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9 November 2020

Victoria Rutson
Alan Tabachnik
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

Re: Conrail – Ab. Ex. – in Hudson County, NJ,
AB 167 (Sub-no. 1189X)

Additional written comments on
STB OEA’s proposed Section 106 MOA

Dear Ms. Rutson and Mr. Tabachnik:

This comment is on behalf of City of Jersey City (“City”), Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“Coalition”), and Rails to Trails Conservancy (“RTC”) (collectively, “City, et al”). City et al reiterate their objections to the agency’s proposed section 106 Memorandum of Agreement (“MOA”) as stated at the virtual hearing arranged by the agency for the evening of October 27. By letter dated October 29, City, et al supplied written versions of the oral remarks of speakers on behalf of City, Coalition, and RTC, as well as additional comments. The comments below supplement our earlier testimony and evidence.

I.

City et al submit herewith, and incorporate herein, a copy of our comments and evidence filed with the agency in response to the agency’s Draft Supplemental

Environmental Assessment (DSEA).¹ In the comments submitted on the DSEA, City et al provided detailed argument and referenced extensive evidence showing that the agency must condition any abandonment on, as a minimum, (1) voiding the deeds issued by Conrail in 2005 to SLH properties, and (2) imposition of a “public use condition” barring Conrail from disposing any property in the Harsimus Branch for 180 days other than for public use.

City et al in essence reiterated that position in oral testimony on this agency’s proposed section 106 MOA on October 27, and in written comments filed in connection with the MOA on October 29. As City, et al there stated, we seek two conditions in any MOA entertained in this proceeding:

(1) The Surface Transportation Board (STB) should void the deeds by Conrail to SLH Properties upon the effectiveness of any abandonment authorization, and

(2) STB should impose a “public use condition” as authorized by 49 U.S.C. 10905 barring Conrail from selling that property for other than public use for 180 days.

II.

The deeds must be voided because they were part of an illegal de facto abandonment, which Conrail either knew at the time was illegal, or acted in willful blindness (the equivalent of knowing misconduct).² If the deeds are voided and a section 10905 public use condition is imposed, then the City would have 180 days to use eminent domain to acquire all the Harsimus Branch, or to invoke the

¹ Attached as Exhibit A.

² City et al have supplied expert testimony showing Conrail knew it was acting unlawfully or should have known and acted out of willful blindness, which is the equivalent of knowing and intentional misconduct. See, e.g., McFarland statement, Attachment I in Exhibit A. Moreover, City had expressly alerted Conrail that it was prepared to use eminent domain to acquire the property and in fact asked Conrail prior to Conrail’s illegal sale to the developer among other things to provide the City with proof of abandonment authorization or that none was required. Conrail of course had no abandonment authorization, and certainly provided no proof that none was required. See Exhibit A. The fact that Conrail was alerted to the City’s interest in the property and inquiry into abandonment status is also discussed in Mr. Curley’s verified statement in Exhibit B.

provisions of NJSA 48:12-125.1 to acquire the Harsimus Embankment (plus two at-grade parcels) at the price paid by the developer.³ This approach would ensure preservation of the historic assets because the price would not contain some developer mark-up, much less more years of litigation. More specifically, City could acquire the six-block-long Embankment and two at-grade parcels for the price paid by SLH Properties (the developer), which was \$3 million. The City has long had bond funds available sufficient to fund the acquisition of the entire Branch and certainly to fund the price paid by the developer. Imposing the two conditions would ensure preservation.⁴

Voiding the illegal deeds and affording the City 180 days to invoke state remedies like eminent domain and NJSA 48:12-125.1 is a remedy for Conrail's violation of law in that it protects this agency's jurisdiction, will encourage railroads to comply with the law in the future rather than reward them for non-compliance, and will actually serve to protect the Embankment, the Branch, and the surrounding historic neighborhoods and other historic assets. Since the remedies proposed by City, et al pose no harm to the railroad, protect this agency's jurisdiction from abuse, and serve the ends of the National Historic Preservation Act, this agency is compelled to adopt them, and anything less is manifestly arbitrary and capricious.

III.

Unless STB's MOA incorporates these conditions, it is also vastly premature, because the agency so far has avoided any meaningful consideration of the requirements of section 110(k) of the National Historic Preservation Act. For the reasons we have so many times stated, Conrail knowingly (or with the equivalent "willful blindness") engaged in "anticipatory demolition," for which section 110(k) provides remedies. These remedies include denial of the abandonment license and presumably measures to restore City, et al to the position they would have enjoyed in terms of preserving historic assets but for the unlawful de facto abandonment/anticipatory demolition actions of Conrail. These remedies are superior to, and would supplant, the mere documentation requirements embodied in STB's current draft MOA.

³ Since Conrail has contracted to sell the developer the property for the price the developer originally paid in the event this agency voids the deeds (Attachment II in Exhibit A), Conrail suffers no injury whatsoever from this approach.

⁴ Pursuant to STB preemption, neither City nor the developer may lawfully acquire a rail line prior to the effectiveness of an STB abandonment authorization.

The agency's proposed MOA is the kind of instrument that parties enter who have not engaged in unlawful abandonments or anticipatory demolition. The MOA might be suitable if Conrail had acted lawfully. But it did not. City et al should be restored to the same position they would have been had Conrail acted lawfully. That approach in the circumstances here not only will foster historic preservation, but also is the only approach that will do so in accordance with law.

IV.

To some degree, the agency seems to denigrate its own powers to void the deeds and impose public use conditions on the ground that it does not know what will happen to the historic Harsimus Branch, much less the historic Embankment, once this property leaves STB jurisdiction. The agency's claim may work in some situations but not here. When Conrail unlawfully sold the Embankment, City, et al petitioned this agency for a determination that the Harsimus Branch was a line of railroad requiring abandonment authorization prior to dismemberment. City of Jersey City, et al., Petition for a Declaratory Order, F.D. 34818, filed January 12, 2006. The developer almost immediately removed a stanchion and threatened others (all of which are key parts of what has now been formally determined to be protected historic assets). City, et al sought relief from the developer's precipitous destruction of historic assets, explaining that Conrail's chosen developer was further destroying historic stanchions (that were also useful for potential future light rail) even as the developer sought more time to respond to City, et al's petition. See Opposition to Intervenor 212 Marin Blvd, LLC, et al "Petition for Extension of Time" in F.D. 34818, filed Jan. 23, 2006 (attached as Exhibit B). City, et al filed a legal opinion indicating that the destruction of the stanchion and threats to the remaining stanchions were part of a plan by Conrail's chosen developer to demolish the entire Embankment without requisite STB abandonment authorization. Verified Statement of John J. Curley, paras 5-9, filed Jan. 23, 2006 with City et al Opposition, supra. Of course, state and local historic preservation organizations joined City, et al in seeking relief. E.g., Preservation New Jersey Letter in F.D. 34818 filed Jan 27, 2006, attached as Exhibit C.

In addition, as City, et al have repeatedly pointed out to this agency, before seeking abandonment authorization, Conrail joined its chosen developer (SLH Properties, or more precisely, the various LLC's to which SLH Properties assigned its rights) in requesting demolition permits for all six blocks of the Harsimus Embankment. We reattach (as Exhibit D) Conrail's joinders in seeking demolition. The Conrail joinders are signed by Conrail's then vice president and

general counsel, Jonathan Broder. And as already noted, Conrail has entered into a contract with the developer to resell the property in question to the developer should this agency void the deeds. See Exhibit A, attachment II. In the circumstances, the agency must take the railroad at its word: it is cooperating with the developer to demolish the Harsimus Branch and Harsimus Embankment. Indeed, it is hard to imagine what more Conrail and its chosen developer could have done to secure the demolition and dismemberment of historic assets without compliance with this Board's jurisdiction and certainly in complete evasion of the National Historic Preservation Act. Once called out in F.D. 34818, the record in AB 167 (Sub-no. 1189X) shows they then litigated literally for years to continue to evade STB jurisdiction and the provisions of NHPA. Even now they beseech this Board not to impose any meaningful relief.

But for federal jurisdiction, these assets would be no more, as illustrated by what happened to the stanchion discussed in City, et al's opposition filed Jan. 23, 2006 (Exhibit B). Loss of federal jurisdiction is an extreme adverse effect in this case. The only remedy is to keep the property under federal jurisdiction as provided for cases such as this involving anticipatory demolition (NHPA, section 110(k)), or to void the deeds and provide City 180 days to use eminent domain or N.J.S.A. 48:12-125.1 to secure the property before the developer destroys it. Anything less simply rewards the railroad and developer for blatant unlawful conduct.

V.

Conrail and the developer have long argued that the City in effect is asking this agency to engage in local land use planning. Conrail's chosen developers took this line again at the virtual hearing on October 27. They argue that this agency should quickly conclude the section 106 process, release federal jurisdiction, and leave the City to its own devices. They basically wish to treat this agency's abandonment jurisdiction as meaningless and the remedies the agency affords for the public interest as irrelevant. To the contrary, if this line were restored to its status quo (Conrail ownership) before the unlawful dismemberment, then the 180-day public use condition would afford the City a meaningful and indeed valuable remedy to acquire the property from Conrail for the price paid by the developer. This would clearly serve the public interest while costing the railroad nothing. The railroad and the developer were on notice that the assets in question were historic and that the City viewed the property as under STB jurisdiction before the unlawful sale. They cannot complain that they lost their gamble that they could use litigation to silence City, Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus

Stem Embankment Preservation Coalition so that Conrail and the developer could get away with it. Gamblers who lose should not be rewarded by bailouts from STB. In the sense that Conrail and the developer are calling on this agency to bail them out, they are the ones asking the agency to do local land use planning, by depriving the City of federal remedies to which it is entitled, and around which New Jersey state and local law are built.

VI.

In conclusion, City, et al reiterate their objection to the draft MOA as currently proposed by the agency. Under the circumstances here, the agency must impose conditions that actually foster preservation of the historic assets, not the documentation of historic assets that are slated for demolition. As the D.C. Circuit recognized in City of Jersey City v. Consolidated Rail Corp., 668 F.3d 741, 744 (D.C.Cir. 2012), “Conrail’s refusal to [timely] invoke STB proceedings injures the City by depriving it of the benefits of those proceedings – namely, the opportunity to acquire and to protect the property” under the various remedies available in or as a result of the federal proceedings. City, et al want our federal rights and remedies, of which we were unlawfully deprived, back. Those rights and remedies, and the state rights and remedies they trigger, will be adequate actually to save the Embankment and the Branch. It is arbitrary and capricious to omit them from a section 106 MOA.

Respectfully submitted,

/s/

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

Attachments:

Exhibit A (DSEA Comments, filed in AB 167 (Sub-no. 1189X) Oct. 19, 2020

Exhibit B (City et al "Opposition" filed Jan. 23, 2006 in F.D. 34818, including Verified Statement of John J. Curley, discussing stanchion demolition and overall plan for demolition)

Exhibit C (Preservation New Jersey letter filed Jan. 27, 2006 in F.D. 34818)

Exhibit D (Conrail joinders in all six LLC demolition permit applications, dated December 13, 2007)

Exhibit A

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

301186

ENTERED
Office of Proceedings
October 19, 2020
Part of
Public Record

CSX Transportation, Inc. –)
Disc. Ex. –) AB 55 (Sub-no. 686X)
In Hudson County, NJ)

Norfolk Southern Railway Co. --)
Disc. Ex. --) AB 290 (Sub-no. 306X)
In Hudson County, NJ)

Comments on Draft Supplemental Environmental Assessment

City of Jersey City (“City”), Rails to Trails Conservancy (“RTC”), and
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition
 (“Coalition”) (collectively “City et al..”) comment collectively as follows on the
Draft Supplemental Environmental Assessment (“DSEA”), served Sept. 10, 2020:

Overview

The DSEA purports to conclude that authorizing Consolidated Rail Corporation
 (“Conrail”) an unconditioned abandonment¹ “would not significantly affect the
quality of the human environment” and further environmental analysis under the

¹ The DSEA reaches a similar conclusion as to authorizing unconditioned
discontinuances for Conrail’s corporate parents Norfolk Southern Corporation
 (“NS”) and CSX Transportation, Inc. (“CSX”).

National Environmental Policy Act (“NEPA”) is “unnecessary.”² Although the DSEA goes on for 18 pages, it is a remarkably simple document that can be boiled down to the following three fundamentally incorrect suggestions and assumptions: First, the DSEA suggests that the City had a chance to acquire the property in question before it was sold to a private developer (the “Hyman LLCs”) in 2005.³ Second, the DSEA assumes that once the property was sold to the Hyman LLCs in 2005, the agency cannot void the sale or otherwise control what the developer does with it.⁴ Third, the DSEA assumes on this basis that there is no environmental analysis necessary because the agency has no regulatory authority to do anything other than rubberstamp Conrail’s subsequent and much-belated abandonment license applications. In a nutshell, the DSEA contends that if Conrail unlawfully

² DSEA p. 17.

³ This agency has repeatedly warned parties that it is a misuse of its processes for railroads to transfer rail lines for non-rail purposes (i.e., abandonment) unless the railroad first obtains an abandonment authorization. E.g., City of Temple, Tex. – Acquisition and Operation Exemption – Georgetown Railroad Company, F.D. 35369, served April 23, 2010, slip op. p. 1 (“acquiring a line of railroad for the purpose of abandoning rather than operating over it constitutes a misuse of [this Board’s] procedures”). In this light, the DSEA’s discussion of the City’s alleged opportunity to acquire is entirely false and misleading. Neither the City nor any buyer could have legally acquired the property because Conrail had not asked for nor received required authorization from the STB to sell it. 49 U.S.C. 10903(d); 49 U.S.C. 10501(b) (federal preemption). Further, the record shows that Conrail marketed the property to buyers for non-rail use, and that upon the City inquiring as to whether the line had received an abandonment authorization, immediately and without prior notice to the City sold it to a developer for non-rail purposes.

⁴ The agency also implicitly and wrongly assumes that it need not consider this alternative for purposes of NEPA compliance.

engages in a de facto abandonment of a line without first obtaining STB authority as required by law, the agency lacks any power whatsoever to enforce its jurisdiction or to apply environmental (including historic preservation) protections. In other words, according to the OEA's DSEA, Conrail's illegal action (conveniently) relieves the agency of its responsibilities.

The DSEA as described above is based on false assumptions and irrelevant information, and violates core principles governing NEPA.. The DSEA assumes away the agency's well-established powers to invalidate deeds issued in derogation of federal law; falsely implies that the City should have purchased the property unlawfully or, in the alternative, falsely suggests the City had an opportunity to acquire the property; fails to consider conditions to keep the right of way intact and thereby mitigate potential adverse effects; ignores the unlawful sale; incredibly fails to do anything responsive to the vast majority of the roughly 2000 comments STB acknowledges it received;⁵ fails to recognize that loss of federal jurisdiction in the situation described in the DSEA will itself be an adverse impact meriting an environmental impact statement ("EIS"); and mistakenly ignores key alternatives available to the agency to ameliorate adverse

⁵ DSEA p.2. The DSEA limits its comments analysis to a few statistics about outcomes the comments supported. DSEA at p. 17. Evidently far more comments supported preservation of the historic Branch than its demolition (DSEA p. 17), which is the likely outcome of an unconditioned abandonment.

environmental effects. For these and other reasons, the DSEA sadly fails to fulfill the function of an environmental assessment (“EA”) or an EIS to inform the agency and the public of measures and options that are available to lessen or ameliorate adverse environmental consequences flowing from the proposed unconditioned abandonment.

At the very least, the DSEA should have analyzed what the agency could have done had the property not been unlawfully sold before Conrail, NS, and CSX sought abandonment authorization. That analysis, if accurately and reasonably done, would alert the agency and the public to the scope of the prejudicial impact of Conrail’s unlawful 2005 sale of the Harsimus Branch. It would further equip the agency to consider measures and options to achieve what the agency could have done had Conrail, NS and CSX acted lawfully in the first instance.

To add to the prejudice, STB in its DSEA is now apparently excising from NEPA consideration all matters relating to adverse impacts on historic assets arising from the proposed abandonment. NEPA impact analysis, however, must include impacts on historic assets. The agency cannot conclude with any sort of finality there are no adverse impacts, as it purports to do in the DSEA, before the process under Section 106 of the National Historic Preservation Act (“NHPA”) is complete. See 36 C.F.R. 800.8(a). The Section 106 process to date has identified a host of historic assets that would be adversely impacted by loss of federal

jurisdiction over this rail line. Yet when Commenters sought an extension of time for comments on the DSEA in order to prepare for commenting and a hearing October 27 on a critical draft “Memorandum of Agreement” to resolve adverse impacts on historic assets, the agency promptly refused. This attempt to ignore impact on historic assets for NEPA purposes is unlawful.

The DSEA is based on false assumptions and misleading statements, overlooks the unlawful de facto abandonment that occurred, and fails utterly to consider any means to ameliorate Conrail’s unlawful action. It must be withdrawn, and a new DSEA issued that is responsive to the actual situation. It should focus on all available avenues for the agency to return the property to its status quo prior to Conrail’s unlawful sale, thus providing the City and the public generally with full recourse to public use conditions, environmental conditioning, and any other remedies otherwise available under state and federal law. In short, the DSEA should focus on how to make the public interest whole, not how to use unlawful conduct as an excuse to ignore adverse consequences flowing from the unlawful conduct. Proceeding to a decision under this DSEA sets a terrible precedent that encourages the regulated industry to ignore this agency’s abandonment jurisdiction in order to obtain the reward of evading meaningful NEPA and NHPA analysis and the conditioning on abandonments in the public interest that flows therefrom and from the other remedial statutes administered by

the agency. The fundamental idea behind the concept of “rule of law” is that unlawful conduct is remedied, not rewarded.

The DSEA Relies on Misleading or Irrelevant Characterizations

A. Conrail’s Claim It Believed the Line a Spur Is Not Credible and Does Not Excuse the Railroad’s Unlawful Conduct

The DSEA in effect excuses and, on this basis erroneously authorizes, Conrail’s unlawful sale and de facto abandonment of the Harsimus Branch because Conrail claims it thought the line was a mere spur. This DSEA suggestion is spurious. We begin by noting there is no basis for Conrail’s claim.⁶ Conrail, NS

⁶ City et al. have repeatedly explained that all available evidence all along has conclusively demonstrated that the Harsimus Branch was a line of railroad for which abandonment must be pre-authorized under 49 USC 10903(d), and not some forgotten track serving one or two shippers on some byway, that could constitute a “spur” outside this agency’s abandonment jurisdiction per 49 USC 10906. To take some of the more recent examples, see City et al.’s Comments filed in this proceeding (AB 167-1189X) on September 25, 2014; Letter to V. Rutson and J. Wayland (STB OEA) dated October 6, 2017, filed as an environmental comment in this proceeding; Objections to STB’s CREAR filed Dec. 4, 2019 at 14-15. City et al. have been making this argument often in conjunction with the application of NHPA section 110(k), now codified at 54 U.S.C. 306113. All the arguments in these documents are incorporated herein. City et al. also incorporate their Summary Statement Concerning Section 110(k) and Exhibits in Support Thereto, filed in AB 167-1189X and related proceedings on January 21, 2009. In all events, this agency twice determined the Harsimus Branch was a line (Decisions in F.D. 34818, served Aug. 9, 2007 and Dec. 19, 2007, vacated on jurisdictional grounds by the D.C. Cir. at 571 F.3d 13 (2009), and it was also conclusively so determined by the United States District Court for the District of Columbia, in a decision upheld by the United States Court of Appeals for the D.C. Circuit. City of Jersey City v. Consolidated Rail Corp., 968 Supp. 2d 302 (D.D.C. 2013), summarily affirmed, D.C. Cir. No. 13-7175, filed Feb. 19, 2014, 2014 U.S.App.

and CSX are not naifs concerning the requirements of federal rail regulation, nor may they be presumed to employ same. Conrail and its corporate parents knew, or were willfully blind (which is the equivalent of actually having knowledge), that the Harsimus Branch was a regulated railroad line. They knew, or were willfully blind, to the fact that the Harsimus Branch was the former Pennsylvania Railroad mainline. They knew that it contained historic resources (Conrail in fact had objected to that fact to the Keeper of the National Register in 1999 on the ground the historic nature of the Embankment would encumber the railroad's non-rail development plans.) City annexes hereto the Verified Statement of Thomas F. McFarland, executed 27 Sept. 2017, and filed in this proceeding with Letter to V. Rutson, et al, supra. Mr. McFarland therein provides an expert opinion concerning whether, at the time (July 2005) Conrail sold the Embankment portion of the Harsimus Branch to its chosen developer,

Lexis 3067, 2014 WL 1378306. Indeed, the whole controversy over its status was so contrived that the parties ultimately stipulated the Harsimus Branch was a line, not a spur. It is well-established that a line once a line remains a line, it cannot be recategorized a spur by a railroad and abandoned on that basis, and it forever requires prior abandonment authority before it may be converted to non-rail use, even if rail use has stopped and facilities removed. E.g., Oregon Shortline Abandonment, 267 ICC 633, 635 (1947); Old Colony Railroad Co. et al. Trustees Abandonment, 224 ICC 681, 682-83 (1938); Chelsea Property Owners – Aband. – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, 8 ICC2d 773 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). See also Phillips v. Denver & R.G. RR, 97 F.3d 1375 (10th Cir. 1996) (no de facto abandonment).

“Conrail knew or reasonably should have known that the Embankment was a ‘railroad line’ within the meaning of that term in 49 U.S.C. 10903(d), rather than a ‘spur, industrial, team, switching or side track’ ... within the meaning of those terms in 49 U.S.C. 10906.”

Based on 52 years of experience in railroad law, with a particular focus on railroad abandonments, including the distinction between spurs and railroad lines, Mr. McFarland states that it is his

“firm opinion that Conrail knew or reasonably should have known at the time that the Embankment was a railroad line.”

In sum, the evidence supplied by City et al. has long shown that Conrail intentionally violated the law with the railroad’s July 2005 sale to the Hyman LLCs.

B. Conrail’s Willfully Blind Excuse that It Thought the Line a Spur Is No Excuse for This Agency to Ignore Conrail’s Unlawful Conduct

Just as Conrail cannot hide behind willful blindness to the facts, neither can STB. If Conrail knew or should have known this was a line, the agency cannot give any credit to Conrail’s excuse, and the Conrail spur claim is irrelevant. It provides absolutely no basis for STB’s limited view of its legal authority to mitigate the adverse effects of abandonment of the line. To the contrary, to the extent Conrail’s unlawful sale limits the effectiveness or availability of measures to

mitigate the adverse impacts of the abandonment, the need to unwind the unlawful transaction, either by voiding the deeds or by denying abandonment until Conrail returns the property to *status quo ante* (i.e., re-acquires the property) is even more compelling.

Given this backdrop, it is particularly surprising that the DSEA intimates, and Conrail has certainly and repeatedly argued, that Conrail should be excused for its illegal sale to the Hyman LLCs because the City had opportunities to buy the Embankment prior to 2005.⁷ At this point, it is astonishing that it is necessary to once again point out to the agency how thoroughly and conclusively this argument has been rejected by the Court of Appeals for the D.C. Circuit. In particular, City of Jersey City v. Consolidated Rail Corp., 668 F.3d 741, 745-46 (D.C.Cir. 2012), rejected Conrail's claim that the City was not injured by the unlawful sale because the City itself could unlawfully use eminent domain to secure the property without

⁷ The DSEA even claims the City began negotiating to purchase the portion of the Harsimus Branch from Conrail “[s]tarting in 1984” even though the Branch was still in freight rail service in that year. The DSEA claims no deal was reached, and claims the City participated in removal of bridges, was offered the Embankment in the 1990’s but that no deal was reached, and instead the Embankment was declared eligible for the New Jersey Register of Historic Places in 1999. (The DSEA fails to recognize that the Embankment is eligible for the National Register of Historic Places as well.) The DSEA notes that Conrail in the meantime sold off the Harsimus Yard to private developers, and then put the Embankment up for sale in 2002. The DSEA says Conrail treated the line as “unregulated spur track” and sold it to a private developer in 2005. DSEA at 3-4. In short, the DSEA details but does not find that Conrail participated in an unlawful de facto abandonment.

an STB abandonment authorization for no identified entity would complain. The Court explained that the City was suing

“under a federal statute that offers it an array of rights and benefits, [and] it seeks to void an allegedly unlawful sale of railroad line that threatens its interests in the historic and environmental value of the property. In that context, the City’s refusal to invade federal jurisdiction and engage in unlawful self-help can hardly deprive it of standing.”

668 F.3d at 745. The Court also noted that in any event “Conrail’s refusal to [timely] invoke STB proceedings injures the City by depriving it of the benefits of those proceedings – namely, the opportunity to acquire and to protect the property” under the various remedies available in or as a result of the federal proceedings. 668 F.3d at 744.

Moreover, this agency has warned municipalities not to acquire rail lines for non-rail purposes absent abandonment authority. E.g., City of Temple, supra. The agency cannot warn cities not to do things and then insinuate in environmental assessments they should or could have anyway.

It is unlawful for a railroad to sell to any party a regulated freight rail line for non-rail purposes unless it first has an STB abandonment authorization. Inasmuch as the Embankment has never had an effective abandonment

authorization. To this day, the City cannot lawfully acquire it for such purposes, either by voluntary negotiation or by eminent domain, because it still has no effective abandonment authorization. And the Hyman LLCs could not, and still cannot, lawfully acquire it either. To the contrary, STB jurisdiction precludes dismantlement and sale of a regulated rail line prior to the railroad's receipt of an effective STB abandonment authorization.⁸

Consistent with federal law, the New Jersey title practice manual (L. Fineberg, Handbook of New Jersey Title Practice, 2d ed., 2000, 3d ed. 2005) provides that a party seeking to acquire Conrail property should first obtain proof of federal abandonment authorization or proof that no such authorization was required.⁹ When Conrail pressed for sale of the property to developers in the 2002-05 period, the City retained outside eminent domain counsel to assist it in preserving the Embankment. Consistent with federal law and the New Jersey title practice manual, City's outside eminent domain counsel (Mr. Curley), via his paralegal, requested proof from Conrail of abandonment authorization or that none was

⁸ STB Policy Statement on Consummation of Rail Line Abandonments..., Ex Parte 678, served April 23, 2008, slip at 4 ("Policy Statement"): "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." (Emphasis added.)

⁹ Fineberg, supra, 2d ed. at pp. 98-4 to 6; 3d ed. at pp. 98-1 to 6 (see Appendix I to City et al.'s Comments filed Sept. 25, 2014 in this proceeding at pp. 34-44).

required by letter dated June 28, 2005.¹⁰ Instead of providing any showing of abandonment or that no STB authorization was necessary, Conrail quickly and surreptitiously sold the property to the Hyman LLCs.¹¹ This shows the railroad not only was on notice that a lawful sale needed prior abandonment approval or proof that none was required, but also that the railroad had none, for it provided none.¹² That being the case, the events prove Conrail acted intentionally to violate the law, and did not merely act out of willful blindness.

C. This Is but One Example of Repeated Unlawful Abandonments
by Conrail in Jersey City

This is not the first instance in which Conrail has unlawfully sold off lines in Jersey City without prior STB abandonment authorization; it is merely the first time it has done so in order to evade efforts to preserve historic assets and to thwart public acquisition of a line under federal and state remedies otherwise available. Essentially contemporaneously with unlawful sales involving the Harsimus Branch, Conrail sold off portions of the Lehigh Valley Main Line located on the Jersey City waterfront to developers (but more importantly to New Jersey Transit

¹⁰ See p. 69 of City et al.'s Sept. 25, 2014 Comments, *supra*.

¹¹ See pp. 70-71 of City et al.'s Sept. 25, 2014 Comments, *supra*.

¹² So far as City et al. is aware, the Hyman LLCs, although presumably aware of the New Jersey title practice manual, did not seek or obtain proof that no abandonment authorization was required. They were thus complicit in the intentional or willfully blind violation of federal law.

for light rail) without prior STB authorization. See Consolidated Rail Corporation – Ab. Ex. – in Hudson County, NJ, AB 167 (Sub-No. 1190X). This agency ultimately exempted the proceeding from a private OFA, and thereafter authorized the abandonment, not in order to facilitate private developers but instead to avoid interference with New Jersey Transit’s Hudson-Bergen Light Rail passenger transit system, which was evidently already constructed and operating on a key portion of the line. See id., decision served May 17, 2010. The agency, however, instituted an investigation into Conrail’s unlawful sale of the line to New Jersey Transit “without seeking or obtaining Board authority.” Id. at p. 6. The investigation was docketed as Consolidated Rail Corporation’s Sales and Discontinuances, Ex Parte 695, served May 17, 2010. The Board stated that because “the record indicates that Conrail began selling parts of the line as far back as 1996, we also hereby order Conrail to disclose to the Board all of its line or partial line sales and all of its discontinuances of service since January 1, 1996, for which no Board authority was sought and no exemption notice was filed along with an explanation of why Board authority was not sought and no exemption notice was filed.” Slip. op. p. 6.

In response, Conrail claimed it could find no record of other such sales. That was obviously a misrepresentation by Conrail, in light of line sales since January 1, 1996, involving the Harsimus Branch, of which the 2005 sale of the Embankment was a case in point. Conrail has subsequently alerted City et al. to additional

transactions with New Jersey Transit apparently without abandonment or transfer authorizations. STB terminated its investigation on the basis of Conrail's misrepresentation that it had not made additional unlawful sales in Jersey City since January 1, 1996. See id. served January 31, 2012. City et al. and this Board know, notwithstanding Conrail's claim, that Conrail is a repeat offender in Jersey City.¹³

D. The Agency Has Ample Power to Enforce Its Jurisdiction

Faced with knowing and repeated unlawful conduct by Conrail, the next question is whether the agency can do anything about it. The DSEA implicitly and mistakenly assumes the agency cannot do anything about it, or will not. In any event, the DSEA instead relies on Conrail's unlawful action for its legal position that there is nothing for the agency to analyze under NEPA, because Conrail has sold the property to a developer. Thus, the DSEA takes the position it need not analyze, inter alia, the impact on City streets of the huge salvage project

¹³ It is not clear at this time whether the sale of the Hudson Street Industrial Track occurred before or after January 1, 1996. The Hudson Street Branch (PRR Line Code 1440) was designated by USRA to Conrail as a line in Final System Plan at 272 (1975). It is referenced by Conrail in its original Notice of Intent to Initiate a Case in AB 167-1189X, filed March 12, 2008; by Jersey City's Mayor in his letter to Conrail Associate General Counsel Enright dated March 4, 2008, which is filed with the Notice of Intent to Participate of City et al. in AB 167-1189X, filed March 21, 2008; and by the Hudson County Planning letter filed April 11, 2008 in AB 167-1189X) occurred before or after January 1, 1996.

represented by tearing down and removing the historic Harsimus Embankment in a residential area itself made up of historic districts.¹⁴

The DSEA's implicit assumption that STB can do nothing is of course absurd. The agency has ample power to enforce its jurisdiction. For example, the agency can void the deeds from Conrail to the developer.¹⁵ If the deeds are voided, then the property belongs to Conrail again. The agency can then impose conditions on salvage to protect the environment from noise, dust, and possible toxic material

¹⁴ Conrail has joined in its chosen developer's applications to demolish the Embankment. The Conrail documents joining in the developer's demolition requests were signed by Conrail's then VP and General Counsel Jonathan Broder and were filed with STB as exhibits to a scheduling order filed in AB 167-1189X on June 17, 2014; these are accessible in the STB e-library filings, and per the following web link: [https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/2350286946ac153485257cfa004ce051/\\$FILE/236196.pdf](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/2350286946ac153485257cfa004ce051/$FILE/236196.pdf). Unfortunately, the e-library version is somewhat garbled, so City et al. tendered more legible copies with comments on the CREER. Conrail joined in demolition permit requests for each of the six blocks of the Embankment, as witnessed by the six "Joinders" executed on Dec. 13, 2007, after STB had initially determined that the Harsimus Branch was a line of railroad subject to abandonment licensing jurisdiction in F.D. 34818 (decision served August 9, 2007), but well before Conrail had instituted any abandonment proceeding.

¹⁵ Various commenters have been calling for invalidation of the Conrail to Hyman LLCs deeds, or the reconveyancing of the property back to Conrail, in this proceeding (AB 167-1189X) since at least 2008. See, e.g., comments by Jersey City Landmarks Conservancy, filed 4/2/2008; Comments by Van Vorst Parks Association et al, filed 4/2/2008; Comments by Civic JC filed 4/2/2008; Comments by Liberty State Park filed 4/7/2008. The Jersey City Mayor called for invalidation of the deeds in his letter to Conrail Associate General Counsel Enright dated March 4, 2008, filed with the Notice of Intent to Participate of City et al. in AB 167-1189X, filed March 21, 2008.

volatilized as a result of salvage of the Embankment. In addition, the agency can prevent Conrail from transferring the property other than for public use for at least 180 days, pursuant to 49 U.S.C. 10905,¹⁶ and impose other conditions pursuant to both 49 U.S.C. 10903(e)(1)(B) and Section 110(k) of the NHPA (anticipatory demolition).¹⁷ The imposition of a public use condition would permit the City to negotiate for the property without interference from developer claims, and to employ eminent domain and other state law remedies (NJSA 48:12-125.1 permits City to acquire the property for the same price contracted by the developer) unmolested by the developer.¹⁸ This would provide a reasonable remedy to City et al. in that it would enable the City to acquire the property under roughly the same circumstances which would have applied had Conrail acted lawfully.

In The Land Conservancy of Seattle & King County – Acquisition & Operation Exemption -- BNSF, F.D. 33389, served Sept. 26, 1997, slip op. at 3, this agency

¹⁶ Various commenters have been calling for a public use condition since at least 2008 as well. See, e.g., Comments of East Coast Greenway in AB 167-1189X, filed May 6, 2009; and comments in note 15 supra.

¹⁷ Again, concern has been expressed that Section 110(k) be applied as a remedy by various commenters since the inception. See note 15 supra for some early examples. See also comments of the Hudson County Division of Planning in AB 167-1189X, filed April 11, 2008, at item 8.

¹⁸ The record in this proceeding demonstrates that the Hyman LLCs have repeatedly sued the City (as well as City et al. and in some cases their attorneys) in state court, and pursued litigation in federal court and before this agency as well, in order to frustrate the City's efforts to acquire the property in question.

voided a railroad's deed to a conservation organization because it found that the transfer of property was for purposes of non-rail use without an abandonment authorization. If the agency voids transfer to preservation groups seeking to conserve a corridor because they do not have an STB abandonment authorization, STB clearly has the power to void a transfer (without any STB authority whatsoever) to a real estate developer intending to destroy a regulated line of railroad. In Pyco Industries – Feeder Line Application – Lines of South Plains Switching, Ltd. Co., F.D. 34890, served August 3, 2006, slip op. at 6, this Board voided land transfers by South Plains Switching (SAW) as an attempt to evade the Board's authority. STB noted that it had “voided similar transfers of interests in leases and agreements that were designed to shield railroad property from the Board's authority,” citing Railroad Ventures, Inc. – Acquisition and Operation Exemption -- Youngstown & Southern Railroad Co., F.D. 33385, served Oct. 4, 2000, aff'd Railroad Ventures v. STB, 299 F.3d 523 (6th Cir. 2001). As the Board indicated in SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway between La Harpe and Peoria, F.D. 33995, served Oct. 17, 2002, slip at 19, “persons who engage in such abuses [should not] be allowed to profit from them.” The Board ordered SF&L to “immediately reconvey” property acquired contrary to STB regulations. Id. The SF&L case involved a purchaser who acquired a line of railroad to break it up and salvage it,

which is what the Hyman LLCs did here. STB clearly has the authority to enforce its jurisdiction by voiding deeds like those Conrail issued to the LLCs here which are in complete derogation of the agency's abandonment jurisdiction and a palpable and knowing evasion of NEPA and NHPA. It would be arbitrary and capricious, among other things, for the agency to fail to do so.

E. Because STB Has the Power to Enforce Its Jurisdiction, the DSEA Conclusion That There Are No Environmental Effects That Are within the Agency's Jurisdiction Is Plainly in Error

Since STB has power to enforce its jurisdiction by voiding the deeds or taking tantamount action, the DSEA is in error in claiming in essence the agency can do nothing about remaining salvage items and other environmental effects. There are profound environmental effects that are within the agency's jurisdiction, including remaining salvage of line, and application of remedies that serve to preserve the line in the public interest. By failing to analyze the line as if it had not been de facto abandoned, the DSEA utterly fails to provide STB decisionmakers environmental and related information germane to their decision. The DSEA in short arbitrarily limits its analysis of alternatives, and/or fails to discuss means to mitigate adverse environmental impacts. In effect, the STB treats the line as if has already been abandoned, which violates the fundamental principles of NEPA. See Illinois Commerce Commission v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988) (“RTC correctly asserts that after an exemption is finally authorized and the

railroad begins to tear up the track and dispose of the right-of-way, alternatives are clearly foreclosed and it would be too late at that point to consider environmental factors”).

F. Alternatives and Conditioning to Mitigate Adverse Impacts
Arbitrarily and Capriciously Omitted from the DSEA

In the circumstances here, there are two obvious alternatives to an unconditioned abandonment. One is to deny abandonment authority, at least until Conrail reassembles its ownership interests. That result comports with the agency’s authority not only under 49 U.S.C. 10903 but also under NHPA Section 110(k) (denial of license authority when regulated entity engages in anticipatory demolition activities). Once Conrail reassembles the asset, it can again seek abandonment authority, but this time all public remedies will be available.

The second alternative to an unconditioned abandonment authorization is a conditioned abandonment. The prime condition to be considered is one that not only protects this agency’s jurisdiction but also mitigates adverse environmental impacts. The DSEA should consider and recommend, and the agency should adopt, the following two conditions:

a) All deeds issued by Conrail relating to any portion of the Harsimus Branch at issue in this proceeding issued by Conrail after January 1, 1996¹⁹ are void upon the effective date of this abandonment authorization.

b) Conrail shall take no action to sell or alienate any property interest in this proceeding for 180 days following the effective date of this abandonment authorization other than for public purposes.²⁰

In the alternative, the agency could adopt similar conditions to the same end providing that Conrail shall not consummate any abandonment authorization until (1) it has reacquired all portions of the Harsimus Branch at issue in this proceeding alienated by Conrail after January 1, 1996, and (2) offered same for sale for public purposes for a period no less than 180 days.

Upon consideration and recommendation of either alternative (a)-(b) or (1)-(2), Conrail will once again be in full ownership of the Embankment parcels. The City will have an unmolested 180 days to invoke eminent domain and NJSA 48:12-

¹⁹ Conrail represented to the agency in Ex Parte 695 that it had not sold lines or portions of lines in Jersey City after January 1, 1996. That being the case, there are presumably no illegal sales relating to the Harsimus Branch to the extent at issue here, other than those to the Hyman LLCs.

²⁰ The 180 days “Public Use Condition” period (i.e., application of 49 U.S.C. 10905) will be sufficient for the City to initiate eminent domain proceedings and/or to invoke N.J.S.A. 48:12-125.1 to secure the Embankment, and the entire Branch, in the public interest. In the event of acquisition, the City does not plan to remove the Embankment but to preserve it, and the Branch as well, which will eliminate adverse environmental impacts.

125.1 remedies to acquire the property. In addition, since Conrail will own the property upon the effectiveness of the abandonment, this agency will unequivocally have jurisdiction to impose conditions to mitigate dust, noise and toxic effects that will occur on salvage.²¹

Even if Conrail were not in full ownership, the agency has erred in claiming there is no salvage issue to analyze. The record demonstrates that removal of the Embankment will be a huge demolition project (see note 21). The fact that Conrail has contracted the demolition to a chosen developer does not mean that environmental consideration of, and conditioning for, salvage-related issues can be ignored. Most railroads contract out salvage upon abandonment to third-party contractors. This practice has never before obviated this agency's responsibility to

²¹ Parties early on called the agency's attention to the massive salvage operation entailed in removing the historic Harsimus Embankment, as sought by Conrail. The Embankment contains 59,250 cubic yards of sandstone, plus 154,800 cubic yards soil, and would require between 14,300 and 12,400 truck loadings. Consultants (Dresdner Robin) for the City found that lead, arsenic, mercury and antimony and several "PAH's" in the Embankment's contents exceed the NJDEP residential direct soil cleanup criteria, meaning the material cannot be reused as clean fill. A copy of the 1998 report was filed with STB along with additional comments by City et al. in AB 167-1189X on April 7, 2008. The Report did not discuss airborne hazards from this much disruption, but airborne hazards, traffic congestion, noise and run-off issues must be presumed enormous. In addition, since most consultant reports were prepared, the Embankment has sprung to life with vigorous flora and fauna. No one has yet analyzed the impact of loss of urban habitat, or the additional burdens flowing from removal of six blocks of vegetation and fill that serves to break up and contain stormwater in the middle of residential neighborhoods and historic districts. The DSEA wrongly treats all environmental impacts arising from demolition of the Embankment as irrelevant.

consider environmental factors and condition the abandonment accordingly. In the case before the agency here, Conrail has not merely contracted out the job, but has also joined in the demolition permit applications.

Either option (a)-(b) or option (1)-(2) is well within the power of the agency and if adopted by the agency not only will protect this agency's jurisdiction and restore to the public the remedies that Conrail's illegal actions have evaded but also will ameliorate the adverse environmental impacts flowing from Conrail's illegal de facto abandonment and the proposed but completely unwarranted rubberstamp of illegal conduct implicitly endorsed by STB's Office of Environmental Analysis.

There will be no unjust effect upon the Hyman LLCs. Like Conrail, they knew this was railroad property. They and their (many) lawyers can read the New Jersey title manual as well as the City and its legal counsel. They knew that they should have, but did not, require Conrail to prove that it did not require abandonment authorization. They instead chose to cooperate with Conrail to attempt an end-run around agency jurisdiction, NEPA, NHPA, and assorted remedies to preserve this rail corridor upon abandonment.

Moreover, Conrail has already contracted to sell the property back to the developer for the same price the developer paid if this agency voids the deeds.

See attachment II (Oct. 13, 2007 contract between Conrail and the Hyman

LLCs).²² Thus, if this agency voids the deeds (or requires Conrail to re-acquire) and imposes a public use condition, and if the City were to fail to invoke eminent domain and/or N.J.S.A. 48:12-125.1 to secure the property, Conrail can simply transfer the property back. However, the City has the right to acquire the property for the same price as Conrail contracted to sell, or sold, the property to a developer pursuant to N.J.S.A. 48: 12-125.1. Since the City has long held sufficient funds set aside to acquire the property for that price, once this agency issues an effective abandonment authorization, and on voiding of the Hyman LLCs' deeds, the City will be ready, willing and able to acquire. City et al. submit that the two conditions they request above are also most compatible with reaching a settlement with Conrail and the Hyman LLCs that will once and for all end this dispute. In its original EA in this proceeding served March 23, 2009, at p. 8, this agency (citing a 1991 ICC policy position) states that it does not attempt to identify and to address the environmental impacts of reuse alternatives of an abandoned right of way. The two conditions sought by City et al. do not require the agency to identify or address alternatives. They simply return the situation to status quo ante Conrail's unlawful transfer of the property to the Hyman LLCs without abandonment authority, thus allowing City et al. to benefit from the rights and

²² The October 13, 2007 contract in essence commits Conrail to defeat any meaningful exercise of this agency's jurisdiction by ensuring sale of the Embankment parcels to the developer for the original contract price.

preferences to which they are lawfully entitled. Accord, City of Jersey City v. Consolidated Rail Corp., supra, 668 F.3d at 744-46 (City seeks to enjoy the rights and remedies to acquire and to protect the property otherwise available but for Conrail's unlawful de facto abandonment).

In any event, the 1991 ICC policy statement on which STB relies is wrong in the circumstances here. The agency should identify and address alternatives. NEPA requires the consideration of reasonable alternatives even if the alternative is not within the agency's jurisdiction. See Natural Resources Defense Council v. Morton, 458 F.2d 827, 834-36 (D.C.Cir. 1972) (Interior Department had to consider reasonable alternatives to off shore oil lease which would reduce or mitigate the need for offshore exploration, including nuclear energy development and changing natural gas pricing, even if that might require Congressional action); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (9th Cir 1999). The agency's whole environmental process is flawed in failing to consider retention of the Harsimus Branch for park, trail, historic preservation, rail (including light rail) purposes as sought by the City. The fact, if it is a fact, that this retention of the Branch for park, trail, historic preservation and rail purposes involves action by the City does not disqualify it as an alternative. The agency at least can analyze measures it can take to facilitate the City in achieving its alternative. In addition, the agency fails to consider the specific alternative set

forth by the Coalition on its website (<https://embankment.org/vision.html#vision-section-vision>). The agency thus ignores actions it could take to facilitate mitigation by others of adverse effects flowing from Conrail's proposed unconditioned abandonment. These alternatives are hardly impossible: Conrail all along has argued that the City has an eminent domain remedy (unfortunately, this remedy is preempted until an abandonment authorization is effective). But more importantly, STB's DSEA ignores the City's N.J.S.A. 48:12-125.1 remedy, also applicable upon an STB authorized abandonment, which itself would void deeds to developers in the circumstances here, while providing the City the right to acquire the property at the same price Conrail contracted to sell it to the developer. By ignoring the alternatives advanced by City et al., the DSEA fails to empower the agency's decisionmakers in considering not just reasonable alternatives to mitigate adverse effects, but how to cooperate with City et al. to achieve them. This failing is arbitrary and capricious and not in accordance with law.

In order to ensure that the 180-day PUC is properly accorded, City et al. herewith submit (Attachment III) a formal restated PUC request per 49 C.F.R. 1152.28.

Unless the agency adopts the conditions recommended herein, the proposed action in this proceeding (abandonment licensing) will have serious adverse

impacts not considered in its DSEA. A full environmental impact statement is therefore necessary.

There is another problem with the artificial reality the Board's DSEA purports to create. It violates STB's applicable Policy Statement. STB's Policy Statement (see footnote 8 supra) acknowledges that the Board has responsibilities under various public interest statutes, and states that where an unlawful abandonment occurs, "[t]he Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them." Ex Parte 678, slip at 4 (emphasis added). But the DSEA recommends no measures be taken at all. It ignores the unlawful nature of the abandonment at issue in this proceeding and in effect rewards Conrail and the Hyman LLCs for acting unlawfully. The Policy Statement requires the Board to take whatever steps are necessary to enforce compliance. Voiding the unlawfully issued deeds is the necessary step to enforce compliance not just with NEPA and NHPA but also with this agency's abandonment jurisdiction. The Board violates its Policy Statement – renders it meaningless – unless it voids the deeds and otherwise causes the relevant property to be available to the City as if Conrail had not acted unlawfully in 2005 and thereafter.

The reasons to preserve the Harsimus Branch are even stronger today than they were when STB circulated its initial EA in this proceeding in 2009. There is more

need for transit corridors and green space. Developer pressure on historic assets continues. The preferred route of the East Coast Greenway moved an enormous step further to fruition with this Board's issuance of an interim trail use/railbanking order for the Boonton Branch between Montclair and Jersey City. Norfolk Southern Railway Co. – Ab. Ex. – in Hudson and Essex Counties, NJ, AB 290 (Sub-no. 408X), served Sept. 29, 2020. The Harsimus Branch is a vital component of the East Coast Greenway and now the only major piece missing in Jersey City.²³

Failure to comment on particular assertions in the DSEA should not be deemed as an admission. Many aspects of the DSEA discussion are inaccurate, false or misleading, or assumptions without rational foundation, as shown in the years of pleadings filed by City et al. and the public in this proceeding to date. However, the overriding issue here is that the agency's acceptance of – and failure to take any remedial action to address – Conrail's unlawful de facto abandonment has fundamentally tainted the consideration of environmental impacts in the DSEA in violation of core precepts of NEPA.

Conclusion

For the reasons stated above and in our prior pleadings, the DSEA is deficient. It utterly fails to take into account Conrail's unlawful de facto abandonment, and

²³ See Decision in AB 290 (Sub-no. 408X), served Sept. 29, 2020, slip at p. 2 n.3 (noting that City et al supported the preservation of the line at issue as part of a larger system, including the line at issue in this proceeding.)

this failure is all the more egregious because City et al. has demonstrated that Conrail knew or was willfully blind to the fact that it was acting unlawfully. The agency fails to analyze even minimal actions to facilitate invocation of state and local remedies to keep the corridor (and the Embankment) intact. In this vein, the agency fails to analyze conditioning the abandonment on (a) voiding all deeds out on the relevant property after January 1, 1996 and (b) imposing a public use condition barring Conrail from alienating any Harsimus Branch property for no less than 180 days, except for public purposes. As shown herein, Commenters have been requesting this sort of relief since the inception of this proceeding in 2008. The agency has continued to evade and to ignore these issues, refusing to consider meaningful remedies within its jurisdiction, much less outside it, on the ground that Conrail's unlawfulness excuses both Conrail and the agency from meaningful compliance with not just NEPA and NHPA, but with STB jurisdiction generally. The time for ignoring the crux of the case with this excuse should, after twelve long years, be over. The DSEA is inviting the Board to rubberstamp Conrail's unlawful de facto abandonment, and, indeed, to reward Conrail for its illegal conduct by excising any meaningful environmental conditioning or public interest remedies. This will have profound adverse environmental impacts (loss of historic assets, traffic congestion, dust, loss of vegetation and habitat, and salvage operations in residential areas and historic districts, loss of the last available under-

used transportation corridor into downtown Jersey City). Based on these results, the agency should prepare a complete EIS and not rely on the non-analysis represented in the current DSEA. The DSEA is a kind of alternative to reality in that it pretends that there are no effects and in all events no alternatives because it refuses to acknowledge, much less take into account, Conrail's fundamentally illegal actions and evasion of law and the many authorities available to remedy or to at least mitigate the illegal actions below.

For filing: 19 Oct. 2020

Respectfully submitted,

/S/

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Attachment I: T. McFarland V.S.
II: Oct. 12, 2007 Conrail/Hyman LLC contract
III: PUC request

Attachment 1

Verified Statement of Thomas McFarland, Esq.
(including exhibits)

VERIFIED STATEMENT OF THOMAS F. McFARLAND

My name is Thomas F. McFarland. I am an attorney having an office at 208 South LaSalle Street, Suite 1666, Chicago, IL 60604. I am a sole practitioner and sole shareholder of Thomas F. McFarland, PC, a professional corporation.

I have been requested by the City of Jersey City, N.J., Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively referred to as Jersey City, et al.) to provide an expert opinion on whether or not, when Conrail conveyed the Harsimus Embankment Property, (the Embankment) to a group of limited liability companies (LLCs) for nonrail use in July, 2005, Conrail knew or reasonably should have known that the Embankment was a "railroad line" within the meaning of that term in 49 U.S.C. § 10903(d), rather than a "spur, industrial, team, switching or side track" (collectively referred to as a spur) within the meaning of those terms in 49 U.S.C. § 10906.

For the reasons explained in this statement, it is my firm opinion that Conrail knew or reasonably should have known at that time that the Embankment was a railroad line.

I am qualified to render this opinion by virtue of 52 years of experience in railroad law exclusively, with particular focus on railroad abandonment law, including differentiating between railroad lines and spurs in an abandonment context.

Upon graduation from Loyola University School of Law in 1965, I was employed as a Commerce Attorney in the Law Department of Illinois Central Railroad Company at Chicago, IL. My duties in that position included helping to prepare applications to the Interstate Commerce Commission (predecessor of the Surface Transportation Board (STB)) for authority to abandon

railroad lines, and determining whether particular right-of-way and/or trackage was a railroad line or a spur.

In 1970, I became employed by the Chicago law firm of Belnap, Spencer, Hardy & Freeman (Belnap Firm) as an associate attorney. I became a partner in the Belnap Firm in 1977. The Belnap Firm practiced railroad law exclusively. My specialty in that practice was railroad abandonment law.

I remained in the private practice of railroad law for the next 47 years, to date. Over that period, my partners either retired or died, such that since 2001 I have been a sole practitioner as sole survivor of the Belnap Firm.

During my 52 years of railroad practice, I have litigated over 100 railroad abandonments, representing both applicants for abandonment authority and opposing parties. I am reasonably certain that no other attorney in the United States has nearly that much experience in railroad abandonment.

During the course of my career, I have often been called upon to render opinions as to whether particular railroad right-of-way and track constituted a railroad line or a spur. I have also been involved in litigation in regard to that issue. One such example is *Battaglia Distributing Co., Inc. v. Burlington Northern R. Co.*, 2 S.T.B. 323 (1997), *pet. to reopen den.* 1998 WL 857070.

I reviewed the following materials, among others, in order to prepare my testimony in this matter:

1. Decision of the Surface Transportation Board (STB) in its Docket No. F.D. 34818, *City of Jersey City, et. al -- Petition for Declaration Order*, service date August 9, 2007;
2. Decision of the STB in its Docket No. F.D. 34818, *City of Jersey City, et. al -- Petition of Declaratory Order*, service date December 19, 2007;
3. *City of Jersey City, et. al v. Consolidated Rail Corporation*, 968 F.Supp. 2d 302 (USDC, DC, 2013);
4. Decision of the United States Court of Appeals for The DC Cir. No. 13-7175, (unpublished) that summarily affirmed the decision in number 3 above;
5. Decision of the Interstate Commerce Commission (ICC) in *The Atchison, T. & SF Ry. Co. -- Aband. Exempt. -- in Lyon County, KS*, 1991 WL 120344 (ICC Docket No. AB-52 [Sub-No. 71X], decided June 11, 1991);
6. Decision of the STB in *Chelsea Property Owners -- Aband. -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track, in New York, NY*, 8 ICC 2d 773 (1992);
7. Decision of the STB in *Battaglia Distrib. Co., Inc. v. Burlington Northern R. Co.*, 2 STB 323 (1997);
8. Decision of the STB denying a petition to reopen the decision in No. 7 above, at 1998 WL 857070;
9. Decision of the Superior Court of New Jersey in its No. HUD-L-5801-09, *212 Marin Boulevard v. Chicago Title Insurance Co.*, filed August 31, 2017;
10. Letter of Robert M. Jenkins, III, Mayer Brown LLP to Victoria Rutson, Director, Office of Environmental Analysis, STB, dated September 8, 2017;
11. Compilation headed "Spur Decisions Made By Law Department", dated 9-4-97;
12. Memorandum dated July 11, 2005, from John K. Fiorilla, Esq. to Bridget McLaughlin re July 13 Sale Embankment Jersey City;
13. Letter dated October 4, 2005 from John K. Fiorilla to Carmine R. Alampi, Esq. re Consolidated Rail Corporation to SLH Holding Company Inc., Our File No. 0476-50485.

I am familiar with the issues involved in Docket No. AB-167 (Sub-No. 1189X) and related proceedings as a result of reviewing the STB's decisions in those matters as they appeared on the STB's website. Because the issues in those cases were of general interest to me, I also read the related Court decision in *City of Jersey City v. Consolidated Rail Corporation*, 968 F.Supp.2d 302 (USDC, DC, 2013).

By virtue of the latter decision, it is judicially settled that the Embankment was conveyed to Conrail in 1976 as a railroad line subject to STB abandonment jurisdiction. Thus, it is clear that in 1976 the Embankment was a railroad line, not a spur. The issue I am to address is whether or not Conrail reasonably could have believed that the Embankment was no longer a railroad line, but instead was a spur, when it conveyed the Embankment to the LLCs in 2005. For the reasons explained below, it is my firm opinion that Conrail could not have reasonably so believed.

There is a widely-known principle in ICC-STB jurisprudence to the effect that "once a line of railroad, always a line of railroad". Thus, where, as here, railroad property has been determined to constitute a railroad line, such property cannot lawfully be treated as a spur at a later time, even though as a result of passage of time the property may have taken on many of the physical characteristics of a spur.

Thus, in *The Atchison, Topeka and Santa Fe Railway Co. -- Abandonment Exemption -- in Lyon County, KS*, 1991 WL 120344 (Docket No. AB-52 [Sub-No. 71X], decided on June 11, 1991) (*Atchison Topeka* case), the ICC said (at *3):

Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur and the Commission divested of jurisdiction over it solely through the railroad's unilateral decision to change its use of the track segment over time. To find that this is a spur would be inconsistent with our well-established policy that where a carrier decides to reduce or cease service and/or remove track, the carrier's common carrier obligation remains until appropriate abandonment authority is obtained . . .

Fully in accord with that ruling is the ICC's decision in *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporations West 30th Street Secondary Track in New York, NY*, 8 ICC 2d 773, 1992 WL 233599 (Docket No. AB-167 [Sub-No. 1094], decided August 28, 1992) (*the Highline case*). There, the ICC said (8 I.C.C.2d at 791, 1992 WL 233599 at *11):

Given the Highline's history as a regulated rail line, we continue to have jurisdiction over it, even though the track in question now possesses many of the characteristics of a spur. We recently addressed the status of a rail line unused for 15 years. In holding that the track's use as part of a line haul rail operation prior to the unauthorized cessation of service made it a railroad line subject to our abandonment regulation, we stressed the well established principle that a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track (citing the *Atchison Topeka* case, *supra*). . .

It would not be credible for Conrail to contend that it was not aware of the determination that the Highline is a railroad line when it conveyed the Embankment to the LLCs. That determination was made in regard to a Conrail property located in the same general territory as the Embankment in a proceeding in which Conrail was an active party. Like the Embankment proceeding, *the Highline case* generated widespread publicity because it involved an intense dispute over a potentially expensive removal of an elevated Conrail right-of-way. The finding that the Highline is a railroad line was made not long before the dispute involving the

Embankment. It is likely that a number of key Conrail personnel participated actively in both the Highline and the Embankment disputes. It is my understanding that Conrail's General Counsel, Jonathan Broder, and Conrail's outside railroad counsel, John Fiorilla, both held similar positions in 1992 when the *Highline* case was decided and in 2005 when the Embankment was conveyed to the LLCs.

My expert opinion is not at all changed upon consideration of two allegations by Conrail outside counsel John Fiorilla in 2005 that the Embankment was a spur. The first of such allegations was made virtually on the eve of closing of sale of the Embankment to the LLCs in a memorandum to Ms. Bridget McLaughlin dated July 11, 2005, a copy of which is attached as my Appendix TFM-1. The allegation regarding the spur nature of the Embankment is in numbered paragraph 6 of the memo. No legal authority nor reasoning was provided by Mr. Fiorilla in support of the allegation. Mr. Fiorilla is a longtime railroad attorney and representative of Conrail. He was surely familiar with the principle of "once a railroad line, always a railroad line" that was applied in the *Highline* decision, a case with which he undoubtedly was familiar. Mr. Fiorilla surely knew, or had good reason to know that his allegation, that the Embankment was a spur, was false.

The second such allegation was made in a letter from Mr. Fiorilla to Carmine R. Alampi, Esq., an attorney for the LLCs, dated October 4, 2005, a copy of which is attached as my Appendix TFM-2. That allegation was made in response to an "ICC/STB issue". That allegation, too, was not supported by any citation of legal authority or legal reasoning. For the

same reasons as spelled out in regard to appendix TFM-1, Mr. Fiorilla knew or had good reason to know that the allegation, that the Embankment was a spur, was not true.

Neither is my expert opinion at all affected by the fact that the Harsimus Branch was characterized as a spur by a member of the Conrail Law Department in a compilation headed "Spur Decisions Made By Law Department" dated September 4, 1997 that appeared in the record in *212 Marin Boulevard v. Chicago Title Insurance Co., supra*. That compilation is attached as my Appendix TFM-3. No legal reasoning of any kind was cited in support of that characterization. That characterization is flatly inconsistent with the determination of the Court in *Jersey City et. al v. Consolidated Rail Corporation, supra*, that the Embankment was conveyed to Conrail in 1976 as a railroad line.

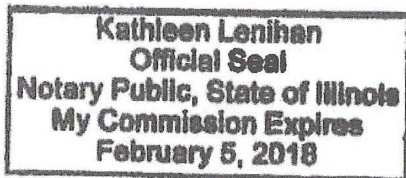
The unsupported allegations of Mr. Fiorilla and the unsupported spur characterization of the Conrail Law Department were the purported underpinnings of the State Court's decision in *212 Marin Boulevard v. Chicago Title Insurance Co.*, Superior Court, N.J., No. HUD-L-5801-09, filed August 31, 2017, that the title insurance company failed to prove that Conrail fraudulently or negligently misrepresented that the Embankment was a spur not requiring STB authority for its abandonment. *Jersey City, et. al* were not parties in that case. The result surely would have been different if it had been explained to the Court that it is judicially settled that Conrail acquired the Embankment as a rail line, and that under settled ICC-STB precedent, the Embankment remained a railroad line requiring STB authority for its abandonment when it was sold to the LLCs without the requisite abandonment authority.

Attached to my statement as Appendix TMF-4 is a copy of a letter from Robert M.

Jenkins, III, Esq., an outside attorney for Conrail, to the Director of the STB's Section of Environmental Assessment, dated September 8, 2017, alleging that the Court's decision in *212 Marin Boulevard v. Chicago Title Insurance Co.*, *supra*, supports a determination that Conrail did not act intentionally or negligently in regard to the sale of the Embankment to the LLCs. I strongly disagree. As I have explained, the Court's decision in the *212 Marin Boulevard* case would surely have been different if it had been explained to the Court that the Embankment was conveyed to Conrail as a railroad line, not a spur, in 1976, and that under settled ICC-STB precedent the Embankment remained a railroad line when it was conveyed to the LLCs in 2005 notwithstanding that as a result of the passage of time it may have taken on some characteristics of a spur. That being the case, I strongly believe that when Conrail conveyed the Embankment to the LLCs in 2005, Conrail knew or had good reason to believe that the Embankment was every bit as much a railroad line as its Highline was determined to be only a short time earlier.

VERIFICATION

THOMAS F. McFARLAND, being duly sworn, states that he has knowledge of the factual assertions set forth in this Verified Statement; and that all of those assertions are true and correct.



Thomas F. McFarland
THOMAS F. McFARLAND

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

SUBSCRIBED and SWORN to before me
this 27th day of September, 2017.

Kathleen Lenihan
Notary Public

My Commission expires: 2/5/2018

0.59

From: John K. Fiorilla [mailto:jfiorilla@capehart.com]
Sent: Monday, July 11, 2005 1:27 PM
To: Bridget McLaughlin
Cc: Ryan, Bob; calamp1@alamplaw.com
Subject: July 13 Sale Enbankment Jersey City

Bridget: I spoke to Carmine this morning and after consultation with my client I would appreciate if you would let him know the following:

1. Real Estate transfer tax is NOT exempt from payment since this is not active railroad property. However our agreement with your client indicates that the buyer will pay this tax regardless of what the local custom is.
2. Regarding real estate tax adjustments, we are working on these and should have them by the end of the day.
3. Regarding the tax declarations faxed to us they appear to apply only to individuals and not corporations. Our client indicated that they recently checked the box regarding the fact that it was not a an individual, estate or trust and was exempt. I note that we would sign both that form and the non residency form but there is no withholding.
4. We are obtaining copy of that tax bill for Block 446 Lot 18a as Carmine requested.
5. Conrail will NOT provide an affidavit of title since the deeds involved are quitclaim deeds and this is mentioned in the contract for sale.
6. The properties abandoned constituted "Spur tracks" over which the STB and previously the ICC had no authority pursuant to 49 USC§ 10906. Therefore no formal abandonment of the property was ever filed. (I have attached a copy of that section of the 49 USC to this email).
7. Regarding the payment of the moneys owed, we have sent the info regarding wiring the funds to our account. Later this week we will wire to your account \$ 1,000,000 from our client Conrail to your trust account on behalf of Steve Hyman reflecting option funds held by our client Conrail in this matter. Please confirm that we can send a letter with wording like this later in the week. We will also send a check for the amount of the real estate transfer tax which will have been sent to us along with the \$ 3,000,000 from the bank so that your firm can pay those charges on behalf of the buyers pursuant to the agreement of sale.

Let me know if you have any comments regarding this.

John K. Fiorilla, Esq.
Capehart & Scatchard P.A.
8000 Midlantic Drive, Suite 300
Mount Laurel, NJ 08054

Confidentiality Note

This transmission is intended only for the addressee, and may contain privileged and/or confidential information from the law firm of Capehart & Scatchard, P.A. If you are not the intended recipient, please do not use, disseminate, or copy this material. If you have received this transmission in error, please notify us immediately by telephone, return this transmission, and delete or destroy any copies.

Thank you.



0 60

John K. Fiorilla
856.914.2054
jfiorilla@capehart.com

October 4, 2005

Rec'd
10/7/05

Via Fax and Regular Mail

Carmine R. Alampi, Esq.
Carmine R. Alampi, L.L.C.
Suite 404
1 University Plaza
Hackensack, NJ 07601

Re: Consolidated Rail Corporation - Jersey City Railroad Embankment
Consolidated Rail Corporation to S.L.H. Holding Company, Inc.
Our File No. 0476.50485

Dear Carmine:

Recently, I met with our clients and reviewed with them the status of the abandonment of the line that formerly traversed the Jersey City Embankment parcels. Based upon this review, the line at issue was reviewed and we continue to be confident that it was properly abandoned under the governing criteria for Spur Lines under the applicable federal statute and that no filing was required before the Interstate Commerce Commission at that time (nor would there be any requirement to file before the Surface Transportation Board at this time).

In any event, since the City of Jersey City and the State of New Jersey were given the opportunity to purchase the parcels and specifically decided NOT to purchase same, the sale to your client should not be disturbed. Neither the City, nor the State has been disadvantaged in any way by Conrail's abandonment of the property. It was offered for sale to the City and the City chose not to bid. The City still has the right to legally condemn the property should it so choose. Accordingly, the ICC/STB issue, we respectfully submit, is a red herring.

Please call me if you have any further questions.

Sincerely,
CAPEHART & SCATCHARD, P.A.

John K. Fiorilla

JKF/ajd
cc: Jonathan M. Broder, Esq.
Mr. Robert W. Ryan
AJD/SDB/96

Spur Decisions Made by Law Department
(DO NOT REQUIRE JDC/STB FILING)

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Line Name	Type	LC	MP 1	MP 2	RL ML	Att'y	Decision Date	Requested by
Arlington Ave. I.T. (Indianapolis, IN)	Line	80-8342	-0.90	0.70	1.60	JJP	5/1/85	F. R. Stapleton
Alhol Br. (Athol, MA)	Spur	unknown				JJP	8/24/83	R. C. Krafty
Avonmore I.T. (Avonmore, PA)	Spur				1.90	JJP	11/15/85	F.B. Gossic
Axle Works I.T. (Homestead, PA)	Spur				0.80	JJP	11/1/89	M. A. Hutchinson
Beaver I. T. (Lovett, PA)	Spur	20-2144				JJP	8/1/83	J. W. Fallon
Bena Creek (Portage Dump Trk)	Spur	20-2149	0.00	0.68	0.68	JJP	4/28/83	J. W. Fallon (04/12/83)
Bloodgood Br. (Union County, NJ)	Spur	10-0532	19.91	20.05	0.14	JJP	5/8/84	Z. Drzewiecki
Bloomfield / Belleville, NJ	Spur	unknown				JJP	5/12/83	Z. J. Drzewiecki
C-A-P Br. (Scranton, PA)	Spur				0.00	JJP	11/7/86	G. Smith
Claremont R.T. (Baltimore, MD)	Spur	20-			1.10	JKE	11/7/85	G. Comstock
Dad's Dog Food Lead (Meadville, PA)	Line	40-6501			0.50	JJP	5/10/86	F. B. Gossic
Dillsburg Br.	Spur				0.50	JJP	8/15/85	J. Ahonen
Edgemoor I. T. (Edgemoor, DE)	Spur	10-1262	0.00	1.00	1.00	JJP	8/2/83	M. C. Rosemilla
Engleside I. T. (Phila, PA)	Spur	10-1183	0.00	0.30	0.30	JJP	8/4/83	Richard Cross
Enola Branch (Marysville, PA)	Jt. Project	xx-1328	74.00	74.40	0.40	JJP	8/8/86	A. T. Bankson
Exon Lead (Sharonville Yard Lead)	Spur	80-8211	0.00	0.67	0.67	JJP	1/4/86	F. R. Stapleton
Former Beech Creek	Spur	unknown				JJP	5/12/83	J. W. Fallon
Fort Wayne, Ind. Lead	Spur	unknown				JJP	8/24/83	R. D. Threlkeld (land sale)
Frankford St. I. T. (Trenton Ave. Ln)	Spur	10-1174				JJP	8/24/85	N. J. Prosperi (track lease)
Franklin I. T. (Franklin, OH)	Spur	80-8258	3.60	4.20	0.60	JJP	5/7/83	M.S. Scime
Gettysburg I. T. (Carlisle, PA)	Spur	20-0315	0.00	0.80	0.80	JJP	11/4/83	J. W. Fallon
Grand Jct. (East Boston I. T.)	Spur	30-4132	7.57	9.50	1.93	JJP	10/5/85	J. H. Ahonen
Greencastle I. T.	Spur	unknown				JJP	6/3/83	J. W. Fallon
Harsimus Br. (Jersey City, NJ)	Spur	10-1420	0.00	1.36	1.36	JJP	4/14/84	J. R. Beard (02/18/84)
Hastings Branch (Hastings Jct., PA)	Spur	20-xxxx	0.00	2.60	2.60	JJP	8/2/83	J. W. Fallon
Herkimer Spur (Herkimer, NY)	Spur				0.00	JKE	10/28/85	J. Hindman
Hudson Sec. (Maybrook, NY)	Spur	30-0101	0.00	2.10	2.10	unknown	no letter on file	
Hudson St. I. T. (Jersey City, NJ)	Spur	10-1440	0.00	1.30	1.30	JJP	4/29/83	T. P. Dwyer
Hurley Lumber Ld (Perth Amboy)	Spur	unknown				JJP	1/20/83	Z. J. Drzewiecki (12/15/82)
Indian Run Ind. Track (Kensington, PA)	Spur	40-2288	1.10	1.30	0.20	JJP	11/8/84	F. B. Gossic
Johnstown I.T. Johnstown, PA)	Line		1.10	1.60	0.50	JKE	11/10/86	G. R. Comstock
Kalamazoo Br. (Grand Rapids, MI)	Spur	50-5341	94.00	94.45	0.45	JJP	5/15/86	J. Kelly
Kennedy Valve Spur (Elmira, NY)	Spur	30-6304	246.90	249.10	2.20	JJP	8/12/86 - JJP	
Lancaster Mills I. T.	Spur	30-4182	0.60	1.50	0.90	JJP	5/14/83	M. G. Peterson
Langhorne Team Track / Ind. Lead	Spur	unknown				JJP	12/18/83	M. C. Rosemilla (land sale)
Mardella I. T. (Salisbury, MD)	Spur	10-1239	39.40	40.80	1.40	unknown	no letter on file	
Marginal Branch	Spur	40-2211			0.49	JJP	5/27/87	Brian Harrison
Middle Canal/Lumber (Williamsport, PA)	Spur	20-2318	217.90	218.10	0.20	JJP	11/22/84	A. K. Robbins / G. L. Smith
Millbrook Sliding (Elmira, NY)	Spur	unknown				JJP	8/2/83	M. B. Phillips (land sale)
Muncy Br. (Muncy, PA)	Spur	unknown	0.00	0.60	0.60	JJP	2/23/85	C. A. Archer (Fallon, 02/02/84)

Spur Decisions Made by Law Department

0 49

Line Name	Type	LC	MP 1	MP 2	Rt. MI.	Att'y	Decision Date	Requested by
Niles IT (South Bend, IN)	Spur	50-5346	9.90	10.60	0.70	JJP	7/30/97	R. Dietz (Asset Opt. Dept.)
Oberlin Ind. Lead (Harrisburg, PA)	Spur	unknown	0.00	1.04	1.04	JJP	3/19/98	K. Robbins (Harrisburg Div.)
Pappas Lead (Washington, DC)	Spur	unknown				RSN	1/27/95	Donald Shappel
Perth Amboy Br.	Spur	10-0510	17.00	18.00	1.00	JJP	4/28/93	Z. J. Drzewiecki (04/13/93)
Red Key I.T. (Sweetser, IN)	Line	xx-3107	162.05	163.20	1.15	JJP	5/14/92	W. Schoelwer
S. Canton Br. (Canton, OH)	Spur	40-2402			0.00	JJP	10/5/95	F. Gossio
S. Chester Tk. (Marcus Hook, PA)	Exempt	unknown	Market St.	Green St.		JJP	4/28/94	P. Kilian
Speedway I.T. (Indianapolis, IN)	Spur	80-8564	4.18	4.70	0.52	JJP	5/31/94	
Thoroughfare Track (Phila, PA)	Spur	unknown				JJP	7/2/93	P. H. Kilian
Toms River I. T. (Toms River, NJ)	Spur	10-0219	4.82	5.00	0.38	JJP	8/24/93	M. C. Rosamilia
Union Belt (Marion, OH)	Spur	unknown				JJP	11/4/93	W. A. Schoelwer (request to remove track)
Weirton Secondary (Collier, WV)	Line		35.70	36.40	2.70	JKE	2/22/96	F. B. Gossio
Westland Br. (Houston, PA)	Spur	40-	0.00	0.97	0.97	JJP	11/9/94	F. Gossio

Appendix TFM-4

September 8, 2017

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins, III
Direct Tel +1 202 263 3261
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

Re: STB Docket No. AB 167 (1189X) and associated
dockets

Dear Ms. Rutson:

Consolidated Rail Corporation ("Conrail") wishes to bring the attached court decision to your attention. The decision was issued on August 31, 2017 by the Superior Court of New Jersey (hereinafter, "the Court") and addresses claims against Conrail brought by Chicago Title Insurance Company, the title insurer for the Harsimus Embankment properties at issue in AB 167 (1189X) and associated dockets. Chicago Title alleged that Conrail fraudulently or negligently misrepresented the jurisdictional status of the Embankments when Conrail sold them to the LLCs. Conrail had stated that the Embankments were non-jurisdictional track for which STB abandonment authority was not required. Following a two-day non-jury trial in which the Court heard live witnesses and considered various documentary evidence, the Court concluded that Conrail's statements were neither fraudulent nor even negligent.

The Court stated that "Chicago Title has failed to provide any evidence that the statements made by Conrail were fraudulent. . . . [T]here was no credible proof . . . that Conrail made a false representation about the nature of the Embankment that detrimentally and prejudicially induced Chicago Title to rely on those statements." Slip op. at 17-18; *see also id.* at 19 (stating that "no credible proof exists" that Conrail witnesses Ryan and Fiorilla, who testified at trial and were Conrail's representatives for the sale, "knew that the parcel was a designated rail line and, nevertheless, represented otherwise"). "Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track. . . . Despite the arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion." *Id.* at 21.

The Court also found that "Chicago Title has similarly failed to provide this Court with evidence of negligence on the part of Conrail when it made the statements about the nature of the Embankment." *Id.* at 23. "The record does not bear out the contentions that Conrail's representatives failed to act properly in their determinations." *Id.* at 24.

Mayer Brown LLP

Victoria Rutson
September 8, 2017
Page 2

This decision (which, as noted, followed a two-day trial in which live testimony and documentary evidence were presented) is consistent with, and provides further support for, the Board's rejection of the allegations by the City of Jersey City and other commenters that Conrail intentionally violated Section 110(k)—allegations that the City and others have made repeatedly since at least 2008 and continue to make to this day. Specifically, the Court's decision buttresses the Board's conclusion in the March 2009 Environmental Assessment that there is no evidence of "any intent on Conrail's part to harm historic sites or structures." Environmental Assessment, slip op. at 14 (served Mar. 23, 2009). Thus, the City, the New Jersey State Historic Preservation Office, and a financially-motivated title insurer have all failed to show that, in selling the property without first seeking abandonment authority, Conrail intentionally acted to evade legal duties (or even acted negligently, for that matter).

As Conrail demonstrated in its June 29, 2017 letter to you, the City and other commenters have had abundant opportunities to find support for their baseless Section 110(k) allegations. That they have not been able to has not stopped them from continuing to beat the drum. The attached decision provides conclusive, judicial support for a finding that "there is no there there."

Sincerely,

Robert M. Jenkins III^{/s/}

Robert M. Jenkins III
Enclosure

cc: Consulting and Interested Parties
Charles H. Montange
Eric Strohmeier

Attachment 2

Conrail 2007 Contract with LLCs

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739



24 September 2014
By Express Delivery

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, D.C. 20423-0001

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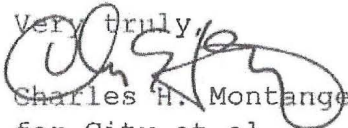
ENTERED
Office of Proceedings
September 25, 2014
Part of
Public Record

Re: AB 167 (Sub-no. 1189X): Conrail - Aban.
Exemption - In Hudson County,
and related proceedings
AB 55 (Sub-no. 686X): CSX- Disc. Exemption,
AB 290 (Sub-no. 306X): NS Rwy - Disc. Exemption

Dear Ms. Brown:

Enclosed please find for filing the original (unbound) and ten copies of Additional Supplemental Comments on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") on the Environmental Assessment served 3/23/2009, especially concerning the violation of NHPA section 110(k), the evasion of federal abandonment licensing requirements, and the various unlawful actions by and agreements between Consolidated Rail Corporation ("Conrail") and a developer d/b/a 212 Marin Boulevard LLC, et al. that have occurred.

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
for City et al

Encls. (orig and ten)
cc. Service list (w/encl.)

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12th day of October, 2007, between Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation, with its principal offices at Two Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania 19103, SLH Holding Co., LLC ("SLH"), having a mailing address c/o Carmine Alampi, Esq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC and 446 Newark Avenue, LLC (collectively referred to as "LLCs"), "Conrail", "SLH" and "LLCs" collectively referred to as "Parties".

Whereas, Conrail and SLH entered into an Agreement of Sale dated June 24, 2003, with respect to 6.2 acres of property ("Property") in Jersey City, New Jersey, which Agreement was amended by letters dated September 22, 2003, May 7, 2004 and September 15, 2004 and by Amendment to Agreement of Sale dated October 27, 2004 (collectively referred to as "Agreement"); and

Whereas, SLH assigned its rights under the Agreement to the LLCs; and

Whereas, on July 13, 2005 Conrail conveyed title to the Property to the LLCs; and

Whereas, after the sale, LLCs obtained a number of approvals for development of the Property from local governmental authorities; and

Whereas, on August 9, 2007, the Surface Transportation Board ("STB") issued a decision finding that the Property sold to LLCs remains part of the national rail system until appropriate abandonment authority is obtained.

Whereas, Conrail, SLH and the LLCs desire to maintain the benefit of the 2005 sale of the Property for all Parties.

NOW, THEREFORE, Conrail, SLH and the LLCs agree, this 12th date of October, 2007, as follows:

1. Conrail will seek approval from the STB for abandonment of rail service over the Property. Conrail will decline any public use or trail use conditions and, as soon as practicable, upon the effective date of the abandonment, execute any such documents as may be required to effectuate and/or confirm the 2005 sale of the Property.
2. If any governmental entity commences condemnation proceedings with respect to the Property Conrail will assign to LLCs its rights to defend any condemnation proceedings and to receive all monies obtained either by final settlement or condemnation award or judgment.



3. Conrail will cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property.

4. The Parties agree to file timely appeals of the STB's August 9 decision pursuant to 28 U.S.C. § 2321(a).

5. Conrail agrees that if the proceedings in Docket No. HUD-L-4908-05 in the Superior Court of New Jersey are not dismissed, Conrail will not in that or any other proceeding claim that SLH's or the LLC's failure to seek relief against Conrail precludes them from seeking relief against Conrail in any other proceeding.

6. The Parties agree that implementation and enforcement of the foregoing terms is subject to negotiation of any mutually agreeable documents as are necessary to carry out the terms of this Memorandum of Understanding, and its approval by Conrail's Board of Directors.

CONSOLIDATED RAIL CORPORATION

By:

Title:

Date:

Jonathan M. Boodt
VP - General Counsel
Oct. 12, 2007

SLH HOLDING CO., LLC

By:

Title:

Date:

A. Hym
member
Oct. 12 2007

ATTACHMENT III

Public Use Condition Request
for filing in AB 167 (Sub-no. 1189X)

On behalf of

City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment
Preservation Coalition,

and

Rails to Trails Conservancy

(hereinafter City et al.)

Per 49 C.F.R. 1152.28(a)(2) and 49 U.S.C. 10905, City et al. state and/or restate as follows:

(i) Condition sought: a condition on any effective abandonment authorization that bars Consolidated Rail Corporation from selling or alienating any interest in any portion of the Harsimus Branch at issue in this proceeding for 180 days from the effective date of any abandonment authorization.

(ii) Public importance of the condition: the record demonstrates that the Harsimus Branch is the last underutilized transportation corridor into the heavily congested downtown of Jersey City. It can serve as a light rail corridor inter alia between downtown Jersey City and Journal Square. It is the preferred route of the East Coast Greenway. It is a critical link for local, regional, and national trails. It in its entirety has been determined part of several historic districts. The Embankment portion is a Jersey City Historic Landmark and is eligible for listing on the National Register of Historic Places, and would be listed but for owner (Conrail) objection. City desires to acquire the Harsimus Branch for rail, trail, park, green space, and historic preservation purposes. Coalition and RTC share the City's view of the importance of preservation of the Harsimus Branch at issue in AB 167 (Sub-no. 1189X).

(iii) The period of time for which the condition would be effective (up to the statutory maximum of 180 days): City et al. seek the statutory maximum.

(iv) Justification for imposition of the time period. This time period is required for the City to negotiate a settlement, or, in the alternative or in addition thereto (there are many parties and some may settle, others or all may not), initiate eminent domain proceedings, and/or proceedings to acquire relevant portions of the property pursuant to N.J.S.A. 48:12-125.1.

As required by 49 C.F.R. 1152.28, a copy of the comments of which this PUC is a part is being mailed to counsel for applicant Conrail as counsel is listed on the current STB service list for this proceeding.

To the extent necessary, City et al. move for waiver of any time limitation on this request set forth in section 1152.28 or elsewhere. Accepting this PUC will not delay the proceeding, is consistent with City et al.'s prior comments, and with numerous PUC requests already filed in this proceeding. There is no prejudice to any party.

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

/s/

By: Charles H. Montange, counsel for City
et al.

For filing: Oct. 19, 2020

Certificate of Service

I hereby certify service by depositing copies of the foregoing comments on the DSEA (and attachments) on behalf of City et al. with the USPS on October 19, 2020, for first class delivery, or equivalent, upon representative of parties of record as indicated in the STB service list for AB 167-1189X as that service list is found on the STB website for October 16, 2020, using the mailing addresses that appear on that website.

/s/

Charles H. Montange,

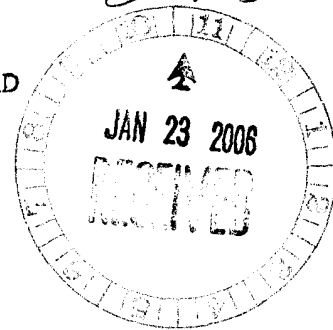
Attorney for City et al.

Exhibit B

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition --
Petition for a Declaratory Order

ENTERED
Office of Proceedings

PETITIONERS CITY OF JERSEY CITY, ET AL'S
OPPOSITION TO
INTERVENOR 212 MARIN BOULEVARD, ET AL'S
"PETITION FOR EXTENSION OF TIME"

JAN 23 2006

Part of
Public Record

While petitioners City of Jersey City, et al. (hereinafter "Jersey City") do not oppose intervention in this proceeding by 212 Marin Boulevard, et al (intervenors are hereinafter referred to as "SLH Properties" or "the developer"),¹ Jersey City underscores its opposition and objection to any extension of time for the developer (or anyone else) to file a reply.

As made clear below, at the same time the developer's attorneys were drafting their request for an extension, the developer was initiating demolition of structures relating to the Harsimus Embankment. No party should expect to get an extension when they at the same time are so blatantly using any

¹ On January 20, 2006, 212 Marin Boulevard, LLC; 247 Manila Boulevard, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (which state that they refer to themselves collectively as "SLH Properties") filed a petition to intervene. All the SLH Properties have common ownership (namely, developer Steven Hyman).

time made available to them for the purpose of actively destroying the very assets that are the point of the proceeding in which they seek the extension.

No extension of any sort should be allowed unless this Board issues an order preserving the status quo, or conditions the extension upon such an order.

INTRODUCTION

Background. This proceeding raises the question whether Consolidated Railroad Corporation (Conrail) illegally abandoned the Harsimus Branch railroad line between MP 1.3 (near Luis Munoz Marin Blvd., formerly Henderson Street) and MP 2.54 (near Waldo Avenue) in the City of Jersey City, in violation of 49 U.S.C. § 10903. The portion of railroad line at issue contains the Harsimus Embankment (also known as the Sixth Street Embankment). The Embankment is a structure which not only is listed on the New Jersey Register of Historic Places² but also has been determined eligible for listing on the National Register of Historic Places.³

Conrail never sought abandonment authority from this Board prior to selling the segment of line containing the Embankment to the developer, who seeks to tear it down and subdivide it for

² See Letter, D. Guzzo to Conrail, Jan. 25, 2000 (Embankment "was entered onto the New Jersey Register of Historic Places on December 29, 1999"), second document in Appendix I to Jersey City's Petition for a Declaratory Order.

³ The only reason it was not listed on the National Register is that the then-owner (Conrail) objected. See Verified Statement of Richard James, ¶2 (attached as Exhibit E to Jersey City's Petition for a Declaratory Order).

houses. Had Conrail sought abandonment approval, it would have had to comply with section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, before exercising any authority to abandon the line. Certainly there could have been no demolition prior to compliance with section 106.

STB's e-library records Jersey City's petition as filed on January 13, 2006. At the very same time the developer's attorneys were preparing their motion for an extension of time (which they filed on Friday, January 19), the developer's construction personnel began removing old stone piers and stanchions from the property. This action must be viewed in the context of the developer's standard no-hold's-barred practice of denying any City request for additional time in state court litigation, while pushing forward on the ground "in the hope he can just outrun any opposition"⁴ in respect to leveling the Harsimus Embankment and breaking up this railroad line into little housing developments. Further factual detail is set forth in the Verified Statement of John J. Curley, set forth in full below and incorporated herein as Jersey City's statement of facts.

⁴ Verified Statement of John J. Curley, infra, ¶8, penultimate line.

ARGUMENT

No extension of time should be granted absent a stay maintaining the status quo. In cases involving disputes over the need for authority or for a particular kind of authority from this Board, this Board frequently grants, at the behest of an interested party, a "housekeeping" stay to maintain the status quo pending further consideration,¹ without the need to make the traditional showings under Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) ("WMATA") and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Those showings bear on (i) probability of success on the merits, (ii) irreparable injury to the moving party absent a stay, (iii) lack of commensurate harm to the other side, and (iv) public interest in favor of a stay.

As a matter of course, this Board should enter a housekeeping stay prohibiting further demolition and thus preserving the status quo here. In any event, Jersey City has more than met the requirements for a stay under WMATA.²

1. Probability of success on the merits. Jersey City has demonstrated probability of success on the merits. Conrail is

¹ For example, in this Board's recent decision in City of Alameda -- Acquisition Exemption -- Alameda Belt Line, FD 34798, served Dec. 15, 2005, the Board issued a housekeeping stay to maintain the status quo pending further efforts by the parties to set forth their positions.

² The developer has submitted to the jurisdiction of this Board by intervening. See also 49 U.S.C. § 721(b)(4).

obligated to obtain abandonment authority for railroad lines pursuant to 49 U.S.C. § 10903; Conrail cannot unilaterally reclassify railroad lines as spurs on the basis of more recent non-use. Jersey City's Petition establishes that the Harsimus Branch was unequivocally a railroad line (it was the main line of freight into the Pennsylvania Railroad's Jersey City freight transshipment terminal) and that it continued in rail use under Conrail, gradually diminishing until the early 1990's.

As indicated in Jersey City's Petition at more length, under applicable precedent (e.g., Chelsea Property Owners-- Abandonment -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, 8 ICC2d 773, AB 167 (Sub-no. 1094), served Sept. 16, 1992, aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994)), the Harsimus Branch is accordingly a railroad line.

Although Conrail must obtain abandonment authority for the Branch, Conrail did not. See Strauss Verified Statement, Exhibit D to Jersey City's Petition. Moreover, Conrail's General Counsel conceded that Conrail did not obtain abandonment authority in a telephone conversation with counsel for Jersey City the day before Jersey City tendered its Petition to STB for filing. Jersey City is likely to prevail on the merits.

2. Irreparable injury to Jersey City and the public. While the destruction of an ordinary structure might be remediable by the payment of damages, the demolition of historic structures is not. Destruction of an historic structure

constitutes an irrevocable commitment (in the form of elimination) of a resource. "The act of demolition is irrevocable. Consideration of alternative plans ... is permanently foreclosed once the structures have been razed." Boston Waterfront Residents Association v. Romney, 343 F.Supp. 89, 91 (D. Mass. 1972). As the Second Circuit noted in affirming the grant of an injunction against the demolition of an historic structure, "the district judge was surely correct in finding irreparable injury; demolition is generally irreparable." WATCH v. Harris, 603 F.2d 310, 312 n.2 (2d Cir. 1979). See also Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 282 (3d Cir. 1983) (upholding injunction against demolition pending compliance with section 106). The developer threatens destruction of not only the historic Harsimus Embankment but also the ancillary old stone stanchions. He has demonstrably started his engines in that regard, taking out an old stone stanchion or pier even as his attorneys crafted their motion for an extension of time last week. See V.S. of John J. Curley, supra, part of our statement of facts. As Mr. Curley makes clear, further destruction of the old stone stanchions is expected. Moreover, as Jersey City explained in its Petition, the developer in state court is seeking to compel the local Planning Board to issue required permits without regard to this Board's jurisdiction. Petition at 27. Once those permits are issued, the developer will presumably launch his bulldozers on the Embankment itself. In

the circumstances, the delay sought by the developer here is merely cover for the infliction of irreparable injury on Jersey City and the public.

3. Lack of commensurate harm to others. Conrail and the railroad industry in general will sustain no harm from a stay. Conrail has no financial interest left in the Embankment, having already deeded it to (and having already been paid by) the developer.³ The developer will sustain no legally cognizable harm, for there has been no compliance with section 106 with respect to any part of the old Embankment, including the old stone stanchions now being assaulted. In any event, any harm to the developer will be limited to a brief delay while this Board considers the issues, and the length of that delay is at least partly in control of the developer, who, ironically, is the very party that has requested slower procedures of the Board.⁴

4. Public interest. Congress has declared the public interest here: that is compliance with section 106 of the NHPA. In any event, Jersey City wishes to acquire the property at issue for rail (light rail) and open space purposes. See Curley V.S., supra, at ¶ 6; see also Exhibit C to Petition (Curley V.S.) ¶ 6. The City's ordinances declare the public interest

³ Moreover, the City is prepared to pay Conrail the amount Conrail was paid by the developer should Conrail obtain requisite abandonment authority so the property may lawfully be sold.

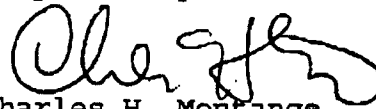
⁴ It is certainly relevant to note that Jersey City asked for expeditious treatment (both in its cover letter to the filing and in its Petition at pp. 26-27).

in favor of preservation of the very structures under assault by the developer. See Exhibit G to Jersey City's Petition.

Conclusion

No extension of time should be granted the developer (or any other party) for filing a reply unless a housekeeping stay is entered barring further destruction of the property, at least until this Board issues a final decision in this proceeding.

Respectfully submitted,



Charles H. Montange
Attorney for petitioners
City of Jersey City,
Rails to Trails Conservancy,
PRR Harsimus Stem Embankment
Preservation Coalition,
and Assemblyman Louis M. Manzo

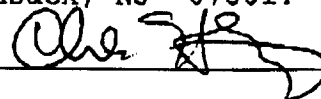
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739

Of counsel for
Rails to Trails Conservancy

Andrea Ferster
Rails to Trails Conservancy
1100--17th St., N.W., Tenth Fl.
Washington, D.C. 20036

Certificate of Service

I hereby certify service on January 23, 2006, by placing copies of the foregoing petition with an express service, next business day delivery, addressed to Jonathan Broder, VP/General Counsel; David C. Ziccardi, Associate General Counsel, Consolidated Rail Corp., 2001 Market St., 8th Fl., Philadelphia, PA 19103, and to Carmine R. Alampi, Alampi & Demarrais, One University Plaza, Suite 404, Hackensack, NJ 07601.



BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34918

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition, petitioners --
Petition for a Declaratory Order

VERIFIED STATEMENT OF
JOHN J. CURLEY

I, John J. Curley, make this Verified Statement in opposition to the developer's request for a 20 day extension to respond to the Petition for a Declaratory Order filed by petitioners the City of Jersey City, et al. in the above-captioned proceeding.

1. I am special counsel for the City of Jersey City, Jersey City Historic Preservation Commission and Joanne Monahan (Assistant City Counsel) in litigation brought by eight limited liability companies controlled by developer Steven Hyman (the "Developer") who claims to hold property interests acquired by from Conrail to the portion of the Harsimus Branch containing the Sixth Street Embankment.

2. A Petition has been filed with the Surface Transportation Board for a declaratory judgment that the Surface Transportation Board has jurisdiction over the railroad property at issue in this proceeding.

3. The Developer is seeking a 20 day extension of time in

which to respond to the Petition.

4. The Developer proposes to develop the Embankment property for residential purposes through the construction of one and two family homes, which is in accordance with the zoning of the area. The construction of the residential units necessitates the demolition of the remaining railroad structures and the embankment as the homes are to be constructed at grade.

5. The Developer has filed several site plan and subdivision applications with the Planning Board of the City of Jersey City for the residential development. The applications before the Planning Board have been prosecuted with the threat of an automatic approval in the event of delay of decision beyond the statutory time period for planning board action. Moreover, a court order prevented the Planning Board from denying the application as to the property located on Monmouth Street between Fifth and Sixth Streets on the basis of possible Federal jurisdiction. This parcel is designated as Block 415, Lot 50 on the Jersey City tax assessment map. Record title to the parcel is held by 415 Brunswick Street, L.L.C. by a quitclaim deed from Conrail made without a termination of Surface Transportation Board jurisdiction. Within the last five days, and after service of the Petition for Declaratory Relief upon the developer, the developer has demolished and removed a stone pier railroad structure from this parcel.

6. The old stone railroad pier or stanchion was demolished

as part of site preparation on the parcel for a change to non-rail use. This pier or stanchion would probably have been reused if a light rail system were to be built on the right of way as contemplated by the City of Jersey City.

7. If the Developer is granted the requested extension, these construction activities will likely continue. One additional stone pier is on the parcel in question. Furthermore, there are approximately seven more piers or stanchions which formerly supported rail tracks on the adjacent parcel on Newark Avenue (Block 446, Lot 18A) that Conrail conveyed by quitclaim deed to the same developer under the name of 446 Newark Avenue, L.L.C. These pier structures are not protected by historic landmark designation, but are clearly structural components of the elevated rail system leading to the embankment running along Sixth Street and were in use until at least 1992. Unless restrained, the developer would be able to demolish and remove these rail structures before submitting an answer to the pending Petition.

8. The Developer has refused to grant the City of Jersey City any extensions of time to reply to summary judgment motions filed in pending state court actions. The purpose of these motions has been to obtain approvals for subdivision and demolition activities in order to establish non-rail use of the land purchased from Conrail without termination of the Surface Transportation Board's jurisdiction. It is my belief that the developer and

Conrail intentionally delayed the City of Jersey City's appraisal inspections to slow down the City's acquisition process. For example, a letter from Conrail's attorney on June 17, 2005 promised access for appraisal inspections after July 13, 2005 stating that Conrail was in the process of moving its offices in New Jersey and needed time. However, Conrail delivered the quitclaim deeds to the developer on July 12, 2005 without notifying the City that it was about to complete a sale of the properties. It was only in reply to a follow up appraisal inspection request that Conrail's attorney wrote on July 18, 2005 that the property had been sold. The developer then refused the City access to conduct its appraisal inspection. The City of Jersey City was forced to apply to the court for an order against the developer for access. The land use approval litigation in the state court was then commenced by the developer. The entire strategy being pursued by the developer is based upon speed in the hope that he can just outrun any opposition.

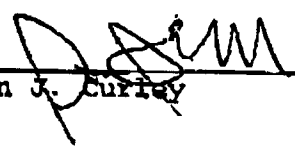
9. Since its acquisition of the properties, the developer has never provided any proof to the City that the property has undergone abandonment proceedings before the Surface Transportation Board or is exempt from this requirement, and thereby settle the jurisdictional questions surrounding this dispute.

10. As set forth in greater detail in my Verified Statement accompanying the Petition to the Surface Transportation Board,

immediate action by the Surface Transportation Board is required to protect its jurisdiction over the embankment and to prevent the destruction of a State and local historic landmark that is eligible for listing on the National Register of Historic Places. The developer's request for an extension of time to respond is yet another tactic being used against the City of Jersey City in order for the developer to carry out his plan to devote the land to non-rail use. Once accomplished, demolition of the rail piers cannot be undone, thereby rendering the City of Jersey City and the Surface Transportation Board in effect powerless.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 21, 2006.


John J. Curley

Fax Cover Page

To: Secretary, STB and Office of Proceeding

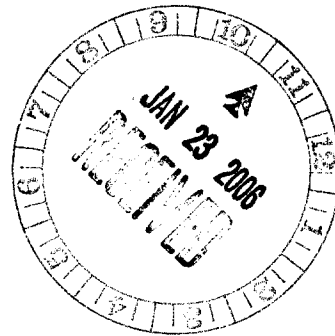
From: Charles H. Montange
426 NW 162 St.
Seattle, WA 98177

(206) 546-1936
fax: 546-3739

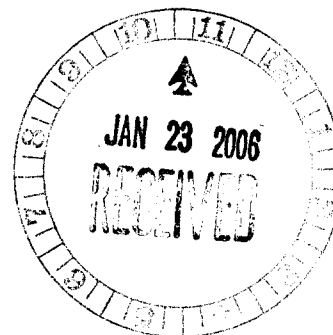
Date: 23 Jan 06

Message: For Filing.

Attached page(s): 14



CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX: (206) 546-3739



23 January 2006
BY FAX

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: City of Jersey City, et al. --
Petition for a Declaratory Order,
F.D. 34818

fax filing

Please distribute immediately

Dear Mr. Williams:

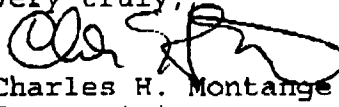
At some point on Friday, January 20, intervenors 211 Marin et al. (hereinafter "the developer") filed a petition seeking 20 additional days to reply to City of Jersey City's Petition for a Declaratory Order. This fax is to advise that City of Jersey City opposes the developer's proposed extension, because the developer is demolishing the very railroad structures that this proceeding is about, which is obviously not the sort of conduct in which a party seeking more time should be engaging. I enclose a copy (12 pages) of our Opposition by fax.

I am attempting to have eleven copies of this filing assembled in Washington, D.C. and hand-delivered for filing today (January 23).

Please advise the Office of Proceedings that we are tendering an opposition to the extension request. City of Jersey City urges that any extension be conditioned upon the entry of a housekeeping stay barring developer from further destruction of the premises pending the outcome of this proceeding.

Thank you for your assistance in this filing.

Very truly,



Charles H. Montange

for petitioners

City of Jersey City,
Rails to Trails Conservancy,
Embankment Preservation Coalition,
and NJ State Assemblyman Louis P.
Manzo

Encl.

cc. Counsel, per certificate of service
(w/encl.)

Exhibit C

PRESERVATION

new jersey
i n c o r p o r a t e d

215693
ENTERED
Office of Proceedings

JAN 31 2006

Part of
Public Record

JAN 31 2006

January 27, 2006

**Secretary
Surface Transportation Board
Washington, DC 20423**

Re: Jersey City -- Petition for a Declaratory Order, STB Finance Docket 34818

Dear Secretary:

Founded in 1978, Preservation New Jersey is the only statewide private membership-supported historic preservation organization in New Jersey. Our mission is to sustain and enhance the vitality of New Jersey's communities by promoting and preserving their diverse historic resources. Revitalization and reuse of cultural and historic resources in already developed cities and towns has simultaneously advanced both preservation and Smart Growth goals in many places across the state. PNJ and our preservation partners are increasingly alarmed, however, at redevelopment efforts in a number of communities that are endangering or destroying historic buildings and places with little or no regard for their importance to the community.

The Harsimus Branch Embankment in Jersey City is one such historic site that is under threat by a developer. This developer has already removed one stanchion on a non-landmarked parcel and has challenged the municipal landmark designation for four of six blocks that were designated a local landmark in 2003, have been on the State Register of Historic Places since 1999, and are eligible for the National Register (owner objection). We believe the actions of this developer are premature, as research indicates Conrail never abandoned the rail line according to federal regulations, thus depriving the public of National Historic Preservation Act Section 106 review and environmental oversight, as well as short-circuiting City efforts to acquire the property, as it has expressed interest in doing.

The seven-track Harsimus Branch Embankment structure was built circa 1902 to replace an earlier two-track elevated structure, on an even earlier rail right-of-way. It was the Pennsylvania Railroad's main freight line to the Hudson River waterfront, where cargo from the American Midwest continued on its way to Manhattan and beyond on boats leaving from the Harsimus Docks. The massive stone structure is an important physical reminder of the Golden Age of Railroads and the preeminence of the Pennsylvania Railroad, as well as of the grade-separation campaigns that took place in the metropolitan area around the turn of the 19th century. Its

Executive Committee

Michael Calafati, AIA
President

Megan E. Thomas, Esq.
Vice President

Jerry Raymond
Treasurer

John D. S. Hatch, AIA
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Felipe J. Gorostiza, PhD

William L. Hoffman, Esq.

Mary-Anna Holden

Betty Demy Hutcheon

Diane S. Kaese, RA

Greta Kiernan

Glasgow A. Limerick, ASLA

Marguerite L. Mount, CPA

Frederick C. Raffetto, Esq.

Mary Lou Strong

Hon. Jose "Joey" Torres

R. Scott Wolf

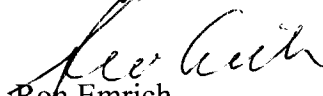
Ron Emrich
Executive Director

reminder of the Golden Age of Railroads and the preeminence of the Pennsylvania Railroad, as well as of the grade-separation campaigns that took place in the metropolitan area around the turn of the 19th century. Its engineer was James J. Ferris, a local progressive politician of note. The structure has the potential of being an important historic site destination as well as providing continued use to the public as light rail corridor, open space and habitat corridor, and greenway.

We therefore support the Petition for a Declaratory Order filed by the City of Jersey City, Rails to Trails Conservancy, the Embankment Preservation Coalition, and NJ State Assemblyman Louis Manzo re the Harsimus Branch rail line. We ask you to begin a proceeding, or order Conrail to comply with 49 USC 10903 by seeking an abandonment authorization.

Please include this letter as part of the record of the proceeding. Attached for the record are letters from the Jersey City Landmarks Conservancy and the Metropolitan Waterfront Alliance. Representatives of the parties have been sent copies of this correspondence by US mail (see the CC: list below).

Sincerely,


Ron Emrich
Executive Director

cc: Jonathan Broder, VP and GC
Conrail
2001 Market St., 8th Fl.
Philadelphia, PA 19103

Carmine R. Alampi
Alampi & Demarrais
One University Plaza, Suite 404
Hackensack, NJ 07601

Charles H. Montange
426 NW 162d St.
Seattle, WA 98177

Exhibit D

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 212 MARIN BOULEVARD, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

John M. Packer
Consolidated Rail Corporation
VP + General Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 389 MONMOUTH STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Bonds
Consolidated Rail Corporation
VP + General Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 354 COLE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Butler
Consolidated Rail Corporation
VP + General Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 280 ERIE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215). 209-2000

12/13/07
Date

Jonathan M. Buer
Consolidated Rail Corporation
VP + General Counsel

CONSENT TO FILING APPLICATION

The undersigned hereby joins in and consents to the pending application of 317 JERSEY AVENUE, LLC for Certificate of Appropriateness and a Certificate of Economic Hardship for Demolition of portion of the Sixth Street Embankment on this tract, and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Bruck
Consolidated Rail Corporation
VP + Gen. Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 247 MANILA AVENUE, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Back
Consolidated Rail Corporation