

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Reply by Jersey City
to Consolidated Rail Corporation's
Motion to Reject the OFA Process
and
Request for Clarification

City of Jersey City ("City") hereby opposes the de facto motion filed on April 1 by Consolidated Rail Corporation ("Conrail") purportedly to reject the "offer of financial assistance" ("OFA") process in this proceeding.

City also requests clarification of what the Board means in a footnote in its April 6 decision in this proceeding relating to the schedule under which the Board intends to address OFA matters.

Background

This Board granted an ex parte notice of exemption for abandonment was granted by this Board, with Federal Register publication on March 18, 2009, pursuant to 49 C.F.R. 1152.50, effective on April 17, 2009. Prior to the due date (March 30) given in the Federal Register notice for filing notices of intent to file an offer of financial assistance ("OFA") in this proceeding, two parties (CNJ Rail Corporation and City of Jersey City) filed such notices. Under this Board's regulations relating to application of the OFA remedy in ex parte notice of

exemption abandonments, the effect of such a filing is to stay any abandonment for ten days beyond the ordinary effective date. This automatically shifted the effective date from April 17, 2009 until April 27, 2009. In an order served April 16, this Board subsequently suspended the effective date until environmental issues can be addressed.

An OFA is ordinarily required on the 30th day after Federal Register publication (here, that day would be April 17). However, this Board's regulations permit OFA applicants to request certain information from the railroad, and require the railroad promptly to furnish it, for it is germane to preparation of an OFA. If the information is not supplied, then the OFA applicant may request a tolling of the time period for OFA, provided that request was made on or before the 25th day from Federal Register publication. In this proceeding, both CNJ and City timely requested the information, but Conrail has provided none. Both CNJ and City have timely requested tolling.¹ A tolling decision is due no later than April 22. See 49 C.F.R. 1152.27(c) (2) (ii) (C).

In effect, under the Board's regulations for application of the OFA remedy in ex parte abandonment exemption cases, when a

¹ CNJ requested a stay pending the provision of information in its original notice of intent to OFA. City reserved the right to request a stay in its original notice of intent, and when Conrail made clear it would not supply information, City requested a stay pending provision of the information in a pleading filed April 7.

notice of intent to file an OFA is submitted, the only "reply" is for the railroad against whom the notices are directed is to serve promptly the information requested.

City hereby confirms that, as of April 21, Conrail thus far failed to supply any information whatsoever to City in response to City's requests. As of April 15 (when counsel inquired of CNJ), CNJ reported that it had received no information either.

On April 1, Conrail filed what it termed a "reply" to the notices of intent to file an OFA. The "reply" is a de facto motion for an exemption from the OFA process, but it also serves as a confirmation by Conrail that it is providing no information responsive to City's and CNJ's requests. There is an STB regulation which provides for an automatic stay of the due date for OFA's when the railroad advises the Board that it requires more time to address informational requests. See 49 C.F.R. 1152.27(c)(2)(ii)(D). Conrail's April 1 "reply" is thus tantamount to a claim that the railroad needs more time to prepare the requested information. As so read, this automatically tolls the due date for OFA's.

In a pleading dated April 3 (the agency does not record it as filed until April 7), City indicated it intended to reply to Conrail's de facto motion to reject the OFA process within the 20 day period allowed by STB regulations, but requested a seven day extension to permit counsel to attend the April 20 oral argument

in Washington, D.C., in a related proceeding, Consolidated Rail Corporation v. STB, D.C. Cir. No. 07-1401.

In a decision served April 6, this Board responded to a request by Embankment Preservation Coalition for more time for environmental comments by extending the due date for such comments and the effective date for the abandonment by 30 days. In addition, in a decision served April 16, this Board indefinitely stayed the effective date for the abandonment.

In a footnote to the April 6 decision, the Board indicated that it intended to address the notices of intent to file OFA at the conclusion "of the environmental phase of this proceeding." Decision at 1 n.1, (late) served April 6, 2009.

I. Reply to Conrail De Facto Motion
for an OFA Exemption

A. Overview of Law Concerning
Exemptions from OFA

Since no OFA is yet due, or has been filed, in this proceeding, Conrail's motion in effect is a motion to reject the entire OFA process. This amounts to a motion to exempt this proceeding from the otherwise applicable OFA remedy.

This Board almost never grants exemptions from the OFA process in abandonment proceedings, even when requested not just by the railroad, but by the local governments and even any shippers. For practical purposes, exemptions are limited to instances in which there is a "compelling public need" for the

property. As this Board succinctly explained in Sea Lion Railroad - Abandonment Exemption - in King County, WA, AB 544X, served Aug. 11, 1998,

"Exemption from the OFA provisions of section 10904 are only rarely granted (i.e., there must be a compelling need to use the property for a valid public purpose and no overriding public need for continued rail use). See, e.g., Norfolk and Western Railway Company - Abandonment Exemption - in Cincinnati, Hamilton County, OH, STB Docket No. AB 290 (Sub-no. 184X) (STB served May 13, 1998) and cases cited there a p. 11."

Slip Op. pp. 6-7. The Sea Lion case is especially interesting because it involved a private agreement securing continued rail service under the Board's modified public convenience and necessity regulation (49 C.F.R. 1152.21, et seq.). The Board explained that even where there was a private agreement for continued rail service, "[i]t would be inappropriate for us to subordinate [the OFA] process to a private agreement simply because the interested parties find it preferable to use such a mechanism." Slip at 7.

The reason the Board rarely grants exemptions, except in the face of a compelling public need, is articulated in Yakima Interurban Lines Association - Abandonment Exemption - in Yakima County, WA (YILA), AB 600 (sub-no. 1 X), served Feb. 17, 2006.

In that case, this Board refused to grant an exemption from OFA requested by the railroad and the local county for an unused and broken up line, despite a representation that state financing for rehabilitation would not be available unless the line were owned by the county. The Board stated that "[t]he OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned." Slip at 2. The Board indicated that it viewed a notice of intent to OFA as "present[ing] the possibility of preserving rail service pursuant to the method provided by Congress."

In light of the congressional interest in preserving any prospect for continuing or resuming rail freight service, the issue of current rail need - that is, existing actual shippers - is only a matter of concern if a local government or its surrogate is arguing that there is a compelling public need for some other use of the line. Otherwise, the fact, if it is a fact, that there are no current shippers is irrelevant.

If there is a "compelling" public need for the property to be devoted to some non-rail public purpose, then actual current rail need becomes relevant. If the Board finds a compelling public need for a line, then the Board sometimes grants an OFA exemption if it determines that public need outweighs the public need for continued rail service. But the key point is that the

Board enters this inquiry only when faced with a compelling public need for non-freight rail use. Otherwise, the Board allows the OFA process to continue, in deference to the Congressional policy to "preserve, whenever possible, any prospect for continuing or resuming rail freight service...."

YILA p. 2. This policy of deference to the OFA applicant absent a conflicting compelling public need should be especially strong for OFA's by State and local governments, like that of City, since the Board has an entire regulatory program ("Modified Certificate of Public Convenience and Necessity," 49 C.F.R. 1150.21-.24)) to encourage state and local governments to preserve abandoned or about-to-be abandoned rail corridors. Under that program, local governments can acquire lines and arrange for any common carrier service to be predicated upon conditions, like shipper guarantees to furnish rehabilitation expenses or sufficient minimum carloadings to cover projected expenses of operations. The Board makes no "feasibility" assessment under that program, and its case law plainly shows it does not do so absent a "compelling public need" in OFA's either.

B. Conrail's OFA Exemption Is Contrary to Law

Here, Conrail makes no showing - or even an argument - that an OFA exemption would serve a compelling public need. Instead, Conrail seeks an exemption in order to thwart City's efforts to acquire the line for compelling public needs and for resumption

of rail service. In fact, as the record shows in F.D. 34818 and in this proceeding as well, prior to Conrail's seeking, much less obtaining, abandonment authorization in this proceeding, Conrail purported to sell all of its interests, retaining not even a rail easement, to a developer for non-rail use of the rail corridor. Conrail in related proceedings has dismissed any public need, and actively seeks to secure the property for private use, not public use. It aggressively states that it will not cooperate to accomplish any public use whatsoever. Conrail cites no case where an exemption has been sought, much less granted, in such circumstances. Given Conrail's basic anti-public use posture, this proceeding is clearly not appropriate for an OFA exemption. The basic criterion for such an exemption is simply not met.

Since Conrail shows no "compelling need," there is no requirement for City to show a current freight rail need sufficient to overcome the compelling public need that Conrail failed to show. It is enough that City's OFA serves the Congressional purpose of preserving the prospect of resumption of service, and this is especially the case since the OFA is by a government, and this Board's "Modified Certificate" program has long envisioned similar acquisitions for the such purposes without any showings of current rail need.

In any event, the City has a "compelling need" for the property, but the City's OFA is fully consistent with that need.

The fact that the OFA remedy serves the City's needs is not ground to foreclose the City from use of the remedy when the City's needs are consistent with the remedy. According to the Board's case law, light rail use of a corridor is a compelling public need. Conrail does not contest that the City seeks to acquire the corridor for light rail use. But passenger and freight traffic can move on the same line. All the City's needs are served by the OFA.

C. Conrail's Requested Relief Is Not Supported by Precedent

Not only are cases granting exemptions from OFA rare; Conrail cites no case granting an exemption in circumstances resembling those here, and we are aware of none. The first case on which Conrail places reliance is BNSF - Abandonment Exemption - King County, WA, in the Matter of an OFA, AB 6 (Sub-no. 380X), served August 5, 1998, aff'd, Redmond Issaquah R.R. Preservation Ass'n v. STB, 223 F.3d 1057, 1061 (9th Cir. 2000) (hereinafter referred to as "King County"). In King County, the local government (King County) sought an unused line for use as part of that government's extensive trail system. In prior decisions, the Board, however, had already refused to grant an OFA exemption such as Conrail seeks here. Instead, the Board, already aware that there was a public need for the property (King County wanted to use a trail), had required that any OFA applicant be prepared to show an actual need for rail. In the referenced August 5

decision, the Board found that the OFA applicant - an association of adjoining landowners opposed to any trail on the premises - had not established a public need for rail service in the face of the public need for the property for another use. The Board specifically noted that whether the adjoining landowners's were motivated by an anti-trail animus was not dispositive. Slip at 7.

King County is readily distinguishable insofar as it involved an OFA dismissal. The local government in King County opposed the OFA process on ground of compelling public need and lack of overriding continued rail need. Here, Conrail does not argue that the OFA is inconsistent with getting the property into the hands of the public in order to foster a compelling public objective. Conrail opposes the OFA in order to facilitate its chosen private developer. Moreover, the local government (Jersey City) supports application of the OFA process as consistent with compelling public needs.

One aspect of King County is germane: that is STB's holding that the motivation of the OFA applicant is not relevant so long as the OFA is consistent with provision of freight rail service. Thus, City's interest in light rail, which is compatible with freight rail, does not disable the City from use of OFA.

Interestingly, in other decisions related to the King County proceeding, this Board voided a sale from BNSF to the Land

Conservancy of Seattle and King County on the ground that the Land Conservancy acquired the property from BNSF prior to any abandonment authorization for purposes of converting it into a trail. The Land Conservancy of Seattle and King County - Acquisition Exemption - BNSF, F.D. 33389, served Sept. 26, 1997, slip op. 3, ordering para. 2, reconsideration denied, F.D. 33889 consolidated with AB-6 (Sub-no. 380X) and AB 508X, served May 13, 1998. City and others have asked for the same relief against Conrail's unauthorized sale of the Harsimus Branch to SLH Properties for conversion into townhouses. This is not a case where the railroad sold an underlying fee interest and retained a rail easement. It is a case in which the railroad illegally engaged in flat out de facto abandonment - a sale of a line for non-rail purposes without any retention of a rail easement is such an action. Thus, a Board proceeding on which Conrail places key reliance supports the City's requests for relief elsewhere, and it does not support the relief which Conrail seeks here. Indeed, in the larger picture, the only reason Conrail seeks an OFA exemption here is to foster its illegal sale of the Branch to SLH Properties, which sale should be voided for the reasons this Board relied upon in Land Conservancy.

Whether the Board invalidates the illegal sale or not will bear on the OFA purchase price, because under Board precedent, the valuation of rail property depends on what the railroad owns

in fee. If Conrail is viewed as having deeded out the property to SLH Properties, then it is entitled to at most nominal consideration for that property. On the other hand, if the property is ordered reconveyed, then Conrail would be entitled to the price under its contract with SLH Properties. In this light, it is to Conrail's (and SLH's) benefit for the unlawful sale to be invalidated.

Conrail also relies on Roaring Fork Railroad Holding Authority ("RFRHA") - Abandonment Exemption - in Garfield, Eagle and Pitkin Counties, CO, AB 547X, aff'd Kulmer v. STB, 236 F.3d 1255 (10th Cir. 2001). In that proceeding, STB again did not grant any exemption from OFA. Instead, STB ultimately dismissed an actual OFA against a line of railroad previously acquired by a group of local governments (RFRHA) for continued freight rail use in conjunction with planned passenger rail operations. The OFA applicants indicated that their plan to restore service on the line was contingent upon rehabilitation of the line to be funded by RFRHA: "the offerors acknowledge that continued freight service would not be self-sustaining and that their objective in seeking to acquire the line is the same as RFRHA's own plans for the right-of-way (the plans for which RFRHA had sought an exemption from the OFA process)." Slip op. 5. The Board basically concluded that such an OFA added nothing to RFRHA's plan to do so directly: "[i]t would be inappropriate and unfair

to permit use of the OFA process to wrest the right-of-way away from one person desiring to use it for a valid public purpose and give it to another person to be put to use for the identical public purpose.” Id. The Board further noted that resumption of rail service appeared more likely by RFRHA than the OFA applicant. Slip op. 6 note 19. Since the OFA basically was contingent on financing by the party in possession, and since the governments in possession opposed the OFA, the Board properly dismissed it.

The situation here of course is much different. Unlike the OFA applicant in RFRHA, Jersey City is not proposing to piggy-back on any plans of Conrail to serve any public (including rail) purpose. Conrail has no such plans. Jersey City is the only party seeking to serve any public (including rail) purpose.

Conrail also cites Union Pacific RR - Abandonment and Discontinuance Exemption - in Los Angeles County, CA, AB 33 (Sub0no. 265X), served May 7, 2008 (“Los Angeles”). That case appeared to involve an OFA by a Mr. Riffin for a 0.39 mile segment, of which 0.31 miles was only a trackage right (over a line owned by a government entity) for which a purchase OFA was unavailable. The Board concluded that the remaining 0.08 mile segment of line “was incapable of supporting rail service due to its short length,” and that the narrow width of the trackage area was insufficient to permit switching. In contrast to Los

Angeles, there is no physical impossibility in providing rail service on the Harsimus Branch. The Embankment portion is approximately 100 feet in width. The line overlaps the national rail system both at Waldo (west of the Turnpike) and in front of the Palisades. Recent inspection confirms that the switch is still in place at Waldo.² In any event, the Los Angeles case in fact appears to be another compelling public need case. It is related to Los Angeles County Metropolitan Transportation Authority (LACMTA) - Abandonment Exemption - in Los Angeles County, CA, AB 409 (Sub-no. 5X), served July 17, 2008 ("LACMTA"), in that the two cases involve essentially the same trackage (i.e., MP 485.69 to MP 486.0). In LACMTA, STB also rejected another Riffin OFA. STB ruled that LACMTA was exempt from abandonment regulation, including OFA, pursuant to a 1992 ICC decision, but that even if it were not, the agency would grant an exemption if one were required. The agency explained that exemptions from OFA were granted "where the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." Slip. op. 5. STB said that mass transit was "not only a valid public purpose but ... an important one" and that LACMTA required the property

² Conrail references some non-rail structures on one block between the Embankment and light rail on Washington Street, but as indicated elsewhere, there is sufficient land on the north side of that area, and the "Bed Bath and Beyond" to which Conrail refers is being removed.

for that purpose. Id. The Board indicated that Riffin had not produced any evidence showing a freight rail need for the little segment. In short, STB declared and applied the standard formula for granting exemptions.

In sum, Conrail's arguments do not respond to the standard formula in the case law it cites: Conrail makes no showing that the right-of-way is needed for a public purpose incompatible with the OFA. To the contrary, Conrail seeks to avoid OFA in order to devote the Branch to non-public purposes. Given that Conrail seeks to thwart a public need, not to serve it, an exemption from OFA is simply not appropriate given the desire by Congress "to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned." YILA at 2.

Conrail cites one other case in its de facto motion which merits comment: Norfolk Southern Railway Company - Abandonment Exemption - in Norfolk and Virginia Beach, VA, AB 290 (Sub-no. 293X), served Nov. 6, 2007. This is another case involving a Riffin OFA. In that case, Norfolk Southern (one of Conrail's owners) contracted to sell a portion of a line to a city for light rail use, and sought to abandon the entire line. According to the Board's decision, Mr. Riffin - the OFA applicant -- essentially admitted that he filed a notice of intent to OFA in order to pressure the railroad to sell him another line. Slip

op. at 2 & 3. Under the circumstances, it is clear that the local government had a valid public need but that the OFA applicant showed no rail need at all.

In contrast, Jersey City here is seeking to use the OFA process to acquire a line that Conrail has known the City has sought since at least 2005. Conrail cannot claim, and is not claiming, that City is using the OFA process to pressure Conrail elsewhere. Moreover, the City is using the OFA process consistent with all public needs, and not in derogation of them as was the case in AB 290 (Sub-no. 293X).

This exhausts the cases cited by Conrail. None support the exemption from OFA to which Conrail pretends. As indicated, none support an exemption from OFA here.

There is nothing special about Conrail to merit granting an exemption. Even when Congress in 1981 adopted an expedited process to facilitate Conrail abandonments for revenue-deficient lines,³ Congress nonetheless preserved the OFA remedy.⁴

If one were to make a general observation of the Board's case law concerning exemptions from OFA, it is that OFA's are allowed in order to fulfill the Congressional purpose to "preserve, whenever possible, any prospect" of resumed service.

³ See Northeast Rail Service Act of 1981 ("NERSA"), 45 U.S.C 748.

⁴ 45 U.S.C. 748(a)(2).

This does not require a showing that the service is needed at this time by a specific shipper. However, if a local government or its surrogate shows that there is a compelling alternative public use (like mass transit or highways, or sometimes trails) for a rail line, then the Board sometimes grants an OFA exemption if there is no significant current freight rail need. The Board frequently denies exemptions even in those circumstances. Under the case law, Conrail has failed to assert any justification for an exemption.

Conrail's only motivation for seeking an exemption is its own convenience. But the OFA statute is to preserve, whenever possible, any prospect for continued or resumed service. Conrail's interest is protected by the streamlined process for OFA sale, and by provisions like 49 U.S.C. 10904(f)(4), which states that an OFA purchaser may not discontinue service for two years after acquisition, or transfer the property to an entity other than Conrail for five years. In other words, the OFA applicant assumes a genuine burden when it acquires the property, and cannot "flip" it to another for five years. This appears to limit the agency's responsibility in filtering OFA's, because it means that the OFA applicant will be assuming obligations that are serious and thus self-policing.

D. Conrail's Financial Responsibility Argument

Although Conrail contests the financial responsibility of

CNJ, Conrail does not contest the financial responsibility of the City.⁵ As Conrail admits in its "reply" at p. 9 note 5, under this Board's regulations, the City is deemed to be financially responsible. 49 C.F.R. 1152.27(c)(1)(ii)(B).

E. Conrail's Suggestion the City
Has an Improper Purpose

Conrail's chief argument is that the City has "no interest in starting up a freight rail operation." Conrail Reply at 7 (emphasis in original). This is not correct.

Conrail does not dispute that the City has a very strong interest in light rail operations on the Branch: the Mayor has repeatedly indicated (including in his statement attached hereto) a desire to provide light rail connection over the Branch to Journal Square and to Secaucus (the Lautenberg Station). This and the need to address street congestion has led the City to expand its interest in not just the Branch but in the potential for other light rail lines to deliver freight. Thus, assuming arguendo Conrail may be able to point to statements or actions in

⁵ In general, claims that an OFA applicant lacks financial responsibility are premature until Conrail responds to informational and document requests pertaining to what interests (if any) it still owns in the property, and the basis for any valuation it attaches thereto. Once the information is disclosed, an OFA applicant can determine what financial responsibility it must show, and there is a record of sorts for making a determination that the OFA applicant has made the requisite showing. Also, financial responsibility is generally contested only when the OFA is made. Here, there also will be a substantial rehabilitation expense.

the past that the railroad feels imply that the City has no freight interest, they are simply no longer relevant.

Robert Cotter, Director of the City's Division of City Planning, states that:

"The 2007 'European Green Paper' on urban mobility stated that 'any urban mobility policy must cover both passenger and freight transport.' We agree and so stated in the Circulation Element of the Jersey City Master Plan (adopted April 14, 2009) that the city will 'Investigate a shared-use strategy for Hudson Bergen Light Rail to carry freight to local destinations.' (Action G-10-6 of Goal 10: Accommodate the local delivery of goods and services through community-sensitive practices.) New Jersey Transit was one of the stakeholders on the committee that wrote the Circulation Plan. Their representative approved the wording of [the quoted] sentence."

In short, the City has recently amended its Master Plan to permit freight on light rail corridors. Mr. Cotter explains that in Europe, light rail systems are used to carry freight: "In Dresden, light rail has been carrying freight between two Volkswagen factories since 2001. In Paris, the retail chain Monoprix delivers to 27 of its stores in the center city by light rail. Amsterdam is planning a major operation using up to 53 freight trolleys to replace half the 5000 trucks that deliver to

the central city each day...." Mr. Cotter notes that the existing light rail system connects to multi-modal and warehousing areas, and the Harsimus Branch connected to the Lautenberg Station would as well. It is customary to operate freight on lines used for passenger rail at different hours (rail gauge is the same). In short, the City to relieve congestion wishes to secure the Branch for both freight and passenger service. Per Mr. Cotter, "[f]rom an energy, air quality and congestion standpoint, [such use] makes perfect sense."

The Embankment portion of the Harsimus Branch is grade-separated from adjoining streets and would make an excellent route for freight to reach the downtown Jersey City light rail system for local distribution.

City governments obviously have to go through planning processes to do anything, but the recent change to the City's Master Plan is an important verification of the City's freight intent, and other elements of the Master Plan likewise validate the City's other compatible interests in the Harsimus Branch. The City's OFA thus genuinely serves Congress' purpose "to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned." The City otherwise plans to retain an operator to provide freight transload, and recognizes that this may have to be at an interim location pending construction of light rail

over the Branch.

Conrail says that "[f]or years, City hounded Conrail to terminate its freight operations on the Harsimus Branch and work with the City to sell off the property to private developers...." Id. at 7-8. The record in F.D. 34818 shows that Conrail allowed bridges on the Branch to deteriorate to the point they posed safety hazards, and this certainly resulted in complaints from the City. Conrail chooses to characterize this as "hound[ing]" the railroad to terminate its freight operations. Even if Conrail were so hounded, that does not bar the City from seeking now to foster freight rail service along the lines suggested by the Director of the Division of Planning. All must recognize that congestion, the run-up in fuel prices in 2008, and the concern about global warming require urban governments to place new reliance on rail technology.

In addition, the fact that the City sought to foster the development of the old Harsimus railyard into commercial and high density residential uses does not conflict with the above. As to the Branch at issue here, by 1999 key portions of it had been determined eligible for the National Register of Historic Places, and also listed on the equivalent State Register. Since that time at least, neither the City nor the Jersey City Redevelopment Agency have "hounded" Conrail to sell the property to developers. Instead, City prepared to file an eminent domain proceeding to

acquire it for preservation. Of course, once it appeared STB still regulated the line, City could not use that eminent domain power (it was preempted from doing so). When Conrail then illegally sold the Embankment portions of the line to SLH Properties, City and others petitioned the Board for a determination that the property was subject to this Board's jurisdiction. Conrail has been bitterly assailing the City ever since. But it was Conrail that violated the law, not the City.

Conrail claims that the City did not mention any interest in freight use in pleadings filed in F.D. 34818 (the declaratory proceeding). Conrail motion at 8. The short answer is that the issue was not germane to the City's argument, and in any event, the City's interest has matured. As Mr. Cotter notes, the Circulation Element of the City's Master Plan was amended on April 14, 2009, to encompass freight use of all light rail facilities. Cities necessarily operate through a planning process, this moves only in accordance with notice and comment procedures (and thus is not done by fiat), and Jersey City's amended Master Plan now green-lights realistic use of the Branch for freight in conjunction with development for light rail.

Conrail at p. 8 also claims that there are structures now precluding freight use. There is no question that the old yard area on the Hudson River waterfront has been developed for non-rail purposes. However, the right of way for rail is intact from

Waldo as far as Luis Munoz Marin Boulevard, and City expects to work with developers of proposed new buildings after that point to accommodate a connection as far as Washington Street (existing light rail) or to use portions of city streets if absolutely necessary. In particular, there is space on the north side of the Bed, Bath and Beyond store that Conrail references, and fortunately (from public's point of view), the structure there will be removed anyway for redevelopment.

Conrail at p. 10 says there is no freight infrastructure. There is no freight yard in the Cove, if that is what Conrail means. However, City intends a different freight use of the line. Also, from City's perspective, the issue is not just shipper deliveries on the line, but also use of the line to reach the existing light rail system from which local deliveries can be made. There is a switch at Waldo with an active Conrail freight line (there was a Conrail switch engine parked there when inspected recently), and in any event, a grade level connection with another operating Conrail line east of Waldo. Over the longer term, the City aspires to an additional connection of the Harsimus Branch all the way to Secaucus. The Embankment parcels themselves offer an intact grade-separated corridor of great value to the City's plan for both passenger and freight rail use. In short, the City does not propose to rekindle rail use of the Hudson River waterfront as a freight port, or to devote the

property to use by some new factory. The City does wish to move to what the Planning Director refers to as a European model. The fact that City is also interested in the line for light rail purposes does not disqualify the City from making an OFA; it merely means that there will be sufficient resources available to restore the rail infrastructure that Conrail allowed to decay to the point it had to be removed. As Mr. Cotter's statements indicate, the City is interested, now very formally through an amendment to the Circulation Element of its Master Plan, in a kind of transload use of light rail lines, and the Branch not only would serve light rail purposes but also as the route to bring in freight to Jersey City's entire light rail system.

In addition, CNJ Rail has expressed an interest in transload in Jersey City in two Conrail proceedings (AB-167 (Sub-no. 1190) and this one. As between the two lines, the City would prefer to work with interested parties in locating a freight transload on the Harsimus Branch.

Conrail at p. 10 says that an OFA applicant has to point to specific shippers. As already explained, that is not the law, except in the rare case where the Board finds a compelling public need for the line for non-freight purposes. Here Conrail neither argues there is an alternative compelling public use, and it certainly is not seeking to foster any public use at all: its whole effort is bent on hampering any public use.

F. Conrail's Delay Allegation

Conrail also suggests that the City is motivated only by an intent to "delay." The OFA process, if Conrail were to cooperate in it, is quite fast, and would likely be over and done with long before environmental and historic preservation requirements for an abandonment to become effective are met. Since 2005 the City has indicated to Conrail that it intended, and still intends, to use eminent domain to obtain the property since Conrail refuses negotiation.⁶

Finally, City is not simply pursuing its OFA rights. City has informed Conrail that it intends to assert its rights under N.J.S.A. 48:12-125.1. Conrail sent City a letter dated March 5,

⁶ Conrail seeks to facilitate its unlawful sale of the property to SLH Properties, a developer, and thus refuses any real negotiation. The developer frequently intimates or implies to the press that it is making, or has made, offers of settlement to the City. City wishes to make clear two things: first, to be an actual settlement, a proposal cannot be impossible at law. Thus, it must be something that can be done under federal rail regulation (and attendant environmental and historic review requirements), and under local land use regulations. This means that the property on which the development will occur must go through a federal process associated with STB abandonment licensing and a local land use regulatory process with several steps. Second, a proposal has to accommodate the City's interest in securing a viable corridor which can be developed for light rail and freight rail, and other compatible public purposes. City has yet to receive a proposal from the developer that meets either the first criterion or the second criterion. In other words, the developer (much less Conrail) has failed to produce anything that comports with STB review processes, or with the City's objectives. The developer and Conrail have rejected the City's generous proposals to it. The City's proposals were procedurally possible, and substantively consistent with the developer's declared objectives as well as those of the City.

2009, acknowledging City's rights under that statute, which will be triggered by an effective STB abandonment authorization, to acquire the property by purchase or eminent domain. By letter dated April 8, 2009, the City per its Mayor notified Conrail that City plans to exercise its state law rights, that the City's 90 day window begins when abandonment is effective, and that the City's rights are not limited to what interests Conrail claims to have retained, because the state statute voids sales to developers before the City has received notice and an opportunity to exercise its rights pursuant to that notice.⁷ Nothing the City seeks by OFA is more burdensome to, or cause for more delay for, Conrail than what the City is entitled to, and has invoked, under New Jersey law. City expects that the OFA process would be less burdensome and much faster than the state law alternative. If Conrail is concerned about delay, it should favor application of the OFA statute.

In the end, Conrail is responsible for any delays here. The delays flow from the railroad's failure to seek STB abandonment authority before it unlawfully sold the property for non-rail purposes. Since the line is in a major metropolitan area, is desired for rail and other public purposes, and is surrounded by National Historic Districts and contains structures eligible for

⁷ If the City acquires the property under an OFA, then the predicate for the state law invalidation of deeds (namely, STB abandonment) will not occur.

listing on the National Register of Historic Places, there could well have been delays if Conrail had timely sought an abandonment authorization and had not unlawfully sold the property. But Conrail - acting with full knowledge of the City's interest - instead elected to proceed, and did proceed, without prior agency authorization. The law does not require this agency to rubberstamp what Conrail did, just because what it did violated the law. If that agency merely facilitated Conrail on account of its unlawful conduct, then Conrail would be obtaining a huge benefit from unlawful conduct. That presumably is not the message a federal regulatory agency wishes to send to the railroads it regulates.

This reply to Conrail's motion is further supplemented by the following Verified Statement of Mayor Healy:

Verified Statement
of
the Honorable Jerramiah Healy,
Mayor, City of Jersey City

I, Jerramiah Healy, state that I am the Mayor of the City of Jersey City, and that I make this Verified Statement in support of Jersey City's notice of intent to file an "offer of financial assistance" and in opposition to the motion to reject the entire OFA process filed by Consolidated Rail Corporation ("Conrail") on or about April 7, 2009 in AB 167 (Sub-no. 1189X).

1. Since I have been Mayor of Jersey City, I have actively sought to acquire Conrail's currently unused Harsimus Branch for public purposes. While I view the property as suitable for a variety of public uses, including park and trail, my chief interest is to facilitate renewed rail transportation use. No one pretends that City wishes to use the Harsimus Branch as a freight mainline serving a port facility as the line was formerly used in the past. However, we believe resumed freight use of at least some of the line can assist us in alleviating our growing congestion problems by eliminating at least some truck traffic. In all events, railroad transportation is the most energy

efficient form of land transportation and we should be given a chance.

2. There is interest, as witnessed by notices of intent to file an OFA in this and another recent proceeding by CNJ Rail, in developing freight transload on the line. Unfortunately, Conrail allowed bridges to deteriorate to the point they had to be removed before I became Mayor. This renders resumption of rail service over the bulk of the line expensive, because of capital costs of restoring the bridges. However, City of Jersey City badly needs additional transportation facilities to relieve growing surface congestion. I view the Harsimus Branch as an ideal facility to link downtown Jersey City with Journal Square and as an economically feasible route to existing passenger rail facilities at Secaucus. In combination with passenger rail service, resumption of freight service is economically feasible. Since this kind of passenger rail is customarily done by governments, Jersey City must be prepared to assemble the resources to provide it. We are particularly interested in the line from approximately Washington Street (intersection with existing passenger rail) to Waldo (where Conrail still operates and PATH facilities are located). This seems a logical section of the Branch on which to operate, and our analysis indicates that there are several potential locations for transload on this segment. We prefer transload on the Harsimus Branch as opposed

to the Lehigh [AB 167 (Sub-no. 1190X), where CNJ has filed a notice of intent to OFA] because we wish to use some of the Lehigh segment for construction of new buildings for some city agencies.

3. The City understands that to invoke the "OFA statute," City must be prepared to resume freight rail uses and to assume a freight rail common carrier obligation. Many governments own rail lines used for freight, operating same not directly but through contract operators who discharge the freight common carrier obligation for the government owner. Jersey City would almost certainly use this approach in order to ensure discharge of the common carrier obligation which we would be acquiring. It is my understanding that representatives of the City have already made preliminary contacts with CNJ and perhaps others in connection with immediately becoming the City's freight operator should the City acquire this property pursuant to the OFA statute.

4. I reject Conrail's suggestion that City is invoking the OFA process in order to "harass" Conrail. City is merely trying to acquire the property for continued rail use in a way fully consistent with the OFA statute. City is not calling on this agency to force Conrail to restore structures previously removed from the property, but City wishes all rail structures currently on the property left intact, and the property to be conveyed to

the City. Conrail has long known that City has sought to acquire the Harsimus Branch; it has been an objective of mine since I became Mayor. City notified Conrail that City intended to use eminent domain remedies in 2005, but Conrail claimed that this was preempted, as we are advised it indeed was, by federal law. As the record shows, Conrail sold the property to a developer for non-rail purposes after being advised of our interest. However, this sale was not authorized by this agency, and in any event, was and is void under New Jersey state law, as our attorneys have advised Conrail and the developer. It is my understanding that the OFA remedy is a kind of eminent domain remedy administered by this agency; it is an OFA remedy not preempted by federal law; and it will get this matter over with quickly if applied. City properly seeks to employ it here for the benefit of the public and freight rail transportation.

As provided in 49 C.F.R. 1104.5, I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Jerramiah Healy, Mayor

Date: _____

II. Request for Clarification

As noted in the Background section, this Board's April 6 decision at p. 1, n. 1, said OFA issues would be dealt with after environmental issues are resolved. In this Board's April 16 decision, the Board indefinitely stayed the effective date of the ex parte abandonment authorization pending resolution of environmental issues.

The OFA process is ordinarily independent of the environmental process. If the Board means to hold the OFA process in abeyance, then it should issue an order so holding. That would obviate the need for pleadings such as this, otherwise necessary to preserve City's position under the statute.

City notes that Conrail opposed City's motion for a seven day extension of time to respond to the Conrail motion to reject. This seems to suggest that although Conrail is refusing to supply information which it is required to supply, it nonetheless wants to let the OFA process continue.

Conrail's April 1 pleading effectively indicates that the railroad is indefinitely delaying the assembly and provision of the information sought in the City and CNJ notices of intent to OFA. Under the Board's regulations, this automatically tolls the due date for OFA's. Moreover, City and CNJ have requested tolling due to Conrail's non-response. City wishes to exercise the OFA remedy but desires the information it requested for that

purpose. Conrail unquestionably engaged in an unlawful abandonment in connection with the Harsimus Branch. That does not entitle it stubbornly to insist on further advantages from additional regulatory non-compliance (i.e., refusing to supply required information) when finally it initiates an abandonment process. City requests that the Board clarify the schedule it intends for OFA purposes.

III. Conclusion

Conrail's de facto motion for exemption from OFA should be denied.

Respectfully submitted,

Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739
for City of Jersey City

Certificate of Service

I hereby certify service of the foregoing on 21 April 2009 by deposit for express (next business day) delivery addressed to Robert Jenkins III, Mayer Brown, 1909 K Street, NW, Washington, D.C. 20006; Eric Strohmeier, CNJ Rail Corporation, 81 Century Lane, Watchung, NJ 07069.
