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SERVICE DATE – DECEMBER 19, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION,
AND NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO–
PETITION FOR DECLARATORY ORDER

Decided: December 17, 2007

In this decision, we are denying a petition for reconsideration of our decision in this declaratory order proceeding that was served on August 9, 2007 (the August 2007 Decision).¹

BACKGROUND

In this proceeding, the City of Jersey City, NJ (City), the Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Coalition, and State Assemblyman Louis M. Manzo (collectively, petitioners) asked us to determine whether Consolidated Rail Corporation (Conrail) needed prior Board authorization to abandon trackage known as the Sixth Street Embankment (Embankment), extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ. Conrail had recently sold the Embankment to a group of limited liability companies referred to collectively by petitioners (in their filings) and the Board (in the August 2007 Decision) as SLH Properties (SLH)² for development as residential housing without obtaining abandonment authority from the Board.

The Embankment is part of a rail line known as the Harsimus Branch, which was constructed by the United New Jersey Railroad and Canal Company (UNJRCC) and leased to the former Pennsylvania Railroad Company (PRR) together with other UNJRCC-owned lines. The

¹ Petitions for judicial review of the August 2007 Decision have been filed in 212 Marin, LLC et al. v. STB, No. 07-1397 (D.C. Cir. filed Oct. 2, 2007) and Conrail v. STB, No. 07-1401 (D.C. Cir. filed Oct. 4, 2007).

² SLH consists of 212 Marin Boulevard, L.L.C.; 247 Manila Avenue, L.L.C.; 280 Erie Street, L.L.C.; 317 Jersey Avenue, L.L.C.; 354 Coles Street, L.L.C.; 389 Monmouth Street, L.L.C.; 415 Brunswick Street, L.L.C.; and 446 Newark Avenue, L.L.C. By decision served January 24, 2006, SLH was granted leave to intervene in this proceeding.

UNJRCC main line ran between Newark, NJ, and Exchange Place, in Jersey City near the Hudson River. The Harsimus Branch connected with the UNJRCC main line at Waldo Avenue and continued over the Embankment into Harsimus Cove Yard on the Hudson River. PRR used the Harsimus Branch as part of that carrier's main freight route between the Midwest and Harsimus Cove Yard.

As we noted in our August 2007 Decision, the Harsimus Cove Yard contained coal piers, warehouses, grain elevators, stockyards, and other facilities that were used to handle rail-marine traffic. The yard also had piers and float bridges to serve lighters and car floats to transfer cargo to vessels in the harbor and to piers and yards in Manhattan and Brooklyn and for through movement to other Northeast destinations. In addition, local shippers were served from trackage in Harsimus Cove Yard.

During the 1950's and 1960's rail service at Harsimus Cove Yard began to decline. PRR was subsequently merged into the Penn Central Transportation Company (Penn Central) on February 1, 1968.³ Penn Central relocated much of the rail-marine traffic from Harsimus Cove Yard to Penn Central's Greenville facility located several miles to the south, and by the 1970's, parts of the yard were no longer used for rail service.

Penn Central declared bankruptcy in 1970, along with seven other railroads in the Northeast.⁴ In response, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (3R Act). The 3R Act established the United States Railway Association (USRA) to prepare a plan for restructuring the railroads in reorganization into a financially viable, self-sustaining rail system that ultimately became Conrail.

USRA issued its Final System Plan (FSP) on July 26, 1975, describing "rail properties" of the railroads in reorganization that would be conveyed to Conrail. Page 272 of the FSP listed UNJRCC properties to be transferred to Conrail. Included on the list was "Line Code 1420," described as the Harsimus Branch, running between milepost 1.0 in Jersey City and milepost 7.0 at Harrison, NJ. The FSP indicated that yards, spur tracks, and other ancillary facilities associated with the rail lines designated to be acquired by Conrail would be conveyed automatically unless the FSP provided otherwise. Page 262 of the FSP indicated that portions of the Harsimus Cove Yard were also transferred to Conrail.

³ See Pennsylvania R. Co.–Merger–New York Central R. Co., 327 I.C.C. 475 (1966) (Penn Central Merger).

⁴ The other bankrupt railroads were: The Reading Co., The Erie Lackawanna Railroad Company, Lehigh Valley Railroad Company, Boston & Maine Corp., Ann Arbor Railroad Co., Lehigh & Hudson River Railroad Company, and Central of New Jersey Railroad Company. The Penn Central bankruptcy included the UNJRCC, as a lessor of Penn Central lines.

The property constituting Line Code 1420 was conveyed to Conrail by deed from Fairfax Leary, Trustee of the property of the UNJRCC, dated March 31, 1976.⁵ Exhibit A to the deed described the relevant property that was conveyed as follows:

Situate in the County of Hudson, State of New Jersey, and being The United New Jersey Railroad and Canal Company's line of railroad known as the Penn Central Harsimus Branch and being all the real estate property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Harsimus Cove, passes through Journal Square, and terminates in the County near the junction with the Penn Central New York-Philadelphia Main Line, west of the New Jersey Turnpike Overhead Bridge.

The line of railroad described herein is identified as Line Code 1420 in the records of the United States Railway Association.

On April 1, 1976, Conrail began operating the rail system established in the FSP. It provided service to several shippers located on Hudson Street using the line identified as Line Code 1420, including the Embankment. According to the record, Conrail handled 3,204 cars for shippers on Hudson Street over a 1-year period ending in September 1984. Traffic declined to 637 cars in 1986. Conrail's last customer served by the line of railroad constituting Line Code 1420 was gone by 1992.

In our August 2007 Decision, we determined that Conrail had acquired the Embankment as a line of railroad under Line Code 1420 of the FSP, and that, as such, the Embankment remained subject to Federal abandonment regulation. We also determined that the Embankment property sold to SLH remains part of the national rail system subject to the Board's exclusive jurisdiction until appropriate abandonment authority is obtained.

On August 29, 2007, SLH filed a petition for reconsideration, asserting that the August 2007 Decision contains material error. Petitioners filed a joint reply on September 18, 2007.

⁵ The deed was submitted in Appendix XVI to petitioners' Opening Statement.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), a petition for reconsideration will be granted only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances or (2) involves material error. Here, SLH's petition asserts that our August 2007 Decision contains material error. However, SLH has not shown material error.

Evidence issues. SLH asserts that the Board improperly relied in part on materials outside the record (ICC decisions and Internet sources) in deciding that the Embankment was a line of railroad. However, as explained in the August 2007 Decision, at 8-9, although Conrail and SLH had claimed that Line Code 1420 referred to the "UNJRCC main line" and that the Harsimus Branch was ancillary track that was transferred along with the UNJRCC main line, neither Conrail nor SLH had presented evidence demonstrating where the "UNJRCC main line" was located. Therefore, we properly considered the valuation maps⁶—which are a matter of public record maintained by the Board—and the Track Charts submitted by the parties in determining that the portion of the UNJRCC line that ran on "Railroad Avenue" between Brunswick Street and Exchange Place had been marked as being "sold," prior to the enactment of the 3R Act, meaning that it was excluded from property conveyed to Conrail. We also took official notice of facts contained in relevant ICC decisions that confirm that what petitioners refer to as the UNJRCC main line could not have been the line of railroad transferred to Conrail in 1976 under Line Code 1420, because it had previously been abandoned pursuant to authority granted by the ICC and apparently was used by PRR only for passenger commuter service. See, e.g., United New Jersey R. & Canal Co. Abandonment, 312 I.C.C. 529 (1961) (UNJRCC Abandonment).

SLH argues that we should have provided a true copy of the relevant portions of the ICC's published decision in UNJRCC Abandonment under 49 CFR 1114.5 and 49 CFR 1114.6. But those regulations apply to the use of official records and materials from other Board or ICC proceedings, not to Board or ICC decisions themselves. We may take official notice of this agency's decisions and the facts contained in those decisions.

We cited the Internet sources in our August 2007 Decision to confirm that the line authorized for abandonment in UNJRCC Abandonment was indeed abandoned before it could have been transferred to Conrail. Those sources merely contain historical accounts showing that

⁶ The ICC had been required by the Valuation Act of 1913, Pub. L. No. 62-400, 37 Stat. 701, to establish the value of all property owned or used by railroads subject to its jurisdiction. The statute required each rail carrier to prepare maps to assist the ICC in valuing its property. See former 49 U.S.C. 10781 et seq. (1995). The valuation maps submitted in this proceeding were prepared after detailed surveys during 1915-1920 and were part of the ICC's valuation of the PRR, including UNJRCC, that was published in Pennsylvania R. Co., 22 Val. Rep. 1 (1929).

in the late 1960's the City acquired the elevated structure that carried the UNJRCC line that ran between Brunswick Street and Exchange Place and dismantled it. One source is published by New Jersey City University as part of its Jersey City: Past and Present website.⁷ The other source, which is part of a website containing historical and operating information about the New York City subway system, details the history of the passenger commuter service in Jersey City that had been provided by PRR and the Hudson and Manhattan Railroad Company, and now by the Port Authority Trans-Hudson Corp. (PATH).⁸ And it corroborates the information contained in the New Jersey City University website.

In its petition for reconsideration, SLH does not dispute the accuracy of the materials we cited. That information is sufficiently reliable and probative for us to have considered these sources as part of our analysis of the status of the Embankment. These sources are easily obtainable, and their factual content regarding dismantling the line on which SLH relies as being the UNJRCC main line is readily verifiable.

SLH also questions our decision to include the internet citation for a portion of the valuation of UNJRCC-owned lines that was part of the ICC's valuation of the PRR. However, because the ICC's valuation reports, which were issued primarily in the 1920's, are not widely available to the public, we cited to the internet version of the part of the ICC's valuation report pertaining to UNJRCC simply as a convenience to the parties and the public. SLH has failed to demonstrate how that assistance constituted material error.

SLH also has raised competency objections to the Board's reliance on a Verified Statement by Richard James and historic preservation materials that were submitted as Exhibits E and I to the Petition for Declaratory Order. But SLH did not object to these exhibits in its response to the Petition for Declaratory Order or any other filing it submitted to the Board prior to the issuance of the August 2007 Decision. And the information provided in these materials satisfies our admissibility requirements at 49 CFR 1114.1 and has enabled the Board, and subsequently the public, to better understand the physical description and history of the Embankment. Again, SLH has failed to demonstrate material error in our consideration of that evidence.

Location of Line Code 1420. Next, SLH asserts that the August 2007 Decision does not identify where Line Code 1420 is located, citing conflicting milepost numbers for the subject track. In support of its position that the Embankment was part of ancillary track that is excepted

⁷ New Jersey City University, Jersey City Past and Present, Exchange Place, http://www.njcu.edu/programs/jchistory/Pages/E_pages/Exchange_Place.htm (last visited Nov. 20, 2007).

⁸ New York City Subway Resources, Path/Hudson & Manhattan RR, <http://www.nycsubway.org/nyc/path> (last visited Nov. 20, 2007).

from entry and exit regulation under 49 U.S.C. 10906 (formerly 49 U.S.C. 10907(b)), SLH points out that there is no record of any abandonment proceeding involving the portion of Line Code 1420 that extends from milepost 1.0 at the Hudson River to milepost 1.3 near Luis Munoz Marin Boulevard and submits aerial maps showing that the segment between milepost 1.0 and milepost 1.3 has been developed with commercial buildings.⁹

However, our August 2007 Decision properly identified where Line Code 1420 is located: from milepost 1 at the Hudson River to milepost 7 near Harrison.¹⁰ Thus, SLH has not shown that we materially erred in our determination that Line Code 1420 includes the Embankment trackage as a line of railroad.

Severance. SLH asserts that we did not consider whether the Embankment may have been lawfully severed from the national rail system by the abandonment of Conrail's River Line in Conrail Abandonment of the Weehawken Branch—in Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 766N), et al. (STB served Jan. 17, 2002) (Conrail Abandonment). In their response, petitioners note that Conrail's River Line connected to the Harsimus Branch at Waldo, but did not include any portion of the Harsimus Branch. Petitioners further point out that there is another active line of freight railroad that intersects with the Embankment portion of the line.

While not specifically addressed in our August 2007 Decision, we find that SLH has failed to show that the Embankment trackage has been lawfully severed from the national rail system. The Conrail Abandonment decision describes the River Line as extending from “the connection to the Passaic and Harsimus Branch at Controller Point (CP) ‘Waldo’ in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard.” While the River Line connected with what Conrail now calls the Passaic and Harsimus Branch at Waldo, the abandonment of the River Line would not have severed the Passaic and Harsimus Branch from other lines connecting to the national rail system,¹¹ and, based on all of the valuation maps and Track Charts submitted, would not appear

⁹ The aerial photographs—obtained from Google.com—purportedly show the current area around the Embankment. Petitioners object to these photographs, contending that they are cumulative of a photo that they submitted as Exhibit B to their Petition for Declaratory Order. We will accept the photographs submitted by SLH in the interest of a more complete record.

¹⁰ Regarding the segment between milepost 1.0 and milepost 1.3, petitioners point out that neither they nor anyone else have asked the Board to determine the status of that segment, and we have had no occasion to do so.

¹¹ As we noted in the August 2007 Decision, a Conrail Track Chart dated January 1982 showed the “Passaic and Harsimus Branch” as running west from milepost 0 at Waldo to milepost 9 near Kearny.

to have severed the Embankment trackage either, regardless of whether the trackage is considered part of the Passaic and Harsimus Branch.¹²

City's position. SLH asserts that the City's position that STB abandonment authority is required here is inconsistent with its active support for redeveloping the Harsimus Cove area for residential and commercial uses. But the issue of whether there is any inconsistency in the City's positions is immaterial to whether the Embankment is a line of railroad subject to federal abandonment regulation. In any event, as petitioners point out in their response, local governments and planning agencies frequently ask railroads to participate in redevelopment or joint use projects with the understanding that the railroad will obtain appropriate authorization from the Board, if necessary. The Board has authorized a number of abandonment proposals that were submitted by rail carriers to facilitate redevelopment projects.¹³ Support by a local government does not excuse the railroad from seeking abandonment authority prior to removal of a rail line from the national rail transportation system.

No legitimate purpose. SLH next argues that the Board should have refrained from declaring the Embankment to be a line of railroad when the property currently is not used for rail transportation purposes. However, as we noted in our August 2007 Decision, since 1976 Conrail has filed more than 1,100 abandonment proposals. Some of those proceedings have involved short segments of track that, like the Embankment, were no longer used for rail operations when abandonment authority was sought. Moreover, a line of railroad does not cease to be a line of railroad simply as a result of non-use. See The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991). In short, as we explained in our prior decision, Conrail acquired the Embankment as a line of railroad under Line Code 1420 of the FSP. Thus, the Embankment is subject to federal abandonment regulation, and the Embankment property sold to SLH remains

¹² We note that SLH, in its reply filed April 24, 2006, at 4, primarily relied on the sale of the Waldo Avenue Yard to PATH in questioning whether the Embankment could effectively connect to the national rail system. Waldo Avenue Yard, however, is located south of the Harsimus Branch and its sale would not have severed the Embankment from the national rail system.

¹³ See, e.g., The Kansas City Southern Railway Company—Abandonment Exemption in Jackson County, MO, STB Docket No. AB-103 (Sub-No. 17X) (STB served July 27, 2004); Union Pacific Railroad Company—Abandonment Exemption—in Merced County, CA, STB Docket No. AB-33 (Sub-No. 179X) (STB served Sept. 7, 2001); Fox Valley & Western LTD—Abandonment Exemption—in Fond Du Lac and Washington Counties, WI, STB Docket No. AB-402 (Sub-No. 7X) (STB served Jan. 31, 2000); and Norfolk and Western Railway Company—Abandonment Exemption—in Cincinnati, Hamilton County, OH, STB Docket No. AB--290 (Sub-No. 184X) (STB served May 13, 1998).

part of the national rail system subject to the Board's jurisdiction until abandonment authority is obtained and exercised.

Jurisdiction. Finally, SLH questions our jurisdiction to determine the status of Line Code 1420. It contends that the 3R Act authorized the Special Court, and later the United States District Court for the District of Columbia, to interpret orders conveying properties of bankrupt carriers to Conrail, citing 45 U.S.C. 719(e)(2).

Petitioners have asked the Board to determine whether Conrail is obligated to obtain Board authority to abandon the Embankment trackage. That determination falls within the Board's authority to administer Part A of Subtitle IV of Title 49 U.S.Code, including our exclusive authority over railroad abandonments in 49 U.S.C. 10903. In addition, the 3R Act expressly grants the Board authority over Conrail abandonments. 45 U.S.C. 744(g). And we have authority to issue declaratory orders to eliminate controversy or remove uncertainty. 5 U.S.C. 554(e); 49 U.S.C. 721. Thus, our determination to issue our August 2007 Decision regarding the status of the Embankment is an appropriate exercise of the Board's authority.

In sum, SLH has not shown that our August 2007 Decision contained material error. Nor has SLH presented any other justification to warrant reconsideration of our prior decision. Accordingly, we will deny SLH's petition for reconsideration.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners' request to strike aerial photographs submitted by SLH is denied.
2. SLH's petition for reconsideration is denied.
3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary