

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423



STB NO. AB 167 (SUB-NO. 1189X) 224304

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN
HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X) 224305

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON
COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X) 224306

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

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COMMENTS OF CONSOLIDATED RAIL CORPORATION
ON ISSUES RAISED BY PRE-FILING CORRESPONDENCE

Consolidated Rail Corporation (“Conrail”) today filed its Notice of Exemption and Supplemental Environmental and Historic Report with the Board in the above-captioned proceedings¹ Conrail also filed a Motion to Hold in Abeyance for 180 days the effective date of Conrail’s Notice, so as to permit the Section of Environmental Analysis (“SEA”) to proceed with its historic preservation review under Section 106 of the National Historic Preservation Act (“NHPA”) in advance of issuing its Environmental Assessment

¹ Conrail, CSX Transportation, Inc (“CSXT”), and Norfolk Southern Railway Company (“NS”) have filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS)

Conrail's pre-filing notices, including its initial Environmental and Historic Report, filed March 6, 2008, generated a number of letters to SEA and to the Secretary concerning the proper procedures in these proceedings. Conrail comments here on the issues raised by that correspondence.

Introduction

By Decisions served August 9 and December 19, 2007 ("2007 Decisions"), the Board held that part of Conrail's "Harsimus Branch" in Jersey City, New Jersey, constituted a line of railroad requiring abandonment authorization. *City of Jersey City, Et Al —Petition for Declaratory Order*, STB Fin Dkt No 34818. As described in the Board's Decisions, the Harsimus Branch ran from a main-line connection at CP Waldo into Harsimus Cove Yard on the Hudson River. August 9, 2007 Decision, slip op at 2. Although the City of Jersey City and others (hereafter "the City") claimed that the entire Harsimus Branch was a line of railroad requiring abandonment authorization, the City sought a declaratory order from the Board only for the segment running between Waldo Avenue and Marin Boulevard.²

As discussed in the Board's decision, even before Conrail began operating in the Jersey City area in 1976, the City had begun redevelopment efforts designed to convert the few remaining industrial operations in the area to high-end commercial developments. *Id.* at 4. As shown on V-1 01, ST-2, a significant piece of property at the east end of the Harsimus Branch on

² There was some debate in the case about the mileposts applicable to the Harsimus Branch. Conrail drew the applicable mileposts from the Valuation Maps (V-1 01, ST-1 and ST-2) presented in the case (August 9, 2007 Decision, slip op at 5), which showed the connection at Waldo Avenue (CP Waldo) as Milepost 0 00 and ran eastward to Milepost 0 88 at Marin Boulevard (formerly Henderson Avenue) and on to Milepost 1 48 (Station 7803) on the Hudson River. See Verified Statement of Conrail Witness Robert W. Ryan, filed April 24, 2006, at 4-6 (hereafter "VS Ryan"). The Board found that CP Waldo is at Milepost 2 54, Marin Boulevard is at Milepost 1 30, and the Hudson River is at Milepost 1 00. See *City of Jersey City, Et Al —Pet for Dec Order*, STB Fin Dkt No 34818 (served Aug 8, 2007), slip op at 1 and 3.

the Hudson River was sold off before Conrail began operations³ After Conrail took over, it worked closely with the City to sell off other properties in the Harsimus Cove area, including properties on the Harsimus Branch, to private developers and to the Jersey City Redevelopment Agency Conrail viewed the Harsimus Branch as ancillary spur track that did not require abandonment before pieces of it were sold. Id at 7 The last shipper was gone by 1992 Id at 4 The properties on the Harsimus Branch east of Milepost 0 88 (Marin Boulevard) had all been sold for redevelopment, to a number of different buyers, by the mid-1990s The remaining undeveloped parcels consisted of (a) six raised earth and stone "Embankment" parcels between Mileposts 0 36 and 0 88, (b) two at-grade parcels between Mileposts 0 18 and 0 36 with concrete or stone piers that had supported a bridge raising the line up to the level of the first Embankment parcel, and (c) an at-grade parcel between Mileposts 0 00 and 0 18 With the strong urging of the City, all of the track and the bridges connecting the Embankment parcels and leading to and from those parcels were removed to facilitate redevelopment VS Ryan at 11-12, 14 (filed April 24, 2006, in STB Fin Dkt No 34818)

The Jersey City Redevelopment Agency spent considerable time and money preparing to acquire and redevelop the six Embankment parcels VS Ryan at 14 However, the City lost interest in pursuing its own redevelopment plans when, over the objection of the City and Conrail, the six Embankment parcels were placed on the New Jersey State Register of Historic Places in late 1999 Unable to interest the City in acquiring the property, Conrail in 2003 put

³ In a letter filed in the above-captioned abandonment proceedings on April 28, 2008, counsel for the City complained (at page 5) that Conrail had not shown the Harsimus Branch extending to the water's edge on the Hudson River The reason Conrail did not do that is that the property at the easternmost end of the Harsimus Branch was not transferred to Conrail, and Conrail obviously cannot be required to abandon what it did not acquire When Conrail later listed the track it had acquired that it regarded as spur track, Conrail listed the Harsimus Branch as running from Milepost 0 00 to Milepost 1 36. Ryan VS at 13-14 That is what Conrail is now seeking to abandon

the six Embankment parcels and the two at-grade parcels between Milepost 0.18 and 0.88 out for bids. While the properties were out for bids, the City designated the six Embankment parcels as a *Municipal Landmark* under the City's local historic preservation laws. Conrail notified all bidders of the City's action. VS Ryan at 15-16

SLH Properties was the only bidder that met Conrail's minimum bid requirements. SLH formed eight limited liability companies (hereafter, "the LLCs") to acquire the eight parcels. The sale to the eight LLCs closed in July 2005. It was only after the sale to the LLCs had closed that the City claimed that authority was required from the Board for abandonment of Conrail's right-of-way.

The logic of the Board's 2007 Decisions suggested that abandonment authority was required not only for the part of the Harsimus Branch right-of-way between Milepost 0.00 and 0.88, but also for the remainder of the right-of-way between Milepost 0.88 and 1.36. In accordance with the Board's abandonment rules concerning pre-filing consultation with federal, state, and local agencies (49 C.F.R. §§ 1105.7(b) and (c) and 1105.8), Conrail on February 7, 2007, sent letters to the relevant agencies advising them of Conrail's intention to file a Verified Notice of Exemption to abandon the Harsimus Branch right-of-way and seeking their input regarding environmental and historic issues. Insofar as Conrail received responses to those letters, Conrail attached those responses and included their substance in the Environmental and Historic Report it circulated to the agencies and to other interested parties, and filed with the Board, on March 6, 2007.⁴ Conrail noted in the cover letter accompanying the Report that it expected to file its Notice of Exemption on April 7, 2008.

⁴ Out of an abundance of caution, Conrail in its February 7 letters and in its March 6 Environmental and Historic Report advised the relevant agencies and other interested parties that its Notice of Exemption would include not only the Harsimus Branch, but also another old right-

The City responded to Conrail's circulation of its preliminary Environmental and Historic Report with letters to SEA dated March 4, 20, 28, and April 3, 2008, raising a variety of concerns about the Notice of Exemption process and Conrail's Environmental and Historic Report. Other parties filed letters with the Secretary echoing many of the concerns expressed by the City. In light of these concerns, Conrail on April 16, 2008, sent a letter to the Secretary advising that Conrail would be deferring filing its Notice of Exemption and would address the issues raised by the City and others when it did file.⁵

The issues raised by the City and others fall into six categories: (1) concerns about the Notice of Exemption process, (2) concerns about Conrail's Environmental and Historic Report, (3) concerns about the historic review process under the National Historic Preservation Act (NHPA), (4) concerns about the environmental review process under the National Environmental Protection Act (NEPA), (5) requests that the Board order the Embankment properties reconveyed to Conrail, and (6) requests that the Hudson Branch I T abandonment be severed from this proceeding. We discuss each in turn below.

1. Concerns About the Notice of Exemption Process. The Harsimus Branch has been out of service for many years, accordingly, Conrail has followed the class exemption procedures set forth in the Board's rules for an out-of-service abandonment. The City and others complain

of-way in the same area—the Hudson Street Industrial Track (“Hudson Street I T”). On further reflection, as discussed further below, Conrail has decided that there is no need for it to seek authority to abandon the Hudson Street I T. The Hudson Street I T was always considered spur track, no trace of it remains, and no one contends that abandonment authority is required. Accordingly, the Notice of Exemption that Conrail filed today does not include the Hudson Street I T right-of-way.

⁵ Curiously, having complained that the abandonment process was moving too quickly, the City in a letter filed April 28, 2008, claimed that Conrail might be seeking to delay the process in order to avoid the Board's abandonment authority. Conrail responded with a letter to the Board dated April 30, 2008, which demonstrated that the City's claim was groundless.

that those procedures do not provide adequate time for them to comment City March 28 Letter at 2 They further object to the use of class exemption procedures on the ground that the case is too controversial for those procedures. City March 4 Letter at 4⁶

These parties' objection to the use of class exemption procedures on the grounds of "controversy" is without foundation. The class exemption in this case only relieves Conrail of the transportation-related requirements associated with a full abandonment application A class exemption from those requirements does not exempt the proceeding from environmental or historic review See *Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions*, STB Ex Parte No. 678, 2008 WL 1815592, *1 (served April 23, 2008). While it may be appropriate to deny the use of a class exemption in a case with controversial transportation-related issues, see *Riverview Trenton R R Co — Acquisition and Operation Exemption—Crown Enterprises, Inc*, STB Fin Dkt No 33980 (served Feb 15, 2002), there is no tenable argument for requiring Conrail to file a full-scale abandonment application where the City has raised no transportation-related issues

Insofar as the City's and others' concern is that they have sufficient time to comment on environmental and historic issues, by a separate contemporaneous motion Conrail is requesting that the Board hold the effective date of its Notice of Exemption in abeyance for 180 days to give all parties ample time to comment on Conrail's Supplemental Environmental and Historic

⁶ In a letter to SEA dated December 23, 2008, in which the New Jersey Historic Preservation Office ("HPO") concurred with the Area of Potential Effects proposed by Conrail for purposes of a cultural resources review under Section 106 of the NHPA, the HPO also requested the STB to consider "classifying the proposed abandonment of the Harsimus Branch and Embankment as at least a Petition for Exemption" The HPO does not explain why the Board should deviate from its normal class exemption processes The HPO's suggestion is misinformed and wrong for the same reasons the City's and others' same suggestion is wrong

Report, and to permit the historic review process under Section 106 of the NHPA to be completed before SEA issues its Environmental Assessment

2. Concerns About Conrail's Initial Environmental and Historic Report. The City and others challenged the adequacy of the initial Environmental and Historic Report that Conrail served on all interested parties and filed with the Board. In particular, they complained that Conrail did not provide enough detail concerning the environmental and historic preservation impacts of demolition of the Embankment properties. City's March 28 Letter at 1. As an initial matter, Conrail wishes to emphasize that Conrail is simply abandoning its right-of-way over the Embankment properties. Since there is no longer any track, roadbed, or bridges on those properties, there is nothing for Conrail to salvage. If there is any environmental or historic impact, it has not and will not result from Conrail's abandonment of its right of way, but only from possible reuse of the underlying properties by their present or future owners.

Moreover, demolition of the Embankment properties is by no means a necessary result of Conrail's abandonment of its right-of-way. First, the City has made very clear its intention to purchase or condemn the properties for public use. In September 2004, the City adopted an ordinance authorizing acquisition of those parcels for park and trail use, and it has had a consultant prepare plans for such a park. Those plans would require construction work on the Embankments, but not their demolition. If funding becomes available and the necessary transit agencies are interested, the Mayor has also expressed an interest in using part of the right-of-way for light transit, but no concrete steps have been taken in furtherance of that concept.⁷

Second, even assuming the City did not follow through on its announced intention to

⁷ By letter to Conrail dated March 13, 2008, the New Jersey Department of Transportation has indicated that it has no interest in abandonment of the Harsimus Branch or Hudson Street I T as it pertains to rail freight services.

condemn the Embankment properties, the LLC's have made clear that demolition of the Embankment properties is not their first choice for reuse of the properties. They have presented a number of different proposals to the City for development of the properties that would leave the Embankment structures substantially intact. Under one of those proposals, some 75% of the surface area of the Embankments would be developed as park land, with a trail running the length of the Embankments. The LLCs, however, would require significant zoning changes and cooperation from the City regarding the development of other properties to make these proposals viable.

Absent zoning changes, most of the Embankment properties can only be developed with single-family residences. Such residences can only economically be built, consistent with the height limitations in the area, if the Embankments are demolished. Accordingly, the LLCs have prepared plans, and sought local development approvals, for demolition of the Embankments and construction of single-family housing at grade on most of the parcels. The LLCs also have plans for construction of a residential apartment building on the easternmost parcel and a mixed use building (upper three floors residential, ground floor commercial) on the westernmost parcel. Because the Embankment properties have been designated as a local Historic Landmark, among the approvals the developer must obtain is the approval of the Jersey City Historic Preservation Commission. Whether that approval will be forthcoming and what conditions may be attached to it is unknown.

In short, Conrail does not believe that it is reasonably foreseeable that demolition of the Embankments will result from Conrail's abandonment of its right-of-way. Moreover, the STB has made clear that it will not normally attempt to identify and address reuse alternatives that may be presented by a particular right-of-way. *See Implementation of Environmental Laws, 7*

1 C C 2d 807, 811-812 (1991) Particularly where another governmental authority must approve any third-party reuse of the Embankment properties, the STB's abandonment authorization cannot be deemed the "proximate cause" of such reuse See *City of Shoreacres v Waterworth*, 420 F.3d 440, 452 (5th Cir 2005) ("[I]t is doubtful that an environmental effect may be considered as proximately caused by the action of a particular federal regulator if that effect is directly caused by the action of another government entity over which the regulator has no control.") (citing *DOT v Pub Citizen*, 541 U S 752, 767 (2004)). Here, the Embankment properties cannot be reused for park or trail purposes unless and until the City authorizes condemnation of those properties and appropriates monies to pay for such condemnation Furthermore, the Embankment properties cannot be reused for residential housing unless and until the Jersey City Historic Preservation Commission approves the demolition of the *Embankments to permit the construction of such housing.*

Nevertheless, to avoid any argument that Conrail's environmental and historic report is inadequate, Conrail has prepared a Supplemental Environmental and Historic Report discussing the environmental and historic effects that would result if (1) the City condemned the Embankment properties for a park project or (2) the LLCs' contingent proposal for demolition of the Embankment properties and construction of housing at grade were approved by the Jersey City Historic Preservation Commission and effected by the LLCs.⁸ While there are other proposals that have been made for reuse of the properties, including mixed park, trail, public

⁸ Conrail's Supplemental Environmental and Historic Report incorporates an extensive report by Richard Grubb and Associates, Inc., a New Jersey consulting firm specializing in cultural resources investigations for railroad undertakings, regarding the Area of Potential Effects ("APE") of the indirect effects of the possible park project and residential housing development

transit, and housing projects, none of those is sufficiently concrete that an analysis of their impacts would be other than speculative

3. Concerns About the NHPA Process. The City and others request that the Board not permit abandonment of the line until there has been full compliance with Sections 106 and 110(k) of the NHPA City March 28 Letter at 10-14 Conrail supports compliance with Section 106 review In fact, as noted above, Conrail by separate motion is asking the STB to hold in abeyance for 180 days the effective date of its Notice of Exemption, so as to provide adequate time for completion of Section 106 review before SEA issues its Environmental Assessment ⁹

Conrail does vigorously oppose the idea that Section 110(k) has anything to do with this proceeding. Section 110(k) is a prohibition against granting permits to applicants who engage in anticipatory demolition of historic properties with specific intent to avoid the Section 106 review process See, e.g., *Committee to Save Cleveland's Hewletts v U S Army Corps of Engineers*, 163 F Supp 2d 776, 793 (N D Ohio 2001) (Section 110(k) "works to punish those who would seek to manipulate the Sec 106 process by denying them access to post-demolition permits"), *Young v General Services Admin*, 99 F Supp 2d 59, 82 (D.D.C 2000) (Agency's job under Section 110(k) to determine if the applicant "intended to avoid the requirements of Section 106")

The City claims that Conrail engaged in anticipatory demolition within the meaning of Section 110(k) by removing bridges and track from the Embankment properties between 1994 and 1997 without the Board's approval City March 28 Letter at 13 There is not a shred of evidence, however, that Conrail or anyone else believed at that time that any approval was

⁹ In light of that 180-day proposed schedule—as well as the notice that interested agencies and other parties have already received, and the comments Conrail has already received—Conrail has also requested a waiver of the pre-filing notification requirements of 49 C F R §§ 1105.7 and 1105.8 with respect to its Supplemental Environmental and Historic Report

required from the Board to salvage what Conrail regarded as spur track. Moreover, there is no evidence that Conrail believed that the Embankment properties or any of the track or bridges on those properties were "historic properties" meriting any kind of special consideration. It was not until after Conrail closed its sale of the Embankment properties in July 2005 that anyone claimed that abandonment authority was required for the Harsimus Branch, and it was not until 1999 that anyone applied to designate the Embankments to any historic register. The City itself worked with a developer to demolish the bridge from the easternmost Embankment parcel over Marin Boulevard, and the City ceaselessly badgered Conrail to eliminate the other bridges. The City also opposed designation of the Embankments to the State Historic Preservation Register in 1999. It is the height of hypocrisy, and completely unsupported, for the City now to accuse Conrail of any kind of intentional avoidance of the Section 106 process in connection with the earlier demolition of the Embankment bridges and salvaging of its track.

It also appears that the City claims that the sale of the Embankment properties to SLH constituted intentional avoidance of the Section 106 process. City March 28 Letter at 13. However, the Section 106 process is only triggered by an "undertaking" that is subject to the jurisdiction of a federal agency. 16 U.S.C. § 470w(7), 36 C.F.R. § 800.16(y). Prior to Conrail closing the sale to SLH in July 2005, no one had claimed that any federal approval was required to permit Conrail to sell the Embankment properties, or the rest of the Harsimus Branch properties, for either private or public development. Thus, Conrail cannot be charged with any intentional effort to avoid the Section 106 process by selling the property. Conrail was aware that the Embankments had been declared a Municipal Landmark by the City of Jersey City. In fact, in 2003 Conrail advised all of the parties on the list of prospective bidders that development of the property would be contingent on their compliance with the City's Historic Preservation

laws After the sale of the Embankment properties to the LLCs, it became their problem to determine how to win approval of their plans for developing the sites for residential housing consistent with those properties having been declared a Municipal Landmark Thus, there was no effort by Conrail to avoid *any* historic preservation law, whether federal, state, or local ¹⁰

4. Concerns About the NEPA/NHPA Process. The City argues that the STB should require the preparation of an Environmental Impact Statement (“EIS”) in this proceeding City March 28 Letter at 7-10 The STB’s regulations provide that ordinarily the STB will prepare an Environmental Assessment (“EA”) in connection with abandonment of a rail line 49 C F R § 1105.6(b)(2) It is rare that the STB requires the preparation of an EIS in an abandonment case, and rarer still that it does so without first preparing an EA

The City cites a case where the ICC required the preparation of an EIS, after first preparing an EA, but in that case the embargo of an 11-mile rail line in Maryland and the District of Columbia was going to result in coal being moved by truck instead of rail through city streets to a heating plant in Georgetown if the abandonment were authorized City March 28 Letter at 7 Accordingly, the key issue was the environmental impact of making permanent the use of substitute coal truck service through residential areas *The Baltimore and Ohio R R Co , Et Al —Abandonment and Discontinuance of Service—In Montgomery County, MD, and the*

¹⁰ There was also no effort by SLH to avoid any historic preservation laws SLH did begin to demolish one of the bridge piers on the properties between Milepost 0.18 and 0.36, west of the Embankments. But those properties, and those bridge piers, have never been included in the City’s or the State’s historic preservation designations. In any event, after the City began its declaratory judgment action at the STB in Docket No. 34818, SLH ceased all demolition activity

District of Columbia, Docket No. AB 19 (Sub-No 112), 1988 WL 225973, * 2 (February 25, 1988) (“*B&O*”). No such environmental impact is presented here ¹¹

The *B&O* case also involved seven bridges and a tunnel that had been found eligible for inclusion in the National Register of Historic Places. The ICC held that if the railroad’s salvage operations required the removal or modification of those structures, the railroad would be required to prepare historical documentation. *Id.*, * 12. The railroad was also required to perform archeological testing before initiating salvage operations. *Id.* That was the full extent of the historic preservation conditions imposed in that case.

The Board routinely uses the EA process in cases where it imposes environmental and historic preservation conditions on abandonments. See 49 C.F.R. § 1105.6(b)(2). Moreover, under the NHPA, an agency’s finding of adverse effects on historic property may not be “construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required.” 16 U.S.C. § 470h-2(i) ¹². The City has presented no valid reason for the Board to deviate from its normal procedure in this case.

5. Request for Reconveyance Condition. The City argues that the STB should require the reconveyance of the Embankment properties to Conrail. The City claims a reconveyance order is justified because Conrail had no authority to transfer the Embankment properties to

¹¹ The City has asserted that there could be temporary environmental impacts attributable to the dust and noise resulting from the possible demolition of the Embankments, but such temporary impacts do not require the preparation of an EIS. See *Chelsea Property Owners—Abandonment—Portion of the Conrail Corp W 30th St Secondary Track in New York, NY*, 81 C.C.2d 773, 793 and n. 24 (1992) (because effects of demolishing elevated line, including through buildings, would be temporary and governed by local safety and noise ordinances, preparation of EIS was not warranted, and finding of no significant impact was justified).

¹² Thus, there is no basis for the HPO’s suggestion in its December 23, 2008 letter to SEA that possible adverse effects on historic property support the City’s argument for preparation of an EIS.

LLCs, and because reconveyance is necessary to protect the Embankment properties from demolition City March 28 Letter at 14-15 Neither claim has any merit

It bears emphasizing at the outset that there is no fundamental difference between Conrail's conveyance of eight parcels of property on the Harsimus Branch to the LLCs in July 2005 and Conrail's earlier conveyance of properties on the Harsimus Branch to other developers and to the Jersey City Redevelopment Authority. If the fact that Conrail may have made a mistake in deeming those lines spur track after it took them over in 1976 were sufficient justification for the STB to order reconveyance of the properties that Conrail sold off, then the STB would have to consider ordering reconveyance of properties that have retail establishments, residential buildings, office buildings, and active light transit operations on them That obviously would make no sense There is no demand for freight rail service on any of these properties Conrail sold those properties, and the developers purchased them, in complete good faith¹³ Conrail is not here disputing that it must now obtain abandonment authority in order to terminate its common carrier obligation over these properties, but there is no good reason to require reconveyance of these properties—with all of the attendant legal and contractual turmoil—as a condition of abandoning Conrail's common carrier obligation to non-existent shippers

¹³ In contrast, the City cites a case, *The Land Conservancy of Seattle and King County—Acquisition Exemption—in King County, WA*, Fin Dkt 33389 (served Sept 26, 1997), where a noncarrier had used an acquisition exemption to acquire an active jurisdictional rail line from a railroad, ostensibly for continued rail service, but immediately sought to abandon the line City March 28 Letter at 14 Rail labor complained that the noncarrier was effectively acting as a straw man to avoid the railroad paying labor protection in an abandonment proceeding The STB held that “when an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused.” Slip op. at 3 The STB revoked the exemption and ordered the line reconveyed to the railroad, so that the railroad itself could seek abandonment (and be subject to labor protection) Such intentional misuse of the STB's processes is not present here

Moreover, railroads have never required a fee interest in the property underlying a freight rail right of way in order to meet their common carrier obligation. See, e.g., *Georgia Great Southern Division, South Carolina Central R R Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, Ga.*, STB Dkt. No. AB-389(Sub-No 1X), 1999 WL 219645, at *3 (April 12, 1999) (“The agency has long found that it is consistent with the common carrier obligation of a railroad for the carrier to sell the underlying assets of a rail line while retaining an easement that is sufficient for carrying out rail operations”) Conrail did not expressly retain an easement over the Harsimus Branch properties it sold, but the effect of the STB’s August 9, 2007 decision was to require that a rail freight right-of-way easement or license be constructively maintained on the Embankment properties owned by the LLCs until such time as Conrail obtains abandonment authority. There is no need for the LLCs to reconvey their fee interest in the six Embankment properties or the two non-Embankment properties to maintain Conrail’s constructive common carrier easement

This is a commonsense legal proposition. In *Columbiana Port Auth v Boardman Township*, 154 F Supp 2d 1165 (N D. Ohio 2001), a railroad sold property, including a railroad right-of-way, to a private business. No abandonment authority was sought from the STB or its predecessor, the Interstate Commerce Commission (“ICC”) *Id.* at 1170. Subsequently, a public Park District condemned part of the property, including a segment of the railroad right-of-way, and paid a condemnation award to the private business. *Id.* at 1172. When a successor railroad claimed the right to operate over the right-of-way, the Park District asserted that it owned the right-of-way and sought to block rail operations. *Id.* at 1178. The court found that the right-of-way constituted a “line of railroad” that could not be abandoned without authorization from the

STB, and that the Park District's acquisition of the real estate (like the private business's acquisition before it) was subject to an easement for rail service. *Id.* at 1172-75

Significantly, at no point did the court or any party in *Boardman Township* suggest that the original sale of the property to the private party and the subsequent condemnation of that property by the Park District must be unwound. The court found that the railroad's right to provide rail service and the STB's authority to control the abandonment of the right-of-way was completely protected by the railroad's retention of an easement.

Also significantly, in *Boardman Township* the form of quitclaim deed that the original railroad owner had used to sell the property to the private business did not expressly retain an easement for a railroad right-of-way. Rather, the quitclaim deed contained generic language under which the sale was made "under and subject to all public streets, roads, *easements and rights-of-way*, as evidenced by instruments of record or *as may be apparent on the premises*" *Id.* at 1170 (emphasis in original). The court held that this language supported its determination that the transfer of the property was made subject to the railroad's right to continued use of the right-of-way. *Id.* at 1175-76

Conrail too used quitclaim deeds to transfer the Embankment properties to the LLCs, and those quitclaim deeds were also made "UNDER and SUBJECT . . . to . . . roads, alleys, bridges or streets . . . and . . . any easements or agreements of record or otherwise affecting the Premises, and to the state of facts which a personal inspection or accurate survey would disclose." City Pet. for Dec. Order, filed January 12, 2006, Exh. C, App. I. The STB's August 9 decision determined as a matter of law that Conrail had a continuing duty to maintain the ability to provide rail freight service over the properties it sold to the LLCs. That duty can be met through

the constructive maintenance of a rail freight easement over the property until Conrail is authorized to abandon

Finally, contrary to the City's claim, there is no need for the STB to order reconveyance to prevent demolition of the Embankments. The City claims that because the LLCs are seeking development permits, with Conrail's support, absent reconveyance the STB's jurisdiction could be totally ignored. City March 28 Letter at 14. That is simply untrue. Under New Jersey law, a developer is permitted to seek development permits, including demolition permits, in advance of having every permit and authority it needs to proceed. The permits the developer receives remain conditional until such time as the developer has finished obtaining all of the authorities—whether local, state, or federal—it needs for a project. When the City took the position that municipal agencies did not have to process the LLCs' applications until Conrail obtained abandonment authority from the Board, the LLCs moved in state court for an order directing the Jersey City regulatory authorities to process the LLCs' applications. The court issued that order. No one at any point suggested that if the municipal regulatory authorities issue those permits that the LLCs will be free to proceed with development of the properties absent the proper federal authority. The court's order simply held as a matter of state law that the municipal agencies before which the LLCs have permits pending must process those permits without regard to whether Conrail has yet obtained the necessary federal authority. See Conrail's Letter dated April 30, 2008.

Conrail and SLH are both well aware that the Embankment structures cannot be touched, so long as the Board's 2007 Decisions are in force, until abandonment of the Harsimus Branch is

authorized by the Board and consummated by Conrail. After that, the City will be free to take the Embankment properties by eminent domain for whatever public purposes it desires.¹⁴

6. Request for Severance of the Hudson Street I.T. The City suggests that the issues relating to the Hudson Street I.T. are separate from the issues relating to the Harsimus Branch and it is “confusing” to address them in the same proceeding. City March 28 Letter at 16. As the City itself has pointed out, the Hudson Street I.T. has been completely redeveloped, and the City has no concerns about its abandonment. City March 4 Letter at 2. On further reflection, Conrail agrees that there is no need for it to seek authority to abandon the Hudson Street I.T. in this proceeding, or in any proceeding. Conrail considered the Hudson Street I.T. a spur line and no one, including the City, has ever contended otherwise. Accordingly, Conrail is no longer seeking abandonment authority with respect to the Hudson Street I.T.

Respectfully submitted,

John K. Enright
Associate General Counsel
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103
(215) 209-5012

¹⁴ Under New Jersey law, N.J.S.A. 48:12-125.1, once Conrail has received abandonment authorization, Conrail may not sell or convey its right-of-way for 90 days, other than to the State of New Jersey, a county or municipality. Conrail intends to meet this requirement of the statute. It will wait 90 days to dispose of the right-of-way. (If a public use condition is imposed under 49 U.S.C. § 10905, Conrail will be required to delay disposition of the right-of-way for up to 180 days.) If no government entity seeks to exercise eminent domain, Conrail will relinquish the right-of-way and the LLCs will continue with their ownership of the Embankment properties. Of course, the LLCs will still not be able to develop the properties without the requisite state and local authorizations, and those authorities will still be free to initiate eminent domain proceedings against the LLCs.



Robert M. Jenkins III
Kathryn Kusske Floyd
MAYER BROWN LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3261

Dated: January 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2009, I caused a copy of the foregoing "Comments of Consolidated Rail Corporation on Issues Raised by the Pre-Filing Correspondence" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List


Robert M Jenkins III

SERVICE LIST

**Charles H Montagne (By Overnight Mail)
426 NW 162nd Street
Seattle, Washington 98177**

**Stephen D Marks, Director
Hudson County Planning Division
Justice Brennan Court House
583 Newark Avenue
Jersey City, NJ 07306**

**Bradley M Campbell, Commissioner
State Historic Preservation Office
NJ Department of Environmental Protection
401 East State Street
P O Box 404
Trenton, NJ 08625-0404**

**Mayor Jerramiah T Healy
City Hall
280 Grove Street
Jersey City, NJ 07302**

**Michael D. Selender
Vice President
Jersey City Landmarks Conservancy
P O Box 68
Jersey City, NJ 07303-0068**

**Ron Emrich
Executive Director
Preservation New Jersey
30 S Warren Street
Trenton, NJ 08608**

**Valerio Luccio
Civic JC
P O Box 248
Jersey City, NJ 07303-0248**

**Eric Fleming
President
Harsimus Cove Association
P O Box 101
Jersey City, NJ 07302**

Jennifer Greely
President
Hamilton Park Neighborhood Association
22 West Hamilton Place
Jersey City, NJ 07302

Jill Edelman
President
Powerhouse Arts District Neighborhood Assoc
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Dan Webber
Vice-President
Van Vorst Park Association
289 Varick Street
Jersey City, NJ 07302

Gretchen Scheiman
President
Historic Paulus Hook Association
121 Grand Street
Jersey City, NJ 07302

Robert Vivien
President
Newport Neighborhood Association
40 Newport Parkway #604
Jersey City, NJ 07310

Dolores P Newman
NJ Committee for the East Coast Greenway
P O Box 10505
New Brunswick, NJ 08906

Gregory A Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin
President
Friends of Liberty State Park
75-135 Liberty Avenue
Jersey City, NJ 07306

Daniel D Saunders
Deputy State Historic Preservation Officer
State Historic Preservation Office
NJ Department of Environmental Protection
P O Box 404
Trenton, NJ 08625-0404

Fritz Kahn
1920 N Street, NW
8th Floor
Washington, DC 20036-1601

Daniel H Frohwirth
Jersey City Landmarks Conservancy
30 Montgomery Street
Suite 820
Jersey City, NJ 07302