

ENTERED
Office of Proceedings
June 1, 2015
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB 167 (SUB-NO. 1189X)

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

**RESPONSE OF CONSOLIDATED RAIL CORPORATION
TO ORDER TO PRODUCE VALUATION INFORMATION**

Consolidated Rail Corporation (“Conrail”) responds here to the Board’s order in its Decision served May 22, 2015, that Conrail produce to the City of Jersey City (“City”) by June 1, 2015, valuation information described in 49 C.F.R. §§ 1152.27(a) and (d) pertaining to the Harsimus Branch.¹ There has been no rail traffic and no rail infrastructure on the Harsimus Branch for many years; accordingly, the only question here for purposes of Section 1152.27 is the value of Conrail’s property interest.

As the Board knows, Conrail does not own a fee interest in much of the Harsimus Branch. The at-grade property east of Marin Boulevard that used to underlie the eastern end of the Harsimus Branch in the Harsimus Cove Yard was long ago sold to developers or the Jersey City Redevelopment Authority. The area has been extensively redeveloped with retail, residential, office, and hotel space. No trace of the Harsimus Branch remains there, and no

¹ The Board’s Decision requires Conrail to produce valuation information to the “City Parties,” which includes the City, the Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition. Slip op. at 2, 6, 9. However, only the City filed a notice of intent to file an Offer of Financial Assistance (“OFA”), on March 27, 2009, and only the City filed a motion to compel Conrail to provide valuation information pursuant to 49 C.F.R. § 1152.27, on December 23, 2014. In any event, STB counsel for the City Parties is the same person, so there may no practical difference in Conrail providing him with valuation information in his capacity as counsel for the City and providing him that information in his capacity as counsel for the City Parties.

determination has ever been made that that part of the Harsimus Branch is even a line of railroad.² Further, the City does not appear to have any interest in an Offer of Financial Assistance (“OFA”) with respect to this part of the Harsimus Branch.³ In any event, even if a valuation of Conrail’s property interest for this part of the Harsimus Branch were required, the answer would be that the value of Conrail’s property interest there is zero.

The eight blocks of the Harsimus Branch between Newark Avenue and Marin Boulevard are owned by 212 Marin Boulevard, et al. (the “LLCs”).⁴ This includes the six elevated embankment blocks between Brunswick Street and Marin Boulevard. The only interest Conrail has in this part of the Harsimus Branch results from the decisions of the Special Court and the Board that abandonment authority is required for Conrail to abandon the right of way. For all intents and purposes, Conrail has a constructive regulatory easement over these properties until it

² From the beginning, the City Parties have only sought a determination that the Harsimus Branch west of Marin Boulevard was a regulated line of railroad. In its declaratory order decision served August 8, 2007, in Docket No. 34818, the Board observed that the question before it, which it answered affirmatively, was “whether [Conrail] needs prior agency 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.” Slip op. at 1. In its decision on reconsideration, served December 18, 2007, the Board specifically confirmed that it had made no determination that the line east of Marin Boulevard was a line of railroad. Slip op. at 5-6 and n.10. The City Parties similarly limited their complaint in the Special Court to the line west of Marin Boulevard, and the Special Court defined the “Harsimus Branch,” for purposes of determining what was transferred to Conrail as a regulated line of railroad, as the “portion of rail property . . . between CP Waldo and Luiz Munoz Marin Boulevard.” *City of Jersey City v. Consolidated Rail Corp.*, 968 F.Supp.2d 302, 303 (D.D.C. 2013). The Court specifically rejected as untimely and prejudicial to resolution of the case the idea that it was necessary for the Court also to determine the location and regulatory status of rail properties east of Marin Boulevard. *Id.* at 306-07.

³ When the City Council authorized the City to seek an OFA, it expressly limited that authorization to the part of the Harsimus Branch running from CP Waldo to Marin Boulevard. *See City Motion to Compel*, filed December 23, 2014, Exh. B at 1-2.

⁴ For convenience, we refer to Newark Avenue as the western terminus of the LLCs’ property. In fact, the parcel owned by 446 Newark Avenue, LLC, is west of Newark Avenue, largely under the New Jersey Turnpike.

obtains the necessary abandonment authority. It has long been held that for OFA purposes the value of a rail easement that a railroad is seeking to abandon is zero, because it terminates upon abandonment. *See, e.g., S. Pac. Transp. Co.—Abandonment Exemption—Sacramento & El Dorado Counties, CA*, Docket No. AB-12 (Sub-No. 159X), 1994 WL 573053, at *5 (served Oct. 20, 1994) (“For purposes of computing NLV [net liquidated value], we assign value only to land to which a railroad holds marketable title Thus, property . . . held by easement for rail purposes, is not included in determining real estate NLV.”); *Boston & Maine Corp. & Springfield Terminal Ry. Co.—Abandonment & Discontinuance Exemption—in Berkshire County, MA in the Matter of a Request to Set Terms & Conditions*, Docket No. AB-32 (Sub-No. 42X), 1990 WL 300526, at *3 n.7 (Nov. 14, 1990) (“Reversionary land and land with easements usually have no marketable value upon abandonment of the line.”). Assuming, as Conrail has consistently maintained, that there is no reason for the LLCs not to continue to own their properties during the pendency of the abandonment proceedings, then for OFA purposes the value of Conrail’s constructive easement over those properties is zero.

It bears noting, however, that the City Parties have taken the position in the past that the Board should order the LLCs’ properties reconveyed to Conrail, and they have asserted that they intend to move again to void the deeds to the LLCs. *See City Parties Motion for Scheduling Order*, filed June 17, 2014, at 15-16. We need not repeat here the practical and legal reasons why the City Parties’ position is wrong. *See Conrail Comments on Issues Raised by Pre-Filing Correspondence*, filed January 6, 2009, at 13-18. We raise the issue here only because if the properties were reconveyed to Conrail, then Conrail would hold them in fee, meaning the property would have “marketable value,” and, therefore, as the cases cited and quoted above establish, the value of those properties would *not* be zero. In fact, they would likely be in the

many millions of dollars. Conrail has not attempted an appraisal of the fee value of these properties, both because it does not own them and because the Board has not shown any inclination to order reconveyance. But if circumstances were to change and the Board were to order reconveyance to Conrail (and the Board had not already denied any OFA that was pending), the valuation of the properties between Newark Avenue and Marin Boulevard would have to be reopened for OFA purposes.

The first part of the Harsimus Branch, between CP Waldo and Newark Avenue, consisted mostly of a trestle supported by concrete piers (which still exist) that enabled traffic running to or from Harsimus Cove Yard to connect with the first elevated embankment at Brunswick Street. No at-grade rail service was provided off the trestle and, obviously, there was no ancillary property associated with any at-grade rail service. The only at-grade property that could be said to be associated with the Harsimus Branch was the strip of land immediately under the trestle, which contained the concrete piers and provided air rights for the trestle. Conrail still owns that strip of land, and we understood from the City's January 20, 2015 filing in support of its motion to compel that the City had expressly limited its request for "1152.27 information" to a "60-foot corridor" between CP Waldo and Newark Avenue. City Reply at 10. As we pointed out in our January 26 response, however, the City also ambiguously suggested that Conrail volunteer to make other property available over a wide area between CP Waldo and Newark Avenue, regardless of whether it had anything to do with the Harsimus Branch. Conrail Reply at 4-5. Conrail refused to do this, and the City subsequently made clear that it wanted the Board to order Conrail to be ordered to provide valuation information for any and all Conrail property the City believed it needed in the area to build an at-grade transload facility, regardless of whether that

property had anything to do with the Harsimus Branch. See City Reply, filed April 7, 2015, at 2, and Conrail Reply, filed April 10, 2015, at 1-2.

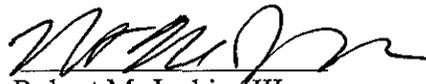
The Board resolved the issue in its May 22 Decision, holding that the valuation information Conrail was required to provide under Section 1152.27 was “limited to the operation of and property comprising the Harsimus Branch only.” Slip op. at 6. This means that the *most* Conrail could be required to provide is valuation information for the strip of land beneath the former Harsimus Branch trestle. Conrail has never had that strip itself appraised, and could not possibly do so in the four working days that it had between the Board’s issuance of its May 22 Decision and the June 1 due date the Board set for Conrail to provide valuation information. However, Conrail has had appraisals done for some other parcels in the area. To arrive at valuation for a 60-foot strip, Conrail has averaged the per-acre valuations from those appraisals to derive a valuation for the strip. The average per-acre valuation is \$17,835.82. The strip contains 1.23967 acres.⁵ Therefore, the total valuation for the strip between CP Waldo and Newark Avenue is \$22,109.51.⁶

The Board in its May 22 Decision said that it would set a due date for OFAs in a future decision. Conrail continues to believe that there is no basis upon which the City can demonstrate any reasonable likelihood of providing and maintaining freight rail service on the Harsimus Branch. Conrail encourages the Board to set a prompt due date for OFAs to be filed, so that the issue can be disposed of once and for all.

⁵ The distance from CP Waldo to the western edge of the 446 Newark Avenue, LLC parcel is approximately 900 feet. A 60-foot strip would contain 54,000 square feet, or 1.23967 acres.

⁶ Pursuant to 49 C.F.R. § 1152.27(a)(3), Conrail will provide the workpaper and appraisals underlying these calculations to the City under the protective order in this case for “highly confidential” information.

Respectfully submitted,



Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3261

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Attorneys for Consolidated Rail Corporation

June 1, 2015

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 1st day of June, 2015 I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Daniel Horgan
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096

Fritz R. Kahn, P.C.
1919 M Street NW
7th Floor
Washington, DC 20036

Aaron Morrill
Civic JC
64 Wayne Street
Jersey City, NJ 07302

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

Eric Fleming
President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Hamilton Park Neighborhood Association
PMB # 166
344 Grove Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

East Coast Greenway Alliance
5315 Highgate Drive
Suite 105
Durham, NC 27713

Jill Edelman
President
Powerhouse Arts District Neighborhood Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Robert Crowell
Monroe County Planning Department
Room 306 Courthouse
Bloomington, IN 47404

Justin Frohwirth, President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Joseph A. Simonetta, CAE
Executive Director
Preservation New Jersey Incorporated
414 River View Plaza
Trenton, NJ 08611

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin
President
Friends of Liberty State Park
P.O. Box 3407
Jersey City, NJ 07303-3407

Jersey City Economic Development Corp.
30 Montgomery Street, Suite 1400
Jersey City, NJ 07302

Massiel Ferrara, PP, AICP, Dir.
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Daniel D. Saunders
Deputy State Historic Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Eric S. Strohmeier
Vice President COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Maureen Crowley, Coordinator
Embankment Preservation Coalition
263 Fifth St
Jersey City, NJ 07302

Embankment Preservation Coalition
495 Monmouth Street
Jersey City, NJ 07302



Adam C. Sloane