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June 7, 2023

VIA E-FILE AND EMAIL

Ms. Daniel Gosselin
Director
Office of Environmental Analysis
Surface Transportation Board
395 E St. SW
Washington, D.C. 20423

Mr. Alan Tabachnick
Federal Preservation Officer
Office of Environmental Analysis
Surface Transportation Board
395 E St. SW
Washington, D.C. 20423

Re: AB 167 (Sub-No. 1189X) et al.

Dear Ms. Gosselin and Mr. Tabachnick:

The LLCs and the Albanese Organization, Inc. (“LLCs/Albanese”) hereby reply, pursuant to 49 C.F.R. § 1104.13(a) (permitting replies to a motion), in opposition to the Motion 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 May 31, 2023, to strike the LLCs/Albanese reply letter of May 10, 2023 (“LLCs/Albanese Reply”).

City Parties’ Motion Is Without Merit

City Parties’ Motion should be denied. First, City Parties filed their Motion beyond the allowed twenty days, without explanation or any request for leave, and at least in part in contravention of the Board’s prohibition on replies to replies, as the Motion goes well beyond simply seeking to strike and includes substantial, and improper, surrebuttal. 49 C.F.R. § 1104.13.

Second, while the City Parties claim that the LLCs/Albanese Reply focused not on historic preservation issues, but instead constituted “an ad hominem attack on City, et al.’s rail counsel,” that is not true. The Reply was filed to correct materially misleading assertions that the City Parties, through their counsel, made to OEA and the consulting parties, including (1) counsel’s failure to acknowledge that the Board’s decision served August 22, 2022, made final, definitive findings that there was (a) no destruction or irreparable harm to historic property by Conrail (or the LLCs), and (b) no improper sale of property in violation of the NHPA (Section 110(k)), and (2) counsel’s incorrect and highly misleading allegations at multiple places of OEA’s alleged “foreclosure of comment” under Section 106, which clearly is not true.¹ Such

¹ The Motion’s claim that LLCs/Albanese “inappropriately attempts to interfere with the attorney-client relationship” is also unfounded. The Reply addressed only the continued use of

misleading and incomplete representations of fact and law are clearly inappropriate, and in no way did the LLCs/City parties engage in “personal abuse” by raising the issue and providing a complete record.²

Third, the City Parties, through their Motion, continue to engage in other misleading statements. For example, the City Parties urge that “various sanctions, including financial penalties,” are necessary under their much repeated refrain that Conrail “engaged in unlawful de facto abandonments.” However, once again, counsel fails to inform OEA and the consulting parties that the Board’s 110(k) decision dismissed as “misplaced” such spurious “de facto abandonment” allegations out of hand. STB decision served Aug. 22, 2022, at n.31.

Motions to strike are 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”). Nothing in the City Parties’ Motion comes close to meeting the Board’s demanding threshold.

City Parties’ Surreply OFA Threats

While the City Parties’ Motion fails both procedurally and substantively, it reveals a new troubling matter that warrants further attention. As part of their surreply, the City Parties, for the first time, disavow any interest in invoking the Board’s Offer of Financial Assistance (“OFA”) procedures for purposes of restoring freight service through the Harsimus Cove residential neighborhood. The City Parties, through their counsel, now assert their intent to use OFA procedures only “for light and passenger rail uses.” Yet that statement directly contravenes the City of Jersey City’s former Director of Planning’s sworn testimony from 2009. When noticing the City’s intention to invoke the Board’s OFA procedures, the former City Planner, through a verified statement submitted by its counsel, expressed the City’s “bona fide interest in developing rail freight to relieve congestion, and in the use of the Harsimus Branch for that purpose” as is done in Europe to replace downtown truck deliveries, which he said may occur during the overnight hours (when residents are sleeping), so as to avoid any conflict with anticipated light rail services during daytime hours, or otherwise with freight cars attached to light rail trains. Verified Statement of Robert D. Cotter (Apr. 23, 2009) (emphasis added). He added that “[s]ince the Branch is largely grade separated from existing streets, it is very attractive for the purpose intended,” especially because “freight rail uses the same gauge as passenger rail.” *Id.* More recently, in 2014, the City of Jersey City claimed ample shipper support and demand for freight service restoration through the neighborhood, including for the shipment of

regulatory counsel for land-use settlement discussions. The reply in no way suggested that the City Parties’ regulatory counsel should stop representing them before the Board.

² City Parties inexplicably claim that “this Board’s ethical standards for practitioners do not govern” their counsel, apparently under their mistaken belief that their counsel is not a “practitioner” under the Board’s rules. The Board’s Canons of Ethics also apply to all “lawyers,” including the City Parties’ counsel.

construction materials delivered to Jersey City's downtown area, and claimed that freight rail service restoration was feasible.

We assume from the City Parties' surreply that the City no longer has plans to restore freight rail service on the Harsimus Branch through this residential community, because, in fact, there is no true demonstrated need or demand for freight rail restoration, there is no community support for service restoration, and restoring such service is infeasible. However, the City Parties' new contradictory statement relating to the OFA raises serious questions as to their true interests in seeking to invoke the OFA remedy, the validity and truthfulness of their earlier testimony which remains on the record unretracted, and whether they seek to use the Board's procedures for legitimate purposes.

Further while City Parties' counsel suggests that "STB personnel long ago suggested the OFA remedy to the City," counsel knows that the Board's rules prohibit OFAs to be used solely for passenger service. In fact, the Board denied Jersey City's attempts (brought by its same counsel) to expand the OFA rules to allow the OFA procedures to be used solely for passenger service, and also denied the City's request that the rules should not apply to OFAs filed by governmental entities. *Offers of Financial Assistance*, EP 729 (STB served June 28, 2017) at 15, 17. Even in this proceeding, the Board denied an appeal by Jersey City seeking to loosen the OFA rules requiring a showing of a demonstrable commercial need for freight rail service, community support for same, and operational feasibility. STB decision served Nov. 2, 2015.

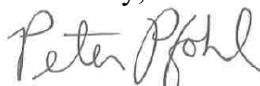
Finally, even if the OFA procedures could be invoked exclusively for light rail or passenger rail purposes, which, again, the City Parties' counsel knows is prohibited under the Board's OFA rules, the Mayor has informed the public that no light rail is anticipated over the Harsimus branch until possibly decades from now, far removed in time from the immediate freight service reengagement time required for bona fide OFA offers.

At a minimum, the City Parties' and their counsel's continued lack of candor on this subject remains troubling.

* * *

For the reasons stated, the Board should deny the City Parties' untimely and unwarranted Motion. While the motion is an abuse of the Board's procedures and lacks 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, rather than further continuation of the status quo that serves no party's best interests.

Sincerely,



Peter A. Pfohl

An Attorney for the LLCs and Albanese
Organization, Inc.