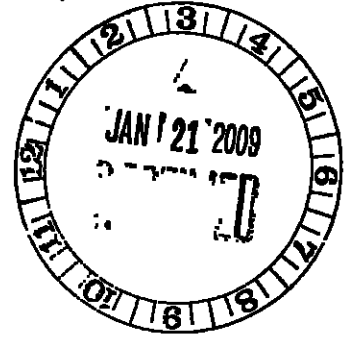


224371

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20 January 2009
by express

Hon. Anne Quinlan
Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

ENTERED
Office of Proceedings
JAN 21 2009
Part of
Public Record

Section of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

Re: Consolidated Rail Corporation - Abandonment
Exemption - in Hudson County, NJ,
AB 167 (Sub-no. 1189X) and related proceedings;

Action requested on or before January 26, 2009, to
prevent ex parte abandonment authorization on that
date.

Madams/Sirs:

Enclosed for filing on behalf of City of Jersey City
("City"), Pennsylvania Railroad Harsimus Stem Embankment
Preservation Coalition ("Coalition"), and Rails to Trails
Conservancy ("RTC") with the Section of Environmental Analysis is
a summary discussion with exhibits showing that section 110(k) of
the National Historic Preservation Act (NHPA), 16 U.S.C. 470h-
2(k), applies in this proceeding.

Pursuant to section 110(k), the agency may not license an
abandonment absent a demonstration of justification for the
illegal sale of the Embankment, and other actions in the nature
of anticipatory destruction of the Harsimus Branch, undertaken by
Conrail before it sought a license from this Board.

On behalf of City, Coalition and RTC I also enclose eleven
copies of this letter, summary and exhibits, for filing with the

Secretary as an official pleading in this proceeding. City, Coalition and RTC note that Conrail filed a "class exemption" abandonment licensing request on 6 January 2009. Under this Board's regulations, the Board would ordinarily grant the Conrail request ex parte twenty days later, which here is January 26. In light of section 110(k), this is inappropriate. The agency should not grant any abandonment license prior to compliance with section 110(k). Compliance with that section requires either dismissal of the Conrail proceeding, or a preliminary finding of justification and consultation with ACEP to determine whether the justification is sufficient to proceed further. City, Coalition, and RTC in an Opposition to a Conrail procedural motion filed on January 15, 2009, have already suggested a housekeeping stay while the agency considers what to do. In all events, the agency should prevent an abandonment authorization from being published on January 26.

STB on April 23, 2008, issued a policy statement which included the following language, obviously directly germane here:

"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. The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them."

Consummation of Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, STB Ex Parte No. 678, served April 23, 2008, slip op. at p. 4.

Consonant with our Opposition filed January 15, 2009, City, Coalition and RTC request SEA to recommend dismissal of this proceeding under section 110(k) (since Conrail provides no justification for its actions and since there is no legitimate justification in any event), and further request such dismissal by STB. If a motion to dismiss is required, City, Coalition and RTC so move for the reasons expressed in the attachment.

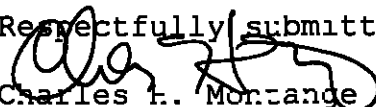
If SEA instead recommends a finding of possible justification, then City, Coalition and RTC have requested consulting party status under the NHPA, and wish to consult with the Board, the New Jersey State Historic Preservation Officer

(SHPO), and ACHP concerning any such finding before any abandonment authorization is issued.

Under state law, Conrail must notify local agencies when it receives abandonment authority and afford them 90 days to exercise eminent domain before sale to a developer. Deeds, such as those Conrail issued to its developer, are void if a local government seeks to acquire under the statute. N.J.S.A. 48:12-125.1. Due to federal preemption, City cannot exercise eminent domain prior to an effective abandonment authorization. It will take far more than 90 days from January 26, 2009, to comply with section 106 and section 110(k) of NHPA. As Conrail notes in its Motion filed January 6, 2009, at p. 3, section 106 compliance can take several years. Conrail will simply reissue its deeds to the developer, and has already indicated that is what it will do. Conrail Comments filed Jan. 6, 2009, at p. 18 n. 14. This unreasonably deprives City, Coalition and RTC of a state remedy against Conrail that would keep the property intact consistent with NHPA. For this and other reasons, issuance of an abandonment authorization prior to full compliance with the NHPA (both section 110(k) and section 106) is extremely prejudicial to City, Coalition, and RTC.

By my signature below, I certify service of this document upon Robert Jenkins, III, Mayer Brown, 1909 K Street, NW, Washington, D.C. 20006, by deposit with an express service, next business day delivery, on 20 January 2009, and on all other parties on the service list available on the STB website by U.S. Mail, postage pre-paid, on the same date.

Respectfully submitted,


Charles E. Montange

for City of Jersey City,

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

Of counsel:

Andrea Fester

General Counsel

Rails to Trails Conservancy

2121 Ward Court, NW, 5th Floor

Washington, D.C. 20037

Encls.

cc. Counsel and parties, as indicated (w/encls)