

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB NO. AB 167 (SUB-NO. 1190X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN
HUDSON COUNTY, NEW JERSEY**

STB NO. AB 55 (SUB-NO. 690X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON
COUNTY, NEW JERSEY**

STB NO. AB 290 (SUB-NO. 313X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY**

NOTICES OF EXEMPTION

MOTION FOR ACCEPTANCE OF A REPLY TO A REPLY

Introduction

Consolidated Rail Corporation (“Conrail”) hereby requests the Board to accept Conrail’s reply to the reply of CNJ Rail Corporation (“CNJ”) filed on April 24, 2009 in response to Conrail’s Motion to Dismiss Notice of Intent to File an Offer of Financial Assistant which Conrail filed on April 2, 2009. CNJ’s Reply is, in effect, the Motion to Compel Discovery that in a letter to the Board, dated February 9, 2009, CNJ had advised it would be filing by February 15, 2009. Conrail would have had the right to respond to CNJ’s Motion to Compel had it been

filed and should not be deprived of that right simply because CNJ has now captioned what is essentially a Motion to Compel as a Reply to Conrail's Motion to Dismiss.

Regarding the substance of CNJ's "Reply", CNJ offers little more than poor excuses and tries to pass the buck to Conrail for CNJ's failure to comply with the Board's rules governing OFAs. What becomes strikingly clear from CNJ's Reply is that no OFA has been forthcoming, not for lack of discovery from Conrail, but for lack of any substance to CNJ's Notice of Intent. As such, the Board should bring an end to CNJ's procedural maneuverings that are clearly designed to prolong the OFA process with no meaningful objective to be served. See, e.g., *Union Pacific Railroad Co.—Abandonment and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA*, STB Docket No. AB-33 (Sub-265X), 2008 WL 1968728 (STB served May 7, 2008) ("*Los Angeles County*").

Background

The background to this matter was fully provided in Conrail's April 1, 2009 Motion. In response to that Motion, CNJ has provided a number of rationales for its inaction, none of which stand up to scrutiny.

Argument

1. The Board should consider this Reply because Conrail would have had the right to reply to CNJ's Motion to Compel

If CNJ believes that Conrail has not fully complied with its discovery obligations (a position with which Conrail disagrees for the reasons set forth below), then it should have filed a Motion to Compel. Instead it has filed the subject "Reply" to Conrail's Motion to Dismiss. However, CNJ's "Reply" primarily addresses CNJ's claim that Conrail has not fulfilled its discovery obligation. Accordingly, it is tantamount to a Motion to Compel (which would have

been the appropriate filing by CNJ under the circumstances) and, therefore, this Reply should be considered by the Board. Accordingly, Conrail respectfully requests that the Board accept this Reply.

2. Conrail was not directed by the Board to provide a Minimum Purchase Price on property it no longer owns

Conrail noted in its Motion to Strike that CNJ failed to follow through on a Motion to compel that, in its February 9, 2009 letter, it advised the Board it would be filing the week of February 15, 2009. Now CNJ claims that the reason that it did not seek to compel further discovery from Conrail was that Conrail was already under a Board order to provide such discovery. The discovery in question concerned the Minimum Purchase Price for property Conrail no longer owns and property that CNJ admits it has no intention of using for rail service. Clearly, the Board's OFA regulations cannot be construed to require discovery that is both beyond the capability of the railroad to provide and is otherwise clearly not relevant to any OFA to be filed. CNJ also argues that Conrail's filing contains false and misleading statements about its ability to dispose of the entire line. To the contrary, Conrail's filing contains only accurate information and is in no way misleading. The purpose of an abandonment proceeding is to obtain Board authorization to relieve the applicant railroad of its common carrier obligation over a line of railroad. By filing such an application or, as in this case, a Notice of Exemption, the railroad is neither certifying that it owns the line in question (indeed, the railroad often only has a rail easement or other less than fee ownership rights) nor that it is currently providing rail service over the line. Indeed, with respect to a Notice of Exemption, the opposite is true, namely that there has been no rail service for at least two years. *Norfolk Southern – Abandonment Exemption – In Baltimore County MD*, Docket No. AB 290 237 X, upon which CNJ relies, had to do with

improper notice and is inapposite to the subject proceeding. There was nothing deficient in the Notice filed by Conrail. The rules do not require the railroad to describe the ownership status of the various segments comprising the Line to be abandoned.

3. CNJ Rail Corporation's lack of demonstrated financial responsibility is a legitimate issue at this stage of the proceedings

Apart from the inappropriateness of the discovery CNJ seeks, there is the underlying question of whether a bona fide OFA is possible under the circumstances of this abandonment proceeding. In its "Reply", CNJ also goes to great lengths to justify its intentions and ability to follow through with an OFA. First, it makes a vain attempt to explain its lack of legal status as a corporation by stating: "CNJ has never ceased operations nor has it refrained from conducting business since its time of operations" but tellingly never describes what those operations are or what business it conducts. The only business of CNJ that Conrail is aware of is injecting itself into abandonment proceedings to no apparent legitimate purpose. Furthermore, the admitted carelessness in which it conducts its corporate legal obligations certainly suggests that its capability to operate a railroad is more of an issue than its professed ability to obtain a reinstatement certificate. See 49 C.F.R. § 1152.27(c)(ii)(B); *Maryland Transit Admin.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34975, 2008 WL 428198, *1 n.3 (served Sept. 19, 2008) ("MTA").

Also casting doubt on CNJ's capability to operate a railroad is its financial responsibility. CNJ claims that this issue is premature since it has not yet filed an OFA. CNJ goes to great lengths to describe a prior OFA which was rejected by the Board but apparently not for lack of CNJ's financial responsibility. Whether CNJ, given current credit market conditions, will be able to obtain the necessary financing for a rail project involving the subject rail line is, at best,

speculation on its part. While CNJ claims those prospects are fairly good, upon closer scrutiny, its optimism is misplaced since the subject line is no longer suitable for rail operations. CNJ in its Argument 4 poses a number of questions regarding prior actions of Conrail with respect to the Line¹. What events might have led up to the current condition of the subject Line has no bearing upon the merits of any OFA that might be filed by CNJ. In addressing an OFA, the Board has to evaluate whether rail service is feasible and it is incumbent upon the applicant to satisfy that inquiry. As CNJ correctly noted from the Board's January 7, 2009 Order with respect to the subject Notice of Intent.

Any person who intends to file an OFA should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.

It is submitted that CNJ will not be able to meet any of these conditions. Most importantly, as discussed in Conrail's Motion to Dismiss, there has been no demonstrated interest in rail service (nor could there be since there are no current or potential rail customers that could be serviced by the Line). See *King County*, 3 S.T.B. at 634, 641-42; 1998 WL 452837, *1, 5-6.; *Roaring Fork*, 4 S.T.B. at 120; 1999 WL 323347, at *3. Community support for rail service is also clearly lacking. CNJ itself notes Jersey City Mayor Jerramiah T. Healy's recent statement that "we wish to use some of the Lehigh segment for construction of new buildings for some city agencies." CNJ argues that the Mayor's "statement does nothing to tell the Board which property it is, nor does it show how it relates to, or would effect [sic] a potential OFA." CNJ's Reply at 11. However, Mayor Healy's recent letter to Conrail in connection with

¹ "Does Conrail actually have a line of railroad from milepost 2.90 to milepost 5.17?
Did the sales of Conrail's assets require approval of either the ICC or the Board?
Did the common carrier obligation actually transfer with the sale of the line?"

Conrail's September 10, 2008 "Section 125" letter (which is required to be filed with various public entities under New Jersey law with respect to any "railroad right[s] of way proposed to be abandoned" (N.J.S.A. 48:12-125-1)) provides that specificity. In that letter, Mayor Healy stated:

Conrail's abandonment of the portion of the line, north of Linden Avenue which includes the Danforth Avenue Transit Village Redevelopment area as well as the proposed P.S.E.G. LLC/Chapel Hill Associates project, conforms to Jersey City's existing land use plans for the relevant area, as is demonstrated by the attached Redevelopment Plan under Exhibit B.

That said, the City does have an interest in the line south of Linden Avenue. In particular, the City desires to acquire that property for inclusion in a tract to which the City hopes to construct office buildings into which to relocate certain City agencies. It is our understanding that Conrail has already sold that portion of the line to a third party. We are currently seeking to acquire that portion of the line from the third party.

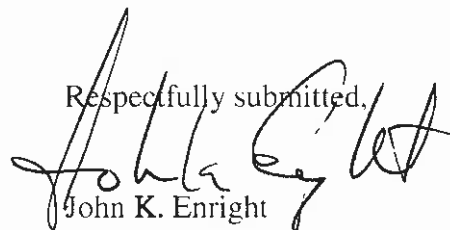
Finally, CNJ argues that "even if the City wished to move ahead with its [proposed buildings], it is still possible to rehabilitate the line by accessing the line from a new connection that can be built off the Bayonne Industrial Track." What CNJ neglects to mention is that any such new connection would involve property that neither Conrail nor CNJ owns. Therefore, CNJ's ability to build such a connection would clearly require the conveyance of such property from an unidentified third party and is best characterized as wishful thinking on its part.

Conclusion

CNJ in its Reply to Conrail's Motion to Dismiss continues to attempt to prolong the OFA process without offering any information to the Board that would suggest that a bona fide OFA is forthcoming or indeed even possible. If CNJ believes that Conrail has withheld discoverable information, a position that Conrail strongly disputes, it should have, in accordance with the rules, filed a Motion to Compel. Instead, well past the time for filing such a Motion, it has made its discovery arguments under the guise of a Reply to Conrail's Motion to Dismiss, presumably to preclude Conrail from replying to its discovery arguments. Conrail urges the Board to see

through CNJ's misuse of the Board's procedural rules and grant this request to file this Reply. Conrail has provided in discovery all the information to CNJ required by the rules. The OFA rules have specific deadlines so that the OFA process does not unduly delay or prolong the overall abandonment proceeding. CNJ's bombardment of the Board with its various filings to no purposeful end is having that very effect. It is time to bring this wasteful exercise to an end by dismissing CNJ's OFA Notice as well as its Notice to Participate as a Party and request to toll this proceeding. The purpose of an OFA proceeding is to continue freight rail service over a line. Not only has the Lehigh Valley Main Line been out of service for many years, it is no longer connected to active railroad right-of-way. CNJ has neither the intention, nor the financial capacity, nor a realistic prospect of providing freight rail service on the Lehigh Valley Main Line. Any further discovery in this matter will not change that underlying essential truth.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John K. Enright", is written over the typed name and title.

John K. Enright

Associate General Counsel

CONSOLIDATED RAIL CORPORATION

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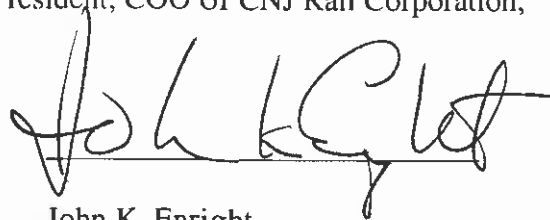
Philadelphia, PA 19103

(215) 209-5012

Dated: May 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 7th Day of May, 2009, a copy of the foregoing Motion for Acceptance of a Reply to a Reply filed by CNJ Rail Corporation on April 24, 2009 was served by UPS overnight delivery to Eric S. Strohmeyer, Vice President, COO of CNJ Rail Corporation, 81 Century Lane, Wachtung, NJ 07069.

A handwritten signature in black ink, appearing to read 'John K. Enright', written over a horizontal line.

John K. Enright
Associate General Counsel
Consolidated Rail Corporation