

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB NO. AB 167 (SUB-NO. 1189X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NEW JERSEY**

STB NO. AB 55 (SUB-NO. 686X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION –
IN HUDSON COUNTY, NEW JERSEY**

STB NO. AB 290 (SUB-NO. 306X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY**

236818
236821
236822

**REPLY OF CONSOLIDATED RAIL CORPORATION
TO “ADDITIONAL SUPPLEMENTAL COMMENTS”
OF JERSEY CITY, ET AL.**

ENTERED
Office of Proceedings
October 15, 2014
Part of
Public Record

Consolidated Rail Corporation (“Conrail”) replies here to the “Additional Supplemental Comments” filed by the City of Jersey City, et al. (“City Parties”) on September 25, 2014. As in their Reply to Conrail’s Supplemental Environmental and Historic Report, filed September 3, 2014, and their Motion to Compel Discovery, filed September 18, 2014, the City Parties in their “Additional Supplemental Comments” claim that Conrail has engaged in intentional “anticipatory demolition” in violation of Section 110(k) of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470h-2(k).

Conrail responded to this claim at some length in its Reply to the City Parties’ Motion to Compel, filed October 7, 2014. In a nutshell, the City Parties have made a Section 110(k) claim

since the outset of this proceeding, arguing that Conrail removed track and bridges from the Harsimus Branch in the 1990s with the intention of evading historic preservation review under Section 106 of the NHPA. In its Environmental Assessment served March 23, 2009, the Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or “OEA”) rejected that claim. Observing that the City itself had pressured Conrail to remove the track structure and that Conrail had cooperated in the abandonment process once the STB had determined that the Harsimus Branch was a line of railroad, OEA found that Conrail had acted “appropriately and in good faith.” EA at 14. The City Parties are now attempting to argue that circumstances have changed, because in subsequent Special Court proceedings the owners of the properties at issue (the “LLCs”) made a fraud claim against Conrail, which the Special Court refused to entertain.

Conrail showed in its Reply to their Motion to Compel why the City Parties’ effort to transmute the LLCs’ failed claim *against* Conrail, which Conrail vigorously disputed, into an admission of intentional wrongdoing *by* Conrail, is completely nonsensical. Conrail Reply at 6-9. We need not repeat that discussion here. What the City Parties appear to be trying to do in their “Additional Supplemental Comments” is support their Section 110(k) claim by selectively re-telling the history of the City’s involvement with the Harsimus Branch, in an effort to make it appear that Conrail somehow intentionally misled the City about the regulatory status of the Harsimus Branch.

Nowhere, however, in any of the City Parties’ selective rendition of the history of the City’s involvement with the Harsimus Branch is there *any* indication that Conrail believed the Harsimus Branch was a line of railroad subject to STB abandonment authority, either before or after Conrail removed the track and bridges. The evidentiary record and the STB’s and OEA’s

own findings make abundantly clear that Conrail worked closely with the City and its Redevelopment Agency to make property underlying the Harsimus Branch east of the Embankment properties available for redevelopment, and *no one* suggested that abandonment authority was required.¹ Furthermore, Conrail worked closely with the City and its Redevelopment Agency for several years to make the Embankment properties available for redevelopment, and, here again, *no one* suggested that abandonment authority was required.² As OEA pointed out, the City itself removed a bridge on the Embankment properties at Marin Boulevard and Conrail removed the remaining bridges at the urging of the City. EA at 14.

The City Parties in their “Additional Supplemental Comments” make much of the fact that Conrail in 1999 opposed the listing of the Embankment properties on the State Register of Historic Places. Supp. Comments at 11-12. The City Parties neglect to mention, however, that the City itself also in 1999 expressly opposed the listing of the Embankment properties on either the State or National Registers of Historic Places. Indeed, the City presented expert testimony at the State Review Board hearing opposing the listing. Then-Mayor Schundler subsequently reiterated the City’s opposition in a letter to the Assistant Administrator of the New Jersey Department of Environmental Protection that attached a detailed summary of the City’s objections.³ Certainly, Conrail cannot now be criticized by the City Parties for raising objections in 1999 to the listing of the Embankment properties on the State Register when the City itself at the time was actively opposing such a listing.

¹ See, e.g., Decision served August 9, 2007, in STB Finance Docket No. 34818, *City of Jersey City, Et Al.—Pet. for Dec. Order*, slip op. at 4-5; Reply Statement of Consolidated Rail Corporation in STB Docket No. 34818, filed April 24, 2006 (“Conrail April 24, 2006 Reply Statement”), Ryan Verified Statement (“VS”) at 10-14.

² Conrail April 24, 2006 Reply Statement, Ryan VS at 14-18.

³ See Conrail April 24, 2006 Reply Statement, Appendix O.

The City Parties also criticize Conrail for selling the Embankment properties to the LLCs in 2005 when the City had engaged eminent domain counsel, who was seeking access to the properties to perform an appraisal. Supp. Comments at 4-6. What the City Parties conveniently elide, however, is that Conrail *three years* earlier had put the properties out for bids, after several prior years of fruitless negotiation with the City and its Redevelopment Agency for the City to acquire the properties.⁴ Both the Redevelopment Agency and the City reviewed the bid invitation in 2002 and expressed no interest.⁵ Only the LLCs' principal submitted a bid that met Conrail's minimum requirements, and Conrail entered into a binding contract with that principal long before the City's counsel contacted Conrail. Having been frustrated for years in its effort to sell the Embankment properties to the City, Conrail could hardly be criticized for closing a sale with a committed buyer simply because the City's counsel belatedly suggested that the City had a renewed interest in acquiring the properties.⁶

The City Parties suggest repeatedly in their "Additional Supplemental Comments" that a Declaration filed by the LLCs' counsel in the Special Court proceedings demonstrates that there was no good faith basis for anyone to believe in 2005 that the Embankment properties were not

⁴ See Conrail April 24, 2006 Reply Statement, Ryan VS at 14-16.

⁵ See Conrail April 24, 2006 Reply Statement, Appendices R, S, and T.

⁶ The City Parties assert that after the City designated the Embankment properties as an "historic landmark" in 2003, the City held meetings with Conrail about acquiring the Embankment properties. Supp. Comments at 13. But Conrail never received any concrete proposals. "What it received instead were periodic overtures to meet to talk about the possibility of the City or some other public entity acquiring the property instead of Conrail selling the property to the only bidder that had met Conrail's terms." Conrail April 24, 2006 Reply Statement, Ryan VS at 16. At one such meeting, the City Parties assert that Conrail told the City that its condemnation authority was preempted. Supp. Comments at 13. This is not a new assertion, and it is not only unsupported by the concurrent notes of the City consultant who supposedly heard it at the meeting, but also by the Verified Statements of the Conrail representatives at the meeting who supposedly said it. See Conrail April 24, 2006 Reply Statement, Ryan VS at 16-17 and Fiorilla VS at 2.

part of an active line of railroad. Supp. Comments at 14-15, 17-20. The lawyer who filed that Declaration did not become an attorney for the LLCs until 2008, and he did not have his epiphany until 2012, when the LLCs presented his Declaration as evidence to support their newly hatched fraud claim against Conrail. As the City Parties themselves note, he has a difficult time squaring the assertions in his Declaration with positions he himself took in proceedings before this agency and in state court on behalf of the LLCs. *Id.* at 17-18. More important, however, his position cannot be squared with the expert opinion of the LLCs' prior counsel, former ICC General Counsel Fritz Kahn, and the many expert witnesses Mr. Kahn presented to the STB in support of the LLCs' position that the Harsimus Branch was and is a spur, and not a regulated line of railroad.

Mr. Kahn is well-versed in all facets of rail regulation, including the "case-by-case, fact-specific" determination of the jurisdictional status of rail trackage. *N.Y. City Econ. Dev. Corp.—Pet. for Dec. Order*, STB Finance Docket No. 34429, slip op. at 5 (served July 15, 2004). The LLCs not only were represented by Mr. Kahn, but they also obtained the services of an impressive array of former railroad and United States Railway Association ("USRA") personnel to research the Embankment properties and offer testimony in the form of Verified Statements. These included (1) John D. Heffner, himself a long-time practicing transportation attorney, a former staff attorney at the ICC, and a former member of the Office of General Counsel for USRA, (2) James W. McClellan, who was USRA's Vice President in charge of the Office of Strategic Planning, (3) Richard B. Hasselman, formerly a Vice President at Penn Central and a Senior Vice President at Conrail, (4) William F. Wulforth, former special duty Assistant Trainmaster on the Harsimus Branch, who was also familiar with operations on the Hudson

Street Industrial Track, and (5) Victor Hand, a former USRA official who also at one time was a brakeman on the New Jersey Division of the Penn Central.⁷

Together with this detailed testimony, the LLCs presented extensive documentary evidence, participated in written discovery and document production, and made their own independent legal arguments to the STB, the United States Court of Appeals for the District of Columbia Circuit, and (until 2012) the Special Court that the Harsimus Branch was not a regulated line of railroad. Whatever may have been the motivation of the LLCs in changing legal counsel and reversing a position they had firmly espoused for six years, their change in tactics, which the Special Court rejected, does not alter the fact that their own independent legal and factual experts refuted the belated assertions of their subsequent counsel. Conrail is not here contesting that abandonment authority is now required for the Harsimus Branch, including over the Embankment properties, but there was and is ample support, including in the LLCs' own expert evidence and argument, for its good faith belief that the Harsimus Branch was not a regulated line of railroad.

The City Parties attach to their "Additional Supplemental Comments" excerpts from the New Jersey Title Practice Handbook and a copy of N.J.S.A. 48:12-125.1. Supp. Comments at 3-4. They suggest that Conrail or the LLCs, or both, violated the Title Practice Handbook. Even assuming it were possible to violate a treatise like the Title Practice Handbook, if the City Parties have a state-law claim concerning the LLCs' title to the Embankment properties, they can make it in state court. They are already making a claim in state court under N.J.S.A. 48:12-125.1 that the sale of the Embankment properties to the LLCs violated state law, so it is mystifying why they are raising that law with the STB.

⁷ See Reply Statement of 212 Marin Boulevard, et al., in STB Docket No. 34818, filed April 24, 2006.

Whether the state court does or does not void the sale under N.J.S.A 48:12-125.1, there is no reason for the STB to do so. The net effect of the parties' stipulations and the Special Court's judgment is that Conrail retains a common carrier obligation over the old Harsimus Branch right of way. For all intents and purposes, Conrail has a constructive easement that cannot be extinguished without abandonment authority from the Board. Contrary to the City Parties' ominous suggestions (Supp. Comments at 20), no demolition of the Embankment properties can or will take place without that authority.⁸ And the remedies the City Parties can seek in the STB's abandonment proceedings are the same regardless of whether Conrail or the LLCs own the property underlying the right of way.⁹

⁸ Furthermore, no demolition of the Embankment properties can take place without a waiver of Jersey City's Historic Landmark designation for those properties. As Conrail explained in its Supplemental Environmental and Historic Report filed August 21, 2014, the LLCs have been denied such a waiver, after extensive hearings, both by the Jersey City Historic Preservation Commission and by the Jersey City Zoning Board of Adjustment. Accordingly, it is no longer reasonably foreseeable that the LLCs could carry out any demolition of the Embankment properties if the STB grants abandonment authority.

⁹ That does not mean that the City Parties or any other party will get the remedy it wants. Conrail is not required, for example, to agree to a Trails Use request, and has already made clear that it will not do so. By the same token, Conrail has made clear that it is prepared to offer and provide in the Section 106 review process—if there remains any need to conduct such a process (in light of the LLCs' inability to obtain waivers from Jersey City's Historic Landmark restrictions)—only the remedies it would provide if it still owned the underlying fee interest in the property. See Reply of Consolidated Rail Corporation to "Motion to Reopen," filed May 18, 2009, at 6 and n. 1. The ICC determined years ago by rule that the most the agency can require of railroads in a Section 106 proceeding is that they provide documentation of rail lines, bridges, and other historic structures to preserve the historic record. See *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-29 (1991). The ICC and the STB have adhered to that rule since. See *Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Union Pac. R.R. Co.—Abandonment and Discontinuance of Trackage right Exemption—In Los Angeles County, CA*, Docket No. AB-33 (Sub-No. 265X), 2008 WL 1968727 (served May 7, 2008). Conrail would provide such documentation for the Harsimus Branch if it continued to own the Embankment properties and the rest of the Harsimus Branch east of Marin Boulevard in fee, and it will provide such documentation regardless of the LLCs' ownership of the fee interest in the Embankment properties and the ownership by multiple other parties of the fee interest in the properties underlying the Harsimus Branch east of Marin Boulevard.

The City Parties argue, however, that a 2007 Memorandum of Understanding ("MOU") between Conrail and the LLCs somehow constitutes a contract to evade Section 106 review and engage in anticipatory demolition. Supp. Comments at 21-23. Conrail responded at length to the City Parties' mischaracterization of the 2007 MOU in its Reply to their Motion to Compel filed October 7, 2014, and we need not repeat that discussion. Conrail Reply at 9-11. Suffice it to say here that nothing in the MOU evinces any intent to evade STB jurisdiction.

The City Parties profess to seek an expeditious handling of this abandonment proceeding, yet they continue to raise baseless reasons why it should be extended, most recently for burdensome discovery that has no relevance to any legitimate issue in the proceeding. Their "Additional Supplemental Comments" reflect the continuing inability of these parties to refrain from rehashing the same issues over and over in multiple pleadings. Nothing they say in this latest filing advances their cause one whit.

Respectfully submitted,

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III / ACS
Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street NW
Washington DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

October 15, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 15th day of October, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

Charles H. Montange
426 NW 162nd Street
Seattle, WA 98177

Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Daniel Horgan
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096

Fritz R. Kahn, P.C.
1919 M Street NW
7th Floor
Washington, DC 20036

Aaron Morrill
Civic JC
64 Wayne Street
Jersey City, NJ 07302

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

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

President
Hamilton Park Neighborhood Association
PMB # 166
344 Grove Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

East Coast Greenway Alliance
5315 Highgate Drive
Suite 105
Durham, NC 27713

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

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Robert Crowell
Monroe County Planning Department
Room 306 Courthouse
Bloomington, IN 47404

Justin Frohwirth, President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Joseph A. Simonetta, CAE
Executive Director
Preservation New Jersey Incorporated
414 River View Plaza
Trenton, NJ 08611

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

Massiel Ferrara, PP, AICP, Dir.
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

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

Embankment Preservation Coalition
495 Monmouth Street
Jersey City, NJ 07302

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

Jersey City Economic Development Corp.
30 Montgomery Street, Suite 1400
Jersey City, NJ 07302

Daniel D. Saunders
Deputy State Historic Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

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

I further certify that, in accordance with 49 C.F.R. §§ 1105.7(b) and 1105.11, on this 15th day of October, 2014, I provided a copy of the foregoing to each of the agencies designated below by First Class Mail, postage prepaid :

AGENCY SERVICE LIST

Mayor Steven M. Fulop
City Hall – 280 Grove Street
Jersey City, NJ 07302

New Jersey State Clearinghouse
State Review Process
Office of the Governor
P.O. Box 001
Trenton, NJ 08625-001

Thomas A. DeGise
County Executive
Justice Brennan Court House
538 Newark Avenue
Jersey City, NJ 07306

NJ Department of Environmental Protection
Historic Preservation Office
Attn: Patty Christman, NJ Transit & Rail
Infrastructure
Mail Code 501-04B
P.O. Box 420
Trenton, NJ 08625-0420

Ruth W. Foster, Ph.D.
NJ Department of Environmental Protection
Office of Permit Coordination and
Environmental Review
401 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

Richard Reilly, Bureau Chief
NJ Department of Environmental Protection
Bureau of Inland Regulation
501 East State Street
Mail Code 501-02A
P.O. Box 420
Trenton, NJ 08625-0420

Grace Musumeci, Chief
Environmental Review Section
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

The District Engineer
U.S. Army Engineer District, New York
Jacob J. Javits Federal Building
26 Federal Plaza, Room 2109
New York, NY 10278-0090

Dr. Dan Roman, Acting Chief
Spatial Reference System Division
National Geodetic Survey
1315 East-West Highway
Silver Spring, MD 2090-3282

Bradley M. Campbell, Commissioner
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

David Sumba, Pr. Env. Specialist
NJ Department of Environmental Protection
Bureau of Coastal Land Use Compliance &
Enforcement
100 North Road
Chester, NJ 07930

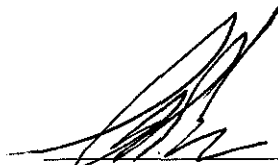
NJ Department of Environmental Protection
Division of Land Use Regulation
Attention: David Franz, Acting Director
Mail Code 501-02A
501 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

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

Director's Office
National Park Service
U.S. Department of the Interior
1849 C Street, NW
Room 2216
Washington, DC 20240

Mike Caldwell, Regional Director
National Park Service
U.S. Custom House
200 Chestnut Street, Fifth Floor
Philadelphia, PA 19106

Carrie Mosley
State Conservationist
Natural Resources Conservation Services
220 Davidson Avenue, 4th Floor
Somerset, NJ 08873-4115



Adam C. Sloane