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Hon. Anne Begeman
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Appeal of January 26 (2018) denial of
Portion of FOIA Request No. 18-009

Related to: Conrail - Ab. Exemption -
In Hudson County, NJ, AB 167-1189X

Dear Chairman Begeman:

This is an appeal of the partial denial of the Freedom of Information Act (FOIA) request (STB FOIA request No. 18-009) by City of Jersey City, Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively "City et al") manifest in Mr. Oehrle's letter dated January 26, 2018 (attached as Exhibit A). As indicated in Mr. Oehrle's letter, the portion of City et al's FOIA request which was denied sought all communications between RGA, Inc. and Consolidated Rail Corporation ("Conrail") relating to AB 167-1189X.¹ In order to comprehend this appeal, and to understand the error in denial of the FOIA request, it is necessary to discuss the context of the FOIA request.

Context of FOIA Request

The context of the FOIA request as manifest in filings in the record of AB 167-1189X is as follows:

1. Every freight railroad in the United States is supposed to obtain a transfer authorization of some sort from this agency before it sells a line for rail use by another entity, and an abandonment authorization of some sort from this agency before

¹ City et al of course agreed that competitively sensitive information such as rates for work could be redacted.

it sells a line to another entity for non-rail use (commonly referred to as abandonment). Failure to obtain the required STB pre-authorization subverts this agency's authority, undermines application of environmental and historic preservation laws, and is - in the words of the agency - "unlawful."²

2. In 2005, the City of Jersey City (in anticipation of condemning the Branch for public use) asked Conrail for proof of STB authorization for abandonment or that none was required. Rather than provide proof, Conrail purported unlawfully to sell an eight-block segment of the Harsimus Branch - the former freight mainline of the Pennsylvania Railroad - in Jersey City to a developer (eight commonly owned and controlled "LLC's" d/b/a 212 Marin Boulevard, LLC, et al.) without any abandonment or transfer authorization from this agency. Conrail retained no rail easement or any other rail interest in the property. The LLC's immediately sought local land use approvals to demolish the six-block-long Harsimus Embankment (located on the property), and to convert the rail line in question into residential townhouses or other non-rail uses.

3. Although Conrail claimed to the City that no abandonment authorization was required because the line was a spur, the railroad's action was clearly an unlawful de facto abandonment: the property in question among other things was the former freight mainline of the Pennsylvania Railroad and served many shippers in Jersey City well after acquisition by Conrail. Conrail (and the LLCs for that matter) knew (or should have known) that the Harsimus Branch at the time of sale was a line of railroad requiring this agency's pre-authorization for abandonment. In addition, both Conrail and the LLCs knew that the Harsimus Embankment, contained on the line in question, was listed on the State Register of Historic Places since 1999 and was eligible for the National Register of Historic Places since 2000 and/or was otherwise an historic asset protected by federal and state laws. Due to the protected status of the Embankment, STB could never authorize abandonment of the property without compliance with section 106 of the National Historic

²"In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected." Consummation of Rail Line Abandonments, STB Ex Parte 678, served April 23, 2008, slip op. at 4.

Preservation Act, 54 U.S.C. 306108, which requires assessment of loss of federal jurisdiction and other adverse impacts on historic sites and means to mitigate such impacts. Conrail and the LLCs by the unlawful de facto abandonment among other things sought to evade STB jurisdiction in order to evade section 106. The unlawful evasion of STB jurisdiction and of section 106 implicates NHPA section 110(k), 54 U.S.C. 306113. Section 110(k) bars federal involvement (e.g., abandonment licensing) in any anticipatory demolition, as would occur if STB now took action tantamount to authorizing the unlawful transfer of the property to the LLCs for demolition and conversion to townhouses or skyscrapers, which Conrail has bound itself to support and from time to time joined in requesting.

4. In January 2006, after negotiations for an amicable solution failed and the LLCs began demolishing structures on the property, City et al filed a petition for a declaratory order (F.D. 34818) that the property was part of a line of railroad, rendering the deeds to the developer void or voidable under either or both federal law and N.J.S.A. 48:12-125.1 (applicable upon STB abandonment authorization). City et al prevailed in City of Jersey City, et al - Pet for Dec. Order, F.D. 34818, served 8/9/2007, reconsideration denied 12/19/2007.

5. In response to this Board's decisions in F.D. 34818, Conrail and the LLCs entered into a contract in which Conrail agreed to take all necessary steps to secure title to the eight blocks of rail line in the LLCs for their proposed non-rail development.³ Consistent with its contract with the LLCs to ensure the Harsimus Branch was theirs to develop, Conrail took two courses of action:

(a) Conrail retained Richard Grubb and Associates (now d/b/a RGA, Inc.) to act as Conrail's consultant for environmental and historic preservation analysis in support of a planned "notice of exemption" for abandonment of the portion of the Harsimus Branch containing the section 106-protected Embankment already unlawfully sold to the developer. When Conrail eventually filed its abandonment proceeding (docketed as Conrail - Ab.Ex.-in Hudson County, N.J., AB 167-1189X), Conrail's consultant not surprisingly minimized any environmental impacts, failed to consider all historic assets in the area that could be impacted by the abandonment, and claimed the abandonment would have no impact on historic assets, even though it would place the section 106-protected Embankment

³ The LLCs first filed this contract in litigation in 2012. City et al first provided a copy of the contract (Exhibit A to a Motion for a Scheduling Order filed 6/17/2014 in AB 167-1189X well before STB lifted the stay on the proceeding (8/11/2014).

outside the jurisdiction of this agency and thus into the hands of a developer actively seeking its utter destruction. Conrail also expressly joined in demolition permit requests for the Embankment.

(b) Conrail and the LLCs also filed petitions for review in the D.C. Circuit, resulting in prolonged litigation (including two more appeals to the D.C. Circuit and two sets of proceedings in the U.S. District Court for the District of Columbia). This agency placed AB 167-1189X in abeyance, effectively from 2009 until August 2014. During that period, the LLCs, sometimes with Conrail's active support, pursued a multitude of state court litigation, including state court SLAPP-type litigation, against City et al, their officers and their lawyers to force City et al to forego any remedies at STB, to accede to the unlawful abandonment of the Harsimus Branch and to suffer the total loss of the Harsimus Branch for transportation (including rail transportation) and other compatible and important public uses.⁴

6. When this agency lifted the stay in AB 167-1189X in 2014, this agency apparently informed Conrail that the agency lacked resources to undertake and to complete environmental and historic preservation analysis required for the abandonment licensing that Conrail sought. Conrail and this agency entered into an agreement whereby Conrail would pay its consultant (Richard Grubb and Associates, now d/b/a RGA, Inc.) to work for STB in providing the environmental and historic preservation analysis required by statutes like NHPA. As indicated, RGA initially was retained by Conrail while Conrail was under contract to facilitate the developer's goal to demolish the Embankment and substitute townhouses, and evidently continues to be retained by Conrail and STB while Conrail is governed by its contract calling for the railroad in effect to secure section 106-protected assets to its chosen developer (the LLCs) for demolition. On top of this, Conrail has objected to the costs associated with the environmental and historic preservation process, which it claims to be paying.

7. The section 106 process remains in its early stages. RGA prepared a "Cultural Resources Identification" ("CRID") report which, among other things, missed some very important section 106 resources potentially impacted by the Embankment (including an historic cemetery, the Harsimus Branch itself, and certain adjoining historic structures or districts), drawing

⁴ SLAPP stands for "strategic lawsuits against public participation" and are used by developers to run up the expenses of public interest litigants to the point that they are driven from the field.

corrections from City et al, numerous experts, and the State Historic Preservation Officer (SHPO). It is City et al's understanding based on a memorandum that this agency placed in the "environmental correspondence" for AB 167-1189X in January of 2018 that the agency is requiring RGA to perform additional analysis which the agency hopes will address at least the concerns expressed by the SHPO. City et al is informed that a supplement to the CRID Report may be available by July.

8. In AB 167-1189X, City et al contend, among other things, that there is a fundamental conflict of interest on the part of STB in having RGA, Conrail's consultant, now also purport to act as the agency's consultant in AB 167-189X. RGA first came on board AB 167-1189X as Conrail's consultant to facilitate placing a section 106-protected asset in the hands of the LLCs for demolition and non-rail development. Although RGA now supposedly works for STB, Conrail -- which objects already to the expense -- is responsible for negotiating and making payments to RGA for its work for STB. As the (very old) saying goes, "he who pays the piper calls the tune." As applied here, the person (here Conrail) who controls the payment decides how something is done. But this is the same Conrail that has contractually bound to make its decisions based on providing the section 106-protected assets to the LLCs for destruction.

9. The Office of Environmental Analysis purports to place in its "environmental correspondence" for AB 167-1189X all incoming or outgoing comments or correspondence between STB Office of Environmental Analysis (OEA) and the parties in AB 167-1189X. However, the OEA has omitted any correspondence bearing on AB 167-1189X between Conrail and RGA. This exacerbates the problem of conflict of interest because it has the effect of concealing potentially key comments made by the railroad to its consultant (now STB's consultant) RGA.

Appeal

In an effort to determine if in fact STB was monitoring Conrail's chosen consultant -- and now STB's consultant-- RGA and Conrail for conflict of interest in AB 167-1189X, City et al sought in a FOIA inter alia to obtain all writings between RGA and Conrail bearing on AB 167-1189X. Mr. Oerhle responded that the agency does not have any such writings, and therefore need not make them available. Mr. Oerhle states that the agency did not create or obtain the ex parte communications between the regulated railroad (Conrail) and the Board's supposed consultant (RGA) nor does the Board "control" them for purposes of FOIA. The cases cited by Mr. Oehrle not only are distinguishable but also to the extent germane support the position of City et al

that the material sought is subject to disclosure. For example, Burka v. U.S. Department of Health and Human Services, 87 F.3d 508, 515 (D.C. Cir. 1996) affirms that an agency not only has constructively created but also maintains constructive control over records generated by a consultant in a project which it is supervising. It is certainly STB's claim to be supervising RGA's work in connection with the on-going environmental and historic preservation process for AB 167-1189X.⁵

But even more importantly, the position taken by Mr. Oehrle on behalf of the Board raises the prospect of unpoliced abuse. This consultant (RGA) supposedly is now retained to assist the Board in regulating Conrail. Communications between Conrail and this consultant that are not reviewed by the Board constitute ex parte communications between a regulated entity and the Board on a matter of considerable controversy (an unlawful abandonment) that has been pending in one or multiple forms in proceedings before the Board and the judicial system for thirteen years. The potential for abuse is all the greater since the Board's purported consultant (RGA) was originally retained by Conrail to facilitate a fast-track rubber-stamp authorization for the unlawful abandonment via 49 C.F.R. 1152.50 in a matter of months in order to place historic assets protected under section 106 in the hands of a developer for demolition and conversion into non-rail uses.

Assuming arguendo that Mr. Oehrle is correct that STB has no such writings, the condition flows from STB's failure to require RGA to retain and to make available to STB all correspondence (email, letters, memos or other communications) it has with Conrail concerning AB 167-1189X. In failing to require RGA to retain and to make such material available to the agency, STB has created a situation in which Conrail in fact can "call the tune" with its former consultant, now the agency's consultant, out of sight of the public and out of sight of this agency. The agency, according to Mr. Oehrle's rationale, has adopted a "see no evil, hear no evil, speak no evil" stance with respect to the relationship between RGA and Conrail. Especially in the circumstances here, this fundamentally prejudices and undermines the section 106 process. STB cannot discharge its responsibilities under section 106 and similar statutes without ensuring that the interested party paying RGA's bills is not suborning the process in its ex parte communications with a

⁵ The Court of Appeals expressly affirmed that data (certain tapes) held by contractors to an agency were indeed "agency records" for purposes of FOIA.

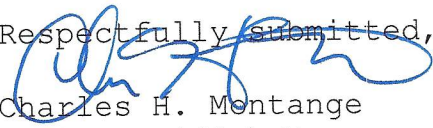
consultant (RGA) which purportedly is now functioning for STB. The agency's failure to obtain all ex parte communications between RGA and Conrail is prejudicial to the public and error on the part of the agency in the circumstances here.

The agency can obtain all RGA-Conrail communications still retained by RGA by simply requesting same from RGA at no cost to the agency. The agency should do so, and cause them to be published on the OEA's "environmental correspondence" website for AB 167-1189X, or at least make them available to City et al pursuant to City et al's FOIA request. The agency should also make public whether RGA has retained all communications to or from Conrail.

City et al reserve all objections to STB's continued reliance on RGA in any part of the environmental or historic review process.

This agency's guidance for FOIA appeals does not address service on parties to proceedings associated with the FOIA request. In order to avoid any claim that this appeal constitutes an ex parte communication, City et al is also filing a notice attaching a copy as a pleading in AB 167-1189X, with service on the parties.

Respectfully submitted,


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Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus
Stem Embankment Preservation
Coalition

Att: Oerhle Letter of January 26, 2018



Surface Transportation Board
Washington, D.C. 20423-0001

January 26, 2018

Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Dear Mr. Montange,

This letter responds to your Freedom of Information Act (FOIA) request dated December 4, 2017 (designated FOIA Request No. 18-009), as amended and clarified. Your request originally sought "all documents ... from Consolidated Rail Corporation in the files of RGA, Inc. received by RGA, Inc. ... relating to AB 167-1189X; and all such documents in the files of RGA, Inc. sent by RGA, Inc. ... relating to AB 167-1189X to Consolidated Rail Corporation." After further email and telephone communications with you, we released to you two particular records on January 10, 2018. After a December 29 telephone conversation in which you indicated that you still are seeking communications between Conrail and RGA, I explained in a January 2, 2018, email that any records that have not already been turned over to you are not agency records subject to FOIA because they have never been provided to the Board. Nevertheless, in five emails between January 8, 2017, and January 16, 2018, you again requested the same materials.

To qualify as an "agency record" subject to FOIA, the agency must have either created or obtained the record, and have been in control of the record at the time the FOIA request was made. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989); Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir 1996). Here, the Board neither created nor obtained the requested communications solely between Conrail and RGA. Therefore, the documents are not subject to FOIA under the first prong of the test. See Burka, 87 F.3d at 515; see also Beveridge & Diamond, P.C. v. U.S. Dep't. of Health & Human Servs., 85 F.Supp.3d 230, 238 (D.D.C. 2015) ("FOIA applies to 'records which have in fact been obtained, and not records which merely could have been obtained'" by the agency).

Nor does the Board "control" the requested records within the meaning of the second prong of the agency-record test. Documents that an agency does not use, review, or rely on are not in the control of the agency for the purposes of FOIA. Judicial Watch, Inc. v. Federal Housing Finance Agency, 646 F.3d 924, 927-28 (D.C. Cir. 2011); see also Beveridge & Diamond, 85 F.Supp.3d at 240 (when an agency has not created or referenced a document, it does not control the document for the purposes of FOIA). The mere ability to request such documents from another entity (assuming for the sake of this response only that the Board does have that right) does not render documents "agency records" for the purposes of FOIA. See Forsham v. Harris, 445 U.S. 169, 185-86 (1980); Judicial Watch, 646 F.3d at 928 ("documents an agency had the right to acquire would not become agency records subject to FOIA 'unless and until the right is exercised'"). Because the requested

documents do not qualify as agency records subject to FOIA under either of the relevant criteria, your request for communications between Conrail and RGA is denied.

You may appeal the denial of your request to the Chairman of the Board within 90 days of receipt of this letter. 5 U.S.C. § 552(a)(6)(A)(i). Any appeal should include the grounds for the appeal and be addressed to Acting Chairman Ann Begeman, 395 E Street, S.W., Washington DC 20423. It may be faxed to (202)245-0450 or emailed to Chairman.Staff@stb.gov.

You may also seek dispute resolution services from the STB FOIA Public Liaison or the Office of Government Information Services (OGIS). OGIS offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you choose to use OGIS's mediation services, the Board will participate. Of course, using OGIS services does not affect your right to pursue litigation (once your administrative appeal is complete). You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

If you send additional correspondence, please refer to FOIA Request No. 18-009.

Sincerely,



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