

From: [C. Montange](#)
To: [Tabachnick, Alan](#)
Subject: AB 167-1189X, STB OEA "virtual meeting" scheduled Sept. 28 re Harsimus Branch
Date: Wednesday, September 27, 2023 6:09:23 PM
Attachments: [Cityetalvirtualmeetingcommentsforsept28inAB167\(1189X\).pdf](#)

Hello Mr. Tabachnick. As I indicated, I cannot participate in the Sept. 28 virtual meeting because of a long-scheduled trip to, inter alia, Toronto on that date. I understand that others will be speaking on behalf of my three allied clients (City of Jersey City, Rails to Trails Conservancy and PRR Harsimus Embankment Preservation Coalition). Without prejudice to any of those comments, or to my clients' federal and state remedies in general, I submit herewith some comments which I have prepared concerning the current status of this case on behalf of all three of my clients. I understand that by providing them by email attachment to you, you will incorporate them into the record of the September 28 hearing as OEA determines able, and otherwise include them as incoming environmental comments on the STB website.

Written Statement on behalf of City of Jersey City,
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and
Rails to Trails Conservancy
by Charles Montange, rail counsel for the above

Conrail – Abandonment Exemption – in Hudson County,
AB 167 (Sub-no. 1189X)
STB OEA Virtual Meeting September 28, 2023

This Statement is on behalf of the City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy for the record in STB OEA's September 28, 2023 "virtual meeting" purportedly to discharge STB's responsibility under Section 106 of the National Historic Preservation Act (NHPA) to mitigate adverse impacts flowing from an unconditioned abandonment authorization sought by Conrail in the above proceeding. I am unable to participate due to prior travel plans. My three clients will present important information through other speakers. However, I wish to ensure certain matters are before the agency and thus submit these written comments on their behalf for inclusion in the record.

To date, the agency has professed lack of any authority to impose conditions or incorporate provisions in the draft "Memorandum of Agreement" ("MOA") (prepared to comply with National Historic Preservation Act section 106 processes) that would serve actually to preserve -- or at least contribute in some meaningful way to the preservation of -- the Harsimus Embankment. My clients have long maintained the agency has far more power to provide meaningful relief due to the specific facts of this case.

In particular, Conrail, knowing that the Harsimus Embankment was an historic structure, unlawfully abandoned the line of railroad of which it was a part by precipitously selling it to a developer in 2005 in the face of (a) inquiries as to whether Conrail had abandonment authority (it did not), and (b) efforts by the City to acquire the property by eminent domain if Conrail did not need abandonment authority (which it did). The details are recounted in pleadings in (among others) City of Jersey City, et al., -- Petition for a Declaratory Order, F.D.

34818, which City et al. initiated in early 2006 to force Conrail to comply with federal railroad abandonment law, and in subsequent U.S. District Court litigation. E.g., [MEMORANDUM OPINION. Signed by Judge Amy Berman Jackson on 9/30/13. \(DMK\) \(justia.com\)](#) Suffice it to say that the Harsimus Branch was decisively determined to be a line of railroad. Conrail nonetheless had sold the eight blocks of Embankment parcels off (without retaining any rail easement) long before the railroad applied for STB authority to abandon. This kind of sale, in the words of STB, is “unlawful.” [Microsoft Word - 38903.doc \(dcms-external.s3.amazonaws.com\)](#) at p. 4 (STB decision ID 38903, served April 23, 2008). The unlawful sale has prejudiced the public in many ways, including but not limited to (a) rendering the public use conditioning process under 49 USC 10905 useless/meaningless, and (b) effectively foreclosing meaningful environmental and historic preservation commenting and conditioning. STB still has failed to provide an adequate or actual remedy that meaningfully protects the public in these circumstances. STB, for example, refuses to consider anything to encourage or to implement City plans to preserve even just the Embankment parcels, or to contribute to proposed settlements, or to promote or to adopt other actions that might preserve or serve to preserve the Embankment, let alone the Harsimus Branch. Not surprisingly in the face of the agency’s hands-off approach, Conrail walked out of negotiations a couple years ago and is already in litigation with the City.

There are remedies within STB’s power that can help, even if STB declines to encourage the parties to settle or to facilitate a settlement through the section 106 process. In particular, the agency can, should and must enforce its jurisdiction by putting the parties back into the status quo before the unlawful sale.

A key aspect of federal abandonment law is that a railroad must seek authority from STB to abandon a line of railroad BEFORE it tears it up, or sells it to a developer to tear up. Sales of line without prior authorization are simply “unlawful.” For one thing, such sales effectively foreclose the legal right of public interest parties to invoke 49 U.S.C. 10905 to prevent railroads from selling off their property for 180 days post-abandonment except for public uses. This 180-day period is intended to allow public interest parties to employ local law remedies to secure historic and other public interest properties from destruction. This entire provision is effectively gutted where STB allows railroads to sell off their property

before it can be invoked. In addition, STB by its refusal to enforce its jurisdiction is allowing the unlawful pre-abandonment-authorization sales to foreclose any meaningful application of section 106 of the NHPA as a means to consider and implement plans to preserve historic assets. STB, for example, takes the position that once the property has been sold off, it is limited to possibly documenting what is about to be destroyed and putting up plaques about it. This disincentivizes railroads and developers from complying with the law (or from reaching a settlement when they are caught) for STB invites them to evade the law and any reasonable settlement by engaging in illegal de facto abandonments before STB is even approached for authorization. In addition, STB's position amounts to admitting that meaningful comment has been foreclosed under section 106 and as to public interest remedies in general. STB in effect reads 49 USC 10905 and NHPA section 106 out of the law. The only real basis the agency offers for this result is that these provisions protect the actual public and that complicates STB's business. This is arbitrary and capricious. The agency cannot ignore the law.

Instead, STB must meaningfully enforce its jurisdiction. Otherwise the agency invites wholesale evasion of the abandonment pre-authorization requirement and abuse of the public interest. The agency is effectively reading the pre-authorization requirement out of the law, and it lacks authority to do so. To enforce its jurisdiction, STB in an unlawful sales case like this as a minimum must put the parties in the same position as before the unlawful sale. To do so, the agency either (a) must require Conrail to reacquire the unlawfully sold property as a condition of abandonment, or (b) must void the deeds as a condition of abandonment. STB clearly has the power to deploy these remedies to protect its jurisdiction. It has done so multiple times in the past as my clients have documented elsewhere.

Whether the agency requires Conrail to reacquire or simply voids the deeds as a condition to abandonment, STB should also impose a 180-day public use condition under 49 U.S.C. 10905 from the date the abandonment condition (voiding deeds or reacquisition) is met, so the City can bring timely local law proceedings (eminent domain and/or 48 NJSA 12-125.1) to secure the property for preservation and public use. Conditioning of abandonment as indicated above to require restoration of the status quo prior to Conrail's unlawful

transaction with the developer would be far more “mitigation” of the adverse impacts on historic assets than documenting the Embankment and putting up tombstones, which is all that STB OEA is choosing to contemplate, as manifest in the defective draft Memorandum of Agreement that STB OEA to date has circulated.

Given the status of the STB proceedings as of today’s date, City, et al., invite all state agencies and public interest parties to oppose the draft MOA and to call on STB, as a minimum, to refuse to authorize abandonment unless it is conditioned either (a) on Conrail first reacquiring all portions of the Harsimus Embankment it unlawfully sold off in 2005, or (b) on first voiding the deeds to STB’s chosen developer. Such conditioning is expressly permitted under 49 U.S.C. 10903(e)(1)(B). Alternatively, the agency can mitigate the adverse effects on historic assets caused by the unlawful and unauthorized sales by refusing to authorize abandonment at all as authorized by 49 U.S.C. 10903(e)(2). STB must also impose a meaningful 180-day stay on any disposition of the property post-abandonment other than for public purposes as provided in 49 U.S.C. 10905. In all events, the agency should stop reading the actual public out of the ICC Termination Act. The agency by enforcing its jurisdiction can protect the public against the “unlawful” actions of Conrail manifest in this case.

These comments are in addition to and not in lieu of all other comments submitted by City, Coalition or RTC at or for the September 28 hearing. They are also without the benefit of any agency presentation at said hearing, and on behalf of my clients, I (and they) reserve the right to file additional or modified comments. Finally, all comments are submitted without prejudice of any kind to the rights of my clients to pursue all available remedies available under state and local law to preserve and to protect historic assets involved in this STB proceeding.

Respectfully submitted,

/ Charles H. Montange

Charles H. Montange
Law Offices of Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
206-546-1936
c.montange@frontier.com
for City, et al.

dated: 27 September 2023