



CNJ RAIL CORPORATION

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August 14, 2015

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US Surface Transportation Board
Office of Proceedings

Chief – Section of Administration
395 E Street SW
Washington, DC 07302

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

Re: *RJ Corman Railroad Company / Allentown Lines, LLC.*
Abandonment Exemption – In Lehigh County, PA
Docket# AB 550 (Sub No.# 3)X

Consolidated Rail Corporation
Sales and Discontinuances
EP 695

Norfolk Southern Railway
Acquisition – D&H South Lines
FD 35873

Delaware & Hudson Railway – Discontinuance – Over certain rail lines
in NY, PA, NJ, MD, VA, and the District of Columbia
AB 156 (Sub No.# 27) X

Dear Ms. Brown,

I am transmitting to you today my formal **Notice of Intent To Participate** (with Comments) as a party of record in STB Docket# AB 550 (Sub No#3)X which is referenced in the above captioned proceedings.

On July 30th 2015, RJ Corman filed a document which is clearly identified as a “Motion for leave to supplement the record”. For reasons unknown, the Board placed the document upon the Board’s website as a “reply” instead of a motion.

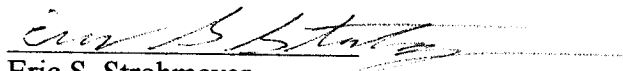
Since the document is clearly a Motion in which considerable new evidence and information was made available to the Board, the CNJ Parties feel compelled to now participate in this proceeding, especially in light of two recent decisions wherein the Board immediately put this new information into decisions in which the CNJ Parties are actively participating.

Because the Board has elected to use this newly discovered evidence in pleadings without giving parties appropriate time to respond to this evidence, CNJ is herein requesting that it be permitted to place a copy of these comments into the records of all of the other proceedings captioned above. If leave to supplement the record is required, please accept this letter as such a request.

In response to RJ Corman’s pleading of July 30th, 2015, The CNJ parties have noted in our pleading of the appropriate regulations that govern replies to such motions. We feel are Notice of Intent to Participate is consistent with Board’s acceptance of another recently late-filled Notice in AB 156 (Sub No.# 27) X¹. The CNJ Parties have **served all the parties of records** contained in all four of the above captioned proceedings. (See attached service list)

If you have any further questions or concerns, feel free to give me a call.

Respectfully,


Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation

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¹ See NJ Transit’s Notice of Intent to Participate in AB 156 (Sub No.# 27) X, filed August 11th 2015

Before the
SURFACE TRANSPORTATION BOARD

*RJ Corman Railroad Company / Allentown Lines, LLC.
Abandonment Exemption – In Lehigh County, PA
Docket# AB 550 (Sub No.# 3)X*

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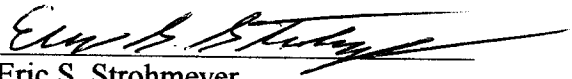
CNJ RAIL CORPORATION

and

**ERIC S. STROHMEYER
(individually)**

NOTICE OF INTENT TO PARTICIPATE
(With COMMENTS) in **AB 550 (Sub No#3)X**

Respectfully Submitted,



Eric S. Strohmeyer
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CNJ Rail Corporation
c/o CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069
Tel: (908) 361 – 2435

Dated: August 14th, 2015

Before the
SURFACE TRANSPORTATION BOARD

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AB 156 (Sub No.# 27) X*

Now comes CNJ Rail Corporation and Mr. Eric S. Strohmeyer (“CNJ Parties”), both of whom are parties of record in two related proceedings currently before the Board. The CNJ Parties¹, for the reasons articulated herein below, respectfully request the Board deny Corman’s request for relief.

In this proceeding, RJ Corman Railroad Company / Allentown Lines LLC (“Corman”), a Class III rail carrier, is seeking an Individual Exemption from the Board’s abandonment

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The CNJ Parties continue to vigorously protest the failure to include and consolidate the related proceedings. The clearly related transactions are integrally related and are, in fact, incapable of being approved absent the simultaneous approval of the other.

Furthermore, CNJ continues to argue that the failure to timely submit all transactions simultaneously made the NS application “incomplete” and the Board’s failure to date to correct that deficiency constitutes material error and deprives the parties of due process. CNJ would like to note for the record that the purported discontinuances in this proceeding are significantly larger than what Norfolk Southern indicated they would be in *NS Acquisition*.

The CNJ Parties continue to argue that the failure to timely disclose and precisely replicate the discontinuances outlined in the NS Proceeding deprived CNJ of its ability to articulate an appropriate request for conditions because the Norfolk Southern Corp (“NS”) along with co-applicants Delaware and Hudson Railway Company, Inc. (“D&H”) failed to disclose the full extent D&H’s rights that were to be the subject of this transaction.

regulations which would permit Corman to abandon a section of rail line located in Lehigh County, PA.

Normally, this transaction should have been fairly routine and non-controversial. However, this proceeding is directly impacted by five related transactions. Two of the proceedings are currently before the Board. The other three, while at first glance appearing to have been long adjudicated, may, or may not be, currently before the Board as well. More importantly, two of the five related transactions impart not one, but two significant impacts upon this current proceeding.

Related Proceedings

Without resolution of all the related proceedings, which act as legal impediments to the Board's ability to grant the relief that Corman is currently seeking in this proceeding, the Board must deny the requested exemption.

The related proceedings are:

- *Norfolk Southern – Acquisition – D&H South Lines STB Finance Docket# 35873 (“NS Proceeding”),*
- *Delaware & Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Exemption – In Broome County, NY; Essex, Union, Somerset, Hunterdon, and Warren Counties, NJ; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, and Philadelphia Counties, PA; Harford, Baltimore, Anne Arundel, and Prince Georges Counties, MD; District of Columbia; and*

Arlington County, VA STB Docket # AB 156 (Sub No. 27) X (“D&H proceeding”)

- *Consolidated Rail Corporation – Abandonment – Between Catasauqua and Lehigh, PA ICC Docket# AB 167 (Sub No.# 451N), ICC served March 11th, 1982 (“Lehigh Proceeding”)*
- *Consolidated Rail Corporation – Abandonment – In Lehigh County, PA, ICC Docket# AB 167 (Sub No.# 623N), ICC served July 19th, 1984 (“Catasauqua Proceeding”)*
- *Consolidated Rail Corporation – Petition under 49 U.S.C. Section 10505 that the termination of trackage rights by Delaware & Hudson Railway over petitioners Lehigh Secondary Track be exempt from the requirements of 49 U.S.C. 10903 ICC Finance Docket# 30334, ICC decided April 20th, 1984. (“Adverse Discontinuance proceeding”)*
- *Consolidated Rail Corporation – Sales and Discontinuances – EP 695 (“Conrail Line Sales proceeding”)*

I. NOTICE OF INTENT TO PARTICIPATE

At this time, the CNJ parties serve notice of their intent to participate in this proceeding. The CNJ Parties have been closely watching this proceeding for some time now. However, it was not until RJ Corman filed its extensive supplement to its original Exemption application on July 30th 2015 that the CNJ Parties saw issues arise that require us to actively participate in this proceeding.

Participation is appropriate at this time

On July 30th 2015, RJ Corman filed what Corman clearly captioned as a “Motion for leave to supplement the record”. For reasons unknown, the Board captioned the pleading as a “Reply” when placing the document upon the Board’s website. The plain language in the document was clear and unambiguous; it is clearly a **Motion for leave to supplement the record**.

Since Corman did not simultaneously seek a reduction in the amount of time for parties to file replies to its motion, the CNJ Parties believe that pursuant to 49 C.F.R. § 1104.13(a), parties would be permitted a full 20 days to respond to the Motion. In this case, the deadline for filing a reply to Corman’s July 30th Motion would be August 19th 2015.

Since that date would be after the date set forth as the time the Board is expected to render a final decision in this proceeding, it would appear that Corman’s late filed Motion would either give cause for the Board to delay a final decision in this proceeding to address the late filed information and permit parties the appropriate time to respond, or potentially leave the Board’s final decision to be vulnerable to attack in judicial review for depriving parties of “due process” under the regulations by failing to give parties the required time to respond to the supplemental information. This would especially true if the Board relied upon information contained in the supplement in making its final decision.

In its Motion, Corman introduced a number of significant documents into the record in this proceeding. Given that there is a reasonably foreseeable belief that the Board may rely in whole, or in part, on this newly submitted evidence in not only this proceeding, but other

proceedings related to this one as well, CNJ believes it has a right to participate for the purpose of responding to the newly submitted documents.

These documents introduce a level controversy which may affect legal positions that the CNJ parties have taken in the related proceeding in which we are presently engaged. Given the likelihood that these newly discovered documents will undoubtedly produce further controversy, the CNJ Parties feel it is now appropriate for us to respond to the potential impact the documents will likely have upon not only this proceeding, but on the related proceedings as well.

Furthermore, as set forth below, CNJ's participation will not unduly delay or burden this proceeding. As the attached documents to our pleading clearly demonstrate, the Board will not be able to approve this request regardless of the controversies surrounding the Delaware & Hudson Railway's ("D&H") rights (whatever they actually may be) in the Corman property.

II. STRANDED SEGMENT

Before the CNJ Parties delve into the morass of the many issues related to the D&H Proceeding, it should be noted that Corman's Exemption request cannot be granted at this time regardless of the convoluted D&H related issues. Granting Corman its relief will produce a "stranded segment".

As mentioned above, there are not one, but two, related abandonment proceedings initiated by the Consolidated Rail Corporation ("Conrail"). In this proceeding, Corman is seeking to abandon a segment of a line of railroad it acquired from Conrail. While Corman has alleged that the line is "stub-ended", a careful examination of the two Conrail proceedings reveals that may not be the case.

As both Corman and Mr. Riffin have pointed out in previous pleadings with this Board, the Corman line, and the Conrail lines are portions of the same line of railroad which was originally transferred to Conrail pursuant to the Final System Plan (“FSP”). In developing the plan, the United States Railway Association (“USRA”), the quasi-governmental agency created by Congress to oversee the development and implementation of the FSP, assigned Line-code number 0503A to the segment of the former Lehigh Valley Railroad (“LV”) Mainline between Milepost 93.3 (located in Allentown, PA) and Milepost 119.1 (located in Lehigh, PA).

Back in the early 1980’s, Conrail undertook a series of steps to rationalize its physical plant consistent with certain mandates set forth by Congress. Of significance to this proceeding, Conrail sought to relieve itself of its obligation to maintain Line-code 0503A, (which it renamed the Lehigh Secondary Track). In two steps, Conrail sought to abandon significant segments of the line. In the *Lehigh Proceeding*, Conrail sought to abandon the Segment between roughly Milepost 119 and Milepost 98 (“*Lehigh Segment*”). In the *Catasauqua Proceeding*, Conrail sought to abandon the Segment between roughly Milepost 98 and Milepost 96.5 (“*Catasauqua Segment*”).

The ICC approved both abandonment applications and granted Conrail *permissive*² authority to abandon the two segments. As both Corman’s and Mr. Riffin’s pleadings demonstrate, there was considerable controversy surrounding the rights of the D&H in the line. Notwithstanding the D&H issues, it should be emphasized once again, Conrail’s abandonment authority was permissive. The CNJ Parties believe that the issue that should be of greatest

² See: 45 U.S.C. § 748 (e)(3)(B) which states, in part, “..... the Corporation *may* abandon or dispose of the line as it chooses” (emphasis added, portions omitted). The entire section provides a streamlined process beginning with the initial application and ending with the liquidation of the line. If Congress wanted to make abandonment absolutely compulsory and compel liquidation, they would have removed any discretion from the statute which otherwise could permit Conrail the ability to choose to retain the line and continue providing service.

importance to the Board in adjudicating this proceeding is: Did Conrail ever exercise their *permissive*³ authorities?

In its July 30th supplement, Corman seems to be arguing that there appears to be a significant amount of evidence that Conrail exercised the permissive abandonment authority it received in the *Lehighton Proceeding*.

Assuming, *arguendo*, that Corman is correct and the Board has lost all jurisdiction over the line segment embraced in the *Lehighton Proceeding*, then one could argue that Corman's line is now a stub-ended line of railroad. However, there is another proceeding regarding an additional segment of this same line.

In the *Catasauqua Proceeding*, Conrail received permissive authority to abandon another smaller segment of 0503A. That segment was the section between Corman's segment and the *Lehighton Segment*. Of critical importance to this proceeding is the Interstate Commerce Commission's ("ICC") explicit directive to Conrail in that matter. In its July 13th, 1984 decision, the ICC expressly stated:

(2) If the authority granted by this certificate and decision is exercised, **Conrail shall advise this commission in writing, immediately after abandonment** of the line of railroad, of the date on which abandonment actually took place. (emphasis added)

There is nothing ambiguous in the Commission's directive. Upon close examination of the totality of the documents contained within the Board's extensive records, the CNJ Parties

³ While the CNJ Parties are aware of a number of court decisions which have called into question the Board's ability to make a determination regarding whether Conrail has exercised Section 308 abandonment authority, none of the parties in those proceedings appear to have argued before the court the plain language of the Statute in 45 U.S.C. § 748(e)(3)(B).

were quick to note **the absence of a critical document. Conrail appears to have never notified the ICC, in writing, of the date it consummated its abandonment authority.**

It has been 30+ years since the ICC issued its directive. The absence of a letter or notice confirming consummation creates a conundrum for the Board. This revelation leads to two possible outcomes, either;

1. Conrail never filed the required notification because **it never exercised** the permissive authority, or
2. Conrail failed to comply with an explicit order of the ICC

Before the Board can decide this proceeding, it must determine⁴ if Conrail has, in fact, exercised its permissive authority in the *Catasauqua Proceeding*. If Conrail has indeed exercised its permissive authority, then the Board's grant of relief would not produce a stranded segment. However, if Conrail never exercised its authority, and if the Board has lost jurisdiction over the line segment in the *Lehighton Proceeding*, then granting Corman's relief clearly produces a "stranded segment" because the *Catasauqua Segment* would not connect at either end with the remainder of the national system.

It is well established law that a party or person is innocent until proven guilty. Of the two scenarios we set forth above, the CNJ Parties cannot, in good conscience, immediately jump to the conclusion that Conrail failed to comply with an explicit order of the ICC. Such blatant disregard for a commission order could lead to serious adverse consequences. We must assume

⁴ To the extent that parties may question if the Board has the jurisdiction to make such a determination, the CNJ Parties respectfully argue that since the ICC explicitly ordered Conrail to provide such a letter, the Commission DID NOT provide unconditional relief. The CNJ Parties discuss this further at length herein below.

that Conrail did follow the order. If Conrail exercised its authority, it would have followed the ICC order and submitted its letter to the commission as directed.

However, that assumption must mean the **absence of the consummation letter / notice** is more than sufficient evidence that Conrail must never have exercised its permissive authority and therefore, all of the line segments contained within the *Catasauqua Proceeding* must still be active lines of railroad. To the CNJ Parties, in the absence of, (1) a Conrail letter confirming abandonment, or (2) a proceeding to determine the actual legal status of various lines of railroad in the Catasauqua Segment, it appears that Corman's Application is fatally "impeded" because the proposed abandonment would strand a segment of common carrier rail line in violation of Board precedent and policy.

It is well settled law that the Board's precedent does not allow a segment of common carrier track to be "stranded" due to abandonment of an adjacent section of track. In *Central Oregon & Pacific Railroad, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR*, STB Docket No. AB-515 (Sub-No. 2), slip op. at 12 (served Oct. 31,2008) ("Central Oregon"), this Board held:

"It is well settled that so long as there is a common carrier obligation attached to a particular segment of track, the Board will not allow that segment to become isolated from the rail system as a result of the abandonment of the adjoining segment."

Consistent with this precedent, the Board also has denied abandonment exemptions where the proposed abandonment would result in a stranded segment. Other examples include: *Norfolk Southern Railway Company - Abandonment Exemption - In Baltimore County, MD*, STB Docket No. AB-290 (Sub-No. 237X), slip op. at 4 (served April 3,2006) (Board denies

exemption because, among other things, no party adequately addressed the apparent "stranded segment" created by the proposed abandonment); *Buffalo & Pittsburgh Railroad, Inc. – Abandonment Exemption – In Erie and Cattaraugus Counties, NY*, STB Docket No. AB-369 (Sub-No. 3X), slip op. at 7 (served Sept. 18, 1998) (Board denies exemption because, among other things, proposed abandonment would "isolate" another rail line "from the national rail system").

It should be noted this conundrum of the stranded segment will exist regardless of whether or not any of the segments are further impacted by the rights of the D&H. This stranded segment controversy will exist whether or not the D&H has any rights in Corman's line.

The CNJ Parties believe the burden now falls squarely upon Corman to produce convincing evidence that Conrail had, in fact, exercised its *permissive* authority and consummated the abandonment in the *Catasauqua Proceeding*.

It should be noted: If Corman's evidence is sufficiently convincing, then the CNJ Parties will have to carefully evaluate statements made by Conrail in another proceeding before this Board. If Conrail failed to follow the Commission's explicit directive, did Conrail also fail to follow this Board's direction, or otherwise mislead this Board, when it filed a response to the Board's explicit directive in the *Conrail Line Sale Proceeding*? See EP 695.

III. CONRAIL LINE SALE PROCEEDING

At first glance, the CNJ Parties are fairly confident that Conrail would not have violated an explicit directive from the Commission. To further bolster our position, we take note of Conrail's own response previously filed in the *Conrail Line Sale Proceeding*. In that proceeding,

Conrail provided a report⁵ which appears to suggest that a very extensive review of all Conrail Line Sales was conducted prior to the preparation of the report that the Board required Conrail to produce.

Assuming that all the statements contained therein are truthful, the following portion of Conrail's report must be closely examined. On page 1, Conrail stated:

"Conrail worked diligently to comply with the Board's order under difficult circumstances. Conrail has made over six hundred property sales since January 1, 1996. A significant percentage of those sales took place during the three-year period in the late 1990's **when Conrail was sold** and largely divided between CSX Transportation, Inc. ("CSXT") and **Norfolk Southern Railway ("NS")**." (Emphasis added)

Conrail went on to further state:

" **Frequently, it was necessary to cross-check the records** retrieved against other records, and a variety of materials—including, for instance, deeds, valuation maps, closing reports, and **regulatory filings** — were consulted to ascertain the terms of the transactions, **the nature of the property at issue**, and whether abandonment authority was obtained when necessary." (Emphasis added)

Further on, Conrail stated:

" **Where jurisdictional track was involved**, Conrail established in its review either (a) that **ICC or STB abandonment authorization was obtained before the sale**, (b) that the **sale was to another railroad for freight service**, and accordingly no discontinuance or abandonment authorization was required, or (c) Conrail retained a freight easement that gave it continued control over freight operations on the line, so that no discontinuance or abandonment was involved." (Emphasis added)

⁵ A complete copy of Conrail's September 27, 2010 report is attached hereto as Exhibit # 1

Since Conrail stated it made a concerted effort to comply with the Board's order, it must be assumed to be correct, since the Board relied upon that statement as justification for terminating their limited review of Conrail's line sales without further scrutiny.

As Corman itself has placed into the record, it acknowledged that it acquired the line it now seeks to abandon **from Conrail**. That acquisition occurred within **the time period** that Conrail **was required** to report on. If Conrail's statements are true, then Conrail must have reviewed the Corman Transaction as part of its "extensive search" of its records.

As Corman also pointed out, the portion of the line immediately north of their line was conveyed to Norfolk Southern. That acquisition also occurred within **the time period** that Conrail **was required** to report on. If Conrail's statements are true, then Conrail must have reviewed the sale transaction to Norfolk Southern in addition as a part of its "extensive search" of its records.

If, as Conrail suggests, it "cross checked" its records against its "regulatory filings", it is appropriate to surmise that Conrail would have realized, and / or otherwise discovered, it never filed a letter confirming the consummation of its abandonment authority (as it was explicitly directed by the ICC to do so). After all, Conrail stated that one of the reasons for doing this extensive search was to determine "the nature of the property at issue".

It is that very "nature of the property at issue" which prevents this Board from approving Corman's transaction. The CNJ Parties would like to reiterate again that Conrail's abandonment authorities under NERSA are permissive. It was at Conrail's discretion if Conrail chose to exercise that authority.

What makes the issue of determining if Conrail had, in fact, exercised that authority even more important and critical to not only this proceeding, but also to the *NS Acquisition Proceeding*, is what Corman added in footnote #9 of its July 30th, 2015 supplement.

Corman stated:

“It may interest **the Board to know** that **RJC's investigation** indicates **that NSR**, decidedly not one of Riffin's fans, **appears to have succeeded to Conrail's fee title interest** in the land underlying the fully-abandoned Lehighon Segment. Accordingly, for Riffin to accomplish any plan he may be entertaining to construct a new rail line northward along the alignment of the Lehighon Segment to reach Lafarge, then he would have to deal with NSR.”

Notwithstanding Corman's qualifying statement of “fee interest”, the fact that Corman has confirmed that Conrail has, in fact, conveyed portions of the line north of Corman's segment to NS is not helpful to their case. The resulting implications of such conveyances become dire for Corman. If Conrail, as Corman states its investigation revealed, sold the line north of Corman's to NS **without ever consummating** the abandonment authority it received, then “the nature of the property” it transferred to Norfolk Southern was not un-regulated real estate; **It instead conveyed a line of railroad fully subject to the Board's jurisdiction.**

The CNJ Parties are not implying the transfer from Conrail to NS was illegal. Quite to the contrary, in *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases / Agreements – Conrail Inc. and Consolidated Rail Corporation* STB Finance Docket# 33388 the Board approved the sale and subsequent split of Conrail between NS and CSX Transportation (“CSX”).

Therefore, the sale of certain Conrail assets and interests, like those in either the Lehighton or Catasauqua segments was clearly authorized.

The question is not whether or not the transfer to NS was legal, but rather, what was “the nature of the property at issue” at the time it was conveyed. Since the ICC explicitly required Conrail to confirm its exercise of the authority granted in the *Catasauqua Proceeding* in writing “**immediately after**” it exercised that authority, the absence of any evidence of a **timely filed consummation letter** prior to the conveyance of their interests in the segments to NS meant that NS took title to the property as a line of railroad, not as unregulated real estate.

The implications of this revelation are significant in a number of ways. First, only Conrail was entitled to the unique⁶ relief of the expedited abandonments procedures available under NERSA. Only Conrail could make an application for relief under NERSA. The available relief only applies to Conrail. The authority granted by the ICC to abandon a line only applied to Conrail.

In the vast majority of such abandonment cases made pursuant to Section 308, Conrail, once it received permission from the ICC, usually liquidated the line in question in some form. Once abandonment authority was granted, Conrail was free to dispose of the line in any manner it so chose. The ICC’s oversight role typically came to an abrupt end immediately after the granting of an **unconditional** abandonment authority.

In this case however, the commission placed a single condition in its abandonment authority; Conrail was required to notify the ICC when it consummated its abandonment

⁶ In the Northeast Rail Services Act of 1981, Congress amended the Regional Rail Reorganization Act of 1973 by adding Section 308 to the act. Today, that section is now codified at 45 U.S.C § 748

authority. This significant detail alters the nature of the transaction from an unconditional Section 308 abandonment, to an atypical Section 308 abandonment.

Conditional abandonments under NERSA were not typical. The commission would have retained jurisdiction over the line in question until the condition was satisfied in order to be able to enforce compliance of its order. As such, the Board, as the successor agency to the Commission, would also retain jurisdiction to this day if the condition remains unsatisfied. According to the records contained within the Board's own library, the condition remains unfulfilled.

Since Corman has proffered evidence that Conrail has already conveyed its interest to NS, and the Board's own records do not contain any evidence from Conrail indicating that it consummated the abandonment authority, the CNJ parties respectfully argue that the Board:

1. Has the requisite jurisdiction to decide the matter,
2. Has no evidence to indicate that Conrail ever exercised its permissive authority and thus can reasonably conclude that Conrail never exercised the permissive authority it received,
3. Has sufficient evidence to indicate that NS has already lawfully acquired the line segment from Conrail,
4. Has sufficient evidence to determine the completely lawful Sale between NS and Conrail was approved and "consummated" many years ago,
5. Has sufficient evidence to conclude that relief provided in Conrail's Section 308 application is moot due to the lawful sale of the un-abandoned line of railroad to NS.

In the event that Corman is correct and NS did purchase the Catasauqua Segment as many as **15 years ago**, the CNJ Parties respectfully submit that any attempt by Conrail to

produce a consummation letter at this late date is a clear violation of ICC's explicit directive. Today, the Board typically gives a carrier up to a year to consummate an abandonment authority. Occasionally, a timely request for a brief extension may be granted in certain circumstances. However, 15 years past the date of a sale to NS is not timely.

If Conrail sold the property to NS 15 plus years ago, and never filed the consummation notice it was ordered to produce, then CNJ believes that the most appropriate result is to simply find that the line was never abandoned and was lawfully sold to NS, with all the common carrier rights attached to the property.

Having stated all the above, Conrail could simply argue that until the D&H's rights are fully extinguished, it was barred from consummating the abandonment authority. That is a fully plausible explanation for why it did not file its consummation notice. However, it also creates another conundrum for the Board.

As was mentioned previously, if Conrail elected to sell the line prior to exercising the abandonment authority it obtained, then NS acquired a still-fully-regulated line at the time of the sale. Once NS took lawful title to the line, Conrail's abandonment authority became moot. The full plethora of common carrier rights and obligations would have fully vested in NS at the time of the closing. NS replaced Conrail as the owner and operator of the line. NS however, is not Conrail.

45 U.S.C. § 748(a) states:

The Corporation may, in accordance with this section, file with the Commission an application for a certificate of abandonment for **any line which is part of the system of the Corporation.** (emphasis added)

When Conrail and NS closed on the sale transaction, the Catasauqua Segment was no longer a part of the system of the Corporation (Conrail). Section 308 abandonment authority only applies to lines which are a part of the system of the Corporation. Clearly, after a sale, the line is no longer a part of the Conrail System. The abandonment application is effectively moot and the Board retains jurisdiction over the line and the new carrier operating the line by virtue of the approval of the line's sale. The new line owner is subject to all of the applicable regulations of the Board.

IV. IMPACT ON THE NS ACQUISITION PROCEEDING

Before we begin to delve into the morass of the issues related to D&H's rights in the line, the CNJ parties would like to briefly discuss the impact of this proceeding on the Board's pending reconsideration of the *NS Acquisition Proceeding*. While the Board, at first glance, may be inclined to deduce that there is no way this proceeding could impact on the *NS Proceeding*, the CNJ Parties would vigorously argue otherwise.

In the *NS Acquisition Proceeding*, NS sought permission to acquire approximately 280 miles of rail lines from the D&H. Despite vigorous opposition from a number of parties, the Board approved the transaction, subject to certain conditions. As of the date of this pleading, Petitions for Reconsideration of the May 15th decision remain pending before the Board.

From the onset of these proceedings, the CNJ Parties have vigorously argued, among many other issues, that the NS application was "incomplete" and should have been rejected as such. The impact of this proceeding on the NS Acquisition Proceeding is just another example as to why the transaction was "incomplete".

49 C.F.R. §1180.8(c)(4) requires an applicant to discuss in any anticipated abandonment or discontinuances related to the transaction. In its response to this section, NS stated:

The Transaction subject to this Application will not involve any discontinuance of services or abandonment of rail lines.

The application went on to discuss the D&H's expected filing for Discontinuance of what NS alleged as various "Trackage Rights". The CNJ Parties simply would like to point out that D&H's rights (whatever they may be) appear to still impact the Catasauqua Segment and Corman Segments respectively.

Given the likelihood that the transfer to NS of Conrail's interest in the Catasauqua Segment prior to consummation of the Conrail's permissive abandonment authority, conveyed to and imparted upon NS, a full spectrum of common carrier rights and obligations associated with the segment, the CNJ Parties argue that it was a reasonably foreseeable outcome that NS would need to seek abandonment authority for the Catasauqua segment.

Like Conrail before it, and Corman in this proceeding, the D&H's rights impact not only Corman's line but also NS' Catasauqua Segment. Those rights, like in this proceeding, should have been disclosed in the application at the time of its filing on November, 17th, 2014. The failure to disclose the need to seek related abandonments of the Catasauqua Segment constitutes yet another example of why the NS application was incomplete and should have been rejected.

CNJ further argues that the NS application does not comport with the express requirements 49 C.F.R. 1180.8(c)(4) because it failed to discuss both Corman's abandonment proceeding, as well as its own pending abandonment proceeding necessary to extinguish its own rights in the Catasauqua Segment. As previously mentioned above, NS is not entitled to use Conrail's abandonment authority as its own, as that authority only applies to Conrail and lines

within the Conrail system. NS will have to file its own abandonment authority to extinguish its right's in the Catasauqua segment. It may also need to file another abandonment application to extinguish its rights in the Lehigh Segment.

Needless to say, until the Board determines the precise nature of NS's rights in both the Lehigh and Catasauqua segments, there remains significant impediments to Corman's requested relief.

V. D&H's INTEREST IN THE RAIL LINE

In closing, the CNJ parties will briefly touch upon the impacts of the D&H Proceeding upon Corman's proceeding. In the *D&H Proceeding*, the D&H, a Class II rail carrier⁷, is seeking to discontinue operations over approximately 670 miles of miles of railroad that it claims are "overhead" trackage rights. The CNJ Parties are challenging any and all parties who claim or argue that any rights the D&H may have are "trackage rights".

In this proceeding, Corman and Mr. Riffin both alleged that D&H may, or may not have what they describe as "trackage rights" over Corman's rail line. The CNJ Parties are directly challenging both parties' characterizations of the D&H's rights. The precise "nature" of D&H's rights is in dispute.

Based upon evidence already in the record in the *D&H Proceeding*, it appears to the CNJ Parties that Corman, D&H, NS and Mr. Riffin continue to misrepresent to the Public, and to the Board, the very nature of the D&H's actual rights. Evidence that the D&H itself has submitted into the record does not comport with the D&H's claim that is seeking to simply discontinue

⁷ The D&H is a wholly owned subsidiary of the Canadian Pacific Railway ("CP"), a multi-national Class I rail carrier headquartered in Calgary, Alberta, Canada.

“trackage rights”. The D&H’s **own evidence** does not clearly demonstrate that its rights are indeed “trackage rights”.

In Exhibit # 2 hereto attached, is the main body of the Verified Statement of James D. Clements. It includes a copy of Exhibit #2 to the verified statement. Exhibit # 2 is a partial copy of the agreement which memorializes in writing the rights governing D&H operations over what the agreement calls “Joint Lines”. It also describes what it calls “operating rights”. According to Mr. Clements Verified Statement, the document is a “true and correct” copy of the 1979 agreement which sets forth the terms and conditions of D&H’s rights to and from Oak Island.

While Mr. Clements characterizes the rights as “trackage rights”, the actual agreement does not use the word trackage rights. In fact, nowhere in the agreement do the words “trackage rights” appear. In short, the agreement itself gives no indication that it is a “trackage rights” agreement.

Based upon this evidence submitted by the D&H, the CNJ Parties are challenging the characterization of the D&H’s right’s as trackage rights. The D&H’s rights are far greater than those of a basic trackage rights agreement. In the spirit of brevity, the CNJ Parties adopts, and incorporates fully herein by reference, all the various arguments related to our previous arguments contained in both the CNJ Parties’ June 4th, 2015 “Petition for Reconsideration”, filed in *NS Acquisition Proceeding*, as well as those contained in our “Petition to Revoke” which was filed in the *D&H Proceeding* on July 22nd, 2015.

The CNJ Parties will end with this one point. Pursuant to 45 U.S.C. § 719(b) and 45 U.S.C. § 719(e), this Board does not have the legal authority to interpret orders and instruments

of conveyance made pursuant to the Final System Plan. While the Board may want to step into the fray and try to interpret such instruments, the Board lacks the jurisdiction to do so.

In *Consolidated Rail Corporation v. Surface Transportation Board* 571 F.3d 13 (D.C. Cir. 2009) (“*Conrail v. STB*”), the Court of Appeals for the DC Circuit addressed the issue of whether the Board has the jurisdiction to interpret orders or conveyances of the Final System Plan. Like in *Conrail v. STB*, this Board now finds itself once again being required to interpret what the language of an agreement derived from the Final System Plan actually means, and what the nature of the “rights” which may flow from said agreement, actually are.

It should be noted that the very nature of the D&H’s rights have been challenged. The plain language in the implementing agreement clearly does not match the characterizations of the D&H’s rights set forth by Corman, D&H, NS, or even Mr. Riffin. If the Board lacks the jurisdiction to interpret these instruments, so do all of the parties in this proceeding. Only the Special Court has the jurisdiction to address this challenge. Any discussion in the NS Proceeding, the D&H Proceeding, or this Corman Proceeding, which is included in a decision by the Board that concludes or “finds” that the D&H’s rights are “trackage rights” in light of the plain language in the agreement, would clearly exceed the Board’s jurisdiction.

It would have been far better for all the parties who wanted to characterize the D&H’s rights as solely overhead trackage rights, to have impressed upon the D&H to have not submitted the agreement into the record in the D&H proceeding. Given that it was the D&H who placed the agreement into the record, and then appears to have proceeded to mischaracterize the nature of the rights in such a manner which permits parties to challenge the characterization of those rights contained therein, it would appear that the Board’s conundrum in this regard has been created by none other than the D&H itself.

The CNJ Parties' evidence is clear: Nowhere does the agreement say it is a trackage rights agreement. Nowhere in the agreement does any language appear that gives the reader some definitions of what the terms contained therein mean. Only the Special Court can determine if the D&H's agreement is, or is not, a trackage rights agreement. Only the Special Court can determine the exact nature of those rights.

WHEREFORE, for the foregoing reasons, the CNJ Parties would respectfully pray that the Board:

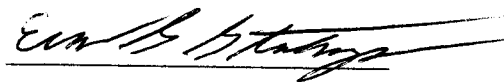
A. Deny R.J. Corman the relief that it has requested, until such time that R.J. Corman has adequately addressed the stranded segment issue discussed above;

B. Deny R.J. Corman the relief that it has requested, until such time that R.J. Corman has addressed the other issues discussed above;

C. And for such other and further relief as would be appropriate.

On Behalf of the CNJ Parties,

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Eric S. Strohmeyer", written over a horizontal line.

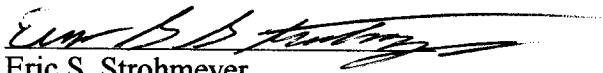
Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation

Dated: August 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2015, a copy of the CNJ Parties':

Notice of Intent to Participate (with comments) in, was served on all the Parties of Record noted below, via E-mail and / or First Class Mail.


Eric S. Strohmeyer

To the Parties of record in

STB Docket # AB 550 (Sub No.# 3)X

STB Docket# FD 35873

Docket# AB 156 (Sub No.# 27) X

Via Email to:

Brotherhood of MOW Employees: Richard Edelman: REdelman@odsalaw.com

Brotherhood of Locomotive
Engineers & Trainmen: Kevin Moore: bletdiv191@hotmail.com

CNJ: Thomas McFarland: mcfarland@aol.com

D&H Railways: Karl Hansen: karl.hansen@stinsonleonard.com

D&H Railways: David Rifkind: david.rifkind@stinsonleonard.com

IAM District Lodge 19: Jeffrey A. Bartos Jbartos@geclaw.com
Kyle A. DeCant Kdecant@geclaw.com

Genesee & Wyoming, Inc.: Eric Hocky: ehocky@clarkhill.com

	Allison M. Fergus:	afergus@gwrr.com
Maryland DOT:	Charles Spitulnik:	cspitulnik@kaplankirsch.com
NY DOT:	Keith Martin:	keith.martin@dot.ny.gov
National Grain & Feed Assoc:	Randall C. Gordon:	ngfa@ngfa.org
National Grain & Feed Assoc:	Thomas Wilcox:	twilcox@gkglaw.com
Norfolk Southern:	Williams Mullins:	wmullins@bakerandmiller.com
PPL Energy:	Kelvin Dowd:	kjd@sloverandloftus.com
PA NE Regional RR Auth:	Lawrence Malski:	lmalski@pnrra.org
Saratoga & N. Creek Ry:	John D. Heffner:	John.Heffner@strasburger.com
Seda-Cog Railroads:	Jeffery K. Stover:	jra@seda-cog.org
U.S. Clay Producers Assoc:	Vincent P. Szeligo:	vszeligo@wsmoslaw.com
James Riffin:	Pro Se:	jimriffin@yahoo.com
New Jersey Transit Corporation	Allison Fultz	afultz@kaplankirsch.com
	Charles Spitulnik	cspitulnik@kaplankirsch.com

And via regular mail to all remain parties on the Board's official service list.

Via email to the following parties in

STB Docket# AB 550, (Sub No.# 3)X

RJ Corman Railroad Company	Audrey L. Brodrick	abrodrick@fletcher-sippel.com
	Robert A. Wimbish	rwimbish@fletcher-sippel.com

And via US Mail, postage prepaid to all remaining parties on the Board's official service.

Via email to all the parties of record in

Docket # EP 695

Consolidated Rail Corporation Richard Jenkins III rmjenkins@mayerbrown.com

First Class mail:

Gordon P. MacDougall, 1025 Connecticut Ave. N.W., Washington, DC 20036.

EXHIBIT 1 (a)

Document is a courtesy copy of the
Surface Transportation Board's

May 13th, 2010 Decision

Commencing

*Consolidated Rail Corporation
Sales and Discontinuances*

EP 695

SERVICE DATE – LATE RELEASE MAY 17, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 695

CONSOLIDATED RAIL CORPORATION'S SALES AND DISCONTINUANCES

Decided: May 13, 2010

On November 19, 2008, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) jointly filed a verified notice of exemption (Notice of Exemption), pursuant to 49 C.F.R. § 1152.50, for Conrail to abandon, and CSXT and NS to discontinue service over a 2.27 mile line of railroad in Hudson County, NJ, known as the "Lehigh Valley Main Line" (the Line). Consol. Rail—Aban. Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X); CSX Transp., Inc. — Discontinuance Exemption—in Hudson County, N.J., Docket No. AB 55 (Sub-No. 690X); Norfolk S. Ry.—Discontinuance Exemption—in Hudson County, N.J., Docket No. AB 290 (Sub-No. 313X).

In the Environmental and Historic Report that accompanied the Notice of Exemption, however, Conrail revealed that it no longer owns an interest in all portions of the line it sought to abandon. Conrail asserted that the proposed abandonment would have no effect upon regional or local transportation systems and patterns, noting that New Jersey Transit Corporation (NJ Transit) "took no issue with Conrail's abandonment of the Line, and stated that it previously acquired portions of the Line[.]"¹ Conrail again disclosed its lack of ownership of the full line in addressing public health and safety issues and subsurface ground issues associated with the Line's abandonment.² Attached to Conrail's Environmental and Historic Report was a letter from NJ Transit in which it asserted "[n]o issue with Conrail's 'abandonment' of the rail line, as we have previously acquired (from Conrail) portions of this right of way, upon which can be found the shop and yard complex for the Hudson Bergen Light Rail System."³

Exactly what parts of the Line NJ Transit acquired is the source of some confusion, even between Conrail and NJ Transit. The same October 17, 2008 letter from NJ Transit to Conrail's Associate General Counsel states, "Of the two parcels which Conrail alleges that they retain, NJ Transit has no interest in the parcel located between Chapel Avenue and Linden Avenue. The

¹ Notice of Exemption 12, Nov. 19, 2008.

² Id. 5, 10.

³ Id. 29.

other parcel, near Communipaw Avenue, appears to us to already be NJ Transit-owned property.”⁴ In its cover letter to many of the parties Conrail contacted to solicit environmental or historic comments about the Line, Conrail openly admitted that rail service was “previously discontinued” and that most of the underlying right-of-way has been sold to various parties.⁵ In addition, Conrail included two quitclaim deeds, dated August 29, 1996, and November 19, 1996, purporting to transfer part of the property that constitutes the Line to NJ Transit.⁶ Both deeds, in fact, appear to have been executed on behalf of Conrail by Robert Ryan, Conrail’s Director of Real Estate from October 1996 to July 31, 2009.

Questions regarding Conrail’s ownership interest (or lack thereof) in the Line have complicated this abandonment proceeding. CNJ Rail Corporation sought information from Conrail and subsequently filed a notice of intent to submit an offer of financial assistance (OFA), pursuant to 49 U.S.C. § 10904, for the Line, but for what part and for what value became a source of increasing confusion. Although, in our decision served concurrently today in Consolidated Rail—Abandonment Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X), we are exempting the Line from the OFA process, we continue to have serious concerns regarding what appears to be Conrail’s 1996 sale of a line without Board authorization.

As of the January 1, 1996, the effective date of the ICC Termination Act of 1996, a person other than a rail carrier may acquire a railroad line only if the Board issues a certificate authorizing its acquisition. See 49 U.S.C. § 10901(a). Similarly, a rail carrier providing transportation subject to the Board’s jurisdiction who intends to abandon or discontinue service over a line must file an application to do so with the Board. See 49 U.S.C. § 10903. The Board has promulgated regulations pertaining to section 10901 applications, see 49 C.F.R. § 1150, and abandonment and discontinuances of service, see 49 C.F.R. § 1152.

Pursuant to 49 U.S.C. § 10502, the Board has also established exemptions that allow parties to acquire lines of railroad or discontinue service on a line without using the Board’s detailed application procedures. However, to utilize those exemptions, a party must file a notice of exemption with the Board, allowing the Board and other interested persons an opportunity to challenge whether the proposed acquisition, abandonment or discontinuance is appropriate. See, e.g., 49 C.F.R. § 1150.32 (regarding exemption from 49 U.S.C. § 10901); 49 C.F.R. § 1152.50(c) (regarding exemption from to 49 U.S.C. § 10903).

There are statutory penalties for failing to comply with either 49 U.S.C. § 10901, § 10903, or the regulations promulgated to implement those provisions. Section 11901(c) states “a person knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title [Title 49] or of a requirement or a regulation under any of those

⁴ Id.

⁵ See, e.g., Notice of Exemption 31, 35-39, 41, 43-48.

⁶ Conrail’s Sept. 11, 2009 Reply to Offerors’ Answer to Show Cause Order, V.S. of Ryan, Ex. C.

sections, is liable to the United States Government for a civil penalty of not more than \$5,000.”⁷ In addition, the Board may seek injunctive relief through a civil action to enjoin a rail carrier from violating § 10901, § 10903, or a regulation prescribed, order, or certificate issued under either of those sections. See 49 U.S.C. § 11702.

We are unable to locate any filing by Conrail, NJ Transit, or any other person seeking our authority or invoking an exemption to transfer title to any part of the Line prior to the Notice of Exemption Conrail filed with us on November 19, 2008. Similarly, we are unable to locate any filing by Conrail, NJ Transit, or any other person seeking our authority or invoking an exemption to abandon or discontinue service on any part of the Line prior to the November 19, 2008 filing of that same notice. Therefore, we are ordering Conrail to submit to us a full explanation of how and under what authority it came purportedly to transfer title to parts of the Line to NJ Transit. In addition, Conrail should explain when, under what authority, and under what circumstances it purported to discontinue service on the Line.

Finally, as the record indicates that Conrail began selling parts of the line as far back as 1996, we also hereby order Conrail to disclose to the Board all of its line or partial line sales and all of its discontinuances of service since January 1, 1996, for which no Board authority was sought and no exemption notice was filed along with an explanation of why Board authority was not sought and no exemption notice was filed.

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

It is ordered:

1. Conrail’s explanation regarding the Lehigh Valley Main Line is due on July 1, 2010.
2. Conrail’s reports regarding line sales and discontinuances are due August 16, 2010.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

⁷ The trial for a civil action brought pursuant to 49 U.S.C. § 11901 takes place in a U.S. District Court where venue lies. See 49 U.S.C. § 11901(f).

EXHIBIT 1 (b)

Document is a courtesy copy of the

Reply of the
Consolidated Rail Corporation

Filed: September 27th, 2010 in

*Consolidated Rail Corporation
Sales and Discontinuances*

EP 695

227874

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rmjenkins@mayerbrown.com

September 27, 2010

VIA HEND-DELIVERY

Cynthia T. Brown
Surface Transportation board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings

SEP 27 2010

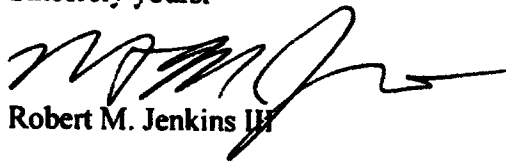
Part of
Public Record

Re: Ex Parte 695 -- Consolidated Rail Corporation's
Sales and Discontinuances

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of "Consolidated Rail Corporation's Report Regarding Line Sales and Discontinuances Since January 1, 1996." Please date stamp the extra copy of the filing and return it to our representative. Thank you.

Sincerely yours.



Robert M. Jenkins III

RMJ/bs

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 695

**CONSOLIDATED RAIL CORPORATION'S
SALES AND DISCONTINUANCES**

**CONSOLIDATED RAIL CORPORATION'S
REPORT REGARDING LINE SALES AND DISCONTINUANCES
SINCE JANUARY 1, 1996**

By decision served May 17, 2010, the Board ordered Consolidated Rail Corporation ("Conrail") to produce a report on August 16 disclosing any line or partial lines sales and discontinuances of service since January 1, 1996, for which no Board authority was sought, as well as an explanation of why Board authority was not sought. In a decision served August 13, 2010, the Board granted Conrail's request to extend the due date for its report to September 27, 2010.

Conrail worked diligently to comply with the Board's order under difficult circumstances. Conrail has made over six hundred property sales since January 1, 1996. A significant percentage of those sales took place during the three-year period in the late 1990's when Conrail was sold and largely divided between CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway ("NS"). Many of the records of these and other sales from that era are not computerized, or are computerized in formats that have been superseded and are not easily accessed. Many of the records were in storage at several different locations, including at CSXT and NS facilities. Once the records were retrieved, hand searches were often required to determine what kind of sale was involved. Frequently, it was necessary to cross-check the records retrieved against other records, and a variety of materials—including, for instance, deeds,



valuation maps, closing reports, and regulatory filings—were consulted to ascertain the terms of the transactions, the nature of the property at issue, and whether abandonment authority was obtained when necessary.

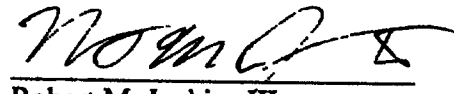
The property sales fell into a number of different categories. Most did not involve jurisdictional track. Many were sales of parcels adjacent to rail lines that did not involve track at all. Often the sales were of easements for crossings, pipelines, sewer, or other projects that did not interfere with rail service. Sometimes the parcels involved track that was disconnected from the rail system by a prior, authorized abandonment. Sometimes the parcels involved yard, spur, or side track. Where jurisdictional track was involved, Conrail established in its review either (a) that ICC or STB abandonment authorization was obtained before the sale, (b) that the sale was to another railroad for freight service, and accordingly no discontinuance or abandonment authorization was required, or (c) Conrail retained a freight easement that gave it continued control over freight operations on the line, so that no discontinuance or abandonment was involved. The only exception was the parcels on the “Lehigh Valley Main Line” that Conrail previously discussed in its Comments filed July 1, 2010, in this proceeding. In Docket No. AB 167 (Sub-No. 1190X), *Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, NJ* (served May 17, 2010), the Board exempted that entire line from the requirements of 49 U.S.C. § 10904.¹

¹ Conrail is also not reporting here the parcels that it sold on the “Harsimus Branch,” which were the subject of the Board’s proceedings in Docket No. AB 167 (Sub-No. 1189X), *Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, NJ* (served Aug. 9 and Dec. 19, 2007). On appeal, the United States Court of Appeals for the District of Columbia Circuit vacated the Board’s decisions holding that those parcels were part of a line of railroad requiring abandonment authority. *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009). By decision served April 20, 2010, in Docket No. AB 167 (Sub-No. 1189X), the Board held Conrail’s petition for an abandonment exemption regarding those parcels in abeyance while the

In sum, after an extensive search, with the exception of the Lehigh Valley Main, Conrail found no line or partial lines sales or discontinuances of service since January 1, 1996, for which Board authority was required and was not sought and obtained.

Respectfully submitted,

John K. Enright
Associate General Counsel
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103
(215) 209-5012


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

Dated: September 27, 2010

United States District Court for the District of Columbia, acting as the Special Court, addresses the underlying question of the nature of the trackage involved.

EXHIBIT 1 (c)

Document is a courtesy copy of the

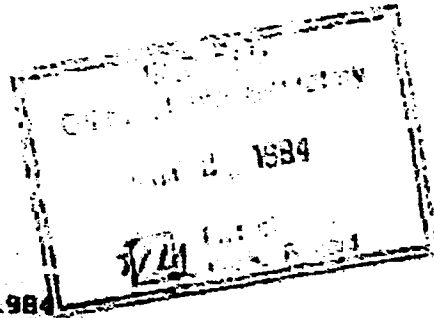
Cover letter of the
Consolidated Rail Corporation

And the ICC's conditional decision in

*Consolidated Rail Corporation
Abandonment – Ironton Industrial Cluster*

AB 167 (Sub No.# 623N)

CONRAIL



April 6, 1984

Mr. James H. Bayne
Acting Secretary
Interstate Commerce Commission
Room 1312
12th and Constitution Avenues, NW
Washington, DC 20423

Re: Application Under Section 308(c) of the Regional
Rail Reorganization Act of 1973, as enacted by
Section 1156 of the Northeast Rail Service Act of
1981, for abandonment of the Lehighton Secondary
Tracks and the Ironton Industrial Cluster in
Lehigh County, Pennsylvania
Docket No. AB 167 (Sub No. 623N)

Dear Mr. Bayne:

Enclosed for filing with the Commission are the original
and six copies of the above described application. This
application is submitted under Section 308(c) of the Regional
Rail Reorganization Act of 1973, as enacted by Section 1156
of the Northeast Rail Service Act of 1981. Notice of Insuf-
ficient Revenue was filed October 18, 1983.

The Lehighton line, which is one of the subjects of this
application, is subject to D&N trackage rights. This appli-
cation will not affect such rights unless and until the
Commission approves their discontinuance.

Copies of the application have been served on the
shippers and other persons designated on the attachment to
this letter.

Please stamp and return the enclosed extra copy of this
letter to acknowledge receipt.

Very truly yours,

Charles E. Mechen
Charles E. Mechen
Senior General Attorney
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5017

FILED

INTERSTATE
COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

SERVICE DATE

JUL 18 1984

Docket No. AB-147 (Sub-No. 62)4

CORRAIL ABANDONMENT IN LEHIGH COUNTY, PA

Decided: July 13, 1984

On April 9, 1984, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 108 of the National Rail Reorganization Act of 1973^{1/} to abandon a total of 10.1 miles of track. The abandonment consists of three segments: (a) The Lehigh Valley Secondary Track^{2/} in Catasque from 200 feet east of the West Side of the Main Street Bridge, U.S. 994.50 (approximately Milepost 98.6) to the point of prior abandonment (approximately Milepost 98.9); (b) The Ironton Industrial Track (formerly Main Line of Ironton Railroad) from Ironton (approximately Milepost 1.0 to Coplay, the end of the line (approximately Milepost 5.3); and (c) The Ironton Industrial Track from the point of intersection with the former Main Line of the Ironton Railroad (approximately Milepost 0.0) in Egypt to Catasque, the end of the line (approximately Milepost 4.2), in Lehigh County, PA.

Under section 108(e) the Commission must grant any application for abandonment filed by Conrail within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 108(d) during that 90-day period.

The time for the filing of offers of financial assistance has expired without a bona fide offer. In the absence of such an offer, an appropriate certificate and decision should be entered.

It is certified: Conrail is authorized to abandon the line described above.

It is ordered:

(1) This certificate and decision is effective upon service.

(2) If the authority granted by this certificate and decision is exercised, Conrail shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

By the Commission, the Review Board, Members Carleton, Williams and Sewell.

(SEAL)

James H. Bayne
James H. Bayne
Secretary

^{1/} This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

^{2/} The Abandonment includes approximately 3,200 feet of additional Right-of-Way extending westwardly from the Lehigh Valley Secondary Track at Milepost 97.2 to the Junction of the Former Lehigh Valley Railroad and Ironton Railroad.

EXHIBIT # 2

Document is a copy of the main portion of the

Verified Statement of James D Clements

And includes a copy of

Exhibit # 2

which is referenced in the Verified Statement

An attachment to a pleading submitted

on May 8th, 2015 in

STB DOCKET# AB 156 (Sub No.#27 X)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-156 (SUB-NO. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN BROOME COUNTY, NY; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,
AND WARREN COUNTIES, NJ; LUZERNE, PERRY, YORK, LANCASTER,
NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND,
DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA; CECIL, HARFORD,
BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S COUNTIES, MD; THE
DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, VA

VERIFIED STATEMENT OF JAMES D. CLEMENTS

My name is James D. Clements. I am employed by Canadian Pacific Railway Company ("CP") as Vice President Strategic Planning and Transportation Services. I have been employed by CP since 1994 and have occupied my present position since 2014. During my employment with CP, I have served in a variety of positions in planning, operating, commercial, and administrative roles. Since 2013, my responsibilities have included tactical and strategic asset acquisitions, line rationalization, and other strategic transactions to preserve and improve the efficiency and capacity of CP's system including its indirectly owned subsidiaries such as the Delaware and Hudson Railway Company, Inc. ("D&H"). In my prior positions, including as Director, Mines, Metals and Aggregates and as General Manager – Car Management, I participated in the operations of D&H. I provide this statement in support of the D&H's Reply to Petitions to Revoke and Reply to Petition to Toll.

The majority of D&H's trackage rights that are the subject of this discontinuance proceeding were obtained as part of the Final System Plan with the intention of enabling D&H to compete effectively with the newly formed Conrail. Ensuing changes in the past three decades, however, have had the effect of eliminating the utility of these trackage rights for D&H.

For example, the trackage rights between Harrisburg and Potomac Yards initially allowed D&H to interchange traffic with the Southern Railway. After the Southern merged with the Norfolk and Western Railway, however, D&H's participation in traffic was reduced when the interchange was shifted north to New York and Pennsylvania or in some cases eliminated altogether. The subsequent Conrail acquisition by Norfolk Southern and CSXT effectively eliminated any residual utility to those overhead trackage rights and D&H has not operated between Harrisburg and Potomac Yards in more than a decade.

Similarly, the trackage rights between Allentown, PA and Oak Island in Newark, NJ ostensibly established D&H as a competitor to Conrail for New York and New Jersey port traffic. The division of Conrail, however, put D&H at a significant disadvantage to compete for such traffic and D&H has handled no intermodal or carload traffic to or from Oak Island since June 2012. D&H also no longer operates over its trackage rights to and within Philadelphia due to its continual loss of traffic to rail and intermodal competitors. D&H handled minimal traffic over these trackage rights in 2012 and no traffic since March 11, 2013.

Although D&H continues to operate over its trackage rights between Dupont and Allentown and between Sunbury and Harrisburg in Pennsylvania, due to the factors discussed above, the volumes have diminished significantly. The diminishing volumes prevent D&H from realizing operating efficiencies from economies of density, which results in high operating costs. Not coincidentally, D&H interchanges the vast majority of the traffic that it moves between

Dupont and Allentown with NSR. D&H's traffic between Sunbury and Harrisburg is similarly low volume, carload traffic and D&H fills the excess capacity on the trains it operates with NSR haulage traffic. Accordingly, the proposed trackage rights discontinuance will strengthen D&H as a carrier and a competitor by allowing D&H to focus resources and capital where it is better able to compete for traffic.

Attached hereto as Exhibit 1 is a chart of the 19 ZIP Codes that James Riffin ("Riffin") alleges were omitted from D&H's Notice of Exemption. As illustrated in the chart, D&H has not operated over lines in eleven of the ZIP Codes in more than a decade, and has not operated over the lines located in the two valid ZIP Codes in Middlesex County, NJ since June 2012. As to the remaining six ZIP Codes, it is my understanding that one is no longer a valid ZIP Code, two are associated with specific P.O. boxes, and the three Hudson County, NJ ZIP Codes concern lines over which D&H has no trackage rights.

As to the Hudson County ZIP Codes, D&H's overhead trackage rights to Oak Island over both the former Lehigh Valley Railroad ("LVRR") and Central Railroad of New Jersey ("CNJ") terminate in Newark, not Jersey City as Riffin asserts. Riffin's Petition ¶¶ 18-21 and Exhibit One pp. 39-44 incorrectly assume that Oak Island Jct at milepost 1.7 is located on CNJ's Main Line, USRA Line Code 0201. Attached hereto as Exhibit 2 is a true and correct copy of the pertinent provisions of the April 25, 1979 trackage rights agreement ("Agreement"), which granted D&H's trackage rights to Oak Island. Exhibit A to the Agreement identifies the CNJ endpoint as Oak Island Jct. at milepost 1.7 on USRA Line Code 0205. The excerpt of the July 26, 1975 Final System Plan attached hereto as Exhibit 3 identifies USRA Line Code 0205 as the Newark and Elizabethport Branch. CNJ's Newark and Elizabethport Branch trackage map attached hereto as Exhibit 4 indicates that Oak Island Jct. is located north of Newark Airport and

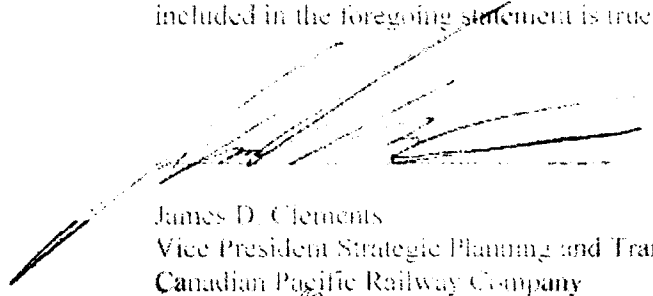
south of Wilson Avenue in the City of Newark. The LVRR timetable dated August 10, 1975 attached hereto as Exhibit 5 confirms that Oak Island Jct. (LVRR milepost 8.6) is west of Newark Bay. A current map of Newark, NJ attached hereto as Exhibit 6 clarifies that Newark Liberty International Airport and Wilson Avenue are located entirely within the city and entirely within Essex County, NJ.

All the ZIP Codes Riffin identified are included in the areas of circulation by D&H's newspaper notices.

D&H lacks the facilities at Oak Island to support the movement of municipal solid waste and silica from Oak Island that Riffin offers to subsidize in his Notice of Intent to File an Offer of Financial Assistance.

VERIFICATION

I, James D. Clements, declare under penalty of perjury that I am authorized to make this verification on behalf of Delaware and Hudson Railway Company, Inc., and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



James D. Clements
Vice President Strategic Planning and Transportation Services
Canadian Pacific Railway Company

Dated: May 8th, 2015

EXHIBIT 2

M.D. 19696

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(THIS AGREEMENT made this 27th day of *April*, 1979
between CONSOLIDATED RAIL CORPORATION ("Conrail"), a corporation
of the Commonwealth of Pennsylvania, and DELAWARE AND HUDSON
RAILWAY COMPANY ("D&H"), a corporation of the State of Delaware.

RECITALS

A. The parties have acquired the right to conduct rail operations over certain lines of railroad hereinafter described ("Joint Lines") as provided in the Final System Plan of the United States Railway Association ("USRA") adopted pursuant to Section 206(c) (1) (B) of the Regional Rail Reorganization Act, as amended ("Rail Act").

(B. The Joint Lines were conveyed to Conrail subject to operating rights granted to D&H either by the railroads in reorganization which had conducted rail operations over such properties prior to April 1, 1976, or by persons whose rail properties were operated or leased by railroads in reorganization which had conducted such operations.

C. The parties desire to set forth the terms and conditions for D&H's exercise of operating rights over the Joint Lines.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, intending to be legally bound, the parties do hereby agree as follows:

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ARTICLE I

JOINT FACILITIES

Section 1.01. Description of Joint Lines. This Agreement shall set forth the terms and conditions of D&H's operation over the Joint Lines described in detail on Exhibit A and included in one of the following Joint Line Routes:

<u>Joint Line Route</u>	<u>Operating Rights Grantor</u>
Oak Island-Freemansburg	Trustees of Lehigh Valley Railroad Company, Debtor
Oak Island-Phillipsburg	Trustee of Central Railroad Company of New Jersey, Debtor
Freemansburg-Lehighton	Trustees of Lehigh Valley Railroad Company, Debtor
Lehighton-DuPont	Trustees of Lehigh Valley Railroad Company, Debtor and Lehigh Coal and Navigation Company, Debtor
Saucon-Lehighton	Lehigh Coal and Navigation Company
Allentown-Reading-Philadelphia	Trustees of Reading Company, Debtor and Allentown Terminal Railroad Company
Sunbury-Rockville	Trustees of Penn Central Transportation Company, Debtor and Trustees of Northern Central Railway Company, Debtor
Lanesboro-Hornell	Trustees of Erie Lackawanna Railway Company, Debtor
Hornell-Buffalo	Trustees of Erie Lackawanna Railway Company, Debtor.

The parties have been unable to agree upon the lines to be included in D&H's operating rights beyond Buffalo "FW" (MP 422.4)

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and shall make a continuing effort to resolve open questions concerning these lines. Either party may, upon prior notice to the other party, request USRA to restate the lines intended to be included in the operating rights designated to D&H beyond Buffalo "FW". The parties agree to be bound by such designation.

Section 1.02. Facility Changes, Additions and Removals.

Conrail shall not remove or shall not alter the Joint Lines if such alteration will increase D&H's cost of operating or the time required under normal conditions for D&H's trains to traverse the Joint Lines. Subject to the foregoing, Conrail may improve or add to the Joint Lines for its own benefit. D&H may request facility changes, additions and betterments to the Joint Lines. Conrail and D&H in good faith shall determine the proportion of benefit to each of them of facility changes, additions and betterments proposed by D&H and if such a determination can be agreed to by Conrail and D&H, each of them shall bear their proportionate cost of such facility changes, additions and betterments. If Conrail, in the exercise of its best business judgment, determines that its proportionate benefit from any such facility change, addition or betterment is less than the amount of the cost thereof which D&H believes should be borne by Conrail, Conrail shall nonetheless make such facility change, addition or betterment at D&H cost and expense if requested in writing by D&H.

ARTICLE II

JOINT LINE OPERATIONS - GENERAL

Section 2.01. Scope of Operations. D&H shall have the right to operate such rail service over the Joint Lines as it may deem necessary or advisable to provide efficient and economical transportation consistent with the Interstate Commerce Act and with its operating authority under the Rail Act including, without limiting the foregoing, pick-up and set-out of bad order cars, necessary repair and servicing of equipment, and the operation of trains, cars or vehicles for inspection and management purposes. D&H and Conrail shall interchange traffic at the Joint Line locations of Buffalo, Binghamton, DuPont, Allentown, Philadelphia, Harrisburg and Oak Island (intermodal only). D&H shall also have the right to interchange cars with other carriers, directly or through switching tariffs or haulage arrangements and to operate onto or off other carriers from points on the Joint Lines between Binghamton and Buffalo, New York; Attica and Groveland, New York; at and within the Buffalo, Black Rock and Niagara Falls, New York, terminal areas; including without limitation the right to interchange with and operate on or off the Philadelphia, Bethlehem and New England Railroad at Bethlehem, Pennsylvania and the Baltimore and Ohio Railroad (Chesapeake System) at Park Junction (Philadelphia), Pennsylvania. The parties agree, however, to request USRA to state whether D&H

is entitled, as an incident to the grant of its operating rights over the Joint Lines, to switch and classify its cars at intermediate points on the Joint Lines and to interchange cars with other carriers or operate onto or off other carriers at intermediate points on the Joint Lines other than those specified in this Section. The parties agree to be bound by USRA's determination. D&H shall not perform any local freight service on the Joint Lines except at stations published as D&H stations in the Official Open and Prepay Station List No. 93, I.C.C. No. A-58. Conrail shall have the right to admit other parties to the use of the Joint Lines with the prior consent of D&H whose consent shall not be withheld unreasonably.

Section 2.02. Employees.

(a) D&H shall operate its rail service over the Joint Lines with its own employees and at its sole expense subject to such Conrail rules, regulations and orders as shall be applicable to those lines provided that no employee shall engage in such operations over the Joint Lines until he or she shall have been successfully examined on applicable operating rules and regulations by D&H officers qualified by Conrail. This Agreement shall not require the re-qualification of any D&H officer or employee who has been successfully examined on or before the effective date of this Agreement.

(b) D&H shall also have the right to utilize and direct its own employees, at its sole expense, for any

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Section 7.10. Effective Date. This Agreement shall become effective on January 1, 1979, except that any outstanding disputes between the parties relating to events arising out of the operation of the Joint Lines between April 1, 1976 and the effective date of this Agreement shall be settled in accordance with the terms and conditions set forth in this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals on the day and year first above written.

ATTEST:

CONSOLIDATED RAIL CORPORATION

K. L. F. Wick
ASSISTANT SECRETARY

By: Stuart M. Reed
PRESIDENT

DELAWARE AND HUDSON RAILWAY COMPANY

R. S. Long

By: J. P. [Signature]
PRESIDENT & CHIEF
Executive Officer

JOINT LINES

U.S.R.A. Code	Conveying Carrier	From (MP) (LV)	To (MP)
<u>Oak Island - Freemansburg</u>			
0501	LV	Oak Island (6.5)	Newark Interchange (
0502A	LV	Newark Inter- change (11.4)	New Jersey/Pennsylva State Line (76.6)
0502A	LV	New Jersey/Penn- sylvania State Line (76.6)	Freemansburg (85.8)

Oak Island - Phillipsburg (CNJ)

0205	CNJ	Oak Island Jct. (1.7)	Elizabethport (5.5)
0201	CNJ	Elizabethport "FH" (8.9)	Phillipsburg (72.1)

Note: Line Segments 0501, 0502A, 0205 and 0201 are for the purpose of handling intermodal traffic including the right to LV's Oak Island intermodal facility and use of LV's Oak Island yard. The links are connective permitting use between Bethlehem Interlocking and Oak Island via either the LV or CNJ route

Freemansburg - Allentown - Lehigh (LV)

0502A	LV	Freemansburg (85.8)	Bethlehem Interlockin (88.6)
0502A	LV	Bethlehem Inter- locking (88.6)	Allentown (93.3)
0503A	LV	Allentown (93.3)	Lehigh (119.1)

Note: Line Segment 0502A includes the right to interchange with all railroads at Allentown/Bethlehem including the Philadelphia, Bethlehem and New England

Lehigh - DuPont (LV, LC&N)

0503A	LV	Lehigh (119.1)	Fraser (147.1)
0506	LV	Fraser (147.1)	Laurel Run (164.1)
0504	LC&N	Fraser (143.8)	Laurel Run (161.2)
0506	LV	Laurel Run (164.1)	DuPont (175.5)

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Saucon - Bethlehem Junction - Allentown Yard - Lehighton (LC&N)

0502F	LC&N	Saucon Yard	Bethlehem Junction (83.4)
0502F	LC&N	Bethlehem Junction (83.4)	Bethlehem (84.3)
0521	LC&N	Bethlehem (84.3)	Lehighton (114.7)

Note: Line Segment 0502F includes the right to interchange with all railroads at Allentown/Bethlehem, including the Philadelphia, Bethlehem and New England.

Line Segment 0521 includes the right to use Allentown Yard.

Allentown-Reading-Philadelphia (Reading and AT)

0502	AT	"R" Tower (88.2) (Including connecting track, E. Penn Jct.- Burn)	Burn (89.1)
0312	RDG	Burn (35.4) (same as AT Burn (89.1)	Pike (1.1)
0309	RDG	Park (2.4)	Falls (5.4)
0322B	RDG	Falls (5.4)	Reading (Belt Line Jct.) (61.4)
0339	RDG	Blandon (0.0)	Klappert Hall Jct. (13.0)

Sunbury - Rockville (PC, NC)

1314	PC	Kase (286.4)	Sunbury (287.5)
1314	NC	Sunbury (138.7)	Dauphin (93.4)
1314	PC	Dauphin (93.4)	Rockville (90.6)

Note: Line Segment 1314 links with line segments described in Article I, Joint Facilities of Agreement between the parties made November 3, 1978 covering lines between Rockville, Enola, Harrisburg, Perryville and Potomac Yard. Included is the right to interchange with Conrail at, and to use, Enola Yard

Lanesboro - Hornell (EL)

6303	EL	Lanesboro (189.8)	Binghamton "BD" (213.2)
6301	EL	Binghamton "BD" (213.2)	Hornell (331.8)

EXHIBIT A
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Hornell - Buffalo (EL)

6401	EL	Hornell (331.8)	Buffalo "Union" (418.0)
6401	EL	Buffalo "Union" (418.0)	Buffalo "FW" (422.4)

Note: Line Segment 6401 includes (1) the right to use Bison Yard and to interchange with all railroads including Conrail at Buffalo, and (2) the right to interchange with existing or future railroads between Binghamton "BD") and Buffalo, except Conrail.

6443	EL	North Alexander (395.9)	Attica (401.0)
6441	EL	Groveland (360.2)	North Alexander (360.2)

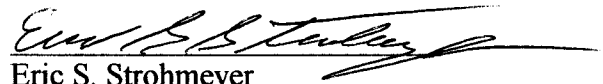
Note: Line Segment 6441 includes the right to interchange with all connecting railroads.

Abbreviations:

(AT)	Allentown Terminal Railroad Company
(CNJ)	Trustees, Central Railroad Company of New Jersey, Debtor
(EL)	Trustees, Erie Lackawanna Railway Company, Debtor
(LC&N)	Lehigh Coal and Navigation Company
(LV)	Trustees, Lehigh Valley Railroad Company, Debtor
(NC)	Trustees, Northern Central Railway Company, Debtor
(PC)	Trustees, Penn Central Transportation Company, Debtor
(RDG)	Trustees, Reading Company, Debtor

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2015, I have served¹ a copy² of the foregoing "Notice of Intent to Participate (with comment)", filed herein STB Finance Docket No.35873, by first class mail, properly addressed with postage prepaid, or via a more expeditious means of delivery with consent of the receiving party, upon all parties of record in this proceeding.


Eric S. Strohmeyer

¹ The form and style of this *Certificate of Service* complies precisely with the Board's regulations found at 49 C.F.R. § 1104.12(c)

² The accompanying document was properly served in full compliance with the Board's regulations. See: 49 C.F.R. § 1104.12(a)