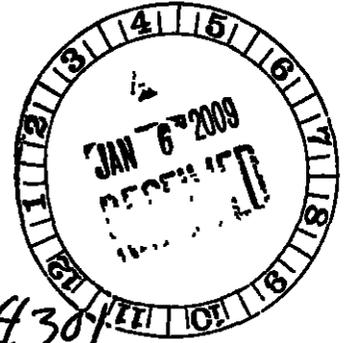


BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423



STB NO. AB 167 (SUB-NO. 1189X) 224301

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN
HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X) 224302

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON
COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X) 224303

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

ENTERED
Office of Proceedings
JAN - 7 2009
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Public Record

MOTION TO STAY EFFECTIVE DATE OF VERIFIED NOTICES OF EXEMPTION
AND TO WAIVE PRE-FILING NOTIFICATION REQUIREMENTS

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc (“CSXT”), and Norfolk Southern Railway Company (“NS”) today filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS), pursuant to 49 C F R § 1152 50(b) (out-of-service exemption), of property the Board has determined is a line of railroad requiring abandonment authority (the “Harsimus Branch”) in Jersey City, Hudson County, New Jersey *See City of Jersey City, Et Al—Pet for Dec Order, STB Fin Dkt No 34818 (served August 9 and December 17, 2007) (“2007 Decisions”)* Conrail also filed and served a Supplemental Environmental and Historic Report, pursuant to 49 C F R §§ 1105 7 and

1105.8. The purpose of this Motion is to request a stay of the effective date of the Verified Notices of Exemption and a waiver of the pre-filing notification requirements for the Supplemental Environmental and Historic Report

Applicants originally intended to file their Notices of Exemption in the above-captioned proceedings in April 2008. In anticipation of that filing, on February 7, 2008, Conrail notified all public entities listed in 49 C.F.R. §§ 1105.7 and 1105.8 of the proposed abandonment and sought their comments. On March 6, 2008, Conrail served those same entities and other interested parties with an Environmental and Historic Report

Conrail received a significant number of comments on its March 2006 Environmental and Historic Report, primarily raising historic preservation issues. In light of those comments, Conrail determined to defer filing the Verified Notices of Exemption and prepare a Supplemental Environmental and Historic Report. To aid in the preparation of that supplemental documentation, Conrail retained the services of Richard Grubb and Associates, Inc. ("RGA"), a New Jersey consulting firm that specializes in cultural resources investigations involving railroad undertakings. The Principal Investigators assigned to the project exceed the National Park Service's *Professional Qualifications Standards* for Historians, Architectural Historians, and Archaeologists. RGA developed a report that defines the Area of Potential Effects ("APE") for the undertaking and proposes a methodology for a cultural resources investigation under Section 106 of the National Historic Preservation Act ("NHPA") (hereafter, "APE Report"). Conrail and RGA consulted with both the Section of Environmental Analysis ("SEA") and the New Jersey Historic Preservation Office ("HPO") about the APE Report, which is incorporated into the Supplemental Environmental and Historic Report

Ordinarily, an abandonment Notice of Exemption under 49 C F R § 1152 50(b) becomes effective 30 days after the Board publishes the Notice of Exemption in the Federal Register 49 C F R § 1152 50(d)(3) Since the Board publishes the Notice of Exemption 20 days after it is filed, the Notice of Exemption is usually effective 50 days after it is filed *Id* In accordance with this schedule, the Board's Section of Environmental Analysis ("SEA") normally issues an Environmental Assessment ("EA") 25 days after the Notice of Exemption is filed, and parties have 15 days to comment on the EA. 49 C F R § 1105.12 This leaves very little time to address historic preservation issues Thus, if there are any historic properties potentially affected by the abandonment, the Board often imposes an open-ended historic preservation condition that requires completion of the Section 106 process of the NHPA before the abandonment can be consummated. *See, e g , Great Western Ry of Colorado, LLC—Abandonment Exemption—in Weld County, CO*, STB Docket No. AB-857 (Sub-No. 1X), 2008 WL 2271470 (served June 4, 2008) The Section 106 process can drag on for years *See, e g , Consolidated Rail Corp — Abandonment Exemption—Lancaster and Chester Counties, PA*, 4 S.T B 312, 1999 WL 608840 (served August 13, 1999)

Conrail believes that a different procedure is called for in this case As recognized in the Board's August 9, 2007 Decision in STB Finance Docket No 34818, almost all of the property underlying the Harsimus Branch right-of-way has been sold, and much of it has already been redeveloped. Slip op at 4-5 Most of the particular property underlying the right-of-way involved in the STB's decision was sold in July 2005, and its possible reuse is being held in limbo because of the STB's determination that Conrail must first obtain abandonment authority Conrail is not here contesting the Board's decision that Conrail must seek abandonment

authority¹ Nor is Conrail here claiming that because it no longer owns the property underlying the right-of-way involved in the Board's decision, the Board cannot impose historic preservation conditions on Conrail with respect to that property.² But Conrail does believe that the Board in this case can and should conduct the Section 106 process *before* it issues its EA, so that the EA can incorporate the results of the Section 106 process (including any Memorandum of Agreement that may be reached, if adverse effects are identified) and the Board can expeditiously render a final decision permitting abandonment of the right of way and disposition of the underlying property.³

To that end, Conrail requests that the Board stay the effective date of Applicants' Notice of Exemption for 180 days, to July 6, 2009, to allow time for the Board's Section of

¹ At the same time, Conrail is not conceding that the STB conclusion in its 2007 Decisions that Conrail must seek abandonment authority was correct. Conrail and 212 Marin, et al are currently appealing those Decisions to the U.S. Court of Appeals for the District of Columbia in *Consolidated Rail Corp v United States* (Nos. 07-1401, 07-1529, 08-1019, and 08-1052). A railroad may pursue abandonment before the STB at the same time it contests the STB's abandonment jurisdiction. *See, e.g., Huron and Eastern Ry Co—Aban Exemption—Sanilac County, MI*, STB Dkt. No. AB-380X (served Dec. 22, 1992), slip op. at 1.

² The Board has previously determined that it can impose historic preservation conditions only to the extent a particular property is owned by a carrier. *See Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-29 (1991). Thus, where a carrier sells off property and retains operating rights, or obtains only operating rights in the first place, the Board will not impose historic preservation conditions on the abandonment or discontinuance of service over the line. *See, e.g., Chicago and N.W. Transp. Co—Abandonment and Discontinuance of Service Exemption in Hennepin County, MN*, STB Docket No. AB-1 (Sub-No. 252X) (served Aug. 23, 1994), *Lamoille Valley R.R. Co—Abandonment and Discontinuance of Service Exemption—In Franklin and Lamoille Counties, VT*, STB Docket No. AB-444X (served Oct. 17, 1996). Nevertheless, in order to moot any claim that Conrail improperly avoided any historic preservation obligation in connection with the sale of the property at issue, Conrail is prepared to cooperate in a Section 106 review and to provide appropriate mitigation. *See Implementation of Environmental Laws*, 7 I.C.C.2d at 830.

³ As discussed in Conrail's "Comments on Pre-Filing Correspondence," Conrail does not concede that the possible impacts of "reuse" of the properties at issue here are either proximately caused by the proposed abandonment and discontinuance or reasonably foreseeable within the meaning of the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA").

Environmental Analysis (“SEA”) to conduct its environmental review and complete the Section 106 process before it issues its EA. Conrail intends that all interested parties have ample opportunity to participate in the Section 106 process. *First*, Conrail expects some parties will comment on the Supplemental Environmental and Historic Report that Conrail is filing today, including the APE Report. *Second*, Conrail expects a draft Cultural Resources Report, prepared by RGA, will be ready for circulation by January 22, 2009.⁴ Conrail proposes that the Board in late January schedule a Public Information Forum in Jersey City for late February, where Board representatives, the HPO, Conrail representatives, and RGA can receive oral input from interested parties. Conrail would also propose that the Board invite written comments on the draft Cultural Resources Report. With that oral and written input, Conrail expects that RGA can issue the final Cultural Resources Report by March 10, 2009.

Third, with the assistance of the final Cultural Resources Report and any additional comments parties have on that report, Conrail expects that SEA can issue its EA by early May, 2009. Conrail proposes that SEA give parties a full 30 days to comment on the EA.⁵ SEA can then finalize its EA as needed to enable the Board to issue a final decision before the effective date of the abandonment on July 6, 2009.

In light of (1) the fact that public agencies and interested parties were earlier in 2008 provided with substantial advance notice of the proposed abandonment, (2) the extensive opportunity that public agencies and interested parties will have to comment on the proposed

⁴ The draft Cultural Resources Report will include a proposed Memorandum of Agreement (“MOA”) among consulting parties concerning the mitigation for any historical preservation effects. Conrail will actively participate with the Board and the HPO in attempting to reach agreement on an MOA.

⁵ Normally, parties have only 15 days to comment on an EA in an abandonment exemption proceeding under 49 C.F.R. § 1152.50. See 49 C.F.R. § 1105.10(b).

abandonment over a six-month period under Conrail's proposed schedule, and (3) the consultation that has already taken place with the HPO regarding the APE Report and proposed methodology for the Cultural Resources Report. Applicants request that the Board waive the pre-filing notification requirements of 49 C F R. §§ 1105 7 and 1105 8 with respect to the Supplemental Environmental and Historic Report. By any measure, public agencies and interested parties will receive far more notice and opportunity to comment before issuance of the EA in this case than parties receive under the usual 50-day time frame for Notices of Exemption under the Board's rules.

Accordingly, for the foregoing reasons, Applicants request that the Board stay the effective date of the Notice of Exemption for 180 days from Applicants' filing (i.e., until July 6, 2009) and waive the pre-filing notification requirements of 49 C F.R. §§ 1105 7 and 1105 8.

Respectfully submitted,

John K. Enright
Associate General Counsel
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103
(215) 209-5012

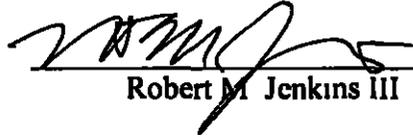


Robert M. Jenkins III
Kathryn Kusske Floyd
MAYER BROWN LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3261

Dated January 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2009, I caused a copy of the foregoing "Motion to Stay Effective Date of Verified Notices of Exemption and to Waive Pre-Filing Notification Requirements" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List.



Robert M. Jenkins III

SERVICE LIST

**Charles H. Montagne (By Overnight Mail)
426 NW 162nd Street
Seattle, Washington 98177**

**Stephen D. Marks, Director
Hudson County Planning Division
Justice Brennan Court House
583 Newark Avenue
Jersey City, NJ 07306**

**Bradley M Campbell, Commissioner
State Historic Preservation Office
NJ Department of Environmental Protection
401 East State Street
P O Box 404
Trenton, NJ 08625-0404**

**Mayor Jerramiah T Healy
City Hall
280 Grove Street
Jersey City, NJ 07302**

**Michael D Selender
Vice President
Jersey City Landmarks Conservancy
P O Box 68
Jersey City, NJ 07303-0068**

**Ron Emrich
Executive Director
Preservation New Jersey
30 S Warren Street
Trenton, NJ 08608**

**Valerio Luccio
Civic JC
P O Box 248
Jersey City, NJ 07303-0248**

**Eric Fleming
President
Harsimus Cove Association
P O Box 101
Jersey City, NJ 07302**

Jennifer Greely
President
Hamilton Park Neighborhood Association
22 West Hamilton Place
Jersey City, NJ 07302

Jill Edelman
President
Powerhouse Arts District Neighborhood Assoc
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Dan Webber
Vice-President
Van Vorst Park Association
289 Varick Street
Jersey City, NJ 07302

Gretchen Scheiman
President
Historic Paulus Hook Association
121 Grand Street
Jersey City, NJ 07302

Robert Vivien
President
Newport Neighborhood Association
40 Newport Parkway #604
Jersey City, NJ 07310

Dolores P Newman
NJ Committee for the East Coast Greenway
P O Box 10505
New Brunswick, NJ 08906

Gregory A Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin
President
Friends of Liberty State Park
75-135 Liberty Avenue
Jersey City, NJ 07306

Daniel D Saunders
Deputy State Historic Preservation Officer
State Historic Preservation Office
NJ Department of Environmental Protection
P O Box 404
Trenton, NJ 08625-0404

Fritz Kahn
1920 N Street, NW
8th Floor
Washington, DC 20036-1601

Daniel H Frohwirth
Jersey City Landmarks Conservancy
30 Montgomery Street
Suite 820
Jersey City, NJ 07302