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July 14, 2023

Mr. Alan Tabachnick
Federal Preservation Officer
Office of Environmental Analysis
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423

**Re: Conrail Comments on the Revised Draft Memorandum of
Agreement Regarding STB Docket No. AB 167 (Sub-No.
1189X)**

Dear Mr. Tabachnick:

Consolidated Rail Corporation (Conrail) appreciates the opportunity to comment on the revised draft Memorandum of Agreement among the Surface Transportation Board (STB), the Advisory Council on Historic Preservation (ACHP), the New Jersey Historic Preservation Office (SHPO), and Conrail that you circulated on June 14, 2023 (Revised Draft MOA).

Conrail appreciates the opportunity to participate in this process as a consulting party and as a signatory, pursuant to 36 C.F.R. § 800.6(c)(2)(iii). Execution of the MOA will reflect the culmination of a rigorous and lengthy evaluation of historic resources potentially affected by Conrail's abandonment request, as well as that the STB has taken into account and sufficiently addressed the effects of the proposed abandonment on historic properties, consistent with the requirements of Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108.

Conrail generally agrees with most of the mitigation measures proposed in the Revised Draft MOA. However, Conrail has some concerns with the STB's proposed approach, certain of which should be addressed through revision to the Revised Draft MOA.

Proper Scope of the Historic Preservation Analysis and the MOA

Conrail fully agrees with the limitations on the scope of resolution as set forth in the Revised Draft MOA. Failing a voluntary agreement among the parties, the only mitigation requirement that the STB is authorized to impose in a Section 106 proceeding as a condition of abandonment is historic documentation of the line. *See* Conrail Comments on Cultural Resources Effects Assessment Report at 4–5 (Apr. 29, 2019).

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Although Conrail is sympathetic to concerns expressed by several commenters regarding the eventual use of the underlying property, those issues are land use considerations that go far beyond the scope of any proper consideration by the STB. There is no legal basis for the MOA to become a surrogate for broader community concerns about a range of potential re-use scenarios. Moreover, several commenters seek to use these proceedings to inject a range of issues relating to the abandonment proceeding that simply are not before the STB in developing an MOA.

Conrail has consistently taken the position that the STB should not consider post-abandonment uses that have been proposed for the Harsimus Embankment under the National Environmental Policy Act (NEPA) or NHPA, because they are not reasonably foreseeable. *See* Conrail Comments on 2009 Draft EA at 3 (May 7, 2009). Conrail reiterated this position in its April 2019 comments on the Cultural Resources Effects Assessment Report, its October 2020 comments on the Draft Supplemental EA, and its November 2020 Comments on the Draft MOA, and Conrail reasserts that position here.

The Extent of the Impacts Mitigation on Affected Properties

Conrail generally agrees with the terms of the Revised Draft MOA regarding the retention of a qualified historic preservation/cultural resource contractor(s) of its choice to complete the recordation, documentation, and interpretation measures specified. However, Conrail continues to believe there should be no need for the contractor to perform additional archival research (*see* Section I.A.1.i), given the extensive materials already gathered as part of the Section 106 process. Conrail reviewed the STB's response to Conrail's prior comment on this issue and respectfully states that the response simply restates language in the Revised Draft MOA and does not provide a substantive response to Conrail's comment no need exists to supplement the extensive research that was already performed as part of the STB's thorough environmental process.

In addition, Conrail continues to believe that certain of the proposed interpretation measures are beyond the scope of any reasonable documentation of the historic rail line itself or the foreseeable impacts of the STB's action. In particular, the Revised Draft MOA continues to provide that interpretative signage may include (i) educational panels illustrating the history and development of immigrant communities in Jersey City, as well as (ii) a narrative detailing the historic significance of the War of 1812 context in specific relation to the Jersey City and Harsimus Cemetery Historic District. *See* Section I.B.1. These matters seem collateral to the effect of the rail line and the Harsimus Embankment, and involve matters that in certain instances significantly pre-dated the historic features at issue and that are unrelated to its historic features. Conrail reviewed the STB's response to Conrail's prior comments on this issue and respectfully states that neither "the nature of the undertaking" nor "the importance of the historic resources at issue to the community" nor "the high number of affected historical properties" separately or together explain why any rational basis exists for proposing signage addressing matters unrelated to the Harsimus Branch. Although the Revised Draft MOA says only that the signage "may" include those collateral matters, and thus gives Conrail discretion, by suggesting the inclusion of these matters, the Revised Draft MOA creates the risk of an unnecessarily complicated consultation process.

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The Approval Process for Educational Interpretive Content

Conrail understands the importance of securing expert agency input into interpretive and educational materials it would commit to prepare under the MOA. However, Conrail continues to believe that there is no basis for expanding the review and comment process into a requirement for obtaining “final” approval before Conrail can move forward with its obligations to produce the interpretive sign panels. *See* Section I.B.1.iv. To do so, as does the Revised Draft MOA, is unconventionally proscriptive and may unduly delay completion of these requirements. The proposed addition of a 15-day final review period in Section I.B.1.iv of the Revised Draft MOA does not resolve these concerns, because it does not address what is to occur during the additional review period, or how it could affect the “*final version* of the materials” that were already prepared by Conrail. *See* Section I.B.1.iii. (emphasis added) Conrail continues to recommend removing the final approval requirement to render those provisions consistent with the review provided for the webpage described in Section I.B.2. Conrail also recommends adding a clear statement that if a party with a right to review does not comment within the 30-day review period, Conrail and STB “shall assume concurrence and proceed.”

The Separate Provisions for the Review Process of Mitigation Items in Section II

Conrail believes that the revisions to the Draft MOA have created inconsistencies and introduced unnecessary costs that would best be addressed by deleting Section II of the Revised Draft MOA. *First*, the general 30-day review provision in Section II.A is already addressed in connection with the specific mitigation items addressed in Section I. *Second*, the requirement that Conrail summarize all comments received on final deliverables appears to be unnecessary and costly make-work because such deliverables are, by definition, final. *Third*, the provision for “subsequent reviews” in Section II.C is not needed because the Revised Draft MOA provides for a single review period of most mitigation items, and it is inconsistent with Section II.B.1.iii, which expressly provides for a 15-day review period for the “final” version of signage (although Conrail believes the STB should remove that review period, as discussed above).

Restrictions Related to Signage Upon Sale of Right-Of-Way

As the STB is aware, Conrail sold much of the right-of-way underlying the Harsimus Branch in 2005. Conrail therefore understands Section III to be addressing any sales of right-of-way still owned by Conrail. Conrail is willing to commit that any sales of the remaining right-of-way will contain a provision requiring the purchaser to agree to leave any signage Conrail erects under the MOA.

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Conrail appreciates the opportunity to provide these comments on the Revised Draft MOA.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael L. Rosenthal".

Michael L. Rosenthal
*Counsel for Consolidated
Rail Corporation*