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March 22, 2004

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ENTERED
Office of Proceedings

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

MAR 29 2004

Part of
Public Record

Re: STB Docket No. AB-167 (Sub-No. 1095X), Consolidated Rail Corporation -
Abandonment Exemption - In Lancaster and Chester Counties, PA -
Response to "Petition" of Lancaster County for Interim Trail Use

Dear Mr. Williams:

Norfolk Southern Railway Company, Lessee and Operator of Pennsylvania Lines, LLC, Successor to Consolidated Rail Corporation, will not consent to the issuance of a Notice of Interim Trail Use in this docket or negotiate with Lancaster County for interim trail use of the former line of railroad that is the subject of this proceeding, as requested by the County in its "petition" dated March 17, 2004, although not listed on the Board's web site as filed as of March 19, 2004. NSR requests that the Board deny the request for a NITU, proceed expeditiously to complete the historic preservation process, the last remaining issue in this proceeding, and thus conclude this long-delayed matter.

We frankly are baffled by the County's assertion that a sentence in the Board's Section of Environmental Analysis's October 20, 2003 notice in this proceeding that NSR would consider a proposal for trail use that met certain specified criteria means that NSR should be taken to agree to issuance of NITU in this proceeding and that this "willingness to discuss trail use justifies reconsideration of the STB's prior orders concerning the subject rail line," although no explanation of, or precedent or other support for, this statement is provided. The County's conclusion, which is drawn from a statement that is not directly quoted, is not only overdrawn and out of context, but is flatly contradicted by SEA's full statement and overall discussion of trail use. It is also directly contrary to NSR's written comments both before and after the date of the notice in this proceeding, all of which have been served upon the County. Furthermore, NSR has given the County oral

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advice on more than one occasion, including within the past week, that it would not agree to the issuance of a NITU in this proceeding or negotiate with the County unless it could reach a prompt and unanimous agreement with the Townships and Pennsylvania DOT.

Just one page after the sentence on which the County relies, in footnote 7 on page 5 of SEA's notice, SEA states: "NS has indicated that although it might agree to a proposal to use this right-of-way as a trail under the circumstances discussed above, it does not believe that issuance of a trail condition by the Board (a notice of interim trail use or NITU) would be appropriate here. If NS continues to take this position, any trail use would have to be by private arrangement of the parties following consummation of the abandonment and conclusion of the section 106 process."

SEA's notice also clearly states that NSR would consider a proposal that was "made promptly so as not to delay the conclusion of this proceeding," "completely satisfies all of [the Townships and PennDot]" and "is acceptable to [the PUC]." The notice also stated: "NS also has indicated that it will honor the settlement agreements entered into by Conrail and approved by PUC....NS has indicated that any agreement with a potential trail sponsor to use the right-of-way as a trail would have to be acceptable to the Townships and PennDOT." SEA's conclusion to this section, to which footnote 7 above was attached, was "....it would be inappropriate for the Board to force the parties to negotiate or to include a trail use condition as part of the section 106 mitigation measures for this proceeding."

Footnote 16 of NSR's December 2, 2003 comments in response to the October 20 notice reads: "This proceeding should not be delayed for further consideration of trail use alternatives to the Stipulation of Settlement. NSR only would agree to modify the Stipulations of Settlement or to convey the property to another party upon agreement of all of the Townships, PennDOT and the PA PUC, and only if the modification or substitution of another party did not result in additional costs or obligations to Conrail or NSR, continued to relieve the railroad of further responsibility for the property and protected Amtrak's easement and rights with respect to the location and maintenance of the electric power transmission line on the Line. We believe that there is little chance that such an agreement can be reached in a timely manner. Lancaster County, or other parties interested in ownership or use of the property, should deal with the Townships with respect to that ownership or use after the Townships have taken ownership and possession of the property to be conveyed to them under the Settlement Agreements."

The concluding section of NSR's December 2, 2003 comments reads in part:
"X. The Board Should Not Further Delay Completion of a Final MOA Essentially as Now Drafted or Performance of That MOA as Full Mitigation of Any Adverse Historical Effects

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From Abandonment of the Line for Trail Use Negotiations.

"While the Line still could be converted to a trail after the conveyance of the most significant middle segment of the Line to the Townships, that should now be a matter for the government entities to decide, in consultation with each other and their citizens, after the MOA documentation is completed and the Settlement Agreements are implemented. Most of the property, after all, will be placed under public ownership.

"NSR's main concern is that further delay in concluding this proceeding and conveying the property to the Townships (or if they all promptly agree, to another governmental entity or responsible party) be avoided. Conrail negotiated for years for a possible trail use agreement, without success. Moreover, NSR stated in comments almost a year ago that trail use could be achieved if a prospective trail user stepped into the position of the Townships, with their approval, required no more of NSR (or PRR or Conrail) than is required by the Settlement Agreements, and protected Amtrak's electric power transmission line and easement. Yet, no serious negotiations have taken place and no serious proposal has been placed on the table. Further delay for unnecessary exploration of trail use is unwarranted. That use is not precluded by transfer of the property to the Townships. In view of the Settlement Agreements and the PA PUC order, as affirmed by the Pennsylvania Supreme Court, NSR is bound to provide performance of Conrail's obligations under the Settlement Agreements, and as noted above, the Board cannot require otherwise.

"NSR certainly would like to substantially reduce or totally avoid the documentation of the Line required by the MOA that might be achievable if the Line were to be converted into a trail, but we also wish to avoid further delays in concluding this matter and must acknowledge the commitments previously made by, or required of, Conrail.

"While the Board should not delay finalization of the MOA and its performance, and NSR will proceed with that performance as soon as possible, we would not reject a reasonable and specific proposal from a responsible party such as Lancaster County, to take over the duties and obligations of the Townships in the Settlement Agreement, provided all the Townships agree to the substitution of that party and the PA PUC approves it, which would not result in extra liability, expense or continuing conditions or responsibilities for NSR, PRR or Conrail, and which would protect Amtrak's electric power transmission line and easement to the same extent as required of the Townships in the Settlement Agreement. NSR would continue to provide the payments and other consideration in the Settlement Agreements but would take on no additional obligations, liabilities or continuing responsibilities or any further obligations or expenses than those required in the Settlement Agreements. Otherwise, we believe there is little more to be

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said or done with regard to this matter or that we can reasonably do consistent with our obligations to our shareholders, our customers, the Townships, PennDOT, the PA PUC and the general public. To propose anything else would force the railroad into an untenable position with regard to its resources and duties to its customers and shareholders, and result in either the Board acting contrary to the ICCTA policies and denying or indefinitely delaying consummation of the abandonment or forcing the railroad to do nothing until someone came forward with funding or a reasonable proposal.

"More than enough time has passed for planning and studies and negotiations. No further delays in permitting the railroad to exit from this situation and to implement the agreement with the Townships or a mutually agreeable alternate arrangement are tolerable. A prolonged period of trail use negotiation prior to any movement toward prompt conclusion of this proceeding is no longer an acceptable way to proceed with handling this matter.

"Further delay hurts the general public most of all. The Townships and PennDOT cannot make needed improvements to roads and bridges, including removal of a few structures, that would promote public safety. The Townships cannot provide adequate clean-up and property protection and security while the property remains in railroad hands. As the record in this proceeding indicates, many public officials and citizens have expressed their urgent desire that this matter be concluded."

The conclusion to NSR's comments was "XI. Conclusion.

"NSR requests that the Board take these comments and suggestions into account in making any further revisions to the MOA, that the Board add no substantial further requirements or mitigation measures to the draft MOA, that no further delays be permitted in concluding the proceeding and that the Section 106 process be promptly concluded in this proceeding."

As have explained more than once, and as we repeated in the December 2, 2003 comments:

"Under the February 25, 1997 Stipulation of Settlement ("Settlement Agreement") between Conrail and the Townships, attached as Exhibit 3, Conrail agreed to convey the real property comprising the Line that was located in each Township, except for certain property in Conestoga Township beyond Milepost 27.0 and the property in West Sadsbury Township, to the respective Townships....

"The PA PUC approved the Stipulations of Settlement in its order entered October 9, 1997 in A-00111016, *Application of Consolidated Rail Corporation for the abolition of*

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31 Crossings of the Enola Branch, LC: 201323, MP 3.5 to MP 27.0, Sub No. 1095X, Harrisburg Division, Lancaster County and C-00913256, *Board of Supervisors of Bart Township v. Consolidated Rail Corporation, Pennsylvania Department of Transportation, and Lancaster County, et al.* Pertinent pages from the lengthy decision and order are attached as Exhibit 5. The PA PUC order was eventually affirmed on appeal to the Supreme Court of Pennsylvania in a brief order without opinion in No. 0782, M.D. Allocatur Docket 1998, *Friends of the Atglen-Susquehanna Trail, Inc. and Historic Preservation Trust of Lancaster County v. Pennsylvania Public Utility Commission*, June 29, 1999, attached as Exhibit 6.

"Upon completion of this proceeding NSR plans to comply with these Settlement Agreements in accordance with the PA PUC order and to make the conveyances and payments specified in those agreements and to perform such other work as the Settlement Agreements require...."

NSR knows of no basis other than the criteria, including complete agreement of all the Townships and PennDOT, that we have already suggested, under which it can disregard, indeed breach, the agreements with the Townships and PennDOT. Indeed, that would also be contrary to the PUC order as affirmed by the Commonwealth Court and the Pennsylvania Supreme Court. Such breach or disregard of the agreement and order would be exactly what NSR's consent to a NITU and negotiations with the County in the absence of the County agreeing with the Townships, PennDOT and the PUC would be.

Moreover, a close examination of the facts would lead to the conclusion that Conrail consummated the abandonment of the subject line, subject only to any conditions in effect and outstanding at the time. If fully examined, this too would preclude the Board from issuing a NITU in this proceeding. See *RLTD Railway Corporation, et al. v. STB, et al.*, 166 F.3d 808 (6th Cir. 1999); *Becker v. STB*, 132 F.3d 60 (D.C. Cir. 1997); *Consolidated Rail Corp. v. STB*, 320 U.S. App. D.C. 130, 93 F.3d 793, 799 (D.C. Cir. 1996).

Inasmuch as Conrail determined that its ownership of the property permitted it to convey the right-of-way at issue to the Townships without use of the Trails Act procedures, those procedures are not necessary for the County or other trail sponsor to reach an agreement with the Townships and PennDOT to use the property in whole or in part as a trail, subject to Amtrak's power line easement, whether that agreement is reached presently or after NSR transfers the property to the Townships. The Amtrak easement alone seems to insure that the length of the entire right-of-way for at least a certain width will be preserved for the foreseeable future. Regardless, the time has long since passed when further delay in concluding this proceeding for further trail use studies or negotiations

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is legally permissible, much less reasonable or necessary.

No amount of delay or study or negotiations can change the effects of the Settlement Agreements and PUC order as affirmed by the Pennsylvania Supreme Court. NSR has no ability to enter into a different deal than the one Conrail made - only the Townships and PennDOT can agree, unanimously, to a change. The Board has long recognized that it lacks jurisdiction either to order a trail use condition under any theory or otherwise to reverse or overturn the Pennsylvania decisions.

From all that has been presented, and news and attendee reports of a recent meeting of County representatives with Township representatives, the County still has no concrete plan or offer and indeed, has made little, if any, progress in convincing the Townships to sign on to any proposal with respect to transfer of the right-of-way to the County, nor has the County presented any definite proposal. Even if it did present something definite, the legal posture of this proceeding precludes further delay for the purpose of reaching an agreement. Moreover, we reiterate that the County can reach an agreement with the Townships and PennDOT, or exercise any other rights it may have under State law, after the property is transferred to the Townships as well as before.

The Board cannot require "rail-banking" and interim trail use arrangements. See Ex Parte No. 55 (Sub-No. 22a), *Implementation of Environmental Laws*, 7 I.C.C. 2d 807 (1991), *National Wildlife Federation v. ICC*, 850 F.2d 694, 698-702 (D.C. Cir. 1988); *Washington State Dept. of Game v. ICC*, 829 F.2d 877, 879-881 (9th Cir. 1988); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 482-483 (2d Cir. 1988). See also *Preseault v. ICC*, 491 U.S. 1, 110 S.Ct. 914, 924 n.8 (1990) (noting that Section 1247(d) has been construed "as not providing federal power to condemn railroad rights-of-way for interim trail use.")

The Board has noted the voluntary nature of trail use conditions and the Board's solely ministerial authority with respect to the issuance of NITU's on many occasions, perhaps most recently in STB Docket No. AB-33 (Sub-No. 189X), *Union Pacific Railroad Company – Abandonment Exemption – in Eau Claire County, WI*, served February 20, 2004. See also STB Docket No. AB-389 (Sub-No. 1X), *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. – Abandonment and Discontinuance Exemption – Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA*, served February 2, 2004 and *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986).

The National Historic Preservation Act is a procedural, not a substantive statute, (as

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and its scope is limited. Section 106 requires the agency (not a private party) that is engaged in or approving a Federal undertaking to consider mitigation of any adverse effects of that Federal undertaking on historic properties. It is clear that no particular substantive result is required and that no project need be prevented because of NHPA. It certainly does not give the Board any authority to impose trail negotiation or trail use conditions despite the lack of Board authority to do so under the directly relevant statutes, the Interstate Commerce Commission Termination Act and the National Trails System Act. See *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (D.C. Cir. 1999); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991).

After a railroad consummates abandonment of a line of railroad, the Board's jurisdiction over the property is ended and the owner of the property, often still the railroad, becomes subject to the processes of State law with respect to the property. *Hayfield N. R. R. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 633 (1984); *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990). See also *Lucas v. Twp. of Bethel*, 319 F.3d 595 (3rd Cir. 2003); ICC [STB] Docket No. AB-55 (Sub-No. 486), *CSX Transportation, Inc. – Abandonment – Between Bloomington and Montezuma, in Parke County, IN* and embraced cases, served September 13, 2002; *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981).

While it may be unusual for any State proceeding with respect to the property to have taken place before the ICC/STB proceeding was concluded, and in many States there would be no such proceeding, the State proceeding also appears to be good evidence that Conrail thought it had consummated the abandonment, except perhaps for compliance with some conditions with respect to documentation of certain bridges. Regardless of the reasons for the timing, the State proceeding would not necessarily be invalid simply because it proceeded in tandem with the STB proceeding. Certainly the State courts, which affirmed the result, did not think so. The State agency order does not appear to deal with on a subject as to which it has no current or at least future jurisdiction or has been pre-empted or to interfere with the Board's jurisdiction or proceeding. The PUC has not tried to enforce any order with respect to property over which it does not or may not yet have jurisdiction. Not only would the Pennsylvania State courts likely hold that the PUC action was not premature or that the timing invalidated it, but the holding in this very case indicates those Courts would hold the State proceeding related to subject matter over which the agency has jurisdiction regardless of the timing of any STB proceeding. No. 3003 C.D. 1997, *Friends of the Atglen- Susquehanna Trail, Inc., v. Pennsylvania Public Utility Commission*, Commonwealth Court of Pennsylvania, 717 A.2d 581; 1998 Pa. Commw. LEXIS 655 (1998).

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The County's proposals are not foreclosed by the inability to secure a NITU or even to reach an immediate agreement with NSR or the Townships and PennDOT. The County simply must work out a deal with the Townships and PennDOT, subject to Amtrak's easement. However, there is no legal basis or other good reason to delay conclusion of this proceeding while they attempt to do so. NSR will not, and indeed we are convinced that we legally cannot, consent to the issuance of a NITU in this proceeding. At this point, we could add little more than to restate the information and reasoning and repeat the position already provided in previous comments in this matter, including our point that further delay is unnecessary and unwarranted. The most pertinent of the comments to the issue presented by the County are restated above. Our requested conclusion thus remains the same, that the Board deny the request for a NITU, proceed expeditiously to complete the historic preservation process, the last remaining issue in this proceeding, and thus conclude this long-delayed matter.

Very truly yours,



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