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March 26, 2015
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Public Record

212 Marin Blvd LLC et al)
Petition for a Declaratory Order) F.D. 35825
Of Exemption)

REPLY TO (1) LLCs' MOTION to SUPPLEMENT AND
(2) LLCs' "SUPPLEMENT MOTION FOR RECONSIDERATION"

This Reply is on behalf of City of Jersey City ("City"),
Rails to Trails Conservancy ("RTC"), and Pennsylvania Railroad
Harsimus Stem Preservation Coalition ("Coalition")
(collectively, "City et al") to the "Motion to Supplement" and
"Supplement Motion for Reconsideration" filed by 212 Marin Blvd.
LLC et al (LLCs) in this proceeding on March 6, 2015.

Summary

The "Motion to Supplement" is in effect an untimely
petition for reconsideration or to reopen, has no merit, and
should be denied. Petitions for reconsideration or reopen must
be based on new evidence, changed circumstance or material
error. 49 C.F.R. 1115.3 & 1114.4. The LLCs show nothing
meeting any of these criteria.

- I. The LLCs' Complains of Delay Which Is Wholly Self-
Inflicted and the LLCs' Complaints Themselves Justify
Denial of the LLCs' Motions

In a letter e-filed with this agency on or about March 4, 2015, and served on parties (but not appearing as a filing on the STB website),¹ the LLCs complained to this agency's General Counsel that failure of the STB to act in AB 167-1189X (the abandonment proceeding relating to the same property that is at issue in this proceeding) constitutes a "regulatory taking" of their alleged property interests in the Harsimus Branch. The LLCs otherwise threatened more litigation against the agency and/or other parties to AB 167-1189X, at least unless this agency promptly granted the LLCs the relief which they seek.

Wholly apart from the fact that the U.S. Supreme Court has soundly rejected such "takings" claims,² the delays of which the LLCs complain are to date all attributable to actions and litigation strategies and tactics of Conrail and the LLCs. First, Conrail illegally purported to sell all its interests in eight blocks of the Harsimus Branch (containing an historic Embankment protected under section 106 of the National Historic Preservation Act, 16 U.S.C. 470f) to the LLCs without compliance with federal law requiring a prior abandonment authorization. Second, rather than comply with STB requirements once this

¹Because the letter does not appear in STB's e-library under filings, City et al do not know if it was offered to STB in F.D. 35825 or AB 167-1189X, or both.

² *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

agency determined it had jurisdiction, the LLCs (generally with the assistance of Conrail) engaged in an irresponsible and bad faith campaign, extending from 2007 to date, to thwart this agency's jurisdiction. This effort included contest of this agency's jurisdiction in Special Court on the theory that the Harsimus Branch was not a line of railroad when, as the LLC's later conceded and expressly stipulated, the facts indisputably demonstrate that the line was conveyed to Conrail subject to this agency's jurisdiction. Even then, the LLCs engaged in a multi-year effort to postpone this agency's exercise of jurisdiction while the LLCs sought improperly to inject, inter alia, damage claims in Special Court against Conrail for fraudulently misrepresenting to the LLCs that the Harsimus Branch was something other than a line of railroad subject to STB abandonment jurisdiction.

Astonishingly, even after the Special Court determined on summary judgment that STB had jurisdiction and otherwise repudiated their efforts at delay, the LLCs filed F.D. 35825 to continue to contest this agency's abandonment jurisdiction. The LLCs' main argument in F.D. 35824 was that the Harsimus Branch had been "severed." This argument had been rejected by STB in F.D. 34818, served Dec. 19, 2007, slip at 6. Neither Conrail nor the LLCs pressed it on appeal of that decision and the argument should be treated as waived.

This agency denied the LLCs' severance petition in F.D. 35825 on the same date that it re-initiated proceedings in AB 167-1189X (that abandonment proceeding had been held in abeyance since 2009 due to the earlier machinations of Conrail and the LLCs). Decision in F.D. 35825, served August 14, 2014; Decision in AB 167-1189X, served August 14, 2014. Shamelessly contriving to obtain yet more delay, the LLCs petitioned for reconsideration in F.D. 35825. City et al opposed. That petition for reconsideration has not yet been resolved, and the LLCs are back at work to delay things further with their motions of March 6 to supplement their prior filings.

The LLCs' tactic of filing frivolous motion after motion in F.D. 35825 impedes orderly resolution of AB 167-1189X, which undoubtedly is the LLCs' intention. The baseless claims raised by the LLCs in F.D. 35825 (e.g., the idea that the Harsimus Branch is somehow severed) is simply another attempt to thwart this agency's jurisdiction contrary to the LLCs own stipulations and the finding of the Special Court, for which all appeals have been exhausted. In short, the LLCs' continued attack on this agency's jurisdiction is designed mainly to further thwart City et al in their efforts to obtain meaningful relief based on final rulings, obtained after almost ten years of litigation.

Since the LLCs themselves (albeit disingenuously) complain to the General Counsel that the delays to date amount to a

regulatory taking (for which the United States would owe them damages), the LLCs' motion to supplement and "Supplement Motion" should be denied on the grounds that they simply cause more self-inflicted delay, of which the LLCs complain. Principles of equitable estoppel must be applied to bar the LLCs from filing motions which cause that of which they then complain, to the point of charging the United States with a regulatory taking. In any event, the LLCs' practice imposes an unreasonable burden upon this agency, as well as City et al. In short, the LLCs by their own complaints to the General Counsel in their March 4 letter condemn their contemporaneous (March 6) motion to supplement and supplement motion on equitable estoppel grounds.

II. The LLCs Present No Evidence, Material Change of Circumstances or Material Error Warranting Re-opening F.D. 35825 or Supplement of the Record

The LLCs' motion to supplement otherwise has no merit. A proceeding may be reconsidered or reopened only on grounds of new evidence, changed circumstance or material error. 49 C.F.R. 1115.3 & 1115.4. The LLCs appear to be claiming they have new evidence (in the form of pre-existing tax parcel maps), or some admission by the City that there has been a severance. Tax parcel maps are not new evidence, even if "newly discovered" by the LLCs. They are the same now as when the LLCs filed their petition. They are not grounds for reopening. Friends of Sierra Railroad v. ICC, 881 F.2d 633, 667 (9th Cir. 1989). And

neither City nor City et al have made any admission of severance, so there is no evidence or changed circumstance in that connection of benefit to the LLCs' frivolous case. The LLCs point to no material error.

The LLCs stipulated in Special Court that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to STB abandonment jurisdiction. Rail lines subject to STB abandonment jurisdiction must receive an abandonment authorization before they can be sold off for non-rail purposes. 49 U.S.C. 10901, et seq. No one claims the Harsimus Branch ever received an abandonment authorization. The LLCs nonetheless inconsistently filed F.D. 35825 claiming the agency nonetheless lacks jurisdiction. This Board found against them in a Decision served August 14, 2014. The LLCs sought reconsideration, in a petition still pending.

The gravamen of the LLCs' motion to supplement/Supplement Motion is their claim that the City that somehow now agrees with them. That claim is false. The record unequivocally demonstrates that City (and RTC and the Coalition) since this dispute began have consistently maintained that Conrail and the LLCs engaged in an illegal de facto abandonment in contravention of STB jurisdiction. As to the LLCs' claim that the River Line abandonment severed the Harsimus such that STB lost jurisdiction over it, City, RTC and Coalition have all along agreed with STB

that the River Line abandonment did not include any portion of the Harsimus Branch, and that even if did, Conrail still owned the relevant property³ and in any event, the Branch still intersected the National Docks Secondary,⁴ in which case there could be no severance under STB precedent. See City of Jersey City, et al - Petition for a Declaratory Order, F.D. 34818, served Dec. 19, 2007, slip op. 6-7 (STB finds no severance); 212 Marin Boulevard LLC et al - Petition, F.D. 35825 served August 14, 2014, slip op. at 4 (STB finds no severance). Since the City has not changed its position, the LLCs under the applicable regulations [49 C.F.R. 1114.3(b) and 1114.4] show no new evidence, changed circumstance, or material error justifying supplementation of their existing petition for reconsideration, let alone filing a new one.

The LLCs specifically seek to supplement the proceeding with a document from the County tax assessor's office showing tax parcels in the CP Waldo area that, insofar as they seek to rely upon it, has been extant for years, and is not materially different from other similar documents on which the LLCs have previously relied. It is not new evidence on which

³ E.g., BNRR - Ab. Ex. - between Klickitat and Goldendale, WA, AB-6 (335X), served June 8, 2005 (no severance where RR still owns at least a rail easement on connecting property).

⁴ E.g., Norfolk & Western Rwy Co. - Ab. Ex. - between Kokomo and Rochester, AB 290 (Sub- no. 168X), slip op at 8 (no severance where line intersects another line).

reconsideration or reopening can be based. Friends of Sierra Railroad, supra. The LLCs claim it is some sort of admission by the City. It is nothing of the sort. Conrail in AB 167-1189X professed confusion as to what property the City wished 1152.27 data upon for OFA purposes. City responded basically by saying all property in particular tax parcels in the CP Waldo area, and, in the alternative, certain portions of some of the tax parcels. The tax map was merely a convenient means to address Conrail. The LLCs attempt to treat anything the City does in connection with the Harsimus as some sort of admission against interest, but their tactic is always a fallacy, amounting to the classic demand to know "when the City stopped beating its wife." The answer to such loaded questions is to deny their implicit assumption. The map is irrelevant to the severance issue, and it is not an admission of severance. All of the LLCs' arguments are based on fallacy.

The record indicates that Conrail removed the tracks comprising the Harsimus Branch before it removed the last version of the River Line in the CP Waldo area. The Harsimus Branch originally connected with the mainline in the area of Waldo Avenue through what is now a gate in the west end of the CP Waldo area, as represented by Conrail in its maps in AB 167-1189X. The foundations for the old catenaries for the (electrified) Branch are still visible parallel to the "Historic

Jersey City and Harsimus Cemetery" immediately to the north of the Branch in that area, as is the old gate. Although not relevant, the last configuration of the River Line would have employed a "diamond" at the point the LLCs claim is a severance. An abandonment of a line with a diamond over a second line is not a severance of the second line. In lay terms, the last connection to the River Line intersected the north side of the CP Waldo area no closer than the cross point (diamond) with the Harsimus Branch.⁵ It appears to have interconnected with the Harsimus Branch through another gate (still extant, and different from the Harsimus Branch gate) located near some of NJ Transit's facilities some distance from the diamond. Any abandonment of the River Line physically could not have included any portion of the Harsimus Branch at issue here, wholly apart

⁵ For the benefit of the LLCs, we attach hereto a picture of a diamond, in this case on the Corinth Railroad. Obviously, dispatchers would have to control the entire area around the River and Harsimus crossings and switches in order to avoid collisions. In lay terms, CP Waldo is not a point, but an area controlled for dispatch purposes. In lay terms a "CP" ("control point") such as the one at Waldo means interlockings, or the location of track signals which dispatchers can specify when controlling trains. An "interlocking" itself means a location that includes a switch or crossing of two tracks. It is derived from the early practice of installation of a system of mechanical equipment called an *interlocking plant* to prevent collisions. Where several lines come together, a control point in effect becomes an area, for the dispatchers must control trains from switches or signals on different lines entering the area so the trains do not collide at switches or diamonds.

from the fact that the River Line abandonment did not authorize abandonment of any portion of the Harsimus. The tax map indicates nothing to the contrary.

There are remnants of the most recent version of that old connecting track, including some rail and a trestle from the CP Waldo area all the way over Newark Avenue, still in place. Although not germane, the map seems consistent with some of the remnants. Again, although not germane here, those remnants, still owned by Conrail, may be useful to freight operation of an OFA'd line. Under this agency's precedent, the City may seek them on OFA in accordance with terms and conditions set by the agency. City reserves the right to seek them.

The LLCs clearly wish to prevent an OFA,⁶ and the City is confident the LLCs will endeavor to litigate every possible

⁶ The LLCs are concerned that Conrail, despite purporting to convey all of its interests to the LLCs in 2005, now claims that it retained an "implied" railroad easement in order to refute the position of City et al that the line sale to the LLCs was patently illegal. The LLCs are no doubt aware that if this agency were to agree with Conrail, then Conrail's purported retained easement would be valued at zero in an OFA proceeding for purposes of transfer to the City. If the agency concludes that Conrail's claim is fraudulent (which we surmise the LLCs are maintaining), then the alleged sale should be voided, or the property should otherwise be reconveyed to Conrail, and in all either event should be made available on OFA to the City at the contract price (\$3 million) under STB precedents. The LLCs are not pleased with that outcome either, hence their efforts to evade STB jurisdiction. The LLCs' deeds are also void and City has a right of first refusal over the property at state law if STB has abandonment jurisdiction and if this agency authorizes abandonment. N.J.S.A. 48:12-125.1. City et al believe this

issue to the maximum extent tolerated by STB in AB 167-1189X. However, the LLCs have no need to litigate these issues in their effort in F.D. 35825 to deprive this agency of jurisdiction to afford any relief to City et al, or the public, in connection with the illegal transactions in which the LLCs and Conrail engaged.⁷

As this agency has determined, the River Line abandonment by its terms only applied to the point of connection with the Harsimus Branch. Decision in F.D. 35825, served August 14, 2015, slip op. at 3. It therefore could not and did not include any part of the Branch. Nothing in any submission by the City is to the contrary. If the River Line is viewed by the LLCs as

outcome under state law also prompts the LLCs frivolous claims that this agency lacks jurisdiction, as well as the multitude of lawsuits that the LLCs have filed to exhaust City et al in state court. The outcomes that the LLCs fear are the natural consequence of failure of Conrail and the LLCs to act in accordance with law.

⁷ This Board ordered Conrail to provide valuation information required under 1152.27 to the City (and to CNJ) in connection with their OFA's in a Decision served in AB 167-1189X, served May 26, 2009. City currently seeks that information so it can prepare and file an OFA. City reserves the right to prepare its OFA on the basis of information provided pursuant to 1152.27, and to change or alter the areas on the maps of which the LLCs complain accordingly. The maps simply indicated some of the tax parcels in which City was interested. The City will not have a definitive answer on what we will OFA (other than the entirety of Conrail's property at issue from Marin to beginning near Waldo Avenue) until we receive all of Conrail's 1152.27 information and we can better evaluate the optimal purchase area for continued rail use (all consistent with historic preservation of the Harsimus Branch and particularly its section 106-protected Embankment).

connecting at the diamond, then that is where the River Line ended. In addition, all other arguments made by City on this issue previously continue to apply and are incorporated herein.

III. The LLCs Petition to Supplement is Untimely

The LLCs "Supplement Petition" for reconsideration is way past the period (20 days) for timely petitions for reconsideration specified at 49 C.F.R. 1115.3(e), and must be treated as a petition to reopen under 49 C.F.R. 1115.4. As such, it is premature as the Board has not yet acted on the original petition for reconsideration. In any event, the Supplement Petition" raises no new evidence, changed circumstance, or material error and thus must be denied under either 1115.3(b) or 1115.4, for the reasons previously stated.

Conclusion

As the LLCs suggest,⁸ the Board should consider City's actual position. The City's actual position, as well as the position of RTC and the Coalition, is not the stuff dreamed up by the LLCs in their confused imagination and parallel universe. The position of City et al is and consistently for the past ten years has been that STB has jurisdiction, there cannot possibly be a severance, nothing City et al have filed is to the contrary, the LLCs' pleadings are frivolous, burdensome and part

⁸ LLC Motion, at 8.

of an improper effort to delay meaningful relief to City et al.
In all events, the LLCs do not meet the grounds for
reconsideration or reopening specified in this Board's
regulations, or in statutes and case law.

Respectfully submitted,

CHARLES H MONTANGE 

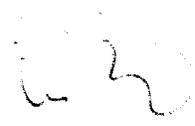
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Attachment: a picture demonstrating a RR diamond for the LLCs

Certificate of Service

The undersigned hereby certifies service by posting the
foregoing in the US Mail, postage pre-paid, first class or
priority mail, on or before the 26th day of March 2015 addressed
to the parties or their representatives per the service list
below, unless otherwise indicated.

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for their latest filing in F.D. 35825 with address corrections
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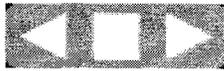
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The Corinth Railroad Diamond



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This is what the battles of Shiloh and Corinth were all about; the crossings of the Memphis & Charleston Railroad (Memphis is towards the top) and the Mobile & Ohio Railroad (Mobile is towards the left). Both railroads were critical to the supply of the Confederate military.

