

**BEFORE THE SURFACE TRANSPORTATION BOARD
Washington, D.C.**

237994
238001
238004

**Motion for Determination that Documents
Filed with Board as "Confidential" and "Highly Confidential"
Should be Unsealed**

ENTERED
Office of Proceedings
March 18, 2015
Part of
Public Record

**By Intervenors:
212 Marin Boulevard, LLC
247 Manila Avenue, LLC
280 Erie Street, LLC
317 Jersey Avenue, LLC
354 Cole Street, LLC
389 Monmouth Street, LLC
415 Brunswick Street, LLC
446 Newark Avenue, LLC
NZ Funding, LLC
Limited Liability Companies of New Jersey.**

**In
Conrail Petition For Exempt Abandonment
Hudson County, New Jersey
STB Docket: AB-167-1189-X
And Related Proceedings
AB-55-686-X
AB-290-306-X**

DANIEL E. HORGAN, DC BAR # 239772
WATERS, McPHERSON, McNEILL, P.C.
300 Lighting Way
Secaucus, New Jersey 07096
Telephone: 201-863-4400
Fax: 201-863-2866
Counsel for Intervenors

DATED: March 18, 2015

The eight LLC intervenors (“Intervenors”) respectfully move for entry of an Order determining that a document filed by the City of Jersey City (“City”) under seal, and subsequent filings by the Intervenors and the City discussing and analyzing that document do not qualify as “Confidential” or “Highly Confidential” under the Board’s decision of September 24, 2014 and applicable precedent. The document filed under seal by the City is a verified statement of a company allegedly interested in using the Harsimus Branch (the “Shipper’s Verified Statement”). The Shipper’s Verified Statement does not contain any information that could reasonably be described as “confidential” or “highly confidential.” Ergo, the parties’ analyses of the Shipper’s Verified Statement cannot be confidential or highly confidential either. Further, the public interest in disclosure of the City’s alleged plans for returning freight rail services to downtown Jersey City after a quarter century’s absence justifies unsealing the record. Finally, the sealed documents relate to a state court challenged by the Intervenors to the City’s ordinance authorizing the filing of an offer of financial assistance (“OFA”). For those reasons, the Intervenors respectfully request the motion to unseal the filed records be granted.

Background

The complete background of this matter has been described repeatedly in the various pleadings and motions currently before the Board. Briefly, on January 6, 2009, Consolidated Rail Corporation (“Conrail”) filed a verified petition for exemption from abandonment regulations for the Harsimus Branch, described by Conrail as a line beginning at CP Waldo (MP 0.00) and ending at MP 1.36, located in downtown Jersey City, New Jersey.

The City and CNJ Rail corp. (“CNJ Rail”)—a non-party—filed notices of intent to file OFAs on March 27, 2009. Although the City’s and CNJ Rail’s notices of intent were separate

filings, they clearly related to each other. The City's stated plan in the notice was to own the line. CNJ Rail would be the City's designated operator of the line. The City proposed alternatives for what it would seek in an OFA. The City's options included acquiring the length of the Harsimus Branch, the segment between CP Waldo and Marin Boulevard, or some lesser interest. The City claimed it could use the Harsimus Branch or some portion of it for freight rail service or light rail service. It has also repeatedly stated its intention to use some portion of the Harsimus Branch as a park and simply to preserve it from any development.

By order entered on May 26, 2009, the Director of Proceedings directed Conrail to provide certain financial information relevant to an OFA, and tolled the time for the City and CNJ to file a formal OFA until ten days after receipt of the financial information. The Director of Proceedings then provided the following instructions on filing an OFA:

The OFA process is designed for the purpose of providing continued rail service. The Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic. Any person who intends to file an OFA in this proceeding should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible. See Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Las Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X), slip op. at 2-3 (STB served June 16, 2008) (requiring this showing where traffic had not moved over the line in 2 years and carrier sought exemption from OFA procedures). [Exhibit A.]

The City filed a timely appeal with the Board challenging the Director of Proceedings' decision. That appeal has not been resolved. In June 2014, the City requested the Board decide its 2009 appeal, which is still pending.

While the Conrail exemption petition was proceeding, the City filed a complaint in the United States District Court for the District of Columbia the (“Special Court”) for a declaratory ruling that the Harsimus Branch between CP Waldo and Marin Boulevard was a line of rail. City of Jersey City v. Conrail, docket number 09-1900. On April 10, 2010, the Board ordered that the matter be held in abeyance until the issue of whether the Harsimus Branch was a regulated line was resolved in the Special Court.

The Intervenors are the fee owners of a segment of the Harsimus Branch referred to as the Embankment.¹ The Intervenors purchased the Embankment from Conrail on July 12, 2005. The Embankment parcels are located within the segment of the Harsimus Branch between CP Waldo and Marin Boulevard that was the focus of the City’s Special Court declaratory judgment action. However, the remaining length of the Harsimus Branch from Marin Boulevard to MP 1.36 was not included in the Special Court action.²

The Special Court concluded that the Harsimus Branch between CP Waldo and Marin Boulevard was conveyed to Conrail in 1976 as a line of rail subject to the Board’s jurisdiction, including the abandonment jurisdiction. City of Jersey City v. Conrail, 968 F.Supp.2d 302 (D.D.C. 2013). Following conclusion of the Special Court proceedings, the Board permitted the Intervenors to join this case and lifted the stay on August 11, 2014.

On September 15, 2014, CNJ Rail filed a motion for a protective order to prevent dissemination of information requested in discovery. The motion was uncontested, and on September 24, 2014, the Board issued a decision and order permitting parties to designate

¹ The “Embankment” refers to the eight parcels owned by the Intervenors, located between the New Jersey Turnpike (Interstate 78) right-of-way and Marin Boulevard. The Intervenors’ Embankment properties include the six stone embankment structures that elevated the tracks above street level.

² Intervenors also maintain that Conrail’s exempt abandonment does not properly address the full extent of the remainder of the Harsimus Branch running to the Hudson River shore.

documents produced in discovery either “confidential” or “highly confidential.” (Exhibit B). The protective order provides: “Any party producing information, data, documents, or other materials (hereinafter collectively referred to as ‘material’) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as ‘CONFIDENTIAL,’ and such material must be treated as confidential.” (Exhibit B, at para. 1). The protective order further states, “Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rates or cost data, or other competitively sensitive information as ‘HIGHLY CONFIDENTIAL’.” (Exhibit B, at para. 2).

Thereafter, the City filed a motion on an expedited basis on December 23, 2014 seeking to compel Conrail to produce information pursuant to 49 C.F.R. § 1152.27(a). The City’s motion was accompanied by the Shipper’s Verified Statement, which the City filed under seal because it was marked as “highly confidential material.” The details of the Shipper’s Verified Statement are discussed below; however, the City submitted that document in support of its request for expedited treatment of the motion. The City did disclose in its brief, which is publicly available, the fact that there was shipper with an “urgent” need for rail service, and that to accommodate that shipper, the question of the OFA must be resolved by June 2015. The City also revealed that this shipper would require more than 1,437 carloads per year. Despite the City’s request for expedited resolution, the motion is still pending.

The discussion on the contents of the Shipper’s Verified Statement is contained in the attached Exhibit C, which is being filed under seal.

On November 7, 2014, the Intervenor filed an action in the Superior Court of New Jersey, Law Division, Hudson County, 247 Manila Avenue, LLC, et al. v. City of Jersey City, et al., docket number HUD-L-4954-14 challenging the ordinance of the City authorizing the filing of an OFA (the “Ordinance Challenge Action”). The Intervenor has asserted the ordinance is illegal under several New Jersey state statutes, including the Open Public Meeting Act, a statute regulating entry of rail service contracts and appropriations by municipalities and counties (N.J.S.A. 40:9C-1), the Local Bond Law, the Local Lands and Building Law, the Local Fiscal Affairs Law, and the Local Public Contract Law. The Intervenor also argues the ordinance is arbitrary and capricious.

On February 23, 2015, the Intervenor corresponded with the City and CNJ Rail to request waiver of the designation of the Shipper’s Verified Statement as “highly confidential” to permit use of that document, and the parties’ analyses of it, in the Ordinance Challenge Action. The Intervenor stated their willingness to seek a protective order in the Superior Court if CNJ Rail and the City believed it necessary to protect a legitimate business interest in confidentiality. (Exhibit D).

The City responded that the Intervenor must file a motion with the Board to unseal the documents. (Exhibit E). The City claimed that it had not procured the Shipper’s Verified Statement, and had filed it under seal with its first motion because it had been marked “highly confidential” by another. Although the City has never expressly said as much, it is reasonable to conclude CNJ Rail is the original source of the Shipper’s Verified Statement and the party who designated it “highly confidential.”³

³ Intervenor initially received the Shipper’s Verified Statement by mail from James Riffin after a discovery request they had served upon CNJ Rail.

CNJ Rail responded that it would not consent to the use of the documents in any proceeding other than the pending exempt abandonment petition and any judicial review therefrom. CNJ Rail then stated it would object to use of any document, even if not privileged or confidential, if that document was obtained in discovery in the pending matter. CNJ Rail's representative then stated that documents could be obtained in discovery in other proceedings to be used in those proceedings. (Exhibit F).

Discussion

A. The Document Filed under Seal was Improperly Designated as "Highly Confidential"

The Board's September 24, 2014 decision defines the standard for designating a document "highly confidential" or "confidential." Highly confidential documents must contain competitively sensitive information: "Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rates or cost data, or other competitively sensitive information as 'HIGHLY CONFIDENTIAL'." Confidential materials reflect a lower standard: "Any party producing information, data, documents, or other materials (hereinafter collectively referred to as 'material') in discover to another party to this proceeding, or submitting material in pleadings that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as 'CONFIDENTIAL,' and such material must be treated as confidential." The September 24, 2014 order permits a party to challenge the designation of a document produced in discovery or annexed to a pleading filed with the Board as confidential or highly confidential.

The discussion on the contents of the Shipper's Verified Statement relating to the confidential and highly confidential standards is contained in the attached Exhibit C, which is being filed under seal.

In conclusion, the Shipper's Verified Statement contains no proprietary or sensitive information. The rates or costs are not included. The information provided is either speculation or public. The Board should therefore determine the document is not confidential and unseal it and make it part of the public record as there is substantial public interest in the City's proposals.

B. The Document Filed Under Seal Purports to Relate to Demonstrable Commercial Need for Rail Service, Community Support for Rail Service, and Operational Feasibility of Rail Service.

The Director of Proceedings has requested that any party filing an OFA demonstrate that there is a commercial need for rail service, community support for rail service, and operational feasibility. The City filed the Shipper's Verified Statement in support of its application to compel disclosures from Conrail of financial information arguably relevant to an OFA. The Shipper's Verified Statement supposedly demonstrates the existence of the first requirement: commercial need. Intervenor's note, however, that thus far the only indication for need for rail service is the speculative comments of a single, potential shipper that is not presently operating. (The City has stated in its public filings that the shipper will require service effective June 2015, but has failed to explain why it differs from the Shipper's Verified Statement's date of end of March 2015.)

The other two requirements – community support and operation feasibility – are not addressed. To address or disprove those factors, the nature of the intended use of the Harsimus Branch cannot be kept a secret. The City cannot show community support for resumption of

freight rail service when the shipper and the shipper's intended use are kept in the dark. Also, the City cannot show operational feasibility unless how the Harsimus Branch is planned to be used is disclosed. The Shipper's Verified Statement is silent on the operation of a trans-load facility, where the facility will be built, or how access to the nationwide rail network will be achieved.

The public has a right to know what the City's plans are concerning an OFA for the Harsimus Branch. The City cannot consistently argue that there is public support for an OFA while keeping all of the details under seal with the Board. When the lack of genuinely confidential or highly confidential information contained in the Shipper's Verified Statement is considered, it becomes readily apparent that the document and the evaluations of it filed under seal by the parties should be unsealed and undesignated as highly confidential by the Board.

C. The Document Filed Under Seal is Relevant to the Intervenors' Ordinance Challenge Action.

The Intervenors' challenge to the City's OFA ordinance now pending in the Superior Court of New Jersey is grounded on several bases. Included among those reasons is the position that the ordinance is arbitrary and capricious because the City is attempting to use the OFA process for ulterior purposes, specifically, to acquire a park.

As demonstrated in the evaluations of the statement filed by the Intervenors under seal, there are serious concerns about the legitimacy of the Shipper's Verified Statement and the claims about the shipper's proposed activities. Those concerns are addressed supra.

The lack of any substance to an OFA, as demonstrated by the single potential user of the Harsimus Branch identified to date by the City is a critical consideration for the Superior Court

of New Jersey to evaluate when addressing whether the City's ordinance violates multiple State laws.

In these Board proceedings, the Intervenor's have challenged the factual assertions in the Shipper's Verified Statement filed under seal. The City's reliance on that statement before the Board to advance its OFA is directly related to the Ordinance Challenge Action. The Intervenor's alleged that the City's operation for which it intends to file an OFA and construct and operate a trans-load facility (directly or through a designated operator) is arbitrary and capricious because there is no demonstrable need for rail freight service—and that the City knows that, but is pursuing an OFA anyway to avoid the cost of condemning the land for a park.

Although the City claims it did not procure the Shipper's Verified Statement, it is obvious that the City's proposed designated operator—CNJ Rail—elicited the statement, and in any event the City has effectively adopted that statement by filing it with the STB as support for a motion.

The Superior Court must be permitted to review the statement under seal to fully and properly evaluate the City's actions, and the Board should facilitate such review, not aid the City and CNJ Rail. If the City adopted the OFA ordinance knowing there were no genuine shippers and had knowledge of, or relied upon, the fanciful statements made on behalf of the shipper, the ordinance could be found to lack any support.

Accordingly, the Shipper's Verified Statement, and the parties' analyses of it should be unsealed and the Intervenor's permitted to use them in the Ordinance Challenge Action as evidence the City's OFA ordinance lacks any factual or legal support. Such a finding of arbitrariness and capriciousness would require that the OFA ordinance be invalidated and if the legislative authority for the City to maintain its notice of intent to file an OFA and the

accompanying motion is struck down, this Board can dismiss the notice of intent and deny all of the City's pending motions; proceed to complete historical and environmental review; and, then, finally authorize abandonment of the Harsimus Branch.

The Intervenors have proposed that at a minimum, the Shipper's Verified Statement be unsealed to the extent that they can use the document in the Ordinance Challenge Action. The New Jersey Superior Court has adequate rules to ensure the confidentiality of the Shipper's Verified Statement and related documents analyzing it in the event the Board considers any information contained therein to be highly confidential or confidential. N.J. Ct. R. 1:38-11 and 4:10-3(g). (Reprinted at Exhibit G).

The Intervenors note that the City has argued that it is not in a position to waive confidentiality of a document created by another. CNJ Rail, for its part, has argued, in part, that unsealing the documents is not appropriate because they could be obtained by other means, specifically discovery in the Superior Court action. An assumption in such a statement is that in the Ordinance Challenge Action, neither the City nor CNJ Rail would object to producing the Shipper's Verified Statement in discovery and having it filed with the Superior Court. Given the protections under the New Jersey Rules of Court, such objections would be meritless. However, the City and CNJ Rail should disclose now, to the Board, whether either would object to turning over the Shipper's Verified Statement in Superior Court discovery.

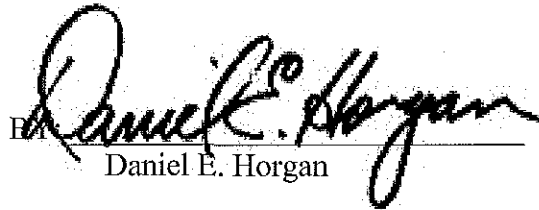
Conclusion

The Intervenors respectfully request entry of an order (1) determining the Shipper's Verified Statement is neither "highly confidential" nor "confidential," and unsealing that document, as well as the parties' submissions under seal commenting on the Shipper's Verified

Statement or (2) unsealing the Shipper's Verified Statement for the limited purpose of permitting the Intervenor to use it in the Ordinance Challenge Action.

Respectfully submitted,

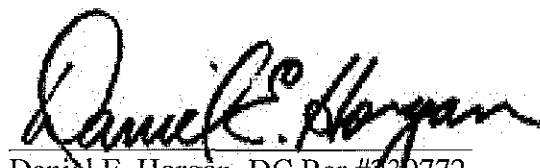
WATERS, McPHERSON, McNEILL, P.C.


Daniel E. Horgan

Dated: March 18, 2015

CERTIFICATE OF SERVICE

I, Daniel E. Horgan, hereby certify that I caused a copy of the foregoing to be served by First Class mail upon those on the attached Service List by depositing same with the U.S. Postal Service on March 18, 2015.


Daniel E. Horgan, DC Bar #239772
Waters, McPherson, McNeill, P.C.
300 Lighting Way
Secaucus, New Jersey 07094
Phone: 201-330-7453
Counsel for Intervenor
Dated: March 18, 2015

SERVICE LIST

Counsel for Jersey City, Coalition, RTC:
Charles H. Montange
426 NW 162nd Street
Seattle, WA 98177

Counsel for Rails to Trails Conservancy (RTC)
Andrea Ferster, Esq.
General Counsel
2121 Ward Court NW, 5th floor
Washington, D.C. 20037

Counsel for Conrail:
Robert M. Jenkins, III, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006-1101

Former Counsel for LLCs
Fritz Kahn, Esq.
1919 M Street, NW
7th Floor
Washington, D.C. 20036

And the following self-represented individuals or entities:

Robert Martin
Daniel D. Saunders
NJ Department of Environmental Protection
State Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Massiel Ferrara, Director
Hudson County Planning Division
595 County Avenue
Bldg. 1, Second Floor
Secaucus, NJ 07094

Ron Emrich - **UNKNOWN**
Executive Director
Preservation New Jersey
310 W. State Street
Trenton, NJ 08618

Michael D. Selender
Vice President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

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

Jennifer Greely – **UNABLE TO FORWARD**
President
Hamilton Park Neighborhood Assoc.
22 West Hamilton Place
Jersey City, NJ 07302

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

Robert Crown
Vice President of Communications
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Dan Webber
Vice President
Van Vorst Park Association
289 Varick Street
Jersey City, NJ 07302

Gretchen Scheiman
President
Historic Paulus Hook Ass'n
121 Grand Street
Jersey City, NJ 07302

Robert Vivien
President
Newport Nbd Ass'n
ADDRESS UNKNOWN

Delores P. Newman
NJ Committee for the East
Coast Greenway
ADDRESS UNKNOWN

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

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

Daniel H. Frohwirth
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303

Valerio Luccio
Civic JC
ADDRESS UNKNOWN

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

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

Karen Votava - **UNDELIVERABLE**
East Greenway Alliance
27 North Road
Wakefield, RI 02879

Non-Parties of Record – Provide copies of Pleadings only

Kenneth Koschek - **UNDELIVERABLE**
New Jersey Department of Environment Protection
P.O. Box 418
Trenton, NJ 08625-0418

New Jersey Department of Environmental Protection - **UNDELIVERABLE**
P.O. Box 402
Trenton, NJ 08625

New Jersey Department of Environmental Protection - **UNDELIVERABLE**
Bureau of Coastal and Land Use
P.O. Box 422
Trenton, NJ 08625

New Jersey Historic Preservation Office
P.O. Box 404
Trenton, NJ 08625-0404

Greg Remaud
NY/NJ Baykeeper
52 w. Front Street
Keyport, NJ 07732

U.S. Fish and Wildlife Service
927 N. Main Street
Building D
Pleasantville, NJ 08232-1451

845939.3

EXHIBIT A

Exhibit A to LLC Intervenors' Motion to Unseal Filed Records

Nature of Exhibit:

Decision in In Re: Consolidated Rail Corporation – Abandonment Exemption in Hudson County, NJ, STB Docket No. AB-167(Sub No. 1189X)(Service Date May 26, 2009)

39951
DO

SERVICE DATE – LATE RELEASE MAY 26, 2009

SURFACE TRANSPORTATION BOARD

DECISION

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)

CSX 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

Decided: May 26, 2009

This decision directs Consolidated Rail Corporation (Conrail) to provide the information necessary to formulate an offer of financial assistance (OFA), as specified in 49 CFR 1152.27(a), and grants the request of the City of Jersey City (City) and CNJ Rail Corporation (CNJ) to toll the due date to submit an OFA.

Conrail, CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, applicants) jointly filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, an approximately 1.36-mile portion of a line of railroad known as the Harsimus Branch, between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City, Hudson County, NJ.¹ The notice of the exemption was served and published in the Federal Register on March 18, 2009 (74 FR 11631-32).

¹ In City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Louis M. Manzo—Petition for Declaratory Order, STB Finance Docket No. 34818 (STB served Aug. 9, 2007), the Board described the line as follows: extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ.

The exemption was scheduled to become effective April 17, 2009, unless stayed by the Board. On March 27, 2009, City and CNJ each filed a formal expression of intent to file an OFA to purchase the line. City and CNJ requested Conrail to provide the information required by 49 CFR 1152.27(a) and certain additional information relating to Conrail's present, prior, or future use of the line, including all valuation maps for the line, and if not depicted on the valuation maps, a listing of all deed references showing Conrail's legal interests in the line. CNJ also requested that the time period for it to submit an OFA be tolled, until 10 days after it received the data requested from Conrail.² On April 1, 2009, Conrail filed a reply to the notices of intent to file an OFA, requesting that the Board reject City and CNJ's notices of intent. On April 22, 2009, City replied to Conrail's April 1 filing.

By decision served on April 6, 2009 (April 6 Decision), the Board granted a request of the Embankment Preservation Coalition and extended the deadline for filing petitions to reopen, requests for trail use and public use conditions, and responses to the Environmental Assessment until May 7, 2009. By decision served on April 16, 2009 (April 16 Decision), the effective date of the exemption was stayed until the environmental review process is complete.

The stay of this proceeding during the environmental phase should not delay the exchange of information requested by City and CNJ under the OFA procedures. Conrail is directed to provide City and CNJ with the information specified in 49 CFR 1152.27(a).³ The due date for City and CNJ to submit an OFA will be tolled until 10 days after Conrail provides the information specified in 49 CFR 1152.27(a) and notifies the Board that it has done so. Once the stay is lifted, the effective date of the exemption will be determined.⁴

The OFA process is designed for the purpose of providing continued rail service. The Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic.⁵ Any person who intends to file an OFA in this proceeding should address one or more

² On April 7, 2009, City filed a motion joining in CNJ's request to toll the time for submitting an OFA.

³ City and CNJ are reminded that, under the Board's OFA procedures, a potential offeror is entitled only to the information specified in 49 CFR 1152.27(a).

⁴ If City and CNJ submit OFAs, Conrail's April 1 filing and City's related filings will be considered together when the stay is lifted.

⁵ See, e.g., Union Pacific Railroad Company—Abandonment and Discontinuance of Trackage Rights Exemption—in Los Angeles County, CA, STB Docket No. AB-33 (Sub-No. 265X) (STB served May 7, 2008); Roaring Fork Railroad Holding Authority—Abandonment Exemption—in Garfield, Eagle, and Pitkin Counties, CO, STB Docket No. AB-547X (STB served May 21, 1999), aff'd sub nom. Kulmer v. STB, 236 F.3d 1255, 1256-58

(continued...)

of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible. See Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X), slip op. at 2-3 (STB served June 16, 2008) (requiring this showing where traffic had not moved over the line in 2 years and carrier sought exemption from OFA procedures).

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The time period for City and CNJ to file an OFA is tolled until 10 days after Conrail provides City and CNJ with the information specified in 49 CFR 1152.27(a) and notifies the Board that it has done so.
2. The effective date of the exemption will be determined when the stay is lifted by the Board.
3. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary

(...continued)
(10th Cir. 2001); The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 380X) (STB served Aug. 5, 1998).

EXHIBIT B

Exhibit B to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

Decision in In Re: Consolidated Rail Corporation – Abandonment Exemption in Hudson County, NJ, STB Docket No. AB-167(Sub No. 1189X)(Service Date September 24, 2014)

44030
DO

SERVICE DATE – LATE RELEASE SEPTEMBER 24, 2014

SURFACE TRANSPORTATION BOARD

DECISION

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

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

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

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

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

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

MOTION FOR PROTECTIVE ORDER

Decided: September 24, 2014

This decision grants a motion for a protective order in these related proceedings.

These proceedings involve an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in an urban area of Jersey City, N.J. The Harsimus Branch extends between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City.¹ In a decision served on August 11, 2014, the Board vacated the stay it had issued on April 20, 2010, and reinstituted these proceedings. In the August 11 decision, the Board determined that these abandonment and discontinuance proceedings are within the jurisdiction of the Board. The August 11 decision also granted the request of a group of limited liability companies (LLCs)² to intervene, and discussed the preparation of a Supplemental

¹ Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009).

² The LLCs are described as: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

Environmental Assessment (Supplemental EA) by the Board's Office of Environmental Analysis.

On September 15, 2014, CNJ Rail Corporation (CNJ), a non-party to these proceedings, filed a motion for protective order. CNJ states that it received discovery requests from the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties) and the LLCs³ on September 10, 2014. CNJ states that the City of Jersey City introduced an ordinance expressly authorizing the City Managers, acting on behalf of the City, to take all necessary steps to file a formal Offer of Financial Assistance (OFA) in these proceedings. While the final vote has not yet been scheduled, according to CNJ, CNJ states that the OFA authorization ordinance and the Board's OFA procedures are the driving force behind the discovery requests and that the information provided would likely be used for an OFA. CNJ states that in order to accommodate the LLCs' and City Parties' requests for document production, it is requesting expedited consideration. Included with its motion are a proposed protective order and undertakings. According to CNJ, granting the motion will facilitate the disclosure and use of confidential and commercially sensitive material in these proceedings.

Good cause exists to grant the motion for protective order. Issuance of the protective order will ensure that confidential and highly confidential information will be used solely for the purpose of preparing to file and/or filing an OFA in these proceedings and not for other purposes. Further, the motion conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted, and the protective order and undertakings are adopted for this proceeding, as modified in the Appendix to this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for a protective order is granted, and the protective order and undertakings, as modified in the Appendix to this decision, are adopted.
2. The parties are directed to comply with the protective order set forth in the Appendix to this decision.
3. Materials designated as confidential or highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the

³ The document requests by City Parties and the LLCs were attached to the motion as Exhibits 1A and 1B, respectively.

Docket No. AB 167 (Sub-No. 1189X), et al.

appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. Any party¹ producing information, data, documents, or other material (hereinafter collectively referred to as "material") in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 12.
 - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 C.F.R. § 1104.14.
 - (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.

¹ The term "party" as used in this Protective Order is not limited to parties to this proceeding, but includes both parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the "HIGHLY CONFIDENTIAL" material. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).
3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Board, or the court, as appropriate, with a written

request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
7. To the extent that "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material is produced by a party in these or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of these and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within three working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the

producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.

11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party, if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
12. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on September 24, 2014, governing the production of confidential documents in AB 167 (Sub-No. 1189X), et al., understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than for filing or preparing to file an Offer of Financial Assistance in connection with AB 167 (Sub-No. 1189X), et al. or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of these proceedings and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I, _____, have read the Protective Order served on September 24, 2014, governing the production of highly confidential documents in AB 167 (Sub-No.1189X), et al., understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL" that I will limit my use of those documents and the information they contain to filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing "HIGHLY CONFIDENTIAL" information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party name]

Dated: _____

EXHIBIT C

Exhibit C to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

****EXHIBITS C, and C-1 THROUGH C-5 FILED UNDER SEAL****

EXHIBIT D

Exhibit D to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

LLC Intervenor's Counsel's February 23, 2015, Request for Consent to Utilize Documents Filed under Seal with the U.S. Surface Transportation Board

WATERS, MCPHERSON, MCNEILL

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

300 LIGHTING WAY

P.O. Box 1560

SECAUCUS, NEW JERSEY 07096

DANIEL E. HORGAN

MEMBER OF N.J., N.Y. & D.C. BARS

OFFICE DIRECT DIAL: 201-330-7453

CELL and VOICE MAIL: 201-926-4402

E-MAIL dehorgan@lawwmm.com

February 23, 2015

Eric Strohmeier
Vice President, COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069
cnjrail@yahoo.com

John J. Curley, Esq.
John J. Curley, LLC
Harborside Financial Center
1202 Plaza Ten
Jersey City, NJ 07311
Jcurley@curlaw.com

Charles H. Montange, Esq.
426 NW 162d Street
Seattle, WA 98177
c.montange@frontier.com

BY REGULAR MAIL & E-MAIL

**RE: REQUEST FOR CONSENT TO UTILIZE DOCUMENTS
FILED UNDER SEAL WITH THE U.S. SURFACE
TRANSPORTATION BOARD**

Gentlemen,

On behalf of our clients, we have filed a civil action in the Superior Court, Law Division, Hudson County, Docket No. HUD-1954-15 seeking to declare Ordinance 14-103 of the City of Jersey City invalid and void. This ordinance purportedly authorizes the City to pursue an Offer of Financial Assistance before the Surface Transportation Board for our clients' properties, among other things. This ordinance has also been made part of the record in STB Docket AB-167-1189-X and related matters, ostensibly to support the merits and *bona fides* of the City's OFA efforts. In those efforts by Jersey City, the City had submitted a Verified Statement by a purported rail shipper. That statement had originated from CNJ Rail and was first produced to us in STB discovery, marked "Highly Confidential." As a consequence when the statement was later submitted by the City in support of its OFA efforts, that submission and all related pleadings, briefs and motions submitted by the parties were filed under seal as directed by a Protective Order issued by the STB's Director of Proceedings on September 24, 2014. A copy of the Director's decision and the Protective Order itself are attached to this letter for your reference.

The proceedings now in the Superior Court in Hudson County are related directly to the good faith and *bona fides* of the City's plans to submit and support an Offer of Financial Assistance to the STB. The verified statement of the only purported shipper and

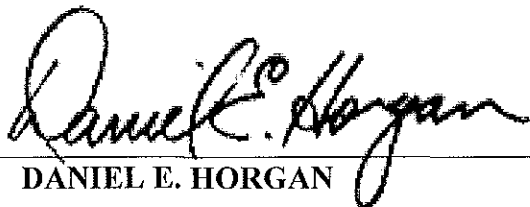
other documents filed under seal are material to that issue coming before the court. We would like to address the process under which it receives continued protection, if indeed such protection is still required, and minimize the need for proceedings before the STB on the protective order, or before the Superior Court on the need for a separate protective order pursuant to the provisions of N.J. Court Rule 4:10-3(g).

We see no reason for the continued protection of the identify of the purported shipper on whose behalf the Verified Statement was made, nor of any of the materials filed with the STB under seal as a consequence of CNJ Rail having marked the statement as "highly confidential." Despite that position, which we will continue to maintain, with your consent, we will prepare a consent motion on behalf of our clients, and the other Parties who have made filings under seal with the STB to lift the present seal and the "highly confidential" classification of the statement. If CNJ Rail, the City, or any other party objects to this procedure, we propose a Consent Order between our clients and the City in the Superior Court proceedings to impose a Protective Order covering the identity of the shipper and all pleadings filed in the related STB proceedings. That should fully address any confidentiality concerns, while allowing a proper record to be presented to the court.

With the foregoing proposals to address concerns for confidentiality as the preferred alternative, this letter should be considered as a formal notice that we intend to seek permission to disclose the above noted materials to the Superior Court in relation to our challenge to the City's OFA ordinance. Therefore, we request that each of you provide your response to our suggested resolutions within three days of receipt of this letter. Since it appears, at least by inference, that Thomas McFarland, Esq. of Chicago, is acting as counsel for CNJ Rail in this matter, we are sending him a copy of this letter with the added request that he advise us of his role with respect to these proceedings.

Very truly yours,

WATERS, McPHERSON, McNEILL, P.C.

BY: 
DANIEL E. HORGAN

CC: Thomas McFarland, Esq.
Suite 1890
208 South LaSalle St.
Chicago, IL 60604
mcfarland@aol.com

EXHIBIT E

Exhibit E to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

Counsel for the City's March 5, 2015, e-mail to LLC Intervenor's Counsel responding to LLC Intervenor's Counsel's e-mail of March 5, 2015

From: C. Montange [c.montange@frontier.com]
Sent: Thursday, March 05, 2015 6:43 PM
To: Horgan, Daniel; cnjrail@yahoo.com; John J. Curley
Cc: mcfarland@aol.com; Robert Jenkins
Subject: Re: Request concerning Documents under Seal / STB Protective Order

Mr. Horgan, you are now filing pleadings/letter/demands at the rate of one every day or two, and your mode of proceeding tends to overwhelm the system, as one tries to sort out what has to be done and the entities to consult on each of your matters, much less whether they relate to each other or are consistent with each other.

I told you I was on business travel and felt I would be able to respond to your request that the City waive the protective order as to what you refer to as the "CNJ" statement on behalf of a shipper. After consulting with relevant parties, I inform you on behalf of the City that we lack the power to waive the protective order. You must file a motion for whatever relief you seek with the STB. As an aside, since you claim that the shipper statement is false and seem to insinuate to the General Counsel of STB in another of your filings that the City (and I) knowingly filed a false statement, I wonder what possible purposes, other than confusion and shipper intimidation, and subversion of STB processes, you intend by filing something you claim is false in support of your claims in your most recent state proceeding against the City intended to derail yet another STB process. In other words, you show no need to breach the STB protective order.

On Thursday, March 5, 2015 2:52 PM, "Horgan, Daniel" <dehorgan@lawwmm.com> wrote:

Gentlemen, We wrote the attached letter and sent it to each of you over a week ago, requesting a prompt reply. Despite reminders, we have had no response. From that we conclude that you will not voluntarily address the issues and that we have no choice to proceed, advising both the STB and the State Court of your reluctance to address the matter.

Daniel E. Horgan, ESQ
WATERS, McPHERSON, McNEILL, P.C.
300 Lighting Way, 7th Fl.
Secaucus, NJ 07094-3672
201-330-7453 (direct)
201-926-4402 (cell)
201-863-7153 (direct fax)
dehorgan@lawwmm.com

EXHIBIT F

Exhibit F to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

Eric Strohmeier's March 6, 2015, e-mail to LLC Intervenor's Counsel on behalf of CNJ Rail Corporation

From: Eric Strohmeyer [cnjrail@yahoo.com]
Sent: Friday, March 06, 2015 12:30 AM
To: C. Montange; Horgan, Daniel; John J. Curley
Cc: mcfarland@aol.com; Robert Jenkins
Subject: Re: Request concerning Documents under Seal / STB Protective Order

Re: STB Docket# AB 167 -1189

Dear Mr. Horgan,

I have reviewed your letter in which you appear to be seeking either:

1. a request for a waiver off certain provisions of the STB's protective order, or
2. requesting permission to use a document in a completely separate legal proceeding outside of the current STB proceeding in which the document was filed.

In order to respond to your request in a timely fashion, please accept this email as CNJ's response to your inquiry.

CNJ **will not consent** to the use or admission of any documents filed under seal with the STB to be used in any type legal proceeding outside of the current STB pleading in which it was filed, except for any judicial review proceeding that may directly flow from the underlying STB proceeding (See: STB Docket# AB 167 - 1189).

Likewise, CNJ would object to the use any documents obtained in discovery from the current STB proceeding to be used in any other proceeding, regardless of whether said document does, or does not, contain privileged or commercially sensitive material. Discovery obtained in an STB proceeding is to be used only in an STB proceeding, not whatever other proceeding you may wish to pursue in other venues.

I am sure that whatever legal action (outside of the current STB proceeding) you may be taking, or otherwise contemplating, your chosen legal venue will have its own legal mechanism for obtaining discovery. If you feel certain documents may be relevant to your new or contemplated action, I don't see what would prevent you from using the appropriate discovery mechanisms available in those proceedings to obtain whatever documents you feel are relevant to your case.

While my knowledge might be somewhat limited, it is my understanding that a party uses:

- *STB discovery procedures* for obtaining document production for use in STB proceedings.
- *Appropriate State discovery procedures* for obtaining document production for use in State Court proceedings.
- *Appropriate Federal discovery procedures* for obtaining document production for use in Federal Court proceedings.

I may be wrong, but it appears to me you would have access to appropriate relief for engaging in discovery in whatever venue you are seeking your desired legal relief. Since litigation is clearly your *forte*, I'm surprised you would pass up the opportunity to earn a considerable number of billable hours by engaging in appropriate discovery proceedings in those venues.

If you have any further questions, give me a call at your convenience to discuss the matter further.

Sincerely,

Eric S. Strohmeyer

Vice President, COO
CNJ Rail Corporation
(908) 361 - 2435

On Thursday, March 5, 2015 9:03 PM, C. Montange <c.montange@frontier.com> wrote:

Mr. Horgan, City's response is not to defer to CNJ. City's response is that you need to file a motion. At this point, what CNJ tells you, if CNJ chooses to tell you anything, is moot.

On Thursday, March 5, 2015 5:29 PM, "Horgan, Daniel" <dehorgan@lawwmm.com> wrote:

OK. So for the City's part, it cannot do anything but abide by the Protective Order. That leaves CNJ to decide the matter.

I request of CNJ (Strohmeyer and/or McFarland) that they advise on the CNJ position by tomorrow.

As to the rest of the statements below, they do not require a response.

From: C. Montange [mailto:c.montange@frontier.com]
Sent: Thursday, March 05, 2015 6:43 PM
To: Horgan, Daniel; cnjrail@yahoo.com; John J. Curley
Cc: mcfarland@aol.com; Robert Jenkins
Subject: Re: Request concerning Documents under Seal / STB Protective Order

Mr. Horgan, you are now filing pleadings/letter/demands at the rate of one every day or two, and your mode of proceeding tends to overwhelm the system, as one tries to sort out what has to be done and the entities to consult on each of your matters, much less whether they relate to each other or are consistent with each other.

I told you I was on business travel and felt I would be able to respond to your request that the City waive the protective order as to what you refer to as the "CNJ" statement on behalf of a shipper. After consulting with relevant parties, I inform you on behalf of the City that we lack the power to waive the protective order. You must file a motion for whatever relief you seek with the STB. As an aside, since you claim that the shipper statement is false and seem to insinuate to the General Counsel of STB in another of your filings that the City (and I) knowingly filed a false statement, I wonder what possible purposes, other than confusion and shipper intimidation, and subversion of STB processes, you intend by filing something you claim is false in support of your claims in your most recent state proceeding against the City intended to derail yet another STB process. In other words, you show no need to breach the STB protective order.

On Thursday, March 5, 2015 2:52 PM, "Horgan, Daniel" <dehorgan@lawwmm.com> wrote:

Gentlemen, We wrote the attached letter and sent it to each of you over a week ago, requesting a prompt reply. Despite reminders, we have had no response. From that we conclude that you will not voluntarily address the issues and that we have no choice to proceed, advising both the STB and the State Court of your reluctance to address the matter.

Daniel E. Horgan, ESQ

WATERS, McPHERSON, McNEILL, P.C.
300 Lighting Way, 7th Fl.
Secaucus, NJ 07094-3672
201-330-7453 (direct)
201-926-4402 (cell)
201-863-7153 (direct fax)
dehorgan@lawwmm.com

EXHIBIT G

Exhibit H to LLC Intervenor's Motion to Unseal Filed Records

Nature of Exhibit:

New Jersey Rules of Court RR. 1:38-11 and 4:10-3

1:38-11. Sealing of Court Records

- **(a)** Information in a court record may be sealed by court order for good cause as defined in this section. The moving party shall bear the burden of proving by a preponderance of the evidence that good cause exists.
- **(b)** Good cause to seal a record shall exist when:
 - **(1)** Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
 - **(2)** The persons or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38.
- **(c)** The provisions of this rule do not apply to actions required to be sealed pursuant to the New Jersey False Claims Act (N.J.S.A. 2A:32C-5(c)).
- **(d)** Documents or other materials not exempt from public access under Rule 1:38 may not be filed under seal absent a prior court order mandating the sealing of such documents, and should not be submitted to the court with the motion, which may be filed on short notice, requesting an order to seal.

Note: New Rule 1:38-11 adopted July 16, 2009 to be effective September 1, 2009; new paragraph (c) adopted January 5, 2010 to be effective immediately; new paragraph (d) adopted June 23, 2010 to be effective July 1, 2010.

4:10-3. Protective Orders

On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- **(a)** That the discovery not be had;
- **(b)** That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- **(c)** That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- **(d)** That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- **(e)** That discovery be conducted with no one present except persons designated by the court;
- **(f)** That a deposition after being sealed be opened only by order of the court;
- **(g)** That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- **(h)** That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a proper showing pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

Note: Source - R.R. 4:20-2. Former rule deleted (see R. 4:14-3(a)) and new R. 4:10-3 adopted July 14, 1972 to be effective September 5, 1972 (formerly R. 4:14-2); paragraph (e) amended July 29, 1977 to be effective September 6, 1977; amended July 27, 2006 to be effective September 1, 2006 .