

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
December 29, 2014
Part of
Public Record

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

RESPONSE TO LLCs' MOTION TO CLARIFY
RESPONSES TO LLCs' REQUESTS FOR ADMISSIONS

City of Jersey City ("City"), Rails to Trails Conservancy ("RTC"), and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition") (collectively "City et al") respond below to the "motion to clarify responses to requests for admissions" from Consolidated Rail Corporation ("Conrail") and from City et al by eight intervening LLCs in this proceeding, hereby collectively referred to as "212 Marin Boulevard, et al" or "the LLCs."¹

Background. After the LLCs commenced discovery in this abandonment proceeding, City et al filed document requests addressed to the LLCs and to Conrail germane to environmental issues, including section 110(k) of the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470k-2, and germane to valuation of the rail line in question (City in 2009 filed a

¹ The requests for admission were originally tendered by nine LLCs. One of the nine LLCs (NZ Funding, LLC) did not participate in the motion to clarify.

timely notice of intent to OFA). Conrail and the LLCs refused to make any documents available. City has filed motions to compel both against Conrail and against the LLCs.

Although the LLCs refused discovery to City et al, the LLCs filed identical requests for admission against Conrail and City et al. Conrail objected to all the requests, declining any response. Before responding, City et al inquired of the LLCs concerning the relevancy of the requests, and also asked whether the LLCs themselves asserted that the requests were factually correct.

City will address what the LLCs had to say about the truth of their own requests for admissions first. As shown in Exhibit A, City et al specifically asked if the LLCs asserted the truth of all their requests for admission. Counsel for the LLCs refused so to assert. See Exhibit A. The request for admission process is tantamount to an effort to achieve a set of stipulations for purposes of facilitating further proceedings; in particular, it is supposed to confirm facts generally available. It is not a one-way street, in which one side is asked to concede something that the proponent of the admission then contests. Given that the LLCs disavowed the truth of their own requests for admissions, they were fortunate that City et al made any response other than to object to the requests as an abusive mis-use of this agency's discovery procedures.

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Astonishingly, on p. 2 of their motion to clarify, the LLCs reverse their lead attorney's written refusal in Exhibit A to assert that the requests for admission the LLCs tendered were truthful. The LLCs now say they assert their requests were true. This is like the thirteenth chime of a clock, calling into question whatever the LLCs say. In all events, it is directly contrary to what they represented to City et al prior to City et al's response to the request for admissions. The LLCs' belated assertion of truth does not justify an order compelling City et al to say anything more than City et al did on any of the LLCs' requests when the LLCs disavowed their own requests, even assuming arguendo the requests sought relevant information. It is not consistent with orderly proceedings for the LLCs' counsel to continue to flip flop the LLCs' positions.²

² The LLCs further complain that City et al would not attest to the genuineness of documents that they asked City et al (and Conrail) to attest to, including specifically a document prepared by one of the LLCs' witnesses (Dixon) in Special Court (which per Exhibit A they refused to assert was true). They did not supply this document with their requests for admission. Instead, they referred City et al to an electronic version located on the Special Court website which City et al has never been able to "open." The whole matter is irrelevant (see below), but if they want to litigate a motion to compel about the document their witness prepared, then they should supply it in a fashion that can be opened. In short, rather than complain to the Board that City et al cannot open their untendered document, they should supply the document in an opened or openable fashion.

City et al now turn to the matter of relevancy. The only relevancy the LLCs offered was that the requests were tendered to support their argument that STB continues to lack abandonment jurisdiction over the Harsimus Branch. City et al responded accordingly with appropriate objections, but with some admissions. The LLCs filed a motion to "clarify." As to Conrail, the LLCs seek to compel a response other than objections. As to City et al, the LLCs seem to want more response.

Since Conrail is/was the common carrier, owner of the property the LLCs claim to wish to put at issue, and repository of the records germane to regulatory matters on the Branch, Conrail as a source of information on rail matters dwarfs City, let alone RTC or the Coalition. In general, City et al have no knowledge on rail-relevant matters other than as City et al obtains discovery from Conrail, or City et al win a decision from STB or a Court or both determining (or mooting) the issues on which factual evidence or legal conclusion is sought.³ The LLCs' requests for admission are thus appropriately directed for location of rail lines and so forth should be directed at Conrail (the owner), not non-carriers/non-owners such as City et

³ The attorney for City et al may also develop information, but that is generally protected under the work product doctrine.

al. Indeed, the fact that the LLCs sent City et al the requests at all suggests the primary reason for the LLCs' discovery against City et al (and the LLCs' focus on City et al in their motion to clarify) is evidently to distract attention away from the legitimate motions to compel that City et al have filed against the LLCs and Conrail relating to valuation and environmental matters.⁴

Summary of position. Conrail responded to the LLCs on December 19, opposing the LLCs' motion. City et al agree with Conrail that the LLCs' motion to clarify should be denied.

The LLCs' discovery is irrelevant and moot. The issue on which the LLCs seek discovery (STB's jurisdiction over the Harsimus Branch) has already been decided by the special court and the LLCs' appeal of that decision has been dismissed by the D.C. Circuit. The LLCs took no further appeal, and therefore, the LLCs are barred by principles of res judicata, law of the case and/or collateral estoppel from seeking discovery on this issue in this related proceeding.

The LLCs' motion makes clear that the only reason for their discovery inquiries into this issue is to seek information

⁴On December 23, City filed a motion to compel Conrail to furnish information pursuant to 49 C.F.R. 1152.27(a). This Board had ordered Conrail to supply that information in a decision served May 26, 2009, and Conrail has supplied nothing.

purportedly to show that this Board lacks jurisdiction over the Harsimus Branch until there are more proceedings at Special Court to "locate" the Hudson Street Track. But the Special Court has conclusively determined the STB to have abandonment jurisdiction over the Harsimus Branch. City of Jersey City v. Conrail, 968 F.Supp. 2d 302 (D.D.C. sitting as Special Court 2013) (summary judgment), summarily affirmed D.C. Cir. No. 13-7175 (D.C. Cir. Feb. 19, 2014). The LLCs opposed both summary judgment and summary affirmance on the ground that the Special Court needed first to make determinations concerning additional rail lines in Jersey City. The LLCs lost this argument. There is no support for the LLCs' claim that the courts reserved to them the claim STB cannot exercise abandonment jurisdiction until there are further proceedings in Special Court. Rather, the decisions are clear that the only claims against Conrail that remain undecided are the LLCs' state law claims for fraudulent and negligent misrepresentation. Principles of res judicata, law of the case and/or collateral estoppel bar relitigation of whether STB has abandonment jurisdiction over the property claimed by the LLCs.

In any event, the D.C. Circuit decision on which the LLCs predicate their argument clearly held that reference to the Special Court was needed only for interpretation of the Final System Plan or a conveyancing order: "Only in proceedings in

which the Board's authority is challenged and an interpretation of the FSP or the Special Court's conveyance order under 45 U.S.C. § 719(e) (2) is required does the Board lack jurisdiction to resolve the question of the nature of the trackage sought to be abandoned." Conrail v. STB, 571 F.3d 11, 20 (D.C. Cir. 2009). There is no rule or rule of law that requires the Special Court to "locate" a line of railroad proposed for abandonment, nor to "interpret" the FSP or conveyance order before STB may exercise abandonment jurisdiction. ICC and STB have conducted nearly 1200 Conrail abandonment proceedings without having to do so, except for the one instance in the 2009 Conrail case, which after years of litigation resulted in the LLCs stipulating in essence that STB was correct that the property was a line of railroad subject to its abandonment jurisdiction. City et al can find two other instances since the 2009 Conrail case in which a party claimed that Conrail v. STB, supra, bars this agency from exercising jurisdiction over Conrail or former Conrail lines until the Special Court interprets the FSP. In Allegheny Valley RR Co. - Pet. Dec. Order, F.D. 35239, served June 15, 2010, vacated on the basis of new evidence on other grounds, decision served April 19, 2013, this Board ruled that it could determine whether or not a former Conrail track was a line or a spur without interpreting the FSP or conveyancing order. In Norfolk Southern Rwy Co. - Petition

for Exemption - in Baltimore City and Baltimore County, AB 290 (Sub-no. 311X), served May 4, 2010, slip op. at 4-5, this Board ruled that it could determine the nature of the track and that the matter was clear on the face of the FSP.

STB to date has not found it necessary to consult anything within the purview of the Special Court in connection with any of the track which the LLCs keep seeking to place at issue. This Board rejected all the LLCs' arguments against this Board's jurisdiction in AB 167-1189X, including those about the relevancy of trackage east of Marin Boulevard, in 212 Marin Boulevard LLC, et al - Pet. Dec. Order, F.D. 35825, served August 11, 2014, slip op. at 4 n.15, as already decided. (212 Marin Boulevard LLC was another legal proceeding brought by the LLCs to contest this Board's abandonment jurisdiction here.) There is no reason apparent to City et al why STB ever should find it necessary to interpret the FSP in connection with track east of Marin Boulevard that may or may not have been associated with the Harsimus Branch. City et al is certainly not seeking any FSP interpretation or conveyancing order construction from this agency, nor do we understand Conrail to be expressing interest in any further FSP or conveyancing order delays. STB can readily determine the nature of any truly controversial trackage, if that is necessary, on the basis of general rail law. The LLCs' proposed discovery is thus directed at matters

which are already decided, moot, irrelevant, or all three, and certainly vexatious, and not designed to lead to the production of any useful evidence.

In addition, as Conrail points out, the LLCs are raising the question of additional lines vastly out of time. Conrail originally filed a notice of intent to initiate a proceeding in AB 167-1189X that included not only the Harsimus Branch but also the Hudson Street Track. See Conrail notice entered into public record March 12, 2008. Conrail received comments calling for the proceeding to be focused on the Harsimus Branch. Conrail filed its notice of exemption on January 6, 2009, with that focus, and so indicated in its environmental report. City et al is unaware of any objection to Conrail's notice at the time; certainly the LLCs did not object. The LLCs' belated attempt to encumber this proceeding with issues they should have raised six or so years ago should be rejected.

The LLCs' lack of interest in 2008 or 2009 bears emphasis for another reason. The LLCs, as they admit in their motion to clarify, own no property east of Marin Boulevard.⁵ The LLCs, moreover, are neither rail shippers nor environmental organizations nor interested in providing rail service. They thus have a total lack of interest as to any of the trackage

⁵ See, e.g., LLCs' Motion to Clarify at p. 21 (LLCs admit no property interest east of Marin).

east of Marin Boulevard over which they now insist this agency fuss, or, more accurately, over which they now insist this agency do nothing until the Special Court "locates" the lines in which the LLCs have no interest. This is a clear instance of a party who lacks standing on an issue but nonetheless seeks to compromise the integrity of this agency's abandonment processes by asserting the issue.

Conrail's spur argument. In Conrail's opposition to the LLCs' motion to clarify, Conrail also argues that it regarded the Hudson Street Industrial Track as a "spur" not requiring abandonment approval.⁶ This argument is unnecessary to reject the LLCs' motion to clarify for the reasons stated above. City et al, however, wish to be clear that Conrail's unilateral labeling of a line as "spur" or "regulated" is not probative. It is especially entitled to little weight in AB 167-1189X, which involves a line which Conrail illegally sought to de facto abandon. It has long been the law that a track's "classification by [its] owner is [not] determinative" of regulatory status. E.g., Clinchfield Railroad Co. Abandonment, 295 ICC 41, 44 (1955). Nor may a railroad convert a line into a spur by reducing or ceasing service or by removing track. E.g., Chelsea Property Owners - Abandonment - Portion of the

⁶ Conrail Reply at 4.

Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, 8 ICC2d 7, AB 167-1094, 1992 ICC Lexis 192 at *35-*36, served Sept. 16, 1992, aff'd sub nom. Conrail v. ICC, 29 F.3d 706 (D.C.Cir. 1994); Oregon Short Line R. Co. Abandonment, 267 ICC 633 (1947). Whether a track is a line or a spur turns on historic use, number of carloadings, number of shippers, and/or use by through trains. E.g., Oregon Short Line Co. Abandonment, supra. See also UTU-Illinois v. STB, 169 F.3d 474, 477-78 (7th Cir. 1999). Conrail's unilateral classification for a track is thus not probative under federal rail law. In addition, Conrail's "opinion" on the status of a track as regulated or unregulated is not entitled to weight under New Jersey title practice. The standard of practice for title examiners representing parties acquiring rail property from Conrail in New Jersey is set forth in L. Fineberg, Handbook of New Jersey Title Practice, published by the New Jersey Land Title Institute, 3d ed. Revised Sept. 2005, volume II, chapter 98, section 9806. That standard requires the title examiner, among other things, to require that Conrail provide proof of approval by STB for the conveyance "or, in the alternative, proof that such approval is not required." A railroad's arbitrary claim is not proof. If the issue whether the Hudson Street Track is still "live" notwithstanding our arguments herein, and if Conrail wants to assert that the Hudson Street

Track is "spur," it needs to make the showings specified in cases such as those cited above.

City et al have never claimed that the Hudson Street Industrial Track is an unregulated spur. From at least the date of former Mayor Healy's letter to Conrail's Associate General Counsel Enright on March 4, 2008, City has simply told Conrail that "the City of course supports abandonment of Conrail's freight rail obligations in connection with the Hudson Street Industrial Track." In the face of many potential illegal de facto abandonments by Conrail in Jersey City, the position of City et al is merely that the Harsimus Branch abandonment proceeding should focus on the Harsimus Branch and not be turned into a general investigation of all of Conrail's past unlawful de facto abandonment activities inside the City. The reason is simple: the Harsimus Branch contains property protected under Section 106 of the National Historic Preservation Act (the Harsimus Embankment) for which City et al seek preservation for transportation (including rail) and other public purposes. This property has been slated for public use in planning documents since well before Conrail sold it to the LLCs. In addition, City specifically sought to acquire the property before Conrail sold it to the LLCs. Both Conrail and the LLCs were aware at the time of the illegal sale that the property had not been abandoned, and either knew or should have known that an

abandonment authorization was required. After all, the property description in all the relevant deeds declared it to be part of a "line of railroad" and Conrail told the LLCs it had no abandonment authorization. Finally, City et al are not federal rail police; City et al have no obligation to seek enforcement of federal law as to lines in which they lack interest.

The LLCs in their Motion to Clarify suggest that their requests concerning the Hudson Street Track are germane to the issue of "improper segmentation." Motion to Clarify at 19. In a nutshell, improper segmentation arises in environmental law when the proponent of an action divides it up in order to avoid analyzing the actual consequences of the action (or alternatives to it). In rail law, it arises most often in the context of feeder line proceedings or some abandonments where shippers or local governments claim they are being cherry-picked (i.e., that some longer or shorter length of railroad would be economically viable). But whether there is an improper segmentation embodied in Conrail's January 6, 2009 notice of exemption in this proceeding has nothing to do with any interpretation of the FSP or any conveyancing order. It is a matter that can be resolved on the basis of general rail law through consideration of factors canvassed in cases like UTU-Illinois v. STB, supra, for a determination of whether a track is line or spur, and in relevant NEPA or rail law cases in respect to whether a

segmentation has happened if some jurisdictional track is omitted from the abandonment proceeding.⁷

The LLCs' requests for admission are based on a false assumption: the LLCs assume that the Special Court must "locate" certain track before this agency can decide if the track must be included in the Harsimus proceeding. The only document which Conrail produced to City et al in discovery (long ago in F.D. 34818) bearing on the location of the Hudson Street Track was long ago filed by City et al as part of Exhibit E of Summary Statement Concerning Section 110(k), on January 21, 2009, in this proceeding. The document (a map) shows the Track (#210) as located in Hudson and Essex Streets. That location is

⁷ In LLCs' Motion to Clarify at p. 16 and elsewhere, the LLCs claim that the City has made misrepresentations as to the nature of the Hudson Street Track, or is somehow inconsistent. Once again, neither City, RTC nor Coalition has ever claimed that the Hudson Street Track was a spur. City et al have simply stated lack of interest, and a wish that the matter not encumber this proceeding. City et al are not federal rail police required to devote resources to seeking enforcement of this agency's abandonment jurisdiction in properties in which they have no interest in Jersey City, the State of New Jersey, the East Coast, or America generally. It is ironic that the LLCs, who spent years denying that the Harsimus Branch was a regulated line and castigating the City in State court for arguing otherwise, and also seeking judgments against City's rail attorney, now admit that the City et al were absolutely correct that the Harsimus was a line, but now seek to delay this proceeding in order to litigate whether additional trackage (as to which the LLCs have no standing in federal court) are also lines on the basis of legal theories the LLCs have disavowed as to the Harsimus Branch, but now wish to re-avow for the additional trackage.

now occupied by a light rail system. There are no rail shippers on the light rail system. The LLCs identify no environmental or historic concerns on the Track. In any event, any possibly cumulative environmental and historic preservation issues raised by the Hudson Street Industrial Track can be addressed in the context of AB 167-1189X (this proceeding) without any need for further location of the Track. As noted, City et al support abandonment of the Hudson Street Track by Conrail. Nothing in this requires or calls for an interpretation of the FSP or any conveyancing order. This agency can determine if the Hudson Street Track is a line over which it must now exercise jurisdiction as improperly segmented (if that issue remains open at all) based on number of shippers, existence of through trains, total carloadings, historical use, and so on.

It would be "passing strange"⁸ to hold up the Harsimus Branch abandonment proceeding to await a Special Court determination of the location or status or whatever of a Track in which none of the participants in the Harsimus Branch abandonment proceeding has any interest, in which there is no need for an interpretation of the FSP or a conveyancing order in the first place, and concerning which the Special Court has already determined that STB has abandonment jurisdiction.

⁸ Othello Act 1, Scene 3, 158-163 (means surpassingly strange or odd, weird).

Equally relevant, City et al does not see how honoring the LLCs' request to place the Harsimus Branch in regulatory limbo until someone somewhere is found with standing to sue, and does sue, Conrail in Special Court over the Hudson Street Industrial Track in any way helps the LLCs. Since the LLCs' only relevant property interest is west of Marin Boulevard, and has been conclusively determined to be part of a regulated rail line, Conrail may not lawfully sell to the LLCs what they continue to claim (namely, eight blocks of the Branch) for non-rail use, and neither they nor Conrail may lawfully devote it to non-rail use, until and unless there is an effective final abandonment authorization.⁹ To be sure, City et al argue, and intend to argue, that the LLCs' deeds from Conrail must be voided in the federal abandonment process, and that if not voided by STB, that the deeds must still be voided under N.J.S.A. 48:12-125.1 once they emerge from the process. The LLCs might delay this

⁹ City et al have already pointed out that under section 110(k) of the National Historic Preservation Act, 16 U.S.C. 470h-2(k), this Board may not authorize an effective abandonment (until and unless the deeds to the LLCs are first voided or otherwise neutralized) of the Harsimus Branch. City also seeks to file an OFA. This, if successful, will also result in voiding the deeds. In any event, given N.J.S.A. 48:12-125.1, it makes no sense to treat the sale of the line to the LLCs as valid for purposes of federal environmental review. But even if this agency were to greenlight Conrail's unlawful de facto abandonment by failing to investigate 110(k) issues or allow discovery on them, and/or by failure to void the deeds, Conrail's deeds to the LLCs are still void under N.J.S.A. 48:12-125.1.

eventuality by continuing their decade-long effort to undermine the integrity of this agency's jurisdiction, but all they will accomplish is further assault on the agency's jurisdiction through the continued creation of legal knots which they hope is faster than the agency or the public interest parties in this proceeding can untie them. In the meantime, the LLCs will be placing the Harsimus Branch in legal - actually illegal - limbo: they cannot do anything with the property, other than pay taxes on it (which they have in the past defaulted). Since the LLCs' own legal theory gains them nothing, the discovery they propound for it serves no legitimate or relevant purpose. It just encumbers this agency, the courts, and other parties with unnecessary and purposeless litigation.

In the end, the LLCs began their assault on the integrity of this agency's jurisdiction in 2005 when they accepted deeds from Conrail declaring the parcels they acquired to be part of a line of railroad known as the Harsimus Branch, for which they knew Conrail lacked abandonment authorization. The LLCs have waged their attack on STB processes, generally with Conrail assistance, to this date.

Summary. The LLCs' discovery is based on incorrect assumptions, and is moot, irrelevant, barred by principles of res judicata/collateral estoppel, otherwise misdirected, and deals with issues five or six years too late. All the arguments

presented by the LLCs not addressed in this pleading are erroneous or trivial, or do not overcome the stated objections of City et al, on which we stand, as well as those of Conrail's arguments in which we have joined.

The LLCs' motion to clarify should be denied.

Respectfully submitted,

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Exhibits

Exhibit A - LLC refusal to assert the truth of its own requests for admission

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 28th day of December 2014 addressed to the parties or their representatives per the service list below, unless otherwise indicated.

CHARLES H MONTANGE

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[AB 167 (Sub-no. 1189X)]

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presented by the LLCs not addressed in this pleading are erroneous or trivial, or do not overcome the stated objections of City et al, on which we stand, as well as those of Conrail's arguments in which we have joined.

The LLCs' motion to clarify should be denied.

Respectfully submitted,



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Exhibit A

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me Nov 19
To Horgan, Daniel
CC jfarrell@jcnj.org, aferster@railstotrails.org, John J. Curley,
Robert Jenkins, Adam Sloane

Before we conclude this, I suppose I should ask you if the LLCs assert as true each of the points they seek admitted for purposes of the proceeding.

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Horgan, Daniel Nov 19
To me
CC jfarrell@jcnj.org, aferster@railstotrails.org, John J. Curley,
Robert Jenkins, Adam Sloane

Dear Charles, Our 24 requests should not be interpreted beyond the discovery rule, which merely gives us the ability to ask these questions, and we are not burdened with any further obligations, implications, or inferences by having asked them. Our position on the requests is that each of them is material to the jurisdiction of the STB over the matters at hand in 1189X and we will be informed by the answers we receive from each of the parties.

Prior to that we have no obligation to conclude the entire truth, accuracy or genuineness of the subject of any of our requests. By contrast, an admission is conclusive only against the party making the admission, but not against any other party. Our Requests for Admissions are just that, requests, and nothing more.

This should clear the way for you to provide us with your clients' respective responses to each of our requests. Thank you.