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JAMES RIFFIN

PETITIONER

V.

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SURFACE TRANSPORTATION BOARD

RESPONDENT

**APPEAL OF AN INITIAL ALJ DECISION OF
THE SURFACE TRANSPORTATION BOARD**

AB 167 (Sub. No. 1189X)

(Harsimus Branch – Jersey City, NJ)

**RIFFIN’S REBUTTAL TO
CITY ET AL.’S AND THE LLCs’ OPPOSITION TO
RIFFIN’S APPEAL OF ALJ DRING’S DECISION**

**Submitted by: James Riffin, Petitioner
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RE: STATUS OF TRACKS EAST OF MARIN BLVD

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1. On January 31, 2017, Riffin filed his appeal of ALJ Dring's October 26, 2017 Served Decision.

2. On February 7, 2017, City et al. and the LLCs timely filed their Opposition to Riffin's appeal. Conrail elected **not** to file a reply.

3. In their Opposition, City et al. and the LLCs raised new issues. The purpose of this rebuttal is to address those new issues.

4. It is unclear whether Rebuttals (in effect, a 'reply'), are permitted. Normally, rebuttal is permitted in appellate proceedings. But at the same time, replies to a reply are not permitted. 49 CFR 1115 .1 and .9, make no mention of 'rebuttals.'

5. In the event that leave is needed to file this Rebuttal, Riffin respectfully asks for leave to file this rebuttal. Accepting this rebuttal, and the additional appendix attached hereto, will provide the STB (and the reviewing Court, if review is sought), with a more complete record.

CONRAIL

6. Even though Riffin raises the issue of whether the STB has jurisdiction to address the underlying proceedings (Conrail's abandonment, CSX and Norfolk Southern's Discontinuance of Service), Conrail elected **not to file any pleading** regarding this issue. (In effect, taking 'no position' on any of the issues raised in Riffin's ALJ Dring Appeal.)

7. Riffin will remind the STB that this proceeding **is Conrail's proceeding**. The LLCs, City et al., and Riffin, are mere 'interested parties.' So Conrail's professed 'desires' should carry more weight / be afforded more deference, than the individual interests of 'interested parties.' And Riffin will remind the STB that the paramount issue is whether abandonment authority should be granted. (**Should** the rail corridor be preserved for continued **freight** rail service?)

8. Who should provide the continued freight rail service, is not presently an issue. And will only become an issue **IF** the STB concludes that the rail corridor should be preserved to provide continued **freight** rail service.

9. The ALJ Dring Appeal in effect asks the STB to take sides in a fight between interested parties. **Not** to take sides between its regulated Carriers, and non-carriers.

10. This dispute is similar to the dispute that arises when multiple parties are vying to gain an advantage at a probate proceeding. None of the parties are 'entitled' to anything. But eliminating the 'competition,' betters the odds the surviving competitor will get 'more.'

THE LLCs

11. The LLCs argued:

- A. The STB should defer to ALJ Dring (and affirm his decision).
- B. Riffin's objections to City et al.'s Discovery Requests, are untimely.
- C. The STB should ignore what Conrail has said in other proceedings.

12. **IF** ALJ Dring had followed the 'rules,' **IF** Riffin had in fact 'knowingly' refused to obey ALJ Dring's Order, then deference would be appropriate. But ALJ Dring did not follow the rules. Nor did Riffin knowingly refuse to obey ALJ Dring's Order.

13. ALJ Dring failed to address the multiple criteria that **must be addressed**, before dismissing Riffin from the proceeding. ALJ Dring imposed sanctions, and awarded attorney's fees, **without the required** "Certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." FRCP 37(a)(2)(A), 37(a)(4)(A). ALJ Dring 'failed to specify the place' where Riffin was to permit City et al. 'To Inspect' Riffin's e-mails.

14. Riffin did not ‘knowingly’ refuse to permit City et al. ‘To Inspect’ Riffin’s e-mails.

15. The Motion to Compel that was before ALJ Dring, was a motion to compel Riffin to comply with City et al.’s second Discovery Request. (It was **not** a motion to compel Riffin to comply with the **additional demands** made in City et al.’s Motion to Compel.) As such, the inquiry should have been focused on City et al.’s Discovery Request. Where City et al. sought e-mails between Riffin and the “LLCs,” which City et al. **defined** as the six LLCs represented by Daniel Horgan.

16. Riffin’s Discovery objections **were not** ‘**untimely**,’ as argued by the LLCs. Riffin argued from Day One that his obligation, per FRCP 34 and 49 CFR 1114.30(a)(1), was to “produce and permit the party making the request **to inspect** any designated documents” As the cases cited in Riffin’s Appeal unanimously have held: That **inspection** is to occur “where the documents are generally kept.” **NOT** “at the office of the movant’s attorney.” (As City et al. demanded.)

17. The LLCs’ **only argument** that the STB has the jurisdiction to adjudicate this proceeding, is (A) the STB **should ignore** Conrail’s representations in ‘other proceedings,’ and (B) the ‘Map’ appended to Conrail’s NOE.

18. The LLCs’ jurisdiction argument amounts to “consent.” Because the parties ‘have consented’ that the STB has jurisdiction, the STB has jurisdiction. Unfortunately, that is not what the appellate courts have unanimously held. Jurisdiction cannot be obtained by ‘consent of the parties.’ That was tried in the FD 34818 proceeding. (City et al.’s Petition for Declaratory Order.) Without success. (The D.C. Circuit began, and ended, its inquiry, with the issue of jurisdiction. The D.C. Circuit held that when the STB’s jurisdiction is challenged / when the proper classification of track segments is challenged, the proper classification for the track segments at issue, **must be addressed**. And when those track segments were conveyed to Conrail pursuant to the Final System Plan, **the only entity** that can address that issue, is the Special Court. The D.C. Circuit then vacated the STB’s decision.)

19. Appended hereto is an excerpt from Conrail's Supplemental Environmental and Historic Report, Appx 601, and two Conrail 'replies,' Appx 605 and 629.

20. In Conrail's Supplemental Environmental and Historic Report, Appx 603, Conrail stated:

"The STB in Decisions served August 9 and December 19, 2007, in Finance Docket No 34818 (2007 Decisions), determined that the part of the Harsimus Branch running from milepost 0.00 to Milepost 0.88 constituted a line of railroad requiring abandonment authority from the STB. The STB was not asked to determine, and **did not determine**, that the remainder of the Harsimus Branch required abandonment authority[.] [H]owever, to avoid any debate about that issue, Conrail is seeking abandonment of all of Harsimus Branch property that Conrail was deemed that could be claimed to be a line of railroad."

21. In Conrail's April 24, 2006 Reply, in FD 34818 (Jersey City's Petition for Declaratory Order), Conrail **vigorously** argued that it **acquired** the track segments East of Marin Blvd as 'excepted' track. Appx 612-617.

22. And in Conrail's December 5, 2016 Reply in FD 36078 (Riffin's Hudson Street Industrial Track Petition for Declaratory Order), Conrail **vigorously** argued:

"First, the Board **has no jurisdiction to initiate** the declaratory order proceeding sought by Riffin. The law in this case is crystal clear that **only** the United States District Court for the District of Columbia, sitting as the successor to the Special Court under the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, **has jurisdiction** to determine the regulatory status of **Harsimus Cove properties** formerly owned by Conrail. See *Consolidated Rail Corp. v. STB*, 571 F.3d 13, 18-20 (D.C. Cir. 2009)." Appx 629.

"As Riffin notes, the properties at issue were conveyed to Conrail under the Final System Plan ("FSP") of the United States Railway Association ("USRA"). ... Conrail has consistently taken the position that neither the properties constituting the defunct Hudson Street IT **nor the properties constituting the defunct Harsimus Cove Yard** were conveyed as regulated lines of railroad. Rather, they constituted spur and yard track over which the Board **has no abandonment authority**. FN 1: In the Special Court, Conrail stipulated that it would *not contest* the regulatory status of the Harsimus Embankment properties *west* of Marin Boulevard. ... Conrail, however, neither affirmatively agreed

that those properties actually were part of rail line nor entered into *any* stipulation about the property *east* of Marin, **including the former Harsimus Cove Yard** and the former Hudson Street IT, and, as noted in the text, **Conrail continues to contest the regulatory status of the former Harsimus Cove Yard** and the former Hudson Street IT.” End FN 1.

The D.C. Circuit has definitively determined that **only** the U.S. District Court for the District of Columbia, *qua* Special Court, has jurisdiction to determine whether properties that Conrail claims were conveyed by USRA as spur and yard track were in fact conveyed as regulated main line track. The D.C. Circuit specifically determined that the Board “lack[s] jurisdiction to resolved the question of the nature of the trackage.” *Consolidated Rail Corp. v. STB*, 571 F. 3d 13, 20 (D.C. Cir. 2009). FN 2: The Board was not asked by the City of Jersey City to decide, and **did not decide**, the regulatory status of **any Harsimus Cove Yard or other properties east of Marin Boulevard**. *See* Docket No. 34818, *City of Jersey City, et al. – Pet. For Declaratory Order*, Decisions served August 9, 2007, slip op. at 1, and December 19, 2007, slip op. at 5-6, and n.10. The Special Court likewise limited its proceedings to a determination, **as requested by the City of Jersey City**, whether the properties **west** of Marin Boulevard were conveyed as regulated properties. The Special Court specifically rejected the LLCs’ **motion to enlarge** its proceedings to encompass the Hudson Street IT and other track east of Marin Boulevard;” Bold added. Italics in original.

23. Riffin will repeat what the D.C. Circuit held in the FD 34818 proceeding:

“Because the Board “does not have authority... over ... abandonment ... of spur, industrial, team, switching, or side tracks,” 49 U.S.C. § 10906, the **Board's approval or denial of an abandonment application presupposes that the trackage** for which abandonment is sought **is “part of [the rail carrier's] railroad lines” subject to the Board's abandonment authority** under section 10903. ... **Only in proceedings** in which the **Board's authority is challenged and an interpretation** of the FSP or the Special Court's conveyance order under 45 U.S.C. § 719(e)(2) is required **does the Board lack jurisdiction** to resolve the question of the nature of the trackage sought to be abandoned. In such a case, as here, we see no conflict between 45 U.S.C. § 719(e)(2) and 49 U.S.C. §§ 10903 and 10906. The Board retains its authority under sections 10903 and 10906 to approve or deny an abandonment application. Under 45 U.S.C. § 719(e)(2), however, the district court *qua* **the Special Court retains its exclusive jurisdiction to decide the antecedent question if it arises**, namely, whether the trackage was conveyed by the FSP as “part of [the rail carrier's] railroad lines.” 49 U.S.C. § 10903(a)(1)(A).”

24. Conrail has challenged, and continues to challenge, the STB’s abandonment authority over the track segments East of Marin Blvd. As has Riffin, and the LLCs. And as the D.C. Circuit has previously held: Once challenged, **“the Board lack[s] jurisdiction** to resolve the

question of the nature of the trackage sought to be abandoned.”

25. And once the nature of the track segments subject to an abandonment proceeding have been challenged, the STB **is required** to ascertain the nature of those track segments (in order to determine whether it has the jurisdiction to continue adjudicating the proceeding).

26. Since the track segments East of Marin Blvd were conveyed to Conrail via the Final System Plan, **determining** the nature of those track segments, is within the exclusive jurisdiction of the Special Court. And until the nature of those track segments is **determined** by the Special Court, the STB has no jurisdiction to continue to adjudicate this proceeding.

27. And since Conrail **challenged** the nature of the track segments East of Marin Blvd, both before and after filing its NOE, and continues to challenge the STB’s regulatory authority over the track segments East of Marin Blvd., Riffin argues that the STB was without jurisdiction to make any adjudications in this proceeding, beginning on January 9, 2009, the date that Conrail filed its NOE.

28. While Riffin has suggested that the STB hold this proceeding in abeyance until such time that the Special Court addresses the nature of the track segments East of Marin Blvd, Riffin is uncertain whether the STB can do that. That sounds a lot like ‘jurisdiction by consent.’ The only option may be to dismiss this proceeding, without prejudice to refile if the Special Court finds that there are lines of railroad East of Marin Blvd that could be the subject of an abandonment / discontinuance of service proceeding.

CITY ET AL.

29. City et al. argued:

A. Riffin’s jurisdictional argument is waived / barred by the Law of the Case. (Riffin did not raise the issue of jurisdiction before ALJ Dring. The Special Court rejected

the LLCs' attempt to expand City et al.'s Special Court Complaint, to include tracks East of Marin Blvd. The STB refused to compel Conrail to provide the LLCs with documents regarding the regulatory status of the track segments East of Marin Blvd. Including the Hudson Street Industrial Track.)

Response: The issue of jurisdiction may be raised at any time. It is never 'waived.'

B. 49 CFR 1115 does not permit Riffin to appeal ALJ Dring's Decision.

Response: The STB has addressed this issue. If City et al. did not agree with the STB's January 31, 2017 decision, it should have timely filed an appeal of that decision. (To the full Board, since the decision was made by the Office of Proceedings.)

C. To vacate ALJ Dring's Decision, Riffin must prove 'material error.'

Response: The STB, in its January 31, 2017 decision, held that the standard was per 49 CFR 1115.1, to wit: "Clear error of judgment **OR** to prevent manifest injustice." Riffin has argued that ALJ Dring's failure to 'follow the rules,' was a 'clear error of judgment.' Riffin has also argued that it would 'prevent manifest injustice' to vacate ALJ Dring's decision, particularly since there is no evidence that Riffin **knowingly** disobeyed ALJ Dring's Order. [It was reasonable for Riffin to use City et al.'s definition of the term, LLCs, to mean the six LLCs noted in City et al.'s Request for Documents. City et al. has failed to demonstrate how it was **prejudiced** by Riffin's alleged deficiencies, since City et al. had no right to any of the e-mails between Steve Hyman and Riffin. (Steve Hyman was not included in City et al.'s Request for Documents' definition of the term "LLCs.")].

D. Riffin did not comply with ALJ Dring's August 25, 2016 Served Order.

Response: Riffin e-mailed to City et al. a copy of **all** of the e-mails **remaining** in

Riffin's e-mail account, between Riffin and **the LLCs**. (And between Riffin and Daniel Horgan, counsel for the LLCs, Vicki Hyman, manager of the LLCs, and Steve Hyman, the husband of Vicki Hyman.)

E. Riffin is (unlawfully) representing Steve Hyman.

Response: Steve Hyman **is not a 'party'** in this proceeding. Consequently, there is no way that Riffin can 'represent' Mr. Hyman in this proceeding.

F. No FRCP 37(a) 'Certification' is required as a condition precedent to being awarded attorney's fees.

Response: FRCP 37(a)(2)(A) and (4(A) says otherwise. The STB's discovery rules "parallel" those of the Federal Rules of Civil Procedure. See *Westinghouse Elec. Corp. v. Alton & Southern Sy. Co.*, 1 I.C.C. 2d 182, 195 n.7 (1984).

G. Riffin's stay request should be denied.

Response: While two of Charles Montange's clients, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy, do not have sovereign immunity, **neither of them are paying any of Mr. Montange's legal bills. They are being represented 'pro bono.'** **The only client that is paying Mr. Montange's legal bills, the City of Jersey City, has sovereign immunity.** And while New Jersey's Contracts and Tort Claims laws may deny the invocation of sovereign immunity as a defense against a contract or tort claim, neither statute has any relevance in this proceeding. There is no 'contract' between Riffin and Jersey City. Nor is there a 'tort claim' between Riffin and Jersey City. ALJ Dring's Order did not create a 'contract' between Riffin and Jersey City, nor did it create a 'tort claim' between Riffin and Jersey City. Issuing a 'stay' of all (or the attorney fees award) of ALJ Dring's Order would prevent 'manifest injustice.' The STB has long held that State Claim disputes

must be resolved in a State Court. The STB will not resolve such disputes. And Riffin's demand for repayment of any monies sent to Mr. Montange, would be a 'State Claim.' (The STB has no jurisdiction over Jersey City, so could not compel Jersey City to return any legal fees forwarded to Mr. Montange.)

CONCLUSION

30. The Office of Proceedings thought that it would reduce its work load by using FERC ALJs to resolve discovery disputes. It turns out, using FERC ALJs has **increased, substantially**, the work load of the STB. Part of the problem is the FERC ALJs' **mis**understanding of the **STB's** discovery rules. FERC's discovery rules are very liberal. The STB's discovery rules are very constrained. And expressly state that discovery in abandonment proceedings (such as this one) is strongly discouraged.

31. As in the *Finch Paper LLC – Petition for Declaratory Order* proceeding, FD 35981, using FERC's ALJs has created more problems than it has solved. Witness Canadian Pacific's ("CP") January 25, 2017 **second** appeal of a FERC ALJ Discovery decision.

32. In the *Finch Paper* proceeding, on remand, the FERC ALJ set out his understanding of the discovery rules. Then merely stated that the discovery criteria had been met. CP, in its January 25, 2017 second appeal, reiterated that the FERC ALJ had failed to "go into any level of detail as to why or how it reache[d its] result." CP second appeal at 3-4.

33. Likewise, ALJ Dring, in his October 26, 2016 decision, failed to "go into any level of detail as to why or how it reache[d its] result." ALJ Dring merely stated: "For the reasons stated in City et al.'s Motion for Sanctions." But a close look at the 'reasons stated in City et al.'s Motion for Sanctions,' reveals that City et al. **was not prejudiced** by any alleged 'deficiencies' in the gratuitously-provided e-mails between Riffin and Steve Hyman. Nor did Riffin hinder in any way, City et al.'s right **to inspect** Riffin's e-mails. Riffin's mistake was thinking that providing City et al. with a copy of his e-mails, would reduce the amount of

resources that he, and the STB, would have to devote to this totally irrelevant journey into Montange's 'conspiracy' fantasy.

34. The STB has made it clear on numerous occasions: Discovery is limited to the "subject matter involved in [the] proceeding." Board precedent instructs that 'more than a minimal showing of potential relevancy' is necessary before granting a motion to compel discovery. *Potomac Elec. Power Corp. v. CSX Transp. Inc.*, 2 S.T.B. 290, Served May 27, 1997. The STB has explained that 'the requirement of relevance means that the information might be able to affect the outcome of a proceeding.' *Reasonableness of BNSF Railway Co, Coal Dust Mitigation Tariff Provisions*, FD 35557, Served June 25, 2012. Moreover, 'discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.' *Duke Enerby Corp. v. Norfolk Southern Ry. Co*, STB Docket No. 42069, Served July 26, 2002. Thus, City et al. "Must demonstrate a real, practical need for the information." *See Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548 (1985).

35. ALJ Dring, in his Sanction Order, **did not articulate** how the alleged 'deficiencies' are relevant to the issues in this proceeding. Rather than provide any detailed explanation or analysis as to why the e-mails requested by City et al. are relevant, ALJ Dring summarily sanctioned Riffin because City et al. alleged that the e-mails provided by Riffin, were somehow 'deficient,' without any showing whatsoever that those alleged deficiencies were relevant to the issues in this proceeding.

36. The FERC ALJs are learning the STB's unique discovery rules. CP / Finch Paper and Riffin are the test subjects. It has not been a very pleasant experiment. Hopefully, no one else will have to endure what CP / Finch Paper and Riffin are enduring.

37. ALJ Dring made a number of 'errors of judgment.' Vacating ALJ Dring's October 26, 2016 Served Decision would "prevent manifest injustice."

38. WHEREFORE, for the foregoing reasons, Riffin would pray that the STB vacate ALJ

Dring's October 26, 2016 Order; Stay ALJ Dring's October 26, 2016 Order under such time that this appeal, and any judicial review thereof, has concluded, and for such other and further relief as would be appropriate.

Respectfully,

James Riffin
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(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on or before the 10th Day of February, 2017, a copy of the foregoing James Riffin's Rebuttal, and Volume Five of the Appendix thereto, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid.

James Riffin

JAMES RIFFIN

PETITIONER

V.

SURFACE TRANSPORTATION BOARD

RESPONDENT

**APPEAL OF AN INITIAL ALJ DECISION OF
THE SURFACE TRANSPORTATION BOARD**

AB 167 (Sub. No. 1189X)

(Harsimus Branch – Jersey City, NJ)

RECORD EXTRACT

VOLUME FIVE – EXCERPTS FROM CONRAIL'S FILINGS

RE: STATUS OF TRACKS EAST OF MARIN BLVD

PP. 601 - 628

**Submitted by: James Riffin, Petitioner
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Timonium, MD 21094
(443) 414-6210**

APPENDIX

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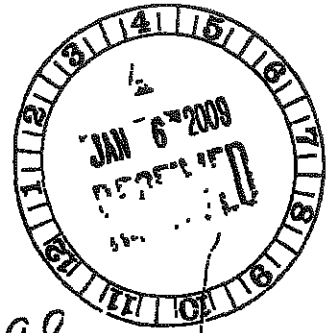
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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423



STB NO. AB 167 (SUB-NO. 1189X) 224298

CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION - IN
HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X) 224299

CSX TRANSPORTATION, INC. - DISCONTINUANCE EXEMPTION - IN HUDSON
COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X) 224300

NORFOLK SOUTHERN RAILWAY COMPANY - DISCONTINUANCE
EXEMPTION - IN HUDSON COUNTY, NEW JERSEY

VERIFIED NOTICES OF EXEMPTION

FILED

JAN - 6 2009

SURFACE
TRANSPORTATION BOARD

FEE RECEIVED

JAN - 6 2009

SURFACE
TRANSPORTATION BOARD

1 Consolidated Rail Corporation ("Conrail") hereby files its Verified Notice of Exemption pursuant to 49 C F R 1152.50 to abandon property, described below, that the Board has determined is part of a line of railroad subject to the Board's abandonment authority. CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS") hereby file their Verified Notices of Exemption pursuant to 49 C F R 1152.50 to discontinue service over the same property. A map showing the location of the property and more specifically describing the portion to be abandoned is attached hereto as Exhibit A.

Name - Harsimus Branch

601

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

STB NO. AB 167 (SUB-NO. 1189X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN
HUDSON COUNTY, NEW JERSEY**

STB NO. AB 55 (SUB-NO. 686X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON
COUNTY, NEW JERSEY**

STB NO AB 290 (SUB-NO. 306X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY**

NOTICES OF EXEMPTION

SUPPLEMENTAL ENVIRONMENTAL AND HISTORIC REPORT

Consolidated Rail Corporation (“Conrail”) submits this Supplemental Environmental and Historic Report in accordance with 49 C F R §§ 1105.7 and 1105.8.¹ Conrail previously submitted an Environmental and Historic Report in these proceedings on March 6, 2008. The March 6 Report focused on the direct effects of the abandonment itself. There are none, because the line the Board has determined is a line of railroad (“Harsimus Branch”) has been out of service for many years and all of the track and track structure has been removed.

¹ Conrail, CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NS”) have filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS).

residential housing. Conrail does not believe or concede that either of those reuse possibilities is reasonably foreseeable within the meaning of either the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"). Moreover, in light of the need for the current owners to obtain approval from the Jersey City Historic Preservation Commission for any demolition of the Embankments necessary for the construction of residential housing, and the need for the City to authorize condemnation and appropriate the necessary funds for the development of a park, Conrail does not believe or concede that the abandonment undertaking proposed here could properly be held the proximate cause, within the meaning of NEPA or the NHPA, of any impacts resulting from the City's park proposal or the current owners' residential housing proposal. Applicants determined nevertheless to address those proposals in the APE Report and in this Supplemental Environmental and Historic Report.

ENVIRONMENTAL

1. **Proposed Action and Alternatives.** As described in the March 6 Report, the proposed action is abandonment and discontinuance of part of a line of railroad known as the Harsimus Branch, running from Milepost 0.00 to Milepost 1.36 in the City of Jersey City, Hudson County, New Jersey. The STB in Decisions served August 9 and December 19, 2007, in Finance Docket No. 34818 (2007 Decisions), determined that the part of the Harsimus Branch running from Milepost 0.00 to Milepost 0.88 constituted a line of railroad requiring abandonment authority from the STB.³ The STB was not asked to determine, and did not

³ There was some confusion in the record in Finance Docket No. 34818 concerning the appropriate milepost numbers for the Harsimus Branch. Conrail has used milepost numbers that correspond by length and direction to the station and bridge numbers on the valuation maps (V-1.01, ST-1 and ST-2) for the Harsimus Branch. Originally, the Harsimus Branch ran from Milepost 0.00 at CP Waldo to Milepost 1.48 on the Hudson River. Before Conrail acquired the line, however, a large parcel next to the Hudson River had already been sold off for development. Thus, Conrail is seeking here to abandon only the property from Milepost 0.00 to

determine, that the remainder of the Harsimus Branch required abandonment authority, however, to avoid any debate about that issue, Conrail is seeking abandonment of all of Harsimus Branch property that Conrail was deemed that could be claimed to be a line of railroad

There is no realistic alternative to abandonment. The right-of-way has not been used for rail service for many years, all of the track and track structure has long been removed, and there are no shippers currently or potentially interested in rail service.

This history of the Harsimus Branch and the current status of the realty underlying the right-of-way is set forth in the STB's 2007 Decisions and the attached APE Report. All traces of the track east of Milepost 0 88 (Marin Boulevard, a/k/a Henderson Street) have been eliminated by extensive development of the properties for retail, residential, and commercial projects. Thus, abandonment of the right-of-way will have no impact, environmental or otherwise, east of Milepost 0 88. Similarly, abandonment of the right-of-way will have no impact on the property that is still owned by Conrail, between Milepost 0 00 and Milepost 0 18, because Conrail has no current plans for that property. Abandonment of the right-of-way between Milepost 0 18 and 0 88 will have no direct impact on the property, but it will allow the property to be developed by the City of Jersey City, if the City follows through with its announced plans to condemn the property for park or trail use and complies with state and local historic preservation requirements. Alternatively, if the City does not condemn the property, it may be developed for residential housing by its current owners, assuming they are able to obtain the necessary development permits and approval from the Jersey City Historical Preservation Commission.

1 36 that Conrail was deemed. According to the Board, the Milepost at CP Waldo is 2 54 and the Milepost at a point near Marin Boulevard (which Conrail has designated as Milepost 0 88) is 1 30. The Board has not assigned a Milepost number to the point east of Washington Street that Conrail has designated as Milepost 1 36. *See City of Jersey City, Et Al —Pet for Dec Order, STB Fin Dkt. No 34818 (served Aug 8, 2007), slip op at 1.*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Finance Docket No. 34818

**CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION, AND NEW JERSEY STATE ASSEMBLYMAN
LOUIS M. MANZO—PETITION FOR DECLARATORY ORDER**

**REPLY STATEMENT
OF
CONSOLIDATED RAIL CORPORATION**

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Dated: April 24, 2006

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34818

**CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
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LOUIS M. MANZO—PETITION FOR DECLARATORY ORDER**

**REPLY STATEMENT
OF
CONSOLIDATED RAIL CORPORATION**

INTRODUCTION AND SUMMARY

Pursuant to the Board's decision served February 8, 2006, Consolidated Rail Corporation ("Conrail") replies here to the Opening Statement of Petitioners City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Louis M. Manzo (collectively, "Jersey City" or "the City"). Attached in support of Conrail's Reply are the verified statements of Robert W. Ryan and John K. Fiorilla and accompanying exhibits.¹

Jersey City's fundamental argument in this case is that (1) a half century ago the Harsimus Cove Yard and elevated lead ("embankment lead") into that yard constituted a

¹ The verified statements are referenced herein as "Ryan VS" and "Fiorilla VS." The exhibits are referenced as "Exh."

Pennsylvania Railroad "line of railroad" providing through rail service to New York City via lighterage over the Hudson River and (2) Conrail could not for regulatory purposes "downgrade" the embankment lead and yard track by "reclassifying" it as spur or yard track. The fundamental fallacy in Jersey City's argument is that it was the United States Railway Association (USRA), not Conrail, that determined in the early 1970s which of the thousands of miles of track before the bankruptcy courts in the Northeast were to be operated as "lines of railroad." Conrail was not the "successor" to the Pennsylvania Railroad (by then, the Penn Central Railroad) or any of the other bankrupt railroads whose assets were winnowed by USRA to create a new rail system. Conrail started from scratch, with only the obligations that Congress, through USRA, imposed on it. If track was not transferred to it as a "line of railroad," Conrail had no obligation to treat it as a "line of railroad."

The City argues that since the "Harsimus Branch," Line Code 1420, Mileposts 1-7, was conveyed by USRA in the Final System Plan ("FSP") to Conrail, that must mean that USRA intended to convey the Harsimus Cove Yard and embankment lead as a "line of railroad" or segment thereof. But the "Harsimus Branch" designation is at best confusing, since the term "Harsimus Branch" historically referred only to the one and one-half mile track that veered off from the main line, and that ran west to east, from Station 0+0 (Milepost 0.0) at Waldo Avenue to the piers on the Hudson River that had been used years earlier for the lighterage operations at Station 78+03 (Milepost 1.48). USRA made clear not only in the FSP but also in the deed conveying the property, which attached the relevant valuation maps, that what it intended to convey was the line of railroad at the heart of Line Code 1420. That was the old main line of the United New Jersey Railroad and Canal Company ("UNJRCC"), which years earlier had leased its track to the Pennsylvania Railroad. That line ran from the bulkheads on the Hudson River

(Milepost 1) to Harrison (Milepost 7). Conrail combined that line with another rail line (Line Code 1420) to make up its "Passaic and Harsimus" line—which *began* at Waldo Avenue.

The only reference to the Harsimus Cove Yard or lead into it was in the "Exceptions and Additions" to the FSP, where USRA made clear that only part of the yard was being conveyed to Conrail. There was no suggestion that the yard was part of a "line of railroad," except as auxiliary track that was conveyed along with the line to which it pertained. It would have made no sense for it to be conveyed as a line of railroad, because no through traffic moved through the yard. And Conrail understood that. Even before Conrail took over the line, it had set forth in its timetable the various branch lines that would constitute its New Jersey Division, and the "Passaic and Harsimus Branch" *began* at CP Waldo and ran westward to Lane. When Conrail took over operations on April 1, 1976, its General Order No. 1 reiterated that the Passaic and Harsimus Branch ran "between CP Waldo (MP 0.0) and Lane (MP 9.3)." (Ryan VS at 8; Exhs. A and D.)

Conrail always treated the Harsimus Cove Yard and embankment lead into it as spur and yard track, and so did Jersey City. The City pressed relentlessly for Conrail to tear up the tracks and make it available for redevelopment, and Conrail cooperated in doing so wherever it could without disrupting the few remaining switching operations in the yard area. Neither Conrail nor the City ever suggested that authorization from the ICC (or, later, the STB) was required to sell off the property. By the late 1980s, approximately 90% of the property had been sold in half a dozen different transactions, both to private developers and to the Jersey City Redevelopment Agency, and the last shipper had left the area. Conrail maintained the embankment lead only because part of one of the tracks was being used as turnaround space for a train serving a shipper in Kearny, New Jersey. When the City pressed Conrail to tear up the track and demolish the

bridges connecting the remaining parcels, Conrail agreed to do so as soon as it finished a track connection west of CP Waldo that would eliminate the need for the turnaround space.

As soon as that connection was completed, in 1994, Conrail removed the switch connection to the lead track and permitted the City and a private developer to remove one of the bridges at the east end of the lead. Conrail then proceeded to remove the track along the lead, and by 1997 had also removed the rest of the bridges connecting the "embankment" parcels. At no point in this entire process did the City, the Jersey City Redevelopment Agency, or any of the private developers contend that abandonment authorization from the ICC or the STB was required, and Conrail gave them no reason to think it was required.

Once the rail infrastructure was removed, Conrail offered the parcels of land that were left for sale to the City and engaged in active negotiations with the Jersey City Redevelopment Agency for that purpose. The Redevelopment Agency had surveyors, appraisers, development experts, architects, and others examine the property between 1997 and 1999, but the City and Redevelopment Agency lost interest in acquiring the property, and moved on to other projects, when a group of citizens, over the City's strong objection, succeeded in having the "embankment" parcels listed on the New Jersey State Register of Historic Places. When no other public entity came forward to purchase the property, Conrail in October 2002 put the parcels up for bid. Conrail made sure to send the Redevelopment Agency the bid package, but the City and the Redevelopment Agency made clear they no longer had any interest in the property. Accordingly, Conrail began negotiations to sell the property to the only bidder, SLH Holding Co., LLC ("SLH"), that had met Conrail's minimum bid requirements.

In late 2003, Conrail received a letter from the City proposing "opening a dialogue" about a public entity acquiring the property. Conrail met with representatives of the City and the

Harsimus Stem Embankment Preservation Coalition; however, it never received a concrete proposal meeting its minimum requirements from anyone other than SLH. In early 2005, when Conrail's negotiations with SLH were well advanced, Conrail was contacted by an eminent domain lawyer, John Curley, who had been retained by the City. Conrail cooperated with Mr. Curley's requests for information, but Conrail made clear that it had a legal commitment to SLH that it intended to keep. When and if the City got around to condemning the property, its legal right to do so would not be affected by whether the property was in Conrail's hands or the hands of the entities (the Intervenor in this case) that SLH created for purposes of acquiring the individual parcels of property at issue. Conrail closed the sales of those parcels to the Intervenor in July 2005.

It was only then, when the Intervenor began presenting their development plans to the City Planning Board, that the City began asserting that abandonment authority was required from the STB before Conrail could "abandon" the "line of railroad" supposedly represented by the parcels of land SLH had acquired. Of course, the issue here is *not* rail service. There are no shippers and no one suggests there ever will be. What the City wants is a determination from the STB that abandonment authority is required, so that it can invoke in state court a New Jersey state law provision (N.J. Stat. § 48:12-125.1), which requires notice to state and local officials when a railroad seeks such abandonment authority, and prohibits sale of the rail line to anyone other than a state or local government for a 90-day period (absent a waiver by the government). Most importantly, it concludes that "[a]ny sale or conveyance made in violation of this [provision] shall be void." (Exh. EE.) The City, of course, has received years of notice about Conrail's intention to sell the property, and ample opportunity to negotiate a purchase or condemn the property. The state too—not only through the Jersey City Redevelopment Agency,

but also through notice that Conrail provided to the New Jersey Department of Transportation on April 12, 2005—has had ample notice of Conrail's intentions. Nevertheless, the City hopes to be able to convince a state judge that Conrail has somehow circumvented the STB's jurisdiction and that this gives the City grounds under state law to void Conrail's property sales to the Intervenor.

The Board should not permit its processes to be so abused. The City leans heavily on *Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, 8 I.C.C.2d 773 (1992) (*Chelsea Property Owners*), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994), to argue that the STB does not lose abandonment jurisdiction because Conrail has not used a line for a long period of time. But that is not the point here. Conrail indisputably acquired the West 30th Street line as a line of railroad in the FSP, and Conrail steadfastly maintained that it was a line of railroad for which abandonment authority was required during the entire period of its non-use. Here, Conrail did not acquire the Harsimus Cove Yard and lead into that yard as a line of railroad, and neither Conrail nor anyone else ever claimed that it was a line of railroad—until the City's last-minute change of mind after the property had been sold. If the City wants to condemn the property, nothing about the sale to the Intervenor prevents it from doing so. But it should not be permitted to use the Board's processes to upset a settled transaction and draw Conrail into the fray.

ARGUMENT

I. UNDER THE FSP, CONRAIL ACQUIRED THE HARSIMUS COVE YARD AND EMBANKMENT LEAD AS AUXILIARY YARD AND SPUR TRACK, NOT AS A "LINE OF RAILROAD."

Jersey City does not deny that the key question in this case is the character of the property conveyed by USRA to Conrail. Conrail and the Intervenor take the position that USRA conveyed the Harsimus Cove Yard and embankment lead as yard and spur track, not as a "line of railroad." Jersey City asserts the opposite. City Statement at 25-26. We address the City's position that this track was conveyed as a "line of railroad," or segment thereof, in Part I.A. below.

The City's second argument is that Conrail could not "downgrade" or "reclassify" track that it received as a "line of railroad." City Statement at 26-32. Since this argument assumes that USRA conveyed the track at issue as a "line of railroad," it puts the rabbit in the hat. As we discuss in Part I.B. below, Conrail has never argued that it could "downgrade" track through lack of use. But if Conrail acquired track from USRA as yard and spur track, it was entitled to treat it as yard and spur track, regardless of whether at an earlier point the Pennsylvania Railroad may have used that track differently.

A. Conrail Acquired Only What USRA Conveyed, And USRA Did Not Convey Any Of The Harsimus Cove Yard Property As A "Line Of Railroad."

Conrail was a unique railroad formed under unique circumstances. "A rail transportation crisis seriously threatening the national welfare" was precipitated by the successive bankruptcies of eight major railroads in the northeast and midwest region of the country. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 108 (1974). Congress responded by passing comprehensive legislation, the Regional Rail Reorganization Act of 1973, Pub. L. 93-236 ("3R Act"), which was designed to build on a "clean slate" a new railroad, Conrail, "from the

wreckage that was the northeastern rail system.” *City of Philadelphia v. Consolidated Rail Corp.*, 222 F.3d 990, 992 (D.C. Cir. 2000). For that purpose, Congress established a new government corporation, USRA, and empowered it to pick and choose among the properties of the bankrupt railroads and designate in the FSP which of those properties would be acquired by Conrail. Under Section 303(b)(2) of the 3R Act, Conrail received those properties “free and clear of any liens or encumbrances,” and under the Rail Act’s “fresh start” policy Conrail could not be held responsible for the obligations of the bankrupt railroads with respect to those properties. *See, e.g., Penn Cent’l Corp. v. United States*, 862 F.Supp. 437, 446 (Special Court 1994).

In other words, Conrail was not the legal successor to any railroad. It was an entirely new entity that acquired portions of the assets of bankrupt railroads. And what those assets were upon transfer—whether “lines of railroad” or auxiliary facilities like yards and spurs—was determined by USRA. The prior history of those properties was irrelevant. Indeed, if USRA did not include a rail line in the FSP, the 3R Act authorized its immediate abandonment. *See, e.g., STB Finance Dkt. No. 34618, East Penn Railway, Inc.—Modified Rail Certificate* (served December 1, 2004) (“The Octoraro Branch was not included in the final system plan at the time Consolidated Rail Corporation was formed and, as such, was authorized to be abandoned without further regulatory approvals pursuant to the [3R Act].”); *STB Finance Dkt. No. 33722, Brandywine Valley Railroad Co.—Modified Rail Certificate* (served April 16, 1999) (same).

USRA first prepared a Preliminary System Plan (“PSP”) discussing its preliminary views regarding lines that should or should not be acquired by Conrail, and then in the FSP specified the lines that were to be acquired by (“designated to”) Conrail. Ryan VS at 3. The FSP provided that yards, spur track, and other auxiliary facilities associated with rail lines designated to

Conrail would transfer automatically with those lines, unless the FSP provided otherwise. Ryan VS at 3-4; Exh. C at 261. The FSP line designation relied on by the City in this case is one of a number from the United New Jersey Railroad and Canal Company ("UNJRCC"), which had leased its lines years before to the Pennsylvania Railroad.

In his attached verified statement, Conrail's witness Robert Ryan explains in detail why the City's reliance on the "Harsimus Branch" designation is misplaced. (Ryan VS at 4-9.) In brief, the designation of "Harsimus Branch," Line Code 1420, Mileposts 1-7, was a one-line summary of the property more fully described in the deed transferring the property to Conrail. The deed makes clear that "[t]he line of railroad described herein is identified as Line Code 1420 in the records of the United States Railway Association," which is supported by valuation maps attached to the deed. (Ryan VS at 4-5; Exhs. AA, BB, and CC.) The valuation maps make clear that the "line of railroad" that was the focal point of Line Code 1420 was the old UNJRCC main line that ran from the Hudson River in the Harsimus Cove area through Journal Square to the intersection with the old New York Bay Railroad near Harrison (which continued from there as Line Code 1421). That "line of railroad" was laid out on six valuation maps—all designated as V-2.1 and Line Code 1420, beginning with number ST-1 at the bulkhead on the Hudson River and running through ST-6 to the "cut" with Line Code 1421. (Ryan VS at 5; Exh. BB.) The Harsimus Cove Yard track and embankment lead, in contrast, were set forth on *separate* valuation maps, designated as V-1.01, ST-1 and ST-2. They were auxiliary to the main line, just like all of the other spur and yard track that was part of Line Code 1420, and that transferred along with the "line of railroad" described in the deed. (Ryan VS at 5-6; Exh. CC.)

In its zeal to try to characterize the Harsimus Cove Yard and embankment lead as an integral segment of line of railroad at the heart of Line Code 1420, the City invents milepost

numbers that it recognizes do not fit, but which it nevertheless tries to claim can be derived as "approximations" of milepost numbers starting with Milepost 1 in Harsimus Cove Yard, to Milepost 1.3 at Henderson Street, to Milepost 2.54 at CP Waldo. (City Statement at 2 n.1.) The problem, among other things, is that the actual distance from CP Waldo to Henderson Street is less than a mile, not the 1.24 miles implied by the City's "approximations." (City Petition at 9.) The answer is on both the track chart and the valuation maps. The embankment lead and Harsimus Cove Yard track mileage was calculated *separately* from the old UNJRCC main line, and ran *west to east*, from 0.0 at CP Waldo, to .88 at Henderson Street, to 1.48 at the piers on the Hudson River. (Ryan VS at 5-6.) In contrast, the milepost designations for the old UNJRCC main line ran *east to west*, and CP Waldo was at 2.54 on that line. When the correct milepost numbers are used, it is readily apparent that USRA intended to use the mileposts applicable to the old UNJRCC main line to define the "line of railroad" it was transferring. (Ryan VS at 6-7.)

Further evidence of USRA's intent is provided by the "Exceptions and Additions" to the FSP, which spelled out that some yards belonging to the transferring railroads were not transferred to Conrail, and some were transferred in part. The Harsimus Cove Yard was among those that was transferred in part. Nothing in the Exceptions and Additions referred to the Harsimus Cove Yard or the embankment lead into the Yard as part of the "Harsimus Branch" line specified in the FSP. It was simply one of a number of yards that were transferred to Conrail as ancillary facilities. (Ryan VS at 7; Exh. C at 262.)

As Mr. Ryan also discusses, additional evidence of USRA's intent, and Conrail's understanding of that intent, is provided by the timetables and operating orders that Conrail developed for the properties that were designated to it by the FSP. Almost *two years* before Conrail began operations, it set forth in its 1974 timetable the various branch lines that would

constitute its New Jersey Division, and the "Passaic and Harsimus Branch" was the "line of railroad" that Conrail created out of the Line Code 1420 and 1421 branch line track it received in the area. That track *began* at CP Waldo, *west* of the embankment lead and Harsimus Cove Yard track, and continued *westward*. (Ryan VS at 8; Exh. A.) CP Waldo was designated for operating purposes as milepost 0.0—the end of the line. When Conrail actually began operations on April 1, 1976, Conrail in its General Order No. 1 reiterated that the Passaic and Harsimus Branch ran "between CP Waldo (MP 0.0) and Lane (MP 9.3)." (Ryan VS at 8; Exh. D.) Thus, the evidence is clear that from Day One Conrail did not operate, and had no plans to operate, the embankment lead and Harsimus Cove Yard track as a "line of railroad" or as a segment of a "line of railroad."

The City argues that Conrail's track charts in 1976, 1977, and 1980 indicated that Conrail treated the Harsimus Cove Yard track and embankment lead as a "line of railroad" (City Statement at 31), but, as Mr. Ryan discusses, those track charts included *all* of the trackage in the area (including all of the yards, sidings, spurs, and other auxiliary property). (Ryan VS at 6; Exh. E.) Those early track charts, which were not used for *operating* purposes, continued to reflect the Pennsylvania Railroad milepost numbers for the old UNJRCC main line for a few years, but they were soon corrected to show the Passaic and Harsimus Branch beginning at Milepost 0.0 at CP Waldo. None of the trackage east of CP Waldo, including the embankment lead and Harsimus Cove Yard track, was even included on the track charts after 1982. (Ryan VS at 8-9; Exh. F.)

The City suggests that since as many as 3000 carloads of traffic were switched through the Harsimus Cove Yard for the remaining customers in the area in 1983, "Conrail was still using it as a dead-end branch, not a mere spur." City Statement at 31. But yard track used for

switching, including the lead into the yard, do not become "lines of railroad" by virtue of the number of cars switched there or the size of the yard. See, e.g., *Nicholson v. ICC*, 711 F.2d 364, 367-68 (D.C. Cir. 1983) (Congress intended to regulate main or branch lines of railroad used for "through service by full trains," and not the "mass of tracks" used for switching and other services "incidental to, but not actually and directly used for, such transportation service.") (internal quotation marks omitted) (quoting *Detroit & M. Ry. Co. v. Boyne City, G. & A. R.R. Co.*, 286 F. 540, 546 (E.D. Mich. 1923). See also *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 166 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967) ("If . . . the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction.") (citation omitted). Thus, there is no legal or factual foundation for the City's suggestion that the switching Conrail performed for the few remaining shippers in the Harsimus Cove Yard area converted that "mass of tracks" from a yard into a regulated branch line.

B. Conrail Did No "Downgrade" or "Reclassify" The Yard Or Embankment Lead, And Cases Concerning "Downgrading" Have No Bearing On This Case.

As just discussed, Congress' purpose in the 3R Act, and USRA's purpose in the FSP, was to start Conrail with a "clean slate." *City of Philadelphia*, 222 F.3d at 992. The Harsimus Cove Yard and embankment lead were acquired by Conrail as auxiliary spur and yard track, and were operated as such from Day One of Conrail's existence. The City in its statement cites cases for the proposition that a railroad cannot "downgrade" or "reclassify" a line of railroad (City Statement at 23), but that assumes, incorrectly, that Conrail received the track as a "line of

railroad" in the first place. If there was any "downgrading," it was done by USRA—which was specifically empowered by Congress to do exactly that.

The City also argues that a line does not become a spur simply from disuse (City Statement at 23), and it claims in this regard that the *Chelsea Property Owners* case is "devastating to anything Conrail may be trying to claim." (id. at 29). In *Chelsea Property Owners*, developers seeking "adverse abandonment" of Conrail's West 30th Street Track (the "Highline") in Manhattan claimed that it had become a spur line. The ICC indeed held that the Highline had not become spur track simply because it had not been used for a long period of time. What the City ignores, however, is that USRA designated the Highline as a "line of railroad." In fact, USRA discussed at some length in the Preliminary System Plan the question of whether the Highline should be transferred to Conrail as a line of railroad. (Ryan VS at 10.) USRA's recommendation, in light of projections of close to 30,000 carloads per year of traffic on the line and the active support of the City of New York for transfer of the line, was that the "30th Street Branch" should be transferred to Conrail. (Exh. B at 639.) The FSP adopted that recommendation and transferred the line to Conrail as a line of railroad. (Exh. C at 281.) Conrail's treatment of the Highline was completely consistent with that designation. It always treated the Highline as a line of railroad that it could not abandon without ICC or STB authorization. Conrail never claimed that disuse of the Highline permitted it to "downgrade" or "reclassify" the line. It actively resisted efforts by developers to have it tear down the rail infrastructure, and it opposed the developers' "adverse abandonment" petition. 8 I.C.C.2d at 777.

Thus, far from "devastating" to Conrail's position, USRA's, Conrail's, and the ICC's treatment of the Highline is completely consistent with Conrail's position in this case. To be

clear, Conrail's position here is *not* that the decline in traffic being switched on the Harsimus Cove Yard track between 1976 and the mid-1980s enabled it to "downgrade" or "reclassify" property that it received as a "line of railroad." Conrail's position is that it did not receive that track as a line of railroad and never treated it as a line of railroad. It was already "downgraded" when Conrail acquired it.

II. CONRAIL'S AND JERSEY CITY'S CONSISTENT TREATMENT OF ALL OF THE HARSIMUS COVE YARD PROPERTY AS YARD AND SPUR TRACK UNDERSCORES THE WEAKNESS OF THE CITY'S BELATED CLAIMS.

USRA and Conrail were not alone in treating the Harsimus Cove Yard track and embankment lead as spur and yard track. As Mr. Ryan discusses in his verified statement, Jersey City and the Jersey City Redevelopment Agency began working with Conrail to sell off the property for redevelopment, either to private developers or to the Redevelopment Agency, as soon as Conrail began operations in the Jersey City area. By the mid-1980s, Conrail had sold off nearly 90% of the property in a half-dozen different transactions. Conrail did not seek, and no one suggested it should seek, authorization from the ICC to sell off this track or the underlying land. Conrail only retained easements where it was necessary to be able to switch the few remaining shippers in the area. (Ryan VS at 10-11.)

The City was still not satisfied with the pace of development. Indeed, in 1984 the Mayor of Jersey City complained to the Chairman of Conrail that Conrail was not doing enough to dispose of "underutilized railroad property and trackage which services the remaining industrial facilities" in the Harsimus Cove area. (Ryan VS at 11; Exh. G.) Conrail continued to juggle the needs of the few remaining shippers and the City's redevelopment objectives until the last shipper left the area in the late 1980s. At that point, all that was left was the embankment lead. When the City began to dun Conrail to tear that down and sell it off, Conrail agreed to do so as

soon as it completed a track connection elsewhere (the "Marion Connection") that would eliminate the need to use the embankment lead for turnaround space for a train moving to a shipper in another part of the county. In the interim, Conrail agreed to work with the City to dismantle the tracks and bridges on the lead that were not needed for the turnaround operation. (Ryan VS at 11-12; Exh. H.)

Conrail's work was constrained by its own limited budget, and did not proceed fast enough for the City. In 1994, the City joined with a developer, National Bulk Carriers, Inc., that had earlier bought a large block of property from Conrail east of Henderson Street, to tear down the bridge over Henderson Street. (Ryan VS at 12; Exh. J.) When the Marion Connection was completed in 1994, Conrail removed the switch connecting the embankment lead to the main line and began planning for demolition of the remaining infrastructure on the line. The City repeatedly pressed Conrail to finish the job, but the demolition work was expensive, and Conrail did not finish it until 1997. (Ryan VS at 14.)

The City then commissioned a preliminary redevelopment study for the project (which the Jersey City Planning Board completed in March 1998), followed by an exhaustive study by Louis Berger & Associates, Inc., in association with Li-Saltzman Architects, P.C., which laid out a number of redevelopment alternatives, and was completed in July 1999. (Ryan VS at 14; Exhs. L and P.) At the same time, the Jersey City Redevelopment Agency was in active negotiations with Conrail to acquire the property for redevelopment. Pursuant to those negotiations, the Redevelopment Agency conducted extensive surveying, soil boring, demolition/clearance estimating, property appraisal, and other planning work. (Ryan VS at 14; Exh. K.) At no time during any of these negotiations did anyone suggest that there was any need for Conrail to obtain any kind of abandonment authority from the STB. The embankment lead property was treated

just as all of the other Harsimus Cove property that Conrail had sold off for redevelopment—as yard and spur track.

The City's redevelopment plans were sidetracked when a group of citizens petitioned the State of New Jersey to have most of the embankment lead designated as an "historic place." Because that designation would significantly limit the redevelopment alternatives for the property, both the City and Conrail opposed the designation, but the State nevertheless in 1999 placed the embankment lead on the State Register of Historic Places. (Ryan VS at 14-15; Exhs. N, O, and Q.) The City and the Redevelopment Agency thereafter stopped talking to Conrail about acquiring the property and moved on to other projects. Since the City and the Redevelopment Agency were no longer interested in the embankment parcels, Conrail in December 2001 sent out a bid notice to a number of potential developers, and in October 2002 formally put the parcels out for bid. Conrail was careful to send both the notice and the bid package to the Redevelopment Agency. (Ryan VS at 15; Exhs. R and S.) The Redevelopment Agency and the City reviewed the package, but they still had no interest. (Ryan VS at 15, Exh. T.) In January 2003, the City passed an ordinance designating the embankment part of the embankment lead as an "historic landmark," and Conrail informed all of the prospective bidders that the ordinance would require a successful bidder to obtain the consent of the Jersey City Historic Preservation Commission to proceed with development. (Ryan VS at 15-16; Exh. U.)

Only one bidder, SLH, met Conrail's minimum bid requirements. Accordingly, Conrail began negotiations with SLH to sell it the remaining parcels. In October 2003, Conrail received a letter from the City proposing "opening a dialogue" with Conrail to have a public entity acquire those parcels. (Ryan VS at 16; Exh. V.) By then, Conrail had been attempting to dispose of the property since 1997, and it had entered into a contract to sell to SLH as a result of the bidding

process. Conrail determined to proceed with the contract with SLH, but to remain open to any concrete proposals from other entities in the event the contracted sale was not completed. (Ryan VS at 16.) No such concrete proposal was ever forthcoming. The City was well aware that Conrail had a binding legal commitment to sell the property to SLH. (Ryan VS at 17; Fiorilla VS at 2.) In late 2004 the City adopted an ordinance declaring that the property was needed for public use, and it hired an eminent domain lawyer, John Curley, to pursue that possibility. Conrail's counsel corresponded with Mr. Curley about the City's interest in the property, but Conrail never represented to the City or anyone else that it would, or could, hold up the sale to SLH while the City, once again, contemplated acquiring the property. (Ryan VS at 18; Fiorilla VS at 2-4.) The City's eminent domain authority under New Jersey law applied (and applies) in any event equally to condemnation of the property in SLH's hands as to condemnation of the property in Conrail's hands. (Fiorilla VS at 4.)

In April 2005, Conrail sent a detailed notification to the New Jersey Department of Transportation explaining Conrail's plan to sell the embankment lead property to SLH and requesting waiver of the state law regulatory filing and publication requirements governing sales affecting railroad property. (Ryan VS at 18-19; Exh. W.) In June 2005, Conrail received the Department of Transportation's approval, and in July 2005, Conrail closed the transaction with the various entities SLH had formed (the Intervenor in this case) to purchase the various parcels. (Ryan VS at 19; Exh. Y.)

It was only *after* Conrail had closed the sale and the Intervenor had begun presenting their development plans to the Jersey City Planning Board that the City began to argue that Conrail was required to obtain abandonment authorization from the STB before disposing of these last parcels from the Harsimus Cove area. We discuss next why, even were there any

serious question about the regulatory status of the Harsimus Cove Yard track, the Board should not permit its processes to be abused in this case to unwind a settled transaction. Our point here is that from the time Conrail acquired this track in 1976 to the time Conrail disposed of it in 2005—almost 30 years—not one party contended in any forum that Conrail was required to obtain abandonment authority to dispose of *any* of the Harsimus Cove Yard track, including the embankment lead. This is powerful evidence that *everyone* recognized that this track was spur and yard track, not a “line of railroad,” and that the City’s imaginative effort at this late date to pin a new label on the few remaining parcels should be rejected as what it is—purely revisionist history.

III. THE BOARD SHOULD NOT PERMIT ITS PROCESSES TO BE ABUSED BY THE CITY TO UNWIND A SETTLED TRANSACTION

The City devotes considerable space in its argument to explaining why it should not be held to have waived any belated contention that the Harsimus Cove Yard property it worked for decades to have Conrail liquidate—with nary a peep about any supposed obligation to seek abandonment approval from the ICC or the STB—should now be considered property subject to the STB’s abandonment authority. (See, e.g., City Statement at 7-11, 32-38.) The City resorts to bizarre interpretations of a City engineer’s handwritten notes to attempt to argue that Conrail engineers misled a City engineer into thinking that Conrail would obtain abandonment authority for the property.² The City also states twice in its statement that the National Bulk Carriers’

² The City draws the obviously unsupportable inference that the City engineer’s notes of a conversation with a Conrail engineer about an internal Conrail budgetary “AFE” or “Authorization for Expenditure” actually is about a request for “ICC” authorization. (City Statement at 9, 33; Ryan VS at 12-13.) Similarly, when the same City engineer’s notes reflect that a different Conrail engineer had told him that “[i]f it is a stub or branch line abandonment, it doesn’t need approval [from the ICC],” the City suggests nonsensically that the engineer’s loose

"project manager" had "always believed" that Conrail obtained abandonment authorization for the property it sold to National Bulk Carriers. (City Statement at 10 n.15, 36.) But the City's own files contain a letter from the *president* of National Bulk Carriers in which he takes the position that *no* ICC authorization is required. (Ryan VS at 13; Exh. I.) Particularly since Conrail's own listing of "spur lines" shows that Conrail's lawyers contemporaneously confirmed that the track was "spur" track, it is impossible to credit the project manager's contrary assumption. (Ryan VS at 13-14; Exh. FF.)

The City also attempts to suggest that it was motivated by safety concerns, rather than development concerns, when it encouraged Conrail and National Bulk Carriers to tear out all of the infrastructure that made rail service possible over the embankment lead. (City Statement at 33.) But if safety had been the City's only concern, Conrail could have maintained the bridges and other rail infrastructure at considerably less cost than tearing it all down. As noted earlier, even when Conrail had active rail operations on the property, the City was dunning Conrail to cease those operations and sell off the property for development. The City never exhibited the slightest concern that Conrail might be running a risk if it tore out the rail infrastructure without ICC or STB authorization, because neither the City nor anyone else believed that ICC or STB authorization was required. It was not until after Conrail closed its sale with the Intervenor in 2005, and the Intervenor began to work with the Planning Board to advance their development plans, that the City suddenly decided that Conrail needed federal abandonment authority.

There is little doubt about the motive for the City's belated effort to assert that the embankment lead is a "line of railroad." It is not to preserve rail service. There are no shippers

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use of the term "branch line" amounts to recognition by Conrail that abandonment authorization *is* required. (City Statement at 7-8; Ryan VS at 12.)

and no infrastructure capable of providing service.³ The City's purpose cannot be a Trails Act agreement, because there is no trail, and the City is fully aware that Conrail would not enter into such an agreement with the City in any event.⁴ The City cannot have any genuine concern about historic preservation, because the "embankments" have already been subjected to state and local historic preservation requirements. What the City's belated claim is about is throwing a cloud under *state* law on Conrail's sale of the last pieces of property in this area, so as to obtain leverage in a possible condemnation action.

The City's position clearly proves too much. Conrail has disposed of over half a dozen pieces of property in the Harsimus Cove area with the City's active encouragement. Those properties are now, or will soon be, largely covered with hotels, office buildings, and residential developments. The City's position ostensibly is that "[t]he entire Harsimus Branch was at one point a through route all the way to interchanges (by float) on the Hudson River" and that "a railroad . . . must seek abandonment authorization for the through track in the yard." (City Statement at 36 n.24.) The City specifically proposes that Conrail should seek abandonment

³ Jersey City's own ordinances attached as Exhibit G to the City's Petition recite that the "Harsimus Branch" property "is no longer needed for any railroad purpose or use." (City Ordinance Nos. 04-096 and 05-064.)

⁴ The law is clear under the Trails Act, 16 U.S.C. § 1247(d), and the Board's implementing regulations, 49 C.F.R. § 1152.29, that if the rail carrier "does not intend to negotiate an agreement for trail use," the applicability of the Trails Act fails even if the track in question is subject to the Board's abandonment authority. (*Id.* at § 1152.29(b)(1)(ii).) The City accuses Conrail of "exhibiting a Janus-like approach to the question: Conrail supported conversion of the Highline on Manhattan to trail use with arguments opposing the same kind of claims it is now indorsing [sic] across the Hudson in New Jersey." City Statement at 40. The City's accusation is flatly wrong. As discussed above, Conrail consistently maintained that the Highline was a line of railroad and always maintained the infrastructure on that line that could serve either to provide rail service or support trail use. In this case, in contrast, Conrail has never claimed that the Harsimus Cove Yard track and embankment lead constituted a line of railroad, and, with the City's urging, tore down all of the infrastructure that could have provided rail service or supported a trail.

authority—to “bring itself into compliance with applicable law”—regarding the property it sold to National Bulk Carriers years ago. (City Statement at 36-37.) Yet, under the City’s reading of N.J. Stat. § 48:12-125.1, that would render “void” the transaction with National Bulk Carriers unless every state, county, and municipal government entity entitled to notice under the state disclaimed in writing any interest in acquiring the property, at this late date, from *Conrail*. (Exh. EE.)

The Board should not permit its processes to be so belatedly and blatantly manipulated by the City in order to disrupt settled transactions. In the first place, there is no more reason to permit a state or municipality to misuse the Board’s abandonment authority than to permit a railroad to do so. See *Modern Handcraft, Inc.—Abandonment in Jackson County, MO*, 363 I.C.C. 969, 972 (1981) (“The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.”) Conrail is not now standing in the way, and never has stood in the way, of the City’s legitimate exercise of its condemnation authority under New Jersey law.⁵ But Conrail no longer owns the property. The

⁵ The City suggests that at a meeting in March 2004, “Conrail” took the position at a meeting with representatives of the City and the Embankment Coalition that “City use of eminent domain [regarding the embankment lead] was preempted.” (Opening Statement at 33; Petition at 13, Exh. D.) Conrail’s witnesses Ryan and Fiorilla were Conrail’s representatives at that meeting, and they both testify that they took no such position. (Ryan VS at 16-17; Fiorilla VS at 2.) They note that the subject of Conrail’s legally binding commitment to SLH *was* addressed at the meeting. If there was any discussion of eminent domain, it likely revolved around the question of whether Conrail or SLH would be the subject of eminent domain, if and when the City decided to initiate condemnation proceedings. (Ryan VS at 17; Fiorilla VS at 2.) As discussed above, the City later the same year hired an eminent domain lawyer, John Curley.

City should not be permitted to use the Board's processes to attempt to try to unwind a transaction that closed almost a year ago—simply because the City would prefer to condemn the property from Conrail rather than the Intervenor.

Moreover, fundamental principles of finality, repose, and detrimental reliance militate against a decision by the Board in the City's favor. Conrail gave the City and the Jersey City Redevelopment Agency every opportunity to purchase the property at issue from Conrail between 1997 and 2002. The Redevelopment Agency was given the opportunity to bid on the property at the same time SLH was, but the Redevelopment Agency and the City were not interested. The City also had ample opportunity to condemn the property while it was still in Conrail's hands, but did not do so.⁶ A decision in the City's favor could not only place a cloud on Conrail's transaction with the Intervenor, but also on Conrail's transaction with National Bulk Carriers and any other entity that the City or some other party could claim involved a "line of railroad" in the Harsimus Cove Yard area. In an analogous context, where parties seek to revoke exemptions under 49 U.S.C. § 10502 after a transaction has closed, the Board has made

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But it was not until 2005, when Conrail was well along in the process of closing the sale of the property to the Intervenor, that he began to inquire about the City's condemning the property. Conrail never made any representation to Mr. Curley on anyone else that it would hold up the sale of the property pending the City's consideration of whether to condemn the property. In fact, Mr. Fiorilla could not have made clearer that Conrail intended to honor its obligation to SLH. (Fiorilla VS at 2-3.) When Conrail did so, it certainly did not do so to evade the City's condemnation rights. The City has the same right to condemn the property in the hands of a developer as in Conrail's hand. (Fiorilla VS at 4.)

⁶ The embankment lead ceased being transportation property for purposes of 49 U.S.C. § 10501(b) when Conrail tore out all of the rail infrastructure in 1997 and offered the embankment parcels for sale for development purposes. If the City or the Redevelopment Agency had wanted the property and could not negotiate a purchase with Conrail, they could have initiated condemnation proceedings at any time.

clear that "concerns for administrative finality, repose, and detrimental reliance must be balanced against any benefits to be derived from reopening and revocation of the exemption." STB Fin. Dkt. No. 32162, *Indiana Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Co. Line Between Rochester & Argos, IN* (served Jan. 30, 1998), slip op. at 4-5. By the same token, the Board should look with a particularly skeptical eye on the City's belated effort to use the Board's processes to disrupt Conrail's settled transaction with the Intervenors.

CONCLUSION

For the foregoing reasons, the Board should deny the City's request for declaratory judgment and find that Conrail did not require abandonment authority from the ICC or the STB to dispose of the property at issue in this case.

Respectfully submitted,

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Dated: April 24, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36078

PETITION FOR DECLARATORY ORDER

(HUDSON STREET INDUSTRIAL TRACK/HARSIMUS BRANCH, JERSEY CITY, NJ)

REPLY OF CONSOLIDATED RAIL CORPORATION IN OPPOSITION

Consolidated Rail Corporation ("Conrail") submits this reply in opposition to the petition for declaratory order (hereinafter, "Petition" or "Pet.") filed by James Riffin ("Riffin") in the above-referenced docket. In his Petition, Riffin asks the Board to open a declaratory order proceeding to address the regulatory status of the former Hudson Street Industrial Track ("Hudson Street IT") and certain property within the former Harsimus Cove Yard. The Petition should be denied for multiple reasons.

First, the Board has no jurisdiction to initiate the declaratory order proceeding sought by Riffin. The law in this case is crystal clear that only the United States District Court for the District of Columbia, sitting as the successor to the Special Court under the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, has jurisdiction to determine the regulatory status of Harsimus Cove properties formerly owned by Conrail. *See Consolidated Rail Corp. v. STB*, 571 F.3d 13, 18-20 (D.C. Cir. 2009) ("*Consolidated Rail Corp.*").

Second, Riffin has never suggested, much less demonstrated, any interest in any Harsimus Cove properties east of Marin Boulevard—except as part of properties he might include in an offer of financial assistance ("OFA") in Docket No. AB-167 (Sub-No. 1189X), *Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, NJ*. But any OFA

plans Riffin may have had in that proceeding are moot, because he has been dismissed from the proceeding by Order served October 26, 2016 (Administrative Law Judge Dring). Absent reopening and reversal of the October 26 Order, Riffin can point to no benefit he would receive, or that anyone else would receive, from the Board's instituting a declaratory order proceeding.

Third, even if the Board had jurisdiction to entertain a declaratory order proceeding, and even if Riffin still had a putative OFA interest, the Board would still not be justified in instituting a proceeding. The reason is that Riffin's supposed OFA interest is a demonstrable sham, and so is Riffin's petition for declaratory order. In addition to the Riffin discovery abuses that resulted in the October 26 Order barring him from the abandonment proceeding, the City of Jersey City ("City") has demonstrated at length that Riffin has no interest in providing rail service east of Marin Boulevard. He simply wants to extort a "settlement." *See* "Motion on Behalf of City of Jersey City, et al. for Sanctions Against James Riffin," filed September 15, 2016, in Docket No. AB 167 (Sub-No. 1189X), at pp. 8, 12-13, 14-15, Exh. G, Exh. I. The STB should not permit its OFA processes to be so abused.

ARGUMENT

Conrail presumes the Board's familiarity with Riffin and the history of the Harsimus abandonment case and related proceedings. Rather than repeat facts and contentions with which the Board is likely all too familiar—thereby inviting additional motions from Riffin to "supplement" the record, or "reply to a reply"—we will proceed directly to the arguments for the denial of Riffin's Petition.

I. THE BOARD HAS NO JURISDICTION TO INITIATE THE DECLARATORY ORDER PROCEEDING SOUGHT BY RIFFIN

"Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty where the Board has subject-matter

jurisdiction.” STB Docket No. 42055, *Household Goods Carriers' Bureau Comm.—Pet. for Declaratory Order*, slip op. at 1 (STB served Mar. 28, 2001), *reconsideration denied (Entire Board)* (STB served July 13, 2001). The Board does not have subject-matter jurisdiction to resolve the issues that Riffin seeks to raise.

As Riffin notes, the properties at issue were conveyed to Conrail under the Final System Plan (“FSP”) of the United States Railway Association (“USRA”). See Pet. ¶ 6, at 2. Conrail has consistently taken the position that neither the properties constituting the defunct Hudson Street IT nor the properties constituting the defunct Harsimus Cove Yard were conveyed as regulated lines of railroad. Rather, they constituted spur and yard track over which the Board had no abandonment authority.¹

The D.C. Circuit has definitively determined that only the U.S. District Court for the District of Columbia, *qua* Special Court, has jurisdiction to determine whether properties that Conrail claims were conveyed by USRA as spur and yard track were in fact conveyed as regulated main line track. The D.C. Circuit specifically determined that the Board “lack[s] jurisdiction to resolve the question of the nature of the trackage.” *Consolidated Rail Corp. v. STB*, 571 F.3d 13, 20 (D.C. Cir. 2009).²

¹ In the Special Court, Conrail stipulated that it would *not* contest the regulatory status of the Harsimus Embankment properties west of Marin Boulevard. See *City of Jersey City v. Consolidated Rail Corp.*, 968 F. Supp. 2d 302, 303-05 (D.D.C. 2013), *aff'd*, 2014 WL 1378306 (D.C. Cir. Feb. 19, 2014) (per curiam). Conrail, however, neither affirmatively agreed that those properties actually were part of rail line nor entered into *any* stipulation about the property east of Marin, including the former Harsimus Cove Yard and the former Hudson Street IT, and, as noted in the text, Conrail continues to contest the regulatory status of the former Harsimus Cove Yard and the former Hudson Street IT.

² The Board was not asked by the City of Jersey City to decide, and did not decide, the regulatory status of any Harsimus Cove Yard or other properties east of Marin Boulevard. See Docket No. 34818, *City of Jersey City, et al.—Pet. for Declaratory Order*, Decisions served August 9, 2007, slip op. at 1, and December 19, 2007, slip op. at 5-6 and n.10. The Special Court likewise limited its proceedings to a determination, as requested by the City of Jersey City,

Riffin tries to evade this insurmountable obstacle to his Petition by invoking a distinction between how the track was *conveyed* and how it was *used*. But here, that is a distinction without a difference.

The Board and the D.C. Circuit were provided evidence of how the Harsimus Embankments, Harsimus Cove Yard, and Hudson Street IT were used in the early- to mid-1980s, after they were conveyed to Conrail. The City of Jersey City and its co-petitioners in Docket No. 34818 introduced such evidence in Appendix I to their Opening Statement, and Conrail introduced other such evidence. The Board cited some of that evidence in its August 2007 decision in Docket No. 34818. *See* FD No. 34818, *City of Jersey City, et al.—Pet. for Declaratory Order*, slip op. at 4 (STB served Aug. 9, 2007) (hereinafter, “STB Aug. 2007 Decision”). And the D.C. Circuit cited of some of the evidence of Conrail’s post-conveyance usage in its decision reversing the Board’s disposition of Docket No. 34818. *See Consolidated Rail Corp.*, 571 F.3d at 17.

Evidence of post-conveyance usage also was included in the Joint Appendix in the D.C. Circuit proceedings. *See* Joint Appendix in D.C. Circuit Case No. 07-1401 & consolidated cases at JA-000330-35, JA-000824, JA-000864 (Planning Board Report noting that “[t]hrough the last two decades of our Century, Penn-Central’s corporate successor, Conrail, used the line more as an extended siding for its intermodal operations than to deliver goods to our locality”); JA-00865.

whether the properties west of Marin Boulevard were conveyed as regulated properties. The Special Court specifically rejected the LLCs’ motion to enlarge its proceedings to encompass the Hudson Street IT and other track east of Marin Boulevard; and the D.C. Circuit summarily rejected the LLCs’ appeal. *See City of Jersey City*, 968 F. Supp. 2d at 306-07; *City of Jersey City v. Consolidated Rail Corp.*, 2014 WL 1378306 (D.C. Cir. Feb. 19, 2014) (per curiam) (summarily affirming district court decision).

Yet despite this evidence, neither the Board nor the D.C. Circuit viewed the post-conveyance usage as material to the question whether the Board, rather than the Special Court, had jurisdiction to resolve the issues about the status of the trackage. This is readily explicable.

Post-conveyance usage could be material only if that usage *changed* the status of the track from its status at conveyance—that is, if a change in the use of the track transformed trackage that was, or might have been, conveyed as non-jurisdictional track into jurisdictional rail lines. Here, there is no basis for an argument that post-conveyance usage of the Harsimus Cove Yard or the Hudson Street IT had such a transmogrifying effect.

To make such an argument, there would have to be evidence of an *increase* and *change in character* of the use of the track, post-conveyance. But of course, there is no such evidence. To the contrary, as the evidence recited by the Board in the August 2007 decision in Docket No. 34818 shows, traffic *decreased* over time. *See* STB Aug. 2007 Decision at 4. Thus, in this case, there is no basis for distinguishing between the property's status at conveyance and its post-usage status. Notwithstanding the distinction that he tries to draw between conveyance and use, the only issue Riffin could frame as a legal matter is how the Harsimus Cove Yard and Hudson Street IT were conveyed in the FSP; and that is an issue within the "exclusive jurisdiction" of the "district court *qua* the Special Court." *Consolidated Rail Corp.*, 571 F.3d at 20.

Because Riffin's Petition seeks a determination outside the scope of the Board's jurisdiction, it must be denied. *See* STB Docket No. 42055, *Household Goods Carriers' Bureau Comm.*, slip op. at 1-2 (STB served Mar. 28, 2001) (denying petition to institute a declaratory order proceeding because issue raised was outside the Board's jurisdiction).³

³ That the Special Court has exclusive jurisdiction to make the determination sought by Riffin does not, of course, mean that Riffin could successfully invoke that court's jurisdiction. As noted below (*see infra* at 7-8), Riffin would face extremely difficult, if not insuperable, barriers

II. RIFFIN IS RAISING A PURELY ABSTRACT ISSUE CONCERNING WHICH HE HAS NO COGNIZABLE INTEREST

Although the Board is not bound by standing and case or controversy requirements applicable in Federal courts, the Board has made clear that it will not institute declaratory order proceedings to resolve abstract issues that lack significance to the industry or that are not ripe. *See* Docket No. MC-C-30205, *USX Corp, U.S. Steel Grp.—Pet. for Declaratory Order*, 1992 WL 322948, at *2 (Served Nov. 9, 1992) (“[T]he Commission has broad discretion in considering [requests for declaratory orders]. In exercising its discretion, the Commission considers many factors, including significance to the industry and ripeness of the controversy. The Commission may deny a petition where it finds that the need for the determination petitioners seek is premature, i.e., where it is not shown that such a proceeding is necessary to terminate an active controversy.”); Docket No. 40717, *Thomasville Furniture Indus., Inc.—Pet. for Declaratory Order—Effectiveness of Contract*, 1992 WL 26632, at *1 (Feb. 12, 1992) (“Declaratory orders may be issued by an agency to ‘terminate a controversy or remove uncertainty’ 5 U.S.C. 554(e). The Commission has broad discretion as to whether and to what extent to issue a declaratory order and has developed criteria to be followed in exercising this discretion. In exercising its discretion, the Commission considers, among other things, the ripeness of the controversy and the issue’s significance to the industry.”) (citations omitted); Docket No. MC-C-30118, *Union Oil Co. of Calif., Chemicals Div., and Laughlin Trucking, Inc.—Pet. for Declaratory Order*, 1988 WL 226238, at *1 (Dec. 20, 1988) (“[O]ur present policy . . . is not to accept [declaratory order petitions] where there is not a true controversy.”).

to establishing standing and other case or controversy requirements in the Special Court with regard to the status of the former Harsimus Cove Yard, even if the Board were to reverse ALJ Dring’s order striking Riffin’s notice of intent to file an OFA and prohibiting him from participating in the Harsimus abandonment proceedings. And there is no discernible basis for his standing to present a Special Court argument with regard to the Hudson Street IT.

Here, Riffin seeks to raise an issue concerning the regulatory status of the former Harsimus Cove Yard and the former Hudson Street IT concerning which he has no cognizable interest. He does not purport to be a shipper located on or near the former Harsimus Cove Yard or the former Hudson Street IT. And he does not purport to own any property in the area.

Indeed, his only remotely cognizable interest in any of this property derives from a notice of intent to make an OFA, which he submitted in the Harsimus Embankments abandonment case for property in the former Harsimus Cove Yard that he alleges he needs to turn around trains. But as the Board well knows, in an order served October 26, 2016, Administrative Law Judge Dring (i) struck Riffin's notice of intent and all his other pleadings in the Harsimus Embankments dockets, (ii) prohibited Riffin from introducing anything further into evidence in those dockets, (iii) dismissed Riffin from those proceedings and barred him from further participation, and (iv) ordered Riffin to "pay City et al.'s counsel fees." ALJ Dring's October 26, 2016 Order at 2. ALJ Dring imposed these sanctions in response to a motion by City of Jersey City et al., for failure to respond to discovery requests in violation of one of ALJ Dring's orders. *Id.* at 1-2. ALJ Dring also stated he was "making a demeanor credibility determination in which [he found] that Mr. Riffin is not a reliable witness as to the truth of the matter to which he asserts. His deportment suggests evasiveness, deliberate obtuseness, faulty memory, and mental reservation." *Id.* at 2.

Riffin has appealed ALJ Dring's order.⁴ If the order stands, Riffin would have no cognizable interest of any kind in the former Harsimus Cove Yard. (He does not have any

⁴ The City et al. have persuasively argued that, in appealing the ALJ's order pursuant to 49 C.F.R. § 1115.2, Riffin has chosen the wrong rubric for challenging the order. *See* City of Jersey City, et al.'s Comment in Opposition "Appeal of an Initial AJL Decision" Filed Nov. 14 by Mr. Riffin at 6-7.

interest in the former Hudson Street IT regardless of the fate of ALJ Dring's order,⁵ and it is certainly highly questionable whether a notice of intent to make an OFA would create an interest that would be recognized in a Federal court.)

Thus, at least with regard to Riffin's interests, the Petition would raise purely abstract issues, rather than a "true controversy" (No. MC-C-30118, *Union Oil Co. of Calif., Chemicals Div., and Laughlin Trucking, Inc.—Pet. for Declaratory Order*, 1988 WL 226238, at *1). As such, Riffin's Petition clearly is either moot or not ripe for consideration and would properly be subject to dismissal under the Board's precedent with regard to declaratory order petitions.

III. THERE IS NO ACTUAL CONTROVERSY OR UNCERTAINTY

Finally, the controversy and uncertainty upon which Riffin purports to base his Petition have been concocted by Riffin himself to further his abuse of Board procedures and remedies as part of a strange and elaborate plot to extract a settlement for the benefit of the LLCs that own some of the Harsimus Embankments property. City et al. have presented evidence that Riffin filed both his OFA and a lawsuit against current owners of property in the former Harsimus Cove Yard in order to force Conrail and the City to enter into a settlement that would benefit the LLCs, with Riffin getting a commission from the LLCs. The LLCs have denied any agreement with Riffin, but that is neither here nor there. Even in the absence of an agreement—that is, even if Riffin were acting on his own—his improper motives are manifest for (a) filing a notice of intent to make an OFA, (b) bringing suit against the owners of property in the former Harsimus Cove Yard, and (c) filing the instant Petition.

⁵ In his late-filed "Third Supplement to Petition for Declaratory Order" Riffin attempts to create an interest in the former Hudson Street IT by asserting in paragraphs 18-21 and 23.B. that he may acquire a parcel from which he suggests he could require Conrail to ship aggregates, or perhaps ship aggregates over the New Jersey Transit tracks in the area. This last-minute assertion is not only wholly unsupported but transparently impracticable.

For instance, in Exhibit G to the City et al.'s September 15, 2016 motion for sanctions against Riffin, the City et al. provided a memo from Riffin to an attorney named Bruce Nagel. The memo outlined a strategy to "[p]ersuade Conrail to negotiate a settlement with Steve Hyman, Jersey City, Riffin and Wasser/Forest City" that would include Riffin's obtaining an injunction to prevent further development of portions of the former Harsimus Cove Yard and inducing the current owners there to "sue Conrail for \$800 million." Memo at 1. Riffin would then lift his injunction upon Conrail's agreement to "an acceptable settlement" as outlined in the memo. *Id.* The strategy, to a great extent, hinged on legal rights supposedly accruing from Riffin's notice of intent to make an OFA (*id.* at 1-2), and the legal argument allegedly supporting the gambit turned, in part, on the regulatory status of the former Hudson Street IT and the former Harsimus Cove Yard (*id.* at 3-7). Riffin went on to describe "Riffin's strategy" as follows: "Riffin desires to stop **all** construction, including construction on the Pep Boys site. To do that, it must be established that the Pep Boys site is still subject to the STB's jurisdiction, and is still subject to the OFA process." *Id.* at 7. Riffin closed the memo by asking, "What is the likelihood that Forest City would sue Conrail? And that Forest City's suit against Conrail would induce Conrail to negotiate a settlement? (Which is the ultimate goal.)." *Id.* at 10.⁶

The City et al. also have submitted a "Certification" of Gregg Wasser. He is the "Wasser" referred to in Riffin's memo to Nagel and the President of Jersey City Associates Inc, the General Partner of G&S Investors/Jersey City, L.P.—which is a member of the group developing part of the former Harsimus Cove Yard and was a defendant in the action brought by Riffin to enjoin construction in the former yard. Mr. Wasser relates a July 20, 2016 meeting with Steven Hyman at which Riffin showed up, without being invited but apparently with Hyman's

⁶ For the convenience of the STB, we are attaching a copy of Exhibit G of the City's motions for sanctions as an exhibit.

knowledge. According to Mr. Wasser, Riffin said that “he had told Mr. Hyman that he wanted 5% of whatever monetary recovery the LLCs might obtain through the resolution of their dispute with Jersey City and Conrail. Mr. Hyman permitted Mr. Riffin to present me an argument on why Conrail should pay the Hyman LLCs to settle the dispute. Consequently, I understand that Mr. Hyman had agreed to pay to Mr. Riffin 5% of whatever recovery the Hyman LLCs might receive.” Wasser Certification at 2 (attached to City et al’s Oct. 20, 2016 reply to the LLCs’ motion for sanctions).⁷

Whether or not Mr. Wasser’s understanding about an agreement between Hyman and Riffin is correct, and whether or not any such agreement constitutes an agreement with the LLCs, it is clear that Riffin is engaged in an elaborate scheme to misuse Board processes and remedies, including the OFA procedures and the declaratory order proceedings rules, for purposes that have nothing at all to do with protecting Board jurisdiction over freight rail transportation or continuing freight rail transportation on lines slated for abandonment. In short, Mr. Riffin has ginned up a non-existent controversy to advance his improper scheme to extract money from Conrail and, possibly, others as well.

As noted above, petitions to initiate declaratory order proceedings have been rejected when it has become apparent that no “true controversy” exists. *See, e.g.,* Docket No. MC-C-30118, *Union Oil Co. of Calif., Chemicals Div., and Laughlin Trucking, Inc.—Pet. for Declaratory Order*, 1988 WL 226238, at *1. Here, there is no “true controversy” and no genuine uncertainty. Rather, Riffin is attempting to stir up a controversy or uncertainty to advance his illicit purposes.

⁷ For the convenience of the STB, we also are attaching Mr. Wasser’s certification as an exhibit.

CONCLUSION

The Board should not allow the integrity of its processes to be abused in this manner. Rather, the Board should exercise its "broad discretion" to decline to initiate a declaratory proceeding. *See, e.g., No. 40717, Thomasville Furniture Indus., Inc.—Pet. for Declaratory Order—Effectiveness of Contract*, 1992 WL 26632, at *1.

The Petition should be denied.

Respectfully submitted,

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December 5, 2016

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that on this 5th day of December, 2016, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following, who either appear on the STB's service list:

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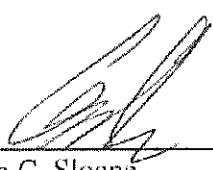
In addition, I have emailed a courtesy copy of the foregoing to those listed above and have mailed and emailed courtesy copies of the foregoing to the following:

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