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SERVICE DATE – LATE RELEASE OCTOBER 2, 2014

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

MOTION FOR CLARIFICATION

Decided: October 2, 2014

This decision denies the City of Jersey City's Motion for Clarification of the September 24, 2014 Surface Transportation Board Protective Order issued in these proceedings (Protective Order or the Order).

These proceedings involve an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in an urban area of Jersey City, N.J. The Harsimus Branch extends between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City.¹

In January 2006, the City of Jersey City (the City), the Pennsylvania Railroad Stem Embankment Coalition, the Rails to Trails Conservancy, and New Jersey Assemblyman Louis M. Manzo asked the Board for a declaratory order finding that the Harsimus Branch was a line of railroad subject to the Board's abandonment authority rather than a spur. In August 2007, the

¹ Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009).

Board found that the Harsimus Branch was a line of railroad subject to its abandonment authority. On appeal, however, the United States Court of Appeals for the D.C. Circuit vacated the Board's order on jurisdictional grounds, holding that the U.S. District Court had jurisdiction to decide the status of the Harsimus Branch. The District Court, after litigation involving the standing of the City, Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties), granted summary judgment in favor of the City Parties based on the parties' stipulation that the Harsimus Branch was conveyed to Conrail as a line of railroad, and the D.C. Circuit summarily affirmed this decision early this year.²

Following the Board's August 2007 decision, the railroads instituted abandonment proceedings before the Board, but the Board's proceedings were stayed while the federal district court and D.C. Circuit litigation went forward. The Board vacated the stay and reinstated these proceedings in an August 11, 2014, decision, after the D.C. Circuit's summary affirmance of the D.C. District Court's decision regarding the Harsimus Branch. The August 2014 decision also granted the request of a group of limited liability companies (LLCs)³ to intervene, and discussed the preparation of a Supplemental Environmental Assessment by the Board's Office of Environmental Analysis.

On September 15, 2014, CNJ Rail Corporation (CNJ), a non-party to these proceedings, filed a Motion for Protective Order. CNJ stated that it had received discovery requests from the City Parties and the LLCs on September 10, 2014. CNJ explained that the City was in the process of passing an ordinance expressly authorizing the City Managers, acting on behalf of the City, to take all necessary steps to file a formal Offer of Financial Assistance (OFA) in these proceedings.⁴ CNJ stated that the OFA authorization ordinance and the Board's OFA procedures were the driving force behind the discovery requests and that the information provided would likely be used for an OFA.

The Board found that good cause existed to grant CNJ's Motion for Protective Order and that issuance of the protective order would ensure that confidential and highly confidential information would be used solely for the purpose of preparing to file and/or filing an OFA in these proceedings. As a result, on September 24, 2014, the Board granted the motion and adopted a protective order.

² City of Jersey City v. Conrail, 968 F.Supp. 2d 302 (D.D.C. 2013), aff'd., No. 13-7175 (D.C. Cir. Feb. 19, 2014).

³ 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; and 446 Newark Avenue, LLC.

⁴ At the time CNJ filed its motion, the ordinance had not yet been voted on. It has since been voted on and passed.

On September 25, 2014, the City filed a Motion for Clarification and, additionally, requested expedited treatment of the motion. The City states that it has received requests for documents from the LLCs under the New Jersey Open Public Records Act (OPRA), N.J.S.A. § 47-1A-1 et seq. According to the City, these requests seek documents that the City and CNJ may consider commercially sensitive and covered by the Protective Order. The City, expressing concern there may be a conflict between its obligations under OPRA and the Protective Order, filed this Motion for Clarification about the applicability of the Order to documents requested under OPRA. Because of the response timeframes in OPRA and the fact that its response to the LLCs' OPRA request is due on October 2, 2014, the City also requested expedited consideration of the motion.

The City's Motion for Clarification is denied. There does not appear to be a conflict between OPRA and the Board's September 24, 2014 Protective Order and, thus, no clarification is necessary. By its own terms, the Protective Order applies only to discovery produced or received pursuant to discovery requests made within the context of Board discovery procedures in this proceeding.⁵ Documents obtained and received outside of the discovery processes of the Board in this proceeding are not subject to the Protective Order. Thus, the production of any such documents under OPRA would not violate the Order. Moreover, with respect to documents (1) produced or received in the course of discovery initiated pursuant to Board rules and procedures in this proceeding *and* (2) designated as either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under the Order, it appears that these documents could qualify for exemptions from disclosure under OPRA. See N.J.S.A. § 47-1A-9 (OPRA does not abrogate any grant of confidentiality established by statute, court rule or judicial case law, which may be claimed to restrict public access to a public record or government record); see also N.J.S.A. § 47-1A-1.1(6).

It is ordered:

1. The Motion for Clarification is denied.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁵ See e.g., Protective Order Appendix, ¶¶ 9, 10 & fn. 1.