

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins, III
Direct Tel +1 202 263 3261
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

June 29, 2017

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. AB 167 (1189X) and associated
dockets

Dear Ms. Rutson:

In their June 19, 2017 filings, City of Jersey City, et al. (hereinafter, referred to as the "City") and other commenters argue that the historic review process should be halted pending resolution of their claims that Conrail has violated Section 110(k) of the National Historic Preservation Act ("NHPA"). As a related matter, they also argue that, before the abandonment and historic review can proceed, the sale of the Embankments to the LLCs should be voided because the STB would not otherwise be in a position to mitigate harms under NHPA. (The City also alludes to issues with regard to the availability of discovery concerning Section 110(k) issues.) The City and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition") also urge OEA to designate the entirety of the Harsimus Branch from approximately Marin Boulevard to CP Waldo as eligible for inclusion in the National Register as an Historic District, and they speculate about Conrail's plans for property that Conrail owns. In significant respects, the arguments on these issues are incorrect or seriously misleading, and therefore Conrail files this letter to correct the record.¹

Before turning to these matters, however, Conrail wishes to respond briefly to the "Supplemental/Correction Comments" filed by the City on June 23, 2017. In those comments, the City assails OEA's use of the contractor, RGA, Inc., in connection with the abandonment because that firm has previously done work for Conrail. The City also attacks the RGA Statement of Work. Despite the fact that the Statement of Work was docketed in the outgoing environmental correspondence files as number EO 2640, with a "Letter Date" of July 28, 2015, the City claims to have only just discovered its existence.

¹ If this letter is deemed a reply to a reply requiring leave to file, Conrail hereby requests leave to file in order to correct the record and address issues that were not raised in the Cultural Resources Identification Report.

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Little need be said in response to this transparent attempt to further delay these proceedings, except to point out that the City has known of RGA's role in this phase of the case for at least a year—and probably longer. RGA was in attendance and made a presentation at a meeting concerning historic review issues, which was held at the STB and attended by counsel for the City on March 2, 2016. RGA was also present at a public meeting in Jersey City on May 24, 2016 concerning historic preservation issues in this proceeding. To our knowledge, the Statement of Work about which the City professes surprise and concern was posted in the STB's environmental dockets for public review shortly after it was signed in late July 2015. That the City is claiming to have just discovered the issues that it raises in its Supplemental/Correction Reply Comments is simply not credible.

In addition, the City unaccountably ignores a Memorandum of Understanding among Conrail, the STB, and RGA that is posted right above the Statement of Work in the online docket of outgoing environmental correspondence files. That Memorandum of Understanding is docketed as EO 2639 and, like the Statement of Work (EO 2640), has a "Letter Date" of July 28, 2015. The Memorandum of Understanding contains numerous provisions to assure RGA's independence from Conrail in the historic review project. Here again, it is simply not credible that counsel for the City did not notice this document. In light of all this, it is clear that the City's belated complaints are merely another delaying tactic.

Just as the Board, at the instigation of the *City*, has refused to countenance a "pattern of conduct of obstruction and delay" on the part of a now-former participant in this proceeding (see the decision in this proceeding served April 28, 2017, slip op. at 10), so, here, the Board should reject the City's patent "dilatatory and obstructive" (*id.* at 11) attempt to make an issue of matters that the City knew or should have known about for no less than a year (and more likely close to two years). The City's arguments about RGA's role in this matter should be rejected as dilatatory, meritless, and obstructionist.

We turn now to the June 19, 2017 comments.

1. Section 110(k), Voiding the Deeds, and the Availability of NHPA Remedies

For more than a decade, the City and other commenters have been claiming that Conrail wrongfully sold the Embankments with knowledge that they were part of a regulated line of railroad. The City has been specifically alleging Section 110(k) violations since at least 2008. The Board already has considered and rejected these allegations. In fact, in March 2009, the Board, in the Environmental Assessment, addressed them at length. The Board's discussion of the matter bears quoting:

The SHPO and others, including the City, argue that the historic review process should not proceed because Conrail has engaged in "anticipatory demolition" in violation of Section 110(k) of NHPA. Section 110(k) permits an agency to suspend processing of an application when "an applicant who, with intent to avoid the

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requirements of [Section 106], has intentionally significantly adversely affected a historic property.” 16 U.S.C. 470h-2(k). In support of their anticipatory demolition argument, these parties assert that Conrail should have known that the Harsimus Branch was a “line of railroad” requiring abandonment authority from the Board and that by removing bridges and track structure, Conrail demonstrated intent to harm the Embankment.

This argument fails because the parties making this argument have not demonstrated any intent on Conrail’s part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board’s environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts.

Environmental Assessment, slip op. at 14 (served March 23, 2009).²

This did not stop the City and its allies from continuing to beat the drum on their Section 110(k) claims. Conrail answered those claims many times, perhaps most fully in an October 7, 2014 Reply to the City’s motion to compel responses to discovery requests. For the convenience of OEA and the parties, we are attaching that reply to this letter as Exhibit 1.

Throughout the proceedings involving the Harsimus Branch, the City and other parties have had ample opportunities to delve into the question of Conrail’s intent and actions with regard to the sale of the Embankments to the LLCs. In Finance Docket No. 34818—the declaratory order proceeding relating to the jurisdictional status of the Embankments—there was

² The Board’s summary of the facts about the City’s role in the redevelopment and re-purposing of the Harsimus Branch was in accord with its August 2007 decision in FD 34818, *City of Jersey City, et al.—Petition for Declaratory Order*, slip op. at 4-5.

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a great deal of discovery that resulted in the production of documents concerning the Embankments' jurisdictional status, the sale of the Embankments to the LLCs, and what Conrail believed about the Embankments' status.

Moreover, the City was afforded additional opportunities for discovery during the abandonment proceedings. Thus, in a decision served on May 22, 2015, the Board granted in part the City's motion to compel discovery relating to Section 110(k) matters. *See* May 22, 2015 Decision, slip op. at 5 ("In both motions to compel, the City Parties argue that they are entitled to the requested documents because they relate to the claim that Conrail and NSR and/or CSXT intended to avoid the requirements of Section 306108 of the NHPA."). Conrail served its responses to the discovery requests on June 19, 2015.

Subsequently, on February 2, 2017—*after* the Board had assigned discovery matters in the proceedings to an Administrative Law Judge ("ALJ") and *after* discovery had closed pursuant to the ALJ's order, the City filed a motion to compel Conrail to produce yet more documents. This time, the City demanded documents from the files of Conrail's designated corporate representatives in a state court case relating to the property sold to the LLCs. After communications with Conrail's counsel, the City, on February 7, 2017, withdrew the motion to compel. Subsequently, on February 27, 2017, Conrail—without conceding that it was under an obligation to produce documents in response to the City's request, and without conceding that the documents were, in fact, responsive—produced additional documents to the City. Then, on March 20 and March 21, 2017, Conrail also produced to the City transcripts and exhibits from the depositions of the corporate representatives in the state court case.

The City, therefore, has had an adequate opportunity for discovery relating to its spurious Section 110(k) allegations, and has even received documents and deposition transcripts that it requested *after* the close of discovery. Those documents do not provide an iota of support for the City's allegations. Thus, there is no basis whatsoever for OEA to reconsider its March 2009 conclusion that no party had made any demonstration that Conrail improperly demolished historic properties or otherwise violated Section 110(k).

Moreover, there is no basis for claims that, unless the Section 110(k) issues are addressed first, and the deeds of sale to the LLCs are voided, the STB will be unable to afford remedies under NHPA. As an initial matter, as Conrail showed in the October 7, 2014 Reply to the City's motion to compel responses to discovery requests (Exhibit 1, at 13-14), neither Section 110(k) nor Board precedent supports the existence of STB authority to void the deeds in this case.

In addition, as Conrail also showed (*id.* at 14-15), voiding the deeds would have no effect on the NHPA remedial issues. First, as a result of the STB's determination that the property at issue is a jurisdictional line of railroad, Conrail necessarily retains a constructive easement over that property. Second, once abandonment is approved, the City can use applicable state procedures to obtain the property, regardless of who owns it. And third, the mitigation options available to the Board can be invoked, if necessary, even if the property remains in the hands of the LLCs.

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The Board has repeatedly held that the mitigation options available to it under Section 106 are “very limited . . . [A]s a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us.” *Implementation of Env'tl. Laws*, 7 I.C.C.2d 807, 828-29 (1991). The ICC and the STB have adhered to that principle. See *Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Union Pac. R.R. Co.—Abandonment and Discontinuance of Trackage right Exemption—In Los Angeles County, CA*, Docket No. AB-33 (Sub-No. 265X), 2008 WL 1968727 (served May 7, 2008). Because the LLCs have been denied a waiver of Jersey City’s Historic Landmark Designation, the LLCs cannot carry out any demolition of the Embankment properties if the STB grants abandonment authority. Moreover, Conrail would provide the documentation contemplated in *Implementation of the Environmental Laws* for the Harsimus Branch regardless of the LLCs’ ownership of the fee interest in the Embankment properties and the ownership by multiple other parties of the fee interest in the properties underlying the Harsimus Branch east of Marin Boulevard. On these points, we refer OEA also to Conrail’s Reply to the “Additional Supplemental Comments” of Jersey City, et al., which Conrail filed on October 15, 2014, and which we are attaching as Exhibit 2 for the convenience of OEA and the parties.

2. Whether the Harsimus Branch From Marin Boulevard To CP Waldo Is Eligible for Inclusion in the National Register

Contrary to the reasoned conclusion in the Cultural Resources Identification Report, the City, its consultants, and the Coalition assert that the entire Harsimus Branch from Marin Boulevard to CP Waldo (which the Coalition locates at approximately Chestnut Street) should be recommended for listing on the National Register as an Historic District. On the apparent premise that any evidence of past rail operations in Jersey City is of lasting historical interest, the commenters apparently believe that, because the detritus of parts of the Harsimus Branch can still be detected beneath the brush in the area west of the Embankment properties up to CP Waldo, that area should be included in the National Register.

To buttress this claim, the Coalition and one of the City’s consultants point to three listings in the National Register, only one of which is a former rail line. They note that the nominations for these three listings indicate that portions of them were paved over, destroyed, or otherwise were no longer visible or intact. This is true but irrelevant because in each case, far more of each of the historic properties was intact and recognizable as at least a semblance of its former self than is the case with the Harsimus Branch, especially the portion west of the Embankments properties to CP Waldo.

Thus, the Coalition trumpets the Union Pacific Park City Branch RR Grade, which is in the National Register despite the fact that one segment was “much modified.” Coalition Cmts. at 32. The Coalition quotes the UP corridor’s Nomination with regard to that segment (*id.*), but fails to attach the Nomination itself to its comments or to note that the UP corridor Nomination describes many intact structures on the corridor and concludes that “[i]n general, the features of this structure appear to have been built and modified during the historic period, 1873-1945. The

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railroad grade, culverts, and bridges are in good condition and retain their structural and visual integrity.” Union Pacific Park City Branch Railroad Grade, Park City, Summit County, UT, Continuation Sheet Section 7 Page 2.

By no stretch of the imagination could the same be said about the Harsimus Branch at any point, and certainly not about the portion west of the Embankment properties up to CP Waldo. Since a picture truly is worth a thousand words in this case, we invite OEA to compare the photographs that accompanied the UP corridor Nomination with the photographs taken of the recent inspection of the Harsimus Branch segment west of the Embankment properties that accompany the Coalition comments and the statements of the City’s retained experts. Unlike the Harsimus Branch between the Embankment properties and CP Waldo, the UP corridor looks like a former rail line. We invite OEA and interested and consulting parties to review the UP corridor Nomination and photographs at

<https://npgallery.nps.gov/pdfhost/docs/NRHP/Text/96000413.pdf>, and <https://npgallery.nps.gov/pdfhost/docs/NRHP/Photos/96000413.pdf>, respectively.

The Delaware and Raritan Canal, cited by one of the City’s experts, also was in incomparably better shape than is the portion of the Harsimus Branch between the Embankment properties and CP Waldo. For instance, the Nomination for that canal states that “[m]any of the lock tender and bridge tender dwellings remain along the canal.” Continuation Sheet (3). (The Nomination is available on the internet at <https://npgallery.nps.gov/pdfhost/docs/NRHP/Text/73001105.pdf>, and the photographs are at <https://npgallery.nps.gov/pdfhost/docs/NRHP/Photos/73001105.pdf>.) The Delaware and Raritan Canal Nomination also quotes a 1945 report that observes that “[e]nough present canal structures show the original construction to permit a relatively easy restoration of desirable units and canal waterway as part of the recreational development.” Continuation Sheet (7). Again, the same could not possibly be said of the Harsimus Branch between the Embankment properties and CP Waldo, and a comparison of the photographs accompanying the Delaware and Raritan Canal Nomination with those taken by the intrepid band that inspected the portion of the Harsimus Branch between the Embankment properties and CP Waldo reveals the stark differences in historical integrity between the canal and the Harsimus Branch.

Finally, with regard to the Morris Canal, which is cited by one of the City’s experts, it is difficult to determine whether there are portions of that canal that are as devoid of historic integrity as is the portion of the Harsimus Branch from the Embankment properties to CP Waldo. The Nomination and accompanying photographs of the Morris Canal do indicate that much of the canal was paved over or otherwise obliterated. (The Nomination is available at <https://npgallery.nps.gov/pdfhost/docs/NRHP/Text/74002228.pdf>, and the photographs are at <https://npgallery.nps.gov/pdfhost/docs/NRHP/Photos/74002228.pdf>.) That it nonetheless was listed in its entirety in the National Register, however, does not mean that the entirety of the Harsimus Branch deserves to be listed. For one thing, it is clear that far more of that canal remained intact than do the remains of the Harsimus Branch.

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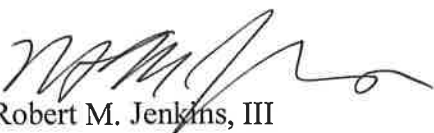
3. Comments Regarding Conrail's Plans for the Property

Finally, with regard to comments about Conrail's planned post-abandonment reuse of the portions of the Harsimus Branch that it still owns, Conrail already has addressed these issues in a letter dated February 29, 2016. That letter is posted in the OEA's incoming environmental correspondence files, and is docketed as EI-21355. There, Conrail addressed the same sorts of claims about Conrail's plans as the City makes now. What Conrail said in the February 2016 letter remains true today.

* * *

It appears that a primary motive of a number of the commenters is to continue to obstruct and delay the completion of these proceedings by needlessly complicating the issues and raising meritless arguments, many of which already have been thoroughly vetted and rejected by the Board. We hope that OEA firmly rejects such obstructionism. As Conrail noted in concluding its June 19, 2017 comments, should the Section 106 review process continue to drag on, Conrail reserves all legal options to seek to accelerate the process or bring it to a close.

Sincerely,



Robert M. Jenkins, III

Enclosures

cc: Consulting and Interested Parties
Charles H. Montange
Eric Strohmeier

EXHIBIT 1

236773
236774
236775

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
October 7, 2014
Part of
Public Record

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**

**REPLY OF CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION,
INC., AND NORFOLK SOUTHERN RAILWAY COMPANY
TO “MOTION ON BEHALF OF CITY OF JERSEY CITY ET AL TO COMPEL
CONSOLIDATED RAIL CORPORATION ET AL
TO RESPOND TO DISCOVERY (DOCUMENT) REQUESTS”**

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSX”), and Norfolk Southern Railway Company (“NS”) hereby reply to the Motion to Compel (“Motion” or “Mot.”) filed by the City of Jersey City (“City”), Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, “City Parties”) in the above-referenced proceedings. The Motion seeks an order directing Conrail, CSX, and NS to respond to document requests tendered by the City Parties on or around August 11, 2014.¹

¹ The City Parties assert that CSX and NS “made no response at all, by objection or otherwise, to the document requests and thus are in default.” Mot. at 2. This contention, which is unsupported by argument or citations to authority, is meritless. These proceedings primarily address a Conrail abandonment request, and the discontinuance notices filed by CSX and NS are ancillary to the Conrail request. Conrail has been the active railroad party throughout these proceedings.

As set forth in further detail below, the discovery requests seek, among other things, documents and information relating to the sale of the property at issue in this proceeding, a 2007 Memorandum of Understanding (“MOU”) and any other agreements between Conrail and the purchasers of the property at issue here (hereinafter the “LLCs”), Conrail policies relating to the approval of sales and agreements, information identifying Conrail directors and other individuals, documents relating to communications with other entities, documents addressing the constitutionality of statutes of five states, and a litany of other matters.

For the reasons set forth below, the motion should be denied.

ARGUMENT

Discovery is disfavored in abandonment proceedings. *See Ind. Sw. Ry. Co.—Abandonment Exemption—in Posey & Vanderburgh Counties, Ind.*, STB Docket No. AB 1065X, slip op. at 4 (served Feb. 11, 2011); *Cent. R.R. Co. of Ind.—Abandonment Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Counties, Ind.*, STB Docket No. AB459 (Sub-No. 2X), slip op. at 4 (served Apr. 1, 1998). “Parties seeking discovery in abandonments must demonstrate both relevance and need.” *Ind. Sw.*, slip op. at 4. The City Parties have not carried that burden.

I. **THE CITY PARTIES’ BASELESS ALLEGATIONS OF FRAUD AND VIOLATIONS OF NHPA SECTION 110(K) ARE INADEQUATE TO JUSTIFY DISCOVERY IN THIS PROCEEDING**

As characterized by the City Parties, their discovery is intended to inquire into “matters relating to the fraudulent misrepresentation allegations [made by the LLCs] and . . . the

The City Parties served the requests upon Conrail’s outside attorney as counsel for all three entities. Conrail’s counsel consulted with counsel for CSX and NS concerning its responses on their behalf, and it was clear that Conrail’s objections were lodged on behalf of all three entities.

agreements to further the fraudulent misrepresentations and to deny meaningful relief to the City.” Mot. at 6.

In a recent letter motion filed with the Board, the City Parties have provided what may be the clearest articulation of their overall position in this matter—a position that forms the ultimate ground for their attempt to obtain discovery from Conrail, CSX, and NS: “City of Jersey City takes the position that [Conrail’s] unlawful sale of a large portion of the Harsimus Branch to the LLCs in 2005 should be voided, and that Conrail should be directed to transfer the property on equivalent terms to the City as a remedy for, inter alia, the violation of NHPA section 110(k) and evasion of STB jurisdiction and remedies that the unlawful sale represents. This Board’s ‘OFA’ remedy would result in similar relief. . . . City is interested in the most expeditious means to achieve meaningful relief as set forth above from the unlawful 2005 sale and subsequent actions aggravating it taken by Conrail and the LLCs.” Letter Mot. for Clarification from Charles H. Montange, Esq. to Cynthia T. Brown, Chief, Section of Administration, Office of Proceedings, STB, at 2 (Sept. 25, 2014).

In its 2009 Environmental Assessment (“EA”) in this proceeding, the then-Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or “OEA”) rejected the City Parties’ arguments that the historic review process should not proceed because Conrail had engaged in “anticipatory demolition” in violation of Section 110(k) of the National Historic Preservation Act (“NHPA”). Far from engaging in intentional wrongdoing, OEA found that Conrail had acted “appropriately and in good faith.” EA at 14. The City Parties now argue that because OEA lacks the resources to conduct its own investigation of the City Parties’ allegations, discovery is needed to establish that Conrail has deceived the City Parties and the Board by illegally selling the property at issue in this proceeding and then misrepresenting the

property's jurisdictional status, and has violated Section 110(k) of the NHPA, 16 U.S.C. § 470h-2(k), by engaging, or conspiring with the LLCs to engage, in intentional anticipatory demolition of the property.

According to the City Parties, Conrail's alleged illegal and fraudulent acts necessitate action by the Board, although we remain puzzled about what the City Parties are in fact seeking. It appears, however, that the principal remedies sought by the City Parties are the voiding of the deeds of sale of the property to LLCs, the reconveyance of the property to Conrail, and an order requiring Conrail to sell the property to the City at the same price that Conrail sold the property to the LLCs in 2005. Alternatively, a grant of a City Offer of Financial Assistance ("OFA") also is clearly within the menu of options presented by the City Parties to the Board. This, at least, seems to be what the City Parties suggest in the September 25, 2014 letter quoted above.²

The City Parties cite a number of facts and documents that allegedly support their claims that discovery is needed because of evidence that Conrail has acted illegally and deceptively.

² The City Parties devote several pages of their motion to berating Conrail for misrepresenting their position with regard to whether they really are seeking to have the Board deny the abandonment authorization sought by Conrail in this proceeding. *See* Mot. at 12-15. Even after closely examining this argument, it is not altogether clear whether the City Parties are actually saying that they would be satisfied with a blanket *denial* of the abandonment authorization or are rather arguing that any *grant* of the authorization should be conditioned on various steps, such as the voiding of the deeds and reconveyance of the property to Conrail, together with an order directing "Conrail to convey the property to the City at the same price paid by the LLCs in the illegal abandonment." *Id.* at 13. The City Parties also argue that they have consistently asserted that class exemption notice procedures should not be used for this matter. *Id.* at 14.

Putting aside the fact that the City Parties do not explain the legal basis for an order to convey property to the City in 2014 (or after) at the same price that the property was sold to the LLCs in 2005, Conrail does not believe that it has misrepresented the City Parties' position. As explained below, it is highly doubtful that the City Parties would be satisfied with a simple denial of abandonment authorization.

First, the City Parties seem to assume that there simply could not be any good faith controversy about the jurisdictional status of the property.³ In other words, the City Parties seem to believe that Conrail's disagreement with the City Parties about the jurisdictional status of the property is itself evidence of fraud.

The short answer to this contention is that mere disagreement with a legal position is not evidence of fraud, and certainly could not justify discovery in this proceeding. The somewhat longer answer is that the Board has repeatedly noted that the determination of the jurisdictional status of trackage requires a case-by-case analysis of various factors. *See, e.g., Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, STB Finance Docket No. 35424, slip op. at 3 (served June 14, 2011) (“The terms ‘spur, industrial, team, switching, or side tracks’ (collectively, ‘spur’ track) are not defined in the Interstate Commerce Act, nor does the legislative history of the statute reveal a clear Congressional intent regarding the meaning of these terms. The agency and the courts have adopted a case-by-case, fact-specific approach to make this determination.”) (internal citation omitted); *N.Y. City Econ. Dev. Corp.—Pet. for Declaratory Order*, STB Finance Docket No. 34429, slip op. at 5 (served July 15, 2004) (“Moreover, there is no single test for determining whether a particular track segment is a ‘line of railroad,’ or is instead simply a spur. Rather, the agency and the courts have adopted a case-by-case, fact-specific approach to make this determination.”); *id.* at 6 (“[I]t is well settled that the agency must consider a variety of relevant factors in determining the spur vs. line of railroad issue.”); *Chicago Southshore & South Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind.*, STB Finance Docket No. 33522, slip op. at 4 (served Dec. 17, 1998) (“There

³ For examples of how the City Parties treat legal disagreements with its position as evidence of fraud, see the Reply of the City Parties to Conrail's Supplemental Environmental and Historic Report, filed September 3, 2014 (“City Parties’ Reply to Supp. Rep.”) at 8-10, 17 & n.9.

is no single test of what constitutes exempt track under 49 U.S.C. 10906. Our analysis must focus on the disputed track's use, history, and physical characteristics, and we rely on a variety of indicia . . .").⁴

Conrail's position that the Harsimus Branch was not a line of railroad was based on an analysis of various considerations, and although Conrail may have been incorrect—a conclusion that Conrail has never in fact conceded—its position was not frivolous, much less patently fraudulent, no matter how vociferously City Parties' counsel disagrees with it.

Second, the City Parties argue that, in Special Court proceedings to determine the jurisdictional nature of the property, the LLCs "*admitted* that Conrail had fraudulently misrepresented to them, the courts, this agency and the City that the Harsimus Branch was something other than a line of railroad." Mot. at 4 (emphasis added). This is a gross distortion of the record. The LLCs did not "*admit*[]" that Conrail made fraudulent misrepresentations; they *accused* Conrail of fraud in an eleventh-hour bid to forestall summary judgment.⁵

As Conrail showed in the Special Court proceedings, the LLCs' allegations were utterly meritless.⁶ They cannot serve to justify discovery in a proceeding where discovery is otherwise disfavored.⁷

⁴ *New York City Economic Development Corporation* underscores the error of assuming that the mere presence of disagreement about a track's status reflects bad faith on the part of one of the parties. There, the Board's members disagreed about whether the track at issue was a spur, with two Board members holding that the track was a spur, and Vice Chairman Mulvey dissenting.

⁵ There is nothing inadvertent about the City Parties' conflation of an admission and accusation. The City Parties also characterized the LLCs' accusation as an admission in its reply to Conrail's Supplemental Environmental and Historic Report. *See* City Parties' Reply to Supp. Rep. at 2-3.

⁶ *See* Resp. of Conrail to City Parties' Notice of Decision & Request for Lifting of Stay of Proceeding, filed herein on December 11, 2013 (attaching Conrail's Special Court memorandum in opposition to the LLCs' motion to amend their answer to add fraud claims against Conrail).

⁷ It bears noting that the LLCs also made various allegations against the City Parties in the Special Court, and for largely the same baseless reasons. The City Parties no doubt regard those

The City Parties further argue that, when combined, the LLCs' "admission" and Conrail's *response* to the LLCs' fraud allegations are a "combination of admissions [that] constitute an admission that Conrail and the LLCs intentionally misled the agency, the courts and the City in an effort to evade STB abandonment regulation, including NHPA section 106." Mot. at 4-5. The City Parties state that "Conrail responded in essence that the LLCs were aware of [or] should have been aware of the relevant facts at all times pertinent. If the LLCs were aware or should have been aware, then so should Conrail." *Id.* at 4.

This somewhat convoluted assertion is similar to assertions repeated throughout the City Parties' Reply to Conrail's Supplemental Environmental and Historic Report. *See* City Parties' Reply to Supp. Rep. at 3 ("Conrail's response to this charge boils down to showing that the developer knew or should have known this at all pertinent times. But if the developer knew or should have known, so should Conrail, so both Conrail and its chosen developer in open court in effect have acknowledged their own knowledge or willful blindness to an illegal abandonment."). In its most misleading form, the City Parties claim: "The developer now says the arguments on which Conrail relied for this purpose in the D.C. Circuit were fraudulent misrepresentations. Conrail says the developer knew that the misrepresentations were fraudulent all along and participated in them." *Id.* at 10-11; *see also id.* at 23 n.15 ("Conrail has indicated that the developer was aware at all pertinent times, or should have been aware, that the property was part of a line of railroad requiring STB abandonment authorization"); *id.* at 31, 33 n.24, 36-37.

This, of course, completely misrepresents what Conrail stated in response to the LLCs' fraud allegations. Conrail's responses were made in the context of arguing that the LLCs should

allegations against them as frivolous, yet the City Parties choose to give credence to the allegations against Conrail for purposes of attempting to obtain discovery here.

not be permitted to amend their Special Court pleadings to add newly-hatched fraud claims against Conrail on the eve of summary judgment. The LLCs had argued that they should be permitted to plead their new claims at the last minute because they had only just discovered the factual predicates for those claims. Conrail argued that the LLCs' claim of a new discovery was an utter fiction. Conrail showed that the facts that the LLCs asserted that they had just discovered were actually aired in the STB proceedings years earlier.

In doing so, Conrail did not, and does not, concede that these facts establish that the property was, in fact, part of a line of railroad. But the significant issue, given the procedural posture of the Special Court proceedings, was whether these facts were, as the LLCs contended, newly discovered, and Conrail showed they were not.

For example, the fact that the Harsimus Branch carried significant amounts of Hudson Street Industrial Track ("Hudson Street IT") traffic was repeatedly adverted to by the City Parties themselves in the Declaratory Order proceedings (STB Finance Docket No. 34818). *See* City Parties' Opening Statement at 5, 18, 22, 31 (Mar. 9, 2006); City Parties' Rebuttal at 4, 12 n.17, 13, 14, 15, 18, 20 (May 9, 2006). Therefore, Conrail argued that the LLCs should not be allowed to amend their pleadings to state claims for fraud based on such facts on the eve of the conclusion of the Special Court proceedings. But Conrail never stated or suggested that the LLCs were aware of a Conrail *misrepresentation*, or that there was any misrepresentation, or that the allegedly newly-discovered facts established that the Harsimus Branch was a line of railroad. To the contrary, in the STB proceedings, Conrail (and the LLCs, for that matter) acknowledged these facts, but argued that they did not prove that the Harsimus Branch was a line of railroad. Conrail made that argument in good faith. The City Parties' blatant and repeated

misrepresentations of Conrail's argument do not justify discovery and should not be countenanced.⁸

Third, the City Parties cite a 2007 Memorandum of Understanding ("MOU") as evidence of a fraudulent conspiracy between the LLCs and Conrail, and argue that this (and other unnamed agreements) "confirm that any section 106 process undertaken at this time is meaningless, and that a section 110(k) . . . anticipatory demolition has transpired." Mot. at 5. According to the City Parties, the MOU reflected an agreement "to further the fraudulent misrepresentations and to deny meaningful relief to the City." *Id.* at 6. *See also id.* at 12 (referring to agreements entered into "for intentional evasion of STB jurisdiction, which of course includes section 106, and to circumvent effective remedies"); *id.* at 13 (alleging that "the LLCs and Conrail entered into an agreement in 2007 to circumvent STB remedies"). The City Parties go on to characterize the 2007 MOU as an agreement "providing that the LLCs would not sue Conrail so long as Conrail cooperates with them, and secures the property to them," and allege that "an agreement by Conrail to cooperate so it is not sued for fraud reflects a motive to evade liability for unlawful or tortious behavior. Such an agreement calls for further evasion of effective remedies for past misconduct and amounts to an agreement to cover up as well." *Id.* at 16.

Putting to one side the question whether the MOU is even enforceable—a point that Conrail does not concede—the City Parties' characterization of the MOU is pure fiction.⁹ Far

⁸ In the STB proceedings in the 2006-2009 timeframe, the LLCs were represented by former Interstate Commerce Commission General Counsel Fritz Kahn. On behalf of the LLCs, Mr. Kahn conducted his own factual investigation of the history of the property, presented numerous witnesses, including respected former United States Railway Association members, and argued vigorously that the property was not a jurisdictional line of railroad.

⁹ For their interpretation of the thrust of the 2007 MOU, the City Parties rely in part on actions undertaken by the LLCs alone. *See* Mot. at 16-17. Conrail, however, is not responsible for the

from reflecting an intent to evade STB jurisdiction, the MOU refers to Conrail's seeking "approval from the STB for abandonment of rail service over the Property." MOU ¶ 1. That it refers to Conrail declining any public use or trail use conditions would certainly not be evidence of any intent to evade STB jurisdiction, either. Nor is there any fraudulent intent evident in the provision stating that Conrail would, "as soon as practicable, upon the effective date of the abandonment, execute any such documents as may be required to effectuate and/or confirm the 2005 sale of the Property." *Id.* Similarly, Conrail's assignment of its rights to the LLCs to defend any condemnation proceedings and "to receive all monies obtained either by final settlement or condemnation award or judgment" (MOU ¶ 2) would merely reflect a common commercial arrangement and does not reflect any fraudulent intent.

That Conrail would "cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property" (MOU ¶ 3) clearly does not reflect any intent to evade STB jurisdiction. That such applications were contemplated merely demonstrates the fact, further reflected in paragraph 4, that at the time the MOU was executed, the appeals of the STB's decision in the Declaratory Order proceeding had not yet occurred, and, in any event, any development approvals under city or state law would be contingent on compliance with federal abandonment law and processes. (The apparent belief of counsel for the City Parties that the exercise of appellate rights is an abuse of STB proceedings is, thankfully, not the law of the land.)

LLCs' legal maneuvers or for the LLCs' principal's alleged abuses of legal process. After all, these are the very entities that have tried to sue Conrail for fraud.

A copy of the MOU is attached to this Reply. It bears noting that the City Parties have the MOU, so they cannot excuse their mischaracterizations of it by arguing that they necessarily have to conjecture about its contents.

Paragraph 5 of the MOU is the only provision dealing with possible litigation between the LLCs and Conrail, and contrary to the City Parties' characterization, nothing in that paragraph reflects an "an agreement by Conrail to cooperate so it is not sued for fraud." Mot. at 16. Far from disclosing an intent to *release* Conrail from possible later-pled claims, paragraph 5 provides that Conrail would not claim (by virtue of the New Jersey "complete controversy" doctrine) that the LLCs' failure to seek relief against Conrail in their pending New Jersey Superior Court proceedings against the City precluded the LLCs from seeking relief against Conrail in other proceedings. As already discussed, the LLCs did subsequently attempt, unsuccessfully, to sue Conrail for fraud in the Special Court proceedings.

Thus, the City Parties' characterization of the MOU is sheer fantasy, and there is no basis for arguing that the MOU is evidence of fraudulent or other unlawful intent, or for inquiring into the MOU through discovery. As Conrail stated in its objections to the City Parties' discovery, "[t]he invocation of the MOU is mere make weight" to justify discovery. Conrail Resp. to Request for Prod. Of Documents at 3 (Sept. 3, 2014).

The other "evidence" that the City Parties cite—in Appendix I to the Motion—to support their admissions-of-fraud theory is equally off the mark. Thus, that Conrail objected to the inclusion of the property in State and National Register listings in 2000—years before Conrail sold the properties to the LLCs—does not reflect fraudulent intent. Many property owners would rather that their property not be so listed. Indeed, *the City itself* also objected at the time to the historical designation.

Similarly, "Conrail's joinder in demolition permit requests signed . . . after this Board concluded in F.D. 34818 that the Harsimus Branch was a line of railroad" (Mot. at 31) also does not reflect an intent to evade Board processes. Even were the Jersey City authorities to waive

their Historic Landmark designation to permit the Embankments to be demolished for development purposes, no such demolition could occur unless and until the Board's processes were satisfied.¹⁰

Thus, the fundamental premise upon which the City Parties base their arguments for discovery—which is that Conrail has engaged in intentional anticipatory demolition and made misrepresentations in order to evade the Board's jurisdiction and the Section 106 process—is completely baseless. The City Parties have spun a web of innuendo, word play, and fantasy to justify a fishing expedition. That they argue that discovery is needed to preserve the integrity of the Board's processes is ironic under the circumstances. Their rhetoric and distortions of the record pose a far greater threat to the integrity of Board processes than any action Conrail has taken. Their discovery is a blatant abuse of the Board's processes, and is clearly calculated to harass Conrail, NS, and CSX.

II. THE DISCOVERY IS IRRELEVANT TO ANY REALISTIC RESOLUTION OF THE ISSUES BEFORE THE BOARD

As the City Parties have repeatedly stated, they seek discovery to establish that Conrail knowingly sold the property illegally, engaged in misrepresentations about the property, and violated NHPA Section 110(k) by engaging in intentional anticipatory demolition. The ultimate purpose of proving these allegations through discovery is to create the predicate for various forms of relief and sanctions in these proceedings.

As noted above, it remains unclear to Conrail whether the City Parties genuinely want the Board to deny abandonment authority for the properties, but for the purposes of responding to

¹⁰ The *developer's* offer to Hoboken of the Embankment for fill in January 2014 (Mot. at 31) cannot be cited as evidence against Conrail. Aside from the fact that Conrail does not and has never controlled the actions of the LLCs' principal, the LLCs have stipulated that they will not take any action to alter the Embankment properties without prior authorization from the Board.

the City Parties' motion—especially, in light of their multi-page diatribe about Conrail's "misrepresentation of City Parties' position" on the matter (*see* note 2, *supra*)—we will assume that this is one option that they believe the Board should consider. The principal other two options for Board action, as we understand the City Parties' position, are (1) for the Board to void the deeds of sale for the property, order the reconveyance of the property to Conrail, and order that Conrail sell the property to the City for the same amount for which it sold the property to the LLCs in 2005, and (2) to order the voiding of the deeds and grant an OFA request.

With regard to the latter two, contrary to the City Parties' apparent belief, there is nothing in Section 110(k) that authorizes the voiding of the deeds, much less an order that Conrail convey the property to the City for the same amount for which Conrail sold the property to the LLCs in 2005. By its terms Section 110(k) contemplates that a license may be denied or granted. It does not provide a roving commission for the imposition of various alternative remedies.¹¹

Although the Board may have the inherent authority to void the deeds to protect the integrity of Board processes, the Board has never applied such a sanction in a case like this. In their recent submissions to the Board, the City Parties have discussed two cases as precedent for an order that property be reconveyed to a railroad that had previously sold it—*Land Conservancy of Seattle & King County—Acquisition & Operation Exemption—The Burlington N. & Santa Fe Ry. Co.*, STB Finance Docket No. 33389 (served Sept. 23, 1997), and the combined decision in *SF&L Ry., Inc.—Acquisition & Operation Exemption—Toledo, Peoria & W. Ry. Corp. Between*

¹¹ In its entirety, Section 110(k) provides, "Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 470f of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant." 16 U.S.C. § 470h-2(k).

La Harpe and Peoria, Ill., STB Finance Docket No. 33995, and *Kern W. Schumacher & Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry, Inc.*, STB Finance Docket No. 33996 (served Oct. 17, 2002).

In both of those cases, unlike this one, the parties to the property transactions filed notices of exemption that, apparently, misrepresented their intent to continue to provide service over the subject lines. Moreover, shipper and/or labor interests were harmed or potentially harmed by the deceptive transactions. Finally, in neither case did the Board purport to grant relief under Section 110(k).

In any event, the voiding of the deeds of sale for the property at issue in this case is wholly unnecessary. Because Conrail retains a constructive easement, an OFA request could be granted regardless of whether the LLCs continue to own the property.¹² Moreover, once the abandonment is approved, the City can use applicable state procedures to obtain the property. Since there is no basis for the City Parties' request that the Board order Conrail to convey the property to the City for the price the LLCs paid for it, the City Parties would suffer no deprivation of a benefit to which they are entitled under federal law if they were forced to avail themselves of State law condemnation procedures. Thus, because voiding the deeds would be unnecessary (to the extent that it is permissible at all), discovery undertaken for the purpose of obtaining the voiding of the deeds and the reconveyance of the property to Conrail cannot be justified.

¹² This is not the occasion to address the merits of an OFA for the Harsimus Branch property. Suffice it to say that, based on the facts on the ground and prior representations made by the City Parties, any OFA request in this case should be subject to intense scrutiny. The City Parties themselves stressed in the earlier declaratory order proceeding that "[n]o one is pretending that the petitioners in this proceeding are seeking to preserve the Harsimus Branch as an operating freight railroad." City Parties' Rebuttal at 25.

As for using the fruits of discovery to justify the denial of the abandonment authorization altogether, that, too, would be a pointless exercise. A denial of abandonment authority would leave the *status quo ante* in place, and, in light of the City Parties' clear desire to acquire the property, a flat denial of abandonment would hardly be a satisfactory end of the matter for the City Parties.

Rather, their goals—as we understand them—can be met only if the property ultimately is abandoned, and STB jurisdiction over the property is terminated. Thus, if the abandonment authority sought by Conrail is denied, it is likely that the City Parties would file for an adverse abandonment, starting much or all of the process all over again from the beginning. This would be a colossal waste of administrative resources. Thus, even if there were some genuine basis for believing that Conrail has willfully violated the law and made misrepresentations, an outright denial of abandonment authority would, under these circumstances, be of no long-term value.

For the foregoing reasons, discovery cannot be justified by the argument that it could provide a basis for voiding the deeds or denying the abandonment authority altogether.¹³

III. THE CITY PARTIES' DEMAND FOR A PRIVILEGE LOG SHOULD BE DENIED

Even if the Board allows some of the City Parties' discovery requests, Conrail, CSX, and NS should not be subjected to the burden of producing privilege logs. A number of the discovery requests relate to matters in which there are likely to be numerous privileged

¹³ Nor can discovery be justified by arguing that it might support various mitigation directives under Section 106 of NIIPA. The Board has repeatedly held that the mitigation options available to it under Section 106 are "very limited. . . . [A]s a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us." *Implementation of Envtl. Laws*, 7 I.C.C.2d 807, 828-29 (1991). Notwithstanding Conrail's sale of the property to the LLCs, Conrail has expressed its willingness to document the historic resources at issue in this proceeding.

communications. The preparation of logs itemizing each of these communications would be extremely burdensome, would impose significant costs on the responding parties, and would unduly delay the completion of discovery.

“The Board does not routinely require the production of privilege logs.” *Canadian Pac. Ry Co.—Control—Dakota Minn. & E. R.R. Corp.*, STB Finance Docket No. 35081 (Sub-No. 2), slip op. at 4 (served Mar. 26, 2014). The Board has done so, however, in cases in which the discovery relates directly to the fulfillment of conditions for transactions to which the party from which discovery has been sought has agreed (*id.*), or where the circumstances of the case suggest a greater than usual likelihood of erroneous designations of evidence as privileged (*Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557, slip op. at 8 (served June 25, 2012).) Neither of those circumstances are present here. Therefore, the City Parties’ burdensome request for privilege logs should be denied.

IV. MANY OF THE REQUESTS ARE UNTIMELY IN WHOLE OR IN PART

The City Parties have long argued—including throughout the Declaratory Order proceedings (Finance Docket No. 34818)—that Conrail’s sale of the property at issue in this proceeding was illegal. Thus, many of the topics concerning which they are now attempting to obtain discovery—such as matters relating to the sales agreements between Conrail and the LLCs—could, and should, have been inquired into long ago, when discovery was had in the Declaratory Order proceeding, a proceeding in which (unlike this proceeding) there was no presumption against discovery.

Contrary to the City Parties’ claim, there was ample discovery in that proceeding, and the City Parties could have inquired into many of the issues that they seek to probe here. In the Declaratory Order proceeding, the City Parties propounded eleven document production requests to Conrail, resulting in the production by Conrail of a significant number of documents and

maps. The City Parties also served two requests for admission and one interrogatory upon Conrail.¹⁴ Thus, many of the discovery requests are, in whole or in part, untimely.

V. THE CITY PARTIES FAIL TO REBUT CONRAIL'S SPECIFIC OBJECTIONS

As shown above, there is no basis for discovery at all in this proceeding. Even if there were some grounds for limited discovery, the requests propounded by the City Parties suffer from a host of defects that necessitate the denial of the City Parties' motion to compel.

Request 1: The City Parties fail to justify their request for "original sales agreements and amendments thereto." Mot. at 20. The City Parties' belief—which is not explained or justified—"that the original 'sale' agreement was in the nature of an option only, allowing ample time for due diligence" does not establish that the request is "certainly relevant to evasion and intent to evade." *Id.* at 20-21. The City Parties' assertion of relevance is mere *ipse dixit*.

Contrary to the City Parties' claims, this information could have been sought in the Declaratory Order proceeding, in which the City Parties repeatedly asserted that the sale of the property was illegal and in which there was discovery. Moreover, the City Parties' characterization of this document request ignores the broad, vague, and unduly burdensome portion of the request that seeks "[a]ll writings that relate in any way to the foregoing [agreement, letters, and amendment]." *See* Request 1(d).

The City Parties' putative justification of this request is insufficient to overcome the presumption against discovery in abandonment proceedings.

Request 2: The City Parties also fail to justify this request, which seeks all versions of the MOU and other "similar agreements." In purporting to explain the relevance of this request, the City Parties again misrepresent the MOU's terms (characterizing it as an agreement for the

¹⁴ The City Parties separately served document production requests upon the LLCs.

I.L.Cs not to sue Conrail) and simply assert that the “document request is obviously relevant, and anything but overbroad.” Mot. at 21. The City Parties have failed to carry the burden of justifying this request. Rather, as Conrail noted in its objections, this request appears to have been propounded for the improper purpose of intruding upon applicable Joint Interest and Settlement Privileges.

Request 3: The City Parties state that this request, which “seeks documents sufficient to show how Conrail approves real estate transactions” is “germane to determining who may have been involved in the illegal abandonment, and also to Conrail’s intentions. A[t] a minimum, [the documents subject to the request] may lead us to possible candidates for a deposition.” Mot. at 21.

This explanation reveals that the City Parties’ intent is to engage in a wide-ranging fishing expedition, the end-result of which will be depositions of Conrail, CSX, and NS present and/or former board members and officers. At a minimum, this request calls into question the City Parties’ protests (Mot. at 19) that they have no motive (or ability) to harass Conrail with needless discovery. The Motion with regard to this intrusive discovery request should be denied.

Requests 4 and 5. As the City Parties explain, these requests call for various Board of Director minutes. In purporting to justify these requests, the City Parties (once again) offer only speculation that the requests may lead to admissible evidence (Mot. at 21-22) without explaining how they could do so. The City Parties also misrepresent the 2007 MOU. The City Parties have failed to carry their burden of justifying such discovery in an abandonment proceeding, but rather have offered only innuendo, speculation, and misrepresentations.

Request 6: This request seeks “[d]ocuments sufficient to set forth the name and current business address of members of the Conrail board of directors 2002 to the date of this document

request (or a list with relevant dates of service, names, and business addresses).” *See* Request 6. The clear intent of this request is to seek targets for depositions. The City Parties apparently think no justification for this request—or for depositions of Conrail board members—is required. Besides invoking their usual misrepresentations of that 2007 MOU, the City Parties simply assert that they are entitled to this information and to depose the board members. Mot. at 22-23. The City Parties’ intent to harass Conrail and its board and officers and to punish Conrail for having the audacity to oppose the City Parties’ legal position is transparent.

Request 7: This request seeks “documents relating to agreements or understandings purporting to toll any statute of limitations defense that may be asserted by Conrail or an attorney representing any party (including but not limited to Conrail) to the Agreement of Sale dated June 24, 2003, as later amended.” *See* Request 7. Nowhere do the City Parties explain the relevance of this request. They merely assert that this request seeks “documents relevant to agreements by Conrail and the LLCs to subvert STB regulation or undermine STB’s remedies.” Mot. at 23. But the City Parties do not explain *how* information, if any, responsive to this request could possibly reveal such an illicit intent. The assertion that information responsive to this request would be relevant is pure *ipse dixit*, and hardly justifies the allowance of this discovery in an abandonment proceeding.

Request 8: This request “asks for communications between NJ DOT and Conrail other than pleadings concerning the sale of the Harsimus Branch or STB proceedings.” Mot. at 23-24. The City Parties assert that this request is relevant because they have an “understanding that NJ DOT may have warned Conrail that the Harsimus Branch was a line of railroad during the title insurance process.” *Id.* at 24. This request should be denied. Even were there any responsive documents, the New Jersey Department of Transportation has no special authority with regard to

the regulatory status of rail properties. Any opinion offered by the New Jersey Department of Transportation on the jurisdictional status of the property, therefore, would not be binding on Conrail and would not support an inference of knowing illegal conduct on the part of Conrail. Conrail reached its own conclusions about the jurisdictional status of the property, and did so in good faith. Moreover, as noted above, the determination of a track's jurisdictional status requires a case-by-case, fact-specific inquiry, and is often the subject of reasonable disagreement. That two entities might disagree on such issues does not provide a basis for concluding that one of those entities must be a bad actor.

Request 9: This request seeks “[a]ll documents relating to sale or potential sale of land or interests in land containing the portion of the Harsimus Branch between CP Waldo and the portion of the Harsimus Branch purportedly sold to SLH Holding Company and/or the LLCs, including but not limited to proposed sales, proposed brokerage agreements, and any other proposal that might result in non-railroad use of that portion of the Harsimus Branch.” See Request 9. The City Parties seek to justify this request by speculating that “[i]f there are any additional sales or contracts for sale and so forth, then they are further evidence of evasion of this Board’s jurisdiction and processes. In addition, the information is potentially germane to claims of severance mounted by the LLCs.” Mot. at 24.

These putative justifications for this request are specious. Conrail is not contesting this agency’s jurisdiction over the Harsimus Branch from CP Waldo eastward. The City Parties do not explain *how* documents relating to the designated sales or potential sales could possibly constitute further evidence, or lead to further evidence, of evasion of this Board’s jurisdiction and processes. As for the LLCs’ severance claims, those claims have been thoroughly briefed, and to the extent that we understand them, they are predicated upon the impact of the

abandonment of the River Line, not on sales or potential sales of property from CP Waldo to the east. The City Parties' reference to the severance issue is mere make weight to justify an unjustifiable discovery request.

Request 10: This request seeks "[d]ocuments sufficient to identify (by name, current business address and position during all relevant times at the railroads) all persons advising or taking action for Conrail or recommending action by Conrail in connection with the sale of any portion of the Harsimus Branch from 2000 to date." *See* Request 10. The City Parties state that "[t]he identity of those persons who advise and act for the corporation is obviously germane to issues of evasion and intention to evade STB jurisdiction and remedies. Conrail must be compelled to respond." Mot. at 24-25.

Like Requests 3 and 6, this request is clearly being made for the purpose of assembling a list of potential deponents. The City Parties simply assert that they are entitled to this information and that it is relevant, but they completely fail to offer any non-conclusory reasons for their entitlement to the information. The City Parties' motive to harass and punish Conrail and its advisors, officers, and directors is patent. The Board should not assist the City Parties in this endeavor.

Request 11: As the City Parties state, Request 11 is similar to Request 10, but it seeks information about the identities of all persons "advising or taking action for *SLH Holding or the LLCs*." *See* Request 11 (emphasis added). Concededly, the City Parties often have appeared not to understand the distinction between the LLCs and Conrail—hence, their repeated, utterly baseless references to the LLCs as "Conrail's chosen developer." But in their argument regarding this request, they eschew such rhetorical gambits, clearly revealing that they do understand that Conrail and the LLCs are distinct entities, but imperiously assert that they are

entitled to seek the LLCs' information from *Conrail*. Mot. at 25. They do not deign to justify this unreasonable request, which appears to have been propounded solely to harass and annoy Conrail. Having failed to offer any justification for such a discovery request in an abandonment proceeding, the motion to compel a response to this request should be denied.

Request 12: This request seeks “[a]ll documents reflecting any inquiry by [former] Conrail employee Ryan or Conrail attorney Fiorilla or any other employee or agent of Conrail directed to any other person employed by, retained by, or acting as an agent for Conrail, CSX or NS concerning whether the Harsimus Branch was a line of railroad requiring STB abandonment authorization prior to sale to SLH Holding Company or the LLCs, and all documents responsive thereto.” *See* Request 12. In the motion to compel, the City Parties refer solely to inquiries made by former employee Ryan. Thus, it appears that they no longer are seeking documents reflecting inquiries by attorney Fiorilla.

Be this as it may, the City Parties once again make no effort to explain the relevance of the request, but simply assert that it seeks “clearly relevant” information, imperiously asserting that “Conrail must be compelled to respond.” Mot. at 25. In the context of an abandonment proceeding, where discovery is disfavored, these conclusory arguments are inadequate to justify discovery.

Request 13: This request seeks a broad array of documents relating to the Harsimus Branch in the files of CSX or NS. The City Parties seek to justify this request by conjecturing that “it is possible that some of the officers of NS and CSX may have documents relating to the Harsimus Branch which they are keeping in their NS and CSX files” and stating that “[i]t is hardly stunningly overbroad to ask that someone at least look.” Mot. at 26.

This hardly justifies this extremely overbroad request. The request seeks “[a]ll documents . . . relating to the rail regulatory status, historic nature, or sale of [the] Harsimus Branch from 2000 to date” other than pleadings, appeals or petitions from various specified proceedings. *See* Request 13. It seeks this information from all CSX and NS files, “including the files of their attorneys, consultants, agents, employees, officers, and board members.” *Id.* Thus, this request could well require a search of numerous files and the production of large volumes of documents, many of which would be duplicative and few (if any) of which would have any relevance to the matters at issue in this proceeding. As a justification for discovery in an abandonment proceeding, the City Parties’ cavalier discussion of this request is insufficient. The Motion with regard to this request should be denied.

Request 14: This request seeks “[a]ll documents (other than pleadings prepared by Conrail seeking to contest the constitutionality of N.J.S.A. 48:12-125.1) showing NS, CSX, or Conrail compliance with, or objection to, any state law that creates a preferential purchase right for public agencies in connection with railroad lines that are subject to STB abandonment proceedings, including but not limited to N.H. Rev. Stat 228:60-b; Vermont Stat. Ann § 3404; Mass. Gen., Law, chap. 161C, § 7; Conn. Stat. 13b-36(c); New York’s Transportation Law § 20.” *See* Request 14. In its objections to this request, Conrail pointed out the irrelevance to these STB proceedings of analyses of *State* laws, especially the State laws designated in the request, since none of the property at issue in this proceeding is located in any of those States, and Conrail, NS, and CSX do not even operate in several of them.

The City Parties devote more than a page to defending this request, but fail utterly to explain why the STB would have any interest in any Conrail, CSX, or NS analyses of such State preferential purchase right statutes. The City Parties assert that the sought-after information is

relevant “to whether Conrail intends to evade not only STB remedies but also STB-mediated state law remedies like preferential purchase rights.” Mot. at 27. But the City Parties do not explain how analyses of these State remedies have any bearing at all on the issue—actually, non-issue—of evasion of STB remedies or why the STB has any concern with the posture(s) of Conrail, NS, and CSX with regard to such State remedies.

Thus, the City Parties fail to justify this request. Rather it appears to have been propounded solely to harass, delay, intrude upon the attorney-client privilege, and punish Conrail for opposing the City Parties in this proceeding.

Unnumbered Request (1): This request was made in an August 11, 2014 letter to Conrail’s counsel. The request is similar to, though broader than, Request 9. The request seeks “all documents . . . bearing upon or relating to sales or transfers, or projected sales or transfers, of property interests of Consolidated Rail Corporation to any interest controlled or owned by Steve Hyman or Victoria Hyman, or the Port of Authority of New York and New Jersey (PATH), or any other party (a) in or near the former Waldo Yard in Jersey City, (b) between any portion of the former Waldo Yard in Jersey City and the Harsimus Branch, (c) along the former Pennsylvania Railroad mainline between Journal Square and Newark Avenue in Jersey City, and/or (d) along the former River Line (or connections thereto from National Docks Secondary or the Harsimus Branch) between the Bergen Archers Cut and CP Waldo in Jersey City from January 1, 2006 to the date of response. Conrail is specifically requested to produce all maps relating to such sales or transfers, or projected sales or transfers, in its custody or control.” Letter from Charles H. Montange to Robert M. Jenkins III, enclosing the City Parties’ document requests, at 1-2 (Aug. 11, 2014) (“Montange Aug. 11, 2014 letter”).

The City Parties seek to justify this broad request for information relating to property other than the property at issue in this proceeding by asserting that “[s]ales or deals concerning parcels in the Waldo area may be as unlawful as the 2005 sale to the LLCs, or related to efforts to evade accountability for that unlawful sale. In addition, the information might be relevant to valuation proceedings (e.g., pending OFA). In all events, it is within 49 CFR 1114.21. Conrail must be compelled to respond.” Mot. at 28.

This is a hardly a justification for this intrusive, overbroad, and irrelevant discovery. There is no basis beyond free-floating speculation for inquiring into “sales or deals concerning parcels in the Waldo area,” and the relevance of such information to this proceeding (either with regard to the City Parties’ fraud claims or an OFA) is nowhere explained by the City Parties. Thus, the City Parties have failed to respond to Conrail’s objection that the request appears to have been propounded for purposes of harassment and delay, and to intrude upon matters subject to the settlement privilege. The motion to compel with respect to this request should be denied.

Unnumbered Request (2): This request seeks “all documents . . . constituting, reflecting, or arising out of proposed transactions between Conrail and (a) Victoria Hyman, (b) Steve Hyman, or (c) any company owned or controlled by Victoria or Steve Hyman involving (i) any portion of the Harsimus Branch or (ii) any property in Jersey City owned or controlled by Conrail from January 1, 2003 to the date of response.” Montagne Aug. 11, 2014 letter at 2. The City Parties purport to justify this request with the conclusory assertion that “[t]his request would result in production of documents showing the course of dealing between the LLCs and Conrail in regard to the Harsimus Branch, and is germane to issues of evasion of STB regulation as well as cover up of evasion.” Mot. at 28.

The open-ended scope of this request appears calculated to intrude upon the attorney-client and settlement privileges. The request also potentially encompasses a huge number of documents accumulated over an almost twelve-year period. Rather than seeking relevant evidence, or information likely to result in the discovery of relevant evidence, this request—like the City Parties' other requests—appears to have been propounded principally to harass, delay, intrude upon privileged matters, and to punish Conrail for taking positions at odds with the City Parties. The motion to compel a response to this request should be denied.

CONCLUSION

The fundamental premise of the City Parties' discovery—that there is evidence that Conrail engaged in fraud, knowing illegal conduct, and intentional anticipatory demolition—is false and is itself the product of gross misrepresentations of the record and of Conrail's arguments, and an arrogant conviction that no one who disagrees with the City Parties does so in good faith. There is no reason or legal basis to deny abandonment authority or to void the deeds and order the reconveyance of the property at issue in this case to Conrail, and no authority whatever for the contention that the STB should order Conrail to convey property to the City for same price that it sold the property nearly ten years ago. Thus, there is no basis for any discovery in this matter.

Moreover, in light of the fact that discovery is disfavored in abandonment proceedings, the City Parties cannot rest their arguments for individual discovery requests on *ipse dixit*, non sequiturs, innuendo, and conclusory assertions. Yet this is what they have done.

For the foregoing reasons, the motion to compel should be denied.

Respectfully submitted,

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III / *ACS*
Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street NW
Washington DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation, CSX Transportation, Inc.,
and Norfolk Southern Railway Company

October 7, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 7th day of October, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Daniel Horgan
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096

Fritz R. Kahn, P.C.
1919 M Street NW
7th Floor
Washington, DC 20036

Aaron Morrill
Civic JC
64 Wayne Street
Jersey City, NJ 07302

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

Eric Fleming
President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Hamilton Park Neighborhood Association
PMB # 166
344 Grove Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

East Coast Greenway Alliance
5315 Highgate Drive
Suite 105
Durham, NC 27713

Jill Edelman
President
Powerhouse Arts District Neighborhood Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Robert Crowell
Monroe County Planning Department
Room 306 Courthouse
Bloomington, IN 47404

Justin Frohwirth, President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Joseph A. Simonetta, CAE
Executive Director
Preservation New Jersey Incorporated
414 River View Plaza
Trenton, NJ 08611

Sam Pesin
President
Friends of Liberty State Park
P.O. Box 3407
Jersey City, NJ 07303-3407

Massiel Ferrara, PP, AICP, Dir.
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Eric S. Strohmeyer
Vice President COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

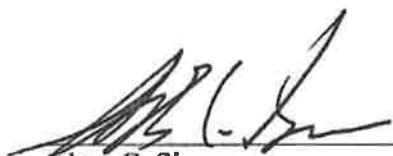
Embankment Preservation Coalition
495 Monmouth Street
Jersey City, NJ 07302

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Jersey City Economic Development Corp.
30 Montgomery Street, Suite 1400
Jersey City, NJ 07302

Daniel D. Saunders
Deputy State Historic Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Maureen Crowley, Coordinator
Embankment Preservation Coalition
263 Fifth St
Jersey City, NJ 07302


Adam C. Sloane

ATTACHMENT
MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12th day of October, 2007, between Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation, with its principal offices at Two Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania 19103, SLH Holding Co., LLC ("SLH"), having a mailing address c/o Carmine Alampi, Esq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC and 446 Newark Avenue, LLC (collectively referred to as "LLCs"), "Conrail", "SLH" and "LLCs" collectively referred to as "Parties".

Whereas, Conrail and SLH entered into an Agreement of Sale dated June 24, 2003, with respect to 6.2 acres of property ("Property") in Jersey City, New Jersey, which Agreement was amended by letters dated September 22, 2003, May 7, 2004 and September 15, 2004 and by Amendment to Agreement of Sale dated October 27, 2004 (collectively referred to as "Agreement"); and

Whereas, SLH assigned its rights under the Agreement to the LLCs; and

Whereas, on July 13, 2005 Conrail conveyed title to the Property to the LLCs; and

Whereas, after the sale, LLCs obtained a number of approvals for development of the Property from local governmental authorities; and

Whereas, on August 9, 2007, the Surface Transportation Board ("STB") issued a decision finding that the Property sold to LLCs remains part of the national rail system until appropriate abandonment authority is obtained.

Whereas, Conrail, SLH and the LLCs desire to maintain the benefit of the 2005 sale of the Property for all Parties.

NOW, THEREFORE, Conrail, SLH and the LLCs agree, this 12th date of October, 2007, as follows:

1. Conrail will seek approval from the STB for abandonment of rail service over the Property. Conrail will decline any public use or trail use conditions and, as soon as practicable, upon the effective date of the abandonment, execute any such documents as may be required to effectuate and/or confirm the 2005 sale of the Property.

2. If any governmental entity commences condemnation proceedings with respect to the Property Conrail will assign to LLCs its rights to defend any condemnation proceedings and to receive all monies obtained either by final settlement or condemnation award or judgment.

3. Conrail will cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property.

4. The Parties agree to file timely appeals of the STB's August 9 decision pursuant to 28 U.S.C. § 2321(a).

5. Conrail agrees that if the proceedings in Docket No. HUD-L-4908-05 in the Superior Court of New Jersey are not dismissed, Conrail will not in that or any other proceeding claim that SLH's or the LLC's failure to seek relief against Conrail precludes them from seeking relief against Conrail in any other proceeding.

6. The Parties agree that implementation and enforcement of the foregoing terms is subject to negotiation of any mutually agreeable documents as are necessary to carry out the terms of this Memorandum of Understanding, and its approval by Conrail's Board of Directors.

CONSOLIDATED RAIL CORPORATION

By:

Title:

Date:

Jonathan M. Bostz
VP - General Counsel
Oct. 12, 2007

SLH HOLDING CO., LLC

By:

Title:

Date:

[Signature]
Member
Oct 12 2007

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

236818
236821
236822

**REPLY OF CONSOLIDATED RAIL CORPORATION
TO “ADDITIONAL SUPPLEMENTAL COMMENTS”
OF JERSEY CITY, ET AL.**

ENTERED
Office of Proceedings
October 15, 2014
Part of
Public Record

Consolidated Rail Corporation (“Conrail”) replies here to the “Additional Supplemental Comments” filed by the City of Jersey City, et al. (“City Parties”) on September 25, 2014. As in their Reply to Conrail’s Supplemental Environmental and Historic Report, filed September 3, 2014, and their Motion to Compel Discovery, filed September 18, 2014, the City Parties in their “Additional Supplemental Comments” claim that Conrail has engaged in intentional “anticipatory demolition” in violation of Section 110(k) of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470h-2(k).

Conrail responded to this claim at some length in its Reply to the City Parties’ Motion to Compel, filed October 7, 2014. In a nutshell, the City Parties have made a Section 110(k) claim

since the outset of this proceeding, arguing that Conrail removed track and bridges from the Harsimus Branch in the 1990s with the intention of evading historic preservation review under Section 106 of the NHPA. In its Environmental Assessment served March 23, 2009, the Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or "OEA") rejected that claim. Observing that the City itself had pressured Conrail to remove the track structure and that Conrail had cooperated in the abandonment process once the STB had determined that the Harsimus Branch was a line of railroad, OEA found that Conrail had acted "appropriately and in good faith." EA at 14. The City Parties are now attempting to argue that circumstances have changed, because in subsequent Special Court proceedings the owners of the properties at issue (the "LLCs") made a fraud claim against Conrail, which the Special Court refused to entertain.

Conrail showed in its Reply to their Motion to Compel why the City Parties' effort to transmute the LLCs' failed claim *against* Conrail, which Conrail vigorously disputed, into an admission of intentional wrongdoing *by* Conrail, is completely nonsensical. Conrail Reply at 6-9. We need not repeat that discussion here. What the City Parties appear to be trying to do in their "Additional Supplemental Comments" is support their Section 110(k) claim by selectively re-telling the history of the City's involvement with the Harsimus Branch, in an effort to make it appear that Conrail somehow intentionally misled the City about the regulatory status of the Harsimus Branch.

Nowhere, however, in any of the City Parties' selective rendition of the history of the City's involvement with the Harsimus Branch is there *any* indication that Conrail believed the Harsimus Branch was a line of railroad subject to STB abandonment authority, either before or after Conrail removed the track and bridges. The evidentiary record and the STB's and OEA's

own findings make abundantly clear that Conrail worked closely with the City and its Redevelopment Agency to make property underlying the Harsimus Branch east of the Embankment properties available for redevelopment, and *no one* suggested that abandonment authority was required.¹ Furthermore, Conrail worked closely with the City and its Redevelopment Agency for several years to make the Embankment properties available for redevelopment, and, here again, *no one* suggested that abandonment authority was required.² As OEA pointed out, the City itself removed a bridge on the Embankment properties at Marin Boulevard and Conrail removed the remaining bridges at the urging of the City: EA at 14.

The City Parties in their "Additional Supplemental Comments" make much of the fact that Conrail in 1999 opposed the listing of the Embankment properties on the State Register of Historic Places. Supp. Comments at 11-12. The City Parties neglect to mention, however, that the City itself also in 1999 expressly opposed the listing of the Embankment properties on either the State or National Registers of Historic Places. Indeed, the City presented expert testimony at the State Review Board hearing opposing the listing. Then-Mayor Schundler subsequently reiterated the City's opposition in a letter to the Assistant Administrator of the New Jersey Department of Environmental Protection that attached a detailed summary of the City's objections.³ Certainly, Conrail cannot now be criticized by the City Parties for raising objections in 1999 to the listing of the Embankment properties on the State Register when the City itself at the time was actively opposing such a listing.

¹ See, e.g., Decision served August 9, 2007, in STB Finance Docket No. 34818, *City of Jersey City, Et Al.—Pet. for Dec. Order*, slip op. at 4-5; Reply Statement of Consolidated Rail Corporation in STB Docket No. 34818, filed April 24, 2006 ("Conrail April 24, 2006 Reply Statement"), Ryan Verified Statement ("VS") at 10-14.

² Conrail April 24, 2006 Reply Statement, Ryan VS at 14-18.

³ See Conrail April 24, 2006 Reply Statement, Appendix O.

The City Parties also criticize Conrail for selling the Embankment properties to the LLCs in 2005 when the City had engaged eminent domain counsel, who was seeking access to the properties to perform an appraisal. Supp. Comments at 4-6. What the City Parties conveniently elide, however, is that Conrail *three years* earlier had put the properties out for bids, after several prior years of fruitless negotiation with the City and its Redevelopment Agency for the City to acquire the properties.⁴ Both the Redevelopment Agency and the City reviewed the bid invitation in 2002 and expressed no interest.⁵ Only the LLCs' principal submitted a bid that met Conrail's minimum requirements, and Conrail entered into a binding contract with that principal long before the City's counsel contacted Conrail. Having been frustrated for years in its effort to sell the Embankment properties to the City, Conrail could hardly be criticized for closing a sale with a committed buyer simply because the City's counsel belatedly suggested that the City had a renewed interest in acquiring the properties.⁶

The City Parties suggest repeatedly in their "Additional Supplemental Comments" that a Declaration filed by the LLCs' counsel in the Special Court proceedings demonstrates that there was no good faith basis for anyone to believe in 2005 that the Embankment properties were not

⁴ See Conrail April 24, 2006 Reply Statement, Ryan VS at 14-16.

⁵ See Conrail April 24, 2006 Reply Statement, Appendices R, S, and T.

⁶ The City Parties assert that after the City designated the Embankment properties as an "historic landmark" in 2003, the City held meetings with Conrail about acquiring the Embankment properties. Supp. Comments at 13. But Conrail never received any concrete proposals. "What it received instead were periodic overtures to meet to talk about the possibility of the City or some other public entity acquiring the property instead of Conrail selling the property to the only bidder that had met Conrail's terms." Conrail April 24, 2006 Reply Statement, Ryan VS at 16. At one such meeting, the City Parties assert that Conrail told the City that its condemnation authority was preempted. Supp. Comments at 13. This is not a new assertion, and it is not only unsupported by the concurrent notes of the City consultant who supposedly heard it at the meeting, but also by the Verified Statements of the Conrail representatives at the meeting who supposedly said it. See Conrail April 24, 2006 Reply Statement, Ryan VS at 16-17 and Fiorilla VS at 2.

part of an active line of railroad. Supp. Comments at 14-15, 17-20. The lawyer who filed that Declaration did not become an attorney for the LLCs until 2008, and he did not have his epiphany until 2012, when the LLCs presented his Declaration as evidence to support their newly hatched fraud claim against Conrail. As the City Parties themselves note, he has a difficult time squaring the assertions in his Declaration with positions he himself took in proceedings before this agency and in state court on behalf of the LLCs. *Id.* at 17-18. More important, however, his position cannot be squared with the expert opinion of the LLCs' prior counsel, former ICC General Counsel Fritz Kahn, and the many expert witnesses Mr. Kahn presented to the STB in support of the LLCs' position that the Harsimus Branch was and is a spur, and not a regulated line of railroad.

Mr. Kahn is well-versed in all facets of rail regulation, including the "case-by-case, fact-specific" determination of the jurisdictional status of rail trackage. *N.Y. City Econ. Dev. Corp.—Pet. for Dec. Order*, STB Finance Docket No. 34429, slip op. at 5 (served July 15, 2004). The LLCs not only were represented by Mr. Kahn, but they also obtained the services of an impressive array of former railroad and United States Railway Association ("USRA") personnel to research the Embankment properties and offer testimony in the form of Verified Statements. These included (1) John D. Heffner, himself a long-time practicing transportation attorney, a former staff attorney at the ICC, and a former member of the Office of General Counsel for USRA, (2) James W. McClellan, who was USRA's Vice President in charge of the Office of Strategic Planning, (3) Richard B. Hasselman, formerly a Vice President at Penn Central and a Senior Vice President at Conrail, (4) William F. Wulforth, former special duty Assistant Trainmaster on the Harsimus Branch, who was also familiar with operations on the Hudson

Street Industrial Track, and (5) Victor Hand, a former USRA official who also at one time was a brakeman on the New Jersey Division of the Penn Central.⁷

Together with this detailed testimony, the LLCs presented extensive documentary evidence, participated in written discovery and document production, and made their own independent legal arguments to the STB, the United States Court of Appeals for the District of Columbia Circuit, and (until 2012) the Special Court that the Harsimus Branch was not a regulated line of railroad. Whatever may have been the motivation of the LLCs in changing legal counsel and reversing a position they had firmly espoused for six years, their change in tactics, which the Special Court rejected, does not alter the fact that their own independent legal and factual experts refuted the belated assertions of their subsequent counsel. Conrail is not here contesting that abandonment authority is now required for the Harsimus Branch, including over the Embankment properties, but there was and is ample support, including in the LLCs' own expert evidence and argument, for its good faith belief that the Harsimus Branch was not a regulated line of railroad.

The City Parties attach to their "Additional Supplemental Comments" excerpts from the New Jersey Title Practice Handbook and a copy of N.J.S.A. 48:12-125.1. Supp. Comments at 3-4. They suggest that Conrail or the LLCs, or both, violated the Title Practice Handbook. Even assuming it were possible to violate a treatise like the Title Practice Handbook, if the City Parties have a state-law claim concerning the LLCs' title to the Embankment properties, they can make it in state court. They are already making a claim in state court under N.J.S.A. 48:12-125.1 that the sale of the Embankment properties to the LLCs violated state law, so it is mystifying why they are raising that law with the STB.

⁷ See Reply Statement of 212 Marin Boulevard, et al., in STB Docket No. 34818, filed April 24, 2006.

Whether the state court does or does not void the sale under N.J.S.A. 48:12-125.1, there is no reason for the STB to do so. The net effect of the parties' stipulations and the Special Court's judgment is that Conrail retains a common carrier obligation over the old Harsimus Branch right of way. For all intents and purposes, Conrail has a constructive easement that cannot be extinguished without abandonment authority from the Board. Contrary to the City Parties' ominous suggestions (Supp. Comments at 20), no demolition of the Embankment properties can or will take place without that authority.⁸ And the remedies the City Parties can seek in the STB's abandonment proceedings are the same regardless of whether Conrail or the LLCs own the property underlying the right of way.⁹

⁸ Furthermore, no demolition of the Embankment properties can take place without a waiver of Jersey City's Historic Landmark designation for those properties. As Conrail explained in its Supplemental Environmental and Historic Report filed August 21, 2014, the LLCs have been denied such a waiver, after extensive hearings, both by the Jersey City Historic Preservation Commission and by the Jersey City Zoning Board of Adjustment. Accordingly, it is no longer reasonably foreseeable that the LLCs could carry out any demolition of the Embankment properties if the STB grants abandonment authority.

⁹ That does not mean that the City Parties or any other party will get the remedy it wants. Conrail is not required, for example, to agree to a Trails Use request, and has already made clear that it will not do so. By the same token, Conrail has made clear that it is prepared to offer and provide in the Section 106 review process—if there remains any need to conduct such a process (in light of the LLCs' inability to obtain waivers from Jersey City's Historic Landmark restrictions)—only the remedies it would provide if it still owned the underlying fee interest in the property. See Reply of Consolidated Rail Corporation to "Motion to Reopen," filed May 18, 2009, at 6 and n. 1. The ICC determined years ago by rule that the most the agency can require of railroads in a Section 106 proceeding is that they provide documentation of rail lines, bridges, and other historic structures to preserve the historic record. See *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-29 (1991). The ICC and the STB have adhered to that rule since. See *Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Union Pac. R.R. Co.—Abandonment and Discontinuance of Trackage right Exemption—In Los Angeles County, CA*, Docket No. AB-33 (Sub-No. 265X), 2008 WL 1968727 (served May 7, 2008). Conrail would provide such documentation for the Harsimus Branch if it continued to own the Embankment properties and the rest of the Harsimus Branch east of Marin Boulevard in fee, and it will provide such documentation regardless of the LLCs' ownership of the fee interest in the Embankment properties and the ownership by multiple other parties of the fee interest in the properties underlying the Harsimus Branch east of Marin Boulevard.

The City Parties argue, however, that a 2007 Memorandum of Understanding ("MOU") between Conrail and the LLCs somehow constitutes a contract to evade Section 106 review and engage in anticipatory demolition. Supp. Comments at 21-23. Conrail responded at length to the City Parties' mischaracterization of the 2007 MOU in its Reply to their Motion to Compel filed October 7, 2014, and we need not repeat that discussion. Conrail Reply at 9-11. Suffice it to say here that nothing in the MOU evinces any intent to evade STB jurisdiction.

The City Parties profess to seek an expeditious handling of this abandonment proceeding, yet they continue to raise baseless reasons why it should be extended; most recently for burdensome discovery that has no relevance to any legitimate issue in the proceeding. Their "Additional Supplemental Comments" reflect the continuing inability of these parties to refrain from rehashing the same issues over and over in multiple pleadings. Nothing they say in this latest filing advances their cause one whit.

Respectfully submitted,

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III / ACS
Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street NW
Washington DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

October 15, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 15th day of October, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

Charles H. Montange
426 NW 162nd Street
Seattle, WA 98177

Daniel Horgan
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096

Aaron Morrill
Civic JC
64 Wayne Street
Jersey City, NJ 07302

Eric Fleming
President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

Jill Edelman
President
Powerhouse Arts District Neighborhood Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crowell
Monroe County Planning Department
Room 306 Courthouse
Bloomington, IN 47404

Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Fritz R. Kahn, P.C.
1919 M Street NW
7th Floor
Washington, DC 20036

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

President
Hamilton Park Neighborhood Association
PMB # 166
344 Grove Street
Jersey City, NJ 07302

East Coast Greenway Alliance
5315 Highgate Drive
Suite 105
Durham, NC 27713

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Justin Frohwirth, President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Joseph A. Simonetta, CAE
Executive Director
Preservation New Jersey Incorporated
414 River View Plaza
Trenton, NJ 08611

Sam Pesin
President
Friends of Liberty State Park
580 Jersey Avenue
Apt. 3L
Jersey City, NJ 07302

Massiel Ferrara, PP, AICP, Dir.
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Eric S. Strohmeier
Vice President COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Embankment Preservation Coalition
495 Monmouth Street
Jersey City, NJ 07302

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Jersey City Economic Development Corp.
30 Montgomery Street, Suite 1400
Jersey City, NJ 07302

Daniel D. Saunders
Deputy State Historic Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Maureen Crowley, Coordinator
Embankment Preservation Coalition
263 Fifth St
Jersey City, NJ 07302

I further certify that, in accordance with 49 C.F.R. §§ 1105.7(b) and 1105.11, on this 15th day of October, 2014, I provided a copy of the foregoing to each of the agencies designated below by First Class Mail, postage prepaid :

AGENCY SERVICE LIST

Mayor Steven M. Fulop
City Hall – 280 Grove Street
Jersey City, NJ 07302

New Jersey State Clearinghouse
State Review Process
Office of the Governor
P.O. Box 001
Trenton, NJ 08625-001

Thomas A. DeGise
County Executive
Justice Brennan Court House
538 Newark Avenue
Jersey City, NJ 07306

NJ Department of Environmental Protection
Historic Preservation Office
Attn: Patty Christman, NJ Transit & Rail
Infrastructure
Mail Code 501-04B
P.O. Box 420
Trenton, NJ 08625-0420

Ruth W. Foster, Ph.D.
NJ Department of Environmental Protection
Office of Permit Coordination and
Environmental Review
401 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

Richard Reilly, Bureau Chief
NJ Department of Environmental Protection
Bureau of Inland Regulation
501 East State Street
Mail Code 501-02A
P.O. Box 420
Trenton, NJ 08625-0420

Grace Musumeci, Chief
Environmental Review Section
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

The District Engineer
U.S. Army Engineer District, New York
Jacob J. Javits Federal Building
26 Federal Plaza, Room 2109
New York, NY 10278-0090

Dr. Dan Roman, Acting Chief
Spatial Reference System Division
National Geodetic Survey
1315 East-West Highway
Silver Spring, MD 2090-3282

Bradley M. Campbell, Commissioner
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

David Sumba, Pr. Env. Specialist
NJ Department of Environmental Protection
Bureau of Coastal Land Use Compliance &
Enforcement
100 North Road
Chester, NJ 07930

NJ Department of Environmental Protection
Division of Land Use Regulation
Attention: David Franz, Acting Director
Mail Code 501-02A
501 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

U.S. Fish and Wildlife Service
927 N. Main Street, Building D
Pleasantville, NJ 08232

Director's Office
National Park Service
U.S. Department of the Interior
1849 C Street, NW
Room 2216
Washington, DC 20240

Mike Caldwell, Regional Director
National Park Service
U.S. Custom House
200 Chestnut Street, Fifth Floor
Philadelphia, PA 19106

Carrie Mosley
State Conservationist
Natural Resources Conservation Services
220 Davidson Avenue, 4th Floor
Somerset, NJ 08873-4115



Adam C. Sloane