

Before the  
SURFACE TRANSPORTATION BOARD

240803

ENTERED  
Office of Proceedings  
May 27, 2016  
Part of  
Public Record

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CONSOLIDATED RAIL CORPORATION  
– ABANDONMENT EXEMPTION –  
IN HUDSON COUNTY, NEW JERSEY  
Docket # **AB 167 (Sub No.# 1189) X**

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CNJ RAIL CORPORATION

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REPLY

In Support of the Rails to Trails Conservancy's  
*Request for an Extension of Time*

REPLY

to Mr. James Riffin's  
*Motion to Strike*

NOTICE OF BREACH

Of the Board's  
*September 24<sup>th</sup> 2014 Protective Order*

Respectfully Submitted,

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*Vice President, COO*

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Dated: May 27<sup>th</sup>, 2016

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

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Now comes CNJ Rail Corporation (“CNJ”), a party of record in the above captioned proceeding, who herein joins with the Rails to Trails Conservancy (“RTC”) and independently requests that the Board grant an extension of time for all parties to file responses to Mr. James Riffin’s various recent pleadings.

In the event the Board declines to provide any additional time to the parties so they may respond to Mr. Riffin’s pleadings, CNJ has included a brief reply contained herein below. In addition, CNJ is putting all parties to this proceeding on notice of a serious breach of the Board’s Sept 24<sup>th</sup>, 2014 protective order.

CNJ respectfully requests expedited consideration of this request.

**I. CNJ’s REQUEST FOR AN EXTENSION OF TIME**

On May 3<sup>rd</sup>, 2016, Mr. Riffin filed a pleading he labeled as a *Motion to strike* in which he asks the Board to strike the *Motion to compel* filed by the City of Jersey City (“City”) on May 2<sup>nd</sup>, 2016. Replies to the City’s motion were due on May 23<sup>rd</sup>, 2016<sup>1</sup>. Replies to Mr. Riffin’s motion were also due on May 23<sup>rd</sup>, 2016.

After filing his May 3<sup>rd</sup> pleading, Mr. Riffin has now subsequently filed a number of other pleadings with the Board which appear to either supplement, or modified his previous

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<sup>1</sup> Pursuant to Board’s current regulations, responses to pleadings / motions / etc. are due 20 days after the date they are filed with the Board, unless otherwise prescribed in the regulations.

pleadings. CNJ Rail respectfully requests that the Board grant an extension of time for all parties to respond to Mr. Riffin's (now) numerous pleadings.

As noted below, CNJ's request for an enlargement of time differs from the RTC request in one significant manner. RTC has requested a new deadline of June 3<sup>rd</sup>, 2016. For the reasons set forth herein below, CNJ formally requests that the Board establish a deadline of **June 16<sup>th</sup>, 2016** instead.

**The City of Jersey City has already asked directly for similar relief**

While CNJ recognizes that it cannot ask for an extension of time to reply to Mr. Riffin's motion on behalf of the City, CNJ can (and does) point out that the City itself has already advised the Board of the unavailability of counsel and has already asked the Board directly for similar relief.

In the City's May 2<sup>nd</sup>, 2016 *Motion to Compel*, counsel for the City directly advised the Board that he will be out of the country from May 3<sup>rd</sup> to May 27<sup>th</sup>, *id.* at 3. He also asked the Board to establish reasonable deadlines in the event further responses became necessary. In his closing remarks, he added:

“If some further response to Riffin is necessary or prudent, City *et al* request this Board to order such response to be due after the return of counsel for City *et al* on May 27.”

June 16<sup>th</sup>, 2016 provides the City's counsel with a full 20 days to review Mr. Riffin's motions and other various pleadings and permits sufficient time to prepare an appropriate response. That date will also give CNJ and the City enough time to contemplate what actions should be taken to address Mr. Riffin's blatant violation of the Board's Sept 24<sup>th</sup>, 2014 protective

order. CNJ is already preparing and evaluating what additional civil actions it will bring in order to protect itself from significant harm.

## **II. CNJ's REPLY TO JAMES RIFFIN's MAY 3<sup>rd</sup> MOTION TO STRIKE**

In the event that the Board elects not to grant any additional time for the parties to file responses to the Mr. Riffin's *Motion to strike*, CNJ respectfully submits this brief reply.

For the reasons set forth herein below, Mr. Riffin's motion should be denied. In his own motion, Mr. Riffin appears to proffer two reasons why he feels the Board should strike the City's motion. Neither reason provides any basis for the Board to grant such relief.

*The City's motion is not redundant or frivolous, nor is the request for relief moot*

CNJ is stunned and dumbfounded by Mr. Riffin's suggestion that the City's motion is somehow frivolous, or redundant. By his own admission, Mr. Riffin:

1. Admits to receiving a properly served discovery request,
2. Admits to agreeing to provide a response by a specific date,
3. Admits to "forgetting" about the request and his commitment, yet.....
4. Admits to remembering very specific details, such as service preferences, yet .....
5. Admits his failure to meet the date he agreed to, is somehow a result of his belief that the City, (who, by the way, does demand that Mr. Riffin fully comply with the Board's requirements for proper service of a formal pleading which is made directly to the Board), needed to be provided a response via a paper copy sent through the US Mail.

CNJ cannot imagine that amount of "chutzpah" that it takes to make such a response. The entire CNJ organization is taken back by such actions. By shamelessly admitting to placing

his response in a USPS mailbox on (or possibly after?) the date he agreed to provide a response by somehow constitutes performance, and thus renders the City's Motion frivolous, redundant, and/or otherwise moot stretches basic logic to the extreme.

The Board's regulations clearly provide for discovery in proceedings before the Board. 49 C.F.R. §1114.21 provides that "...Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. ..."

It is clear from the evidence in the record that a discovery request was properly served, and was received and acknowledged by Mr. Riffin. It is also clear that the City's *Motion to compel* is far from frivolous or redundant.

While CNJ could go step by step and point out the many flaws in such a bizarre argument, we'll limit our response to a few of the more egregious elements. We'll begin with the most obvious.

Responses to discovery requests are not formal pleadings made directly to the Board. While responses to discovery requests do have to be "served" in accordance with the Board's regulations, the Board's discovery regulations provide significant flexibility in how such service is to be made. Mr. Riffin's claim that he had to serve his response to the city's request via a hard copy sent in the mail is NOT supported by evidence in the record. First off, the Board's regulations provide how discovery is to be served. 49 CFR 1114.21(f) states:

"... Unless otherwise ordered by the Board, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, **shall be served** on other counsel and parties, but shall not be filed with the Board. Any

such materials, or portions thereof, should be appended to the appropriate pleading when used to support or to reply to a motion, or when used as an evidentiary submission.” (emphasis added)

While the Board’s regulations do not specifically prescribe **how** responses to discovery requests are to be served, the regulations do prescribe that responses **shall** be served. There is no discretion in the regulation for a recipient of a discovery request to not provide a response. The only exception to that requirement is if the Board has ordered otherwise. In this proceeding, the Board, to date, has not ordered otherwise.

It is clear from the evidence in the record that Mr. Riffin previously acknowledged receipt of the discovery request via his March 30<sup>th</sup> email communication with the City’s counsel. He also clearly communicated he would e-mail his response by April 29<sup>th</sup>. Additional evidence shows that at least two email “reminders” were sent as well.

The Board should note, **none** of the communications from the City’s counsel indicate that responses had to be served via regular First Class mail, nor do they suggest that City would not accept discovery request responses via email. Rather, in fact, the use of email communications appears to be quite common between Mr. Riffin and the City. But more importantly, there is no evidence that the City has ever received a proper response from Mr. Riffin.

The Board’s regulations do provide clear guidance as to what remedies are available to parties who have not received a response to their discovery requests. CNJ notes; the operative word is “received”. 49 C.F.R. § 1114.31 clearly states:

“(a) *Failure to answer*. If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under §1114.24(a), or a party fails to

answer or gives evasive or incomplete answers to written interrogatories served pursuant to §1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

Mr. Riffin appears to admit to, and does not dispute, numerous statements made by the counsel for City. The record clearly indicates that Mr. Riffin:

1. Was served a discovery request,
2. Acknowledged receipt of the discovery request on March 30<sup>th</sup>, 2016,
3. Indicated he would comply with the deadline, without any objection to, or over, the date of the deadline,
4. Failed to comply with the deadline he agreed to,
5. Was sent not one, but two courtesy “reminders” from the City’s counsel that his response was overdue,
6. Clearly indicated he would attempt to “e-mail” a response by Friday, April 29<sup>th</sup>, 2016,
7. Unapologetically admitted to not emailing the response, as he indicated he would,
8. Clearly elected to transmit a response in a manner that would frustrate and prevent the City’s counsel from timely filing a *Motion to compel*.

To CNJ, the missed deadlines, the use of regular mail, and the filing of a *Motion to strike* all appear to form a clear pattern of evasion on the part of Mr. Riffin to avoid providing a timely response to a properly served discovery request.

In the second prong of his attack on the City’s properly filed motion, Mr. Riffin attempts to argue he in fact “served” a response upon the City prior to the City filing its motion and thus renders the City’s request “moot”.

Once again, Mr. Riffin fails to recognize what gives the City the absolute right to file a *Motion to compel*. Two criteria must be present in order for the City to be able to file a motion to compel. Those criteria are:

1. The **deadline** for responding to a discovery **must have passed**, and
2. The respondent has failed to provide an answer to the request.

Nowhere in his *motion to strike* does Mr. Riffin dispute there was an agreed upon deadline of April 19<sup>th</sup>. Mr. Riffin also doesn't argue anywhere that he timely served a response by the deadline he originally agreed to. Mr. Riffin freely admits to missing the deadline. Mr. Riffin also does not dispute that the City's position that it did not receive any response on, or before, the deadline which all sides appear to have mutually agreed to.

Other than engaging in wanton and unsubstantiated speculation with regards to motives of the City, Mr. Riffin does not provide any evidence that the City had "received" a response prior to filing its *motion to compel*, such as a signed and dated delivery receipt, or an email confirmation. Quite to the contrary, it appears quite clear that the City has not received a response and thus had every right to file a motion at the time it did so. CNJ would go so far as to also argue that based on the record to date, it is not clear if the City has ever received the response Mr. Riffin has alleged he sent.

### **Argument**

The Board's regulations are clear and unambiguous; if a party does not get a timely response to a discovery request, they have a right to file a motion to compel a response within 10 days after the deadline has passed. Mr. Riffin does not dispute he failed to meet a deadline he

agreed to. Based on the record to date, it is clear that the City, without question, meets the first critical criteria for being able to file a motion to compel.

Mr. Riffin has also failed to provide sufficient evidence that he has, in fact, provided any type of response to the City's discovery request. As such, there is insufficient evidence to support a finding that the requested relief is "moot".

The only "colorable" argument Mr. Riffin could have made in his *Motion to strike* was that the City's motion may have been filed untimely. Mr. Riffin did not make such a claim. Should he have elected to have made such a claim, CNJ would argue he was making that argument with "unclean hands".

The evidence in the record appears to easily support a conclusion that Mr. Riffin's April 28<sup>th</sup> email to the City's counsel was a blatant attempt to mislead the City's counsel into believing a response would be transmitted via email on April 29<sup>th</sup>. Since April 29<sup>th</sup> was the due date for filing a timely *Motion to compel*, Mr. Riffin's representation he would make a transmission of his response via email would have left the City's counsel in a quandary.

If the City had filed a *Motion to compel* on the 29<sup>th</sup> during the Board's business hours, and then received an email from Mr. Riffin after such making its submission, such actions might have led to additional confusion, and resulted in a motion that might have had to be altered, or withdrawn and filed again. However, it is now clear that Mr. Riffin never followed through with his email transmission. Since the City clearly waited to see if Mr. Riffin followed through with his second representation that he would transmit a response, it is obvious to CNJ why the City's *Motion to compel* was filed with the Board on Monday, May 2<sup>nd</sup>, 2016, instead of Friday, April 29<sup>th</sup>.

## **Conclusion**

CNJ's position is that the City's *Motion to compel* was properly filed with the Board. Both criteria necessary for filing a motion to compel were present, and sufficient evidence is in the record to support, and easily justify, the City's motion. To the extent the Motion was untimely by one business day, CNJ argues that the delay was justified based upon the misrepresentations of the Mr. Riffin.

Wherefore, for the foregoing reasons, CNJ respectfully requests that the Board deny Mr. Riffin's May 3<sup>rd</sup> 2016 *Motion to strike*.

## **III. NOTICE OF BREACH**

CNJ herein puts defendants Consolidated Rail Corporation, Norfolk Southern Railway, CSX Transportation, and Mr. James Riffin on notice that CNJ fully intends to vigorously litigate the recent outrageous breach of the Board's Sept 24<sup>th</sup>, 2104 protective order.

CNJ herein makes known to the above named defendants, and all other parties of record in this proceeding, that it fully intends, pursuant to 49 U.S.C. § 11704(c)(1), to bring a civil action<sup>2</sup> in a US District Court<sup>3</sup> to seek enforcement of the Board's order<sup>4</sup> and to collect damages. A copy of the Board's order which CNJ will seek enforcement of is hereto attached as Exhibit #1.

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<sup>2</sup> 49 U.S.C. § 11704(c)(1) permits a party to either bring a complaint before the Board, or said party may also bring a civil action in a district or state court.

<sup>3</sup> 49 U.S.C. § 11704(d)(1) sets forth the appropriate venue in which a civil action may be brought.

<sup>4</sup> While CNJ could bring an enforcement action before the Board, it **will not** pursue that remedy and instead plans to vigorously seek relief in the Courts. The Board's order is clear; the actions of the defendants are easily discernable; and a District Court trial permits, and provides for, many additional remedies which are not available before the agency.

For the record, Mr. Riffin has elected to place protected information he gathered from this proceeding into the record of not one, but two other proceedings. However, a careful review of the record in this proceeding reveals that Mr. Riffin never sought, much less obtained, a modification of the protective order in this proceeding to allow confidential information he obtained from this proceeding to be used in other proceedings.

In *Offers of Financial Assistance*, EP 729, STB served December 14<sup>th</sup>, 2015, Mr. Riffin elected to place confidential shipper information obtained from this proceeding into the record in the Board's new rulemaking proceeding. While Mr. Riffin did seek, and subsequently received, a protective order in that proceeding, he did not seek leave to modify the clear prohibitions against using protected material in other proceedings which were provided in the Board's Sept 24<sup>th</sup> order. As such, it appears to CNJ that the Board's protective order was clearly violated.

Although it is not exactly clear how it occurred, but it appears Mr. Riffin has also placed confidential information obtained from this proceeding into the record in *Norfolk Southern – Acquisition – D&H South Lines* STB FD# 35873. The case appears be currently docketed in the US Court of Appeals for the District of Columbia Circuit as *James Riffin v. STB*, Case No. # 16–1043.

Just exactly how the protected information entered into the record in judicial review proceedings is not quite clear at the moment. However, it appears Mr. Riffin's Petition for Certiorari to the US Supreme Court of an interlocutory order in that proceeding has directly revealed and made very public, certain protected information. CNJ views this as a very serious and egregious breach of the order.

CNJ notes that the Board's Sept 24<sup>th</sup> order is very clear and explicit. CNJ also points out the all the parties who executed the undertakings agreed to certain conditions. Those fully executed undertakings, in part, state:

“... I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than for filing or preparing to file an Offer of Financial Assistance in connection with AB 167 (Sub-No.1189X), et al. or any judicial review proceeding arising there from. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. ...”

To CNJ, the material found in the US Supreme Court petition clearly contained protected information that Mr. Riffin obviously disclosed to the Court. However, none of the officers of the Court executed undertakings. It is also far from clear just how that information is relevant to filing an OFA in this proceeding.

Furthermore, the Court does not appear to have been ever been notified they were looking at confidential material which was protected by an order of the Board. The Court's disclosure appears to be the result of not being informed about the nature of the material before them. CNJ cannot fathom that any Court would make such a sweeping disclosure in the presence of an existing protective order, unless the existence of such an order was never disclosed to them.

If this proceeding was not so contested, and if the OFA process was advancing quickly, this egregious disclosure might have been mitigated without serious harm to any of the parties.

However, since the normally expeditious OFA process has been effectively stayed until some point well in the future; serious competitive and financial harm to CNJ, (as well as the City too), is very real and almost certain.

This proceeding has garnered significant attention from many parties. The Board's service list in this proceeding is significant for a supposedly routine transaction. The Board's Office of Environmental Assessment has received over 2000 environmental comments. Many other non-parties are carefully watching this proceeding.

Some of the parties watching this proceeding are direct competitors to both the City's and CNJ's interests. Those parties who are following this proceeding can easily deduce from reading all the pleading to date that the City has a genuine shipper interested in using the line. Parties can also deduce that the shipper may not likely get the service they need anytime soon, given the Board's current handling of this matter.

It is clear that the Board is proceeding at a slow, methodical, deliberate pace. When the shippers name was protected, the likelihood that a party harboring competitive aspirations who was watching this proceeding would have been able to have specifically targeted the shipper with competitive alternatives was significantly reduced. Direct competitive marketing could only have occurred if that party stumbled across the shipper via other means. Now, everyone following this proceeding knows who the genuine shipper that the City and CNJ had secured is. Competitors can easily track down the shipper and solicit the shipper's traffic without fear of reprisal from either the CNJ or the City.

In order to protect its interests, CNJ (and likely done in conjunction with the City) will need to bring legal action to protect our interests. The only silver lining to this blatant

transgression is that CNJ can also bring legal action against the likely beneficiaries of this breach; the defendant rail carriers: Consolidated Rail Corporation, CSX Transportation, and Norfolk Southern.

*Defendant Rail Carriers*

While Mr. Riffin may have been the party responsible for the initial breach, his actions alone are not the only harm that CNJ will suffer from such an egregious breach. Any subsequent actions of the rail carrier defendants can clearly harm CNJ, and likely the City as well. As such, CNJ will be seeking injunctive relief barring the defendant rail carriers from directly, or indirectly, soliciting traffic from the shipper. In the event that the defendant rail carriers actually move traffic for the shipper in question, CNJ will be seeking monetary damages. CNJ would expect the City to pursue damages as well.

**CNJ intentions should be clear to all parties; CNJ fully intends to bring appropriate legal action upon any party who has signed the undertakings and acts in manner detrimental to our interests with respect to this breach.**

CNJ also serves notice to all other parties of record, and non-parties watching this proceeding, that CNJ also has legal remedies available to us we will utilize to protect our interests should you elect to pursue traffic from our shipper. In the event you seek to move said traffic with any (or all) of the above named defendant rail carriers, **you are herein put on notice** that CNJ has several legal remedies that will allow us to legally enjoin your organization, and/ or collect damages from you as well. You are advised to govern your actions accordingly.

#### IV. CONCLUSION

In closing, CNJ reiterates our request that the City be granted an extension of time. Counsel for the City clearly indicated his unavailability to be able to reply due to a previously scheduled trip out in which he was out of the country. To be frank, CNJ was surprised that RTC's request was not granted already, as such extensions are routinely granted by this agency.

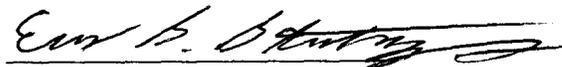
In the event that the Board elects to not grant the City any additional time to reply to Mr. Riffin's *Motion to Strike*, CNJ respectfully requests that the Board accept the brief reply contained herein. If the Board believes that certain portions of this pleading are a reply which is filed out-of-time, then CNJ asks the Board to consider this pleading as a formal request for leave to file the reply.

CNJ takes the breach of the Board's September 24<sup>th</sup> protective order seriously. All parties are put on notice that CNJ will vigorously protect its interests.

For all of the above stated reasons, CNJ respectfully requests that the Board accept this pleading in its entirety, and grants the requested relief to the Rails to Trails Conservancy.

On Behalf of CNJ Rail Corporation,

Respectfully submitted,



Eric S. Strohmeyer  
Vice President, COO

Dated: May 27<sup>th</sup>, 2016

## CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of May, 2016, I have served<sup>1</sup> a copy<sup>2</sup> of CNJ Rail Corporation's "Reply in support of the Rails to Trails Conservancy's Request for an extension of time, CNJ's Reply to James Riffin's *Motion to Compel*, and CNJ's *Notice of Breach* of the Board's September 24<sup>th</sup>, 2014 protective order, filed herein STB Docket No. AB 167 (Sub No. 1189)X, by first class mail, properly addressed with postage prepaid, or via a more expeditious means of delivery with consent of the receiving party, upon all parties of record in this proceeding.

  
Eric S. Strohmeyer

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<sup>1</sup> The form and style of this *Certificate of Service* complies precisely with the Board's regulations found at 49 C.F.R. § 1104.12(c)

<sup>2</sup> The accompanying document was properly served in full compliance with the Board's regulations. See: 49 C.F.R. § 1104.12(a)

# EXHIBIT # 1

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SERVICE DATE – LATE RELEASE SEPTEMBER 24, 2014

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN  
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE  
EXEMPTION—IN HUDSON COUNTY, NJ

MOTION FOR PROTECTIVE ORDER

Decided: September 24, 2014

This decision grants a motion for a protective order in these related proceedings.

These proceedings involve an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in an urban area of Jersey City, N.J. The Harsimus Branch extends between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City.<sup>1</sup> In a decision served on August 11, 2014, the Board vacated the stay it had issued on April 20, 2010, and reinstated these proceedings. In the August 11 decision, the Board determined that these abandonment and discontinuance proceedings are within the jurisdiction of the Board. The August 11 decision also granted the request of a group of limited liability companies (LLCs)<sup>2</sup> to intervene, and discussed the preparation of a Supplemental

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<sup>1</sup> Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009).

<sup>2</sup> The LLCs are described as: 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; and 446 Newark Avenue, LLC.

Environmental Assessment (Supplemental EA) by the Board's Office of Environmental Analysis.

On September 15, 2014, CNJ Rail Corporation (CNJ), a non-party to these proceedings, filed a motion for protective order. CNJ states that it received discovery requests from the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties) and the LLCs<sup>3</sup> on September 10, 2014. CNJ states that the City of Jersey City introduced an ordinance expressly authorizing the City Managers, acting on behalf of the City, to take all necessary steps to file a formal Offer of Financial Assistance (OFA) in these proceedings. While the final vote has not yet been scheduled, according to CNJ, CNJ states that the OFA authorization ordinance and the Board's OFA procedures are the driving force behind the discovery requests and that the information provided would likely be used for an OFA. CNJ states that in order to accommodate the LLCs' and City Parties' requests for document production, it is requesting expedited consideration. Included with its motion are a proposed protective order and undertakings. According to CNJ, granting the motion will facilitate the disclosure and use of confidential and commercially sensitive material in these proceedings.

Good cause exists to grant the motion for protective order. Issuance of the protective order will ensure that confidential and highly confidential information will be used solely for the purpose of preparing to file and/or filing an OFA in these proceedings and not for other purposes. Further, the motion conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted, and the protective order and undertakings are adopted for this proceeding, as modified in the Appendix to this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for a protective order is granted, and the protective order and undertakings, as modified in the Appendix to this decision, are adopted.
2. The parties are directed to comply with the protective order set forth in the Appendix to this decision.
3. Materials designated as confidential or highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the

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<sup>3</sup> The document requests by City Parties and the LLCs were attached to the motion as Exhibits 1A and 1B, respectively.

appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

## APPENDIX

### PROTECTIVE ORDER

1. Any party<sup>1</sup> producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
  - (a) Shall be used solely for the purpose of filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
  - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.
  - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 12.
  - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.
  - (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.

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<sup>1</sup> The term “party” as used in this Protective Order is not limited to parties to this proceeding, but includes both parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the “HIGHLY CONFIDENTIAL” material. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).
3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written

request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
7. To the extent that “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material is produced by a party in these or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of these and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within three working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the

producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.

11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party, if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
12. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING  
CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, have read the Protective Order served on September 24, 2014, governing the production of confidential documents in AB 167 (Sub-No.1189X), et al., understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than for filing or preparing to file an Offer of Financial Assistance in connection with AB 167 (Sub-No.1189X), et al. or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of these proceedings and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
Dated: \_\_\_\_\_

UNDERTAKING  
HIGHLY CONFIDENTIAL MATERIAL

As outside [ counsel ] [ consultant ] for \_\_\_\_\_, for which I am acting in this proceeding, I, \_\_\_\_\_, have read the Protective Order served on September 24, 2014, governing the production of highly confidential documents in AB 167 (Sub-No.1189X), et al., understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL” that I will limit my use of those documents and the information they contain to filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing “HIGHLY CONFIDENTIAL” information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL] [CONSULTANT] TO

\_\_\_\_\_  
[Party name]

Dated: \_\_\_\_\_