BEFORE THE
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

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REPLY OF CONSOLIDATED RAIL CORPORATION TO "ADDITIONAL SUPPLEMENTAL COMMENTS" OF JERSEY CITY, ET AL.

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Public Record

Consolidated Rail Corporation ("Conrail") replies here to the "Additional Supplemental Comments" filed by the City of Jersey City, et al. ("City Parties") on September 25, 2014. As in their Reply to Conrail's Supplemental Environmental and Historic Report, filed September 3, 2014, and their Motion to Compel Discovery, filed September 18, 2014, the City Parties in their "Additional Supplemental Comments" claim that Conrail has engaged in intentional "anticipatory demolition" in violation of Section 110(k) of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470h-2(k).

Conrail responded to this claim at some length in its Reply to the City Parties' Motion to Compel, filed October 7, 2014. In a nutshell, the City Parties have made a Section 110(k) claim

since the outset of this proceeding, arguing that Conrail removed track and bridges from the Harsimus Branch in the 1990s with the intention of evading historic preservation review under Section 106 of the NHPA. In its Environmental Assessment served March 23, 2009, the Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or "OEA") rejected that claim. Observing that the City itself had pressured Conrail to remove the track structure and that Conrail had cooperated in the abandonment process once the STB had determined that the Harsimus Branch was a line of railroad, OEA found that Conrail had acted "appropriately and in good faith." EA at 14. The City Parties are now attempting to argue that circumstances have changed, because in subsequent Special Court proceedings the owners of the properties at issue (the "LLCs") made a fraud claim against Conrail, which the Special Court refused to entertain.

Conrail showed in its Reply to their Motion to Compel why the City Parties' effort to transmute the LLCs' failed claim *against* Conrail, which Conrail vigorously disputed, into an admission of intentional wrongdoing *by* Conrail, is completely nonsensical. Conrail Reply at 6-9. We need not repeat that discussion here. What the City Parties appear to be trying to do in their "Additional Supplemental Comments" is support their Section 110(k) claim by selectively re-telling the history of the City's involvement with the Harsimus Branch, in an effort to make it appear that Conrail somehow intentionally misled the City about the regulatory status of the Harsimus Branch.

Nowhere, however, in any of the City Parties' selective rendition of the history of the City's involvement with the Harsimus Branch is there *any* indication that Conrail believed the Harsimus Branch was a line of railroad subject to STB abandonment authority, either before or after Conrail removed the track and bridges. The evidentiary record and the STB's and OEA's

own findings make abundantly clear that Conrail worked closely with the City and its Redevelopment Agency to make property underlying the Harsimus Branch east of the Embankment properties available for redevelopment, and *no one* suggested that abandonment authority was required.[1] Furthermore, Conrail worked closely with the City and its Redevelopment Agency for several years to make the Embankment properties available for redevelopment, and, here again, *no one* suggested that abandonment authority was required.[2] As OEA pointed out, the City itself removed a bridge on the Embankment properties at Marin Boulevard and Conrail removed the remaining bridges at the urging of the City. EA at 14.

The City Parties in their "Additional Supplemental Comments" make much of the fact that Conrail in 1999 opposed the listing of the Embankment properties on the State Register of Historic Places. Supp. Comments at 11-12. The City Parties neglect to mention, however, that the City itself also in 1999 expressly opposed the listing of the Embankment properties on either the State or National Registers of Historic Places. Indeed, the City presented expert testimony at the State Review Board hearing opposing the listing. Then-Mayor Schundler subsequently reiterated the City's opposition in a letter to the Assistant Administrator of the New Jersey Department of Environmental Protection that attached a detailed summary of the City's objections.[3] Certainly, Conrail cannot now be criticized by the City Parties for raising objections in 1999 to the listing of the Embankment properties on the State Register when the City itself at the time was actively opposing such a listing.

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[1] *See, e.g.*, Decision served August 9, 2007, in STB Finance Docket No. 34818, *City of Jersey City, Et Al.—Pet. for Dec. Order*, slip op. at 4-5; Reply Statement of Consolidated Rail Corporation in STB Docket No. 34818, filed April 24, 2006 ("Conrail April 24, 2006 Reply Statement"), Ryan Verified Statement ("VS") at 10-14.

[2] Conrail April 24, 2006 Reply Statement, Ryan VS at 14-18.

[3] *See* Conrail April 24, 2006 Reply Statement, Appendix O.

The City Parties also criticize Conrail for selling the Embankment properties to the LLCs in 2005 when the City had engaged eminent domain counsel, who was seeking access to the properties to perform an appraisal. Supp. Comments at 4-6. What the City Parties conveniently elide, however, is that Conrail *three years* earlier had put the properties out for bids, after several prior years of fruitless negotiation with the City and its Redevelopment Agency for the City to acquire the properties.[4] Both the Redevelopment Agency and the City reviewed the bid invitation in 2002 and expressed no interest.[5] Only the LLCs' principal submitted a bid that met Conrail's minimum requirements, and Conrail entered into a binding contract with that principal long before the City's counsel contacted Conrail. Having been frustrated for years in its effort to sell the Embankment properties to the City, Conrail could hardly be criticized for closing a sale with a committed buyer simply because the City's counsel belatedly suggested that the City had a renewed interest in acquiring the properties.[6]

The City Parties suggest repeatedly in their "Additional Supplemental Comments" that a Declaration filed by the LLCs' counsel in the Special Court proceedings demonstrates that there was no good faith basis for anyone to believe in 2005 that the Embankment properties were not

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[4] *See* Conrail April 24, 2006 Reply Statement, Ryan VS at 14-16.

[5] *See* Conrail April 24, 2006 Reply Statement, Appendices R, S, and T.

[6] The City Parties assert that after the City designated the Embankment properties as an "historic landmark" in 2003, the City held meetings with Conrail about acquiring the Embankment properties. Supp. Comments at 13. But Conrail never received any concrete proposals. "What it received instead were periodic overtures to meet to talk about the possibility of the City or some other public entity acquiring the property instead of Conrail selling the property to the only bidder that had met Conrail's terms." Conrail April 24, 2006 Reply Statement, Ryan VS at 16. At one such meeting, the City Parties assert that Conrail told the City that its condemnation authority was preempted. Supp. Comments at 13. This is not a new assertion, and it is not only unsupported by the concurrent notes of the City consultant who supposedly heard it at the meeting, but also by the Verified Statements of the Conrail representatives at the meeting who supposedly said it. *See* Conrail April 24, 2006 Reply Statement, Ryan VS at 16-17 and Fiorilla VS at 2.

part of an active line of railroad. Supp. Comments at 14-15, 17-20. The lawyer who filed that Declaration did not become an attorney for the LLCs until 2008, and he did not have his epiphany until 2012, when the LLCs presented his Declaration as evidence to support their newly hatched fraud claim against Conrail. As the City Parties themselves note, he has a difficult time squaring the assertions in his Declaration with positions he himself took in proceedings before this agency and in state court on behalf of the LLCs. *Id.* at 17-18. More important, however, his position cannot be squared with the expert opinion of the LLCs' prior counsel, former ICC General Counsel Fritz Kahn, and the many expert witnesses Mr. Kahn presented to the STB in support of the LLCs' position that the Harsimus Branch was and is a spur, and not a regulated line of railroad.

Mr. Kahn is well-versed in all facets of rail regulation, including the "case-by-case, fact-specific" determination of the jurisdictional status of rail trackage. *N.Y. City Econ. Dev. Corp.—Pet. for Dec. Order*, STB Finance Docket No. 34429, slip op. at 5 (served July 15, 2004). The LLCs not only were represented by Mr. Kahn, but they also obtained the services of an impressive array of former railroad and United States Railway Association ("USRA") personnel to research the Embankment properties and offer testimony in the form of Verified Statements. These included (1) John D. Heffner, himself a long-time practicing transportation attorney, a former staff attorney at the ICC, and a former member of the Office of General Counsel for USRA, (2) James W. McClellan, who was USRA's Vice President in charge of the Office of Strategic Planning, (3) Richard B. Hasselman, formerly a Vice President at Penn Central and a Senior Vice President at Conrail, (4) William F. Wulfhorst, former special duty Assistant Trainmaster on the Harsimus Branch, who was also familiar with operations on the Hudson

Street Industrial Track, and (5) Victor Hand, a former USRA official who also at one time was a brakeman on the New Jersey Division of the Penn Central.[7]

Together with this detailed testimony, the LLCs presented extensive documentary evidence, participated in written discovery and document production, and made their own independent legal arguments to the STB, the United States Court of Appeals for the District of Columbia Circuit, and (until 2012) the Special Court that the Harsimus Branch was not a regulated line of railroad. Whatever may have been the motivation of the LLCs in changing legal counsel and reversing a position they had firmly espoused for six years, their change in tactics, which the Special Court rejected, does not alter the fact that their own independent legal and factual experts refuted the belated assertions of their subsequent counsel. Conrail is not here contesting that abandonment authority is now required for the Harsimus Branch, including over the Embankment properties, but there was and is ample support, including in the LLCs' own expert evidence and argument, for its good faith belief that the Harsimus Branch was not a regulated line of railroad.

The City Parties attach to their "Additional Supplemental Comments" excerpts from the New Jersey Title Practice Handbook and a copy of N.J.S.A. 48:12-125.1. Supp. Comments at 3-4. They suggest that Conrail or the LLCs, or both, violated the Title Practice Handbook. Even assuming it were possible to violate a treatise like the Title Practice Handbook, if the City Parties have a state-law claim concerning the LLCs' title to the Embankment properties, they can make it in state court. They are already making a claim in state court under N.J.S.A. 48:12-125.1 that the sale of the Embankment properties to the LLCs violated state law, so it is mystifying why they are raising that law with the STB.

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[7] *See* Reply Statement of 212 Marin Boulevard, et al., in STB Docket No. 34818, filed April 24, 2006.

Whether the state court does or does not void the sale under N.J.S.A 48:12-125.1, there is no reason for the STB to do so. The net effect of the parties' stipulations and the Special Court's judgment is that Conrail retains a common carrier obligation over the old Harsimus Branch right of way. For all intents and purposes, Conrail has a constructive easement that cannot be extinguished without abandonment authority from the Board. Contrary to the City Parties' ominous suggestions (Supp. Comments at 20), no demolition of the Embankment properties can or will take place without that authority.[8] And the remedies the City Parties can seek in the STB's abandonment proceedings are the same regardless of whether Conrail or the LLCs own the property underlying the right of way.[9]

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[8] Furthermore, no demolition of the Embankment properties can take place without a waiver of Jersey City's Historic Landmark designation for those properties. As Conrail explained in its Supplemental Environmental and Historic Report filed August 21, 2014, the LLCs have been denied such a waiver, after extensive hearings, both by the Jersey City Historic Preservation Commission and by the Jersey City Zoning Board of Adjustment. Accordingly, it is no longer reasonably foreseeable that the LLCs could carry out any demolition of the Embankment properties if the STB grants abandonment authority.

[9] That does not mean that the City Parties or any other party will get the remedy it wants. Conrail is not required, for example, to agree to a Trails Use request, and has already made clear that it will not do so. By the same token, Conrail has made clear that it is prepared to offer and provide in the Section 106 review process—if there remains any need to conduct such a process (in light of the LLCs' inability to obtain waivers from Jersey City's Historic Landmark restrictions)—only the remedies it would provide if it still owned the underlying fee interest in the property. *See* Reply of Consolidated Rail Corporation to "Motion to Reopen," filed May 18, 2009, at 6 and n. 1. The ICC determined years ago by rule that the most the agency can require of railroads in a Section 106 proceeding is that they provide documentation of rail lines, bridges, and other historic structures to preserve the historic record. *See Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-29 (1991). The ICC and the STB have adhered to that rule since. *See Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Union Pac. R.R. Co.—Abandonment and Discontinuance of Trackage right Exemption—In Los Angeles County, CA*, Docket No. AB-33 (Sub-No. 265X), 2008 WL 1968727 (served May 7, 2008). Conrail would provide such documentation for the Harsimus Branch if it continued to own the Embankment properties and the rest of the Harsimus Branch east of Marin Boulevard in fee, and it will provide such documentation regardless of the LLCs' ownership of the fee interest in the Embankment properties and the ownership by multiple other parties of the fee interest in the properties underlying the Harsimus Branch east of Marin Boulevard.

The City Parties argue, however, that a 2007 Memorandum of Understanding ("MOU") between Conrail and the LLCs somehow constitutes a contract to evade Section 106 review and engage in anticipatory demolition. Supp. Comments at 21-23. Conrail responded at length to the City Parties' mischaracterization of the 2007 MOU in its Reply to their Motion to Compel filed October 7, 2014, and we need not repeat that discussion. Conrail Reply at 9-11. Suffice it to say here that nothing in the MOU evinces any intent to evade STB jurisdiction.

The City Parties profess to seek an expeditious handling of this abandonment proceeding, yet they continue to raise baseless reasons why it should be extended, most recently for burdensome discovery that has no relevance to any legitimate issue in the proceeding. Their "Additional Supplemental Comments" reflect the continuing inability of these parties to refrain from rehashing the same issues over and over in multiple pleadings. Nothing they say in this latest filing advances their cause one whit.

Respectfully submitted,

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October 15, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 15th day of October, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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I further certify that, in accordance with 49 C.F.R. §§ 1105.7(b) and 1105.11, on this 15th day of October, 2014, I provided a copy of the foregoing to each of the agencies designated below by First Class Mail, postage prepaid :

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