



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

303092

October 15, 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
October 15, 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 the Objection and Exception to Final Environmental Assessment that the City of Jersey City, the Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, “City Parties”) filed on October 12, 2021 (“Surreply”). The LLCs respectfully submit that the Board should promptly reject the Surreply as an improper, unwarranted, and repetitive filing that misstates facts and law and constitutes an abuse of the Board’s processes.

First, the ostensible premise of the Surreply is an alleged error or mistake in one sentence of the discussion of the views of the Advisory Council on Historical Preservation (“ACHP”) in the Final Environmental Assessment (“Final EA”) prepared by the Office of Environmental Assessment (“OEA”). However, OEA’s October 7, 2020 Decision (EI-3291) explains that such complaints are to be submitted directly to OEA itself, which is responsible for such matters under 49 C.F.R. §§ 1105 et seq. City Parties’ deliberate decision to flout OEA’s directive represents another improper attempt to obtain unfair advantage and “another bite of the apple” of its previous arguments before the Board. Further, even if City Parties’ observation of mistake in characterizing ACHP’s position is correct, OEA unquestionably went out of its way to review and respond in full to all of City Parties’ arguments, including its jurisdictional ones. Thus, the allegations had no material impact on OEA’s environmental impact analysis.

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.

Second, City Parties seek to rehash their unrelated claims that LLCs should be stripped of their property and Conrail should be required to convey the property to the City Parties under terms that the City Parties previously rejected, but now regret. OEA has repeatedly rejected this claim as being outside the scope of its NEPA and NHPA processes, as it surely is. Furthermore, City Parties recently raised these same arguments, and the LLC's fully responded to them, in several filings before the Board on the applicability of Section 110(k). They have no place in an ostensible appeal of the Final EA, and are made only to gain unfair advantage before the Board. The Surreply thus represents an abuse of the Board's processes and clearly violates the Board's rules prohibiting surreplies (49 C.F.R. § 1104.13(c)). In any event, City Parties' reasserted remedial requests shed no new light on the subject, and their proposed remedies continue to be unwarranted, have no basis in law, and are contrary to the public interest.

Nevertheless, City Parties point to the Board's recent decision in *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc.*, FD 35692 (STB served Sept. 29, 2021) ("*Eastside*"), as somehow supporting their remedial requests. But City Parties grossly distort that decision in asserting that it mandates that "'any transfers' without the Board's prior authority 'are void' regardless of whether they 'were valid under state law.'" Surreply at 5. The Board ordered reversal in the *Eastside* proceeding based on the specific, limited factual circumstances present and only after finding that the wrongdoer/transferee had: (i) engaged in materially misleading representations to the Board; (ii) refused to abide by the Board's earlier decision served December 22, 2020; (iii) "flouted the Board's regulatory processes;" (iv) failed to take any corrective actions; and (v) continued to "disregard the Board's requirements" and decisions. In contrast, Conrail has acted in full compliance with the Board's rules and requirements, abided by all decisions, been dutifully pursuing the abandonment process before the Board in AB 167 (Sub-No. 1189X) et al. for over a decade, and has not evaded Board approval.

Eastside is clearly inapposite, and City Parties' contrary suggestions are highly misleading. Especially concerning is that City Parties' counsel is fully aware of the major factual distinctions by virtue of his representation of Snohomish County, an active party in the *Eastside* proceeding. The omissions are made more conspicuous by the Board's recent decision just a few weeks ago that "admonishes" City Parties' counsel, "cautions counsel to take greater care to avoid incorrect or incomplete representations of matters of fact to the Board," and "strongly advises counsel to be meticulous and thorough in any future proceedings before the Board." *Michael Williams – Control Exemption – S&S Shortline Leasing, LLC*, FD 36460 et al. (STB served Sept. 29, 2021), at 5 ("*Michael Williams*").

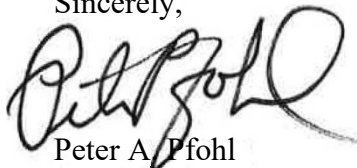
Third, City Parties also rehash their prior, and unfounded, claims that "Conrail is a repeat offender" in terms of flouting the Board's abandonment exemption procedures. They even invoke the *Michael Williams* decision, the very case in which City Parties' counsel was admonished, to support their claim that the Board should reject Conrail's use of the Board's abandonment exemption procedures. Despite that admonishment, City Parties again fail to mention critical facts underlying the decision. In *Michael Williams*, the Board had previously held an acquisition and control exemption proceeding in abeyance and directed the acquiring party/applicant to provide pertinent information. The applicant then provided incomplete and

conflicting statements, even after a second Board decision requested a further explanation of the inconsistencies in the record and ordered that the complete information previously requested be provided. Also, the Board noted that the applicant had been advised “more than once of [the Board’s] concerns regarding his acquisition of control of carriers without having received Board authority to do so.” *Id.* at 4. Nevertheless, beyond the admonishment to counsel, and to the applicant, no transaction was reversed, but the parties were directed to proceed with petitions for exemption or full applications, some after the fact.

Michael Williams is clearly inapposite, as City Parties’ counsel knows full well from his personal participation in the proceeding. In contrast, the record fully demonstrates that Conrail has acted in full compliance with the Board’s rules, requirements, and decisions for a period that now spans eleven years.

For the reasons stated, City Parties’ unwarranted Surreply should be rejected and denied. It is improperly brought, constitutes both a repetitive surreply and an improper attempt to introduce extraneous matters, and intentionally misstates facts and the law. The Surreply evinces clear contempt of the Board’s procedures and constitutes a blatant attempt by a party to manipulate and abuse the Board’s processes to its own advantage and to continue to thwart, delay, and prolong the orderly review and processing of this decade-plus long exemption proceeding. Respectfully, the LLC’s urge the Board to not be distracted by City Parties’ continuing legal tactics, and instead to move to decide and resolve the Section 110(k) issue promptly, complete its Section 106 review, and issue a final decision expeditiously.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Pfohl", written over a horizontal line.

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Attorneys for the LLCs

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of October, 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