

April 7, 2004

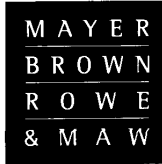
BY HAND-DELIVERY

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

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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

210526

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the Reply of Consolidated Rail Corporation to "Notice of Intent to File Offer of Financial Assistance." Please date-stamp the extra copy that is enclosed and return it to our representative.

Sincerely yours,

Robert M. Jenkins III

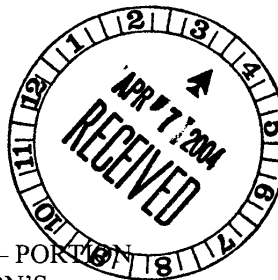
RMJ/bs

Enclosures

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, N.Y.



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**REPLY OF CONSOLIDATED RAIL CORPORATION
TO "NOTICE OF INTENT TO FILE OFFER OF FINANCIAL ASSISTANCE"**

Consolidated Rail Corporation ("Conrail") replies here to the pleading styled "Notice of Intent to File Offer of Financial Assistance" that was filed in this proceeding by Forty Plus Foundation and Manhattan Central Railway Systems, LLC ("Forty Plus/MCRS") on April 2, 2004. In its pleading, Forty Plus/MCRS requests that Conrail and CSX (CSX Corporation and CSX Transportation, Inc.) provide information that Forty Plus/MCRS says it intends to use to make an Offer of Financial Assistance ("OFA") for Conrail's West 30th Street line (the "Highline"). Forty Plus/MCRS also requests that the Board "toll period for submitting Offers of Financial Assistance for an additional 30 days in order to provide MCRS with an adequate opportunity to review and analyze the material provided by Conrail/CSX and submit MCRS' OFA." Notice at 5.

Forty Plus/MCRS's pleading is extraordinarily, and fatally, out of time. The Board's rules governing OFA proceedings provide for parties considering an OFA to request relevant information during the pendency of the abandonment proceeding (49 CFR § 1152.27(a)) and establish the due date for any OFA as 120 days after the abandonment application is filed or 10 days after the decision granting the abandonment application is served, whichever is sooner (49

CFR § 1152.27(b) and (c)). Here, the decision of the Interstate Commerce Commission granting the abandonment was published effective September 16, 1992, and the ICC specifically provided that “[a]n offer of financial assistance to allow rail service to continue must be received by the railroad and the Commission within 10 days after publication.” *Chelsea Property Owners – Abandonment – Consolidated Rail Corp.*, 8 I.C.C.2d 773, 794 (1992), *aff’d sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994).

An OFA was in fact timely filed after the ICC’s September 16, 1992 decision, by the New York Cross Harbor Railroad Terminal Corporation (“Cross Harbor”) and others. That OFA was rejected by the ICC in a decision served in this docket on December 9, 1992. When the Cross Harbor subsequently petitioned to reopen the ICC’s decision rejecting the OFA, on the grounds (among others) of new evidence and substantially changed circumstances, the ICC rejected that petition – emphasizing that “to reopen an OFA decision based on allegations of new evidence and changed circumstances would violate the entire thrust of the statutory scheme. Aside from the inevitable delay, it would give potential offerors the opportunity to pursue an OFA well after their due date.” Decision served July 22, 1993, slip op. at 4.¹ Subsequently, the STB reached the same result in a case where a party sought to reopen an abandonment decision, more than four years after the effective date of that decision, in order to file an OFA. Citing the ICC’s July 22, 1993 decision in this docket, the STB held that “the OFA procedures plainly are no longer available with respect to this line.” *Idaho Northern & Pacific R.R. – Abandonment Exemption – In Wallowa and Union Counties, OR*, Docket No. AB-433X (decision served December 13, 2001), slip op. at 4. The STB noted that while OFA deadlines have sometimes

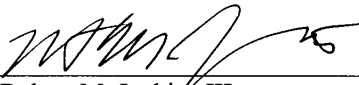
¹ The ICC also noted that a decision not to reopen proceedings to permit late-filed OFA’s “does not deprive offerors of other options to acquire the line. For example, offerors may negotiate the line’s sale outside the context of section 10905 [now section 10904] and the OFA procedures.” Decision served July 22, 1993, slip. op. at 4.

been extended, "such extensions generally were for short time periods and were granted only in exceptional circumstances or when both sides agreed. . . . There is no precedent to entertain an OFA filed 4 years after its due date, and to do so plainly would be inconsistent with Congressional intent." *Id.*

Almost 12 years have passed since the abandonment decision at issue here. Under the authority established by the ICC in this very case, and subsequently adopted by the STB as well, OFA procedures are plainly no longer available with respect to the Highline. Accordingly, Forty Plus/MCRS's OFA "Notice" and OFA-related requests for information and tolling should be dismissed by the Board.²

Respectfully submitted,

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Dated: April 7, 2004

² Conrail is authorized to state that CSX Corporation and CSX Transportation, Inc. concur with Conrail's position.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply of Consolidated Rail Corporation to 'Notice of Intent to File Offer of Financial Assistance'" have been served this 7th day of April 2004, by first-class mail, postage prepaid, or hand-delivery, upon the following persons:

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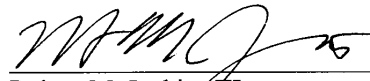
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