

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739



6 May 2009
by express

Hon. Anne Quinlan
Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

225068
225069
225071

Re: Consolidated Rail Corporation - Abandonment
Exemption - in Hudson County, NJ,
AB 167 (Sub-no. 1189X) and related proceedings

Dear Secretary Quinlan:

Enclosed please find Additional Comments on the Environmental Assessment ("EA") on behalf of City of Jersey City ("City") and Rails to Trails Conservancy ("RTC"), with the Embankment Preservation Coalition ("Coalition") joining. I am submitting these for inclusion as a pleading as well as (in a separate packet to SEA) comments on the EA. The Additional Comments among other things indicate that under a long line of cases, Conrail may not be the appropriate party to seek an abandonment authorization in this proceeding. The Board needs to require Conrail to submit information germane to that issue, and reject the abandonment notice if the information is not submitted. These additional comments are supplementary to all earlier comments and relief sought by City, RTC, and Coalition.

Respectfully submitted,

Charles H. Montange
for City of Jersey City,
RTC, and Embankment Coalition

Encl(s).

cc. Robert Jenkins III
Mayer Brown
1909 K St., NW,
Washington, D.C. 20006 (for Conrail) (w/encl.)

SEA (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

CONSOLIDATED RAIL CORPORATION)
- ABANDONMENT EXEMPTION -) AB 167 (Sub-no. 1189X)
IN HUDSON COUNTY, NJ)

Additional Comments
on Environmental Assessment
by City of Jersey City
and
Rails to Trails Conservancy

These additional comments on the environmental assessment ("EA") dated March 23, 2009, in this proceeding are submitted on behalf of City of Jersey City ("City") and Rails to Trails Conservancy ("RTC"). It is the understanding of counsel that Embankment Preservation Coalition also joins in these comments, but may file additional comments, or may have already filed additional comments.

Environmental comments were originally due on April 7. That deadline was extended to May 7 by an order of this Board late-served on April 6. City and RTC already have filed initial comments prepared to meet the original deadline, which comments also joined in the Embankment Coalition's objection to the environmental notice on which Conrail relies in this proceeding. (The Board in an earlier decision had denied that objection prior to the expiration of the 20 day period for timely replies). The comments below supplement all earlier comments filed by City and RTC, and are not in lieu of any.

1. Notice issues. This Board's regulations require that

"[i]n every abandonment exemption case, the applicant shall publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice ... is filed." 49 C.F.R. 1105.12 (emphasis added). The Appendix to section 1105.12 is entitled "Sample Local Newspaper Notice...." The chief purpose of the section 1105.12 notice is to alert the public at the local level. It is not aimed at local rail-dependent businesses (there supposedly are none in notice of exemption cases like this) nor local governments (they are supposed to receive written notice under 49 C.F.R. 1152.50). The citizenry of a county is not likely to be alerted by notice published in a "nation-wide" or "state-wide" newspaper, because the predominant printed media ordinary citizens read is local, even if some of the people in the county do subscribe to the newspaper from the largest city in the state,¹ or maybe the New York Times. That is why section 1105.12 and its appendix use terms like "each county" and "local" in describing the newspaper notice required.

The plain language of the regulation, especially in light of the term "local" in the Appendix, clearly requires publication in a local newspaper in each county traversed by the line. Conrail by its own admission published nothing in Hudson County, the only County in which the abandonment candidate is located. Conrail

¹ Newark is New Jersey's largest city.

thus plainly failed to meet the environmental notice requirement.

In various iterations of its environmental notice requirements, the agency or its predecessor has proposed that organizations like RTC and NARPO be provided with notice. Both objected on grounds of lack of resources to canvass the interested local public, and the agency therefore did not include specific notice to RTC and NARPO. The duty is on the agency to inform the local public of potential agency actions with environmental consequences. STB discharges this duty in local abandonment proceedings through requiring a local newspaper notice in each county traversed by a line. STB does not discharge this duty by publication in a state-wide newspaper of a capital. Few people outside the largest city of a state rely on its paper for local property notices.

Conrail justifies its non-compliance with the local newspaper publication requirement by reference to dicta to New York Central Lines - Abandonment Exemption - in Montgomery & Schenectady Counties, NY, AB-565 (Sub-no. 14X), served Jan. 22, 2004. In that case, the abandonment applicant evidently published notice in one of the two counties traversed by the line, but not the other. A shipper in the county where no notice was published objected. The agency stated that the shipper had actual notice, and that the newspaper notice in the adjoining county was sufficient, citing the apparent fact that the other

newspaper reached a percentage of the neighboring county's households. This case is distinguishable on the ground that the shipper there was not among the individuals that the environmental notice was designed to protect (namely, local citizens concerned about environmental impacts), and on the ground that the shipper in fact had actual notice. The statements upon which Conrail relies in the decision in any event are all dicta that was not necessary for resolution of that case, and thus not authoritative. Alternatively, to the extent that the Board sought to rule that publication in a non-local newspaper or one outside a county meets the local newspaper requirement in its regulation for purposes of providing environmental notice, the Board erred.

Moreover, it is not ground to claim the error harmless because City and RTC in fact have actual notice. 49 C.F.R. 1105.12 is designed to protect the public. The record shows that Conrail has engaged in a controversial series of actions leading to this abandonment proposal, and the proposal itself is intensely controversial. Individual citizens have a right to be heard. This is a case where the local notice requirements should be fully satisfied.

Conrail's proceeding should be held in abeyance until the railroad complies with section 1105.12 by publishing the required notice in a local newspaper in Hudson County where the line is

located, and certifies compliance to this Board.

2. Conrail's illegal sale. Among the leading factors rendering the EA unsatisfactory is the failure of the Section of Environmental Analysis (SEA) to acknowledge and then to discuss the unlawfulness of Conrail's unauthorized sale of the Harsimus Branch to a developer (termed "SLH Properties" herein). Conrail sold the property not only without prior authority from STB, but also without reservation of any right to continue to operate a railroad upon the property. Conrail by its admission reserved no rail easement. This action was not only illegal but confusing in ways unfavorable to Conrail for purposes of sorting out legal obligations.

Under 49 U.S.C. 10901, if a railroad sells all of its assets without any reservations, as Conrail did here, it must receive prior agency authorization. Under 49 U.S.C. 10903, if the sale without any reservation of interest is for non-rail purposes, it requires an agency authorization in the form of an effective abandonment authorization.

Two consequences flow from Conrail's illegal sale: (a) either Conrail is no longer the common carrier on the line because the common carrier obligation now resides in the new owner, SLH Properties, or Conrail at most has trackage rights to discontinue but SLH is the party that must seek abandonment; or (2) Conrail engaged in an illegal de facto abandonment in

violation of 49 U.S.C. 10903 and the deeds to SLH Properties should be voided.

If Conrail is no longer the common carrier on the line because it sold all rights to SLH Properties, then Conrail's notice of exemption must be dismissed because it is not the appropriate party to make the notice. Instead, SLH Properties must make the notice.

If Conrail engaged in an illegal de facto abandonment, then the sale should be invalidated for failure to obtain abandonment authority first. The reason is simple. There are a host of public remedies and environmental and historic preservation requirements applicable whenever STB authorizes an abandonment. If, as the EA suggests, the agency no longer need analyze environmental consequences due to the illegal sales, then the public is deprived of all effective remedies and railroads can evade all meaningful environmental and historic preservation regulation as well. This will encourage exactly the kind of illegal and unauthorized sales that occurred below. The agency will render its abandonment jurisdiction meaningless in terms of affording any protection to the public interest.

This is not a case where Conrail has purported to sell only the underlying fee interest and to reserve a rail easement sufficient to provide common carrier services. The Board, like

the ICC before it, does not regulate such sales.² Here, however, Conrail here has not retained an easement or right of any sort, nor any access, sufficient to operate, maintain or renew the Harsimus Branch. The sale by Conrail to SLH Properties was thus an event that triggered this Board's jurisdiction. The Board would have disallowed it, unless SLH Properties was deemed the new common carrier. If SLH disavowed any interest in providing rail service, the Board would not have allowed the sale, because the Board will not allow sales of unabandoned lines for such purposes.

Illinois Central Railroad Company - Abandonment Exemption - in St. Tammany Parish, LA, AB 43 (Sub-no. 154X), served Nov. 18, 1991, is instructive of the proper course of action here. In that case, Illinois Central between October 1984 and 1985 sold all the real estate underlying a right of way to R.R. Land and Ruhl, Inc. ("Ruhl") for non-rail purposes. Ruhl sued the

² The agency's predecessor cautioned that parties selling rail lines without an intent to transfer the common carrier obligation should submit them for a jurisdictional determination in advance. See Illinois Central Railroad Co. - Abandonment Exemption - in St. Tammany Parish, LA, ICC AB 43 (Sub-no. 154X), served June 17, 1992, 1992 ICC Lexis 133, at footnote 13, citing State of Maine - Acquisition and Operation Exemption - Maine Central Railroad Co., served May 24, 1991. The agency would examine whether the seller retained sufficient control over the line to satisfy any common carrier requirement as a condition for finding the sale non-jurisdictional. This generally required the selling railroad to retain an exclusive rail easement over the line sufficient to ensure that it and its successors or assigns retained both the right and necessary access to maintain, operate and renew the line. See State of Maine, supra.

railroad claiming it had to obtain an abandonment. The railroad then sought abandonment authority. This Board's predecessor stated that

"it appears that [Illinois Central] may not retain sufficient interest in the line to seek abandonment, as opposed to discontinuance, either by application or exemption, and that Rule and R.R. Land may have acquired a common carrier obligation with respect to the line, and thus may be necessary parties to an abandonment proceeding. Because these [entities] failed to seek prior determination as to our jurisdiction over the sale [and alleged lease back], and have not provided sufficient evidence for us to make such a determination now, we are unable to proceed with IC's exemption petition."

The Board ordered the submission of additional information, if the parties chose to do so, and stated it would otherwise reject the petition as incomplete.

Congress has not changed the law in any germane fashion since this ICC decision. ICC's precedent governs the Board. Rather than simply assume that Conrail's unauthorized sale to SLH Properties has no impact other than to militate against any meaningful environmental review because the property now allegedly belongs to SLH Properties, the EA at the very least must recommend to the Board that the Board hold the entire

proceeding in abeyance until and unless a full explanation, in the form of all sales contracts and deeds, is furnished.

Whether or not the EA so recommends, that is what City and RTC hereby move the Board to do, for the reasons stated.

The subsequent decision in the Illinois Central case is also germane, but very unhelpful to Conrail and the EA here. The ICC noted that Ruhl and especially Illinois Central did produce more information on the sale. Evidently Illinois Central explained that its sales contract reserved a rail easement but that was inadvertently omitted in the deed to R.R. Land and Ruhl. Although Ruhl apparently disputed this, Illinois Central got a court order reforming the deed to contain a reserved easement. Finding that the reformed deed reservation not only included an easement but also notice to the buyer that Illinois Central might never be able to deliver possession and that the buyer had agreed "not to interfere in any way with continuing rail operations on the property," the agency concluded that Illinois Central in fact had retained sufficient interest so that the common carrier obligation did not transfer to Ruhl. On this basis, ICC allowed the abandonment to go forward. See Illinois Central, supra, served June 17, 1992, 1992 ICC Lexis 133 at *11 et seq. and footnote 11. ICC reiterated, however, that "mere disclaimers" of an intent to transfer the common carrier interest "are insufficient to defeat ICC jurisdiction over the sale." Id.

at footnote 12. ICC emphasized that the railroad selling the asset had to "back[] up its intent to retain the common carrier obligation with the necessary legal interest to discharge it" and that this was the decisive circumstance that "prevented the common carrier obligation from passing with the assets." Id.

In short, the entire proceeding must be held in abeyance to sort out who holds the common carrier obligation. If the question were to be decided on the current record, then the proceeding must be dismissed because Conrail has admitted that it has not retained the necessary legal interest to discharge the common carrier obligation. Otherwise, the sale must be invalidated as part of an illegal de facto abandonment.

ICC consistently applied Illinois Central. E.g., Orange County Transportation Authority - Acquisition Exemption - ATSF, F.D. 32713, served March 28, 1994 [10 ICC2d 78] (too much control transferred); Missouri River Bridge Co. - Acquisition Exemption - Certain Assets of Chicago Central & P. RR, F.D. 32384, served Feb. 24, 1994 (control retained). This Board is bound by this precedent. The EA may not simply ignore the issue.

Another major problem with the EA's assumption that Conrail's sale to SLH Properties is controlling is the assumption is contrary to New Jersey law. Under NJSA 48:12-125.1, railroads with lines for which abandonment authority is sought must first offer those lines to local governments. Sales to developers in

contravention of this right of first refusal are void. On March 5, 2009, Conrail's John Enright wrote Mayor Healy of Jersey City a letter notifying the City that Conrail was triggering NJSA 48:12-125.1 and requesting the City to disclaim its rights under the state statute. Mayor Healy responded by letter dated April 8, 2009, attached, refusing to disclaim, and asserting the City's rights under the statute, as well as requesting information from Conrail. The letter specifically notes that the statute provides that deeds out by the railroad in contravention of the statute are void. Conrail has not responded with the requested information.

As previously explained, under Illinois Central, the entire Conrail proceeding should be held in abeyance until Conrail (or SLH Properties) provide a full disclosure about Conrail's prior unauthorized sale. The stay would also provide time for the parties and the Board further to address the implications of the state statute. This appears essential to work out whether the Conrail is even the proper party to file for abandonment.

The EA is based on fundamentally wrong assumptions that are mutually exclusive. The EA assumes Conrail properly seeks abandonment, but this is inconsistent with the further assumption that Conrail properly sold all its interests to SLH Properties, and that is further inconsistent with the unlawful nature of a de facto abandonment, in addition to being inconsistent with the

relevant New Jersey statute.

Another key problem with the EA is its pigeon-holing of historic preservation issues for review later. The Branch at issue here contains some six blocks that are eligible for listing on the National Register of Historic Places. The Branch adjoins two national historic districts. The portion at Waldo appears to adjoin an historic old cemetery. The entire line is the historic mainline of the Pennsylvania Railroad. The National Environmental Policy Act (NEPA) and CEQ regulations thereunder make it clear that historic impacts are part of any NEPA analysis. Here the EA ignores the NEPA question entirely, leaving them to be analyzed in some future section 106 process. This is an instance where Board practice violates NEPA. The Board cannot make an informed decision under NEPA when by admission of the EA an entire future process will be required before it can make an informed decision.

The City and RTC further note that the Branch, or at least the bulk of it, are suitable for continued rail use as well as trail and open space use. The City is actively seeking it for same, as attested not just by all the City's pleadings to date, but by the Mayor's April 8 letter to Conrail's counsel, John Enright. Preserving the property for continued rail transportation use, as sought by the City, will foster historic preservation interests at the same time.

The City has filed a timely notice of an intent to file an offer of financial assistance ("OFA") along with information requests necessary to prepare its OFA. Rather than reply with the requisite information, Conrail filed a document in which it called for rejection of all OFA's. It is a measure of Conrail's lack of consideration and obstinance that on May 5, that entity filed a paper with the agency contending that it had a right to move for an ex parte exemption from the OFA process without allowing anyone a right of reply. In particular, Conrail cutely illegitimately claimed that its requested exemption from OFA was in the nature of a reply, to which no one could reply. It is indeed unfortunate that Conrail makes every effort to avoid the regulatory process as opposed to complying with it.

In any event, Conrail cannot object to environmental comments, and the public interest in preserving the Branch for rail, and restoring rail use on it, is germane to NEPA and to NHPA. The City supported its invocation of the OFA process with Verified Statements by the Mayor and the Planning Director indicating that the City sought the line for freight rail use as well as other public uses. Jersey City faces severe traffic congestion problems. It wishes to remove freight traffic and passenger traffic from increasingly crowded city streets. By extending the existing light rail system up the Harsimus Branch to Waldo, or on to Secaucus, or both, the City would have the

opportunity to provide freight service all along the New Jersey Transit system in Jersey City, as is done in modern European cities. The Planning Director notes that the City's Master Plan was recently amended, with NJ Transit consent, to permit examination of freight use - on the entire light rail system in the City. The two Verified Statements are attached hereto.

The EA at p. 16 says that there is no evidence of shippers potentially interested in service, citing removal of track and disuse. As suggested by the Planning Director, City seeks to use the Branch to provide freight service for all of its downtown area through interconnection with the New Jersey Transit system. As City already indicated, City views resumed freight as feasible, given the City's broader and compatible interests in the line, and certainly as consistent with what is happening on the other side of the Atlantic. Congressional policy favors application of the OFA remedy to preserve rail lines wherever possible, especially where a government entity is trying to do exactly that. That is also the purpose of the Board's entire modified certificate program (49 C.F.R. 1150.21, et seq.). SEA should not parrot Conrail's papers or ex parte representations at meetings to which the City was not privy. City and RTC continue to invite SEA to meet with City officials and representatives of the public on-site, as SEA claims it has done with Conrail lawyers and representatives.

3. SEA's EA conclusion. SEA says it "does not believe that the abandonment activities would cause significant environmental impacts" if its mitigation suggestions were accepted. The only mitigation suggestion SEA makes is to bar abandonment effectiveness pending some further Coastal Zone Management analysis. As City and RTC said before, while we support CZMA regulation, the remainder of SEA's conclusion is unsubstantiated. The EA basically avoids analysis of the issues by assuming, incorrectly or at least inconsistently, that Conrail is the proper party to file for abandonment, that the unauthorized sale was lawful, that the deeds to SLH Properties are valid, that demolition of the Embankment is a lawful re-use (as opposed to another salvage activity), and that local regulation is available to address potential hazards flowing from demolition of the massive Embankment structures which the EA otherwise largely ignores.

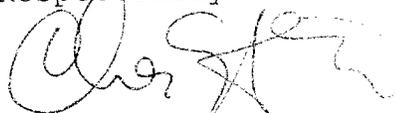
4. NHPA 106 & 110(k). If SLH Properties is the holder of the common carrier obligation for key portions of the Harsimus Branch, as this Board's Illinois Central and related cases suggests, then the EA's analysis of how section 106 and 110(k) apply is completely in error for reasons not heretofore articulated. Those reasons include the fact that it is SLH's actions that constitute the anticipatory demolition and violation of section 106. In particular, the manifest efforts of SLH

Properties to obtain demolition permits and otherwise to raze the line prior to seeking any abandonment authorization are actions constituting anticipatory demolition. Moreover, SLH Properties itself must be the applicant for a license on which section 106 analysis is performed, not Conrail.

5. EIS. As City and RTC have repeatedly stated, there are unresolved issues making this case appropriate for a full Environmental Impact Statement (EIS). An EA is used to evaluate whether a full EIS is necessary, not as a substitute. At the very least, a revised EA must be issued addressing the numerous concerns raised, and City and RTC request a reasonable opportunity to comment on it.

Conrail is currently impeding the OFA process. If the Board properly allows the OFA process to move forward, this may obviate the need for an abandonment, because the City seeks to acquire the line, or the bulk thereof from Waldo to the point of intersection with the existing New Jersey Transit system. City urges SEA to support the OFA process.

Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739
for City of Jersey City

Of counsel:

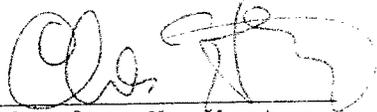
Andrea Ferster
General Counsel
Rails to Trails Conservancy
2121 Ward Ct. NW
Washington, D.C. 20037
(202) 974-5142
fax: 223-9257

Attachments:

April 8 Letter, Mayor to Conrail
V.S. Mayor
V.S. Planning Director

Certificate of Service

I hereby certify service of the foregoing on 6 May 2009 by deposit for express (next business day) delivery addressed to Robert Jenkins III, Mayer Brown, 1909 K Street, NW, Washington, D.C. 20006.



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax - 3739

For City of Jersey City and
Rails to Trails Conservancy

CITY OF
JERSEY CITY



ESTABLISHED BY THE
CITY OF

CITY HALL
JERSEY CITY, NEW JERSEY
TELEPHONE: 201-547-1000
FAX: 201-547-1000

April 8, 2009

Mr. John L. Wright
Conrail
1717 Arch St., 32d Floor
Philadelphia, PA 19103

Re: **STB docket AB 167 (Sub-no. 1189X)**
Conrail – Exemption – in Hudson County, NJ
(Harsimus Branch)

Dear Mr. Wright:

This is in response to a letter dated March 5, 2009, by you addressed to Messrs. DeGise and Healy of NJ Dept. of Transportation, Hudson County, and City of Jersey City (hereinafter "State, County, and City, respectively"). In that letter, you purport to notify the State, County, and City that Conrail expects a Surface Transportation Board (STB) abandonment authorization for the Harsimus Branch, MP 1.00-1.30, effective on or about April 27, 2009, for purposes of N.J.A.C. 18:27-125.1. You state that the State, County, and City shall have 90 days from that date to notify Conrail of an interest in acquisition, and you request a disclaimer.

The City is interested in acquiring the Harsimus Branch from its point of location at "P. Waidd" to its point of interconnection with the existing light rail system, to allow ownership to be a public use. Please provide us with information showing all ownership interests claimed by Conrail in that property, including all contracts related to the property, all easements and encumbrances that might affect the City's use of the property. We also request any appraisals and any appraisals which would show the value of any interest in such property. N.J.A.C. 18:27-125.1 allows City an opportunity to purchase the property following the effective date of STB authorized abandonment, in the case of condemnation. The City wishes to exercise its right to acquire the property in accordance with the statute when it is permitted to reacquire the ownership.

Please be advised that Conrail takes the position that the 90-day period does not commence until 90 days after the abandonment authorization is approved by the agency.

in court with full effect. The City expects that there will be stays placed on any abandonment authorization, same of which may be indefinite in nature, barring the railroad from disposing of interests in the corridor pending resolution of various issues. Under S100's terms, such an abandonment of effect may be brought through N.J.P.R. 2009.

Your letter offers to City only such interests as Council currently holds. Please be further advised that N.J.S.A. 48:12-125 provides for the holding of deeds by railroad in contravention of the statute. It has previously indicated that this portion of the statute is applicable to at least some transactions in which Council has engaged that may have diminished Council's interests insofar as Council currently retains some of its own interests. City's review of N.J.P.R. under this statute and other statute relating to entities, etc.

Please be further advised that until these matters are fully resolved, the City disclaims no interest in the subject matter.

This letter is without prejudice to the City's pursuit of all available remedies to acquire the Harshman Branch, including various thereof, subject to confirmed and used for other compatible public purposes in the proceeding expressed above, or before any tribunal or court deemed appropriate. As Council is aware, the City views the Harshman Branch not only as a key transportation corridor, but also as containing important historic assets.

The City has made a generous and detailed written settlement offer in respect to the matters that conspires with S100 regulations and local land use procedures to Council and to its counsel and developer. We hope a settlement is possible. We believe it would be better for Council to engage in settlement negotiations rather than support what appears to be the developer's effort to me up our land bills and then make us on that grounds to capitulate.

Very truly yours,



JEREMIAH E. HEALY
MAYOR

cc: Stephen Dil's, Counselor
Thomas A. DeGuzio, Council Executive

Verified Statement
of
the Honorable Jerramiah Healy,
Mayor, City of Jersey City

I, Jerramiah Healy, state that I am the Mayor of the City of Jersey City, and that I make this Verified Statement in support of Jersey City's notice of intent to file an "offer of financial assistance" and in opposition to the motion to reject the entire OFA process filed by Consolidated Rail Corporation ("Conrail") on or about April 7, 2009 in AB 167 (Sub-no. 1189X).

1. Since I have been Mayor of Jersey City, I have actively sought to acquire Conrail's currently unused Harsimus Branch for public purposes. While I view the property as suitable for a variety of public uses, including park and trail, my chief interest is to facilitate renewed rail transportation use. No one pretends that City wishes to use the Harsimus Branch as a freight mainline serving a port facility as the line was formerly used in the past. However, we believe resumed freight use of at least some of the line can assist us in alleviating our growing congestion problems by eliminating at least some truck traffic. In all events, railroad transportation is the most energy efficient form of land transportation and we should be given a chance.

2. There is interest, as witnessed by notices of intent to file an OFA in this and another recent proceeding by CNJ Rail, in

developing freight transload on the line. Unfortunately, Conrail allowed bridges to deteriorate to the point they had to be removed before I became Mayor. This renders resumption of rail service over the bulk of the line expensive, because of capital costs of restoring the bridges. However, City of Jersey City badly needs additional transportation facilities to relieve growing surface congestion. I view the Harsimus Branch as an ideal facility to link downtown Jersey City with Journal Square and as an economically feasible route to existing passenger rail facilities at Secaucus. In combination with passenger rail service, resumption of freight service is economically feasible. Since this kind of passenger rail is customarily done by governments, Jersey City must be prepared to assemble the resources to provide it. We are particularly interested in the line from approximately Washington Street (intersection with existing passenger rail) to Waldo (where Conrail still operates and PATH facilities are located). This seems a logical section of the Branch on which to operate, and our analysis indicates that there are several potential locations for transload on this segment. 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.

3. The City understands that to invoke the "OFA statute," City must be prepared to resume freight rail uses and to assume a freight rail common carrier obligation. Many governments own rail lines used for freight, operating same not directly but through contract operators who discharge the freight common carrier obligation for the government owner. Jersey City would almost certainly use this approach in order to ensure discharge of the common carrier obligation which we would be acquiring. 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 this property pursuant to the OFA statute.

4. I reject Conrail's suggestion that City is invoking the OFA process in order to "harass" Conrail. City is merely trying to acquire the property for continued rail use in a way fully consistent with the OFA statute. City is not calling on this agency to force Conrail to restore structures previously removed from the property, but City wishes all rail structures currently on the property left intact, and the property to be conveyed to the City. Conrail has long known that City has sought to acquire the Harsimus Branch; it has been an objective of mine since I became Mayor. City notified Conrail that City intended to use eminent domain remedies in 2005, but Conrail claimed that this

Verified Statement

of Robert D. Cotter

I, Robert D. Cotter, am the Director of Planning for the City of Jersey City. I make this Verified Statement to confirm the City's interest in freight rail use of the Harsimus Branch at issue in Consolidated Rail Corporation - Abandonment Exemption - in Hudson County, NJ, AB 167 (Sub-no. 1189X).

1. In Europe, freight and passenger systems frequently co-exist in congested urban settings. In Dresden, light rail has been carrying freight between two Volkswagen factories since 2001. In Paris, the retail chain Monoprix delivers to 27 of its stores in the center city by light rail. Amsterdam is planning a major operation using up to 53 freight trolleys to replace half the 5000 trucks that deliver to the central city each day.

2. The 2007 'European Green Paper' on urban mobility stated that "any urban mobility policy must cover both passenger and freight transport." We agree and so stated in the Circulation Element of the Jersey City Master Plan (adopted April 14, 2009) that the city will 'Investigate a shared-use strategy for Hudson Bergen Light Rail to carry freight to local destinations.'

(Action G-10-6 of Goal 10: Accommodate the local delivery of goods and services through community-sensitive practices.) New Jersey Transit was one of the stakeholders on the committee that

wrote the Circulation Plan. Their representative approved the wording of this sentence.

3. The Harsimus Branch is of interest to us due to its connection at Waldo with the freight network, and also as part of a light rail system extending to Secaucus, which is a multi-modal and warehousing area. We would be able to connect the Harsimus Branch to the existing light rail system, which runs along Washington Street in downtown Jersey City, and thus develop a system that could handle not only passenger but freight deliveries in our downtown. This would allow us better to address the increasing congestion in downtown Jersey City. Since the Branch is largely grade separated from existing streets, it is very attractive for the purpose intended. Also, freight rail uses the same gauge as passenger rail, so reconstruction for light rail purposes will serve freight as well. And freight service can be provided either at different hours, or with equipment attached to light rail trains. Again, European cities provide workable models. From an energy, air quality and congestion standpoint, this approach makes perfect sense.

4. The portion of the Harsimus Branch at issue in this proceeding would also serve two possible light rail routes, and continued rail use as intended by the City for passenger and freight purposes would be consistent with preserving the Harsimus or Sixth Street Embankment, which is eligible for listing on the National Register of Historic Places. In addition, the property is wide enough to support other public uses compatible with rail, like park and trail.

5. In conclusion, Jersey City has a bona fide interest in developing rail freight to relieve congestion, and in the use of the Harsimus Branch for that purpose, should we be permitted to acquire it.

I, Robert Cotter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to make this Verified Statement.

Executed On APRIL 23, 2009


Robert D. Cotter, PP, AICP