

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36078

PETITION FOR DECLARATORY ORDER

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

REPLY OF CONSOLIDATED RAIL CORPORATION IN OPPOSITION

242196

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

Yet despite this evidence, neither the Board nor the D.C. Circuit viewed the post-conveyance usage as material to the question whether the Board, rather than the Special Court, had jurisdiction to resolve the issues about the status of the trackage. This is readily explicable. Post-conveyance usage could be material only if that usage *changed* the status of the track from its status at conveyance—that is, if a change in the use of the track transformed trackage that was, or might have been, conveyed as non-jurisdictional track into jurisdictional rail lines. Here, there is no basis for an argument that post-conveyance usage of the Harsimus Cove Yard or the Hudson Street IT had such a transmogrifying effect.

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

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

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

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

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

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

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

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

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

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

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

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

III. THERE IS NO ACTUAL CONTROVERSY OR UNCERTAINTY

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

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

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

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

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

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

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

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

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

CONCLUSION

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

The Petition should be denied.

Respectfully submitted,

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December 5, 2016

CERTIFICATE OF SERVICE

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

James Riffin
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Daniel Horgan, Esq.
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In addition, I have emailed a courtesy copy of the foregoing to those listed above and have mailed and emailed courtesy copies of the foregoing to the following:

Charles H. Montange, Esq.
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Andrea Ferster, Esq.
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/s/


Adam C. Sloane

EXHIBIT A

**Exhibit G to City of Jersey City et al's September 15, 2016 Motion for Sanctions
(Riffin's Memo to Bruce Nagel, Esq. with accompany emails)**

Exhibit G

Email: Riffin to Strohmeier 10:21 PM Nov. 21, 2015

Stating Hyman had discussed Riffin to Nagel memo

With Nagel

Riffin to Nagel memo (dated 21 Nov. 2015)

Subject: Fw: letter to bruce nagel
From: Eric Strohmeier (esstrohmeier@yahoo.com)
To: c.montange@frontier.com;
Date: Monday, June 13, 2016 2:53 PM

This is the email I called you about.

Eric

On Saturday, November 21, 2015 10:21 PM, jim riffin <jimriffin@yahoo.com> wrote:

Hyman talked to Nagel today. He has some interest. This is what I sent to him.

Attachments

- STB NJ AB 167 1189 L-1 to Nagel 11-21-15.pdf (103.64KB)

FROM: James Riffin P.O. Box 4044 Timonium, MD 21094 (443) 414-6210
jimriffin@yahoo.com

TO: Bruce Nagel Nagel Rice 103 Eisenhower Parkway Roseland, NJ 07068
Bnagel@naglerice.com (973) 18-0400

DATE: Saturday November 21, 2015

RE: Steve Hyman's Embankment properties.

Hudson Exchange West [Metro Plaza] Property bounded by Marin Blvd on the West, 2nd Street on the South, Light Rail on the East, Gangemi (6th St) on the North.

Bought by / owned by: **Gregg Wasser** G & S Investors.

Being developed by: **Forest City Ratner** Companies of NY, NY.

ULTIMATE GOAL: Persuade Conrail to negotiate a settlement with Steve Hyman, Jersey City, Riffin and Wasser / Forest City.

PATH TO GOAL: Enjoin Wasser / Forest City from development of the Metro Plaza property. Wasser / FC sue Conrail for \$800 million. I agree to lift injunction, providing Conrail negotiates an acceptable settlement.

ACCEPTABLE Settlement: **Conrail** deeds to Hyman the 12 acres +/- West / North of Newark Avenue. Conrail gives Hyman \$5 million in cash. Conrail gives Riffin: The segment of the Harsimus from Marion Junction (½ mile west of Journal Square) to where the Harsimus leaves the PATH r/w; The Harsimus rr easement from Waldo Street to the Light Rail line; The D&H's Terminal Rights at Oak Island; Use of the Bayonne Industrial Track; Trackage rights from Jersey City to: Lakehurst, NJ, Manville, NJ, Oak Island Terminal, Bound Brook, NJ. Norfolk Southern gives Riffin trackage rights to Scranton, PA. CSX gives Riffin trackage rights to Belle Mead, NJ. Conrail, NS, CSX, give Riffin some surplus locomotives, open hopper and covered hopper cars, LP tank cars.

Jersey City grants development rights on the Embankment and Conrail's 12 acres

Hyman grants to Jersey City 3 Embankment tops, for park purposes.

Hyman gets a percentage interest in the Embankment / Conrail's 12 acres development.

Forest City gets to be the developer for the Embankment and Conrail's 12 acres.

Three high-rises are built on 3 Embankments. More high-rises are built on Conrail's 12 acres. A monorail is built connecting Journal Square / the hi-rises / Light rail.

Solar cells are installed on all hi-rises. Natural gas fuel cells provide electricity and some water for the hi-rises.

LEGAL ARGUMENTS: Status quo of RR r/w subject to Offer of Financial Assistance ("OFA"), must be maintained, until OFA process has been completed. (Cannot change the nature, status of r/w.) Cannot build on RR r/w, until OFA process has run its course. (See Vicksburg, MS Glass Road decision.) Riffin granted right to file an OFA. (See November

2, 2015 STB decision.) Riffin has equitable title to RR r/w. Riffin has standing to sue in U.S. District Court to enjoin Forest City Ratner from building on RR r/w. (Federal question involved.)

Wasser / FC can sue Conrail per 49 U.S.C. 11704(b). [Carrier liable for damages sustained by a person as a result of an act or omission of that carrier in violation of the Interstate Commerce Act.] Conrail failed to follow dictates of 49 U.S.C. 10903. [Sold / abandoned line without prior STB authority.] Wasser / FC damaged. Can sue in U.S. District Court. [See 11704(c)(1).] Wasser / FC get attorney fees. [See 11704 (d)(3).]

Even though Conrail sold the real estate under the Harsimus line of railroad, per 49 U.S.C. 10903, 11901, and 11906, Conrail could not lawfully sell the 'line of railroad' easement impressed on the real estate under the Harsimus line of railroad, without STB authority. Nor could Wasser buy the line of railroad / easement impressed on the Harsimus line of railroad. See 49 U.S.C. 10901(a)(4).

Therefore, Conrail still 'owns' the Harsimus line of railroad easement impressed on the Metro Plaza real estate, and 'owned' that railroad easement in 2009, when Conrail filed to abandon the Harsimus line of railroad.

Lines of Railroad

A track, and the right-of-way associated with the track, can become a "line of railroad" two ways:

- A. The Interstate Commerce Commission ("ICC") / Surface Transportation Board ("STB") can expressly authorize its creation. See 49 U.S.C. 10901(a) (1) and (2). [New construction (2), or the extension of an existing line of railroad into new territory, over newly constructed track, or over existing non-line of railroad track owned by another carrier (1).]
- B. If a non- 'line of railroad' track (such as a yard, spur, switching, passing track):
 - a. **Is used** for the movement of '**through**' rail cars (as opposed to 'local' traffic)
AND
 - b. **Is used** to carry rail cars to **more than one shipper**. See *Effingham* and Texas Steel mill case.

Once a track becomes a 'line of railroad,' it remains a 'line of railroad,' until such time that abandonment authority is granted, and exercised. See *Kalo Brick* and *Texas / Mexican RR* cases.

Non line-of-railroad track **can be** converted into a 'line of railroad' track. See *Effingham*.

A 'line-of-railroad' track **cannot** be converted into non- line of railroad (Excepted) track. (It first must be abandoned (as a line of railroad).

"Excepted" track

Non- 'line of railroad' track is known as **"excepted"** track. See 49 U.S.C. 10906. Excepted track is subject to the exclusive jurisdiction of the STB. However, it is **not regulated** by the STB. That is, it can be sold, removed, or installed / removed, **without** prior STB authority.

Line Codes 1420 and 1440

Line Codes 1420 (Passaic and Harsimus) and 1440 (Hudson Street Industrial Track), were conveyed to Conrail on **April 1, 1976, pursuant to the Final System Plan ("FSP")**. Only those two "lines of railroad" were **conveyed** to Conrail via the FSP. The FSP also conveyed to Conrail all tracks and rail assets / properties, associated with those two line codes. **But NOT as "lines of railroad."**

Line Code 1440 was the **Hudson Street Industrial Track**. It started in the Harsimus Cove Yard. It traversed south, down Hudson Street, to Essex street, then went West, in the bed of Essex street. It served at least seven shippers, the largest shipper being the Colgate Company.

Line Code 1420 was the United New Jersey Railroad and Canal Company's **Passaic and Harsimus Branch**. It originally started at Exchange Place (MP 0.0), on the Hudson River. (At the East end of present day Columbus Blvd.) When it was built (in **1867**), it followed the bed of the present day Columbus Blvd, to the present-day PATH maintenance-of-way facility (bounded by Columbus Blvd on the South) [MP 1.0]. It then paralleled the PATH right-of-way, to Harrison (Kearny), NJ. [To MP 7.0.]

The original Passiac and Harsimus Branch carried **both** passenger and freight rail traffic. In **1871**, the Pennsylvania Railroad ("**PRR**") leased the Passiac and Harsimus Branch for 999 years. In **1901** the PRR decided to **re-route** freight traffic along 6th Street. It built an elevated line from the Jersey City Cemetery (on Newark Avenue, East of Waldo Street), parallel to, and adjacent to, 6th Street, to the Harsimus Cove Yard. The portion of the elevated line between Brunswick Street and present day Marin Blvd (**formerly Henderson Street**), was called **The Embankment**.

As of **1905**, all Passiac and Harsimus **freight traffic** was routed over The Embankment. All Passenger traffic was routed down the original Passiac and Harsimus Branch (down present-day Columbus Blvd).

In the 1960's, the PRR decided to **cease passenger** service on the Passiac and Harsimus Branch. In **1961**, the PRR **abandoned** the segment of the original Passiac and Harsimus that traversed over present-day Columbus Blvd. (Abandoned its Passenger Line, **from MP 0.0** (Exchange Place) **to MP 1.0** (Columbus at Brunswick.) Freight traffic continued to move over

the Embankment segment.

On **April 1, 1976**, the assets of the Penn Central and the United New Jersey Railroad and Canal Company, were conveyed to Conrail via the Final System Plan. See FSP p. 282. Line Codes 1420 and 1440 were expressly conveyed to Conrail. Only that portion of Line Code 1420 that was between MP 1.0 (original Passiac and Harsimus at Columbus and Brunswick) and MP 7.0 (Harrison / Kearny, NJ), was conveyed to Conrail. (Remember, in 1961, the PRR abandoned that segment between MP 0.0 and MP 1.0, when the PRR abandoned its passenger service.)

Line Codes 1420 and 1440 included all rail assets associated with those two line codes, such as yard, spur, passing and switching tracks, and all real estate associated with those two line codes.

Prior to Conrail's acquisition of the Passiac and Harsimus **freight** line of railroad, (Line Code 1420), all freight traffic traversed over the Embankment tracks, to the Harsimus Cove Freight Yard. Shortly after Conrail acquired Penn Central's Jersey City rail assets, Conrail named the Embankment right-of-way, the **Harsimus Branch**.

The Harsimus Branch, as it crossed Marin Blvd, had **six tracks**. Historic aerials (1954 and 1966), and the Valuation Maps for the Harsimus Cove Yard, show the location, and uses, of the six tracks that crossed Marin Blvd.:

Track One: The northern-most track went to two shippers on the north side of the pier that today is an extension of 6th Street (**"Pier"**) [**Elk Warehouse and Chicago Shippers.**]

Track Two: The second track down went to the car float at the end of the Pier.

Track Three: The third track down went to the south side of the Pier. Bulk commodities (such as coal) were off-loaded from rail cars to barges anchored to the south side of the pier.

Track Four: Went to three more car floats south of the Pier.

Track Five: Went around the northern part of the Harsimus Cove Yard, and connected to the Hudson Street Industrial Track. It also was used to route cars to the **William J. Morris** Company, a freight consolidator that had bought 24 acres of the water-front portion of the Harsimus Yard in 1973 / 1974.

Track Six: Went around the southern part of the Harsimus Cove Yard. It connected to the track that served shippers located along Provost Street. A number of spur tracks branched off this track, and served warehouses along the East side of Marin Blvd, between Second Street and Fifth Street.

1979

A 1979 aerial map of the Harsimus Cove Yard depicts only two tracks crossing Marin Blvd: Tracks Two and Three.

Track Two was used to serve shippers located on the Pier: Elk Warehouse, Chicago Shippers, and the barges being loaded on the south side of the Pier. The car float at the end of the Pier, was no longer in use.

Track Three was interconnected to Tracks Two, Four, Five and Six. It was used to service William J. Morris, Manischewitz, and shippers located adjacent to the Hudson Street Industrial track.

Rail Traffic in 1984 / 1974

For the 12-month period ending September 30, 1984, the following shippers received the following number of rail cars:

	1984 <u>Carloads</u>	1974 <u>Carloads</u>
Elk Warehouse:	364	
Chicago Shippers:	1,403	
Wm. J. Morris:	186	4,938
U. S. Packing:	?	6,991
Manischewitz:	35	
Hudson Street Industrial Track Shippers:		
Colgate:	1,068	
Refined Onyx:	107	
'B' Line Trucking:	41	

LINES OF RAILROAD IN 1976

On **August 9, 2007**, the STB, in FD 34818, held that the Embankment Segment [between MP 0.0 (Waldo Street) and MP 0.88 (West side of Marin Blvd)] was conveyed to Conrail via the FSP as Line Code 1420, and was conveyed to Conrail as a "line of railroad."

As stated above, Excepted track (yard, spur, switching, passing track) can be, and will be, as an operation of law, converted into "Lines of Railroad," if they are used for "through" rail traffic, and are used to serve more than one shipper.

Even though neither the STB nor the Special Court expressly held that the Harsimus Branch (Line Code 1420) **East** of Marin Blvd. was a 'line of railroad' when Conrail acquired the Harsimus / Line Code 1420 in 1976, Conrail is judicially estopped from arguing that the Harsimus / Line Code 1420 East of Marin Blvd is **not** a 'line of railroad.' (Jersey City only asked the STB and Special Court to rule on the status of the Harsimus / Line Code 1420 between

Waldo Street and the West side of Marin Blvd.) Conrail's abandonment petition says the Harsimus / Line Code 1420, lies between MP 0.0 (Waldo Street) and MP 1.36 (East of Washington Street). Conrail, in a separate pleading, says MP 0.88 is at the West side of Marin Blvd. So there must be 0.47 miles of Line Code 1420 'line of railroad' East of the West side of Marin Blvd. That means the Harsimus / Line Code 1420 'line of railroad' continues across the Metro Plaza property.

Conrail's 1988 ZTS charts identify the track traversing the Embankment, as Track 215. (200 series tracks are 'lines of railroad.') Within the Harsimus Cove Yard, track 210 (Hudson Street Industrial Track), branches off of track 215. Track 215 then divides into tracks 731, 732 and 733, which tracks service "William J. Morris." (A freight consolidator, who bought two parcels from Penn Central in 1973 (10 ac, Parcel 'A') / 1974 (14 Ac, Parcel 'B'). See 3144 / 361 (May 11, 1973) and 3165 / 1 (May 29, 1974)

By 1979, only two of the six tracks that crossed Marin Blvd, were being used by Conrail. Those two tracks interconnected with the former Tracks One to Six. The segments of former Tracks One to Six that were in the Harsimus Cove Yard, were used to serve the shippers on the north side of the Pier (Elk Warehouse / Chicago Shippers, served via **Tracks One and Two**), the barges on the south side of the Pier (served via **Track Three**), William J. Morris (served via **Track Five**), and the Hudson Street Industrial Track (served via **Tracks Five and Six**).

Whether Tracks One to Six were **conveyed** to Conrail as lines of railroad, is irrelevant. What is relevant, is how Conrail **used** Tracks One to Six.

Conrail **used** Tracks One to Six for the movement of **through** traffic to **more than one shipper**. Conrail's **use** of Tracks One to Six caused Tracks One to Six to become "lines of railroad."

Once a track becomes a 'line of railroad,' it stays a 'line of railroad,' until abandonment authority is obtained, and exercised. See *The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), slip op. at 5 (ICC Served June 17, 1991). ["Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur ... solely through the railroad's unilateral decision to change its use of the track segment over time."]

On the 1979 Aerial, and on the Val Map for the Harsimus Cove Yard, Tracks One, Two and Three can be seen going due East from Marin Blvd, to the Pier on the water front. That puts a 'line of railroad' north of the Pep Boys site. Tracks Five and Six can be seen going diagonally across the Metro Plaza land. Spur tracks can be seen branching off of these 'main line' 'lines of railroad.

Yard tracks can be seen branching off the diagonal 'lines of railroad.' Yard tracks, and the land under yard tracks, can potentially be abandoned / sold, without STB approval. (So long as no OFA is filed to acquire the 'line of railroad' adjacent to those yard tracks. Under the OFA process, land adjacent to the line of railroad being abandoned, can also be acquired, even if it has

previously been sold. See *Railroad Ventures*.)

On **August 19, 1985**, Conrail sold the 18-acre parcel where Metro Plaza is currently located, to **National Bulk Carriers**. See Liber 3468, folio 64. On page 65 of that deed, Conrail reserved a **permanent 50-foot wide easement along the entirety of the northern boundary of the parcel sold to National Bulk Carriers, to be used for continued rail operations.**

Conrail never has sought, nor received, authority to abandon that rail easement. Consequently, it still exists.

On p. 66 of the National Bulk Carriers' deed, Conrail reserved a **temporary easement** to continue serving shippers William J. Morris and Manischewitz. Since the easement was being used to serve two shippers, the easement was being used as a 'line of railroad.' And once a 'line of railroad,' always a 'line of railroad.' Consequently, even though Conrail characterized the easement as being 'temporary,' it in fact was a 'permanent' easement, since it was a 'line of railroad' easement. See *Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), ICC served June 17, 1991.

PRESENT DEVELOPMENT

Forest City's **first hi-rise is being built** (construction started 9-3-15) on the Pep Boys site. Forest City's **second hi-rise is to be built** further south, (construction to start in 2016-2017) clearly on the diagonal 'line of railroad' right-of-way.

Conrail, and Forest City, would try to argue that the Pep Boys land was lawfully sold to National Bulk, due to it being Yard tracks, and that the Pep Boys land is no longer subject to the STB's jurisdiction.

However, the National Bulk deed expressly reserves a 50-foot wide easement across the northern boundary of the National Bulk property (which is the northern boundary of Forest City's property).

The National Bulk deed also reserves 'temporary' easements across the center portion of the National Bulk / Metro Plaza property, which Riffin will argue, still exist, since they are 'lines of railroad' easements, which have never been abandoned.

Riffin's strategy

Riffin desires to stop **all** construction, including construction on the Pep Boys site. To do that, it must be established that the Pep Boys site is still subject to the STB's jurisdiction, and is still subject to the OFA process.

Argument: Pep Boys site is still subject to STB jurisdiction

Most Powerful Argument

Riffin's most powerful argument, is that the National Bulk deed expressly reserved a 50-foot wide easement across the northern boundary of the Metro Plaza parcel. Where Forest City is presently driving piles, is clearly within that 50-foot wide easement.

Riffin's second argument, is that the 'temporary' easement was not 'temporary.' Because the easement was used to serve more than one shipper, the easement was used as a 'line of railroad,' which has never been abandoned.

Riffin's third argument:

A 'line of railroad' includes the land adjacent to the 'line of railroad' tracks. A line of railroad's tracks can be placed anywhere within the line of railroad's right-of-way.

The land between the outer-most tracks within a railroad right-of-way, is a part of the 'line of railroad' right-of-way.

Per *Iowa Terminal*, *Railroad Ventures*, and *Boston & Maine*, an OFA offeror can acquire, in an OFA proceeding, land adjacent to a line of railroad's right-of-way, **which land was acquired by the railroad when it acquired the line of railroad**, so long as the adjacent land is 'needed for operation of the line of railroad.'

Land that was 'sold' prior to filing an abandonment petition, can still be acquired via the OFA process, so long as the land is 'needed for continued freight rail service.' (See *Railroad Ventures*, *Boston & Maine*.) [The STB / a court, can order the land be reconveyed back to Conrail. That is not a good option. The OFA purchase price would be the land's present fair market value. The STB / a court, can find that Conrail retained a rail easement over the underlying real estate. A much better option. Rail easements have a Net Liquidation Value of Zero Dollars. The owner of a rail easement has the right to exclusive possession of the full width of the rail easement, to the center of the earth, and to the heavens.]

The Pep Boys land is 'needed for continued freight rail service.' A 'wye' is needed at the East End of the Harsimus, in order to turn trains around. The top of the 'wye' needs to be adjacent to, and parallel to, the Light Rail tracks. The northern-most leg of the 'wye,' needs to traverse over the Pep Boys site. The southern-most leg of the 'wye,' will follow the southern-most line of railroad track, to the southern-most Eastern corner of the Metro Plaza parcel. The land in-between the 'wye' legs, is needed for spur track.

SITE PLANS

Riffin has a number of graphics. The first is a graphic prepared by the STB. The yellow line shows where the STB believes the Harsimus right-of-way is located.

The second graphic has a 'black box' on it. That box is where Metro Plaza is located.

The third graphic is a 'google earth' aerial of the Metro Plaza site. I have scaled the STB's right-of-way graphic onto the google earth graphic. I have also indicated where Forest City has erected a construction fence around its construction site. The building depicted in the upper right-hand corner of the Metro Plaza parcel, within the area enclosed within the construction fence, was the Pep Boys building. The building was demolished in August, 2015. Forest City's first hi-rise is to be built on the foot print of the former Pep Boys building.

Historic aerials can be found at: www.historicaerials.com

Once on the historicaerials' web site, type in the 'search' box: "6th street jersey city, nj"

Put your cursor on the picture, left click and hold your mouse, then move the mouse an inch or so up and to your left. The picture will move, allowing you to view more to the East and South. Look for a baseball field. That is at the corner of Marin Blvd and 6th Street. The Metro Plaza parcel lies East of Marin Blvd, between 2nd street and 6th street.

Zoom in to 30 m or 50 meters.

Click on the following years: 2013. (A fair image of what the site looked like in 2013.)

2004. A good color image of the site in 2004.

1995: Shows Metro Plaza just after it was built.

1994: Shows Metro Plaza and Washington Blvd being built.

1987: Fair image showing yard tracks.

1979: Good color image showing yard tracks and line of railroad, with catenary pole
Shadows. Shows what the Harsimus Cove Yard looked like just after Conrail
acquired it in 1976.

1966: Fair image showing the yard in 1966.

1954. Good Black & white image of the yard in 1954.

1931: Very poor image of the yard in 1931.

Mr. Cassera: I have asked Ted Cassera, a NJ land surveyor, to survey the four corners of the Metro Plaza parcel, bounded by Marin Blvd, 2nd street, the Light Rail, and 6th Street. I asked him to depict: The construction fence, location of BJ's and Bed Bath and Beyond. And the corners of any excavation / construction. I will provide him with information permitting him to depict where the Harsimus line of railroad right-of-way is located, and where the proposed wyc is to be located. On Tuesday, November 17, 2015, aerial photographs of the Metro Plaza site were taken. These aerial photographs will have the boundary lines and lines of railroad overlaid on them.

Mr. Kahn: I have asked Fritz Kahn to read the *Iowa Terminal*, *Railroad Ventures*, and *Boston & Maine* cases, plus the Vicksburg Glass Road Bridge case. I have asked him to prepare an argument supporting my thesis that there were four tracks associated with the Harsimus line of

railroad, as it crossed Marin Blvd, going East. One line of railroad track continued due East, where 6th Street presently exists, to the water front. Two lines of railroad tracks, went across the Metro Plaza parcel on a diagonal. The land between the outer-most line of railroad tracks, is all a part of the Harsimus line of railroad right-of-way, and is needed for 'continued freight rail service' (As a wye, to turn trains around.)

Mr. Kahn is the former General Counsel for the ICC. He was an ICC staff attorney from 1959 to 1971, when he became General Counsel. He remained General Counsel until January, 1976. That makes him an 'expert' on railroad law.

If you would like, I will send to you copies of the Glass Road Bridge case, and the November 2, 2015 STB decision giving me the right to file an OFA, and a copy of the *Iowa Terminal, Railroad Ventures*, and *Boston & Maine* cases. I also have copies of the deeds to the Metro Plaza parcel.

After you read all of this, ask yourself the question: What is the likelihood that I would be successful in getting a federal judge to declare that I have equitable title to the railroad lines of railroad that traverse the Metro Plaza parcel? What is the likelihood I could get an injunction to stop all construction until the OFA process is completed?

What is the likelihood that Forest City would sue Conrail? And that Forest City's suit against Conrail would induce Conrail to negotiate a settlement? (Which is the ultimate goal.)

EXHIBIT B

**Appendix I to City of Jersey City et al's Oct. 20, 2016 Reply to LLCs' Motion for Sanctions
(Gregg Wasser Certification)**

Before the Surface Transportation Board

STB Docket No. AB -167 (Sub-No. 1189X)

**CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION - IN HUDSON
COUNTY, NJ**

STB Docket No. AB-55 (Sub-No.686X)

**SXC TRANSPORTATION, INC. - DISCONTINUANCE OF SERVICE EXEMPTION - IN
HUDSON COUNTY, NJ**

STB Docket No. AB-290 (Sub-No.306X)

**NORFOLK SOUTHERN RAILWAY COMPANY - DISCONTINUANCE OF SERVICE
EXEMPTION - IN HUDSON COUNTY, NJ**

Certification of Gregg Wasser

I, Gregg Wasser, being of full age, do hereby certify as follows:

1. I am the President of Jersey City Associates Inc., the General Partner of G&S Investors/Jersey City, L.P., which is a member of GS FC Jersey City Pep 1, LLC ("GS FC Jersey City"). I make this Certification in support of the Motion on Behalf of City of Jersey City et al for Sanctions against James Riffin for Failure to Respond to Discovery (Document) Requests.

2. On July 20, 2016, I attended a meeting with Steven Hyman at my office in New York City. I understood Mr. Hyman to be speaking to me on behalf of his wife and certain limited liability companies that she controls (the "Hyman LLCs"). I further understood that the Hyman LLCs are engaged in the dispute with Consolidated Rail Corporation ("Conrail") and the City of Jersey City, New Jersey ("Jersey City"), that is the subject matter of this action before the Surface Transportation Board.

3. During my meeting with Mr. Hyman, he stated to me that there was someone from out of town whom I should meet or words to that effect. Shortly thereafter, James Riffin appeared at my office without an appointment or any other notice and joined the meeting at Mr. Hyman's behest.

4. I understood Mr. Riffin to be an individual who had previously written to GS FC Jersey City threatening to file a lawsuit relating certain alleged rail rights.

5. When I spoke to Mr. Riffin, I asked him why he was at my office. In response, he stated he had told Mr. Hyman that he wanted 5% of whatever monetary recovery the LLCs might obtain through the resolution of their dispute with Jersey City and Conrail. Mr. Hyman then permitted Mr. Riffin to present to me an argument on why Conrail should pay the Hyman LLCs to settle the dispute. Consequently, I understood that Mr. Hyman had agreed to pay to Mr. Riffin 5% of whatever recovery the Hyman LLCs might receive.

6. Also on July 20, 2016, Mr. Riffin filed a Complaint for Declaratory Order in the United States District Court for the District of New Jersey, captioned *James Riffin v. Forest City Ratner Companies, G&S Investors/Jersey City, L.P., G&S Metro Plaza LLC, GS FC Jersey City Pep-I-Urban-Renewal LLC, and GS FC Jersey City Pep II Urban-Renewal LLC*, Civil Action No. 16-cv-04433 ES-JAD. A true copy of that Complaint for Declaratory Order is attached hereto as Exhibit A.

I certify that the foregoing statements made by me are true. I understand that any of the foregoing statements made by me are willfully false I am subject to punishment.

Dated: October 18, 2016



GREGG WASSER