

Before the Surface Transportation Board

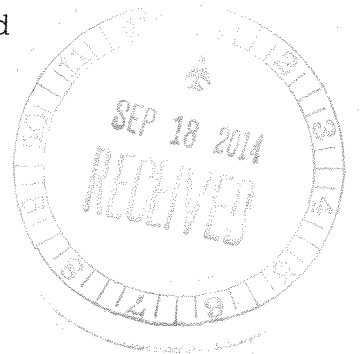
Conrail -- Abandonment)
) AB 167 (Sub-no. 1189X)
--in Hudson County, NJ.)

and

CSX Transp. - Discon. of)
Service - same) AB 55 (Sub-no. 686X)

and

Norfolk Southern -)
Discon. of Service - same) AB 290 (Sub-no. 306X)



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ENTERED
Office of Proceedings
September 18, 2014
Part of
Public Record

Motion on behalf of City of Jersey City et al
to Compel Consolidated Rail Corporation et al
to Respond to Discovery (Document) Requests

City of Jersey City, Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition (City et al) hereby move, pursuant to 49 C.F.R.
1114.21, 1114.30, and 1114.31, for an order compelling
Consolidated Rail (Conrail), Norfolk Southern (NS) and CSX
Corporation (CSX) to respond fully and completely to document
requests tendered on behalf of City et al.

A copy of the most recent version of the document requests
(dated August 11, 2014) is set forth in Exhibit A, attached
hereto. That request called for a response by September 3,
2014. Conrail served a written refusal to supply any document

(in the form of blanket objections) on that date. The refusal is set forth in Exhibit B, attached hereto.

Three of the document requests (numbers 12, 13 and 14) requested documents that may exist in files of NS and CSX. NS and CSX have made no response at all, by objection or otherwise, to the document requests and thus are in default.

Background

Unlawful sale. In 2005, Conrail unlawfully sold a portion of a line of railroad known as the Harsimus Branch to eight commonly owned and controlled LLCs (212 Marin Boulevard LLC, et al) without an abandonment authorization. The portion of the line of railroad sold contained the historic Sixth Street Embankment, which Conrail knew was eligible for the National Register of Historic Places, and thus protected under 106 of the National Historic Preservation Act (NHPA, 16 U.S.C. 470f), since 2000. The unlawful sale not only evaded STB licensing jurisdiction, but also meaningful application of section 106 to the property. It is part of an unlawful anticipatory demolition of the Harsimus Branch in violation of NHPA section 110(k), 16 U.S.C. 470h-2(k).

Federal proceedings. When efforts to resolve the matter by negotiation failed, City et al challenged Conrail's unlawful sale of the Harsimus Branch to the LLCs in F.D. 34818 in January 2006. City et al have sought meaningful relief since that time.

During the course of the many maneuvers by Conrail and the LLCs to prevent City et al from obtaining relief, Conrail filed this abandonment proceeding, and NS and CSX (parents of Conrail) the associated discontinuance proceedings.

However, at the same time Conrail brought this abandonment proceeding, Conrail and the LLCs petitioned for review of STB's orders in F.D. 34818. Conrail and the LLCs took the position that the Harsimus Branch was not a line of railroad, and that this Board lacked jurisdiction to determine that the Harsimus Branch was a line of railroad subject to its abandonment jurisdiction. In 2009 they were successful, inasmuch as the D.C. Circuit vacated this Board's decisions in F.D. 34818, finding that the agency lacked jurisdiction until the United States District Court for the District of Columbia determined that the Harsimus Branch was a line of railroad. See Conrail v. STB, 571 F.3d 13 (D.C.Cir. 2009). Since that time (shortly after this abandonment proceeding was started), this proceeding has effectively been in abeyance, either de facto or by order.

Contrary to their theory in the court of appeals, the LLCs ultimately stipulated that the property was a line of railroad under STB jurisdiction, and Conrail stipulated no contest. Over the continued opposition of the LLCs, City et al moved for summary judgment in effect that the Board had abandonment jurisdiction. The United States District Court for the District

of Columbia, sitting as 3-R Act Special Court, granted summary judgment in City of Jersey City v. Conrail, 968 F.Supp. 2d 302 (D.D.C. 2013) that the Harsimus Branch was indeed a line of railroad subject to STB abandonment jurisdiction.

City et al then sought lifting of the abeyance order at STB. Conrail and the LLCs opposed pending the LLCs' appeal of summary judgment. The court of appeals summarily affirmed the U.S. District Court in an unpublished decision. Once the period for Supreme Court review lapsed, this agency lifted the abeyance order.

Information Disclosed in U.S.D.C. Proceedings

In the course of the proceedings in United States District Court, the LLCs admitted that Conrail had fraudulently misrepresented to them, the courts, this agency and the City that the Harsimus Branch was something other than a line of railroad. Conrail responded in essence that the LLCs were aware of should have been aware of the relevant facts at all times pertinent. If the LLCs were aware or should have been aware, then so should Conrail. The combination of admissions constitute an admission that Conrail and the LLCs intentionally

misled the agency, the courts and the City in an effort to evade STB abandonment regulation, including NHPA section 106.¹

In addition, the LLCs disclosed to the United States District Court that they had entered into various agreements with Conrail, including a 2007 agreement to secure the property in question to the LLCs evidently notwithstanding actions by tribunals with jurisdiction. Such agreements confirm that any section 106 process undertaken at this time is meaningless, and that a section 110(k) [16 U.S.C. 470h-2(k)] anticipatory demolition has transpired. In that event, this agency may not grant an abandonment license, absent conditioning to allow a meaningful section 106 process, which would entail among other things voiding the unlawful 2005 transfer and ordering a transfer to the City notwithstanding Conrail's 2007 agreement with the LLCs to secure the property to the LLCs.

Discovery

On inquiry to the Office of Environmental Analysis (OEA), City et al was advised that the agency lacks resources and procedures to investigate or to examine matters pertinent to section 110(k), such as evaluation of intent. Nonetheless, section 110(k) is unquestionably applicable to STB proceedings.

¹ Documents demonstrating the facts asserted in this paragraph, and elsewhere in this overview, are already on file in this proceeding and are summarized in Appendix I to this Motion.

See 36 C.F.R. 800.9(c). In light of STB's limited resources, it falls on the parties who have sustained injury by reason of the section 110(k) violation to seek and to present argument concerning the violation. Since Conrail is clearly not voluntarily providing such evidence and information, it must be sought using this agency's discovery procedures.

There has been no discovery in this proceeding, which was in de facto abeyance shortly after it commenced. In all events, this is the first discovery opportunity available since information came to light in 2012-13 not only constituting admissions by Conrail and the LLCs of an intentional evasion of STB jurisdiction, but also disclosure by the LLCs that they and Conrail had entered into one or more agreements commencing in 2007 in furtherance of the evasion (including an agreement to neuter any remedies this agency might afford).

After the D.C. Circuit's summary affirmance of the U.S. District Court summary judgment in favor of City et al, City et al accordingly served a set of document requests upon Conrail, CSX and NS on May 6, 2014 on matters relating to the fraudulent misrepresentation allegations and on the agreements to further the fraudulent misrepresentations and to deny meaningful relief to the City.

Conrail, NS and CSX by their attorneys refused to respond on the ground that AB 167 (Sub-no. 1189X) was still in abeyance

by letter dated May 16, 2014. Conrail's letter (Exhibit C) hinted that Conrail might view the request as burdensome, harboring improper motive, or lacking relevance.

City et al through counsel assured Conrail that City et al would be willing to discuss "any reasonable idea" to reduce burden, that the requests were in any event unobjectionable, and invited Conrail to join in seeking a lifting of the abeyance (email dated May 16, 2014, Exhibit D). Conrail declined to seek a lifting of the stay, and declined to discuss the discovery requests.

In the meantime, the LLCs (notwithstanding the judicial determination that the Harsimus Branch was a line subject to STB abandonment jurisdiction) filed a Petition with STB (F.D. 35825) for a determination that the Harsimus Branch was not a line subject to STB abandonment jurisdiction. STB denied the Petition in a decision served August 11, 2014. The LLCs have moved for reconsideration.

In a decision served in this abandonment proceeding (AB 167-1189X) on the same date (August 11), this Board lifted the abeyance order. City et al served (for a second time) the document requests upon Conrail, CSX and NS by email and express the same day, seeking a response by September 3, 2014. In the cover letter (p.2 of letter in Exhibit A), City again expressed a willingness to negotiate reasonable response limitations to

requests Conrail felt unnecessarily burdensome. On September 3, 2014, Conrail responded with the objections attached as Exhibit B and no documents at all. CSX and NS did not respond.

I. Conrail's General Objections Are Misplaced

1. Timeliness objection.

Conrail claims City et al's discovery requests are "grossly untimely." In light of (a) the proceeding being held in abeyance until August 11, 2014; (b) the admissions and disclosures in United States District Court by the LLCs and Conrail in 2012-13; (c) the Board's August 11 decision directing a supplemental environmental process; and (d) the Board's duties under, inter alia, sections 110(k) and 106 of the NHPA, any claim that City et al's discovery requests are untimely is frivolous. Conrail's "notice of exemption" on which this abandonment proceeding is based was filed on February 26, 2009. Oral argument in the Conrail/LLCs' appeal to deprive this agency of jurisdiction was on April 20, 2009, with a decision in June 26, 2009. This proceeding had been in a de facto abeyance since oral argument in April 2009, and certainly since the decision in June 2009. The Board placed this proceeding in formal abeyance in a decision issued April 20, 2010. The SEA's Environmental Assessment was issued on March 23, 2009, obviously before there was any time for discovery, and certainly there was no time for discovery on the "environmental" issues Conrail

thinks germane. Tendering discovery requests on August 11, 2014, on the very day the Board reactivated this proceeding, is obviously timely. The requests were tendered at the earliest opportunity. Indeed, Conrail had a complete foreshadowing of the requests months before, for they were first tendered on or about May 6.

2. Prior opportunity objection.

Conrail claims that City et al had substantial discovery in 2006 in F.D. 34818. City et al had next to no discovery in 2006. First, the discovery was time limited² and focused on use (number of carloadings) and users (customers) for the line, and second, Conrail claimed almost all relevant documents were on outdated computer tapes no longer accessible, at least to normal mortals, or even to experts, since by that time City et al's opening statement was due.³ The issues are now different. The issues in AB 167-1189X are not whether the property was a line. Instead, the issues, among other things, are what Conrail and

² This Board established a schedule in F.D. 34818 by way of a Decision served February 8, 2006. That schedule required City et al to file an opening statement on March 10, 2006 (essentially four weeks later). City et al immediately served some document requests, as to which Conrail and the LLCs obtained a protective order by Decision served March 2, 2006. Discovery during that brief period was obviously truncated.

³ The time between entry of the protective order and due date of City et al's opening statement was all of eight days. See note 2.

the LLCs knew or should have known, and whether they intentionally evaded federal licensing authority. While City et al views the evasion as self-evidently intentional based on Conrail and LLC admissions to date, Conrail is in denial, and thus the whole matter remains the prime subject for discovery. In light of this, the issues are not those of 2006, but instead the issues now relate to application and enforcement of section 110(k) (intent to evade STB jurisdiction), meaningful application of section 106, and protection of the integrity of STB jurisdiction and remedies generally. The gravity of these issues is underscored by the disclosures by the LLCs and Conrail in 2012-13 concerning fraudulent misrepresentations to the City, the courts, and this agency, and by the LLCs concerning the existence of various agreements to evade this Board's jurisdiction or to circumvent effective remedies for the unlawful abandonment. See Appendix I. As we indicated in our Reply to Conrail's "Supplemental Environmental and Historic Report" and Supplemental Comments on Environmental Assessment served 3/23/2009 which City et al filed on September 3 filing (incorporated by reference herein) in this proceeding, all these issues require examination by this Board.

City et al have not had any meaningful opportunity for discovery on these matters until now. Nor has this Board had

any opportunity to examine the issues, especially in light of the disclosures in United States District Court.

3. Relevancy objection.

Conrail claims the discovery is aimed at matters neither relevant nor likely to produce relevant information, because they differ from issues of concern to bringing the 2009 "Environmental Assessment" ("EA") "up to date." Conrail Response at 2. Conrail also says that the OEA in the March 2009 EA resolved section 110(k) issues in Conrail's favor. STB's OEA published the original EA in March of 2009 roughly three weeks after Conrail filed its notice of exemption. The original EA purports to deal with section 110(k), but is obviously deficient in that regard, as we showed in our September 3 Reply. Even more troubling, as OEA staff have stated to us, they lack resources and procedures to deal with section 110(k) matters. In any event, the EA is clearly not up to date on section 110(k). The existing EA instead bases conclusions concerning 110(k) on actions it asserts the City took before the year 2000, or on Conrail's filing of an abandonment proceeding that the railroad at the same time sought to render moot. Nothing the City did at any time immunized Conrail from its duty to comply with this agency's abandonment jurisdiction. And Conrail's belated actions before this agency years later only trigger section 110(k); they are the opposite of showing that the

statute is not applicable. The 2009 EA is thus defective as a matter of law, and in all events it is oblivious to all the disclosures and admissions by the LLCs and Conrail in 2012-2013 in United States District Court. See City et al Reply, supra, filed September 3, 2014, incorporated herein. These disclosures and admissions include the fact that the LLCs and Conrail entered into agreements for intentional evasion of STB jurisdiction, which of course includes section 106, and to circumvent effective remedies. This not only implicates section 110(k) but also suggests that Conrail and the LLCs sought, and continue to seek, to thwart STB jurisdiction generally. City et al's discovery is highly germane.

4. Conrail's misrepresentation of City et al's position.

In a bold attempt to suggest that section 110(k) is irrelevant, Conrail at p. 3 of its "Response" acknowledges that under section 110(k), this Board may not license the abandonment. Conrail then in boldface type claims "[b]ut the City Parties clearly are not seeking to have the Board deny abandonment authorization, and they never suggested that Conrail should withdraw its abandonment notice." This Conrail boldface claim is a combination of fiction and delusion on the railroad's part.

City et al has repeatedly filed extensive objections to abandonment in light of section 110(k) and Conrail's misconduct

generally. For example, we filed a letter and extensive exhibits on January 21, 2009 (a month in advance of Conrail's notice of exemption) noting that this Board could not lawfully license Conrail's proposed abandonment absent a finding of "justification" and consultation with the Advisory Council on Historic Preservation. There is absolutely no showing of "justification" in this proceeding. Instead, the LLCs and Conrail entered into an agreement in 2007 to circumvent STB remedies. No abandonment license may be issued here unless the Board voids the deeds to the developer (or orders reconveyance of the property by the LLCs to Conrail), and further directs Conrail to convey the property to the City at the same price paid by the LLCs in the illegal abandonment.

City et al restated its January 2009 request for relief in a formal "Restatement" filed March 13, 2009. City et al objected to OEA's EA conclusions concerning environmental matters generally and section 106 and 110(k) matters specifically in "Additional Comments" filed May 7, 2009. We formally moved to reopen on, inter alia, section 110(k) grounds filed May 7, 2009.

City et al reiterated our objections, especially in light of the evidence that came to light in the United States District Court in 2012-2013 in our Reply, supra, filed September 3, 2014.

Conrail's boldface is thus wrong at least four times over and has been wrong since January 2009, before the railroad filed this abandonment proceeding.

As to Conrail's use of class exemption notice procedures, City et al have also repeatedly objected. For example, City et al objected to use of 49 C.F.R. 1152.50 procedures in this proceeding in an Opposition filed January 15, 2009, before Conrail filed the notice of exemption on which this proceeding is now based. City et al restated our objection in our Restatement of Previously Requested Relief and Reservation of Rights, filed March 13, 2009. We filed "Additional Comments" and a "Motion to Reopen" on May 7, 2009, objecting inter alia to insufficiency of notice provided by Conrail in this proceeding (Conrail failed to comply with the regulatory requirement for newspaper notice in the county where the abandonment is located). We further noted our objections to use of notice proceedings for controversial cases such as this one in our Reply filed September 3, 2014. Again, Conrail's boldface claim that City et al are not seeking a denial of Conrail's abandonment authorization ignores the record four additional times over and since January 2009.

City et al have repeatedly indicated that this Board should not allow Conrail to use exemption procedures in controversial cases such as this. We have repeatedly opposed any abandonment

authorization unless conditioned on deed voidance and transfer of the property to the City for public use (rail and/or trail and open space) consistent with historic preservation.

Conrail's boldface claim is a boldface "untruth."

Moreover, Conrail's stonewalling our discovery seems to underscore why the two year out-of-service notice procedure is inappropriate here. Conrail is apparently using the procedure as an excuse to evade discovery and to ram through an illegal abandonment without any effective remedies. This agency has said that parties like Conrail and the LLCs engaging in unlawful transfers of a rail line without abandonment authority for the purpose of degrading and destroying the line are engaged in an "abuse" from which they must not "be allowed to profit." SF&L Railway, Inc. - Acquisition and Operation Exemption - Toledo, Peoria and Western Railway, F.D. 33995, served Oct. 17, 2002, slip at 19 & n.35.

5. Conrail's denial argument.

Conrail claims that the 2007 agreement it struck with the LLCs to avoid being sued by them for damages for fraud does not reflect unlawful motive or purpose. Conrail Response at 3. Conrail does not give any reason for this conclusion. Evidently we are to trust the railroad because it is Conrail. But it is too late for that; too much that was invisible is now visible. The LLCs in United States District Court charged Conrail with

fraud on themselves, this agency, the courts and the City. Conrail and the LLCs entered into an agreement in 2007 providing that the LLCs would not sue Conrail so long as Conrail cooperates with them, and secures the property to them, and claimed in District Court that Conrail was in breach. The whole episode leads to a number of conclusions, none favorable to Conrail. For example, an agreement by Conrail to cooperate so it is not sued for fraud reflects a motive to evade liability for unlawful or tortious behavior. Such an agreement calls for further evasion of effective remedies for past misconduct and amounts to an agreement to cover up as well. It suggests two parties fear they have been caught, and are attempting to secure the profit from the unlawful dismantlement of a line. In sum, rather than complying with the law, the 2007 agreement indicates that Conrail and the LLCs set out to thwart it.

This is corroborated by what happened after the agreement. The LLCs (sometimes joined by Conrail) launched a wave of federal and state litigation, including SLAPP suits, against City et al and their attorneys. Indeed, the manager of Conrail's chosen developer (the LLCs) threatened to bankrupt with litigation anyone who mentioned the work "Embankment."⁴

⁴ The LLCs' manager has confessed on the record that he threatened to bankrupt personally the leadership of the Embankment Preservation Coalition "when this is all over." Transcript of Zoning Board of Adjustment Proceeding, Case Z09-

More recently, the manager for the LLCs offered to donate the historic Embankment to a neighboring city for use as fill for hurricane protection. See Appendix I. According to the LLCs, there are additional agreements with Conrail similar or ancillary to the 2007 agreement to accomplish the illegal abandonment. All these agreements and the facts surrounding them are germane to the application of section 110(k) and to the crafting of appropriate relief to protect the integrity of this Board's jurisdiction and processes.

6. Process integrity.

Conrail's various objections are specious for another reason. Conrail's chosen developer has stated that Conrail engaged in fraudulent misrepresentations to the developer, the courts, this agency, and the City concerning the regulation of the Harsimus Branch. This goes beyond environmental issues. It is a charge by a party in a position to know (indeed, Conrail presented extensive evidence that the LLCs very much knew) that Conrail was engaged in an intentional or at least actionably negligent evasion of federal regulation. That kind of conduct calls for effective remedies. To reiterate, this Board has said

010, 212 Marin Boulevard, et al., April 5, 2011, at p. 146. The LLCs' manager also said he would "devastate" the City. Id. at 140. The LLCs' manager appears frequently before the Jersey City Council to advise them that he is winning, and they are only losing money in their attempts to obtain legal remedies before this agency and in the courts.

that parties like Conrail and the LLCs engaging in unlawful transfers of a rail line without abandonment authority for the purpose of degrading and destroying the line are engaged in an "abuse" from which they must not "be allowed to profit." SF&L Railway, Inc. - Acquisition and Operation Exemption - Toledo, Peoria and Western Railway, F.D. 33995, served Oct. 17, 2002, slip at 19 & n.35. The issue goes beyond environmental documentation, and instead involves maintaining the integrity of the agency's jurisdiction and procedures. If parties can get away with what Conrail and the LLCs are attempting, then a meaningful section 106 process is impossible, anticipatory demolition becomes desirable and extremely profitable,⁵ and remedies to protect the public in abandonments are equally meaningless.

7. Burdensomeness objection.

All Conrail's objections on ground of burden are specious. City et al offered to negotiate "any reasonable idea" to reduce burden last May. City et al reiterated that offer in its August 11, 2014 letter to Conrail re-serving the document requests. City et al made that offer in good faith. Conrail does not

⁵ According to a recent news media report ("Hudson County News" August 4, 2014), the LLCs, who paid Conrail \$3 million in the unlawful sale transaction, demand a minimum of \$30 million, but also feels the property should be rezoned, and that the property is now worth \$50 million to \$100 million.

respond. Conrail cannot complain it is burdened when it spurns relief.

8. Privilege objection.

Conrail claims that some of the information sought may be covered by some kind of privilege. Conrail Response at 4. City et al provided an instruction that in the event a privilege is claimed, the document should be identified, parties to it disclosed, and the nature of the privilege asserted. City et al Request for Production pp. 2-3. That is a customary approach for dealing with privileged documents and hardly grounds for objection.

9. Harassment and delay objection.

In its specific objections, Conrail claims that our document requests were tendered for delay and harassment so frequently that we will treat that as a general objection. City et al is sensitive to the harassment issue. City has faced a deluge of state law discovery requests (OPRA) from the LLCs for some years now, and has no wish to face Conrail with what City has faced. Moreover, City et al lack the resources to harass. Our document requests are tendered in order to obtain information germane to the issues in this abandonment proceeding. City et al only wish that STB had the resources of the old ICC to investigate such matters on its own. Moreover, City et al early on advised Conrail we would entertain "any

reasonable idea" to lessen any burden on Conrail; Conrail never responded. We reiterated our offer in our August 11 letter. Conrail responded only with the written objections at issue here.

As to delay, the discovery requests were tendered before this Board lifted the abeyance order. Conrail is responsible for any delay. If Conrail means to complain about delays while this proceeding was in abeyance, the United States District Court for the District of Columbia has already indicated that Conrail's chosen developer (the LLCs) engaged in ploys designed to prejudice the other parties (including most importantly City et al) and to cause unnecessary delay. 969 F.Supp.2d at 303 and 307.

II. Conrail's Specific Objections Are Misplaced

Conrail's specific objections for the most part simply incorporate its general objections. As shown above, Conrail's general objections have no merit. We incorporate our responses to those general objections in each and every response below.

1. Doc. Request 1 seeks the original sales agreements and amendments thereto. The original sales documents and modifications to date are part and parcel of the illegal abandonment. City et al believe that the original "sale" agreement was in the nature of an option only, allowing ample time for due diligence, and that is certainly relevant to

evasion and intent to evade. A request for the original sales documentation and amendments thereto is thus amply relevant or designed to lead to relevant evidence and thus discoverable under 49 C.F.R. 1114.21(a)(2). City et al seek them, and Conrail should now be compelled to produce them.

2. Doc. Request 2 seeks all versions of the October 12, 2007, agreement between Conrail and the LLCs by which the LLCs agreed not to sue Conrail if it cooperated in litigation and secured the property to them (circumvention of effective remedies), as well as any other similar agreements. This document request is obviously relevant, and anything but overbroad. Conrail must be compelled to produce all versions of the October 12, 2006 agreement.

3. Doc. Request 3 seeks documents sufficient to show how Conrail approves real estate transactions. Conrail claims this is not calculated to lead to relevant evidence. Documents showing how Conrail approves real estate transactions are germane to determining who may have been involved in the illegal abandonment, and also to Conrail's intentions. As a minimum, they may lead us to possible candidates for a deposition. Conrail must be compelled to respond.

4. Doc. Request 4 asks for board of director minutes and communications concerning the Harsimus Branch sale. Contrary to Conrail's claim of lack of relevance, what and when its board

of directors was informed, and what its board of directors approved or disapproved, and why, are potentially highly germane to evasion issues, section 110(k) issues, and remedies generally. Boards of directors in general hold ultimate corporate authority and the involvement of Conrail's in this transaction is thus relevant, and certainly may lead to admissible evidence. We know that the Conrail board approved the 2007 agreement by which the LLCs agreed not to sue Conrail if Conrail cooperated with them in litigation against STB and City et al, because the LLCs produced in United States District Court a memo from Jonathan Broder (a Conrail lawyer and officer) so informing the LLCs.

5. Doc. Request 5 is essentially the same as 4 but relates to the 2007 agreement. See our response to number 4. Conrail must be compelled to respond.

6. Doc. Request 6 seeks identification of members of the Conrail board during the relevant time period. Conrail objects that this is "outrageous." Conrail says it is "beyond the pale" that board members would be deposed. Conrail Response at 7. Conrail cites no authority for the proposition that its board members may not be deposed if they may have relevant evidence. We are entitled both to board communications concerning the illegal sale of the Harsimus Branch and the 2007 agreement by Conrail to cooperate with the LLCs so it would not be sued, and

to know who the board members are so we can understand the capacity of the persons mentioned in board communications and undertake further discovery if that appears appropriate. Conrail must be compelled to respond.

7. Doc. Request 7 asks for documents tolling that statute of limitations for suing Conrail concerning the contract to sell the Harsimus Branch. This is another way to search for documents relevant to agreements by Conrail and the LLCs to subvert STB regulation or undermine STB's remedies. Conrail claims that City et al should have sought this information earlier in the proceeding. As already indicated, Conrail's notice of exemption was filed in late February of 2009, and this proceeding shortly thereafter went into a prolonged period of de facto or de jure abeyance due to the claim by the LLCs and Conrail, now renounced, that the Harsimus Branch was conveyed to Conrail as something other than a line of railroad subject to this Board's abandonment jurisdiction. Inasmuch as the LLCs did not disclose until 2012-13 that Conrail had entered into a tolling agreement, and the abandonment proceeding here was in de facto or de jure abeyance until August 11, 2014, this is our first opportunity to seek this information. Conrail must be compelled to respond.

8. Request 8 asks for communications between NJ DOT and Conrail other than pleadings concerning the sale of the Harsimus

Branch or STB proceedings. Conrail's timeliness objection is misplaced for reasons already discussed. Conrail complains about lack of relevance. It is our understanding that NJ DOT may have warned Conrail that the Harsimus Branch was a line of railroad during the title insurance process. That alone is highly germane to Conrail's knowledge and intent to evade STB regulation and STB remedies. Any writing bearing on communications between Conrail and NJ DOT may thus lead to highly relevant evidence of the first order. Conrail must be compelled to respond.

9. Request 9 seeks documents relating to other sales or potential sales of Conrail land between CP Waldo and the point of sale to the LLCs. Conrail's claim that this is untimely is specious for the reasons previously stated. Conrail's claim that this is not relevant is likewise specious. If there are any additional sales or contracts for sale and so forth, then they are further evidence of evasion of this Board's jurisdiction and processes. In addition, the information is potentially germane to claims of severance mounted by the LLCs. Conrail must be compelled to respond.

10. Doc. Request 10 seeks documents identifying those persons who advised or took action or recommended actions for Conrail for the Harsimus Branch from 2000 to date. Conrail says this is irrelevant. The identity of those persons who advise

and act for the corporation is obviously germane to issues of evasion and intention to evade STB jurisdiction and remedies. Conrail must be compelled to respond.

11. Doc. Request 11 seeks similar information as to the LLCs. Conrail objects again on relevancy, and also says that the request should be directed at the LLCs. As to relevancy, our statement in 10 above also applies here. As to asking the LLCs, City et al may well file discovery against the LLCs to the extent our time and resources permit, but City et al are nonetheless within the scope of 49 C.F.R. 1114.21 to ask Conrail for any documents it has showing who was involved for the LLCs. Conrail must be compelled to respond.

12. Doc. Request 12 seeks documents bearing on any inquiry by Conrail employee Ryan, including to NS or CSX, concerning the regulatory status of the Harsimus Branch. Conrail objects on grounds of relevance. Mr. Ryan was an apparent point person for Conrail on the Harsimus Branch transaction. It is clearly relevant to know whether he examined what he claimed to be talking about, and if he did, what he found out, insofar as the documents indicate. Again, the inquiry is well within 49 C.F.R. 1114.21. Conrail must be compelled to respond. NS and CSX did not appear to respond or to lodge objections, and must also be compelled.

13. Request 13 asks for documents from the files of CSX and NS relating to the rail regulatory status, historic nature, and sale of the Harsimus Branch from 2000 to date, other than pleadings in the litigation arising from F.D. 34818. NS and CSX do not respond. Conrail, to which the document request was not directed, claims that what NS and CSX have is "likely" to be copies of what Conrail has, but then objects that the request is "stunningly overbroad." Since the Conrail board of directors is apparently confined for the most part to officers of NS and CSX, it is possible that some of the officers of NS and CSX may have documents relating to the Harsimus Branch which they are keeping in their NS and CSX files. It is hardly stunningly overbroad to ask that someone at least look. As we have said, if Conrail feels something is too burdensome, we will entertain reasonable relief. But Conrail simply lodges a blanket objection. In the circumstances, the information is obviously within the scope of 49 C.F.R. 1114.21, CSX and NS have proceedings piggybacked on AB 167-1189X, and NS and CSX must be compelled to respond.

14. Request 14 calls for documents (other than those prepared by Conrail to contest NJSA 48:12-125.1) showing Conrail, CSX or NS complying with or objecting to a state statute creating a preferential purchase right. Conrail objects on relevancy grounds. Conrail filed a supplemental ER/HR on August 21, 2014, in this proceeding which argued in essence that

City et al has no STB remedies and should rely on state law remedies, but that it lacks funds for such remedies, so (according to Conrail) Conrail and the LLCs have placed City in a position such that it has no meaningful remedies at all. This Conrail argument has been a consistent position of Conrail (and the LLCs) since 2006. NJSA 48:12-125.1 is a state law remedy. It would void the LLCs' deeds, and further provides for a right of first refusal to acquire at the price paid by the LLCs. Conrail has claimed that the remedy is unconstitutional in U.S.D.C. 09-1900. But since Conrail in its August 21 supplement takes the position that City et al have a full and adequate state law remedy, but lack funding, it is germane for City et al to inquire for documents showing whether Conrail, CSX and NS comply or challenge preferential purchase remedies like the New Jersey statute in states where they operate. This information also is germane to whether Conrail intends to evade not only STB remedies but also STB-mediated state law remedies like preferential purchase rights. The information is within 49 C.F.R. 1114.21. Conrail also objects that CSX, NS and Conrail do not operate in some states. This is not an objection. It just means they presumably have no documents relating to those states. Conrail's objections concerning harassment, burden, or attorney client privilege has already been addressed. Conrail must be compelled to respond.

15. First request in August 11 letter asked Conrail for documents relating to sales or transfers or projected sales or transfers in the Waldo to Harsimus area to any interest controlled by the persons in control of the LLCs, or to PATH, from January 1, 2006 to present. Conrail objects on grounds of relevance. Sales or deals concerning parcels in the Waldo area may be as unlawful as the 2005 sale to the LLCs, or related to efforts to evade accountability for that unlawful sale. In addition, the information might be relevant to valuation proceedings (e.g., pending OFA). In all events, it is within 49 C.F.R. 1114.21. Conrail must be compelled to respond.

16. Second request in August 11 letter asked Conrail for documents relating to proposed transactions with the parties controlling the LLCs and Conrail involving the Harsimus Branch or any other property in Jersey City owned by Conrail from January 1, 2003 to date. Conrail objects on grounds of relevance. This request would result in production of documents showing the course of dealings between the LLCs and Conrail in regard to the Harsimus Branch, and is germane to issues of evasion of STB regulation as well as cover up of evasion. It is well within 49 C.F.R. 1114.21 to ask about the unlawful sale of the Harsimus Branch to the LLCs without the required prior STB authorization. Conrail must be compelled to respond. Conrail's

various objections of harassment, privilege, and so forth have already been shown to be inapplicable.

III. Investigation

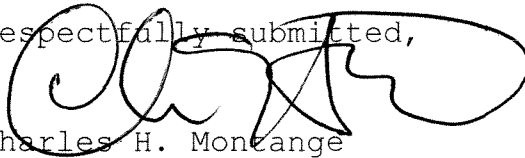
As City et al discussed in our September 3 Reply, supra, the ICC when faced with an unlawful abandonment would conduct an investigation. The law concerning illegal abandonments has not changed in relevant part, but STB lacks the field offices and staff that ICC enjoyed. STB thus relies almost exclusively on voluntary compliance. That has not occurred in the case of Conrail.

From City et al's resource point of view, City et al would much prefer that STB conduct an investigation by sending attorneys and specialists to examine Conrail personnel and documents first hand, relieving City et al of at least some of the burden of seeking discovery. But we recognize that STB no longer has sufficient personnel, and, as the agency says, now finds out about illegal abandonments after the fact.⁶

⁶Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008, slip op. at 4 ("In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.").

This does not mean that railroads such as Conrail should be immune to discovery requests designed to develop the facts and to explore issues germane to the illegal abandonments. Destruction and sale of rail lines without STB prior authorization remains "unlawful." City et al accordingly request this agency to issue an order compelling Conrail to respond fully and completely to all of our discovery requests, if possible no later than October 16, 2009, in order to avoid delay in this proceeding, so the dimensions of Conrail's unlawful actions may be explored, at least in a limited fashion. Conrail is not entitled to a rubber stamp no matter how loudly it stomps its constructive feet at being held to account.

Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
Counsel for City of Jersey City,
Rails to Trails Conservancy,
and Pennsylvania Railroad Harsimus
Stem Embankment Preservation Coalition

Of counsel: Andrea Ferster
General Counsel
Rails to Trails Conservancy
The Duke Ellington Building
2121 Ward Court, NW
5th Floor
Washington, D.C. 20037

Exhibit A - August 11, 2014, cover letter re-tendering document requests served May 6, 2014.

Exhibit B - Conrail objections served September 3, 2014

Exhibit C - Conrail May 16, 2014 letter refusing respond while Proceeding in abeyance

Exhibit D - City et al May 16, 2014 email response to Exhibit C

Appendix I

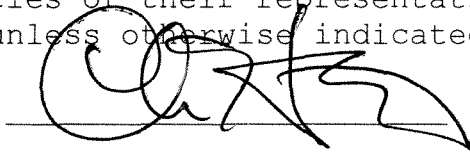
Previously filed evidence includes, but is not limited to, the following, all of which is available on the STB website for this docket:

1. City et al, Notice, filed Nov. 22, 2013 (Exhibit B contains the Developer's Stipulation and Conrail's Stipulation, Exhibit C contains excerpts from the Developer's proposed Answer in which Developer admits Conrail engaged in fraudulent misrepresentations and negligent misrepresentations)
2. Conrail filed a response on December 11, 2013, which attached its brief in U.S.District Court describing how the Developer timely knew all the facts on which the Developer's claims of fraud or negligence by Conrail were based.
3. City et al submission filed May 22, 2014 (Exhibit C sets forth again the Developer's admission that Conrail engaged in fraudulent and negligent misrepresentations; Exhibit D contains a letter from Conrail to SHPO objecting to State and National Register listings - O'Toole to Guzzo, June 4, 1999, and Guzzo's January 25, 2000 noting listing and eligibility nonetheless).
4. City et al motion for a scheduling order (Exhibits include a copy of the 2007 contract between Conrail and Developer, as filed by Developer in U.S.D.C. for D.C. as document 94-3, Conrail's joinder in demolition permit requests, signed Dec. 13, 2007, by V.P. and General Counsel Jonathan Broder after this Board concluded in F.D. 34818 that the Harsimus Branch was a line of railroad; and Decl. by Mr. Marks that Developer offered the Embankment for free as fill to Hoboken in Jan. 2014).

Other relevant evidence has previously been supplied in FD 34818 or in AB 167-1189X before the proceeding was de facto suspended in 2009.

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, on or before the 17th day of September 2014 addressed to the parties or their representatives per the service list below, unless otherwise indicated.



Service List

[AB 167 (Sub-no. 1189X)]

- with address corrections as of August 2014 -

Robert Jenkins III, Esq.

Mayer Brown LLP

1999 K Street, NW

Washington, D.C. 20006-1101

For Conrail [by express (next day) delivery, 16 Sept. 2014]

Daniel Horgan, Esq.

Waters, McPherson, McNeill PC

300 Lighting Way

Secaucus, NJ 07096

For 212 Marin et al

And the following self-represented individuals or entities:

Daniel D. Saunders

State Historic Preservation Office

Mail Code 501-04B

NJ Dept. Environmental Protection

P.O. Box 420

Trenton, NJ 08625-0420

Massiel Ferrara, PP, AICP, Director

Hudson County Division of Planning

Bldg 1, Floor 2

Meadowview Complex

595 County Avenue

Secaucus, NJ 07094

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

Justin Frohwith, President
Jersey City Landmarks Conservancy
54 Duncan Avenue
Jersey City, NJ 07303

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

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

President
The Village Nbd Ass'n
365 Second Street
Jersey City, NJ 07302

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

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

Dennis Markatos-Soriano
Exec. Director
East Coast Greenway Alliance
5315 Highgate Drive, Suite 105
Durham, NC 27713

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 Ave., Apt. 3L
Jersey City, NJ 07302

Aaron Morrill
Civic JC
64 Wayne St.
Jersey City, NJ 07302

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

Exhibit A

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

11 August 2014

Robert Jenkins, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006

Re: Document Requests to Consolidated
Rail Corporation ("Conrail"), Norfolk
Southern Railway Company ("NS"), and
CSX Transportation Company ("CSX")

Conrail - Abandonment - in Hudson
County, NJ, AB 167 (Sub-no. 1189X)
and AB 55 (Sub-no. 686X) & AB 290 (Sub-
no. 306X)

Dear Mr. Jenkins:

Enclosed please find a copy of the document production requests on behalf of City of Jersey City, et al, addressed to Conrail, NS and CSX which were served on May 6, 2014, upon you as counsel for Conrail, NS and CSX. On behalf of Conrail et al, you declined to respond on the ground that AB 167 (Sub-no. 1189X) was being held in abeyance. STB today lifted the stay in the abandonment proceeding. Please treat the attached previously served document requests as renewed on this date, same terms and conditions, with the modification that the response date is now 3 September, 2014.

In addition to the document requests stated in the attachment, my clients also request all documents (same definition as in the attached) bearing upon or relating to sales or transfers, or projected sales or transfers, of property interests of Consolidated Rail Corporation to any interest controlled or owned by Steve Hyman or Victoria Hyman, or the Port Authority of New York and New Jersey (PATH), or any other party (a) in or near the former Waldo Yard in Jersey City, (b) between any portion of the former Waldo Yard in Jersey City and

the Harsimus Branch, (c) along the former Pennsylvania Railroad mainline between Journal Square and Newark Avenue in Jersey City, and/or (d) along the former River Line (or connections thereto from National Docks Secondary or the Harsimus Branch) between the Bergen Arches Cut and CP Waldo in Jersey City from January 1, 2006 to the date of response. Conrail is specifically requested to produce all maps relating to such sales or transfers, or projected sales or transfers, in its custody or control.

City et al also requests all documents (same definitions, terms and conditions, but with due date of September 3, 2014, as set forth in the attached) constituting, reflecting, or arising out of proposed transactions between Conrail and (a) Victoria Hyman, (b) Steve Hyman, or (c) any company owned or controlled by Victoria or Steve Hyman involving (i) any portion of the Harsimus Branch or (ii) any property in Jersey City owned or controlled by Conrail from January 1, 2003, to the date of response.

As usual, I am pleased to discuss reasonable response limitations if you feel any of these document requests are unnecessarily burdensome.

By my signature below, I hereby certify service of the foregoing on the above date by email and express on Mr. Jenkins at his address of record.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'C. Montange', written over a horizontal line.

Charles H. Montange
Counsel for City of Jersey City, Rails to
Trails Conservancy, and Pennsylvania
Railroad Harsimus Stem Embankment
Preservation Coalition

Att.

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation -)
Abandonment Exemption -) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

And related discontinuance proceedings AB 55 (Sub no. 686X) (CSX
Transportation, Inc.) and AB 290 (Sub-no. 306X) (Norfolk
Southern Railway Company)

Request for the Production of Documents
Intervenors City et al to Consolidated Rail Corporation, Norfolk
Southern and CSX

Pursuant to 49 C.F.R. 1114.30 and other applicable
authority, intervenors City of Jersey City, Rails to Trails
Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment
Preservation Coalition hereby request that Consolidated Rail
Corporation ("Conrail"), Norfolk Southern Railway Company
("NS"), and CSX Transportation Corporation ("CSX") (hereinafter
all three collectively referred to as "railroads") produce the
following documents for inspection at the offices of Rails to
Trails Conservancy, 2121 Ward Court NW, 5th Floor, Washington,
D.C. 20037, at 9 AM, 28 May 2014, or such other mutually
convenient time and date (no later than 28 May 2014) is arranged
between counsel, or deliver copies of the said documents to
counsel for City et al his address below on or before that date

pursuant to reasonable terms for payment for costs of duplication and delivery agreed to in writing between counsel.

Definitions. For purposes of this Request, document shall mean any writing, notation, or record, regardless of form, and including but limited to both electronic and non-electronic media, including emails, diaries, business records, and all documents maintained, retained, authored, copied on, or received by consultants, officers, employees, negotiators, board members, attorneys otherwise working for or on behalf of the railroads or any one of them.

Harsimus Branch shall mean any portion of the line of railroad between CP Waldo and Marin Boulevard in Jersey City transferred to Conrail as line code 1420, which line of railroad is the subject of the abandonment proceeding bearing STB docket AB 167 (Sub-no. 1189X).

"The LLCs" shall mean one, more or all of 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC.

Additional instructions. If the railroads claim privilege against disclosure of one or more documents, such as an attorney client privilege, then please identify the document by providing

its author, the persons to whom it was directed, the persons who received copies of it, its date, its basic subject matter, the document request to which it is responsive, and the basis for the claim of privilege.

Document requests. All the following documents are hereby requested pursuant to the foregoing definitions and conditions:

1. All versions of the following documents as referenced in the Memorandum of Understanding executed by "Conrail," SLH Holding Company, and "the LLCs" signed October 12, 2007 by Jonathan Broder and a person believed to be S. Hyman, which Memorandum of Understanding was filed by the LLCs as document 94-02 (filed 11/08/12) in U.S.D.C. 09-1900:
 - (a) "Agreement of Sale dated June 24, 2003"
 - (b) "letters dated September 22, 2003, May 7, 2004, and September 15, 2004"
 - (c) "Amendment of Agreement of Sale dated October 27, 2004"
 - (d) All writings that relate in any way to the foregoing (a), (b), or (c).
 - (e) Any other amendments or modifications to any agreement for the sale of any portion of the Harsimus Branch to any interest owned or controlled, directly or indirectly, by Victoria or Steve Hyman.

2. All versions of the Memorandum of Understanding signed or dated October 12, 2007, by Broder and Hyman as referenced above, and any other agreements or documents reflecting written or oral understandings between one or more of Conrail, the LLCs, or SLH Holding Company "to maintain the benefit of the 2005 sale" of portions of the Harsimus Branch to SLH Holding Company or the LLCs.
3. Documents sufficient to show any policy of Conrail for approval by officers and/or the board of directors of Conrail for real estate, including but not limited to the Harsimus Branch, applicable from 2002 to the date of this document request, including but not limited to any requirements for board approval for sales exceeding certain valuations.
4. All documents, including but not limited to, corporate minutes and communications with, to, from or concerning the board of directors of Conrail, including presentations to the board of directors of Conrail, concerning the sale of any portion of the Harsimus Branch to SLH Holding Company or "the LLCs," including but not limited to any documents relating to approval or to withholding of approval of sales

agreements, or amendments of sales agreement, relating to any portion of the Harsimus Branch.

5. All documents, including but not limited to, corporate minutes and communications with, to, from or concerning the board of directors of Conrail, including presentations to the board of directors of Conrail, concerning the Memorandum of Understanding signed October 12, 2007 by Broder and Hyman as referenced above.
6. Documents sufficient to set forth the name and current business address of members of the Conrail board of directors 2002 to the date of this document request (or a list with relevant dates of service, names and business addresses).
7. All documents relating to agreements or understandings purporting to toll any statute of limitations defense that may be asserted by Conrail or an attorney representing any party (including but not limited to Conrail) to the Agreement of Sale dated June 24, 2003, as later amended.

8. All documents relating to any communication to or from the New Jersey Department of Transportation concerning sale or purported sale of the Harsimus Branch or the need for regulatory action by the Surface Transportation Board concerning same, other than pleadings filed on behalf of the New Jersey Department of Transportation or the attorney general of New Jersey in U.S.D.C. 09-1900.
9. All documents relating to sale or potential sale of land or interests in land containing the portion of the Harsimus Branch between CP Waldo and the portion of the Harsimus Branch purportedly sold to SLH Holding Company and/or the LLCs, including but not limited to proposed sales, proposed brokerage agreements, or any other proposal that might result in non-railroad use of that portion of the Harsimus Branch.
10. Documents sufficient to identify (by name, current business address and position during all relevant times at the railroads) all persons advising or taking action for Conrail or recommending action by Conrail in connection with the sale of any portion of the Harsimus Branch from 2000 to date.

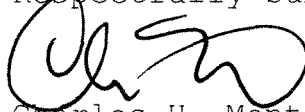
11. Documents sufficient to identify (by name, current business address and position during all relevant times at SLH Holding Company or the LLCs) all persons advising or taking action for SLH Holding Company or the LLCs in connection with the sale of the Harsimus Branch from 2000 to date.

12. All documents reflecting any inquiry by Conrail employee Ryan or Conrail attorney Fiorilla or any other employee or agent of Conrail directed to any other person employed by, retained by, or acting as an agent for Conrail, CSX or NS concerning whether the Harsimus Branch was a line of railroad requiring STB abandonment authorization prior to sale to SLH Holding Company or the LLCs, and all documents responsive thereto.

13. All documents in the files of CSX or NS, including the files of their attorneys, consultants, agents, employees, officers and board members, relating to the rail regulatory status, historic nature, or sale of Harsimus Branch from 2000 to date other than pleadings in F.D. 34818, U.S.D.C. 09-1900, or appeals or petitions for review therefrom, or pleadings in this abandonment proceeding.

14. All documents (other than pleadings prepared by Conrail seeking to contest the constitutionality of N.J.S.A. 48:12-125.1) showing NS, CSX or Conrail compliance with, or objection to, any state law that creates a preferential purchase right for public agencies in connection with railroad lines that are subject to STB abandonment proceedings, including but not limited to N.H. Rev. Stat. 228:60-b; Vermont Stat. Ann. § 3404; Mass. Gen., Law, chap 161C, § 7; Conn. Stat. 13b-36(c); New York's Transportation Law § 20.

Respectfully submitted,



Charles H. Montange

426 NW 162d St.

Seattle, WA 98177

206-546-1936

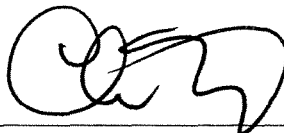
Fax: -3739

Email: c.montange@frontier.com

for Intervenor City et al

Certificate of Service

I hereby certify service of these document requests by email attachment on 6 May 2014 addressed to Robert Jenkins III, counsel for Conrail (and NS and CSX), and by deposit of same for express (next business day) delivery on 6 May 2014 addressed to Mr. Jenkins as his business address of record (Mayer Brown LLP, 1999 K Street, NW, Washington, D.C. 20006).



Charles H. Montange

Exhibit B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**RESPONSE OF CONSOLIDATED RAIL CORPORATION
TO REQUEST FOR PRODUCTION OF DOCUMENTS**

Consolidated Rail Corporation (“Conrail”) responds herein to the request for production of documents it received from the City of Jersey City, et al. (“City Parties”) on August 11, 2014. As described in more detail below, Conrail objects in general to the City Parties’ requests on grounds of untimeliness, irrelevance, and privilege. Conrail objects to the specific requests both on those general grounds and on grounds of overbreadth, burden, and harassment.

GENERAL OBJECTIONS

The City Parties’ requests are grossly untimely. The issue of the legality of Conrail’s sale of the Embankment properties without seeking abandonment authority for the Harsimus Branch was thoroughly joined in the Declaratory Order proceeding (STB Docket No. 34818) that preceded the above-captioned abandonment proceedings. The City Parties obtained substantial document discovery in 2006 both from Conrail and the purchasers of the Embankment properties (the “LLCs”). The City Parties used that discovery extensively both in the Declaratory Order proceeding and in the subsequent abandonment proceedings. Regardless of relevance, most of the matters they are inquiring about now could have been the subject of much earlier discovery requests. Now that these proceedings are in their final stages, it is far too late for the City Parties to serve new document requests.

Furthermore, the discovery requests are neither relevant nor likely to lead the discovery of admissible evidence. The issues framed by the Board in its decision served August 11, 2014 relate only to assuring that the Environmental Assessment (“EA”) is up to date and to assessing whether there have been any changes in circumstances since Conrail filed its last supplemental environmental and historic reports that would affect the Board’s environmental and historic review.¹ The City Parties’ discovery requests do not relate to whether there have been any such changes or to the environmental or historic preservation issues that are before the Board more generally.

The discovery requests also are irrelevant and not likely to lead to the discovery of admissible evidence because they appear to be framed solely to support an argument that Conrail and the LLCs have engaged in a fraudulent scheme, which allegedly would trigger a voiding of the deeds for the property and re-conveyance of the properties to Conrail, and/or the remedies provided for under Section 110(k) of the National Historic Preservation Act (“NHPA”), 16 U.S.C. 470h-2(k)). Conrail continues to vigorously dispute the allegations that it engaged in any fraudulent scheme, but more significantly for present purposes, the allegations are irrelevant because the relief that they allegedly support would do nothing to preserve the integrity of the Board’s processes or to preserve or enhance the Board’s authority to place conditions upon the abandonment.

As we have previously explained, Conrail has asked the Board to approve abandonment of the Harsimus Branch right of way. Ordering a re-conveyance of the underlying real estate to Conrail would not make any difference to the Board’s ability to approve abandonment and impose conditions. The same remedies are available to the Board now that would have been

¹ On August 21, 2014, Conrail filed the supplemental environmental and historic report ordered by the Board.

available if Conrail had sought abandonment of the Harsimus Branch right of way in 2005. As for the remedies that would be available under Section 110(k) of NHPA, that provision empowers the agency, under certain circumstances, to deny a “license” to a petitioner—in this context, abandonment authority. ***But the City Parties clearly are not seeking to have the Board deny abandonment authorization, and they have never suggested that Conrail should withdraw its abandonment notice.***²

The City Parties have attempted to justify new discovery by referring to a 2007 Memorandum of Understanding (“MOU”) between Conrail and the LLCs. Nothing in the MOU, however, reflects any unlawful motive or purpose, or otherwise indicates a scheme to unlawfully evade the jurisdiction of the STB. On its face, the MOU merely sets forth an agreement to undertake legal actions to protect the sale of the properties to which Conrail and the LLCs had agreed. The invocation of the MOU is mere make weight to attempt to justify intrusive, burdensome, harassing, and dilatory discovery. The City Parties have been pressing the same theory that the sale of the properties was illegal since the inception of this proceeding. They have been seeking the voiding of the deeds and asserting violations of Section 110(k) of the NHPA throughout these proceedings. OEA already has rejected the City et al.’s Section 110(k) arguments. EA at 14. The MOU cannot justify this latest attempt to resurrect the City Party’s allegations and to further delay these proceedings and harass Conrail.

² In any event, the Section of Environmental Analysis (now and hereafter the Office of Environmental Analysis or “OEA”) correctly observed in the March 23, 2009 EA that Conrail has not engaged in any “anticipatory demolition” of historic structures that could violate Section 110(k). Indeed, OEA noted that it was “the City itself” that had been the driving force in pushing for redevelopment of underutilized rail property and trackage. EA at 14.

Finally, many of the discovery requests are also overbroad, unduly burdensome, and calculated to inquire into matters subject to the attorney-client, settlement, and/or joint interest privileges.³

SPECIFIC OBJECTIONS

Request 1.

All versions of the following documents as referenced in the Memorandum of Understanding executed by "Conrail," SLH Holding Company, and "the LLCs" signed October 12, 2007 by Jonathan Broder and a person believed to be S. Hyman, which Memorandum of Understanding was filed by the LLCs as document 94-02 (filed 11/08/12) in U.S.D.C. 09-1900:

- (a) "Agreement of Sale dated June 24, 2003"
- (b) "letters dated September 22, 2003, May 7, 2004, and September 15, 2004"
- (c) "Amendment of Agreement of Sale dated October 27, 2004"
- (d) All writings that relate in any way to the foregoing
(a), (b), or (c).
- (e) Any other amendments or modifications to any agreement for the sale of
any portion of the Harsimus Branch to any interest owned or controlled, directly
or indirectly, by Victoria or Steve Hyman.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. Each of the items designated in subsections (a) through (e) could have been

³ Conrail also objects to the demand for a privilege log. The great bulk of the material encompassed by the City et al.'s requests is likely to be privileged. The preparation of a privilege log would be unduly burdensome and would yield no information of any value.

inquired into in discovery earlier in this proceeding. Furthermore, subsection (d) of the request in particular is overbroad and unduly burdensome.

Request 2.

All versions of the Memorandum of Understanding signed or dated October 12, 2007, by Broder and Hyman as referenced above, and any other agreements or documents reflecting written or oral understandings between one or more of Conrail, the LLCs, or SLH Holding Company "to maintain the benefit of the 2005 sale" of portions of the Harsimus Branch to SLH Holding Company or the LLCs.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is overbroad and unduly burdensome and appears calculated to intrude upon applicable Joint Interest and Settlement privileges.

Request 3.

Documents sufficient to show any policy of Conrail for approval by officers and/or the board of directors of Conrail for real estate, including but not limited to the Harsimus Branch, applicable from 2002 to the date of this document request, including but not limited to any requirements for board approval for sales exceeding certain valuations.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Conrail's policies for

approval of real estate sales have no conceivable relevance to the issues remaining in this proceeding. Even if they did, this request is untimely, since these matters could have been inquired into in discovery much earlier in this proceeding.

Request 4.

All documents, including but not limited to, corporate minutes and communications with, to, from or concerning the board of directors of Conrail, including presentations to the board of directors of Conrail, concerning the sale of any portion of the Harsimus Branch to SLH Holding Company or "the LLCs," including but not limited to any documents relating to approval or to withholding of approval of sales agreements, or amendments of sales agreement, relating to any portion of the Harsimus Branch.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. This highly intrusive and unusual request appears designed solely for purposes of harassment and delay. The confidential business deliberations of Conrail's Board on a property sale in 2005 do not have the slightest relevance to the historical and environmental issues remaining in this proceeding. Even if they did, this request is untimely, since it could have been inquired into in discovery much earlier in this proceeding.

Request 5.

All documents, including but not limited to, corporate minutes and communications with, to, from or concerning the board of directors of Conrail, including presentations to the

board of directors of Conrail, concerning the Memorandum of Understanding signed October 12, 2007 by Broder and Hyman as referenced above.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence.

Request 6.

Documents sufficient to set forth the name and current business address of members of the Conrail board of directors 2002 to the date of this document request (or a list with relevant dates of service, names and business addresses).

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Further, this request appears to have been propounded solely for the purpose of harassment and delay. The identity and business addresses of current and former Conrail Board members is pointless information unless the City Parties intend to seek depositions of those individuals. As outrageous and untimely as the City Parties' document requests are concerning the confidential business deliberations of Conrail's Board, the idea of depositions of individual Board members is beyond the pale.

Request 7.

All documents relating to agreements or understandings purporting to toll any statute of limitations defense that may be asserted by Conrail or an attorney representing any party

(including but not limited to Conrail) to the Agreement of Sale dated June 24, 2003, as later amended.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. These matters could have been inquired into in discovery earlier in this proceeding.

Request 8.

All documents relating to any communication to or from the New Jersey Department of Transportation concerning sale or purported sale of the Harsimus Branch or the need for regulatory action by the Surface Transportation Board concerning same, other than pleadings filed on behalf of the New Jersey Department of Transportation or the attorney general of New Jersey in U.S.D.C. 09-1900.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. These matters could have been inquired into in discovery earlier in this proceeding. Furthermore, there is no issue or dispute in this matter relating to the actions of the New Jersey Department Transportation or to Conrail's communications with that entity, and Conrail is not contesting the jurisdiction of the Board or the need for Board approval concerning the abandonment of the property at issue. As such, this request appears to have been propounded solely for the purposes of harassment and delay.

Request 9.

All documents relating to sale or potential sale of land or interests in land containing the portion of the Harsimus Branch between CP Waldo and the portion of the Harsimus Branch purportedly sold to SLH Holding Company and/or the LLCs, including but not limited to proposed sales, proposed brokerage agreements, or any other proposal that might result in non-railroad use of that portion of the Harsimus Branch.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. Much of the information sought in this request could have been sought in discovery earlier in this proceeding.

Request 10.

Documents sufficient to identify (by name, current business address and position during all relevant times at the railroads) all persons advising or taking action for Conrail or recommending action by Conrail in connection with the sale of any portion of the Harsimus Branch from 2000 to date.

Objection: Conrail incorporates its General Objections by reference. This request also is vague, irrelevant, and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. Much of the information sought in this request could have been sought in discovery earlier in this proceeding. Furthermore, this request appears to have been propounded solely for the purposes of harassment and delay.

Request 11.

Documents sufficient to identify (by name, current business address and position during all relevant times at SLH Holding Company or the LLCs) all persons advising or taking action for SLH Holding Company or the LLCs in connection with the sale of the Harsimus Branch from 2000 to date.

Objection: Conrail incorporates its General Objections by reference. This request also is vague, irrelevant, and unlikely to lead the discovery of admissible evidence. Furthermore, this request is improperly directed to Conrail. Only SLH know who was “advising or taking action for SLH.” Even if it had any relevance and was directed to the proper party, this request would be untimely, since the information sought in this request could have been sought in discovery earlier in this proceeding. This request appears to have been propounded solely for the purposes of harassment and delay.

Request 12:

All documents reflecting any inquiry by Conrail employee Ryan or Conrail attorney Fiorilla or any other employee or agent of Conrail directed to any other person employed by, retained by, or acting as an agent for Conrail, CSX or NS concerning whether the Harsimus Branch was a line of railroad requiring STB abandonment authorization prior to sale to SLH Holding Company or the LLCs, and all documents responsive thereto.

Objection: Conrail incorporates its General Objections by reference. This request also is irrelevant and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. These matters could have been inquired into in discovery earlier in this proceeding.

Request 13.

All documents in the files of CSX or NS, including the files of their attorneys, consultants, agents, employees, officers and board members, relating to the rail regulatory status, historic nature, or sale of Harsimus Branch from 2000 to date other than pleadings in F.D. 34818, U.S.D.C. 09-1900, or appeals or petitions for review therefrom, or pleadings in this abandonment proceeding.

Objection: Conrail incorporates its General Objections by reference. This request also is unduly burdensome, irrelevant, and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. Much of the information sought in this request could have been sought in discovery earlier in this proceeding. Finally, it is highly likely that any materials in the hands of NS or CSX “relating to the rail regulatory status, historic nature, or sale of Harsimus Branch from 2000 to date” are copies of documents in Conrail’s files. To request a search of all of NS’s and CSX’s files for any records responsive to this stunningly overbroad request is simply harassment which the Board should not tolerate.

Request 14

All documents (other than pleadings prepared by Conrail seeking to contest the constitutionality of N.J.S.A. 48:12-125.1) showing NS, CSX or Conrail compliance with, or

objection to, any state law that creates a preferential purchase right for public agencies in connection with railroad lines that are subject to STB abandonment proceedings, including but not limited to N.H. Rev. Stat. 228:60-b; Vermont Stat. Ann. § 3404; Mass. Gen., Law, chap 161C, § 7; Conn. Stat. 13b-36(c); New York's Transportation Law § 20

Objection: Conrail incorporates its General Objections by reference. This request also is unduly burdensome, irrelevant, and unlikely to lead the discovery of admissible evidence. Analyses of State laws are irrelevant to this proceeding, and this is particularly so with regard to the laws of the States designated in the request. No property at issue in this proceeding is located in any of those States, and indeed, Conrail, NS, and CSX do not operate in several of them. This request appears to have been propounded solely to harass, delay, and intrude upon attorney-client privileged matters.

Unnumbered Request (1):

All documents bearing upon or relating to sales or transfers, or projected sales or transfers, of property interests of Consolidated Rail Corporation to any interest controlled or owned by Steve Hyman or Victoria Hyman, or the Port of Authority of New York and New Jersey (PATH), or any other party (a) in or near the former Waldo Yard in Jersey City, (b) between any portion of the former Waldo Yard in Jersey City and the Harsimus Branch, (c) along the former Pennsylvania Railroad mainline between Journal Square and Newark Avenue in Jersey City, and/or (d) along the former River Line (or connections thereto from National Docks Secondary or the Harsimus Branch) between the Bergen Arches Cut and CP Waldo in Jersey City from January 1, 2006 to the date of response. Conrail is specifically requested to produce

all maps relating to such sales or transfers, or projected sales or transfers, in its custody or control.

Objection: Conrail incorporates its General Objections by reference. This request also is unduly burdensome, irrelevant, and unlikely to lead the discovery of admissible evidence. The disposition or potential disposition of property that is not the subject of this proceeding is immaterial to the issues before the Board. As such, this request appears to have been propounded merely to harass, delay, and intrude upon matters subject to the settlement privilege.

Unnumbered Request (2):

All documents constituting, reflecting, or arising out of proposed transactions between Conrail and (a) Victoria Hyman, (b) Steve Hyman, or (c) any company involved or controlled by Victoria or Steve Hyman involving (i) any portion of the Harsimus Branch or (ii) any property in Jersey City owned or controlled by Conrail from January 1, 2003 to the date of response.

Objection: Conrail incorporates its General Objections by reference. This request also is unduly burdensome, irrelevant, and unlikely to lead the discovery of admissible evidence. Furthermore, this request is untimely. Much of the information sought in this request could have been sought in discovery earlier in this proceeding. Furthermore, this request appears to have been propounded merely to harass, delay, and intrude upon matters subject to the settlement privilege.

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Attorneys for Consolidated Rail Corporation

September 3, 2014

* * *

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that on this 3rd day of September, 2014, I caused the foregoing Response of Consolidated Rail Corporation to Request for Production of Documents to be served on counsel for City of Jersey City, et al. by email attachment and next business day air (via UPS) at the following addresses:

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

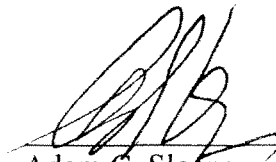

Adam C. Sloane

Exhibit C

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May 16, 2014

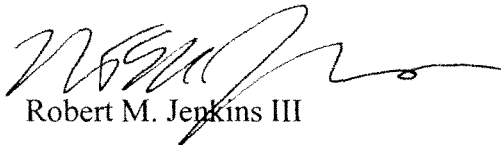
Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Re: Docket No. AB 167 (Sub-No. 1189X).
Consolidated Rail Corporation -- Abandonment
Exemption -- In Hudson County, NJ

Dear Mr. Montange:

This responds to your request for production of documents dated May 6, 2014. As you know, by order dated April 20, 2010, the STB held all proceedings in the above-captioned case in abeyance, and the case has not been reactivated. Parties are not required to respond to discovery or to object to individual requests in an inactive proceeding. Thus, even if your requests were timely and unobjectionable on grounds of relevance, burden, or improper motive, there would be no requirement for Conrail to respond. If the case is reactivated, and if you choose to resubmit these document requests to us, Conrail will respond or object as appropriate.

Sincerely yours,



Robert M. Jenkins III

cc: Jonathan M. Broder

Exhibit D

Me

May 16 ★

To Jenkins, Robert M.

By the way, I have now read your letter. While I am prepared to discuss with you any reasonable idea you may have to relieve any "burdensome" feature of any discovery I tender on behalf of a client to you (in general, I am willing to do that courtesy to any party), if you mean to suggest that the material sought is not relevant (or designed to lead to relevant information), or burdensome, or arising from improper motive, then you of course are mistaken.

Let us join together in getting the abeyance order in AB 167 (1189X) lifted.