

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

**CONRAIL’S REPLY SUBMISSION
REGARDING APPLICABILITY OF SECTION 110(K) OF NHPA**

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Introduction

On opening, Conrail showed Section 110(k) of the National Historic Preservation Act (NHPA) does not apply to these proceedings because Conrail did not act with intent to avoid the requirements of Section 106 of NHPA or with intent to harm historic property when it removed bridges and track from the Harsimus Branch in the 1990s. Conrail believed the Harsimus Branch was a spur, not a line of railroad, and thus it did not believe Section 106 applied to abandonment of the Harsimus Branch. When the Board concluded the Harsimus Branch was a line of railroad, Conrail promptly instituted the Section 106 process, even as it appealed the Board's decision.

The City of Jersey City and other parties contesting the abandonment fail to show Conrail violated Section 110(k). First, they fail to show intent to avoid the requirements of Section 106. They claim Conrail knew or should have known that Section 106 applied to abandonment of the Harsimus Branch. However, their argument is based on a misrepresentation of the critical issue. Contrary to the City's claim, the issue was not whether Conrail could "re-classify" the Harsimus Branch from "line into spur status."¹ As the Board has recognized, the issue was whether the United States Railway Association (USRA) conveyed the Harsimus Branch to Conrail in the Final System Plan (FSP) as a "line of railroad" or as a "spur."² Reasonable people can disagree in good faith about the nature of the conveyance. As the record shows, Conrail believed (and still believes) USRA conveyed Harsimus Branch as a spur that could be abandoned without triggering the requirements of Section 106.

¹ City *et al.* Opening Submission at 8.

² City of Jersey City—*Pet. for Declaratory Order*, FD 34818, slip op. at 8 (STB served Aug. 9, 2007) ("The issue before us here is whether the Embankment was transferred to Conrail as a line of railroad included under Line Code 1420, in which case Board abandonment authority would be required, or whether the Embankment was only ancillary spur and yard track that can be abandoned under 49 U.S.C. 10906 without regulatory approval.").

Second, the City and other parties fail to show intent to harm historic property. To the extent they claim Conrail knew or should have known the Embankment's bridges and track were historic properties *before* the Embankment was designated an historic landmark, they forget the City also believed the site "lack[ed] ... historic significance."³ To the extent they claim Conrail intended to harm historic property by selling the Embankment property *after* the landmark designation, they forget the property was legally protected from harm, and Conrail expressly warned potential purchasers they needed consent from the Jersey City Historic Preservation Commission to proceed with development.⁴ The record in this proceeding fully supports the Board's prior determination that the parties asserting Section 110(k) violations "have not demonstrated any intent on Conrail's part to harm historic sites or structures."⁵

I. Conrail had no intent to avoid the requirements of Section 106.

Conrail believed it abandoned the Harsimus Branch in April 1994, after it ceased using the track. As the record shows, a decade before anyone raised any issue involving Section 106, Conrail determined the Harsimus Branch was a spur and thus abandonment approval was not required.⁶ Conrail's belief regarding the regulatory status of the Harsimus Branch was later tested in a trial.⁷ After hearing live witnesses, the court found Conrail "believed in the truth of

³ Conrail's Opening Submission, Ex. J (Letter from Bret Schundler, Mayor of Jersey City, to James Hall, New Jersey Department of Environmental Protection, dated July 7, 1999).

⁴ See Conrail's Opening Submission, Ex. B. (Ryan VS) at 15–16; *see also id.*, Ex. O (Letter from John K. Fiorilla, Counsel for Conrail, to Jersey City Redevelopment Agency, dated Jan. 13, 2003).

⁵ Environmental Assessment, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (Mar. 23, 2009) (2009 EA) at 14.

⁶ See Conrail's Opening Submission, Ryan VS at 13–14; *see also id.* Ex. E (record of spur decisions made by Conrail Law Department).

⁷ See *212 Marin Blvd., LLC v. Chicago Title Ins. Co.*, No. HUD-L-5801-09 (N.J. Sup. Ct. Aug. 31, 2017). The decision is attached as Exhibit Q to Conrail's Opening Submission.

that opinion.”⁸ The court found no evidence Conrail had even acted negligently in concluding the Harsimus Branch was a spur.⁹ The court’s decision was affirmed on appeal.¹⁰ Conrail’s active participation and cooperation in the historic review process in this proceeding further demonstrates its lack of intent to avoid the requirements of Section 106.¹¹

In its opening submission, the City says Conrail could not have reasonably believed the Harsimus Branch was a spur. However, the City misrepresents the underlying issue—it builds then knocks down a straw man. The City misattributes to Conrail the claim that *Conrail* could “re-classify” the Harsimus Branch from “line into spur status.”¹² Conrail never claimed it had changed the regulatory status of the Harsimus Branch. Conrail’s position has always been that *USRA* conveyed the Harsimus Branch to Conrail as spur track. The City knows this. Conrail called out the same misleading tactic when the City used it back in 2006.¹³ At the time, the

⁸ Conrail’s Opening Submission, Ex. Q at 21; *see also id.* at 19 (discussing testimony of Robert Ryan, the Director of Real Estate for Conrail); *id.* at 18 (discussing testimony of John Fiorilla, Conrail’s outside counsel for the sale of the Embankment parcels).

⁹ *See id.* at 23–24.

¹⁰ *See 212 Marin Blvd., LLC v. Chicago Title Ins. Co.*, No. A-0774-17T2, 2019 WL 287215 (N.J. App. Div. Jan. 23, 2019). The court described the issue of the Harsimus Branch’s regulatory status as involving “a question so Byzantine that it confounded the federal courts for more than a decade and was only resolved when some combatants stipulated the fact and others, including Conrail, agreed not to dispute the stipulated fact.” *Id.* at *4.

¹¹ *See* Conrail’s Opening Submission at 13.

¹² *See City et al.* Opening Submission at 8. The City incorrectly claims Conrail purported to re-classify the Harsimus Branch in April 1994. *See id.* at 15. The Conrail document the City cites to support its erroneous claim shows Conrail’s law department was asked from time to time to evaluate whether certain tracks qualified as lines or spurs, not to reclassify lines as spurs. *See* Conrail’s Opening Submission, Ex. E. Even a cursory review of the document shows several instances in which the law department concluded that certain tracks were “lines.”

¹³ *See* Reply Statement of Consolidated Rail Corporation, *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (filed Apr. 24, 2006) at 3 (“The fundamental fallacy in Jersey City’s argument is that it was [USRA], not Conrail, that determined in the early 1970s which of the thousands of miles of track before the bankruptcy courts in the Northeast were to be operated as ‘lines of railroad.’”).

Board correctly recognized the issue was not whether Conrail could reclassify track, but “whether the Embankment was transferred to Conrail as a line of railroad.”¹⁴

Reasonable people can disagree about the conveyance of the Harsimus Branch. In 2012, the City and the LLCs stipulated that the track was conveyed as a “line of railroad” to terminate their litigation in the D.C. District Court and allow this abandonment case to proceed.¹⁵ Conrail agreed not to contest the stipulation.¹⁶ However, Conrail never agreed the Harsimus Branch was conveyed as a line of railroad. Conrail believes USRA’s designation of “Line Code 1420,” from milepost “1.0” in “Jersey City” to milepost “7.0” in “Harrison,” was intended to convey the former main line of the United New Jersey Railroad and Canal Company (UNJRCC) as a “line of railroad,”¹⁷ while the Harsimus Branch of the UNJRCC main line, which ran from milepost 0.0 at Waldo Avenue to milepost 1.48 at the Hudson River,¹⁸ conveyed automatically as spur track associated with the main line.¹⁹ There is room for doubt. USRA called the line from

¹⁴ *City of Jersey City—Pet. for Declaratory Order*, slip op. at 8; see also *Consol. Rail Corp. v. STB*, 571 F.3d 13, 19 (D.C. Cir. 2009) (“The issue, rather, is the ‘nature’ of the conveyance, that is, as a line of railroad or as spur and yard track.” (internal citation omitted)).

¹⁵ See *City of Jersey City v. Consol. Rail Corp.*, 968 F. Supp. 2d 302, 304 (D.D.C. 2013).

¹⁶ See *id.* at 304–05.

¹⁷ See United States Railway Association, *Final System Plan*, Vol. 1, p. 272 (July 26, 1975), <https://prod.stb.gov/wp-content/uploads/Final-System-Plan-Vol.-1.pdf>.

¹⁸ See *Valuation Report for the Pennsylvania R. Co.*, 22 Val. Rep. 1, 536 (1929) (identifying the Harsimus Branch as 1.47 miles of track the Pennsylvania Railroad acquired from UNJRCC, and separately identifying a total of 33.85 miles of main line acquired from UNJRCC between Jersey City and a point near New Brunswick); see also *id.* at 808 (“The owned mileage [of UNJRCC] amounted to 38.48 miles and consisted of a main line extending from Jersey City to a point west of New Brunswick, N.J., 33.85 miles, and three branch lines, aggregating 4.63 miles, known as the Harsimus Branch, Bonhampton Branch, and Centre Street Branch, all in New Jersey.”).

¹⁹ The FSP provided that connecting spur tracks and all other properties associated with rail lines designated to be acquired by Conrail would be conveyed automatically, unless the FSP provided otherwise. See *Final System Plan*, pp. 241–42; *City of Jersey City—Pet. for Declaratory Order*, slip op. at 4.

milepost 1.0 to milepost 7.0 the “Harsimus Branch.”²⁰ Also, the 1.06-mile segment at the eastern end of UNJRCC main line in Jersey City, between Exchange Place and Brunswick Street, was abandoned before USRA issued the FSP.²¹ But Conrail never believed USRA’s designation of the 6-mile line corresponding to UNJRCC’s former main line was intended to refer to the 1.48-mile, UNJRCC Harsimus Branch. Conrail timetables from the 1970s confirm that Conrail never considered the UNJRCC Harsimus Branch to be a line of railroad.²² Conrail might have been wrong, but only as a result of a good-faith effort to interpret the FSP. Nothing in the record shows any intent to avoid the requirements of Section 106.

II. Conrail Had No Intent To Adversely Affect Historic Property.

The City and other parties contesting the abandonment also fail to show Conrail intended to harm historic property. They carefully avoid claiming Conrail intentionally harmed historic property by removing bridges and track from the Embankment at the City’s request between

²⁰ See *Final System Plan*, p. 272. A witness in the declaratory order proceeding explained how USRA may have mistakenly referred to the “Passaic and Harsimus Line” as the “Harsimus Branch.” See Reply Statement of LLCs, Verified Statement of Richard B. Hasselman at 3–4, *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (filed Apr. 24, 2008).

²¹ See *City of Jersey City—Pet. for Declaratory Order*, slip op. at 6–7. The Board seemed to find this point persuasive. See *id.* at 9. But USRA knew its inventory of rail lines was “not perfect.” *Final System Plan*, p. 241. It could be forgiven for overlooking a 1.06-mile abandoned segment in addressing the 22,000 miles of lines involved in developing the FSP. Also, USRA’s approach was intentionally over-inclusive. Its designations also conveyed all rail properties “in any way ... used or usable by the designee in connection with the rail line designated,” including land and mineral rights. *Id.*, pp. 241–42. USRA may well have designated the entire former main line, recognizing that the abandoned segment may contain rail property useable to support active portions of the line. The details were sorted out in the process of preparing the deeds used to transfer property, which incorporated valuation maps specifically identifying the property actually transferred. See Reply Statement of LLCs, Verified Statement of Victor Hand at 2–3, *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (filed Apr. 24, 2008).

²² See Conrail’s Opening Submission, Ryan VS at 8.

1994 and 1997.²³ They apparently recognize the City itself believed the site “lack[ed] ... historic significance,”²⁴ and thus implicitly concede Conrail did not know it was potentially dealing with historic property before the Embankment was placed on the State Register of Historic Places in December 1999.²⁵ Indeed, the City previously told the Board the “issue for purposes of section 110(k) is what Conrail was up to in 2005,” when Conrail sold the Embankment property to the LLCs.²⁶

Conrail’s sale of the Embankment property to the LLCs did not show any intent to harm historic property. To the contrary, the record shows Conrail acted to *protect* the Embankment. In January 2003, after the City passed an ordinance designating the Embankment an historic landmark under municipal law, Conrail alerted prospective bidders and warned them that a successful bidder would need to obtain consent from the Jersey City Historic Preservation Commission to proceed with development.²⁷

The City says a Memorandum of Understanding (MOU) between Conrail and the LLCs somehow shows Conrail’s intent to harm historic property.²⁸ However, Conrail entered into the

²³ The City itself demolished the bridge over Marin Boulevard in July 1994, when budget constraints delayed Conrail’s plans. *See* Conrail’s Opening Submission, Ex. H (Letter from Gerald J. Nissen, Jersey City Director of Engineering, to J.D. Cossel, Conrail Chief Engineer, dated Apr. 5, 1995).

²⁴ Conrail’s Opening Submission, Ex. J (Letter from Bret Schundler, Mayor of Jersey City, to James Hall, New Jersey Department of Environmental Protection, dated July 7, 1999).

²⁵ *See* Conrail’s Opening Submission, Ryan VS at 14–15; *see also id.*, Ex. K (Letter from Dorothy P. Guzzo, New Jersey Department of Environmental Protection, to Conrail, dated Jan. 25, 2000).

²⁶ Opposition to Conrail Motion at 19, *Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J.*, AB 167 (Sub-No. 1189X) (filed Jan. 15, 2009); *see also id.* (“In particular, Conrail knew it was dealing with a line of railroad which was also an historic resource from 1999 onward.”).

²⁷ *See* Conrail’s Opening Submission, Ryan VS at 15–16; *see also id.*, Ex. O (Letter from John K. Fiorilla, Counsel for Conrail, to Jersey City Redevelopment Agency, dated Jan. 13, 2003).

²⁸ *See City et al.* Opening Submission at 26.

MOU on October 12, 2007, *after* the Board had ruled that Conrail needed authority to abandon the Harsimus Branch, so Conrail knew development efforts could not proceed until it complied with Section 106's requirements or a court ruled that those requirements did not apply. In fact, the MOU expressly addresses the need for abandonment authority or a favorable court ruling.²⁹

The City also says Conrail showed intent to harm historic property by joining the LLCs' requests for permits to demolish the Embankment.³⁰ However, Conrail joined the requests in December 2007, *after* the Board's abandonment ruling, so Conrail knew no demolition could occur until it complied with Section 106's requirements or a court determined that those requirements did not apply.³¹

Finally, the City appears to say Conrail's decision to sell the Embankment property to the LLCs, rather than the City, by itself shows an intent to harm historic property.³² However, the record shows Conrail tried over many years to sell the property to the City.³³ By the time the

²⁹ See *id.*, App. III (MOU dated Oct. 12, 2007) ("Conrail will seek approval from the STB for abandonment of rail service over the Property. . . . The Parties agree to file timely appeals of the STB's August 9 decision pursuant to 28 U.S.C. § 2321(a).").

³⁰ See *City et al.* Opening Submission at 26–27.

³¹ See *id.*, App. IV (Conrail joinders to application for permits, dated Dec. 13, 2007).

³² The City says the developer who controlled the LLCs demonstrated "his destructive intent" when he "demolished an historic stanchion even as City et al. were approaching this Board for relief," and again in 2013 when he "offered the Embankment (both the stone walls and the fill) to Hoboken for flood protection purposes." *City et al.* Opening Submission at 30. However, the Section 106 issue involves Conrail's intent, not the developer's. As the record shows, Conrail responded to reports of the stanchion's removal by securing the developer's agreement not to remove any existing structures on the property during the pendency of the proceeding. See Consolidated Rail Corporation's Reply to the Petition for Declaratory Order of Jersey City et al. at 2, *City of Jersey City—Pet. for Declaratory Order*, FD 34818 (filed Feb. 1, 2006).

³³ See Conrail's Opening Submission, Ryan VS at 14–15.

City expressed interest, Conrail had entered into a contract to sell the property to the LLCs.³⁴

The record shows Conrail's intent was simply to sell the property to a qualified bidder.

III. Conclusion

The City says it is pursuing Section 110(k) claims to obtain an opportunity to acquire the Embankment property.³⁵ If the City were genuinely interested in acquiring the property, it would support the abandonment, and then use eminent domain to acquire the property from the LLCs. Indeed, the City says its plan before Conrail sold the Embankment to the LLCs was to acquire the property from Conrail using eminent domain.³⁶ If the City is being truthful, its tactics over the past 15 years are incomprehensible.

Whatever the City's intent may be, the record shows Conrail did not violate Section 110(k). The record shows Conrail did not intend to avoid Section 106's requirements or harm historic property when it removed bridges and track from the Harsimus Branch or when it sold the Embankment property to the LLCs.

Respectfully submitted,

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³⁴ See *id.*, Ryan VS at 16.

³⁵ See *City et al.* Opening Submission at 10–12.

³⁶ See *id.* at 33.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2021, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Docket No. AB 167 (Sub-No. 1189X), Docket No. AB 55 (Sub-No. 686X), and Docket No. AB 280 (Sub-No. 306X).

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