

Before the Surface Transportation Board

STB Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

242177

ENTERED
Office of Proceedings
December 2, 2016
Part of
Public Record

Comments and Replies to Notice of Proposed Rulemaking

212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (the “LLCs”) respectfully submit the following comments to the proposed amendments to Board regulations concerning Offers of Financial Assistance (“OFA”), 49 C.F.R. 1152.27, in response to the September 30, 2016 notice and decision.

In this rulemaking process, the Board has proposed amendments to the regulations governing OFAs “to improve the process and protect it against abuse.” (Sept. 30, 2016 Decision at 1). Congress has authorized OFAs as an alternative to the discontinuance and abandonment of lines of rail. 49 U.S.C.A. § 10904. It is well-established that OFAs are for the purpose of continuing freight rail service. See, e.g., Redmond-Issaquah RR Preservation Assoc. v. STB, 223 F.3d 1057, 1061-1063 (9th Cir. 2000); Borough of Columbia v. STB, 342 F.3d 222, 226 (3d Cir. 2003); Kulmer v. STB, 236 F.3d 1255, 1257 (10th Cir. 2001). Although OFAs enable freight rail service to continue when a qualified party makes a reasonable offer to either purchase the line of rail or subsidize the carrier for the cost of providing service, abuse of the OFA process unfortunately exists. Abuse may take on several forms, including the filing of

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OFA by facially unqualified parties, who lack the financial responsibility and technical acumen to operate a line of rail; or by parties who have no legitimate interest in providing rail service, but rather see OFAs as a form of federal eminent domain that can be invoked to acquire real property interests for both rail and non-rail purposes.

The amendments to 49 C.F.R. 1152.27 proposed in the September 30, 2016 Decision will help deter abuse, as well as make abuse easier to prevent or detect. Creating requirements respective of financial responsibility and the demonstrating that the OFA is for continuing rail service are important goals that should be adopted. Based on their experience as intervenor parties to an abandonment proceeding in which parties have filed notice of intent to file OFAs, the LLCs believe that there are a few areas in which the proposed regulations can be enhanced, within the intent of Congress and this Board, and within this Board's rule-making power, which will further deter misuse of the OFA process.

Each suggested change is presented and discussed below. All of the proposals the LLCs would recommend appear in proposed new text to 49 C.F.R. 1152.27. The LLCs' recommended additions to the new rules appear in red and are underlined; the original proposed rule amendments from the September 30, 2016 Decision appear in black.

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I. Changes to Proposed 49 C.F.R. 1152.27(c)(1)(ii)

Proposed Additions: Preliminary financial responsibility. Persons submitting an expression of intent to file an offer of financial assistance as described in paragraph (c)(1)(i) or paragraph (c)(2)(i) must demonstrate that they are financially responsible, under the definition set forth in paragraph (c)(1)(iv)(B), for the calculated preliminary financial responsibility amount of the rail line they seek to subsidize or purchase. If they seek to subsidize, the preliminary financial responsibility amount shall be \$4,000 (representing a standard annual per-mile maintenance cost) times the number of miles of track. If they seek to purchase, the preliminary financial responsibility amount shall be the sum of (a) the rail steel scrap price per ton (dated within 30 days of the submission of the expression of intent), times 132 tons per track mile, times the total track length of all track existing and in place on the line to be acquired in miles, plus (b) \$4,000 times the number of miles of existing track times two, plus (c) the estimated cost of replacement of all rail, bridges, switches and other essential rail infrastructure, previously removed or salvaged from the line that would be reasonably required to carry freight on the line, as certified by a licensed professional engineer experienced in railroad construction. Persons submitting an expression of intent must provide evidentiary support for their calculations. If a party submits all of the foregoing information, and the Board does not issue a decision regarding the preliminary financial responsibility demonstration within ten days

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of receipt of the expression of intent, the party submitting the expression of intent will be presumed to be preliminarily financially responsible and, upon request, the applicant must provide the information required under paragraph (a). This presumption does not create a presumption that the party will be financially responsible for an offer submitted under paragraph (c)(1)(iv).

Comments: The section as proposed addresses only the situation that would likely be encountered when a railroad seeks to discontinue service or abandon a line that exists in some form of serviceable condition and is capable, perhaps with some amount of reasonable maintenance and improvement, of carrying freight. What it does not address are the many lines, particularly in the North East, that long ago fell into disuse but were never abandoned. In such cases, it may be that no rail infrastructure is left, and very substantial capital investments would have to be made to resume service. Tracks, switches, bridges, signals, grade crossings at new and busier streets, and other expensive rail infrastructure would have to be replaced to resume rail service. This significant, and necessary, capital expense may deter legitimate offerors, is a critical financial issue, and perhaps an insurmountable barrier to the legitimate restoration of rail service. Therefore, it must be addressed in the regulation in order to avoid Offers of Financial Assistance (OFAs) that are not legitimate, and that are often fatally defective because they do not address this very real and critical issue.

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The proposed changes and language would require this issue to be addressed at the preliminary financial responsibility stage by requiring an offeror to provide a professional certification of the cost associated with actually providing for the restoration of freight service. This additional requirement would require a cold, hard look at the real costs involved. It would not deter sober and sophisticated business people who knew what they were doing, because they would take this step anyway, getting a knowledgeable engineer to give them a fair assessment of what their proposals would cost them if they were to see them through. But it would deter others who have no legitimate interest in pursuing the restoration of rail service and engage in the OFA process for other reasons. Requiring a certification by an engineer experienced in railroad construction would weed out charlatans who would be unable to acquire such a certification, or who would submit clearly insufficient and noncompliant alternatives. It will also help the Board in determining the actual viability of any proposed OFA by establishing a rough quantum of cost that would have to be recouped by an offeror in order for there to be a reasonable chance that freight service on the line could actually be continued.

The additional cost of the engineer's certification would be minimal in relation to the benefits obtained through this requirement. Any legitimate offeror should anticipate hard and soft costs for an OFA well in excess of the cost of the certification; and, those costs, when made by reasonable people, would and should include most if not all of the engineering fees required to produce such a certification. By contrast, the Board has been required to

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devote significant, yet scarce, government resources; burden the federal budget with expenses for staff time, litigation, and otherwise; and, private parties have been forced in many circumstances to also expend enormous sums of money and private resources in resisting improper and fatally defective OAF proceedings by abusive filers. All of these expenses could be reduced, and in some cases avoided, by adoption of this simple proposal. The financial balance, practical considerations, and fundamental fairness all weigh in favor of imposing this simple and fairly inexpensive threshold requirement.

II. Changes to Proposed 49 C.F.R. 1152.27(c)(iv)(B)

Proposed Changes: Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. Examples of documentation the Board will accept as evidence of financial responsibility include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. Examples of documentation the Board will not accept as evidence of financial responsibility include the ability to borrow money on credit cards and evidence of non-liquid assets an offeror intends to use as collateral. Governmental entities that are agencies of the federal government and state transportation agencies will be presumed to be financially responsible. County and

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municipal governments, or any other government agency not specifically created for the purpose of conducting rail freight operations will not be presumed financially responsible and must submit documentary proof of its legal authorization to acquire the line, assume common carrier obligations, and available public financing for the specific operation and maintenance of any line that it seeks to acquire.

Comments: This section, as proposed, is primarily addressed to the small sampling of abusive OFA filers who regularly appear before the Board. Perhaps the best illustration of that limited application is the stated need to reject an offeror because he proposes to charge the cost of reinstituting rail service to his credit card. Financial responsibility should have a higher threshold, and should address fraud and abuse by any government entity not primarily engaged in the actual business of providing real service. Unfortunately, municipal officials do abuse their public trust and official powers and have done so with respect to OFAs. This has been manifest in the longest-running, most vexatious, and least meritorious OFA ever proposed by a municipal government. That, of course, is the Harsimus abandonment case that has now been before the Board in one form or another for almost 12 years, still without resolution.¹

¹ Consolidated Rail Corp.—Abandonment Exemption—in Hudson County, NJ, docket number AB-167-1189X.

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The presumption that local government would be willing to spend millions and millions of scarce public dollars to go into the freight business, setting that as a priority above other municipal needs and budget limitations, clashes with a much more powerful political reality. Local officials want to satisfy local voters by providing them with tangible benefits. Freight trains in residential neighborhoods do not qualify. But parks and public spaces, trails and similar promises do qualify. Municipal officials choose to make those promises to their constituents over promises to the Board because the consequences, under the presently proposed Board regulations, do not outweigh the consequences of strong local opposition. Local politics will prevail over the Board's railroad policies unless a higher threshold for local government financial responsibility is established.

This is painfully evident in the Harsimus case where a municipality is joined by two co-litigants whose stated goals are anything but rail service. The Rails-to-Trails Conservancy, and its longtime counsel, seek trails not trains. A local environmental preservation group wants parks and open space, but not trains. These goals are confirmed by the statements of municipal officials on record at an official meeting, the transcript of which has been filed with the Board on December 23, 2015 as Document 239790 (exhibit A thereto) in the above-referenced Harsimus abandonment. In their statements, these public officials clearly confirm that there is no intent to reinstitute rail service on the property they seek to acquire. Their plans to reinstitute rail service are tentative, sparse and "interim," an apparent code word for "sham." They have

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allocated no funds for the reinstitution of rail service in an enabling municipal ordinance (attached hereto as Exhibit 1),² but millions to acquire property for parks, open space and counsel fees for litigation on behalf of Rails-to-Trails and their local constituents. The fact that this sort of government activity has also attracted other abusers of the OFA process strongly suggests that government entities not engaged in actual rail activities should receive greater scrutiny.

The proposal made to add appropriate scrutiny of government financial responsibility would not apply to federal agencies or state transportation agencies. Those entities would not be burdened and should be presumed to have essential and legitimate interests in the OFA process if they determine to participate. However, imposing a threshold requirement on local government agencies to demonstrate that they in fact have the legal authorization, dedicated funding, and are duly and legally authorized to become common carriers will weed out OFA abuse motivated by local political considerations and other improper motives.

The requirements now proposed are minimal and any local government agency legitimately interested in an OFA would have the necessary

² The local ordinance illustrates the need for the new regulations confirming that OFAs are to be used for continuing rail service only. The local ordinance expressly states that the intended purpose of the OFA that has been authorized to be filed is for rail and non-rail purposes. The ordinance authorizes local officials “to file an Offer of Financial Assistance [OFA] to acquire title to the following property for the purposes of continued freight rail **and other compatible public purposes including passenger rail, open space, trail and historic preservation.**” (Exhibit 1, at para. 1) (emphasis added).

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documentation at hand since it would need to confirm its legal authority to become a common carrier, its operational plans for rail service, and provisions for public financing. These are all necessary and required governmental functions and responsibilities inherent in the decision to pursue a legitimate OFA. The benefits to the Board and other affected parties of avoiding grueling, expensive and unnecessary procedures and litigation would all greatly outweigh any perceived burden on local government or its resources. By way of example, in the Harsimus case the municipality has expended an estimated \$3 million, a property owner affected by the proceedings has settled a title insurance claim for \$5 million and only partially recouped its expenses, while the Board and the United States have engaged in years of litigation and untold diversion of resources from other important matters. The balance clearly favors raising the threshold for local governmental OFA participation.

III. Changes to Proposed 49 C.F.R. 1152.27(c)(1)(iv)(D)

Proposed Changes: Demonstrate that the offeror has placed in escrow with a reputable financial institution funds equaling 10% of the preliminary financial responsibility amount calculated pursuant to paragraph (c)(1)(ii), If the Board has not previously issued a decision regarding the preliminary financial responsibility of the offeror, it will make such determination pursuant to the standards of a(2)(c)(ii) and (iv) in its review of the offer to determine if the offeror is financially responsible.

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Comments: It is proposed to add one sentence at the end of the current Board rule proposal for this section. The purpose is to make it clear that proposed standards for financial responsibility and the requirement to provide a showing of available funds should apply all OFAs filed after the adoption of the rule, even if the initial notice of intent was previously filed. This provision makes sense so that these remedial provisions can be uniformly applied to better serve the purposes of the Board in making these rule changes, that is, to avoid abusive OFA filings that lack financial responsibility.

IV. Reorder Proposed 49 C.F.R. 1152.27(c)(1)(iv)(F), (G), and (H), and 49 C.F.R. 1152.27(c)(1)(iv)(G), (H), and (I), and Add New 49 C.F.R. 1152.27(c)(1)(iv)(F)

Proposed Change: (F) Identify all real property, and other assets to be acquired by purchase from the applicant for abandonment, and any additional property or assets required to enable offeror to reinstitute rail service on the line to be abandoned. The Board will not approve an offer that is contingent, or dependent for its implementation on the acquisition of property or other assets from anyone other than the applicant for abandonment without a clear showing that all steps necessary to provide rail service as a common carrier can be accomplished within a reasonable time;

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Comments: The purpose in adding this new provision is to address the full scope of the proposal to provide rail service so that it may be fully understood; its cost fully disclosed; and, so that it will not be based upon contingencies unlikely to be satisfied, thereby frustrating the fundamental goal of providing rail service. A related purpose is to make it clear that the Board's OFA procedures are limited to the property and assets of the applicant, and that the Board cannot and will not use the OFA process to give an offeror more than can be obtained from the railroad seeking abandonment.

This provision is intended to avoid repetition of the abuse manifest in the Harsimus case where a prospective offeror has stated the intention to ask the Board for relief well beyond the scope of anything appropriate in an exempt abandonment proceeding. Adoption of this provision will make it clear that the Board will not become drawn in to litigation and disputes having nothing to do with the provision of rail service in lieu of abandonment and discontinuance by an applicant.

V. Proposed New Subsection 49 C.F.R. 1152.27(c)(1)(iv)(J)

Proposed Addition: (J) Contain a certification under the penalties of perjury that the offer is made in good faith for the purpose of operation of rail service on the line as a common carrier; that it is not made to acquire property for any other non-rail purpose; that the person certifying the offer has been authorized to make the certification; and, that the contents of the offer and all statements made therein are true and correct. Such certification shall be made

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personally by the offeror, but if the offeror is a legal entity, then by its chief executive officer, or such other officer who has the authority to bind the entity, whether such entity is a corporation, partnership, limited liability company or other legal entity.

Comments: In light of the enormous waste of government resources that arises from meritless and abusive OFAs, it would be appropriate to require offerors to certify their offers, and their legitimacy. Many other government applications require similar action in order to prevent fraud and abuse. It is a well-established procedure with virtually no cost or burden upon legitimate offerors. The efficacy of such a certification is clearly illustrated, again by the Harsimus case. Under such a provision the municipal officials involved would not be able to make the certification proposed; it would be in complete conflict with their admitted plans, discussions, and statements as cited previously at Document 239790 (filed in the Harsimus abonnement on December 23, 2015), in exhibit A thereto. At the same time, such a certification requirement would not deter legitimate government OFA filings.

With much benefit, and virtually no burden, implementation of this well-established type of procedure may be long overdue. Mendacious and abusive filers are not deterred without it, because they are not necessarily motivated to obtain a successful OFA approval. They seem to be motivated simply by the opportunity to participate for purposes of self-interest, delay, and other reasons. Those with no legitimate business or assets have little to lose, except

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by direct exposure to criminal action. Those who would hide behind municipal governments would find it much harder to induce municipal officials perjure themselves on a government application. The proposed certification would be a very effective tool, allowing the Board to halt the ongoing abuse of OFA procedures that has proven immune from other remedial efforts such as warnings, proscriptive orders, and other like procedural measures.

Conclusion

The LLCs respectfully submit these comments and proposed additions to the proposed rules. These changes are modest, reasonable, and fully in conformance with the intent of the Board's rule making objectives. The LLCs' proposed additions will not impose any burdens on legitimate OFA offerors genuinely interested in continuing rail service, and will provide additional deterrents to abuse, and make abuse easier to identify.

Respectfully submitted,

S/ Daniel E. Horgan

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LLC, 317 Jersey Avenue, LLC, 354 Cole
Street, LLC, 389 Monmouth Street, LLC,
415 Brunswick Street, LLC, and 446
Newark Avenue, LLC

DATED: December 2, 2016

CERTIFICATION OF SERVICE

I, Daniel E. Horgan, hereby certify that I have caused a copy of the foregoing to be served by First Class Mail upon those on the attached Service List by having same deposited with the U.S. Postal Service on December 2, 2016.

S/ Daniel E. Horgan

DANIEL E. HORGAN, DC BAR #239772

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Manila Avenue, LLC, 280 Erie Street, LLC, 317

Jersey Avenue, LLC, 354 Cole Street, LLC, 389

Monmouth Street, LLC, 415 Brunswick Street,

LLC, and 446 Newark Avenue, LLC

Service List

Party Of Record: Borman, Keith
American Short Line Regional Railroad Association
50 F Street Nw Suite 7020
Washington, DC 20001-1564

Party Of Record: Dicenso, David
1 Soldier Way
Scott Afb., IL 62225-5006

Party Of Record: Ferster, Andrea C.
2121 Ward Court, N.W., 5Th Fl.
Washington, DC 20037

Party Of Record: Jenkins, Robert M
Mayer Brown Llp
1999 K Street Nw
Washington, DC 20006-1101

Party Of Record: Montange, Charles H

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426 Nw 162Nd Street
Seattle, WA 98177

Party Of Record: Parkerson, Maquiling
Three Commercial Place
Norfolk, VA 23510

Party Of Record: Parkerson, Maquiling B
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

Party Of Record: Riffin, James
P. O. Box 4044
Timonium, MD 21094

Party Of Record: Rinn, Louise A
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

Party Of Record: Sloane, Adam C.
Mayer Brown Llp
1999 K Street, N.W.
Washington, DC 20006-1101

Party Of Record: Strafford, Timothy J.
Association Of American Railroads
425 3Rd Street, Sw, Suite 1000
Washington, DC 20024

Party Of Record: Yasbin, Melanie B.
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The Adams Building, Suite 301 600 Baltimore Avenue
Towson, MD 21204

Non-Party: Chief Counsel For Advocacy
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U.S. Small Business Administration 409 3Rd Street, S.W.
Washington, DC 20416

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Before the Surface Transportation Board

STB Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

Exhibit 1

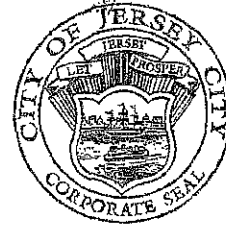
To Comments Submitted on December 2, 2016 by
212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317
Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415
Brunswick Street, LLC, and 446 Newark Avenue, LLC

**Municipal Ordinance 15.186 Adopted by the Municipal Council of the City
of Jersey City on January 13, 2016**

City Clerk File No. Ord. 15.186

Agenda No. 3.N 1st Reading

Agenda No. 4.J 2nd Reading & Final Passage



ORDINANCE OF JERSEY CITY, N.J.

COUNCIL AS A WHOLE
offered and moved adoption of the following ordinance:

CITY ORDINANCE 15.186

TITLE: ORDINANCE AUTHORIZING THE CITY OF JERSEY CITY TO FILE AN OFFER OF FINANCIAL ASSISTANCE [OFA] TO ACQUIRE CERTAIN PROPERTY COLLECTIVELY KNOWN AS THE SIXTH STREET EMBANKMENT FROM CONRAIL AND SUCH OTHER CONRAIL PROPERTIES AS ARE NECESSARY TO CONNECT WITH THE MAIN LINE IN THE VICINITY OF CP WALDO

THE MUNICIPAL COUNCIL OF THE CITY OF JERSEY CITY DOES ORDAIN:

WHEREAS, Consolidated Rail Corporation [Conrail] was the owner of certain property designated as Block 212, Lot M., Block 247, Lot 50A, Block 280, Lot 50A, Block 317.5, Lot 50A, Block 354.1, Lot 50A, Block 389.1, Lot 50 and Block 415, Lots 50 and 50.PL, Block 446, Lot 18A on the City of Jersey City's Official Tax Assessment Map and more commonly known as the Sixth Street Embankment [Property]; and

WHEREAS, the Property is part of a line of railroad known as the Harsimus Branch, which was the former main line of the Pennsylvania Railroad into Jersey City; and

WHEREAS, lines of railroad may not be abandoned and converted into non-rail use without the prior authorization of the Surface Transportation Board [STB], a federal agency, even if the railroad owning the line has ceased to use it for rail purposes; and

WHEREAS, Conrail ceased using the Property in or around 1996; and

WHEREAS, the Property and its extension to CP Waldo (in the vicinity of Chestnut and Waldo Streets) is the last underutilized transportation corridor available to address passenger and freight transportation needs in congested Downtown Jersey City; and

WHEREAS, the property also is part of the preferred route of the East Coast Greenway and is listed on the State Register of Historic Places; and

WHEREAS, in 2004 and 2005, City of Jersey City by adoption of Ordinances 04-096 and 05-064 authorized acquisition of the Property for its own use as open space and for eventual construction of a public park; and

WHEREAS, notwithstanding the City's expression of interest in acquiring the property in 2005 Conrail sold the Property to a private party [Developer] for \$3 million for non-rail purposes without any prior STB rail abandonment authorization; and

WHEREAS, the City of Jersey City along with Embankment Preservation Coalition [Coalition] and Rails to Trails Conservancy [RTC] filed a petition for a declaratory order at STB for a determination that the Harsimus Branch was a line of railroad such that the 2005 sale was illegal, and otherwise objected to the sale and redevelopment of the Property; and

WHEREAS, Conrail and the Developer sought to evade STB regulation (including historic preservation regulation by STB) by claiming that the Harsimus Branch was not a line of railroad; and

ORDINANCE AUTHORIZING THE CITY OF JERSEY CITY TO FILE AN OFFER OF FINANCIAL ASSISTANCE [OFA] TO ACQUIRE CERTAIN PROPERTY COLLECTIVELY KNOWN AS THE SIXTH STREET EMBANKMENT FROM CONRAIL AND SUCH OTHER CONRAIL PROPERTIES AS ARE NECESSARY TO CONNECT WITH THE MAIN LINE IN THE VICINITY OF CP WALDO

WHEREAS, the STB ruled that the Property was part of a line of railroad, but this ruling was appealed by Conrail and the Developer, resulting in litigation in federal courts that ultimately determined in 2013 that the Harsimus Branch in fact was a line of railroad for which STB abandonment authorization was required; and

WHEREAS, the Developer in some cases joined by Conrail filed multiple litigations against the City of Jersey City and its boards, agencies and employees as well as the Coalition and RTC and attorneys for City, Coalition and/or RTC; and

WHEREAS, the STB in a Decision served August 11, 2014, rejected the Developer's most recent efforts to assert that STB lacked jurisdiction over the Harsimus Branch; and

WHEREAS, in another Decision served August 11, 2014, STB reinstituted an abandonment proceeding (AB 167-Sub no. 1189X) for the Harsimus Branch from Marin Boulevard to CP Waldo (vicinity of Chestnut and Waldo Streets) in Jersey City; and

WHEREAS, an important remedy afforded under federal law to communities facing abandonment of lines is the Offer of Financial Assistance [OFA], whereby a community may purchase on terms set by the STB a line or portion thereof interconnecting to the freight rail system for, as construed by STB, continued freight rail and other compatible public purposes; and

WHEREAS, the governing statute (49 U.S.C. 10904) requires that the successful OFA applicant neither transfer nor discontinue service over such line for two years after purchase; and

WHEREAS, the City wishes to use the OFA remedy to secure the corridor for continued freight and passenger rail service in order to relieve congestion and pollution on City streets, especially from trucks, and to employ any surplus property as open space and for other compatible public purposes, all consistent with preservation of the historic Sixth Street Embankment; and

WHEREAS, under STB precedent in OFA proceedings, the presumptive price of fee title to the Property is the price paid by the Developer (\$3 million) and the presumptive price of easement title to the Property is zero; and

WHEREAS, the City under the OFA remedy also will need to acquire additional property to link to the national freight rail network (National Docks Secondary and/or CP Waldo), which will require a corridor of no less than 30 feet width and if otherwise feasible at least 50 to 60 feet width minimum plus staging areas across property believed owned by Conrail extending as far as the National Docks Secondary and/or by easement over said National Docks Secondary to CP Waldo; and

WHEREAS, the City wishes to comply fully with the requirements of 49 U.S.C. 10904; and

WHEREAS, pursuant to N.J.S.A. 48:12-125.1, City is also authorized to acquire Conrail properties subject to STB abandonment proceedings on terms offered by Conrail to other purchasers; and

WHEREAS, in order to pursue the OFA remedy, City will be required to pay an application fee of \$1,600, and, in order to obtain terms and conditions of purchase from STB, an additional fee of \$24,200; and

WHEREAS, in order to invoke the OFA remedy, City must also be prepared to offer expert evidence on valuation issues and upon other issues pursuant to conditions imposed by STB; and

ORDINANCE AUTHORIZING THE CITY OF JERSEY CITY TO FILE AN OFFER OF FINANCIAL ASSISTANCE [OFA] TO ACQUIRE CERTAIN PROPERTY COLLECTIVELY KNOWN AS THE SIXTH STREET EMBANKMENT FROM CONRAIL AND SUCH OTHER CONRAIL PROPERTIES AS ARE NECESSARY TO CONNECT WITH THE MAIN LINE IN THE VICINITY OF CP WALDO

WHEREAS, STB's terms and conditions ordinarily require conveyance of the property by quitclaim deed, as is where is; and

WHEREAS, once STB sets terms and conditions, the OFA applicant is ordinarily given no less than ten (10) days to accept or to reject the terms and conditions; and

WHEREAS, if the terms and conditions are accepted, they are binding on the applicant; and

WHEREAS, funds are available for all costs to be incurred pursuant to this ordinance in Account No. 04-215-55-887-990; and

WHEREAS, the Hudson County Superior Court invalidated, without prejudice, Ordinance 14.103 under the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6, on the ground that certain discussions held by the City Council at the September 8, 2014, closed session should have been disclosed to the public prior to adoption of the Ordinance;

WHEREAS, without conceding that the ruling was correct but rather to better facilitate the prompt availability of the OFA remedy to the City, the City, without waiver of any right to appeal or on appeal, wishes to adopt a lawful Ordinance authorizing an OFA, and to lawfully ratify all actions taken to date to facilitate the filing of any OFA, including retention of experts and taking of legal advice in that connection;

WHEREAS, the City therefore has made available to the public prior to adoption of this Ordinance the unredacted portions of the transcript of the September 8, 2014, closed session that the Hudson County Superior Court ruled were subject to public disclosure pursuant to the OPMA;

WHEREAS, public disclosure of the deliberations recorded in the unredacted portions of the transcript of the September 8, 2014, closed session, in conjunction with a reopening of public comment and Council deliberations constitutes de novo action by City Council in satisfaction of the corrective/remedial action provision of N.J.S.A. 10:4-15 and as referenced in the November 10, 2015, Hudson County Superior Court Order;

NOW, THEREFORE, BE IT ORDAINED by the Municipal Council of the City of Jersey City that:

1. The Corporation Counsel or his duly designated agent and the Business Administrator are authorized to file an Offer of Financial Assistance [OFA] to acquire title to the following property for purposes of continued freight rail and other compatible public purposes including passenger rail, open space, trail and historic preservation: Block 212, Lot M., Block 247, Lot 50A, Block 280, Lot 50A, Block 317.5, Lot 50A, Block 354.1, Lot 50A, Block 389.1, Lot 50, Block 415, Lots 50 and 50.PL, and Block 446, Lot 18A, on the City of Jersey City's Official Tax Assessment Map and more commonly known collectively as the Sixth Street Embankment [Property] for the presumptive sum of \$3 million for fee title to the portion of the Property purportedly sold to the Developer for that price in 2005, and for an additional amount such that the total expenditure does not exceed \$5.7 million for the Property and for all remaining property necessary to achieve a connection to the national freight rail network.

2. The Corporation Counsel of the City of Jersey City or his duly designated agent and the Business Administrator are authorized and directed to undertake any actions and execute any documents necessary or appropriate to acquire any property by purchase from Conrail under an Offer of Financial Assistance as provided in paragraph 1. In the event the STB sets terms and conditions exceeding \$5.7 million under the OFA, the Corporation Counsel shall advise the Council immediately so that the Council may accept or reject such terms and conditions within the time period set by STB.

ORDINANCE AUTHORIZING THE CITY OF JERSEY CITY TO FILE AN OFFER OF FINANCIAL ASSISTANCE (OFA) TO ACQUIRE CERTAIN PROPERTY COLLECTIVELY KNOWN AS THE SIXTH STREET EMBANKMENT FROM CONRAIL AND SUCH OTHER CONRAIL PROPERTIES AS ARE NECESSARY TO CONNECT WITH THE MAIN LINE IN THE VICINITY OF CP WALDO

3. The Corporation Counsel or the Business Administrator are authorized and directed to solicit proposals to engage the services of surveyors, title insurance companies, appraisers and any other professionals whose services are necessary or appropriate to pursue an OFA and otherwise to implement the purposes of this ordinance.
4. The Corporation Counsel or the Business Administrator are authorized and directed to take appropriate measures to meet the City's obligation, in the event of a successful OFA, to seek to provide rail service per 49 U.S.C. 10904, including, but not necessarily limited to, (a) to solicit proposals for construction or operation of interim freight rail transload facilities to serve freight rail customers of the Harsimus Branch on suitable property in the event City acquires all or a portion of the Harsimus Branch at issue in AB 167 Sub 1189X pursuant to an OFA, provided that respondents are encouraged to limit subsidization requests for construction of a switch and trackage or for operation in light of the possible interim nature of said transload operations, pending planning for reconstruction and further operation, and (b), in the event City successfully acquires the Harsimus Branch pursuant to STB's OFA procedures, further to solicit proposals from consultants to prepare plans and recommendations (including for contributions to offset reconstruction costs) for restoration of the Harsimus Branch for rail purposes to the extent practicable consistent with other public purposes.
5. In the event STB does not permit City to OFA the Property, or the OFA is unsuccessful, the Corporation Counsel with the cooperation of the Business Administrator are authorized and directed to pursue all other possible remedies that may result in acquisition of the Property, including connections for rail and other public purposes such as trail at the STB and by means of N.J.S.A. 48:12-125.1.
6. This Ordinance shall take effect at the time and in the manner as provided by law.
7. This Ordinance shall not rescind Ordinance 04-096 or 05-064 which authorized the acquisition of the Embankment solely for open space and a park by purchase or condemnation.
8. All prior actions by or on behalf of the City in furtherance of the goals and objectives of this Ordinance and the preparation and filing of an OFA are hereby ratified, including the retention and payment of experts and consultants.
9. The City Clerk and the Corporation Counsel be and they are hereby authorized and directed to change any chapter numbers, article numbers and section numbers in the event that the codification of this Ordinance reveals that there is a conflict between those numbers and the existing code, in order to avoid confusion and possible accidental repealers of existing provisions.

NOTE: All material is new; therefore, underlining has been omitted.
For purposes of advertising only, new matter is indicated by **bold face**
and repealed matter by *italic*.

MD/he
12/11/15

APPROVED AS TO LEGAL FORM

APPROVED: _____

Corporation Counsel

APPROVED: _____
Business Administrator

Certification Required ☐
Not Required ☐

ORDINANCE FACT SHEET –

This summary sheet is to be attached to the front of any resolution that is submitted for Council consideration. Incomplete or vague fact sheets will be returned with the resolution.

Full Title of Ordinance/Resolution

ORDINANCE AUTHORIZING THE CITY OF JERSEY CITY TO FILE AN OFFER OF FINANCIAL ASSISTANCE [OFA] TO ACQUIRE CERTAIN PROPERTY COLLECTIVELY KNOWN AS THE SIXTH STREET EMBANKMENT FROM CONRAIL AND SUCH OTHER CONRAIL PROPERTIES AS ARE NECESSARY TO CONNECT WITH THE MAIN LINE IN THE VICINITY OF CP WALDO

Initiator

Department/Division	Law	Law
Name/Title	Jeremy Farrell	Corporation Counsel
Phone/email	(201) 547-4667	JFarrell@jcnj.org

Note: Initiator must be available by phone during agenda meeting (Wednesday prior to council meeting @ 4:00 p.m.)

Ordinance Purpose

This ordinance authorizes the relevant City departments to file for, and to pursue, a federal eminent domain remedy (49 USC 10904, called the "OFA" remedy) as administered by the federal Surface Transportation Board (STB) to acquire an unused portion of a line or railroad called the Harsimus Branch (Marin Blvd. to CP Waldo) which contains the Sixth Street Embankment, a City Historic Landmark. City has sought to acquire at least portions of this property since before Conrail in 2005 illegally sold the Embankment parcels to a developer without the required STB abandonment authorization. Conrail and the developer for years sought to prevent STB from exercising its jurisdiction. Now, an abandonment proceeding is finally pending, in which STB affords an OFA remedy. As a condition for invoking the remedy, the City must continue efforts to provide freight rail service on the line for two years before it may seek discontinuance authority.

This ordinance replaces a previous ordinance which was invalidated by the court for alleged violation of the Open Public Meetings Act while preserving our ability to appeal that ruling. This ordinance also reflects and authorizes payment of the increased fees for proceeding before the STB.

The OFA remedy affords an efficient means to acquire the last underutilized transportation corridor into downtown for continued transportation (including rail) use, as well as open space uses, all consistent with historic preservation, all the way from Marin to CP Waldo (roughly Waldo or Chestnut Streets). If City is allowed to file for the remedy, STB will set the terms and conditions of sale, including price, based on the price paid by the developer to Conrail for the Embankment parcels (\$3 million), and appraisals for any portions remaining under Conrail ownership. City is expected to have only a brief period (expected to be approximately 10 days) to accept the terms. If the terms are accepted, City ordinarily would be required to close within 60 days. The ordinance also contains provisions to equip the City to make the OFA, and to be in a position to accept terms and to close on a transaction within time periods set by STB.

I certify that all the facts presented herein are accurate.

Signature of Department Director

Date