

BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD

DOCKET AB 167 1190 X
CONSOLIDATED RAIL CORPORATION
ABANDONMENT EXEMPTION
IN HUDSON COUNTY, NJ

REPLY OF CNJ RAIL CORPORATION

On April 2, 2009, Consolidated Rail Corporation filed a second motion to dismiss in the above captioned proceeding. CNJ Rail Corporation hereby requests that the Board deny the relief Conrail is requesting.

Background

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, applicants) jointly filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, a 2.27-mile portion of a line of railroad known as the Lehigh Valley Main Line, between railroad milepost 2.90+ and railroad milepost 5.17+, in Jersey City, Hudson County, NJ.

In its application, the applicants also certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic that has moved or could move over the line can be rerouted.

On December 9th, 2008, the Board published the notice in the Federal Register and placed the notice on their website.

On December 18th, 2008, CNJ Rail Corporation timely filed a notice of intent to file an OFA and requested the Board toll the time period for filing an OFA until Conrail provided it with the information required 49 CFR 1152.27(A)

By decision served on January 7th , 2009 the Board granted the request to toll the time period for filing an OFA, and ordered Conrail to provide said information.

On February 5, Conrail sent a letter to the Board asking them to terminate the OFA process claiming they had sent the information set for in 49 CFR 1152.27(a). to CNJ and that the time for filing an OFA had passed.

On February 6, CNJ responded to Conrail's letter stating in part that Conrail had not provide a minimum purchase price for the entire line. To date, the Board has taken no action on either request.

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 this 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 it 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 of 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 1: Status of CNJ Rail Corporation

Conrail argues that CNJ Rail Corporation legally does not exist, therefore the OFA process must be terminated. While Conrail was correct, when it filed its motion, that there was a problem with CNJ's corporate status as listed in the state's computer records, that problem is in the process of being resolved. The State of New Jersey requires corporations to submit annual reports to be filed with the State's Division of Commercial Recording. An officer of CNJ, while in the process of dissolving two other corporations he was affiliated with, inadvertently filed paperwork in the name of CNJ Rail Corporation instead of the correct entity. CNJ is grateful to Conrail for bringing this matter to our attention. Upon receipt of our reinstatement certificate, CNJ will gladly forward a copy to the Board with our OFA in this proceeding, should CNJ choose to file one.

CNJ has never ceased operations nor has it refrained from conducting business since its time of incorporation. While this revelation was embarrassing to CNJ, it does not provide Conrail with sufficient grounds to halt the OFA process. In fact, Board precedent shows that the Board is quite lenient with offerors when dealing with problems with the legal status of a corporation (*See AB 55 659 X - CSX Transportation - Abandonment Exemption. - In Allegheny County, MD*) To the extent that this issue for CNJ is a very quick and easy fix, and because the Board's precedent in this regard is quite forgiving, CNJ respectfully argues that Conrail's request that the OFA process should terminate at this point due to CNJ's alleged "liquidation" should be denied.

Argument 2: Financial Responsibility

Conrail argues that the Board ought to terminate the OFA process because it claims CNJ will fail to meet the criteria for Financial Responsibility. Their Argument fails for two reasons. The first reason is that until an OFA is actually filed, an OFA is not currently pending before the Board.

What is before the Board is yet another request by Conrail to undo the temporary stay issued by the Board, which was granted until Conrail complied with applicable regulations and produced the information it was ordered to produce.

Quite frankly, Conrail's financial responsibility argument is, at best, woefully premature.

CNJ can find no case law where the Board required a showing of financial responsibility *before* a carrier is required to simply give an interested party which is considering filing an OFA

the required information set forth in the Board's regulations. The purpose of providing that information is so that the party can make a reasonable determination if it is even worthwhile to pursue an OFA. The first step of due diligence is determining what the price for the item you are considering buying will be.

CNJ does concede the very first step the Board must do in the OFA process is to determine whether or not a party is financially responsible. That is the first test. However, the test begins when an actual OFA is tendered to the Board along with the required filing fee. Indeed, CNJ believes that until an OFA is **actually filed**, there is no legal basis for the Board making a determination of financial responsibility *at this point* in the proceeding.

Even if the Board was inclined to agree with Conrail's ridiculous position that financial responsibility must be determined before they are required to provide the basic information to a potential offeror, their financial responsibility argument will fail. CNJ will certainly meet the criteria for being financially responsible. CNJ Rail has already once demonstrated to the Board its financial responsibility. As the Board is aware, CNJ Rail Corporation previously filed an actual OFA in Delaware and Hudson - Abandonment Exemption - AB 156, Sub 25 (X)

In that OFA, the Board rejected CNJ's OFA on the grounds that the OFA process *to acquire* the trackage rights that was the subject of the proceeding was not available in a discontinuance proceeding. It was not rejected on the grounds of financial responsibility. However, there is certain salient information that can be gleaned from that previous submission to the Board that the Board could reasonably make a preliminary determination as to the likelihood of CNJ's financial responsibility.

In addition to the personnel net worth and bank account statements of CNJ's President and CEO, Mr. William Strohmeyer, filed under seal in that proceeding, CNJ also provided the Board a preliminary loan commitment from First New Jersey Financial Services, LLC. (FNJFS) An redacted copy of the agreement is part of the public record in that proceeding. The preliminary note was for \$1,000,000.00. At the time, CNJ reasonably believed it could have easily obtained up to \$5,000,000.00 in financing, subject to normal financial due diligence by the lending institutions CNJ was dealing with at the time.

The senior partner of New Jersey First Financial Services, LLC is Mr. Mitchell T. Berlant. Mr. Berlant is a well known real estate developer and entrepreneur in New York and New Jersey. Mr. Berlant's family of companies own significant real estate holdings in both New York City (Manhattan), as well as in New Jersey. But, more importantly, he and his firms understand the New Jersey real estate market particularly well. In addition, Mr. Berlant and Mr. Strohmeyer have a 25 year long business and professional relationship.

It is important to note that Conrail's minimum sales price for the portion they claim to still own was \$1.5 million dollars (between Chartel and Linden Avenues). In this property, Conrail appears to have a marketable fee simple interest in nearly 5 acres of real estate (approximately \$300,000.00 per acre), It is located near Exit 14B off the NJ Turnpike (two exits from the Holland Tunnel), has good to superior highway access, is near a NJ Transit Light Rail Station (1/4 mile away) and sits less than six miles from NYC. Certain parts of the New York

City skyline can easily be observed from the property.

If the Board does the basic “back of the envelop” calculation, assuming that two miles of track goes back down (at \$1,000,000.00 per mile), land acquisition costs of \$2,000,000.00, \$500,000.00 budget for operating expenses for a year, and \$125,000.00 for a locomotive and no bridges are involved, with a reserve fund of \$375,000.00. The number CNJ is looking at will be around a \$5,000,000.00 project.

CNJ poses this question to the Board: What is the likelihood that our financial institutions, which were willing to lend money to CNJ for a far less attractive property (from a commercial real estate perspective) in upstate state New York, which had no associated fee simple real estate attached to it, would be interested in a significant property located in their home state, in a market NJFFS knows very well, in a great location, within a few miles of New York City? CNJ reiterates its position that CNJ believes it will be able to meet the Board’s requirements for financial responsibility once we can finish completing our own due diligence.

CNJ Rail realizes that the Board recently had a party try to buy just 200 feet of track with \$13,000.00 and tried to put it on his credit card. (*See AB 33 230 X - Union Pacific - Abandonment Exemption - In Lassen County, CA and Washoe County, NV*) By contrast, CNJ realizes that this project will require significant capital, and like in *D&H*, will require a fairly significant proposal, detailed financial records, and other items that the Board will need to determine financial responsibility. However, until Conrail provides CNJ with the information regarding a minimum purchase price, CNJ just doesn’t know how much capital it will need. Nor can it put together a reasonable, detailed plan for the Board to review.

As CNJ had to do in *D&H* to secure its funding, standard due diligence will be required here as well. The Board might note, in *D&H*, the loan commitment required CNJ to obtain and maintain a certificate of good standing with the State of New Jersey. We had it once, and but for a small error, we’d still have it.

Argument 3: Motion to Compel

Conrail argues that CNJ has not yet filed a Motion to Compel yet and therefore is intentionally delaying the process. It is true that CNJ, in its letter of February , 2009 did indicate it would be filing a Motion to Compel in this proceeding, but after reviewing the Director of Proceedings decision of January 7th , 2009, it was clear that CNJ did not need to take any further action at that time.

The reason CNJ didn’t need to seek to compel Conrail to produce the required information can be found in the plain language of the Director’s order of January 7th order. The Director clearly stated:

The request for tolling of the OFA filing deadline will be granted and ***Conrail will be directed to provide CNJ with the information specified in 49 CFR 1152.27(a)***. The due date for CNJ to submit an OFA will be tolled until 10 days after Conrail

provides CNJ with the information specified in 49 CFR 1152.27(a) and notifies the Board that it has done so. The effective date of the exemption will be extended until 20 days after Conrail provides CNJ with the information specified above and so notifies the Board. (Emphasis added)

As for as CNJ Rail is concerned, on January 7th, the Board already **ordered** Conrail to provide the information set forth 49 CFR 1152.27(a). The Board's regulations clearly require a carrier to provide a **minimum purchase price** for the line. CNJ's notice of intent was clear. We asked for a price for the entire line. Conrail's response was equally as clear. It stated it was only going to give CNJ a price for the portion of the line between Chartel and Linden Avenues, a distance considerably less than the entirety of the line.

In the Board's January 7th order, Conrail was directed to provide us with the information. **To date, it is Conrail that has chosen to ignore a direct order of this Board.** In deed, Conrail appears to be saying to the Board that you, the Board must ask them not once, but twice to produce the basic information required by the CFR. CNJ would like to know what makes Conrail so special that the Board must beg Conrail to do that which the law, as well as the direct instructions of the Director, clearly requires them to do. What CNJ finds more disturbing is that Conrail is so brazen and willing to demonstrate such contempt for the Board's authority. The Director said provide the information. They have not yet, to date, done so. Quite frankly, if Conrail is so willing to ignore this Board's orders, CNJ can not think of any reason why this Board should not ignore all of Conrail's ludicrous motions.

CNJ believes it is not necessary for the Board to take any action at this time. CNJ is not asking the Board to compel Conrail to provide the information at this time because it does not need to. If Conrail would like to move this process forward, all Conrail needs to do is simply send CNJ, and the Board, a letter clearly stating "Here is our minimum purchase price for the entire line between Milepost 2.90 and 5.17. The purchase price is _____" Until Conrail actually does that, the Board's decision to continue tolling the period for filling an OFA should continue in full force and effect. Conrail can move the process forward themselves simply by providing the minimum purchase price.

Even if the Board is willing to accept Conrail's wild argument that the portion of the line between Chartel and Linden Avenues either constitutes the totality of the line, or the only portion to which Conrail can give a price for, The Board should and **MUST** take stock of what Conrail is actually saying in its various subsequent pleadings. CNJ certainly has taken notice of Conrail's pleading and notes the following issues are clearly coming to the forefront:

Argument 4: Conrail's notice likely contains false and misleading statements

In Conrail's notice of exemption, Conrail made the following **verified statements**:

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, applicants) have jointly filed a verified notice of exemption under 49 CFR 1152 Subpart

F-Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, **a 2.27-mile portion of a line of railroad known as the Lehigh Valley Main Line, between railroad milepost 2.90+ and railroad milepost 5.17+**, in Jersey City, Hudson County, NJ. The line traverses United States Postal Service Zip Codes 07304 and 07305. (*Emphasis added*)

Applicants have certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic that has moved or could move over the line can be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of a complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

It is important for the Board to realize exactly what Conrail has stated since then. It subsequently claims to only own or control a fraction of the said line that it seeks this Board's authority to abandon. We might note that estoppel bars them from making that argument. If you are warranting in your verified notice of exemption that you have a line of railroad from point A to point B then you **MUST HAVE DOMINION AND CONTROL** over **ALL** the line of railroad you are claiming to have in your notice.

Clearly, Conrail is barred by estoppel from making any argument that they don't have control over the totality of the line. If Conrail's subsequent arguments are truthful, and Conrail really doesn't have control over the line as they are claiming to have, then the notice is clearly misleading and the information contained therein undoubtedly false. Therefore CNJ would argue, more scrutiny of this transaction is required. Therefore, the Board should not even consider permitting the notice of exemption to move forward. Conrail's notice should be declared *void ab initio* and be rejected for contain false and misleading statements.

In *AB 290 237 X, Norfolk Southern - Abandonment Exemption - In Baltimore County MD*, the Board rejected NS' notice because proper notice had not been served in that proceeding. In addition to there being improper notice, during the course of that proceeding it the Board became aware that the right of way had been sold off to the Maryland Transit Administration. (We might note that the selling party that facilitated that improper line sale was also Conrail.) In its decision, the Board stated the following:

“As the petitioner, NSR has the burden to provide the Board with a complete and accurate record as to what is proposed to be abandoned. NSR also has an obligation to provide the public with accurate information about its proposal to ensure that all potentially interested parties and members of the general public have proper notice and the opportunity to participate in the Board's proceeding. “(emphasis added)

“In addition, other issues have been raised which have not been adequately addressed by the parties. They include: (1) **the “stranded” rail segment** beyond milepost UU-13.8 that extends from Baltimore to the Maryland/Pennsylvania line; (2) **the issue of whether approval of the transfer of Conrail’s assets to MDOT in 1990 was necessary by the Board’s predecessor, the Interstate Commerce Commission**; and (3) the request to be exempted from the OFA provisions of 49 U.S.C. 10904.” (emphasis added)

Here however, Conrail so far has made numerous claims that it has given the required minimum purchase price for *only the segment it controls*, which raises the question:

Does Conrail actually have a line of railroad from milepost 2.90 to milepost 5.17?

Did the sales of Conrail’s assets require the approval of either the ICC or the Board?

Did the common carrier obligation actually transfer with the sale of the line?

All of these questions are now germane to this discussion because of Conrail’s own statements. Remember, it was Conrail, not any other party, that claimed to have a line of railroad from Milepost 2.9 to milepost 5.17. When Conrail was asked to provide a minimum purchase price for the whole property, Conrail subsequently claimed, they don’t control the entire corridor sufficiently enough to give a price for the whole line of railroad.

In addition, in its motion to reject CNJ’s notice, Conrail stated it is under a New Jersey state court ordered settlement to sell the remainder of the line in question (See Conrail motion at P.5). What CNJ can’t understand is that Federal regulations clearly require any persons (non carrier) seeking to acquire a line of railroad subject to this Board’s jurisdiction to have this Board’s permission before it may lawfully acquire a line (see 49 USC 10901). What Conrail failed to disclose was that the action in question is apparently an adverse possession proceeding where a non carrier is attempting to seize the totality of a line of railroad from a rail carrier!

When CNJ asked Conrail why it did not remove the matter to the Federal courts when it was served with the complaint, or asked that the matter be referred to this Board for a determination, Conrail stated there was no federal question because this was a state action under state law. However, 49 USC 10501(b) clearly would have preempted the state court action because the licensing procedures for acquiring a line of railroad is clearly the sole jurisdiction of this Board. Quite frankly, Conrail could have easily ended the litigation in its favor. For some reason, Conrail failed to argue that the action being taken was clearly preempted by federal law.

The Board should be very mindful of the trouble Conrail is in. If this NJ State court action is not dealt with by this Board, then a very bad precedent will be set that will make all carriers across the country subject to adverse possession claims by non carriers intent on removing lines from the national network. This will allow a carriers rail line to be seized

and removed from the national rail network without this Board's approval!

Congress preempted state laws for just this reason and vested licensing powers with this Board. This Board should, at a minimum, direct the NJ State Superior Court to Show Cause as to why the Board should not seek an action in Federal Court to enjoin the State Court from taking actions against a rail carrier in this case. For the sake of all carriers, do not allow this case to go forward without intervening!

It should be noted that Conrail certified to this Board that the Lehigh Line is part of the national rail network. Until the Board released the line from the national rail network, Conrail had no place negotiating away a line of railroad **before** they took actions to remove a line from the national rail network. Indeed, Conrail expects this Board to continue to help them out of situations of their own making. Just how many times is this Board going to permit these reckless acts by Conrail?

Argument 5: The Board should not exempt proceeding from the OFA on its own motion.

On the afternoon of April 22nd, 2009, 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 materially 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'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 this 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.

The Board needs to realize that a small segment of the right of way in the area of Milepost 5 is currently part of a series of lots that the city is planning on acquiring to use for a new public works buildings. The Lot 1501 **lot#29** (herein after identified as Lot 29) makes up the missing piece of land between the Lehigh Line and the rest of the national rail network.. It is important to note that Conrail has sold Lot# 29 to other interest. Conrail retained no permanent easement. The property owners did not seek a *State of Maine* determination to ensure they did not become subject to the Board's jurisdiction with the acquisition of those assets. According to Conrail, the City may have actually been able to condemn a portion of the right of way, despite being a part of the national railroad network still.

CNJ wants the Board to know however, that the line itself intersects to other rail lines in additional places and even if the City wished to move ahead with its buildings on Lot# 29, it is still possible to rehabilitate the line by accessing the line from a new connection that can be built off the Bayonne Industrial Track. This would make it possible to connect to the national system at the mid point to the line, as opposed to the end of the line. Because the City and CNJ has not yet finalized our positions regarding the Lehigh Line, we want to make sure that the Board does not render a unilateral decision to exempt the process from the OFA because it took the Mayor's statement to mean that the line is not needed for continue rail service.

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 certain be happy to do as Conrail prefers and make multiple pleadings instead.

Therefore, for the above stated reasons, CNJ respectfully requests that the Board deny Conrail's motion and continue tolling the time period until Conrail complies fully with the Board' regulations.

On Behalf of CNJ Rail Corporation

Respectfully Submitted,

Eric S. Strohmeyer /s/

Eric S. Strohmeyer
Vice President, COO

April 24, 2009

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/

Eric S. Strohmeyer