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12 March 2009
by express

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

ENTERED
Office of Proceedings

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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 (Sup-no 1189X) and related proceedings

Madams/Sirs:

Enclosed for filing on behalf of City of Jersey City ("City"), Pennsylvania Railroad Hersimus Stem Embankment Preservation Coalition ("Coalition"), and Rails to Trails Conservancy ("RTC") in the above referenced proceeding, please find the original and ten copies (for the Secretary) and one copy (for SEA) of a Restatement and Reservation of Rights.

In a policy statement published some eleven months ago, STB said as follows:

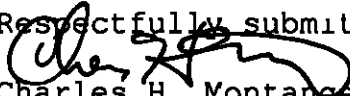
"In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the 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. 673, served April 23, 2008, slip op. at p. 4.

The issue is not just the agency's obligations, but providing the public with the protection that is intended under the statutes this Board is obligated to enforce.

Respectfully submitted,


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

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Encls.

cc. Counsel per certificate (w/encls)

BEFORE THE SURFACE TRANSPORTATION BOARD

CONSOLIDATED RAIL CORPORATION)
- ABANDONMENT EXEMPTION -) AB 167 (Sub-no. 1189X)
IN HUDSON COUNTY, NJ)

Restatement of Previously Requested Relief
and
Reservation of Rights

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

Consolidated Rail Corporation ("Conrail") originally filed a "notice of exemption" under 49 C.F.R. 1152.50 on January 6, 2009, along with a request for waiver of certain pre-filing requirements. In view of the controversial nature of the proposed abandonment, including application of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, to the line in question (known as the "Harsimus Branch"), Conrail proposed a stay on the effectiveness of any abandonment pending a schedule it proposed for addressing historical preservation issues. Although City, Coalition and RTC certainly agreed that the abandonment was controversial and that procedures in addition to those normally required in 49 C.F.R. 1152.50 proceedings were appropriate, City, Coalition and RTC objected generally to use of class exemption proceedings at all, and requested other relief. See Opposition, and Summary Statement Concerning Section 110(4)

and Exhibits, filed January 15 and 21, 2009, respectively, by City, Coalition and RTC in this docket.¹ This "other" relief included, among other things, preparation of an environmental impact statement in the event any proceeding seeking abandonment was filed, and consultation with the Advisory Council on Historic Preservation (ACHP) due to conduct by Conrail which results in foreclosure of meaningful comment opportunity under NHPA section 106, as well as anticipatory demolition under NHPA section 110(k), 16 U.S.C. 470h-2(k). City, Coalition and RTC also requested a housekeeping stay pending STB resolution of the issues. And of course, City, Coalition and RTC have repeatedly indicated that the Conrail's unlawful and unauthorized deeds out to entities affiliated with SLH Properties (Conrail's chosen developer) should be invalidated by this agency.²

¹ City, Coalition and RTC had filed additional pleadings critical of Conrail's proposed use of the class exemption process, and expressing numerous concerns about Conrail's efforts to reap the benefits of its unlawful sale of the Harsimus Branch without required prior authorization from this agency. E.g., pleadings filed April 7 and April 28, 2008. Numerous other parties have been objecting to Conrail's de facto abandonment actions, and have been seeking relief from Conrail's efforts to "get away with it" since this docket opened approximately a year ago.

² There is absolutely no question concerning the illegality of Conrail's sale of eight blocks of the Harsimus Branch at issue here to entities affiliated with SLH Properties. The Branch is a line of railroad. City of Jersey City, et al. - Petition for a Declaratory Order, F.D. 34818, Decision served August 9, 2007, reconsideration denied Dec. 19, 2007. There is no question but that SLH Properties is a non-carrier: it is seeking to demolish the rail structures remaining on the Branch and put townhouses or

In a Decision served January 26, 2009, the agency, per the Director of the Office of Proceedings, denied Conrail's request for waiver, and rejected Conrail's notice of exemption for

worse in their place. Indeed, Conrail and SLH Properties witnesses were testifying for demolition permits at a local hearing in Jersey City for this end on March 9, 2009. But "[b]ecause the track in question is a 'line of railroad,' the prior approval of the ICC [predecessor to STB] would have been required before [developer] could have lawfully acquired the track in 1988. The ICC's jurisdiction to approve the acquisition of a line of railroad was exclusive and plenary. ... Pittsburgh & Lake Erie Railroad Company v. FLEA, 491 US. 490, 498 (1989) ('The proposed sale of assets could not be carried out without compliance with the terms of the [federal rail regulatory statute] which requires that noncarriers seeking to acquire a rail line first obtain a certificate of public convenience and necessity from the ICC.')." Columbiana County Port Authority v. Boardman Township Park District, 154 F.Supp. 2d 1165, 1174 (N.D. Ohio 2001) (emphasis added). In short, SLH Properties is not authorized to own the property. The sale to it was illegal.

It is surprising that Conrail persists in such unlawful disregard of this Board's authority. It is not some novice owner of a small short line. It is chargeable with knowledge of the law. It knows that unlicensed de facto abandonment is illegal. As explained in GS Roofing Products Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998), railroads are subject to a number of duties, including a common carrier obligation. This is a reflection of "the well-established principle that railroads 'are held to a higher standard of responsibility than most private enterprises.' General Foods Corp. v. Baker, 451 F.Supp. 873, 875 (D.Md. 1978). See also Ethan Allen, Inc v. Maine Cent. R.R. Co., 431 F.Supp. 740, 742-43 (D.Vt. 1977) (noting that 'the quasi-public nature of railroads entails a higher degree of public responsibility than is required of most private corporations). Thus, a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable. In addition, a railroad may not unilaterally abandon a line at its own election; it must instead apply for and receive permission from the proper administrative agency. See General Foods, 451 F.Supp. At 875-76." Emphasis added.

failure to comply with procedural requirements under 49 C.F.R. 1152.50. This mooted the relief requested by City, Coalition and Conrail.³

On February 26, 2009, Conrail re-filed a notice of exemption invoking 49 C.F.R. 1152.50 for the portion of the Harsimus Branch from what appears to be CP Waldo to end of line near the Hudson River waterfront in Jersey City.⁴

City, Coalition and RTC hereby restate all of their motions and reservations in connection with Conrail's "notice of exemption." For the reasons City, Coalition and RTC have previously stated, Conrail should not be allowed to use the class exemption process. Indeed, Conrail itself agreed that this Board's class exemption regulations were inadequate to treat the environmental and historic preservation issues that are presented in this case; the railroad itself proposed supplementary procedures in connection with its January 6 filing. For the reasons City, Coalition and RTC previously stated, this case is

³ Since the rejection of the notice filed by Conrail mooted the various motions and requests of City, et al., further discussion of those motions, if touching the merits, was merely dicta.

⁴ Conrail for some reason refuses to use the milepost designation system employed in the original PRR, Penn Central and initial Conrail track charts for the Harsimus Branch. Conrail appears to be proposing abandonment of the Branch from approximately MP 1 (roughly the Hudson River) to approximately MP 2.54 (CP Waldo) in the old track charts used by its predecessors (and by USRA). E.g., Penn Central track chart 1-1-75, served May 23, 2006, in F.D. 34818, line code 1420, Harsimus Branch.

not appropriate for the class exemption process and Conrail's notice should be dismissed on that basis.

The Harsimus Branch at issue in this proceeding encompasses the Harsimus or Sixth Street Embankment, which is eligible for listing on the National Register of Historic Places. The Branch itself was the freight mainline of the Pennsylvania Railroad and City, Coalition and RTC understand that the State Historic Preservation Officer regards it as eligible for listing in its own right. Moreover, the line is the boundary between two National Historic Districts. Abandonment in the circumstances here will be an adverse impact not only on the Embankment and the Branch, but the adjoining Historic Districts.

Conrail stubbornly sold the bulk of the line at issue here to a developer (referred to herein and in other pleadings as "SLH Properties") in disregard of this agency's exit (abandonment) jurisdiction. The only reason for such an action was pique by the railroad at the determination that the Embankment was eligible for the National Register. The railroad sought to cram down destruction of the Embankment through de facto abandonment in order to evade application of section 106 of the National Historic Preservation Act and other environmental statutes. Consonant therewith, Conrail's chosen developer sought demolition permits for the Embankment, precipitating a declaratory proceeding brought by City, Coalition and RTC for a determination

that the Harsimus Branch was a line of railroad, and that the sale to the developer (SLH Properties) without STB abandonment approval was unlawful. This Board so determined in F.D. 34818, decision served August 9, 2007.

Yet Conrail and SLH Properties continue vigorously to pursue demolition of the Embankment and destruction of the Branch. SLH Properties (with active Conrail support) obtained state court orders requiring the City's Historic Preservation Commission to hold hearings on the demolition permits on March 9, 2009. The Court orders purport to require the HPC to ignore STB jurisdiction notwithstanding this agency's exclusive and preemptive authority. 49 U.S.C. 10501(b).

To compound matters, Conrail takes the position that this Board lacks jurisdiction over the property it unlawfully sold to the developer. Although Conrail claims it will go through an exercise of complying with section 106, the developer has not submitted to this Board's jurisdiction and has indicated an intent to pursue demolition under local authority. If this Board authorizes abandonment effective pursuant to standard practice under 49 C.F.R. 1152.50, then Conrail and SLH Properties hope to reap the benefits from Conrail's earlier unlawful de facto abandonment and sale to SLH Properties. This Board's jurisdiction will have been rendered meaningless, except as a means used by Conrail to frustrate the City from use of its

eminent domain authority to preserve the Branch. The Board should not so allow its processes to be abused. Laws which are supposed to protect the public interest in fostering preservation of historic assets and encouragement of alternative public use of otherwise-to-be abandoned railroad rights of way should not be perverted into lipservice and contrivances used to prevent preservation and alternative public use.

As City, Coalition and RTC have repeatedly indicated, Conrail and SLH are in effect foreclosing any opportunity for meaningful comment under section 106, and have engaged in anticipatory demolition. No abandonment should be authorized, and certainly no abandonment authorization should become effective, until this Board has complied with section 106 and with section 110(k) of the NHPA. In addition, this situation is, as City, Coalition, and RTC previously have pointed out, appropriate for requiring an environmental impact statement (EIS). The EIS process would be an excellent vehicle to ensure adequate analysis not only of adverse impacts on the numerous historic resources affected by Conrail's proposed abandonment, but also of impacts on other environmental concerns.

Finally, City, Coalition and RTC are aware of Board precedent that even public use conditions are not available where a railroad claims it no longer owns any property in a line. This precedent is similar to that cited by Conrail for the proposition

. . .
that section 106 does not apply to the property since Conrail no longer owns it. Since Conrail illegally sold it without Board authorization, this Board obviously should protect its own jurisdiction, and the public interest, by voiding all Conrail's deeds issued prior to effective abandonment.

City seeks to protect a corridor for rail use and other compatible public purposes at least from Washington Street to CP Waldo. It cannot do so if this Board fails to enforce its abandonment jurisdiction by allowing Conrail to deed out all the property for non-rail and non-public use without even a nod at this Board's abandonment jurisdiction. That jurisdiction is meaningless to the public if the Board does not enforce it. Its purpose is not to facilitate illegal actions by Conrail but to protect the public interest.

In any event, as City, Coalition and RTC have repeatedly indicated, the Conrail deeds to SLH Properties are void under state law. Conrail and SLH are attempting to circumvent this result by maintaining a frivolous appeal of this Board's determination that the Harsimus Branch is a line of railroad.

City, Coalition and RTC understand from the Advisory Council on Historic Preservation that STB staff have requested ACHP staff to wait until the end of March to see what STB does before ACHP evaluates whether intervention is appropriate in this case. City, Coalition and RTC understand that this Board's

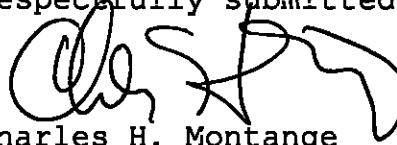
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environmental office will issue an environmental assessment roughly five days after this Board issues the ex parte notice of exemption authorizing 49 C.F.R. 1152.20 abandonment, to which we object. City, Coalition, and RTC reserve the right to file further motions and to seek other appropriate relief after analyzing what STB does by the end of the month. City, Coalition, and RTC reiterate their position that the class exemption process provides inadequate time to consider the issues germane to protection of the public interest.

Conclusion

Reserving the right to comment further and to make additional motions and to seek other appropriate relief after this agency issued its environmental assessment, City, Coalition and RTC restate and readopt all of their previous objections to use of a class exemption in this proceeding, and restate and readopt all of their previous motions against use of 49 C.F.R. 1152.50. No abandonment authorization should be allowed to become effective absent full compliance with sections 106 and 110(k) of the NEPA, and absent an EIS. The Conrail deeds to the developer, SLH Properties, should be voided by this agency. They are also void under state law

Respectfully submitted,



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Certificate of Service

I hereby certify service of the foregoing on 12 March 2009
by deposit for express (next business day) delivery addressed to
Robert Jenkins III, Mayer Brown, 1909 K Street, NW, Washington,
D.C. 20006.

