

BEFORE THE  
SURFACE TRANSPORTATION BOARD

232055  
ENTERED  
Office of Proceedings

MAR 14 2012

Part of  
Public Record

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STB Docket No. AB-167 (Sub-No. 1191-X)  
CONSOLIDATED RAIL CORPORATION  
-ABANDONMENT EXEMPTION-  
IN PHILADELPHIA, PA

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STB Docket No. AB-55 (Sub-No. 710-X)  
CSX TRANSPORTATION, INC.  
-DISCONTINUANCE OF SERVICE EXEMPTION-  
IN PHILADELPHIA, PA

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STB Docket No. AB-290 (Sub-No. 552-X)  
NORFOLK SOUTHERN RAILWAY COMPANY  
-DISCONTINUANCE OF SERVICE EXEMPTION-  
IN PHILADELPHIA, PA

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REQUEST FOR AN EXTENSION OF TIME

AND A

REQUEST FOR MODIFICATION OF THE PROCEDURAL SCHEDULE

( EXPEDITED HANDLING REQUESTED )

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Filed for

ERIC S. STROHMEYER (Individually)

- AND -

CNJ RAIL CORPORATION

Now comes your petitioners, Mr. Eric S. Strohmeyer, a citizen of the State of New Jersey, whose address is 81 Century Lane, Watchung, NJ 07069 and CNJ Rail Corporation, a New Jersey corporation, whose mailing address is 191 North Avenue, Suite 238, Dunellen, NJ 08812, requesting the Surface Transportation Board (Board) grant an extension of time to permit your petitioners an opportunity to respond to the many new issues that Consolidated Rail Corporation (Conrail) raised in a filing it made on March 12<sup>th</sup>, 2012 in the above captioned proceeding. In addition, **the response raised a serious issue that heretofore had not been addressed by either Conrail, or your petitioners.**

Petitioners, in support of their request, state:

1. On March 9<sup>th</sup>, 2012, your petitioners filed an Offer of Financial Assistance (OFA) in the above captioned proceeding. From the onset of this proceeding, Conrail has maintained the position that it was “unaware of **any alternative public uses for the line**” (See: Conrail Verified Notice of Exemption at paragraph 8).

2. It strikes your petitioners somewhat oddly that Conrail seems to have adopted a new found position that there now appears (to them) to be a number of public uses which require the Board to exempt the line from the OFA procedures. For reasons Conrail fails to explain, they never raised those issues, until **after** an OFA was filed. Your petitioners want a chance to respond to all the new allegations in depth before the Director of Proceedings is required to issue her preliminary ruling as set forth in 49 CFR 1152.27.

3. In addition, your petitioners filed a request for a protective order in this proceeding so it can make available our financial materials to the Board. Your petitioners have not yet filed those materials in light of the fact that there has not yet been a ruling on the request for a protective order.

4. The more egregious issue that needs to be resolved is Conrail's unfounded allegations that "it is anticipated that the City (of Philadelphia) will raise strong objections to any resumption of operations on this rail line in its public streets after 30 years of non-use and the changed character of much of the area through which much of the line is located." (See Conrail's March 12<sup>th</sup> response at page 2, third paragraph)

5. It was your petitioners initial reaction to that paragraph (from which the quote in paragraph 4 was taken from) to respond with a very "heavy hand" and vigorously argue the many reasons why Conrail's objection was completely misguided and misplaced . However, in thinking about the issue that was raised, we decided this much more passive approach would be more prudent.

6. It should be noted, that the City of Philadelphia has only filed one document with regards to this proceeding. The only position the City appears to it takes is that it has "no position" on the merits of the abandonment proceeding. It doesn't say the City opposes the abandonment, it doesn't say the City supports the abandonment. The City's only response so far does not indicate much.

7. It should be noted that Conrail's counsel does not appear to be authorized to speak on behalf of the City of Philadelphia. Just how Conrail bases its conclusions that these likely vigorous objections are to be raised is quite unclear. If the City wants to object, the City will object, if it doesn't want to object, it isn't required to object. There is nothing in the record that would suggest the City has taken a position to the benefit of either Conrail or the Offerors in this proceeding.

8. What is clear from the record, is that neither Conrail, or the Offerors, have served the City with any of the OFA pleadings. **Neither party has done so.** Whether the City should have been served is unclear. Neither Conrail, nor the offerors can speak for the City. In light of the fact that the City may not be aware of the OFA proceeding, your offerors would argue that issue

alone may be sufficient justification enough to interrupt the procedural schedule in this proceeding.

9. Your petitioners would therefore respectfully ask that the Board hold the proceeding in abeyance and direct both the OFA Offerors and Conrail to serve copies of all the OFA pleadings to date on the City of Philadelphia and certify to the Board we have done so. In *Consolidated Rail Corporation - Abandonment Exemption - In Jersey City, NJ STB Docket No. AB 167 (Sub. No. # 1190 X)*, the Board interrupted the procedural schedule in that proceeding when it issued a Show Cause order to the Offerors to produce a response to certain questions that the Board had with regards to previously filed pleadings in that proceeding.

10. Your offerors reserve all our rights to argue any and all arguments with regards to just how much influence or weight the City's objections, or support for that matter, to the OFA should be given. The clear language of the operating agreement does not give the City any rights to which they can object to Conrail's assignment of the operating agreement, whether such assignment is voluntary, or in this case, made pursuant to the forced sale provisions of 49 U.S.C. 10904. There are no notice requirements in the agreement.

11. Notwithstanding our reservations with regards to our right to argue certain points, your Offerors are inclined to believe it is better to serve the City now and give them a chance to participate, rather than to go through the entire proceeding, and then try to defend any decision either for, or against, in which the City was not given adequate opportunity to participate. By serving the City with the pleadings, they will be put on notice, and the City can decide what arguments, if any, the City wants to make.

12. There is also a significant benefit to the Offerors (and possibly the Board as well) to having the City participate in the proceeding. Conrail continues to claim it has no clue who removed the tracks out of the City's streets. Conrail continues to maintain they did not give permission to any party to remove the tracks out of the City street. The Offerors believe the City

is fully aware of who removed the tracks out of the City's streets. After all, to have done so would have required the City's blessing, and approval.

13. Your Offerors can't fathom a single scenario that would have the City either permitting others, or by its own actions, removing a railroad's track out of the City's streets without first seeking permission from the railroad whose tracks are to be removed. Since the answer to the question is highly relevant to the matter currently before the Board, the answer can either support Conrail's claim, or will completely impeach their credibility in this proceeding.

*The Offerors were trying to be nice to Conrail*

14. The Offerors, to date, have tried their best to be nice to Conrail in this proceeding. We have done our best to be professional, and courteous to Conrail. Conrail wants to abandon service on the line. We simply want to provide rail service over the line. Morris Iron and Steel Co, an industry located along the line, wants rail service. Your offerors thought this was pretty much of a metaphorical "no-brainer" decision on Conrail's part. We simply can not understand why Conrail is putting up such a fuss.

15. Once Conrail abandons service on the line, they lose any potential to derive any future revenue from the line in question. There is nothing to liquidate, so Conrail is not going to gain one penny from terminating service on the line. **Not one dime.** They will not be burdened with the line any longer, However, they would also not be burdened by the line any longer if they sold the line to another party pursuant to the OFA process, or even if they sold it outside of the OFA process. But they would stand to gain whatever traffic the line would generated without the expense of operating and maintaining it.

16. The City would finally get an operator that will do what Conrail has failed to do for the last 30 years. One that would grow its business, generate rail traffic, and be the economic engine that drives development along the line. The shippers along the line would finally get

service restored. It is not like the shippers haven't asked for service. They have. Conrail (through its parent companies) has refused to provide it.

17. In short, what's the real reasons for the fuss? It can not be all the stuff that Conrail is attempting now, out of the blue, to argue as to why the Board should reject the OFA. After all, if Conrail decided to keep the line tomorrow, it could. Conrail would have to overcome the exact same problems we have identified in our OFA, but the Board would not view a single one of those objections which Conrail raised as a reason to stop the OFA as a sufficient reason to stop Conrail themselves from restoring service, if it was Conrail that wanted to restore the service.

18. Your offerors, prior to Conrail's filing yesterday, were not inclined to raise these following points. Conrail appears to believe the City should be consulted, so be it. We believe then the City too, should be served. As such, it will give us the ability to serve discovery upon the City to determine when, and by whom, the tracks were removed, and who, if any, gave permission to remove them. Those answers, given the fact that there is a significant question as to who owns what in segment # 3, is necessary to determine who may in fact be the common carrier associated with the line in question.

19. Upon completion of the discovery process, your offerors reserve the right to begin the process of preparing a petition to revoke the exemption in this proceeding, its entirety, should it be discovered that any one of Conrail's statements, including, but not limited to whether or not it gave permission to remove any of the tracks in question, are in fact false. It should be noted, that previous to this pleading, we have not chosen to speak about the removal of the track in Girard Avenue.

20. The City of Philadelphia is unique in that it is one of the few cities left with an extensive streetcar system. A number of the street car lines crossed railroad right of ways at grade. Philadelphia is one of a small handful cities in America today where trolleys and railroad cross each other at grade on a daily basis. The most famous of these crossings is located in the

area of 58<sup>th</sup> St in southwest Philadelphia, were over 30 CSX freight trains, and over 100 trolley movements, cross each other's line on a daily basis.

21. The line in this proceeding, also crossed a trolley line located in Girard Avenue. Girard Avenue is a major thoroughfare across Philadelphia. Sometime within the past two decades, the Southeastern Pennsylvania Transportation Authority (SEPTA) renewed the trolley tracks in Girard Avenue. A diamond (which is the common name for the specialized track work which permits two flanged vehicles to cross each others track) was removed in the intersection of Girard and North 2<sup>nd</sup> Street. That diamond was what permitted trains moving along the rail line in this proceeding to cross the trolley tracks.

22. It should be noted, to either remove, or install, a new diamond in the middle of a busy intersection requires a lot of effort. It is absolutely inconceivable that SEPTA, or the City of Philadelphia, did not know that diamond was for Conrail's tracks. SEPTA operates a considerable commuter rail network on tracks which fall within the jurisdiction of the Board.. They are fully aware of STB regulations. So too, is the City of Philadelphia. It borders on the ludicrous to think that they didn't seek Conrail's permission first before they modified that intersection. It also goes without saying that the removal of the approach tracks to that intersection were likely done at the same time.

23. Since Conrail is insisting that the City be notified with regards to this OFA, so too, should SEPTA. Your Offerors fully expect to find, in one or the other of those entity's files, some form of written communication with Conrail where either SEPTA, or the City, sought and received Conrail's blessing to remove the diamond in question. There is no doubt in your Offerors minds we will find out all the particulars, in great detail, to give this Board a thorough and accurate accounting of just how those tracks got removed from the City's streets. We don't believe, for one second, that Conrail's version of "persons unknown" or "unauthorized" will hold up to scrutiny.

24. All of which lead us to the next point of contention. Since Conrail really wants the City involved in this process, the City should be permitted to argue that Conrail, in fact, had already abandoned the line in question, without receiving or seeking permission from the Commission, or the Board, to either discontinued service, or abandon the line in question. Your offerors, after reviewing documents in the PA PUC commission proceeding, believe it is pretty clear that the City of Philadelphia appeared to have argued, in part, that the line was already in fact, abandoned. We also want the Board to be aware of the year that proceeding began. It was in 2008, or there about.

25. Which leads up to the our climactic conclusion. Did Conrail in fact already abandon service on the line. In STB Docket No.# *EP 695 Consolidated Rail Corporation, Lines Sales and Discontinuances*, served, May 13, 2010<sup>1</sup>, Conrail was ordered to disclose all its line sales and all its abandonments and discontinuances which authority had not previously been sought. It would appear that after 30 years of disuse, this line might have fallen in the category of having been previously abandoned without proper authority.

26. What the Offerors find disconcerting, is that Conrail was fully aware that the City of Philadelphia was arguing a portion of this line was already abandoned at the time it was ordered by the Board to make its disclosure, yet the offerors can find no mention of this line in either of Conrail's two disclosure filings. Yet it clearly appears the City may have been arguing in the PA PUC proceeding that Conrail, in fact, had already abandoned the line. We hereby incorporate the entirety of record in the PA PUC proceeding noted in Conrail's original Notice of Exemption by reference as if it were restated fully herein.

27. Since Conrail is so insistent on dragging the City into this proceeding, what a perfect time to ask the City for its opinions on the subject. After all, if Conrail had in fact illegally abandoned the line, than **the City has a perfect, ready made defense against the OFA. The**

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<sup>1</sup>See Exhibit # 1, hereto attached: A copy of the STB's decision in the cited case.

**easement would be already extinguished because Conrail already had in fact, illegally abandoned the rail line!**

28. Of course, that would likely cause some significant problems for the Board, not only in any judicial review of this proceeding, but also in a future proceeding, should someone ask the Board to reconsider the Boards' findings of fact in Docket No.# EP 695. After all, the evidence in this proceeding would certainly constitute "newly discovered evidence".

29. It should be noted that, for reasons unknown, the Board did not engage in a usual fact finding mission in Docket # EP 695.

30. The Board ordered Conrail to self-disclose, as opposed to appointing an independent auditor to review Conrail's sales, and if necessary act as a prosecutor. Given the fact that the Board's decision clearly threatened the potential of sanctions, it would be logical to assume Conrail was not going to self incriminate. Therefore, proper judicial protocol should have been to have appointed an independent prosecutor to review Conrail's submissions.

31. The Board made it worse, by not seeking, or permitting, any other opposition to be able to challenge Conrail's representations. If the Board carefully reviews its decision in EP 695, there is no statement what so ever that clearly indicates that opposition parties were even permitted to file any pleadings in that proceeding. It could be argued further, that it would have been entirely inappropriate to have permitted any other opposition party to have replied, or sought public comment, without an independent investigation by a Board appointed prosecutor first.

32. It should be noted that because the public was not provided an opportunity to participate in that proceeding, the principals of res judicata, and issue preclusion, would not apply to any party seeking to reopen that proceeding for good cause shown. The City of Philadelphia can certainly argue that Conrail had in fact illegally abandoned the line in question

years ago. Since Conrail is so anxious to get the City involved, we will be more than happy to accommodate them.

33. The Board's handling of the case in Docket # EP 695 was completely, and utterly inconsistent with its handling of another case in which it actually fined a carrier. In *Canadian National Railway Company and Grand Trunk Corporation - Control - EJ&E West Company STB Docket# 35087*, the Board first carefully sought an independent auditor to review inconsistencies the Board discovered, on the Board's own initiative, in its own reporting requirements. The Board then held a public hearing to give the independent auditor, the rail carrier, and other parties an opportunity to speak out and either prosecute, defend or support their various positions.

34. After the hearing, the Board carefully reviewed all the facts and testimony, the recommendation of the auditors, and concluded that CN failed to follow an order of the Board and fined them \$250,000.00.

35. By way of contrast to the CN proceeding, the Board in Docket# *EP 695*, failed to see anything wrong with Conrail's disclosure responses, despite the fact it had at least one proceeding simultaneously before it that contained clear information that should have, at a bare minimum, certainly given rise to questioning Conrail's responses, and at most, completely impeached Conrail's response. And wouldn't you know, that other proceeding just happened to have involved a line of railroad in the City of Philadelphia !

36. Compounding the Board's problem, is the Director of Proceeding's decision to accept Conrail's disclosure statements as sufficient without really scrutinizing them. It is not out of the line to question the Board's handling of that proceeding.

37. For example, if a hypothetical criminal court put on a trial by not having a prosecutor, letting the defense put on the only evidence in the trial, and then not letting any one

else challenge any of the “so called evidence” and therefore not permitting anyone else sufficient standing to challenge the findings of the court, would that hypothetical proceeding not legitimately rise to the level of being called a kangaroo court?

34. We ask the Board to compare the hypothetical scenario above, with the Board’s own handling of the case in *Docket# EP 695*. The Board had no independent outside party to review Conrail’s line sales and discontinuances, and either recommend, and/or prosecute its findings if necessary. Conrail (the defendant) was the only party to put on any evidence in that proceeding. No one else (like the City of Philadelphia) was permitted, or expressly invited, to participate and challenge the evidence.

35. Why would the Mayor of Philadelphia be out of line for considering asking members of the Pennsylvania’s Congressional delegation to recommend to the appropriate Congressional committees in Washington that they should consider possibly holding a hearing to determine whether or not the Board did in fact, hold a kangaroo court in that proceeding? While the question above is provided for effect, it should be alarming to the Board that it even can be hypothesized about in the first place. The fact it might have some genuine validity, should rattle every window in the Board’s office in a manner far greater than what the CSX trains do which pass outside.

36. We would hope that the Board takes a moment to reflect on that proceeding, and its potential shadow it can cast on this and future proceedings

37. In *BDB Company - Acquisition Exemption - Consolidated Rail Corporation, STB Docket No.# FD 35398*, BDB Company, through the Notice of Exemption<sup>2</sup> process, sought approval from the Board to acquire from Conrail a portion of what the Board called the “Swanson Rail Yard” in Philadelphia. Two other related notices were filled in that proceeding.

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<sup>2</sup> See Exhibit # 2, hereto attached. A copy of the Notice of Exemption for the cited case.

All three notices made it quite clear that the acquisition would make the related entities rail carriers subject to the Board's jurisdiction.

38. BDB's counsel was quite specific in the pleadings when he pointed out that only Swanson Rail Transfer and BDB would be able to provide service to the City of Philadelphia's Waste Water Treatment plant as a result of the sale. It therefore would make Swanson a common carrier by rail. BDB also pointed out that the actual sale took place, and was fully consummated, **5 years earlier** and that BDB was seeking retroactive approval for the sale. In footnote number 1 of the Notice, the Board itself noted: **"BDB seeks approval now for the acquisition even though the transfer took place in April of 2005"**

39. The verified notice in BDB proceeding was filed in July of 2010, and was published in the Federal Register on August 18, 2010. In Docket # EP 695, the Board ordered Conrail to disclose all line sales, and partial line sales by August 16<sup>th</sup>, 2010. Conrail did ask for, and receive an extension of time to finish its report. However, despite 6 weeks of supposed additional due diligence, Conrail's disclosure report was but four pages long, and did not disclose any specific transactions that would have required the Board's prior approval. Why the Director **completely ignored the unchallenged facts**, and her own footnote contained within the Notice of Exemption in Docket # FD 35398 and did not call Conrail's veracity into question, at a minimum, for not disclosing the FD 35398 proceeding, is truly mind blowing. It also certainly provides fuel for the argument that the Board conducted a "kangaroo court" proceeding in EP 695.

40. Your offerors looked up the definition of "kangaroo court" online while preparing this pleading. FreeDictionary.com gives two definitions for the meaning of "kangaroo court". Defined as a noun, they are: 1. A mock court set up in violation of established legal procedure 2. A court characterized by dishonesty and incompetence.

41. It should be pointed out that the Director of Proceedings has been delegated

substantial authority by the Board to adjudicate a large number of "routine matters". However, it was the **entire** Board that commenced the proceeding in EP 695 and ordered Conrail to disclosure all its line sales and discontinuances. There was nothing routine at all about ordering a carrier to make such a disclosure. However, it was the Director alone that issued the decision that closed the proceeding. Your offerors have not found one rule in the Board's regulations that expressly give the Director the authority to adjudicate such a significant non-routine matter such as reviewing and adjudicating such a disclosure that the full Board ordered Conrail to make.\

42. By way of contrast, in the Canadian National proceeding, it was the entire Board that began the proceeding, ran the entire proceeding, and issued the final decision in the proceeding. Your offerors would argue, at a minimum, the Entire Board should have reviewed Conrail's pleadings in EP 695, especially since the full Board was made acutely aware of Conrail's many past transgressions in earlier proceedings. Your offerors are stunned that this Board has ignored so much already.

43. The entire Board, itself, has overlooked two other previous disclosures and completely ignored them when they were brought to the Board's attention. In *James Riffin d/b/a the Raritan Valley Connecting Railway - Acquisition and Operation Exemption - Raritan Valley Connecting Track STB Docket No. # FD 34963*, Mr. Robert D'Zuro, a Conrail paralegal, placed a verified statement<sup>3</sup> into the record which clearly, and undeniably, stated Conrail had sold a portion of a line of railroad without Board or Commission approval. He stated Conrail terminated service without seeking appropriate authority.

44. It still stuns your offerors to think the Board, despite having that clear verified statement, still did not bother to seek an independent auditor to review Conrail's sales and discontinuances. Clearly, this has happened before. In addition, in a matter now currently before the DC Circuit Court of Appeals, Conrail's failure to disclose its 1997 sale of what Conrail's

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<sup>3</sup> See Exhibit # 3 hereto attached. A copy of the verified statement of Robert D'Zuro

parent Norfolk Southern claimed in 2006<sup>4</sup> was a “lead track” (whatever that is supposed to mean) to the Maryland Transit Administration will be vigorously argued over.

45. It should be noted in *Norfolk Southern - Petition for Exemption - in Baltimore County Md STB Docket No. # AB 290 (Sub No. # 237)*, the Board reject that petition because of, once again, concerns over a questionable previously undisclosed Conrail line sale.

46. Even in this proceeding, the Board has overlooked certain aspects of the evidence produced so far in the proceeding. Conrail has placed a purchase and sale agreement into the record in this proceeding. What caught the offerors attention was the fact that Conrail proceeded to execute another sales contract, for a line of railroad, without seeking authority first. It took Conrail over 12 months to file this proceeding from the time the contract with Mr. Groverman was executed. Despite the fact that the sales agreement was executed only 5 weeks after filing its last disclosure statement, Conrail never once eluded to the fact it was on the verge of executing another sales agreement.

47. And now, Conrail seems to be basing the vast majority of its OFA objections on the fact that the line has been out of service for thirty years. However, the Offerors do not, nor can not control when a carrier chooses to file for abandonment authority. Conrail should not be permitted to sit on a property for thirty years, and then argue no one else should be permitted to preserve the line through the OFA process, without giving parties a thorough opportunity to challenge those assumptions in a timely manner.

48. All this brings us back to the beginning. Conrail has now raised a host of issues regarding which parties should be served in this proceeding, and for seeking an exemption from the OFA process. Your offerors would like some time to address Conrail’s new arguments. In addition, Conrail wants the City of Philadelphia brought into this proceeding. We would agree.

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<sup>4</sup>See Exhibit # 4

The parties should be directed to serve copies of all our pleadings on the City.

48. Wherefore, your offerors sincerely request the Board to:

(1) direct the parties to serve all copies of all the OFA pleadings on the City of Philadelphia;

(2) permit CNJ Rail sufficient time to file a response to Conrail's numerous pleadings alleging various grounds for exemption from the OFA process prior to rendering any decisions in this proceeding on part of case.

(3) grant the motion for a protective order in this proceeding so the Offerors can submit their financial records.

(3) And request any additional relief that the Board may deem just, and necessary, to carry out the requested relief.

On behalf of myself (individually) and  
On behalf of CNJ Rail Corporation

Respectfully Submitted,

*Eric S. Strohmeyer /s/*

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Eric S. Strohmeyer  
Vice President, COO

Dated: March 14<sup>th</sup>, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of March, 2012, a copy of the foregoing Request for an extension of time., was served by first class mail, postage prepaid, and via electronic mail, upon:

Mr. Benjamin C. Dunlap, Jr. Esq.,

Nauman, Smith, Shissler & Hall, LLP,  
200 North Third Street,  
18<sup>th</sup> Floor, Harrisburg, PA 17101  
(717) 236 - 3010, Ext. 21

Counsel for Consolidated Rail Corporation, et. al:

Mr. John K. Enright, Esq.,  
Associate General Counsel,  
Consolidated Rail Corporation,  
1717 Arch Street, 32nd Floor,  
Philadelphia. PA 19103.

Respectfully Submitted

*Eric S. Strohmeyer /s/*

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Eric S. Strohmeyer  
Vice President, COO  
CNJ Rail Corporation

# **Exhibit # 1**

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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 695

CONSOLIDATED RAIL CORPORATION'S SALES AND DISCONTINUANCES

Decided: May 13, 2010

On November 19, 2008, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) jointly filed a verified notice of exemption (Notice of Exemption), pursuant to 49 C.F.R. § 1152.50, for Conrail to abandon, and CSXT and NS to discontinue service over a 2.27 mile line of railroad in Hudson County, NJ, known as the "Lehigh Valley Main Line" (the Line). Consol. Rail—Aban. Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X); CSX Transp., Inc.—Discontinuance Exemption—in Hudson County, N.J., Docket No. AB 55 (Sub-No. 690X); Norfolk S. Ry.—Discontinuance Exemption—in Hudson County, N.J., Docket No. AB 290 (Sub-No. 313X).

In the Environmental and Historic Report that accompanied the Notice of Exemption, however, Conrail revealed that it no longer owns an interest in all portions of the line it sought to abandon. Conrail asserted that the proposed abandonment would have no effect upon regional or local transportation systems and patterns, noting that New Jersey Transit Corporation (NJ Transit) "took no issue with Conrail's abandonment of the Line, and stated that it previously acquired portions of the Line[.]"<sup>1</sup> Conrail again disclosed its lack of ownership of the full line in addressing public health and safety issues and subsurface ground issues associated with the Line's abandonment.<sup>2</sup> Attached to Conrail's Environmental and Historic Report was a letter from NJ Transit in which it asserted "[n]o issue with Conrail's 'abandonment' of the rail line, as we have previously acquired (from Conrail) portions of this right of way, upon which can be found the shop and yard complex for the Hudson Bergen Light Rail System."<sup>3</sup>

Exactly what parts of the Line NJ Transit acquired is the source of some confusion, even between Conrail and NJ Transit. The same October 17, 2008 letter from NJ Transit to Conrail's Associate General Counsel states, "Of the two parcels which Conrail alleges that they retain, NJ Transit has no interest in the parcel located between Chapel Avenue and Linden Avenue. The

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<sup>1</sup> Notice of Exemption 12, Nov. 19, 2008.

<sup>2</sup> Id. 5, 10.

<sup>3</sup> Id. 29.

other parcel, near Communipaw Avenue, appears to us to already be NJ Transit-owned property.”<sup>4</sup> In its cover letter to many of the parties Conrail contacted to solicit environmental or historic comments about the Line, Conrail openly admitted that rail service was “previously discontinued” and that most of the underlying right-of-way has been sold to various parties.<sup>5</sup> In addition, Conrail included two quitclaim deeds, dated August 29, 1996, and November 19, 1996, purporting to transfer part of the property that constitutes the Line to NJ Transit.<sup>6</sup> Both deeds, in fact, appear to have been executed on behalf of Conrail by Robert Ryan, Conrail’s Director of Real Estate from October 1996 to July 31, 2009.

Questions regarding Conrail’s ownership interest (or lack thereof) in the Line have complicated this abandonment proceeding. CNJ Rail Corporation sought information from Conrail and subsequently filed a notice of intent to submit an offer of financial assistance (OFA), pursuant to 49 U.S.C. § 10904, for the Line, but for what part and for what value became a source of increasing confusion. Although, in our decision served concurrently today in Consolidated Rail—Abandonment Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X), we are exempting the Line from the OFA process, we continue to have serious concerns regarding what appears to be Conrail’s 1996 sale of a line without Board authorization.

As of the January 1, 1996, the effective date of the ICC Termination Act of 1996, a person other than a rail carrier may acquire a railroad line only if the Board issues a certificate authorizing its acquisition. See 49 U.S.C. § 10901(a). Similarly, a rail carrier providing transportation subject to the Board’s jurisdiction who intends to abandon or discontinue service over a line must file an application to do so with the Board. See 49 U.S.C. § 10903. The Board has promulgated regulations pertaining to section 10901 applications, see 49 C.F.R. § 1150, and abandonment and discontinuances of service, see 49 C.F.R. § 1152.

Pursuant to 49 U.S.C. § 10502, the Board has also established exemptions that allow parties to acquire lines of railroad or discontinue service on a line without using the Board’s detailed application procedures. However, to utilize those exemptions, a party must file a notice of exemption with the Board, allowing the Board and other interested persons an opportunity to challenge whether the proposed acquisition, abandonment or discontinuance is appropriate. See, e.g., 49 C.F.R. § 1150.32 (regarding exemption from 49 U.S.C. § 10901); 49 C.F.R. § 1152.50(c) (regarding exemption from to 49 U.S.C. § 10903).

There are statutory penalties for failing to comply with either 49 U.S.C. § 10901, § 10903, or the regulations promulgated to implement those provisions. Section 11901(c) states “a person knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title [Title 49] or of a requirement or a regulation under any of those

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<sup>4</sup> Id.

<sup>5</sup> See, e.g., Notice of Exemption 31, 35-39, 41, 43-48.

<sup>6</sup> Conrail’s Sept. 11, 2009 Reply to Offerors’ Answer to Show Cause Order, V.S. of Ryan, Ex. C.

sections, is liable to the United States Government for a civil penalty of not more than \$5,000.”<sup>7</sup> In addition, the Board may seek injunctive relief through a civil action to enjoin a rail carrier from violating § 10901, § 10903, or a regulation prescribed, order, or certificate issued under either of those sections. See 49 U.S.C. § 11702.

We are unable to locate any filing by Conrail, NJ Transit, or any other person seeking our authority or invoking an exemption to transfer title to any part of the Line prior to the Notice of Exemption Conrail filed with us on November 19, 2008. Similarly, we are unable to locate any filing by Conrail, NJ Transit, or any other person seeking our authority or invoking an exemption to abandon or discontinue service on any part of the Line prior to the November 19, 2008 filing of that same notice. Therefore, we are ordering Conrail to submit to us a full explanation of how and under what authority it came purportedly to transfer title to parts of the Line to NJ Transit. In addition, Conrail should explain when, under what authority, and under what circumstances it purported to discontinue service on the Line.

Finally, as the record indicates that Conrail began selling parts of the line as far back as 1996, we also hereby order Conrail to disclose to the Board all of its line or partial line sales and all of its discontinuances of service since January 1, 1996, for which no Board authority was sought and no exemption notice was filed along with an explanation of why Board authority was not sought and no exemption notice was filed.

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

It is ordered:

1. Conrail’s explanation regarding the Lehigh Valley Main Line is due on July 1, 2010.
2. Conrail’s reports regarding line sales and discontinuances are due August 16, 2010.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

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<sup>7</sup> The trial for a civil action brought pursuant to 49 U.S.C. § 11901 takes place in a U.S. District Court where venue lies. See 49 U.S.C. § 11901(f).

## **Exhibit # 2**

41009

SERVICE DATE – AUGUST 18, 2010

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35398]

**BDB Company—Acquisition Exemption—Consolidated Rail Corporation**

BDB Company (BDB), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Consolidated Rail Corporation a parcel of land, formerly known as the Swanson Rail Yard, in Philadelphia, Pa.<sup>1</sup> The property is approximately 159.54 feet wide and 2,063 feet long and is located about 25 feet east of Interstate Highway 95 between Pattison Avenue and the Delaware River Port Authority right-of-way (Walt Whitman Bridge approach/Interstate Highway 76).<sup>2</sup> The purpose of the acquisition is to develop a common carrier truck-rail transfer facility<sup>3</sup> and associated rail common carrier service.

This transaction is related to two other transactions for which notices of exemption have been simultaneously filed: Docket No. FD 35399, Swanson Rail Transfer, L.P.—Lease and Operation Exemption—BDB Company, in which Swanson Rail Transfer, L.P. (SRT) seeks Board approval to acquire the same property by lease

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<sup>1</sup> BDB seeks Board approval now for the acquisition even though the transfer took place in April 2005.

<sup>2</sup> According to BDB, there are no mileposts on this property.

<sup>3</sup> BDB states that, to the extent the facility will handle waste products, it has already been fully licensed by the State of Pennsylvania.

from affiliate BDB and to operate the property; and Docket No. FD 35400, B. Robert DeMento, Jr. and Baggio Herman DeMento—Continuance in Control Exemption—BDB Company and Swanson Rail Transfer, L.P., in which the partners/owners of BDB and SRT, B. Robert DeMento, Jr., and Baggio Herman DeMento, seek Board approval to continue in control of BDB and SRT upon Board approval of this transaction and the transaction in FD 35399.

The transaction may not be consummated until September 1, 2010 (30 days after the notice of exemption was filed).

BDB certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed \$5 million.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than August 25, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35398, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423-0001. In addition, a copy of each pleading must be served on John F. McHugh, 6 Water Street, New York, N.Y. 10004.

Board decisions and notices are available on our website at “WWW.STB.DOT.GOV.”

Decided: August 12, 2010.

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

## **Exhibit # 3**

Before The  
Surface Transportation Board

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Finance Docket No. 34963

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**JAMES RIFFIN, DBA THE RARITAN VALLEY CONNECTING RAILROAD – ACQUISITION AND OPERATION EXEMPTION – ON RARITAN VALLEY CONNECTING TRACK (Line Code 0326, Sub. No. 1038), BETWEEN THE NORTHERLY SIDELINE OF THE LEHIGH VALLEY LINE (AT FORMER DELAWARE & BOUND BROOK MP 57.25), MANVILLE BOROUGH, AND THE INTERSECTION OF THE LINE WITH THE SOUTHERLY SIDELINE OF THE FORMER RARILTAN VALLEY LINE, NOW NEW JERSEY TRANSIT'S RIARTIAN VALLEY COMMUNTER LINE, IN BRIDGEMWATER TOWNSHIP (AT FORMER DELAWARE & BOUND BROOK MP 58.50), ALL IN SOMERSET COUNTY, NEW JERSEY, A DISTANCE OF APPROXIMAGELY 1.25 MILES.**

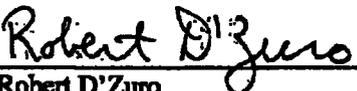
**VERIFIED STATEMENT OF ROBERT D'ZURO**

1. My name is Robert D'Zuro. I am a paralegal employed in the law department of Consolidated Rail Corporation ("Conrail"). I am giving this statement in support of a motion to stay the subject proceeding being filed this date by Norfolk Southern Corporation.
  
2. I have been employed as a paralegal by Conrail since February 28, 1995. During most of my employment with Conrail, I have been the principal paralegal assigned to assist with abandonment proceedings filed by Conrail with the Surface Transportation Board (and previously the Interstate Commerce Commission). As part of that responsibility, I maintain and update as necessary the legal files for all of the abandonments that have been filed (or considered for filing) by Conrail since its creation in 1976.
  
3. In connection with the subject Notice of Exemption, I have reviewed the abandonment files with respect to The Raritan Valley Connecting Track (the "Line"). A Notice of Insufficient Revenue was filed by Conrail with respect to the Line on or about October 31, 1985. I also located in the file a memo from Charles Mechem, Esq., a former attorney in Conrail's Law Department, dated April 17, 1986, which identified the Line as one of several for which Mr. Mechem had "not drafted or filed applications (for abandonment) for one or more of several reasons, including – (a) low priority... (b) lack of exhibits, and/or (c) lack of senior management approval." There is no application or notice of abandonment or of discontinuance of service in the file; accordingly, it appears that Conrail never filed for abandonment or discontinuance of service with respect to the Line. There is an e-mail from a Conrail property manager, dated December 2, 1988, confirming that a notice of abandonment or discontinuance of service for the Line was never filed.

**VERIFICATION**

I, Robert D'Zuro, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

Executed on November 27, 2006

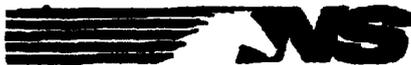
  
Robert D'Zuro

Robert D'Zuro

## **Exhibit # 4**

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Norfolk Southern Corporation  
Law Department  
Three Commercial Place  
Norfolk, Virginia 23510-9241

*James R. Paschall*  
Senior General Attorney

Writer's Direct Dial Number  
(757) 629-2759  
fax (757) 533-4872

March 14, 2006



via fax (202) 565-9004 - 3 pages  
and original and 10 copies via DHL Express

Honorable Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20006.

Re: STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway  
Company - Abandonment Exemption - In Baltimore County, MD

Dear Mr. Williams:

Norfolk Southern Railway Company ("NSR") requests that the Board accept this letter into the record in this proceeding so that NSR may correct background statements concerning the date of purchase of the subject Line by the Mass Transit Administration, an agency of the State of Maryland now known as the Maryland Transit Administration ("MTA").

On pages 6 and 7 of NSR's petition, NSR stated that Consolidated Rail Corporation ("Conrail") sold the Line to MTA pursuant to an agreement dated May 1, 1990, but did not close the transaction until April 25, 1997. This date is repeated in the opening paragraph of the historic report on page 63 and has been mentioned in correspondence. In fact, Conrail and MTA closed the transaction with respect to the entire line of railroad, and most of the related track, on May 1, 1990. Conrail reserved an exclusive freight operating easement over the Line in order to provide freight rail service over the entire Line in accordance with the terms of an operating agreement between MTA and Conrail, dated May 1, 1990. Conrail's 1990 sale of the rail assets and right-of-way specifically excluded the 1.1-mile Cockeysville Industrial Track. The Conrail-MTA April 25, 1997 supplemental agreement and deed, which NSR misinterpreted to apply to the entire Line, only dealt with the conveyance of the Cockeysville Industrial Track to MTA, not to the main line that had been sold to MTA in 1990. Conrail also retained a freight operating easement over that track.

Mr. Vernon A. Williams  
March 14, 2006  
STB No. AB-290, Sub-No. 237X  
Page 2 of 3

NSR has acknowledged in this case that Conrail and MTA did not seek ICC or STB review of the sale of the Line. Such review clearly has been required since the ICC's decision in ICC Finance Docket Nos. 31847, 31829, *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company; Maine Central Railroad Company/Springfield Terminal Railroad Company – Trackage Rights – State of Maine Department of Transportation*, 8 I.C.C. 2d 835 (1991), that clarified that such transactions should be submitted to the agency for a jurisdictional determination. Before that time, whether such review of transactions that only involved transfer of rail assets or right-of-way but left the common carrier obligation to provide freight service over a Line with the selling carrier might not have been as clearly understood. Since the sale did not unduly limit Conrail's ability to provide service over the Line, Conrail intended to continue to provide service over the Line and MTA did not intend to acquire any type of common carrier obligation to provide rail freight service over the Line, the parties might have more understandably concluded over a year before the State of Maine DOT decision that submission of the transaction for agency review was not required and the transaction and operating agreement were not subject to ICC and later STB jurisdiction. The 1997 transaction involved the sale from Conrail to MTA of an industrial lead track that also would not be subject to Board jurisdiction.

Freight operations have been conducted over the Line under the MTA-Conrail operating agreement since 1990 without impairing Conrail's and later NSR's ability to provide reasonable service over the Line. Thus, the 16-year old transaction that transferred ownership of the Line to MTA and reserved Conrail's freight operating rights, subject to the operating agreement, clearly would have left an unimpaired and exclusive common carrier freight obligation with Conrail and put the sale of the rail line assets and the operating agreement outside the agency's jurisdiction.

We apologize for our incorrect description of the sequence of events and trust that the mis-statement and its subsequent correction will not cause the Board or interested parties any undue inconvenience. NSR believes that this correction does not have a direct bearing on the decision in this case, will not unduly hinder the processing of this proceeding and that the Board taking note of it cannot, under the circumstances, prejudice any party. On the other hand, by allowing this correction, the Board will have a more accurate overall record in this proceeding.

Yours very truly,

  
James R. Paschall