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SERVICE DATE – LATE RELEASE JANUARY 26, 2009

SURFACE TRANSPORTATION BOARD

DECISION

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

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

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

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

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

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

Decided: January 26, 2009

This decision denies a request to waive the pre-filing notification requirements for the Supplemental Environmental and Historic Report filed with the notice of exemption in this case and rejects the notice for failure to comply with those requirements.

BACKGROUND

On January 6, 2009, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, applicants) jointly filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, an approximately 1.36-mile portion of a line of railroad known as the Harsimus Branch, between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City, Hudson County, NJ.<sup>1</sup>

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<sup>1</sup> In 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, STB Finance Docket No. 34818 (STB served Aug. 9, 2007), the Board described the line as follows: extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ.

Applicants had anticipated filing their notice of exemption earlier, in April of 2008, and for that reason had filed, on March 12, 2008, an Environmental and Historic Report and served it on the entities required under 49 CFR 1105.7, 1105.8, 1105.11, and 1152.50(d)(1). Thereafter, however, in light of the comments received on the Environmental and Historic Report, applicants decided to postpone filing the notice of exemption and instead prepared a Supplemental Environmental and Historic Report, which was filed and served on January 6, 2009. Applicants filed their notice of exemption the same day, instead of waiting at least 20 days as required under sections 1105.7(b) and 1105.8(c).

Acknowledging that they had not observed the 20-day prefiling notification requirement, on January 6, 2009, applicants also filed a motion to (1) waive that requirement and (2) stay the effective date of the exemptions for 180 days to enable the involved parties to complete the historic preservation process under the section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f).

On January 15, 2009, the City of Jersey City, NJ, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy (collectively, City Parties) filed an opposition to applicants' motion. City Parties also filed copies of comments previously submitted to the Board's Section of Environmental Analysis (SEA) on March 28, 2008. City Parties oppose use of the class exemption and oppose the waiver request, arguing that waiving the prefiling notification requirements would deprive them of adequate time to review and respond to the information. City Parties also requested a housekeeping stay of the exemptions sought by the applicants.<sup>2</sup>

On January 26, 2009, the Jersey City Landmarks Conservancy, Preservation New Jersey, the Village Neighborhood Association, and the East Coast Greenway Alliance (Interested Parties) each filed a reply and request for consulting party status in an NHPA section 106 review. Interested Parties request a full Environmental Impact Statement, oppose use of the class exemption procedures, and assert that Conrail's proposed abandonment should not be authorized because Conrail and others have engaged in anticipatory demolition of the rail line assets.

## DISCUSSION AND CONCLUSIONS

Applicants have failed to show that waiving the 20-day prefiling notification requirement and staying the effectiveness of the exemptions for 180 days are warranted. Because applicants failed to comply with the prefiling notification requirement, the notice of exemption will be rejected, without prejudice to applicants' refiling their notice of exemption with appropriate certifications.

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<sup>2</sup> On January 21, 2009, City Parties filed materials with the Board discussing the application of the National Historic Preservation Act (NHPA), 16 U.S.C. 470h-2(k).

Request to stay the effectiveness of the exemptions for 180 days. Under the Board's regulations, abandonment exemptions ordinarily take effect 50 days after the verified notice is filed. See 49 CFR 1152.50(b). The Board has specific procedures outlined in its regulations to handle historic preservation matters.<sup>3</sup> In cases implicating the historic preservation process under section 106 of NHPA, 16 U.S.C. 470(f), the Board typically has imposed a condition requiring completion of the section 106 process and removal of the condition before the abandonment can be consummated. See, e.g., Minnesota Northern Railroad, Inc.—Abandonment Exemption—in Norman County, MN, STB Docket No. AB-497 (Sub-No. 4X), slip op. at 5 (STB served Dec. 3, 2008). Here, applicants assert that a departure from the Board's standard process is warranted, and that the effectiveness of the exemptions should be stayed for 180 days while the parties seek to complete the section 106 process.

Applicants have not justified departing from the Board's standard practice. Applicants have asserted that the affected parties could complete the section 106 process within 180 days if the effectiveness of the exemptions were postponed; but even if that is true, they have not shown that they could not do so just as expeditiously under the Board's standard process. And, if the Board were to stay the exemptions' effectiveness and the parties were to fail to resolve section 106 issues within that time, applicants have failed to explain why it would not be necessary to do then what the Board typically does under its standard process in any event: impose a condition prohibiting consummation until the section 106 process is complete. Either way, applicants have not demonstrated how imposing an arbitrary 180-day postponement of the exemptions' effectiveness would have any practical effect on the timeliness of concluding the section 106 process.

Waiver of the 20-day prefiling notifications. Applicants seek a waiver of the 20-day prefiling notifications at 49 CFR 1105.7(b) and 1105.8(c) on the grounds that (1) public agencies and interested parties were given advance notice of the proposed abandonment in 2008, (2) interested parties will be able to comment on the proposed abandonment over a 6-month period under Conrail's proposed 180-day stay, and (3) consultation with the SHPO has already taken place with respect to the Area of Potential Effects Report and proposed methodology for the Cultural Resources Report.

As discussed above, applicants have not shown that their proposed 180-day stay of the exemptions' effective date is warranted, and that proposal therefore provides no basis for a further departure from standard Board procedures by waiving the 20-day prefiling notice. Moreover, the purpose of the prefiling notification is to give all of the required interested parties advance notice of the content of an applicant's environmental and historical materials—here, the Supplemental Environmental and Historic Report. Applicants' remaining rationales—that interested parties had notice in 2008 of the proposed abandonment and that some consultation

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<sup>3</sup> See 49 CFR 1105.8; guidance on historic review process available at <http://www.stb.dot.gov/stb/environment/preservation.html>.

with the SHPO already has occurred—do not show that the purpose of the prefiling notification has been satisfied. The request for waiver therefore will be denied and the notice of exemption rejected without prejudice to applicants' refiling with appropriate certifications.

Finally, the stay requests filed by applicants and City Parties are both moot given this action. The absence of traffic over the line for more than 2 years makes the line eligible for the notice of exemption process under 49 CFR 1152.50; that process would allow City Parties and other interested persons (including Interested Parties) to pursue their interests in environmental and historic preservation issues, as well as possible use of the line as an interim trail or some other alternative uses. Neither City Parties nor Interested Parties have demonstrated on this record that the use of the notice of exemption process itself is inappropriate in this situation.

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

It is ordered:

1. Applicants' request for waiver of prefiling notification requirements is denied.
2. Applicants' verified notice of exemption to abandon and discontinue service is rejected, without prejudice to applicants' refiling with appropriate certifications.
3. Applicants' and City Parties' requests for stay are denied as moot.
4. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary