

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Opposition to Motion to Strike

In a pleading filed May 5, 2009, the applicant for abandonment in this proceeding (Consolidated Rail Corporation or "Conrail") moved to strike Jersey City's reply to Conrail's de facto motion to exempt this proceeding from the OFA process. This Conrail motion to strike has no merit and must be denied.

Contrary to Conrail's premise, Jersey City's reply was not a reply to a reply.

Conrail's premise rests on one of two faulty notions. Conrail faulty notion number one is that City filed a "petition" to OFA. City did not file a "petition." City filed a "notice" pursuant to Board regulations. "Notices" are not motions (or petitions) to which a "reply" is due. Indeed, in the case of a notice of intent to OFA, the only response provided for in the STB regulations is that the railroad must make the information listed in 49 C.F.R. 1152.27(a) available to the OFA applicant on timely request. Despite timely request, Conrail has failed to make the information available, and in fact has refused to do so in derogation of the regulations. But then Conrail's entire approach to the Harsimus Branch has been to ignore STB abandonment regulations until and unless forced to comply, and then to argue that there are no remedies because of the illegal unauthorized abandonment in the first instance.

Conrail faulty notion number two is that the City (or any other party filing a notice of intent to file an OFA) must "justify" its filing in the first instance in order to proceed. Nothing in this Board's regulations or the statute so provides. For example, the statute says that "any person may offer to ... purchase the railroad line" that is the subject of the abandonment proceeding. This Board has an entire program to encourage state and local governments to maintain intact otherwise to be abandoned rail lines. 49 C.F.R. 1150.23, et seq. Clearly Jersey City is an eligible candidate to acquire a rail line, and as Conrail elsewhere has recognized, Jersey City is presumed financially responsible for purposes of the OFA statute. City does not have to justify anything.¹

Conrail also pretends that it has not made any kind of motion to reject the OFA process, so that its "reply" asking for an exemption from OFA is not something to which a responsive pleading can be filed. Conrail is like Gollum calling the hobbits "tricksy" in Lord of the Rings. It is the other way

¹ The idea on which Conrail hinges its de facto motion to reject the City's use of OFA provisions is that OFA is available only for freight rail purposes. This notion derives from agency case law that the OFA must be consistent with freight rail use. This presumably reflects the fact that a successful OFA applicant must contemplate providing common carrier freight services over the line, since the line upon transfer to the applicant will remain a freight line under the agency's jurisdiction. But as City indicated in its reply, City contemplates freight use, and views that use as feasible in connection with restoration of the line for light rail purposes. City can readily provide such services through a contract operator, as many other railroad owners do. Nothing in the case law says that the City or any other OFA applicant must devote, or show that it intends to devote, a line exclusively to freight rail use, or even primarily to such use.

around. On the one hand, Conrail is not entitled to a "reply" to a notice, except by motion or by providing the section 1152.27(a) information. On the other hand, when Conrail's pleading whatever it is called contains a motion, it is superficial nominalism to say that there can be no replies to the motion because it was not entitled "motion." We thought that superficial nominalism had gone the way of the dodo bird, but perhaps when one has no argument, the dodo bird kind must do.

As to Conrail's specific objection to City's subsequent provision of Mr. Cotter's statement, Conrail acknowledges that Jersey City timely sought an extension to file its entire reply (which Conrail opposed) to Conrail's de facto motion to exempt from OFA. Jersey City sought the extension because its counsel sought to (and did) attend an oral argument in the District of Columbia in a related proceeding, which interfered with the otherwise applicable schedule. STB staff subsequently indicated that City's timely motion for an extension had been inadvertently overlooked, and the City has been left with the impression that its filings would be accepted. City of course would have benefitted from a timely extension so that it could have submitted a more orderly response.

Conrail argues that this Board "can and should reject the City's OFA petition on the merits."

Conrail's Reply from pp. 3 to its end should be stricken in its entirety. All that material is clearly reply to what City unquestionably filed as a reply.

If Conrail's illegitimate pleading from p. 3 onward is not stricken, then City asks this Board specifically to establish some kind of schedule for full briefing of the issues. Conrail should not be permitted to mount some kind of Abbott and Costello "Who's on first" routine to block City's right argue its case for its right to invoke OFA procedures, if Conrail is making an attack on that right. Indeed, everything Conrail has filed to date on OFA should be ignored, since Conrail says it has not made a motion and no one could claim that what it has filed is otherwise a permissible reply to a notice of intent to OFA.

Leaving aside Conrail's rail regulatory Abbott and Costello routine, Conrail filed the only relevant petition or motion here: that was Conrail's de facto motion to reject OFA's in this proceeding, or exempt the proceeding from OFA. Conrail argues at pp. 1-2 of its motion that City cannot reply to Conrail's de facto motion for exemption, and then in the same pleading argues that this Board should exempt this abandonment from OFA on its own initiative and then launches into many pages of argument to that end.

If Conrail is asking this Board to exercise the Board's initiative, as Conrail is, then Conrail is making a motion for the Board to exercise discretion (which City maintains the Board does not have in this instance). When a party asks for something, then the agency response is no longer sua sponte, as Conrail seems to seek to pretend. In the end, lawyers should speak in the common tongue, where they ask for something, and

acknowledge that fact. Conrail's argument that its motion is not a motion makes civilians think that lawyers are beyond understanding (i.e., at best absurd, or from some other planet, in the vernacular), or at least that their arguments are subject to that critique.

It is indeed ironic that the use of OFA in Conrail abandonment proceedings in Hudson County, New Jersey, appears to have been pioneered by Mr. Steven L. Hyman, the real estate developer to whom Conrail unlawfully sold its line here prior to seeking any STB authorization. In Conrail Abandonment of the Edgewater Branch in Hudson County, NJ, AB 167 (Sub-no. 1036N), served Feb. 27, 1987, the Director of the Office of Proceedings found developer Hyman's OFA to be reasonable to initiate negotiations and "bona fide" (a finding no longer made by this agency, for STB examines only financial responsibility except on motion, but the finding that Hyman's OFA was bona fide is quite contrary to what Conrail seeks here, and thus very interesting). The Director postponed the effectiveness of the abandonment per the OFA regulations.² In contrast to anything Mr. Hyman could have said for the last quarter century, including in 1987, City does have a rail interest in the Harsimus Branch. City does want to keep this rail corridor intact. City does want to restore a rail line to it. City would be delighted to see some alleviation of truck traffic through some freight rail use of the line. City

² Developer Hyman's negotiations were unsuccessful, and his request for terms and conditions was rejected as untimely. Decision in AB 167 (Sub-no. 1089N), served June 2, 1987.

does seek to implement what Europeans have accomplished with their rail systems. City does want to prepare for the future. Moreover, and what in the end is at least as exciting, City understands that it has achieved a reasonable community consensus in that regard.

Should Conrail challenge this pleading, City hereby requests leave to file it. It is a timely response (given the holiday weekend) to Conrail's illegitimate motion to strike and reply to a reply.

Conclusion

Conrail's motion to strike must be denied, and all of its reply to reply from page 3 onward must be stricken, or considered only to the extent it demonstrates the absurdity of Conrail's motion to strike. If this Board is going to entertain Conrail's effort to derail the OFA process any further, then City requests a briefing schedule, and a clear right to reply to all of Conrail's claims. Conrail's argument that the agency should sua sponte exempt this proceeding without examination is unprecedented legerdemain.

Respectfully submitted,

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Certificate of Service

I hereby certify service of the foregoing on 26 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.

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