

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

236280

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

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

**ENTERED
Office of Proceedings
July 3, 2014
Part of
Public Record**

**REPLY OF CONSOLIDATED RAIL CORPORATION
TO MOTION FOR A SCHEDULING ORDER**

Consolidated Rail Corporation (“Conrail”) hereby replies to the Motion for a Scheduling Order (“Motion”) filed by the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Coalition (“City Parties”) on June 17, 2014. Their Motion seeks a scheduling order for the proceedings in the above-referenced matter, if and when the STB lifts the abeyance order now in effect.

Under the rubric proposed by the City Parties, they would have the opportunity to take discovery in support of their ever-expanding list of fraud and conspiracy allegations, and to file a motion to void the deeds of sale by which Conrail conveyed various properties at issue in this proceeding to 212 Marin Boulevard, et al. (“LLCs”). The City Parties also seek to press their claims that the City should not be required to submit the information in support of an Offer of Financial Assistance (“OFA”) that the Board requires. And they suggest the need for a complete do-over of the environmental review processes.

Before turning to a suggestion for an orderly structuring of proceedings regarding the properties at issue in this matter, Conrail must (again) respond to various allegations made by the City Parties and address some of the other points raised in the City Parties’ Motion.

A. The LLCs Are Not Conrail’s “Chosen Developer.”

The City Parties repeatedly refer to the LLCs as Conrail’s “chosen developer.” *See, e.g.*, Motion at 4, 10, 11, 22. The City Parties use this rhetorical gambit (as they have throughout these proceedings) in order to tar Conrail and the LLCs with the same brush whenever the City Parties complain of alleged misdeeds perpetrated by the LLCs.

Because the City Parties appear to believe they are getting so much mileage out of this false association, Conrail understands that they are not likely to stop asserting it no matter what Conrail says. Nevertheless, Conrail wishes to reiterate that the LLCs are not Conrail’s “chosen developer.” Conrail sold the properties at issue here to the LLCs in an arms-length transaction (after offering them to the City) and executed a Memorandum of Understanding with the LLCs (loudly trumpeted by the City as evidence of fraud or conspiracy) in which Conrail undertook to seek necessary approvals for abandonment, resist public use and trail use conditions, execute documents as necessary, assign its rights to the LLCs to defend any condemnation proceedings, cooperate on any necessary applications relating to development, and file timely appeals. Conrail has not engaged in frauds or conspiracies with the LLCs and has not supported the LLCs in bringing lawsuits that the City Parties have characterized as “SLAPP suits.” Nor did Conrail join the LLCs in seeking to “gift the historic assets as landfill” (*id.* at 13).

B. Conrail Has Not Committed Fraud or Engaged in a Conspiracy with the LLCs.

The City once again accuses Conrail of “asserting that the LLCs independently participated [with Conrail] in the misrepresentations [that the LLCs] now claim to be fraudulent” (Motion at 6-7; *see also, e.g., id.* at 10, 12), and now adds lengthy, baseless civil conspiracy allegations to the meritless fraud allegation. Conrail, of course, has never asserted or suggested

that it or the LLCs have engaged in fraud or conspiracy. Nor have Conrail or the LLCs made any statements that could be viewed as judicial admissions of fraud or conspiracy.

The City Parties have attempted to twist Conrail's demonstration to the United States District Court for the District of Columbia that the *LLCs'* fraud claims *against* Conrail were *baseless* into an *admission* that Conrail participated in a fraud *with* the LLCs. Specifically, the City Parties' illogical contention is that by showing that the LLCs knew all the facts that supposedly supported the LLCs' baseless fraud claims against Conrail, Conrail has admitted that it engaged in fraud with the LLCs. This is an obvious and complete non sequitur.

Years after this matter first made its appearance before the Board, and years after the issues were first aired in the District Court, sitting as the 3-R Act Special Court, the LLCs suddenly did an about-face. Having consistently argued that the property at issue was *not* part of a line of railroad subject to STB jurisdiction, they now claimed that it *was*, and they sought to amend their District Court Answer to accuse Conrail of misrepresenting or concealing facts that allegedly revealed that the property was part of a line of railroad.

Conrail's view was, and still is, that those facts do *not* establish that the property was part of a line of railroad.¹ But the *legally material* issue in the District Court proceedings was whether the LLCs should be allowed to amend their Answer to state their newly-hatched fraud theory against Conrail. After Conrail demonstrated that the LLCs (as well as the City Parties and the STB) had known or been on notice of all the allegedly relevant facts for at least six years before the LLCs sought to amend their Answer, the District Court denied the LLCs' motion to amend, granted summary judgment that the Harsimus Branch was conveyed to Conrail as a line

¹ In fact, Conrail has never conceded the property was part of a line of railroad, and refused to stipulate that it was. In the District Court, after the LLCs' about-face, Conrail stipulated only not to contest the issue.

of railroad, and dismissed the case. Nothing in Conrail’s refutation of the LLCs’ fraud claims suggested in any way that Conrail jointly undertook a fraud or conspiracy with the LLCs, and the City Parties’ repeated claims to that effect are baseless.

We will make two other observations. First, the City Parties’ claims of wrongdoing by Conrail and the LLCs are predicated on an assumption that Conrail and the LLCs must be engaged in fraud, conspiracy, or bad faith because Conrail and the LLCs have taken positions with which the City Parties disagree. Such an argument is, of course, completely at odds with our adversarial system.

Second, the City Parties refer to a “spurious appeal” that allegedly was part of Conrail’s and the LLCs’ conspiracy. Motion at 9. They have characterized the appeal similarly in the past. In that appeal, however, the D.C. Circuit *upheld* the argument advanced by Conrail and the LLCs. Far from being spurious, the argument of Conrail and the LLCs that the Special Court has exclusive jurisdiction to determine the regulatory status of property conveyed to Conrail by the United States Railway Association is the law of the land.

C. The City Parties Have Not Explained Why Their Baseless Fraud and Civil Conspiracy Allegations Necessitate the Reopening of the Comment Period for the Environmental Assessment.

The comment period for the Environmental Assessment was still open when the proceedings went into abeyance. Thus, the City’s request for a reopening of the period appears to be based on incorrect premises.

Conrail assumes that if and when the abeyance order is lifted, the comment period will also resume. But Conrail does not understand—and the City Parties have not explained—how the conspiracy alleged by the City Parties has any *environmental* impacts. For that reason, there is no basis for the City Parties’ assertion that “the Section on Environmental Analysis needs to

start over” or why “a supplemental environmental assessment should be issued that considers the necessity of an environmental impact statement in light of the conspiracy to demolish for private on-rail ends a section 106-protected asset.” Motion at 14. The City Parties’ request in this regard seems little more than a tactic to delay and/or increase the costs of this proceeding.

D. The City Parties’ OFA Argument Is Inappropriate.

The City Parties devote approximately seven pages of their motion to rearguing their OFA appeal, which was fully briefed and ready for disposition when the proceedings terminated. Conrail responded to the City Parties’ appeal and argued, among other things, that no appeal lies from a decision of the Director of the Office of Proceedings, that the appeal is premature, and that the Director’s instructions concerning the contents of an OFA were well supported by law and fact. *See* Reply of Consolidated Rail Corporation to “Statement of City of Jersey City in Response to Tolling of OFA Time Period and Protective Appeal” (“Conrail Reply to Protective Appeal”) (filed July 6, 2009).

The only new argument made by the City Parties here—one that can be disregarded in light of the City Parties’ failure to raise it timely in its still-pending appeal—is that it would cost the City at least \$50,000 and take “months to identify available experts, . . . study the situation, and then to prepare reports or studies formally to ‘address’ the issues presented by the Board.” Motion at 17. This is pure ipse dixit.

The Director merely instructed that:

Any person who intends to file an OFA in this proceeding should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.

Decision served May 26, 2009, at 2-3.

The City Parties' assertion that it would require tens of thousands of dollars, the retention of expert consultants, and months of preparation to respond to the Director's straightforward list of issues is not credible. Indeed, if anyone is in a position to know about the issues of commercial need, shipper or customer support, community support, and operational feasibility, one would think it would be the City, which, after all, is expected to have intimate knowledge of the needs and desires of its businesses and citizens. Documenting such knowledge cannot conceivably involve the time and expense that the City Parties assert would be required. In any event, these issues can be addressed in due course if and when the Board rules on the City's appeal.²

E. A Proposed Approach to the Resolution of the Issues.

Conrail suggests that the following is a logical approach to the resolution of the outstanding issues.

First, because the LLCs' currently pending petition in Finance Docket No. 35825 could, if granted, eliminate the need for further proceedings, it seems reasonable for the Board to address that petition first.

² So, too, can the City Parties' suggestion (Motion at 20-21) that the Board shift the cost of replacing rail infrastructure on the properties to Conrail or the LLCs, which, according to the City Parties, "illegally" removed the structures. Conrail notes here that this suggestion conveniently ignores the City's role in the removal of such structures. *See, e.g.*, Conrail Reply to Protective Appeal at 8; Conrail's Reply to Notices of Intent to File an Offer of Financial Assistance at 2, 4, 7-8 (filed April. 1, 2009).

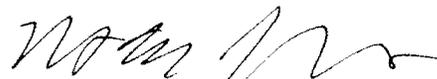
One other point with regard to the OFA issues bears noting: The City Parties characterize the OFA issue in terms of the standards for granting an "exemption" from the OFA process. Motion at 19-22. That is *not* at issue here. *See* Conrail Reply to Protective Appeal at 10. In that submission, Conrail noted that it had repeatedly stated that it was *not* seeking an exemption. *Id.*; *see also* Conrail Motion to Strike at 3, 12 (filed May 5, 2009) (stating that Conrail is not seeking an exemption from the OFA process). The City Parties have ignored Conrail's statements, just as they have ignored Conrail's repeated explanations of the non-fraudulent nature of its conduct. This, then, is just another instance of the City Parties' repetition of baseless claims as true, blurring of key distinctions, and disregard of inconvenient truths.

Second, if the Board denies the LLCs' petition, Conrail has no objection to the resumption of the abandonment proceeding. In any resumed proceeding, Conrail believes that the first order of business should be a decision concerning the City Parties' request to void the deeds of sale between Conrail and the LLCs. The City Parties have previously asked the Board to void the deeds, and the issues have been extensively briefed. An expeditious resolution of that issue would be of great benefit in determining the nature and scope of future proceedings.

Conrail, however, does not believe that further discovery, as proposed by the City Parties, is necessary for the resolution of that (or any other issues). There has already been extensive discovery in the related STB proceedings, and all of the relevant issues (including the question of voiding the deeds) have been litigated and, in a number of cases, already decided. If, however, the Board decides to allow discovery, Conrail will address specific discovery requests in due course and in accordance with Board practice.

Third, once a decision on the voiding of the deeds has been made, the nature and scope of future proceedings can be determined.

Respectfully submitted,



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July 3, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 3rd day of July, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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