

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

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City of Philadelphia – Petition for a Declaratory Order

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**READING INTERNATIONAL, INC.'S REPLY TO  
CITY OF PHILADELPHIA'S PETITION FOR A DECLARATORY ORDER**

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Dated: September 6, 2024

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SURFACE TRANSPORTATION BOARD

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City of Philadelphia – Petition for a Declaratory Order

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**READING INTERNATIONAL, INC.’S REPLY TO  
THE CITY OF PHILADELPHIA’S MOTION TO STRIKE THE  
MOTION TO DISMISS OF ERIC S. STROHMEYER**

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Reading International, Inc. (“Reading”)<sup>1</sup> files this Reply to the City of Philadelphia’s (“City”) Motion to Strike (“Motion”) the Motion to Dismiss of Eric S. Strohmeyer (“Mr. Strohmeyer”).

**ARGUMENT AND AUTHORITIES**

The City spends most of its Motion rebutting points raised in Reading’s Reply to the City’s Petition, not on Mr. Strohmeyer’s Motion to Dismiss or his reasons the City’s Petition should be dismissed. The City uses Mr. Strohmeyer’s Motion to Dismiss as another opportunity to once again restate its arguments against Reading. Rather than use its Motion to solely address Mr. Strohmeyer’s arguments in his Motion to Dismiss the City’s Petition, the City spends half of its 11 1/2-page Motion regurgitating its attack on Reading that has now been the subject of three extensive pleadings before the Surface Transportation Board (“STB”). Although the City is using this Motion as a transparent attempt to again circumvent the limitation on pleadings set forth in 49

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<sup>1</sup> As Reading stated in its Reply to the City’s Petition, Reading International, Inc., through its subsidiary RCPA, LLC, formerly known as Reading Company (collectively “Reading”), never abandoned and still owns the real property at issue in Center City Philadelphia, Pennsylvania that formerly supported portions of the 9th Street Branch of the Philadelphia & Reading Railroad Company (“Reading Railroad”) (collectively the “Viaduct”). *See* Reading’s Reply at 1.

C.F.R. § 1104.13(c), its attempt is in vain as it is clear that: (1) all of the interests in the Viaduct have not been abandoned under the abandonment procedure set forth in 49 U.S.C. 10903, and the STB should rely on the decision by the United States District Court that has already decided the issues the City seeks to relitigate here; (2) the STB maintains jurisdiction over the Viaduct—indeed rail operations continued on the Viaduct line after Conrail abandoned its operations; and (3) the fact that Reading is not a rail carrier does not mean the action the City attempts to take here is not preempted under Federal law.

Since Conrail abandoned its operating rights to the Viaduct, from time to time and especially in the last several years, Reading has worked to perpetuate the historic significance of the transportation corridor, and it is hardly possible to conclude that the Viaduct has been abandoned such that the STB no longer maintains jurisdiction over the Viaduct. The City has not identified any action by Reading that would demonstrate Reading has intended to abandon the Viaduct. Moreover, the City has acted consistently with the position that the Viaduct has not been abandoned. Further, the City has continuously treated Reading as the owner of the Viaduct, recently looking to Reading for development opportunities and financial contribution, including fines, related to the upkeep of the property.<sup>2</sup>

The City incorrectly argues again that Conrail's abandonment of its easement for operations on the line under the 3R Act served to abandon the entirety of the interests in the Viaduct. *See* Reading's Reply at 1-3, 7-11; Reading's Opposition at 6, 9. The point is not about the effect of the abandonment but rather the extent of the interests abandoned. Forty-one years ago, Conrail only abandoned what it possessed—the easement to operate. The City states the “answer is that Conrail did in fact comply with those requirements and as a result, there is no

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<sup>2</sup> The City through its fiscal offices has continued to recognize Reading as the owner.

federal preemption bar to the City's exercise of its condemnation authority." The City's position is directly contrary to the *Scioli Turco, Inc. v. Philadelphia & Reading R.R. Co.* opinion, which the STB should follow.<sup>3</sup> See Reading's Reply at 11-12, 14; Reading's Opposition at 2-3.

Of course, the STB maintains jurisdiction over the Viaduct. See Reading's Reply at 3, 8, 10-11, 14-18; Reading's Opposition at 3, 8-10. The Viaduct continued to be used for rail service after Conrail's abandonment. See Pet. at Exhibit A, Application at 2; see also *Scioli Turco, Inc.*, 2023 WL 7646535, at \*5. Thus, Conrail did not abandon the entirety of rail or property interests in the Viaduct when it abandoned its operations on the line in 1983 under the 3R Act. Conrail only abandoned *Conrail's* easement for operations. The STB clearly maintained jurisdiction after Conrail's abandonment with the continuation of the rail usage on the Viaduct line. In addition, the City has no explanation for when exactly the STB purportedly lost its jurisdiction, considering the Viaduct continued to be used for rail service after Conrail's abandonment. In other words, Conrail's abandonment of its easement for operations did not serve to abandon all of the rail or property interests under the STB's jurisdiction in the Viaduct, and its abandonment did not sever STB jurisdiction from the property.<sup>4</sup> The Viaduct and infrastructure remain, and the STB maintains

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<sup>3</sup> No party appealed the *Scioli Turco* decision, and the STB should rely on it in its decision as it addresses the exact issues to be decided here. See, e.g., *Tesoro Ref. & Mktg. Co., LLC Petition for Declaratory Order*, No. FD 36041, 2016 WL 6809953, at \*4 (S.T.B. Nov. 14, 2016) (denying petition for a declaratory order, noting "Tesoro is seeking a declaratory order finding that the Swinomish Tribe's claims against BNSF are largely preempted by § 10501(b)—the same argument BNSF has asserted to the district court. As the Board has stated, issues involving federal preemption under 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance."); *212 Marin Boulevard, LLC, et al. Petition for Declaratory Order*, No. FD 35825, 2014 WL 3906942, at \*1, 3 (S.T.B. Aug. 8, 2014) (concluding the district and circuit courts had already decided the issue the LLCs sought to have answered, and therefore denying the LLC's petition because the declaratory order sought by the LLCs would be duplicative of the jurisdictional issues that had already been decided by the courts).

<sup>4</sup> Even if certain interests are abandoned, rail interests and common carrier obligations can remain, over which the STB retains jurisdiction. See, e.g., *Midcoast Railservice, Inc.—Discontinuance of Service Exemption—in Cumberland, Knox, Lincoln, Sagadahoc Counties, Me.*, Docket No. AB

jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” *See* 49 U.S.C. § 10501(b)(2); *see also Scioli Turco, Inc.*, 2023 WL 7646535, at \*4. Further, the fact that Reading is not a rail carrier or that tracks have been removed do not mean that a rail carrier could not operate on the property in the future. *See* Reading’s Reply at 14-18; Reading’s Opposition at 8-9.<sup>5</sup>

The STB still maintains jurisdiction—like it does here—and abandonment through the STB is necessary even if a rail property is owned by a non-rail carrier, even if tracks are removed, even if development has occurred on part of the property, and even if the property has not been used for rail in decades. *See, e.g., Angeles A. Zorzi, Tr. of the Angeles A. Zorzi Living Tr., & Antonio Aja, Jr. & Virginia D. Aja, Trustees of the Antonio Aja, Jr. Tr. & the Virginia D. Aja Trust Petition for Declaratory Order*, No. FD 36016, 2017 WL 431330, at \*1 (S.T.B. Jan. 30, 2017) (noting that even though a portion of line over a property had been previously abandoned, subsequent rail activity occurred but no further abandonment through the STB was sought, and thus concluding that, despite rail being removed and no activity occurring, the line remained part of the national rail network and under the STB’s jurisdiction). For example, in the *Conrail Abandonment Proceedings*, because the Harsimus Branch was a rail line subject to the jurisdiction of the STB, abandonment under the STB was required. *See City of Jersey City v. Consol. Rail*

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1341X at n.2, 3-4, n.3, Surface Transportation Board, available at <https://www.stb.gov/proceedings-actions/search-stb-records/> (last viewed Sept. 5, 2024).

<sup>5</sup> The City has not produced any evidence to contradict the sworn declaration of Mr. DiArenzo, who stated: “That tracks and railroad equipment have been removed and structures have been built on certain parts of the Viaduct is not dispositive as to whether rail could operate on the property in the future. To be sure, certain portions of the Viaduct could still support rail services in the future provided geo-technical studies confirmed such operations, which is the beyond the scope of my expertise and experience.” Moreover, as Reading explained in its Reply, that tracks and railroad equipment have been removed and structures have built on certain parts of the Viaduct is not dispositive as to whether rail could operate on the property in the future. *See* Reading’s Reply at 14-15.

*Corp.*, 968 F. Supp. 2d 302, 307–08 (D.D.C. 2013), *aff'd*, No. 13-7175, 2014 WL 1378306 (D.C. Cir. Feb. 19, 2014) (concluding because the parties stipulated that the Harsimus Branch was a rail line and not a spur, it was subject to the STB’s abandonment jurisdiction); *212 Marin Boulevard, LLC, et al. Petition for Declaratory Order*, No. FD 35825, 2014 WL 3906942, at \*1 (S.T.B. Aug. 8, 2014) (denying request of property owners for a declaratory order holding that the STB did not have authority over certain rail property because courts had already found that the trackage at issue was conveyed as a railroad line requiring abandonment authority from the STB). Abandonment proceedings were required despite the fact that: the property was owned by a non-rail carrier; rail had not operated on the property in decades; bridges, tracks, and infrastructure had been removed; and development had occurred on portions of the property. *See Consol. Rail Corp.-Abandonment Exemption-in Hudson Cnty., N.J. CSX Transp., Inc.-Discontinuance of Serv. Exemption-in Hudson Cnty., N.J. Norfolk S. Ry. Co.-Discontinuance of Serv. Exemption-in Hudson Cnty., N.J.*, No. AB 167 (SUB-1189X), 2022 WL 3595013, at \*1 (S.T.B. Aug. 18, 2022) (“The Harsimus Branch has not been used for rail service in decades. In 1994, the first bridge...was removed, and the remaining bridges were removed shortly thereafter... In July 2005, Conrail sold eight parcels...to the LLCs.”); *Consol. Rail Corp. - Abandonment Exemption - in Hudson Cnty., N.J. CSX Transp., Inc. - Discontinuance Exemption - in Hudson Cnty., N.J. Norfolk S. Ry. Co. - Discontinuance Exemption - in Hudson Cnty., N.J.*, No. AB 167 (SUB-1189X), 2020 WL 5496167, at \*2 (S.T.B. Sept. 10, 2020) (“Conrail, treating the Harsimus Branch as unregulated spur track within the meaning of 49 U.S.C. § 10906, sold the portion of the rail line...to private developers without first seeking abandonment authority from the Board. That easternmost portion of the Harsimus Branch was redeveloped for commercial use years ago and no trace of the rail line remains today.”); *Consol. Rail Corp. v. Surface Transp. Bd.*, 571 F.3d 13, 16–17 (D.C. Cir. 2009) (noting “[b]y

1997, all of the trackage and bridges on the Embankment had been removed. In July 2005, Conrail sold the Embankment properties to a private real estate developer.”). The entirety of the Viaduct line has never been abandoned under 49 U.S.C. § 10903, and the STB maintains jurisdiction over the Viaduct.

Finally, the City’s statement that “a non-rail carrier is not entitled to the benefits of federal preemption” has nothing to do with Mr. Strohmeyer or the points raised in his Motion to Dismiss. That statement is also misplaced, and the City does not cite any authority to support that statement. The *Scioli Turco* court found preemption applied. *See Scioli Turco, Inc.*, No. CV 21-563, 2023 WL 7646535, at \*3 (E.D. Pa. Nov. 14, 2023). Moreover, the preemption doctrine is not focused on what party it benefits. Rather, the doctrine is to prevent action taken under a local/state law that conflicts with federal law. That it might also favor a party’s position is irrelevant.

### **CONCLUSION**

Accordingly, for the foregoing reasons, Reading respectfully requests that the STB deny the City’s Motion to Strike.

Respectfully submitted,

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Dated: September 6, 2024



## **CERTIFICATE OF SERVICE**

I, Jennifer Bartlett, hereby certify that a copy of the foregoing Reply dated September 6, 2024, was sent by electronic mail and overnight delivery to the following in this proceeding:

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