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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Consolidated Rail Corporation – Abandonment	)	Docket No. AB 167
Exemption – In Hudson County, NJ	)	(Sub-No. 1189X)
	)	
CSX Transportation, Inc.—Discontinuance of	)	Docket No. AB 55
Service Exemption – In Hudson County, NJ	)	(Sub-No. 686X)
	)	
Norfolk Southern Railway Company –	)	Docket No. AB 290
Discontinuance of Service Exemption – In	)	(Sub-No. 306X)
Hudson County, NJ	)	
	)	

REPLY ARGUMENT AND EVIDENCE OF THE LLCs

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July 19, 2021

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ATTACHMENT 1 – Opening Statement of Fact and Argument from the ICC
Office of Compliance and Consumer Assistance, FD 31292 (filed July 28, 1988)

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REPLY ARGUMENT AND EVIDENCE OF THE LLCs

The LLCs¹ respectfully submit the following reply argument and evidence pursuant to the decision of the Surface Transportation Board (“STB” or “Board”) served in the above-captioned proceedings on May 19, 2021 (“Decision”).

**I.
PREFACE AND SUMMARY**

The Board’s May 19 Decision sought argument and evidence on the applicability of Section 110(k) of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306113, to the notice of exemption for Consolidated Rail Corporation

¹ The LLCs consist of 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

(“Conrail”) to abandon an approximately 1.36 mile portion of a rail line known as the Harsimus Branch, located in Jersey City, New Jersey (“City” or “Jersey City”).

The LLCs’ opening argument and evidence demonstrated that the STB’s act of approving an abandonment exemption petition does not trigger application of Section 110(k), and accordingly, Section 110(k) is inapplicable to this proceeding as a matter of law. The LLCs also demonstrated that, even if Section 110(k) were somehow deemed applicable, the Sixth Street Embankment (“Embankment”) was not considered a historic property under the governing rules of NHPA, i.e., listed or considered eligible for the National Register of Historic Places (“National Register”), until 1999. Further, with respect to Section 106 of NHPA, no part of the Embankment or any other historic property has ever been damaged or destroyed in any way by the LLCs following the LLCs purchase of the property fifteen years ago, either intentionally or purposely, and certainly not with any intent to evade Section 106 review. The LLCs also showed that Conrail did not engage in any anticipatory demolition of historic property before or after the sale to the LLCs. Accordingly, no violation of Section 110(k) has occurred by any reasonable, recognized, and objective measure of review.

The opening argument and evidence that Conrail submitted further demonstrates that it did not engage in anticipatory demolition before or after the sale to the LLCs’ either intentionally or purposely, or with any intent to evade Section 106 review in violation of Section 110(k).

Jersey City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and the Rails to Trails Conservancy (collectively, “City Parties”) also submitted opening argument and evidence. The City Parties contend that Conrail and/or the LLCs intentionally destroyed or irreparably harmed historic properties. However, they largely refrain from alleging that Conrail or the LLCs engaged in any actual physical harm to or destruction of any historic property. Their claim is instead that “Conrail knowingly (intentionally) engaged in an unlawful *de facto* abandonment” of the Harsimus Branch by selling the underlying real estate to the LLCs in 1995, without first obtaining abandonment approval of the rail line. The City Parties claim that this alleged “unlawful *de facto* abandonment” amounts to a specific intent to evade Section 106 review and harm historic resources in furtherance of property development in violation of Section 110(k).

The City Parties claim that Conrail’s contention at the time that the line constituted spur or side tracks under 49 U.S.C. § 10906, for which no abandonment approval or review under Section 106 was required, was just a ruse, as “Conrail acted with knowledge of line status and with animus to historic regulation.” They argue further the intent to develop property, even in a manner that envisages preservation, somehow violates Section 110(k), and that the only remedy is for the Board to void the underlying deeds and force the sale of the property to Jersey City for the City’s own use or possible further sale and development.

A number of local associations, entities, and individuals² also filed opening letters, apparently at the behest of the City Parties, as they largely defer to the City Parties' evidence and argument, but providing no supplemental evidence of their own of any actual intentional destruction of historic assets in violation of Section 110(k). Nonetheless, these entities appear to share the LLCs' intent for responsible preservation of the Embankment.

In sum, there is no meaningful evidence that any historic property underlying the Harsimus Branch has been destroyed, irreparably harmed, altered, or effected in any way by Conrail or the LLCs, much less with any intent to circumvent Section 106 review. No one provides any credible facts that the Embankment itself or any other historic resource eligible for listing in the National Register has been harmed. Instead, as the LLCs' opening evidence explained, the City Parties have begrudgingly confessed that the track and bridge structures that the City and Conrail removed shortly after the line was taken out of service almost three decades ago for public safety purposes were not historic or even eligible for National Register listing in the first place, and that they are not protesting anticipatory demolition of the line structures. A few local association parties seek to contend differently, but they provide no support for their

² These include the Village Neighborhood Association; Bergen Arches Preservation Coalition; Jersey City Parks Coalition; Van Vorst Park Association; Jersey City Landmarks Conservancy; The Friends of Liberty State Park; NY/NJ Baykeeper; Historic Paulus Hook Association; and Hamilton Park Neighborhood Association.

general allegations, and they further assert that “if anything said here conflicts with City et al.’s positions, we defer to City et al.” *See, e.g. Jersey City & Harsimus Cemetery Comments* at 2.

Since they have no coherent claim of either significant harm to protected property or the requisite intent to violate Section 110(k) by Conrail or the LLCs, the City Parties and their supporting allies are forced to concoct a novel straw man argument, that Conrail schemed to violate Section 110(k) by engaging in an “illegal *de facto* abandonment” of the line.

The City Parties base this claim on their familiar refrain that Conrail abandoned the Harsimus Branch illegally, without prior agency approval. However, as even the City Parties’ have verified previously, there can be no such “illegal, *de facto* abandonment” of a line as a matter of law. Instead, except with rare exceptions not applicable here, abandonment can occur only following Board approval, normally through an abandonment exemption proceeding, and only after the Section 106 review is completed – even for lines such as the Harsimus Branch that have been out of service for decades. Conrail has pursued the abandonment process before the Board in AB 167 (Sub-No. 1189X), *et al.* for the last thirteen years and has not evaded Board approval.

After the LLCs made their good faith purchase and the protracted litigation that followed, the parties stipulated that that the property was encumbered by a common carrier rail line, for which Board abandonment authority was required. In 2006, when the

Board's declaratory order proceeding in Finance Docket No. 34818 commenced, and seven years before the litigation over the status of the Harsimus Branch concluded, the LLCs and Conrail voluntarily initiated and pledged not to disturb the Embankment and have not disturbed the Embankment or any other structures or property at any time since. Conrail and the LLCs have actively and cooperatively participated in the proceeding and the Section 106 review process ever since. The Section 106 review in these proceedings is the most comprehensive and thorough review of its kind ever undertaken by the STB. Recognizing that the Section 106 consultation has no further purpose and must be terminated, the City Parties have embarked on a frivolous and nonproductive effort to delay abandonment authorization, despite the continued commitment of the LLCs and the developer to implement a historically sensitive project that could not be achieved through Section 106.

In the end, the City Parties' Section 110(k) allegations are based on an alleged *intent* by Conrail to destroy historic properties to obtain real estate value. However, the record reveals no evidence of any such intent. Even if the City Parties could establish intent, physical destruction is essential to constitute a violation of Section 110(k) as a matter of law.

The violations the City Parties assert, and the self-serving remedies that they seek, continue to be wholly unwarranted and inappropriate, have no basis in Section 106 or Section 110(k), and are contrary to the public interest. At the end of the day, the

City Parties are seeking a “do over” of the multiple times Jersey City passed on the opportunity to purchase the property underlying the Harsimus Branch. The LLCs ultimately purchased the property lawfully and in good faith through a fair and open bidding process, in which the City and other members of the public were invited to participate, but declined. Ultimately, the City Parties and their allies are improperly invoking Board processes to exercise the equivalent of eminent domain, but without any compensation.

Meanwhile, the LLCs remain committed to a voluntary mitigation plan centered on preservation, open spaces, and a linear park and trail of unsurpassed excellence. Ironically, the City Parties and the local neighborhood associations and residents are requesting the very same mitigation.

As the LLCs emphasized on opening, the LLC’s comprehensive plan for responsible redevelopment of property that suffers from urban blight and deterioration far exceeds the usual conditions for Section 106 NHPA mitigation achievable under the Board’s limited jurisdiction. The proposal for responsible redevelopment of the Embankment in furtherance of preservation goals should be encouraged and promoted, not denounced or delayed. As such, the LLCs continue to respectfully request the Board’s assistance in promptly resolving the Section 110(k) issue, completing its Section 106 review, and issuing a final decision expeditiously in this prolonged proceeding.

II. ARGUMENT

A. No Party Has Established that Section 110(k) Applies to Conrail's Abandonment Exemption Petition

The LLCs' opening evidence explained that Conrail's abandonment exemption petition does not entail a request for any loan, loan guarantee, a permit, or license, and that Conrail is not seeking any grant or financial assistance or expenditure of funds that could potentially cause Section 110(k) to apply. LLCs Op. at 21-23.

On opening, no other party addressed the threshold question that Section 110(k) even applies to this proceeding, let alone challenges or disputes the fact that Section 110(k) is inapplicable as a matter of law. Again, while Section 106 extends to rail line abandonments, the reach of Section 110(k) is narrower. Section 106 applies to "undertakings" (36 C.F.R. pt. 800), which the Board has construed to apply to abandonment approvals. In contrast, Section 110(k) applies to a "grant [of] a loan, loan guarantee, permit, license, or other assistance to an applicant." A petition for abandonment authority is not a grant of a loan, permit, or license, especially inasmuch as the courts have construed agency "assistance" to require "agency 'assistance' to approving the expenditure of funds." *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989); *accord Brewery Dist. Soc'y v. FHWA*, 996 F. Supp. 750, 755 (S.D. Ohio 1998); *see also* 36 C.F.R. § 800.9(c). Because approval of an abandonment exemption petition

does not trigger application of Section 110(k), Section 110(k) simply does not apply in this instance.

B. Even if it Somehow Applies, No Party Has Established a Section 110(k) Violation

In the event that the Board finds that Section 110(k) is applicable to this proceeding (which it should not), the LLCs established on opening that there is no factual basis whatsoever for finding that there has been a Section 110(k) violation. LLCs Op. at 23-41.

The letter from the Advisory Council on Historic Preservation (“ACHP”) to the STB’s Office of Environmental Analysis (“OEA”) dated June 15, 2021 (“ACHP June 15 Letter”), presented the following two-part substantive standard for determining a Section 110(k) violation:

[T]he STB should carefully review the timeline of the applicant’s actions and consider whether: (1) an intentional significant adverse effect to a historic property occurred as a result of the applicant’s actions, and (2) in carrying out that action, there is evidence of the applicant’s intent to avoid a Section 106 review. Note that “significant adverse effect” is a higher threshold than the standard “adverse effect” provided for in 36 CFR § 800.5. However, this does not mean that a property must be completely demolished or destroyed. The effects must alter, directly or indirectly, one or more of the characteristics of the historic property that qualify it for

inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity.

Id. at 1.

The LLCs demonstrated on opening that the applicable timeline of Conrail's pertinent actions with respect to the Harsimus Branch shows *no* evidence of record reflecting *any* actions of Conrail (or the LLCs) on a historic property, let alone significant adverse effect, and *no* credible evidence that Conrail (or the LLCs) intended to avoid Section 106 review in carrying out any possible such actions. Both prongs must be met to establish a Section 110(k) violation. Neither has been met or even credibly alleged in this proceeding.

1. There is No Credible Evidence that Conrail or the LLCs Destroyed Historic Property

The LLCs' opening presentation established that the Embankment was not a historic property when the plate girder bridges that connected the sections of the Embankment were removed at the request, urging, and participation of Jersey City in the mid-1990s, and the Embankment was not determined to be eligible for listing on the Historic Register until 1999. Even then, only the ashlar block walls were included in the eligibility determination. The LLCs also showed that the removed track, associated structures, and bridges were never considered historically significant, and were not and could not be designated historic properties when they were removed. LLCs Op. at 8-11, 26-29. The City Parties have complained about the removal of these structures, and some

neighborhood association parties still allege that the structures were protected and their removal constitutes a violation of Section 110(k),³ even as they defer to the City Parties' conflicting positions. Ultimately, faced with these uncontroverted facts, the City Parties and associated allies ultimately have been compelled in this proceeding to admit that such removal actions provide no evidence of or basis for any Section 110(k) violation. As the City Parties candidly stated more than a decade ago:

All the evidence on which SEA relies in the 1980's or 1990's is irrelevant. Prior to 2000, no structure on this part of the Harsimus Embankment had been determined to be eligible for the National Register. As a result, City and RTC are not protesting anticipatory demolition of bridges or rail at that time. (Indeed, there is nothing that indicates any of the removed structures which SEA mentions were in fact eligible for National Register listing in the first place.)

City Parties Apr. 9, 2009 filing on the Environmental Assessment at 22.

Nonetheless, City Parties' opening evidence alleges that "[i]n further evidence of his destructive intent, the developer demolished an historic stanchion even as the City et al. were approaching this Board for relief." City Parties Op. at 30. As explained by the LLCs on opening, even if a stanchion was removed, none of the stanchions that remained on the at-grade parcels were determined to have historic

³ *E.g.*, Friends of Liberty State Park Op. at 2 (alleging that Conrail "destroy[ed] historic assets"); Hamilton Park Neighborhood Association Op. at 2 (alleging that Conrail engaged in the "dismantling of rail structures"); Historic Paulus Hook Association Op. at 1-2 (alleging that Conrail "destroyed historic features of this former main line" and "demolished potentially historic structures"); NY/NJ Baykeeper at 1 (alleging that Conrail engaged in "demolishing potentially historic structures").

significance or had been designated as eligible for listing on the National Register at the time. Accordingly, they were not historic properties protected by the NHPA. LLCs Op. at 28. In fact, the very testimony of the Special Counsel for the City of Jersey City Historic Preservation Commission that the City Parties rely on for their assertion of a destruction to a historic structure actually contradicts the City Parties assertion, by admitting and verifying that “[t]hese pier structures are not protected by historic landmark designation.” *See* City Parties Op. App. at 199. Astonishingly, the City Parties legal assertions are directly refuted and disproved by their own witness. In addition, there is no evidence of any citations made under the historic protections of City Code Chapter 345, Land Development Ordinance § 345-30A, as the LLCs addressed in their opening argument. LLCs Op. at 28-30.

The claims by City Parties and the local associations that Conrail or the LLCs destroyed historically-protected property simply have no factual basis, and in fact are knowingly frivolous and not made in good faith. The facts and the City Parties’ prior admissions and own witnesses demonstrate that no historic property underlying the Harsimus Branch has been destroyed, irreparably harmed, altered, or effected in any way by Conrail or the LLCs. As the ACHP June 15 Letter states, “the effects must alter, directly or indirectly, one or more of the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity.” No such effects can be shown in this case, and the

City Parties do not even attempt to make such a showing. As such, there can simply be no “significant adverse effects” under Section 110(k) that destroy or irreparably harm a historic property or that “alter, directly or indirectly, one or more of the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity.”

2. There is No Credible Evidence that Conrail or the LLCs Had Any Intent to Destroy Historic Property

As shown above, there is no indication that Conrail or the LLCs destroyed any property listed or designated as eligible for listing in the National Register and thus protected by NHPA. The comprehensive survey of historic resources in the City does not even mention any part of the Embankment as being of historic significance (LLCs Op. at 8-11), although it was declared eligible for the National Register in 1999. Accordingly, the Board need not even evaluate whether, in carrying out such an action, Conrail *intended* to avoid a Section 106 review under the second prong of the Section 110(k) test suggested in the ACHP June 15 Letter. As referenced, both prongs must be met, and neither is met here.

As the ACHP June 15 letter states, historic property must be “destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of [S]ection 106 review” for any violation to occur. Even if the Board does examine intent, as the LLCs demonstrated on opening, Conrail has in no way avoided a

Section 106 review, let alone with “the specific intent to significantly adversely affect a historic property to which the grant would relate” as required under Section 110(k).

Even assuming some prohibited destruction could be found, there is no evidence of any specific intent to evade or preordain the outcome of a Section 106 review. Long before the parties stipulated that the Harsimus Branch is a common carrier rail line requiring STB abandonment approval, Conrail filed its abandonment exemption petition, and has since complied and cooperated with every aspect of the STB’s extensive and intensive Section 106 review process conducted over the past decade.

As the LLCs have explained (Op. at 26-27), OEA itself reviewed the evidence and correctly determined that there has been no violation of the NHPA Section 110(k) anticipatory demolition prohibition because there was no intent by Conrail to harm historic resources:

Parties . . . have not demonstrated any intent on Conrail’s part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment.

Environmental Assessment (STB served Mar. 23, 2009) at 14 (emphasis added). The City Parties have provided no basis for overturning OEA’s sound decision.

Conrail’s opening argument and evidence thoroughly reviewed the record of the allegations that it intended to avoid Section 106, and established and confirmed

that it did not act with the intent to avoid Section 106 requirements or to adversely affect a historic property. The LLCs fully concur with this evidence.

The declaratory order decision that the Board served in Finance Docket No. 34818 on August 8, 2007 considered Conrail's belief that the Harsimus Branch was ancillary spur track acquired out of the Penn Central Transportation Company bankruptcy and through the Final System Plan of the United States Railway Association in 1976, and thus excepted from STB entry and exit regulation under 49 U.S.C. § 10906. The Board's decision found that the track actually constituted a common carrier line and required appropriate abandonment authority. Two years later, the D.C. Circuit determined that the Board lacked jurisdiction to determine the status of the line under the 3R Act, which authorized the Special Court, and later the United States District Court for the District of Columbia, to interpret orders conveying properties of bankrupt carriers to Conrail, and vacated the Board's August 8, 2007 decision. *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009). Ultimately, the LLCs and the City of Jersey City entered a joint stipulation that the Harsimus Branch constituted a common carrier line requiring abandonment authority, which was granted by the District Court. *City of Jersey City, et al. v. Consolidated Rail Corp. et al.*, 968 F. Supp. 2d 302, 307-08 (D.D.C. Sept. 30, 2013).

The Board never found any intent to evade or violate Section 106 in its review of the facts after an 18-month declaratory order proceeding that culminated in the

decision served August 8, 2007 in Finance Docket No. 34818. No court found such intent in the following six years of appeals and court proceedings. While the City Parties desire to reopen and reconsider those decisions, there is no legitimate or even colorable basis for doing so.

The City Parties further allege that sufficient intent can be found because Conrail assisted the LLCs through a “secret” agreement to help with local permits, and that the LLCs had malicious intent to demolish the Embankment or to donate the Embankment stones to the City of Hoboken for flood protection. City Parties Op. at 26-30. The LLCs fully addressed these assertions on opening. LLCs Op. at 29-31. The LLCs’ applications for Certificates of Appropriateness filed with the Jersey City Preservation Commission in 2007, and Conrail’s joinder and consent to application for relief, in no way constitute anticipatory demolition in violation of Section 110(k). The mere filing of such applications, in compliance with Jersey City Land Development Ordinance requirements, cannot possibly constitute an anticipatory demolition of historic properties under Section 110(k). Additionally, the LLCs proposed several alternatives for redevelopment of the Embankment, similar to those presented by the current contract purchaser with minimal modification to the walls, but these applications were still met with denial. Applications that were never granted, and that have not led to any physical actions, cannot possibly amount to violations under Section 110(k).

As further explained by the LLCs on opening, despite the painstaking historic resources survey in 1986 that does not identify any historic significance of the Embankment, the six sections of the Embankment are now designated as a Jersey City Municipal Landmark under City Code Chapter 345, Land Development Ordinance § 345-30. LLCs Op. at 8-11, 29-30. Under the Ordinance, a property owner seeking to develop, construct, alter, or rehabilitate such a Landmark must first secure a Certificate of No Effect, a Certificate of Appropriateness, or appropriate waiver, before work commences. Additionally, demolition and development of the Embankment cannot begin until compliance with municipal landmark restrictions that the City has placed on the Embankment properties are approved at the local level, and additional land use plans and local permitting are secured, depending on the final plans and proposals approved by the City. *Id.* at 29-31.

Neither the LLCs nor, to the best of the LLCs' knowledge, Conrail, have been cited for or otherwise found in violation of any Jersey City Land Development Ordinance requirements or local permitting with respect to the Embankment, including the historic preservation portions of the Ordinance. All historic property remains intact, without any destruction or harm by Conrail and the LLCs, and no party credibly alleges otherwise. Additionally, as stated, Conrail and the LLCs have pledged not to disturb the Embankment and will not disturb the Embankment at any time during the STB abandonment review proceeding, including its Section 106 review, and they have not

done so. The efforts of the LLCs and Conrail to proceed in compliance with Jersey City's own requirements cannot possibly constitute a Section 110(k) violation.

3. Conrail Did Not Engage in An “Illegal *De facto* Abandonment” Or Otherwise Purposely Intend to Evade Section 106 in A Manner Constituting A Section 110(k) Violation

As the LLCs discussed on opening, the City Parties have previously argued that Conrail's sale of some of the property underlying the Harsimus Branch to the LLCs in 2005 somehow constitutes “anticipatory demolition” within the meaning of Section 110(k), allegedly because Conrail and the LLCs purposely attempted to avoid STB abandonment review, which would constitute an “undertaking” triggering the Section 106 review process. LLCs Op. at 32. However, as the LLCs have explained, no party has pointed to any credible evidence that Conrail or the LLCs ever took any action to engage in any “anticipatory demolition” within the meaning of Section 110(k), let alone with the intent to evade Section 106 review. *Id.* at 33.

The LLCs explained on opening that they had every reason to believe they were purchasing property free and clear, unencumbered by a common carrier rail line, and not until after the closing was there any suggestion that the line might actually constitute a common carrier line, for which abandonment would require prior Board approval. *Id.* at 32. Following litigation, the parties' stipulation and decision of the Special Court provide that: (1) Conrail has a constructive regulatory easement over the

Embankment until it obtains the necessary abandonment authority, and (2) abandonment authority is required in order for Conrail to abandon the Harsimus Branch. *Id.* at 33.

The City Parties' Opening Evidence recasts its "anticipatory demolition" arguments to now allege that Conrail somehow engaged in an "unlawful" or an "illegal" "*de facto* abandonment" of the Harsimus Branch by intentionally selling the underlying property without seeking abandonment authorization which it knew was required, all with an intent to evade Section 106 review intentionally and purposely for a line that it knew contained historic assets. The City Parties seek to buttress their theory with the testimony of a former Interstate Commerce Commission enforcement attorney, Stephen Day.

a. Conrail Did Not Engage in An "Unlawful, *De facto* Abandonment"

The City Parties "unlawful, *de facto* abandonment" assertions are riddled with fatal flaws. First, the City Parties offer no support for their novel assertion that an "unlawful, *de facto* abandonment" constitutes a violation of Section 110(k) because there is no legal basis for their position. As a matter of law, there is no such thing as an "unlawful, *de facto* abandonment." Where a line has been out-of-service for a significant period of time and the rail carrier has shown a lack of interest and/or ability to undertake the actions needed to restore service, the Board in rare instances may find that a *de facto* **adverse** abandonment already has occurred, and issue a formal order under 49 U.S.C. § 10903 (or an abandonment exemption under 49 U.S.C. § 10502) over the defending carrier's objections and even in spite of arguments about future traffic potential. *E.g.*,

Modern Handcraft, Inc. -- Abandonment, 363 I.C.C. 969 (1981). However, a *de facto* cessation of service does not eliminate the legal requirements that an entity obtain a Board order authorizing line abandonment and termination of rail service, and the Board maintains jurisdiction over the line until abandonment authorization is obtained and exercised. *E.g., State of Vermont & Vt. Ry. – Discontinuance of Serv. Exemption – In Chittenden Cnty., VT Trs. of the Diocese of Vt., et al.*, AB-265 (Sub-No. 1X) (ICC decided July 7, 1987), 1987 WL 98897 at *2.

Significantly, the City Parties have agreed in previous court proceedings regarding the Harsimus Branch that no *de facto* abandonment is possible:

[I]t is a long-established principle of substantive federal rail law that non-use and even removal of rail structures does not divest ICC, now STB, of rail abandonment jurisdiction.¹⁹ In other words, there is no *de facto* abandonment.

¹⁹ *Chelsea Property Owners – Abandonment – Portion of Consolidated Rail Corporation’s West 30th Street Secondary Track in NY, NY*, 8 ICC2d 773, AB 167 (Sub-No. 1094), served Sept. 16, 1992, *aff’d sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994) (no *de facto* abandonment by non-use, otherwise agency authority subverted, 1992 ICC Lexis 192 at *35-*36). *See also Honey Creek R.-- Pet. Dec. Order*, F.D. 34869, served June 4, 2008, slip at 6 (no *de facto* abandonment). *Accord, Phillips v. Denver & R.G. RR*, 97 F.3d 1375, 1377 (10th Cir. 1996) (upholding ICC/STB pre-approval requirement for abandonment notwithstanding claims of *de facto* abandonment)

Mem. on Behalf of City of Jersey City, Rails to Trails Conservancy, & Pennsylvania R.R.
Harsimus Stem Embankment Preservation Coalition in Opp’n to LLCs’ Mot. for Leave to

Amend Answer, *City of Jersey City, et al. v. Consolidated Rail Corp.*, No. 09-1900 (D.D.C.) filed Oct. 22, 2012, at 19.

If no *de facto* abandonment may occur without Board authority, then no “unlawful” or “illegal” “*de facto* abandonment” may occur as alleged by the City Parties. The City Parties legal theory is unsupported and in fact has no valid basis in law. Also, the core premise on which the City Parties’ allegations are based, that Conrail is attempting to abandon a line of railroad without agency authorization, is untrue. The actual facts contradict the City Parties’ assertions.

Conrail has never asserted that the rail line was abandoned, *de facto*, due to a lack of use or pursuant to *Modern Handcraft, Inc.* and its progeny. Instead, Conrail has repeatedly testified that it believed that the line constituted spur or side tracks under 49 U.S.C. § 10906, for which no abandonment approval or review was required or possible. Once it was stipulated that the line was not excepted track, Conrail dutifully proceeded to seek abandonment authority. The City Parties complain that Conrail caused an unlawful “loss of federal jurisdiction” in violation of Section 110(k). City Parties Op. at 9. However, to the contrary, the City Parties demanded abandonment authority, the parties ultimately stipulated that the line was a common carrier line requiring STB abandonment, and that is exactly what Conrail is seeking in this proceeding. There simply has been no loss of jurisdiction by the Board, no *de facto* abandonment, or any attempted *de facto* abandonment, legally or illegally by Conrail as the City Parties allege.

The City Parties assert that the “removal of infrastructure” prior to abandonment approval “was unlawful at all relevant times.” City Parties Op. at 8, 19-20. But that also is untrue. Again, Conrail believed the line was an excepted spur. The removal of non-historic track and structures, at Jersey City’s own request because freight railroad service is no longer needed to reach downtown Jersey City or any car float docks that were removed long ago, does not constitute an illegal or *de facto* abandonment. The Board has long held that even for common carrier infrastructure, “[t]he fact that some tracks were taken up and portions of the line were salvaged is immaterial. Merely removing track materials does not constitute an abandonment.” *San Pedro R.R. Operating Co., LLC – Abandonment Exemption – In Cochise Cnty., AZ*, AB-1081X (STB served Apr. 13, 2006), at 4. “A carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service.” *Kansas City S. Ry. Co. – Abandonment Exemption – Line in Warren Cnty., MS*, AB-103 (Sub-No. 21X) (STB served Feb. 22, 2008), at 9; *accord Baltimore & Ohio R.R., Metropolitan S. R.R. & Washington & W. Maryland Ry. Co. – Abandonment & Discontinuance of Serv. – In Montgomery Cnty., MD & the District of Columbia*, AB-19 (Sub-No. 112) (ICC served Mar. 16. 1987).

The Harsimus Branch has not had any shippers for several decades, and no potential shipper, Jersey City, or any other party has ever lodged an objection that the line had been unlawfully embargoed or that Conrail had failed to abide by its common carrier

obligation. As such, any suggestion that Conrail undertook an unauthorized, purposeful “illegal, *de facto* abandonment” is simply false and contrary to both the facts and basic legal requirements. The City Parties’ claims demonstrate only the lengths to which they will go to forestall responsible preservation and development that is desired and demanded by all interested parties.

b. The City Parties’ Other Contentions Regarding Conrail’s Supposed Intent to Evade Section 106 are Unfounded

Contrary to the City Parties’ assertions, Conrail’s belief that the Harsimus Branch was spur track and sale of the underlying property to the LLCs did not constitute in any way a fraud on the Board with an intent and purpose to evade Section 106 review procedures. As explained above, after an 18-month declaratory order proceeding in Finance Docket No. 34818, followed by six years of appeals and court proceedings, neither the Board or the courts found that Conrail had engaged in an illegal abandonment, or committed fraud on the Board through an intended illegal abandonment. There is no reasonable basis to reopen and relitigate the issues as the City Parties seek to do now.

The City Parties cite prior claims that the LLCs made against Conrail regarding the conveyance of the Harsimus Branch property as supposed proof of Conrail’s intent. City Parties Op. App. VII. As the LLCs explained on opening, while the LLCs’ past expressions of strong dissatisfaction with Conrail, including assertions that Conrail potentially misled it on the sale, have never been upheld and, in fact, were dismissed. LLCs Op. at 34. As the LLCs further discussed, the Superior Court of New

Jersey, following a full trial involving the title company complaint against Conrail, rendered a decision issued on August 31, 2017, rejecting the claim that Conrail acted fraudulently. *212 Marin Boulevard v. Chi. Title Ins. Co.*, No. HUD-L-5801-09, at 21 (N.J. Super. Ct. Aug. 31, 2017), discussed in LLCs Op. at 34-35.

The City Parties' key witness on the subject, Mr. Day, engages in an unwarranted and specious reevaluation of the Board's findings in Finance Docket No. 34818 addressing the status of the Harsimus Branch. The Board should decline to engage in such an exercise. In that 18-month proceeding, Conrail and the LLCs were represented by experienced and recognized STB practitioners, including the former longstanding General Counsel of the ICC. Signatures of attorneys on pleadings before the Board constitute attestation and verification that the attorney "[b]elieves that there is good ground for the document." 49 C.F.R. § 1104.4. While Conrail alleges that Conrail (and the LLCs) have engaged in "willful blindness" to the law, the LLCs' filings were made in full compliance with the Board's rules and in good faith.

The City Parties' statements of improprieties and fraud that Conrail and the LLCs have acted with a knowing "intent to evade Section 106 and to significantly adversely impact (among other historic assets) the Section 106-protective Embankment" are baseless and unwarranted. In making such assertions, the City Parties are belatedly suggesting that counsel has violated the Board's pleading requirements as well as its Canons of Ethics at 49 C.F.R. § 1103, which is certainly not the case.

Mr. Day goes so far as to assert that he would have made a recommendation for referral for criminal prosecution against Conrail, based in large part on his experience as an ICC trial attorney in Finance Docket No. 31292, *Rails to Trails Conservancy et al. – Petition for Declaratory Order* (ICC Decision served June 21, 1988), involving alleged similar factual circumstances. The City Parties depict that case as a prime example of “an unlawful *de facto* abandonment under the guise of a spur designation, as here.” City Parties Op. at 13 n.13. In point of fact, the circumstances in *Rails to Trails Conservancy* were vastly different, yet Mr. Day and the City Parties fail to apprise the Board of any of these substantial differences.⁴

In that case, a carrier had attempted to abandon a 1.5-mile segment of the Sumas Line in Seattle, Washington that was clearly a common carrier line, without any agency approval, by depicting it as an excepted “spur.” Mr. Day and other ICC investigators found and testified, among other things, that:

- Before the attempted abandonment of the line segment, the involved railroad had recognized and acknowledged to the ICC that the Sumas Line was common carrier line, as evidenced by its completion of a series of *five* separate abandonment proceedings of *directly connecting line segments* on the same line in the immediately preceding years (*see* FD 26638 (11.01 miles), FD 26906 (30.47 miles), AB-6 (Sub-No. 66F) (2.74 miles), AB-6 (Sub-No. 242) (4.88 miles), AB-6 (Sub-No. 280X) (8.11 miles);
- The carrier’s subsidiary sought to develop an office park, which necessitated terminating *active* rail service on the involved line segment;
- The line had multiple active shippers, including a retail lumber products business, a steel mill, a petroleum products company, and a paint company,

⁴ City Parties’ counsel represented trails groups in *Rails to Trails Conservancy* and has direct knowledge of the involved facts.

yet the railroad still unilaterally terminated all rail service and sought to unilaterally abandon and sell the line without agency approval;

- After the ICC instituted a declaratory proceeding, the carrier and/or developer purposely removed substantial portions of the involved active rail line to block and prevent further service to active customers; and
- The involved track was alleged by Mr. Day and ICC investigators to be part of the strategic Rail Corridor Network (STRACNET) to support national defense needs.

A copy of the Opening Statement of Fact and Argument from the Office of Compliance and Consumer Assistance in the *Rails to Trails Conservancy* proceeding containing these findings is included at Reply Attachment 1. Despite these stark findings of egregious improper behavior and intentional violations of law by a rail carrier and land purchaser with respect to an active line of railroad serving multiple active customers, Mr. Day and his fellow ICC investigators recommended no penalties or related follow-up actions for the infractions. Instead, they merely recommended that “[t]he Commission should find that all the BNRR rail track and right-of-way . . . are a line of railroad over which rail service could not be discontinued without prior Commission approval.” Mr. Day and the other investigators did not allege “unlawful, *de facto* abandonment,” and the Commission did not find any such “unlawful, *de facto* abandonment.” The investigators made no additional demands for service restoration to the active rail shippers, environmental or historic review, re-conveyance of the underlying property back to the railroad, penalties, further investigations, or criminal referral.

Ultimately, the railroad, developer/purchaser, and interested parties reached a private settlement requiring that some portions of the right-of-way on the involved

property be reclassified as common carrier rail lines subject to the ICC's abandonment jurisdiction. Other portions of the property were allowed to be reconveyed by the developer to the City of Seattle, leased to other private entities, and made available for an easement for a trail – all for non-rail use. The purchasing developer was allowed to retain the remainder for non-rail use. After the parties settled, the Commission served a decision on March 10, 1989, that consented to the dismissal of the investigation, with prejudice. The decision did not require that any formal abandonment authority be sought, or further administrative actions be taken, and no further action or referrals for civil or criminal investigation or prosecution were undertaken to address the knowing, purposeful, and clear violations of law.

In sharp contrast to *Rails to Trails Conservancy*, the facts show Conrail and the LLCs both believed in good faith that the Harsimus Branch constituted excepted spur track and did not require abandonment authority. The Harsimus Branch was long out of service, active shippers were long gone, no customer service was being terminated, let alone unlawfully, and no actions were taken after the institution of the STB declaratory order proceeding to physically disconnect active customers from the rail system. Conrail had not abandoned any connecting rail segments in recent years, evidencing that the Harsimus Branch was somehow part of a § 10901 common carrier line. Also, once it was determined that the Harsimus Branch was a common carrier line under § 10901 requiring STB abandonment authorization, Conrail promptly sought appropriate abandonment

authority, in full compliance with Section 106. Also, at no time since the underlying property was sold to the LLCs fifteen years ago, has there been any demolition of the Harsimus Branch in violation of Section 110(k) or otherwise, and Conrail has fully complied with all Section 106 review requirements over the period.

Thus, Mr. Day's view regarding what ICC investigators would do and what the Board should do here appears to be the exact opposite of the position and findings of his ICC investigations office and the ICC itself in *Rails to Trails Conservancy*, the case on which he and the City Parties ostensibly base their position. *Rails to Trails Conservancy* involved blatant violations of law not even remotely found or even alleged here. Yet the measures that they seek are far more draconian. In *Rails to Trails Conservancy*, the ICC investigators sought the railroad to seek abandonment authority before the Commission. That is exactly what is taking place here.

Mr. Day, who was a key member of the ICC investigations staff in *Rails to Trails Conservancy*, and the City Parties, whose counsel represented a key party to the proceeding, make no effort to disclose these crucial differences or explain why Conrail should be treated more harshly in this instance where the facts are so markedly different and in the absence of any findings of wrongdoing. With all due respect to Mr. Day, his opinion should be afforded little or no weight in these circumstances, especially since nowhere does his statement directly addresses the elements or requirements of Section 110(k), or even Section 106.

**C. The Self-Serving Remedies Sought by the City Parties
Continue to be Unjustified and Highly Inappropriate**

For the reasons set forth herein, and the LLCs' opening evidence, the Board should find that Section 110(k) is inapplicable to this abandonment exemption proceeding, and even if it is, there has been no Section 110(k) violation. OEA should then move to notify ACHP, the NJ SHPO, and consulting parties of the Board's decision, and swiftly move to complete the Section 106 review process. The public interest and the goals of the NHPA require no less.

On opening, the LLCs fully addressed the appropriate remedies to be imposed in the unlikely event the Board were to find a Section 110(k) violation. In particular, the LLCs explained why the City Parties' two requested conditions on abandonment, (1) "voiding the deeds" from Conrail to the LLCs, and (2) "grant[ing] a public use condition barring Conrail from disposing of the property for other than public use for 180 days following the effectiveness of the abandonment," are unwarranted, unlawful, and would completely fail to properly remedy any Section 110(k) violation that may be found. LLCs Op. at 35-41. On opening, the City Parties continue to press for these two remedies. Since the LLCs have already fully addressed these requests in its opening argument, it will not repeat here the multiple reasons why the requested remedies are improper.

However, in their Opening Evidence, the City Parties have included a new remedial request and provide additional information on their proposed remedies. These matters warrant a further response.

First, the City Parties assert that “[t]here are no circumstances that justify granting Conrail an abandonment license notwithstanding its violation of Section 110(k),” and that “Conrail’s application for abandonment must be denied or dismissed with prejudice.” City Parties Op. at 10. This request constitutes an egregious overreach and should be denied. Granting this remedy would effectively block the property from being used for any constructive purpose, freeze the status quo railroad encumbrance on the property for all time, and allow, if not cause, the Embankment to continue to deteriorate, to the detriment of NHPA goals and all involved.

Effectively seizing property by administrative fiat and denying regulatory relief would serve no legitimate purpose. Also, such a result would only serve to further prevent the preservation of historic property and the productive use of property no longer necessary for rail service, and would mean a continuation of deterioration and blight. Moreover, the Board has no authority to force Conrail to maintain in place a common carrier rail line in the absence of a showing of any bona fide public need for continuing rail service. Under 49 U.S.C. § 10903, abandonment and discontinuance authority is permitted where “the present or future public convenience and necessity require or permit the abandonment or discontinuance,” or under 49 U.S.C. § 10502 with the Harsimus

Branch exemption petition, continued service is not necessary to carry out the transportation policy goals.

Even if the exemption petition were denied *without prejudice*, historic preservation and National Rail Policy goals do not favor the need for duplicative and repetitive abandonment filings and Section 106 and environmental reviews. The protracted delay, expense, and burden of completing a whole new review conflicts with the National Transportation Policy to minimize the need for federal regulatory control over the rail transportation system, reduce regulatory barriers to exit from the industry, and require fair and expeditious handling and resolution of all proceedings brought to the Board. 49 U.S.C. §§ 10101(2), (7) & (15). Such an exercise would be a tremendous waste and perversion of administrative and public resources.

Also, such protracted administrative delay and unending gridlock in the face of a meaningful proposal to preserve the Embankment and create a linear park and trail that far exceeds any Section 106 NHPA mitigation that could be imposed by the Board is contrary to and undermines the public interest, especially where the line has been out of service for almost three decades and is no longer needed for common carrier service.

Second, the LLCs fully addressed the lack of legal authority to void deeds (Op. at 37) and reemphasize here that the Board has no authority to “void deeds” for parcels properly and legally conveyed 15 years ago. The City Parties assert on opening

that the legal basis for their request for the voiding of deeds and/or reconveyance is provided under *The Land Conservancy of Seattle & King County – Acquisition & Operation Exemption – BNSF*, FD 33389 (STB served Sept. 26, 1997) at 3 (“*The Land Conservancy*”). City Parties Op. at 33 n.25; App. at 118. However, the City Parties once again grossly misrepresent their relied upon legal authority and mislead the Board. City Parties’ counsel was directly involved in the *Land Conservancy* proceeding, and should be fully aware of its facts and the Board’s decisions, especially as he represented the entities that the STB found to have engaged in a “misuse of our procedures” and an “abuse” of its processes. *Id.* at 3. In that case, the Board revoked the rail line acquisition and operation certificate granted to The Land Conservancy of Seattle and King County (“TLC”), on grounds that TLC “put into effect a plan to convert the line to trail use as soon as possible following its acquisition of the line,” and “never had any intention of reinstituting rail service on the line.” *Id.*⁵

In that case, the Board did not seek further remedies or criminal referral that Mr. Day suggests should occur in this proceeding with Conrail, even in the absence of any Board finding of wrongdoing. The Board did originally order TLC to reconvey the line to BNSF, but the City Parties fail to inform the Board that it stayed that

⁵ Counsel for the TLC, Mr. Montange, was quoted on the front page of the local press at the time as follows: “Chuck Montang[e], attorney for TLC, said the decision ‘speaks to what happens if you’re too frank about what you’re going to do with the line.’” Stacy Goodman, *Rails-to-trail move slowed*, Issaquah Press Oct. 1, 1997, at A1.

requirement. *The Land Conservancy* (STB served Sept. 26, 1997). The City Parties also fail to inform the Board that even as the Board upheld its revocation decision on reconsideration, the Board *reversed its reconveyance decision*. *The Land Conservancy* (STB served May 13, 1998) at 11 (“we will not at this time order TLC to reconvey the subject line to BNSF”).

The City Parties further fail to disclose that the Board instead, *sua sponte*, authorized the abandonment of the involved line to enable the rail line to be turned into a trail, which it believed was the best way to further the public interest as it related to the future use of the subject line. *Id.* In other words, far from requiring a deed to be voided or the land reconveyed, the Board’s decision on reconsideration enabled the line abandonment and specifically authorized the rail line to be transferred for non-rail purposes to the “wrongdoer,” just as TLC had originally desired and intended.

The City Parties inexplicably fail to advise the Board of any of these critical facts and ultimate findings and outcome in the proceeding in which their counsel has intimate familiarity, and on which they predicate their assertion that the Board has the authority to “void deeds.”

Also, the City Parties insist that “[t]here is no basis to treat a developer more favorably than a land trust.” *City Parties Op.*, App. at 119. However, the LLCs, unlike TLC, have not been found to have engaged in any wrongdoing or otherwise to have misused the Board procedures, misled the Board, or abused its processes. In any

event, the LLCs in no way seek more favorable treatment than that afforded the land trust, to which the involved property was allowed to be promptly conveyed for its intended trail use. This conveyance was accomplished only through the cooperation and assistance of the Board, which elected to allow the property to be conveyed in furtherance of the public interest, and despite the finding of substantial misdeeds of the applicants.

Third, the LLCs explained on opening why the public use condition sought by the City Parties has no connection with demolition of historic properties under Section 110(k), and should be denied. LLCs Op. at 38-39. On opening, the City Parties reassert this request, but then candidly admit the real purpose of their public use request: to enable Jersey City to “have an unburdened opportunity to employ [state law] to acquire the property from Conrail at the price Conrail agreed to accept from the developer.” City Parties Op. at 10 n.8. The City Parties further disclose that the City has earmarked funds to purchase the line at that price. *Id.* The City Parties’ premise for its requested relief is that “[this] outcome is superior to destruction of the historic line and Embankment and adverse impacts on adjacent historic assets that would result from the developer’s demolition and redevelopment plans.” *Id.* at 32.

The LLCs strongly object to the City Parties’ characterization. The LLCs seek to implement a preservation plan of unsurpassed excellence serving the diverse interests of the surrounding community, with a public park, walking paths, trails, and a

light rail easement. In contrast, the City Parties have no designed preservation plans. To the contrary, the City Parties real intent for the property has been shown to be the opposite.

LLCs previously provided OEA with a copy of an improper closed session of the City Council of the City of Jersey City on September 8, 2014, where this abandonment proceeding was discussed, the record of which was ordered released by the Superior Court, Law Division, Hudson County. In that session, various City officials stated that they believed the LLC's properties were worth between \$50 and \$100 million, presumably in their present condition and circumstances; the City lacked money to acquire the LLCs' properties or to develop or preserve them in any way; that if acquired for \$3 million, the City might resell the part of the property to a developer to pay for investment; and that the City needed to continue to fight the LLCs proposal given all the time and effort put into the matter, otherwise they would be giving the developer a "gift" of \$50 to \$100 million for \$3 million.⁶

The City Parties' admission that the intent of their public use request is to force the sale of the Embankment to Jersey City at a fire sale price, with no historic preservation protections, and no legitimate public purpose, is alarming. It represents yet another attempt to appropriate property without just compensation, and property that Jersey City had numerous opportunities to acquire upon favorable terms. The LLCs trust

⁶ See Letter from LLCs to OEA (Dec. 7, 2015) (EI-21241) at Exh. A.

that the current administration in Jersey City recognizes the value and need for the proposal to responsibly redevelop the Embankment in furtherance of historic preservation goals as proposed by the LLCs' developer. However, this blatant overreach by the City Parties provides the Board with all it needs to find that the request is completely unwarranted, unfair, and inappropriate. It also makes no sense as it would also prolong the further deterioration of the Embankment and destroy an invaluable preservation plan.

The City Parties' remedial requests do not advance, but instead subvert historic preservation goals and the public interest, and should be denied.

III. CONCLUSION

There is no credible evidence that the Embankment was a historic property until 1999 or that any demolition of the Harsimus Branch occurred in violation of Section 110(k). The assertions by the City Parties and their allies fail to establish any elements of a violation. As the LLCs requested on opening, the Board should promptly rule that Section 110(k) is inapplicable and has not been violated. The Board should proceed

expeditiously to terminate the Section 106 consultation, and issue a final decision as soon as possible to allow this long-delayed exemption proceeding to be concluded.

Respectfully submitted,

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Dated July 19, 2021

Attorneys for LLCs

ATTACHMENT 1

Interstate Commerce Commission

Washington, D.C. 20423

OFFICE OF COMPLIANCE AND CONSUMER ASSISTANCE

July 28, 1988

Noreta R. McGee, Secretary
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, DC 20423

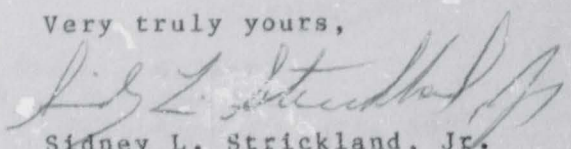
Re: Finance Docket No. 31292
Rails-To-Trails Conservancy, et al.
Petition for Declaratory Order

Dear Secretary McGee:

Enclosed for filing in the captioned proceeding are an original plus 10 copies of the Opening Statement of Facts and Argument of the Office of Compliance and Consumer Assistance, Verified Statement of David A. Randall and Exhibits A through RRRR to Verified Statement of David A. Randall.

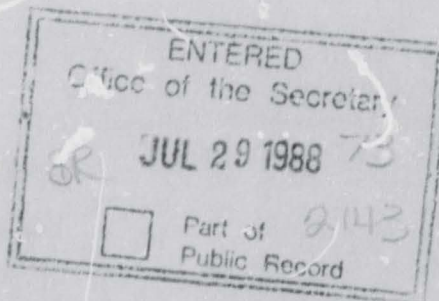
Please acknowledge receipt by date-stamping the enclosed copy of this letter and returning it to me in the self-addressed stamped envelope provided for your convenience.

Very truly yours,


Sidney L. Strickland, Jr.
Associate Director

Enclosures

cc: Parties of Record



BEFORE THE
INTERSTATE COMMERCE COMMISSION

ORIGINAL

FINANCE DOCKET NO. 31292
RAILS-TO-TRAILS CONSERVANCY ET AL.,
PETITION FOR DECLARATORY ORDER

OPENING STATEMENTS OF FACT AND ARGUMENT
OF THE OFFICE OF COMPLIANCE AND CONSUMER ASSISTANCE
INTERSTATE COMMERCE COMMISSION



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Attorneys for
Office of Compliance and
Consumer Assistance
Interstate Commerce Commission

JULY 28, 1988

ENTERED
Office of the Secretary
JUL 29 1988 73
BR 2143
☐ Part of
Public Record

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31292
RAILS-TO-TRAILS CONSERVANCY ET AL.,
PETITION FOR DECLARATORY ORDER

OPENING STATEMENTS OF FACT AND ARGUMENT
OF THE OFFICE OF COMPLIANCE AND CONSUMER ASSISTANCE
INTERSTATE COMMERCE COMMISSION

STATEMENT OF THE CASE

This is a declaratory order proceeding, instituted pursuant to the Commission's inherent authority to clarify statutory obligations, and the Administrative Procedure Act's declaratory order provision, 5 U.S.C. 554(e), to resolve a controversy created by the Burlington Northern Railroad Company's (BNRR), attempt to abandon rail services and sell a portion of track in Seattle, WA, without prior authorization by this Commission. The Office of Compliance and Consumer Assistance (OCCA) is treated as a petitioner in this proceeding, by order of the Commission.

The specific issue to be resolved is whether the BNRR track and right-of-way located in the Fremont District of Seattle, WA, from about milepost 6 near 3rd Avenue, N.W., eastwardly to milepost 8, just past Latona Avenue, N.E., and almost to the Interstate Highway 5 ship canal bridge is a line of railroad that may not be abandoned without prior Commission approval under 49 U.S.C. 10903.

• Relevant statutes are set out in an addendum to this Statement.

A. Jurisdiction

The Interstate Commerce Commission has both plenary and exclusive jurisdiction to determine whether the public convenience and necessity permits extension or abandonment of a "line of railroad" or "railroad line" operating in interstate commerce. See 49 U.S.C. 10901 and 49 U.S.C. 10903 and Chicago and N.W. Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981).^{1/} However, the Commission's broad powers over railroad line extensions and abandonments do not extend to "spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. 10907(b)(1). In this regard, Congress has entrusted to the Commission the initial responsibility for determining its jurisdiction over lines of railroad. See City of Yonkers v. United States, 320 U.S. 685, 691 (1944); Powell v. United States, 300 U.S. 276, 287 (1937). Thus, for example, before the Commission can consider the merits of a proposed rail line extension or abandonment, or before a district court may enjoin rail line construction or abandonment, each forum must first determine the initial jurisdiction question -- whether the trackage at issue is subject to the certification requirement of the Act, i.e., a railroad line. See e.g., Texas & Pac. Ry. Co. v. Gulf, C. & S.F. Ry. Co., 270 U.S. 266, 272-273 (1926); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 163-64 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967).

^{1/} The term "line of railroad" was changed to "railroad line" during the recodification of the Act (Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1337) without any substantive change in meaning. Chicago and N.W.Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 n. 7 (1981). The terms are therefore used interchangeably.

Undertaking either an extension or an abandonment of rail service over a "line of railroad" or "railroad line" without first obtaining Commission certification is unlawful and may be enjoined by a United States District Court in an action brought by the Commission, the United States, the attorney general of a State or the transportation regulatory authority of a State or area affected by the violation. See 49 U.S.C. 11702(a)(1), 11703(a), and 11505 (formerly 49 U.S.C. 1(20)).^{2/} See e.g., Texas, supra, 270 U.S. at 273 (1926). In addition, any person knowingly authorizing, consenting to, or permitting a violation of the certification requirement is subject to a civil penalty of up to \$5,000 per day. 49 U.S.C. 11901(a) and (d).

The Commission instituted this declaratory order proceeding pursuant to its inherent authority to clarify statutory obligations, and the Administrative Procedure Act's declaratory order provision, 5 U.S.C. 554(e) as a result of a controversy that surfaced after the Mayor of the City of Seattle Washington and other city officials requested, in a February 16, 1988 joint letter to Chairman Gradison, an investigation into Burlington Northern Railroad Company's (BNRR) purported sale of 1 1/2 miles of BNRR's Seattle railroad properties in the Fremont District from about milepost 6 near 3rd Avenue, N.W., eastwardly to

^{2/} The original Interstate Commerce Act, 49 U.S.C. 1(20), gave "any party in interest" statutory standing to bring a suit in district court to enjoin an unlawful abandonment. With the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 90 Stat. 127, however, Congress eliminated the right of private parties to file suit in district court. See 49 U.S.C. 1a(9) (1976) [now 49 U.S.C. 11702(a)(1), 11703(a) and 11505(a)]. Thus, under existing law, a private party aggrieved by an alleged unlawful abandonment lacks standing to seek injunctive relief in the courts in its own right.

milepost 8, just past Latona Avenue, N.E., and Interstate Highway 5. (See attached map A). The City of Seattle had contended that the property in question is a railroad line that falls within the Commission's jurisdiction, and that BNRR should have initiated a Commission abandonment proceeding pursuant to 49 U.S.C. §§ 10903-10906 prior to taking any actions concerning the property and therefore requested a determination as to whether BNRR's reclassification of the rail property exempts the property from the Commission's abandonment regulations. BNRR asserted during the investigation that its internal reclassification of the subject track as side track or an industrial spur (it was previously classified as main line) "insulates" the sale from Commission abandonment jurisdiction. (RVS, Ex. M, BB, MM, NN, BBB, GGG, JJJ, LLL). 3/

B. Facts

The abandoned track and right-of-way (ROW) in issue is approximately 1 1/2 miles long and was historically a part of BNRR's lines of railroad between Seattle and Sumas, Washington. (RVS, Ex B, F). From the date of its construction, the trackage was treated and used as a line of railroad.

In the late 1800's the Seattle, Lake Shore, and Eastern Railroad constructed the subject railroad line to connect with a Canadian transcontinental line at Sumas, WA. However, the railroad line was initially finished only as far as Arlington, WA. (RVS, Ex. F).

3/ All references to the verified statement of Special Agent David A. Randall, filed concurrently with this Opening Statement, will be designated "RVS", and references to the lettered exhibits submitted with that statement will be referred to as "RVS, Ex_)".

In 1913, the Northern Pacific (NP) acquired the railroad in issue and connected it with a Canadian transcontinental line outside of Sumas, making the line about 126 miles long and serving shippers in Seattle and in areas north and east of the City of Seattle. The line became part of the BNRR system after the consolidation of the Northern Pacific and Great Northern (GN) to form BNRR in 1970.^{4/} See, Great Northern Pac.-Merger-Great Northern, 331 I.C.C. 228 (1967), sustained on judicial review Northern Lines' Merger cases, 396 U.S. 491 (1969), aff'g 296 F. Supp. 853.

After the 1970 merger and consolidation, BNRR continued regular rail service for shippers along the old NP Sumas line by routing traffic over the old GN main line to Ballard, WA,

^{4/} Prior to the NP and GN consolidation to form BNRR, both NP and GN had a main line running north from Seattle, WA over the Lake Washington Ship Canal. The GN line ran across a drawbridge over the canal, along the Puget Sound shore to Everett, WA, and then turned east extending to St. Paul, MN. The NP line also crossed the ship canal, but over a drawbridge located about two miles to the east of GN's bridge. NP's line then ran east along the north shore of the canal and the Union and Washington lakes, before turning north to connect with a Canadian transcontinental railroad outside Sumas, WA. (RVS, Ex. B).

A short track connected the GN and NP lines just north of the ship canal, allowing the two companies to interchange traffic. A portion of this short "connector" line was, in part, jointly owned by GN and NP and the remaining portion owned solely by GN. GN and NP also served shippers along the "connector" line. (RVS, Ex. B).

and then over the formerly separately and jointly owned old GN and NP "connector" line of railroad to the old NP Sumas line.^{5/} (RVS, Ex. B). This new consolidated BNRR Sumas line of railroad then stretched approximately 126 miles from Seattle to Sumas. (See RVS, Ex. C).

In recognition that the Sumas Line was a line of railroad, BNRR initiated a series of five abandonment proceedings along its Sumas line. (RVS, Ex. C). The first noteworthy abandonment application, filed in 1971, involved that portion of the line between Fremont and Kenmore (between approximately milepost 8 and milepost 19).^{6/} At the time of the Fremont-Kenmore abandonment, BNRR recognized that the entire Sumas line west of Kenmore, WA, to Ballard, WA, was a line of railroad, and BN considered abandonment of this portion of the railroad line along with the Fremont to Kenmore section of the line. (RVS, Ex. I). However, the actual abandonment application and proceeding did not include any portion of the Sumas line west of Fremont at milepost 8. (RVS, Ex. F, G, H, and I).

After approval of the Fremont-Kenmore abandonment, that portion of the Sumas line that ran west of Fremont from milepost 8 (the approximately 4.7 miles of line between the Ballard

^{5/} No traffic was then routed over the old NP bridge; and BNRR eventually removed the old NP bridge in 1978. Thus, the use of the former "connector" fundamentally changed. This became particularly true with the removal of the old NP bridge. This removal resulted in the connector line becoming the only method for moving traffic to or from the Seattle main line (former GN main line), essentially continuing a 4.7 mile branch line which included the "connector" as well as the abandoned portion of the old Sumas line.

^{6/} Burlington Northern, Inc. Abandonment Between Fremont and Kenmore, King County, Wash., 342 I.C.C. 446 (1972). (RVS, Ex. F, G).

mainline connection near Shilshole Bay on Puget Sound and milepost 8) remained in service. (RVS, Ex. B). Indeed, BNRR continued to provide regular service to a number of shippers (RVS, Ex. JJ), including a retail lumber products business ^{7/} at the most eastern point of the remaining track (west of milepost 8), a steel mill, a petroleum products company, and a paint company. (RVS, Ex. DDDD). A newly created Burke-Gilman Trail ran over the 11 abandoned miles of the old NP Sumas line beginning at milepost 8, in Fremont east to Kenmore, WA.^{8/}

Following the Commission's 1972 decision approving abandonment of the 11 mile Fremont-Kenmore segment, BNRR management decided to treat the remaining portion of the Sumas Line, west of the abandoned Fremont-Kenmore segment, as "exempt" industry track. (RVS, Ex. M, V, W, X, BB, CC). In 1978, BN reclassified the remaining portion of the former NP Sumas Line west of milepost 8 as "side track". (RVS, Ex. N, O).

While BNRR continued regular service to the area, another Burlington Northern, Inc. subsidiary, Glacier Park Corporation (GPC), began to consider accommodating the creation of an office park (Burke Industrial Center) which would require BNRR to sever the remaining two miles of the eastern end of the Sumas line,

^{7/} The retail lumber company, Dunn Lumber, was simply advised by BNRR in 1983 that service was being terminated; and subsequently, service was discontinued without Commission approval. (RVS, Ex. RRRR, LL, MM, NN).

^{8/} Seattle plans to continue the Burke-Gilman Trail over the remaining portion of the Sumas line remaining in Seattle, the former GN and NP lines northeast of Salmon Bay and the ship canal to the Shilshole Bay on Puget Sound, as rail use ends.

by terminating all rail service between mileposts 6 and 8. (RVS, Ex. PP, QQ, RR, SS, UU, VV, BBB, FFF, GGG, HHH, III, KJJ, KKK, NNN). To implement this plan, a Burke representative for the planned development, with BNRR's assistance, prodded BNRR rail customers into signing a petition which stated that rail service was not used or desired for the future. (RVS, Ex. SS). Having induced the affected shippers to sign the petition, and without advising the Commission or seeking authority to abandon this portion of the line as required by 49 U.S.C. 10903 (or seeking an exemption under 49 U.S.C. 10505), BNRR made the last car delivery occurring between mileposts 6 and 8 in 1986 to a shipper within the planned Burke Industrial Center. (RVS, Ex. JJ, TT). Nevertheless, several shipper spur track agreements in this area remain in force. (RVS, Ex. FF, GG, HH, II, OOOO).

On February 2, 1988, BNRR, instead of conveying to the Burke Industrial Center project, executed a quitclaim deed (RVS, Ex. YY, OOOO) to an individual, Dennis R. Washington, Trustee for the Roy Dennis Washington Revocable Living Trust. This conveyed certain properties, including the 2 miles of the old NP Sumas line, from milepost 6 to milepost 8. (RVS, Ex. NNN, OOO, PPP). The quitclaim deed describes the property in issue as "All that portion of [BNRR] Company's (formerly [NP] 60 foot wide Seattle, Washington, Ballard to Fremont Branch Line right-of-way..." (RVS, Ex. YY.). The buyer later informed OCCA that he did not believe the property was subject to any common carrier obligation or regulation, and that he did not intend to use it for railroad purposes in a manner that would be subject to the Commission's

jurisdiction. (RVS, Ex. WWW, ZZZ). Shortly after OCCA's investigation began, the line was severed at approximately milepost 6, and an additional 800 feet of track west of that milepost was removed. (RVS, Ex. TTT, UUU).

The Sumas line west of milepost 6 still continues to have regular, rail service to five shippers. (RVS, Ex. JJ). Collectively, three shippers are significant users. For example, in 1987 Salmon Bay Steel shipped or received over 850 cars, Olympic Home Products moved 57 cars and Bardahl moved 10 cars. (RVS, Ex. JJ). To meet these shipper needs, BNRR provides service three times a week. (RVS, Ex. EEEE). BNRR owns and maintains all track and spurs along the line that serve these shippers. (RVS, Ex. EE, FF, GG, HH, II, CCCC, OOOO). BN and GPC records show that BNRR similarly plans to discontinue rail service over this remaining portion of the Sumas line west of milepost 8 during the next five years without prior Commission approval. (RVS, Ex. JJJ, KKK, LLL). This would eventually eliminate the entire branch line created by removal of the old NP bridge, which extends from the BNRR main line connection near Shilshole Bay, and extends east over the "connector", terminating on the abandoned portion of the old NP Sumas mainline.

ARGUMENT

BNRR'S SEATTLE TRACK AND RIGHT-OF-WAY IS A RAIL LINE AND MAY NOT BE ABANDONED WITHOUT PRIOR COMMISSION APPROVAL

Commission and Court cases are legion that once a carrier assumes a common carrier obligation to conduct rail service over a particular "line of railroad", that obligation remains until appropriate authority for abandonment is obtained, irrespective of any subsequent change in the use or operation of that track or the classification of the track by the carrier.

In Chicago & Alton R.R. Co. v. Toledo, Peoria and Western R.R. Co., 146 I.C.C. 171 (1928), for example, the Commission required a certificate of abandonment be obtained prior to cessation of operations even though cessation of operations was required by the terms of a lease. The Commission rejected the contention that the parties have a legal right to rely upon the terms of their lease to terminate a common carrier obligation. Citing a passage from the Supreme Court decision in Louisville & Nashville R. R. v. Mottley, 219 U.S. 467, at 482, the Commission held that, just as it has authority over the establishment of extensions of the rails and service of a tenant rail line, it has similar authority over the discontinuance of such a railroad line. The Commission emphasized that if its jurisdiction over the abandonment of such service was to be limited or circumscribed by the specific provisions of a contract and is only exercisable during the life of a private contract, the Commission's jurisdiction "could be entirely defeated by short-term contracts made renewable at the option of the parties."

Exercising similar reasoning, the Commission in Lehigh Valley R.R. Co. Proposed Abandonment of Operations, 202 I.C.C. 659 (1935), held that the State Line & Sullivan Railroad Company, a lessor which had ceased to operate a railroad line in 1884, prior to enactment of the Interstate Commerce Act, would be required to seek permission to abandon a railroad line which had reverted to it upon expiration of a lease to Lehigh Valley Railroad in April 1934. The Commission stated (Id. at 663):

The subsequent lease of its railroad to another company did not change the lessor's relationship to the public, nor relieve it from performance of the duties and obligations imposed by its charter or the general Laws of the State, Washington, A. & G.R. Co. v. Brown, 17 Wall. 445, and these duties and obligations cannot be cast away at will. (Emphasis Added.)

As further support, the Commission went on to cite Charles Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522, 543 (1923) and the Supreme Court statement that:

A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous losses (citing cases) it may give up its franchise and enterprise, but short of this it must continue. (Emphasis Added.)

The Commission then held that State Line continued to be primarily responsible for performance of its duty to serve the public, unless and until State Line had received abandonment authority from the Commission. Lehigh Valley, supra at 663.

In Oregon Short Line R. Co. Abandonment, 267 I.C.C. 633 (1947), the Commission addressed a change in rail operations similar to the present situation. There the railroad had properly applied to the Commission to abandon a branch line, but the State of Utah challenged Commission jurisdiction on the ground that the involved line was a spur track. The amount of service provided on the line, as here, had steadily decreased over a number of years. The Commission, however, found the involved track clearly to be a "line of railroad" for which prior Commission abandonment approval was required before operations could cease. Most importantly, the Commission stated the following very pertinent point (Id. at 635):

If a carrier by voluntary reduction of service, with or without approval of a State Commission, could change the status of a particular line, our jurisdiction could be defeated entirely. Once having assumed common-carrier obligations subject to the jurisdiction of the Commission with respect to a particular line of railroad, that obligation remains until appropriate authority for abandonment is obtained.
[Emphasis Added]

The courts have also consistently held that until a carrier receives authority from the Commission to abandon or discontinue service over a line it has previously served shippers, its public service obligation remains notwithstanding any operational changes, preexisting contractual obligations, or carrier classification of the line. See, New Haven Inclusion Cases, 399 U.S. 392, 461 (1970); Smith v. Hoboken R. Warehouse & S.S. Connecting Co., 328 U.S. 123, 130 (1946); Thompson v. Texas Mexican R. Co., 328 U.S. 134, 144-145 (1946); Gibbons v. United States, 660 F. 2d 225, 229 (7th Cir. 1981), 660 F.2d 1227, 1232-1235 (7th Cir. 1981). I.C.C. v. Chicago & N.W. Transp. Co., 533 F.2d 1025, 1028 (8th Cir. 1976); See also California v. Southland Royalty Co., 436 U.S. 519, 529 n.6 (1978).

Turning to the present controversy, it is beyond peradventure that, since the late 1800's, the rail property in question has been a portion of a main line of railroad (the Sumas line) used to serve shippers over a 126 mile stretch between Seattle and connection with a Canadian transcontinental line at Sumas, WA. After the line became part of the BNRR system as a result of the consolidation of the NP and GN, BNRR continued to serve shippers along the old NP Sumas line. Indeed, the new consolidated BNRR Sumas line of railroad then stretched approximately 126 miles from Seattle to Sumas.

Even BNRR recognized early on that the Sumas Line was a line of railroad. Importantly, and most revealing to this proceeding, BNRR initiated a series of five abandonment proceedings along its Sumas line between 1971 and 1986. The first, as previously mentioned, involved an 11.01 miles portion of the Sumas Branch line between Fremont and Kenmore, WA (FD 26638). Next, two sections were abandoned, involving a 20.22 miles section between Arlington Junction and Clear Lake, WA and a 10.25 miles section between Hartford and Edgecomb, WA. (FD 26906, and FD 26906 (Sub-No. 1)). The third application to the Commission was a 2.74 miles section between Clear Lake and Sedro Woolley, WA. (Docket No. AB-6 (Sub-No. 66F)). The fourth portion of this branch line involved 4.88 miles section between Kenmore and Woodinville, WA (Docket No. AB-6 (Sub-No. 242)). The final application was a petition for exemption in Docket No. AB-6 (Sub-No. 280 X) and involved an 8.11 miles section of the Sumas Branch line between Snohomish and Hartford, WA. (RVS, Ex. C).

The record, in fact, shows that even at the time of the Fremont-Kenmore abandonment, BNRR recognized that the entire Sumas line west of Kenmore, WA, was a line of railroad that would require Commission abandonment approval. See RVS, Ex. F, G, H, and I. Indeed, after Commission approval of the Fremont-Kenmore abandonment, BNRR continued to provide regular service along that portion of the Sumas line that ran west of Fremont from milepost 8 to a number of shippers, including a retail lumber products business at the most eastern point of the remaining track (west of milepost 8), a steel mill, a petroleum products company, and a paint company.

In 1978, however, BNRR internally reclassified the portion of the former NP Sumas Line west of milepost 8 as "side track" and began to execute on an apparent plan to dispose of the property west of milepost 8 without prior Commission approval; and this, of course, was in blatant disregard to the public interest that may exist for continued rail service under 49 U.S.C. 10910 or 10905, for public use under Section 10906 (e.g., The Trails Act) or for public use related to the Railroads for National Defense Program.

BNRR would still continue to provide regular service to the area; but it would be short lived, as BN would subsequently begin to eliminate service to portions of this line without Commission approval.

BNRR and later its sister Burlington Northern, Inc. subsidiary, Glacier Park Corporation, subsequently became very concerned about accommodating the development of the underlying real estate (the Burke Industrial Center), irrespective of any of the aforementioned public interest concerns. Indeed, BNRR eventually took it upon itself to terminate unilaterally all rail service between mileposts 6 and 8 in blatant disregard of Commission jurisdiction to accomplish these ends. This unilateral action, of course, disrupted any public interest rights in pursuing possible public use for the line as noted above.

Then after lengthy negotiations and planning, on February 2, 1988, BNRR, instead of conveying to the Burke Industrial Center, executed a quitclaim deed to Dennis R. Washington, Trustee for the Roy Dennis Washington Revocable Living Trust. The conveyed properties included approximately two miles of the old NP Sumas line from mile post 6 to milepost 8, described in the deed as the "Seattle, Washington, Ballard to Fremont Branch Line." (RVS, Ex. YY). Once again, any public interest rights were ignored. In fact, shortly after OCCA's investigation began, the BN was bold enough to remove an additional 800 feet of track west of milepost 6.

The Sumas line west of milepost 6 still continues to have regular, rail service to five shippers. Collectively, three shippers are significant users. For example, in 1987 Salmon Bay Steel shipped or received over 850 cars, Olympic Home Products moved 57 cars and Bardahl moved 16 cars. To meet these shipper needs, BNRR provides service three times a week. BNRR and GPC

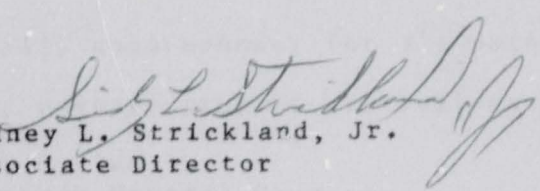
records, however, show that BNRR similarly plans to discontinue rail service over this remaining portion of the Sumas line west of milepost 8 during the next five years without prior Commission approval.

These shippers could be next to lose rail service without ever having the opportunity to seek continued rail service, if desired. (See RVS, Ex. BBBB). Similarly, the track may, in fact, be designated as a part of the Strategic Rail Corridor Network (STRACNET) and eliminated irrespective of our national defense needs. Congress clearly never intended that carriers have the unilateral discretion to abandon railroad lines without prior Commission approval and circumvent the public interest.

CONCLUSION

The Commission should find that all the BNRR rail track and right-of-way west of milepost 8 are a line of railroad over which rail service could not be discontinued without prior Commission approval.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of July, 1988, I have served true and accurate copies of the foregoing Opening Statements of Fact and Argument of the Office of Compliance and Consumer Assistance, Verified Statement of David A. Randall, and Exhibits A through RRRR to Verified Statement of David A. Randall, upon counsel for all parties of record, by first class mail, postage prepaid, as follows:

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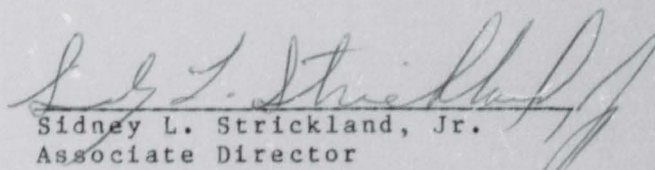
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The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, and who have been sworn in as such, and who are now in the service of the Department.

1. Mr. [Name] has been appointed to the position of [Position] and has been sworn in as such.

2. Mr. [Name] has been appointed to the position of [Position] and has been sworn in as such.

3. Mr. [Name] has been appointed to the position of [Position] and has been sworn in as such.

4. Mr. [Name] has been appointed to the position of [Position] and has been sworn in as such.

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ADDENDUM

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, and who have been sworn in as such, and who are now in the service of the Department.

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10. Mr. [Name] has been appointed to the position of [Position] and has been sworn in as such.

ADDENDUM

STATUTES INVOLVED

The statutes primarily involved in this proceeding are portions of the Administrative Procedure Act ("APA") and the Interstate Commerce Act.

A note regarding the 1976 amendments and the 1978 recodification of the Interstate Commerce Act is in order. Prior to 1976, the relevant sections were found at 49 U.S.C. §§1(3)(a), 1(18), 1(19), 1(20), and 1(22).

The Railroad Revitalization and Regulatory Reform Act (Pub. L. No. 94-210, §§801, 802, enacted on February 5, 1976, 90 Stat. 125-130), amended 49 U.S.C. §1(18); repealed 49 U.S.C. §§1(19) through 1(22); and added a new section, 49 U.S.C. §1a. As so amended, 49 U.S.C. §1(18) dealt with railroad extensions and 49 U.S.C. §1a dealt with abandonments.

By (Pub. L. No. 95-473), enacted on October 17, 1978, 92 Stat. 1337, et seq., the Interstate Commerce Act was repealed and its provisions codified, without substantive change, in Title 49 of the United States Code.

The relevant portions of the APA and the various sections of the Interstate Commerce Act, together with their respective effective dates, are set forth below.

The Administrative Procedure Act

5 U.S.C. §554:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent there is involved --

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

* * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

The Interstate Commerce Act

Prior to February 5, 1976 -

49 U.S.C. §1(18):

* * *

[N]o carrier by railroad subject to this chapter shall abandon all or any portin of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

* * *

49 U.S.C. §1(19):

* * *

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings.

* * *

49 U.S.C. §1(20):

* * *

Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer,

receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

49 U.S.C. §1(22):

The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

From February 5, 1976 to October 17, 1978 -

49 U.S.C. §1a (Pub.L.No. 94-210, 90 Stat. 127-130):

(1) No carrier by railroad subject to this part shall abandon all or any portion of any of its lines of railroad (hereafter in this section referred to as 'abandonment') and no such carrier shall discontinue the operation of all rail service over all or any portion of any such line (hereafter referred to as 'discontinuance'), unless such abandonment or discontinuance is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment or discontinuance. *** Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body. The authority granted to the Commission under this section shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team, switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

* * *

(9) Any abandonment or discontinuance which is contrary to any provision of this section, of any regulation promulgated under this section, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed \$5,000 on each person who knowingly authorizes, consents to, or permits any violation of this section or of any regulation under this section.

* * *

49 U.S.C. §1(18) (Pub.L.No. 94-210, 90 Stat 125-127):

(a) No carrier by railroad subject to this part shall -

- (i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad;
- (ii) acquire or operate any such extension or any such additional line; or
- (iii) engage in transportation over, or by means of, any such extended or additional line of railroad, unless such extension or additional line of railroad is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad.

* * *

(d) Carriers by railroad subject to this part may, notwithstanding this paragraph and section 5 of this part, and without the approval of the Commission, enter into contracts, agreements, or other arrangements for the joint ownership or joint use of spur, industrial, team, switching or side tracks. The authority granted to the Commission under this paragraph shall not extend to the construction, acquisition, or operation of spur, industrial, team, switching, or side tracks if such tracks are located or intended to be located entirely within one State, and shall not apply to any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

(e) Any construction or operation which is contrary to any provision of this paragraph, of any regulations promulgated under this paragraph, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed \$5,000 on each person who knowingly authorizes, consents to, or permits any violation of this paragraph or of the conditions of a certificate issued under this paragraph.

INTERSTATE COMMERCE ACT AS PRESENTLY AMENDED

49 U.S.C. §10321 POWERS:

(a) The Interstate Commerce Commission shall carry out this subtitle [49 U.S.C. §10101-§11917]. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle.

* * *

49 U.S.C. §10901 AUTHORIZING CONSTRUCTION AND OPERATION OF RAILROAD LINES:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may -

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) acquire or operate an extended or additional railroad line; or
- (4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

* * *

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

* * *

49 U.S.C. §10903 AUTHORIZING ABANDONMENT AND DISCONTINUANCE OF RAILROAD LINES AND RAIL TRANSPORTATION:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission ... may

- (1) abandon any part of its railroad lines; or

- (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

* * *

49 U.S.C. §10907 EXCEPTIONS:

(b) The Commission does not have authority under sections 10901-10906 of this title over-

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

* * *

49 U.S.C. §11505 STATE ACTION TO ENJOIN RAIL CARRIERS FROM CERTAIN ACTIONS:

(a) The attorney general of a State or transportation regulatory authority of a State or area affected by a violation of sections 10901-10907 of this title, may bring a civil action to enjoin a rail carrier from violating those sections.

* * *

49 U.S.C. §11702 ENFORCEMENT BY THE INTERSTATE COMMERCE COMMISSION:

(a) The Interstate Commerce Commission may bring a civil action -

(1) to enjoin a rail carrier from violating section 10901-10907 or 10933 or this title, or a regulation prescribed or certificate issued under any of those sections;

* * *

49 U.S.C. §11703 ENFORCEMENT BY THE ATTORNEY GENERAL:

(a) The Attorney General may, and on request of the Interstate Commerce Commission shall, bring court proceedings to enforce this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle and to prosecute a person violating this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle.

* * *

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of July, 2021, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/
Katherine F. Waring