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By E-filing

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

Re: Conrail – Abandonment Exemption – in Hudson County,
AB 167 (Sub-no. 1189X), and related cases (unlawful de facto
Abandonment of Harsimus Branch)

Dear Ms. Gosselin and Mr. Tabachnick:

City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“City et al”) – all of whom are “consulting parties” in this proceeding – hereby respond to the misleading and inaccurate claims by the LLCs and the Albanese Organization (“LLCs/Albanese”) in their alleged “reply” [in the form of a letter by attorney Pfohl (“Pfohl letter”) dated November 22, 2023] to the Comments filed by the New Jersey State Historic Office (“SHPO”) on November 2, 2023 in respect to the on the revised draft Memorandum of Agreement (“draft MOA”) issued by the Office of Environmental Assessment (“OEA”). The LLCs/Albanese filing (Pfohl Letter) is now found as document EI-33159 in this agency’s environmental comments. The SHPO comments are EI-33152.

LLCs/Albanese in the Pfohl letter object that the SHPO comments are “clearly untimely” and ask that they be rejected. The LLCs/Albanese request amounts to a request that STB terminate consultation. To the contrary, the Board must continue consultations, or if it wishes to ignore the SHPO’s comments, follow binding

Section 106 regulations, which sets out a procedure which STB must follow if it chooses to terminate consultation. This requires, inter alia, STB to inform the parties and submit the matter to the Advisory Council on Historic Preservation (“ACHP”) for comment and further proceedings. Since the current draft MOA is manifestly defective, City et al favor further consultation, and in fact a complete reframing of the draft MOA. As a minimum, the reframed MOA either (1) must call for denial of abandonment authority (in which case no MOA may be needed), or (2) must provide that no abandonment authority shall be effective until and unless (i) Consolidated Rail Corporation (“Conrail”) first re-acquires all the property in the Branch it purported to convey to the LLCs or others prior to seeking abandonment authority, or, alternatively, (ii) the Board invalidates the deeds from Conrail to the LLCs and any others to whom Conrail purported to convey the property prior to seeking abandonment authority. In addition, the reframed MOA should provide for (iii) imposition of a public use condition barring Conrail from any sale of the Harsimus Branch for 180 days subsequent to the effectiveness of an abandonment so conditioned. The reframed MOA could provide that the City shall initiate proceedings to acquire the property by eminent domain and/or pursuant to 48 N.J.S.A. 12-125.1 (that statute provides the City with a right of first refusal post abandonment over rail lines). The City would be pleased to negotiate preservational conditions for the historic assets involved with the SHPO and other interested parties, and OEA if OEA wished to participate.

I.

Under the binding Section 106 regulations, the SHPO is a required signatory to any MOA and the SHPO’s continued concerns must be addressed as part of the consultation. 36 C.F.R. 800.6(c) (1)(ii). The applicable regulation does not prescribe a time frame for this consultation. In this case, SHPO is not concurring in the agency’s draft MOA but instead is seeking further consultation. The agency cannot walk away, based on some unilateral self-declared deadline. Instead, STB must either address SHPO’s concerns or (i) declare an impasse, (ii) terminate consultation, (iii) notify all consulting parties, and (iv) formally request the comments of the ACHP. *Id.* 800.7(a)(1). In all events, the general policy of STB is to accept environmental comments so long as the case is still before it. Here, the case is still before the agency because it lacks SHPO concurrence in its deficient MOA.

The LLCs/Albanese suggest SHPO's concerns have been addressed by the Board's Section 110(k) decision.¹ The agency's Section 110(k) decision did not involve Section 106 review or its processes, and it does not narrow or dictate the scope of the Section 106 review. The SHPO's concerns about the STB's refusal to acknowledge the full range of mitigation alternatives in the Section 106 process is highly pertinent and must be addressed now.

II.

The SHPO comments further highlight what OEA and STB to date have shoved under the rug. As City et al. (and dozens of other commenting parties) have repeatedly explained,² Consolidated Rail Corporation ("Conrail") engaged in an unlawful de facto abandonment of the Harsimus Branch.³ The applicable statute (now codified at 49 U.S.C. 10903) for roughly the past century has required railroads to obtain abandonment authorization from the federal government before they sell off and/or tear out lines of railroad. This allows remedies to be timely imposed to mitigate or to eliminate adverse impacts on communities, including adverse environmental and historic impacts of abandonment. When railroads abandon their lines without an abandonment authorization, they circumvent meaningful compliance by STB with environmental and historic preservation laws as well as thwart this agency's jurisdiction and any meaningful implementation of the public use conditioning remedy (49 U.S.C. 10905) which Congress intended to be available in abandonment proceedings. This end-run around agency procedures and jurisdiction is "unlawful," as this agency has itself declared. If STB nonetheless refuses to employ its powers to condition abandonment authorizations

¹ Under the final order doctrine governing petitions for review of STB decisions, City et al cannot seek judicial review of STB's arbitrary and capricious Section 110(k) decision until STB issues a final order either granting or denying abandonment authority. However, City et al reserve all rights to contest the Section 110(k) decision once a final order is issued.

² See, e.g., Additional Comments, document EI-27005 (environmental comment filed in this proceeding). The evidence and argument in this pleading dated 9 Nov. 2020 and exhibits thereto, and all similar pleadings by City et al., are incorporated herein. The facts underlying this dispute are clear and have been repeatedly stated in F.D. 34818 and this proceeding since 2006.

³ STB itself has long acknowledged that de facto abandonments are often belatedly discovered but nonetheless they "are unlawful." STB, Consummation of Rail Line Abandonments ..., Ex Parte 678, served April 23, 2008 (STB doc. 38903), slip op. p. 4.

to afford meaningful relief in the context of unlawful de facto abandonments, it arbitrarily and capriciously deprives the public and interested parties of remedies Congress provided to protect the public interest in the abandonment context.

The Harsimus Branch is unquestionably a line for which abandonment authority is required. This has been conclusively so determined. City of Jersey City v. Consolidated Rail Corporation, 968 F.Supp. 2d 302, 308 (DDC 2013). Indeed, the LLCs themselves alleged that Conrail's claims that the property was not a line for which abandonment approval was necessary were misrepresentations and fraudulent. *Id.* at 306. Conrail and the LLCs certainly do not contest the line determination. Albanese has not claimed to the contrary. Instead, LLCs/Albanese wish for Conrail's unlawful action to be ignored and not remedied, despite its adverse impacts on the Section 106 process and its evisceration of the public use condition remedy which otherwise would be available from STB to facilitate Jersey City's acquisition of the parcels in question.⁴

The only thing currently protecting the Branch from destruction is STB's continued jurisdiction. The draft MOA anticipates that the agency will grant an abandonment in a fashion that allows the Branch and Embankment to be destroyed. When the LLCs initially acquired their claims to the property pursuant to Conrail's unlawful de facto abandonment sale in 2005, they began tearing out structures, with Conrail joining them in seeking demolition permits to tear out the entire Embankment. The LLCs ceased destruction only when City et al. in January 2006 petitioned STB to force Conrail to comply with longstanding federal abandonment law and urgently sought a stay. Conrail and the LLCs responded with federal and state litigation. The LLCs among other suits (including a SLAPP suit against various individuals and public interest parties) launched a barrage of lawsuits inter alia to obtain damages against the City for seeking historic preservation remedies, and to require the City to issue the demolition permits sought by the LLCs and Conrail so they can tear out the Embankment. These suits are stayed pending a final decision by STB in AB 167 (Sub-no. 1189X).

Over the years, the LLCs and then the LLCs/Albanese have purported to negotiate a settlement with the City, but repeatedly have backed out on the ground that whatever they previously sought was no longer economic. They currently are in their "back out mode." In particular, the LLCs and Albanese are refusing to pursue either local land use authorities or a settlement agreement. Their grounds for refusal vary over time, but paint a pattern of unwillingness to commit to

⁴ See also arguments (and exhibits) in pleading referenced in note 2.

anything remotely protecting the historic assets at issue in this case. The LLCs/Albanese instead are stalling for time, in the hope that this Board leaves the historic assets unprotected so that they may be destroyed or severely compromised, as the LLCs have sought through their pending but stayed state court litigation. In short, Conrail's unlawful sale of the Branch to the LLCs has stymied all efforts to date reasonably to preserve the historic assets involved. There is no reason to believe that the LLCs/Albanese will be more cooperative in the future than they have been in the past if STB continues to fail to address the adverse impacts of the unlawful de facto abandonment. In short, any LLCs/Albanese suggestions to the contrary in the Pfohl letter or elsewhere in this Section 106 proceeding are not supported by events to date.

III.

OEA takes the apparent position that STB's powers are so limited as to render a meaningful MOA (i.e., an MOA that actually facilitates preservation) impossible, such that it may arbitrarily limit consultation to non-preservation actions. But City et al. has repeatedly pointed out that this Board has jurisdiction to grant meaningful relief against the unlawful de facto abandonment. City et al. has consistently stressed that there are at least two actions well within this Board's authority that will provide meaningful relief that protects the Harsimus Branch historic assets. First, this Board could deny abandonment authority altogether. Denial of abandonment will maintain the Embankment and the historic rail corridor intact, because the property will remain under federal jurisdiction, and cannot be sold off or torn out. The draft MOA prepared by OEA assumes abandonment approval is inevitable. It amounts to asking signatories to waive denial of abandonment as a remedy. This amounts to asking public interest parties to give up.

But there is no reason to throw in the towel. The basic standard for abandonment is consistency with "public convenience and necessity" which STB construes to include whether harm to shippers is outweighed by harm to a railroad's ability to make profits. In the unusual circumstances of this case, neither Conrail nor Conrail's shippers would be harmed by denial of abandonment authority. Conrail has already liquidated the asset. Thus authorizing abandonment is not necessary to enhance Conrail's profits or to lower costs (prevent subsidization) with regard to shippers elsewhere on Conrail's lines. In making a public convenience and necessity finding, the agency is supposed to consider community impacts. 49 U.S.C. 10903(d). City and its citizens seek to preserve the Branch as open space and for public uses (including historic preservation); Conrail

by its unlawful de facto abandonment has attempted to put the property in the hands of developers who have filed papers to demolish it, and will not commit to any meaningful preservation. Any such authorization for abandonment in the circumstances is inconsistent with public convenience and necessity because it will manifest in adverse community impacts. No MOA is required if STB denies abandonment authority.

A second form of effective relief would be to condition the effectiveness of any abandonment authorization either on invalidating the deeds first, or on Conrail first re-acquiring the property it sold as part of the unlawful de facto abandonment. STB has voided deeds in similar circumstances in order to protect its jurisdiction from abuse. Conrail's unlawful sale (as well as the complicity to Conrail's chosen developer to date) clearly amounts to an effort on their part to evade agency jurisdiction with a *fait accompli*. That *fait accompli* begs to be countered with an order voiding the deeds, or conditioning any abandonment upon Conrail first reacquiring the property. Voiding the deeds (or requiring Conrail re-acquisition) would mean that the line would exit the abandonment process in the fashion it would have lawfully exited the abandonment process had Conrail sought and obtained abandonment authority before engaging in an unlawful de facto abandonment. Restoration of the status quo to what it would have been but for the unlawful de facto abandonment would allow the Board to impose a meaningful public use condition under 49 U.S.C. 10905 barring Conrail from selling the property for 180 days post-abandonment. This would assist the City in using eminent domain or 48 N.J.S.A. 12-125.1 to secure the property for historic preservation. But the draft MOA does not embody either conditioning abandonment authority on voiding the deeds, or on Conrail reacquisition, or on imposition of a public use condition. The draft MOA thus clearly prejudices the ability of the public to obtain any meaningful relief, and amounts to trapping any signatory into waiving/compromising rights to judicial review of STB's faulty procedures and failure to provide relief.

An order denying abandonment, or an order conditioning abandonment effectiveness on Conrail re-acquisition or on deed invalidation is not sought as punishment. Instead it is the minimum necessary to protect the historic assets involved by at least returning the parties to their positions before the unlawful de facto abandonment and allowing Jersey City an opportunity under 49 U.S.C. 10905 to acquire the property, either by negotiation or by use of eminent domain and/or 48 N.J.S.A. 12-125.1 procedures. In doing so, it also protects STB's jurisdiction by de-incentivizing the regulated industry and developer community from engaging in unlawful de facto abandonments. This will foster compliance with

Section 106 and this agency's jurisdiction in the future. Doing less will incentivize circumvention of STB authority and of the National Historic Preservation Act.

STB and its OEA need to address the SHPO's comments (as well as those of City, et al.) in a substantive fashion that protects the many Section 106-protected assets involved in this docket. If instead STB adopts the Conrail/developer position that the illegal sale is a *fait accompli* which precludes any meaningful MOA, then the agency is incentivizing railroads and developers to engage in illegal *de facto* abandonments and otherwise seek to evade STB jurisdiction and especially any meaningful application of Section 106. There is no reason for parties espousing historic preservation or meaningful implementation of Section 106 to agree to the abnegation of STB's responsibilities manifest in the draft MOA. STB should continue consultations and take the public's comments, SHPO's concerns and those of City, et al. into account. If STB, as urged by LLCs/Albanese, instead wishes to ignore the SHPO comments or disregard them as "late," then the Board must declare an impasse, terminate consultation, notify all consulting parties, and formally request the comments of the Advisory Council on Historic Preservation (ACHP) under 36 C.F.R. 800.7(a)(1).

City et al. at the inception of AB 167 (Sub-no. 1189X) well over a decade ago questioned the use of the agency's exemption procedures in this case. Those procedures are not appropriate for controversial cases such as this. As a result of those procedures, STB's efforts to date have perhaps inadvertently resulted in a process that seeks to avoid meaningful relief and remedies to the adverse impacts of an unlawful *de facto* abandonment rather than to explore and to implement meaningful remedies well within the agency's statutory powers. City, et al. reserve all rights to judicial review in the event of a final order that authorizes abandonment in any fashion that denies meaningful relief to preserve the historic assets manifest in the Harsimus Branch.

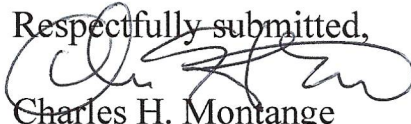
IV.

Conclusion. The LLCs/Albanese claim that this agency cannot or should not consider the SHPO comments is wrong and misleading. SHPO is a required signatory to an MOA. STB therefore must consider the SHPO comments. If the agency wishes to ignore SHPO's concerns or refuses to take them into account, then the agency must declare an impasse, notify all parties, and consult with ACHP per 36 C.F.R. 800.7(a)(1).

Failure to comment on other aspects of the Pfohl letter should not be deemed an admission to, or agreement with, any alleged fact or purported argument contained in it. City et al. is limiting the scope of this response to explaining that LLCs/Albanese arguments to ignore the SHPO letter as out-of-time are wrong or misleading. STB must comply with 36 C.F.R. 800.6-.7 if it wishes to terminate consultation with the SHPO. The relief that the LLCs/Albanese seek is arbitrary and capricious, contrary to law, and otherwise deficient.

If leave to file this response to the Pfohl letter is required, then City et al request that such leave be granted, in order to ensure that the agency complies with 36 C.F.R. 800.6 -.7 should it follow the LLCs/Albanese suggestion that it terminate consultation. In addition, LLCs/Albanese did not serve the out-of-time Pfohl letter on any of the consulting parties, and City, et al. discovered the existence of that letter only by chance upon review of the environmental comments portion of the STB website. In contrast, City, et al., by the signature or its counsel below certifies service by email upon the attached list of consulting parties as identified by STB OEA.

Respectfully submitted,



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For City, et al.

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For Rails to Trails Conservancy

Attachment

cc. Consulting Parties (per attachment)

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City of Jersey City, Jersey City Historic Preservation Commission	Maggie O'Neill	Historic Preservation Specialist	MONeill@jcnj.org
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