

CNJ Rail Corporation

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April 24, 2009

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-000 1

Re: Consolidated Rail Corporation - Abandonment Exemption - In Hudson County, NJ
Docket # AB 167 (Sub 1190) X

Dear Acting Secretary Quinlan:

Please find herein transmitted CNJ's Reply to Conrail's April 2 motion, and a Motion for Leave to Late File said reply. The exhibits attached to the Reply are being transmitted to the Board via overnight courier. The exhibits could not be reproduced for electronic filing.

Should you have any further questions, please feel free to call me at the phone number provided herein.

Thank you for your assistance.

Submitted on behalf of CNJ Rail Corporation

Sincerely,

Eric S. Strohmeyer /s/

Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation
(908) 361 - 2435

CC: John K. Enright, Esq. - Consolidated Rail Corporation

BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD

DOCKET# AB 167 (SUB 1190) X
CONSOLIDATED RAIL CORPORATION
ABANDONMENT EXEMPTION
IN HUDSON COUNTY, NJ

MOTION FOR LEAVE TO LATE FILE REPLY

CNJ Rail Corporation hereby respectfully files its motion for leave to late file its reply to Conrail's April 2, 2009 motion requesting the Board terminate the OFA process. Normally, responses to pleadings are due twenty days after they are filed. However, from time to time, and for good cause shown, the Board has permitted parties in a proceeding to file a pleading beyond the time prescribed by the Board's regulations. Pleadings filed out of time are not entered into the record without the Board's expressed permission. For the reasons set forth below, CNJ respectfully requests the Board's permission to late file its reply in the above captioned proceeding.

History

On April 2, 2009, Conrail, in the above captioned proceeding, filed yet another request for the Board to terminate the OFA process which has begun in that proceeding. Reply's to Conrail's motion were due on April 22, 2009.. On the afternoon of April 22, just prior to serving Conrail and E-filing its response to Conrail's pleading to the Board, CNJ received, via overnight courier, a copy of a separate pleading filed by the City of Jersey City, NJ, dated April, 21st, 2009. The pleading was a response to a Conrail pleading in another Conrail Abandonment proceeding currently before the Board (See AB 167 1189 - Abandonment Exemption - In Hudson County, NJ). Included in the City's pleading was a verified statement from the Mayor of Jersey City, NJ.

In the mayor's verified statement, the mayor spoke to issues related to, but not limited to, the pleading to which his statement was addressing (Docket AB 167 1189), herein after referred

to as the Harsimus Branch, but he also addressed issues materially germane to the above captioned proceeding (AB 167 1190) herein after referred to as the Lehigh Line.

Since this was the first time public officials had spoken directly to issues involved in AB 167 1190 (Lehigh Line), and because the verified statement contained items directly related to information the Director of Proceedings asked any OFA offeror to address in an actual OFA, and because these statements could material impact a Board decision in this case, CNJ filed a request for an extension of time in order to amend its pleading and address the mayor's comments in the reply that was due.

CNJ had no way of making changes to its reply in sufficient time to address the issues raised by the city. Nor did CNJ have any advanced knowledge of the contents of the mayor's verified statement.

Conrail, in its response of April 23rd to CNJ's request for a brief extension of time to file its reply, argued:

1. That CNJ simply missed the deadline.
2. That a verified statement made by the Mayor of Jersey City, made in a separate proceeding, had no relevance to this proceeding.
3. That the simple request was nothing more than a delay tactic designed to abuse the Board's processes.
4. CNJ could have filed its response and then choose to supplement the record with another pleading.

ARGUMENT

Contrary to the representations made by Conrail in its response, CNJ was fully prepared to have filed its pleading on April 22, 2009. On the afternoon of the 22nd, CNJ Rail received its copy of Jersey City's reply, filed with the Board on April 21st, 2009 in Conrail's other abandonment proceeding in Hudson County, NJ currently before the Board. In that pleading was a verified statement from the Mayor of Jersey City, the Honorable Jeremiah T. Healy. After reviewing the pleading briefly, it became quite apparent that our pleading we had prepared would be significantly affected by the mayor's verified statement.

Conrail's argument that the verified statement is irrelevant to this proceeding is absolutely absurd. One only needs to review the Director of Proceedings' January 7th decision, which stayed this proceeding and tolled the time for filing an OFA, to understand the importance of the mayor's statement. In part, the Director clearly stated:

“Any person who intends to file an OFA should address one or more of the following: whether there is a demonstrable commercial *need for rail service*, as

manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; ***whether there is community support for rail service***; and ***whether rail service is operationally feasible***.” (Emphasis added)

It is the last two issues, highlighted above, that the Director’s decision addressed which clearly are impacted by the mayor’s statement. It is important to note, that until the mayor filed his verified statement, the City of Jersey City had not participated in, or significantly, publicly commented upon this proceeding. In his verified statement, filed in the other proceeding, the mayor stated the following:

“However, City of Jersey City badly needs additional transportation facilities to relieve growing surface congestion.”

The mayor went on to say:

“We prefer transload on the Harsimus Branch as opposed to the Lehigh [(AB 167 Sub-no. 1190X), where CNJ has filed a notice of intent to OFA] because *we wish to use some of the Lehigh segment for construction of new buildings for some city agencies*” (Emphasis added)

In addition, the mayor also stated:

“It is my understanding that representatives of the City have already made preliminary contacts with CNJ and perhaps others in connection with immediately becoming the City’s freight operator should the City acquire the property pursuant to the OFA statute.”

CNJ immediately gleaned the following from the mayor’s statement.

1. The City is in need a new rail freight facilities.
2. The City views rail freight in a favorable light.
3. The City is willing to work with CNJ on developing a transload facility.

CNJ herein confirms that it is in direct talks with the City regarding both abandonment proceedings. Discussions have included developing a realistic rehabilitation and operating plan for either one, or both lines.

Notwithstanding the positive statements made in the statement, the mayor inadvertently phrased the second sentence highlighted above, in a manner which could easily be taken out of context and used to the City’s detriment, as well as CNJ’s. Taken at face value, Conrail could easily argue that the City is going to acquire the property in question by eminent domain after the Board removes the line from the national network. CNJ was concerned that Conrail would elect to showcase the City’s manner of acquiring the Lehigh Line property in question to the

Board so as to hurt the City in the City's Harsimus Branch OFA. Conrail would argue that the City could use the exact same method to acquire the Harsimus Branch rail line in the same manner and that the City's OFA need not be processed. Conrail would certainly use estoppel to negate the city from successfully arguing its case to acquire the Harsimus Branch through an OFA process.

In addition, CNJ was concerned that the City's statement, viewed without further explanation, could have lead the Board, on it own motion, to grant Conrail an exemption from the OFA process, citing the City's statement as the reason it elected to do so on its own. However, the Board should note, the statement does nothing to tell the Board which property it is, nor does show how it relates to, or would effect a potential OFA. Therefore CNJ wished to address the matter in its pleading in order to give the Board a more complete record. Since the mayor's statement was not presented to us until the day our pleading was due, CNJ simply could not, in a timely fashion, address the information it contained in the pleading to which it would have been most appropriate.

Contrary to Conrail's belief, the request for a delay was not to further delay this proceeding, or abuse the Boards processes. If CNJ sought to delay this proceeding any further, CNJ would have asked for far more time than 48 hours to simply modify a few small sections of our original pleading to reflect the issues raised, **for the first time in public**, by the City. Those comments first become known to all parties, including CNJ, Conrail, and the Board itself on April 22, the day our pleading was due. We simply had no advance knowledge of those comments.

CNJ Rail understands, and fully agrees with the City's position in the Harsimus Branch proceeding. We acknowledge the City's desire to keep the Harsimus Branch within the national network. However, the City and CNJ have not yet finalized a joint position on what can be done on the Lehigh Line and how efforts down along the Lehigh Line might effect the outcome of an OFA in the Harsimus Branch case. Because certain aspects of statement at first glance appear contradictory to previously made statements, we simply wished to address the statement now before it could be taken out of context.

Conrail argued CNJ could have timely filed it original pleading and then supplemented it later on to address the issues raised by the mayor's verified statement. CNJ, having been privy to far too many cases where parties failed to put all the information into their first pleading and subsequently kept right on supplementing their filings, recognizes that the Boards time is valuable. To take two additional days, to file a response to a motion we are likely to prevail on, was not only appropriate, but should be commended. Multiple pleadings should be reduced to a minimum.

Furthermore, Conrail, in its response to the request for an extension, offered no argument what so ever that it would endure any harm if the Board granted the request. Therefore, CNJ argues that Conrail, by its own admission, or rather, omission, is not, and was not, adversely effected at all by a small 48 hour delay that has the potential to eliminate two additional pleadings and the corresponding responses. Those additional pleadings, by the way, could add nearly a month to this proceeding if done in the manner Conrail suggested. If CNJ truly wanted

to delay this proceeding, we would have done exactly as Conrail had suggested. In the future, CNJ will certainly be happy to do as Conrail prefers and make multiple pleadings instead.

Therefore, for the above stated reasons, CNJ respectfully requests that the Board grant us leave to late file our reply and enter it into the record.

On Behalf of CNJ Rail Corporation

Respectfully Submitted,

Eric S. Strohmeyer /s/

Eric S. Strohmeyer
Vice President, COO

Certificate of Service

I, Eric S. Strohmeyer, do swear under penalty of perjury, that I served today, April 24, 2009 upon Mr. John K. Enright, Associate General Counsel for Consolidated Rail Corporation, 1717 Arch Street, 32nd floor Philadelphia, PA 19103, via regular mail a copy of the CNJ Rail Corporation's Motion for Leave to Late File.

Eric S. Strohmeyer /s/

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