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SERVICE DATE – MAY 19, 2021

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

Decided: May 19, 2021

In these dockets, Consolidated Rail Corporation (Conrail), CSXT Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) jointly filed a verified notice of exemption for Conrail to abandon, and for CSXT and NSR to discontinue service over, an approximately 1.36-mile portion of a line of railroad known as the Harsimus Branch, located in the City of Jersey City, N.J.¹ The Harsimus Branch has not been used for rail service in decades.

After Conrail submitted environmental and historic reports as required under 49 C.F.R. §§ 1105.7, 1105.8, 1105.10-11, the Board's then-Section of Environmental Analysis² commenced its environmental review under the National Environmental Policy Act (NEPA) and historic review under Section 106 of the National Historic Preservation Act (NHPA). OEA issued a Draft Environmental Assessment (Draft EA) on March 23, 2009. The Draft EA examined the potential effects on the environment and historic resources if the Board were to authorize abandonment of the Harsimus Branch and solicited public comment.

Following receipt of public comments, OEA, in consultation with the New Jersey State Historic Preservation Office (SHPO) and interested parties, notified the Advisory Council on Historic Preservation (ACHP) of OEA's conclusion that granting abandonment authority could

¹ Collectively, the dockets are referred to as the Harsimus Abandonment Proceeding.

² The Section of Environmental Analysis is now the Office of Environmental Analysis (OEA). For convenience, this decision hereafter refers to OEA.

cause adverse effects on historic resources and invited ACHP to participate in the historic review process. By letter dated April 10, 2009, ACHP notified the Board of its intent to participate as a consulting party.

The Harsimus Abandonment Proceeding began in 2008, but the Board held it in abeyance while related proceedings were litigated in the federal courts.³ After that litigation concluded, the Board vacated the abeyance and resumed the historic and environmental review processes. See Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) et al., slip op. at 6 (STB served Aug. 11, 2014). Thereafter, the parties engaged in discovery on several issues, including the potential application of Section 110(k) of NHPA.

Section 110(k) of NHPA

Section 110(k) of NHPA states that federal agencies “shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of [Section 106], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with [ACHP], determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.” 54 U.S.C. § 306113; see also 36 C.F.R. § 800.9(c). Therefore, where allegations are made regarding an applicant engaging in anticipatory demolition, the Board is required to make a determination regarding the applicability of Section 110(k). During the Section 106 process of the Harsimus Abandonment Proceeding, certain consulting parties have alleged that Conrail violated Section 110(k) with regard to historic resources on the Harsimus Branch.

Because of the ongoing discovery issues and for administrative efficiency, OEA, with the concurrence of ACHP, previously decided to proceed with the Section 106 process, and potentially conclude that process, prior to the Board’s addressing alleged violations of Section 110(k). (See September 21, 2016 Letter from V. Rutson to C. Vaughn (EO-2861); see also January 24, 2020 Letter from J. Loichinger to V. Rutson (EI-27088).) However, ACHP, in a letter dated March 8, 2021, has requested that the Board determine whether Conrail violated

³ Conrail filed its notice of exemption to abandon the Harsimus Branch following a 2007 decision by the Board in a related case finding that the Harsimus Branch is a line of railroad subject to its abandonment licensing authority. City of Jersey City—Pet. for Declaratory Order, FD 34818 (STB served Aug. 9, 2007). The courts ultimately agreed that the Harsimus Branch is a line of railroad. See Consol. Rail Corp. v. STB, 571 F.3d 13, 19 (D.C. Cir. 2009) (sending the case to district court for a determination of the status of the Harsimus Branch); City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013) (finding that Harsimus Branch was conveyed as a line of railroad in 1976), aff’d, No. 13-7175 (D.C. Cir. Feb. 19, 2014).

Section 110(k) and, if necessary, consult with ACHP regarding Section 110(k), before completing the Section 106 process.⁴

Consistent with ACHP's request, arguments and evidence may now be formally filed so the Board can determine the applicability of Section 110(k) before moving forward with any further historic review under Section 106 if appropriate. Opening submissions will be due by June 18, 2021; replies will be due by July 19, 2021.

It is ordered:

1. Opening submissions are due by June 18, 2021.
2. Replies are due by July 19, 2021.
3. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

⁴ The SHPO has also submitted a letter supporting ACHP's request that the Board address alleged violations of Section 110(k) before completing the Section 106 process. See April 23, 2021 Letter from K. Marcopul to D. Gosselin (EI-30695).