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Office of Proceedings
May 23, 2025
Part of
Public Record

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Consolidated Rail Corporation – Abandonment
Exemption – in Hudson County, NJ,
AB 167 (Sub-no. 1189X) and related cases

Offer of Financial Assistance (Purchase) on behalf of
City of Jersey City, Offeror

Dear Ms. Brown:

City of Jersey City (“City”) has filed a timely Offer of Financial Assistance (Purchase) (“OFA”) that fully addresses all requirements set forth in 49 C.F.R. 1152.27(c)(1)(iv) (applicable to this “class exemption” proceeding by reason of id.(c)(2)(iii)). No other party has timely filed an OFA. No party has sought a dismissal of the City’s OFA. In the circumstances, 49 C.F.R. 1152.27(e)(2) provides that “[t]he Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date of [a class exemption pending further OFA procedures].” The City easily meets the criterion for a continued postponement pending further OFA procedures. By the express terms of 49 C.F.R. 1152.27(c)(1)(iv)(B), the Board must deem City of Jersey City to be presumptively financially responsible as an OFA offeror. The Board accordingly is obligated to allow a 30-day negotiation period for Consolidated Rail Corporation (“Conrail”)

and the City to attempt to reach an agreement, or, absent an agreement, to file a request for the Board to issue terms and conditions. 49 C.F.R. 1152.27(g)(1).

Although Conrail has not filed a motion to dismiss the OFA (to which City would clearly be entitled to reply), Conrail has filed a “Response” (served on May 21, 2025) purportedly raising issues with the City’s OFA. Conrail’s “Response” does not erode the Board’s obligation under 49 C.F.R. 1152.27(e)(2) to allow the 30-day negotiation period and opportunity in that time frame to seek terms and conditions. However, the “Response” does make assertions that are unsupported, irrelevant, factually misleading or wrong, and/or legally incorrect. City accordingly seeks leave to make the following reply in order to ensure that the record is corrected.

Conrail makes three basic claims.

I.

First, Conrail claims that City must show financial responsibility for rehabilitation and operation (for two years) of the line in the same fashion as private offerors. To the contrary, 49 C.F.R. 1152.27(c)(1)(iv)(B) presumes City is financially responsible for all purposes associated with an OFA. Conrail fails to make even a prima facie rebuttal of that presumption. Conrail instead seems to assume City’s funds are limited to \$5.7 million, the amount the City’s Ordinance (14.103) authorizes City officials to expend on real estate without further authorization.¹ But that Ordinance does not purport to address, much less limit, what the City can expend to install and to operate a rail system. Thus, Conrail’s argument that the City has inadequate resources/lacks financial responsibility is a non-starter.

But there is a deeper problem with Conrail’s argument. The freight rehabilitation costs are a direct function of Conrail’s unlawful de facto abandonment, including unlawful sale of parts of the line for non-rail use, and unlawful demolition and destruction of trestles, bridges and other infrastructure without first seeking STB abandonment authorization, much less receiving same. Conrail knew or should have known it was engaged in an unlawful de facto

¹ The Ordinance sets up a mechanism to authorize more for purchase should more be required. \$5.7 million is thus not itself a hard limit even for purchase. See https://library.municode.com/nj/jersey_city/ordinances/code_of_ordinances?nodeId=688940 at para 2 on p.3.

abandonment.² It thus acted intentionally. To claim, as Conrail seems to be claiming, that it can intentionally (or even just recklessly or negligently) destroy railroad infrastructure on a line and then use that destruction as a defense against an OFA (or any other remedy for the public) amounts to an effort to profit from unlawful conduct and to use unlawful conduct to evade this Board's jurisdiction. "[P]ersons who engage in such abuses [should not] be allowed to profit from them." SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway between La Harpe and Peoria, F.D. 33995, served Oct. 17, 2002, slip at 19. In all events, if Conrail is concerned about the costs of restoration arising from its unlawful actions, then the general rule is that Conrail itself is responsible to restore that which it unlawfully destroyed without abandonment authority. (City reserves its rights on this issue.)

II.

Second, Conrail claims the City must show continued need for "freight" service. Again, the relevant regulation calls only for a showing as to "rail" service. Most cases involve freight-only OFA's and thus speak only to that issue, but the case law relevant to this proceeding affirms that OFA's are available for passenger rail purposes. Chicago & N.W. Transp. Co. v. U.S., 678 F.2d 665, 668 (7th Cir. 1982), involved an effort by Lake Geneva Area Joint Transit Commission to employ OFA procedures to acquire an otherwise to-be-abandoned line for passenger use. The Seventh Circuit specifically held that "Congress [in amending the OFA statute to require ICC to set terms and conditions for mandatory transfer] did not want the railroads to have any hold-out power in negotiating with entities planning to continue passenger rail service on a subsidized basis." The Board in proposing and adopting its latest OFA regulations twice acknowledged in response to City of Jersey City's comments that an OFA could be for passenger purposes, so long as freight was also provided, noting that in many cases freight would not be economically feasible unless subsidized by passenger.³ The Board said "if the OFA process is used primarily for passenger rail purposes, the carrier acquiring the line must still be willing to provide freight rail service over the line for two years." Ex

² Accord, expert Verified Statements by Stephen Day and Thomas McFarland, Appendices I and II to document 302560, filed in this proceeding.

³ Offers of Financial Assistance, Ex Parte 729, served Sept. 30, 2016, slip at 13; id., served June 29, 2017, slip at 17.

Parte 729, served June 29, 2017, slip at 17. Jersey City in its OFA has indicated it is aware of this requirement and will comply. In addition, Hudson County Executive Craig Guy supplied a letter (City's OFA, Appendix V) stressing the importance of the OFA to obtain rail relief for truck as well as passenger congestion. Mr. Guy observes, based on a study, that the area faces an expected 45% increase in freight, and that "a rail line on the Harsimus Branch can be feasibly reconstructed and operated." Jersey City Mayor Fulop referenced freight in both his 2014 and 2025 letters to this Board. E.g., from 2014: "If allowed to file OFA and if the OFA is successful, the City's intent is to install, and designate an operator to operate a freight transload facility on the Harsimus Branch fully consistent with the requirements of 49 U.S.C. 10904."

Cases requiring a showing of economically viable freight operations generally involve situations in which a private OFA applicant is seeking to thwart a public project. Here the City is not seeking to thwart a public project. Instead, Conrail is seeking to thwart a public project by resisting City's efforts to use the OFA remedy to preserve the Harsimus Branch intact for light rail and freight rail use. Moreover, as City in its OFA repeatedly explained, this would be a publicly subsidized passenger line compatible with freight, rendering the issue of economically viable freight operations no longer relevant.

III.

Third, Conrail argues that the City is seeking a parcel (which the City in its OFA termed the "Harsimus Connector") that is somehow inappropriate. Conrail suggests if the City were allowed to seek that parcel, Conrail would need to conduct an additional appraisal. Conrail's arguments on both matters reflects confusion on the part of the railroad and have no merit.

A.

Conrail seems to admit that the City can seek ancillary parcels to provide rail service but says they must be "on the line." The Connector sought by City is on the line for all relevant purposes. Conrail attempts to confuse matters by seeming to suggest (at p. 7) that the "Connector" is part of the River Line which Conrail further seems to suggest never connected to the Harsimus Branch but instead connected to the Passaic and Harsimus Branch. The names of Branches may change over time, or between different iterations of railroad ownership, but geography tends to be stable, which is why the City included maps (OFA

Appendices I and II) in its OFA to show exactly what this OFA is about. Notwithstanding Conrail's purported confusion, the Harsimus Branch and the Passaic and Harsimus are the same for all relevant purposes. The City's tax parcel maps all label the Harsimus Connector as part of the Harsimus, not the River.⁴ In all events, City's rail consultant in a Verified Statement indicates that the Harsimus Connector in question was originally a connection from the National Docks line to Harsimus.⁵ A connection is as much part of one line as another. Moreover, contrary to Conrail insinuations, City's rail consultant has determined what City is calling the Harsimus Connector to be feasible for transload use.⁶ In all events, the property is adjacent to the Harsimus Branch and STB is obligated to allow City to seek it under 49 U.S.C. 10904(f)(1)(C) and Iowa Terminal Railroad v. ICC, 853 F.2d 965, 981 (D.C.Cir. 1988) (10 acre adjacent parcel never before used for rail included in OFA).

B.

Conrail's claim that it does not have an appraisal for the Harsimus Connector is not what its appraisers says. In response to earlier STB orders requiring Conrail to supply 49 C.F.R. 1152.27 information, Conrail supplied City with an appraisal by Otteau Valuation Group dated January 20, 2012, on which Conrail relied for its June 1, 2015 valuation in this proceeding. That appraisal covered some 13.4 acres divided into five parcels north and south of Newark Avenue, inclusive of at least portions of the Connector.⁷ The Board allowed Conrail to "update" its valuation on April 17, 2025. Conrail supplied the Wade appraisal to City as the railroad's support for its valuation. The Wade appraisal specifically states that it appraises "Block 10901 Parcel 121." See City OFA, Appendix III, title page to Wade appraisal. This particular parcel is the bulk of what City calls the Harsimus Connector (i.e., what Conrail calls the "the River Line connector"). In particular, parcel 121 contains what the tax map terms the "Conrail (formerly P.C.T. Co) Harsimus Branch." Indeed, this "Harsimus Branch" right-of-way makes up the

⁴ E.g., Exhibit (unnumbered first page) to Ward V.S., Appendix II.

⁵ City OFA, Appendix VIII, Allen V.S. at 5.

⁶ City OFA, Appendix VIII, Allen V.S. at pp. 4-5 and 6.

⁷ When Conrail's counsel indicated to City's counsel that Conrail could not locate the Otteau appraisal, City's counsel provided him with one. In short, Conrail has appraisals for the properties.

bulk of parcel 121 (the dark green area) in the map on the first exhibit page to the Ward V.S. in City's OFA, Appendix II. Since Conrail's appraiser thus says Conrail already has an appraisal of at least parcel 121, and Conrail's Otteau Valuation Group appraisal covers at least the rest of the property (and more), the railroad already has appraisals for all property at issue. Contrary to its claim at p. 9 n.9, the railroad has demonstrated neither need nor entitlement to more appraisals.⁸

Conrail may have failed to review its appraisal, or gotten confused about the many reconfigurations of trackage in that area, but this hardly means it gets yet another re-do.⁹

IV.

The City filed its OFA in good faith seeking the Harsimus Branch for rail purposes. The fact that Conrail unlawfully abandoned the Branch, purporting to demolish infrastructure and sell off key parcels, is not an excuse (and should not be allowed as an excuse) to deny City its lawful remedies, including but not limited to, OFA. The City's OFA does not conflict with any existing or proposed public (or private) transit system. Instead, the City's OFA seeks to acquire and to restore the Branch as part of an expanded public transit system (consistent with freight as required under 49 U.S.C. 10904). The City's OFA is consistent with the public interest as manifest in years of public planning documents, public support, and the ordinance adopted by the City Council authorizing this OFA. City should and must be allowed to proceed.

Respectfully submitted,



Charles H. Montange,

attorney for City of Jersey City, Offeror

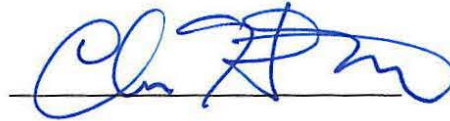
cc. All parties per cert. of service

⁸ Conrail also knew or should have known the property that is at issue in this proceeding. Indeed, its appraiser appended a map in his appraisal (see City OFA Appendix III) which shows the property the City seeks in its OFA (but gives the Harsimus Branch connector a different name).

⁹ If this Board nonetheless determines that the City is not entitled to seek the Harsimus Connector, City reserves the right to reduce its offer by the amount City's appraiser valued that property.

Certificate of service

By my signature below, I certify to service of the foregoing letter upon all parties on the STB service list by e-mail attachment or by deposit with the United States Postal Service, postage pre-paid, first class or equivalent, on May 23, 2025 to each party's address of record on the service list.

A handwritten signature in blue ink, appearing to be "Ch. P. M.", is written over a horizontal line.