

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
December 31, 2013  
Part of the Public Record

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

REPLY to

PETITION TO INTERVENE

This Reply, on behalf of City of Jersey City ("City"), Rails to Trails Conservancy ("RTC"), and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition"), is to the "Petition to Intervene" filed on behalf of eight LLCs, referred to collectively below as 212 Marin Boulevard, LLC et al, or "the LLCs."

To the extent that the Petition to Intervene filed on behalf of the LLCs is intended to allow the LLCs to seek the status of party to the proceeding, City, RTC and Coalition have no objection to it. Indeed, it should facilitate granting relief against them by this Board. The LLCs stipulated that the Harsimus Branch, including the portion involved in this proceeding, was conveyed to Conrail subject to STB abandonment jurisdiction. The United States District Court for the District of Columbia granted summary judgment in accordance with that

stipulation that STB has abandonment jurisdiction over the Harsimus Branch.

But the LLCs have not sought intervention to participate in the proceeding but rather to delay it. City, RTC and Coalition do object to the Petition in light of its misleading character and interposition for delay. While we see no reason to lay out arguments here, aside from reserving our position to make arguments, we do feel it appropriate to state our general position on the LLCs' purpose for intervention (namely, delay) and some of the "issues" the LLCs interpose for delay.

The LLCs essentially admit they are trying to avoid this agency's abandonment jurisdiction. In particular, they say at p. 3, para 7 of their Petition, that they support "procedurally proper abandonment ruling in the event that judicial relief is not granted in the continuing federal litigation." The operative term here is "in the event." The "event" to which the LLCs' refer relates to their continued efforts to persuade the courts into holding that this agency lacks jurisdiction notwithstanding their own stipulation and other admissions to the contrary.

The LLCs follow up their reference to an "event" by asserting that they might controvert the location of lines east of Marin Boulevard in Jersey City and that the U.S. District Court has exclusive jurisdiction to locate those lines. This

is more irrelevant obfuscation. The LLCs own no property east of Marin, they are not shippers, and they do not want to operate a railroad or organize a public use there. Indeed, they oppose public use and railroads on the Harsimus Branch. Since they have no relevant interest, they simply lack standing to debate on that issue.

In addition, the LLCs make some muddled statements on p. 4 which may be a reference to their contention, which they lost in the declaratory proceeding (F.D.34818)<sup>1</sup> that this Board lacks jurisdiction due to some kind of de facto abandonment by reason of non-use or prior abandonment of the River Line. They waived that contention by failing to raise that issue in their petition for review in the D.C. Circuit of this Board's determination against them in F.D. 34818.

The LLCs claim to have been "victimized" by the City's alleged encouragement of Conrail to pursue abandonment of the Harsimus Branch. The LLCs claim these matters pose "unresolved issues," which they elsewhere are asking the courts to address before this agency does. This agency already has addressed the LLCs' contentions, in F.D. 34818, finding against the LLCs,<sup>2</sup> and again, the LLCs did not contest this agency's resolution in

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<sup>1</sup> City of Jersey City, et al - Petition for Declaratory Judgment, F.D. 34818, served Dec. 19, 2007, at p. 6 and p. 7.

<sup>2</sup> Id. p.7.

their petition for review of F.D. 34818. They have thus waived the contentions here, and this Board's decision on this issue is now law of the case/res judicata.

In any event, the fact that the City (and RTC and Coalition) desire the property for public use (including rail, trail, historic preservation and open space) and that the City has thus encouraged Conrail to comply with the law requiring STB abandonment authorization does not mean that the City victimized the LLCs or that this proceeding is not legally required prior to any non-rail disposition of the corridor. The LLCs knew of the City's interest when they acquired the property. They did it in the face of that interest, in an unlawful acquisition that evaded the state and federal remedies which otherwise would have been available to City, RTC and Coalition to secure the property at reasonable expense for public use. The true victim of the LLCs unlawful transaction is the public, whose interest (represented by the City, RTC and Coalition) in keeping the Harsimus Branch intact for public use has been undermined by the LCC's unlawful acquisition and scorched earth litigation tactics.

The LLCs charge that Conrail committed fraud on them.<sup>3</sup> Conrail has explained that the LLCs were aware of the facts they

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<sup>3</sup> See City et al's Notice of Decision, filed in AB 167 (Sub-no. 1189X), on Nov. 22, 2013, at pp. 3-4 and Exhibit C thereto.

say indicate fraud at all relevant points in time. Rather than remedy the fraud, the LLCs say they entered into a subsequent contract with Conrail obligating the railroad to take all necessary steps so they could realize the gains they hoped to achieve from the conduct they now say was fraudulent.<sup>4</sup>

The LLCs are literally seeking to profit by what they now admit was fraudulent or negligent abuse of this agency's jurisdiction by Conrail. Making matters even worse for them, they admit they entered into a contract not to remedy the fraud but obligating Conrail to take all necessary steps to continue to implement it.<sup>5</sup> The LLCs have no reasonable expectation to a gain based on an unlawful transaction, which they themselves charge was fraudulent.

The LLCs say the City acted in "bad faith" in referring in state court to the Board's power to void deeds in evasion of its

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Conrail has submitted extensive evidence showing that the LLCs were knowledgeable about what they now claim was fraud from the inception. See Conrail's Response to Notice of Decision, filed in AB 167 (Sub-no. 1189X) on Dec. 11, 2013. We have no reason to dispute Conrail's assessment that the LLCs were fully knowledgeable, and to the extent they were not, are prepared to show that they were "willfully blind," which is the legal equivalent of knowledgeable. Obviously the fact that the LLCs now admit that the sale of the line at issue in this case was based on fraudulent and negligent misrepresentations, and the fact that Conrail has shown the LLCs were aware of this from the inception, is highly germane to STB's consideration of appropriate remedies for the public. 16 U.S.C. 470f; 16 U.S.C. 470h-2(k), 49 U.S.C. 10903(e).

<sup>4</sup> Id.

<sup>5</sup> Id., appendix C, esp. para 136.

jurisdiction. Petition at 10. That is absurd. This Board certainly has the power, and uses it, to void transactions in derogation of its jurisdiction or to maintain the integrity of its processes (which the LLCs must be viewed as admitting occurred here). This agency customarily orders voidance of deeds or requires reconveyance of properties when actions are taken that call into question the integrity of this agency's jurisdiction or procedures. For example, in SF&L Railway, Inc. -Acquisition and Operation Exemption - Toledo, Peoria and Western Railway Corporation between La Harpe and Peoria, IL, F.D. 33995, STB served Oct. 17, 2002, this Board revoked authority of SF&L to acquire lines and required their reconveyance after finding that SF&L "wrongly purchased the La Harpe Line for the purpose of abandoning and salvaging it." The Board explained that its "exemption process is designed to facilitate continued service to shippers and continued maintenance of the transportation network. The integrity of that process is undermined by, and must be protected from, tactics such as those employed by [SF&L] in these cases ... Nor should the persons who engage in such abuses be allowed to profit from them." Slip op. at 19.

To take another example, in Land Conservancy of Seattle and King County - Acquisition and Operation Exemption - Burlington Northern and Santa Fe Railway Co., F.D. 33389, STB

served Sept. 26, 1997, this Board revoked authority of Land Conservancy to acquire and operate an apparently inactive line on the ground that the acquiring party sought the property in order to engage in a lawful abandonment proceeding and then convert the line into a trail. The Board indicated that its exemption regulation could only be used to acquire a line in order to provide rail service. The Board revoked the acquisition exemption and ordered reconveyance back to the original railroad. Slip op. at 3.

This agency has also addressed situations like this in which a railroad evades environmental and historic preservation laws by unauthorized abandonment. In Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, STB Ex Parte 367, served April 23, 2008, this Board stated as follows:

"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. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected. The Board will continue to carry out its obligations under those statutes *and will take whatever steps necessary to enforce compliance with them*. Railroads that take such actions may find not only that obtaining abandonment authority is delayed, but that the Board will require historic preservation training for the railroad's staff members who are involved with abandonment projects and require the railroad to document the in-house measures that it will implement to prevent

such actions from occurring in the future. Other possible actions the Board may take include restricting the railroad's future ability to employ expedited procedures to obtain abandonment authority, imposing a financial penalty, and seeking a legal remedy against the railroad in a court of law."

Slip op. at 4 (emphasis added)

The D.C. Circuit has alluded to this Board's broad power to condition abandonments under the ICCTA in this very case. See City of Jersey City v. Consolidated Rail Corp., 668 F.3d 741 (D.C.Cir. 2012) quoting Consolidated Rail Corp. v. ICC, 29 F.3d 706, 713 (D.C.Cir. 1994) for the following proposition: "There is no restriction placed on the conditions the [agency] can impose other than that they must be required by the public convenience and necessity."

Here the LLCs admit that they entered into an agreement with Conrail to accomplish what they allege was a fraud on this agency, the City, and the courts: namely, failure to obtain an abandonment authorization and comply with legal requirements prior to abandonment. If the agency can void deeds when the involved parties actually seek to comply with the agency's regulations, all the more so when they fraudulently not only make no attempt, but later, as here, continue to endeavor to evade STB jurisdiction, even when sensitive structures protected by the National Historic Preservation Act are involved.

We have made no attempt to address all of the claims made by the LLCs in their petition to intervene; we reserve our right to respond on all points as appropriate when the stay in this proceeding is lifted and some kind of procedural schedule is developed to indicate when and how the parties may make their cases for appropriate relief. In essence, the LLCs seek to perpetrate what they say is fraud on this agency and the federal courts by litigation in federal courts of matters which are within this agency's primary jurisdiction or which have already been decided by this agency and waived by the LLCs.

The stay in this proceeding should be lifted as soon as possible. Over six years have passed since this Board issued its declaratory order that the Harsimus Branch is subject to this Board's abandonment authority. It is over seven years since the LLCs unlawfully acquired the eight blocks of the Harsimus Branch encompassing the National Register-eligible Embankment and unleashed their litigation upon the City, Coalition and RTC. That this Board has jurisdiction is now stipulated. Any further delay will encourage the LLCs' abusive litigation practices and thwart federal and federally-mediated state law. The LLCs' effort to continue to postpone full and complete remedies for City, RTC and Coalition, as well as any effort by Conrail in that regard, contravenes 49 U.S.C. 10101(15), 16 U.S.C. 470f, 42 U.S.C. 4332, 45 U.S.C. 722(g), 49

U.S.C. 10903 and other federal statutes to which this agency must adhere.

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