

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

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Office of Proceedings  
December 19, 2014  
Part of  
Public Record

**REPLY OF CONSOLIDATED RAIL CORPORATION TO  
“MOTION TO CLARIFY RESPONSES TO REQUESTS FOR ADMISSIONS AND TO  
OTHERWISE COMPEL PROPER RESPONSES TO REQUESTS FOR ADMISSIONS”**

Consolidated Rail Corporation (“Conrail”) hereby replies to the Motion to Compel (“Motion” or “Mot.”) filed by 212 Marin Boulevard, et al. (“LLCs”) on December 8, 2014. The Motion concerns identical requests for admissions that the LLCs served on Conrail and the City of Jersey City (“City”), Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, “City Parties”) in the above-referenced proceeding on or about November 12, 2014.

Conrail objected to the LLCs’ requests for admissions in an Opposition that Conrail served on the LLCs on November 21, 2014, which is attached to the LLCs’ Motion as Exhibit B. Conrail demonstrated there that the Board disfavors discovery in abandonment proceedings and that the LLCs’ requests were not only extremely untimely but also completely irrelevant at this stage in this proceeding. In their Motion the LLCs have mischaracterized Conrail’s position on the appropriateness of discovery in this proceeding and failed utterly to show that their discovery is timely or how their discovery pertains to the issues currently before the Board.

In its Opposition to the requests for admissions, Conrail cited *Ind. Sw. Ry. Co.—Abandonment Exemption—In Posey & Vanderburgh Counties, IN*, STB Docket No. AB1065X,

slip op. at 4 (served Feb. 11, 2011), for the proposition that “discovery is disfavored in abandonment proceedings,” which is a close paraphrase of what the Board said in that case. *See* Conrail Opposition at 1. In their Motion, the LLCs erect a straw man, characterizing Conrail’s position as setting forth an unequivocal categorical rule “that discovery is precluded in Board abandonment exemptions actions” and then proceed to support their requests for admissions by quoting the very same portion of *Posey & Vanderburgh Counties* that Conrail cited. Mot. at 8.

Of course, Conrail did not say that discovery could never be had in abandonment proceedings. As demonstrated in the very case that Conrail cited, discovery may be had where it is relevant to an important matter in issue in the proceeding, and the requests are “sharply focused” on relevant issues. *Posey & Vanderburgh Counties*, slip op. at 4. In *Posey & Vanderburgh Counties*, discovery was sought concerning the bona fides of an Offer of Financial Assistance, in particular whether the town making the offer was financially responsible or was acting as a shill for a third party that sought the line only for salvage purposes. *Id.* The issues implicated by the discovery in *Posey & Vanderburgh Counties* were the subject of an appeal in that very case. *Id.* In the present matter, it is imaginable that similar questions might arise about the bona fides of an Offer of Financial Assistance for the Harsimus Branch, and that discovery might be necessary to resolve that issue.

But, as we detail below, the discovery sought by the LLCs is not relevant to live issues before the Board in *this* proceeding. Thus, the LLCs have not provided any basis for an exception to the presumption *against* discovery in this proceeding.

Moreover, the LLCs’ requests are untimely. In their half-hearted attempt to address Conrail’s timeliness argument, the LLCs completely ignore everything that occurred in these

matters before the September 30, 2013 Special Court decision granting the City Parties' motion for summary judgment. *See Mot.* at 22-23. This puts the rabbit in the hat.

The LLCs' requests concern the location and regulatory status of the Harsimus Branch and the Hudson Street Industrial Track ("Hudson Street I.T."). The location and regulatory status of the Harsimus Branch has been the focus of attention at the STB since 2006, when the City Parties initiated declaratory order proceedings in Docket No. 34818. The City Parties, Conrail, and the LLCs all participated in document discovery in that proceeding that involved information about both the Harsimus Branch (Line Code 1420) and the Hudson Street I.T. (Line Code 1440). The focus of the proceeding was on the "Embankment" portion of Line Code 1420.<sup>1</sup>

After the Board issued its decision in Docket No. 34818 holding that the Embankment portion of Line Code 1420 was a regulated line of railroad, Conrail on March 6, 2008, served all parties with a notice that it intended to file a notice of exemption to abandon both the Harsimus Branch, east of Waldo Avenue ("CP Waldo"), and the Hudson Street I.T. Conrail did not, and does not, believe that any portion of the Harsimus Branch east of CP Waldo or the Hudson Street I.T. was or is a line of railroad subject to STB jurisdiction; but out of an abundance of caution, Conrail served notice for the entirety of both rights of way, and included maps specifying the

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<sup>1</sup> In its decision served August 8, 2007, in Docket No. 34818, the Board observed that the question before it, which it answered affirmatively, was "whether [Conrail] needs prior agency authorization to abandon trackage known as the Sixth Street Embankment (Embankment), extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ." Slip op at 1. In support of their (then) position that the Embankment was ancillary track excepted from regulation, the LLCs observed in petitioning the Board for reconsideration that there had been no abandonment proceedings with respect to the portion of Line Code 1420 extending from milepost 1.0 on the Hudson River to milepost 1.3 near Marin Boulevard. The Board responded in its decision denying the LLCs' petition for reconsideration that "neither [the City Parties] nor anyone else have asked the Board to determine the status of that segment, and we have had no occasion to do so." Decision served December 19, 2007, slip op. at 5-6 and n.10.

location of both rights of way. The City Parties objected to the inclusion of the Hudson Street I.T. in the abandonment proceeding with the Harsimus Branch. Since Conrail had always considered the Hudson Street I.T. spur track, no trace of it remained, and *no one* contended that it required abandonment authority, Conrail decided that seeking abandonment authority for the Hudson Street I.T. was unnecessary. Accordingly, Conrail advised the parties and the Board that it would not seek abandonment authority for the Hudson Street I.T.,<sup>2</sup> and it did not do so in the notice of exemption that it filed in February 2009 for the Harsimus Branch. *No one* objected.<sup>3</sup>

At the time, the LLCs were represented by experienced STB and ICC counsel who had undertaken independent historical research concerning the jurisdictional status of the trackage and who located and presented evidence from numerous witnesses with personal experience and expertise regarding the matters at issue.<sup>4</sup> Yet, the LLCs did not raise any concerns about the

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<sup>2</sup> See Comments of Consolidated Rail Corporation on Issues Raised by Pre-filing Correspondence, filed January 6, 2009, at 4 n.4 and 18.

<sup>3</sup> In their Motion here, the LLCs criticize Conrail for not explaining why it allegedly considered Line Code 1440 a line of railroad when it filed its notice of intent but then omitted it from its abandonment notice of exemption, other than that Conrail “changed its mind and apparently no one cares.” Mot. at 14. But Conrail *never* considered the Hudson Street I.T. a regulated line of railroad. It included the Hudson Street I.T. in its notice of intent only because it wanted to eliminate any issue about whether abandonment authority was required. As it turned out, there was no issue. Since no one claimed that abandonment authority was required for the Hudson Street I.T., Conrail could confidently omit it from its notice of exemption. Conrail was not as sure about whether it could omit the portion of Line Code 1420 east of Marin Boulevard from its notice of exemption. Although the Board had found only the portion of Line Code 1420 west of Marin Boulevard was a line of railroad (*see* footnote 1, *supra*), the City Parties at times had made statements suggesting that they believed the portion of Line Code 1420 east of Marin Boulevard was also subject to the Board’s abandonment authority. Accordingly, Conrail included that portion of Line Code 1420 in its notice of exemption. As discussed below, however, the City Parties only asked the Special Court to make a determination, consistent with the STB’s determination in Docket No. 34818, that the portion of Line Code 1420 west of Marin Boulevard was transferred to Conrail as a regulated line of railroad. And that is all the Special Court determined. Accordingly, it is irrelevant to this proceeding whether STB abandonment authority extends to the portion of the Harsimus Branch east of Marin Boulevard.

<sup>4</sup> See Reply of Consolidated Rail Corporation to “Additional Supplemental Comments” of Jersey City, et al., filed October 15, 2014, at 5-6 (describing the many expert witnesses and

abandonment authority Conrail had requested, much less seek discovery. Indeed, for six years, before the STB, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia (sitting as the Special Court), the LLCs fully and independently supported Conrail's position. It was not until 2012 that the LLCs' new counsel reversed course, declared to the Special Court that the Harsimus Branch was a line of railroad, and attempted belatedly to amend the LLCs' answer to raise issues about the location and regulatory status of the Hudson Street I.T. and its alleged connection with the Harsimus Branch east of Marin Boulevard.

Until that point, the only issue before the Special Court had been whether the portion of the Harsimus Branch running from CP Waldo to Marin Boulevard had been conveyed as a line of railroad subject to the STB's abandonment authority. The LLCs argued belatedly that it was also necessary for the Special Court to establish the location and regulatory status of rail property east of Marin Boulevard. The City Parties pointed out in response that the STB had already determined that it did not need to know the status of rail property east of Marin in order to deal with the Embankment properties west of Marin.<sup>5</sup> In light of the LLCs' and the City Parties' stipulation that the portion of the Harsimus Branch west of Marin had been conveyed as a regulated line of railroad, the Special Court granted summary judgment on that issue. The Special Court *rejected* as untimely and prejudicial to the resolution of the case the LLCs' belated assertion that it was necessary for the Special Court also to determine the location and regulatory status of rail properties east of Marin. In response to the LLCs' appeal, the D.C. Circuit

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documentary evidence presented by the LLCs' former counsel, Fritz Kahn, to support the LLCs' position that the Harsimus Branch was and is a spur, and not a regulated line of railroad).

<sup>5</sup> See Memorandum on Behalf of City of Jersey City, et al., dated October 22, 2012, at 17, excerpt attached to LLCs' Motion as Exhibit E.

summarily affirmed the Special Court's decision granting summary judgment and dismissing the case.<sup>6</sup>

This eight-year saga and the Special Court's and D.C. Circuit's decisions in themselves would be more than adequate to demonstrate that the LLCs' requests for admissions are untimely, as well as irrelevant to the current abandonment proceeding. But the recent STB proceedings in Docket No. 35825, *212 Marin Boulevard, LLC, et al.—Pet. for Dec. Order*, erased any doubt with regard to the utter irrelevance of the LLCs' requests in this proceeding. There, the LLCs argued that the STB should disclaim jurisdiction over *all* of the former railroad properties in the Harsimus Cove area, including the Embankment properties. As they had attempted unsuccessfully in the Special Court, the LLCs in their petition for declaratory order attempted to inject questions about the Hudson Street I.T. and its alleged connection with the Harsimus Branch east of Marin Boulevard into the requested declaratory order proceedings.<sup>7</sup>

Significantly, however, the LLCs stressed in their petition for declaratory order that “*Petitioners seek no relief for any properties other than their own.*” Pet. for Dec. Order at 7 (emphasis added). Since the LLCs' properties terminate at Marin Boulevard, and since no other party has raised any question about the location or regulatory status of any properties east of Marin Boulevard, the only property relevant to the current abandonment proceedings—and certainly the only property in which LLCs have a cognizable interest—is the portion of the Harsimus Branch *west* of Marin Boulevard.

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<sup>6</sup> See *City of Jersey City v. Consolidated Rail Corp.*, No. 13-7175, 2014 WL 1378306 (February 19, 2014), attached to LLCs' Motion as Exhibit D.

<sup>7</sup> See Petition for Declaratory Order of Exemption Pursuant to 5 U.S.C.A. § 554, 49 C.F.R. § 1117.1, and 49 U.S.C.A. § 10502, filed May 8, 2014, at 7, 11, 16-19, and 26 and Exhibits G-3, O, O-2, and O-3.

The location and regulatory status of *that* portion of the Harsimus Branch, however, was clearly established by the Special Court's decision (pursuant, it should be noted again, to a stipulation in which the *LLCs* joined). Indeed, as the STB observed in dismissing the *LLCs*' petition for declaratory order in Docket No. FD 35825, "the *LLCs* acknowledge that in the District Court action, they stipulated to the location of the portion of the Harsimus Branch in dispute and that the Harsimus Branch was conveyed to Conrail as a line of railroad under the ICC's (now the Board's) jurisdiction." Decision served August 11, 2014, slip op. at 3-4.

The *LLCs* claim in their Motion here that the STB's decision in Docket No. FD 35825 was wrong, and they criticize Conrail and the City Parties for neglecting to mention that the *LLCs* have a fully briefed motion for reconsideration of that decision pending. Mot. at 5-6. That the *LLCs* have a motion for reconsideration pending, however, does not alter the fact that the STB and the Special Court have both rejected the *LLCs*' efforts to have them entertain questions about the location and regulatory status of former rail properties east of Marin Boulevard. Their motion for reconsideration will be decided by the Board on its own merits. The *LLCs* cannot be permitted to seek discovery and engage in additional briefing in this abandonment proceeding regarding issues that they themselves asked the Board to address in a separate declaratory order proceeding that the Board dismissed.<sup>8</sup>

In any event, the reason the *LLCs* give for challenging the STB's decision in Docket No. FD 35825 is without merit. The *LLCs* say that the STB mistakenly assumed that the Special Court "ruled on every issue in these proceedings with finality," when the Special Court and the D.C. Circuit said that issues other than the regulatory status of the Embankment portion of the

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<sup>8</sup> Indeed, that is another distinction between this case and *Posey and Vanderburgh Counties*. There, the discovery that was sought was directly relevant to a pending appeal in *that very proceeding*.

Harsimus Branch could be “preserved” for other litigation. Mot. at 5-6. The Special Court and the D.C. Circuit specifically noted, however, that any effort to raise those issues in other litigation would be “subject to any relevant defenses or procedural barriers.” *City of Jersey City v. Consolidated Rail Corp.*, 2014 WL 1378306, \*1. Such barriers are clearly presented here. Aside from the untimeliness of the LLCs’ effort, the issues they seek to raise are irrelevant to whether abandonment of the Harsimus Branch should be permitted and under what conditions. This proceeding, like the Special Court proceeding, has focused specifically on the regulatory status of the properties west of Marin Boulevard. Both the Special Court and the STB have disclaimed any need to determine the regulatory status of property east of Marin in order to decide this case. Moreover, the LLCs have no standing to raise these issues. The LLCs have specifically disclaimed any interest in seeking relief with respect to properties other than their own; the properties east of Marin Boulevard about which they are now raising issues are not their own; and no other party is seeking relief with respect to those properties.

The LLCs argue in their Motion that they have standing here to raise these issues because the D.C. Circuit, in *City of Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741 (2012), found that the City had standing to seek a determination from the Special Court about the regulatory status of the right of way between CP Waldo and Marin Boulevard. Mot. at 4-5. The D.C. Circuit, however, found that the City had standing because it had a “concrete and particularized” interest in the Embankment properties that the City sought to protect under federal railroad abandonment laws and regulations. 668 F.3d at 744-46. The LLCs have no such “concrete and particularized” interest in the former rail properties east of Marin Boulevard. Indeed, they have no interest in those properties at all. Thus, they cannot claim any injury that could give them

standing to invoke federal railroad abandonment laws and regulations with respect to those properties.

The LLCs nevertheless argue that they must be permitted to make the location and regulatory status of properties east of Marin Boulevard an issue in this proceeding in order to show that it would be “discriminatory” to apply the Board’s abandonment authority just to the Embankment properties. Mot. at 4-5, 18. The short answer to this argument is that there is nothing “discriminatory” about applying the Board’s abandonment authority to a portion of a line that has been determined by judicial decree to be within the Board’s authority, but not to a portion that has not been so determined—and certainly not to property covered by an entirely separate line code that has not been so determined. Moreover, even assuming the Board could do so without further proceedings before the Special Court, a decision by the Board to expand this proceeding to include rail properties east of Marin Boulevard would not give the LLCs any relief from the application of the Board’s abandonment authority to the Embankment properties. All it would do is further complicate and delay the proceeding.<sup>9</sup>

The LLCs also argue that the application of the Board’s abandonment authority to the portion of the Harsimus Branch between CP Waldo and Marin Boulevard, but not to the portion east of Marin Boulevard, and not to the Hudson Street I.T., would constitute improper “segmentation” of the Board’s review. Mot. at 19-21. Of course, the LLCs’ argument assumes that the rail properties east of Marin Boulevard constitute jurisdictional and contiguous right of way. The Board’s abandonment authority does not extend to yard and spur track. *See* 49 U.S.C.

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<sup>9</sup> That may be the LLCs’ purpose. *See, e.g.*, Letter from Daniel Horgan, counsel for the LLCs, to Victoria Rutson, Director of the Office of Environmental Analysis, dated December 9, 2014 (observing that the LLCs’ Motion raises “segmentation” questions that allegedly must be addressed and stating that the LLCs “are likely to consider a formal motion to the Board to abate the current environmental review process until all relevant motions concerning involved issues are decided”).

§ 10906. Yet neither the Special Court nor the Board has determined that those properties constitute jurisdictional and contiguous track. Conrail certainly does not agree that they do.<sup>10</sup>

Furthermore, even if the rail properties east of Marin Boulevard could constitute jurisdictional and contiguous track, “segmentation” would constitute no reason for further complicating and delaying this proceeding for the Board to consider whether those properties (and their many owners) should be included in the proceeding. The LLCs cite one case, *Futurex Industries, Inc. v. ICC*, 897 F.2d 866 (7<sup>th</sup> Cir. 1990), which it suggests is on point and a few signaled by “Cf.” Mot. at 19-20. In every one of the abandonment cases cited,<sup>11</sup> the contiguous segments that would not be abandoned actively handled rail freight traffic. The ICC, stressing that the agency is “not bound to a mechanical application of the three part *Futurex* test,” observed that the “ultimate issue” is “whether abandonment of one segment would foreclose the viability of contiguous segments, making their eventual abandonment a foregone conclusion.” *Central Mich. Ry. Co.—Abandonment—East of Ionia to West of Owosso—in Michigan*, 8 I.C.C.2d 166, 173 (1991). Here, there is no issue of foreclosing the viability of active rail freight lines. The record is undisputed that the properties east of Marin Boulevard not only have no trace of rail infrastructure but are now covered by office buildings, residential complexes, hotels,

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<sup>10</sup> In their Motion the LLCs argue that Conrail has presented a “materially false” notice of exemption to the Board, because the LLCs disagree with the location of Line Codes 1420 and 1440 east of Marin Boulevard. Mot. at 2, 10-17. Were the location and status of those rail properties properly at issue in this proceeding, Conrail would respond in detail to the LLCs’ contention. Since they are not, there is no point in burdening the record with rebuttal to the LLCs’ assertions. Suffice it to say here that Conrail vigorously disputes the LLCs’ claims that there was anything false or misleading in either its notice of intent or its notice of exemption about the location of the Harsimus Branch or the Hudson Street I.T. east of Marin Boulevard.

<sup>11</sup> One of the “Cf.” cases, Docket No. 35724, *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, involved the construction of a rail line.

retail stores, and other high-end commercial development.<sup>12</sup> Thus, even if the rail properties east of Marin Boulevard at one time had constituted jurisdictional and contiguous track (which Conrail disputes), there would be no requirement for the Board now to extend its abandonment proceedings east of Marin Boulevard.<sup>13</sup>

Finally, the LLCs suggest that Conrail's objections to their requests for admissions are "not procedurally proper objections to discovery" and that the Board could issue "an order deeming all items admitted by Conrail." Mot. at 26. We are at a loss to understand what is either procedurally or substantively improper about Conrail's timely objection, as provided by 49 C.F.R. §1114.27, to each and all of the LLCs' requests. When all suffer from the same untimeliness and irrelevance, each obviously may be answered with the same objections, which is precisely what Conrail did.<sup>14</sup>

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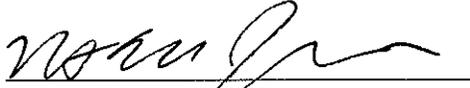
<sup>12</sup> See Docket No. 34818, Decision served August 9, 2007, slip op. at 4-5. The LLCs themselves stressed in their petition for declaratory order in Docket No. 35825, filed May 8, 2014, that there was no rail freight presence or need in the area (Pet. at 23-24), and they attached as Exhibit V to their petition the Declaration of Dean Marchetto detailing the high-end development in the area.

<sup>13</sup> It bears noting as well that the Embankment portion of the Harsimus Branch, in the terminology of *Futurex*, can be said to have "logical termini" and "independent utility." 897 F.2d at 872. When Conrail acquired the Harsimus Branch, the elevated line from CP Waldo to Marin Boulevard acted as a lead into Harsimus Cove Yard. East of Marin Boulevard was a mass of yard track at grade. Conrail sold that yard property off for non-rail commercial development while it was still using the Embankment portion of the Harsimus Branch for rail operations. See Docket No. 34818, Decision served August 9, 2007, slip op. at 4-5; *Consolidated Rail Corp. v. STB*, 571 F.3d 13, 16-17 (D.C. Cir. 2009).

<sup>14</sup> See Conrail's Opposition at 4 n.3 (attached to LLCs' Motion as Exhibit B). To the extent we can make sense of the LLCs' assertion that Conrail has not conformed to Section 1114.27, it appears that the LLCs have simply misread the regulation. Section 1114.27 merely states that when an "objection is made," "the reasons therefor should be stated." That is exactly what Conrail did. Specific responses to individual requests are required only when an "answer" consists of a denial or a statement of the "reasons why the answering party cannot truthfully admit or deny the matter." 49 C.F.R. § 1114.27(a). The regulation itself distinguishes an "objection" from an "answer." See *id.* (stating time frame for service of "a written answer or objection"). Thus, the LLCs' allegations of procedural defects in Conrail's objections are groundless.

For the foregoing reasons, the LLCs' Motion should be rejected.

Respectfully submitted,



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December 19, 2014

**CERTIFICATE OF SERVICE**

I, Adam C. Sloane, hereby certify that, on this 19th day of December, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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