



SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Environmental Analysis

February 19, 2020

Jaime Loichinger
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington DC 20001-2637

RE: STB Docket No. AB 167 (Sub-No. 1189X), Consolidated Rail Corporation—
Abandonment Exemption—in Hudson County, New Jersey

Dear Ms. Loichinger:

Thank you for your January 24, 2020 letter regarding the above-referenced abandonment proceeding. The Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) values ACHP's continued participation in the Section 106 process and would like to respond to the three observations on OEA's November 2019 *Cultural Resources Effects Addendum Report (Addendum Report)* set out in ACHP's letter.

First, OEA appreciates ACHP's continued agreement that, given the circumstances of this case, it is appropriate that the Board's determination regarding the application of Section 110(k) to this case not be made until after the Section 106 process is complete and the full administrative record has been put before the Board for its review and decision.

Second, ACHP indicates in its letter that it believes that OEA has incorrectly limited the definition of the "undertaking" under the National Historic Preservation Act (NHPA) to the Board's decision whether to grant or deny abandonment authority. Broadening the definition of the undertaking, however, would be both inconsistent with the law and what was discussed at our meeting on June 11, 2019.

The federal "undertaking" under the NHPA and ACHP's regulations is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y); *see also* 16 U.S.C. § 470w(7). It is well settled that a federal agency's undertaking does not include subsequent or related private and state actions or projects that are

not within the jurisdiction or control of the federal agency, even if those actions and projects would not occur in the absence of the federal agency's undertaking.¹

The sole undertaking being permitted, licensed, or approved by the Board in this proceeding is the potential granting of authority to abandon a rail line. If the Board authorizes this abandonment, the privately-owned rail line will no longer be part of the national transportation system and the Board's jurisdiction will end once the abandonment is consummated by the rail carrier.² This means that the Board will have no control or jurisdiction over any changes to, or development of, the rail property after it is abandoned. As a result, OEA correctly limited the undertaking here to the activity that the Board would consider "approving" and defined it as the "Board's decision whether or not to authorize Conrail's proposed abandonment of the Harsimus Branch, the result of which, if authorized and consummated, would be to remove the line from the interstate rail system and the Board's jurisdiction."³ *Addendum Report* at 3.

Third, OEA would like to address ACHP's assertion regarding Board jurisdiction and the resolution of adverse effects. In its letter, ACHP encourages OEA to reconsider the applicability of the "small federal undertaking" concept to this abandonment proceeding because it believes "the Board does in fact have a significant amount of control over the line while in status and that control does amount to 'federal jurisdiction.'" ACHP also suggests that, therefore, the removal of Board jurisdiction could be "an adverse effect if there are not adequate conditions placed on the affected historic property to ensure its long-term preservation." However, ACHP's statements appear to be based on a misunderstanding of the Board's jurisdiction.

¹ See *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 377 (D.C. Cir. 2008) (FERC's consideration under the NHPA was properly limited to the permitting of an easement for a discharge pipe and seawall and not "activities not authorized under the license" like the planned housing development for which the easement was requested); *Bus. and Residents' Alliance of E. Harlem v. Jackson*, 430 F.3d 584, 592 (2nd Cir. 2005) (holding that Section 106 was inapplicable to a housing development project because the federal agencies that issued the grant for use on the development did not have direct or indirect power to control the expenditure of the funds after the grant was issued); *Ringsred v. City of Duluth*, 828 F.2d 1305, 1308-09 (8th Cir. 1987) (federal agency's approval of a contract that included a provision for building a parking ramp did not transform the construction of the ramp into a federal undertaking for the purposes of the NHPA when the ramp was not being constructed on federal land, it was not subject to federal licensing, and the agency had no role in or control over the construction); *Standing Rock Sioux Tribe v. U.S. Army Corp. of Eng'rs*, 205 F.Supp.3d 4, 31 (D.D.C. 2016) (federal agency only required under NHPA to consider the effects of the activity it licensed (construction of pipeline crossings of federally regulated waterways) and not the effects of the pipeline construction outside its licensing authority).

² See, e.g., *Consol. Rail Corp. v. STB*, 93 F.3d 793, 797 (D.C. Cir. 1996); *Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996); 49 C.F.R. § 1152.29(e) (regulation adopted in 1996 establishing notice of consummation process for railroads to consummate abandonment authority and thereby remove the property from the Board's jurisdiction).

³ See *Duncan's Point Lot Owners*, 522 F.3d at 377; *Bus. and Residents' Alliance of E. Harlem*, 430 F.3d at 592; *Ringsred*, 828 F.2d at 1308-09.

While the Board has jurisdiction over railroad lines that are part of the interstate rail network, that jurisdiction is defined and limited by the Board's organic statute, the Interstate Commerce Act, as amended by the ICC Termination Act of 1996 (ICCTA), which authorizes the Board to provide economic regulation of rail transportation, including regulating service disputes, regulating rail rates, and licensing entry into and exit from the national rail system. *See* 49 U.S.C. §§ 10101, 10501, 10901, 10903.⁴ The Board's jurisdiction over a rail line as part of rail transportation does not equate to Board control over how particular rail property within that jurisdiction is used or retained for rail service. *Id.* In other words, the Board has no jurisdiction to control whether a railroad retains any particular structures or facilities (such as bridges or terminals) even when the line is part of the interstate rail system. Unless it is addressing a shipper's claim of inadequate service related to track conditions or structures, the Board does not regulate or control the existing physical structures or facilities related to a rail line.

Because of these limits, the Board cannot prevent a railroad from demolishing or altering rail-related structures on a rail line within its jurisdiction, so long as doing so does not result in depriving shippers of adequate rail service on lines that have not been authorized for abandonment or discontinuance.⁵ Thus, suggesting that the Board could require Conrail to preserve a particular structure – or ensure or enforce development of former rail property in a particular way – following the consummation of abandonment would give the Board broader authority over abandoned rail lines than it has over rail lines that are within its jurisdiction as part of the interstate rail network. This clearly cannot be the case. Moreover, since this rail line and the underlying property are privately owned, any Board-imposed limitations on Conrail's use or treatment of the property after abandonment would likely constitute an unconstitutional taking under the Fifth Amendment. In short, the Board does not exercise sufficient control over the Embankment and other rail related structures on the Harsimus Branch to bring non-federal actions taken after abandonment within the scope of either the undertaking or its authority to mitigate adverse effects.⁶

Finally, OEA is moving forward with Step 4 of the Section 106 process and continuing consultation to resolve the undertaking's adverse effects. After discussions with staff at the ACHP, including a conference call with Sarah Stokely on February 13, 2020, and a review of

⁴ *See Griffioen v. Cedar Rapids and Iowa City Ry. Co.*, 785 F.3d 1182, 1191 (8th Cir. 2015) ("The primary focus of the ICCTA's substantive provisions is regulation of competition, rates, licensing, finance, and the economic relationships between shippers and carriers."); *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1132 (10th Cir. 2007) ("Congress's purpose in passing the ICCTA was to establish an exclusive Federal scheme of economic regulation and deregulation for railroad transportation."); *Commonwealth of PA v. STB*, 290 F.3d 522, 524 (3rd Cir. 2002) (STB "has the responsibility for the economic regulation of the country's railroads").

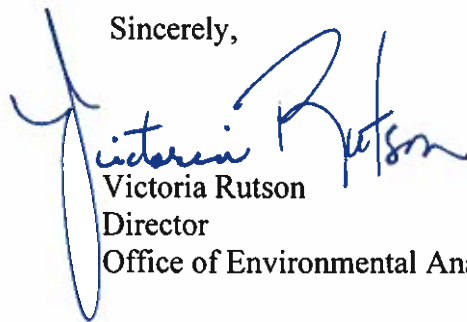
⁵ A request for abandonment authority triggers Section 106 of the NHPA and, therefore, once such a request is made, a railroad cannot alter or demolish historic structures or properties until the Section 106 process is completed and abandonment is consummated. However, while the Board may temporarily require that a railroad retain potentially historic structures during the pendency of a Section 106 review, it does not have the authority to require a railroad to permanently retain such structures.

⁶ *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 770-73 (2004); *Duncan's Point Lot Owners*, 522 F.3d at 377; *Bus. and Residents' Alliance of E. Harlem*, 430 F.3d at 592; *Macht v. Skinner*, 916 F.2d 13, 20 (D.C. Cir. 1990); *Ringsred*, 828 F.2d at 1308-09.

ACHP's guidance on agreement documents, OEA has determined (with ACHP's concurrence) that a Memorandum of Agreement (MOA) is the appropriate type of agreement document for this undertaking. OEA is currently preparing a draft MOA that will be circulated among the consulting parties for review and input. As part of the resolution of adverse effects, OEA is organizing a Section 106 consulting parties' meeting for March 2020, in Jersey City, New Jersey, to present the status of the Section 106 process and obtain additional input on potential measures that the Board could adopt to avoid, minimize, or mitigate the undertaking's adverse effects.

If you have any questions, please do not hesitate to contact me, Alan Tabachnick of my staff ((202) 245-0367, Alan.Tabachnick@stb.gov), or Barbara Miller of the Board's Office of General Counsel ((202) 245-0277, Barbara.Miller@stb.gov). OEA looks forward to continued consultation with ACHP on this important case. Thank you for your participation in the Section 106 process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Victoria Rutson", is written over the printed name and title.

Victoria Rutson
Director
Office of Environmental Analysis