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August 26, 2003

BY HAND DELIVERY

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

Office of Proceedings

AUG 26 2003

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Re: *Docket No. AB-167 (Sub-No. 1094)A; Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*

Dear Mr. Williams:

Enclosed please find the original and 10 copies of Friends of the High Line, Inc.'s post-hearing submission. This submission addresses the question of whether the Board may issue a Certificate of Interim Trail Use in an adverse abandonment proceeding.

In addition, the Board inquired at the July 24, 2003 hearing in New York whether it had conditioned an abandonment on historic preservation in the past. In Docket No. AB-52 (Sub-No. 57), *Atchison, Topeka & Santa Fe Ry. Co. – Abandonment – In Johnson, Wyandotte & Leavenworth Counties, KS*, ICC Decision served June 3, 1988, pp. 7-8, the Interstate Commerce Commission stated that abandonment of a line near Leavenworth, Kansas, was in the public interest "subject to . . . preservation of the structural and historic integrity of the Kansas River Bridge and compliance with any conditions found necessary to preserve this structure if it is deemed eligible for inclusion in the National Register of Historic Structures."

In addition, we note that a federal court of appeals has recently held that, in certain circumstances, simply documenting and recording historic property is insufficient to meet the requirements of the National Historic Preservation Act. The court in that case held that photographing and mapping an historic property were "not 'adequate restrictions or conditions' that 'ensure preservation of the property's significant historic features.'" *Muckleshoot Indian*

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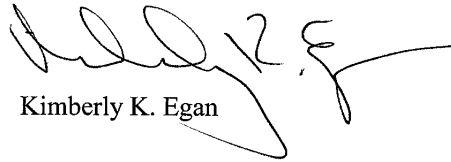
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Tribe v. United States Forest Serv., 177 F.3d 800, 808 (9th Cir. 1999) (quoting 36 C.F.R. § 800.9(c)(3)).

Moreover, the Board has made clear that it may require preservation of a resource as part of consensual mitigation. See Docket No. AB-167 (Sub-No. 1095X), *Consolidated Rail Corp. – Abandonment Exemption – Lancaster & Chester Counties, PA*, STB Notice served Oct. 24, 2002, p. 7. If the City of New York succeeds in achieving a negotiated resolution of this matter, preservation of the historic features of the High Line and surrounding properties presumably will be consensual.

Should the Board conclude at some point that it is necessary to resolve specific historic preservation issues in this case, we will be prepared to provide briefing on those issues at that time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kimberly K. Egan', with a stylized flourish at the end.

Kimberly K. Egan

Enclosures

208784
BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. AB-167 (Sub-No. 1094)A

CHELSEA PROPERTY OWNERS – ABANDONMENT –
PORTION OF THE CONSOLIDATED RAIL CORPORATION’S WEST 30TH STREET
SECONDARY TRACK IN NEW YORK, NY

FRIENDS OF THE HIGH LINE, INC.’S SUPPLEMENTAL FILING
ON QUESTION RAISED BY THE BOARD
AT THE JULY 24, 2003 HEARING IN NEW YORK, NY

ENTERED
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Part of
Public Record

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August 26, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. AB-167 (Sub-No. 1094)A

CHELSEA PROPERTY OWNERS – ABANDONMENT –
PORTION OF THE CONSOLIDATED RAIL CORPORATION'S WEST 30TH STREET
SECONDARY TRACK IN NEW YORK, NY

FRIENDS OF THE HIGH LINE, INC.'S SUPPLEMENTAL FILING
ON QUESTION RAISED BY THE BOARD
AT THE JULY 24, 2003 HEARING IN NEW YORK, NY

At the July 24, 2003 hearing in New York, the Board requested supplemental briefing on the question of whether the Board may issue a certificate of interim trail use ("CITU") in an adverse abandonment proceeding.¹ As explained below, the Board may issue a CITU in an adverse abandonment proceeding, just as it may in a voluntary abandonment proceeding.

1. The National Trails System Act, 16 U.S.C. § 1247(d), authorizes the Board to issue a CITU in any abandonment proceeding, so long as certain statutory prerequisites

¹ An adverse abandonment proceeding is one in which a third party seeks abandonment and the railroad objects to abandonment, wishing instead to keep the line and the easement intact for potential future transportation use.

There is a potential for future transportation use of the High Line. At the July 24 hearing, representatives of Conrail and CSX stated that, if the abandonment were not approved, the railroads would begin to examine possible uses for rail transportation on the High Line. In particular, they mentioned using the line to haul waste out of Manhattan. Other potential uses may emerge in the future.

are met. The statute provides that, where these prerequisites are satisfied, the Board “shall not permit abandonment or discontinuance inconsistent or disruptive of” interim use as a trail. 16 U.S.C. § 1247(d). On its face, this language does not exclude any category of abandonment.

When the Interstate Commerce Commission promulgated regulations implementing railbanking, it made no distinction between lines for which the railroad seeks abandonment and those for which another party seeks abandonment.² Indeed, as the Commission noted in a 1994 study that examined its responsibilities under various statutes, “[i]n every abandonment proceeding, the public is . . . given an opportunity to negotiate voluntary agreements to use the line as a recreational trail . . .” *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(A) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 WL 639996, at *31-32 (Oct. 25, 1994) (commenting on the railbanking statute).

In addition, the United States Supreme Court decision that held railbanking constitutional, *Preseault v. ICC*, 494 U.S. 1 (1990), involved an adverse abandonment. The petitioners in *Preseault* were two trustees of the Diocese of Vermont and a lodge of the Benevolent and Protective Order of Elks, all of whom represented adjacent land owners with potential reversionary interests in a railroad right-of-way.³ The State of Vermont leased the right-of-way to the Vermont Railway, which discontinued operations sometime in the 1970s and removed all the railroad equipment, “including switches, bridges and track.” 494 U.S. at 9.

² There is only one set of regulations governing abandonments, 49 C.F.R. § 1152. These regulations do not set out separate procedures or standards for adverse abandonments.

³ See *State of Vermont & Vermont Ry. – Discontinuance of Service Exemption in Chittenden County, VT*, 3 I.C.C. 2d 903, 904 (ICC 1987).

The petitioners sought a certificate of abandonment from the ICC.⁴ The State of Vermont intervened to oppose the abandonment and it, along with the Vermont Railway, petitioned instead for the right-of-way to be transferred to the city of Burlington for use as a public trail. *Id.* In denying the petitioners' request, the Commission noted that "[i]nvariably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act." *Id.* at 10 (quoting *State of Vermont & Vermont Ry. – Discontinuance of Service Exemption in Chittenden County, VT*, 3 I.C.C.2d 903, 908 (1987)).

Neither the Court nor the Commission suggested that railbanking would be inappropriate in an adverse abandonment setting. This confirms what appears on the face of the Trails Act itself – railbanking is available in any sort of abandonment proceeding.

2. CPO does not address either the statutory language or the *Preseault* decision. It has advanced two arguments for its assertion that the Board may not issue a CITU in an adverse abandonment proceeding. First, at the July 24, 2003 hearing, CPO stated that issuing a CITU in such a proceeding would undermine the policy considerations underlying the Board's authority to grant an adverse abandonment request. Second, in its January 13, 2003 submission to the Board, CPO argued that granting a CITU in an adverse abandonment proceeding is inappropriate because it would interfere with the operation of state law. CPO has cited no authority for either of its arguments; indeed, there is contrary authority that requires the Board to reject them both.

⁴ The petitioners initially brought a quiet title action in state court, alleging that the line was de facto abandoned and therefore the easement was extinguished. The Vermont courts held that they lacked jurisdiction because the ICC had not authorized abandonment and thus still held exclusive jurisdiction over the right-of-way. *Id.*

a. CPO offered no legal support for its statement at the July 24 hearing that allowing railbanking in an adverse abandonment proceeding would undermine the policy considerations underlying an adverse abandonment, and it did not brief the question in any of its pre-hearing submissions. In fact, railbanking is entirely consistent with the policy considerations underlying the adverse abandonment process.

In an adverse abandonment – as in a voluntary abandonment – the Board’s responsibility is to determine whether abandonment or preservation for the purpose of potential transportation use is in the public interest. *See* 49 U.S.C. § 10903; 49 C.F.R. § 1152. The railbanking legislation is designed to keep rail easements available for potential future transportation use. In the case of a railbanking application that satisfies the statutory criteria, Congress has already determined that preserving the line for future transportation use – as opposed to abandonment – is in the public interest. *See Preseault*, 494 U.S. at 6; *cf.* 49 C.F.R. § 1152.29(b)(1)(ii). Accordingly, the policy considerations underlying adverse abandonment and railbanking are compatible. Indeed, because the railroad in an adverse abandonment proceeding is opposed to abandonment and instead wishes to keep a line within the Board’s jurisdiction for possible future transportation use, railbanking is arguably more consistent with an adverse abandonment proceeding than with a voluntary abandonment.

Moreover, there is nothing in the legislative history that suggests that Congress intended any distinction between voluntary and adverse abandonment proceedings with respect to the public interest in railbanking. The United States Supreme Court, in holding that railbanking is constitutional, noted that “Congress apparently believed that *every line* is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable.” *Preseault*, 494 U.S. at 19 (emphasis added). A line constitutes a

potentially valuable asset, regardless of the nature of the abandonment request. As noted at page 2 above, the Commission itself has stated that railbanking is an option “[i]n every abandonment proceeding.”

Accordingly, CPO’s contention that railbanking is inconsistent with the policy considerations underlying adverse abandonment is without merit.

b. In its January 13, 2003 filing, CPO argued that the Board should not issue a CITU in an adverse abandonment context because that would supposedly allow the Board’s “jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.” CPO Jan. 13, 2003 Filing at 10 (quoting *Modern Handcraft, Inc. – Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981)). The Commission, however, rejected a similar argument in the proceeding that led to the *Preseault* decision.

In the proceeding that led to the *Preseault* decision, the petitioners argued that, under *Modern Handcraft*, the Commission should grant their adverse abandonment request and deny the request for trail use on the ground that permitting trail use would allow the carrier to evade the normal processes of state law.⁵ The Commission disagreed, distinguishing *Modern*

⁵ The *Modern Handcraft* decision, which predates the passage of the Trails Act, involved a common carrier that had de facto abandoned a line in Kansas City (using it as a parking lot and as a billboard) but refused to relinquish its common carrier status. The Kansas City Area Transportation Authority tried repeatedly to condemn the line for possible re-use as an urban transit system, but the carrier had maintained control of the property because the Commission had never formally declared the line abandoned. The Commission authorized adverse abandonment and said “it is apparent that the existence of our jurisdiction has enabled” the carrier to thwart the condemnation effort. *Modern Handcraft*, 363 I.C.C. at 971-72.

Here there is no suggestion that the Board’s jurisdiction is enabling CSX and Conrail to thwart New York City’s legitimate interests. To the contrary, the existence of Board jurisdiction is consistent with the City’s interest in obtaining railbanking for the High Line pursuant to the terms of the federal statute.

Handcraft on the ground that, in a railbanking context, “there remain overriding federal interests embodied in the Trails Act: the development of trails and the preservation of railroad rights-of-way.” *State of Vermont*, 3 I.C.C.2d at 907. The Commission further noted that “Congress intended by enactment of the Trails Act to preserve our jurisdiction to protect railroad rights-of-way from title claims such as those of [the *Preseault* petitioners].” *Id.* It reasoned that no state law is obstructed because “any alleged reversionary interests are suspended rather than terminated” and if trail use is later terminated and a certificate of abandonment is ultimately issued, then “reversionary rights would [still] exist.” *Id.* at 908.

On appeal, the Second Circuit observed that state property law “operates only subject to the ICC’s plenary authority to regulate railroad abandonments.” *Preseault v. ICC*, 853 F.2d 145, 150 (2d Cir. 1988), *aff’d*, 494 U.S. 1 (1990) (citing *Chicago v. North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981)).⁶ The court pointed out that no reversionary interest could vest until the Commission determined that abandonment was appropriate. *Id.* at 151. Thus, railbanking would not postpone any reversionary interest any more than would otherwise occur through the agency’s continuing jurisdiction. *See id.*

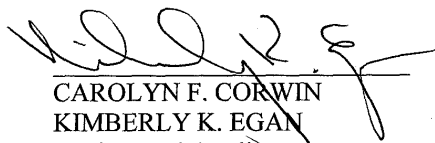
The same is true here. Railbanking the High Line would suspend CPO’s property rights, not terminate them, based on a legitimate federal interest in preserving rail corridors for public and potential future transportation use. As a result, CPO’s suggestion that *Modern Handcraft* prevents the Board from issuing a CITU for the High Line should be rejected.

⁶ The court of appeals further held that the railbanking legislation was reasonably related to a legitimate federal interest, namely, preserving rail corridors for public use. *See* 853 F.2d at 149-50.

CONCLUSION

For the reasons discussed above, the Board has the authority to issue a CITU for the High Line in an adverse abandonment proceeding so long as the statutory requirements for railbanking have been met.

Respectfully submitted,



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August 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing are being served this 26th day of August, 2003, by first-class mail, postage prepaid, or hand-delivery, upon the following persons:

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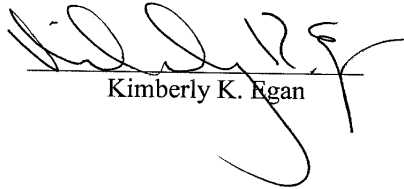
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