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## **Via Electronic Mail**

November 13, 2020

Mr. Alan Tabachnick  
Historic Preservation Specialist  
Office of Environmental Analysis  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

### **Re: Conrail Comments on Draft Memorandum of Agreement Regarding STB Docket No. AB 167 (Sub-No. 1189X)**

Dear Mr. Tabachnick:

Consolidated Rail Corporation (Conrail) appreciates the opportunity to comment on the draft Memorandum of Agreement among the Surface Transportation Board (STB), the Advisory Council on Historic Preservation (ACHP), the New Jersey Historic Preservation Office (SHPO), and Conrail that you circulated on October 14, 2004 (Draft MOA).

Conrail appreciates the opportunity to participate in this process as a consulting party and as a signatory, pursuant to 36 C.F.R. § 800.6(c)(2)(iii). Execution of the MOA will reflect the culmination of a rigorous and lengthy evaluation of historic resources potentially affected by Conrail's abandonment request, as well as that the STB has taken into account and sufficiently addressed the effects of the proposed abandonment on historic properties, consistent with the requirements of Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108.

Conrail generally agrees with the mitigation measures proposed in the Draft MOA. However, Conrail has some concerns with the Board's proposed approach, certain of which should be addressed through revision to the Draft MOA.

### **Proper Scope of the Historic Preservation Analysis and the MOA**

Conrail fully agrees with the limitations on the scope of resolution as set forth in the Draft MOA. Failing a voluntary agreement among the parties, the only mitigation requirement that the STB is authorized to impose in a Section 106 proceeding as a condition of abandonment is historic documentation of the line. *See* Conrail Comments on Cultural Resources Effects Assessment Report at 4–5 (Apr. 29, 2019).

Although Conrail is sympathetic to concerns expressed by several commenters regarding the eventual use of the underlying property, those issues are land use considerations that go far

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beyond the scope of any proper consideration by the STB. There is no legal basis for the MOA to become a surrogate for broader community concerns about a range of potential re-use scenarios. Moreover, several commenters seek to use these proceedings to inject a range of issues relating to the abandonment proceeding that simply are not before the STB in developing an MOA.

Conrail has consistently taken the position that the STB should not consider post-abandonment uses that have been proposed for the Harsimus Embankment under the National Environmental Policy Act (NEPA) or NHPA, because they are not reasonably foreseeable. *See* Conrail Comments on 2009 Draft EA at 3 (May 7, 2009). Conrail reiterated this position in its April 2019 comments on the Cultural Resources Effects Assessment Report and its October 2020 comments on the Draft Supplemental EA, and Conrail reasserts that position here.

### **Extent of the Impacts Mitigation on Affected Properties**

Although Conrail generally agrees with the terms of the Draft MOA regarding the retention of a qualified historic preservation/cultural resource contractor(s) of its choice to complete the recordation, documentation, and interpretation measures specified, the MOA should expressly state that the contractor's work should be performed to a reasonable level of effort and may reuse historical research previously developed for the STB evaluation process.

Conrail also believes there should be no need for the contractor to perform additional archival research (*see* Section I.A.1.i.), given the extensive materials that have already been gathered as part of the Section 106 process.

In addition, Conrail believes certain proposed interpretation measures are beyond the scope of any reasonable documentation of the historic rail line itself or the foreseeable impacts of the STB's action. In particular, the Draft MOA proposes the preparation of (i) educational panels illustrating the history and development of immigrant communities in Jersey City, as well as (ii) a narrative detailing the historic significance of the War of 1812 context in specific relation to the Jersey City and Harsimus Cemetery Historic District. *See* Section I.B.1. These matters seem collateral to the effect of the rail line and the Harsimus Embankment, involve matters that in certain instances significantly pre-dated the historic features at issue, and that are unrelated to its historic features. There is no rational basis for including these requirements as mitigation for this abandonment undertaking.

Further, the section of the Draft MOA contemplating that Conrail might erect signage within the right-of-way of the Harsimus Branch (*see* Section III), seems inconsistent with the provision contemplating that sign panels would be delivered to the SHPO to be stored until some point in the future while locations are identified and agreements are made for their erection, display and future maintenance. (*see* Section 1.B.1.iv).

### **The Approval Process for Educational Interpretive Content Is Overly Proscriptive and Should be Clarified**

Conrail understands the importance of securing expert agency input into interpretive and educational materials it would commit to prepare under the MOA. However, there is no basis for expanding that review and comment process into a requirement for approval before

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Conrail can move forward with its obligations to produce the interpretive sign panels. *See* Section I.B.1.iv. To do so, as does the Draft MOA, is unconventionally proscriptive, and may unduly delay completion of these requirements. Instead, Conrail recommends removing this requirement to render those provisions consistent with the review provided for the webpage described in Section I.B.2. Conrail also recommends adding a clear statement that if a party with a right to review does not comment within the 30-day review period, Conrail and STB “shall assume concurrence and proceed.”

Conrail appreciates the opportunity to provide these comments on the Draft MOA. Conrail looks forward to further discussions of the Draft MOA’s provisions and, ultimately, implementation of an MOA to assure compliance with NHPA’s requirements.

Sincerely,

/s/ Michael L. Rosenthal

Michael L. Rosenthal  
*Counsel for Consolidated  
Rail Corporation*