



CNJ RAIL CORPORATION



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April 29, 2015

US Surface Transportation Board
Office of Proceedings

238298

Chief – Section of Administration
395 E Street SW
Washington, DC 07302

ENTERED
Office of Proceedings
April 30, 2015
Part of
Public Record

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

CONSOLIDATED RAIL CORPORATION
ABANDONMENT EXEMPTION
IN HUDSON COUNTY, NJ

CNJ's reply to: **the Intervener LLCs request to reclassify confidential documents.**

CNJ's request that: **the Board expedite the OFA process.**

CNJ's support of: **the City's Motion to Compel OFA information.**

PUBLIC VERSION

Dear Ms. Brown,

Please except this letter response as CNJ Rail Corporation's ("CNJ") response to the Intervener LLC's.¹ ("LLCs") request to reclassify confidential documents. In addition, this letter respectfully requests that the Board grant the City of Jersey City's ("City") motion to compel. CNJ would also like the Board to lift its stay and expedite the OFA process in this proceeding. At the end of the letter, CNJ provides some additional comments relevant to the ongoing actions of the Consolidated Rail Corporation ("Conrail").

¹ The Intervener LLC's are known 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., 446 Newark Avenue, LLC.

This letter is being submitted to the Board in both a **highly confidential version** and a **public version**. The only difference between the versions is that certain attached exhibits have been designated by CNJ as “Highly Confidential” and have been redacted in their entirety. The main body of the letter is otherwise identical in both versions.

On April 7th 2015, the City filed an extensive reply which more than adequately set forth why the LLC’s request should be denied. After reviewing the various replies, CNJ felt that, while the City’s reply alone should be sufficient for the Board to reach a decision, the absence of any reply from CNJ might be construed as a tacit endorsement of LLC’s position. In order to dispel any notion that we would agree to a reclassification of documents submitted under seal, we are herein below voicing our strong objection to any reclassification of documents filed under seal.

Request to Submit

In the event that the Board would require CNJ to seek leave to file this letter reply, please accept the following as a request to do so. CNJ, which has been a party of record in this proceeding since 2009, would respectfully submit that the following information and arguments contained herein would be beneficial to the Board’s analysis of the various pending motions. In the event that any party would wish to challenge anything contained herein, CNJ has no objection to any party filing responses to this letter. Since we have no objection to anyone filing a reply, we would respectfully argue that no party could argue they are prejudiced by anything contained herein below, since all parties should be allowed to respond to it if they want to.

REPLY TO THE MOTION TO UNSEAL DOCUMENTS

As stated above, this letter reply is being provided simply to insure that the Board does not mistake CNJ’s decision to use restraint in making pleadings in this proceeding as a tacit endorsement of the LLCs position that documents filed under seal should be made public. Such a position would not only adversely affect the City, but the Shipper as well. While CNJ might also be hurt by the release of confidential information, the parties far more likely to experience significant harm caused by the release of their information are the City and the Shipper. Since the shipper could be significantly hurt by the release of confidential information, CNJ feels a moral and ethical responsibility compels it to provide this response.

CNJ Concurs, in large part, with the vast majority of the City’s Reply

CNJ agrees with, concurs with, and supports all the arguments set forth by the City in its reply. CNJ feels very strongly that the LLC’s request is inappropriate, and more importantly, borders on a blatant disregard for this Board’s jurisdiction and its procedures.

It is well settled law that the Board is the sole forum delegated by Congress to adjudicate Offers of Financial Assistance (“OFA”). As the LLC’s own motion sets forth, the primary reason for unsealing the documents is so that a State Court should be allowed to decide whether the City’s OFA is arbitrary and capricious. The State Court has absolutely no jurisdiction to reach such a conclusion. The only place the validity an OFA can be challenged is in front of this agency.

CNJ will not repeat the City’s excellent response, which was already provided, other than to articulate our support for the positions contained therein. CNJ would proffer the following additional information, which may be appropriate for the analysis of the various motions, including any decisions regarding whether or not to permit the OFA process to move forward.

CNJ does confirm it had a limited role in the preparation of one of the disputed documents. CNJ was introduced to the shipper at a meeting held at the invitation of the City at City Hall. The customer indicated to CNJ personnel (and to the City as well) that they would support the City’s OFA efforts. They also indicated that they had no problem providing the City with a verified statement to be used by the City in support of the City’s OFA. Since the customer did not have personal knowledge of the proper format used in preparation of a verified statement typically used in proceedings before the Board, CNJ offered to assist the shipper in preparing its statement of support for the City.

CNJ was provided very specific, commercially-sensitive details relevant to the shipper’s planned construction and subsequent operation of its facility. CNJ assembled those details into an appropriate, properly formatted draft document which was subsequently sent back to the shipper for them to review. The shipper made a significant number of changes to the initial draft which reflected what they wanted to communicate to the Board, and sent them to CNJ to insure those edited items where appropriate. All of the topics discussed in the verified statement were items **supplied by the shipper** to be used in conjunction with the City’s OFA effort.

CNJ reformatted² those changes / corrections into the final version of the document which was ultimately submitted to the Board. The shipper had previously indicated that they wanted to insure their commercially sensitive information was protected from public disclosure. They did not want potential competitors of theirs to be able to use the shipper’s material to undercut their business. CNJ also did not want those commercial elements which discussed CNJ’s involvement to be made public either. It was both the shipper and CNJ which designated the document as highly confidential.

The LLC’s contention that no rates, or any other highly confidential materials, are contained in the disputed verified statement is not accurate. While certain rate information is not in the document, such as final published through rates, the document has extensive origin and

² The document was edited as to its form, not to its content. The shipper provided most, if not all of, the content.

destination pairings, and full routings for certain movements. Those origin and destination pairs are detailed enough for competitors of the shipper to determine ultimate consignees.

For example, that information if disclosed can be used by a competitor of the shipper to seek better rates, or potentially undercut, or otherwise disrupt the shipper's ability to conduct business with those consignees. As such, the information is more than detailed enough to warrant the protective order which is currently in place. The LLC's offer no explanation as to how that information can be adequately safeguarded from competitors of the shipper in the absence of the Board's protective order.

To further highlight the need to maintain the confidential nature of certain material, attached hereto as Exhibit# 1 are a number of email communications between the shipper and just one of their customers. Please note that the emails contain a number of sensitive details regarding contract negotiates, plant locations, and projected volumes. Shared communications like this, plus face to face interviews with the shipper, led directly to the ultimate preparation of the verified statement which was properly submitted under seal. Potential competitors might be able to anticipate actions by the Shipper and attempt to compete directly against the shipper's interest if such information was revealed in open public records.

In addition to the origin and destination pairs, the verified statement contained references to rates being negotiated. CNJ has attached hereto two exhibits (Exhibits# 2 and 3) which support the Shipper's claim. At the request of the Shipper, CNJ solicited rates from CSX Transportation ("CSX") and Norfolk Southern ("NS") for potential movements originating on the Harsimus Line. Each carrier indicated that before they could quote a through rate certain prerequisite steps needed to be taken first³.

The verified statement included references to car supply; either shipper owned, or railroad owned cars. Attached hereto as Exhibit# 4 are just a few small portions of the communications which effectively illustrate the efforts by the shipper to secure an adequate supply of railcars in order to move their product. Public disclosure of such information could seriously jeopardize the shipper's negotiating position in the market place if it is publically disclosed.

And finally, the verified statement discussed briefly various transportation alternatives which, if disclosed to competitors, would reveal operational details about the shipper which could adversely affect the shipper's ability to compete. Exhibit# 5 contains documented communications for just one such solution which have already taken place. CNJ respectfully submits that collectively the totality of all five exhibits more than adequately demonstrates the

³ It should be noted that neither CSX, nor NS, ever refused to provide the requested rates. They stated they simply couldn't publish a through rate with a carrier who was not yet established or authorized to conduct operations. CNJ believed the CSX and NS reasoning was sound and did not object to the failure to provide the requested rates. However, the communications between CNJ, CSX and NS are respectfully submitted as evidence that efforts are underway to negotiate appropriate rates for the shipper.

shipper's sincere efforts to put together appropriate logistical solutions to meet their transportation needs.

CNJ disagrees, in small part, with certain allegations contained within the City's Reply

CNJ Rail does take issue with certain comments contained within the City's reply that it feels compelled to address. In the City's reply on pages 21 and 22 (paragraphs 2 and 3) the City makes a number of statements, some of which CNJ takes serious issue with. CNJ does not deny that it has long advised the LLCs that it might be in the LLCs best interest to seek the lawful acquisition of the line in order to best preserve their title in the line. However, CNJ has never advised the LLC's on how to "defeat" the City.

Had the LLC's pursued such relief, CNJ was willing to be their designated operator, if the LLCs had chosen to pursue legally acquiring the line and if they did not want to deal with the hassles of being the operator of a line of railroad. The effect of the LLCs legally acquiring the line would likely have led to Conrail's abandonment petition being dismissed simply because Conrail would not have retained sufficient legal interest in the line for the Board to consider them as the proper party to be seeking abandonment authority.

However, while such relief might have ended the City's current OFA litigation in the current Conrail docket, it by no means would have "defeated" the City. Quite to the contrary, it would have eliminated Conrail from the mix (simplifying the next proceeding) **while preserving the entire spectrum of Board relief available to the City**. There would be nothing preventing the City from acquiring the line from the LLCs if and when the LLCs sought to remove the line from the Board's jurisdiction. The City would still retain its ability to acquire the line either via an OFA, or via the often cited state statute (if that statute is not preempted).

Furthermore, the Board would have been able to use its oversight powers to insure that the LLCs could not abuse any of the agency's processes. How the City could insinuate that CNJ's advocating that the LLCs should consider lawfully acquiring the line in order to quiet attacks on their title as being tantamount to advising the LLCs on how to "defeat" the city is absurd. CNJ certainly knew that the act of seeking authority to acquire and operate only eliminated Conrail from the mix, quieted title actions, and brought to a conclusion the current Conrail abandonment docket. It certainly would not "defeat" the City.

Furthermore, CNJ's **actions** clearly indicate that we are NOT trying to "defeat" the City. CNJ has been invited to, and willingly and enthusiastically attended meetings with the City to advance the OFA process forward. CNJ assisted the shipper in the preparation of a verified statement which supports the City's OFA. If CNJ was trying to "defeat" the City, why in the world would CNJ be going out of our way (including filing this response and all the supporting evidence contained in this letter) to bolster the City's OFA?

CNJ simply submits our actions speak for themselves. If CNJ wanted to, we could have certainly filed numerous pleadings ourselves in this proceeding. We could have reminded the Board of its many precedents when the issue of an illegal line sale comes to the Board's attention. We could have reminded the Board that "State of Maine" and constructive easement arguments, like those advocated by Conrail, are not available to private non-governmental authorities and fly in the face of the Board's recent precedent. We could have reminded the Board that it doesn't grant abandonment authority when it is unclear who the proper party is that should be seeking abandonment authority.

In short, if CNJ wanted to make this already extremely controversial case a whole lot more controversial, we would have done so, long before now. If it is not immediately apparent to the Board, CNJ has been exercising extreme restraint in this proceeding.

While the City does not expressly state it, it is not CNJ, but rather CNJ's long time ally, Mr. James Riffin, who has been the sole party advocating for the position that the LLCs should prevail in a manner detrimental to the City. As outlined below, CNJ prefers to remain neutral with regards to the legal ownership issues surrounding the line. Mr. Riffin has been quite active in trying to advance his ideas forward. However, he does not speak for CNJ Rail.

Neutrality

The City, and the LLC's, have both tried to insinuate that CNJ is acting as an agent, advisor, co-conspirator, etc. for the other side. Both sides appear to take this position whenever it appears to best suit their respective interests. Both the City and LLCs fail to comprehend CNJ's official position in this proceeding.

CNJ strongly favors the preservation of the Harsimus line corridor for future rail use. To that extent, CNJ will support any party which is advancing the concept of preserving / restoring the corridor for rail use. If multiple parties are seeking the preservation and restoration of rail services in the Harsimus corridor, CNJ will support them all. CNJ is completely neutral as to which competing party's objective should be chosen or advanced.

For example, CNJ has no objections to, and can (and does) easily support the clearly articulated plans for the line that the City has presented to the Board. The City would like to preserve the line for future transportation uses, whether it be commuter rail / light rail / and even freight rail. CNJ applauds the City for its strong desire to preserve the corridor. If the City finds that the corridor's right-of-way is sufficiently wide enough that it can also accommodate other public uses in addition to future rail uses, CNJ does not object to those additional public uses which may be compatible with rail use in the corridor. CNJ fully supports the City's vision for the corridor.

CNJ would also support the LLCs if their goals and desires were consistent with preserving the corridor for some form of future rail use. Provided that sufficient right-of-way

was preserved and developed for future rail uses, CNJ would, like our position with the City, not object to the LLCs developing other uses in and around the corridor. However, we are ambivalent regarding support for the LLCs at the moment. To date, the LLCs have made it clear that their intention is to pursue only non-rail uses for the property.

CNJ would like to see the Harsimus line ultimately be restored to operation. If freight service is restored to the corridor, CNJ would like an opportunity to be considered as a possible operator for the line. CNJ has communicated that desire to both the City, and the LLCs.

There is significant disagreement between longtime allies

CNJ and its long-time ally, Mr. James Riffin, are actually in serious disagreement over the proper course of action that should be taken by certain parties in this proceeding. As enumerated above, CNJ prefers to remain neutral as to who ultimately ends up owning and controlling the corridor. CNJ would simply like to be the operator of the line.

Mr. Riffin, on the other hand, has taken a very clear position in who he intends to fully support. Mr. Riffin has made it clear, that he personally would like to assist the LLC's in prevailing. A popular quote commonly attributed to former Major League Baseball player Lawrence "Yogi" Berra of the New York Yankee can best articulate Mr. Riffin's motives for wanting to help the LLC's: **"It's Déjà vu, all over again!"**.

Mr. Riffin handed CSX Transportation nearly \$1,000,000.00 and never received good title to his rail line. Here, the LLC's have handed Conrail \$3,000,000.00 in good money, and to date, still have a hotly contested title. For him, the issue is deeply personal. He sees the LLC's interest in the Harsimus line much like he saw his own interest in his former Allegheny county line. He does not want to see the LLCs suffer the same fate that he did.

Mr. Riffin has tried to advance a number of potential settlement ideas he concocted. To date, no party (including CNJ) has expressed any interest in any of his "settlement" ideas. To his credit, he did try diplomacy. However there simply is no urgency amongst the parties to reach a settlement, let alone reach a settlement brokered by him. CNJ would note that it was highly ironic that the only person who had the desire to act as a mediator in this dispute was Mr. Riffin. It is a real shame that the Board never considered Board-sponsored mediation as a possible avenue for resolving this dispute.

REQUEST TO EXPEDITE THE OFA PROCESS

CNJ would like to also go on the record and formally support the City's request for expedited relief. It is now appropriate for the Board to swiftly move the current proceeding along. Since the Board has not rejected Conrail's notice of exemption on the basis that the

proceeding is too controversial for the use of the Board's exemption procedures, there is no reason to delay this proceeding any further.

Public convenience and necessity requires swift action now.

The primary reason CNJ believes that swift Board action is needed now is driven solely by the shipping needs of the shipper. The shipper has freight which it needs moved. Either: the shipper, the City, CNJ, or combinations of two or more parties, have sufficient justification, in the absence of a Board decision to swiftly complete the adjudication of the current Conrail abandonment proceeding, to seek additional relief from the Board.

It should be noted, Conrail has not been relieved of its obligation to provide service upon a reasonable demand. Until this Board grants such relief, Conrail retains the obligation to provide service over the entire Harsimus line. Despite its current condition, the Harsimus line remains a line of railroad subject to the Board's continuing jurisdiction.

The easiest and best solution for meeting the shipper's immediate needs is for the Board to simply expedite the OFA process. Congress intended for rail carriers to be able to seek expedited relief to shed unwanted lines. Congress also set for an expedited process for parties, such as the City, to preserve service over marginal lines put up for abandonment. Both processes should be able to move in an expedited fashion.

Additional options for relief (if needed)

Another option for relief that is available to the Shipper, the City, and/or CNJ for seeking relief from the Board is through the Board's ability to issue Emergency Service orders. 49 U.S.C. § 11123(a) and 49 C.F.R. § 1146.1 set forth procedures which could also be used to provide expedited relief, in the event the Board continues to hold the OFA process in abeyance. The OFA process is the most permanent and simplest solution to meeting the shipper's need. However, CNJ has at least begun to examine whether relief can be obtained from the Board through the use of another form of relief in the event this proceeding continues to remain in limbo.

The shipper is a member of the public which this agency has an obligation to protect from the illegal business practices of Conrail. This Board sends a bad signal to all rail carriers when it fails to respond quickly to the needs of a shipper. There is no reason to hold this proceeding in abeyance any longer.

The other option CNJ is evaluating is whether it might be appropriate to proceed with a formal complaint against Conrail. In the absence of being relieved of its obligation on the Harsimus line, Conrail still retains the obligation to provide service upon a reasonable demand. 49 U.S.C. § 11701 – § 11707 expressly permits the Board to investigate, adjudicate, and enjoin

Conrail from failing to provide service upon a reasonable demand. This option could also provide a resolution which could lead to the restoration of rail service on the Harsimus Line.

It should be noted, Conrail could bring about the swift resolution of this proceeding by simply providing to the City, and to CNJ, the required information set forth at 49 C.F.R. § 1152.27. Once that information is provided to the City, and to CNJ, the proverbial “clock” starts to tick; The City will have to make its case quickly, as there are a number of statutory and regulatory deadlines in the OFA process which must be met. A successful OFA can bring this long drawn out proceeding to a swift conclusion.

**SUPPORT STATEMENT FOR THE CITY’S MOTION TO COMPEL CONRAIL
TO PRODUCE REQUIRED INFORMATION AT 49 C.F.R. § 1152.27**

CNJ respectfully asks the Board to grant the City’s pending motion to compel Conrail to provide the required information set forth in the Board’s OFA regulations. Both the City and CNJ requested that information over five years ago. While this proceeding has been held in abeyance for a number of years while the Special Court in Washington addressed the issue of whether the line was conveyed as a line of railroad, that proceeding is now concluded. The Board lifted the stay in this proceeding in 2014. There is no justifiable reason for Conrail to continue to delay providing the required information.

So far, the delay in this proceeding has worked towards the City’s advantage. While Conrail continued to obfuscate the City’s efforts to move the OFA process forward by continuing to drag its feet, the City has quietly been assembling a team of experts, conducting due diligence, gathering appraisals and preparing to make its case-in-chief when the OFA process begins. Indeed, other parties who may seek to provide a competing OFA will be very hard pressed to make a case as strong as the City’s because they will simply not have sufficient time under the Board’s OFA regulations to prepare a competing case capable of surpassing the strength of the City’s.

If Conrail believes that by continuing to delay, it works to their advantage, they are seriously mistaken. With each passing day, the City lines up more support, more witnesses, gathers more information, and can present an exceptionally strong showing when the OFA proceeding begins. By comparison, any other party would need to do in just days what the City has painstakingly completed over many months. It was said that “Rome was not built in a day”. Likewise, other parties can’t build a superior case in a limited amount of time.

CNJ has not yet decided if it will submit its own OFA. Since Conrail has failed to provide the required information they are obligated to provide, we lack the critical information to make an informed decision. Contrary to the many reports on the condition of the line east of

Waldo, a section of the line remains intact, complete with track and sidings. CNJ has a strong interest in that section of the line, which requires little rehabilitation and no bridge reconstruction.

CNJ would like the opportunity to work with the City to advance the City's plans forward. At the moment, we are leaning toward fully supporting the City's OFA for those sections of the line that the City has a desire to acquire, and supplementing the City's OFA with a **complimentary** OFA of our own to cover those sections that the City has not expressed an interest in. We do not see any reason to "fight City Hall," when our interests can be easily aligned to support each other in a mutually beneficial manner. There are absolutely no reasons to NOT support the City's OFA.

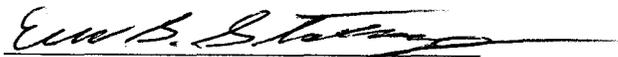
As a result of helping to provide the City with additional information to support and bolster the City's pending OFA, CNJ has enjoyed the benefit of being involved in the City's months-long preparation for filing the City's OFA. CNJ can easily prepare a **complimentary** OFA, within the short window of time the OFA process permits, simply because it has been involved, to a significant extent, with the City's own efforts. In short, CNJ has not been disenfranchised by the long delay in adjudicating the OFA part of this proceeding. CNJ sees absolutely no benefit at all in filing a competing OFA for those sections that the City has already shown a strong interest in.

For all of the reasons stated above, CNJ respectfully requests that the Board:

1. Accept this letter reply into the record,
2. Deny the LLC's motion to unseal confidential documents,
3. Grant the City's reasonable request for expedited relief,
4. Grant the City's motion to compel and direct Conrail to provide the required OFA information,
5. And provide any other relief which is just to affect the foregoing requests.

On behalf of CNJ Rail Corporation

Respectfully Submitted,



Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation
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(Public version)

EXHIBIT # 1

(Entire Documents Redacted)

(Public version)

EXHIBIT # 2

(Entire Documents Redacted)

(Public version)

EXHIBIT # 3

(Entire Documents Redacted)

(Public version)

EXHIBIT # 4

(Entire Documents Redacted)

(Public version)

EXHIBIT # 5

(Entire Documents Redacted)

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2015, a copy of the foregoing **Public Version** - Letter Response, was served by first class mail, postage prepaid, and via electronic mail (email) upon the following parties:

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Dated: April 29th, 2015