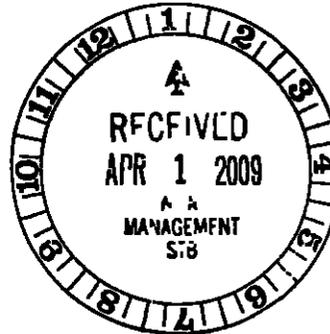


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April 1, 2009

BY HAND DELIVERY

Anne K Quinlan
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re Docket No AB 167 (Sub-No 1189X)
Consolidated Rail Corporation Abandonment
Exemption -- in Hudson County, New Jersey

224801

Docket No AB 55 (Sub-No 686X)
CSX Transportation, Inc —Discontinuance
Exemption—in Hudson County, New Jersey

224802

Docket No AB 290 (Sub-No 306X)
Norfolk Southern Railway Company--
Discontinuance Exemption—in Hudson
County, New Jersey

22483

Dear Secretary Quinlan

Enclosed for filing with the Board are the original and ten copies each of Consolidated Rail Corporation's "Reply to Notices of Intent to File an Offer of Financial Assistance" and "Reply to Embankment Preservation Coalition's Letter to Secretary Quinlan" Please date-stamp the enclosed extra copies and return them to our representative

Sincerely yours,

Robert M. Jenkins III
Robert M Jenkins III

RMJ/bs

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

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

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

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

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

NOTICES OF EXEMPTION

**REPLY TO NOTICES OF INTENT
TO FILE AN OFFER OF FINANCIAL ASSISTANCE**

Introduction

Consolidated Rail Corporation (“Conrail”) replies here to the Notices of Intent to File an Offer of Financial Assistance filed by the City of Jersey City (“City OFA Notice”) and CNJ Rail Corporation (“CNJ OFA Notice”) on March 27, 2009. The Board should reject both Notices. The OFA process is designed for the purpose of continuing to provide freight rail service. It is well settled that the Board will not entertain an OFA request if the Board finds either (1) that the OFA proponent has no genuine interest in providing freight rail service or (2) that there is no realistic likelihood of such traffic over the line to be abandoned. See, e.g., *Union Pacific*

Railroad Co - Abandonment and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA, STB Docket No AB-33 (Sub-265X), 2008 WL 1968728 (STB served May 7, 2008) (“Los Angeles County”)

In this case, the City demonstrably has no genuine interest in providing freight rail service over the rail line at issue (the “Harsimus Branch”) The City has worked assiduously, and successfully, to rid the vicinity of any and all industrial operations and replace them with residential developments, retail stores, office buildings, hotels, and other high-end developments See *City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Louis M Manzo—Pet for Dec Order*, STB Finance Docket No 34818, slip op at 4-5 (STB served Aug 9, 2007) (“2007 Decision”) At no point has the City ever suggested an interest in reviving freight rail service in the area that it has worked so hard to transform

CNJ also has no credible interest in reviving freight rail service on the Harsimus Branch CNJ owns no rail assets and conducts no rail operations *Maryland Transit Admin —Pet for Dec Order*, STB Fin Dkt No 34975, 2008 WL 4281987, *1 n 3 (served Sept 19, 2008) (“MTA”) CNJ simply cannot demonstrate that it has the “financial responsibility” required to sustain an OFA request See 49 C F R § 1152.27(c)(1)(B)

In any event, even if the City or CNJ were genuinely interested in freight rail service, there are no shippers, and there have been none for close to two decades *Id.* at 5 Further, providing freight rail service over the right-of-way would be a physical and financial impossibility No rail infrastructure remains, even on the part of the old right-of-way that is not already covered by commercial development *Id.* at 4-5 In other words, there is no likelihood

whatsoever of any freight rail service over the line¹ Accordingly, the City's and CNJ's OFA Notices should be rejected

Background

The history of the Harsimus Branch and these proceedings is covered at some length in the Board's 2007 Decision in Docket No 34818 and in the Environmental Assessment ("EA") served by the Section of Environmental Analysis ("SEA") on March 23, 2009, in the above-captioned proceedings² Thus, we need only briefly describe here the background of the City's and CNJ's OFA Notices

The old Harsimus Branch right-of-way extended approximately a mile and a half from Waldo Avenue in Jersey City to the Hudson River waterfront Even before Conrail acquired the property in 1976, the City had begun redevelopment efforts intended to replace the few remaining industrial operations in the area with high-end commercial developments 2007 Decision at 4 One significant parcel at the east end of the right-of-way on the Hudson River was sold even before Conrail acquired the rest of the right-of-way Thus, when Conrail later listed the track it had acquired that it regarded as spur track, Conrail listed the Harsimus Branch as running from Milepost 0 00 (Waldo Avenue) to Milepost 1 36 (Washington Street) VS Ryan at 13-14 This included six elevated "embankment" segments ("Embankment") between Milepost 0 36 (Brunswick Avenue) and Milepost 0 88 (Marin Boulevard)

¹ In response to Conrail's notification of its intention to file for abandonment of the Harsimus Branch, the New Jersey Department of Transportation advised Conrail by letter dated March 13, 2008, that it has "no interest in this transaction as it pertains to rail freight services" See Appendix C to the Verified Notices of Exemption filed in the above-captioned proceedings on February 26, 2009

² Further detail and supporting exhibits can be found in the Verified Statement of Conrail Witness Robert W Ryan, filed April 24, 2006, in Docket No 34818 (hereafter "VS Ryan")

Conrail cooperated with the City's efforts to redevelop the area. The City aggressively argued to Conrail that "the time of the freight rail service on this line [i.e., the Harsimus Branch] has passed" and urged Conrail to end rail service and remove the Embankment. VS Ryan at 11-12, Exh. G & H, 2007 Decision at 5, EA at 5. By the early 1990s, the few remaining rail shippers had left the area, and Conrail had sold all of the rail line east of Marin Boulevard (Milepost 0 88) to private developers or to the Jersey City Redevelopment Agency. EA at 5. In 1994, Conrail permitted the City and a private developer, National Bulk Carriers, to remove the railroad bridge at Marin Boulevard and, subsequently, at the urging of the City, Conrail removed the remaining bridges connecting the Embankment segments and the other bridges, track, and track structure between Waldo Avenue and Marin Boulevard. 2007 Decision at 5, VS Ryan at 12-14, Exh. J.

Conrail offered to sell what remained of the Embankment to the City, and both the City and the Jersey City Redevelopment Agency devoted considerable time and effort to redevelopment plans. 2007 Decision at 5, VS Ryan at 14, Exh. L-K. However, the City lost interest in pursuing its own redevelopment plans when the six Embankment parcels were placed on the New Jersey State Register of Historic Places in late 1999. EA at 5, VS Ryan at 14-15, Exhs. N-Q.

Unable to interest the City in acquiring the property, Conrail in 2003 put the six Embankment parcels (between Milepost 0 36 and 0 88) and the two at-grade parcels (between Milepost 0 18 and 0 36) out for bids. While the properties were out for bids, the City designated the six Embankment parcels as an Historic Landmark under the City's local historic preservation laws. Conrail notified all bidders of the City's action and advised them that development of the

property would be contingent on their compliance with the City's historic preservation laws VS Ryan at 15-16.

SLH Properties was the only bidder that met Conrail's minimum bid requirements SLH formed eight limited liability companies to acquire the eight parcels The sale to the LLCs closed in July 2005 EA at 5-6 This left Conrail with ownership of just a 0.18-mile segment of the old right-of-way east of Waldo Avenue

After the sale to the LLCs had closed, the City claimed that authority was required from the Board for abandonment of the Harsimus Branch right-of-way between Waldo Avenue (Milepost 0.00) and Marin Boulevard (Milepost 0.88) The City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, the Rails to Trails Conservancy, and New Jersey State Assemblyman Luis M. Manzo ("City Parties") filed a petition for declaratory order that ultimately resulted in the Board's 2007 Decision in Docket No. 34818 holding that abandonment authority was required for the right-of-way.³

In early 2008, Conrail, CSX Transportation, Inc. ("CSXT"), and Norfolk Southern Railway Company ("NS") initiated abandonment and discontinuance proceedings before the Board, but Conrail's initial filings met with considerable opposition from the City and others, primarily on historic preservation grounds Accordingly, Conrail retained Richard Grubb and Associates, Inc. ("RGA"), a consulting firm that specializes in historic preservation analysis, to provide more information on the Embankment and surrounding area EA at 6 RGA prepared a detailed "Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation" ("APE Report"), and Conrail invited SEA and the New Jersey State Historic

³ Conrail and the LLCs appealed the STB's August 9, 2007 Decision, as well as a Board decision served December 19, 2007 denying the LLCs' petition for reconsideration, to the United States Court of Appeals for the District of Columbia Circuit That appeal is pending

Preservation Officer (“SHPO”) to review the APE Report and visit the site with Conrail and RGA. By letter dated December 23, 2008, the SHPO concurred with the definition of the Area of Potential Effects in RGA’s report. EA at 6.

On January 6, 2009, Conrail, CSXT, and NS filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS). In order to provide time for the Board to address historic preservation issues before the Notices of Exemption in the above-captioned cases became effective, Conrail contemporaneously filed a motion to stay the effective date of the Notices for 180 days and to waive certain pre-filing notification requirements. The City Parties opposed Conrail’s motion, and in a decision served January 26, 2009 (“January 26 Decision”), the Board rejected Conrail’s motion and dismissed the Notices of Exemption without prejudice to Conrail’s re-filing under the Board’s normal exemption procedures set forth in 49 C.F.R. § 1152.50.

On February 26, 2009, Conrail refiled the Notices of Exemption under the normal procedures. As called for under those procedures, on March 18 the Board published notice of the proceeding in the Federal Register, and on March 23 SEA issued its EA.

On March 27, the City and CNJ served their OFA Notice, pursuant to 49 C.F.R. § 1152.27(c). In its Notice, the City seeks detailed information regarding the physical condition, net liquidation value, and sales value of the entire line and three “segments” thereof – as well as all sales contracts, appraisals, and documents indicating marketable title in respect to the line and any portions thereof. City OFA Notice at 2-3. In its Notice, CNJ seeks the same information, and also a plethora of information about traffic on the line, speed limits, interchange arrangement, and other operating data. CNJ OFA Notice at 2-4.

Argument

The Board and the courts have made clear that the purpose of the OFA process authorized by 49 U.S.C. § 10904 and implemented by the Board's procedures at 49 C.F.R. § 1152.27 is to provide a means for continuing freight rail service. See *Redmond-Issaquah R.R. Preservation Ass'n v. STB*, 223 F.3d 1057, 1061 (9th Cir. 2000) ("*Redmond-Issaquah*"), *Los Angeles County*, 2008 WL 1968728 (STB served May 7, 2008). Thus, the Board need not entertain an OFA proposal if it determines that the proponent of that proposal has no genuine interest in continuing or resurrecting rail freight service. See *The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—In King County, WA—In the Matter of an Offer of Financial Assistance*, STB Docket No. AB-6 (Sub-No. 380X), 3 S.T.B. 634, 641-42, 1998 WL 452837, *5-6 (1998) ("*King County*"), *aff'd Redmond-Issaquah*, 223 F.3d at 1060-63. Nor need the Board entertain an OFA proposal if it determines that there is no realistic chance of sufficient future traffic to support a freight rail operation. See *Roaring Fork Railroad Holding Authority—Abandonment Exemption—In Garfield, Eagle, and Pitkin Counties, CO*, STB Docket No. AB-547X, 4 S.T.B. 116, 119-20, 1999 WL 323347, *2-3 (STB served May 21, 1999) ("*Roaring Fork*"), *aff'd sub nom Kulmer v. STB*, 236 F.3d 1255, 1256-58 (10th Cir. 2001) ("*Kulmer*").

The Board should reject the City's and CNJ's OFA Notices both (1) because there is no evidence that the City or CNJ has any interest in starting up a freight rail service on the Harsimus Branch, and (2) because there is no evidence that there is sufficient shipper demand for freight rail service to support a viable freight rail operation.

1 The City has *no* interest in starting up a freight rail operation on the Harsimus Branch. For years, the City hounded Conrail to terminate its freight operations on the Harsimus

Branch and work with the City to sell off the property to private developers or the Jersey City Redevelopment Authority for high-end commercial development. The City's efforts have succeeded. No trace of the Harsimus Branch remains east of Marin Boulevard (Milepost 0.88). Indeed, just east of Marin Boulevard, a Bed, Bath & Beyond store sits on the old right of way, and hotels, condominiums, and office buildings occupy other parcels that are part of the old right-of-way.

The designation of the Embankment as an historic property under state law in 1999 made it difficult for the City to redevelop that part of the Harsimus Branch as it had intended, and in 2003 the City designated the Embankment as an historic landmark under municipal law. Since then, the City and other parties have proposed a variety of possible uses for the Embankment—including use as a park and/or trail and light public transit—but *no one* has suggested that the Embankment should be used again for freight rail service. The City and other parties have filed dozens of pleadings in Docket No. 34818 and in the above-captioned proceedings, and *none* has suggested that *anyone* wishes to see freight rail service operating on the Embankment.

CNJ has not heretofore participated in this proceeding, but its motives in filing its OFA Notice are equally suspect. CNJ is not an operating company. According to a report from the New Jersey State Business Gateway Service, which is attached, CNJ has been "DISSOLVED WITHOUT ASSETS."⁴ The Board recently confirmed that CNJ, despite calling itself CNJ Rail Corporation, does not own any rail assets or conduct any rail operations. *MTA*, 2008 WL 428198, *1 n.3. CNJ asserts that its "has, or within a reasonable time will have, the financial resources to fulfill all of its proposed contractual obligations," CNJ OFA at 2, but there is not a shred of evidence in this proceeding, any other proceeding, or any official business record to

⁴ A search of Dun & Bradstreet yields no information at all for CNJ Rail Corporation.

support that assertion CNJ's obvious lack of financial responsibility alone is ample grounds for dismissing its OFA Notice See, e g , *Norfolk Southern Ry Co —Abandonment Exemption—In Somerset County, PA*, STB Dkt No AB-290 (Sub-No 305X), 2009 WL 217275 (dismissing OFA because proponent's statement of financial responsibility was "unsupported by concrete financial evidence such as income statements, balance sheets, letters of credit, or other financial statements")⁵

It bears emphasizing as well that the Board has an interest in avoiding abuse of its OFA process CNJ's OFA Notice here is a cookie-cutter request for information that displays complete ignorance of the circumstances of the Harsimus Branch, and would impose serious information burdens on Conrail for no legitimate purpose The Board does not permit parties to misuse the OFA process. See *Norfolk Southern Ry Co —Abandonment Exemption—in Norfolk and Virginia Beach, VA*, STB Docket No AB-290 (Sub No 293X), 2007 WL 3277033, at *7 (served Nov 6, 2007) Accordingly, CNJ's OFA Notice should be rejected

The City too appears to have no legitimate reason for having filed an OFA request Further delay appears to be its only motive Like the association of property owners in "*King County*," it appears that the City wishes to use the OFA process to frustrate the legitimate workings of the abandonment process As the Board pointed out in *King County*, it is certainly relevant to the Board's inquiry to consider whether a party filing an OFA Notice has an ulterior motive 1998 WL 452837, at *5 Such a motive may not be dispositive if the Board can otherwise find that the OFA proponent actually intends to provide freight rail service Id But

⁵ As a governmental entity, the City is deemed to be a financially responsible party under 49 C F R § 1152.27(c)(1)(ii)(B) However, that does not relieve the City of the obligation to show that it genuinely intends to provide freight service and that freight service is likely to be viable See *Redmond-Issaquah*, 223 F 3d at 1061-63 (STB properly rejected OFA proponent's argument that it need only show financial responsibility)

no such finding is possible here. The City has made crystal clear that its only intention is to use every device it can to slow down and burden the legitimate abandonment exemption process. Accordingly, the City's OFA Notice should be rejected.

2 Even if the City or CNJ could demonstrate that it had a serious interest in attempting to resurrect freight rail service on the Harsimus Branch, the OFA Notices would have to be rejected. In the first place, freight rail service requires shippers. There are none, and there have been none for close to two decades. In the intervening period, the area has been completely transformed. Even in the cases like *King County* and *Roaring Fork* where the Board has found that there was insufficient evidence of firm shipper commitments to conclude that a freight rail operation could be viable, there was *some* indication from actual shippers in the vicinity that they were actually interested in freight service. *King County*, 3 S T B. at 634, 641-42, 1998 WL 452837, *1, 5-6, *Roaring Fork*, 4 S T B at 120, 1999 WL 323347, at *3. Here, there is no recent rail activity, there are no shippers in the area, and there is no evidence that there will be shippers in the area. In fact, all of the evidence is to the contrary.

Second, freight rail service requires freight rail infrastructure. There is none on the Harsimus Branch. In fact, much of the Harsimus Branch is covered over with other commercial development that is completely incompatible with the resurrection of freight rail infrastructure east of Marin Boulevard. Moreover, even if it were credible that the City might attempt to reintroduce freight rail service on the Embankment, the cost of rebuilding all of the bridges, viaducts, abutments, and other infrastructure required for freight rail service would be exorbitant. In cases like *King County*, *Roaring Fork*, and *Los Angeles County*, the Board found it was unlikely that freight rail service would be provided even though there was already rail

infrastructure in place⁶ Here, it is even less credible that sufficient rail freight business could be found to justify the kind of expenditure that would be necessary to resurrect rail freight business on the Embankment⁷

Conclusion

The purpose of an OFA proceeding is to continue freight rail service over a line. The City has no intention and CNJ has neither the intention nor the financial capacity to provide freight rail service on the Harsimus Branch. Moreover, even if they did have the requisite intent and ability, there are no shippers on the line and no infrastructure to support freight service. Accordingly, the Board should dismiss the City's and CNJ's OFA Notices.

Respectfully submitted,

John K. Enright
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⁶ In *King County* the Board noted that the substantial cost of rehabilitating the line to make it operable for freight rail traffic was yet another reason why the Board doubted the OFA proponent's contention that it would be financially feasible to lure freight rail traffic back to the line at issue there. 3 S T B at 643, 1998 WL 452837 at *7

⁷ The City cannot argue that it could be possible that light rail service could be provided over the Embankment and that freight service could be financially viable in conjunction with light transit rail service. In the first place, the idea of providing light rail transit service over the Embankment is completely speculative. No demonstration has been made that such service is feasible and no money has been authorized or appropriated. In the second place, even if light transit rail service were feasible, that still would not suggest that there was any demand for freight rail service on the line or that freight rail service could co-exist with light rail transit service. Cf. *Trinidad Ry. Inc.—Abandonment Exemption—In Las Animas County, CO*, STB Docket No. AB-573X, 2001 WL 903456, *5 (STB served Aug. 13, 2001) (observing that OFA proponent had demonstrated that an "aggressive marketing effort" and real prospects for coal and crushed rock shipments could support a joint freight and tourist passenger rail operation).

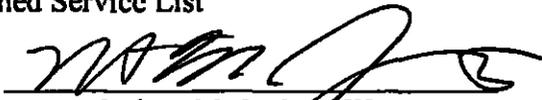


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Dated April 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2009, I caused a copy of the foregoing "Reply to Notices of Intent to File an Offer of Financial Assistance" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List


Robert M. Jenkins III



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Status Report For: CNJ RAIL CORPORATION	
Business Name: CNJ RAIL CORPORATION	Report Date: 03/30/2009
Business ID Number: 0400068070	Transaction Number: Sequence: 1465325-1
Business Type: DOMESTIC PROFIT CORPORATION	
Status: DISSOLVED WITHOUT ASSETS	
Filing Date: 09/13/2004	Home Jurisdiction: NJ
Status Change Date: 01/19/2007	Stock Amount: 1000000
DOR Suspension Start Date:	DOR Suspension End Date:
Tax Suspension Start Date:	Tax Suspension End Date:
Annual Report Month: 9	
Last Annual Report Filed:	
For Last Annual Report Paid Year:	
Incorporator: ERIC S. STROHMEYER	
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Principal Business Address	
Associated Names	
Name	Type Description

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