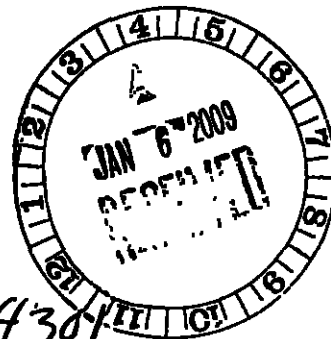


BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423



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

224304

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

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

224302

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

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

224303

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

NOTICES OF EXEMPTION

ENTERED
Office of Proceedings
JAN - 7 2009
Part of
Public Record

**MOTION TO STAY EFFECTIVE DATE OF VERIFIED NOTICES OF EXEMPTION
AND TO WAIVE PRE-FILING NOTIFICATION REQUIREMENTS**

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc (“CSXT”), and Norfolk Southern Railway Company (“NS”) today filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS), pursuant to 49 C.F.R. § 1152.50(b) (out-of-service exemption), of property the Board has determined is a line of railroad requiring abandonment authority (the “Harsimus Branch”) in Jersey City, Hudson County, New Jersey. *See City of Jersey City, Et Al—Pet for Dec Order*, STB Fin Dkt No 34818 (served August 9 and December 17, 2007) (“2007 Decisions”). Conrail also filed and served a Supplemental Environmental and Historic Report, pursuant to 49 C.F.R. §§ 1105.7 and

1105.8 The purpose of this Motion is to request a stay of the effective date of the Verified Notices of Exemption and a waiver of the pre-filing notification requirements for the Supplemental Environmental and Historic Report.

Applicants originally intended to file their Notices of Exemption in the above-captioned proceedings in April 2008. In anticipation of that filing, on February 7, 2008, Conrail notified all public entities listed in 49 C.F.R. §§ 1105.7 and 1105.8 of the proposed abandonment and sought their comments. On March 6, 2008, Conrail served those same entities and other interested parties with an Environmental and Historic Report.

Conrail received a significant number of comments on its March 2006 Environmental and Historic Report, primarily raising historic preservation issues. In light of those comments, Conrail determined to defer filing the Verified Notices of Exemption and prepare a Supplemental Environmental and Historic Report. To aid in the preparation of that supplemental documentation, Conrail retained the services of Richard Grubb and Associates, Inc. ("RGA"), a New Jersey consulting firm that specializes in cultural resources investigations involving railroad undertakings. The Principal Investigators assigned to the project exceed the National Park Service's *Professional Qualifications Standards* for Historians, Architectural Historians, and Archaeologists. RGA developed a report that defines the Area of Potential Effects ("APE") for the undertaking and proposes a methodology for a cultural resources investigation under Section 106 of the National Historic Preservation Act ("NHPA") (hereafter, "APE Report"). Conrail and RGA consulted with both the Section of Environmental Analysis ("SEA") and the New Jersey Historic Preservation Office ("HPO") about the APE Report, which is incorporated into the Supplemental Environmental and Historic Report.

Ordinarily, an abandonment Notice of Exemption under 49 C F R § 1152 50(b) becomes effective 30 days after the Board publishes the Notice of Exemption in the Federal Register 49 C F R § 1152 50(d)(3) Since the Board publishes the Notice of Exemption 20 days after it is filed, the Notice of Exemption is usually effective 50 days after it is filed *Id* In accordance with this schedule, the Board's Section of Environmental Analysis ("SEA") normally issues an Environmental Assessment ("EA") 25 days after the Notice of Exemption is filed, and parties have 15 days to comment on the EA 49 C F R § 1105 12 This leaves very little time to address historic preservation issues Thus, if there are any historic properties potentially affected by the abandonment, the Board often imposes an open-ended historic preservation condition that requires completion of the Section 106 process of the NHPA before the abandonment can be consummated *See, e g , Great Western Ry of Colorado, LLC—Abandonment Exemption—in Weld County, CO*, STB Docket No. AB-857 (Sub-No. 1X), 2008 WL 2271470 (served June 4, 2008). The Section 106 process can drag on for years *See, e g , Consolidated Rail Corp — Abandonment Exemption—Lancaster and Chester Counties, PA*, 4 S T B 312, 1999 WL 608840 (served August 13, 1999)

Conrail believes that a different procedure is called for in this case As recognized in the Board's August 9, 2007 Decision in STB Finance Docket No 34818, almost all of the property underlying the Harsimus Branch right-of-way has been sold, and much of it has already been redeveloped Slip op. at 4-5 Most of the particular property underlying the right-of-way involved in the STB's decision was sold in July 2005, and its possible reuse is being held in limbo because of the STB's determination that Conrail must first obtain abandonment authority Conrail is not here contesting the Board's decision that Conrail must seek abandonment

authority¹ Nor is Conrail here claiming that because it no longer owns the property underlying the right-of-way involved in the Board's decision, the Board cannot impose historic preservation conditions on Conrail with respect to that property.² But Conrail does believe that the Board in this case can and should conduct the Section 106 process *before* it issues its EA, so that the EA can incorporate the results of the Section 106 process (including any Memorandum of Agreement that may be reached, if adverse effects are identified) and the Board can expeditiously render a final decision permitting abandonment of the right of way and disposition of the underlying property³

To that end, Conrail requests that the Board stay the effective date of Applicants' Notice of Exemption for 180 days, to July 6, 2009, to allow time for the Board's Section of

¹ At the same time, Conrail is not conceding that the STB conclusion in its 2007 Decisions that Conrail must seek abandonment authority was correct. Conrail and 212 Marin, et al are currently appealing those Decisions to the U.S. Court of Appeals for the District of Columbia in *Consolidated Rail Corp v United States* (Nos. 07-1401, 07-1529, 08-1019, and 08-1052). A railroad may pursue abandonment before the STB at the same time it contests the STB's abandonment jurisdiction. See, e.g., *Huron and Eastern Ry. Co.—Aban. Exemption—Sanilac County, MI*, STB Dkt. No. AB-380X (served Dec. 22, 1992), slip op. at 1.

² The Board has previously determined that it can impose historic preservation conditions only to the extent a particular property is owned by a carrier. See *Implementation of Environmental Laws*, 71 C.C.2d 807, 828-29 (1991). Thus, where a carrier sells off property and retains operating rights, or obtains only operating rights in the first place, the Board will not impose historic preservation conditions on the abandonment or discontinuance of service over the line. See, e.g., *Chicago and N.W. Transp. Co.—Abandonment and Discontinuance of Service Exemption in Hennepin County, MN*, STB Docket No. AB-1 (Sub-No. 252X) (served Aug. 23, 1994), *Lamoille Valley R.R. Co.—Abandonment and Discontinuance of Service Exemption—In Franklin and Lamoille Counties, VT*, STB Docket No. AB-444X (served Oct. 17, 1996). Nevertheless, in order to moot any claim that Conrail improperly avoided any historic preservation obligation in connection with the sale of the property at issue, Conrail is prepared to cooperate in a Section 106 review and to provide appropriate mitigation. See *Implementation of Environmental Laws*, 71 C.C.2d at 830.

³ As discussed in Conrail's "Comments on Pre-Filing Correspondence," Conrail does not concede that the possible impacts of "reuse" of the properties at issue here are either proximately caused by the proposed abandonment and discontinuance or reasonably foreseeable within the meaning of the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA").

Environmental Analysis ("SEA") to conduct its environmental review and complete the Section 106 process before it issues its EA. Conrail intends that all interested parties have ample opportunity to participate in the Section 106 process. *First*, Conrail expects some parties will comment on the Supplemental Environmental and Historic Report that Conrail is filing today, including the APE Report. *Second*, Conrail expects a draft Cultural Resources Report, prepared by RGA, will be ready for circulation by January 22, 2009.⁴ Conrail proposes that the Board in late January schedule a Public Information Forum in Jersey City for late February, where Board representatives, the HPO, Conrail representatives, and RGA can receive oral input from interested parties. Conrail would also propose that the Board invite written comments on the draft Cultural Resources Report. With that oral and written input, Conrail expects that RGA can issue the final Cultural Resources Report by March 10, 2009.

Third, with the assistance of the final Cultural Resources Report and any additional comments parties have on that report, Conrail expects that SEA can issue its EA by early May, 2009. Conrail proposes that SEA give parties a full 30 days to comment on the EA.⁵ SEA can then finalize its EA as needed to enable the Board to issue a final decision before the effective date of the abandonment on July 6, 2009.

In light of (1) the fact that public agencies and interested parties were earlier in 2008 provided with substantial advance notice of the proposed abandonment, (2) the extensive opportunity that public agencies and interested parties will have to comment on the proposed

⁴ The draft Cultural Resources Report will include a proposed Memorandum of Agreement ("MOA") among consulting parties concerning the mitigation for any historical preservation effects. Conrail will actively participate with the Board and the HPO in attempting to reach agreement on an MOA.

⁵ Normally, parties have only 15 days to comment on an EA in an abandonment exemption proceeding under 49 C.F.R. § 1152.50. See 49 C.F.R. § 1105.10(b).

abandonment over a six-month period under Conrail's proposed schedule, and (3) the consultation that has already taken place with the HPO regarding the APE Report and proposed methodology for the Cultural Resources Report, Applicants request that the Board waive the pre-filing notification requirements of 49 C.F.R. §§ 1105.7 and 1105.8 with respect to the Supplemental Environmental and Historic Report. By any measure, public agencies and interested parties will receive far more notice and opportunity to comment before issuance of the EA in this case than parties receive under the usual 50-day time frame for Notices of Exemption under the Board's rules

Accordingly, for the foregoing reasons, Applicants request that the Board stay the effective date of the Notice of Exemption for 180 days from Applicants' filing (i.e., until July 6, 2009) and waive the pre-filing notification requirements of 49 C.F.R. §§ 1105.7 and 1105.8

Respectfully submitted,

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Dated January 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2009, I caused a copy of the foregoing "Motion to Stay Effective Date of Verified Notices of Exemption and to Waive Pre-Filing Notification Requirements" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List


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