

Before the Surface Transportation Board

ENTERED
Office of Proceedings
September 3, 2014
Part of
Public Record

Consolidated Rail Corporation -)
Abandonment Exemption -) AB 167 (Sub-no. 1189X)
In Hudson County, NJ) (and related proceedings)

Reply
On behalf of City of Jersey City,
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition and
Rails to Trails Conservancy
to Conrail's
"Supplemental Environmental and Historic Report"
and
Supplemental Comments on Environmental Assessment served
3/23/2009

INTRODUCTION and
SUMMARY OF COMMENTS

This proceeding involves the unlawful destruction and sale to a developer of a rail line in Jersey City ("City"), New Jersey, in 2005, by Consolidated Rail Corporation ("Conrail") without the prior authorization of the Surface Transportation Board ("STB"). The rail line in question (a portion of the Harsimus Branch) included the Harsimus Embankment, a six block structure by which the former main line of the Pennsylvania Railroad reached the yards, other rail lines and harbor at Harsimus Cove. The Embankment's Certification of Eligibility for listing in the New Jersey and National Registers of Historic Places dates from February 17, 1999; it was listed on the State

Register on Dec. 29 of that year; and the Keeper formally determined it eligible for listing in the National Register on March 16, 2000.

Had Conrail complied with the law, these determinations would have taken place before Conrail removed track and structures from the corridor without prior authorization for abandonment. But Conrail nonetheless knew the property was protected by section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), long before the illegal sale and abandonment in 2005 because the railroad had been informed of, and objected to, the determinations of eligibility for the State and National Registers, contending they interfered with the railroad's plans.

Conrail also knew - or was willfully blind to the knowledge - that the property was a line of railroad at all pertinent times.¹ Indeed, the developer has admitted that Conrail's claims to the City, Courts and STB that this line was anything other

¹ A party engages in conduct knowingly when it has actual knowledge, or when it is willfully "blind" to the facts. Under the willful blindness doctrine, a party acts knowingly when it recklessly or intentionally does not inquire into what otherwise is obvious. See, e.g., United States v. Jewell, 532 F.2d 697 (9th Cir. 1976); In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) ("[w]illful blindness is knowledge ... in the law generally"). The willful blindness doctrine is especially pertinent to a corporation, which being artificial has no actual mind, and whose intent must be inferred from what it should have known, and what it did.

than a line subject to STB regulation were fraudulent misrepresentations. Conrail's response to this charge boils down to showing that the developer knew or should have known this at all pertinent times. But if the developer knew or should have known, so should Conrail, so both Conrail and its chosen developer in open court in effect have acknowledged their own knowledge of or willful blindness to an illegal abandonment.

Conrail's destruction and sale of the line without prior STB abandonment authorization was a fortiori also an intentional illegal abandonment and evasion of section 106, because section 106 compliance is part of the STB abandonment licensing process. This intentional misconduct calls into play section 110(k) of NHPA, 16 U.S.C. 470h-2(k). This section bars any license here unless it is conditioned on reconveyance of the property to Conrail (or an invalidation of the Conrail to developer deeds) so, inter alia, a meaningful section 106 process can occur.

This agency issued a policy statement in 2008 dealing in part with impacts on historic or environmentally sensitive properties flowing from illegal abandonments. The policy statement indicated that STB generally did not find out about illegal abandonments until after they had occurred and were brought to the agency's attention,² but this did not mean that

² Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex

questions arising from an illegal abandonment may be ignored. Instead, the agency said that destruction and dismemberment of lines prior to authorization was "unlawful." The agency stated that it would "take whatever steps are necessary to enforce compliance with [NEPA and NHPA]."³

Although section 110(k) is not mentioned specifically in the Policy Statement, it may not be dismissed, ignored or otherwise short-circuited. The Secretary of Interior's Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act ("Secretary's Section 110 Guidelines"), which are incorporated in the Advisory Council on Historic Preservation's (ACHP's) binding regulations implementing the NHPA, 36 C.F.R. 800.9(c) (1), direct all agencies to identify, discourage, and guard against "'anticipatory demolition' of a historic property by applicants for Federal assistance. *Agency procedures should include a system for early warning to applicants and potential applicants that anticipatory demolition of a historic property may result*

Parte 678, served April 23, 2008, slip op. at 4 ("In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.").

³ Id. slip at 4.

in loss of Federal assistance." 63 Fed. Reg. 20496, 20503
(April 24, 1998) (emphasis added).

Conrail's intentional illegal activity gravely prejudiced the City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy ("City et al") for whom this Reply and Comments are filed. While our focus is on section 110(k) below in connection with any supplemental environmental documentation undertaken by the agency, we also deal with some other relevant issues.

COMMENTS

I. Section 110(k) of NHPA

A. The NHPA and Implementing Regulations Require STB to Comply with Section 110(k)

Before addressing Conrail's supplemental ER/HR, City, et al wish to underscore their concern that the Section on Environmental Analysis ("SEA") has not developed the procedures or capacity to evaluate how NHPA section 110(k), 16 U.S.C. 470h-2(k), applies to this proceeding. Section 110(k) implicates matters of intent. SEA staff have indicated that they lack resources or capacity for evaluation of intent.

This is troubling, for the Environmental Assessment (EA) served March 23, 2009, in this proceeding purports to conclude that section 110(k) is not applicable, and the inference from staff statements about lack of resources or capacity to evaluate

intent is that STB to date has overlooked or at least only superficially treated section 110(k) issues. While we appreciate environmental staff candor, if SEA indeed lacks resources or capacity to address intent, then SEA cannot conclude, as it purported to do in its March 23, 2009 EA, that section 110(k) is inapplicable. The agency nonetheless has to address the issue meaningfully and not superficially. We now turn to the 2009 EA.

Under section 110(k), Conrail should lose federal assistance (not be licensed for abandonment) until the status quo ante (Conrail ownership of the property) is restored.

The rationale in the 2009 EA for dismissing the applicability of section 110(k) is un-supported by the statements in the EA. The 2009 EA says section 110(k) is not implicated because "the City itself" in 1984 asked Conrail to make underutilized railroad property available for redevelopment, because in 1996 Conrail allowed City (or a company called National Bulk Carriers) to remove a bridge between portions of Embankment, and because the City also "urged" Conrail to remove other bridges. Assuming arguendo that the City did all these things in 1984 and 1996, this has nothing to do with Conrail's intent to evade section 106 as to the property then or later. The City cannot authorize Conrail to act illegally.

Furthermore, the "self-inflicted injury" argument relied on in the EA was rejected by the D.C. Circuit in City of Jersey City v. Conrail, 668 F.3d 741, 746 (2012). The Court of Appeals held that the City's actions "in no way absolves Conrail of its legal duty." If the property is a rail line, then Conrail must seek abandonment authorization and comply with section 106 before demolishing it and selling it off or allowing others to do so, regardless of the position of the City or third parties.

Moreover, neither a request made in 1984 nor concerns expressed in 1996⁴ bar the City from seeking to preserve the property once it was subsequently determined eligible for the State and National Registers in the 1999-2000 time frame. This is especially the case after public hearings on what was a controversial proposal during that period to use JCRA to hand the line to developers disclosed the public interest in retaining the property for alternative public use, and in particular as a means to relieve traffic congestion and to

⁴Moreover, due to intentional deferred maintenance by Conrail, the bridges were unquestionably failing and constituted a safety hazard. Since Conrail would not address the safety hazard, City at the time hardly waived rights in connection with their removal. When a railroad like Conrail allows bridges to deteriorate, this is ordinarily evidence of de facto abandonment, and cannot be twisted into some indication of an intent to comply with federal abandonment law or any other benign intent on the part of the railroad. In short, the evidence cited in the EA confirms an intent to evade by Conrail, and does not excuse the evasion.

address public open space needs.⁵ Any government's interest in property evolves over time based on information as it comes to light and changes in the area served by the government.

The 2009 EA also says that Conrail's benign intent was established by the fact that it filed an abandonment proceeding in 2008/2009 after the Board's determination in 2007 that the Harsimus Branch was a line. Conrail's action in filing an abandonment proceeding in 2008 has nothing to do with, and therefore cannot excuse, Conrail's intentional misconduct prior to being "caught" by this Board by reason of the declaratory proceeding brought by City et al in Finance Docket 34818, filed in January 2006 to contest Conrail's illegal action. The issue is Conrail's evasion in 2005, not Conrail's alleged compliance after being caught. Conrail's evasion in 2005, 2006 and 2007 is clear from the evidence. The history of the line (electrified main line of PRR, used by Penn Central, used by Conrail) was well known due among other things to the State and Federal Register nominations. The Final System Plan, the conveyancing order, and the relevant deed description all described the

⁵ The Section 106 process is also supposed to identify historic assets and timely and meaningfully to consider alternatives for their preservation. The 2009 EA in claiming that Conrail's version of the position of the City years before the section 106 process is undertaken somehow binds all parties so as to preclude a meaningful section 106 process is inconsistent with Section 106. It deprives everyone of meaningful comment. It is clearly inconsistent with the 2008 policy statement.

property as a line. As even the developer admits, the line connected to other lines.

Indeed, Conrail's request for proposals in 2003, and its deeds to the developer (212 Marin Boulevard, LLC, et al) in 2005 all declared the property to be part of a line of railroad (line code 1420). All applicable statutes (e.g., 3-R Act, ICCTA) indicate that property conveyed to Conrail for rail purposes is subject to STB abandonment authority.

It was well-established at the time that a railroad could not arbitrarily evade abandonment approval requirements by claiming a line was a spur. Conrail either knew or was willfully blind to its legal obligations and simply violated them all the way up until it was caught in 2007. At that point, it entered into a contract to take all necessary steps to secure to the developer what the developer obtained unlawfully. Developer and Conrail then embarked on a campaign of ramped up litigation against the agency as well as City et al, which included as a kind of afterthought the abandonment proceeding on which the 2009 EA relies. The litigation the developer and Conrail agreed to pursue was designed to moot (render irrelevant) the STB proceeding on which the 2009 EA relies as evidence of some kind of good faith on the part of Conrail. The agency recognized this by formally staying the abandonment proceeding for almost four years. In this light, the illegal

sale and essentially all Conrail's behavior since was and is part of an anticipatory demolition, including an effort to secure the economic gain from acting illegally, all in violation of section 110(k).

The error in the 2009 EA is also underscored by evidence that has emerged since the EA was issued. For example, the filing of AB 167-1189X was not an action of a contrite railroad, since the railroad and the developer immediately undertook a course of litigation to moot the filing of AB 167-1189X pursuant to a previously secret 2007 written agreement.⁶ The 2007 agreement indicates that Conrail, in order to avoid being sued by the developer, pledged not only to collaborate with the developer in efforts to overturn the Board's 2007 line determination, but also to take all necessary action to secure the Harsimus Branch to the developer. In their joint and initially successful effort to overturn the Board determination, the developer and Conrail took the position that the line was not conveyed to Conrail as a line, such that this agency had no jurisdiction at all. The D.C. Circuit initially agreed, depriving this agency of any power to act, sending AB 167-1189X into limbo for years. The developer now says the arguments on

⁶The developer says there are actually multiple agreements or understandings but so far has only made public the 2007 agreement.

which Conrail relied for this purpose in the D.C. Circuit were fraudulent misrepresentations. Conrail says the developer knew that the misrepresentations were fraudulent all along and participated in them. In these circumstances, the EA cannot rely on Conrail's filing a proceeding that Conrail and the developer in effect sought to derail on the basis of misrepresentations that the developer at least admits were fraudulent on the part of Conrail and that Conrail says the developer already knew about. The only possible conclusion is that Conrail's pre-2007 illegal actions were intentional, and in 2007 the developer and Conrail entered into an agreement jointly to pursue fraudulent misrepresentations in order to secure the economic benefits from their prior intentional misconduct rather than to cooperate in any remediation of that misconduct.

Conrail of course does not discuss any of the evidence that has arisen or come to light since 2008 in its supplemental ER/HR, and instead claims that SEA should simply reaffirm conclusions that were reached without that evidence, and which we have shown to be fatally flawed and contrary to law anyway. City et al has already filed the relevant evidence in one or more pleadings with the Board. For the convenience of SEA, we list references to recent relevant pleadings in Appendix I to these comments.

Section 110(k) plainly bars this agency from licensing the abandonment of the Harsimus Branch if Conrail intentionally sought to evade abandonment approval and thus section 106 of the National Historic Preservation Act. The intent of a corporate entity such as Conrail must be determined on the basis of what the personnel of the corporation knew or should have known, and what their course of conduct was. In other words, intent is inferred from circumstantial evidence. This requires a procedure for investigating intent, and enough resources to do so, as well as an understanding of what a regulated railroad in the United States should be charged with knowing about its own property, and about what it should be charged with knowing about the law. Conrail is a large and sophisticated corporation and has been so during all relevant time periods. It must be deemed to be aware of the history of its property, and the law requiring all lines, even if inactive for years, to receive an abandonment authorization before the railroad destroys rail structures or sells off the property for non-rail use.

Confronted with an illegal abandonment in Seattle in 1998, this agency's predecessor (the Interstate Commerce Commission) conducted an investigation through its regional offices (staffed with attorneys and investigators) conducted an independent investigation, including interviews of railroad personnel, reviews of railroad documents, and issuance of a report (which

in effect concluded an illegal abandonment occurred).⁷ For purposes of this discussion, the legal principles involved in an illegal abandonment have not changed since 1998. Railroads cannot arbitrarily call lines spurs and abandon them based on that "classification."

B. The Agency's "Notice of Exemption" Procedures Are Inadequate to Resolve Section 110(k) and Related Issues

ACHP's regulations require that an agency such as STB, when faced with actions by an applicant for a permit or license (like Conrail) that could constitute anticipatory demolition (like destruction and sale of the Embankment properties prior even to applying for the license), should "determine[], based on the actions of an applicant, [whether] section 110(k) is applicable." 36 C.F.R. 800.9(c) (2). The actions of the applicant here are self-evident: Conrail tore up structure and then purported to dismember the rest. Unfortunately, unless the agency undertakes the required investigation to determine whether an applicant's actions have intentionally resulted in an

⁷See Opening Statements of Fact and Argument of the Office of Compliance and Consumer Assistance, Interstate Commerce Commission, in Rails to Trails Conservancy - Petition for a Declaratory Order, F.D. 31292, dated July 28, 1988 (the Opening Statement contains an excellent summary of the law showing that lines cannot be arbitrarily abandoned as Conrail purported to do here).

anticipatory demolition, parties such as City et al are left to discovery practices to conduct any further investigation.

City et al has had no discovery in this abandonment proceeding (nor in all the federal litigation from 2009 to 2013). City's discovery against Conrail and the developer to date has been limited to document requests on much different matters tendered in F.D. 34818 in 2006, to which Conrail and the developer made only a limited response. And of course, the agreements from 2007 onward between Conrail and the developer to circumvent this Board's jurisdiction were not even in existence in 2006. City in 2014 has now twice served a set of document requests on Conrail in this abandonment proceeding, seeking information relating to issues addressed in these comments, including matters germane to Conrail's intentions, and dealings with the developer to evade STB jurisdiction. Conrail initially refused to respond to City's document requests until and unless City et al re-served the document requests after STB dissolved the stay in this proceeding. City et al again served the document requests on August 11, the date the stay was dissolved. Conrail by email from its counsel has indicated that it nonetheless does not intend to respond other than by objection.

Once Conrail's objections are received (we have requested a response by September 3), City et al expects to file a motion to compel in accordance with STB discovery procedures. In short,

we hope eventually to obtain discovery germane to section 110(k) issues, as well as other relevant matters. This is a burdensome and slow process for City et al in what has to be deemed a controversial and heavily contested abandonment proceeding. It would be preferable for STB staff to engage in the same kind of extensive review of Conrail files and oral examination of witnesses that took place in the case of the illegal abandonment in Seattle to which we earlier alluded. In the absence of such an STB investigation, we will need additional time to carry out even rudimentary discovery against a recalcitrant party like Conrail.

For this reason, as City et al have previously argued, the "notice of exemption" procedures are so far not appropriate for this case. The complex issues are better addressed through a petition for exemption or a full application rather than a fast track notice procedure. In V&S Railway - Abandonment Exemption - in Kiowa County, CO, AB 603 (Sub-no. 3X), served June 17, 2014, the Board said that notice of exemption procedures (in use in this case) are only appropriate for "routine transactions that are uncomplicated and noncontroversial." "A notice," the Board said, "that raises unresolved issues or questions that require considerable scrutiny may be rejected." This abandonment proceeding (AB 167 - sub no. 1189X) is hardly routine, uncomplicated or noncontroversial. It raises

unresolved issues about (among other things) an illegal abandonment, fraudulent conduct as admitted by the developer, and the application of section 110(k) of the NHPA. These issues need development, either by independent investigation by the Board (which we understand the Board lacks resources to undertake) or by discovery against Conrail (and perhaps the developer) by the Board and/or by ourselves. SEA should consult with the Board on whether under V&S and similar cases the Board should reject Conrail's notice of exemption and require Conrail to file either a petition for exemption or a full application.

C. The Record Is Already Replete with Ample Evidence Demonstrating Unlawful Anticipatory Demolition

City et al have already summarized the plethora of evidence indicating that Conrail engaged in an intentional unlawful abandonment. The railroad does not dispute destruction of rail structures and sale of section 106 assets prior to seeking abandonment authority. It is also important to note that 2005 conveyance was in intentional disregard of efforts by the City to keep the property intact and to acquire it for public purposes. City had previously designated the Embankment as a City Historic Landmark, adopted ordinances in 2004 and 2005 to authorize acquisition of the property and use of eminent domain, and indeed retained outside eminent domain counsel (John Curley) to acquire the property. Under New Jersey title practice

governing acquisition of rail lines, practitioners are required to inquire of railroad sellers whether the line in question has a federal abandonment authorization or request proof that none is required.⁸ When Mr. Curley inquired of Conrail, Conrail claimed that the line was a "spur" not requiring abandonment authorization. Conrail's raw claim was hardly "proof." It was contrary to the line's history, as spelled out in the state and federal nomination forms for the State and National Registers. It was contrary to Conrail's description of the line in property descriptions and deeds.⁹ And it was contrary to law, for railroads cannot arbitrarily evade STB abandonment regulation by claiming their "lines" were "spurs."¹⁰

⁸ L. Fineberg, Handbook of New Jersey Title Practice 3d Ed., Sept. 2005, Vol II, chapter 98, section 9806. The 2d Ed. (2000), section 9806, p. 98-4 provided the same.

⁹ Conrail cannot pretend ignorance of what it puts in its own deeds, much less has in its files. All it can pretend is willful blindness. Willful blindness is the legal equivalent of knowledge at federal law. A party cannot ignore clear facts and claim protection from statutes prohibiting intentional misconduct. This is especially the case in a corporation, which is an artificial entity with no mind. The claims by Conrail's attorneys that the corporation harbored no ill intent, or that there is no evidence of ill intent, are belied by the plethora of circumstantial evidence, including the admissions of the developer, and Conrail's own response that the facts showing this was a line were known or should have been known to the developer at all relevant times. If this is so to developer (as Conrail ably has shown), then so much more is it applicable to Conrail.

¹⁰ See sources cited at pages 10-12 of Opening Statements, supra, note 7. Conrail is responsible to know the law.

Moreover, when Mr. Curley sought an on-site inspection as required under New Jersey eminent domain law, Conrail repeatedly postponed cooperation until after it unlawfully purported to sell all of its interests to a developer. This evidence suggests an intent on the part of Conrail to evade federal regulation to the detriment of City et al; indeed, it is the only possible inference.

Since this property was a line, no one may lawfully acquire it for non-rail purposes without an abandonment authorization, nor may it be acquired for rail purposes without a transfer authorization. Conrail by evading this agency's abandonment authority created a condition in which the City could not lawfully acquire the property by voluntary transfer or by eminent domain, and in which the City could not comply with New Jersey title practice in order to secure title.¹¹

¹¹ This agency presumably is familiar with the sorry history of what followed. Conrail's behavior forced the City to approach the STB in order to comply with the law, which City did in F.D. 34818 in January 2006. After initially consenting to STB jurisdiction, Conrail and the developer reneged, arguing to the D.C. Circuit that only the U.S. District Court had jurisdiction to determine if the Harsimus Branch was a line of railroad. When Conrail and the LLCs persuaded the D.C. Circuit to hold that STB lacked jurisdiction until the U.S. District Court for the District of Columbia determined that the Harsimus Branch was conveyed to Conrail as a line of railroad, City et al brought a declaratory action in U.S.D.C. for D.C. Rather than deal with the merits, Conrail and the LLCs attacked the standing of the City to contest their unlawful actions by claiming the City could acquire the property by unlawful use of eminent domain.

City et al can find no case in which STB has previously grappled with the application of section 110(k). However, an intentional illegal abandonment of a rail line (the Harsimus Branch) that encompasses a section 106 asset (the Embankment), and is surrounded by other section 106 assets (two national historic districts), has occurred. The agency needs to address procedures to enforce, obtain capacity to investigate, and ultimately find the violation of section 110(k) that has clearly occurred.

II. Section 110(k) Compliance Can Be Attained and Section 110(k) Investigations Can Be Avoided Only If STB Voids the Unlawful 2005 Sale of the Line to the Developer

Conrail and the developer claimed that since the City could act illegally, it thus sustained no injury giving rise to standing. The argument that the City lacks standing because it could act illegally was decisively rejected by the D.C. Circuit, but the point of the whole episode is that the arguments used by Conrail (and the developer) in effect call for everyone interested in the Harsimus Branch to evade STB authority and compliance with section 106. If this were generalized to all lines, STB would be pretty much a dead letter in abandonments. This is but one example of how the very arguments presented by Conrail and the developer indicate an intent to evade this agency's jurisdiction, including section 106. The very nature of Conrail's arguments, and those of the developer, indicate exactly the intent to evade that makes section 110(k) applicable. Ironically, in its supplemental ER/HR, Conrail says it does not believe the City has funding to acquire the property by state law eminent domain, much less develop it. Conrail Supp ER/HR at p. 6. If Conrail so believes, then its entire standing argument (that City could avail itself of eminent domain remedies) lacked a sound basis in fact, in violation of Rule 11 of the Federal Rules of Civil Procedure. Conrail's argument was soundly rejected by the Court of Appeals for other reasons, but its lack of belief in its own argument is another demonstration of the continued and almost flippant inconsistency of Conrail's positions to date.

The New Jersey State Historic Preservation Office (SHPO) has already pointed out that the March 2009 Environmental Assessment "attempt[s] to unilaterally dictate that Section 106 consultation be completed by parties with no ownership of the Harsimus Branch and with minimal oversight from the STB." SHPO noted that the EA's postulate that the section 106 process would be completed by Conrail prior to effectiveness of abandonment "suggests that STB has, in effect, already granted de facto approval of the abandonment"; in other words, already approved Conrail's illegal sale. SHPO noted that the current "owner" of the Embankment "continues to pursue demolition locally, and operates as if unconstrained by the Section 106 review process." As SHPO indicates, the Section 106 process proposed in the EA is a process in which meaningful consideration of preservation of the Branch is foreclosed. "[I]nstead, it leads to loss of historic property at the consummation of abandonment." SHPO questioned "how the letter and intent of the Section 106 process can be completed while the property is held by a third party." Letter, D. Saunders (NJ SHPO) to Acting STB Secretary Quinlan, May 7, 2009, p. 2. City et al concurs with this analysis.

The 2009 EA is infirm for the reasons stated by SHPO, but that in part is because it improperly addresses section 110(k). As noted above, Conrail and the LLCs not only have engaged in an

unlawful abandonment based on destruction of section 106 assets but in 2007 entered into an agreement under which Conrail pledged to take all necessary steps to secure the historic property to the developer,¹² who unquestionably seeks its destruction.¹³

Under these circumstances, STB has only two lawful choices: to deny abandonment per section 110(k), or to take steps that will allow the agency to carry out its section 106 obligations. The only way the agency can discharge those obligations is to void Conrail's unlawful sale of the property to the developer.¹⁴

Under section 110(k), there can be no abandonment until and unless there is meaningful relief that addresses the illegal

¹² A copy of the contract was filed by the developer in *City of Jersey City v. Conrail*, U.S.D.C. 09-cv-1900-CKK, document 94-3, on November 8, 2012. Conrail's consent to the contract was evidenced by an email from Jonathan Broder (Conrail) to Steven Hyman (manager of the developer) dated November 7, 2007, filed on the same date in the same proceeding as document 94-4.

¹³ For example, the developer offered this year to donate the Embankment as fill to Hoboken. The developer recently claimed in a video interview with an element of the news media that he was doing a favor for the citizens of Jersey City by preventing the City from acquiring the property for public purposes.

¹⁴ STB unquestionably has power to void transfers of rail lines for abandonment prior to receipt of abandonment authority. E.g., SF&L Railway, Inc. - Acquisition and Operation Exemption - Toledo, Peoria and Western Railway, F.D. 33995, served Oct. 17, 2001 (lines may not be transferred to others prior to abandonment authority to "degrade, abandon and salvage", slip at 19.) This Board said that "persons who engage in such abuses [should not] be allowed to profit from them." Slip at 19, see also note 35.

actions and Conrail's pledge to secure the property to the developer for destruction. The illegal sale must be voided, and the property affirmatively made available to City for purposes consistent with historic preservation on terms equal to those on which Conrail sold it to the developer (that is the price provided under N.J.S.A. 48:12-125.1, copy attached in appendix).

STB has a broad power to condition abandonments in the public interest (e.g., 49 U.S.C. 10903(e) (1) (B)). If meaningful relief of this sort is not afforded, then abandonment authority must be denied under section 110(k). If abandonment authority is denied, then Conrail either must re-acquire the property from the developer, or the developer's deeds must be voided. In either event, Conrail would have to keep the corridor intact, and stop destroying structures upon it. Such an outcome is superior to loss of the corridor.

There is no burden on interstate commerce flowing from this relief. Conrail has purported to sell all of its interests to the developer, but the City stands ready, willing and able to acquire the property for the price paid by the developer. Conrail would thus suffer no loss if it had to return the money paid by the developer, because City would reimburse Conrail an equivalent amount. Moreover, the developer would sustain no

loss, for Conrail could reimburse the developer the amount he paid.¹⁵ In either event, the corridor will be kept intact.¹⁶

III. Conrail's Supplemental ER/HR

A. Conrail's Alternatives Analysis Is Flawed

In keeping with its 2007 agreement to defend its unlawful sale of the Harsimus Embankment to the developer for destruction, Conrail's supplemental ER/HR reaffirms the railroad's prior arguments that relevant facts should be ignored, and that STB

¹⁵ Chicago Title is paying the developer's legal fees, and the developer would presumably look to its insurer from reimbursement if the deeds were voided. Chicago Title, among other things, has cross-claimed against its local agent, inter alia for violating New Jersey title practice (see note 8) and exceeding agency authority in issuing the title insurance. Thus the developer appears protected from loss, except as to profit expectations flowing from participation in an illegal abandonment. But no one has a reasonable expectation to profit from contracts that conflict with federal rail law. "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights to property, but, when contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 307-08 (1935), quoted in Connolly v. Pension Guar. Corp., 474 U.S. 211, 223-24 (1986). Moreover, as already noted, Conrail has indicated that the developer was aware at all pertinent times, or should have been aware, that the property was part of a line of railroad requiring STB abandonment authorization.

¹⁶ City has also filed a notice of intent to file an OFA. A successful OFA is an efficient means to keep the corridor intact for purposes (rail) consistent with historic preservation all the way from Marin Boulevard to CP Waldo. This is another reason to allow the City to proceed with its intent to file an OFA.

regulation otherwise should signify nothing for unlawfully abandoned lines.

Conrail appears to reiterate its argument that since it disposed of its interests in the Embankment properties before it filed for abandonment, there are no "reasonably foreseeable" impacts on the Embankment from granting abandonment authorization which need to be analyzed under NEPA or NHPA. Conrail Supp. ER/HR at 5. In the so-called "orphan" defense, a child who kills its parents seeks relief from a murder conviction on grounds that it is an orphan. Conrail's argument is just such an orphan defense: Conrail argues it should not be accountable for dismembering the Harsimus Branch because it has dismembered the Harsimus Branch. Like any orphan defense, Conrail's argument reduces its illegal abandonment into a mechanism to evade NHPA and NEPA wholesale rather than treat the illegal conduct as a problem to remediate. As the SHPO pointed out in its response to the EA (Letter, Saunders to Quinlan), supra, which serves as a critique of Conrail's argument in its supplemental ER/HR, the unlawful sale forecloses meaningful consideration of alternatives, and instead amounts to loss of the historic property. Conrail's argument, either as adopted in the EA and as iterated by Conrail directly, amounts to contending that Conrail should be allowed to engage in evasion of the section 106 process when it unlawfully sold the property in 2005 because it did so.

As explained above, Conrail's evasion must be viewed as intentional: Conrail knew or should have known that the sale was illegal. Even the developer admits as much. Moreover, after being "caught" in F.D. 34818, Conrail joined in requesting demolition permits; Conrail bound itself to take all necessary action to secure the property to the developer who is seeking to destroy the Embankment properties without compliance with section 106; and Conrail continued to contest this agency's licensing jurisdiction. Section 110(k) would bar any abandonment authorization in this case, at least unless conditioned to secure the property to the City for preservation.

Conrail also claims that the Jersey City Historic Preservation Commission (HPC) has now ruled against "waivers" allowing destruction of the property, and this ruling was upheld by the Jersey City Zoning Board of Adjustment (ZBA). Conrail says that although an appeal has been taken (that appeal was stayed pending an outcome in the federal litigation and now this proceeding), demolition is no longer reasonably foreseeable. Conrail Supp. ER/HR at p.6.

This argument at heart is another version of Conrail's rejected argument that the City's injuries are self-inflicted; that is, that the City should rely exclusively on local remedies. But the D.C. Circuit has explained that the availability of relief at the state level does not mean that federal relief may be

disregarded or is otherwise moot. Local regulation is no substitute for meaningful compliance with section 106 before property is sold to a developer who seeks to demolish it.

In any event, Conrail's argument remains wholly unripe, because as Conrail admits, the developer has not exhausted his appeals. The developer has made two major claims against the City. The first is for a "certificate of appropriateness" in which the developer asserts it is appropriate and consistent with the historic designation of the Embankment to demolish it. The second claim is that the historic restriction deprives the developer of the beneficial use of the property. The ZBA initially affirmed the HPC's denial of both claims, but the ZBA ruling was reversed in state court, and remanded for more evidence. After remand and additional hearings, ZBA again denied relief, and developer again appealed. The appeal has been stayed by Judge Bariso basically pending an outcome in the federal litigation (now before STB again).

However, if the developer's appeal is ultimately successful, the LLCs would obtain a demolition permit. In the event the developer is not successful, he will pursue inverse condemnation remedies, and he already has a 42 U.S.C. 1983 damages action pending, against the City. As noted below, Conrail says in its Supplemental ER/HR at 6 that it does not believe the City has money to pay off state law condemnation damage awards for taking the

property. Conrail is in the awkward posture of asking STB to rely on state remedies that it says the City lacks money to enforce. This brings us to Conrail's final argument.

Conrail contends that the only alternative to analyze is City acquisition of the property. City of course seeks to acquire the property for purposes consistent with its preservation. But as stated by Conrail, the "alternative" is another regurgitation of the Conrail/developer argument that because the City has some state or local eminent domain remedies, federal remedies are moot or must in any event be ignored. This position was rejected by the D.C. Circuit.

Conrail in any event goes on to say that it is unnecessary to analyze City acquisition because it believes that City lacks the funding to eminent domain the property. Conrail Supp. ER/HR at p. 6.¹⁷ Why Conrail makes this claim is perplexing. Since Conrail knows the City has bond proceeds sufficient to acquire the property and designated for and set aside for that purpose, we fear that Conrail is trying improperly to suggest that all remedies looking for City acquisition are moot. Perhaps Conrail means to suggest that state law eminent domain would be applicable, and would set

¹⁷ Here as elsewhere Conrail echoes claims by the developer. The developer frequently claims the City lacks any money, and that it must pay up to him under state condemnation law or under state inverse condemnation law. E.g., Transcript of Zoning Board of Adjustment, Case Z09-010, 212 Marin Boulevard, et al., March 30, 2011, at pp. 134-35.

a much higher valuation on the property than would be set at federal law. If Conrail means so to suggest, this is a very good reason for City to pursue federal remedies, like "OFA", section 110(k), and so forth.¹⁸ But the City is pursuing federal remedies, and if necessary will pursue certain federally mediated state law remedies (N.J.S.A. 48:12-125.1) in this proceeding.¹⁹ Under these remedies, the acquisition will be from Conrail, not the developer, and under applicable precedent, would be at a price not exceeding that paid by the developer.

For example, under STB's "OFA" remedy, the City would pay net liquidation value, which is equal to Conrail's contract price with the developer for the Embankment parcels, and to the across the fence value of remaining right of way parcels owned in fee by Conrail. Iowa Terminal RR v. ICC, 853 F.2d 965 (D.C.Cir. 1988).

¹⁸Under general state eminent domain procedures, the City would have to commit to pay whatever a court later determines. This does pose valuation risks, and is in fact a valid reason to pursue federal remedies as superior.

¹⁹An important reason to pursue federal remedies rather than state law eminent domain against the developer is that the sale to the developer was unlawful under both federal and state law, and thus voidable, and any title conveyed by the developer in the circumstances is not only questionable but inconsistent with the New Jersey title practice manual. In short, once the Harsimus Branch is recognized to be, as it is, a line of railroad without STB abandonment approval, the only good title to it is title conveyed by Conrail after the effectiveness of an abandonment authorization. See also N.J.S.A. 48:12-125.1 (developer's title is void). This necessitates pursuit of federal remedies.

Under the OFA remedy, this Board would set terms and conditions such that the City would know in advance what it must pay before it must commit to pay. The same basic principles govern purchases under N.J.S.A. 48:12-125.1. Under that statute, the sales to the developer would be voided, and Conrail required to make the property available to the City at the same price agreed with the developer. The City has bond proceeds which it believes sufficient to acquire the Branch under these circumstances,²⁰ as well as to arrange facilities for basic freight operations pending a planning process to restore rail use on the Branch. These proceeds are also sufficient for STB-mediated state remedies (N.J.S.A. 48:12-125.1).

Further, although Conrail neglects to mention the fact, the developer, joined by Conrail in many important instances, has amply demonstrated its propensity to abuse state court proceedings to delay and to harass City et al and otherwise to

²⁰ Conrail from time to time has claimed a retained implied easement in the Embankment properties. Under applicable OFA precedent, City could acquire this easement for zero. At most, City would pay \$3 million if the Board voided the deeds to the developer and ordered conveyance of the fee interest to City. City would also have to acquire some landlocked parcels of low value to the National Docks Secondary, and then possibly an easement over the Secondary as employed by the Harsimus Branch and the extension up to CP Waldo. In all events, the acquisition would be from Conrail, not from the developer. A similar result would apply under N.J.S.A. 48:12-125.1.

evade the effective remedies available before this agency.²¹

The public interest is best served by some end rather than more litigation at the state level on pain of exhaustion. STB should afford City et al an effective remedy by meaningful enforcement of federal licensing requirements applicable to the Harsimus Branch.

²¹City has endured eight years of federal litigation, plus a barrage of administrative and judicial proceeding at the state level brought by the developer, and joined by Conrail in some instances. As alluded to elsewhere, the developer has filed a suit against the City and some of its attorneys and officials claiming that the City's pursuit of its rights under ICCTA constitute a violation of 42 USC 1983 (a civil rights statute). The developer has filed strategic lawsuits against public participation ("SLAPP suits") against the Coalition, RTC, and their attorneys, including the undersigned, to silence them as well.

Indeed, the developer has publicly acknowledged threatening to sue any opponent of his plans for the Embankment parcels. He mentions his section 1983 suit against the City as evidence that he implements his threats. Transcript of Zoning Board of Adjustment Proceeding, supra, March 30, 2011 at 134. The developer acknowledges that he has threatened to bankrupt personally the leadership of the Embankment Preservation Coalition "when this is all over." Transcript, supra, April 5, 2011, at p. 146. He also said he would "devastate" the City. Id. at 140. This agency has already experienced the developer's tactic of attempting to relitigate already decided matters [see 212 Marin Boulevard, LLC - Petition for Declaratory Order, F.D. 35825, served August 11, 2014, slip at 4 (declaratory petition duplicative of issues already determined), pet. for recon. filed August 29, 2014], and reversals of position (the developer renounced in a 2012 stipulation the argument by which he and Conrail persuaded the D.C. Circuit to vacate this Board's 2007 determination that this property was a line of railroad, and then after renouncing the position, sought to relitigate it again at STB). On August 29, 2014, the developer filed a petition for reconsideration of the August 11, 2014 decision in F.D. 35825, so the churning continues.

Conrail's entire supplement, as well as all of its environmental and historic filings, must be viewed in the context of the admission by the developer that Conrail made fraudulent (or in the alternative negligent) misrepresentations to this agency, the courts, the City and to the developer that the Harsimus Branch was not a line of railroad subject to STB abandonment jurisdiction. As the developer has also shown, Conrail in 2007 entered into a contract obligating itself to take all steps necessary to secure the property to the developer, in order not to be sued by the developer (presumably for fraud). Conrail's chosen developer has admitted in U.S.D.C. for D.C. pleadings to Conrail's fraudulent behavior, and shows that the railroad contracted nonetheless to secure the property to the developer in order to avoid being sued (for damages presumably for fraud). See Appendix I (sources already on file cited).

Under these circumstances, Conrail ceases to be a reliable source of information for the Harsimus Branch, but instead is like the thirteenth chime of a clock, calling into question everything its says, and has said before. Its advocacy is designed to avoid consequences for unlawful conduct and to avoid liability for its past intentionally illegal actions.

B. The EA Must Address Meaningful Alternatives

The alternatives that SEA should analyze in a revised environmental assessment, or environmental impact statement if one is required, include

-- no action, that is, outright denial of abandonment authority due to violation of section 110(k),

-- conditioning abandonment so as to become effective only if the 2005 deeds from Conrail to developer are voided, or only if the property is reconveyed by developer to Conrail,

-- conditioning the abandonment to require transfer of the various parcels purportedly sold to the developer are conveyed to the City for the same price paid by the developer,

-- further conditioning the abandonment to require Conrail to restore the various bridges it allowed to fall into such disrepair that they were removed in the 1990's without compliance with section 106.²²

STB must exercise its broad powers to protect the public interest, through its authority to condition abandonments.²³ The agency also has broad power to protect its jurisdiction by voiding

²²Restoration of the bridges would be consistent with the City's objective of restoring rail service and other public use of the corridor.

²³ Conrail v. ICC, 29 F.3d 706, 713 (D.C.Cir. 1994) ("There is no restriction placed on the conditions the [agency] can impose other than that they must be required by public convenience and necessity.").

deeds, or ordering reconveyance,²⁴ when transfers of rail property occur without proper STB authority.²⁵ Those are the kinds of remedies appropriate here, and which must now be analyzed in the EA (or in an EIS). This is not a prospective abandonment where the issue is what remedies to afford as to line that lawfully remains intact. It is a proceeding where the real issue is how to remedy intentional evasion of STB's abandonment jurisdiction and the anticipatory demolition of an historic asset, especially in light of the public interest in preservation of Jersey City's last underutilized transportation corridor, which Conrail has endeavored persistently to destroy without compliance with any STB requirements.

²⁴Since the developer requested and was granted intervenor status, he is a party to this proceeding, and the agency has jurisdiction to order him to reconvey to Conrail the eight blocks of the Harsimus Branch which he purported to acquire in 2005 without any STB authorization in a transaction which he acknowledges was based on fraudulent misrepresentations concerning STB jurisdiction, and which Conrail shows developer was aware, or should have been aware, at all pertinent times.

²⁵This agency has repeatedly warned parties that it is a misuse of its processes for railroads to transfer rail lines for non-rail purposes (i.e., abandonment) unless the railroad first obtains an abandonment authorization. E.g., City of Temple, Tex. - Acquisition and Operation Exemption - Georgetown Railroad Company, F.D. 35369, served April 23, 2010, slip op. p. 1 ("acquiring a line of railroad for the purpose of abandoning rather than operating over it constitutes a misuse of [this Board's] procedures"). This agency has voided deeds, or required reconveyance, in such situations. E.g., The Land Conservancy of Seattle & King County - Acquisition & Operation Exemption -- BNSF, F.D. 33389, served Sept. 26, 1997, slip op. at 3.

These comments have special relevance to the section 106 process. Conrail by its orphan defense claims to have placed the property beyond this agency's reach by unlawfully alienating it long before the railroad approached STB for abandonment authorization. STB cannot meaningfully address preservation and other environmental issues if the property is no longer in Conrail's hands. The New Jersey State Historic Preservation Office has already questioned how section 106 can meaningfully be applied in such circumstances. It cannot. The only way the agency can discharge its responsibilities under both section 106 and its organic statute in connection with section 106 is to void Conrail's deeds to the developer or to require the developer to reconvey the property to Conrail. Without such remedial actions, reasonable preservation options (and the ACHP's mandatory opportunity to comment on federal undertakings) will be foreclosed.

Finally, unless the deeds are voided now, the section 106 process becomes a fiction, for as soon as STB's jurisdiction ceases, the deeds will be void under state law (N.J.S.A. 48:12-125.1(e), set forth in Appendix II). It makes little sense to pretend to comply with section 106 on the assumption that something that will inevitably be void under state law is valid. In particular, since the developer has repeatedly indicated an intent to demolish the Embankment, and since his deeds are void

or voidable, nothing can be accomplished in terms of meaningful application of section 106 to explore preservation alternatives until the deeds are voided. To the contrary, the only way to address preservation options in a meaningful fashion is to recognize as soon as possible that the deeds must now be voided, or the property reconveyed. The agency should require the corridor to be restored to the status quo prior to the unlawful abandonment.

IV. Other Section 106 Issues

City et al has identified several additional New Jersey SHPO determinations in reasonable proximity to the Harsimus Branch which also bear on the application of section 106 to the Branch. These include:

- 1) National Docks and NJ Junction Connecting Railroad Waldo Tunnel (ID# 4871) SHPO opinion 2/28/2009;
- 2) The New Jersey Railroad Bergen Cut Historic District (ID # 293) From the Hackensack River to "approximately Waldo," SHPO opinion 5/21/1999; and
- 3) The Hudson & Manhattan Railroad Transit System (PATH) (ID #4103) SHPO opinion 3/4/2002.

All three SHPO determinations are relevant to rail lines in the Waldo area, and two were subsequent to information compiled for the original EA. All are red flags about the historical importance of rail structures and properties around CP Waldo, such as the Harsimus Branch. Had Conrail undertaken the abandonment licensing process prior to its illegal demolition

and dismemberment of the Branch, section 106 would have applied, and preservational alternatives would have been amenable to meaningful consideration.

V. Future Inspections by SEA

This Board's August 11, 2014 decision indicates that representatives of SEA visited the property some years ago. In the event another inspection or visit is undertaken, City et al requests that they be informed so they may accompany the inspection.

VI. Miscellaneous

Failure to reply further to Conrail's cursory supplemental ER/HR should not be construed as an admission of any sort as to anything contained therein. The supplemental comments of City et al set forth herein are in addition to those previously supplied on the EA. City et al reserve the right to comment further in the on-going process. City et al invite SEA to advise us if SEA has any additional informational needs.

Conclusion

In conclusion, Conrail's abandonment violates section 110(k) in that the railroad knew or was willfully blind to what it was doing. The developer even admits that Conrail engaged in fraudulent misrepresentations in pretending the line was not a line. Conrail's response that the facts were known or should have been known to the developer in effect seals the case: this

was an intentional illegal evasion of STB. Conrail basically urges an orphan defense (let the railroad off because it has already acted illegally), but this kind of defense encourages illegal behavior and does not remediate it, and in any event is blocked by section 110(k). The agency in a revised EA must find that section 110(k) was violated, and must consider reasonable alternatives, including use of the conditioning process, to so restore the Harsimus Branch that a meaningful section 106 process may be undertaken. In addition, a section 106 process based on the assumption of continued ownership by the developer would be "full of sound and fury, signifying nothing." Any revised EA must consider the alternative of voiding the deeds, for they are inconsistent with both federal law and state law (N.J.S.A. 48:12-125.1 provides that the developer's deeds are void in the circumstances here).

Parties engaging in unlawful transfers of a rail line without abandonment authority for the purpose of degrading and destroying the line are engaged in an "abuse" from which they must not "be allowed to profit." SF&L Railway, supra, F.D. 33395, served Oct. 17, 2002, slip at 19.

City et al looks forward to working with STB and NJ SHPO in a meaningful section 106 process.

Respectfully submitted,

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Appendix I

Previously filed evidence includes, but is not limited to, the following, all of which is available on the STB website for this docket:

1. City et al, Notice, filed Nov. 22, 2013 (Exhibit B contains the Developer's Stipulation and Conrail's Stipulation, Exhibit C contains excerpts from the Developer's proposed Answer in which Developer admits Conrail engaged in fraudulent misrepresentations and negligent misrepresentations)
2. Conrail filed a response on December 11, 2013, which attached its brief in U.S. District Court describing how the Developer timely knew all the facts on which the Developer's claims of fraud or negligence by Conrail were based.
3. City et al submission filed May 22, 2014 (Exhibit C sets forth again the Developer's admission that Conrail engaged in fraudulent and negligent misrepresentations; Exhibit D contains a letter from Conrail to SHPO objecting to State and National Register listings - O'Toole to Guzzo, June 4, 1999, and Guzzo's January 25, 2000 noting listing and eligibility nonetheless).
4. City et al motion for a scheduling order (Exhibits include a copy of the 2007 contract between Conrail and Developer, as filed by Developer in U.S.D.C. for D.C. as document 94-3, Conrail's joinder in demolition permit requests, signed Dec. 13, 2007, by V.P. and General Counsel Jonathan Broder after this Board concluded in F.D. 34818 that the Harsimus Branch was a line of railroad; and Decl. by Mr. Marks that Developer offered the Embankment for free as fill to Hoboken in Jan. 2014).

Other relevant evidence has previously been supplied in FD 34818 or in AB 167-1189X before the proceeding was de facto suspended in 2009.

Appendix II

New Jersey Statutes Annotated

48:12-125.1. Railroad rights of way; acquisition; abandonment; sale, conveyance.

1. a. In order to permit the State and its political subdivisions to receive notice of, and be afforded an opportunity to acquire, by purchase or condemnation, railroad rights of way proposed to be abandoned, any railroad company which makes application to the Surface Transportation Board for authority to abandon any part of its right of way on which passenger or freight services are operated, or to abandon, sell, or lease any of its right of way over which services have previously been authorized for abandonment and title to such right of way currently remains with the railroad shall, within 10 days of making such application, serve notice thereof upon the State and upon each county and municipality in which any part of the right of way proposed for abandonment is located.

b. No sale or conveyance of any part of such right of way shall thereafter be made to any entity other than the State, or a county or municipality, for a period of 90 days from the date of approval by the Surface Transportation Board of the application for abandonment or from the date of service of the notice required by subsection a. of this section, whichever occurs later, unless prior thereto each governmental entity entitled to such notice shall have filed with the railroad company a written disclaimer of interest in acquiring all or any part of said right of way during the time period in which a railroad company is restricted from selling or conveying any part of a right of way pursuant to this subsection.

c. During the period of 90 days in which a railroad company is prohibited from selling or conveying any part of a right of way pursuant to subsection b. of this section, such railroad company shall negotiate in good faith for the sale or conveyance of the right of way with the State, or with any municipality or county in which the right of way proposed for abandonment is located and which expresses written interest in acquiring such right of way.

d. Any sale or conveyance of a right of way made after the expiration of

the foregoing 90-day period to any entity, other than the State or a county or municipality in which any part of the right of way proposed for abandonment is located, shall be subject to the right of first refusal by any of the foregoing governmental entities, provided that the governmental entity has made an offer to purchase such right of way during the 90-day period and which offer was refused by the railroad company. The governmental entity shall have no less than 90 days from either the date of receipt from the railroad company of an offer to purchase the right of way by an entity, other than one of the foregoing governmental entities, or any other contract setting forth the terms and conditions governing the sale to which this right of first refusal is applicable or the effective date of abandonment as authorized by the Surface Transportation Board, including the expiration of any stays, whichever occurs later, to exercise this right of first refusal. Upon exercising this right of first refusal, the governmental entity shall purchase the right of way for the same amount agreed upon between the railroad company and the person to whom the company attempted to sell or convey such right of way pursuant to this subsection.

e. Any sale or conveyance made in violation of P.L.1967, c.282 (C.48:12-125.1 et seq.) shall be void.

As used in this act "right of way" means the roadbed of a line of railroad, not exceeding 100 feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls, or foundations necessary to provide a width not to exceed 100 feet at the base of the rail, but not including tracks, appurtenances, ballast nor any structures or buildings erected thereon.

L.1967, c.282, s.1; amended 2009, c.323.

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this 3d day of September 2014 addressed to Daniel Horgan, counsel for the LLCs, Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096; and Robert M. Jenkins III, counsel for Conrail, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006-1101 and other parties on the attached service list with known addresses.

s/ Charles H. Montange

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[AB 167 (Sub-no. 1189X)]

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