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December 30, 2002

Surface Transportation Board  
Case Control Unit  
1925 K Street, N.W.  
Washington, DC 20423

Attention: Mr. Troy Brady

Re: STB Docket No. AB-167 (Sub-No. 1095X), Consolidated Rail Corporation -  
Abandonment Exemption - In Lancaster and Chester Counties, PA

Dear Mr. Brady:

The Board served a notice on October 24, 2002, requesting comments on the further historic preservation process initiated by the Board pursuant to the U. S. Court of Appeals for the Third Circuit's remand of the Board's decision served August 19, 1999 in the above matter. Several comments were filed on or about December 9, 2002.

Enclosed, please find the original and two copies of the Reply Comments of Norfolk Southern Railway Company, Lessee and Operator of Pennsylvania Lines, LLC, Successor to Consolidated Rail Corporation, in Response to the Board's Request for Comments on the Reopened Historic Preservation Process under Section 106 of the National Historic Preservation Act in response to those comments under the Board's Rules of Practice at 49 CFR 1104.13.

Very truly yours,

*James R. Paschall*  
James R. Paschall

cc: (by mail, w/encl.) All parties on attached Certificate of Service)

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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, DC 20423-0001

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STB Docket No. AB-167 (Sub-No. 1095X)  
CONSOLIDATED RAIL CORPORATION  
- ABANDONMENT EXEMPTION -  
IN LANCASTER AND CHESTER COUNTIES, PA

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REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY,  
LESSEE AND OPERATOR OF PENNSYLVANIA LINES, LLC,  
SUCCESSOR TO CONSOLIDATED RAIL CORPORATION,  
IN RESPONSE TO THE BOARD'S REQUEST FOR COMMENTS ON  
THE REOPENED HISTORIC PRESERVATION PROCESS

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Lessee and Operator of  
Pennsylvania Lines LLC,  
Successor to Consolidated Rail  
Corporation

December 30, 2002

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB-167 (Sub-No. 1095X)

Consolidated Rail Corporation  
- Abandonment Exemption -  
In Lancaster and Chester Counties, PA

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Reply Comments of Norfolk Southern Railway Company,  
Lessee and Operator of Pennsylvania Lines, LLC,  
Successor to Consolidated Rail Corporation,  
in Response to the Board's Request for Comments on  
the Reopened Historic Preservation Process

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**I. Introduction.**

Pursuant to 49 CFR 1104.13, Norfolk Southern Railway Company ("NSR"), lessee of the property and operator of Pennsylvania Lines, LLC ("PRR"),<sup>1</sup> a subsidiary of, and successor to, certain assets of Consolidated Rail Corporation ("Conrail"), files these comments in reply to the comments<sup>2</sup> filed in the subject Surface Transportation

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<sup>1</sup>Norfolk Southern Railway Company and its interest in this proceeding were identified in NSR's Comments in this matter, filed with the Board's Section of Environmental Assessment (SEA) on December 9, 2002.

<sup>2</sup>Comments in response to the Board's (SEA's) October 24, 2002 notice inviting initial comments by December 9, 2002 have been filed by Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"); the Pennsylvania Historical and Museum Commission (the Pennsylvania "SHPO"); The County of Chester, PA; Conestoga, Martic, Providence, Eden, Bart and Sadsbury Townships, PA (the "Townships") with cover letter from Martic Township, PA; Martic Township Planning Commission (same comment as the Townships) Conestoga County, PA Board of Supervisors (same comment as the Townships); Conestoga Township, PA Planning Commission (same

Board ("STB" or "Board") proceeding on or about December 9, 2002 by the interested, (or "consulting") parties listed in footnote 2. The parties filed their initial comments in response to the Board's notice served October 24, 2002. That notice reinitiated the historic preservation process under the procedures of Section 106 of the National Historic Preservation Act ("NHPA") in compliance with the decision of the United States Court of Appeals for the Third Circuit<sup>3</sup> remanding the Board's 1997<sup>4</sup> and 1999<sup>5</sup>

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comment as the Townships); the Pennsylvania Department of Transportation (PennDOT); the Pennsylvania Department of Conservation and Natural Resources ("DCNR"), the Historic Preservation Trust of Lancaster County ("HPTLC"); the Lancaster County Conservancy; the Lancaster Farmland Trust; the South End Community Association ("SECA"); Howard E. Groff; Penn B. Glazier; Glenn R. Morrison; Andrew J. Fullam, III; and NSR. The Board served SEA's October 24, 2002 notice soliciting further comments on the historic preservation process in this matter on 51 potential "consulting parties." NSR has received or found on the Board's web site only the comments from the parties just listed. DCNR's comments appear to include certain views of Lancaster County, PA, but we have received no written comments by the County or any of its agencies since the Board issued the October 24, 2002 notice. The Board's notice indicated that the Pennsylvania State Historic Preservation Officer ("SHPO") and the Advisory Council on Historic Preservation ("ACHP"), and other consulting parties, including the Commonwealth of Pennsylvania and the Lancaster County Planning Commission, had consulted with the Board prior to the issuance of that notice. (The Commonwealth of Pennsylvania's Historical and Museum Commission ("PHMC"), Bureau for Historic Preservation ("BHP") is the Pennsylvania State Historic Preservation Office. Dr. Brent D. Glass is the Executive Director of PHMC. Conrail dealt mainly with Brenda Barrett, Director of the BHP as SHPO and BHP staff members Kurt W. Carr, Chief of the Division of Archaeology and Susan Zacher throughout the period of this proceeding.) As far as NSR has been able to determine, ACHP has filed no written public comments in this docket since the Court's remand decision, nor has that agency submitted any written comments in response to the Board's October 24, 2002 notice.

<sup>3</sup>Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Bd., 252 F.3d 246 (3rd Cir. 2001) ("FAST Decision").

<sup>4</sup>The Board's 1997 decision was served October 2, 1997. In that decision, the Board denied FAST's petition to reopen the proceeding to broaden the historic preservation condition to include the entire property as a "linear resource" but did modify

decisions in this matter. The Court decided that the Board had not fully complied with the Section 106 procedures, but clearly stated that the Board was not required to reach any specific substantive result with respect to historic preservation issues.<sup>6</sup> The Court

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the "stay" condition requiring Conrail not to alter the historic integrity of 32 bridges and 36 potential archaeological sites near bridges that the SHPO had previously identified as possibly eligible for listing in the National Register. Kurt Carr, for the SHPO, advised Conrail Associate General Counsel John J. Paylor in a letter dated March 5, 1990 that the BHP "will verify any known archaeological sites near these bridges." We have found nothing in Conrail's files to show that this identification was ever provided by the BHP to Conrail. Indeed, in footnote 4 of the Board's *August 13, 1999* decision, the Board stated: "The record does not indicate that the SHPO provided Conrail with any further identification of archaeological sites." PennDot argued that Conrail had consummated the abandonment and that the Board's jurisdiction in the matter was terminated. Conrail mentioned its consummation of the abandonment in passing but argued against the petition to reopen on other grounds. The Board did not address PennDOT's jurisdictional argument or determine whether the abandonment had been consummated.

<sup>5</sup>The Board's 1999 decision was served August 13, 1999. In that decision, the Board denied FAST's petition for reconsideration of the 1997 decision, imposed the mitigation conditions that the Board, the SHPO and Conrail had previously agreed upon and terminated the Section 106 process. This action by the Board was both reasonable and substantively correct. Indeed, there was little else the Board could do. The decision also appeared in concert with ACHP's procedures at that time, and certainly were in compliance with the Board's own policies and procedures. Nonetheless, for reasons that do not seem to be entirely applicable to the facts as set forth in the Board's 1999 decision, the Court of Appeals viewed the Board's effort finally to end this matter as procedurally deficient and remanded the case so that the Board might follow the proper procedures, even if the Board reached same decision after following them. It is noteworthy that the issue of whether the abandonment had been consummated was not presented to or decided by the Board in the 1999 decision, as well. NSR's lease and operation of the PRR properties began June 1, 1999. Thus, NSR did not participate in this proceeding prior to the Board's August 13, 1999 decision.

<sup>6</sup>In the *FAST Decision*, the Court stated at 252 F.3d at 267: "In determining to vacate and remand this matter, we in no way suggest that FAST is entitled to the relief it seeks. We take no position as to whether the entire Enola Branch is eligible for inclusion in the National Register or as to whether there is sufficient evidence of changed perceptions of historical significance or changed circumstances to justify preserving the entire line. We also take no position as to whether the mitigation plan

did not address whether the NHPA is properly applied at all to STB rail line abandonment exemption or application proceedings. That issue was not presented to

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avored by the STB is proper although we note that the ultimate decision is left to the STB after due consideration of comments from interested parties. See *Concerned Citizens*, 176 F.3d at 696. We also take no position as to whether consultation is at an impasse and whether the process properly should be terminated. We only hold that, on remand, the STB must conduct the Section 106 process in accordance with the regulations. It must consider the comments and opinions of the Keeper, the ACHP, and other interested parties as to the scope of the eligible historic properties and as to a proper mitigation plan. If the STB again decides that further consultation is fruitless and that the Section 106 process should be terminated, it must follow the procedural track established by the regulations for termination.” The Court thus rewarded the dilatory tactics of FAST and the agencies that have associated with its cause on extremely technical procedural grounds despite the Board’s salutary efforts to end these tactics. The result has caused great expense and inconvenience to the Board, the railroad and the general public, not to mention the grief caused by accidents at the bridges slated for removal.

FAST and the associated agencies continue to seek unlawful and unreasonable mitigation measures with respect to the supposed adverse effects of the Board’s exemption from regulation of the abandonment of rail service over this allegedly historic private property through confiscating it (directly or indirectly through onerous and expensive processes and conditions) in order to turn it into a trail. Given the facts of the case and the Board’s limited range of options, it is difficult to see how these arguments are interposed for any purpose other than to delay the proceeding and to pressure the Board, the railroad and perhaps the Townships into a voluntary resolution of the proceeding that the Board cannot order. The Board has consistently and properly recognized the sought relief as unauthorized by the Interstate Commerce Commission Termination Act (which only authorizes the transfer of railroad properties for continued rail service, subject to compensation), the National Trail System Act (under which completely voluntary actions by all parties may be approved), the National Historic Preservation Act (which is procedural and at most requires as reasonable accommodation for historic interests as can be made consistent with the main purpose of the agency’s governing statute), and the Fifth Amendment to the United States Constitution. Thus, despite FAST’s obstinate and frivolous refusal to recognize it, what they seek is beyond the Board’s jurisdiction. It is difficult to reach a conclusion other than that the comments already filed in this matter make clear that the Board will be required to follow the last “track” suggested by the Court and terminate consultation. If the Board does not discontinue this proceeding on jurisdictional grounds, as we argue it should, the sooner consultation, and thus this proceeding is terminated and the procedural clock on the Section 106 process runs out, the better the general public interest as represented by the Members of Congress, the Townships, PennDOT, the

the Court.<sup>7</sup> The Court's remand also does not affect the Interstate Commerce Commission's ("ICC"), the Board's predecessor agency's, long-final decision to allow the exemption from prior review and regulation by the agency of the abandonment of regulated, common carrier rail service on the subject rail line, pursuant to a notice of exemption filed by Conrail on October 3, 1989.

Some of the recently-filed initial comments raise issues or contain statements that require NSR response or clarification. NSR trusts these reply comments will clarify the facts and issues and result in the prompt resolution of this unduly prolonged case. NSR offered its Comments, and offers these Reply Comments, without waiving the

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Pennsylvania PUC and the purposes of the ICCTA will be served.

<sup>7</sup>The Court also declined to address NSR's argument that the Board was without jurisdiction to consider further historic preservation mitigation measures since Conrail had consummated abandonment of the subject line because this argument had not been considered by the Board. Of course, NSR was not responsible for the property and did not participate in the proceeding prior to FAST's petition to the Court of Appeals for review of the August 13, 1999 STB decision. Thus, NSR had no previous opportunity to present the argument to the Board and there was no STB finding as to whether the railroad had consummated the abandonment of the subject segment of the A&S Branch.

The Court did not preclude the Board's consideration of this jurisdictional argument, however. The Court stated in the *FAST Decision* at 252 F.3d at 262: "The issue is whether Norfolk has abandoned, sold or otherwise disposed of any portion of that property, a point on which the record is silent. If, on remand, the STB concludes that Norfolk has disposed of some portion of the line, the STB will be without power to expand the historical condition to cover the property already sold." NSR points out that the references to "Norfolk" and to property "already sold" should not be taken out of context. Clearly, Conrail could have consummated the abandonment prior to NSR's taking control of the property, a point, which the Court noted, "on which the record is silent." Moreover, the Court recognized the true scope of the actions that terminate Board jurisdiction over abandonments when they cited precedents describing determinations on consummation of abandonments and when they used the phrase in the preceding sentence identifying the issue as whether the railroad "has abandoned, sold or otherwise disposed of any portion of that property...."

jurisdictional argument suggested in NSR's initial Comments. NSR contends that the NHPA is inapplicable to STB railroad abandonment proceedings, especially exemption proceedings, and that this proceeding should be discontinued and consummation of the abandonment of the Line recognized. NSR also does not waive any other argument pertaining to the Board's lack of continuing jurisdiction over any or all matters in this proceeding.<sup>8</sup>

## **II. Clarification As to Location and Length of the Line To Be Abandoned.**

### **A. Conrail's Notice of Exemption Applied to Only 33.9 Miles of Rail Line But Needed to Apply to No More Than 23.8 Miles of Rail Line; 66.5 Miles of Rail Line Are Not At Issue in this Proceeding; "Enola Branch" Is Misnomer.**

The line of railroad that is to be abandoned pursuant to the notice of exemption in this proceeding is a segment of the former Conrail line that was called in the notice, and has been known to some extent in recent decades, as the "Enola Branch" in Lancaster and Chester Counties, PA. This designation was a misnomer.<sup>9</sup> The original purpose of

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<sup>8</sup> Jurisdictional arguments can be raised at any time. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003; 140 L. Ed. 2d 210 (1998); STB Docket No. AB-55 (Sub-No. 562X), *CSX Transportation, Inc. – Abandonment Exemption – in Rocky Mount, Nash County, NC*, served July 27, 2000, slip. op. page 4.

<sup>9</sup> While Conrail's bridge list does in fact refer to the subject line as the "Enola Branch," we are somewhat puzzled by this reference. When the line appeared in the Pennsylvania Railroad's timetable (and thereafter), it was called the Atglen and Susquehanna Branch. Conrail showed it in the Sept./Oct. 1978 edition of *The Official Railway Guide*, simply as the Susquehanna Branch, although this may have been an abbreviation. Frederick H. Abendschein refers to the Line in his article detailing all of the history that appears to be available concerning it, "The Atglen and Susquehanna: Lancaster County's Low Grade," *The Keystone*, Volume 27, Number 4, Winter 1994, page 10, The Official Publication of the Pennsylvania Railroad Technical and Historical Society, as the "A&S Branch" or the "Low Grade." Not once does he refer to the line as

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the Line was to provide extra capacity over an additional and nearly parallel route to a congested segment of the Pennsylvania Railroad Company's Trenton, NJ-Harrisburg, PA main-line cutoff route between Parkesburg, PA or Atglen, PA and Enola Yard at Enola, PA, just west of Harrisburg, PA. However, the nearer terminus of the subject Line at the time of its construction was at Wago Junction, PA, nearly 20 miles from Enola. A line of the Northern Central Railway Company, a Pennsylvania Railroad subsidiary, ran from Enola, PA to Wago Junction, PA, 1.8 miles from York Haven, PA (and in fact, from there to York, PA). The Northern Central line was expanded from two to four tracks when the Atglen and Susquehanna Branch was built between 1902 and 1906.

Thus, the Atglen and Susquehanna Branch (or A&S Branch) was its first, and "official," name. It is also much more descriptive of the actual location of the line. The A&S Branch has also been called the "Low Grade Line," because it was designed to provide a low grade route through Lancaster County, PA between Parkesburg, PA, near Atglen, PA (where it reached the Trenton-Harrisburg main line) and a point near Safe Harbor, PA near the Susquehanna River (from which point it began to parallel the Port Road Branch). Almost all of the rest of the A&S Branch (except for a few miles between Shocks Mill, PA and Wago Junction, PA) paralleled some other line of the Pennsylvania Railroad or a subsidiary, and still does.

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the "Enola Branch." Repeated use of this misnomer seems to have simply produced confusion as to the Line's length and location.

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For the sake of accuracy,<sup>10</sup> we will refer to the Line at issue in this proceeding in these Reply Comments as the A&S Branch, unless some citation, quote or previous reference requires us to call it the “Enola Branch.” It should be understood that once we finish our explanation of the location of the Line, we will be referring in later sections of these Reply Comments to the 23.0-mile line segment between the Chester County/Lancaster County line and Safe Harbor, PA, the only part of the Line that is even arguably at issue at this stage in this proceeding.

Segments of that portion of the original A&S Branch that were the subject of the notice of exemption in this proceeding parallel, and serve the same locations as, the Trenton, NJ-Harrisburg, PA Amtrak/PRR (NSR) main line cut-off route (between Milepost 0.0 at Parkesburg, PA and approximately Milepost 3.2 at Atglen, PA) and the Port Road Branch (between approximately Milepost 27.0 near Safe Harbor, PA and approximately Milepost 33.1 (to MP 33.9) at Port, PA) where in more recent years the line’s designation effectively becomes part of the Port Road Branch. The Line then essentially parallels or merges with the Port Road Branch to a point near the bridge over the Susquehanna River at Shocks Mill, PA. The bridge, in turn, is near the western terminus of the original A&S Branch at Wago Junction, PA.

In general, the Board has accurately described the length and location of the Line that was the subject of the notice of exemption, as well as that part of the Line in Lancaster County that Conrail intended to dispose of, and therefore might be the

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<sup>10</sup>We trust the future accuracy will be worth the small risk of a little further confusion.

subject of the historic preservation process.<sup>11</sup> However, some parties have made inaccurate statements pertaining to the length,<sup>12</sup> if not the location<sup>13</sup>, of the Line.

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<sup>11</sup>It should be understood that all our statements in these Reply Comments about the further application of the historic preservation process or the portion of the Line that should be subject to that process are subject to the condition that NSR believes that the process has no further application to any segment of the Line or to this type of STB rail abandonment proceeding at all. We will try to omit this caveat whenever possible in order to avoid its tedious repetition.

<sup>12</sup>In the *FAST Decision*, the Court referred to the "Enola Branch" as "a 66.5-mile rail corridor." 252 F.2d at 255. Surprisingly, the second paragraph of FAST's December 5, 2002 Comments to the Board refer to the Line as "a rail line sixty-six and one-half miles long." The one-paragraph of comments on the Keeper of the National Register of Historic Places's one-page eligibility determination form concerning the "Enola Branch," dated April 16, 1999, refers to "the entire 66.5-mile Enola Branch." The Advisory Council on Historic Preservation's February 26, 1999 letter to the Keeper also refers to the Line as a "66.5-mile line" in at least one reference. These references clearly reflect confusion as to the length of the Line that requires clarification.

<sup>13</sup>The Board and the parties should disregard NSR's footnote 2 in its December 9, 2002 Comments. While the footnote is essentially correct, the fifth through seventh sentences are somewhat vague with reference to the "Quarryville Line." A further review of the document describing the Quarryville Line now leads us to think that the term either referred to the easternmost approximately 11 miles of the line between Quarryville, PA and Parkesburg, PA or to the 27-mile portion of the A&S Branch between Safe Harbor, PA and Parkesburg, PA. It is even possible that it referred to the former Quarryville Branch that was ruined in, and abandoned after, Hurricane Agnes in 1972. The original Atglen and Susquehanna Branch, as the line was first named, and is most accurately described, that has come erroneously to be referred to herein as the "Enola Branch," was the line between Milepost 0.0 at Parkesburg, PA and Milepost 50.6 at Wago Junction, PA. Wago Junction is well beyond the Milepost 27 location where the old A&S Branch begins to parallel the still active line now known as the Port Road Branch, much less the Milepost 33.7 end point for abandonment of both tracks included in Conrail's notice of exemption. Since our reference to the Quarryville Line was vague and does not help in describing the location of this segment, the reference should be disregarded. In the final analysis the Quarryville reference is of no real importance to the identification of the subject Line or to any other issue in this matter. The actual total length of the subject Line as set forth in Conrail's notice of exemption was 33.9 miles, not 66.5 miles, as explained in the text. Thus, all references to a 66.5-mile "line" in NSR's, and anyone else's, previous comments should be disregarded as well. As we

Clarification of both the length and location of the subject Line is required.<sup>14</sup>

Conrail proposed to abandon 66.5 miles of "track" in its October 3, 1989 notice of exemption. This description may have led to some later confusion about the subject Line's length. Conrail's notice actually applied to the abandonment of no more than approximately 33.9 miles of rail line between Milepost 0.0 at CP "Park" in Parkesburg, PA<sup>15</sup> and Milepost 33.9 near the connection of this Line with the Port Road Branch at CP "Port" in Manor Township, PA.<sup>16</sup> The 32.6 additional miles of "track" referred to the

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indicate, Conrail could have omitted about 10 miles of this Line from the notice, because it parallels the Amtrak/PRR line between Philadelphia and Harrisburg or the Port Road Branch along the Susquehanna River, and a slightly greater segment than part of the parallel line has been sold to SEPTA. So at most only 23.0 miles of the Line (if any) are actually now at issue.

<sup>14</sup>Considerable time was required to study the voluminous file and complex background concerning the length and location of this track and to present this detailed review and clarification. That time was unavailable to us earlier due to justifiable reliance on the prior presentations, concentration on the legal issues and the press of other business, principally related to the Conrail transaction. The need for the clarification also was not readily apparent until the conflicting and confused statements about the length and location of the Line began to accumulate and the importance of the background became evident.

<sup>15</sup>NSR inadvertently misspelled "Parkesburg" as "Parkersburg" in its December 9, 2002 Comments.

<sup>16</sup>The segment of the Line described in the notice of exemption that is between Milepost 0.0 and approximately Milepost 4.03 is in Chester County, PA and passes through West Sadsbury Township. The segment of the Line between Milepost 4.03 and Milepost 33.1 is in Lancaster County, PA, and passes through the Townships of Sadsbury, Bart, Eden, Providence, Martic and Conestoga, and the Borough of Quarryville in that county. The Line passes into Manor Township between Milepost 33.1 and Milepost 33.9 but since this segment is parallel to the Port Road Branch, will be retained by NSR, track on the segment will be reclassified as excepted track (or exempt track, as it has sometimes been referred to), and no portion of the Line to be conveyed is in Manor Township, no segment of the Line in that township is at issue and Manor Township has no interest in the proceeding.

second track that Conrail intended to remove from this formerly double tracked line between approximately Milepost 1.1 and Milepost 33.7.<sup>17</sup> In fact, the A&S Branch track between Milepost 0.0 at Parkesburg, PA and Milepost 3.2 at Atglen, PA parallels, and serves the same points as, the Amtrak/PRR main line cut-off route between Trenton, NJ and Harrisburg, PA. Similarly, the A&S Branch track between approximately Milepost 27.0 near Safe Harbor, PA and Milepost 33.9 at Port, PA parallels a still active rail line, the Port Road Branch.

Because of FAST's baseless suggestion that additional PRR (NSR) line must be considered in this proceeding, and because NSR suggests that certain portions of the Line included in the notice of exemption are not properly a part of any further

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The main focus of the historic preservation process in this matter has been on the portion of the line of railroad in Lancaster County, PA between approximately milepost 27 (1 mile east of Safe Harbor, at the confluence of Conestoga Creek with the Susquehanna River) easterly to the Chester County, PA, line at milepost 4.03, as even the Board's December 24, 2002 notice suggests. As explained in the text, this is proper because it reflects Conrail's and NSR's retention of the Line between Milepost 27.0 and Milepost 33.9 and the fact that this segment is parallel to the Port Road Branch. It also reflects the use and conveyance of the line segment in Chester County, PA, as well as most of its parallel location with the Trenton-Harrisburg line.

NSR also notes that Conrail filed an application with the Pennsylvania PUC on September 4, 1993 in PUC Docket No. A-111016 for permission to abolish the crossings located along the "Enola Branch" between Mileposts 4.0 and 27.0. Conrail's action may have reflected its intention to retain the property between Mileposts 27.0 and 33.9 for railroad, including reclassified excepted (or exempt) track use. It does not reflect an intent not to abandon the A&S Branch between these mileposts because there were no shippers at these locations and Conrail never exhibited any intention to hold itself out to provide service along this segment of the A&S Branch. Of course, Conrail could, and NSR can, serve any active shipping locations along this segment from the Port Road Branch.

<sup>17</sup>The somewhat different descriptions of the end points of the second track simply indicated points on the same rail line, not descriptions of locations on a different line.

consideration in this matter, a slightly more detailed description of the location of the original Atglen and Susquehanna Branch, and how it relates to the current PRR/NSR railroad system, is appropriate.

On the east end of the subject Line, between Milepost 0.0 at Parkesburg, PA and approximately Milepost 3.2 at Atglen, PA, a portion of the A&S Branch parallels the line of the Amtrak/PRR (NSR) Trenton, NJ-Harrisburg, PA main line cut-off route. On the west end of the Line, starting at approximately Milepost 27.0 at Safe Harbor, PA, a portion of the A&S Branch parallels the Port Road Branch, until it reaches a connection with the Port Road Branch near Port, PA (between Milepost 33.1 and 33.9).

While the foregoing description encompasses the entire Line that was the subject of Conrail's notice of exemption, some further description of the PRR lines operated by NSR in this area may be useful in this matter. The Port Road Branch runs mainly along the Susquehanna River between Perryville, MD (Milepost 0.0), an important freight railroad point on the Northeast Corridor between Washington and New York and Columbia, PA (Milepost 44.4) where it continues under another name to Harrisburg, PA. The Port Road Branch already existed when the A&S Branch was constructed. As noted, the A&S Branch parallels the Port Road Branch starting at approximately Milepost 27.0 and connects with it at approximately Milepost 33.1. At Columbia, PA, the Columbia Branch (or Columbia Secondary) between Lancaster, PA and Columbia, PA connects with the Port Road Branch. At the time the A&S Branch was constructed, and for many years thereafter, the line from this point at Columbia, PA on the east side of the Susquehanna River into Harrisburg was called the Columbia Branch. However, it

appears that after Conrail took over the property, Conrail generally called the line continuing in a northwesterly direction from this point into Harrisburg simply the Susquehanna Branch rather than either the Columbia Branch or the Port Road Branch.

The official end point of the Atglen and Susquehanna Branch at the western end of the line at the time of its construction was at Wago Junction, PA (Milepost 50.6 = Milepost 116.6 on the "York Haven" Line). Wago Junction, however, is on the west side of the Susquehanna River. At Columbia, PA (Milepost 44.4), the then Columbia Branch and current Susquehanna Branch (the continuation of the Port Road Branch), along with the old A&S Branch, continues northeasterly. At Shocks Mills, PA or CP Shocks (Milepost 111.5 on the Susquehanna Branch), the old Atglen and Susquehanna Branch diverges from the old Columbia Branch to cross the Susquehanna River, into York County. Just beyond the river crossing, the line runs reaches Wago Junction, PA (Milepost 116.6) the western terminus of the original Atglen and Susquehanna Branch. In recent Conrail timetables, the line from the river crossing through Wago Junction, PA and on to Enola, PA, was shown as continuing under the name of the "York Haven Line." York Haven, PA itself is at Milepost 118.4, 1.8 miles beyond Wago Junction. The York Haven Line continues northwesterly along the west side of the Susquehanna River, mostly in York County, on to Enola Yard, PA (Milepost 135.7-Milepost 138.9 on the York Haven Line). This line crosses into Cumberland County near Harrisburg.

The more recently denominated Susquehanna Branch, or old Columbia Branch continuation of the Port Road Branch (no longer having had any parallel with the old A&S Branch from this point) diverges from what becomes the York Haven Line near the

Susquehanna River bridge and continues northwesterly from Shocks Mill, PA as well, but on the east side of the Susquehanna River. At Royalton, PA (Milepost 123.3), this line rejoins the Trenton, NJ-Harrisburg, PA main line and proceeds on into Harrisburg, PA (Milepost 133.4). The east end of Enola can be reached by about a 2.3-mile movement across the Susquehanna River on the main line.

Because of the portions of the A&S Branch that run between and serve essentially the same locations as active line, the approximately 5.3 miles of track that Conrail stated would be removed from the right-of-way along the approximately 3.2-mile line segment between Parkesburg, PA and Atglen, PA and the 13.8 miles of track that Conrail stated would be removed on the right-of-way on the 6.9-mile line segment between Safe Harbor, PA and CP Port, PA could have been removed without ICC authority. Conrail was not required to designate either the overlapping double track mileage or the A&S Branch (or "Enola Branch" as it was called) tracks that were parallel to the Trenton-Harrisburg main line cutoff route or to the Port Road Branch for abandonment since the parallel active rail lines on which railroad operations continue remain between and serve essentially these same points as the track on the A&S Branch. Thus, these overlapping line segments (and track miles) and double tracks did not need to be included as separate miles of track in the notice of exemption at all.

NSR, on behalf of PRR, also intends to retain the property on which the A&S Branch tracks were located between Milepost 27.0 at Safe Harbor, PA and Milepost 33.9 at Port, PA, which, as noted, parallels an active railroad line, as also apparently was Conrail's intention. This property to be retained also happens to be the segment of

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the subject Line that parallels the Susquehanna River.

Thus, SEA's reference to the Line at issue on page 2 of the October 24, 2002 notice as extending between approximately Milepost 27 (1 mile east of Safe Harbor, PA) easterly to the Chester County, PA line at Milepost 4.03 thus precisely describes the portion of the Line (if any) at issue in this reopened proceeding.

In the October 24, 2002 notice, SEA also referred to the 4.03 miles of line between Mileposts 0.0 and 4.03 in Chester County, PA at the east end of the Line as part of the subject Line in this proceeding. However, as we have just indicated, the line between Milepost 0.0 at Parkesburg, PA and at least Milepost 3.2 at Atglen, PA also parallels, and serves the same locations, as an active line. Moreover, except for an insignificant segment of approximately 0.03-mile (no more than about 53 yards) in length, the portion of the Line in Chester County also should no longer be under consideration in this matter for other reasons. Conrail reclassified and continued to use the track between Milepost 0.0 at Parkesburg, PA and approximately Milepost 1.5 at Lenover, PA, except for Amtrak's bridge at Milepost 1.5, as the Parkesburg Industrial Track, which is still in active railroad use. Moreover, again excepting the Amtrak bridge, Conrail sold the line between Milepost 1.5 at Lenover, PA and Milepost 4.0 at the Chester County/Lancaster County line to the Southeastern Pennsylvania Transportation Authority ("SEPTA") by deed dated May 13, 1996.

Decisions issued after the filing of the notice of exemption in this proceeding make clear that no STB authority or exemption is required at all to remove one of the tracks from a double track line of railroad as long as at least one track remains to serve

shippers at the parallel locations. A railroad can fulfill its common carrier obligation to serve shippers on a line over a single track<sup>18</sup> and that is all the Board is concerned with, not with how many tracks are built upon or removed from a right-of-way. The Board's rail line abandonment and discontinuance proceedings deal only with the number of miles of "line" that are the subject of the proceedings, not with the number of tracks, or

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<sup>18</sup>See *Chicago, M., St. P. & P. R. Co. Trackage Rights*, 312 I.C.C. 75, 76 (1960); *Boston & Albany R. Abandonment*, 312 I.C.C. 458, 461 (1961); *Missouri-K.-T. R. Co. Abandonment*, ICC Finance Docket No. 21180 (decided Nov. 1, 1960). Conrail may have overlooked these old and somewhat obscure precedents, which apparently were not cited again until after the notice of exemption was filed in this case, and then in a rail line construction, rather than a rail line abandonment, proceeding. ICC Finance Docket No. 32395, *City of Stafford, Texas v. Southern Pacific Transportation Company*, served November 8, 1994. However, removal of one track from a double-tracked line without ICC or STB authority or exemption obviously is not a novel concept as is exemplified by the ICG's well publicized track removal program in the recent past.

Moreover, as STB Finance Docket No. 33611, *Union Pacific Railroad Company - Petition for Declaratory Order -- Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, 3 S.T.B. 646 (1998), served August 21, 1998, makes clear, whether parallel tracks are in the same right-of-way or merely close by are not important to a Board's determination of whether they serve the same territory or locations and can be considered double tracks. The key fact is whether service to the same locations and any shippers at those locations can be served from the parallel track. Although the cited case is a construction case, there is no reason why the same principle would not apply to an abandonment case if the cited tracks serve the same locations or shippers. The ICC and the STB have cross-cited construction and abandonment cases when the same principles have been at issue.

Put differently, if parallel tracks serve same general locations and no shipper loses service because one of the tracks is removed, the parallel tracks may be considered double tracks. As such, one of them may be removed without Board authority or exemption. Here, no shipper will lose service as a result of the removal of the parallel tracks. While the connections with the parallel tracks are at the far end of the parallel lines to the A&S Branch, this is a distinction without a difference in this case. No shippers will lose rail service as a result of the abandonment of, or removal of track from, the "middle segment" between Atglen and Safe Harbor. Moreover, the railroad could have abandoned most of the parallel trackage and continued to connect with this middle segment, were it necessary to serve any shippers there, at a different location

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track-miles, to be removed from a right-of-way. That is in large part because the Board's jurisdiction extends to railroad transportation, or service, not to real estate matters. In this case, the A&S Branch parallels the Trenton-Harrisburg line or the Port Road Branch tracks along the segments indicated above.

STB authority or exemption to abandon a certain number of miles of line simply permanently relieves a railroad from providing regulated, common carrier rail service over a line between two points, regardless of the number of tracks on the line.<sup>19</sup>

STB, and formerly ICC, authorization or exemption of a rail line abandonment is only a determination that under its Congressional mandate, the STB's permission or exemption that allows a railroad to cease providing common carrier, regulated service along a certain line would not hinder the agency's purposes as set forth in the Congressional policies. Those policies are expressed in the Interstate Commerce Commission Termination Act ("ICCTA") 49 U.S.C. Subtitle IV, the law that the Board is

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along the parallel trackage.

<sup>19</sup>The Board may also authorize or exempt the discontinuance of service over a rail line. Discontinuance authority or exemption relieves the railroad from the requirement to provide rail service upon reasonable request over the line. However, discontinuance is a lesser action than permanent abandonment of service. The discontinued line remains part of the railroad system. The railroad can continue to hold the property and to use it for other railroad purposes. The railroad even can later reactivate service over the discontinued line. Once the railroad has received STB discontinuance authority or exemption, however, the railroad is relieved of its common carrier obligation to provide service over the line until it chooses to reactivate it. The railroad cannot be compelled to reactivate service over the line. Thus, discontinuance does not constitute permanent abandonment of service over the line, which requires further STB authorization or exemption. It also means that although the railroad may have the ability to use the line, including materials on the line, for other purposes, it can take no action that would make the reactivation of rail service impossible without STB

charged with administering. These policies principally require that a railroad fulfill its common carrier obligation with respect to shippers on its lines and that it operate economically and without loss through cross-subsidization of unprofitable operations. The relevant provisions of the railroad transportation policy are set forth in the footnote.<sup>20</sup>

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abandonment authority or exemption.

<sup>20</sup>Congress has provided, among other things, in 49 USC §§ 10101. Rail Transportation Policy (2002):  
"In regulating the railroad industry, it is the policy of the United States Government--  
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(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

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(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

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(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

\*\*\*\*\* and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part."

None of these policies or goals are being met in this or similar proceedings. The application of NHPA to STB rail line abandonment proceedings in general, and the abusive and frivolous manipulation of the Section 106 procedures and the delay of the conclusion of this proceeding caused by FAST in this proceeding in particular, are squarely and directly contrary to the Board's mission and the policy of the Congress as expressed in the ICCTA, the Act that the Board administers.

This case is not only a graphic illustration of the rationale for NHPA's lack of application to this type of proceeding that involves private property, no federal funding, minimal federal action and no subsequent federal oversight, but it shows that the Board must bring this matter to as speedy a conclusion as possible consistent with the policies

After a railroad consummates a rail line abandonment, which means that the railroad has taken action showing that it has no intention of restoring rail service over the line<sup>21</sup>, the railroad then has the ability to deal with the property as any landowner would deal with property. This includes the right to dispose of it, without further STB

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of the ICCTA. Of course, we do not place any responsibility on the Board for the delays caused by either FAST's abuses of the Board's processes or the suspect decision of the Court of Appeals. Nonetheless, we urge that the Board move this matter to a conclusion with all possible expedition considering the problems that it has been confronted with in this matter.

<sup>21</sup>Anyone not familiar with rail line abandonment proceedings might think that the abandonment would take place on the effective date of the Board's order. However, STB abandonment authority or exemption is permissive, not mandatory. STB Docket No. AB-83 (Sub-No. 16X), *Maine Central Railroad Company-Abandonment Exemption-In Androscoggin County, ME*, served Sept. 15, 2000. Thus, in order to exercise that authority or exemption, the railroad needs to take some further action to show that the abandonment has been "consummated." *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-34 (1984); *Birt v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir. 1996). In the past, this action would show the railroad's intent to exercise the abandonment authority. However, to end a growing number of controversies concerning whether a railroad had exercised abandonment authority arose, in 1996, the Board adopted a regulation, that requires a railroad to file a letter of consummation with the Board in order to exercise abandonment authority or exemption. 49 CFR 1152.29(e)(2), 1152.50(e). The rule requiring a mandatory notice of consummation applies only to abandonment proceedings filed after the effective date of the new regulations, January 23, 1997. See, STB Ex Parte No. 537, *Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. 10903*, served June 27, 1997, slip. op. 5. The effective date of the regulation, however, makes the letter of consummation regulation inapplicable to this proceeding.

The gap between the effective date of the STB's decision or notice and consummation of the abandonment could serve practical purposes as well, such as allowing the railroad time to wind up its affairs with respect to a line and, on at least a few occasions, to determine that service might economically be restored on all or part of the line because. Reasons for this last minute restoration of service might include the appearance of new business, the availability of a subsidy, negotiation of a contract that would make restoration of rail service on the line profitable or sale of all or part of the line to a short line. As the Board knows, these situations have occurred and the reasons are not just theoretical.

regulation, permission or supervision.<sup>22</sup>

The Board does not take the disposition of the property into account in granting abandonment authority or exemption, does not authorize or prohibit any future use of the property that comprised a line of railroad after a rail line abandonment is consummated, and has no oversight authority or jurisdiction over the former rail line once the railroad exercises or consummates the line's abandonment.<sup>23</sup> After the railroad exercises or consummates abandonment of a line pursuant to Board authority or exemption, it may remove any and all tracks that are on the line, but is not necessarily required to do so. The railroad may treat the property as any other private landowner could treat its property. In fact, if the railroad owns the property that

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<sup>22</sup>As the Board stated at pages 15-16 of the slip opinion in STB Finance Docket No. 33611, *Union Pacific Railroad Company -- Petition for Declaratory Order -- Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, 3 S.T.B. 646 (1998), served August 21, 1998: "Once abandonment of a rail line is consummated, as here, the Board loses jurisdiction over the line, and as the Supreme Court observed in *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-34 (1984), the abandoned line becomes no different than any other real estate, both in terms of its use and a State's jurisdictional oversight. n8 Accordingly, whether we have jurisdiction over a subsequent transaction involving the line is necessarily based on the nature of the activity independent of the prior abandonment."

<sup>23</sup>*Hayfield Northern Railroad Co., Inc. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 633-634 (1984); *Wisconsin Cent. Ltd. v. Surface Transp. Bd.*, 112 F.3d 881, 887-888 (7th Cir. 1997); *Black v. ICC*, 737 F.2d 643, 652 (7th Cir. 1984); STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corporation - Adverse Abandonment - in Salt Lake City, UT*, served March 8, 2002; STB Docket No. AB-246 (Sub-No. 2X), *Yreka Western Railroad Company -- Abandonment Exemption -- In Siskiyou County, CA*, served May 4, 1999, slip op. 12; ICC Docket No. AB-33 (Sub-No. 78), *Union Pacific Railroad Company -- Abandonment -- In Saline, Ottawa, Lincoln, Russell, Osborne and Rooks Counties, KS*, served January 19, 1994. See also, *Landmark West! v. United States Postal Serv.*, 840 F. Supp. 994 (S.D.N.Y. 1993), *aff'd* 41 F.3d 1500 (2d Cir.

comprises a right-of-way of an abandoned line in fee, it can simply retain it, with or without tracks, if it wishes to do so.<sup>24</sup>

As explained below, there is a reason to include a segment of line on which track, and rail operations, will remain as part of a rail line "abandonment," and this can account in part for the inclusion in the notice of exemption of the line segments on which Conrail clearly intended to leave a single track. A line that has been "abandoned" as a line of railroad can be reclassified in whole or in part for continued railroad use as industrial or other excepted track.<sup>25</sup> Conrail clearly intended to do this.

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1994).

<sup>24</sup>In *Consolidated Rail Corp.--Petition for Declaratory Order*, 1 I.C.C.2d 284 (1984), Conrail petitioned for a declaratory order, questioning whether post-abandonment handling of overhead or bridge traffic under contract was subject to ICC jurisdiction. The ICC stated at 285:

We conclude that the overhead operations contemplated do not give rise to a common carrier obligation. Conrail has implemented the abandonment authority . . . and no longer holds itself out to provide any common carrier service over the abandoned line. Upon abandonment, the line, as a legal matter, no longer functions in interstate or foreign commerce and, in effect, is no longer an active rail line. *Application Proc.--Construct., Acq. or Oper. R. Lines*, 365 I.C.C. 516, 518 (1982). Moreover, Conrail's continued ownership of the abandoned lines does not render Conrail a common carrier with respect to the line. *State of Vt. and Vermont Ry., Inc., Acquisition and Op.*, 320 I.C.C. 609 (1964). . .

<sup>25</sup>There are many examples of this type of track being referred to as exempt track, including in relatively recent decisions. "Excepted track" now appears to be the favored and appropriate term, however.

**B. Part of the Subject Line Was Reclassified As Industrial or Other Excepted Track; The Inclusion of This Portion of the Line Segment in the Abandonment Notice Was Only For Purposes of Track Reclassification; Part of the Subject Line Is Parallel to Another Line and No STB Authority or Exemption is Required for Removal of Track on That Segment, or the Board Should Recognize that Abandonment of That Segment Has Been Consummated.**

Conrail's inclusion of the line segments between Mileposts 0.0 and approximately 1.1 and Mileposts 33.7 and 33.9 in the 1989 notice of exemption, although seemingly even more unnecessary than the inclusion of the entire larger segments of the Line paralleling the Trenton-Harrisburg line or the Port Road Branch, thus served the purpose of identifying the track on those shorter segments for reclassification as industrial or other excepted track. Even though railroad use of a track will continue after it is reclassified from a line of railroad to excepted track, a railroad must seek STB abandonment authority or exemption for the line segment to be reclassified in order to make such a track reclassification. The Board has determined that such track reclassifications can only be made after a line has been abandoned<sup>26</sup> and is no longer

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<sup>26</sup>Although there are a few older cases, the ICC's decision in ICC Docket No. AB-52 (Sub-No. 71X), *The Atchison, Topeka and Santa Fe Railway Company -- Abandonment Exemption -- In Lyon County, KS*, served June 17, 1991, clearly indicated that track that is part of a "line of railroad" cannot be reclassified without first being abandoned, even if the use of the track by the railroad has clearly changed or will clearly change as a result of the abandonment of adjacent track. Thereafter, in many cases, the ICC and the STB have noted without disapproval that the railroad filing for a rail line abandonment exemption intended to reclassify part of the line to be abandoned as industrial, spur, lead, yard or storage track. STB Docket No. AB-43 (Sub-No. 171X), *Illinois Central Railroad Company - Abandonment Exemption - In McLean County, IL*, served May 6, 2002; STB Docket No. AB-55 (Sub-No. 568X), *CSX Transportation, Inc.*

subject to the Board's jurisdiction as a "line of railroad," even though the newly excepted track continues to be used for railroad purposes.<sup>27</sup> Conrail obviously intended to reclassify and continue to operate short segments of track on both ends of this Line where it indicated that a single track would remain. Since the railroad retains the track for use in providing railroad service, it is not appropriate for the Board to place any historic mitigation or other conditions on the "abandonment," retention and continued use of the track. The line's "abandonment" will have no effect on the condition and use of this portion of the railroad's private property.

In fact, in this case, on the east end of the Line, Conrail did retain and continue to use the remaining single track between Milepost 0.0 at CP Park and approximately Milepost 1.2 near the clearance point of the switch to Green Giant in Parkesburg, PA as an industrial lead track. NSR still operates over this track segment, which is now known as the Parkesburg Industrial Track, to serve one or more shippers at Parkesburg. The

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*– Abandonment Exemption – In Franklin County, PA, served March 9, 1999; STB Docket No. AB-33 (Sub-No. 123X), Union Pacific Railroad Company – Abandonment Exemption – In Butler County, IA, served January 29, 1999; ICC Docket No. AB-290 (Sub-No. 172X) and Norfolk Southern Railway Company – Abandonment Exemption – In Granville and Vance Counties, NC, served October 12, 1995.*

<sup>27</sup>The track is still being used for railroad purposes and, as a result, technically, the reclassified track is still under the Board's jurisdiction pursuant to 49 U.S.C. 10501(b)(2). However, the Board has been directed not to exercise that jurisdiction with respect to construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks under 49 U.S.C. 10906. The existence of the Board's jurisdiction nonetheless pre-empts any State or local regulation of the excepted tracks. STB Finance Docket No. 34111, *North San Diego County Transit Development Board - Petition for Declaratory Order*, served August 21, 2002; STB Finance Docket No. 32058, *Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Company*, served December 11, 1998.

retained railroad property at Parkesburg, PA actually extends to approximately Milepost 1.5, but not to Amtrak's bridge at that point.<sup>28</sup> The Board may wish to officially recognize this reclassification.<sup>29</sup>

On the west end of the Line, Conrail's notice of exemption indicated that it would retain a 0.2-mile line segment between Mileposts 33.7 and 33.9 in order to connect with the Port Road Branch in Manor Township. However, Conrail's old bridge list appears to show that a track segment of at least 0.8-mile in length between Milepost 33.1 (the actual approximate location of the Port Road Branch connection) and Milepost 33.9 near CP Port (in Manor Township, PA) must be retained in order to keep this connection and provide sufficient room for an excepted track useful in railroad operations at this location.<sup>30</sup> Moreover, Conrail not only had no apparent intention to dispose of so much track or property that the connection to the Port Road Branch from the remaining excepted track at this end of the line could not be retained, but it had no intention to dispose of any of the right-of-way at all along the parallel track between Milepost 27.0

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<sup>28</sup>Extension of the retained trackage for the Parkesburg Industrial Track to Milepost 1.5 fits with the conveyance of the line between Mileposts 1.5 and 4.0 to SEPTA, discussed below. However, Amtrak owns and is responsible for the bridge at Milepost 1.5 which crosses its active line and contains its utility poles and perhaps other items. This bridge thus has neither been retained by NSR nor was it conveyed to SEPTA. It was not identified as historic when previously reviewed. In any event, it is Amtrak's property and responsibility. It cannot be considered further herein.

<sup>29</sup>This would be appropriate even though the segment of track is also part of the A&S Branch line segment that parallels the Harrisburg-Trenton main line, and could have been removed or retained at the railroad's option in any event.

<sup>30</sup>That also removes any part of the Line in Manor Township, which is also in

near Safe Harbor, PA and Milepost 33.9 near CP Port.<sup>31</sup> Conrail merely wished to remove most of the track from this segment of the Line that parallels the Port Road Branch. NSR also currently intends to keep the right-of-way between Milepost 27.0 and Milepost 33.9 for railroad purposes, including excepted track use, but may remove the track, or not currently replace track on any part of the parallel right-of-way that was the A&S Branch between Milepost 27.0 and Milepost 33.9.<sup>32</sup> The Board thus should recognize that no abandonment authority or exemption was necessary for Conrail (or NSR) to remove the track on the segments of the A&S Branch between Mileposts 0.0 and 3.2 and between Mileposts 27.0 and 33.9, or to retain track on any part of these line segments as excepted track. Moreover, the Board should recognize that NSR is free to treat the property as ordinary private property not subject to STB jurisdiction.

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Lancaster County, from further consideration in this matter.

<sup>31</sup>Even if Conrail or NSR intended to dispose of the A&S Branch where it approaches and parallels the Port Road Branch at Milepost 27.0 near Safe Harbor, PA. Conrail intended to abandon the A&S Branch or "Enola Branch" as a line of railroad, it would be dangerous and totally inappropriate to place a trail on the right-of-way between Milepost 27.0 and Milepost 33.9 next to active railroad line. This is equally true of the property parallel to the Trenton-Harrisburg line between Milepost 0.0 and approximately Milepost 3.2 that is being retained by NSR and use for the operation of industrial track or has been conveyed to SEPTA. However, as indicated, Conrail intended, and NSR intends to retain this property.

<sup>32</sup>Of course, NSR would consummate the abandonment of any portion of this 6.9-mile line segment (or approximately 6.1-mile segment if the reclassified excepted track were excluded) if for any reason the Board decided that NSR is required to do so. If it did so, no historic preservation mitigation measures would be required, because NSR would continue to retain the property for railroad purposes, and removal of the track and materials from the line has already taken place. Moreover, there are no structures on this segment of the Line subject to any removal order by the Pennsylvania Public Utility Commission or any other State or Federal agency.

In the alternative, the Board should find that Conrail's removal of track and retention of the property parallel to those active rail line consummated the abandonment of those portions of the line segment that was the subject of Conrail's notice of exemption, and that no historic preservation mitigation conditions are necessary or possible for these retained portions of the Line. These portions of the Line continue to be owned by the railroad (or SEPTA) and used or retained for railroad purposes. Thus, any action by the Board in recognizing consummation of their "abandonment" will have no effect on any supposed historic properties. It also will make no substantive difference from recognizing that the track could be removed from these segments of the A&S Branch without STB authority or exemption.

The Board may also recognize that a longer line segment is required to retain the connection to the Port Road Branch at the west end of the Line and that NSR should be free to reclassify more than 0.2-mile of track as industrial or other excepted track at CP Port.<sup>33</sup>

**C. Conrail Sold 2.5 Miles of Line in Chester County, PA to SEPTA in 1996.**

As previously noted, NSR has recently discovered that Conrail sold approximately 2.5 miles of the Line in Chester County, PA, between Milepost 1.5 at Lenover, PA and Milepost 4.0 near the Chester County/Lancaster County line, to the

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<sup>33</sup>In any event, as just suggested, the longer line segment parallel to the Port Road Branch between Milepost 27.0 and Milepost 33.9 should be considered abandoned but retained by the railroad for railroad purposes and no longer subject to consideration in the historic preservation process

Southeastern Pennsylvania Transportation Authority ("SEPTA") by deed dated May 13, 1996.<sup>34</sup> This line segment includes almost all of the remaining portion of the Line in Chester County after either the reclassification of the Parkesburg Industrial Track (MP 0.0 to MP 1.5) or the recognition that no STB authority or exemption was required to remove the track from the segment parallel to the Trenton-Harrisburg main line is taken into account.

Thus, the only portion of the Line in Chester County that has not been removed from consideration in this proceeding at all is at one end of a bridge over Noble Road and Octoraro Creek at Milepost 4.03, plus about 50 yards of access to the end of the bridge, which was not conveyed to SEPTA. As part of the Settlement Agreement with the Townships, Conrail agreed to convey this bridge to Sadsbury Township, but to provide a joint payment to Sadsbury Township and West Sadsbury Township (in Chester County) in order for them to take ownership and maintenance of the bridge at Milepost 4.03. Conrail had enough property remaining at the Chester County/Lancaster County Line to provide the approximately 50 yards of access to the Townships from the Chester County end of the bridge.

The continued use of the Parkesburg Industrial Track for railroad service and the sale of the remainder of the line in Chester County to SEPTA,<sup>35</sup> presumably for some

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<sup>34</sup>While Conrail may have notified the Board of this sale of a portion of the Line to SEPTA, we have been unable to find any record of this prior to FAST's appeal of the Board's 1999 decision to the U. S. Court of Appeals for the Third Circuit.

<sup>35</sup>The arguments made by Conrail in 1996 and 1997 in Pennsylvania PUC

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use connected with SEPTA's commuter rail service, means that no mitigation measures are either possible or necessary with respect to the portion of the Line in Chester County<sup>36</sup> and Chester County's remaining interest in the case is minimal, at most.<sup>37</sup>

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proceedings and on May 1, 1996 in reply to FAST's petition to reopen the STB abandonment proceeding to broaden the historic preservation condition from certain bridges on the line to the entire property indicated that Conrail believed the ICC's decision served February 22, 1990, which referred only to keeping intact certain bridges until completion of the Section 106 process, the passage of 330 days without further action by the SHPO or the ICC with respect to historic preservation matters, the ICC's decision served April 19, 1993 declining to extend the trail use negotiating period and ordering: "The trail use condition imposed in the February 22, 1990 decision is vacated and Conrail may abandon the line" left Conrail free to consummate abandonment of the entire Line. As far as Conrail knew at the time, the only remaining historic preservation requirement was the documentation of the five bridges previously identified as potentially eligible historic properties by the SHPO. These were the only properties at risk of being subject to adverse effects because Conrail planned to take them down. The preamble to the February 25, 1997 Settlement Agreement between Conrail and the Townships indicated that Conrail believed it was free to abandon the line. The Board did not reopen the proceeding until its order served October 2, 1997. Thus, Conrail's actions in conveying the approximately 2.5 miles of line for which it believed it had abandonment authority and which was not subject to any mitigation conditions was understandable and defensible. Moreover, a large part of this line parallels the Harrisburg-Trenton line, for which Conrail needed no ICC authority or exemption to remove the track or otherwise dispose of or convey.

<sup>36</sup>In the *FAST Decision*, the Court of Appeals recognized that all or part of the Line may have been abandoned. The Court in particular realized that the Board might be without jurisdiction to expand the historical preservation condition to property that had been sold. The Court stated at 252 F.3d at 246: "If, on remand, the STB concludes that Norfolk has disposed of some portion of the line, the STB will be without power to expand the historical condition to cover that property already sold." The Board's continuing jurisdiction over the Line does not depend on whether the property has been sold, however, but on whether the abandonment has been exercised or consummated. The Court actually recognized this in the following sentence when it referred to the Board's authority to expand the historical condition "to cover all property not abandoned" and in its citation of much of the relevant case authority pertaining to consummation of abandonment prior to the Board's institution of the letter of consummation procedure. The Board should find that Conrail consummated abandonment of the entire line, as further explained in the text, *infra*.

**D. No More Than Approximately 23 Miles of Line Remains Under Any Consideration in This Proceeding; the Board Should Recognize the Consummation of the Abandonment of, or the Lack of Need for Board**

The segments of the Line that have been converted to excepted track for further railroad use and the segment that has been sold to SEPTA clearly have been removed from the Board's jurisdiction. Moreover, Conrail needed no authority to remove the track from, and abandon, the line segments that parallel active rail lines. Inasmuch as NSR on behalf of PRR, and SEPTA, are retaining all of the parts of the Line that are parallel to active rail lines, these segments should be considered as exempt or excepted from or outside of Board jurisdiction or as part of lines for which abandonment has been consummated and no conditions were either necessary or appropriate.

Conrail entered into a stipulation in the Pennsylvania PUC proceeding dealing with the Line to be abandoned in Lancaster County to convey most of the remaining Line segment to the Townships and another stipulation concerning the future responsibility for and maintenance of certain bridges with PennDOT. These actions manifested Conrail's obvious intent to consummate abandonment of the Line. Conrail agreed to dispose of the property because it appropriately considered that it had consummated abandonment of the Line pursuant to prior STB exemptions and had, or would soon, comply with the historic preservation mitigation conditions as it understood them. The conveyance was not to, and obviously did not, take place until the conditions were satisfied. Thus, Conrail had submitted to the processes of State law to wind up its affairs with respect to the segment of the Line that it did not intend to retain or sell to SEPTA. NSR can think of no basis on which the Board could order this stipulation to convey this segment of the Line to be negated, especially since Conrail tried to satisfy the historic preservation mitigation requirements as it then understood them, notwithstanding the Court of Appeals remand decision, which after all did postulate a scenario in which additional conditions could not be imposed.

Thus, the Board should not act to subject either the railroad or the purchasers or donees of the property (the Townships) under these agreements to any further historical mitigation conditions with respect to the conveyance of the property to them, much less act to attempt to negate the agreement. Conrail and NSR proceeded in good faith to adhere to the Board's conditions and to perform all the mitigation measures previously proposed as to any arguably historical properties as to which subsequent planned actions might have an adverse effect. There is no basis for not recognizing the consummation of the abandonment or for ordering any further conditions to be placed on implementation of the Settlement Agreement and the final disposition of the segment of the Line covered by that agreement.

<sup>37</sup>To be clear, NSR states that except for the small access point of no more than 0.03-mile (approximately 53 yards, at most) of property and West Sadsbury Township's portion of the bridge at Milepost 4.03, no part of the Line in Chester County should remain under consideration in this proceeding.

**Authority or Exemption for the Abandonment of, the Other 10.9 Miles of the Subject Line.**

While NSR believes the Board should discontinue this proceeding for lack of jurisdiction, for purposes of further discussion in these Reply Comments, NSR will refer to the length of the remaining Line under consideration in the historic preservation process as a 23-mile Line between Mileposts 4.0 and 27.0 in Lancaster County, PA (recognizing that an insignificant segment of less than 0.03-mile (53 yards) of the Line is in Chester County, PA). This takes into account the parallel trackage or reclassification of certain track on the subject Line in Chester County, as described above, and the conveyance of the Line between Mileposts 1.5 and 4.0 to SEPTA.

**III. NSR Does Not Waive Jurisdictional Arguments.**

NSR's December 9, 2002 Comments explained in detail that the National Historic Preservation Act is not properly applied to STB rail line abandonment proceedings in general, and to notice of exemption proceedings in particular.<sup>38</sup> NSR specifically reserves this argument. NSR submitted the Comments and submits these Reply Comments without waiver of the previously submitted jurisdictional argument or any

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<sup>38</sup>NSR wishes to clarify that we have not argued that the Board has the authority under the ICCTA to exempt railroads from the application of the NHPA in a case where that Act actually might apply. Rather, we argue that the NHPA is not applicable to rail line abandonment proceedings, especially pursuant to notices of exemption, because these proceedings are limited in scope, do not involve any federal funding and thus are not "federal undertakings" of the type to which NHPA applies. The fact that the Board might exempt a railroad abandonment from regulation is an indication that the Board's action is not the type of action that constitutes a "federal undertaking" under NHPA, but it is because of the limited nature of the Board's action, not because the Board has

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other jurisdictional arguments applicable to this case.

**IV. The Earlier Comments of Senator Specter and Congressman Pitts.**

On April 22, 2002, Senator Arlen Specter of Pennsylvania wrote to the Board concerning this matter. Senator Specter requested that the Board expedite a decision in this proceeding. He stated: "I have been advised of the public safety and financial concerns that loom for the surrounding townships as this issue is deliberated. Numerous accidents have occurred at the over thirty rail way crossings that exist on the former line. The townships have spent considerable sums to participate in this lengthy legal and regulatory process."

On March 22, 2002, Congressman Joseph R. Pitts also wrote to the Board, and to the Pennsylvania SHPO, requesting that this matter be expedited. Congressman Pitts wrote: "The townships are most anxious for a decision, and are extremely concerned about the long delay in getting this matter resolved. Please note that Conrail started to abandon this track in 1989, and that the townships involved accepted ownership approximately eight years ago. Further, the townships view this as a public safety issue as well as a financial one. There are over 30 crossings involved that have been the scene of numerous accidents. The townships have also spent considerable sums of money participating in this lengthy legal and regulatory process."

The Board should respond promptly to this showing of Congressional concern. Since the facts, the comments, and the law, show what the substantive result must be,

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acted directly to exempt the abandonment proceeding from the application of NHPA.

and any further delay simply exacerbates an already intolerable situation and plays into FAST's game plan, NSR also urges that the matter be resolved expeditiously. The best way to do that is to recognize that the Board should not be applying the Section 106 process to this type of rail line abandonment proceeding. The next best way to do it is to terminate the Section 106 process (in line with the procedures required by the Court and the suggestions of PennDOT) and to recognize Conrail's abandonment of the Line. In order to insure the result, it may be well for the Board to pursue both options simultaneously.

**V. General Reply Comments.**

**A. This Proceeding Deals With Private Property.**

The commenters who favor taking the railroad's property for use as a trail seem to forget that the Board, and this proceeding, is dealing with the railroad's private property. They seem to think that the Board ought to conduct this proceeding as if the private property owner had no rights with respect to the disposition of its property and no real say in the outcome of the matter, and moreover, should pay as much as they require simply in order to be able to exit the business along this line and to dispose of the property.

There are both statutory and constitutional limits as to what the Board can order with respect to private property, as the Board itself has often recognized. While it is true that the segment of the Line that is at issue will become public property as a result of the Settlement Agreement with the Township's, that is of no relevance to the Board's

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decision and no basis for the Board to treat it as public property before it becomes such. Moreover, the Board has no jurisdiction over the railroad's property once the abandonment is consummated. After consummation,, the property no longer constitutes a line of railroad, and the Board will have no jurisdiction over the former rail line once the Townships subsequently take ownership and possession of that property. When the Townships take possession of the segment of the Line to be conveyed to them and it becomes public property, those persons, groups or agencies who are concerned with its use can use whatever local forums and procedures are available to them to influence that use.

FAST's comments, in particular, treat this private property as if it were public property and indeed, almost as if they have more of an ownership interest than the railroad, or its prospective owners, the Townships. FAST's comments actually proceed as if the only real question is determining its highest and best use as public property, or their property, not whether the rights of the owners of the private property or the parties to the settlement agreements, under the jurisdiction and order of the Pennsylvania PUC, are to be respected. They also disregard abundant legal precedent on these matters.

FAST's comments are focused on planning for trail use, not historic preservation. This shows that FAST's entire purpose in trying to add tremendous cost and delay to this proceeding is to abusively manipulate the Section 106 process in an attempt to achieve indirectly that which it cannot do directly, confiscate the railroad's property, soon to be the Township's property, for their own use.

Of course, there is nothing to prevent the Townships from using the property for

recreational or trail purposes. Some or all of them very well may do so. But that is up to them as a public policy or planning measure, not up to the Board as a historic preservation measure, and certainly not up to FAST.

We must ask why FAST, and the ACHP, insist that the Board go through all this process simply to attempt to force the Board to reach a conclusion that the Board clearly cannot order under the ICCTA or any other law? The answer rather clearly seems to be to wear out the Board and the real parties in interest so they will give FAST something it is not entitled to have under any legal theory.

If FAST thinks that NSR will meekly play that game, however, they are mistaken. We have presented our position in comments and reply comments. We will respond to any questions or orders of the Board. We may file a motion, if needed to bring this matter to a prompt conclusion. We will otherwise defend our legal position. We will listen to any reasonable proposal within the time frame of termination of consultation under the Section 106 process (approximately 45 days), which we urge the Board to begin as soon as possible. However, that proposal must already have the agreement of all the parties to the settlement agreements (all of the Townships, PennDOT and the PUC), and must not result in extra liability, expense or continuing conditions or responsibilities for NSR. Nor may it adversely affect the Townships, since we assume they would not agree to any proposal that had such a result. Otherwise, we believe there is little more to be said or done with regard to this matter or that we can reasonably do consistent with our obligations to our shareholders, our customers, the Townships, PennDOT, the Pennsylvania PUC and the general public.

FAST chastises NSR, or sets up the basis for doing so for being "biased" in its further consideration of this matter. Presumably, NSR's attempt to protect its private property interests and to use its resources for fulfilling its common carrier obligation to the public and its duties to its shareholders constitutes bias. Or perhaps simply not accepting FAST's foregone, and baseless, conclusions reflect this bias in their view.

If railroads cannot abandon lines without having to go through an inordinately long, expensive and confiscatory process, the goals and policies of the ICCTA (as expressed in 49 U.S.C. 10101, cited above) and the repeated attempts by Congress to speed up abandonments and permit the railroads to rationalize their plant and devote their resources to their best use in the enterprise will be thwarted.

This proceeding, with its undue and pernicious effect on private interests, shows why the historic preservation process was meant to apply, and only should be applied to undertakings involving federal funds or perhaps that result in income to a private party through federal funds and involve federal oversight. That is what Congress evidently realized and intended even in the revised definition of a federal undertaking in the NHPA when it kept these requirements. Courts are increasingly recognizing this as well, as the decisions cited in our Comments attest.

FAST does not indicate who will take over the property as the trail sponsor, and exactly how it gets around the legal impediments to the property's expropriation for this purpose. They also do not offer any plan for compensation for the property or for the extra expense to NSR and the Townships involved with their proposals. Nor do they suggest that anyone else pay for it.

**B. The Board Has Limited, If Any, Jurisdiction Over Either the Disposition of the Property or Historic Preservation Conditions That Can Be Placed on That Disposition.**

In the first place, as NSR has shown in detail in its initial Comments, the NHPA does not apply, and should not be applied, to this type of STB rail line abandonment exemption proceeding.

Even if NHPA were to apply to this proceeding, the Board is constrained by the fact that it is dealing with private property, its duty to administer the ICCTA, its lack of a role with respect to railroad property after it is no longer used as a line of railroad, the Fifth Amendment to the U. S. Constitution and the fact that the NHPA is a procedural statute that must merely be taken into account. NHPA is not meant to be applied to place onerous conditions on private undertakings with respect to private property that defeat the underlying substantive purposes and policies of the substantive law, the ICCTA, under which the railroads operate and which the Board administers. There is no need to repeat the legal citations in support of these statements as they are adequately set forth above, in NSR's initial Comments and even in the Board's 1999 decision and October 24, 2002 notice.

Therefore, the Board cannot require that the property be conveyed to FAST or anyone else for use as a trail, whether or not under the guise of a condition to mitigate alleged adverse effects on supposed historic properties. Moreover, the Board cannot require that the railroad place restrictive covenants or other conditions on the disposition of the property so that the same effect is achieved and the purposes of the ICCTA are defeated. The value of the railroad's property cannot be effectively and

unconstitutionally diminished, or the use or value of that property made unavailable for other purposes consistent with the ICCTA. The fact that Conrail chose to donate the 23.0-mile segment of the property under consideration to the Townships and make certain payments to them to assist in its maintenance and use does not affect the general validity and application of this principle. It merely shows that Conrail weighed the various benefits and detriments concerned with abandonment of the Line and made what it believed to be an appropriate, and voluntary, decision as to the most favorable disposition of the property.

**C. Reply Comment on General Comments Made in Initial Comments.**

SEA's notice has actually elicited surprising little comment, and nothing new, with respect to either how to resolve the issues in this proceeding, or the specific questions asked by SEA. One theme runs through the comments other than those by FAST and a few of its supporters: this matter needs to be expedited and brought to a conclusion. Even some of the groups, agencies or individuals that have associated with FAST's substantive position agree on this.

The Townships, in four statements from four different agencies, strongly urge that the Board avoid the continued delays in bringing about a safe and equitable conclusion to this matter, just as Senator Specter and Congressman Pitts have already done. The Townships express concern over the issue of public safety at crossings that will be made safer when obstructions can be removed. They note the personal injury, property damage and even death that have occurred at these crossings, stating: "The longer these unsafe conditions are allowed to exist, the greater the risk of public safety

and property damage.”

Several groups and individuals have submitted variations on a form letter that does little more than ask that they be consulting parties. These groups and individuals seem to support turning the property into a trail, but they provide no legal support for the position, nor do they add anything that is applicable to any part of the historic preservation process. They do not respond to SEA's questions. They include no suggestions as to appropriate, and legally permissible, mitigation measures. They treat the matter as if they are dealing with public property with which the STB has a free hand to deal with as it chooses and with someone else's unlimited funds.

A few parties express concern over preservation of the stone arch bridges. Not all of these bridges will be taken down as a result of NSR's conveyance of the property to the Townships. The structures that will be taken down need to be taken down for reasons of public safety. This has been found and ordered by an independent state agency, the Pennsylvania Public Utility Commission, that is charged with making such findings. Those structures have already been photographed and documented for the SHPO. That is all that needs to be done with them. It is no tribute to the artisans who produced these structures that their descendants are endangered on the highways because of their continued existence. Not all of them need to be preserved in place to be remembered and admired. Moreover, structures have a useful life. These are working utilitarian structures, not sites of independent historical significance. Now that their purpose has been served, and their useful lives near their ends, they need to be removed. They can be remembered in other ways, as the historic preservation process

recognizes through mitigation by documentation.

Two individuals support trail use; two others point to the hazards of old arched railroad tunnel on Route 222. Mr. Andrew J. Fullam, III, recounts the tragic death of his daughter due to the continued existence of this structure that has long been slated for removal. Little more can be said about this unfortunate and unnecessary loss of life except to say that everything possible should be done to end this matter promptly and in a manner that will best prevent any more such tragedies.<sup>39</sup>

Chester County in fact recognizes that limitations on the use of the Line in the Boroughs of Atglen and Parkesburg reduce that County's interest in the matter. In fact, as we have shown, only the west end of the bridge at Milepost 4.03 and about 50 yards of access is available for conveyance to the public at the Chester County end of the Line. The remainder of the four miles of Line in that County has been conveyed to SEPTA or is still being used by NSR. Most of it parallels an active main line railroad right-of-way and would be dangerous to use for a trail in any event.

The only remaining comments, which we will address in more detail, are those of PennDOT, DCNR, the Pennsylvania SHPO and FAST.

## **VI. Reply to PennDOT Comments.**

Although PennDOT's comments are generally reasonable and meant to be

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<sup>39</sup>Indeed, it is not even obvious that the removal of this structure would have any significant effect on the use of the right-of-way for a trail. Trails cross roads at grade in many locations throughout the country. People know how to cross streets, and Route 222 is far from being an interstate highway that would be impossible to cross.

helpful, we do not agree with PennDOT's comments that mitigation should include recordation of a sampling of the remaining ordinary bridges on the Line. The extraordinary structures, and more importantly, the ones that are slated to be taken down have been recorded. All the other structures on the Line, whether interesting or not, have been photographed. Those photographs were presented to the SHPO by Conrail long ago. We are not sure that PennDOT realizes this.

PennDOT makes no proposal as to where the funds should be found to provide this recordation. They also do not suggest a source of funding for publishing a more comprehensive history of the line or for providing additional money to the municipalities. Conrail has already provided enough money for use by the municipalities and for mitigation. It has provided much more than we have ever seen provided by a railroad in any other such matter.

While we assume that PennDOT is familiar with Mr. Abendshein's article cited in footnote 9, perhaps they are not. We cannot see how a more comprehensive history of the Line than Mr. Abendshein's article can be produced. More information about such secondary lines simply does not exist. The railroad is already committed to provide \$1.3 million to the municipalities to take over the structures not scheduled to be taken down. We do not see how we can do anything more without creating a serious imbalance between spending the railroad's limited private resources for providing maintenance and improvement of its physical plant and fulfilling its corporate purpose and charge under the ICCTA of providing common carrier freight rail service and complying with doubtfully pertinent historic preservation measures.

PennDOT has provided useful comments to the Board on terminating consultation and how to proceed expeditiously and efficiently to bring this matter to a conclusion. We think the Board should consider them.

PennDOT joins the chorus of parties urging the Board to end this matter and resolve the public safety issues for which adequate provision was made in the settlement agreements between PennDOT and Conrail, and between the Townships and Conrail, in 1997. NSR sees no reason why it should not abide by these agreements.

**VII. Reply to DCNR Comments; Absence of Independent Comment by Lancaster County.**

DCNR requests additional assessment of the Line for its value for a rails-to-trails corridor and other recreational opportunities. These may be laudable goals as to public property but DCNR does not take into consideration the fact that the Board cannot order the railroad to turn over its private property without compensation and contrary to the order of the Pennsylvania PUC and the settlement agreements for use as a trail. When the property becomes public property, DCNR is free to conduct such studies as it wishes and to deal with the government entities who will own it.

This property was available for disposition for eight years before the settlement agreements were reached. Conrail negotiated with Lancaster County for about three years in an effort to convey the Line as a whole to it for public purposes. Conrail even negotiated with FAST for a time after it had consummated abandonment of the Line. The property has been available for public entities wishing to do any more with it than

the Townships plan to do for over five years. All they have need to do is to step forward and offer to funds for such uses and to compensate the railroad, the Townships and PennDOT, if necessary, for costs of changing the previous agreements and for any further costs that may be imposed on the parties in interest as a result of any action that might be taken by the PUC or anyone else as a result of terminating those agreements. No agency has yet done that. It is by no means clear that is what DCNR and Lancaster County propose even now.

Holding up the railroad's abandonment of the Line and the implementation of the settlement agreements to perform such studies as are suggested by DCNR are beyond the Board's mission or power to act upon. Since these really do not relate to the historic preservation process and cannot bring the matter to a conclusion, they are simply a waste of time insofar as this proceeding is concerned.

If the State of Pennsylvania or Lancaster County wants this private property, either of them can act expeditiously to work out a plan with their constituent governmental entities (the Townships, PennDOT and the PUC) and NSR before it becomes public property, or with the governmental entities after it becomes their property or responsibility. DCNR should not be backing any attempt to force the STB to compel the railroad to give away its property to them, or worse, to a private group, as supposed mitigation for alleged adverse historic effects. The action proposed by the railroad is not to gain a contract or license to build a road or produce some income from federal funding. The railroad is simply exiting the railroad business along this line, and conveying the property for free, with a substantial donation in addition, to the local

governments. NHPA does not require any more than that and the ICCTA certainly does not.

The DCNR has stated that the Lancaster County Commissioners have expressed a willingness to become a sponsor of a rails-to-trails project. While we certainly accept the DCNR's statement at face value, the fact that Lancaster County has not even submitted a one paragraph letter of endorsement of DCNR's comments leads us to wonder about how serious Lancaster County can be about working toward a different resolution of this matter than the one already worked out by Conrail, the Townships and PennDOT and sanctioned and ordered by the PUC.

If DCNR and Lancaster County can offer an agreement that will satisfy all the parties with an interest in this proceeding in the very short period of time that it will take the Board to terminate consultation and end this proceeding, NSR will certainly listen to them. We will seriously consider, and would foresee no reason to reject, any proposal that (1) does not result in the commitment of any additional railroad funds than are already committed to this project, (2) does not result in the commitment of any substantial amount of railroad time to the project, (3) does not result in any additional liability for the railroad, (4) does not result in any continuing responsibility to the project by the railroad after it has consummated the abandonment and conveyed the relevant segment of the Line, (5) completely satisfies all of the Townships and PennDOT, and (6) is acceptable to the PUC in substitution for its previous order. We do not see how we can consider any proposal that falls short of these requirements consistent with our duties to our shareholders and the general public, our commitments to the Townships

and PennDOT and the outstanding order of the PUC. To propose anything else would force the railroad into an untenable position with regard to its resources and duties, and result in either the Board acting contrary to the ICCTA policies and denying or indefinitely delaying consummation of the abandonment or forcing the railroad to do nothing until someone came forward with funding or a reasonable proposal.

We also believe that more than enough time has passed for planning and studies and negotiations. No further delays in permitting the railroad to exit from this situation and to implement the agreement with the Townships or a mutually agreeable alternate arrangement are tolerable. DCNR in fact agrees that expedition in concluding this matter is called for, so they can understand our position that a prolonged period of negotiation is no longer an acceptable way to proceed with handling this matter.

**VIII. Reply to the SHPO Comments; Absence of ACHP Comment.**

The SHPO has said nothing substantive in its comments in this proceeding. The ACHP has said nothing at all, at least publicly. Under these circumstances, the Board can only conclude that they have nothing more to contribute to this matter substantively despite the Board's request for comments. We assume they will support Senator Specter and Congressman Pitts in their call to expedite this matter, although the SHPO's response to Congressman Pitts certainly is not reassuring in this regard.

If all these agencies are actually interested in, or realize that they can accomplish, is to protect their procedures and right to comment, they have had their protection, and they have had their opportunity to comment. Therefore, the Board

should continue to handle the matter as the procedures require, even though NHPA does not apply to these types of proceedings, in order to protect against delay through court appeals. The Board should terminate consultation, and give these agencies their final opportunities to comment and proceed to a conclusion of this matter, while at the same time recognizing that this process need no longer apply to abandonment exemption proceedings so Congress's repeated attempts to speed up this process is no longer thwarted by the misapplication of NHPA to limited STB actions with respect to private undertakings with private funds.

**IX. Reply to FAST Comments.**

**A. Reply to FAST's Direct Questions or Points Directed To NSR's Position.**

FAST: NSR should be required to state its intentions with respect to reinstatement of rail service on all or part of the line or other disposition of the property.

NSR: Although it was reasonably accurately reported that NSR explored the possibility that the entire Line could be sold to SEPTA or the Line could be reactivated for freight use and another Line sold to SEPTA for passenger rail use, NSR made no commitments in this respect. These discussions took place during the period of the court appeal and had no effect on holding up the disposition of this matter. At no time did NSR hold itself out as a common carrier to provide freight service over the Line. Ultimately, NSR and SEPTA could not come to an agreement with respect to SEPTA's potential purchase of any more railroad property. These discussions in no way negated Conrail's consummation of abandonment of the Line or NSR's intention to act consistently with Conrail's actions and agreements. NSR would have had to have taken

whatever legal steps were necessary to reactivate an abandoned rail line had it decided to take that course.

NSR now intends to retain that portion of the Line between Milepost 0.0 at Parkesburg, PA and Milepost 1.5 at Lenover, PA, except for Amtrak's bridge, for use as the Parkesburg Industrial Track. Conrail sold the Line between Milepost 1.5 at Lenover, PA and Milepost 4.0 near the Lancaster County/Chester County Line to SEPTA. NSR intends to honor the Settlement Agreements with PennDOT and the Townships pertaining to disposition of the Line between Milepost 4.0 near the county line and Milepost 27.0 near Safe Harbor, PA to the Townships and with respect to the bridges to be removed. NSR intends to retain possession of the property between Milepost 27.0 near Safe Harbor, PA and Milepost 33.9 at Port, PA in connection with its operation of, and in order to protect, the Port Road Branch. It may retain or place excepted track on all or a portion of this Line.

As abundant authority cited above and in NSR's initial Comments demonstrate, NSR's post-consummation actions with respect to the property are outside the STB's jurisdiction. They are not the subject of the ICC's exemption of the permanent abandonment of rail service over the Line, and the use of the Line as a line of railroad, from the prior approval requirements of the Interstate Commerce Act, now the ICCTA.

FAST: NSR should be required to request the PUC to vacate its order concerning the line, including the settlement agreements, because it predates the Keeper of the National Register's determination of the entire line's eligibility for inclusion in the National Register of Historic Places.

NSR: The Keeper's determination is entitled to no weight whatsoever at the mitigation phase and certainly is no basis for requiring NSR to request vacation of the PUC order or for the Board to take any action that would bring about that result. Even if the Keeper's determination were entitled to any consideration, it would only be at the identification phase. It has no substantive effect, and relates only to the identification of the eligibility of the property for listing. The decision was obviously a pro forma acceptance of FAST's and the ACHP's request. On its face shows that it was not the subject of independent analysis.<sup>40</sup>

Determinations by the Keeper are advisory in nature in any event. As noted, a determination by the Keeper has no real bearing on appropriate mitigation. In fact, this mitigation has been adequately taken into account by the documentation and donation actions already taken by Conrail and NSR and by the Settlement Agreement between Conrail and the Townships in any event.

There is absolutely no legal or factual basis for NSR to request that the PUC vacate its order and the Settlement Agreements between Conrail and the Townships and Conrail and PennDOT. If NSR made such a request, it is entirely possible that the

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<sup>40</sup>NSR was not involved in the matter at that time. The determination may have been made without notice and opportunity to be heard by anyone with a contrary viewpoint. It may have been made with notice via Federal Register notice. If so, and if Federal Register notice was adequate for that determination, it is certainly more than adequate notice to the public of this reopened proceeding and the Board's 46-day comment period and additional 21-day reply period pursuant to the Board's rules of practice. In addition, the Board's October 24, 2002 notice was served on 51 parties, published on the Board's web site, and of widespread interest in notoriety in the Lancaster County area as the comments by several groups and individual citizens

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PUC would order even more of the structures removed. This would certainly not achieve FAST's purpose, but as its unsuccessful appeal of the PUC's order already indicates, there is nothing they can do about it.

Moreover, vacation of the PUC's order could well subject NSR to more costs than it will otherwise incur in winding up this matter. The Board should obviously not do this consistent with its mission under ICCTA. No one has suggested how NSR or the Townships, or PennDOT, would be compensated for any extra costs of vacating the settlement agreement. Certainly FAST has not offered to provide such compensation.

Also, the Board cannot order NSR to ask the PUC to vacate its decision inasmuch as that decision relates to post-abandonment State real estate matters with respect to the property. As the Board is well aware, it cannot order the PUC to do anything or pre-empt the PUC from doing anything that is outside the Board's jurisdiction, but within the province of the PUC. The PUC's actions with respect to the property reflect "the ordinary processes of State law" which the Board has so often stated take effect after consummation of an abandonment when the Board no longer has jurisdiction over a rail line. Even if Conrail had not consummated abandonment of the Line, or thought it was proceeding to initiate the PUC proceeding before it had consummated abandonment of the Line, no authority has been cited for the proposition that a PUC proceeding that deals with property that will become subject to its jurisdiction is premature. As long as the PUC does not order anything that is either beyond its jurisdiction or that takes effect before it gains jurisdiction, there appears to be

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demonstrate.

nothing wrong with the PUC proceeding with respect to the matter. There may be reasons for not holding such proceedings prematurely, when, for example, the matter at issue cannot be adequately determined until some other action is taken. Such reasons do not apply in this case, since the PUC proceeding has been held and has not reached a result that appears to be beyond its jurisdiction as currently understood or is in any other way improper. Indeed, events have shown that anything that can expedite conclusion of this proceeding should be encouraged. Since the PUC has stayed its order pending further proceedings in this docket, there is no harm in having the determination on record already.

Furthermore, the PUC order does not "conflict with the Section 106 process." It applies after the Section 106 process is completed and as to matters that the Section 106 process cannot reach. FAST argued to the PUC that its proceeding and proposed order were contrary to NHPA and the Pennsylvania Historic Preservation Statute. The PUC rejected these arguments. FAST presented this same bogus Section 106 federal pre-emption argument to the Pennsylvania Supreme Court, which rejected it by virtue of a per curiam decision without opinion.

FAST's argument in fact constitutes a collateral attack on the PUC decision, which the Board has neither a reason nor the authority to entertain. As noted, the PUC decision has already been sustained by the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court after an appeal by FAST.

Since the Settlement Agreements between Conrail (NSR for PRR) and the Townships and between Conrail (NSR for PRR) and PennDOT will result in the

preservation of some of the structures, the Settlement Agreement with the Townships in particular should properly be viewed as a mitigation measure. The fact that the Townships have not agreed to maintain structures forever that have a certain lifespan so that they can be used for more convenient trail purposes does not affect this view.

Inasmuch as the railroad Line remains private property until the Townships take ownership and control of it, it makes no difference that the other "consulting parties" were not parties to the Settlement Agreement that will result in transferring the Line segment to the Townships. These so-called consulting parties have no ownership interest in the property, no expectation of an ownership interest in the property, no legal right to an ownership interest in the property, and no standing before the PUC to be parties to the Settlement Agreement (although they were allowed to participate and appeal the PUC decision). They bring no proposal to the table to overcome these problems. They offer no funds in order to persuade the parties to the Settlement Agreement to allow them to participate in a new agreement that will not adversely affect them.

NHPA does not apply to state, local or private actions.<sup>41</sup> NHPA cannot pre-empt state actions with respect to abandoned rail lines. NSR has no duty to comply with NHPA (except to the extent required to do so by the Board) because it is a private party dealing with private property (formerly devoted to serving the public under a common

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<sup>41</sup>W. Mohegan Tribe & Nation v. New York, 246 F.3d 230 (2d Cir. 2001), affirming in part, vacating in part Western Mohegan Tribe and Nation v. New York, 100 F. Supp. 2d 122, 128 (N.D.N.Y. 2000); Vieux Carre Prop. Owners v. Brown, 875 F.2d 453, 458

carrier obligation, but nonetheless private property) in a private undertaking.

FAST: A title search must be undertaken with regard to the line and made a part of the record.

NSR: Since NSR will never convey any of the property to FAST, and since the Townships are already satisfied with the proposed conveyance of the property to them, this is both unnecessary and a waste of time and resources. It has no bearing on any potential conditions to mitigate effects on supposed historic properties.

**B. Reply to Other FAST Comments.**

FAST: FAST's Comments refer to a rail line "sixty-six and one-half miles in length."

NSR: As discussed at length earlier, the Line at issue in this proceeding is not 66.5 miles in length. It is no more than 33.9 miles in length.

FAST: Public involvement must be "actual" and not "pro forma."

NSR: Since FAST has already stated its intention that the Line be turned into a trail, the purpose of this "actual," rather than "pro forma" involvement is apparently to delay the proceeding until FAST achieves its objectives indirectly or to provide a forum for FAST and any supporters to voice their support for turning the property into a trail. There is no reason to think that these other parties will provide any more factual, legal or financial basis for this result than FAST does. The Board can provide all the "actual" consultation to anyone it wishes, of course. If these parties have nothing to say other

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(5th Cir. 1989).

than to support (or oppose) FAST's position, it will not advance the process at all.

FAST states that due process requires that decisions are made with public input on an ongoing basis and not behind closed doors. What FAST forgets is that due process first requires, under the Fifth Amendment to the U. S. Constitution, that private property not be taken without just compensation, nor can it be taken by the government for private purposes at all. Nothing in the solely procedural NHPA and Section 106 process requires NSR to forfeit this basic constitutional right. Moreover, nothing in the ICCTA requires NSR to submit supinely to the confiscation of its property or the waste of its resources contrary to the purposes and policies of that Act, the primary Act that regulates it as a common carrier and sets out its duties to the general public. It, rather than NHPA, is the Act that the Board is charged with administering.

There is also no reason to think that the Board will disregard anyone's comments which provide any valid input, of which there has been precious little despite the Board's extraordinary effort to generate it. If anyone has anything else to provide with respect to any aspect of this process, why have they not produced it in response to the Board's request for comments? It really does not matter because presumably FAST would only accept comment that supports its position as "actual." The Board need not follow that standard.

FAST: The entire line must be included.

NSR: Exactly what FAST means by this is not clear. SEA's notice already

states that the Board will treat the entire Line as eligible for listing in the National Register. While NSR does not agree with this determination, we believe it will make no difference in the final analysis and will lead to a faster final decision on this matter.

This Line has already been studied more than any rail line that we are aware of that has ever been proposed for abandonment. Starting over from the beginning will add nothing to the process.

NSR disagrees with the Keeper's determination, which was indeed pro forma and based on very little information. Despite the list of items provided to the Keeper, in fact all the Keeper had besides some photographs, a letter from the Smithsonian that has not been shared with the parties, and some conclusory letters and reports by FAST and its supporters was Mr. Abendschein's article cited in footnote 9.

As far as NSR can determine, Conrail has already provided any relevant information in its records concerning the line. If NSR comes across any other relevant information, we will be glad to provide it. We should not have to spend scarce resources better spent on active line maintenance to manufacture it. If it exists, it will still exist when the abandonment of the line is consummated.

FAST: The consulting parties must include not only the 51 potential parties listed by the Board, but both the governing bodies and planning commissions of those governments and communities groups concerned with conservation. FAST has added 29 other groups that it believes must be consulted because they have a specific interest in all or part of the rail line, including establishing a recreational trail on the line as its best possible use.

NSR: Anyone with an interest already knows about the proceeding and has had an opportunity to file comments. Adding parties who may simply support FAST's position, or who are suggested as parties simply to run up the costs of, and to delay, the proceeding, serves no historic preservation purpose. The bottom line is that the STB cannot confiscate the railroad's property and turn it into a trail as a "mitigation measure" for supposed adverse historic effects of ceasing to use it as a rail line. There is no reason to think that these consulting parties, which have no direct interest in the property or the proceeding, are likely to add anything new to the historic preservation process, but can be simply expected to support turning the property into a trail, if they participate as all. FAST cannot have been expected to set up all these parties as possible consultants for this process except to the extent it might be clear that all they might be interested in, or consulted about, is whether the property should be turned into a trail. That is a matter that has nothing to do with the historic preservation process. Furthermore, if the 29 other groups were truly interested, and FAST has no doubt already contacted them if they are, they could have come forward in response to the October 24, 2002 notice. These parties and agencies can debate the use of the property for a trail as much as they desire once it becomes public property. If they have a better plan, and a better offer for all the parties than the present agreements consistent with the interests of the real parties in interest and the goals of the ICCTA, they can produce it for the consideration of NSR, the Townships, the PUC, PennDOT, and the Board. We suspect such a plan, or offer, will be a long time in coming.

FAST: SEA needs to identify new officials when State positions change in

January 2003 and bring them into the process. SEA needs to share its plan to identify and include the broadest possible group of consulting parties, as well as the public at large.

NSR: The interested government agencies are already participating. There is no reason to think the views of any elected officials will change the views of these agencies or the range of options that can be presented or considered. This is another delaying tactic.

FAST: There needs to be public hearings together with one or more site visits earlier in the day. The STB should explain its role and take responsibility for this phase and for the entire process, not delegate the responsibility to the railroad.

NSR: The public hearings and site visits are simply another example of FAST trying to run up the costs of further handling of this matter. The STB has a limited role in this matter and a limited range of options. The Board has made this abundantly clear in its decisions and notices in this matter and in similar cases. The STB has no role with respect to the property once the railroad has consummated abandonment of the Line.

The Board has no oversight jurisdiction with respect to anything that happens with respect to the Line. The Board could make clear that if it indeed had the power to order the railroad to do as FAST suggests, it would have no jurisdiction to do anything about it once FAST had control of the property. We doubt this is the kind of explanation that FAST is seeking, however.

FAST: It is SEA's duty to try to affirmatively identify interested persons because it has much greater resources than most community organizations. Providing

information over the internet is good, but does not go far enough. The local press, TV and radio stations, both public and private should also be used to alert the public to meetings and plans involved in the process.

NSR: This is a stunningly naive view of the Board's size and resources. It also does not take into account either the Board's mission or the factual and legal limitations with regard to the Board's lawful range of possible actions in this proceeding. It also does not take into account the extraordinary effort the Board has already made with respect to this proceeding.

FAST: The STB should confirm that the process will go forward considering the entire line as eligible for listing in the National Register. This requires a complete review of the historic and archaeological resources on the line.

NSR: The Line has already been determined to be eligible for listing in the National Register according to the Keeper. All of the structures have been photographed. There is nothing else to see or identify. If this Line was historic, it was historic because of what it was used for, not for its continued existence as a strip of land with some bridges on it. Mr. Abendschein has written a more comprehensive history of the Line than has been written about any other secondary main or branch line in the country. See footnote 9. This article is now readily available to the public. We cannot see what further purpose this identification process would serve, except delay and increased costs.

Neither the railroad nor the Board is required to do an archaeological survey of the property. No action taken by the Board will affect archaeological resources. No

action by the railroad in conveying the property to the Townships will affect archaeological resources. Taking down a limited number of structures will not affect known archaeological resources. Supposedly, surveys of archaeological resources were available to identify whether any bridge removal might disturb these resources. The railroads have been waiting for over 12 years to receive them. A standard condition requiring care to be taken in removal of the bridges and to stop work and consult with the SHPO if any such resources are discovered has always been considered sufficient in past cases and there is no reason to think anything more is required here. Very little land will be disturbed by the removal of these structures which are mainly above ground. Except for the removal of a few structures, neither the Board's action, nor NSR's plans for the Line involve disturbing of identified archaeological sites.

FAST: Because of the age of the study, a new environmental study and review of the environmental and physical characteristics of the line is required. SEA needs to identify who will conduct this review and how it will be conducted.

NSR: This has nothing to do with historical preservation. There is no reason to think that the prior review is inadequate for purposes of the Board's decision to permit Conrail to permanently cease providing common carrier rail service over the Line. The prior environmental report and the Board's assessment are still valid for purposes of exempting the abandonment of the Line from regulation under the Act.<sup>43</sup> This is another

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<sup>43</sup>We will be guided by any request or order of the Board in this regard, of course.

example of FAST's dilatory tactics. We are also puzzled as to why FAST thinks the Keeper's determination has any effect on environmental reviews except to provide some rationale for this baseless suggestion.

FAST: SEA needs to have a plan for assessment and determine impacts on transportation, land use, air and water, and wildlife.

NSR: We frankly do not see what this adds to the standard environmental reporting. The Board's standard environmental report is certainly adequate for all these purposes. The effect of the ICC's (now STB's) actions with respect to these issues has already been evaluated. Since nothing has changed with respect to these actions, and nothing has even changed with respect to the property, except that it is a little more run down and the track and material have already been salvaged and thus there will be no further effects of salvage<sup>44</sup>, there is no reason to believe anything will be changed by a further report.

If FAST is implying that the Board needs to do an assessment concerning the post-abandonment use of the property, they are completely wrong. The Board has no jurisdiction over the property once an abandonment has been consummated, and does

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If the Board does believe that a new report is required, we request that we be advised as soon as possible. There is no reason to think that the standard report prepared by the railroad or a consultant on its behalf which has been deemed sufficient in every other abandonment proceeding processed before the Board since the requirement was added to the Board's regulation would be insufficient.

<sup>44</sup>Except for taking down a few structures which have already been accounted for by recordation and the removal of which will not disturb the environment or can be appropriately performed so it will not cause such disturbance, nothing with respect to the original report has changed.

not concern itself with post-abandonment use of the property. We seriously doubt that FAST really wants the delay this measure would cause or that FAST's friends in the trail user community would want this proposition established. They have worked hard to establish the proposition that the STB does not need to evaluate the post-abandonment use of the property, which serves them well in most cases. There is legal precedent supporting the proposition, as well. *Goos v. ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion under section 1247(d) to base its issuance of an NITU or CITU on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision.")

**FAST:** FAST refers to the description of the property along the River as justifying the need for further updating of the environmental report.

**NSR:** The segment of the Line along the River will be retained by NSR for railroad purposes in connection with the Port Road Branch, which also runs along the River, and which the old A&S Branch closely parallels or merges with along this section of right-of-way. Since the material on the Line has already been salvaged, and there are no bridges on this segment of the Line subject to the jurisdiction of the Pennsylvania PUC, the abandonment of this segment of the Line as a line of railroad, but its retention by NSR for railroad purposes, will have no effect at all on resources along the River.

If FAST is truly concerned about the identification of any endangered plant and animal resources along the Susquehanna River at this point, they can consult the U. S. Fish and Wildlife's list of endangered and threatened species. If they do that, they will

see that there are 3 endangered or threatened plant species in Pennsylvania, none of them known to exist in this area. They will see that there are 16 endangered or threatened animal species, but many of these are actually either nationally threatened or endangered species such as the bald eagle and the Indiana bat or are maritime species and residents of the Chesapeake Bay. There is no reason whatsoever to think that any of these species are present in Lancaster County. More to the point, there is no reason to think that any of them would be in any way harmed or threatened by the Board recognizing consummation of the abandonment of this Line or by any actions of the railroad after consummation of the abandonment, principally removing a few structures along and conveying the 23-mile segment of the Line away from the River in Lancaster County to the Townships.

If FAST were truly concerned with the possible effect of subsequent activities on the property on these species along the River, they should support the railroad's plan to leave the property in private hands and not open it to intrusion by numerous persons.

FAST: The Keeper's determination dealt with the line in Cumberland and York Counties as well. The impact of the project on that line needs to be taken into account as well; and the impact of the project on a joint National Heritage Park along the Susquehanna River in Lancaster and York Counties also needs to be considered.

NSR: Although it may be that the Keeper did not take a thorough look at the Line segment at issue, we see nothing in the Keeper's determination that includes any such erroneous reference to property in York or Cumberland Counties. No segment of the Line to be abandoned – indeed, no segment of the original A&S Branch – is or was in

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Cumberland County. Moreover, no portion of the Line segment to be abandoned is in York County. The railroad lines in these counties are active lines of railroad.

The Port Road Branch/Susquehanna Branch along the east side of the Susquehanna River is the direct route between Perryville, MD, a principal freight shipping point and freight railroad access point on the Northeast Corridor and the PRR main lines at Harrisburg, PA. The York Haven Line on the west side of the Susquehanna River is part of the route structure between a principal terminal at Hagerstown, MD and Harrisburg, PA as well as the Northeastern United States, mostly bypassing the Northeast Corridor. No one knows what the future might hold for demand for rail service in certain areas. There is no reason to think, however, that any of the additional lines suggested by FAST will be anything but active rail lines for the foreseeable future.

The Board's action will not affect these areas outside the immediate vicinity of the Line, nor will the railroad's retention or disposition of the property because the Board is not, and cannot, sanction any future use of, or restraint against, using the property that was formerly a line of railroad. The A&S Branch is not within sight or sound of any of these areas and its future use for any purpose will not affect them or their use in any way.

There is absolutely no basis whatsoever to support FAST's statement that the "undertaking" will have any affect on the "joint National Heritage Park within the Lancaster and York areas." Of course, if this is a national park, and the National Park Service thinks the A&S Branch property at issue is important to it, they can condemn it

and pay just compensation for it. Further consideration of these extraneous matters is not relevant to concluding the historic preservation process in this proceeding.

FAST: Mitigation must go well beyond the old Memorandum of Agreement. "A member of the Historic Preservation community in Lancaster asks, 'Who says the only possible nonconsensual outcome is documentation?'"

NSR: It would probably be difficult to find any more absurd statement ever being presented to the Commission or the Board. We truly doubt that the Board will accept this statement by an anonymous source for the proposition that private property can be confiscated for a trail for the benefit of a private group without any hint of compensation under the procedural auspices of the NHPA in complete contravention of the policies and purposes of the ICCTA and the Fifth Amendment to the United States Constitution.

So, the answer to "who says" is the framers of the U. S. Constitution's Bill of Rights, the Congress of the United States, the United States Courts that have interpreted the National Historic Preservation Act as limited and procedural and the very agency to which this bizarre statement has been presented.

FAST: "...with adequate community involvement, a consensual approach to actual mitigation can be achieved."

NSR: Again, this reflects no acknowledgment or respect for the function of the Board or the ownership rights of NSR or the contract rights of the Townships and PennDOT. FAST can develop all the community involvement and consensual approach to the property that it wants in the appropriate forums to the extent permitted by State and local law after the 23.0-mile line segment at issue becomes public property.

FAST: "Such mitigation measures will include trail use, as advanced by FAST in all the ongoing stages of these proceedings as the highest and best use of the property."

NSR: Here, of course, is the heart of the matter. FAST will settle for nothing less than confiscation of this property for its use as a trail, regardless of the facts, the law or the general public interest. Why go through all the other useless steps previously proposed by FAST, if this is their goal? Why not simply get down to the mitigation phase as is perfectly appropriate and as the Board proposes to do? The answer is obvious. FAST knows the Board cannot give them what they want, so they are trying to run up the costs and delay the matter in the hope that the Board, the railroad and the Townships will give them what they want to get them to go away.

The Board need not put up with this nonsense. No law administered by the Board or that it must take into account allows it to confiscate the railroad's private property without its consent for use as a trail as a mitigation condition for alleged adverse affects on "historic" property. No law administered by the Board can require the Pennsylvania PUC or the Townships to agree to this interference with their jurisdiction or the settlement agreement.

NHPA does not even apply to this limited type of "federal undertaking," as the courts are making clear. It surely does not require the abusive manipulation of the Section 106 process and delays proposed by FAST to the detriment of the public interest in an effort to achieve what the law Congress passed to directly deal with such proposals, the National Trail System Act, does not allow. Neither does the ICCTA.

NSR has no interest in whether the property is or is not used for a trail once it conveys it. However, we do not think all persons, or even the majority, would necessarily agree that a trail is the highest and best use for property. Other parties in other proceedings have asserted numerous problems resulting from trails, including: litter control, noise, unauthorized access to private property, vandalism and destruction of fences, lack of police protection, assault, drug use, methamphetamine production, underage drinking, parties, loitering, poaching, unauthorized use of motor vehicles, continued bisection of private properties, removal of property from the tax rolls, failure to provide liability protection or other types of insurance or bonds, failure of the trail group to have sufficient financial resources, failure to develop and maintain the trail, including weed and tree control, failure to maintain structures on the trail, failure to install or maintain signs, failure to post no trespassing signs, failure to grant farmers easements to cross the right-of-way, and lack of volunteer or community support.<sup>45</sup> Stating that use of property for a trail is its highest and best use, especially when the trail sponsor is private group, is by no means a foregone conclusion.

FAST: Ten thousand members of the public have signed petitions endorsing trail use on the 23-mile section in Lancaster County. A master plan is in the record in the FAST v. STB case.

NSR: We have not seen these petitions. How do we know the signatures are

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<sup>45</sup>See, for example, STB Docket No. AB-6 (Sub-No. 395X), *Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - In Cherokee County, KS and Jasper County, MO*.

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genuine? What identifies the people? Do they live in the area or are they trail supporters from around the nation? Did they know that this was private property and that government funds might need to be used for the development and maintenance of the property? Do they know whether FAST has any funding with which to support, maintain and police a trail? Certainly the Townships, the representatives of the people who live closest to the trail do not support FAST. In any event, does this have any bearing on the legal principles which govern this case?

The so-called master plan that FAST referred to in the court case was prepared and presented by FAST. The court did not comment on its validity, much less endorse it. This plan, which dates from 1994, has no bearing on the historic preservation process. It, of course, has everything to do with conversion of the property to a trail. But that is beside the point.

FAST: FAST and other groups believe trail use is the highest and best use of additional miles of the line in Lancaster County known as the "river section."

NSR: The property that FAST refers to as the "river section" parallels an active line of railroad, the Port Road Branch, and will be retained by NSR for the foreseeable future. There is no law or policy under which the Board can include this section of the Line under any historic preservation mitigation condition as a trail or for any other reason.

Even if there were some way for the Board to permit confiscation of "the river section" from the railroad, will FAST indemnify the railroad for any personal injuries or deaths that occur from people wandering on to the tracks because of this forced public

use? Of course not, and they would not have the resources to do so even if they said they would. Will any government agency get the Pennsylvania legislature to waive its sovereign immunity and to require a State agency to take responsibility and financial liability for such occurrences? We seriously doubt it. Nor should we need to wait to find out.

There is no theory under which the Board can cause the railroad to give up its private property adjacent to an active rail line as an adverse effects historic mitigation measure and then be subjected to potential liability as a direct result of its former property's use, in addition.

FAST: The archaeological sites, including Native American sites, on the property will need protection in the mitigation plan.

NSR: This is completely irrelevant to this proceeding. This "river section" is part of the property to be "abandoned" but it is not part of the property to be conveyed by the railroad in the foreseeable future.

No projected use of this property, nor for that matter any public use in the future, will disturb any archaeological sites on the "river section." No archaeological sites have been identified to the railroad on this property that has been used for a railroad for 100 years. Even if there were, they were likely greatly disturbed if they were anywhere near the surface by the construction of the line, as Mr. Abendschein's article referred to in footnote 9 makes clear. There is nothing that needs to be done about them. FAST, of course, presents no comment on who is supposed to pay for their mitigation plan. Would FAST pay for it if they gained control of the property? If they say they will, will

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they let us see their financial statements and sources of income so that we can judge whether they can fulfill these responsibilities?

FAST: FAST continues to talk about consulting entities that would contribute statements about the viability of the property for trail use.

NSR: This begs the question as to whether trail use is a proper historic preservation measure or whether the Board can take any action that will require that the railroad is forced to turn the property into a trail. It certainly does not appear that FAST wants these groups or individuals brought into the process for their historic knowledge or historic preservation expertise.

FAST: "It is essential that mitigation include assurance of future involvement and consultation when and if changes which would affect the property are proposed."

NSR: This statement certainly does not make clear whose future involvement or consultation is supposed to be required "when and if changes which would affect the property are proposed." If the property were taken by a governmental entity, whether it be the county or the Townships, is the Board or the railroad supposed to guarantee that FAST will continue to have a say as to the property? The STB has no jurisdiction over the property once the abandonment is exercised. The STB is in no position to monitor the future use of the property; nor is the railroad able to spend resources on it.

Is FAST saying that it should have the right to tell the railroad what to do with its private property at some indefinite point in the future after the abandonment has been consummated if some part of the property will be retained by the railroad, as it will be in this case? NSR categorically and unconditionally rejects any suggestion that a private

party can be given the right to dictate to another private party what it does with its private property, even when it is subject to government regulation, much less when it is no longer subject to such regulation. The Board cannot in effect place a servitude on this property requiring NSR to consult with FAST when it wants to do something with the property.

FAST: The photographic display and video is woefully inadequate and should be laid to rest.

NSR: \$15,437 has been paid for the purpose of preserving some history of the entire line. This is more than is usually done and is more than enough of the railroad's private resources, especially when its proposed payments to the Townships and costs of bridge removal are considered, for the purpose of exiting this property. It is sufficient mitigation to document the entire line. Moreover, Mr. Abendschein's article, referred to in footnote 9, constitutes a permanent record of the history of the A&S Branch. This is more documentation than can normally be found for a branch or secondary main line. Conrail has already documented and photographed the structures to be disposed of on this property. In fact, we have recently determined that Conrail presented to the SHPO photographs of all 83 structures on this entire line. The vast majority of these structures are ordinary, repetitive railroad bridges. Some of them in fact are modern highway bridges that are not even owned by the railroad but simply happen to cross the Line. Under these circumstances, NSR's offer in its initial Comments to photograph structures on the Line if they have not been photographed is unnecessary and therefore is withdrawn.

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FAST's comments constitute a textbook example of an attempt to abusively manipulate the processes of a public agency for private advantage that the agency cannot grant. The proposals, or demands, therein should be rejected.

**X. The Section 106 Procedure Should Be Terminated.**

**A. The Line is Not Historic; the Board Has Made the Identification In Any Event.**

As we have indicated, there is nothing especially historic about the A&S Branch. Mr. Abendschein has written an admirably complete article about it. It was a secondary main line built for the purpose of adding extra capacity to the railroad between Philadelphia and Harrisburg. It is well constructed. Such should have been expected after about 75 years of national railroad construction. By 1889, 8,225 miles of railroad line existed in Pennsylvania alone.

Much has been made about the Line's engineering and its grade separations. There was nothing novel about this. William Mahone engineered a similar 83-mile line, 51 miles of it perfectly straight, with room for double tracks, built up to be perfectly level and separate from the surrounding countryside, between Norfolk, VA and Petersburg, VA before the Civil War. That line set the standard for similar construction. It is still in use today, paralleling U. S. Route 460.

The A&S Branch was not even a novel example of this type of construction on the Pennsylvania Railroad. In an 1889 article by Thomas Curtis Clarke, "The Building of A Railway," republished as a chapter in the book, *The American Railway*, published by Bramhall House of New York, Mr. Clarke stated at page 13: "The Pennsylvania Railroad

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between Philadelphia and Harrisburg is a notable example of this. Within the past few years it has been rebuilt on a grand scale, and in many places relocated, and miles of sharp curves and heavy gradients, originally put in to save expense, have been taken out. The system has been followed everywhere, except on a few branch lines, and upon one monumental example of failure - the West Shore Railroad, of New York." At page 17, Mr. Clarke twice refers to the need to get the "easiest gradient" in the construction of a Line.

Mr. Abendshein's article notes that the A&S Branch became extremely expensive to maintain. While the ruling grade was half of the main line's 0.6%, that gradient is by no means extreme. He says at page 22: "Despite all of the A&S's advantages, the railroad now owned a route that had many cuts (prone to landslides) and fills (subject to washouts)." We do not point these things out to diminish the achievements and sacrifices of those that built this Line or of its contribution to the local economy. However, we cannot sit by and accept the statement that this secondary main line is a rail line of novel construction or national significance when that is simply not the case.

For some reason, construction of this Line has been compared to the building of the Panama Canal. Mr. Abendschein noted that the Line was about the same length as the Panama Canal, built around the same time, and was a substantial engineering feat. At no point, however, does he suggest that the task was as monumental as building the Panama Canal.

The Keeper described the Line, in the one paragraph of comments about it in her eligibility determination as 66.5 miles in length. It isn't. The original A&S Branch was

50.6 miles long. Only 33.9 miles of that Line were the subject of the notice of exemption.

The Keeper emphasized the unique nature of the construction. Impressive as it was, it was no different than the building of other railroads for decades prior to that time, as Mr. Clarke's article clearly indicates.

The Keeper also cited the construction of the stone bridges. These three bridges are in fact prominent and interesting structures. But those properties found eligible and which are to be removed have been documented. In any event, the existence of these structures in no way makes the entire line historic.

**B. The Board's Actions Will Not Cause Adverse Effects on Historic Properties That Have Not Already Been Mitigated; the Board Has Prepared to Move Beyond This Phase In Any Event.**

The Board is simply exempting the railroad's permanent cessation of rail service over the subject Line from regulation. The railroad, after consummation of the abandonment, will remove a few structures from the Line, and convey 23.0 miles of the Line to the Townships. None of these actions necessarily will lead to adverse effects on eligible properties except for the removal of some of the bridges, which have been adequately documented.

**C. No Further Mitigation Measures Are Necessary, Appropriate or Within The Board's Power to Order; No Further Mitigation Measures Short of Taking the Property and Turning It Into A Trail Have Been Suggested or Are Likely to Be Suggested.**

The railroads have already adequately mitigated the supposed adverse effects of the abandonment on eligible, albeit private, property: They have presented photographs of all 83 structures on the Line to the SHPO, even those structures along the portion of the Line that will not be sold. They have documented and professionally photographed the bridges that will be removed from the Line. They have provided \$15,437 for preparation of a video display on the Line the Pennsylvania Railroad Museum. They have entered into an agreement with the Townships that will give them 23.0 miles of the Line and provide them with \$1.3 million for maintenance of some of the structures along the Line. There is nothing more the railroads can reasonably be expected to without wasting vast resources on this project.

**D. Nothing Can Be Added to This Process By Further Processing That Will Only Unduly Prolong and Delay Conclusion of the Proceeding.**

FAST makes clear they will settle for nothing less in this process than confiscating the railroad's property for trail use. The SHPO and ACHP continue to say nothing substantive about the property and appear to be delaying the matter as well. The initial commenters added little than what was already known about the proceeding. FAST and its supporters also urge the Board to take actions that are beyond its jurisdiction. Under these circumstances, the Board should terminate consultation under the Section 106 process and move this matter to a prompt conclusion.

**XI. Conclusion.**

NSR submits that the Board should end this matter by finding that the Section 106 process is inapplicable to this type of proceeding. In the alternative, NSR asks that the Board recognize consummation of the abandonment, terminate consultation under the Section 106 process and conclude this proceeding.

Respectfully submitted,

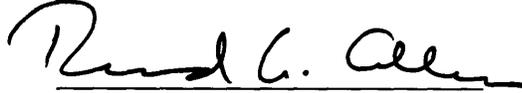
NORFOLK SOUTHERN RAILWAY COMPANY,  
Lessee and Operator of Pennsylvania Lines LLC,  
Successor to Consolidated Rail Corporation

By   
James R. Paschall  
General Attorney

December 30, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have served these Reply Comments on the following parties by first-class mail, postage prepaid, this 30<sup>th</sup> day of December, 2002.



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