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April 19, 2024
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April 19, 2024

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: *City of Philadelphia – Petition for Declaratory Order*, STB Finance Docket No. 36768

Dear Ms. Brown:

I have attached for e-filing the City of Philadelphia's Petition for Declaratory Order in the above-referenced proceeding.

Please note that the filing fee of \$1,400 has been paid via pay.gov. The Pay.gov Tracking ID is 27DOFJ1J.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Charles A. Spitulnik', with a long horizontal flourish extending to the right.

Charles A. Spitulnik

Enclosure

FEE RECEIVED
April 19, 2024
Surface
Transportation Board

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April 19, 2024
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

City of Philadelphia – Petition for a Declaratory Order

PETITION FOR DECLARATORY ORDER

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Attorneys for the City of Philadelphia

Dated: April 19, 2024

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

City of Philadelphia – Petition for a Declaratory Order

PETITION FOR DECLARATORY ORDER

The City of Philadelphia (“City”) respectfully petitions the Surface Transportation Board (“STB”) to issue, pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, a declaration that:

- (a) The right to operate a railroad line on top of a derelict viaduct in Center City Philadelphia, Pennsylvania that last supported portions of the 9th Street Branch of the Philadelphia & Reading Railroad Company (“Reading Railroad”) (the “Viaduct”) more than forty years ago was and remains abandoned pursuant to an application approved by the Interstate Commerce Commission (“ICC”) on June 17, 1983, and consummated by the Consolidated Rail Corporation (“Conrail”) on April 23, 1984;
- (b) The STB has no remaining jurisdiction over the ownership, control, or use of the Viaduct because the railroad line the Viaduct supported is abandoned, the tracks have been removed and portions of the viaduct have been demolished at either end; and
- (c) The owner of the Viaduct, Reading International, Inc. (“Reading International”), cannot claim a right to use the Viaduct for railroad purposes because it is not and never has been a rail carrier and possesses no authority to operate a rail line.

I. FACTUAL AND PROCEDURAL BACKGROUND

There were at one time railroad tracks on top of the Viaduct supporting the now-abandoned 9th Street Branch of the Reading Railroad that crosses over Spring Garden Street in Philadelphia. The former Reading Railroad utilized the railroad tracks on top of the Viaduct to move trains through Center City Philadelphia. In 1976, after filing for bankruptcy, Reading Railroad transferred its railroad assets to Conrail under the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* (“3R Act”). The assets transferred included the right to operate rail lines on top of the Viaduct. *See Reading Company v. Schweitzer*, Petition for a Writ of Certiorari, 1985 WL 696137 (June 26, 1985). In Reading [Railroad]’s own words “[a]s of April 1, 1976, Reading [Railroad] ceased to operate as a railroad. The only assets that Reading [Railroad] retained following the conveyance to Conrail were certain non-rail properties [including the Viaduct], a trucking company, some marine equipment, other investments, a claim against Conrail and the United States for the value of the assets that were transferred, and its federal income tax net operating loss carry-forwards.” *Id.* at 4.

On January 1, 1981, Reading Railroad emerged from bankruptcy as the newly-formed Reading Company. The Reading Company was subsequently purchased by the Craig Corporation, which used the (now exclusively non-railroad) assets to finance movie theaters in Puerto Rico, Australia, and New Zealand. Eventually, through a series of mergers, the company came to be called Reading International, Inc. *See* <https://www.sec.gov/Archives/edgar/data/716634/000089843001503845/d425.txt>. Reading International is not a rail carrier and does not operate any common carrier rail transportation.

On March 10, 1983, with the completion of the Center City Commuter tunnel providing an alternative route for rail operations, Conrail applied to the ICC “for abandonment of [operating

rights for] portions of the 9th Street Branch and City Branch, in the City and County of Philadelphia,” including rights associated with the Viaduct. *See* Conrail’s Application, attached hereto as **Exhibit “A.”** On June 17, 1983, the ICC issued an order that “Conrail is authorized to abandon the line described above.” *See* ICC Decision, attached hereto as **Exhibit “B.”** On April 23, 1984, Conrail wrote to the ICC “to notify the Commission that Conrail has implemented the abandonment authority granted in said order.” *See* Conrail’s Abandonment Confirmation, attached hereto as **Exhibit “C.”** Since Conrail’s abandonment, Reading International agreed to the demolition of the entire southern portion of the Viaduct to enable the construction of the Pennsylvania Convention Center so that the Viaduct is no longer connected to or capable of being connected to any rail lines or stations and Reading International has removed the tracks from on top of the Viaduct. During the last 40 years, the Viaduct has become a dilapidated, overgrown, and hazardous blight on nearby neighborhoods.

In 2018, the City completed construction of a park on another abandoned segment of viaduct south of the Viaduct on the former City Branch Line (the “Rail Park.”) *See* <https://centercityphila.org/ccd-services/streetscape/rail-park>. This further cemented the Viaduct’s inability to ever serve as rail infrastructure again, as it is now physically blocked by the Rail Park. The City has authorized the acquisition of the Viaduct, including by condemnation if necessary, to expand the Rail Park.

The reason for this request for declaratory relief is that Reading has and continues to prevent the City from applying local laws to the abandoned Viaduct, over which the STB no longer has any jurisdiction. In 2023, two neighborhood groups near the Viaduct, Scioli Turco, Inc. and 915 Spring Garden Associates, LP, brought an action in the Court of Common Pleas in Philadelphia under the Abandoned and Blighted Property Conservatorship Act, 68 Pa. C.S.A.

§ 1101 *et seq.* (“Blight Act”) to appoint a conservator to rehabilitate a blighted former railroad building on land owned by Reading International adjacent to the Viaduct. Reading removed the action to the federal district court in Philadelphia based on its erroneous “once a railroad, always a railroad” claim that the local anti-blight law is preempted by the Interstate Commerce Commission Termination Act of 1985 (“ICCTA”). *See Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.*, No. CV 21-563, 2023 WL 3007926 (E.D. Pa. Apr. 19, 2023).

On November 14, 2023, the federal district court in Philadelphia granted Reading International’s motion to dismiss the Blight Act petition, agreeing with Reading that the application of the Blight Act is preempted by ICCTA with respect to former Reading Railroad properties. *See Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.*, No. CV 21-563, 2023 WL 7646535 (E.D. Pa. Nov. 14, 2023), attached as **Exhibit “D.”** The federal district court in Philadelphia regarded as immaterial that the Viaduct can no longer physically be used for rail transportation and that Reading International is a movie theater company, not a rail carrier. *Id.* at *3-*4. Rather, the federal district court mistakenly held that “Conrail’s abandonment of its operation of the 9th Street Branch [before the I.C.C.] is inapplicable to the STB’s jurisdiction over the line today” because the abandonment was “consummated under a specific regime wholly distinct from the more standard procedures outlined in the ICCTA.” *Id.* at *4. The federal district court in Philadelphia concluded that the only way for the Blight Act to be applied to Reading International’s real estate would be for the Blight Act plaintiffs to “refile their action in this Court or the Court of Common Pleas of Philadelphia County if and when the STB approves the abandonment of the 9th Street Branch.” The Blight Act plaintiffs did not appeal, and Reading International retained ownership and control of the property, which it then proceeded to demolish.

The City intends to acquire the Viaduct through condemnation and Reading International has indicated that it, in turn, will challenge the City's condemnation attempts using the same logic and argument it made in the federal district court. Accordingly, the City respectfully petitions the STB for a declaratory order stating that the abandonment of the operating rights associated with the Viaduct was authorized by the ICC and consummated by Conrail, that the STB no longer has jurisdiction over the Viaduct, and that the ownership, control and use of the Viaduct is not subject to the ICCTA.

II. ARGUMENT

A. Applicable Standards

The STB has discretion under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order. Under 5 U.S.C. § 554(e), “[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” *See Delegation of Auth.—Declaratory Or. Proceedings*, 5 I.C.C.2d 675 (I.C.C. June 30, 1989) (“We here announce our decision to delegate to the Director of the Office of Proceedings the authority to institute or decline to institute declaratory order proceedings upon petition by any person.”). This is particularly the case where a court refers a matter to the STB for evaluation. *See Boston and Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257, 259 (D. Mass. 2002) (STB issued the declaratory order requested by the district court to “evaluate the rights of the defendants”). As the City intends to condemn the Viaduct and pursue its own action under state or local law, it asks the STB to declare the Viaduct abandoned and no longer subject to the STB's jurisdiction.

B. The Viaduct is Abandoned

The ICC-authorized abandonment of the railroad rights associated with the Viaduct was consummated in 1984. “Once a carrier abandons a rail line pursuant to authority granted by the

Interstate Commerce Commission, the line is no longer part of the national transportation system, and . . . as a general proposition ICC jurisdiction terminates.” *Preseault v. I.C.C.*, 494 U.S. 1, 5 n.3 (1990). The law makes no distinction between the STB and the ICC in this regard. *See Natl. Ass’n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 137 (D.C. Cir. 1998) (“When abandonment approval is given . . . *federal regulatory jurisdiction ends*”) (emphasis added). In fact, when enacting the ICCTA in 1995, Congress specifically granted the STB “the ICC’s remaining regulatory authority and provided that ICC precedent applies to the STB.” *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 809 n.1 (D.C. Cir. 2011) (emphasis added). Nor is there any distinction between rail properties abandoned under the “specific regime” of the 3R Act as opposed to those subsequently abandoned under “the more standard procedures outlined in the ICCTA.” *Scioli Turco*, 2023 WL 7646535, at *4. To the contrary, the STB has recognized that a rail line “abandoned in 1977 pursuant to § 304(b) of the Regional Rail Reorganization Act of 1973 . . . is no longer within the Board’s jurisdiction” *Ulster & Delaware Ry. Revitalization Corp.—Petition for Declaratory Or.*, FD 36164, 2018 WL 3209656, at *1 (S.T.B. June 28, 2018); *see also Lucas v. Twp. of Bethel*, 319 F.3d 595, 597, 602 (3d Cir. 2003) (making clear that an abandonment proceeding under Section 308 of the 3R Act results in an unconditional abandonment). The district court erred by suggesting there was any distinction between the two abandonment procedures.

Thus, there is no question that abandonments authorized by the ICC under the 3R Act and consummated — such as Conrail’s abandonment of railroad rights associated with the Viaduct — remain in force. *See Lucas*, 319 F.3d at 597 (the STB lacked jurisdiction because “the ICC’s unconditional authorization of abandonment was sufficient to end its jurisdiction over the Allegheny Secondary Track.”); *see also, e.g., Maryland Dept. of Nat. Resources—Pet. for*

Declaratory Or., FD 36606, 2023 WL 180361 (S.T.B. Jan. 11, 2023) (declaratory order that STB lacked jurisdiction over a line abandoned under ICC authority); *Iowa Traction Ry. Co.—Discontinuance of Serv. Exemption—in Cerro Gordo Cnty., Iowa*, AB 1269 (SUB-1X), 2020 WL 1692646 (S.T.B. Apr. 1, 2020) (STB lacked jurisdiction over line abandoned in 1987); *R.J. Corman R.R. Co. / Pennsylvania Lines Inc. Constr. and Operation Exemption Clearfield and Ctr. Ctys., Pennsylvania*, FD 35116, 2010 WL 3294291 (S.T.B. July 23, 2010) (“In 1995, Conrail abandoned additional lines in the area [under ICC approval] . . . the abandonments were consummated, thereby removing this property from the national rail transportation system and the Board’s jurisdiction.”).

Reading Railroad’s residual ownership interest in the Viaduct does not change this result. The judge’s decision in *Scioli Turco* suggests that because “Conrail only had an easement over the line,” Conrail’s abandonment of the line “simply does not affect the STB’s current jurisdiction over the 9th Street Branch and the rights of its owner, Reading.” 2023 WL 7646535, at *4. But the Final System Plan designated the rail line at issue to Conrail¹. 1 Final System Plan 261, 281, 332. Those designations encompass the entire “rail propert[y].” 45 U.S.C. § 716(c)(1). Once the rail line was transferred to Conrail, Reading was left with no interest on the Viaduct for rail operations and Reading’s interest in the underlying property could not prevent Conrail from consummating the abandonment of the rail line and taking the entire property out of the STB’s jurisdiction. *Cf. Nat’l Wildlife Fed’n v. ICC*, 850 F.2d 694, 703–04 (D.C. Cir. 1988) (noting that, where a property owner owns land “subject to a railroad right-of-way,” after an unconditional certificate of abandonment has been issued “a right-of-way may be transferred or extinguished under state law”).

¹ The portion of the Branch south of Spring Garden Street was designated to Conrail for acquisition by SEPTA. 1 Final System Plan 261, 281, 332.

It cannot be disputed that Conrail abandoned the right to utilize the Viaduct for railroad purposes pursuant to the ICC's authority. Conrail applied to abandon the 9th Street Branch on March 10, 1983; the ICC approved the abandonment on June 17, 1983; and Conrail consummated the abandonment on April 23, 1984. *See Exhibit "A" - Exhibit "C."* Accordingly, the STB should declare that the Viaduct is no longer a part of the national rail system, and is not subject to the STB's jurisdiction.

C. A New STB Abandonment Order Is Not A Prerequisite for the Application of Local Laws Affecting the Ownership and Control of the Viaduct

As discussed above, there are no existing railroad rights associated with the Viaduct. Those rights were abandoned by Conrail decades ago. But even if the Viaduct had not previously been abandoned, the ICCTA would not preempt state and local property law from regulating the ownership, control or use of the Viaduct because Reading International is not a rail carrier and the Viaduct is not and cannot be used for railroad operations. Accordingly, a new STB abandonment order is not a prerequisite for application of the City's condemnation power.

The ICCTA shields railroad operations subject to STB jurisdiction from the application of state and local laws. 49 U.S.C. § 10501(b). The STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities" 49 U.S.C. § 10501(b)(2) ("the remedies provided under this part *with respect to regulations of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.") (emphasis added). However, once an abandonment is completed, the STB's jurisdiction ends.

Thus, while the ICCTA preempts state or local regulations over ownership, control or use of rail facilities, it does so only "with respect to rail transportation" and "transportation by rail carrier." The STB made that limitation clear in a case in which a petitioner incorrectly claimed

that “the Board has exclusive jurisdiction over construction of a railroad facility, without regard to who operates the facility,” stating:

[W]hile section 10501(b)(2) enumerates various transportation activities over which the Board’s jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board’s jurisdiction is over “transportation by rail carrier.” Thus, to come within the Board’s jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute “transportation” and must be performed by, or under the auspices of, a “rail carrier.” For an activity to be subject to the agency’s jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not just one as suggested by [petitioner].

Town of Babylon and Pinelawn Cemetery--Pet. for Declaratory Or., FIN 35057, 2008 WL 275697, at *3 (S.T.B. Jan. 31, 2008). *See also R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002) (“Thus, *if a railroad line falls within its jurisdiction*, the STB’s authority over abandonment is both exclusive and plenary”) (emphasis added).

Reading International indisputably is not and never has been a rail carrier. It is not registered as a rail carrier; it is an entertainment company, several mergers and acquisitions removed from the Reading Railroad, which also ceased to be a rail carrier after conveying all of its rail assets to Conrail. *See Reading Company v. Schweitzer*, Petition for a Writ of Certiorari, 1985 WL 696137 (June 26, 1985) (“As of April 1, 1976, Reading ceased to operate as a railroad. The only assets that Reading [Railroad] retained following the conveyance to Conrail were certain non-rail properties . . .”). Moreover, and in any event, it would be impossible today to use the Viaduct for rail transportation. The tracks have long been removed. Even if the tracks were still there, there is no ability to connect to any other tracks at either end, and the former 9th Street Branch is blocked by the City’s Rail Park project. The ICCTA does not preempt state or local

regulation of a piece of property that physically cannot be used for rail travel and is owned by a company in the movie theater business with no ties to the rail industry.²

III. CONCLUSION

For all of these reasons, the City requests that the STB issue an order declaring that:

- (a) The Viaduct was and remains abandoned pursuant to an application approved by the ICC on June 17, 1983, and consummated by Conrail on April 23, 1984;
- (b) The STB has no jurisdiction over the ownership, control or use of the Viaduct because the railroad line the Viaduct supported is abandoned; and

² The *Scioli Turco* opinion suggests that the STB has jurisdiction over the Viaduct and Reading because “it is well-established that someone other than a rail carrier may apply to the STB to have a rail line declared abandoned.” 2023 WL 7646535, at *4. Presumably this refers to the process known as “adverse abandonment.” See, generally, *Howard v. Surface Transp. Bd.*, 389 F.3d 259, 261 (1st Cir. 2004); *Consol. Rail Corp. v. I.C.C.*, 29 F.3d 706, 708-09 (D.C. Cir. 1994). However, there are two reasons why third-party rights to adverse abandonment are inapplicable here. First, only a third-party with a “proper interest” may apply for adverse abandonment. See *City of S. Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009) (“A rail carrier may abandon a line upon its own petition or that of a third-party with a ‘proper interest’”); *Modern Handcraft, Inc.–Abandonment in Jackson Cnty., Mo.*, 363 I.C.C. 969, 971 (I.C.C. 1981) (“Subject to establishing a proper interest in an abandonment proposal, any person may institute [abandonment].”) Those with a “proper interest” are very limited, but include adjacent property owners with a reversionary interest in the abandoned rail property, see *Modern Handcraft*, 363 I.C.C. 969, the owner of the underlying rail infrastructure when Conrail refuses to abandon an easement, see *David H. Murdock d/b/a Murdock Inv. Co. – Abandonment – Consol. Rail Corp. Line in Baltimore, Md.*, AB-167, 1992 WL 187780 (I.C.C. Aug. 6, 1992), and the city or municipality in which the rail property is located, see *City of S. Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166 (D.C. Cir. 2009). Reading has none of these interests.

Moreover, this is a false analogy by the court because Reading International is *not* a third-party, but purports to be the “first-party” owner of the Viaduct, which must be a rail carrier even in an adverse abandonment proceeding. The third-parties would be the City, Scioli Turco, or anyone else who Reading International claims must clear the procedural hurdle of filing for adverse abandonment prior to rejuvenating the Viaduct under state or local law. But the question of whether a non-rail carrier such as the City has standing to apply for adverse abandonment is completely separate from whether the STB has jurisdiction in the first place to adjudicate the rights of a company that is not a rail carrier concerning property that is not used for rail transportation. Because Reading International and the Viaduct fit that description, the STB has no jurisdiction over an abandonment proceeding, whether adverse or not.

(c) Reading International cannot claim a right to use the Viaduct for railroad purposes because it is not a rail carrier and lacks authority to operate a rail line.

Respectfully submitted,

/s/David Smith

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Ira Neil Richards (Pa. I.D. 50879)
Matthew H. Davis (Pa. I.D. 325840)
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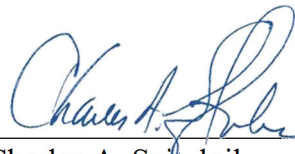
Attorneys for the City of Philadelphia

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of April, 2024, I caused a copy of the foregoing Petition for a Declaratory Order to be served electronically on the following parties:

Reading International, Inc.
Craig Tompkins
Executive Vice President-General Counsel
5995 Sepulveda Blvd
Suite 300
Culver City, CA 90230
Tel: (213) 235-2240

Kevin Greenberg
Greenberg Trauig
1717 Arch St
Suite 400
Philadelphia PA 19103
Tel: 215-988-7818
Attorney for Reading International, Inc.



Charles A. Spitulnik

EXHIBIT A

Conrail Application for Abandonment

CONRAIL

DST

March 10, 1983

Mrs. Agatha L. Mergenovich
Secretary
Interstate Commerce Commission
12th and Constitution Avenues, NW
Washington, D.C. 20423

Re: Application Under Section 308(c) of the Regional
Rail Reorganization Act of 1973, as enacted by
Section 1156 of the Northeast Rail Services Act of
1981, for abandonment of portions of the 9th Street
Branch and City Branch, in the City and County of
Philadelphia, Commonwealth of Pennsylvania --
Docket No. AB 167 (Sub No. 479)

Dear Mrs. Mergenovich:

Enclosed for filing with the Commission are the original
and six copies of Application in reference to the above
lines. This Application is submitted under Section 308(c) of
the Regional Rail Reorganization Act of 1973, as enacted by
Section 1156 of the Northeast Rail Services Act of 1981.
Notice of Insufficient Revenue was filed on November 22,
1982.

Copies of the Application have been served on the
agencies and persons designated on the attachment to this
letter. No shippers are affected.

Please stamp and return the enclosed extra copy of this
letter to acknowledge receipt.

Very truly yours,

Charles E. Mechem
Charles E. Mechem
General Attorney
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103
(215) 977-5017

CEM/km

CHIEF ENGINEER Closures

RWH
MAR 14 1983

PHILA., PA.
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CONSOLIDATED RAIL CORPORATION SIX PENN CENTER PLAZA PHILADELPHIA, PA 19104

March 10, 1983
Page 2

cc: The Honorable Richard L. Thornburgh
Governor, Commonwealth of Pennsylvania
State Capitol
Harrisburg, PA 17120

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1200 Transportation and Safety Building
Harrisburg, PA 17120

Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Rail Services Planning Office
12th and Constitution Avenues, NW
Washington, DC 20423

Harry C. Dennis
Office of Federal Assistance
(RFA-23)
Federal Railroad Administration
400 Seventh Street, SW
Washington, DC 20036

Mr. Wayne A. Michel
Office of Proceedings
Interstate Commerce Commission
12th & Constitution Avenue, NW
Washington, DC 20423

Director, Extension Service
Dr. J.M. Beattie
Agrl. Administration Bldg.
Pennsylvania State University
University Park, Pa. 16802

Bureau of Outdoor Recreation
U.S. Dept. of Interior
18th & Constitution, NW
Washington, DC 20240

Office of the Special Counsel
Interstate Commerce Commission
Washington, DC 20423

March 10, 1983
Page 3

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STOP 105 MT-SA
Washington, DC 20315

National Railroad Passenger Corporation
400 North Capitol Street, NW
Washington, DC 20001

Railroad Retirement Board
824 North Bush Street
Chicago, IL 60611

Railway Labor Executives Association
Railway Labor Building
400 1st Street, NW
Washington, DC 20001

SEPTA
130 South 9th St.
Philadelphia, PA 19106

Lindenmeyo Paper Co.
919 Wallace
Philadelphia, PA

March 10, 1983
Page 4

bcc: L. S. Crane
S. M. Reed
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J. A. Hagen
R. B. Hasselman
J. W. Rowe
W. B. Newman, Jr.
R. H. Steiner
R. W. Garbett (Attn: Saul Resnick)
C. W. Owens
J. F. Spreng
R. F. Bush
J. F. Folk
L. A. Huff
D. W. Mattson
J. E. Musslewhite
G. M. Williams, Jr.
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J. E. Sandefur
J. W. Dietz
B. J. Gordon
J. T. Sullivan
T. H. Ramsey
C. A. Bassani
J. F. Betak
P. K. Harris

BEFORE THE
INTERSTATE COMMERCE COMMISSION

APPLICATION OF CONSOLIDATED RAIL	:	DOCKET NO. AB 167
CORPORATION PURSUANT TO SECTION	:	(SUB NO. 479N)
308(c) OF THE REGIONAL RAIL REOR-	:	
GANIZATION ACT OF 1973, AS AMENDED	:	
BY SECTION 1156 OF THE NORTHEAST	:	
RAIL SERVICE ACT OF 1981, FOR	:	
APPROVAL OF THE ABANDONMENT OF	:	
PORTIONS OF THE 9TH STREET BRANCH	:	
AND CITY BRANCH, IN THE CITY AND	:	
COUNTY OF PHILADELPHIA, PENNSYL-	:	
VANIA.	:	

Charles E. Mechem
General Attorney
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5017

March 10, 1983

BEFORE THE
INTERSTATE COMMERCE COMMISSION

APPLICATION OF CONSOLIDATED RAIL	:	DOCKET NO. AB 167
CORPORATION PURSUANT TO SECTION	:	(SUB NO. 479N)
308(c) OF THE REGIONAL RAIL REOR-	:	
GANIZATION ACT OF 1973, AS AMENDED	:	
BY SECTION 1156 OF THE NORTHEAST	:	
RAIL SERVICE ACT OF 1981, FOR	:	
APPROVAL OF THE ABANDONMENT OF	:	
PORTIONS OF THE 9TH STREET BRANCH	:	
AND CITY BRANCH IN THE CITY AND	:	
COUNTY OF PHILADELPHIA, PENNSYL-	:	
VANIA.	:	

TO THE INTERSTATE COMMERCE COMMISSION, WASHINGTON, DC:

1. The name of applicant is Consolidated Rail Corporation (Conrail). Correspondence relating to this application should be addressed to Charles E. Mechem, General Attorney, 1138 Six Penn Center, Philadelphia, Pennsylvania 19103.

2. Applicant is a common carrier by railroad subject to the former Interstate Commerce Act (now 49 U.S.C.A. Subtitle IV) and to the Northeast Rail Services Act of 1981 (NERSA).

3. Conrail files this application pursuant to Section 308(c) of the Regional Rail Reorganization Act of 1973 (RRR Act), as amended by Section 1156 of NERSA. A copy of said statute is attached hereto as Exhibit A.

4. By this application Conrail requests the Commission's approval of the abandonment of its operation of the

lines of rail described below and situated in the City and County of Philadelphia, Pennsylvania:

- (1) The Ninth Street Branch from a point South of Jefferson Street, at approximately Milepost 1.6, to Milepost 0.0 at Reading Terminal, a distance of approximately 1.6 miles, and
- (2) The City Branch from Milepost 0.35 to Milepost 0.45, which 0.1 mile segment forms the connection between (a) the Ninth Street Branch, described above, and (b) the portion of the City Branch owned by Conrail, which was described in a Notice of Insufficient Revenue filed with the Interstate Commerce Commission October 20, 1982 in Docket AB 167 (Sub No. 459N).

The above-described lines will hereafter be referred to as the Subject Lines. The above described lines are owned by Southeastern Pennsylvania Transportation Authority (SEPTA), and it is for this reason that the presently proposed abandonment relates only to Conrail's operation of the lines. No freight shippers are currently served, and no revenues generated, by these lines.

5. Attached as Exhibit B is a map showing the location of the Subject Lines.

6. Because the lines are not owned by Conrail and because they generate no revenues or expenses, Conrail has not computed an estimate of the subsidy that would be required to keep the lines in operation or an estimate of the value of the lines.

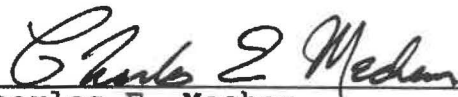
7. All requests for information concerning this application should be made in writing to C. E. Mechem, Room 1138

Six Penn Center, Philadelphia, PA 19104. Copies of such requests should be sent to the Office of Proceedings, Room 4126, Interstate Commerce Commission, Washington, DC 20423.

8. Recipients of this application are advised that any person requesting information or assistance with respect to the abandonment provisions of the Northeast Rail Services Act may contact either the ICC Section of Finance (telephone 202-275-7245) or the Section of Rail Services Planning (telephone 202-275-0826).

WHEREFORE, Applicant requests that the Commission, within 90 days after the filing hereof, approve the abandonment of operation of the lines identified in Paragraph 4 above.

Respectfully submitted,


Charles E. Mechem
General Attorney
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5017

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

G. M. WILLIAMS, JR. makes oath and says that he is Assistant Vice President, Regional Market Development of Consolidated Rail Corporation, the applicant herein; that he has been authorized by proper corporate action on the part of said applicant to verify and file with the Interstate Commerce Commission the foregoing application; that he has general knowledge of the facts and matters relied upon in such application; and that all representations set forth therein are true and correct to the best of his knowledge, information and belief.


G. M. WILLIAMS, JR.

Sworn to and Subscribed :
before me this *10th* day :
March
of ~~February~~, 1983. :


Notary Public

ROSEMARY C. WILLIAMS
Notary Public, Phila., Phila. Co.
My Commission Expires May 2, 1983

SEC. 308 OF REGIONAL RAIL REORGANIZATION
ACT OF 1973 (45 U.S.C.A. 748)

EXCERPTS FROM 49 U.S.C.A. 10905

§ 748. Abandonments

(a) General. The Corporation may, in accordance with this section, file with the Commission an application for a certificate of abandonment for any line which is part of the system of the Corporation. Any such application shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of title 49, United States Code [49 USCS §§ 10901 et seq.].

(b) Applications for abandonment. Any application for abandonment that is filed by the Corporation under this section before December 1, 1981, shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to the line to be abandoned.

(c) Notice of insufficient revenues. (1) The Corporation may, prior to November 1, 1983, file with the Commission a notice of insufficient revenues for any line which is part of the system of the Corporation.

(2) At any time after the 90-day period beginning with the filing of a notice of insufficient revenues for a line, the Corporation may file an application for abandonment for such line. An application for abandonment that is filed by the Corporation under this subsection for a line for which a notice of insufficient revenues was filed under paragraph (1) shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to such line.

(d) Offers of financial assistance. (1) The provisions of section 10905(d)-(f) of title 49, United States Code [49 USCS § 10905(d)-(f)] (including the timing requirements of subsection (d) thereof), shall apply to any offer of financial assistance under subsection (b) or (c) of this section.

(2) The Corporation shall provide any person that intends to make an offer of financial assistance under subsection (b) or (c) of this section with such information as the Commission may require.

(e) Liquidation. (1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.

(2) Appraisals made under paragraph (1) shall not be appealable.

(3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property.

(4) If the purchaser under paragraph (3)(A) of this subsection of any line of the Corporation abandons such line within five years after such purchase, the proceeds of any track liquidations shall be paid into the general fund of the Treasury of the United States.

(f) Employee protection. The provisions of section 10903(b)(2) of title 49, United States Code [49 USCS § 10903(b)(2)], shall not apply to any abandonment granted under this section. Any employee who was protected by the compensatory provisions of title V of this Act [former 45 USCS §§ 771 et seq.] immediately prior to the effective date of the Northeast Rail Service Act of 1981, who is deprived of employment by such an abandonment shall be eligible for employee protection under section 701 of this Act [45 USCS § 797].

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

EXHIBIT B

LOCATION AND MAP

Ninth Street Branch

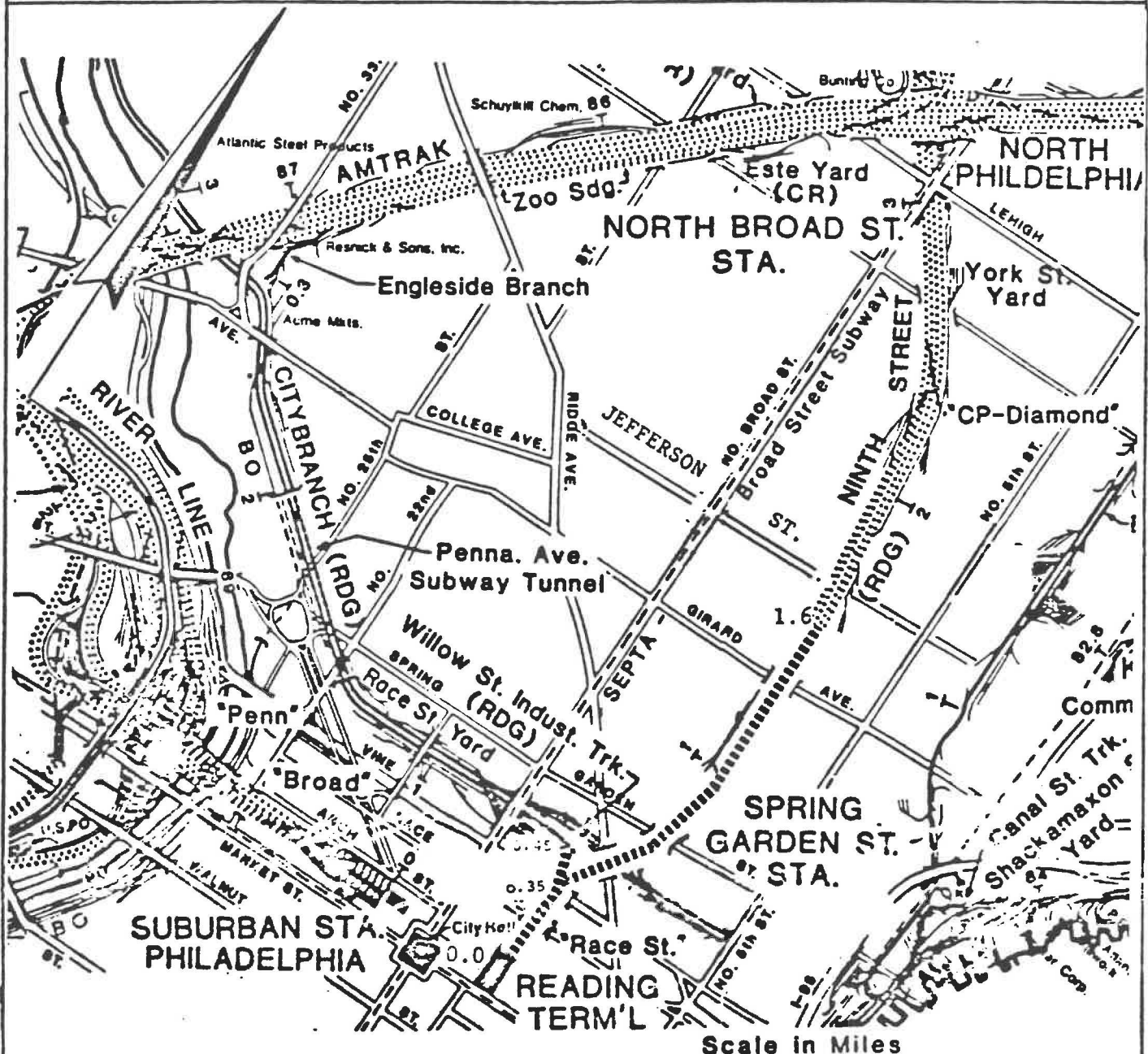
Reading Terminal (Approx. M.P. 0.0) to
South of Jefferson Street (Approx. M.P. 1.6)

City Branch

Connection with Ninth Street Branch (Approx. M.P. 0.35) to
SEPTA-Conrail Junction (Approx. M.P. 0.45)

State(s): PA

Counties: Philadelphia



PROPOSED ABANDONMENT

0

1

2

EXHIBIT B

Interstate Commerce Commission Decision, June 17, 1983

RB

SERVICE DATE

JUN 24 1983

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-167 (Sub-No. 479)

CONRAIL ABANDONMENT IN PHILADELPHIA, PA

Decided: June 17, 1983

On March 16, 1983, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973^{1/} to abandon (1) the Ninth Street branch, 1.6 miles of rail line between points south of Jefferson St., (milepost 1.6) and Reading Terminal (milepost 0.0), and (2) the City Branch from (milepost 0.35 to milepost 0.45) which 0.1 mile segment forms the connection between the Ninth Street branch and the portion of City Branch owned by Conrail all of which properties are in Philadelphia, PA.

Under section 308(c) the Commission must grant any application for abandonment filed by Conrail within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 308(d) during that 90-day period.

The time for the filing of offers of financial assistance has expired without a bona fide offer. In the absence of such an offer, an appropriate certificate and decision should be entered.

It is certified: Conrail is authorized to abandon the line described above.

^{1/} This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

It is ordered:

- (1) This certificate and decision is effective upon service.
- (2) If the authority granted by this certificate and decision is exercised, Conrail shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

By the Commission, the Review Board, Members Joyce,
Krock, and Williams.



Agatha L. Mergenovich
Secretary



INTERSTATE COMMERCE COMMISSION

SERVICE DATE

6-24-83

SERVICE OF PROCESS

DOCKET NO.

AB-167 Sub 479

TOTAL NUMBER SERVED

24

ADDITIONAL CASES TO BE SERVED

INITIALS OF CLERK MAKING SERVICE

mm

On the above date a copy of the attached

- ☐ ENTIRE COMMISSION DECISION (EC) ☐ NOTICE ☐ INITIAL DECISION (ID)
☐ ORAL HEARING ASSIGNMENT ☐ DIVISION DECISION (D)
☐ CERTIFICATE, PERMIT, LICENSE ☐ REVIEW BOARD DECISION (RB)
☐ MODIFIED PROCEDURE ASSIGNMENT (MP) ☒ OTHER

was sent to the parties listed below and those shown on the attached list or order^{1/}REGIONAL MANAGING DIRECTORS: ☐ 1 ☒ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

ADDITIONAL INFORMATION

AB000167/0479/ 1270 SCSS APP
CONSOLIDATED RAIL CORPORATION
1138 SIX PENN CENTER PLAZA
PHILADELPHIA PA 19104

AB000167/0479/ -4 SCSS
DEPARTMENT OF ENVIRONMENTAL RESOURCES
DIV OF FOR ADV SERV
BOX 1467
HARRISBURG PA 17120

AB000167/0479/ 12629 SCSS POR
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF OUTDOOR RECREATION
WASHINGTON DC 20240

AB000167/0479/ -4 SCSS
DIRECTOR, HIST & MUSEUM COMM
BOX 1026
HARRISBURG PA 17120

AB000167/0479/ -4 SCSS
DEPT OF ENVIRONMENTAL RESOURCES
P. O. BOX 1467
THIRD AND REILY STREETS
HARRISBURG PA 17120

AB000167/0479/ -1 SCSS
OFFICE OF THE GOVERNOR
STATE CAPITOL BUILDING
HARRISBURG PA 17120

^{1/}For certain Modified
reverse of the Order.

printed on the

AB000167/0479/ -3 SCSS
LOCAL AND AREA TRANSPORTATION
DEPT. OF TRANS.
COMMONWEALTH & FORSTER STREETS
HARRISBURG PA 17120

SERVICE DATE

6-24-83

DOCKET NO.

AB-167-Sub-479

AB000167/0479/ 520 SCSS POR
C.M. MCINTOSH
RAILWAY LABOR BUILDING
400 1ST ST. N.W.
WASHINGTON DC 20001

AB000167/0479/ 1271 SCSS APR
CHARLES E. MECHEM
113 SIX PENN CENTER PLAZA
PHILADELPHIA PA 19104

AB000167/0479/ -4 SCSS
OFFICE OF POLICY & PLANNING
ROOM 506
FINANCE BUILDING
HARRISBURG PA 17120

AB000167/0479/ -4 SCSS
PENNSYLVANIA FISH COMMISSION
P. O. BOX 1673
HARRISBURG PA 17120

AB000167/0479/ -2 SCSS
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265
HARRISBURG PA 17120

AB000167/0479/ 36635 SCSS VIS
WILLIAM H. PETRECCA, JR.
BOX 2137 MID CITY STA.
PHILADELPHIA PA 19103

AB000167/0479/ -4 SCSS
DEPT OF ENVIRONMENTAL RESOURCES
BUREAU OF STATE PARKS
P. O. BOX 1467
HARRISBURG PA 17120

SERVICE DATE

6-24-83

DOCKET NO.

AB-167-sub-479

AB000167/0479/ -4 SCSS
AQUATIC BIOLOGIST
PENN FISH COMM
ROBINSON LANE
BELLEFONTE

PA 16823

AB000167/0479/ -4 SCSS
CHIEF, DIVI OF GAME MGT
GAME MANAGEMET
P. O. BOX 1567
HARRISBURG

PA 17120

AB000167/0479/ -4 SCSS
PENN GAME COMMISSIONER
BOX 292
105 SOUTH STATE STREET
MILLVILLE

PA 17846

AB000167/0479/ 2099 SCSS POR
JAMES SMAILES
ROOM 5404
DOT--400 7TH STREET, SW
WASHINGTON

DC 20590

AB000167/0479/ -4 SCSS
US DEPT OF THE INTERIOR
DIV OF ENVIR AFF
600 ARCH STREET
PHILADELPHIA

PA 19106

AB000167/0479/ 2101 SCSS POR
HOWARD M. WELCHINS
955 L'ENFANT PLAZA, S.W.
WASHINGTON

DC 20595

AB 167-479

KUNKEL TRANSPORTATION SERVICE INC
FOR: CONSOLIDATED RAIL CORPORATION
425 13TH ST NW SUITE 523
WASHINGTON DC 20036

EXHIBIT C

Conrail's Abandonment Confirmation

CONRAIL



April 23, 1984

Mr. James H. Bayne
Acting Secretary
Interstate Commerce Commission
Room 1312
12th and Constitution Avenues, NW
Washington, D.C. 20423

Re: Docket AB 167 (Sub No. 479)
Abandonment of the
Ninth Street and City Branches

Dear Mr. Bayne:

As required by the Commission in its order approving Conrail's application in the above docketed proceeding, the purpose of this letter is to notify the Commission that Conrail has implemented the abandonment authority granted in said order.

Very truly yours,

Charles E. Mechem
Charles E. Mechem
Senior General Attorney
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5017

CEM/km

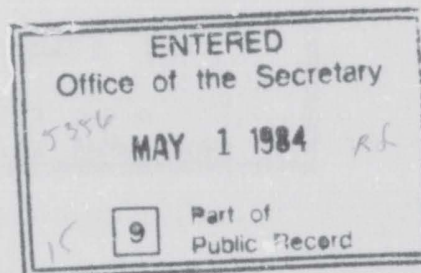


EXHIBIT D

***See Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.,*
No. CV 21-563, 2023 WL 7646535 (E.D. Pa. Nov. 14, 2023)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SCIOLI TURCO, INC. and	:	
915 SPRING GARDEN ASSOCIATES, LP,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 21-563
PHILADELPHIA & READING RAILROAD	:	
CO. and READING INTERNATIONAL, INC.	:	

MEMORANDUM

SURRICK, J.

November 14, 2023

I. BACKGROUND

Through much of the 19th and 20th Century, Philadelphia & Reading Railroad Company, later the Reading Company, operated a railroad line known as the “9th Street Branch” along a viaduct through a station located at 901 Spring Garden Street in Philadelphia (“the Property”). (“Mot. to Remand,” ECF No. 14, at 13–14, 24; “Defs’ Resp.,” ECF No. 16, at 14, 19.)¹ By the late 1960’s, the railroad began to decline and it filed for bankruptcy in 1971. *See In re Reading Co.*, 378 F. Supp. 474, 475–76 (E.D. Pa.). In 1976, through federal legislation known as the 3R Act, 45 U.S.C. § 701 *et seq.*, Reading transferred to a new, Congressionally-created railroad, Conrail, an easement to operate on the 9th Street Branch. (Mot. to Remand at 14–15; Defs’ Resp. at 12, 14–15.) Conrail abandoned operations on the 9th Street Branch in 1983 and trains stopped running on the tracks shortly thereafter. (Mot. to Remand at 14; Defs’ Resp. at 12–13, 15.) The Southeastern Pennsylvania Transportation Authority (“SEPTA”) maintained an easement in a

¹ All page numbers refer to ECF Pagination.

“traction power substation at Callowhill Street” and overhead transmission wires along the line until 2010, when it relinquished the easement. (Defs’ Resp. at 17–18.)

In the 1980’s, businessman James Cotter purchased the Reading Company’s assets out of bankruptcy and formed Reading International, Inc. (“Reading”). (“Pls’ Memo,” ECF No. 15, at 9–10.) Today, Reading primarily owns and operates movie theaters in the United States, Australia, and New Zealand, while retaining “the fee interests in various parcels related to [its] historic railroad operations,” including the 9th Street Branch. (ECF No. 29, at 97–100, 120.) The Property and the greater 9th Street Branch now sit in a state of significant disrepair. (*See* Pls’ Memo at 6–7; ECF No. 23-2.)

Plaintiffs, Scioli Turco, Inc., and 915 Spring Garden Associates, LP, are, respectively, an economic development organization and the Property’s immediate neighbor. (Pls’ Memo at 6.) In an attempt to rehabilitate the Property, Plaintiffs filed an action against Reading under the Abandoned and Blighted Property Conservatorship Act, 68 Pa. Stat. § 1101 *et seq.* (“Act 135”), in the Court of Common Pleas of Philadelphia County to have Scioli Turco be appointed as conservator of the Property in order to rehabilitate it.² (“Pls’ Compl.,” ECF No. 12-1, at 2–3, 18–20, 53.) Reading removed the case to this Court (“Ntc. of Rem.,” ECF No. 1) and filed a Motion to Dismiss (“Mot. to Dismiss,” ECF No. 13). Plaintiffs thereafter filed a Motion to Remand the case to the Court of Common Pleas. (Mot. to Remand.) We denied Plaintiffs’ Motion to Remand, holding that removal was proper based on diversity jurisdiction under 28 U.S.C. § 1332. (“Memo on Mot. to Remand,” ECF No. 25, at 3.) Because both parties had

² Plaintiffs also listed as a defendant the Philadelphia & Reading Railroad Company. However, because Philadelphia & Reading Railroad Company is a now-extinct corporation that was absorbed by the Reading Company and later Reading International, Inc., we held that it was a nominal party to the case. (Memo on Mot. to Remand at 5–7.)

submitted materials outside of the pleadings in support of or in opposition to the Motion to Dismiss, we then ordered that Reading's Motion to Dismiss would be treated as a Motion for Summary Judgment under Fed. R. Civ. P. 56. (ECF No. 27.) Accordingly, we now address Reading's Converted Motion to Dismiss.

II. LEGAL STANDARD

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

III. DISCUSSION

Reading argues that Plaintiffs' action under Act 135 is "completely" and "ordinarily" preempted by 49 U.S.C. § 10501(b) ("Section 10501(b)"). (Mot. to Dismiss at 10.) The complete preemption doctrine operates to allow a federal court to exercise federal question jurisdiction under 28 U.S.C. § 1331 over an ostensibly state law cause of action, such as Plaintiffs' claim under Act 135. *See Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6–8 (2003). However, because we held that we have diversity jurisdiction over this case under 28 U.S.C. § 1332, we need not address Reading's complete preemption argument. (*See* Memo on Mot. to Rem. at 3.) The only question that we need now address is whether Plaintiffs' Act 135 suit is "ordinarily" preempted by Section 10501(b) pursuant to the Supremacy Clause, U.S. Const. art.

VI, cl. 2. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (under the Supremacy Clause, “Congress has the power to preempt state law” and “withdraw specified powers from States by enacting a statute containing an express preemption provision”).

A. Plaintiffs’ Act 135 Action is Preempted

When it enacted the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10101, *et seq.*, Congress abolished the Interstate Commerce Commission (“ICC”) and transferred its remaining regulatory authority to the newly-created Surface Transportation Board (“STB”). *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 809 n.1 (D.C. Cir. 2011). As part of that act, Section 10501(b) provides that the STB has exclusive jurisdiction over the following:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, *abandonment*, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b) (emphasis added). It further provides that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.*

“[Section] 10501(b) applies to three types of state statutes, regulations, and judicial remedies.” *City of Ozark, Arkansas v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1171 (8th Cir. 2016). First, it preempts “any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations.” *Id.* (quoting *CSX Transp., Inc.*, Fin. Dkt. No. 34662, 2005 WL 1024490, at *2–3 (S.T.B. May 3, 2005)). Second, it preempts state and local regulation of “matters

directly regulated by the [STB]—such as the construction, operation, and *abandonment* of rail lines.” *Id.* (emphasis added). And lastly, “[f]or state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* With respect to this last category, Section 10501(b) preempts state statutes, regulations, or judicial remedies “that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)).

Based on the text of Section 10501(b) and applying these precedents, Plaintiffs’ Act 135 action is preempted. There is no dispute that the Property in question, a former station, was a “facility” used for rail transportation on the 9th Street Branch. *See* 49 U.S.C. § 10501(b)(2) (providing exclusive STB jurisdiction over the “abandonment . . . of . . . facilities”); 49 U.S.C. § 10102(9) (defining the “transportation” that the STB has jurisdiction over to include any “property, facility . . . or equipment of any kind related to the movement of passengers or property, or both, by rail”). And Plaintiffs’ action argues that the Property meets the necessary conditions of “blight and abandonment” necessary to appoint a conservator under Act 135, which is formally titled the “Abandoned and Blighted Property Conservator Act.” (*See* Pls’ Compl. at ¶ 46); *see also* 68 Pa. Stat. §§ 1101 (providing the title of Act 135), 1102 (declaring that the purpose of Act 135 is to “provid[e] a mechanism to transform abandoned and blighted

buildings into productive reuse”). Therefore, Plaintiffs’ action concerns a “matter[] directly regulated” by the STB: the abandonment of a rail line. *See City of Ozark*, 843 F.3d at 1171. Plaintiffs, however, make several arguments as to why their action is not preempted. For the reasons discussed below, those arguments are unavailing.

B. Reading and the Property’s Lack of Use

Plaintiffs primarily argue that Section 10501(b) does not apply to their action and the STB does not have jurisdiction over the property because Reading is not a railroad and the property has not been used for rail operations since the mid 1980s.³ They maintain that application of Act 135 to the property would have no impact on rail transportation. *See New York Susquehanna*, 500 F.3d at 252 (Section 10501(b) does not preempt laws “having a more remote or incidental effect on rail transportation”). They argue that “the Property is nothing more than a piece of real estate.” (Mot. to Remand at 23.)

However, Plaintiffs’ argument confuses two distinct categories of laws that Section 10501(b) preempts. On one hand, Section 10501(b) preempts state and local regulation of “matters directly regulated by the [STB]—such as the construction, operation, and *abandonment* of rail lines.” *City of Ozark*, 843 F.3d at 1171 (emphasis added). On the other hand, “[f]or state or local actions that are *not facially preempted*,” courts engage in a factual assessment to determine whether those actions “would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* (emphasis added). Because Plaintiffs’ Act 135 action directly relates to the abandonment

³ As discussed *supra*, SEPTA utilized electrical equipment on the branch for its train operations until 2010.

of part of a rail line, we need not engage in this factual assessment. It does not matter that Plaintiffs’ action would not affect any active rail transportation at all. Under Section 10501(b), the STB’s jurisdiction over the abandonment of facilities related to rail transportation “is exclusive” and state remedies that concern the same are preempted. 49 U.S.C. § 10501(b). *See also Cnty. of Dutchess v. CSX Transp., Inc.*, No. 09-5606, 2009 WL 2913684 (S.D.N.Y. Sept. 10, 2009) (holding that a state action to condemn approximately five acres of railroad right-of way was preempted by Section 10501(b) even though plaintiff argued that the right-of-way had already been abandoned in practice due to lack of use); *Richmond Waterfront Indus. Park, LLC v. Philadelphia Belt Line R.R. Co.*, No. 220302872, 2023 WL 3337301 (C.P. Phila. Mar. 01, 2023) (holding that a quiet title action seeking adverse possession of a railroad right-of-way in Philadelphia was preempted by Section 10501(b) even though the tracks on the right-of-way were in a state of disrepair, unusable, and did not connect to a terminal).

Nor does it matter that Reading is an entertainment company, not a railroad. As Section 10501(b) declares, “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The remedy provided for abandonment under the ICCTA comes in 49 U.S.C. § 10903. That section provides that “a rail carrier providing transportation subject to the jurisdiction of the [STB] . . . who intends to . . . abandon any part of its railroad lines . . . must file an application relating thereto with the [STB].” 49 U.S.C. § 10903(a)(1). A “rail carrier,” in turn, is defined as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system

of rail transportation.” 49 U.S.C. § 10102(5). Reading, which runs movie theatres, clearly does not meet this definition. Therefore, because on its face the remedy provided by the ICCTA for abandonment does not apply to Reading, it might be presumed that the preemption provision likewise does not apply to Plaintiffs’ action against Reading.

However, two points resist this conclusion. First, while Section 10501(b)(1) provides the STB with exclusive jurisdiction over “transportation *by rail carriers*” (emphasis added), Section 10501(b)(2) simply provides the STB exclusive jurisdiction over “the . . . abandonment . . . of . . . facilities,” but does not mention “rail carriers.” 49 U.S.C. § 10501(b). Accordingly, the ICCTA does not on its face restrict the STB’s jurisdiction, and therefore the scope of the preemption provision, to the abandonment of rail facilities by *rail carriers*. Second, it is well established that someone other than a rail carrier may apply to the STB to have a rail line declared abandoned. *See Howard v. Surface Transp. Bd.*, 389 F.3d 259, 261 (1st Cir. 2004) (citing *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 708–09 (D.C. Cir. 1994)). Therefore, an abandonment remedy is available to Reading (and to Plaintiffs), and Section 10501(b) still preempts Plaintiffs’ Act 135 action.

C. The Conrail Abandonment

Plaintiffs also argue that, even if Section 10501(b) would otherwise preempt their Act 135 action, the STB no longer has jurisdiction over the Property. Specifically, they point to a 1983 petition by Conrail to the ICC for “approval of the abandonment of its operation of” the 9th Street Branch, which the ICC approved.⁴ (*See* Pls’ Memo, Ex. 3 at

⁴ The ICCTA provided that ICC precedent applies to the STB. *Bhd. of R.R. Signalmen*, 638 F.3d at 809 n.1.

¶ 4, Ex. 4.) According to Plaintiffs, because the STB/ICC has already approved the abandonment of the 9th Street Branch, it no longer has jurisdiction over the Property and their Act 135 action is therefore not preempted. (Pls’ Memo. at 17–18 (citing *Arnold v. United States*, 137 Fed. Cl. 524, 551 (2018) (“If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way.”); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 135 (2011) (“When a railroad abandons a line through [a designated procedure with the STB], federal regulatory jurisdiction ends and state property law then controls the disposition of the right-of-way.”)).)

However, as Reading points out, Conrail’s abandonment of its operation of the 9th Street Branch is inapplicable to the STB’s jurisdiction over the line today. Conrail’s abandonment application was brought pursuant to the Regional Rail Reorganization Act of 1973 (“3R Act”), 45 U.S.C. § 701 *et seq.* (Pls’ Memo, Ex. 3 at ¶ 3, Ex. 4.) The 3R Act was enacted “[i]n response to a series of rail bankruptcies [including Reading’s] that threatened the viability of intercity rail travel” in the northeast. *Nat’l R.R. Passenger Corp. v. Se. Pennsylvania Transp. Auth.*, 56 F.4th 129, 131 (D.C. Cir. 2022). As part of the 3R Act, “Congress created Conrail, a private, for-profit railroad company charged with providing rail service on some of the defunct companies’ lines.” *Id.* Under Section 308(c) of the 3R Act, Conrail had until November 1, 1985, to “file with the [ICC] a notice of insufficient revenues for any line which is part of the system of [Conrail].”⁵ 45 U.S.C. § 748(c)(1). “At any time after the 90-day period beginning with the filing of a

⁵ The 3R Act refers to Conrail, or the Consolidated Rail Corporation, as “the Corporation.” 45 U.S.C. § 702(5).

notice of insufficient revenues for a line, [Conrail could] file an application for abandonment for such line.” 45 U.S.C. § 748(c)(2). That is exactly what Conrail did with respect to the 9th Street Branch. (*See* Pls’ Memo, Ex. 4.)

Ultimately, Conrail’s abandonment was consummated under a specific regime wholly distinct from the more standard procedures outlined in ICCTA. Its abandonment application specifically acknowledged that it did not own the line and that its application “relates only to Conrail’s operation of” the 9th Street Branch. (Pls’ Memo, Ex. 3 at ¶ 4.) Conrail only had an easement over the line. (Mot. to Remand at 14–15; Defs’ Resp. at 12, 14–15.) Conrail’s abandonment simply does not affect the STB’s current jurisdiction over the 9th Street Branch and the rights of its owner, Reading.

D. SEPTA’s Use of the Property

Finally, Plaintiffs maintain that “[e]ven had Conrail not abandoned the Property, the STB still would not have jurisdiction” because “[a]t the time of Conrail’s application, the [9th Street Branch] was owned by SEPTA,” (Mot. to Remand at 22), “[t]he last rail to run on the tracks at the Property was owned by [SEPTA],” and “[t]he STB has no jurisdiction over public transportation provided by a local governmental authority such as SEPTA’s commuter rail system,” (Pls’ Memo at 17). *See also* 49 U.S.C. § 10501(c) (providing that, generally, the STB does not have jurisdiction over “public transportation provided by a local government authority”). However, as mentioned *supra*, SEPTA never owned a fee interest in the 9th Street Branch; rather, it simply maintained an easement in a “traction power substation at Callowhill Street” and overhead transmission wires along the line. (Defs’ Resp., Ex. C at B-13.) Notwithstanding SEPTA’s past operations on the 9th Street Branch, it does not currently maintain any operations on the

Branch or even utilize its now-defunct electrical equipment, to which it relinquished its rights in 2010. (*See* Defs’ Resp. at 17–18.) Even if SEPTA were still using the facilities on the Branch, the STB would nonetheless maintain jurisdiction over the line, as it is owned by Reading, not SEPTA, and therefore does not fall under the public transportation exception of the ICCTA. *See Union Pac. R. Co. v. Chicago Transit Auth.*, No. 07 C 229, 2007 WL 1202417, at *3 (N.D. Ill. Apr. 20, 2007) (holding that the STB maintained exclusive jurisdiction over track which the Chicago Transit Authority leased from Union Pacific for its commuter rail service).⁶ Therefore, SEPTA’s use of the Branch does not affect the STB’s jurisdiction.

E. Plaintiffs’ Way Forward

For the reasons discussed, Plaintiffs’ Act 135 action is preempted by Section 10501(b). This does not mean that they are not without a remedy, however. Plaintiffs may file an “adverse abandonment” application with the STB to have the 9th Street Branch declared abandoned. *See Howard*, 389 F.3d at 261. If and when the STB approves this abandonment, Plaintiffs may again file their Act 135 action, whether in state or federal court. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 261 (3d Cir. 2001) (“Unless the STB attaches post-abandonment conditions to a certificate of abandonment or exemption . . . the authorization of abandonment ends the Board’s regulatory mission and its jurisdiction.”); *City of S. Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009)

⁶ Under the version of the ICCTA referred to by the court in *Chicago Transit Auth.*, the term “mass transportation” was used in place of the current term, “public transportation.” *See* Pub. L. No. 114-94, § 3030(g)(2), 129 Stat 1312, 1497 (2015) (striking “mass transportation” and inserting “public transportation”).

(“Abandonment frees subservient landowners to exercise reversionary rights in, and local governments to condemn, the railroad’s right-of-way.”)

While Plaintiffs’ position that they should not need to obtain this kind of authorization or approval from the STB with regard to a rail line that has long since been used for rail transportation is understandable, requiring them to do so is necessary to remain faithful to the Congress’s intent. “The exclusive and plenary nature of the [STB’s] authority to rule on carriers’ decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). Section 10501(b)’s preemption provision was designed to “prevent a confusing situation where legal actions are instituted under a variety of laws,” such as Act 135, resulting in “similar claims being treated differently from one state to another and would likely encourage forum shopping.” *S. Dakota ex rel. S. Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 933 (D.S.D. 2003) (quoting S. REP. No. 104-176, at 57 (1995)). “In order to avoid this, exclusive remedies are needed to provide a consistent method of resolving disputes.” *Id.* Ultimately, Plaintiffs are “impermissibly attempting to subject to state law property that Congress specifically put out of reach” until the STB approves its abandonment. *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013–14 (W.D. Wis. 2000).

IV. CONCLUSION

For the foregoing reasons, Reading is entitled to judgement as a matter of law and its Converted Motion to Dismiss is granted. Plaintiffs’ action is dismissed without prejudice. They

may refile their action in this Court or the Court of Common Pleas of Philadelphia County if and when the STB approves the abandonment of the 9th Street Branch.

An appropriate order follows.

BY THE COURT:

/s/ *R. Barclay Surrick*

R. Barclay Surrick, J.