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SERVICE DATE – NOVEMBER 2, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON  
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN  
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE  
EXEMPTION—IN HUDSON COUNTY, NJ

Digest:<sup>1</sup> This decision: (1) denies an appeal filed in 2009 by the City of Jersey City (City) regarding the Board's offer of financial assistance (OFA) standard; (2) grants in part, and denies in part, a motion filed by a group of limited liability companies (LLCs) to unseal a document filed as highly confidential pursuant to the protective order in this case; (3) addresses the City's request for clarification concerning the OFA due date; (4) denies the City's motion regarding the schedule for the submission of OFAs; (5) addresses James Riffin's (Riffin) notice of intent to file an OFA and the objections thereto; and (6) grants Riffin's request for documents.

Decided: October 29, 2015

BACKGROUND

This proceeding involves a request to abandon an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in the City of Jersey City, N.J. Consolidated Rail Corporation (Conrail) filed a notice of exemption in this proceeding to

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

abandon the Harsimus Branch (Harsimus Abandonment Proceeding)<sup>2</sup> following a 2007 decision by the Board in a related case finding that the Harsimus Branch is a line of railroad subject to its abandonment authority. City of Jersey City—Pet. for Declaratory Order, FD 34818, slip op. at 1 (STB served Dec. 19, 2007). The Harsimus Abandonment Proceeding was held in abeyance while the related proceeding was being litigated in federal court.<sup>3</sup> The Board lifted the abeyance order and reinstated the Harsimus Abandonment Proceeding on August 11, 2014.

In March 2009 – prior to the Board’s abeyance order – two Notices of Intent to File an Offer of Financial Assistance (OFA) were filed, one by the City and one by CNJ Rail Corporation (CNJ). In response, the Director of the Office of Proceedings (Director) issued an order on May 26, 2009 (May 2009 Decision) directing Conrail to provide the information required under 49 C.F.R. § 1152.27(a) to the City and CNJ and tolling the time to file an OFA. The May 2009 Decision also summarized the OFA standard. On June 15, 2009, the City filed an appeal challenging the OFA standard as articulated in the May 2009 Decision. Conrail filed a reply on July 6, 2009. The Harsimus Abandonment Proceeding was held in abeyance before the City’s appeal was addressed. As noted above, the Board lifted the abeyance order on August 11, 2014.

In a decision served May 22, 2015, the Board addressed several discovery-related motions filed by the parties. Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al. (STB served May 22, 2015) (May 2015 Decision). This decision addresses issues that were not addressed in, or have arisen since, the May 2015 Decision.

## DISCUSSION AND CONCLUSIONS

The City’s 2009 Appeal. In the May 2009 Decision, the Director explained the OFA standard as follows:

The OFA process is designed for the purpose of providing continued rail service. The Board need not require the sale of a line under the OFA provisions if it

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<sup>2</sup> Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009). Collectively, these three dockets are referred to in this decision as Harsimus Abandonment Proceeding, and all decisions under these three dockets will be titled as such.

<sup>3</sup> The courts ultimately agreed that the Harsimus Branch is a line of railroad. Consol. Rail Corp. v. STB, 571 F.3d 13, 19 (D.C. Cir. 2009) (sending case to district court for a determination of the status of the Harsimus Branch); City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013), aff’d, No. 13-7175 (D.C. Cir. Feb. 19, 2014) (Harsimus Branch was conveyed as a line of railroad in 1976).

determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic. Any person who intends to file an OFA in this proceeding should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.

May 2009 Decision 2-3 (internal citations omitted). The City's appeal challenges the standard as articulated.<sup>4</sup>

Pursuant to 49 C.F.R. § 1011.7(a)(2)(ii) and § 1011.2(a)(7), the Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director evaluating OFAs. See also 49 C.F.R. § 1152.25(e)(1) (describing the same appellate procedure). If the May 2009 Decision were construed instead as an exercise of the Director's delegated authority to dispose of routine procedural matters, under 49 C.F.R. § 1011.6(c)(3), the Board would review it under the appeal standard applicable to that section. See 49 C.F.R. § 1011.6(b) ("Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."). Whether we view this as an appeal under § 1011.2(a)(7) or § 1011.6(b), the appeal will be denied, as the City has not shown error in the Director's decision.

First, the City argues that the Director erred in finding that the City must show "urgent or overriding commercial need." (Statement of City of Jersey City in Response to Tolling of OFA Time Period & Protective Appeal (City Appeal) (filed June 15, 2009) at 11.) However, the City mischaracterizes the OFA standard set out in the Director's decision, which never stated that the need for rail service had to be "urgent or overriding." The Director's decision calls only for "demonstrable commercial need for rail service," which an offeror could demonstrate, for example, with support from shippers or receivers on the line or other evidence of immediate and significant commercial need. May 2009 Decision 3.

Second, the City objects to the Director's statement that the OFA standard includes a showing of community support for rail service. It claims that it can find no case in which the Board has rejected an OFA because an offeror has not demonstrated community support. (City Appeal 9.) The Board has previously held that community support is a factor to be considered in

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<sup>4</sup> The City cites 49 C.F.R. § 1115.2 as the authority for its appeal, but that section only applies to appeals from initial decisions of an administrative law judge, individual Board Members, or employee board. To provide guidance to the parties, we will treat this as an appeal of an OFA decision under 49 C.F.R. § 1011.7(a)(2)(ii) and § 1011.2(a)(7). As discussed above, however, the Board's action on the appeal would not change if it considered the appeal under 49 C.F.R. § 1011.6(b).

determining whether an OFA is genuine. See, e.g., BNSF Ry. Co.—Aban. Exemption—in Kootenai Cty., Idaho, AB 6 (Sub-No. 468X) (STB served Nov. 27, 2009) (pointing to community support as a factor to be considered); CSX Transp.—Aban. Exemption—in Glynn Cty., Ga., AB 55 (Sub-No. 697X) (STB served July 8, 2009) (same). Moreover, merely because the Board has never rejected an OFA for failure to demonstrate community support does not mean that that aspect of the standard is null. Accordingly, this part of the Director’s order was not erroneous.

Finally, the City argues that it was erroneous for the Director to articulate operational feasibility as an OFA criterion. The operational feasibility of a line, however, is directly relevant to the purpose of the OFA process: to provide an opportunity for continued rail service. BNSF Ry. Co.—Aban. Exemption—in King Cty., Wash., AB 6 (Sub-No. 380X), slip op. at 11 (STB served Aug. 5, 1998) (“The issue is not whether service is currently being provided, but whether the circumstances in their entirety indicate that the financial assistance is being offered for rail service.”), aff’d sub nom., Redmond-Issaquah R.R. Pres. Ass’n v. STB, 223 F.3d 1057 (9th Cir. 2000).

In short, the Director properly explained the standard in the light of Board and court precedent. For these reasons, we will deny the City’s appeal.<sup>5</sup>

The LLCs’ Motion to Unseal. On March 18, 2015, a group of LLCs that intervened in this proceeding<sup>6</sup> filed a motion asking that the Board unseal a document (Exhibit D) that was attached to a motion to compel (seeking valuation information) filed by the City. Exhibit D is a statement from a prospective shipper stating that the shipper is in need of rail service. The City designated the entire shipper statement as highly confidential and filed it under seal. The LLCs argue that the information in the shipper statement does not qualify as “confidential” or “highly confidential” under the Board’s September 24, 2014 Protective Order and, therefore, it should be unsealed.

“Highly confidential” is defined by the Board’s Protective Order as information “containing shipper-specific rate or cost data, or other competitively sensitive information.” Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al. (STB served Sept. 24, 2014) (Protective Order) ¶ 2. “Confidential” material “reflects proprietary or confidential

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<sup>5</sup> We also note that the City appears to conflate the Board’s standard for granting an exemption from the OFA process with the Board’s standard for approving an OFA. (See, e.g., City Appeal 2, 12, 16.)

<sup>6</sup> The LLCs are described as: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; 446 Newark Avenue, LLC; and NZ Funding, LLC. The LLCs have an ownership interest in a set of properties along the Harsimus Branch.

information.” Id. ¶ 1. Information that is publicly available is not subject to the Protective Order. Id. ¶ 9.

Exhibit D does not appear to contain shipper-specific rate or cost data or other competitively sensitive information that would justify labeling this entire document highly confidential. However, certain information in the shipper statement could be considered proprietary and confidential. Specifically, the City arguably could treat as confidential the information in the shipper statement regarding the financial backing of the shipper, the shipper’s projected production output, the identities of the shipper’s suppliers and customers, carload projections, and origin and destination pairs. However, this is the only information in the shipper statement that could potentially qualify as confidential under the Protective Order, based on the information currently before the Board. Accordingly, we will grant in part the LLCs’ motion and hold that the shipper statement does not qualify as highly confidential and does not contain highly confidential information. We direct the City to produce an unredacted confidential version and a public version of the exhibit, redacting from the public version only those portions of the shipper statement that qualify as confidential in accordance with this decision and the Protective Order. Protective Order ¶ 12. The LLCs’ motion to completely unseal Exhibit D will be denied.

The City’s Request for Clarification Concerning OFA Due Date and Motion Regarding Schedule for Submission of OFAs. The May 2009 Decision directed Conrail to provide valuation information to the City and CNJ and stated that OFAs would become due 10 days after Conrail provided that information. May 2009 Decision 3. The May 2015 Decision, however, stated that, “[h]ere, because of the unique circumstances of this case, the Board will decide whether to make the notice of exemption effective and will set a due date for OFAs in a future decision.” May 2015 Decision 7. The City, thus, seeks clarification of the OFA filing deadline. The Board clarifies here that the May 2015 Decision supersedes the May 2009 Decision and that no deadline for filing OFAs is currently imposed in this proceeding. To the extent that the City is seeking a specific OFA deadline at this time, that request will be denied.

James Riffin’s Notices of Intent and Request for Documents. On June 8, 2015, James Riffin (Riffin) filed a Notice of Intent to Participate, Notice of Intent to File an OFA, and a First Request for Documents. His request for documents seeks valuation information from Conrail pursuant to 49 C.F.R. § 1152.27(a). Both the City Parties<sup>7</sup> and Conrail object to Riffin’s involvement and argue that he is out of time to file a notice of intent to file an OFA.

Typically in class exemption proceedings, a notice of intent to file an OFA is due 10 days after the Federal Register publication, see 49 C.F.R. § 1152.27(c)(2)(i), which, in this case, was in March 2009. But as explained in the May 2015 Decision, the circumstances presented here

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<sup>7</sup> The City Parties are described as: City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition.

are unique, which have already caused the Board to alter certain due dates. Moreover, both the City and CNJ have provided notices of intent to file an OFA, and accepting Riffin's notice of intent and giving Riffin access to the valuation information required by the Board's OFA regulations would not delay the conclusion of these proceedings. Accordingly, we will accept his notices of intent, and we direct Conrail to provide to Riffin the same valuation information that it provided in response to our May 2015 Decision.

It is ordered:

1. The City's 2009 appeal is denied.
2. The LLCs' Motion to Unseal is granted in part and denied in part. Exhibit D does not qualify as highly confidential and the City has until November 12, 2015 to file an unredacted confidential version and a public version of the document as required by the Protective Order.
3. The May 2015 Decision supersedes the May 2009 Decision, and no deadline for filing OFAs is currently set in this proceeding.
4. The City's motion to set a specific OFA deadline at this time is denied.
5. Riffin's Notice of Intent to Participate and Notice of Intent to File an OFA are accepted.
6. Riffin's Request for Documents is granted. Conrail must produce valuation information described in 49 C.F.R. §§ 1152.27(a) and (d) pertaining to the Harsimus Branch by November 12, 2015.
7. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.