

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
August 9, 2021
Part of
Public Record

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

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

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

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

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

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

CONRAIL’S REPLY TO MOTION TO STRIKE

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INTRODUCTION

The July 19, 2021, submission by City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rail to Trails Conservancy (collectively, “City”), includes three motions to strike certain material discussed in Conrail’s Opening Submission.¹ The Board should deny the motions because each motion “goes more to the weight to be accorded [the material] rather than its admissibility.”²

1. **Office of Environmental Analysis’s Rejection Of The City’s Argument That Conrail Violated Section 110(K)**

The City asks the Board to strike Conrail’s references to a paragraph contained in the Board’s 2009 Environmental Assessment in which OEA³ explained why it rejected the City’s argument that Conrail violated Section 110(k) of NHPA.⁴ Specifically, OEA stated:

This argument fails because the parties making this argument 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. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted

¹ City *et al.* July 19, 2021, Submission at 32–38.

² *The N.Y., Susquehanna & W. Ry.—Trackage Rights Exemption—Onondaga County Indus. Dev. Agency*, FD 32772, slip op. at 3 (STB served Aug. 7, 2001); *see also Reliance Group Holdings, Inc., Pet. for Declaratory Order*, 366 I.C.C. 446, 447 (1982) (denying motion to strike where objections “affect the weight rather than the admissibility of challenged statements”); *Ametek, Inc.—Pet. for Declaratory Order*, Docket No. 40663, 1993 WL 24033, at *2 (ICC served Jan. 29, 1993) (denying motion to strike where objection “involve[d] an issue of weight to be accorded [a verified statement] rather than its admissibility.”).

³ At the time, the OEA was called the Section of Environmental Analysis.

⁴ City *et al.* July 19, 2021, Submission at 32–33.

appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board’s environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts.⁵

Contrary to the City’s claim, OEA was fully within its authority in addressing the Section 110(k) issue in the 2009 EA. The Board’s rules *require* OEA to prepare an Environmental Assessment discussing “relevant environmental and historic preservation issues,”⁶ and *the City itself* made the issue relevant by arguing that the historic review process should not proceed because of the alleged violation of Section 110(k).⁷ The City may disagree with OEA’s analysis, but such disagreement is not a reason to strike Conrail’s references to OEA’s cogent discussion.

2. Robert Ryan’s Verified Statement Discussing The History Of The Harsimus Branch And Events Relevant To This Proceeding

The City also asks the Board to strike the Verified Statement of Robert Ryan, Conrail’s former Director of Real Estate.⁸ The City specifically objects to use of Mr. Ryan’s statement to support a claim that the Harsimus Branch is not a “line of railroad.”⁹ However, Conrail attached Mr. Ryan’s statement as an exhibit to its opening submission to help explain the history of this proceeding, not to relitigate the regulatory status of the Harsimus Branch.¹⁰ The City also says

⁵ 2009 EA at 14.

⁶ 49 C.F.R. § 1105.10(b); *see also id.*, § 1105.2 (addressing the Director of OEA’s delegated authority to address environmental and historic preservation matters).

⁷ *See* 2009 EA at 14; *see also* City *et al.* Comments to the Section of Environmental Analysis, dated Mar. 28, 2008 (EI-7065), p. 2 (claiming “Section 110(k) precludes any agency action here in light of Conrail’s anticipatory demolition of the Harsimus Embankment”).

⁸ City *et al.* July 21, 2021, Submission at 34–37.

⁹ *Id.* at 34–35.

¹⁰ Conrail’s reply submission explains why Conrail believes the Harsimus Branch is a spur, but only to address the City’s straw man argument that Conrail purported to “reclassify” the track.

Mr. Ryan’s “factual claims are unreliable.”¹¹ However, Conrail’s opening submission includes documents directly confirming his factual statements. Also, a state court judge heard Mr. Ryan testify about the disputed facts and concluded that Mr. Ryan “testified consistently, directly, and credibly.”¹² In any event, the City’s objections go to the weight to be accorded to Mr. Ryan’s statement, not its admissibility, and thus do not support a motion to strike.¹³

3. New Jersey Court Decision Finding No Fraud Or Negligence In Conrail’s Sale Of The Embankment Properties To The LLCs

Finally, the City asks the Board to strike Conrail’s references to the decision of the New Jersey Court that found Conrail “believed in the truth of [its] opinion” that the Harsimus Branch was a spur¹⁴ and did not act negligently in concluding that the Harsimus Branch was a spur.¹⁵ The City misleadingly cites a New Jersey state court rule that says unpublished opinions are not precedential or binding.¹⁶ The rule does not prohibit parties from citing unpublished opinions. To the contrary, the rule recognizes that unpublished opinions may be persuasive or instructive in particular circumstances and simply requires parties citing them to serve copies on the court and other parties.¹⁷ The City also disagrees with the court’s conclusions.¹⁸ However, once

¹¹ City *et al.* July 21, 2021, Submission at 35.

¹² See Conrail’s Opening Submission, Ex. Q at 19.

¹³ See cases cited in note 2.

¹⁴ Conrail’s Opening Submission, Ex. Q at 21.

¹⁵ See *id.* at 23–24.

¹⁶ See City *et al.* July 21, 2021, Submission at 37–38.

¹⁷ See N.J. Court Rule 1:36-3 (“No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.”).

¹⁸ See City *et al.* July 21, 2021, Submission at 38.

again, the City's arguments go to the weight to be accorded to the evidence rather than its admissibility.¹⁹

CONCLUSION

For the reasons discussed above, the Board should deny the City's motions to strike.

Respectfully submitted,

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¹⁹ See cases cited in note 2.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2021, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Docket No. AB 167 (Sub-No. 1189X), Docket No. AB 55 (Sub-No. 686X), and Docket No. AB 280 (Sub-No. 306X).

/s/ Michael L. Rosenthal