

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

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

224798

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

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

224799

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

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

NOTICES OF EXEMPTION

224800

REPLY TO EMBANKMENT PRESERVATION COALITION'S LETTER TO
SECRETARY QUINLAN

Consolidated Rail Corporation ("Conrail") hereby replies to the March 27, 2009 letter from Maureen Crowley, Coordinator, Embankment Preservation Coalition (hereinafter "EPC"), to Secretary Quinlan. In the letter, EPC asserts that Conrail's Notice of Abandonment Exemption was defective, because Conrail published it in *The Star Ledger*, rather than *The Jersey Journal*. EPC also requests an extension of time for submissions relating to requests for reconsideration, public use, conditions, trail use, and for environmental comments.

EPC's challenge to Conrail's notice is misguided, and its request for an extension of time should be denied.

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1. Conrails' Notice of Abandonment Exception Was Not Defective

Conrail filed its Notice of Abandonment Exception in *The Star-Ledger*, a large circulation newspaper in the State of New Jersey. EPC asserts that Conrail rather should have filed that notice in *The Jersey Journal*, a newspaper owned by the parent company of *The Star Ledger* that, according to EPC, provides local coverage for Hudson County. EPC asserts that "Hudson County residents typically do not look in general circulating newspapers like *The New York Times*, *Wall Street Journal*, or *Star Ledger* for legal notices pertaining to Hudson County

Under 49 C.F.R. § 1015.12, Conrail's notice could be defective only if *The Star Ledger* is not "a newspaper of general circulation" (49 C.F.R. § 1105.12) in Hudson County. EPC, however, does not provide any basis for reaching such a conclusion. EPC does not contend that *The Star Ledger* is not readily available on newsstands on Hudson County, that it does not have subscribers there, or that it otherwise does not circulate generally in the county. Rather, EPC merely asserts that *The Jersey Journal* "is the main newspaper covering Hudson County." Letter at 1. But, to our knowledge, there are no STB regulations or case law stating that a county may have only one "newspaper of general circulation" or that notices must be published in the county's "main newspaper" (EPC Letter at 1).

Moreover, any allegation that *The Star Ledger* is not a newspaper of general circulation in Hudson County would come as a surprise to the Sheriff of Hudson County, whose office publishes notices of properties to be sold at auction in *The Star Ledger* (as well as *The Jersey Journal*). See <http://www.hudsonsheriff.com/sales.html>

Finally, EPC's assertions about the reading habits of Hudson County residents is mere *ipse dixit*. EPC has not presented a single affidavit or declaration from a Hudson County resident stating both that the resident is regular reader of legal notices pertaining to properties in

the county and that the reader seeks out such notices solely in *The Jersey Journal*, and not in *The Star Ledger*.¹ Even if EPC were to find an affiant or declarant to provide such information, however, it would be insufficient to establish that Conrail's notice was defective, because 49 C.F.R. § 1105.12 merely requires publication in a "newspaper of general circulation," not publication in the newspaper with the biggest circulation or the newspaper where county residents are most likely to look for legal notices.

For the foregoing reasons, EPC's attack on Conrail's notice is utterly without merit.

2. EPC's Request for an Extension of Time Should Be Denied.

EPC seeks a thirty-day extension "for our organization and the public to respond appropriately to upcoming deadlines for requests for reconsideration, public use, conditions, trail use, and for environmental conditions." EPC Letter at 1. EPC "especially" requests this extension of time "to reply to the Section of Environmental Analysis's Environmental Assessment (EA), before the abandonment exemption is in effect." *Id.* at 2. In support of this request, EPC refers to the absence of its counsel from the country "since March 12" (*id.* at 1) and asserts that many of EPC's supporters, as well as other organizations "are interested in the preservation of this National-Register-eligible historic, cultural, environmental, and transportation asset" (*id.* at 2).² According to EPC, "[w]e expect many will want to comment

¹ It bears emphasizing as well that the Notices of Exemption in the above-captioned proceedings were served on a comprehensive service list of parties, including the EPC and every other party that has filed comments of any kind in these widely publicized proceedings. There is thus little doubt that interested parties received actual notice.

² The specific "asset" to which EPC is referring is unclear. Based on the name of the organization and its past activity (as described, for instance, in the EA, *see, e.g.*, EA at 6, 14), as well as the fact that the line of railroad that is sought to be abandoned in this proceeding has been out of service for decades, it can fairly be inferred that EPC is primarily concerned with historic preservation issues relating to the Harisimus Embankment.

We need time to inform members that they are able to submit comments and how they may do so. They, in turn, need time to read the EA and formulate their responses.” *Id.* at 2

The EPC’s request is not justified. For one thing, the absence of EPC’s attorney fails to justify EPC’s request. EPC has not explained why EPC, its supporters, and its allies cannot communicate with each other and review the relatively short and extremely straightforward EA within the time frames set by the Board’s regulations. Even if they need their attorney to draft and file comments on the EA, his return on April 1, 2009 would not hinder their filing of comments in accordance with the Board’s established deadlines, and certainly would not justify a 30-day extension of time for the preparation of such comments.³

EPC’s assertions about the desire of many interested parties to comment on the EA and the need to inform those parties about the EA also fail to justify an extension of time. Such circumstances arise in many abandonment cases. If they justify an extension of time here, then the time frames for exempt abandonments and discontinuances of service established in 49 C.F.R. § 1152.50 would be overridden in virtually every case in which many groups and individuals claim an interest in an abandonment.

Finally, it bears noting that EPC’s extension request appears to be premised on a fundamental misunderstanding of the procedures that SEA has proposed to govern this case. As noted above (*supra* at note 1), the EPC and other organizations in this proceeding have focused principally on historical preservation issues with regard to the embankments. *See, e.g.*, EA at 14 (“SEA received numerous comments on the proposed abandonment and discontinuance raising issues and concerns which primarily focused on the Board’s responsibilities under Section 106 of

³ We note that the Coalition’s counsel, Charles Montange, is also counsel for the City of Jersey City, and he managed on March 27, 2009, to file a Notice of Intent to File an Offer of Financial Assistance on behalf of the City.

the NHPA and alternative reuse of the right-of-way.”); *see also* EA at 6 (stating that “several parties submitted comments raising historic preservation issues and asserting that the reports [submitted by Conrail] should address possible reuse of the Harsimus Embankment ”)

As the EA repeatedly makes clear, however, there is no basis for concern that parties interested in the historic preservation issues will not have the opportunity to weigh in on them. As the SEA explained, the historic review process will be ongoing, and the Board can impose a condition prohibiting Conrail from consummating the abandonment until it is completed. *See* EA at 3, 4, 13-14, 15-16. Indeed, SEA responded to the precise concerns raised in EPC’s letter at length (and repeatedly in the EA)

Where the historic review process is ongoing, the Board generally imposes a condition prohibiting the railroad from selling the line, altering any sites or structures on the line, or conducting salvage activities on the line until the historic review is complete and the Board removes the condition. This preserves the status quo pending completion of the historic review process, because abandonment may not be consummated, and potentially historic property may not be disturbed until Section 106 is satisfied and the historic review condition has been removed.

EA at 3 (footnote omitted)

In short, the historic review process *is just beginning*. And with the imposition by the Board of SEA’s recommended historic preservation condition, *the status quo will be retained* until the conclusion of the Section 106 process because Conrail will be unable to consummate this proposed abandonment until that process is complete.

Id. at 13-14 (emphasis added)

In a letter of January 26, 2009, the SHPO expressed concern about the short time frames established in the class exemption for out-of-service rail lines, stating that the time frames would prevent the full completion of the NHPA process. The SHPO also raised concerns that if Conrail continues to pursue sale and demolition, the project will result in an adverse effect on the historic embankment.

However, as explained above, the Section 106 is *ongoing*. Our recommended condition would require that Conrail retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project right-of-way that are eligible for listing or listed in the National Register *until the Section 106 process of NHPA is completed*. Moreover, our recommended condition specifically provides that Conrail may not consummate this abandonment until the Section 106 is completed, and the Board has removed the Section 106 condition. Therefore, Conrail's decision to seek abandonment authority under the streamlined class exemption process does not mean that the Section 106 process will not be completed. *Rather, SEA's recommended condition assures that the status quo will be maintained until Section 106 is satisfied and the historic condition is removed*.

Id. at 15 (emphasis added; footnote omitted)

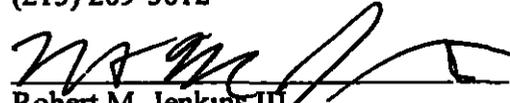
Thus, the concerns that appear to underlie EPC's request for an extension of time appear to be entirely misplaced. SEA's recommended historic preservation condition – which Conrail *does not oppose* – would allow for a fully deliberative consideration of the historic preservation concerns voiced by EPC and its allies (and a full opportunity for EPC and its allies to participate in the process of studying and addressing historic preservation issues) while allowing for the expeditious resolution of other issues in this proceeding in accordance with the time frames established in the STB's regulations. For the foregoing reasons, EPC's request for an extension of time should be denied.

CONCLUSION

Conrail's publication of its notice in *The Star Ledger* fully satisfied 49 C F R § 1105.12. In addition, EPC's request for an extension of time is not justified. Accordingly, both of the requests set forth in EPC's letter of March 27, 2009 should be denied.

Respectfully submitted,

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Dated: April 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2009, I caused a copy of the foregoing "Reply to Embankment Preservation Coalition's Letter to Secretary Quinlan" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List


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