

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

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**REPLY OF CONSOLIDATED RAIL CORPORATION TO
“MOTION FOR LEAVE TO FILE A REPLY” AND
“REPLY ON BEHALF OF JERSEY CITY”**

Consolidated Rail Corporation (“Conrail”) hereby replies to the Motion for Leave to File a Reply and the Reply filed by the City of Jersey City (“City”) on January 17, 2015. Conrail does not oppose the City’s Motion, so long as the Board also accepts for filing Conrail’s Reply to the City’s Reply. Conrail’s Reply is set forth below.

In its motion to compel filed December 23, 2014, the City claimed that it needed valuation information from Conrail for OFA purposes because the City had identified a shipper that desired freight service over the Harsimus Branch. In its reply filed January 12, 2015, Conrail observed that the City had never suggested that it had any interest in an OFA if it did not encompass the Embankment properties that are at the heart of this proceeding. Yet the “freight service” described by the City in its motion to compel was an at-grade transload operation that had nothing to do with the elevated Embankment blocks. Conrail argued that the City could not bootstrap an OFA for at-grade transload freight service (even assuming such an OFA were feasible and lawful) into an OFA for elevated Embankment blocks that could not possibly be reached by that service. Accordingly, Conrail requested that the Board reject the City’s motion.

In its Reply filed January 17, the City confirms that the City indeed wants an OFA that covers the elevated Embankment blocks the City covets. Referring back to its Notice of Intent

filed March 27, 2009, the City says it seeks valuation information for “four overlapping segments,” all of which include the entirety of the Embankment properties. Reply at 9. The City says that its “OFA intentions have never been *limited* to the Harsimus Embankment,” *id.* (emphasis added), but it nowhere suggests that it would have any interest in an OFA that did not *include* the Harsimus Embankment properties. Nor does the City suggest that Conrail was wrong in any way when Conrail observed that the transload freight operation described by the City would have *nothing* to do with the Embankment properties.

The City implies in its January 17 Reply that the Board should ignore the disconnect between an at-grade transload freight operation and the Embankment properties because the Board in a decision issued May 26, 2009, ordered Conrail to respond to the City’s valuation requests. Reply at 6-7. That Board decision, however, rested on the assumption, which was expressly set forth in the decision, that the City was prepared to show how an OFA involving the Embankment properties would serve to continue freight rail service. Slip op. at 2 (citing *Union Pacific Railroad Company—Abandonment and Discontinuance of Trackage Rights Exemption—in Los Angeles County, CA*, STB Docket No. AB-33 (Sub-No. 265X) (STB served May 7, 2008); *Roaring Fork Railroad Holding Authority—Abandonment Exemption—in Garfield, Eagle, and Pitkin Counties, CO*, STB Docket No. AB-547X (STB served May 21, 1999), *aff’d sub nom. Kulmer v. STB*, 236 F.3d 1255, 1256-58 (10th Cir. 2001); *The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) (STB served Aug. 5, 1998). Indeed, the City expressly stated in its motion to compel that it was providing the information regarding the transload operation to show shipper demand and support in compliance with the showings required by the May 26, 2009 decision. Motion to Compel at 14-18. The information regarding the transload operation, however, shows

no shipper support for an OFA over the Embankment properties. The suggested transload operation cannot even reach the Embankment properties. Thus, the City can make no claim that it has complied, or is even prepared to comply, with the showings required by the May 26, 2009 decision for an OFA that includes the Embankment properties.

As we observed in Conrail's January 12 reply, even if the City had an interest in an OFA limited to the portion of the Harsimus Branch west of the Embankment properties, there would be serious legal and practical barriers to the City's at-grade transload idea. As a legal matter, as the Board stressed in its May 26, 2009 decision, the purpose of an OFA is to provide for continued freight rail service over an existing rail line that would otherwise be abandoned. Ordinarily, OFAs do not present any issues regarding construction authorization or environmental and historic review, because there is no abandonment, and no new construction. In this case, however, the right-of-way between CP Waldo and the Embankment properties was elevated on a trestle supported by concrete piers, which still exist. There was never any at-grade rail service and, obviously, no ancillary property associated with any at-grade rail service. The City, a non-carrier, proposes to construct a new at-grade rail line where none has existed, in an area that it has characterized as fraught with environmental and historic preservation concerns, to provide service that has never been provided before, over railroad property that has never been used for such service. This would not be continued freight rail service over an existing line. It would be completely different service over a completely different line that would have to be constructed from scratch. To our knowledge, the Board has never permitted an OFA applicant to use the statute to appropriate a railroad's property not only to build an entirely new line but to evade the Board's approval and environmental and historic preservation review authority for new rail line construction.

Furthermore, while a narrow corridor of property is all that was required for the Harsimus Branch trestle between CP Waldo and the Embankment properties, an at-grade transload facility of the type suggested by the City would require considerably more property, not only to accommodate holding and switching tracks, but also to accommodate loading and unloading facilities, and parking, turnaround space, and ingress and egress roads for the many trucks the City says would use the facility. Even assuming the City could use OFA processes to obtain a narrow corridor of property where the Harsimus line trestle used to stand, it could not use those processes to obtain other Conrail property that was not used by Conrail to support the Harsimus line. This appears to be why the City in its January 17 Reply limits its request for “1152.27 information” to a “60 foot corridor” between Newark Avenue and Waldo. Reply at 10. Ambiguously, however, the City also says it seeks information concerning numerous Conrail parcels that are spread over a wide area between Newark Avenue and Waldo, including parcels associated with the at-grade and extremely active National Docks line. *Id.* at 10-11 and Attachment I.

The City does not say in its Reply that it believes it is entitled to valuation information under 49 C.F.R. § 1152.27 outside the “60 foot corridor” defined in its Reply. Instead, the City suggests that Conrail volunteer “what property the railroad will make available and at what price” and that Conrail and the City negotiate about any “boundary issue” Conrail may have. *Id.* at 11. Even assuming (1) that the City had any interest in an OFA for an at-grade transload facility that does not include the Embankment properties and (2) that an OFA for the construction of a new at-grade rail line that bears no relationship to the previous elevated line were lawful, Conrail does not believe it could be required to provide any valuation other than for the narrow corridor underlying the old trestle. An OFA is not a roving mandate for expropriation

of any railroad property the OFA applicant may desire, regardless of its association with the line being abandoned. And Conrail is not interested in voluntarily discussing the sale of any of the parcels the City has identified west of Newark Avenue for a transload operation that Conrail firmly believes would be economically and operationally infeasible anywhere in that area.¹

Respectfully submitted,

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¹ If Conrail were required to provide valuation information for various parcels within the broad area suggested by the City, it would be no simple task, since each would have to be evaluated separately. Certainly, Conrail could not perform appraisals in the 10-day timeframe requested by the City. Contrary to the City's assertions, there is no emergency requiring such a timeframe, particularly when the City appears to have only a vague idea of where and how it proposes to conduct a transload operation. Accordingly, if the Board ordered Conrail to produce valuation information (which, for the reasons given above, Conrail believes cannot be justified under OFA law or the facts in this case), Conrail would request that it be given 30 days to do so.

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 26th day of January, 2015 I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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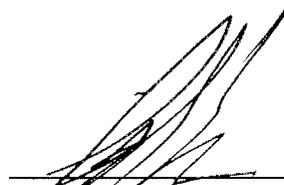
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