



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

302827

August 6, 2021

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
August 6, 2021
Part of
Public Record

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

Dear Ms. Brown:

The LLCs¹ hereby reply in opposition to three motions that the City of Jersey City, the Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, “City Parties”) filed to strike evidence that has been part of the record in these proceedings since as early as 2006 and that are specifically permitted under the Board’s rules. Although the motions are procedurally improper and substantively lacking, the LLCs are replying to assure a complete record for the Board to review.

Specifically, at pages 32 to 38 of their reply argument, the City Parties seek to strike: (1) a paragraph at page 14 of the Environmental Assessment (“EA”) that the Office of Environmental Analysis (“OEA”) served on March 23, 2009, where OEA determined that there has been no violation of Section 110(k) of the National Historic Preservation Act because there was no intent by Conrail to harm historic resources; (2) the Verified Statement of Conrail witness Robert W. Ryan filed April 24, 2006 in FD 34818 that Conrail relied on as part of its opening argument and evidence; and (3) the decision of the Superior Court of New Jersey in *212 Marin Boulevard v. Chicago Title Ins. Co.*, No. HUD-L-5801-09 (N.J. Super. Ct. Aug. 31, 2017), that rejected a claim that Conrail acted fraudulently as to its belief that the Harsimus Branch was excepted spur track.

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.

Each of the City Parties' motions to strike is unwarranted and should be denied. The Board's standard for such motions to strike is demanding. The Board construes its rules "liberally to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3. Motions to strike are thus disfavored and will not be granted unless the matters sought to be omitted from the record have no possible relationship to the controversy, are immaterial, or otherwise are impertinent or scandalous. 49 C.F.R. § 1104.8 (the Board may strike "any redundant, irrelevant, immaterial, impertinent, or scandalous matter from . . . any document"). None of the City Parties' motions to strike comes close to meeting the Board's demanding threshold, and all of them are untimely.

First, OEA's earlier decision is not subject to a proper motion to strike. Instead, the City Parties' motion to strike a portion of the EA constitutes a request for reconsideration, or an appeal of the OEA's findings that is grossly untimely, by over eleven years. 49 C.F.R. § 1115.2 (petitions for reconsideration must be filed within 20 days). It is also without substantive foundation. OEA properly examined the evidence in depth and correctly determined that Conrail had no intent to harm historic resources. In any event, even if the EA were subject to a motion to strike, the City Parties provide no valid basis for the material to be struck as this clearly relevant portion of the EA is well-reasoned and rests on a sound factual foundation.

Second, the City Parties contend that Mr. Ryan's 2006 verified statement is "not competent." This motion to strike is also untimely, by over fifteen years,² and without foundation. Mr. Ryan's statement is clearly relevant, within his area of knowledge and responsibility, and was properly signed, affirmed, verified under penalty of perjury, and in full compliance with the Board's rules. 49 C.F.R. §§ 1104.4, 1104.5. The City Parties' belated and unsubstantiated objections at best go only to the weight and credibility to attribute to Mr. Ryan's testimony, which does not begin to support a finding that the testimony should be stricken. *E.g., Union Pac. R.R. – Abandonment Exemption – In Lafayette Cnty., MO*, AB 33 (Sub-No. 297X) (STB served July 22, 2011) at 4 (denying motion to strike where allegations "go[] only to the weight and credibility to be attributed to [testimony]").

Third, the City Parties also disagree with the New Jersey Superior Court's findings of a lack of fraud by Conrail that were made following a full trial. The City Parties complain that they were not a party or intervenor to that proceeding and that courts in New Jersey are not bound by unpublished decisions. Neither assertion provides a basis for the Board to strike the judicial findings from the record, particularly as the decision is not being relied upon for an abstract legal principle, but for the direct factual determination. In any event, the

² Replies or motions addressed to any pleading must be filed within 20 days after the pleading is filed. 49 C.F.R. § 1104.13.

Board's rules clearly authorize the Board to consider the findings of this decision under 49 C.F.R. § 1100.3. Even if the decision is not binding, it is surely material and relevant.³

As shown above, each of the City Parties' motions to strike are grossly untimely and procedurally improper. None of the motions comes anywhere near to meeting the Board's demanding threshold for motions to strike. In fact, the determination of City Parties to seek to strike the evidence carries with it an implicit concession that the facts are so adverse to their position that giving the evidence any weight is fatal to their claim that Conrail or the LLCs had an intent to harm, and did harm, historic resources in violation of Section 110(k). The motions to strike raise issues that go, at most, to the weight of the evidence, and are frivolous. Although the motions are an abuse of the Board's procedures and lack merit, we are not asking the Board to consider sanctions but simply request an expeditious review and disposition of these proceedings to allow an invaluable preservation opportunity to be furthered.

For the reasons stated, the Board should deny the City Parties' unwarranted motions to strike.

Sincerely,

A handwritten signature in black ink that reads "Peter Pfohl". The signature is written in a cursive, slightly slanted style.

Peter A. Pfohl

An Attorney for the LLCs

³ City Parties motion to strike this decision is also untimely under 49 C.F.R. § 1104.13, as the decision was submitted into the record by Conrail, first on September 8, 2017, and again on February 23, 2021.

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of August, 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
An Attorney for Complainant