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SERVICE DATE – AUGUST 22, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON COUNTY, N.J.

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN HUDSON COUNTY, N.J.

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN HUDSON COUNTY, N.J.

Digest:[1] The Board finds that Conrail did not engage in "anticipatory demolition" of historic properties in violation of Section 110(k) of the National Historic Preservation Act.

Decided: August 18, 2022

In these dockets, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) request authority for Conrail to abandon, and for CSXT and NSR to discontinue service over, an approximately 1.36-mile portion of a line of railroad known as the Harsimus Branch, located in the City of Jersey City, N.J.[2] By decision served on May 19, 2021 (May 2021 Decision), the Board formally commenced consideration of the applicability of Section 110(k) of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306113 (formerly 16 U.S.C. § 470h-2(k)), to the Harsimus Abandonment Proceeding. As discussed below, after considering the evidence and arguments submitted, the Board finds that there has been no violation of Section 110(k).

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Collectively, the dockets are referred to as the Harsimus Abandonment Proceeding.

BACKGROUND

The Harsimus Branch extends from milepost 0.00, CP Waldo, to milepost 1.36, a point east of Washington Street, in Jersey City, Hudson County, New Jersey (the Line). The Harsimus Branch includes the Sixth Street Embankment (Embankment), which consists of a series of six earthen embankments enclosed by stone walls and ranging in height from 12 to 34 feet, located between city streets and originally joined by plate girder bridges that spanned those north-south streets. Part of the Harsimus Branch previously ran on top of the Embankment and its connecting bridges.

The Harsimus Branch has not been used for rail service in decades.[3] In 1994, the first bridge on the Embankment was removed, and the remaining bridges were removed shortly thereafter. Conrail discussed selling the Embankment to the City multiple times before it put the Embankment properties up for sale through a bidding process in 2002 and engaged in negotiations with of a group of developers (the LLCs) who submitted the only qualifying bid.[4] In July 2005, Conrail sold eight parcels, including the six-block-long Embankment and two at-grade parcels located to the west of the Embankment, to the LLCs.

Procedural History

The Board's involvement began in 2006, when the Board received a petition in City of Jersey City—Petition for Declaratory Order, Docket No. FD 34818, asking the Board to determine the regulatory status of the Harsimus Branch. The Board instituted a proceeding, and, in 2007, issued a decision finding—based on the parties' evidence, and an examination of the deed, additional historical information detailing the trackage found in "valuation maps," Pennsylvania Railroad Track Charts, and other information about the history of the Line and other rail lines in the area—that the Harsimus Branch is a line of railroad subject to its abandonment licensing authority. City of Jersey City—Pet. for Declaratory Order (2007 Declaratory Ord.), FD 34818 (STB served Aug. 9, 2007). The Board denied administrative reconsideration in a decision served on December 19, 2007.

The Harsimus Abandonment Proceeding began in 2008 when Conrail, CSXT, and NSR jointly filed a verified notice of exemption under 49 C.F.R. part 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NSR to discontinue service over, the Harsimus Branch. The notice of exemption was served and published in the Federal Register on March 18, 2009 (74 Fed. Reg. 11,631). The exemption was scheduled to become effective April 17, 2009.

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[3] A previous Board decision provides a full history of the Harsimus Branch. Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) et al., slip op. at 2-6 (STB served Aug. 11, 2014).

[4] The LLCs are currently described as: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

In compliance with Board regulations, Conrail prepared and submitted environmental and historic reports to the Board's then-Section of Environmental Analysis.[5] Conrail's filing of the notice of exemption triggered OEA's environmental review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321-4370m-12, and historic review under Section 106 of the NHPA, 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f). OEA issued a Draft Environmental Assessment (2009 Draft EA) on March 23, 2009. The 2009 Draft EA examined the potential effects on the environment and historic resources if the Board were to authorize abandonment of the Harsimus Branch, and the 2009 Draft EA solicited public comment.

Following receipt of public comments, OEA, in consultation with the New Jersey State Historic Preservation Office and interested parties, notified the Advisory Council on Historic Preservation (ACHP) of OEA's conclusion that granting abandonment authority could cause adverse effects on historic resources and invited ACHP to participate in the historic review process. By letter dated April 10, 2009, ACHP notified the Board of its intent to participate as a consulting party. Consulting parties, identified as organizations that would participate in the Section 106 process, also include City of Jersey City (City), Rails-to-Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, City Parties), in addition to 20 other local and historic organizations.

The Board's proceedings, including the environmental and historic review, were stayed and held in abeyance after City Parties filed a complaint against Conrail in U.S. District Court for the District of Columbia (District Court) seeking a determination on whether the Harsimus Branch was a rail line that could be abandoned only with Board authority, rather than ancillary spur track exempt from Board exit licensing under 49 U.S.C. § 10906.[6] That litigation continued until 2013, when the District Court granted summary judgment based on City Parties' and the LLCs' stipulation that the Harsimus Branch was conveyed to Conrail as a line of railroad.[7] The D.C. Circuit summarily affirmed that decision in 2014.[8] After that litigation concluded, the Board vacated the abeyance and OEA resumed the environmental and historic review processes. See Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) et al., slip op. at 6 (STB served Aug. 11, 2014).

When OEA restarted the NEPA and NHPA processes, it decided to conduct them as separate reviews because many of the comments on the 2009 Draft EA had focused on the

[5] The Section of Environmental Analysis is now the Office of Environmental Analysis (OEA). For convenience, this decision hereafter refers to OEA.

[6] City Parties filed their complaint in that court after the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that the District Court, rather than the Board, had jurisdiction to determine whether the Harsimus Branch was a line of railroad, because that question involved a dispute concerning the interpretation of the Final System Plan, which designated certain rail lines of bankrupt carriers to be transferred to Conrail in 1976. Conrail v. STB, 571 F.3d 13, 19-20 (D.C. Cir. 2009).

[7] Conrail took no position on the stipulation.

[8] City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013), aff'd, No. 13-7175 (D.C. Cir. 2014).

historic nature of the Harsimus Branch and the surrounding communities. As part of the historic review process, OEA issued a Cultural Resources Identification Report (CRI Report) on May 5, 2017, and issued an addendum to the CRI Report on October 16, 2018. OEA issued a Cultural Resources Effects Assessment Report to document potential effects on historic resources on March 29, 2019, and then on November 12, 2019, after receiving public comment and input from consulting parties, OEA issued a Cultural Resources Effects Assessment Report Addendum. As part of the NEPA process, on September 10, 2020, OEA issued a Draft Supplemental EA for comment, followed by a Final EA on September 23, 2021. The Final EA, as pertinent here, summarized the Section 106 review process and, in keeping with the Board's May 2021 Decision (see below), explained that the next step of the historic review process would be a Board review of submissions regarding whether a Section 110(k) violation occurred and a determination on Section 110(k) because certain parties specifically argued that Conrail previously violated Section 110(k).[9]

Section 110(k) of NHPA

Section 110(k) of NHPA, entitled "Anticipatory Demolition," states that each federal agency

> shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of [Section 106 of NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with [ACHP], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

54 U.S.C. § 306113; see also 36 C.F.R. § 800.9(c). Therefore, where an applicant may have engaged in "anticipatory demolition"—that is, violated Section 110(k)—the Board is required to make a determination on that issue before granting a permit or license or providing any other assistance to an applicant.

Certain consulting parties, including City Parties, made allegations of "anticipatory demolition" by Conrail in violation of Section 110(k), and the parties engaged in discovery on the potential application of Section 110(k) after the Board issued its August 2014 decision and OEA resumed the environmental and historic review processes. See May 2021 Decision at 2; Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) et al. (STB served May 22, 2015). OEA, with the consent of ACHP, decided to proceed with Section 106 review and potentially conclude that process prior to the Board addressing the alleged violations of Section 110(k).[10] However, in a letter dated March 8, 2021, ACHP requested that the Board determine whether Conrail violated Section 110(k) before completing the Section 106 process. See May 2021 Decision, slip op. at 2.

[9] On October 21, 2021, OEA issued a correction to the Final EA.

[10] See September 21, 2016 Letter from V. Rutson to C. Vaughn at 1 (EO-2861); May 15, 2017 Letter from V. Rutson to C. Vaughn et al, at 4 (EO-2915); January 24, 2020 Letter from J. Loichinger to V. Rutson at 1 (EI-27088).

Consistent with ACHP's request, the May 2021 Decision formally started the Board's consideration of the Section 110(k) allegations.

In response to the May 2021 Decision, opening submissions and comments were received from numerous individuals and entities, including ACHP, City Parties, Conrail, and the LLCs.[11] Most of the comments from organizations and residents in the Jersey City area emphasize the historic nature of the Embankment and allege that Conrail violated Section 110(k) by removing bridges and related rail infrastructure from the Embankment in the 1990s and by selling the Embankment to the LLCs in 2005. ACHP, in a letter dated June 15, 2021, suggests that the Board review the timeline of Conrail's alleged actions in considering whether Section 110(k) was violated. ACHP also explains that a "significant adverse effect" does not mean that a property must be completely demolished or destroyed but includes effects that alter the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places (National Register) in a manner that would significantly diminish its integrity. (See Letter from J. Loichinger to D. Gosselin (EI-30899).)

Replies were submitted by City Parties, Conrail, and the LLCs, including City Parties' arguments to strike certain portions of Conrail's and the LLCs' opening arguments.

POSITION OF THE PARTIES

City Parties' main argument that Conrail violated Section 110(k) stems from their claim that Conrail knew or should have known the Harsimus Branch was a rail line that could not be abandoned without Board authority and that Conrail intentionally, significantly, and adversely impacted historic property to avoid the Section 106 historic review requirements.[12] (City Parties Opening 3, 8-10, 12-24, V.S. Day.) As part of this argument, City Parties argue that intent under Section 110(k) includes acting with the purpose of producing a consequence, acting knowing a consequence is substantially certain to result, and acting with willful blindness that a consequence will occur. (City Parties Opening, 6-7.) City Parties first assert that because the Harsimus Branch was called a "line of railroad" when it was originally conveyed to Conrail, it was and remained a main line subject to Board abandonment licensing. (Id. at 15, V.S. Day 9, Ex. 1.) City Parties also argue that a Conrail representative admitted in a 2003 appearance before the Jersey City Council that the Harsimus Branch had been used for rail purposes. (Id. V.S. Day at 10 & Ex. 5.) City Parties further state that Conrail discussed an expedited abandonment process in 1988, which, City Parties claim, demonstrates that Conrail knew the

[11] The following additional individuals and entities filed comments: Hamilton Park Neighborhood Association; Tia Biasi; Historic Paulus Hook Association; Peter Zirnis; Robb Kushner; Van Vorst Park Association; Jersey City Landmarks Conservancy; Jersey City Parks Coalition; Bergen Arches Preservation Coalition; Village Neighborhood Association; North Jersey Transportation Planning Authority; Friends of Liberty State Park, Inc.; NY/NJ Baykeeper; Harsimus Cove Association; Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition; Historic Jersey City and Harsimus Cemetery.

[12] Included in City Parties' pleadings are two verified statements by attorneys Stephen Day and Thomas McFarland offering their opinions on interpretation of the evidence and the law. (See City Parties' Opening.)

Harsimus Branch required abandonment authority. (Id. V.S. Day, Ex. 2.) City Parties also argue that Conrail improperly reclassified the Harsimus Branch as ancillary spur track exempt from the need to obtain abandonment authority in 1994. (Id. V.S. McFarland, TFM 3.)

Regarding Conrail's knowledge of the historic nature of the Embankment, City Parties argue that Conrail knew of its historical significance in 1994, when bridges and related rail infrastructure were removed, and in 2005, when the six-block-long Embankment and an additional two blocks were sold. (Id. at 9, 20-24.) City Parties argue that Conrail sought to maximize the real estate value and that historic designations were interfering with Conrail's efforts to sell the property. (Id. at 9, 16, 20.) City Parties point to a letter from the president of Conrail objecting to the Embankment being declared eligible for listing on the New Jersey State Historic Register (NJ Historic Register). (Id. at 20, V.S. Day, Ex. 3.) City Parties also note that the Embankment has had two historic districts bordering it since before 1994 and thus contend that Conrail should have known that any actions taken involving the Embankment would likely significantly and adversely impact those areas.[13] (Id. at 22.)

City Parties assert that the evidence they present demonstrates that Conrail intended to classify the Harsimus Branch as spur to evade Section 106 review, and that the LLCs were complicit in these actions. (Id. at 9, 29-31.) More specifically, City Parties argue that Conrail violated Section 110(k) by removing the bridges and related infrastructure in the 1990s, with the alleged knowledge that the Harsimus Branch was a line of railroad. (Id. at 8-10.) City Parties also argue that the later sale to the LLCs itself was an adverse impact and that an alleged loss of federal jurisdiction is a further adverse impact on the Harsimus Branch.[14] (Id. at 23-24.) Finally, City Parties assert that the Board did not allow sufficient discovery on these issues and should investigate Conrail's alleged unlawful actions.[15] (Id. at 40-44.)

Conrail argues that Section 110(k) does not apply because it did not act with intent to avoid Section 106's requirements, nor did it intend to harm historic properties. Conrail states that as demand for rail service diminished, shippers left the area and the Harsimus Branch was only used to provide turnaround space. (Conrail Opening 4, Ex. B (V.S. Ryan) 2, 11-12.) According to Conrail, its law department was asked whether authority from the Board's predecessor agency, the Interstate Commerce Commission (ICC), was required before the Harsimus Branch could be abandoned, and in 1994 it concluded that the Harsimus Branch was spur track that could be abandoned without Board authority. (Id.) In support of this claim, Conrail submits a 1997 legal department document listing the classification of various tracks,

[13] In support of its claims relating to possible adverse effects on historic resources, City Parties include verified statements from historic preservation consultants, two historic preservation employees of the City, and a Hoboken city employee. (See City Parties Opening, V.S. Kaese, et al., V.S. Marks; City Parties Reply, V.S. Kaese et al., V.S. Wrieden, et al.)

[14] City Parties state that the adverse impacts resulting from the sale to the LLCs include demolition of a stanchion that was part of the Embankment rail infrastructure. (Id. at 29-30.)

[15] As City Parties discuss, the parties engaged in discovery on the potential application of Section 110(k) and other issues, and that process has concluded. (City Parties Opening 40-44; see Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) (STB served Jan. 4, 2017).)

which states that the Harsimus Branch was determined to be a spur in April 1994. (Id., Ex. E.) Conrail notes that its belief that the Harsimus Branch was a spur was shared by National Bulk Carriers, which removed the first bridge on the Embankment in a joint venture with the City. (Id. at 11, 14, Ex. B (V.S. Ryan) 12-13, Ex. F.) According to Conrail, the City specifically "urged" Conrail to remove the bridges connecting the blocks of the Embankment, a task that Conrail completed in 1997. (Id. at 5, Ex. H.)

In further support of Conrail's view that Board authority was not required to abandon the Harsimus Branch (and thus, that no Section 106 review was necessary), Conrail points to a 2017 New Jersey state court decision involving a lawsuit by the LLCs' title insurer against Conrail. (Id. at 11-12, Ex. Q.) Conrail asserts that the state court rejected the claim that Conrail acted fraudulently and found no evidence that Conrail acted negligently in concluding the Harsimus Branch was spur track, despite the fact that the Board in the 2007 Declaratory Order and federal courts ultimately disagreed with Conrail's conclusion. (Id. at 12-13.) Conrail also states that once the Board and the courts found the Harsimus Branch to be a line of railroad, Conrail complied with all of the Section 106 requirements. (Id. at 13.)

Conrail also claims it had no intent to adversely affect historic property. (Id. at 14.) According to Conrail, the City never suggested that the Embankment could be a historic resource when it urged Conrail to remove the bridges on the Embankment. (Id.) Citing to a 1999 letter from the mayor asserting that the Embankment lacked historic significance, Conrail argues that the City itself opposed efforts to place the Embankment on the NJ Historic Register and National Register. (Id., Ex. J.) Conrail also provides portions of OEA's 2009 Draft EA, addressing claims of anticipatory demolition, as evidence that it did not have an intent to harm historic property. (Id. at 15-16.)

The LLCs, like Conrail, argue there has been no violation of Section 110(k). In describing the timeline of events associated with the Harsimus Branch, the LLCs assert that in the mid-1980s the City contracted with a historic preservation consultant to review properties and districts to be declared potentially eligible for listing on the National Register. (LLCs Opening 8-9, (citing, CRI Report app. Q).) Neither the Embankment nor the track nor rail infrastructure was listed, nor was the Embankment included in "The City of Jersey City Master Plan," which the City adopted in May 2000. (Id. at 9-10.) The LLCs assert that there has been no violation of Section 110(k) because the Harsimus Branch, including the Embankment, had not been deemed a historic property at the time the bridges and rail infrastructure were removed. (Id. at 11, 25-27.) In response to allegations regarding removal of a stanchion from one of the at-grade parcels the LLCs purchased from Conrail, the LLCs assert that the stanchions on the at-grade parcels had not been determined to have historic significance or designated as eligible for listing on the National Register at the time of the stanchion's removal. (Id. at 28.)

The LLCs also claim that their application for local demolition permits filed in 2007 does not constitute a violation of Section 110(k). (Id. at 28.) The LLCs explain that any demolition or development could not occur until after the Section 106 review is completed and would require compliance with municipal restrictions and approval of final plans by the City. (Id. at 31.) Lastly, the LLCs argue that Conrail's sale of the Embankment to the LLCs does not

constitute a violation of Section 110(k) because the sale occurred before any formal determination by the Board that the Harsimus Branch was a line of railroad. (Id. at 32-35.)

PRELIMINARY MATTERS

City Parties moved to strike three documents or portions of documents from the record in this proceeding. City Parties first argue that a paragraph from the 2009 Draft EA,[16] which discusses City Parties' Section 110(k) allegations, should be stricken from the record because OEA did not have the authority to make a finding on a Section 110(k) violation and OEA's finding is flawed. (City Parties Rebuttal 32-33, July 19, 2021.) Second, City Parties argue that the verified statement of Robert Ryan supporting Conrail's view that the Harsimus Branch should be classified as exempt spur should be stricken or not be relied upon. (Id. at 34-36.) City Parties state the verified statement was originally submitted in the 2007 Declaratory Order proceeding and, because the regulatory status of the Line now has been definitively determined and Conrail stipulated that it would not contest the Line's status, Conrail is estopped from relying on it. (City Parties Rebuttal 34-36); see 2007 Declaratory Ord., FD 34818. City Parties also suggest that because Ryan is not an attorney, any legal determinations expressed in his statements are not competent. (City Parties Rebuttal 34-36.) Third, City Parties argue that references to the 2017 state court insurance litigation decision should be stricken because the decision is unpublished and therefore not binding or precedential. (Id. at 37-38.)

The motions to strike will be denied. First, the Board will not strike the portions of the 2009 Draft EA discussing Section 110(k) findings because that paragraph is part of the administrative record in this proceeding. Moreover, violations of Section 110(k) are matters for the Board to decide, and following issuance of the 2009 Draft EA, the Board permitted discovery on the potential application of Section 110(k) and, in the May 2021 Decision, provided all parties the opportunity to brief the issue. The Board bases its determination here on the parties' evidence and arguments, not the statements in the 2009 Draft EA relating to Section 110(k). Second, Conrail and the LLCs are not estopped from relying on the Ryan verified statement to support claims that in 1994 and 2005 Conrail did not believe that the Harsimus Branch was a line of railroad.[17] The Board did not address the regulatory status of the Harsimus Branch until it issued the 2007 Declaratory Order based on the parties' evidence and analysis of the deed and detailed historical information on the Harsimus Branch and other lines in the area. The parties are not prohibited from submitting evidence regarding what Conrail knew and believed prior to issuance of that decision and the subsequent related court challenges, as that evidence could be relevant to a determination of whether Conrail violated Section 110(k). Lastly, the Board will not strike the unpublished New Jersey state court decision from the record. The conclusions in that case are not binding on the Board, but the Board may review that decision and rely on it to the extent the Board finds it persuasive and instructive. The Board agrees with Conrail that City

[16] 2009 Draft EA at 14.

[17] The Board rejects the claim of City Parties that the Ryan verified statement should be stricken because Ryan is not an attorney. Ryan worked in Conrail's real estate division and the admissibility of his 2006 factual statements reflecting what Conrail believed at that time, and why, does not turn on whether he is an attorney.

Parties' arguments go to the weight to be accorded to the evidence rather than its admissibility. (Conrail Reply to Mot. to Strike 1, 4, Aug. 9, 2021.)

City Parties also claim that they were unable to conduct meaningful discovery for this proceeding. (City Parties Opening 41-45.) Discovery is typically disfavored in abandonment cases; however, it is permitted if parties seeking such discovery demonstrate relevance and need. Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Cntys., Ind., AB 459 (Sub-No. 2X) (STB served Apr. 1, 1998). Acknowledging the unique circumstances of this case, the Board allowed discovery here, including discovery on City Parties' Section 110(k) claims specifically. Harsimus Aban. Proc., AB 167 (Sub-No. 1189X) et al. (STB served May 22, 2015). The Board permitted a significant amount of discovery to proceed but limited or denied certain of City Parties' discovery requests deemed overbroad or that, based on the information presented, sought information not relevant to the proceeding. Id. City Parties did not seek reconsideration of the Board's 2015 order, provide any additional information or argument supporting the discovery requests that were denied, or seek any additional discovery relating to Section 110(k). The Board has fully analyzed the claims of a Section 110(k) violation based on all of the evidence presented and will not further delay a decision in this proceeding due to an alleged lack of meaningful discovery that the City Parties themselves failed to pursue.[18] The record in this proceeding contains ample evidence for the Board to determine whether Conrail violated Section 110(k), as discussed in detail below.

DISCUSSION AND CONCLUSIONS

The Board must determine whether Conrail violated Section 110(k) of the NHPA before it can rule on whether to allow the notice of exemption to become effective, thereby permitting abandonment of the Harsimus Branch. Section 110(k), entitled "Anticipatory Demolition," has specific elements that must be satisfied before a violation can be found—in particular, the party must have "intentionally significantly adversely affected" the historic property at issue and it must have done so with the "intent to avoid" the historic review requirements of Section 106 of the NHPA. 54 U.S.C. § 306113. As explained below, after carefully reviewing the extensive evidence of record in this case, the Board finds that Conrail did not violate Section 110(k) because the required elements of the statute are not satisfied.

The purpose of Section 110(k), to which the provision's title alludes, is "to eliminate so-called 'anticipatory demolition,' where an individual seeking Federal assistance demolishes an historic structure before making the application for assistance, in order to avoid historic preservation review provisions." S. Rep. 102-336 at 13 (1992). As the Department of the Interior (which administers the National Register) has explained, Section 110(k) applies where "an historic property is destroyed or irreparably harmed with the express purpose of

[18] City Parties also allege that the Board provided insufficient time when it set a briefing schedule that allowed 30 days for opening briefs on the Section 110(k) issue. (City Parties' Opening 44-45 n. 31.) City Parties, however, do not explain why 30 days is insufficient and never requested additional time. The Board provided ample opportunity for all interested parties to present their views on the applicability of Section 110(k), and City Parties have provided no basis for concluding otherwise.

circumventing or preordaining the outcome of [S]ection 106 review." Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs, 63 Fed.Reg. 20,496, 20,503 (Apr. 24, 1998). Under the plain language of the statute, in evaluating an alleged violation of Section 110(k), the Board must determine if Conrail both intended to significantly adversely affect a historic property **and** did so with the intent to avoid the requirements of Section 106. 54 U.S.C. § 306113. Section 110(k)'s legislative history and the Secretary of the Interior's guidance suggest that the statute includes a requirement of actual subjective intent to both significantly adversely affect a historic property and avoid Section 106 requirements.[19] However, there is no clear caselaw on whether actual subjective intent is required, nor has the Board previously addressed Section 110(k)'s requirements.[20] In other civil contexts, courts have interpreted "intent" to include either an actual subjective intent to violate the statute or a reckless disregard for the fact that certain actions would violate the statute.[21] The Board need not make a final determination here on whether a violation of Section 110(k) requires an actual subjective intent or whether it also includes a reckless disregard of the facts because, as the Board finds below, there was no violation of Section 110(k) under either interpretation of intent.

Here, based on the evidence and arguments presented, the two actions by Conrail that allegedly violated Section 110(k) are: (1) the removal of bridges and related rail infrastructure in the mid-1990s, and (2) the sale of the Embankment properties to the LLCs in 2005. As discussed below, neither action constitutes a violation of Section 110(k).

Removal of Bridges and Related Rail Infrastructure

First, under Section 110(k), the Board must decide whether Conrail removed the bridges and related rail infrastructure in the mid-1990s with the intent to significantly adversely affect a historic property and with the intent to avoid Section 106 requirements. Section 106 only applies if Conrail needs Board authority to abandon the Harsimus Branch; thus, the first question before the Board here is whether Conrail knew it needed such authority when the bridges and related infrastructure were removed, or showed a reckless disregard for whether it needed that authority at the time. While Conrail would have needed abandonment authority if the Harsimus Branch

[19] Construction of words relating to intent in a statute is often dependent on the context of the statute. Safeco Ins. Co. v. Burr, 551 U.S. 47, 57 (2007).

[20] See Protect Our Parks v. Buttigieg, __ F.4th __, 2022 WL 2376716 *8 (7th Cir. July 1, 2022) (implying that actual subjective intent is required for a Section 110(k) violation).

[21] While "specific intent" in the criminal context generally requires an act done voluntarily with a specific intent to violate the law, in the civil context intent has been interpreted more broadly to also include additional states of mind including reckless violations of a statute. See Safeco, 551 U.S. at 57-59 (interpreting the meaning of "willfully fails to comply" in the context of the Fair Credit Reporting Act); Wehr v. Burroughs Corp., 619 F.2d 276, 280-83 (6th Cir. 1980) (discussing the complicated and sometimes contradictory history of interpreting intent in civil and criminal statutes and discussing willful, knowing, and reckless violations of the law in interpreting the Age Discrimination in Employment Act); Am. Arms Int'l v. Herbert, 563 F.3d 78, 83-84 (4th Cir. 2009) (discussing intent and the multiple interpretations of willfulness that include reckless disregard or indifference to whether conduct violates civil law).

were a line of railroad, no abandonment authority would be required if it were ancillary spur track under § 10906. Here, the record includes a March 1994 memo by a member of the Jersey City Division of Engineering stating that Conrail expected a decision imminently by its legal department as to whether the Harsimus Branch required abandonment authority. (City Parties Rebuttal, Ex. I at 190.) Consistent with that memo, a subsequent 1997 document prepared by Conrail's legal department that lists spur determinations states that in April 1994 the legal department determined that the Harsimus Branch was a spur. (Conrail Opening, Ex. E; City Parties Opening, V.S. McFarland, TFM 3.) These contemporaneous documents constitute credible evidence which supports a finding that, in the 1990s, Conrail did in fact believe the Harsimus Branch to be a spur (when the bridges and related rail infrastructure were removed) and thus, at the time, Conrail did not believe prior abandonment authority or Section 106 review was required.

In addition, the record shows that the bridges were removed in response to repeated requests by the City. (Conrail Opening, Ex. H.) And in fact, the first bridge was removed not by Conrail, but jointly by the City and National Bulk Carriers. (See id. Ex. H.; City Parties Rebuttal, Ex. I, Ex. J.) Thus, the apparent reason the bridges were removed was not to avoid Section 106, but rather to comply with requests by the City. Accordingly, the record evidence supports the conclusion that Conrail did not believe that it required prior abandonment authority and thus that its removal of (or allowance of others to remove) the bridges and related infrastructure in the mid-1990s was not done with an actual intent to avoid the requirements of Section 106.

Nor does the record demonstrate that Conrail's belief that the line was a spur was in reckless disregard of the facts. As detailed in the filings before the Board in the 2007 Declaratory Order proceeding, Conrail believed that the Harsimus Branch was not deeded to it as part of Line Code 1420 (the relevant 1976 deed in the Final System Plan), but was merely ancillary spur track. See 2007 Declaratory Ord., FD 34818, slip op. at 8. While the Board ultimately found in the 2007 Declaratory Order that the Harsimus Branch was not a spur, its decision was by no means obvious or a foregone conclusion. Indeed, as noted above, see supra at 2, the agency was only able to make that determination after a detailed examination of the deed, historical evidence, and information about the Harsimus Branch and other lines in the area.[22] Id. at 5-6. In further support of the reasonableness of Conrail's conclusion in the 1990s is the fact that other parties involved in the removal of the bridges shared Conrail's view that the Harsimus Branch did not require abandonment authority. (See Conrail Opening, Ex. F (1994 letter from National Bulk Carriers stating that its counsel had concluded that abandonment authority was not required).) Therefore, the record does not support the conclusion that Conrail made its determination in reckless disregard of the facts.

City Parties' arguments and evidence do not support disregarding the direct, contemporaneous evidence from the relevant time period when the bridges and related rail

[22] While the Board's determination was later vacated on jurisdictional grounds, it remains the sole determination of the status of the Line based on an examination of evidence addressing the merits. The federal court that held that the Harsimus Branch was a line of railroad did so based on a stipulation between City Parties and the LLCs to which Conrail did not object.

infrastructure were removed—the 1990s. City Parties argue that Conrail knew or should have known that the Harsimus Branch was not a spur, pointing to several pieces of evidence that they claim support that conclusion. (City Parties Opening 8-10, 12-16.) That evidence, however, is not persuasive. According to City Parties, in a 2003 Jersey City Council meeting, Conrail stated that the Harsimus Branch was used for rail purposes and was not idle. (Id. V.S. Day, Ex. 5, App. at 048.) But those statements do not prove Conrail knew or should have known that the Harsimus Branch was not spur track. Spur track, which is typically used to move shipments to and from railroad lines and the facilities of shippers, by its nature is used for rail purposes. The use of particular track in rail service, by itself, sheds no light on whether the track is a line of railroad or ancillary spur track, and therefore, does not indicate whether it is spur track excluded from the Board's abandonment authority under § 10906.[23]

City Parties also argue that Conrail knew the Harsimus Branch's ultimate regulatory status because it was conveyed to Conrail "as a line of railroad" via a deed recorded in 1978. (City Parties Opening 8, 15-17.) City Parties are correct that the deed for Line Code 1420 transferred to Conrail a "line of railroad." However, as Conrail explained both in this proceeding and in the prior 2007 Declaratory Order proceeding directly addressing the status of the Harsimus Branch, it did not believe that the track at issue here was deeded to it as part of Line Code 1420. Instead, Conrail believed that the main line deeded to it as Line Code 1420 ended at CP Waldo and the remaining track to the east (including the Embankment) was ancillary spur and yard track. See 2007 Declaratory Ord., FD 34818, slip op. at 8-10. This evidence regarding Conrail's belief has not been contradicted. Therefore, the language in the deed for Line Code 1420 is not determinative of Conrail's understanding as to the status of the Harsimus Branch in 1994. In addition, City Parties claim that the 1994 Conrail legal department's conclusion that the Harsimus Branch was a spur was "an internal reclassification" of its regulatory status; but, because there is no evidence that Conrail viewed the Harsimus Branch as a line of railroad prior to the legal department's conclusion, the record does not show that the legal department's determination was a change or "reclassification." (City Parties Opening 15-16.) Moreover, as discussed above, the Conrail legal department's 1994 conclusion that the Harsimus Branch was spur track occurred before any bridges were removed and years before the Board's involvement and litigation in the federal courts about the track's regulatory status. (Conrail Opening, Ex. E.) There is no evidence that the Conrail legal department was offering a post hoc justification for not seeking abandonment authority.

City Parties infer a Section 110(k) violation through exhibits in which individuals made references to the possibility of Conrail pursuing an abandonment in connection with the Harsimus Branch prior to the removal of the bridges. (See City Parties Opening V.S. Day Ex. 2; City Parties Rebuttal Appx. I.) But passing statements about potential abandonment requests, made without the benefit of a formal legal determination by Conrail about the regulatory status of the Harsimus Branch, are insufficient to overcome the direct evidence of an express legal

[23] City Parties also assert that Conrail "operated the line /as a line of railroad and not as a spur or other non-ICC/STB jurisdictional track," but they provide no evidence supporting that claim. (See City Parties' Opening 15; V.S. Day 9-10.)

determination by the Conrail legal department in 1994 that the Harsimus Branch was a spur.[24] These passing statements, thus, do not support a conclusion that a Section 110(k) violation occurred here.

In any event, even if it could be determined that Conrail knew or recklessly disregarded knowledge that the Harsimus Branch was not a spur and therefore needed abandonment authority, there still was no violation of Section 110(k). To amount to a violation, Conrail also must have known or shown reckless disregard for the fact that the Embankment was a historic resource under Section 106. If Conrail did not know (or recklessly disregard) that fact, then there could be no intent to "significantly adversely affect a historic property" and no intent to avoid Section 106. See 54 U.S.C. § 306113. And in fact, Conrail could not have known, at the time the first of the bridges and related infrastructure were removed in 1994, that the Embankment would first be listed as a historic property in 1999, when it was placed on the NJ Historic Register. Further, there is nothing in the record to indicate that Conrail knew that the Embankment was a historic resource to which Section 106 requirements would apply prior to removal of the bridges. Similarly, there is nothing in the record indicating that a conclusion that the Embankment was not historic could only be made with reckless disregard of the facts. No entity had listed it as a historic property by 1994 and, while there were historic districts bordering the Embankment, the definition of those districts did not include the Embankment itself.[25] In addition, when the Embankment was proposed for listing as a historic property prior to 1999, other parties, including the City itself, argued against its listing.[26]

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[24] The verified statements by McFarland and Day largely consist of their opinions concerning the evidence and the law—but those are the matters specifically within the Board's purview to decide in this proceeding. Here, the Board is satisfied after weighing all the evidence presented by the parties (including the actions taken by the City itself) that Conrail viewed the Harsimus Branch as exempt spur track in the 1990s and that its view was not held in reckless disregard of the facts.

[25] Ultimately, OEA determined that the Embankment was a contributing resource to the bordering historic districts and recommended expanding the boundaries of those districts to include the Embankment. However, that determination was made in 2017 only after extensive review and input from consulting parties in the Section 106 process. Prior to this Section 106 review, the Embankment had never been included as part of these historic districts and, in fact, the applications to establish these two historic districts in the 1970s and 1980s refer to the rail line in discussing the district boundaries and expressly exclude the Embankment from the districts. CRI Report App. N & App. O. This strongly supports the conclusion that any failure by Conrail to consider the Embankment as part of those districts in the mid-1990s was not made with reckless disregard for the facts.

[26] City Parties also err in arguing that the removal of the bridges adversely affected the bordering historic districts and that the adverse effect on the historic districts constitutes a violation of Section 110(k). First, there is no indication that removal of the bridges altered a characteristic of the districts that qualify them as historic districts. Moreover, the language of Section 110(k) applies solely where there has been an adverse effect to the "historic property to which the grant would relate." 54 U.S.C. § 306113. Thus, the statute only bars a significant adverse effect to the Harsimus Branch itself, and any resulting adverse effect to the historic

As a result, the Board finds that Conrail did not violate Section 110(k) when it removed or permitted another entity to remove bridges and related infrastructure from the Embankment in the 1990s because there was no intent to avoid Section 106 requirements or intent to harm a historic resource.

Sale of the Embankment

The second action by Conrail that City Parties allege violated Section 110(k) is the sale of Embankment property to the LLCs in 2005. That sale, however, did not result in a Section 110(k) violation. Not only is there no evidence showing that Conrail or the LLCs had any intent to harm a historic resource following the sale in 2005, but neither the Embankment nor any of the remaining rail infrastructure on the Harsimus Branch have been significantly adversely affected since that transaction. Moreover, contrary to what City Parties argue, the Board has retained jurisdiction over the Harsimus Branch even after the sale to the LLCs. Accordingly, there cannot have been any violation of Section 110(k) as a result of the sale.

The only post-sale alteration of the rail infrastructure on the Harsimus Branch that the City Parties allege constitutes a violation of Section 110(k) is the removal of a stanchion by the LLCs in January 2006. City Parties refer to the 2006 verified statement of John J. Curley, special counsel for the City, as evidence that a stanchion was removed by the LLCs. (City Parties Opening at 30). The verified statement asserts that "an old stone railroad pier or stanchion" was demolished in January 2006 on the parcel located "on Monmouth Street between Fifth and Sixth Street." (Id., V.S. Curley at 11-12.). However, this description refers to the location of one of the six Embankment blocks and the historical record, including maps and diagrams presented in the CRI Report, indicates that no stanchion was present at this location in or prior to January 2006. CRI Report, App. M.[27]

The historical record does suggest that a stone abutment structure, presumably associated with a bridge that had been previously removed in the 1990s, was removed from the at-grade parcel on the west side of Brunswick Street between Fifth and Sixth Streets, which is one block to the west of Monmouth Street, the street identified in the verified statement (CRI Report, App. S at 1-20). That section of the Harsimus Branch west of Brunswick Street is not within the boundaries of the Embankment, which extend from the east side of Brunswick Street to the west side of Marin Boulevard. (CRI Report at 1-6). Thus, at the time the structure may have been removed, in or about January 2006, the portion of the right-of-way to the west of Brunswick Street had not yet been identified as potentially historically significant. OEA determined the portion of the Harsimus Branch right-of-way between CP Waldo and Marin Boulevard to be eligible for listing on the National Register as a historic district only in May 2018, after extensive

districts (which at the time did not include the Embankment) would not constitute a violation of Section 110(k).

[27] A stanchion is a structure that is used to support an elevated bridge or viaduct. At the street location described in the verified statement, the rail line ran above grade on top of the Embankment and the connecting bridges, so no stanchion would have been placed at this location.

review and input from consulting parties in the Section 106 process. (CRI Report Addendum at 1-10). Even if the LLCs did remove a stanchion, pier, or abutment from an at-grade parcel following the sale of the Harsimus Branch, there is no evidence showing either Conrail or the LLCs knew or recklessly disregarded the fact that the parcel would, after significant debate, years later be identified as a historic resource. Thus, there would have been no intent to harm a historic resource.

Moreover, the removal of a single stanchion, pier, or abutment would not have "significantly adversely" affected the approximately 0.87-mile-long National Register-eligible portion of the Harsimus Branch. See 54 U.S.C. § 306113. The guidance received from the ACHP states that, in order to meet the heightened standard of "significantly adversely affect[ing]" a historic property, the action must alter "one or more of the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity."[28] (See Letter from J. Loichinger to D. Gosselin at 1 (EI-30899).) The portion of the Harsimus Branch right-of-way between CP Waldo and Marin Boulevard was determined eligible for listing on the National Register primarily due to the association of the rail line with the history of commerce, transportation, and local government policy in Jersey City. CRI Report, 5-16. No parties have submitted evidence that removal of the stanchion, pier, or abutment would have affected this association or otherwise altered the characteristics of the Harsimus Branch that qualifies a portion of the rail line for inclusion in the National Register.[29]

City Parties also argue that the loss of federal jurisdiction constitutes a significant adverse effect. The loss of federal jurisdiction, however, is not a significant adverse effect resulting from the sale of the property. At the outset, Conrail's notice of exemption is not yet effective, so the Board retains jurisdiction over the Harsimus Branch. The fact that there has been a sale of the Embankment property does not in and of itself change the status of the line or affect the Board's jurisdiction over the line. City Parties additionally argue that the sale harmed the property because it adversely impacted potential historic preservation mitigation. (City Parties Opening 3, 11 n.10, 33 n.25.) But the sale does not impact mitigation possibilities under Section 106 because the Section 106 process for the Harsimus Branch is still ongoing. Thus, any historic mitigation that could have been imposed prior to the sale is still available.[30] The only way for

[28] The Secretary of the Interior's guidance similarly incorporates the heightened standard for a "significant adverse effect" under Section 110(k) by defining it as "destroying or irreparably harming" a historic property. Removal of one of the multiple remaining stanchions would not destroy or irreparably harm the historic portions of the right of way.

[29] City Parties also argue that the fact that the LLCs and Conrail filed requests for demolition permits for the Embankment supports a claim of a Section 110(k) violation. However, a Section 110(k) violation requires an actual significant adverse effect to the historic resource. See 54 U.S.C. § 306113. Since no demolition has occurred as a result of these permits, they are not relevant to whether there has been a Section 110(k) violation to date.

[30] The Board notes, however, that because of the limits of the Board's jurisdiction over interstate rail lines, which ends upon the consummation of abandonment, the historic preservation mitigation that the Board can impose in an abandonment proceeding is generally

the Board's jurisdiction over a rail line that is part of the interstate rail system to end is for the carrier to receive abandonment authority from the Board and exercise that authority. See Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (consummation of abandonment terminates the agency's jurisdiction); Baros v. Tex. Mexican Ry., 400 F.3d 228, 234 (5th Cir. 2005) ("Once a rail carrier abandons a line, the line is no longer part of the national transportation system, and the [Board's] jurisdiction terminates."). Here, the Board has retained jurisdiction because, even though the Line was sold, it still remains a line of railroad that is part of the interstate rail system. Abandonment authority must be obtained from the Board in order to remove it from that system, and Conrail is attempting to do just that. The Section 106 historic review process for this proceeding will continue and any mitigation recommendations that may result from that process have yet to be finalized.[31]

As discussed above, the Board finds that Conrail did not act with an intent to avoid Section 106 requirements, and that its actions did not constitute an intentional significant adverse effect to a historic property. Therefore, the Board concludes that there was no violation of Section 110(k) and will proceed with completion of the Section 106 historic review.

It is ordered:

1. City Parties' motions to strike are denied.

2. As explained above, the Board finds that Conrail has not violated Section 110(k) of the National Historic Preservation Act.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

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limited to requiring documentation. In re Implementation of Env't Laws, 7 I.C.C.2d 807, 828-29 (1991); Consol. Rail Corp.—Aban., 4 S.T.B. 312 *4 (1999). City Parties suggest that the Board should impose a variety of conditions or remedies in this proceeding, including a public use condition under 49 U.S.C. § 10905 and restoring the status quo prior to the sale to the LLCs by either requiring reconveyance of the Embankment properties back to Conrail or declaring those deeds void. Because this decision solely addresses the question of whether a Section 110(k) violation occurred, requests to impose conditions or other relief as part of any grant of abandonment authority are premature and will be addressed, as appropriate, by the Board in its final decision in this proceeding.

[31] There can be no abandonment of a line of railroad, de facto or otherwise, without ICC or Board authority. See Zorzi—Pet. for Declaratory Ord., FD 36106, slip op. at 3 (STB served Jan. 31, 2017). There is no dispute that no such authority was sought or granted for the Harsimus Branch before the present proceeding. Therefore, City Parties' arguments relating to a "de facto abandonment" by Conrail, to the extent they are based on anything other than the removal of the bridges and related infrastructure and the sale to the LLCs (which are addressed in this decision), are misplaced and do not require consideration here.