

**BEFORE THE SURFACE TRANSPORTATION BOARD
Washington, D.C.**

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Public Record

Docket Number AB 167(SUB-NO. 1189X)

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

REPLY OF INTERVENORS:

**212 Marin Boulevard, LLC
247 Manila Avenue, LLC
280 Erie Street, LLC
317 Jersey Avenue, LLC
354 Cole Street, LLC
389 Monmouth Street, LLC
415 Brunswick Street, LLC
446 Newark Avenue, LLC
NZ Funding, LLC
Limited liability companies of New Jersey.**

TO MOTION OF:

**Jersey City
Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition**

**TO COMPEL INTERVENORS TO RESPOND TO DISCOVERY REQUESTS
FOR DOCUMENTS**

The Intervenor LLC's respectfully submit this reply to the motion of Jersey City, et al. (hereinafter "City") of October 23, 2014 that seeks to compel the LLC's to provide support for a continued attack upon the Environmental Assessment of March 23, 2009, and ill-conceived efforts by the City to marshal arguments that the Board should deprive Intervenors of their property, without just compensation, pursuant to the National Historic Preservation Act. No basis exists to grant the City the relief it seeks on the motion and it should be denied.

LLCs' Responses To City Document Requests

Intervenor LLCs provided the City with appropriate responses to each of the demands served upon them. The LLCs fully agree that Conrail has likewise provided appropriate responses to similar demands, which are the subject of a parallel motion by the City to compel responses. This agreement by two parties that the City has overstepped its bounds in its discovery requests has been characterized in the City's present motion as some kind of conspiracy between the LLCs and Conrail. The City's conspiracy theories have no factual support and were first rejected in the Environmental Assessment of March 2009. They had been repeated in almost every filing with the Board since then, including the present filing. In his letter to Ms. Brown of October 23, 2014, which accompanied the present motion, Mr. Montange explains at the bottom of page 1, that he "... wish[es] to obtain discovery of these documents before filing further motions." In other words, there are no facts to support his conspiracy theories, but he wants to keep looking anyway. The LLCs and Conrail have correctly pointed out that this is not the proper basis for extended discovery.

Running even farther afield, the City argues that this proceeding is entirely open-ended, and intended primarily to serve the City's interests, by this statement to the Board: "City et al of course also seek other relief in this proceeding." Motion, page 9, line 4. Without any hint of limitation on the scope of these proceedings--as the City sees them--the brief continues: "For example, City et al intend to move this Board to void the deeds from Conrail to the LLCs, independent of section 110 (k)." The rest of the paragraph that follows portends a Grand Inquisition into the intent of the parties, who find themselves burdened with requests for irrelevant discovery. This is only the first of many steps into something the City clearly intends to be a never-ending administrative process. The Board's own Environmental Assessment has rejected the City's arguments in 2009, and the issues the City wishes to pursue have long ago been addressed. The Intervenors' specific objections to the City's document requests clearly specify how and why each request is inappropriate. Based on those responses to the City's requests, the present motion should be denied.

Anticipatory Demolition

Much of the City's present argument is grounded in speculation that Conrail engaged in anticipatory demolition of historic structures in order to avoid the imposition of historic conditions by the Board in an abandonment proceeding. The fact is that the end of demand for rail freight service on the Jersey City waterfront decades ago was an economic reality imposed on Conrail, in substantial part by the City itself. The City formulated plans for the redevelopment of its waterfront and condemned, purchased, or encouraged the redevelopment of former railroad properties for non-industrial uses, all of which are inconsistent with rail freight. Once the Harsimus Embankment was no longer

useful, vacant and fell into disrepair, Conrail salvaged the track and the bridges. This was a reasonable course of action under the circumstances at the time. Conrail's intent certainly appears to have been reasonable, but its "intent" was also to satisfy the demands of the City which wanted the Embankment developed for productive use. It bears mention that all of these things happened before the Embankment was designated as an historic site.

The present motion argues, at least by inference, that Conrail's objection to any historic designation of the property was improper, or at least the function of some improper motive. Ignored in this is the fact that the City itself also objected to the state designation of the embankment as an historic site, because, at the time, it still favored development of the Embankment¹. There is nothing in the actual history of the property prior to the 2005 sale to the Intervenors that can be twisted into any malevolent attempt at anticipatory demolition. During this period, Conrail marched in lockstep with the City. It is clear from the record that the City had the same intent as Conrail, that is, the productive reuse and development of the property, along with all of the other former railroad property that had been sold and redeveloped prior to this.

Now, in a factually unsupported attempt at revisionist history, the City seeks to justify its discovery requests by objecting to the findings of the 2009 Environmental Assessment, particularly those contained in the first two full paragraphs of page 14 of that document. Exhibit A. This is clear from the statement: "City et al are vigorously contesting SEA's conclusion, as expressed in the March 23, 2009 EA, that Conrail

¹ The City still does favor development of all other properties, except for any properties owned by the LLCs. On all other former railroad properties, the City has taken an opposite position and ignores STB jurisdiction.

lacked the requisite intent." Motion, page 7. It then points out that these objections are being repeatedly raised, including the most recent filings on September 3, 2014 and September 25, 2014. *Id.* pp. 7-8. All of these arguments by the City have the common failing of lacking any factual support. In lieu of facts, the City offers convoluted arguments, mostly contained in footnotes. See, for example footnote 4, which begins at page 5 of the Motion and continues on page 6.

Being wholly unsatisfied with the facts as they are, and (again) having none of its own to offer in rebuttal, the City argues that discovery is not only necessary, but that the failure to pursue the City's conspiracy theories amounts to a serious regulatory failure by the Board. "To date, City et al is aware of no independent investigation or discovery undertaken by OEA or other arms of the Board into section 110(k) issues in this proceeding." Motion, page 7. The footnote (#5) to this sentence goes on to compare the Board unfavorably to its predecessor, the ICC, which presumably would have disagreed with the conclusions of the current Environmental Assessment, just as the City does.

The facts, conclusions, and reasoning of the Environmental Assessment refute any argument by the City for an inquiry into the intent of any party, or issues of anticipatory demolition.

Imposition of Environmental Conditions

The 2009 Environmental Assessment recommended reasonable environmental conditions upon abandonment by Conrail within the scope of the National Historic Preservation Act ("NHPA"). The City's stated position is that "Under section 110 (k), this agency may not authorize abandonment of the Harsimus Branch if Conrail sought to evade NHPA section 106 requirements by intentionally significantly adversely affecting

the Harsimus Embankment (a property protected under section 106)." Motion, at page 4. There is no evidence that Conrail attempted to do any such thing. To the contrary, the Environmental Assessment noted Conrail's cooperation. The City, after almost 10 years of disputing the sale of the Embankment, has no facts to support a contrary conclusion. The only issue is the City's disagreement with the conclusions of the Environmental Assessment. The City makes this plain in its motion at page 8 when it states:

Nonetheless, until and unless STB reverses the EA's March 23, 2009 claim that the City et al have failed to show that Conrail intended to harm historic properties, City et al must exhaust their efforts to make such a showing. This constitutes a perfectly adequate showing of "need" for further discovery, both of documents and the identity of potential witnesses at both Conrail and the LLCs.

The LLC's respectfully suggest that the City has already "exhausted" the issue and should not be permitted to continue.

Another reason for denying the City's motion, particularly with respect to the LLCs, but also as to Conrail, is that it seeks relief that is simply not available under the NHPA. The City has made no showing that historic, or any other abandonment conditions, can be applied to the properties now owned by the LLCs. Yet, the ultimate historic condition that the City would have the STB apply has been made clear--the City wants the agency to declare the 2005 deeds from Conrail to the LLCs void. There is no precedent known to Intervenors that authorizes any federal agency to seize property for purposes of historic preservation. There is no precedent under NHPA to impose conditions in abandonment proceedings on any party other than the railroad seeking abandonment or conducting freight operations. But if the railroad does not hold title to the land, the STB cannot impose historic preservation conditions on property not owned

by the railroad. See: Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board, 252 F.3d 246 (3d Cir. 2001) at 262. Not only has counsel for the City avoided any mention of this issue, they have never properly raised their “intended” claim to void the LLCs’ deeds. Claiming that they need factual support for the extraordinary step of asking the STB to take property without just compensation for historic preservation purposes, begs the question of what legal authority exists for even requesting such draconian action.

On this point, Conrail in its brief in opposition to a parallel motion by the City to compel discovery, at page 13, speculates that the Board "... may have the inherent authority to void the deeds to protect the integrity of Board processes...". It then quickly points out that there is no precedent in any similar action, and distinguishes a few instances where the Board may have enjoyed such authority because they involved active rail lines and the protection of legitimate interests of interstate commerce. This is certainly not the case here where there is no possibility for continued rail service after decades of inactivity.

Conrail also leaves the facts behind at page 14 of its brief when it claims that it retains a constructive easement to operate rail service on the LLCs’ properties and therefore it would not be necessary to void any deeds in order to proceed with an OFA or other form of continued rail service. This is pure fiction and litigation-oriented reasoning, because Conrail never reserved any such right in its deeds to the LLCs. Those deeds have been placed in the record of this matter, and other matters before the Board, on numerous occasions. In responding to the City's attacks, Conrail is seeking to justify its own past conduct in this and other conveyances of railroad property, such as the still un-abandoned

portions of the Harsimus Branch, line code 1420, and Line 1440 in Jersey City. These are issues for another day and should not give rise to discovery of issues not before the Board in these proceedings.

Illegal Abandonment by Conrail

The City's principal conspiracy theory in support of its discovery requests may raise a serious question for the Board, and Intervenors have no objection whatsoever to the Board pursuing an inquiry into such matters. However, this is not the proceeding to address those issues. The City, beginning at page 3 of its brief, argues that Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008 (hereafter "EP 678") allows it to act as the Board's roving agent for enforcement. No such authority exists, nor should it. The City would be a horrible choice for such a duty because it is highly partisan against the parties and, as the Environmental Assessment clearly points out, the City had a very large role in creating the current circumstances against which it now complains. See: Exhibit A.

What EP 678 actually suggests is a separate ex parte proceeding against Conrail in which intervenors would have no role. Nor should the City have a role either. If the Board is serious about its policy statements in EP 678, it should direct its attention to the issues raised in that decision. In any such proceeding, the Board would not, and could not, adjudicate any claims brought by the LLCs against Conrail. As the D.C. Circuit Court of Appeals has most recently ruled, those claims are preserved for the LLCs to bring in separate proceedings. Neither the Board nor the City would need to be necessary parties in such proceedings. In any event, the remedies proposed in EP 678 are all

directed against the railroad, and not anyone else. The precedent does not apply to the interests of Intervenor in the present matter. It does not support anything like punishing the Intervenor in this proceeding. What the Board actually said in EP 678, pertinent here, is as follows:

The Board will continue to carry out its obligations under those statutes [NEPA, NHPA] and will take whatever steps necessary to enforce compliance with them. Railroads that take such actions [failing to seek abandonment authority] may find not only that obtaining abandonment of authority is delayed, but that the Board will require historic preservation training for the railroad 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 taking 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. Id. p. 4.

What we have in the present matter is the Board carrying out its obligations under NEPA and NHPA. Those obligations have not been adversely affected nor impaired. The fact that the City does not like the way the Board is proceeding is of no moment. And while this may motivate the City to ultimately file an appeal, without any factual or legal basis for the Board to act as the City demands it should act, such an appeal would suffer from the same lack of merit as the City's present argument for endless discovery.

Specific Objections

The City's specific responses to the Intervenor's objections to its discovery demands all suffer from the deficiencies addressed above, and depend heavily upon

acceptance of the City's conspiracy theories. As to each of the City's responses, Interveners add the following:

1. The City's response here is dependent upon making the LLC's title to the properties an issue in this matter. The 2007 memoranda is obviously a document negotiated between parties at serious issue over the 2005 sale. That dispute has nothing to do with an historical evaluation or an OFA, despite the fact that the City wishes to intermeddle, whether to inflict further harm on the LLCs, or to advance defenses in the pending action against it and its officials for Civil Rights violations.
2. See comment, above.
3. The City's response makes it quite clear that it seeks the information in furtherance of its role as a Grand Inquisitor to burden, punish, and embarrass anyone associated with the LLCs.
4. Tolling agreements evidence disputes, not conspiracies to evade STB jurisdiction or NHPA. The purpose of the request is to permit the City to meddle in the affairs and issues of others unrelated to its dispute over the Environmental Assessment or any proposed OFA.
5. The City's response discloses that it has been digging through the LLC's litigation against Chicago Title Company, a matter which is not stayed and is currently pending for the appellate courts in New Jersey. The City offers only speculation that evidence of a conspiracy lurks in the record. The discovery request is nothing but an improper attempt to further meddle, and potentially obstruct, the LLCs' efforts to secure relief against yet another entity that failed to recognize the

- regulated nature of the property, because Conrail had consistently sold other similar properties, at the City's urging, without securing abandonment authority. In that matter, Chicago Title has filed a third-party claim against Conrail, making this yet another private dispute beyond the jurisdiction of the Board.
6. The City's response claims that it has an interest in post-abandonment development of the property. This is nothing more than yet another disagreement with the Environmental Assessment.
 7. The City's response indicates that it would like to know who may have made fraudulent representations on behalf of Conrail. Citing back to a 1988 ICC matter (see footnote 5 at page 7 of motion) this request is made in the City's self assumed role as roving enforcement agent for the Board.
 8. See comment, above.
 9. This is yet another attempt to prove the conspiracy theory that the LLCs' acted in concert with Conrail to avoid abandonment.
 10. The City is seeking documents beyond any issue in the case; here it seeks documents concerning any post-abandonment plans. This is yet another effort in opposition to the Environmental Assessment.
 11. See above comment to item number 10, above.
 12. See above comment to item number 10, above.
 13. The City's response to this item raises yet another, new conspiracy theory. It has nothing to do with any substance of an offer of financial assistance. To this end, the objection concludes: "... such communications will assist the City in determining if CNJ is a bona fide potential operator of a rail transload should the

City's OFA be successful, or whether CNJ is some kind of Trojan horse for the LLC's and by extension Conrail."

14. The City's response says virtually nothing about why information is required.

Also, see comment 5, above.

15. See comments 4 and 7, above.

For all of the foregoing reasons the motion by the City to compel the requested discovery should be denied.

Respectfully submitted,

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BY: 
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Dated: November 13, 2014
831161

CERTIFICATE OF SERVICE

I, Daniel E. Horgan, hereby certify that on November 13, 2014, I caused a copy of the foregoing to be served by First Class mail upon those on the below Service List.

BY: 
DANIEL E. HORGAN

Dated: November 13, 2014

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EXHIBIT A

until the conclusion of the Section 106 process because Conrail will be unable to consummate this proposed abandonment until that process is complete.

The SHPO and others, including the City, argue that the historic review process should not proceed because Conrail has engaged in “anticipatory demolition” in violation of Section 110(k) of NHPA. Section 110(k) permits an agency to suspend processing of an application when “an applicant who, with intent to avoid the requirements of [Section 106], has intentionally significantly adversely affected a historic property.” 16 U.S.C. 470h-2(k). In support of their anticipatory demolition argument, these parties assert that Conrail should have known that the Harsimus Branch was a “line of railroad” requiring abandonment authority from the Board and that by removing bridges and track structure, Conrail demonstrated intent to harm the Embankment.

This argument fails because the parties making this argument have not demonstrated any intent on Conrail’s part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board’s environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts.

Below, we set forth a brief summary of the submissions received that raise concerns associated with historic sites and structures:

Conrail submitted its historic report to meet the requirements of the Board’s environmental rules [49 CFR 1105.8(a)] and served the reports on the SHPO pursuant to 49 CFR 1105.8(c). The Area of Potential Effect Report prepared by Conrail’s consultant, RGA, indicates that the six embankment parcels have been determined eligible for listing on the National Register of Historic Places (National Register). Other structures and historic districts within the Area of Potential Effect are also listed or eligible for listing on the National Register.

SEA received numerous comments on the proposed abandonment and discontinuance raising issues and concerns which primarily focused on the Board’s responsibilities under Section 106 of the NHPA and alternative reuse of the right-of-way. Comments were received from the City Parties¹¹ (the City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and Rails to Trails Conservancy); the New Jersey State Historic

¹¹ The City Parties filed comments on March 13, 2009, restating the same arguments made in prior submissions.