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January 16, 2020

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Consolidated Rail Corporation—Abandonment
Exemption—In Hudson County, NJ, STB Docket
No. AB 167 (1189X)

Dear Ms. Rutson:

It has come to our attention that on December 4, 2019, the City of Jersey City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and the Rails to Trails Conservancy (“City Parties”) posted as an environmental comment “Objections” to the Cultural Resources Effects Assessment Report Addendum issued by the Board on November 12, 2019. These “Objections” are untimely and vexatious, since without a shred of justification they seek to reopen stages of the Section 106 process which have been thoroughly litigated and completed, and they repeat meritless arguments that the City Parties have made without success in the past.

The City Parties in their “Objections” first take issue with the boundaries for the Pennsylvania Railroad Harsimus Branch Right-of-Way Historic District – which the Board established and defined at an earlier stage in these proceedings, but which the City Parties now say they dispute. Objections at 3-11. Now, the City Parties claim that instead of just the Harsimus Branch right-of-way itself, the Harsimus Branch Right-of-Way Historic District should include all of Conrail’s properties in the “plateau” area “south of the Cemetery, east of Waldo, west of National Docks Secondary, and north of the PATH lines.” Objections at 11. The Board should reject this belated claim.

Your office of course will recall that after lengthy proceedings, the Board on May 5, 2017, first issued a Cultural Resources Identification Report in which it determined, among other things, that the Harsimus Branch right-of-way itself lacked sufficient visual and structural integrity to qualify for listing on the National Register. 2017 Report at 5-16. The City Parties and the NJ SHPO took issue with that, and after more lengthy proceedings, the Board on October 16, 2018, issued a Cultural Resources Identification Report Addendum reversing its position and determining that the portion of the Harsimus Branch right-of-way between CP Waldo and Marin Boulevard should be included in a Harsimus Branch Right-of-Way Historic District. 2018 Addendum at vi, 1-10. The Board included a map (Figure 1.3) showing the historic district

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confined to the right-of-way. *Id.* at 1-14. No one claimed that the historic district should be expanded to include any of Conrail's properties adjacent to the right-of-way.

Having concluded the Cultural Resources Identification phase (Step 2) of the Section 106 process, the Board then moved on to the Assessment of Adverse Effects stage (Step 3). The Board issued a lengthy Cultural Resources Effects Assessment Report on March 29, 2019. It included a map (Figure 1.3) showing the same Harsimus Branch Right-of-Way Historic District as shown in the 2018 Cultural Resources Identification Report Addendum. 2019 Report at 1-9. No one took issue with that historic district being confined to the Harsimus Branch right-of-way. In response to other concerns, the Board on November 12, 2019 issued its Cultural Resources Effects Assessment Report Addendum. That Addendum too used a map (Figure 3) that contained exactly the same rendering of the Harsimus Branch Right-of-Way Historic District that the Board had established and set forth in its 2018 Cultural Resources Identification Report Addendum and 2019 Cultural Resources Effects Assessment Report. 2019 Addendum at 14.¹

The City Parties in their Objections now belatedly say that they believe that the Harsimus Branch Right-of-Way Historic District should include Conrail properties adjacent to the Harsimus Branch right-of-way – including properties traversed by the long-abandoned River Line, which connected to the Harsimus Branch, and other properties that may have served some rail “control” or rail “maintenance” purpose in the past, regardless whether they were part of the actual Harsimus Branch itself. In purported support of their claim, City Parties attach the statement of John McLaughlin, who recounts that there used to be rail operations in the area by multiple rail lines other than the Harsimus Branch, and says he found some evidence of that (masonry work in a drainage ditch, foundations of one or two catenary poles, and a vandalized relay box) in the area. McLaughlin VS at 3-4. None of this, however, demonstrates that the Board has misidentified the boundaries of the Harsimus Branch right-of-way, much less that the entire “plateau” identified by the City Parties can or should be hitched to that right-of-way. It is

¹ Further, in a Technical Memorandum attached to the 2019 Addendum (Attachment 5), the Board refined its delineation of the Harsimus Branch right-of-way, using a wealth of data to show in more detail where that right-of-way runs and why it does not impinge on the Harsimus Cemetery Historic District boundary. 2019 Addendum at 53-65. The City Parties in their “Objections” suggest that the Board in its Technical Memorandum has somehow improperly “shriveled” the Harsimus Branch west of the Embankments from the 100-foot-wide right-of-way at Brunswick Street to avoid impinging on the Cemetery (Objections at 4), but this ignores that west of Brunswick the Harsimus Branch right-of-way consisted of a much narrower elevated two-track trestle supported by stanchions. As the Board notes in its Technical Memorandum, small-scale maps of the Harsimus Branch right-of-way cannot be exact. 2019 Addendum at 55. In any event, the City Parties’ real objection is not to the Board’s delineation of the Harsimus Branch right-of-way, but to the Board’s failure to include in the Harsimus Branch Right-of-Way Historic District adjacent Conrail properties that are not part of the right-of-way at all.

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long past time for the Board to draw the line on such attempts to drag out the Section 106 process. Accordingly, the Board should reject the City Parties' belated effort to reopen and relitigate the Harsimus Branch Right-of-Way Historic District.

The Board should also reject the City Parties' other claims of "errors" in the Board's 2019 Addendum. The City Parties claim that the Board erred in failing to include among its "reasonably likely" post-abandonment scenarios Conrail's supposed plans to build "10,000 units of development" on its Palisades properties and install "billboards visible perhaps as far as Manhattan." Objections at 11-12. Aside from the fact that what Conrail may or may not seek to build on its Palisades properties which are not part of the Harsimus Branch right-of-way is not at issue in this abandonment proceeding, Conrail has repeatedly debunked the City Parties' tiresome claim that Conrail has ever had any intention, much less developed plans, to seek to build "10,000 units" or install massive billboards on its properties. Letter from Jenkins to Rutson dated Feb. 29, 2016, at 2.

The City Parties also claim that the Board erred in failing to include "loss of federal control" over the Harsimus Branch as an adverse effect on the Harsimus Branch Right-of-Way Historic District. Objections at 12-13. The Board directly addressed and properly rejected that claim. 2019 Addendum at 43. The Board has also previously addressed and rejected the City Parties' suggestion (Objections at 13-14) that the OFA process was related to the Section 106 process and might be used as a mitigation remedy. 2019 Report at 2-5. Further, it does no good for the City Parties to keep asserting that Conrail knowingly and intentionally harmed protected structures on the Harsimus Branch, in supposed violation of Section 110(k) of the NHPA. Objections at 14-18. Aside from the fact that the Board previously determined that there was no evidence of "any intent on Conrail's part to harm historic sites or structures" (Environmental Assessment, slip op at 14, served March 23, 2009), and the Board has made clear that it is not going to revisit that issue until the record in this proceeding is complete (2019 Addendum at 42-43), the Superior Court of New Jersey has determined after a thorough adjudication of the facts, in a 24-page opinion, that Conrail was not even negligent, much less intentionally fraudulent, in its historic treatment of the Harsimus Branch as spur track that could be dismantled (*see* Letters from Jenkins to Rutson dated Sept. 8 and Oct. 18, 2017).

The only part of the City Parties' "Objections" that is even marginally responsive to the Board's 2019 Addendum is their comments on the Board's Technical Memorandum clarifying the boundaries of the Harsimus Cemetery Historic District. Objections at 18-20. But their principal complaint appears to be that a survey they plan to conduct might improve the precision of the analysis. That may be, but until they perform such a survey and it proves relevant, the Board is entirely justified in relying on the maps and deeds it used in its detailed Technical Memorandum.

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Sincerely yours,

Robert M. Jenkins III

Robert M. Jenkins III

Counsel for Consolidated Rail Corporation