by Grantee and subsequent transfer to SEPTA.)”

The underlined caption “Reading Terminal to Fairmount Avenue” accurately describes the entirety of the line segment, which also includes both the segment that is in dispute in this proceeding, as well as the segment at issue in *Conrail vs. US*. However, it is the term which states: “ ... the fee, **or any lesser interest** ...” (emphasis added) that brings this matter to a swift conclusion before the Board.

The Deed is prime facie evidence that ConRail may not have received from the bankruptcy estate of the RDG-Co. the **entirety** of the legal interest in the rail line in question, and thus, the RDG-Int’s claim that it might have retained a sufficient legal interest in the property to maintain a residual common carrier interest requires this Board to interpret the exact nature and extent of the legal interest being transferred from RDG-Co. to ConRail, as well as the nature of those rights that were being retained by the RDG-Co., and which were memorialized in the conveyance document, in order to determine if RDG-Int’s position has merit or not.

The deed makes clear, Conrail had an option to acquire some level of interest in the property. The deed does not define what level of interest Conrail received with any specificity. This leads one to ask the obvious question: What exactly was ConRail receiving, and what exactly was RDG-Co. giving away?

The Board attempted to do this exact same analysis when it was asked by a local government once before in the forementioned *Jersey City – Pet. for Dec. Ord.* The Court of Appeals for the District of Columbia Circuit made clear that the Board lacked the jurisdiction to make these kinds of determinations. See: *Conrail v. STB*.

Furthermore, the Movant would like to remind the Board what the Special Court itself stated to **both** the **City** and **RDG-Co.** in *Conrail vs. US*.

The Court stated clearly, in part:

“... "[t]his Court is the final arbiter of the correct interpretation of the conveyance documents, Rail Act, and FSP. ...”

Id. at 1574

It is simply mind-boggling to the Movant as to why this proceeding was brought before the Board. The Special Court made clear, nearly 20 years after the original conveyance, regarding the exact same line, that it would assert its jurisdiction to resolve a dispute which included the need to interpret the conveyance instruments and the nature of the rights and obligations of the parties to the agreement. Both parties in this proceeding were parties in *Conrail vs. US*. In the opinion of the Movant, the audacity of the City to ignore what the Special Court made clear to the parties in *Conrail vs. US* almost reaches the level of contempt. This proceeding should be dismissed immediately.

B. Lack of jurisdiction – Part II

Basic fairness requires the Movant to equally call out RDG-Int. for advancing similar erroneous arguments too. RDG-Int’s reliance on the District Court’s decision in *Scioli Turco, Inc. and 915 Spring Garden Associates, L.P. vs. Philadelphia & Reading Railroad Co. and Reading International, Inc.* No. CV 21-563 (E.D. Pa. Apr. 19, 2023), and hereinafter referred to as the *Scioli Turco decision*, is misplaced. Just like the Board, the District Court lacked the requisite subject matter jurisdiction to reach the conclusion that it did regarding RDG-Int’s interest in the property. The District Court’s decision in that proceeding is highly vulnerable to a successful collateral attack at any time by the City, for the same

exact reason that any decision by the Board in this proceeding would be unlikely to survive judicial review; specifically, a lack of subject matter jurisdiction.

Congress explicitly gave the D.D.C. *qua* the Special Court, both the statutory authority, and the original and exclusive jurisdiction, to address “... any action ... to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 743(b) of this title in order to effect the purposes of this chapter or the goals of the final system plan. ...” See: 49 U.S.C. §§ 719 (b)(2) and 719 (e)(2) Pursuant to 49 U.S.C. § 719 (g), the D.D.C. *qua* the Special Court, can both stay and permanently enjoin¹⁴ the *Scioli Turco decision* if the Court finds that “... such action or proceeding is contrary to any provision of this chapter, impairs the effective implementation of this chapter, or interferes with the execution of any order of the special court pursuant to this chapter. ...”

In reading the *Scioli Turco decision*, there is one issue the District Court failed to adequately address; specifically, its own jurisdiction to hear the case. The Court addresses the background, the legal standard it chose to apply, and then delves into its discussion regarding the merits of case, and then finally the court’s conclusions. There is no discussion of any magnitude as to why it had the jurisdiction to address the question as to the nature of RDG-Int’s rights and obligations in the line of railroad. There is not a single reference anywhere in the District Court’s decision to the Special Court, or any discussion of the Special Court’s original and exclusive jurisdiction. This leads one to firmly believe that no party to the proceeding raised the role that the Special Court played in bifurcating the legal interests in the rail line in question before the District Court.

¹⁴ In addition to being authorized to act as a District Court judge, the Special Court also had the full powers and authority of a Court of Reorganization. See: 49 U.S.C. § 719 (b)(1). Just like in a traditional bankruptcy court, 49 U.S.C. § 719 (g) functions in a similar manner to the automatic stay in a regular bankruptcy proceeding. See, compare, and contrast with 11 U.S.C. § 362.

In short, the *Scioli Turco decision* gives no indication that the court was even aware that it lacked the requisite subject matter jurisdiction to hear the case.

Given the fact that nearly 50 years have passed since the initial conveyance, it is understandable that parties today might not have a complete understanding of all the unique aspects and complexities of the 3R-Act. While this might provide a reasonable explanation for why the plaintiffs in the *Scioli Turco decision* failed to raise the jurisdictional issue, it does not excuse RDG-Int's failure to properly represent to the District Court that it lacked the jurisdiction to hear the case.

RDG-Int. should have known to remove the matter to the D.D.C. *qua* the Special Court. RDG-Co. was a party to *Conrail vs. US* and thus was aware of the Special Court's mandate regarding its exclusive jurisdiction to address these matters. The District Court's attention in the *Scioli Turco decision* was clearly focused towards the Board and not the Special Court. The questions the Movant must ask is: Why? Which party focused the Court's attention towards the Board and not the Special Court? And, which party improperly removed the matter to the US District Court for Eastern Pennsylvania in the first place?

C. Impact on Other Proceedings and Prior Decisions

To be candid as well; at first glance, the Movant believed that the RDG-Int's position in both this proceeding, and in the *Scioli Turco decision*, was a bit farfetched. While drafting this Motion to dismiss, and reviewing a number of previous Board proceedings the Movant has been directly and indirectly involved in, and the various other cases related thereto, and after further careful consideration, a different conclusion has now been reached. RDG-Int's novel position may well come to fruition eventually, even though the FSP seemed to indicate such an outcome was not otherwise possible.

There remains a strong possibility, absent the involvement of **all** the interested parties, that the D.D.C. *qua* the Special Court could potentially reach the same conclusion as the District Court did in the *Scioli Turco decision*. This conclusion is reached after a careful reexamination of the proceeding the D.D.C. *qua* the Special Court recently adjudicated in *City of Jersey City, et.al. vs. Consolidated Rail Corporation, et.al.* 968 F. Supp. 2d 302 (D.D.C. 2013), hereinafter referred to as *Jersey City v Conrail*; a thorough review of how the court in the *Scioli Turco decision* reached its decision; and one other critical factor.

That most critical factor is the passage of time and the subsequent loss of institutional memory regarding the Special Court and its critical functions. It has been nearly 50 years since most (if not all) of the FSP conveyances occurred, and nearly 30 years since the Special Court was abolished. Furthermore, Congress may not have put sufficient safeguards in the statutes on the D.D.C. *qua* the Special Court to limit its jurisdiction and ensure the integrity of prior decisions. Replacing a three-judge panel with a single judge will not likely produce the same type of quality decisions as the original Special Court would have produced.

For example, in forementioned *Jersey City vs Conrail*, the Court's discussion regarding its jurisdiction was rather lacking compared to previous Special Court discussions on jurisdiction. The Court basically stated, in one sentence, that it had jurisdiction because the Court of Appeals for the District of Columbia Circuit said so. Such a discussion does not inspire confidence in the quality of the decision. The Special Court's jurisdiction was quite specific.

In reviewing the *Scioli Turco decision*, there was virtually no discussion at all regarding how that court had the jurisdiction to reach the decision that it did. Neither court addressed how their respective decisions may have impacted the

totality of the original proceeding in which the conveyance was made. Special Court conveyances were not made in a vacuum. After a conveyance was made, there was a valuation proceeding that followed. Neither court considered how their decision might have impacted the rights of others in their respective decisions, nor how their decision might have impacted the financial considerations that flowed following the conveyance.

In the opinion of the Movant, there was a high probability that had RDG-Int. removed the underlying state case which was brought against it to the correct court, and made the same arguments that it did with the parties that were before the court, the D.D.C. *qua* the Special Court might very well have reached the same conclusion as the US District Court of Eastern PA did. Such a decision would have had far reaching consequences that quite literally would have opened a modern-day legal equivalent of the mythical Pandora's Box.

Many previous ICC and Board decisions could become susceptible to potential reopening, reconsideration, or even vacating if RDG-Int's position comes to fruition. Cases such as *Midtown TDR Ventures Llc – Acquisition Exemption – American Premier Underwriters, Inc., The Owasco River Railway, Inc., and American Financial Group, Inc.* STB Finance Docket No. 34953, Decided: February 11, 2008 would be at serious risk if the D.D.C. *qua* the Special Court were to find that the bankruptcy estates of the former rail carriers in reorganization retained residual common carrier obligations in their former rail lines as a result of the Special Court's order to bifurcate the property interests in said rail lines, and where both Conrail and the estates of the former rail carriers had concurrent legal interests in the line, and those lines continued as active parts of the national rail network post conveyance.

In addition, such a finding would undermine the Board's well-established *State of Maine* doctrine¹⁵ in a significant manner. Just like the ICC, the Board lacks the jurisdiction to unwind a conveyance order or a finding of the Special Court. 45 U.S.C. § 719 (e)(2) states, in part: "... Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court **shall be final** and **shall not be restrained or enjoined** by any court." The Board cannot reach a *State of Maine* conclusion regarding rail lines where the Special Court has already found that the non-carrier property owner has a residual common carrier obligation. Numerous properties of SEPTA, NJ Transit, Metro-North, and MBTA could well be adversely impacted by a such a ruling. The fall-out from such a bad decision could be very wide ranging.

The Movant cannot help but think about Judge Ditter's prophetic warnings regarding the temptations of entertaining the RDG-Co's novel legal theories discussed previously on page 15 *supra*.

The Board should be aware that there are now two proceedings which will land before the D.D.C. *qua* the Special Court in the next 12 months. One proceeding will likely occur as a result of the Board's decision in this proceeding, and the other (which is nearly ready for filing with the Court) that flows out of the Board's decision¹⁶ in *Riffin-Campbell Rd. NOE*. While the D.D.C. *qua* the Special

¹⁵ The Board has routinely approved transactions where parties were permitted to acquire the physical assets of a line of railroad subject to the Board's jurisdiction, but did not acquire the common carrier rights and obligations that are normally associated with such ownership. This long establish doctrine flows from the ICC's decision in *State of Maine - Acquisition and Operation Exemption - Maine Central Railroad*, 8 I.C.C.2d 835 (1991).

¹⁶ The Movant will be seeking to participate in the Board's recently announced public hearing regarding *Growth in the Freight Rail Industry*, Docket No. EP 775 in September. The intent is to speak about how short line rail carriers may need to seek some regulatory relief in the form of partially revoking certain exemptions (related specifically to intermodal transportation) in order to grow their traffic base. The movant will be discussing the active rehabilitation activities currently underway to restore the tracks which are a part of the rail line that was the subject of the *Riffin - Campbell Rd. NOE*. The movant will be prepared to answer all questions that the Board may have regarding the project at that time.

Court proceeding regarding Mr. Riffin's line of railroad will not likely produce a Pandora's Box type situation, it will be historic in that it will be the first time that the Court will be asked to issue an amended conveyance order ever. However historic a decision involving Mr. Riffin's matter might be, a decision in favor the RDG-Int. out of the D.D.C. *qua* the Special Court which is similar in result to the *Scioli Turco decision* would certainly be far more catastrophic and wide ranging.

D. Notice to Interested Parties

Given how potentially destabilizing a decision consistent with RDG-Int's current position would be, the Board may want to give serious consideration to adding a requirement that any party seeking relief in the D.D.C. *qua* the Special Court related to this matter be required to serve notice on many of the parties who would have been required to be served previously and would have had standing to intervene, or otherwise participate in the proceeding. For example, the parties who would have been required to be served notice in the past would have most likely included the following:

1. USRA (Association)
2. ConRail (Corporation)
3. ICC (Commission)
4. Bankruptcy Trustee (of the debtor railroad)
5. US Trustee's Office (DOJ)
6. Those creditors which intervened
7. Other interested parties (such as SEPTA, City of Philadelphia, etc.)

The service list in the past would have been moderately extensive in a proceeding before the Special Court. However, in *Jersey City, et.al. vs. ConRail, et.al*, the service list for that proceeding in the D.D.C. *qua* the Special Court was just a small handful of parties. ConRail was the only original party in that most recent proceeding. While the Court's decision was in keeping with the spirit of

the FSP, how the court reached its decision was concerning. More importantly, it was not clear if all the parties who should have been given notice were, in fact, aware of the proceeding before the D.D.C. *qua* the Special Court.

On January 1, 1987, Congress abolished the USRA. See 45 U.S.C. § 1341 (a)(1). All remaining responsibilities of the Association were transferred to Secretary of Transportation. See 45 U.S.C. § 1341 (a)(2). Just as Congress assigned the remaining responsibilities and jurisdiction of the original Special Court to the D.D.C., it appears that Congress likewise assigned any remaining responsibilities of the USRA to the Secretary of Transportation if the USRA's interest in a potential proceeding may be impacted. It would appear to be a reasonable requirement for any party bringing a proceeding before the D.D.C. *qua* the Special Court to serve a courtesy copy of their complaint / pleadings upon the Secretary as the designated successor to the USRA.

Since RDG-Co's bankruptcy proceeding has long since concluded, and RDG-Int. appears to be the now-successfully reorganized debtor, there is no need to require service upon the Trustee of the Debtor or its creditors. They no longer have any interest in the properties. However, to ensure the integrity of previous Special Court decisions, it may be prudent to require a party to serve a courtesy copy of a complaint or pleading upon the Office of the United States Trustee. The Special Court was a court of reorganization, and the transfers occurred from railroads that were in reorganization. The Office of the US Trustee would certainly have been a party closely monitoring the all the original proceedings, and intervening as the interests of the United States so required.

Finally, there are parties to this proceeding that may wish to participate in any proceeding in the DCC *qua* the Special Court which begins as a result of the Board's decision in this proceeding. Whether the parties will have sufficient

standing to intervening in the proceeding is obviously at the discretion of the Court. However, in order to intervene, timely notice is required.

Today, an appropriate service list might include following:

1. Secretary – DOT (as successor to the USRA)
2. ConRail (since the Corporation still exists)
3. STB – Board (as successor to the ICC)
4. RDG-Int. (Successor to the RDG-Co's estate)
5. US Trustee's Office (Department of Justice)
6. Known interested parties (such as SEPTA, City of Philadelphia, etc.)

The Board recently explained that service of pleadings upon nonparties is appropriate in certain circumstances. See *Riffin-Campbell Rd. NOE*. It is unclear however if the Board has the authority to require service of pleadings upon nonparties if a proceeding is brought in a Federal Court. The Board does routinely publish notices of Court Actions on their website in the related dockets. It is unknown if a similar type of notice would be available as well.

IV. CONCLUSIONS and PRAYER FOR RELIEF

The Board lacks the subject-matter jurisdiction to decide the question of the extent of the **retained rights** that might affect RDG-Int's right-of-way. The Board should dismiss this proceeding and direct the parties to seek relief in the United States District Court for the District of Columbia, *qua* the Special Court, regarding the nature and extent of RDG-Int's retained rights.

The current petition is, at best, premature until the US District Court for the District of Columbia, *qua* the Special Court, addresses the exact nature of RDG-Int's retained rights. Thus, the Petition should be dismissed **without prejudice** since there may, in fact, be a controversy that the Board may need to resolve subsequently after the Special Court proceedings have come to an end.

Finally, the Board should direct any party who seeks relief before the US District Court for the District of Columbia, *qua* the Special Court regarding the subject matter of this proceeding, to **serve timely notice** of the commencement of said proceeding upon the Board (as the successor to the I.C.C.), the Secretary of Transportation (as the successor to the U.S.R.A.), upon ConRail (as the Corporation), and all parties of record to this proceeding.

For all the foregoing reasons, your Movant respectfully requests that the Board grant his relief, and any other relief that is just and necessary to facilitate his request.

Respectfully Submitted,

Eric S. Strohmeyer /s/

Eric S. Strohmeyer – *Pro se*

VERIFICATION

I, Eric S. Strohmeyer, declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Notice of Intent to Participate, Reply, and Motion to Dismiss. Executed on this 1st day of August, 2024

Signature: *Eric S. Strohmeyer* /s/

CERTIFICATE OF SERVICE

I certify that I , Eric S. Strohmeyer, have this 1st day of August, 2024, served copies of the foregoing document upon all parties of record in this proceeding, by either electronic mail, or by first class mail.

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Respectfully Submitted: *Eric S. Strohmeyer* /s/ Date: August 1, 2024