

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX: (206) 546-3739

ENTERED
Office of Proceedings
July 15, 2016
Part of
Public Record

15 July 2016

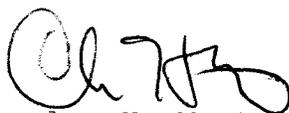
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: Rules Relating to Board-Initiated Investigations, EP 731
Comments due 15 July 2016

Dear Ms. Brown:

Please find attached, for filing in the above referenced proceeding, comments on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Commenters") in response to proposed rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the STB Reauthorization Act of 2015, 129 Stat. 2228 (2015), see 49 U.S.C. 11701 and this Board's notice in EP 731 served May 16, 2016.

Respectfully submitted,



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

Att. (comments)

BEFORE THE SURFACE TRANSPORTATION BOARD

Proposed Rules Relating to Board-)
Initiated Investigations) EP 731

COMMENTS ON BEHALF OF CITY OF JERSEY CITY,
RAILS TO TRAILS CONSERVANCY, and
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION

The following comments, on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Commenters"), are in response to the proposed rules relating to Board-Initiated Investigations as manifest in STB Ex Parte 731.

Interest of commenters. City of Jersey City is the second largest city in New Jersey with a long historical involvement with the railroad industry. Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition are non-profit organizations with an interest in timely application of remedies administered by the Surface Transportation Board (STB) to preserve otherwise-to-be abandoned rail lines for public use (including historic preservation), or for rail re-use, before they are fragmented and otherwise demolished.

Since approximately 2005, Commenters have been concerned about an unlawful de facto abandonment of the Harsimus Branch.

The Branch contains a six- block-long Embankment protected under federal, state and local law due, inter alia, to its eligibility for listing on the National Register of Historic Places, listing on the equivalent State Register, and designation as a City Historic Landmark. The unlawful de facto abandonment was manifest in 2005 when Consolidated Rail Corporation, then as now owned by CSX Transportation and Norfolk Southern Corporation, purported to sell the line to a developer for demolition without any prior STB authorization, in clear violation of 49 U.S.C. 10903, and over the objection of, inter alia, City of Jersey City.¹ Although Commenters challenged the unlawful abandonment by filing a declaratory proceeding (F.D. 34818) and, after the developer and Conrail exhausted their jurisdictional challenges against this agency, by vigorous participation in Conrail's belated abandonment proceeding seeking a rubber stamp for the railroad's unlawful actions (AB 167-1189X), the unlawful effort to achieve demolition continues to thwart remedies to preserve the Branch, including, even after more than a decade of litigation, any meaningful remedies ostensibly provided under federal, state, or local law for the historic preservation of the Branch and its Embankment. Ironically, although the Board

¹ As the Board's records show, this is not the only unlawful abandonment without prior authorization in Jersey City in which Conrail has engaged.

appears to recognize that federal law prohibits anticipatory demolition of historic assets, the Board has so far failed to investigate whether an anticipatory demolition has occurred, and Commenters understand that the Board has not yet devised means to make such an investigation or even determined what part of the agency shall do so, if any part ever does. For this and other reasons, Commenters have a very direct interest in how the Board "investigates" violations of the statutes which it administers.

Lack of institutions for inquiry and investigation. Prior to the downsizing of the old Interstate Commerce Commission (ICC), the agency maintained regional offices with investigative staff and attorneys who could and would look into infractions of the statutes administered by the old ICC. For example, such an office conducted a thorough investigation of an unlawful abandonment of a Burlington Northern branch line in Seattle, including interviews with railroad employees and third parties by ICC investigative staff, and the filing of extensive interview notes, documentary evidence, and a legal brief finding an unlawful abandonment. The investigation served to preserve what is now the Burke-Gilman Trail. Commenters are currently unaware (certainly agency staff have been unable or unwilling to identify) any comparable investigation by STB. Commenters of course understand that STB's resources, both in personnel and in

terms of available funds, are substantially less than for the old ICC. However, this makes it especially appropriate, before considering what the Board's investigative regulations should look like, to inquire into the institutional structure and resources available to the Board to conduct meaningful investigations.

In preparing these comments, Commenters accordingly inquired into the Board's institutional organization and resources. Commenters begin by noting that the Board's ex parte communications rules bar agency staff involved in decision-making (the Office of Proceedings and the Board members themselves) from ex parte contacts, which essentially means that the Office of Proceedings and the Board members themselves cannot conduct an investigation involving interview of witnesses and ex parte review of documents. Moreover, STB as downsized no longer maintains any regional offices. Even more troubling, the agency no longer even has an independent investigative unit that can interview railroad staff, review documents, and provide evidence or information to the Office of Proceedings or to Board members. In particular, the agency disbanded its investigative staff, which formerly resided in what is now the Office of Public Assistance, Government Affairs, and Compliance ("OPAGAC"). On inquiry to OPAGAC, Commenters were informed that, to the extent OPAGAC gets involved in alleged violations

of the statutes that STB administers, OPAGAC performs solely a non-binding mediation-type role, if it gets involved at all. Commenters were further informed that, due to ex parte prohibitions, OPAGAC does not communicate with any STB decision-makers (Office of Proceedings or Board Members) concerning potential violations. Commenters were advised that OPAGAC recalled one instance in which public alarm over potential violations resulted in it sending staff to hear complaints, but statements made at the meeting (or meetings) between OPAGAC and the interested public evidently were not communicated to agency decision-makers.

STB does maintain an Office of Environmental Analysis (OEA). That entity does have the power to engage in ex parte contacts. However, its "investigations" are severely constrained. In particular, it does not communicate with agency decision-makers (Office of Proceedings and Members) except through issuance of an environmental assessment, and in most abandonment proceedings, this document is not supplied to the Board or the public until after the Board has issued abandonment authorization. This calls into question the meaningfulness of the exercise, even if the Board "conditions" its authorizations on limited environmental conditions it subsequently imposes, or provides a means to request, or sometimes imposes, "stays" of its abandonment authorizations until Part 1105 issues are sorted

out. Second, OEA itself has limited staff to deal with the Board's entire case load, even taking into account the fact that OEA's purview is limited to the very limited environmental matters set forth in the constraints found in 49 C.F.R. Part 1105. This lack of staff is compounded by the tight timetable that statutes and regulations provide for many Board actions. In the circumstances, even though self-reporting of violations of law is unreliable, OEA in general feels compelled (and its regulations have been set up to compel it) to rely upon information submitted by the railroads themselves, or by consultants retained by the railroads and paid for by them, to provide information or otherwise to "assist" OEA. OEA also relies on sign-offs from federal and state officials, like State Historic Preservation Officers. These allegedly "independent" consultants are being paid by railroads to accomplish the railroads' purposes. This raises the risk that the agency is relying on biased information. In addition, it is extremely unlikely that such consultants will probe beyond the confines of the limited environmental and historic issues set forth in 49 C.F.R. Part 1105, which omits many potential infractions of statutes administered by the Board, including matters such as anticipatory demolition and deprivation of meaningful comment resulting from unlawful de facto abandonments. After all, Part 1105 assumes that railroads will comply with the law; it is not

designed to identify violations of the law. Moreover, federal and state officials, including SHPOs, themselves lack the resources to engage in independent investigation on behalf of STB, and themselves rely on the information supplied by the railroads or railroad-retained consultants. They certainly are not in a position to do STB's job in terms of securing compliance with applicable statutes, even in the environmental and historic preservation area, much less identifying violations of statutes.

Commenters sought further information on how the Board engages in, or is organized to engage in, inquiries and investigations by contacting agency staff. In particular, the Board's EP 731 Notice served May 16, 2016, states that persons seeking further information on EP 731 should contact Mr. Scott Zimmerman at 202-256-0386 for further information, but when contacted on this matter, Mr. Zimmerman instructed Commenters that he could not (was told by Office of Proceedings not to) provide further information. If the Board wishes meaningful comment on investigative rules, it needs to provide some indication of its proposed institutional structure, staffing and resources to conduct investigations in the first place.

If the Board lacks institutional structure, staffing and resources to conduct meaningful investigations, then it is limited to self-reporting by the industry of violations of law.

This is unreliable. It can and does lead to widespread violations of the law, excused when "discovered" by the agency as mere inadvertence by the railroads that engaged in the violations. In 2008, this agency explained in a Policy Statement (Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions, STB Ex Parte No. 678) that it does not find out about illegal abandonments of inactive lines until after unlawful actions are taken.² But the Policy Statement also stated that the agency nonetheless "will take whatever steps are necessary to enforce compliance with [NEPA and NHPA]."³ While the Board has said it will not tolerate unlawful behavior, failure to maintain a meaningful function for gathering information on violations of law means that the agency lacks a reliable institutional ability to gather information on violations apart from the rare instances of self-reporting. This contributes to a kind of systemic breakdown. The agency inherently is unable to enforce meaningful compliance with NEPA, NHPA, and other statutes which the Board administers, because

² Ex Parte 678, served April 23, 2008, slip op. at 4 ("In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.").

³ Id.

the agency has no reliable means to learn of the violations until after they have occurred. This problem is exacerbated by a failure to provide meaningful remedies where violations have clearly occurred, as manifest in the prolonged proceedings in F.D. 34818 and AB 167-1189X. The industry is encouraged to betray the statutes (certainly to minimize resources committed to ensuring compliance) when it knows it is seldom if ever held to account because the agency in effect relies on self-reporting of violations. The agency in such cases risks becoming captive of the industry; indeed, rather than discharging its obligation to regulate the railroads, the agency risks being viewed as a device for preventing meaningful regulation. This problem manifests in two ways. First, under 49 U.S.C. 10501, STB regulation preempts state and local regulation. If the agency does not enforce its statutes, then the industry in effect is unregulated because section 10501(b) bars state and local governments from protecting their own citizens. Second, aware of federal rail regulation, state and local governments adopt statutes that assume that federal law will be obeyed (enforced). When STB fails to enforce federal law, the state and local laws predicated on federal compliance are also rendered risible. It is popular in the United States to complain against regulation. While some in the rail transportation industry may find neutralization of meaningful regulation a pleasant development,

Commenters expect in the end it will result in loss of confidence in the established regulatory process and an erosion of the Board's preemptive powers. Regulations are intended to prevent abuse. If they are not enforced in a meaningful fashion, it means that the abuse is continuing and more regulation will be the outcome. It is inherently unstable to create conditions in which statutes are violated and enforcement is effectively limited to those rare instances of self-reporting, with the railroad violating the law (and its accomplices) arguing for ineffective remedies, or none at all.

Inquiry and investigative powers. The Board's general powers bearing on inquiries and investigations are currently codified at 49 U.S.C. 1321. That statute empowers STB "to inquire into and report on the management of the business of [rail] carriers..." Similarly, STB can examine any person controlling rail carriers. Even more importantly, section 1321(b)(3) empowers STB to "obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV." This indicates that the rail carriers must supply the Board with the information the Board seeks. In the event the Board is conducting a "proceeding," the Board is further specifically empowered to subpoena witnesses and records, to depose witnesses, and to order witnesses to produce records."

There is nothing in P.L. 114-110 that indicates that it was intended to limit the Board's general powers to make inquiries into violations of the statutes which it administers as manifest in 49 U.S.C. 1321. Those powers certainly flourish to their fullest extent in all proceedings not initiated by the Board itself. As indicated at pp. 2-6 infra, the Board needs to ensure that it is institutionally capable of securing compliance with its mandate through broader use of its inquiry and investigative powers in proceedings not initiated by the Board.

An equally troubling set of issues arise in connection with Board-Initiated Investigations. The first major question is the apparent restriction that P.L 114-110 has made in 49 U.S.C. 11701(d)(2). Under P.L. 114-110, formal investigations launched on the Board's own initiative are limited to "issues that are of national or regional significance." While this in the abstract may sound like a wise way to direct the agency's extremely limited resources, industry will use this provision as a means to attack any investigation, and especially allegations concerning illegal abandonments, and thus conceal a pattern of abusive violations of 49 U.S.C. 10903, as has apparently occurred in the case of Conrail's multiple illegal abandonments in Jersey City. One way to avoid being hamstrung by litigation on this issue in individual investigations is to adopt an appropriate definition of national or regional significance as

part of the final regulation. Any unlawful abandonment (removal of structures or sale of real estate) involving a former main line or other historically important rail line, or of any line containing an asset listed on or eligible for the National Register of Historic Places, or the state equivalent, or which is designated as a city landmark, should qualify as an "issue of national or regional significance." Failure of this rulemaking to address this matter will result in costly litigation as industry attempts to stifle all independent investigations on the ground of lack of significance of the violations involved. The Board's proposed regulations are deficient in failing to deal with this issue.

Another very troubling feature of the Board's proposal is its exclusion of the public from the process. The Board's regulations call for a secret (i.e., "non-public") "preliminary fact-finding" (1122.3) to determine whether an issue is of national or regional significance and warrants a "Board-initiated Investigation." If the "staff" concludes an investigation is not appropriate, then it will (presumably secretly) inform the party under investigation. Under 1122.6, the information and documents developed in the preliminary fact-finding "will be treated as nonpublic" by the Board, unless the Board directs otherwise, or the documents come to light in a public proceeding, or disclosure is otherwise required by law.

In short, STB proposes that (1) staff conduct a secret preliminary investigation, (2) staff be empowered without any Board oversight to terminate the investigation by informing the party in question, and (3) that all information on the investigation be kept secret if lawful to do so, except as ordered by the Board. There is no justification for this secrecy, it is unnecessary, and it may be perceived as allowing the railroad under investigation to manipulate the Board's staff. The entire process as envisioned should be totally revised. The Board's preliminary investigation should be publicly noticed at the same time the railroad is notified. All information developed in the preliminary investigation should be publicly filed with the Board, along with the staff's recommendations. The Board should then accept or reject the staff's recommendations after the public has a reasonable opportunity both to supply evidence and to comment upon the staff's information and recommendations. Confidential commercial information can be protected pursuant to one of the agency's customary protective orders, by filing a version that is redacted for the public, and allowing access only to attorneys for adversaries to non-redacted versions. Even if the information developed by staff fails to meet the regional or national significance test, it may show a violation of law on which the public is empowered to act, even if the Board is

unable to proceed on its own. The information may also demonstrate that staff (or the Board) failed to correctly ascertain that an issue was of sufficient significance to warrant a Board-Initiated Investigation, or failed to recognize that a violation had occurred, or failed to conduct a meaningful investigation. The Board's proposal on preliminary inquiries needs to be open and public, save only as to genuinely confidential commercial information, in order to prevent abuse or the appearance of abuse, and in order to ensure that relevant information and considerations are supplied to the Board's relevant officers.

A similar set of problems, to which a similar solution is available, exists in respect to the Board-Initiated Investigation itself. The Board's proposed regulation provides that even if an investigation is instituted, it will be secret (i.e., "nonpublic.") See proposed 1122.4. Even though the matter is of national or regional significance, the Board proposes by regulation to provide that no party other than the one under investigation has a right to participate or to intervene. See proposed 1122.8. No means is provided for the Investigating Officer or the Board to obtain views or evidence from third parties, no matter how adversely impacted third parties or the public may be from possible violations of law,

and no matter how much information on those violations third parties or the public could make available.

Unless the Board opens up its investigation to public input, including submission of evidence and argument, the Board's record for decision-making will be presumptively incomplete, containing only information supplied by the railroad in secret, unreviewed by the entities that may be directly harmed by any violations of the law, much less the public, including relevant state and local governments.

The problem of incompleteness of the record in the Board's proposed secret investigations is exacerbated by the lack of resources (staff and appropriations) available to the Board to dig out inculpatory evidence from recalcitrant railroads. In addition, under 28 U.S.C. 2323, "[c]ommunities, associations, corporations, firms, and individuals interested in the controversy or question before the Board, or in any action commenced [under 28 U.S.C. 2321], may intervene in such action at any time after commencement thereof." Since all interested parties have a presumptive right to intervene in judicial review proceedings concerning an investigation, they should have an equal right to participate fully in investigations, and in all of the phases of the investigation, including the preliminary inquiry. Especially since the rail industry has equipped itself with a de novo review provision for findings in a Board-

Initiated Investigation of violations (49 U.S.C. 11701(e)(1)), it is vital that the Board provide for full and complete participation by all interested members of the public in order to ensure a full and adequate record. Otherwise the lack of a full and complete record will inevitably be an issue on de novo review.

The Board in its explanation references its ex parte rules, noting that it seeks to insulate decision-makers from the party under investigation, although it indicates that party can make written submissions (presumably secret from everyone else under other portions of the Board's proposed rules) to the Members of the Board at any time (proposed 1122.12). If there is only one party to the investigation, and it can go directly to the highest decision-makers at the Board at any time, then it is not clear what the point is about barring ex parte communications. The only entities or individuals barred will be third parties injured by the party under investigation, the public, state and local governments, and other federal agencies. It is a denial of due process to allow a railroad under inquiry or investigation to go to the highest levels of the Board at any time in secret, but to bar everyone else, especially on matters supposedly of national or regional significance. Proposed section 1122.12 should be deleted in its entirety. It is not clear how a revision would solve the problem, unless the Board

abandons any ex parte prohibition in inquiries and investigations in terms of contacts with the Members.

Summary. The Board is charged with regulating the rail industry in a fashion compatible with the public interest, and in doing so properly to apply the protections of statutes like NEPA, NHPA, and so forth. Commenters can find nothing in the Board's general statutory authorities, or in the language of P.L. 114-110, or in the explanation the Board provides in connection with EP 731 that justifies excluding the public from Board-Initiated Investigations. Injured parties, the public, and state and local governments (and other federal agencies for that matter) should be permitted meaningful participation in all inquiries and investigations, before conclusions are purportedly drawn. This alternative approach will foster, rather than hinder, the development of the record; it will also serve generally to benefit the inquiry or investigation in question; and it can be done consistent with protecting bona fide confidential commercial information using the Board's customary protective order mechanisms. More important, it will foster and preserve the integrity of the Board's processes, and under the circumstances is the only alternative that serves to secure enforcement of the statutes which the Board administers.

Respectfully submitted,


Charles H. Montange

426 NW 162nd St.
Seattle, WA 98177
206-546-1936
Fax -3739
c.montange@frontier.com

Attorney for City of Jersey City,
Rails to Trails Conservancy,
and PRR Harsimus Stem Embankment
Preservation Coalition