

Before the Surface Transportation Board

212 Marin Boulevard, LLC, et al. )  
Petition for a Declaratory Order ) F.D. 35825  
of Exemption )



Reply to LLCs' "Motion for Reconsideration"

236700

This Reply, on behalf of City of Jersey City ("City"),  
Rails to Trails Conservancy ("RTC"), and the Pennsylvania  
Railroad Harsimus Stem Embankment Preservation Coalition  
("Coalition") (collectively referred to as "City et al") is  
directed at the "Motion for Reconsideration" from this Board's  
denial served August 11, 2014, of the Petition for Declaratory  
Order filed on behalf of eight LLCs (hereinafter "the LLCs")  
claiming ownership of portions of the Harsimus Branch, a line of  
railroad, by reason of eight deeds from Conrail, and NZ Funding  
LLC ("NZ"). In F.D. 35825, the LLCs basically seek an adverse  
abandonment using improper exemption procedures for meritless  
reasons in order to avoid meaningful relief for the City in a  
proceeding (AB 167-1189x) Conrail has already pending. This  
Board properly denied the LLCs' petition in the August 11  
decision, and the LLCs' motion for reconsideration adds nothing  
to the equation. The LLCs' motion has no merit and must be  
denied.

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Public Record

This Board permits discretionary appeals from an action of the entire Board. Such an appeal is supposed to be entitled a "petition for reconsideration," 49 C.F.R. 1115.3(a), and this appears to be what the LLCs in effect filed. So treated, the petition is governed by 49 C.F.R. 1115.3 (b). That regulation provides that the petition may only be granted on the basis of "new evidence or changed circumstances" or "material error." The LLCs do not claim to present any new evidence or changed circumstance. Instead, they claim only errors of law or fact. Mot. Recon. at 3. None of their arguments shows any "material error" and reconsideration must be denied.

A. No Material Error in Rejection of LLCs' De Facto Abandonment Claim

The LLCs first claim that the Harsimus Branch was de facto abandoned by non-use such that this Board has "no authority and no interests in that which it formerly regulated." Mot. Recon. at 5. But 49 U.S.C. 10903 requires an abandonment license from the STB. A railroad cannot evade the licensing requirement by "reduction of service" for that would permit the agency's jurisdiction to "be defeated entirely." Oregon Shortline Abandonment, 267 UCC 633, 635 (1947). The courts have consistently rejected the notion that a de facto abandonment (non-use of line) deprives STB of jurisdiction. See, e.g., Phillips v. Denver & R.G. RR, 97 F.3d 1375 (10<sup>th</sup> Cir. 1996).

See also cases cited at pp. 22-23 of Petition filed January 12, 2006, in F.D. 34818, available on the STB website. That has been the consistent position of this agency and its predecessor. E.g., Old Colony Railroad Co. et al. Trustees Abandonment, 224 ICC 681, 682-83 (1938), and cases cited at pp. 21-22 of the F.D. 34818 petition, supra. The situation presented here is also similar to a proceeding involving another Conrail line, the 1.45-mile West 30th Street Secondary Track known as the "High Line," located in Manhattan. In that proceeding, the ICC determined that the High Line, which had also been conveyed to Conrail as a line of railroad, was subject to the agency's abandonment regulation even though the track had not been used by Conrail for many years. Chelsea Property Owners-Aban.-The Consol. R. Corp., 8 I.C.C.2d 773, 790-91(1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). What is good law on one side of the Hudson River for Conrail remains good law on the other. There is no de facto abandonment from non-use so the LLCs "lack of commerce" argument fails to show material error because it is irrelevant as a matter of law.

The LLCs appear to attack the law against de facto abandonments on the ground that STB lacks power under the Commerce Clause to regulate the abandonment of rail lines if a railroad arbitrarily reduces service and moves to disassemble

the line without first obtaining abandonment authorization, based on the LLCs' view that there is no "present or future need for rail service on their properties." Mot. Recon. at 3. But Congress gave STB, not real estate developers like the LLCs, exclusive and plenary authority to make abandonment determinations. 49 U.S.C. 10501(b). The LLCs cannot make those determinations or purport to strip the Board of its exclusive jurisdiction over the matter. The LLCs' argument flies in the face of numerous decisions observing that countenancing de facto abandonments would permit wholesale circumvention of this agency's jurisdiction, not to mention evasion of statutes like 49 U.S.C. 10904 (offers of financial assistance), 49 U.S.C. 10905 (public use conditioning), section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), and the National Environmental Policy Act. In other words, the LLCs are rowing against the current of uniform case law for roughly the past century.

The LLCs' constitutional argument does not square with any applicable precedent. For example, it flies in the face of Preseault v. ICC, 494 U.S. 1, 17-19 (1990). In that case, the Supreme Court considered whether 16 U.S.C. 1247(d), whereby the ICC could retain jurisdiction over otherwise to be abandoned rail corridors for possible future rail reactivation and interim trail use, was within Congress' Commerce Clause powers. The

Court held that the statute served two goals valid under the Commerce Clause: development of additional trails and preservation of established railroad rights of way for future rail reactivation. Moreover, "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, see, e.g., Colorado v. United States, 271 U.S. 153 (1926), that is a judgment that Congress is entitled to make." 494 U.S. at 19. Since the Supreme Court has indicated that Congress is within its power to view every line as suitable for preservation for future use, then STB's exclusive authority to control abandonment is clearly constitutional under the Commerce Clause.

In Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972), relied upon by the LLCs (mot.recon. at 3 & 6), the court of appeals upheld FCC's determination that it had no licensing jurisdiction over telephone exchange buildings. Here, by contrast, the entity designated by the United States Court of Appeals for the D.C. Circuit to determine STB jurisdiction -- the U.S.D.C. for D.C. sitting as Special Court -- entered a summary judgment, upheld by the D.C. Circuit, that the Harsimus Branch is a line of railroad subject to STB abandonment licensing jurisdiction.

The other cases relied upon by the LLCs are unavailing to them. None involved illegal property sales without an effective abandonment authorization. In Becker v. STB, 132 F.3d 328 (D.C. Cir. 1997), RLTD Railway Corp. v. STB, 166 F.3d 808 (6<sup>th</sup> Cir. 1999), and Conrail v. STB, 93 F.3d 793 (D.C.Cir. 1996), the courts of appeal found that STB had lost jurisdiction because the agency had issued final abandonment authorizations which had become effective. There has been no final and effective abandonment authorization here.

Railroads such as Conrail are subject to a federal common carrier obligation. "Thus, a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable. ... In addition, a railroad may not unilaterally abandon a line at its own election; it must instead apply for and receive permission from the proper administrative agency." GS Roofing Products Co. v. STB, 143 F.3d 387, 391 (8<sup>th</sup> Cir. 1998) citing General Foods v. Baker, 451 F.Supp. 873, 875-76 (D.Md. 1978). The Harsimus Branch is part of interstate commerce until and unless this Board grants an unconditioned effective abandonment authorization.

B. The Special Court Found that STB Had Abandonment  
Jurisdiction over the Harsimus Branch

The LLCs next claim that the U.S.D.C. for D.C., sitting as Special Court, did not find that STB had abandonment jurisdiction.

Mot. Recon. 7-8. This is an absurdly constrained and wholly inaccurate reading of the relevant opinion. The District Court stated as follows:

"As the D.C. Circuit held in Consolidated Rail Corp., the district court has "exclusive jurisdiction to decide the antecedent question if it arises" of whether a track at issue "was conveyed . . . as 'part of [the rail carrier's] railroad lines'" subject to the STB's abandonment jurisdiction. 571 F.3d at 20 (alteration in original), citing 49 U.S.C. § 10903(a)(1)(A). If so, then the STB "retains its authority under sections 10903 and 10906 to approve or deny an abandonment application." Id. Given that the parties have now stipulated that the Harsimus Branch was conveyed to Conrail as a line and not a spur, the Court rules that the Harsimus Branch "was conveyed . . . as 'part of [the rail carrier's] railroad lines'" subject to the STB's abandonment jurisdiction."

City of Jersey City v. Consolidated Rail Corp., 968 F.Supp.2d 302, 307-08 (D.D.C. 2013) (emphasis added). The District Court accordingly granted summary judgment to City et al.

Since de facto abandonments (unilateral reductions in service and removal of trackage) are not lawful, there was nothing else for the District Court to decide. In other words, once the Special Court found that the property was conveyed subject to this Board's abandonment jurisdiction, then as a matter of law this agency has abandonment jurisdiction, as the district court ruled. Accord, 45 U.S.C. 744(g), 49 U.S.C. 10501. The Court of Appeals summarily affirmed the District Court. D.C.Cir. No. 13-7175 (Feb. 19, 2014).

To be sure, the District Court refused to allow the LLCs to amend their Answer to assert counterclaims and crossclaims inter alia against Conrail for damages for fraudulently misrepresenting the line as not subject to STB jurisdiction, and against City et al for the location of another rail line (the Hudson Street Industrial Track). 968 F.Supp. 2d at 306. The court said that the LLCs could raise these issues in separate litigation. 968 F.Supp.2d at 307.<sup>1</sup> The LLCs complain that STB has not considered their various counterclaims and cross claims. Motion for Recon. at 7. But the LLCs have not sought to raise their state law counterclaims for damages against Conrail before STB.<sup>2</sup> In their motion for reconsideration, the LLCs fail to

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<sup>1</sup> This does not mean that the LLCs' claims against the City have any merit. For example, why the City, much less Rails to Trails Conservancy or the Embankment Preservation Coalition, would be the appropriate defendant concerning a suit by the LLCs to determine the location of the Hudson Street Industrial Track, is beyond the comprehension of City et al. Since the LLCs do not claim to own that line (as they do the Harsimus), they presumably do not even have standing on the issue. Moreover, the LLCs sought to claim against City et al for damages for asserting City et al's rights before STB. But there is no rational legal theory under which City et al could be held liable for damages to the LLCs for pursuing the remedies of City et al at STB for what the LLCs in essence stipulated was an unlawful sale in 2005. None of the claims made by the LLCs against City et al had any legal merit, and instead were interposed to burden City et al, to silence City et al, and to delay any relief to City et al in STB or related proceedings.

<sup>2</sup> Tort claims such as this in general are state court issues. The LLCs' fraud and negligence claims against Conrail are germane to this abandonment proceeding only in that they amount to admissions that Conrail intentionally misled them in

identify any specific claims that STB allegedly failed to consider, at least that amounted to material error. The LLCs need to specify which of their claims that allegedly survived summary judgment was in fact presented to STB in their petition F.D. 35825, but that the agency did not consider, and which would have changed the result (i.e., amounted to material error).

The only claim of the LLCs over which the agency had jurisdiction is the de facto abandonment by severance claim and STB properly rejected it. Nothing else the LLCs presented was relevant to immunize the Harsimus Branch from the district court's summary judgment. The LLCs have the burden of proof, not this agency or other parties to the proceeding. The LLCs simply fail to show how STB made a material error in connection with the summary judgment decision. As the Special Court found,

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asserting to them that the Branch was not subject to STB regulation. See City et al Reply to F.D. 35825, Ex. C. Conrail responded by showing that the LLCs at all relevant times knew or should have known the same facts that Conrail knew that indicated the line in fact was a line of railroad subject to STB jurisdiction. See Exhibit I attached hereto. In short, both Conrail and the LLCs have admitted to, or shown, that they were aware (or were willfully blind to) facts showing that STB had abandonment jurisdiction over the Harsimus Branch at the time of the sale to the LLCs in 2005. For the LLCs to argue the contrary before this agency is inconsistent with their own stipulation and with their own pleadings, flies in the face of the summary judgment against them, and faces the headwind arising from (a) the LLCs' admission that Conrail misrepresented the regulatory status of the Branch, and (b) Conrail's showing that the LLCs knew or should have known it was a regulated line.

the agency "retains its authority ... to approve or to deny an abandonment [license]" for the Harsimus Branch. 968 F.Supp. 2d at 307. There are no de facto abandonments. See Part A supra.

C. The LLCs Fail to Show Material Error on the  
Severance Issue

The LLCs finally contend that the River Line abandonment somehow severed the Harsimus Branch (Marin Boulevard to CP Waldo) from CP Waldo. It is hard to understand the LLCs' claim, which appears to be smoke signifying nothing. At best, the LLCs appear to claim (1) that by 1982, the Harsimus Branch was something called the Harsimus and Passaic Branch in the vicinity of CP Waldo, but (2) that when the River Line was abandoned, Conrail removed an additional 750 feet of track beyond the point of intersection with the Harsimus (or Harsimus and Passaic, or whatever the LLCs feel is their flavor of the moment). The LLCs apparently posit that this 750 feet was part of the River Line abandonment.

The LLCs' position is patently wrong. First, Conrail's "notice of exemption" in AB 167 -1189X, filed February 22, 2009, certifies that Conrail is proposing abandonment of a line from Waldo Avenue (which Conrail asserts is MP 0) to Washington Street (which Conrail asserts in MP 1.36). See Exhibit III (excerpts from "notice") at p. 2, maps comprising Exhibit A to "notice," maps attached to Conrail's environmental report, and

notice letter to agencies (Exhibit D). Conrail does not represent that there is any "gap." Instead, Conrail represents in its environmental report that the railroad still owns the property between MP 0 and MP 0.18 (roughly the Turnpike Extension) that the LLCs appear to claim has somehow disappeared. See Exhibit III, Conrail Environmental Report at p. 4 (4<sup>th</sup> sentence of 2d full paragraph). Conrail represents that it is proposing to abandon that segment in order to facilitate the City. Id. The "notice of exemption" is verified by Jonathan Broder (Conrail's Vice President and General Counsel and Corporate Secretary). See Exhibit III ("notice") at p. 5. In short, there is no severance.

Second, it appears that the LLCs' basic severance claim is based on some notion of de facto abandonment arising from track removal. But as already discussed, the removal of track material from the Harsimus does not deprive the STB of abandonment jurisdiction. Perhaps the LLCs mean to regurgitate their old argument that the Harsimus Branch was a spur. But the LLCs stipulated that the Harsimus was conveyed as a line, and the courts have so ruled. Especially in these circumstances, railroads and their chosen non-rail developers cannot evade STB abandonment jurisdiction by arbitrarily reclassifying lines as spurs. See Old Colony Railroad, supra, 224 ICC at 682-83 (railroad may not lawfully reduce line to spur status without

agency permission to abandon); Clinchfield Railroad Co.

Abandonment, 295 ICC 41, 44 (1955) (classification of trackage by the owner is not determinative). If Conrail as a matter of law cannot arbitrarily "abandon" a portion of any of these lines by recombining them in some way and treating possible remnants as a "spur," neither can a developer.

Conrail track charts for the Harsimus Branch, the Passaic Branch, and the River Line (in the Waldo area) dated 1-1-1980 are attached as Exhibit II. The east end of the Passaic Branch intersected the west end of the Harsimus Branch at "Karny." The River Line intersected the Harsimus (or the Harsimus and Passaic combination) at CP Waldo. The Harsimus Branch extended from Karny (MP 7) through CP Waldo at least as far as Henderson Street (MP 1.3, now Marin Boulevard) in Jersey City. Thus, the Harsimus was and remains continuous from Karny to Marin Boulevard until abandonment authority is received from STB for a relevant portion of it.

Third, this Board's authorization for the River Line abandonment defines that line in relevant part as commencing at point of connection to the Harsimus Branch at CP Waldo. AB 167 - 1067N, served Jan. 17, 2002, slip at 1 n.1. As a matter of law, the River Line abandonment thus could not have included any portion of the Harsimus. The River Line abandonment did not go beyond the point of connection to the Harsimus at Control Point

Waldo to some other point of "disconnection" from the Harsimus Branch 750 feet away. The River Line abandonment is thus irrelevant.

Fourth, as we indicated in our initial Reply to the LLCs' petition in F.D. 35825, cases finding severance require not only a lawful and effective abandonment authorization, but also alienation of land within the area of lawful abandonment pursuant to that authorization so that the ability to interconnect with the severed portion of line is lost. The key is loss of ability to interconnect that is de jure and de facto. This Board has recognized that if the rail carrier retains ownership of the connecting parcels, or a third party makes alternative parcels available for rail restoration, there is no severance. See, e.g., BN RR - Ab.Ex. - Between Klickitat and Goldendale, AB 6 (Sub-no. 335X), served June 8, 2005, slip at 3 (both railroad and a third party owned land or easements allowing reconnection). Conrail has affirmatively told this Board that it still owns the point of connection which the LLCs seek to put at issue. See Conrail "notice of exemption" environmental report AB 167-1189X, at p. 4, 2d para., 4<sup>th</sup> sentence, supra. Accord, Dec. of Naomi Hsu, p.2, para 3, Exhibit B to City et al's Reply to the LLCs' original Petition in this proceeding. This uncontroverted fact independently precludes severance under STB case law.

Fifth, the Harsimus Branch intersects National Docks Secondary (an operating line in interstate commerce) east of CP Waldo and west of Marin Boulevard. Under STB precedent, this incontrovertible fact also independently defeats the LLCs' severance claims. City et al Reply to F.D. 35825 Petition at p. 20.

That the River Line abandonment has nothing to do with the Harsimus Branch is further confirmed by the fact that Conrail used NERSA procedures to abandon the River Line. The notice of insufficient revenue qualifying the River Line for NERSA abandonment was filed by Conrail in AB 167-1067N on October 31, 1985. The mapping for that Notice indicated the Harsimus and Passaic lines of railroad were different from the River Line, and that the River joined the Harsimus Branch at CP Waldo. Conrail never filed a notice of insufficient revenue for any portion of the Harsimus Branch, because at all relevant times for NERSA abandonments Conrail was making a substantial profit on shipments from the Branch. That is borne out by the documents on which this Board relied at page 4 of its decision in F.D. 34818 served August 7, 2006 (e.g., reference to 3204 carloads for shippers in year ending Sept. 30, 1984). Consistent with what STB has already said, the NERSA abandonment papers show the Harsimus Branch (or whatever the LLCs choose to

call it) was continuous through CP Waldo, and the River Line connected at Control Point Waldo.<sup>3</sup> That is all.

Finally, the LLCs never contested this Board's finding of no severance (Decision in F.D. 34818, served Dec. 19, 2006), slip at 6-7, in their appeal to the D.C. Circuit in Nos. 07-1401, et al., Brief dated Feb. 3, 2009. The issue was therefore waived. E.g., Wroblewski v. City of Washburn, 965 F.2d 452, 455 n.1 (7<sup>th</sup> Cir. 1992).

The LLCs fail to show any material error in the agency's analysis of the severance issue. They face uncontroverted facts as well as applicable legal principles barring any finding of severance.

#### D. The Motion Is Improper in Purpose

The motion for reconsideration not only lacks merit for the reasons set forth above, but also must be viewed in light of past tactics of the LLCs. The LLCs purported to recognize in their Reply (p. 2) filed February 1, 2006 in F.D. 34818 that this agency must resolve the status of the Harsimus Branch. Conrail in its Reply of the same date said it would not oppose

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<sup>3</sup> The relevant track charts for Harsimus and River Line around the time of filings of notices of insufficient revenue for NERSA abandonment purposes are attached as Exhibit II. The River Line was portrayed as continuous into the National Docks line, with a connection to the Harsimus Branch at CP Waldo. So far as we can tell, Conrail merely abandoned the connection when it abandoned the rest of the River Line.

such a resolution. In response, this agency found in F.D. 34818 that the Branch was a line of railroad subject to its abandonment jurisdiction. Decision in F.D. 34818, served August 9, 2007. The LLCs, with Conrail's participation and support, then brought a tidal wave of claims and litigation to debunk this agency's resolution of the status issue, and to prevent the agency from exercising abandonment jurisdiction. The LLCs did not seek resolution; they instead sought to burden City et al, and their attorneys, with state and local litigation, including a Strategic Lawsuit Against Public Participation (SLAPP suit) targeting not just the City, RTC and Coalition, but also their attorneys, until City et al gave up.

The LLCs' petition in F.D. 35825 to declare the Harsimus Branch "exempt" from STB regulation flies in the face of the LLCs' own stipulation as well as with summary judgment that the line is subject to STB jurisdiction. F.D. 35825 is simply more churning to burden City et al. The motion for reconsideration in F.D. 35824 is yet another turn of the crank.

The LLCs do not seek to comply with the law. Instead, they seek to prevent this agency from exercising abandonment jurisdiction. They seek instead to avoid any actual abandonment proceeding. The reason is simple: they want to prevent City from any relief until it gives up. This indeed is their constant propaganda spiel to the City Council and to the press.

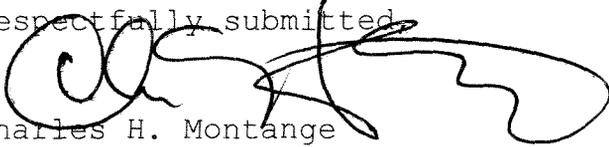
As long as STB has jurisdiction but the LLCs can contrive to prevent its exercise, then the City neither can employ eminent domain to acquire the property (due to federal preemption), nor access a variety of federal remedies, and federally-mediated state law remedies (e.g., N.J.S.A. 48:12-125.1), under which City could acquire the Harsimus Branch from Conrail for public uses (continued rail and compatible park, trail and open space) consistent with historic preservation, all on terms far superior to those sought by the LLCs (whose deeds would be void). In order to wear down City et al, the LLCs employ every device or ruse their attorneys can imagine not just to postpone the day of reckoning but to churn up litigation at all levels to threaten, burden and exhaust City, RTC and the Coalition. All these unreasonable delays are highly prejudicial to City et al. After more than eight years of this, the point has come to get some compliance with the law rather than avoidance of its remedies. See Jersey City v. Conrail, supra, 968 F.Supp. at 303 & 307 (denying LLCs' motion to amend to make various cross and counter claims on grounds of unreasonable delay and prejudice to the other parties). In the end, the LLCs are simply erecting smokescreen after smokescreen, hoping somehow to avoid any abandonment proceeding, and then again re-argue their smokescreens long after they have been blown away.

The LLCs (and Conrail) want an illegal abandonment, and to profit from it. This agency has said that parties like Conrail and the LLCs engaging in unlawful transfers of a rail line without abandonment authority for the purpose of degrading and destroying the line are engaged in an "abuse" from which they must not "be allowed to profit." SF&L Railway, Inc. - Acquisition and Operation Exemption - Toledo, Peoria and Western Railway, F.D. 33995, served Oct. 17, 2002, slip at 19 & n.35. That precept is certainly applicable in the case of the Harsimus Branch. There is no special exemption that allows Conrail or those who deal with it to act unlawfully.

#### Conclusion

There is no basis to grant the LLCs' motion for reconsideration under 49 C.F.R. 1115.3 (b). It must be denied.

Respectfully submitted,



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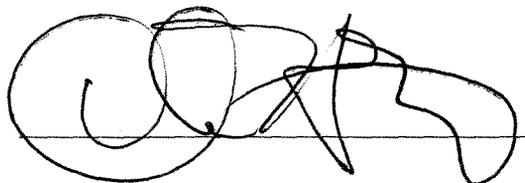
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Attachments: Exhibit I - Conrail's summary showing the LLCs' knew or should have known this was a line; Exhibit II -- the Conrail track charts for Harsimus Branch, Passaic Branch, and River Lines (1980); Exhibit III - excerpts from Feb. 22 Conrail "notice of exemption" in AB 167-1189X

#### Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this 16<sup>th</sup> day of September 2014 addressed to Daniel Horgan, counsel for the LLCs, Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096; and Robert M. Jenkins III, counsel for Conrail, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006-1101, with courtesy copies to the additional parties in AB 167-1189X per the service list below.



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Service List

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

- with address corrections as of August 2014 -

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Exhibit I

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITY OF JERSEY CITY, <i>et al.</i> ,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CONSOLIDATED RAIL CORPORATION,	)
	)
Defendant, and	)
	)
212 MARIN BOULEVARD, LLC, <i>et al.</i> ,	)
	)
Defendant-Intervenors.	)

C.A. No. 09-01900-CKK

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CONSOLIDATED RAIL CORPORATION'S OPPOSITION TO  
DEFENDANT-INTERVENORS' MOTION FOR LEAVE TO  
FILE AN AMENDED ANSWER

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Dated: October 22, 2012

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND AND STATEMENT OF FACTS .....	2
ARGUMENT .....	7
I. THE PROPOSED AMENDMENTS REFLECT UNDUE AND INEXCUSABLE DELAY, BAD FAITH, AND DILATORY MOTIVE .....	7
A. The LLCs Knew in 2006 That Conrail Halted Service Without Filing for Abandonment Authority .....	11
B. The LLCs Knew in 2006 That the City Urged Conrail to Halt Service to Clear the Way for Waterfront Development.....	11
C. The LLCs Knew in 2006 That Conrail Removed Rail Improvements on the Embankment and Eastward Without STB Approval .....	12
D. The LLCs Knew in 2006 About Conrail’s Supposed Internal “Reclassification” and Representations to the City and LLCs Concerning the Regulatory Status of the Harsimus Branch .....	12
E. The LLCs Knew in 2006 About Service to the Hudson Street IT .....	14
F. The LLCs Knew in 2006 About the Milepost Controversies .....	16
II. THE PROPOSED AMENDMENTS ARE HIGHLY PREJUDICIAL .....	17
III. THE PROPOSED AMENDMENTS ARE FUTILE .....	19
A. This Court Does Not Have Jurisdiction Over the Crossclaims.....	19
B. The Crossclaims Are Barred By the Statute of Limitations and Do Not Relate Back .....	22
CONCLUSION.....	25

of the positions that they have recently abandoned. Further, as we demonstrate below, *every* allegedly newly discovered fact that they now construe as support for their claims against Conrail was fully available to them in the STB proceedings, more than six years before they surfaced their proposed amendments in June of this year.

### ARGUMENT

“The grant or denial of leave to amend is committed to the discretion of the district court. It is an abuse of discretion, however, to deny leave to amend without sufficient reason, ‘such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.’” *ASPCA*, 244 F.R.D. at 50-51 (quoting *Foman*, 371 U.S. at 182; citation omitted). Here, virtually every factor set forth in *ASPCA* compels denial of the LLCs’ motion.

Indeed, the very cases cited by the LLCs in support of their amendments compel denial of their motion. *See* Mot. 16-17. The LLCs seek to do far more than “clarify legal theories or make technical amendments” to their Answer. *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). Rather, their amendments would inject entirely new issues into the case and would be highly prejudicial. Thus, under the cases the LLCs themselves cite, the motion should be denied.<sup>4</sup>

#### I. THE PROPOSED AMENDMENTS REFLECT UNDUE AND INEXCUSABLE DELAY, BAD FAITH, AND DILATORY MOTIVE

The basic premise of the LLCs’ attempt to justify their dilatory amendments is false. They even go so far as to blame Conrail for their own failure to bring their claims sooner, suggesting that Conrail’s standing arguments unnecessarily delayed the case (*see* Mem. 7, 22),

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<sup>4</sup> We do not understand the LLCs to be arguing that “mandatory joinder” principles concerning counterclaims (Mem. 14) support their motion to add the *crossclaims*, because, as the LLCs seem to recognize, crossclaims are not mandatory. *See, e.g., Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980).

**A. The LLCs Knew in 2006 That Conrail Halted Service Without Filing for Abandonment Authority**

That Conrail did not seek leave from the STB to abandon the Harsimus Branch was no secret. Conrail admitted it; the LLCs themselves referred to it in a January 23, 2006 petition for extension of time in the STB proceedings, Ex. C, at 1-2; and the STB assumed it in its August 2007 Decision, Ex. A at 1. The LLCs also admitted in their original Answer here that “Conrail did not seek or obtain authorization for abandonment from the [STB] prior to” selling the property to the LLCs. ECF No. 28-1, ¶ 19. Thus, their characterization of this as a recent discovery is belied by the very Answer they now seek to amend. It beggars credulity that the LLCs can cite this “discovery” now as a basis for their proposed amendments.

**B. The LLCs Knew in 2006 That the City Urged Conrail to Halt Service to Clear the Way for Waterfront Development**

That the City urged Conrail to halt service to clear the way for waterfront development and that Conrail sold other parcels also was revealed, indeed emphasized—*by Conrail*—in early 2006 in the STB proceedings. *See* Conrail’s Reply to Pet. for Declaratory Order of Jersey City, et al. (filed Feb. 1, 2006), Ex. I, at 3 (“On the contrary, Jersey City and the Jersey City Redevelopment Agency strongly encouraged Conrail to make the ‘Harsimus Branch’ property, particularly along the waterfront, available for development, and Conrail began to sell off various parcels to the Redevelopment Agency and to private developers. Over time, almost 90% of the acreage was sold off in a half dozen different transactions. The majority of the ‘Harsimus Branch’ property is now covered by commercial and residential developments.”). Of course, the LLCs did not need Conrail to tell them about these facts in 2006: the LLCs’ own February 1, 2006 Reply to the City’s Petition for a Declaratory Order (Ex. J), recited much the same story. *See id.* at 7. The STB likewise recited it in its August 2007 Decision. Ex. A at 5.

**C. The LLCs Knew in 2006 That Conrail Removed Rail Improvements on the Embankment and Eastward Without STB Approval**

That Conrail removed rail improvements on the Embankment and eastward without STB approval also was known to the LLCs in early 2006. The LLCs themselves adverted to this fact in their STB filings. Thus, in their Reply to the City's Petition for a Declaratory Order, the LLCs noted "Conrail removed the tracks and ties and, at the urging of the City of Jersey City, it removed the bridges which crossed the intersecting streets—Grove Street, Erie Street, Jersey Avenue, Coles Street and Monmouth Street. All this was done by Conrail without securing the advance abandonment authorization from the ICC or this Board. Moreover, all this was done by Conrail with the knowledge and acquiescence of the City of Jersey City." LLCs' Reply, Ex. J, at 7; *see also* Ex. H at 4, 23-24; Conrail's Reply, Ex. I, at 3 (referring to "removal of the tracks and bridges" and stating that Conrail removed "all of the railroad infrastructure on the remaining property at Jersey City's request"). The STB's August 2007 Decision also noted this fact. Ex. A at 2, 5. Thus, this supposedly new discovery is a discovery of nothing new. It was known by the LLCs in 2006. It cannot support a motion to amend in 2012.

**D. The LLCs Knew in 2006 About Conrail's Supposed Internal "Reclassification" and Representations to the City and LLCs Concerning the Regulatory Status of the Harsimus Branch**

In early 2006, the LLCs also knew about the alleged "reclassification" by Conrail of the Embankment as a spur. They also knew about Conrail's expression to the LLCs of its belief that there were no regulatory issues with respect to the property, and that Conrail advised the City that the Harsimus Branch had been lawfully abandoned without the need for ICC approval (as well as that the City alleged that Conrail had made a conflicting statement to the City). In fact, the allegation about Conrail's alleged internal reclassification of the property was front and center in the STB proceedings. In its Petition for a Declaratory Order in January 2006, the City

alleged that “in April 1994, Conrail arbitrarily internally reclassified the Harsimus line as ‘spur’ or ‘industrial’ and subsequently took the position that it could sell it to developers without prior ICC (now STB) approval, notwithstanding the claim to the City as late as 2004 that indicated Conrail recognized continued STB jurisdiction.” Ex. K, at 16. *See also id.* at 23 (“Unilateral reclassification of a line is not a permissible means to avoid federal abandonment jurisdiction . . . .”); Ex. L.<sup>5</sup>

In fact, a 1994 list identifying the property as “spur track” was disclosed by Conrail in discovery in the STB proceedings, discussed by Jersey City in its March 9, 2006 Opening Statement, Ex. M, at 4, and included as the very first two pages of Appendix I to Jersey City’s Opening Statement.<sup>6</sup> Jersey City also called Conrail’s alleged representations to the LLCs into question in its March 9, 2006 Opening Statement, in which it referred to an email and a letter from Conrail outside attorney Fiorilla to LLC attorney Alampi. Ex. M at 3. Clearly, Jersey City’s argument in its Opening Statement should have put the LLCs on inquiry about these issues. But in the STB proceeding, the LLCs firmly and repeatedly argued that Conrail’s position was the correct one.

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<sup>5</sup> Exhibit L, an exhibit to the City’s Petition for a Declaratory Order, is a letter, dated June 17, 2005, from one of Conrail’s outside lawyers, John Fiorilla, to one of the City’s lawyers, John J. Curley. It states that the property at issue in this case “was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC (now Surface Transportation Board) approval.” This letter has been in the public record, then, since January 2006. The LLCs cannot argue now that they have just become aware of it or of its potential significance.

<sup>6</sup> Appendix I is included in Exhibit M. Conrail also included the document as Exhibit FF to its April 24, 2006 Reply Statement. Conrail continues to take the position that the list does not reflect an internal *reclassification* but rather the conclusions of an analysis of the regulatory status of various Conrail properties.

**E. The LLCs Knew in 2006 About Service to the Hudson Street IT**

The LLCs' references to revelations about connections between the Harsimus Branch or Harsimus Cove Yard and the Hudson Street IT also are unavailing. The precise significance of these revelations is difficult to tease out from the LLCs' motion and proposed amended pleading. At bottom though, the record of the 2006 STB proceeding establishes that whatever significance service to Hudson Street via the Harsimus Branch or Harsimus Cove Yard may have for the LLCs *now*, the LLCs would have to be charged with knowledge about such service in *2006*, and, at a minimum, were on notice to make inquiries about it no later than early 2006. For instance, in its Opening Statement filed in the STB proceedings in early March, 2006, the City noted:

Conrail by 1985 was referring to the portion of the Harsimus Branch involved in this proceeding as part of the 'Passaic and Harsimus Branch and Hudson Street Track.' This nomenclature appears to encompass everything on the old Harsimus Branch down to the Cove and then south along the waterfront to the former location of the Colgate Palmolive plant on Hudson Street. According to a Conrail document dated January 17, 1985, during the twelve month period ending 9/84, there were seven customers on the Branch, with 3,204 carloadings per year.

Ex. M, at 5. In Appendix I to the City's Opening Statement are several documents produced by Conrail in discovery in the STB proceeding that discuss rail traffic Conrail moved over the Harsimus Branch to and from the Hudson Street IT. *See Ex. M.*<sup>7</sup>

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<sup>7</sup> The third page of that appendix contains a document that prominently discusses the Hudson Street IT, referring to the "Passaic & Harsimus Branch/Hudson St. Industrial" as a "line" that "generated 637 carloads in 1986." The next page of the appendix is titled "Conrail Line Screening Summaries," and "Passaic & Harsimus/Hudson St." is the first entry on that page. That entry provides 1983-1986 data on the number of cars, the number of customers, the revenues, and other information about the use of the trackage. There follows a document (with the header "Exhibit 1") that has a centered title "Hudson Street Track," and lists the customers on the trackage and the carloads and revenues for them for the period ending September 1984. Next, the appendix includes a Conrail memorandum whose subject is "Passaic & Harsimus Branch/Hudson Street Track, Jersey City, NJ." That document also provides an analysis of the customers, carloads, and revenues relating to the trackage. *See Ex. M.*

The LLCs did not just have *notice* about the service via the Hudson Street IT. They discussed it in their own papers. *See* Reply Statement, Ex. H, at 22-23. In fact, LLC witness William F. Wulforth related that when he was special duty Assistant Trainmaster working on the Harsimus Branch, for the Pennsylvania Railroad, they “handle two or three carloads of inbound traffic, five nights a week, for Colgate, but that was a difficult operation, as the train had to wend its way through the streets of Jersey City to reach Colgate’s plant . . . .” *Wulforth V.S.*, Ex. F, at 2. As the documents referred to in the previous paragraph show, Colgate was the primary customer on the Hudson Street IT.<sup>8</sup>

Finally, any argument that the LLCs were not aware until recently that the Hudson Street IT had been assigned its own Line Code number and was separately conveyed to Conrail cannot stand even the slightest scrutiny. The reference to the Hudson Street IT and its line code (Line Code 1440) occurs on the *same page* of the FSP (page 272) as does the reference to the Harsimus Branch. That page has been introduced into proceedings relating to the property many times, including in Appendix VIII to the City’s March 9, 2006 Opening Statement. *See* Ex. M. It also was specifically cited by the STB in its August 2007 decision. Ex. A, at 3.

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<sup>8</sup> The service to Hudson Street via the property was also noted in the STB’s August 2007 decision. *See* Ex. A, at 4, 8-9 (referring to the trackage as having been used for shippers located on Hudson Street), 10 (trackage used to “move substantial amounts of traffic to serve shippers located on Hudson Street”); *see also* STB December 2007 Decision, Ex. B, at 3 (noting volume of cars for shippers on Hudson Street). The prominence of the issues relating to the Hudson Street IT in the STB proceedings also torpedoes the LLCs’ argument that they were somehow misled or put off inquiry by Conrail’s inclusion of the Hudson Street IT in a 2008 abandonment notice followed by Conrail’s subsequent withdrawal of the Hudson Street track from that notice. In light of what they knew about the allegations concerning the implications of service to the Hudson Street IT in 2006, it is utterly mysterious how Conrail’s subsequent filing in the STB could have put them off the trail.

**F. The LLCs Knew in 2006 About the Milepost Controversies**

As for the LLCs' alleged discoveries about alleged misstatements by Conrail concerning the relationship between the Embankment and the Harsimus Branch designated in the FSP as Line Code 1420 and the correct location of the mileposts referred to in the FSP, these issues were sharply contested in the STB 2006 proceedings. Essentially, the position that the LLCs are now taking appears to be the very position that the City took—and the LLCs disputed based on their own independent research—in the 2006 STB proceedings. *See, e.g.*, LLCs' Reply (Feb. 1, 2006), Ex. J, at 2-3, 6-7; Jersey City, et al., Opening Statement, Ex. M, at 1, 16-21, 25; LLCs' Reply Statement, Ex. H, at 1, 13-14 (disputing that Line Code 1420 designated the property at issue in this case to be an active line of railroad and noting that Jersey City's argument "completely ignores the milepost designations of the 6th Street Embankment as set forth" in the FSP); *see also id.* at 14-18 (further discussing location of the property and milepost issues); Heffner V.S., Ex. D, at 3-4 (discussing mileposts as shown on maps reviewed by Heffner and Kahn at the National Archives); LLCs' Reply (May 26, 2006), Ex. N, at 2 (discussing mileposts in connection with City's motion to admit track charts). The LLCs relied on their milepost analyses to claim, like Conrail, that the Harsimus Branch was ancillary track to the Main Line of the Pennsylvania Railroad, and the LLCs specifically petitioned the STB for reconsideration of its contrary decision. August 29, 2007 LLCs' Pet. for Reconsideration, Ex. O, at 3-5.<sup>9</sup>

Given how vigorously the parties disputed the location of the mileposts and the relationship between the property and the FSP's designation of Line Code 1420, as well as the amount of independent research performed by the LLCs' lawyers and experts in the 2006 STB

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<sup>9</sup> The LLCs continued to make the same milepost/property identification argument in their appeal to the D.C. Circuit. *See* Br. of Pet'rs 212 Marin Blvd., LLC et al., Ex. P, at 5-6 (submitted Feb. 3, 2009 in Case Nos. 07-1401, 07-1529, 08-1019, and 08-1052).

proceedings, it is clear that, at a minimum, the LLCs were on notice in early 2006 of the basis for the allegations that they now assert against Conrail. Their claim to have just discovered facts causing them to change their position defies belief.

\* \* \*

In short, the record clearly establishes that in early 2006 the LLCs knew or were on notice about every matter that they claim just to have discovered. Their proposed amendments reek of undue delay, bad faith, and dilatory motive.

## **II. THE PROPOSED AMENDMENTS ARE HIGHLY PREJUDICIAL**

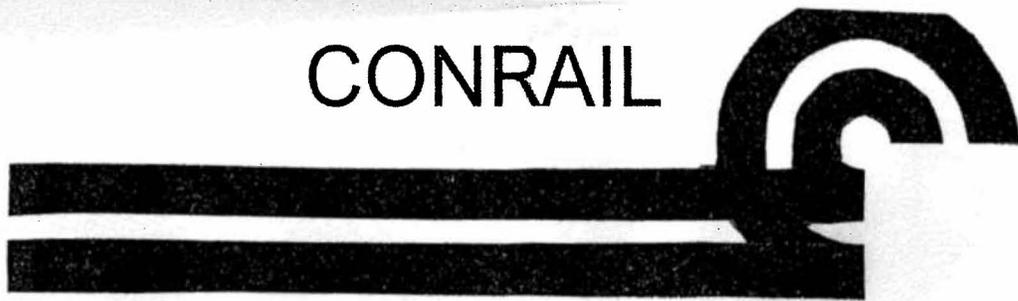
Prejudice to the party opposing the proposed amendment is a critical factor for the Court to consider in deciding whether to grant leave to amend. *ASPCA*, 244 F.R.D. at 50-51. “The Court may deem prejudicial an amendment that substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation. The Court may also deny leave to amend where the non-moving party would be put to the additional expense and burden of a more lengthy and complicated trial or where the issues raised by the amendment are remote to the issues in the case.” *Id.* at 51 (internal quotation marks and citation omitted).

The LLCs’ proposed fraud crossclaims would be highly prejudicial to Conrail. Until now, this case has been about the terms of the FSP and the conveyance documents executed pursuant to the FSP—focusing on whether the Embankment was conveyed to Conrail as a line of railroad. Conrail (and Plaintiffs) have briefed those issues on summary judgment and developed and memorialized evidence relating to those matters.

The LLCs’ proposed state-law fraud claims, however, would radically alter the theory on which the case has proceeded and greatly increase Conrail’s burden and expense in defending itself. Under New Jersey law, the elements of common law fraud are “(1) a material

Exhibit II

CONRAIL

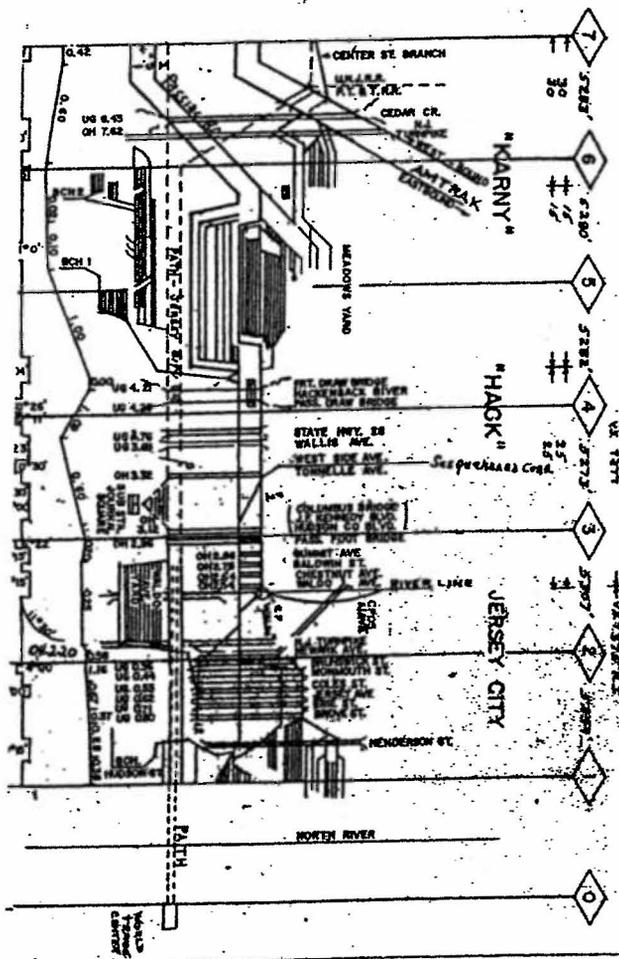


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Exhibit III

ENTERED  
Office of Proceedings

FEB 26 2009

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC 20423

**FILED**

FEB 26 2009

SURFACE  
TRANSPORTATION BOARD

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

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

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

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

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

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

VERIFIED NOTICES OF EXEMPTION

**FEB RECEIVED**

FEB 26 2009

SURFACE  
TRANSPORTATION BOARD

I Consolidated Rail Corporation (“Conrail”) hereby files its Verified Notice of Exemption pursuant to 49 C.F.R. 1152.50 to abandon property, described below, that the Board has determined is part of a line of railroad subject to the Board’s abandonment authority. CSX Transportation, Inc (“CSXI”) and Norfolk Southern Railway Company (“NS”) hereby file their Verified Notices of Exemption pursuant to 49 C.F.R. 1152.50 to discontinue service over the same property. A map showing the location of the property and more specifically describing the portion to be abandoned is attached hereto as Exhibit A.

Name. Harsimus Branch

Location City of Jersey City, Hudson County, New Jersey

Description of Track. Rail right-of-way running from CP Waldo (Milepost 0 00) in the City of Jersey City to a point east of Washington Street (Milepost 1.36), which traverses United States Postal Service Zip Codes 07302, 07306, and 07310 (According to the Board, the Milepost at CP Waldo is 2 54 and the Milepost at a point near Marin Boulevard is 1.30. The Board has not assigned a Milepost number to the point east of Washington Street. See *City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Coalition, and New Jersey State Assemblyman Louis M. Manzo—Pet. for Dec Order*, STB Fin Dkt. No 34818 (served Aug 8, 2007), slip op. at 1.)

Length of Track 1.36 miles±

2. Applicants certify that (a) no local or overhead traffic has moved over the property for at least two years, (b) any overhead traffic that has or could move over the property can be rerouted, and (c) no formal complaint filed by a user of rail service on the property (or a state or local government entity acting on behalf of such user) regarding cessation of service over the property either is pending before the Board or any United States District Court or has been decided in favor of a complainant within the last two years.

3. The proposed consummation date of the abandonment is April 17, 2009

4. The exact names of the applicants are Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company ("Applicants").

5 Applicants are common carriers by railroad subject to Subtitle IV, Part A, of Title 49, United States Code, and are not a part of any other railroad system.

6. The relief Applicants seek is abandonment of and discontinuance of service over the above-described property that the Board has determined is part of a line of railroad

7 Applicants' representatives to whom correspondence relating to this matter should be addressed are John K. Enright, Associate General Counsel, Consolidated Rail Corporation, 1717 Arch Street, 32<sup>nd</sup> Floor, Philadelphia, PA 19103, Telephone (215) 209-5012, and Robert M Jenkins III, Mayer Brown LLP, 1909 K Street, NW, Washington, DC 20006, Telephone (202) 263-3261.

8 Possible public uses that have been suggested for the property include public park use, public trail use, and light rail use. The property east of Milepost 0.18 has previously been sold to various private and public development entities. See *City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Coalition, and New Jersey State Assemblyman Louis M. Manzo—Petition for Declaratory Order*, STB Fin. Dkt. No. 34818 (served August 9, 2007), slip op. at 4-5.

9. Applicants acknowledge that the Board must require provisions for protection of the interests of employees as a condition of any abandonment and that it may not in the exercise of its exemption authority relieve a rail carrier from an obligation to protect the interests of

employees. See 49 U.S.C. 10903(b)(2) and 10502(g), as amended. Applicants believe that the appropriate level of labor protection to be imposed is that contained in the conditions set forth in *Oregon Short Line Railroad Company – Abandonment – Goshen*, 360 I.C.C. 91 (1979)

10 On March 6, 2008, Applicants filed with the Board an Environmental and Historic Report in conformance with 49 C.F.R. 1105.7 and 1105.8. Attached as Exhibit B is a Supplemental Environmental and Historic Report providing additional environmental and historic preservation information with respect to possible indirect impacts arising from reuse of the property (Conrail does not concede that such indirect impacts would be caused by the proposed undertaking within the meaning of either the National Environmental Policy Act or the National Historic Preservation Act.)

11. Counsel for Conrail certifies that Conrail has sent the letter required by 49 C.F.R. 1152.50(d)(1) to the agencies and entities specified (a copy of which is attached hereto as Exhibit C), that Conrail has served copies of the Supplemental Environmental and Historic Report on all of the agencies and entities specified in 49 C.F.R. 1105.7(b), 1105.8(c), pursuant to a letter conforming to the requirements of 49 C.F.R. 1105.11 (a copy of which is attached hereto as Exhibit D), and that Conrail has served the Notices of Exemption, including the Supplemental Environmental and Historic Report, on the parties on the service list in these proceedings. Counsel for Conrail also certifies that the requirements of 49 C.F.R. 1105.12 have been fulfilled by the publishing of a notice on February 24, 2009, in the *Star-Ledger*, a newspaper of general circulation in Hudson County, New Jersey. A copy of the text of this notice is attached hereto as Exhibit E.

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



Robert M. Jenkins III  
Kathryn Kusske Floyd  
MAYER BROWN LLP  
1909 K Street, NW  
Washington, DC 20006  
(202) 263-3261

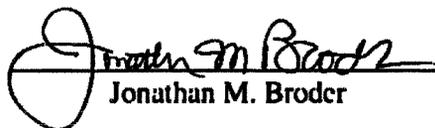
DATE: February 26, 2009

**VERIFICATION**

COMMONWEALTH OF PENNSYLVANIA

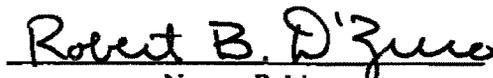
COUNTY OF PHILADELPHIA

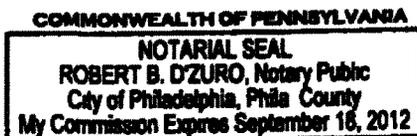
Jonathan M Broder, being duly sworn, makes oath and says that he is Vice President – General Counsel and Corporate Secretary of Consolidated Rail Corporation, that he has been authorized by proper corporate action of Consolidated Rail Corporation to verify and file with the Surface Transportation Board the foregoing Notices of Exemption, that he has general knowledge of the facts and matters relied upon in such Notices; and that all representations set forth therein are true and correct to the best of his knowledge, information and belief.

  
Jonathan M. Broder

Sworn To and subscribed Before Me This

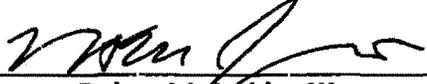
23<sup>rd</sup> Day of February, 2009

  
Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2009, I caused a copy of the foregoing "Verified Notices of Exemption" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List.

  
Robert M. Jenkins III

# EXHIBIT A



**Begin Milepost 0.00**

**HARSIMUS BRANCH  
LINE CODE 1420**

**End Milepost 1.36**

**LIBERTY  
STATE PARK**

**ANTICIPATED LINE ABANDONMENT  
HARSIMUS BRANCH**

■■■■■ ANTICIPATED ABANDONMENT

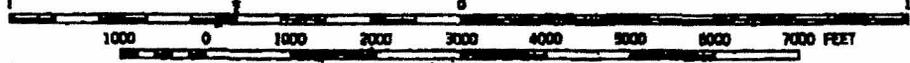
**EXHIBIT "A"**

**1 of 2**

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DMA 6185 II NE-SERIES V822

**SCALE 1:24 000**



Jersey City, New Jersey



Begin. Milepost 0.00

HARSEMUS BRANCH  
LINE CODE 142B

End Milepost 1.36

EXHIBIT "A" SHEET 2 of 2

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# EXHIBIT B

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC 20423**

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

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

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

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

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

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

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**NOTICES OF EXEMPTION**

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**SUPPLEMENTAL ENVIRONMENTAL AND HISTORIC REPORT**

Consolidated Rail Corporation (“Conrail”) submits this Supplemental Environmental and Historic Report in accordance with 49 C.F.R. §§ 1105.7 and 1105.8<sup>1</sup> Conrail previously submitted an Environmental and Historic Report in these proceedings on March 6, 2008. The March 6 Report focused on the direct effects of the abandonment itself. There are none, because the line the Board has determined is a line of railroad (“Harsimus Branch”) has been out of service for many years and all of the track and track structure have been removed.

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<sup>1</sup> Conrail, CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NS”) have filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS).

determine, that the remainder of the Harsimus Branch required abandonment authority, however, to avoid any debate about that issue, Conrail is seeking abandonment of all of Harsimus Branch property that Conrail was decided that could be claimed to be a line of railroad.

There is no realistic alternative to abandonment. The right-of-way has not been used for rail service for many years, all of the track and track structure has long been removed, and there are no shippers currently or potentially interested in rail service.

This history of the Harsimus Branch and the current status of the realty underlying the right-of-way is set forth in the STB's 2007 Decisions and the attached APE Report. All traces of the track east of Milepost 0.88 (Marin Boulevard, a/k/a Henderson Street) have been eliminated by extensive development of the properties for retail, residential, and commercial projects. Thus, abandonment of the right-of-way will have no impact, environmental or otherwise, east of Milepost 0.88. Similarly, abandonment of the right-of-way will have no impact on the property that is still owned by Conrail, between Milepost 0.00 and Milepost 0.18, because Conrail has no current plans for that property. Abandonment of the right-of-way between Milepost 0.18 and 0.88 will have no direct impact on the property, but it will allow the property to be developed by the City of Jersey City, if the City follows through with its announced plans to condemn the property for park or trail use and complies with state and local historic preservation requirements. Alternatively, if the City does not condemn the property, it may be developed for residential housing by its current owners, assuming they are able to obtain the necessary development permits and approval from the Jersey City Historical Preservation Commission.

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1.36 that Conrail was decided. According to the Board, the Milepost at CP Waldo is 2.54 and the Milepost at a point near Marin Boulevard (which Conrail has designated as Milepost 0.88) is 1.30. The Board has not assigned a Milepost number to the point east of Washington Street that Conrail has designated as Milepost 1.36. See *City of Jersey City, Et Al.—Pet for Dec. Order*, STB Fin. Dkt. No 34818 (served Aug. 8, 2007), slip op. at 1.

**COLOR PAGES INCLUDED**

**APPENDIX A**

AREA OF POTENTIAL EFFECTS REPORT  
AND PROPOSED METHODOLOGY FOR  
SECTION 106 CONSULTATION  
CONRAIL HARSIMUS BRANCH ABANDONMENT  
(STB DOCKET NO. AB167 (SUB-NO. 1189X))  
CITY OF JERSEY CITY  
HUDSON COUNTY, NEW JERSEY  
SEPTEMBER 2008

**RICHARD GRUBB & ASSOCIATES, INC.**  
Cultural Resource Consultants

**Area of Potential Effects Report  
and Proposed Methodology for  
Section 106 Consultation  
Conrail Harsimus Branch Abandonment  
(STB Docket No. AB 167 (Sub No. 1189X))  
City of Jersey City, Hudson County  
New Jersey**

**September 2008**

**Principal Investigators**

Philip A. Hayden (Senior Historian)

**Prepared by:**

Richard Grubb & Associates, Inc.  
30 North Main Street  
Cranbury, New Jersey 08512

**Prepared for:**

Consolidated Rail Corporation  
1717 Arch Street  
Philadelphia, PA 19103

## **INTRODUCTION**

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) are requesting approval from the Surface Transportation Board (STB) to abandon and discontinue freight service on a railroad right-of-way known as the Harsimus Branch, Milepost 0.00+- to Milepost 1.36+-, in the City of Jersey City, Hudson County, New Jersey (Figure 1). The abandonment itself will have no direct impact on historic properties in the right-of-way or in the surrounding area. However, possible actions by third parties after the abandonment is approved may be regarded as reasonably foreseeable and potentially causing indirect changes to historic properties. This report has been prepared to delineate the Area of Potential Effects (APE) for a cultural resources investigation in compliance with Section 106 of the National Historic Preservation Act of 1966. The report also outlines a proposed methodology for conducting the investigation, recommends consulting and interested parties, and suggests a public participation plan to initiate Section 106 consultation among Conrail, the STB, the New Jersey Historic Preservation Office (HPO), and other consulting parties.

## **THE HARSIMUS BRANCH**

In a decision issued August 9, 2007, in Docket No. 34818, the STB held that part of the Harsimus Branch running between Waldo Avenue and Marin Boulevard constituted a line of railroad requiring abandonment authorization. As described in the STB's decision, the Harsimus Branch ran from a main-line connection at Waldo Avenue into Harsimus Cove Yard on the Hudson River. (There was some debate in the decision about the applicable milepost numbers. For convenience, we use here milepost numbers for the right-of-way drawn from the historic Valuation Maps.) The City of Jersey City and others sought a declaratory order from the Board only for the part of the Harsimus Branch running between Waldo Avenue and Marin Boulevard, but the City claimed that the entire Harsimus Branch was a line of railroad requiring abandonment authorization. Accordingly, Conrail is seeking abandonment authority for all of the Harsimus Branch right-of-way that it ever owned.

The Harsimus Branch right-of-way extends through a highly developed, urban landscape characterized by passenger and freight rail lines, modern highway viaducts, contemporary single-story commercial and industrial buildings, warehouses, a cemetery, parking lots, public parks, athletic fields, attached and detached town homes, civic and religious buildings, and multi-story residential and business structures ranging in age from the mid-nineteenth century to the present day. The western end of the right-of-way begins at Milepost 0.00 inside the Bergen Cut, a 40-foot deep channel cut through a ridge of trap rock on the western side of Jersey City. The track (no longer

**APPENDIX B: FIGURES AND PLATES**

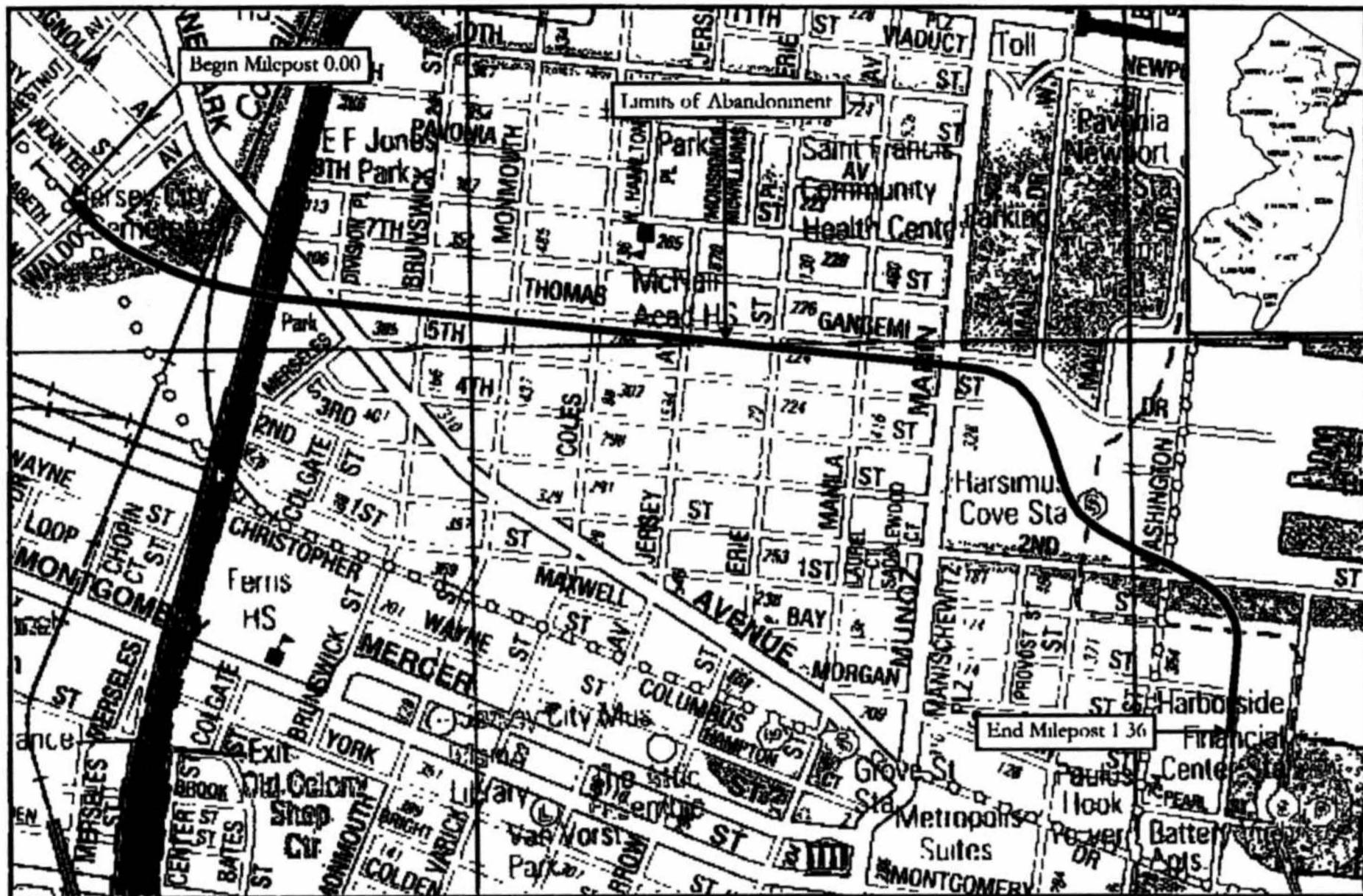
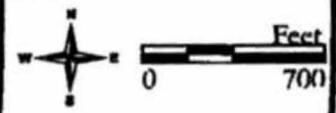


Figure 1:  
Limits of Abandonment  
(from 2004 Hagstrom Map Company, Inc., Street Map of Hudson County, New Jersey).



# EXHIBIT D

**CONRAIL**



**JOHN K. ENRIGHT, Associate General Counsel**

1717 Arch Street, Philadelphia, PA 19103  
Phone 215-209-5012 • Fax 215-209-4819  
john.enright@conrail.com

February 6, 2009

To: All Parties on Attached Service List

Re: Docket No. AB 167 (Sub-No. 1189X)  
Consolidated Rail Corporation—Abandonment  
Exemption—in Hudson County, New Jersey

Docket No. AB 55 (Sub-No. 686X)  
CSX Transportation, Inc.—Discontinuance  
Exemption—in Hudson County, New Jersey

Docket No. AB 290 (Sub-No. 306X)  
Norfolk Southern Railway Company—Discontinuance  
Exemption—in Hudson County, New Jersey

On January 6, 2009, Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NS”) filed with the Surface Transportation Board (“STB”) combined Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS) regarding a rail line known as the Harsimus Branch (between milepost 0.00 and 1.36) in the City of Jersey City, Hudson County, New Jersey. The same day, pursuant to 49 C.F.R. §§ 1105.7, 1105.8, and 1105.11, Conrail served a consultation notice on the public agencies specified in those regulations, along with its Supplemental Environmental and Historic Report. Because the consultation notice was not served 20 days in advance of the filing of the Notices of Exemption, as required by the regulations, and because Conrail was moving to stay the effective date of the Notices of Exemption for 180 days, Conrail sought a waiver from the STB of the pre-filing notification requirement. In a decision served January 26, 2009, the STB denied Conrail’s request for a waiver of the pre-filing notification requirement and Conrail’s motion to stay the effective date of the Notices of Exemption for 180 days—without prejudice to Conrail re-filing under the normal procedure for abandonment notices of exemption.

All Parties on Attached Service List  
February 6, 2009  
Page 2

Conrail intends to refile its Notice of Exemption on or about February 26, 2009, under the normal procedure. The Supplemental Environmental and Historic Report that Conrail circulated on January 6, 2009, has not changed. A month has passed since Conrail circulated that Report. Nevertheless, out of an abundance of caution, to ensure there is no question of compliance with 49 C.F.R. §§ 1105.7, 1105.8, and 1105.11, Conrail is again providing a copy of that Supplemental Environmental and Historic Report describing the proposed abandonment undertaking and the possible indirect environmental and historical effects that may arise from reuse of the "Embankment" portion of the property by third parties after abandonment, as well as a map of the affected area.

Conrail does not believe that any particular reuse is reasonably foreseeable or that the proposed abandonment would be the proximate cause of such reuse. A number of potential uses have been proposed for the property, and active negotiations continue about the various possibilities. Two possibilities appear more likely than others. The first is that the property will be acquired by the City and converted to a public park. The second is that the current owners of the various properties making up the Embankment will develop those properties for residential housing. Although Conrail does not believe that either of those reuse possibilities is reasonably foreseeable or would be caused by abandonment of the right-of-way, Conrail has addressed them in the attached Supplemental Environmental and Historic Report.

Conrail is providing this Report so that you may review the information that will form the basis for the STB's independent environmental and historic preservation analysis of this proceeding. If any of the information is misleading or incorrect, if you believe that pertinent information is missing, or if you have any questions about the Board's environmental review process, please contact the Section of Environmental Analysis ("SEA"), Surface Transportation Board, 395 E Street, SW, Washington, DC 20423, telephone (202) 245-0295, and refer to Docket No. AB 167 (Sub-No. 1189X). Because the applicable statutes and regulations impose stringent deadlines for processing this action, your written comments to SEA (with a copy to our representatives) would be appreciated within 3 weeks.

Your comments will be considered by the Board in evaluating the environmental and/or historic preservation impacts of the contemplated action. If there are any questions concerning this proposal, please contact our representatives directly. Conrail's representatives are John K. Enright, Associate General Counsel, Consolidated Rail Corporation, who may be contacted by telephone at (215) 209-5012 or by mail at 1717

All Parties on Attached Service List

February 6, 2009

Page 3

Arch Street, 32nd Floor, Philadelphia, PA 19103, and Robert M. Jenkins III, Mayer  
Brown LLP, who may be contacted by telephone at (202) 263-3261 or by mail at 1909 K  
Street, NW, Washington, DC 20006.

Sincerely,

A handwritten signature in black ink, appearing to read "John K. Enright". The signature is stylized and cursive, with the first name "John" and last name "Enright" clearly legible.

John K Enright

Begin Milepost 0.00

HARSIMUS BRANCH  
LINE CODE 1420

End Milepost 1.36

LIBERTY  
STATE PARK

ANTICIPATED LINE ABANDONMENT  
HARSIMUS BRANCH

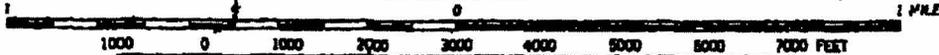
\*\*\*\*\* ANTICIPATED ABANDONMENT

EXHIBIT "A"  
1 of 2

JERSEY CITY, N. J. - N. Y.  
N4037 5-W7400/7 5

1967  
PHOTOREVISED 1981  
DMA 6188 II NE-SERIES V822

SCALE 1 24 000



Jersey City, New Jersey



Begin Milepost 0.00

HARSMUS BRANCH  
LINE CODE 1420

End Milepost 1.36

EXHIBIT "A" SHEET 2 of 2

0 mi 0.2 0.4 0.6 0.8 1

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