

Before the
SURFACE TRANSPORTATION BOARD

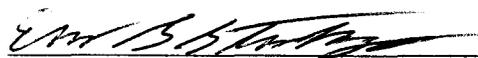
CONSOLIDATED RAIL CORPORATION
– ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NEW JERSEY

Docket # **AB 167 (Sub No.# 1189) X**

CNJ RAIL CORPORATION

REPLY

Respectfully Submitted,



Eric S. Strohmeyer
Vice President, COO

CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Tel: (908) 361 – 2435 (direct line)
Email: e.strohmeyer@cnjrail.com

Dated: December 7th, 2015

Consolidated Rail Corporation
– Abandonment Exemption –
AB 167 (Sub No.# 1189) X

Now comes CNJ Rail Corporation (“CNJ”), a party of record in this proceeding, who herein replies to the Motion to Compel filed on November 17th, 2015 by the Intervener LLCs in the above captioned proceeding.

For the reasons set forth herein below, the Intervener LLCs motion should be denied as moot.

I. Background Information

This proceeding has a long, and as some may say – torturous history. For this reason, CNJ will not repeat all that has transpired herein; the Board is well aware of the voluminous record in this proceeding. However, one particular portion of the record is highly relevant to the LLC’s motion and needs to be briefly highlighted in order for the Board to adequately understand CNJ’s response.

In its decision of May 21st, 2015, the Board stated:

“The Board recognizes the lengthy history of this proceeding and the complex and controversial issues that have been presented.” (*portion omitted*)

The Board went on to further state:

“We note, however, that the **record has become voluminous and, in our opinion, needlessly so.** Although the Board cannot limit the filings submitted by the parties in the future, **we expect the parties to exercise**

sound judgment when weighing the need for future motions or objections.” (*emphasis added*)

While there have been hundreds of pleadings filled in this proceeding thus far, it should be noted that CNJ to date itself has only filed a total of 5 of our own pleadings (which includes this one) in this docket. In a smaller number of other pleadings, CNJ has permitted the City to indicate our concurrence with a request or pleading they were making.

Being very mindful of the Board’s May 21st admonishment to the parties as outlined above, CNJ respectfully submits this single pleading which it hopes will adequately address the Board’s November 10th directive, as well as address issues raised in the Motion to Compel.

The City’s reasonable November 3rd request

In response to the Board’s November 2nd, 2015 order, which was directed solely at them, the City requested that the Board instead direct the party who (helped) produce the document, and whom was also one of the parties who placed the confidential classification on the document, to produce a new confidential, and a new public version, of the disputed document. On November 10th, 2015, the Board issued a clarification directing CNJ Rail to produce the required documents.

It should be noted that when the Order was directed solely at the City, the Board requested the documents be produced in 10 days time. However, the Board, when directing its order towards CNJ, only permitted CNJ 2 days in which to produce the documents.

CNJ now recognizes that the City did not specifically ask for any additional time to produce the redacted document. Since the Board issued its May 21st admonishment, and given

that we concurred with the City's request for clarification, CNJ did not file its own separate request, as such a request would have been completely redundant since the City was asking for the same relief we would have wanted. However, since CNJ did not produce the pleading that requested the clarification, we weren't aware there was no request to the Board for CNJ to also be permitted 10 days to produce the documents from the date when the Board would issue their clarification.

CNJ takes full responsibility for that oversight. CNJ acknowledges that it omitted to communicate to the City the amount of time we would need to produce the required documents when their Counsel called and asked if we would concur with the City's requested relief. That oversight was not intentional. We simply presumed that the Board would have reset the due dates if it issued a clarification decision in favor of the City. For that assumption, we apologize.

Notice of the Decision

While CNJ is willing to take full responsibility for failing to ask for additional time, we will not willing to admit total culpability for missing the Board's November 12th deadline. According to the Board's website, the Board made its decision on November 9th, 2015. The decision appears however to have been served on the 10th, the date it was published on the Board's website.

While CNJ officials do regularly keep abreast of what is happening before this agency, it does not check the Board's website every single day. On November 11th and 12th, CNJ officers who normally would review the Board's website, were travelling and thus were not in the office those two days. CNJ's officers did not become aware of the Board's November 10th decision until the morning of Friday 13th, 2015 when the undersigned reviewed an Email, apparently

transmitted at 4:45 pm the previous day, from one of the Attorneys for the LLCs. The email, attached hereto as Exhibit 1, included a copy of the Board's November 10th decision.

That email, when it was finally read on the Friday the 13th, was the first constructive notice CNJ had been given of the Board's clarification decision. In short, we learned of the decision AFTER the deadline had passed. The hard copy of the Board's decision, which the Board itself transmitted directly to us via US Mail, arrived at our offices on Monday, November 16th, 2015.

After receiving the copy of the order the Board itself had served, CNJ began to undertake the task of producing a new redacted (public) version of the document. Efforts to contact the shipper to discuss what could, and could not, be redacted began immediately. In the mean time, recognizing the new redacted document could not possibly be filed on time, CNJ began to prepare a motion for leave to late file the document. However, on Tuesday, November 17th, the undersigned received an electronic copy of a Motion to Compel from the LLC's.

Instead of picking up the phone and calling CNJ to inquire as to why it was not filed, or when the document would be available, the LLC's immediately sought to file another motion and, once again, attack the City. If they had called us before filing their motion, they would have learned that; 1. Efforts to redact the document were well underway; 2. The reasons for the delay, and; 3. That the document they desired could have been produced by the end of the week. Instead, they choose to file yet another motion asking this Board to order its production.

It should be noted; the Board already ordered the production of the document when it issued its clarification decision. CNJ does not need to be told to produce the document twice; once is sufficient for us. CNJ fully understands what it means to be ordered to do something.

II. Argument

Since the LLC's filled yet another request to compel production of a redacted version of the document, and ever mindful of the Board's May 21st, 2015 admonishment to the parties, CNJ simply felt the best way to handle this matter so as to not anger the Board would be to simply attach the new redacted public version of the shipper statement as an Exhibit to this reply. See: Exhibit 2, hereto attached. CNJ felt this approach was most consistent in keeping with the Board's May 21st directive.

First, the submission of the redacted document with this reply eliminates the need to file a separate motion seeking leave to file the document out of time. It therefore eliminates the need for other parties to reply to the motion. The reply proffers a valid and reasonable reason for why it is so late in being submitted. It also provides a legally appropriate way for the document to enter into the record in this proceeding

Including the document that the LLC's so desperately want within this reply gives the Board the ability to deny the LLC's motion as moot, without a need to require further pleadings from the parties. This will streamline the process and permit the Board to move its docket forward without having to deal with yet another round or two of unnecessary pleadings.

Request to be excused from filing a new "Confidential version"

While technically this request could be viewed as a motion in its own right, we believe this request can be granted without the need for any further pleadings. The City, the LLCs, and Conrail have all executed both the "Highly Confidential" and "Confidential" undertakings. Since the Board has already indicated it feels the document in question qualifies for no more than

a “Confidential” designation, CNJ feels there is really no need to produce a document specifically marked as such.

If required to prepare a new “Confidential” version, the only difference between the two versions will be the removal of the word “Highly” from in front of the “Confidential” designation. That will be the only change made. Everything else in the document will be precisely the same.

The only significant difference between the two types of “Confidential” designations in an STB proceeding is in “who” has access to view the confidential information contained therein. A “Highly Confidential” classification restricts access to the information to outside counsel and properly authorized third party experts. However, both types of “Confidential” designations protect the sensitive material in the exact same manner. In short, the difference between the two is not about “how” confidential information is protected; it is with whom confidential information is permitted to be shared with, and disclosed to.

CNJ has no objection to any party who has already properly executed the “Confidential” undertaking, from reviewing the document in question as it exists today. Since the LLCs, the City, and Conrail are the only parties who have sought, (and have long received) access to the confidential versions of the document by executing the undertakings, there should be no objection from them in treating the previously submitted document pursuant to “Confidential” rules, as opposed to the “Highly Confidential” rules.

While Mr. Riffin has not executed an undertaking for CNJ, it is believed that he has executed a “Confidential” undertaking for Conrail. CNJ has no objection to permitting Mr. Riffin to view the existing, already filed document as it appears. CNJ understands from Riffin

that he will not object to this request since he too believes it is pointless to submit a new confidential document when everyone can review and treat the existing document properly under the “Confidential” designation. In short, all the parties who have already signed the undertakings can treat the document now as a “confidential” document, as opposed to a “highly confidential” document.

In ruling on the LLC’s motion, the Board can easily grant this request as well, since no party can argue it would be disenfranchised if this relief is granted. It should be noted that those parties who have already asked for the document have had the now-“confidential” version in their possession for well over a year now, and those likely to want access to the document can simply execute a “confidential” undertaking and ask for a copy.

While CNJ believes that Mr. Riffin does not have a copy of the original version in his possession, it is believed he is, and has been, generally aware of its contents. Should he ask us for it, CNJ will gladly provide a copy to him, just as soon as he has demonstrated to us that he has properly executed a “Confidential” undertaking.

Should any other party come forth, execute a “Confidential” undertaking, and request a “confidential” copy of the document, CNJ will gladly furnish them a copy of both the document, as well as the Board’s November 2nd decision in which it was declared that only portions of the document qualify for “confidential” treatment. To date, no other party has expressed any interest in reviewing the “confidential” version of the document.

CNJ would argue that this request is consistent with the Board’s May 21st directive, and is very limited in nature. In requesting this relief, if even if the relief is perceived as “*ex parte*”, CNJ argues no party will be harmed as a result of the Board granting CNJ its desired relief.

III. Conclusions

CNJ begins by apologizing to the Board for not being specific with our request when the City sought clarification. If we had been, the events which lead to us missing the Board-ordered deadline for producing the public version of the document would have been avoided. We simply assumed that CNJ would have been given 10 days to produce the document from the date of clarification. It was our error in failing to make sure the request was communicated properly to the Board.

While CNJ does apologize for missing the deadline, we temper our apology with the following caveat: If we had timely knowledge of the Board's clarification decision, we would have reacted in a manner considerably different than what we did. CNJ does not intentionally defy orders of any tribunal we appear before. Had we known, we would have moved to correct the problem quickly.

When the LLCs sought their motion to compel, CNJ took careful stock of the situation and to the best of its ability, crafted this reply in a manner so as to reduce the amount of effort needed by the Board to dispose of this request and advance this proceeding forward. We respectfully hope that the Board will take note of our desire to comply with the Board's May 21st Directive.

As the City correctly pointed out, the original statement is now a year old. When they are permitted to file an OFA, a new "updated" verified statement from the shipper, which reflects the significant changes that have occurred in the past year's time, will be provided to the Board in conjunction with the City's OFA.

Wherefore, CNJ respectfully requests that the Board:

1. Accept our sincere apologies,
2. Dismiss the LLC's Motion to Compel as moot,
3. Grant our request to be excused from filing a new "confidential" shipper statement,
4. If necessary, issue an order instructing the parties that the previously filed Verified Statement, which was marked originally as "Highly Confidential", may be treated by all parties from now on as if it was labeled as a "Confidential" document, notwithstanding its original designation.
5. Advance the OFA process forward as soon as possible.
6. For any relief which is just and equitable to effectuate the foregoing requested relief.

On Behalf of CNJ Rail Corporation

Respectfully submitted,



Eric S. Strohmeyer
Vice President, COO

Dated: December 7th, 2015

CERTIFICATE OF SERVICE

Docket # AB 167 (Sub No.# 1189)X

I hereby certify that on this 8th day of November, 2015, a copy of CNJ Rail Corporation's **Reply** (with Exhibits), was served upon on all Parties of Record in the above captioned proceeding, at the addresses denoted on the Board's official service list, via First Class US Mail, postage prepaid, or where, by prior arrangement and with consent of that party, via a more expeditious means of delivery.

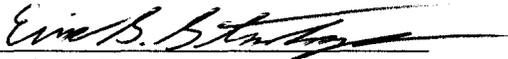

Eric S. Strohmeyer

EXHIBIT #1

Email from the Mr. Jorge DeArmas, Esq.

Transmitted: November 12th, 2015 at 4:46 pm

Subject: Conrail - AB-167-1189-X - Pace Glass Statement
From: DeArmas, Jorge (jdearmas@lawwmm.com)
To: cnjrail@yahoo.com;
Cc: ASloane@mayerbrown.com; Rmjenkins@mayerbrown.com; dehorgan@lawwmm.com;
edm@lawwmm.com; aferster@railstotrails.org; c.montange@frontier.com; jimriffin@yahoo.com;
Date: Thursday, November 12, 2015 4:46 PM

Eric,

As you are aware, the attached order requires CNJ Railroad to provide a redacted version of the statement from Pace Glass "Exhibit D" today.

As of now, the statement has not been filed with the STB.

Please file the redacted version of the statement as required by the attached order as ordered.

Thank you,
Jorge R. de Armas
WATERS, McPHERSON, McNEILL, P.C.
300 Lighting Way
P.O. Box 1560
Secaucus, N.J. 07096

Telephone: (201) 863-4400
Direct Dial: (201) 319-5741
Facsimile: (201) 863-2866
E-Mail: jdearmas@lawwmm.com<mailto:jdearmas@lawwmm.com>

-CONFIDENTIALITY NOTICE-

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Attachments

- STB November 9 Order.pdf (81.13KB)

EXHIBIT #2

Public Version

Verified Statement

of

(Shipper)

*** Public Version ***

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET # AB-167 (Sub No. 1189) X

CONSOLIDATED RAIL CORPORATION
ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NEW JERSEY

VERIFIED STATEMENT
OF

Respectfully Submitted By,

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a cursive name, written over a horizontal line.

Dated: November 6th, 2014

STB Docket# AB 167 (Sub. No.# 1189) X

Verified Statement

of

For filing with the US Surface Transportation Board:

My name is _____ . I am a citizen of the United States. I am over the age of 18. I am qualified and authorized to make this statement. I am aware that this statement is made under penalty of perjury and that all of following facts are true; and that totality of the information contained herein below is accurate to the best of my personal knowledge and belief.

I am preparing this statement in support of the City of Jersey City's ("City") Offer of Financial Assistance ("OFA") in the above titled proceeding.

I am one of the principles of _____

*** Public Version ***

Currently, our facility is being renovated and expanded. Work currently being performed on site includes the erection of a new pre-fabricated steel building, the installation of processing machinery, and the construction of additional support infrastructure, such as our new truck scale.

Harsimus Rail Line

first learned about the Harsimus Line through our company attorney, Mr. William Matsikoudis. He⁵ invited us to a special meeting which was held at City Hall in Jersey City. The event, which was called an information gathering meeting, introduced us to the City's plan to restore rail freight service on the Harsimus Line.

At the meeting, the City solicited some general information from those participants who were present. The City stated it was interested in obtaining the information so that the City could determine what level of interest the attendees might have in either, using, rebuilding, or operating the Harsimus Line. It was explained to the attendees what the City was hoping to accomplish.

It was a fairly large meeting. A number of other interested parties were in attendance as well. They included representatives from a local concrete company, a railroad construction company, and a local bridge building company. From our standpoint, the most interesting and informative party present at the meeting were the two representatives from CNJ Rail Corporation ("CNJ").

The reason for our high interest in the Harsimus rail line is straight forward and simple. In order to move the volume of material which we are anticipating, we need a suitable location to load railcars which is in fairly close proximity to our plant. We also would like a spot to be able to receive product by rail as well.

The City has outlined its desire to assist businesses in Jersey City with reducing transportation costs by providing trans-loading locations located along a portion of the Harsimus Line. The city-provided facility will greatly reduce our capital costs, since the City is proposing to build and finance the trans-load sites. In addition, the City anticipates it will hire a

⁵ Mr. Matsikoudis is a partner in the law firm of Matsikoudis & Fanciullo, LLC. Prior to re-entering private practice, Mr. Matsikoudis was the Corporation Counsel for the City of Jersey City for many years. He is acutely aware of the details surrounding the Harsimus Line and understands the City's goals and objectives.

“designated operator” to manage and run the facility for the City. This will provide access to the “value-added” services of a short-line railroad.

The location at which the City is considering developing rail infrastructure along the Harsimus Line is ideal from our perspective because it sits within miles of our plant, can be easily accessed by our trucks, and can be easily configured to load

As result. has a real, genuine, and significant interest in rail service. We outline our needs in greater detail below:

Rail Shipping Needs

*** Public Version ***

Rail Traffic Volume

Service Requirements

In order to meet the needs of our customers, [redacted] trans-load facility will require daily switching. [redacted] will also require additional storage capacity for empty railcars if transit times become unreliable. Since new material will always be arriving at the processing plant, the transfer of our finished product to the waiting railcars is essential in keeping the manufacturing process from bogging down due to an inability to load out material.

Alternatives

[redacted] has only one concern with regards to the City's proposed facilities along the Harsimus Line. Given our need to begin shipping by [redacted] is concerned that the City might not be able to complete the Harsimus facilities in a timely manner sufficient for us to meet our immediate transportation needs. As such, [redacted] may need to look at alternative locations until the City facilities can come online.

CNJ Rail has indicated to us that there are a number of ways to provide us with an interim solution. However, those alternatives require us to provide the capital to construct the loading facility. The City's proposal is very attractive to [redacted] in so far as the City is willing to provide rail trans-loading facilities for the benefit of shippers located within Jersey City.

Conclusion

In closing, I would like to reiterate [redacted] support for the City's plans for the Harsimus Line. [redacted] hopes that this Verified Statement is adequate enough to demonstrate our immediate need for rail service, and our desire to have access to that service in Jersey City.

Respectfully Submitted,

VERIFICATION

State of New York

|

STB Docket# AB 167 (Sub No.#1189)X

City of New York

|

I, _____ being duly sworn according to law, hereby deposes and states that I am a principal in _____ ; and that I am authorized to make this verification; that I have read the foregoing document, and know that the facts asserted therein are true and accurate as stated to the best of my personal knowledge, information and belief.



Subscribed to and sworn to be me, a Notary Public, in and for the City of New York, County of Queens, State of New York, this 6th day of November, 2014.



Notary Public

My commission expires on:

**RISA R. LANDER
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02LA6283380
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES JUNE 03, 2017**

*** Public Version ***

Exhibit 1

- Verified Statement
