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9 Dec. 2016

Ms. Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
Washington, D.C. 20423-0001

Re: STB Dkt. No. AB 167-1189X, Consolidated Rail
Corp. - Abandonment Exemption - in Hudson County,
NJ

Dear Ms. Rutson:

This letter is on behalf of the City of Jersey City, Rails
to Trails Conservancy, and the Pennsylvania Railroad Harsimus
Stem Embankment Preservation Coalition ("City et al").

Based on a recent review of the Surface Transportation
Board's ("STB's") "environmental correspondence" on its website,
City et al have recently become aware of a letter dated August
4, 2016, from the Advisory Council on Historic Preservation
("ACHP") to you as Director, Office of Environmental Analysis
("OEA"), STB, and a response dated September 21, 2016, by you to
ACHP.¹ City et al disagree with the path forward outlined by you
in response to ACHP's concerns, as well as your statements
concerning discovery, both of which have serious inaccuracies
and deficiencies. Please include this letter and attachments
in the "environmental correspondence" for AB 167-1189X, and
please post it on the web page for same.

I.

The ACHP letter of August 4, 2016, indicates that STB
should investigate the applicability of section 110(k)
("anticipatory demolition") of the National Historic
Preservation Act ("NHPA"), 54 U.S.C. 306113, "before it proceeds
with Section 106 consultation." Letter dated August 4, 2016, p.
1, first para, last sentence. City et al agree. Consolidated

¹ As of December 7, 2016, the OEA's September 21, 2016, letter
had been removed from the "environmental correspondence"
website. We provide it herewith.

Rail Corporation ("Conrail") sold the Embankment portions of the Harsimus Branch to a developer without any compliance with applicable STB licensing requirements or with Section 106. The Embankment portions included the Sixth Street (or Harsimus) Embankment, determined eligible for listing on the National Register in 2000. The developer, with Conrail concurrence, applied to demolish the Embankment.²

Conrail and the developer now take the position that STB is without authority to address this unlawful sale. The sale clearly forestalls any opportunity for meaningful consideration of measures to void or mitigate adverse effects to the historic Harsimus Embankment and other affected resources under Section 106. As both Conrail and the developer have now conceded, the sale was intentional, and the Harsimus Branch at the time was a regulated line of railroad subject to the STB's jurisdiction requiring an abandonment authorization before the sale that occurred. Accordingly, this constitutes a prima facie anticipatory demolition. The agency needs to consider how to apply section 110(k) to the situation, before it considers the matter under Section 106, because the public is otherwise denied a right of meaningful comment.

However, your letter of September 21, 2016, to the ACHP mischaracterized the ACHP's position, stating "[STB] agrees that the investigation into Section 110(k) can take place simultaneously with the Section 106 review." Obviously, that is not what ACHP's letter said.

Rather than continue to avoid this key issue, STB should do what ACHP's letter indicates is necessary to comply with Section 110(k): STB, for example, must provide "documentation specifying the circumstances, including the degree of damage to the integrity of any historic property affected[,]" and the agency "must clarify if the abandoned Harsimus line is National Register eligible and what effect has resulted from abandonment." Of course, it is well-known that the Embankment parcels west of Marin Boulevard are National-Register-eligible and will be demolished by the developer and Conrail as a result of the abandonment and sale.

All of the currently listed National Register property that is affected by the anticipatory demolition (e.g., the

² The developer seeks to remove the Embankment and replace it with townhouses or skyscrapers.

Embankment, adjoining historic districts and structures) is located west of Marin Boulevard.

Under Section 110(k), the agency, if confronted with an anticipatory demolition, may not proceed with the proposed licensing action, absent special findings taken in consultation with ACHP. It follows that Section 110(k) currently bars the agency from allowing the abandonment to become effective west of Marin Boulevard due to the anticipatory demolition that occurred there.

There are at several relatively easy ways out of this problem. For example, STB OEA could recommend, and STB could impose, conditions barring Conrail from consummating any abandonment authorization for the property west of Marin Boulevard until it had re-acquired its prior property interests in that portion of the rail line. Alternatively, the agency could simply void the deeds purporting to convey that property for non-rail purposes without the required STB abandonment authorization. Under either approach, the Section 106 process could move forward, and any potential adverse effects to the property could be avoided by allowing the City of Jersey City to acquire the property. City et al note that the City is actively pursuing a notice of intent to make an offer of financial assistance ("OFA") pursuant to 49 U.S.C. 10904. The City is ready, willing and able to acquire all of the property including the Embankment pursuant to the OFA. Alternatively, if the deeds from Conrail to the developer are voided, City is ready, willing and able to acquire all of the property pursuant to N.J.S.A. 48:12-125.1. Under either statute, Conrail will receive its constitutional entitlement to just compensation as construed under this Board's OFA precedent.

II.

City et al have repeatedly urged STB to engage in the Section 110(k) process. In OEA's March 2009 "environmental assessment," OEA took the position that there is no Section 110(k) issue, misleadingly claiming the City asked Conrail to redevelop the property in 1984, before it was recognized as National-Register-eligible, and also that Conrail filed an abandonment proceeding in response to litigation filed by City et al (first at this agency, and then in Special Court).³

³ OEA made the following statement in its March 13, 2009, "Environmental Assessment" in AB 167-1189X, at p. 14, which

In fact, the grounds OEA offered to evade compliance with 110(k) in March 2009 are specious. It is well established that requests or support by a City for redevelopment involving rail facilities does not excuse a railroad (or STB) from railroad abandonment licensing, which includes National Historic Preservation Act requirements.⁴ This position was confirmed in

stands as the agency's only pronouncement on Section 110(k) in this proceeding:

"The SHPO and others, including the City, argue that the historic review process should not proceed because Conrail has engaged in "anticipatory demolition" in violation of Section 110(k) of NHPA. Section 110(k) permits an agency to suspend processing of an application when "an applicant who, with intent to avoid the requirements of [Section 106], has intentionally significantly adversely affected a historic property." 16 U.S.C. 470h-2(k). In support of their anticipatory demolition argument, these parties assert that Conrail should have known that the Harsimus Branch was a "line of railroad" requiring abandonment authority from the Board and that by removing bridges and track structure, Conrail demonstrated intent to harm the Embankment.

"This argument fails because the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board's environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts."

⁴ E.g., City of Jersey City, et al - Pet. Declaratory Order, F.D. 34818, served Dec. 19, 2007: "[L]ocal governments and planning

Special Court and the D.C. Circuit. In addition, as the developer itself has pointed out, Conrail's claims that the line did not require abandonment approval were fraudulent (intentionally false, and made with the intent to deceive inter alia the STB and the Courts) for the pecuniary gain of Conrail.⁵ Moreover, the fact that Conrail filed an abandonment proceeding only when forced by litigation brought by City et al does not vitiate the anticipatory demolition that happened before the abandonment application was filed.

STB OEA has done nothing to address Section 110(k) issues since 2009. OEA staff has repeatedly informed counsel for City et al that OEA has no procedures or personnel for such purpose. STB OEA relies on consultants hired by Conrail to compile information concerning National Historic Preservation Act issues. The consultants are not examining Section 110(k) matters. Since STB has no other investigators, there is no other STB effort to examine the anticipatory demolition that occurred on the Harsimus Branch. Until the anticipatory demolition is addressed, meaningful public comment under Section 106 is denied and foreclosed. That is why the agency must first address the anticipatory demolition. It amounts to putting the cart before the horse for OEA to purport to comply with Section 106 before considering anticipatory demolition and the resultant foreclosure of an opportunity for meaningful comment. This also will cause unwarranted delays in the proceeding.

III.

Your September 21 letter to ACHP seems to suggest that STB is relying on discovery propounded by City et al to develop Section 110(k) issues. You state that "[d]iscovery is currently

agencies frequently ask railroads to participate in redevelopment or joint use projects with the understanding that the railroad will obtain appropriate authorization from the Board, if necessary. The Board has authorized a number of abandonment proposals that were submitted by rail carriers to facilitate redevelopment projects. [Footnote omitted.] Support by a local government does not excuse the railroad from seeking abandonment authority prior to removal of a rail line from the national rail transportation system."

⁵ See City et al "Notice of Decision", Exhibit C (excerpts from LLCs' proposed Amended Answer), in AB 167-1189X, filed November 22, 2013 (available on STB website, e-library, filings for that date).

ongoing, and the Board has expressly held that the parties may seek discovery of information and documents that are relevant to the question of whether a Section 110(k) violation occurred under the circumstances at issue here." STB has an independent obligation to investigate the anticipatory demolition that has occurred which it cannot pass off to private discovery. In any event, City et al disputes claims made in OEA's September 21, 2016, letter to ACHP concerning discovery.

In particular, the quoted statement from your September 21 letter to ACHP is misleading and incorrect. First, as of September 21, 2016, there were no pending Section 110(k) discovery requests. The only pending discovery matters were a motion for sanctions directed at Mr. James Riffin and a motion to compel discovery against the developer interests. Neither motion involved discovery concerning Section 110(k) matters.

Second, you indicate that STB has authorized the parties to seek discovery against Conrail and the Hyman interests on Section 110(k) issues. To the contrary, STB has stated that it discourages discovery in abandonment proceedings, and has allowed only very limited discovery in AB 167-1189X, including Section 110(k) issues, in effect rendering its discovery procedures useless to obtain relevant information on the matter. In particular, the agency drastically curtailed any information that Conrail or the LLCs were required to supply City et al at that time concerning documents and the identity of witnesses germane to environmental issues.

In short, at the time of your September 21, 2016, letter, there was no pending discovery on Section 110(k); the agency had never encouraged and instead expressly limited Section 110(k) discovery, as it discourages discovery generally, and in fact precluded meaningful discovery by its ruling in May of 2015. The City's subsequent discovery filed against Riffin and developer in 2016 arose from statements and actions by Riffin and the developer that implicated them in an effort to subvert the OFA process or engage in a variety of extortion against other developers, Conrail, and the City in Jersey City. It did not involve Section 110(k), except to the extent it serves to confirm the destructive intent of City et al's counter-parties.

The only additional fact to add is that the agency per ALJ Dring's order of October 26, 2016, has cut off all discovery after December 15, and has required completion of all discovery by December 31. Since Conrail and the developer respond to all discovery requests with objections, the only way STB permits

discovery is by motion to compel. The overall discovery process thus takes about four months per round. Thus there has been no discovery opportunity on Section 110(k) issues, and there is none now.

IV.

In conclusion, City et al stand ready to cooperate with STB in any meaningful investigation that the agency undertakes to discharge its obligations under Section 110(k). City et al urge STB to do so forthwith. There can be no meaningful comment under Section 106 until the Section 110(k) issues are resolved. In addition, the agency cannot authorize an abandonment west of Marin Boulevard given the anticipatory demolition of a National Register-eligible asset in the line west of that location, unless the status quo before the unlawful sale to the developer is restored, or the City is allowed by OFA or otherwise to acquire that property.

Respectfully submitted,


Charles H. Montange
for City of Jersey City,
Rails to Trails Conservancy,
and Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition

Of counsel: Andrea Ferster
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Rails to Trails Conservancy
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Tel: (202) 974-5142

Att(s). Letter, ACHP to STB OEA, August 4, 2016
Letter, STB OEA to ACHP, Sept. 21, 2016

cc. (with attachments)
Charlene Dwin Vaughn
Assistant Director, Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street NW
Washington, DC 20001-2637

Kate Marcopul, NJ State Historic Preservation Office
Andrea Tingey, NJ State Historic Preservation Office



Preserving America's Heritage

EI-25314

CN

AB 167 (1189X)

August 4, 2016

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

Ref: *Harsimus Branch proposed rail line abandonment*
Jersey City, New Jersey

Dear Ms. Rutson:

The Advisory Council on Historic Preservation (ACHP) has been made aware of consulting party concerns regarding the referenced undertaking's adverse effects on historic properties. Based upon background information provided by the Surface Transportation Board (STB), activities undertaken by the Conrail Railroad Company (Applicant) in advance of complying with the requirements of Section 106 of the National Historic Preservation Act (54 U.S.C. Sections 300101 et seq.) (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), may have resulted in adverse effects to historic properties. As we understand, the Applicant may have abandoned the Harsimus Branch rail line prior to requesting STB's approval of the rail line abandonment. Likewise, this activity occurred before the Section 106 process was initiated by STB. Since numerous local stakeholders are concerned about the applicability of Section 110(k) to this undertaking, we are requesting that STB investigate this matter before it proceeds with the Section 106 consultation.

Section 110(k) of the National Historic Preservation Act (NHPA) prohibits a Federal agency from granting a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid Section 106 of the NHPA, has intentionally significantly adversely affected an historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur. In this case, we understand that STB intends to carry out the four-step Section 106 review so that it can decide on whether or not to approve the Harsimus Branch rail line abandonment. Since the Applicant has already sold the land on which the rail line was laid, this complicates STB's review of effects on historic properties and may compromise STB's ability to comply with the requirements of Section 106.

In accordance with Section 110(k), the agency must consult with the ACHP when determining whether mitigating circumstances justify granting the approval of the rail line abandonment. Should STB conclude that the actions of the Applicant were important and critical to the abandonment that triggered Section 110(k), STB must explain why circumstances may justify granting the approval. STB should provide us with documentation specifying the circumstances, including the degree of damage to the integrity of any historic properties affected. Further, it must clarify if the abandoned Harsimus line is National Register

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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eligible, and what effect has resulted from the abandonment. STB also must explain how it will proceed with the Section 106 review, and comply with Sections 800.3 through 800.6 of our regulations.

Should STB determine that a finding of "no historic properties affected" or "no adverse effect" is appropriate, it will need to consult with the State Historic Preservation Officer (SHPO) and other consulting parties and determine whether they objected to this determination. If no timely objection is filed, STB can complete the Section 106 review. However, should STB determine that this undertaking will result in an adverse effect on historic properties; STB will need to consult with other consulting parties to resolve the adverse effects. This includes developing measures to further avoid, minimize or mitigate adverse effects. Given the widespread public interest in this project, as well as the complexity of addressing the anticipatory demolition, the ACHP will participate in the Section 106 review. Accordingly, we will notify the STB Board that this undertaking invokes Appendix A of our regulations, and we believe our participation is warranted.

We look forward to receiving STB's response to this matter. If you have additional questions, or require further assistance, please contact Najah Gabriel at (202) 517-0210 or via email at ngabriel@achp.gov.

Sincerely,

A handwritten signature in cursive script, reading "Charlene Dwin Vaughn".

Charlene Dwin Vaughn, AICP

Assistant Director

Office of Federal Agency Programs

Federal Permitting, Licensing, and Assistance Section



Office of Environmental Analysis

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

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September 21, 2016

Charlene Dwin Vaughn
Assistant Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street NW
Washington DC 20001-2637

*Re: STB Docket No. AB-167 (Sub-No. 1189X), Consolidated Rail Corporation -
Abandonment Exemption - in Hudson County, NJ*

Dear Ms. Vaughn,

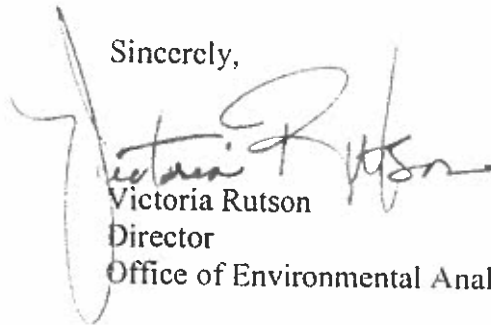
The Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) appreciates your August 4, 2016, letter regarding the National Historic Preservation Act (NHPA) Section 106 process for the Harsimus Branch rail abandonment proceeding and the need to address the question of whether a Section 110(k) violation may have occurred. As OEA has previously indicated, the Board will fully consider the Section 110(k) question in making its final determination on whether or not to authorize the abandonment of the Harsimus Branch and, if so, what conditions to impose to avoid, minimize, or mitigate adverse effects. For the reasons discussed below, OEA agrees with ACHP that it is appropriate to proceed with the Section 106 process (and the environmental review process under the National Environmental Policy Act (NEPA)) while investigating but before making a determination with respect to Section 110(k).

As you know, OEA formally re-initiated the Section 106 consultation process in this case approximately a year ago. Since then, OEA has made significant progress and the assessment of adverse effects of the undertaking on historic properties is well underway. Attempting to conclude the Section 110(k) inquiry prior to proceeding with OEA's Section 106 review would be counterproductive and would result in unnecessary delay. Discovery is currently ongoing, and the Board has expressly held that the parties may seek discovery of information and documents that are relevant to the question of whether a Section 110(k) violation occurred under the circumstances at issue here. Following the close of discovery, the parties will present arguments to the Board addressing, among other matters, whether, in their view, a Section 110(k) violation took place. The discovery and subsequent pleading process before the Board in this proceeding is unlikely to conclude for some time. Until it does, the Board will not have before it a full record on the Section 110(k) issue.

As a result, the most expeditious and efficient way to proceed is for OEA to continue with the Section 106 (and NEPA) process at the same time discovery and the filing of pleadings to the Board based on that discovery is taking place. After discovery ends, the parties' final pleadings are filed, and OEA completes its environmental and historic review, and makes final conclusions and recommendations to the Board (following ample opportunity for input from the Advisory Council on Historic Preservation (ACHP), the State Historic Preservation Officer, consulting parties, and the public), the Board will have the information it needs to rule on the proposed abandonment and address the environmental and historic preservation issues, including those involving Section 110(k). Allowing OEA to continue moving forward with the Section 106 review while the Board is conducting its Section 110(k) inquiry will, I believe, encourage a more efficient and effective review of this proceeding.

We are pleased that ACHP has decided that it will participate in the Section 106 review here and look forward to continuing to work closely with you, as well as all interested parties, as the Board continues to meet its NHPA obligations in this proceeding.

Sincerely,

A handwritten signature in dark ink, appearing to read "Victoria Rutson", is written over a large, light-colored oval shape that serves as a background for the signature.

Victoria Rutson

Director

Office of Environmental Analysis