

ENTERED
Office of Proceedings
May 29, 2014
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**

**REPLY OF CONSOLIDATED RAIL CORPORATION
TO “SUPPLEMENTAL INFORMATION IN SUPPORT OF
MOTION ON BEHALF OF CITY OF JERSEY CITY, RAILS
TO TRAILS CONSERVANCY AND PENNSYLVANIA RAILROAD
HARSIMUS STEM EMBANKMENT PRESERVATION COALITION
TO RESCIND ORDER HOLDING PROCEEDING IN ABEYANCE”**

Consolidated Rail Corporation (“Conrail”) hereby replies to the “Supplemental Information” filed by the City of Jersey City, et al. (“City Parties”) on May 22, 2014. In that pleading, the City Parties accuse Conrail of engaging in “unlawful” conduct and “misusing” proceedings, and they suggest that the Board should lift the stay in this abandonment proceeding so that they may file further motions.

Conrail has already responded repeatedly in this docket to the City Parties’ prior intemperate pleadings concerning their request that the Board lift the stay in this proceeding. *See* Conrail’s submissions filed December 11, 2013, and January 3 and 14, 2014, in Docket No. AB 167 (Sub-No. 1189X). Once more, Conrail must object to the City Parties’ gratuitous and baseless characterization of Conrail’s motives and actions with respect to disposition of the Embankment properties. Conrail from the beginning has acted in good faith, and the City Parties’ vituperative suggestions otherwise are wholly unsupported.

With respect to the question whether the Board should lift the stay in the abandonment proceeding, Conrail believes that it is more efficient for the Board first to address the pending

Petition for Declaratory Order filed by 212 Marin, LLC, et al. (“LLCs”) in Docket No. 35825. That petition has been fully briefed, and if the Board grants the order requested by the LLCs, it will moot Conrail’s notice of exemption in the abandonment proceeding. Alternatively, if the Board denies the petition, the abandonment proceeding could go forward without the complication of further disputation regarding the issues raised in the petition.

If the Board denies the LLCs’ petition, Conrail does not object to the Board lifting the stay in the abandonment proceeding. Conrail wishes to stress, however, that circumstances have changed materially since that proceeding was active.

As the Board knows, Conrail’s abandonment of its constructive right of way over the Harsimus Branch will not result in any salvage activities, because all of the rail infrastructure has long since been removed. Any environmental or historic impact could only result from reuse by third parties.

When it filed its Notice of Exemption in this proceeding on February 26, 2009, Conrail observed that the LLCs could not implement their plans to demolish the Embankments and construct residential housing without waivers from the Jersey City Historic Preservation Commission. At that time, Conrail also observed that City had plans to condemn the Embankments and convert them to a public park on top of the Embankments. Nevertheless, the Environmental and Historic Report and Area of Potential Effects Report that Conrail attached to its Notice of Exemption addressed the possible impacts of the LLCs’ demolishing the Embankments and constructing residential housing. The Section of Environmental Analysis similarly included the possible impacts of the demolition of the Embankments and the construction of residential housing in its Environmental Assessment served March 23, 2009.

In April and May 2009, however, after lengthy hearings, the Jersey City Historic Preservation Commission denied the LLCs' requests for waivers that would permit the LLCs to develop the Embankment properties. The LLCs appealed those decisions to the Jersey City Zoning Board of Adjustment, which conducted its own lengthy and independent hearings. In October 2011, the Zoning Board also denied the LLCs' requests for waivers. Thus, while the LLCs have appealed the Zoning Board's decision, it is now clear that demolition of the Embankments and construction of residential housing is not reasonably foreseeable within the meaning of either the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"). By the same token, Conrail's abandonment could not be held to be the proximate cause, within the meaning of NEPA or the NHPA, of any impacts resulting from the LLCs' twice-rejected housing proposal, since it is not reasonably foreseeable that the LLCs' proposal will ever be carried out.¹

That leaves only the City's condemnation and park proposal as a possible candidate for review under Section 106 of the NHPA. But Conrail does not believe that the City Parties have either the funding or the desire to both acquire the Embankment properties and make significant changes to them, particularly since they are protected as a Municipal Landmark. Thus, even

¹ See 40 C.F.R. § 1508.8 (Council on Environmental Quality regulation defining "indirect effects" under NEPA as effects that "are caused by the action and are later in time or farther removed in distance, *but are still reasonably foreseeable*") (emphasis added); see also, e.g., *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) ("NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause. [In a prior case,] [t]he Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). In a guidance document, the Advisory Council on Historic Preservation has stated that "[t]o the extent that Section 106 and NEPA share common concepts, the terminology, such as 'reasonably foreseeable,' will have the same meaning, and the established NEPA definition will be followed." ACHP, Section 106 Regulations: Section-by-Section Questions and Answers (discussing Section 800.5) (available at <http://www.achp.gov/106q&a.html>) (last visited May 28, 2014).

assuming the park proposal were reasonably foreseeable within the meaning of the NHPA, no adverse impact on historic properties would result.²

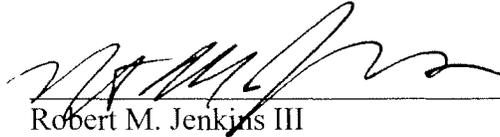
In other words, very little remains to be done for the abandonment proceeding to be concluded.³ One would think that the City Parties, who have been pressing to reinstitute the proceeding, would cheer its expeditious conclusion.⁴ Instead, they assert that their intention is to renew their objection to the use of expedited exemption procedures (Supp. Info. at 3 n. 2), to compel more discovery against Conrail (id. at 6, 8), to once again move the Board to void the deeds from Conrail to the LLCs (id. at 6, 8), and “for other relief” (id. at 6, 8). They ask the Board to be “mindful” of their intention (id. at 8). Conrail would ask the Board to be “mindful,” as the Section of Environmental Analysis concluded in its Environmental Assessment, that Conrail has acted “appropriately and in good faith” to try to move this proceeding forward, and that the City Parties had “not demonstrated any intent on Conrail’s part to harm historic sites or structures” (E.A. at 14). Conrail will strenuously oppose any effort by the City Parties to clog up the proceeding with untimely, burdensome, and repetitive motions. It is time to bring this lengthy and costly saga to a close.

² In any event, if the City wishes to have *its* proposal evaluated under NHPA and NEPA, the City can retain the necessary consultants and enter into the necessary undertakings to carry out such an evaluation.

³ There were Offer of Financial Assistance petitions pending when the abandonment proceeding was suspended that would need to be disposed of. That should not be difficult, since no one has ever identified a potential shipper in this highly urban area with the slightest interest in freight rail service, much less sufficient business to merit the enormous cost of installing the rail infrastructure that would be required.

⁴ The City Parties emphasize in their Argument, citing 49 U.S.C. § 10101(15), that “it is the policy of the United States Government ‘to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part’” (Supp. Info. at 6-7).

Respectfully submitted,



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

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

Attorneys for Consolidated Rail Corporation

May 29, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 29th day of May, 2014, 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

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

Bradley M. Campbell, Commissioner
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

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

Jennifer Greely
President
Hamilton Park Neighborhood Association
22 West Hamilton Place
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

Preservation New Jersey Incorporated
310 W. State Street
Trenton, NJ 08618

Sam Pesin
President
Friends of Liberty State Park
75 Liberty Ave., Box 135
Jersey City, NJ 07306

Olu M. Howard
President
Hamilton Park Neighborhood Association
308 Eighth Street
Jersey City, NJ 07302

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

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

Michael D. Selender
Vice President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

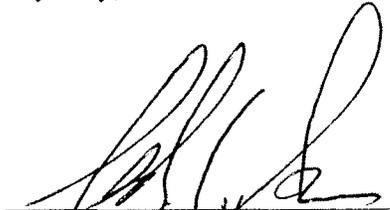
Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Justin Frohwirth, President
Jersey City Economic Development Corp.
30 Montgomery Street, Suite 820
Jersey City, NJ 07302

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

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

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



Adam C. Sloane