

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739

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12 October 2021

For E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Consolidated Rail Corporation – Abandonment
Exemption – in Hudson County, NJ, AB 167 (Sub-no.
1189X) and related cases AB 55 (Sub-no. 686X) (CSX
discontinuance exemption) and AB 290 (Sub-no. 306X)
(NS discontinuance exemption)

(1) Objection and Exception to Final Environmental
Assessment served September 23, 2021

(2) Notification of Two Recent Authorities Supporting
Relief Sought by City et al in this Proceeding

Dear Ms. Brown:

This agency's Office of Environmental Analysis ("OEA") issued a Final Environmental Assessment ("FEA"), served in the above-captioned proceedings on September 23, 2021. The FEA states that "OEA is neither requesting nor providing time to submit environmental comments on this Final EA." FEA in AB 167 (Sub-no. 1189X).

The FEA is supposed to inform agency decision-making. Unfortunately, the FEA contains, among other things, a fundamental and fatal error. Because the error will result in false or misleading information in the FEA potentially being relied upon the Board, City of Jersey City ("City"), Pennsylvania Railroad

Harsimus Stem Embankment Preservation Coalition ("Coalition") and Rails to Trails Conservancy ("RTC") (collectively, "City et al.") submit for filing in these three related dockets the attached Objection and Exception to Final Environmental Assessment.

The filing also provides notice of two recent authorities pertaining to matters that include but are not limited to the National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") processes currently under way. Both recent authorities support the relief previously sought by City et al. in connection with Conrail's unlawful de facto abandonment of the Harsimus Branch.

City et al. request that this document be treated as a formal filing (not an environmental comment) and that it be supplied to all decisionmakers receiving the FEA at the Board.

Certificate of Service. By my signature below, I certify service of this cover letter and the accompanying Objection and Exception by email attachment or (if email is unavailable) USPS, postage pre-paid first class, on all parties listed on STB's current service list for AB 167 (Sub-no. 1189X) and related dockets.

Respectfully submitted,



Charles H. Montange
for City of Jersey City, Pennsylvania
Railroad Harsimus Stem Embankment
Preservation Coalition, and Rails to
Trails Conservancy

cc. Parties per certificate of service (all with att.)

Att. Objection and Exception to Final Environmental Assessment

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

CSX Transportation, Inc. –)
Disc. Ex. –) AB 55 (Sub-no. 686X)
In Hudson County, NJ)

Norfolk Southern Railway Co. --)
Disc. Ex. --) AB 290 (Sub-no. 306X)
In Hudson County, NJ)

City of Jersey City,
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition, and Rails to Trails Conservancy

(1) Objection and Exception to
Final Environmental Assessment
and
(2) Notification of Two Recent Authorities

Introduction

City of Jersey City (“City”), Rails to Trails Conservancy (“RTC”), and
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition
 (“Coalition”) (collectively “City et al.”) make the following Objection and take the

following Exception to the Final Environmental Assessment (“FEA”) served September 23, 2021 in these proceedings.¹

Objection and Exception

In response to City et al.’s contention that “loss of federal jurisdiction” is a significant environmental impact, the FEA asserts that this Board’s Office of Environmental Analysis (“OEA”) consulted with the Advisory Council on Historic Preservation (“ACHP”) in the context of whether loss of federal control amounts to an “adverse effect” for purposes of the National Historic Preservation Act (“NHPA”) per 36 C.F.R. 800.5(a)(2)(vii). OEA in the FEA served September 23 falsely claims that “OEA and ACHP have agreed that the Board’s limited jurisdiction over the rail line proposed for abandonment in this case does not constitute ‘federal ownership or control’ under 36 C.F.R. 800.5(a)(2)(vii).” FEA at p. 11. City et al. object and take exception to this statement as false and/or misleading. In any event, it would be an expression of an agreement stating legal

¹ City et al. in this paper are focusing on a central fatal flaw in the Final Environmental Assessment issued by the Office of Environmental Analysis. Nothing herein should be taken as an admission or concession that the Final Environmental Assessment is otherwise reliable or without flaw, or that the procedures employed by OEA and/or this Board to address any provision of the National Environmental Policy Act (“NEPA”) or any other environmental law or environmental or historic preservation statute involved in this proceeding are adequate or would survive judicial review should this Board not adopt mitigative measures (conditions on any authorization for abandonment) as recommended herein.

conclusions that are contrary to law, arbitrary and capricious and thus, inter alia, irrelevant.

OEA's FEA Statement Is False and/or Misleading

OEA in its FEA at footnote 18 cites "EI-27088" (Letter, J. Loichinger for ACHP to V. Rutson for STB) as authority for the false and misleading claim in the FEA. EI-27088 is attached as an appendix. At p. 2, item number 3, of that letter, ACHP specifically states that "the ACHP disagrees with [OEA's] statement that 'OEA and ACHP have concluded that the Board's limited jurisdiction does not constitute 'federal ownership or control' under 36 C.F.R. 800.5(a)(2)(vii).'" (Emphasis added.)

In any event, any position by OEA that the Board's jurisdiction under 49 U.S.C. 10903 and related statutes is so limited as not to constitute "federal control" for purposes of NHPA or NEPA is contrary to law, including recent authorities. OEA in the past has argued lack of "federal control" on the grounds that Consolidated Rail Corporation ("Conrail") not only (a) removed almost all track and tie from the Harsimus Branch at issue here prior to seeking abandonment authorization, but also (b) purported to sell the historic Harsimus Embankment and at least eight blocks of the Harsimus Branch to a developer (Steven Hyman, now deceased,

doing business as eight LLCs² under common ownership and control) prior to seeking (much less obtaining) an abandonment license (or any other form of transfer license) from this Board authorizing Conrail to sell, or anyone to acquire, the property now claimed by the Hyman LLCs. OEA in effect has assumed (over prior and repeated objection by City et al.) that the unlawful sale to the Hyman LLCs is an irremediable de facto loss of federal jurisdiction. In other words, OEA has assumed that if a railroad acts illegally to transfer property without prior authorization, this incapacitates STB from affording any relief to a victimized party under the ICC Termination Act or any other statute. This is contrary to law. STB has power to enforce its jurisdiction, and thus to afford relief against unlawful de facto abandonments. The agency of course has jurisdiction to invalidate the unlawful transfers to the Hyman LLCs and thus to accord City et al. their right under 49 U.S.C. 10905 for a preferential 180-day period to acquire the Harsimus Branch, and especially the eight parcels purportedly transferred to the Hyman LLCs. The City has committed to use of 48 NJSA 12-125.1 to acquire these parcels.

Recent Authority Demonstrates OEA's Position Is Contrary to Law

² The eight LLCs are specifically 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 389 Monmouth Street, LLC; 354 Cole Street, LLC; 317 Jersey Avenue, LLC; 415 Brunswick Street, LLC; 446 Newark Avenue, LLC (hereinafter referred to as "Hyman LLCs").

In addition to being contrary to pre-existing precedent,³ OEA's position is also contrary to recent precedent. As the Board indicated in its recent decision in Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP Rly, Inc., F.D. 35692, served Sept. 29, 2021, “any transfers” without the Board’s prior authority “are void” regardless whether they “were valid under state law.” Slip op. at 4. The Board ordered Eastside Community Rail and its principal (Douglas Engle) to take any action necessary to re-convey the line in question to the legitimate licensee for the line (GNP), or to make a representation to the Board within 30 days disclaiming title to GNP. Slip op. at 4.

As demonstrated in Eastside Community Rail, LLC, supra, and related cases, the Board has the power to void Conrail’s unlawful sale to the Hyman LLCs. If the Board voided the sales, then it could impose an effective public use condition upon Conrail pursuant to 49 U.S.C. 10905 that would bar the railroad from selling the property to a third party other than for public use. The City has already committed to buy the property from Conrail for the same price paid by the Hyman LLCs, which is the purchase price provided under applicable state law (48 N.J.S.A.

³ See Jt. App. 118-21 of City et al. to Opening 110(k) Statement for filing June 18, 2021, but due to newly declared holiday filed June 21, 2021 in AB 167 (Sub-no. 1189X).

12-125.1), should it be afforded this opportunity under section 10905.⁴ The City similarly could employ eminent domain against Conrail during that period.

There Are No Mitigative Factors to Justify
Failure to Void the Eight Deeds

There are no mitigative factors on which the Board can rely to justify refusal or failure to void the deeds. Conrail has done absolutely nothing to mitigate the unlawful sale of the Harsimus Embankment. Instead, Conrail doubled down on implementation of its unlawful actions. For example, upon this Board's determination that the Harsimus Branch was a line in a decision in F.D. 34818, served August 9, 2007, Conrail committed by contract to do everything possible to place the property in the hands of the developer,⁵ and joined in local permit applications to demolish the historic Embankment.⁶ The developer launched a wave of litigation against City et al. (and sometimes their attorneys) in an effort to prevent and retaliate against City et al. from enforcing the law.⁷ Sometimes

⁴ 48 N.J.S.A. 12-125.1 provides the City with a preferential purchase right and right of first refusal as to rail property subject to STB abandonment proceedings. It is similar to rights of first refusal over rail property sales in many other states. E.g., N.H. Rev. Stat. 228:60-b; Conn. Stat. 13b-36(c); Vt. Stat. Ann. 5:3404.

⁵ Filed multiple times, see, e.g., Jt. App. 74-47 of City et al. to Opening 110(k) Statement for filing June 18, 2021, but due to newly declared holiday filed June 21, 2021 in AB 167 (Sub-no. 1189X).

⁶ Filed multiple times, most recently at Jt. App. 77-83 in id.

⁷ See Jt. App. 121-22 in id. (developer states objective to bankrupt opponents and their attorneys with litigation).

Conrail joined in this litigation. This complete resistance to correcting its unlawful conduct continues to this day, manifest in Conrail's recent abandoned settlement negotiations without offering any explanation. In effect, Conrail and its chosen developer claim the power to subvert not just STB jurisdiction, but the rights of public entities under 49 U.S.C. 10905 and the federal requirement that railroads comply with NEPA and NHPA before (not after) abandonment licensing. Any failure by the Board to enforce the law in this context would reward Conrail and its chosen developer for acting in blatant disregard for the law, and encourage similarly lawless action by others.

Additional Recent Authority Shows Exemption Procedures
Are Inappropriate in This Case

It is also relevant that Conrail is a repeat offender⁸ in terms of unlawful de facto abandonments in Jersey City. In additional recent precedent, the Board refused to allow a repeat offender to use notice of exemption procedures

⁸ For example, Conrail evidently failed timely to seek, and has never obtained, abandonment authority for the line known as Conrail Line Code 1440 (Hudson Street Track in Conrail Track Chart Correct to 1-1-80), which intersects the Harsimus Branch (Line Code 1420), in Jersey City. In addition, STB granted an exemption from OFA (effectively declining to void deeds) in Conrail – Ab. Ex. -- in Hudson County, NJ, AB 167 (Sub.no. 1190), served May 10, 2010 because of a finding that key portions of the property were already in public use pursuant to an unlawful pre-authorization sale of a line to NJ Transit in 1996. Moreover, City et al. during the course of settlement discussions aborted by Conrail identified evidence of other similar unlawful pre-authorization sales in Jersey City by Conrail to PATH.

notwithstanding lack of objection from third parties.⁹ In contrast, City et al. have repeatedly called on this Board to reject Conrail's use of notice of exemption procedures in this proceeding.¹⁰ This recent precedent is additional authority in support of rejecting Conrail's notice entirely.

STB's OEA Wrongfully Fails to Identify and Call for Imposition of
Two Key Conditions to Mitigate Adverse Effects

As an alternative to rejecting Conrail's notice in this proceeding, STB could nonetheless protect the public interest as well as its own jurisdiction by mitigating Conrail's illegal de facto abandonment and sale of this property. This can be done by declaring in any order authorizing abandonment of the Harsimus Branch that the sale by Conrail to the eight LLCs is void and by imposing a public use

⁹ In S&S Shortline Leasing, LLC. – Acquisition Exemption – City of Ely and Nevada Northern Railway Foundation, F. 36461 and related cases, Michael Williams – Control Exemption – S&S Shortline Leasing, F.D. 36460 and Michael Williams – Control Exemption – McCloud Railway Company, F.D. 36474, all served September 29, 2021, this Board rejected “notices of exemption” relating to acquisition and control primarily because the Board viewed the person seeking the Notices of Exemption (Mr. Williams) as a serial offender in failing to seek required STB licensing for acquisition of shortline railroads or lines of railroad prior to acquisition. Interestingly, no actual party opposed Mr. Williams' use of exemption procedures; in contrast, in the Harsimus Branch situation, Conrail's use of exemption procedures has been repeatedly opposed by parties. Conrail, of course, is a much larger entity than Williams, but size in this regard is not a meritorious distinction.

¹⁰ E.g., City et al. Letters in AB 167 (Sub-no. 1189X) dated 20 March 2008 and 25 April 2008. See also City et al. Environmental Comments in id. at p. 2, dated 28 March 2008, and Comments dated 13 March 2009 in id. at p.1.

condition that, after the effectiveness of an abandonment authority, bars disposition of the property for 180 days except for public use. This would permit the City to acquire the property intact from Conrail as 49 U.S.C. 10905 provides under state law remedies (e.g., 48 NJSA 16-125.1 or eminent domain) for 180 days without liability to the developer. Such an action would result in preservation of the Embankment, mitigating the adverse impact on this historic asset and many other historic assets (for example, the entire Harsimus Branch is an historic asset protected by section 106 and at least eight blocks of it would thereby be preserved). Declaring the sale void would also eliminate the adverse environmental impacts flowing from destruction of the huge earth-filled embankments located in a flood plain and between two National Historic Districts containing fragile buildings more than a century-and-a-half old.¹¹

¹¹ The LLCs have claimed that section 10905 public use conditions are useless or meaningless here because STB says it cannot compel a sale during the pendency of the condition and Conrail has contractually committed itself to sell the property to the LLCs. But City et al. does not expect Conrail to engage in a voluntary transfer, nor does section 10905 anticipate one. Section 10905 is designed to afford a state or local government time to institute an eminent domain proceeding if necessary to secure rail property. During the 180-day public use condition period, STB prevents sales by Conrail to anyone (including the LLCs) other than for public use, which gives public (and public service) entities a 180-day preferential purchase period for all property held by Conrail at abandonment. Had Conrail acted lawfully, this would include all the property encompassed by the Embankment and eight blocks unlawfully transferred without a shred of STB authority to the Hyman LLCs. See generally Note, Public Rights of First Refusal,

The FEA thus clearly errs in failing to insist that the Board adopt the following two conditions on any effective abandonment authorization:

(1) Upon the effectiveness of any abandonment authorization in this proceeding, all deeds by Conrail to the eight Hyman LLCs are null and void ab initio and the property shall be considered as returned to Conrail.

(2) Pursuant to 49 U.S.C. 10905, Conrail shall not transfer any portion of the Harsimus Branch to any third party other than for public use for a period of 180 days from the effective date of the abandonment authorization.

In the circumstances here, it would be arbitrary and capricious and otherwise contrary to law for the Board to authorize an abandonment without the two conditions referenced above. City et al. have previously urged OEA to recommend imposition of these or similar conditions.

The City seeks to acquire the property in question both for light rail, open space and trail purposes, all compatible with historic preservation.¹² There is no question

129 Yale L.J. 812 (2020) (discussing benefits of preferential rights for public purposes). In short, the LLCs argument against 10905 has no basis in fact or law.

¹² City has already indicated in this proceeding that it will commit to pay Conrail \$3,000,000 (the price paid by the developer) for the eight blocks (six Embankment blocks and two at-grade blocks) should the deeds be invalidated, and to acquire same on the same terms and conditions as did the developer within 180 days of the effectiveness of this Board's order authorizing the abandonment in a fashion allowing lawful acquisition subject to the public use condition. The City will also

that all of these are legitimate public purposes. In addition, these conditions will mitigate significant adverse impacts on the environment including the human environment (historic resources) flowing from Conrail's unlawful actions, which OEA instead proposes to rubberstamp.¹³

City et al. object and take exception to claims in the FEA that ACHP concurs that STB is powerless in this abandonment proceeding to impose effective relief. OEA's claim that STB is powerless is arbitrary and capricious and not in accordance with law, whether or not ACHP defers to that claim, or it is adopted by the Board itself.

commit to bringing proceedings under 48 N.J.S.A. 12-125.1 and/or eminent domain proceedings to acquire the property within the 180-day period. City also filed a timely notice of intent to "OFA" in AB 167 (Sub-no. 1189X). City reserves all its rights under 49 U.S.C. 10904. Under this provision, the Conrail to Hyman LLC deeds would also be voided.

¹³ "To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations. The ICC has in other instances imposed right of way preservation conditions even though the right of way was to be used eventually for a highway rather than a railroad. Norfolk & Western Ry. Abandonment, 193 I.C.C. 363, 368-69 (1933); St. Louis -- S.F. Ry. Abandonment, 158 I.C.C. 602, 613 (1930); Washington & Old Dominion R. Abandonment -- Virginia, 311 I.C.C. 587 (1968)." Reed v. Meserve, 487 F.2d 646, 649-50 (1st Cir. 1973).

Conclusion

Due to significant errors in the FEA, the Board as a minimum must adopt at least two additional conditions should it determine to authorize an effective abandonment. In particular, the Board may not lawfully authorize any effective abandonment in this proceeding unless it imposes at least the following two conditions to mitigate the adverse impacts on the environment and historic resources otherwise manifest in loss of federal jurisdiction. These conditions are also required to protect the Board's jurisdiction and to prevent Conrail and its chosen developer from subverting remedies to which City et al. are entitled, but which Conrail's unlawful actions subvert.

Respectfully submitted,

s/ *Charles H. Montange*

Charles H. Montange
Law Offices of Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
c.montange@frontier.com
for City of Jersey City, Rails to Trails
Conservancy, and Pennsylvania Railroad
Harsimus Stem Preservation Coalition

Andrea Ferster
General Counsel
Rails to Trails Conservancy
The Duke Ellington Bldg.
2121 Ward Court, NW, Fifth Floor
Washington, D.C. 20037
(202)669-6311
aferster@railstotrails.org
for Rails to Trails Conservancy

For filing: October 12, 2021

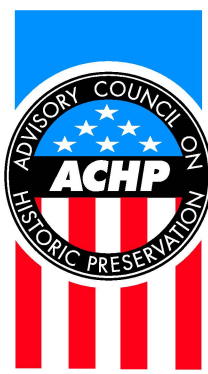
Certificate of Service

By my signature below, I attest service of this entire Submission by electronic transmission or by posting with USPS for first class or equivalent delivery as appropriate on all parties on the Board's service list for this proceeding on or by the filing date above.

s/ Charles H. Montange

Charles H. Montange

Att: EI 27088



EI - 27088

Preserving America's Heritage

January 24, 2020

Ms. Victoria Rutson
Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Ref: *Proposed Abandonment of Consolidated Rail Corporation's Harsimus Branch*
Jersey City, Hudson County, New Jersey
ACHP Connect Log Number #001682

Dear Ms. Rutson:

On November 13, 2019, the Surface Transportation Board (STB or Board) provided the Advisory Council on Historic Preservation (ACHP) with its Cultural Resources Effects Assessment Addendum Report (Addendum Report) regarding the referenced undertaking. The Addendum Report is submitted as part of the STB's compliance with the Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800). In this Addendum Report, STB provided additional information and responded to the comments and questions from the ACHP, the New Jersey State Historic Preservation Officer (NJ SHPO), and the consulting parties on the first Cultural Resources Effects Assessment Effects Report (Effects Report) issued on March 29, 2019. However, the ACHP would like to clarify some of the STB's responses in the Addendum Report.

The Addendum Report appropriately responds to the majority of the ACHP's and consulting parties' comments and questions on the Effects Report. Additionally, the ACHP and STB met on June 11, 2019, to further discuss our questions and comments, and came to agreement on some key points summarized in this report. We offer the following observations to the Addendum Report's Attachment 1:

1. Section 110(k): The ACHP and STB agreed that an assessment regarding the applicability of Section 110(k) to this undertaking will be conducted once the full administrative record has been put before the Board for its review and decision. The ACHP understands the unique circumstances regarding this decision, and agrees that it can be completed at a later time. However, in future consultations, it is important for the STB to complete its Section 110(k) assessment prior to moving forward with other steps in the Section 106 review. This ensures consistency with the statutory requirements within the NHPA.
2. Definition of the undertaking: The STB has limited the definition of the undertaking to the Board's decision to grant or deny abandonment authority, which is inconsistent with our regulations. Pursuant to 36 C.F.R. § 800.16(y), the undertaking subject to review by the federal agency is not limited to the activity requiring federal approval. Rather, the undertaking encompasses the entire

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

project, including but not limited to the components that require federal approval. Accordingly, the undertaking should be defined to include portions of the project area previously sold to a developer with the intention to develop it. It is evident that the land will be used for private and/or public usage based on information provided to STB and the consulting parties. Despite the undertaking being defined too narrowly, STB has made a reasonable and good faith effort to identify and evaluate historic properties and analyze the potential direct, indirect, reasonably foreseeable, and cumulative effects for four alternatives.

3. The Board's Limited Jurisdiction: While the ACHP and the STB previously discussed the small federal handle concept to address the STB's limited jurisdiction over the larger undertaking, the ACHP disagrees with the statement that "OEA and ACHP have concluded that the Board's limited jurisdiction over the rail line proposed for abandonment in this case does not constitute "federal ownership or control" under 36 CFR § 800.5(a)(2)(vii)." Rather, in justifying the applicability of the small federal handle for the undertaking, the STB should consider limitations on its responsibility to resolve adverse effects. Such a consideration would have to take into account that the undertaking's APE includes the Harsimus Branch rail line, the abandonment of which requires STB approval. This raises the question whether the undertaking would be developed without the STB's approval of the rail abandonment, and may challenge the applicability of the small federal handle to the undertaking. As the ACHP learned during our June 11, 2019, meeting, the STB does in fact have a significant amount of control over the line while in status and that control does amount to "federal jurisdiction." As such, STB's approval of a rail abandonment could be an adverse effect if there are not adequate conditions placed on the affected historic property to ensure its long-term preservation.

The ACHP recommends the STB incorporate these corrections into the Addendum Report. We appreciate the significant time and effort your agency has invested with this consultation, particularly in addressing the consulting parties' comments and questions on the analysis of the undertaking's potential effects. We look forward to continuing consultation to resolve the undertaking's adverse effects. Should you have any questions or concerns, please contact Sarah Stokely at (202) 517-0224, or via e-mail at sstokely@achp.gov.

Sincerely,



Jaime Loichinger
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs