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**Before the
Surface Transportation Board**

STB FINANCE DOCKET NO. 36078

PETITION FOR A DECLARATORY ORDER

(Hudson Street Industrial Track / Harsimus Branch

(Jersey City, Hudson County, NJ)

RIFFIN'S REBUTTAL TO RESPONDENTS' OPPOSITION

1. Comes now your Petitioner, James Riffin ("**Riffin**"), who herewith files his rebuttal to the Respondents' Opposition to the Petition for Declaratory Order that he filed on **October 14, 2016**, and in rebuttal states:

2. 49 CFR 1112.2 (Modified Procedures) states that a petitioner may file a rebuttal to a reply to Petitioner's Opening Statement. In the event that §1112.2 is not applicable, Riffin's seeks leave to file his reply to Respondents' Replies, in order to provide the Surface Transportation Board ("**STB**") with a more complete record.

CONRAIL

3. Conrail argued that there are three reasons why the STB should deny the Petition:

4. **The STB has no jurisdiction. Response:** The Special Court has exclusive jurisdiction to determine the nature of what was **conveyed** to Conrail. The STB has the jurisdiction to determine how Conrail **used** the track segments that were conveyed to Conrail.

5. Yes, the LLCs did ask the Special Court to address the very issues that Riffin raises in his Petition. And Conrail is correct when it states that the Special Court declined to address the issues. However, the reason why the Special Court declined to address the issues is relevant:

A. The Special Court Complaint was filed by City et al. City et al. expressly limited its Complaint to that portion of the Harsimus that traversed between CP Waldo and the West side of Marin Blvd. City et al. deliberately did not seek a determination as to the nature of what was conveyed to Conrail East of Marin Blvd. Either as a part of the Harsimus, or as the Hudson Street Industrial Track (“**HSIT**”).

B. The LLCs were intervenors in the Special Court proceeding. Intervenors do not have the right to expand the scope of the issues presented. Consequently, the LLCs had no right to ask the Special Court to consider any issues not expressly raised by City et al. And the Special Court declined to expand the issues presented by City et al.

6. Riffin is asking the STB to determine how Conrail **used** the track segments that were conveyed to Conrail. The STB decidedly has the authority to determine how Conrail used / uses its track segments.

7. Conrail argues that **how Conrail uses its tracks is only relevant if Conrail’s use of the tracks would change the character of the tracks.** **Response:** Conrail has argued, and continues to argue, that both the Harsimus and HSIT were conveyed to Conrail as Excepted track. While Riffin does not agree with Conrail’s argument¹ Conrail’s argument as to how all

¹ Under Conrail’s theory, every line that was conveyed to Conrail by the Final System Plan (“**FSP**”) was conveyed as excepted track. Conrail’s use / classification of each line conveyed via the FSP, determined whether the hundreds of lines conveyed to Conrail, were, once in the possession of Conrail, lines of railroad. If this were true, what was the purpose of calling the lines conveyed to Conrail, ‘line?’ And what was the purpose of noting that all lines conveyed, included all track segments ‘ancillary’ to the lines conveyed? Besides, it has long been held that how a carrier classifies its track segments, is not determinative of the nature of the track segment. See for example, *Texas and Pacific v. Gulf*, 270 U.S. 266 (1926), where the carrier attempted to classify the track segment that it wanted to build, as excepted track, without

lines were conveyed to Conrail, defeats the very argument that Conrail now tries to use: If the HSIT and Harsimus were conveyed to Conrail as excepted track, and if thereafter Conrail used these excepted track segments for through traffic, then Conrail's use of the track segments would have 'changed' the nature of the track segments conveyed, from excepted to line.

8. Conrail argued that **Riffin has no cognizable interest.** **Response:** While Conrail is correct that Riffin **presently** is not a shipper on the HSIT, nor does Riffin have any property interests on the HSIT, that is about to change. Riffin's present cognizable interest is: He would like to know if the HSIT is an unabandoned line of railroad **prior to** obtaining a property interest adjacent to the HSIT. If the HSIT is an unabandoned line of railroad, then Riffin could make a demand for service, once he obtains a property interest adjacent to the HSIT. If the HSIT is not a line of railroad, then there is no reason for Riffin to obtain a property interest adjacent to the HSIT, since the reason for obtaining a property interest adjacent to the HSIT, would be to be able to demand, and to receive, rail service.

9. It should be noted: Riffin is actively seeking a property interest in a parcel adjacent to the HSIT, and expects shortly to have such a property interest. Which will buttress Riffin's cognizable interest.

10. It should be further noted: Both Jersey City and Riffin have advocated that there are a number of entities in Jersey City that would like freight rail service, if it was only available. One of those entities submitted a verified statement in the 1189X proceeding, asking for rail service. As it turns out, the HSIT is actually **closer, and more accessible** to Pace Glass than sites on the Harsimus.

11. Conrail argues that Riffin's interest is only 'abstract.' Nothing could be further from the truth. While both Jersey City and Riffin have indicated that they have a desire, and a willingness, to provide rail service in Jersey City, only Riffin has actually bought a line of

success. Conrail's argument that it is somehow 'special,' and is not subject to long-standing rules, is self-serving, and without merit.

railroad, bought a locomotive, bought a dozen plus rail cars, bought thousands of feet of rail, and thousands of cross ties, and bought a full set of maintenance-of-way equipment.

12. Conrail also argues that it is premature to institute a declaratory order proceeding, and that the issues involved have no significance to the industry. In actuality, this proceeding should have been instituted when Jersey City filed its FD 34818 proceeding. Had that happened, Forest City would know whether there were unabandoned lines of railroad traversing the Metro Plaza parcel.

13. As for the industry: The industry needs to know if the STB is actually going to do anything, when carriers sell the real property underlying their lines of railroad, when non-carriers acquire lines of railroad without authority, and when non-carriers erect structures on lines of railroad, thereby making it impossible to provide rail service. If the STB does nothing, then carriers, and non-carriers, will know that they no longer need to bother to seek STB authority prior to selling / buying / encumbering lines of railroad. On the other hand, if the STB does institute a declaratory order proceeding, and does let it be known that the STB strongly disapproves of what Conrail / the non-carriers have done / are doing, that too will send a message to the industry: The STB still wants carriers / non-carriers, to comply with the STB's rules / to respect the STB's jurisdiction and authority.

14. Conrail also argues that **there is no controversy / uncertainty. Response:** Conrail argues the HSIT, and the balance of the Harsimus, is excepted track. City et al. argues that there is at least one line of railroad that traverses the Metro Plaza parcel. City et al. argued that the Harsimus was a line of railroad. That is one controversy. The HSIT is as much a line of railroad, as the Harsimus is. Both were named lines of railroad. Both were assigned line code numbers. Both were conveyed via recorded deeds. Both were used by Conrail to deliver thousands of railcars per year, to multiple shippers.

15. Forest City has indicated that it desires to resolve the status of the track segments that traversed Metro Plaza, as quickly as possible, since the uncertainty will adversely affect Forest

City's construction schedule.

16. The industry is uncertain if the STB is going to actually enforce its authority / jurisdiction.

FOREST CITY

17. Forest City argues Riffin's Petition should be denied because:

A. Riffin is using his Petition as an 'end run around Judge Dring's order dismissing Mr. Riffin from the abandonment proceeding." In support of this argument, Forest City argues that the issues in 1189X are the same as the issues in Riffin's Petition.

Response: While the issues in Riffin's Petition are similar to the issues raised in FD 34818, they are dissimilar to the issues in 1189X. 1189X has to do with whether Conrail should be granted abandonment authority for the Harsimus. Granting Conrail abandonment authority for the Harsimus, will not permit Conrail to abandon the HSIT. While Conrail has filed an Environmental and Historic Report which encompasses both the Harsimus and the HSIT, Conrail has given no **required notice** that it is seeking to abandon the HSIT. Neither in a newspaper of general circulation, nor in the *Federal Register*. And without notice, no abandonment authority may be granted. As noted above, Riffin's Petition is similar to City et al.'s FD 34818 proceeding: Both seek a determination as to the proper classification of specified track segments / a determination as to whether abandonment authority must be obtained.

B. Forest City argues that Riffin filed his Petition "solely for the purpose of extracting some financial leverage." FC Reply at 6. **Response:** No where does Forest City argue that Riffin is seeking "a financial windfall" from Forest City. There is some evidence that Riffin would like a small commission from the LLCs. However, both

Riffin and the LLCs have made it clear: There is no agreement between Riffin and the LLCs. And the LLCs have never complained about Riffin seeking a ‘financial windfall’ from the LLCs. That is because the LLCs are under no obligation to provide Riffin with any kind of a ‘financial windfall.’

18. Forest City argues that there was no uncertainty until Riffin arrived. Perhaps that is true. Until Riffin made an issue of the unabandoned lines of railroad that traversed the Metro Plaza parcel, Forest City, Conrail, and Jersey City, **fully expected (and were quite certain)** that the STB would ‘look the other way,’ and that the STB would totally ignore the fact (A) that Conrail sold the real property underlying its lines of railroad, without STB authority, to Forest City’s predecessor in title; (B) that Forest City’s predecessor in title acquired multiple lines of railroad without authority; (C) that Jersey City facilitated, and strongly supports, both verbally and financially, Forest City’s acknowledged intention to erect structures on unabandoned lines of railroad, thereby making the provision of freight rail service, impossible; (D) that City et al.’s position with regard to the Embankment portion of the Harsimus is diametrically opposite its position with regard to the portion of the Harsimus that traversed the Metro Plaza parcel: City et al. vehemently opposes **developer** Hyman from developing the Embankment portion, while City et al. strongly supports, both verbally and financially, **developer** Forest City’s development activities on the Metro Plaza portion of the Harsimus / portion of the HSIT.

19. And it is that ‘certainty’ that the STB will do nothing, that Riffin finds to be abhorrent. It is a total lack of respect for the STB’s regulatory authority.

20. It is not “Riffin’s interference with this development project [that] appears to be unending.” FC Reply at 10. It is the STB’s jurisdiction over the unabandoned lines of railroad that traverse the Metro Plaza parcel that is ‘unending.’ And will continue to be ‘unending,’ until such time that the lines of railroad are properly abandoned.

21. “The Board should not let itself be manipulated by” Forest City, City et al., and Conrail, FC Reply at 11, would be a more accurate statement.

22. Riffin agrees with Forest City's statement: "It is critical for the STB to dispel any uncertainty created by Mr. Riffin's ... Petition soon so that Forest City and G&S Investors can finalize planning and proceed with the next phase of the project." FC Reply at 11.

23. And the best way to 'dispel any uncertainty created by Mr. Riffin's ... Petition,' is to institute a declaratory order proceeding, determine whether unabandoned lines of railroad traverse the Metro Plaza parcel, and if so, let Conrail determine what it wants to do with those unabandoned lines of railroad.

THE LLCs

24. The LLCs argue that Riffin's ALJ Dring appeal should be decided first. The basis for this argument appears to be that the LLCs believe that Riffin's only cognizable interest, is his interest in filing an OFA. And that if ALJ Dring's Order is upheld, Riffin will not have any cognizable interest. **Response:** As noted above, Riffin's desire to file an OFA is only one of his cognizable interests. He also has a cognizable interest in the HSIT. Which is what his Petition is about.

25. The LLCs do correctly state:

"Mr. Riffin proclaims, **essentially correctly**, that he is merely using the very same arguments that the City previously used against the LLCs and Conrail in AB-167-1189-X. For Metro to oppose Riffin on the merits of those claims would cause it to become aligned with the LLCs' arguments, and against the City, and perhaps Conrail." LLC Reply at 4-5.

"Nor do the Metro plans, approved by the City, envision the fictional light rail corridor, or any other transportation corridor, along the Metro portion of the Harsimus Branch." LLC Reply at 5.

26. While it may be beneficial for the STB to address Riffin's ALJ Dring appeal before addressing Riffin's Petition, doing so is not required.

City et al.

27. City et al. made the same ‘cognizable interest’ argument that Conrail made, noting that Riffin is **presently** not a shipper on the HSIT, nor does he **presently** have a property interest adjacent to the HSIT. As noted above, that is likely to change very soon. And as noted above, Riffin’s cognizable interest is: He needs to know if the HSIT is an unabandoned line of rail **before** he acquires a property interest adjacent to the HSIT.

28. City et al. make the argument that abandonment of the HSIT can be incorporated within the 1189X proceeding. City Reply at 10-11. As noted above in §17 A, because the **required notice of abandonment** has not been given for the HSIT, the HSIT **cannot be abandoned**, either as a part of the 1189X proceeding, or *sua sponte* by the STB.

29. And while it may not be necessary to know the exact location of the endpoint of the Harsimus, the location of the Harsimus, and the HSIT, as they traversed Metro Plaza, does need to be known, since Forest City has certified that Forest City intends to erect a second multi-story building on the Metro Plaza parcel in 2017. Once the location of those two lines of railroad is ascertained, it can be determined whether Forest City’s second multi-story building would materially interfere with Conrail’s ability to provide rail service. And until the Harsimus, and the HSIT are properly abandoned, Forest City should be barred from erecting any additional structures, since there is a high probability that Forest City’s continued re-development of the Metro Plaza parcel would materially interfere with Conrail’s ability to provide rail service.

30. To do otherwise, would be to totally negate the STB’s regulatory authority over the lines of railroad that it has been entrusted to preserve and oversee.

31. City et al. does acknowledge:

“all that is arguably necessary is that Conrail seek abandonment of a through line in the massive yard that used to exist east of Marin.” City Reply at 12.

32. However, because Conrail was conveyed **two** lines of railroad in Jersey City, it needs to be determined where that second line of railroad (the HSIT) is located, so that it too can be properly abandoned, if Conrail so desires. (The abandonment notice that is required, requires the location of the line to be abandoned, to be specified in the abandonment notice, and to be noted on a map.)

33. Riffin finds it to be disconcerting, that City et al. takes diametrically opposed positions with regard to the STB's NEPA and NHPA duties. City et al. acknowledges that when the track infrastructure has been removed, "abandonment of a line in general poses no significant adverse environmental effects." City Reply at 13. However, simply because no one has built structures on the Embankment portion of the Harsimus, there is a 'habitat' that needs special protection. How about the 'habitat' that exists at the **end** of the HSIT? Would not that also need 'special protection?' (There are no structures on the HSIT right-of-way at its endpoint. Nor, for that matter, are there any structures on any portion of the HSIT right-of-way.) And just because the stone walls of the Embankment have been declared to be 'historic,' they need special attention? How about the stone pavers that still exist on portions of the HSIT? Should not they also receive special attention? Or at least **a mention** in the STB's analysis of the historic attributes of the HSIT. After all, they were put in place about the same time as the stones that make up the Embankment. Evidently not. At least from City et al.'s prospective. Since City et al. has no interest in acquiring any portion of the HSIT, evidently it is ok to gloss over the potential environmental and historic impacts of abandoning the HSIT.

34. City et al. makes note:

"The only historic assets involved in the area involved the Embankment and adjoining historic districts and properties." City Reply at 14.

35. Implying that the HSIT does not "adjoin historic districts and properties." When the HSIT in fact passes through at least two historic districts: Paulus Hook and Van Vorst Park.

Representatives of both of which are on the 1189X service lists. Served the historic Morris Canal. And is directly across from Liberty State Park, a representative of which is also on the 1189X service list.

36. Evidently City et al. felt a bit uncomfortable with its double standard, for it did concede:

“To the extent the agency’s section 106 analysis is not capturing the entire area where a **through line** may be, at this point City et al would support any **reasonable additional section 106 analysis** in AB 167-1189X as a far more efficient alternative than through initiating a declaratory [sic] before STB or a Special Court proceeding to determine whether an additional abandonment proceeding is necessary” City Reply at 15.

37. And evidently City et al. is unaware that the STB **is required** to determine whether a track segment is a line of railroad, **before permitting** an abandonment proceeding to commence / move forward. See, for e.g.: *CSX Transportation, Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub. No. 562X), Served December 1, 1999 (Rejecting an Exemption Notice, since the track segment was determined to be excepted track); *Grand Trunk Western Railroad – Petition for Declaratory Order – Spur, Industrial, Team, Switching or Side Tracks in Detroit MI*, STB FD 33601, Served July 30, 1998 (holding that three track segments were excepted track, and thus could not be the subject of an abandonment proceeding.).

38. City et al. acknowledges that it has a property interest in the real property upon which 6th Street, extended, is built. (6th Street, between Marin Blvd and Washington Blvd.) City Reply at 16. What City et al. evidently does not know, or is unwilling to acknowledge, is that there was a line of railroad where present-day 6th Street, extended, presently exists. That is the line of railroad that **Conrail used** to serve Elk Warehouse and Chicago Shippers, see Appx 4, [and thus is a line of railroad in Conrail’s possession, since Conrail **used** that track segment for through traffic (to serve more than one shipper)], and that was **used by the PRR** to transport rail cars to waiting car ferries / to barges, to have their contents transloaded onto barges (and thus was a line of railroad that the Special Court is likely to hold was **conveyed** to Conrail as a line of railroad).

39. Being a line of railroad, Jersey City needed authority to acquire it. Using City et al.'s argument in 1189X: Jersey City's deed to that line of railroad, needs to be voided, just as Jersey City has argued the LLCs' deeds need to be voided. Which would make that line of railroad subject to the STB's OFA process in 1189X. (The closer one looks, the messier things get.)

40. City et al. incorrectly argues that because the Special Court chose not to enlarge City et al.'s proceeding (at the request of the LLCs / by including the HSIT), the STB can no longer address the status of the HSIT. Had the Special Court actually addressed the status of the HSIT, and made a determination, that would be correct. But the Special Court did not. And expressly stated that the issue of the status of the HSIT was a matter for another day.

CONCLUSION

41. Riffin presently has, and shortly expects to have an additional, cognizable interest in the HSIT. The STB has a cognizable interest in declaring, and in protecting, its cognizable interest in (regulatory authority over), the HSIT. Addressing the status of the HSIT now, will eliminate uncertainty, multiple controversies, and will make it possible to resolve the 1189X proceeding expeditiously, once the supplemental environmental / historic reviews are completed.

42. Continuing to ignore / deny, the STB's regulatory authority over the balance of the Harsimus, the entirety of the HSIT, does no one any favors. The deliberate, conscious, knowing circumvention of the STB's regulatory authority is what created this mess. Continuing to knowingly circumvent / ignore the STB's regulatory authority, will only make matters worse.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 12th Day of December, 2016, a copy of the foregoing Riffin's Rebuttal, was served on the following entities by e-mail: Charles Montange, counsel for City et al.; Daniel Horgan, counsel for the LLCs; Robert Jenkins, Adam Sloane, and Jonathan Broder, counsel for Conrail; Brendan Judge, Matthew Warren, Hanna Chouest, counsel for the owners / developers of the Metro Plaza parcel; Eric Strohmeier, COO of CNJ Rail. A paper copy was also mailed to Mr. Montange.

James Riffin