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HONORABLE VERNON A. WILLIAMS, SECRETARY
SURFACE TRANSPORTATION BOARD
1925 K Street, N.W. Suite 700
Washington, D.C. 20423-0001

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 Secretary Williams:

Enclosed for filing in the above-captioned proceeding an original and ten (10) copies of the FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS LLC, Appeal for Reconsideration of Decision Served October 6th, 2003, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self addressed, stamped envelope provided. In addition to applicable filing fees, we are enclosing a 3.5 inch diskette with this document.

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Enclosures

cc: All Parties of Record

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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 "HIGHLINE"
IN NEW YORK, NEW YORK

APPEAL FOR RECONSIDERATION OF DECISION FOR A 90 DAY ABEYANCE,
SERVED OCTOBER 6TH, 2003, IN THE ABOVE REFERENCED MATTER BY
THE FORTY PLUS FOUNDATION & MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC

FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC
Tomislav R. Neuman, *Executive Director*
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Dated: October 21, 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, NEW YORK

APPEAL FOR RECONSIDERATION OF DECISION FOR A 90 DAY ABEYANCE,
SERVED OCTOBER 6TH, 2003, IN THE ABOVE REFERENCED MATTER BY
THE FORTY PLUS FOUNDATION & MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC

The FORTY PLUS FOUNDATION’S “*Manhattan Central Railway Systems, LLC.*” (MCRS) a party to this proceeding, wishes to appeal the Surface Transportation Board (“Board”) recent decision to grant an abeyance in the above matter and respectfully petitions the Board to immediately revoke the Decision, dated October 6th, 2003, requested by both the City of New York, NY (“*the City*”) and the Chelsea Property Owners (“CPO”), two of “*the Parties*” of this proceeding, in their joint October 2nd, 2003 letter requesting an;

“...abeyance for a period of ninety (90) days, and to refrain during that period from issuing a decision with respect to the various motions now pending. CPO and the City are having discussion that they anticipate will resolve the issues between them that are before the Board.”

Petitioner seeks to revoke this Decision on the grounds that “*the Parties*” failed to properly notify all parties with motions pending, and incorrectly and /or misleadingly certified in its letter that all parties do not oppose the request to hold the proceeding in abeyance for 90 days.

I. BACKGROUND

Petitioner, MCRS, presently has before the Board a proposal that maintains as a priority to reinstate rail service on the rail line at issue (*i.e.* “*Highline*”) in the above referenced docket **AB 167 (Sub-No. 1094) A**, as a Class III, Shortline in response to the July 28, 2003 Order of the Board. Petitioner wishes to alert the Board that evidently due to an inopportune oversight on the part of both “*the*

City” and “CPO” (“*the Parties*”) – in their haste to present their request before the Board on Thursday, October 2nd, 2003 (docket #: 209038) -- “*the Parties*” had inadvertently neglected to appraise Petitioner of their disquieting interest to seek an abeyance of the above proceedings for a period of ninety (90) days, plus, further requested that the Board refrain during that period from issuing a decisions with respect to the various motions now pending.

Unfortunately, Petitioner was unaware of the above “request” submitted by “*the Parties*” until Tuesday, October 7th, 2003 (via mail) – regrettably a full day after the Board had already granted “*the Parties*” request on Monday, October, 6th, 2003. This single one (1) business day velocity of both receiving and immediately granting the request is somewhat baffling since there is no apparent “deadline” or urgency where an accelerated decision would be so critical as to justify neglecting the timely notification of, or response from all parties. Both “*the Parties*” have been duly aware of Petitioner’s presence, interests and participation in the “Highline” over the past several years, including our ease of access and contact.

With all due respect, it is the Board’s custom to require parties of proceedings to extend the professional courtesy not only to any complementary interests but to all parties having motions before the Board, including to make every effort to accurately reflect all participants’ true position within a motion or request. It would appear from “*the Parties*” October 2nd request that the Board was led to inadvertently presume, as a result of the articulation within the correspondence, that all parties were in agreement with respect to “*the Parties*” request for an abeyance. Had Petitioner received the courtesy of a solicitation by “*the Parties*” for our opinion/position (as extended to others identified within the correspondence) to review the necessity for such a request “*the Parties*” could have avoided any superfluous encumbrances on the Board’s resources. Petitioner presently maintains serious reservations regarding the abeyance in question.

As a result of the STB’s July 24th, 2003 public hearing in NYC, yielding the Board’s order served July 29, 2003, which graciously invited concerned parties to assist the Board to arrive at a timely and

reasonable resolution to the long simmering “*novel legal issues*” beleaguering the “*Highline*”-- Petitioner must respectfully oppose any extension(s) in light of the *de facto* 14+ year “abeyance” that has been the unsanctioned hallmark of this case, remarkably, as a result of both *the City* and *CPO* who have been ersatz allies and consequential participants and/or contributors in virtually all delays to date.

On July 24th, STB Chairman Roger Nober had made it crystal clear that the Board was committed to resolving the question of the future of the Highline in a timely manner. As a result of both the incessantly grueling chronology and the unprecedented resources extended by the Board, including an extraordinary public hearing -- all parties have been afforded ample opportunity to state their positions and furthermore have in fact done so. Any further delays could contribute and perpetuate an unfortunate false myth that the “*Highline*” may be ineligible to continue active rail service, when in fact the opposite is true -- emphasized by the Board's mission of preservation and reactivation which is the priority over any demolition or CITU. Therefore any further delays, specifically not dealing with the future continuation of rail service on the “*Highline*”, would only be counterproductive not in the public's interest and contrary to the Board's clear message to resolve the indeterminable impasse surrounding this valuable resource.

II ARGUMENT

The Board must revoke a request where the motion contained false or misleading information. If the request contains false or misleading information, this abeyance request is void *ab initio* and the Board should summarily reject the request. Furthermore, the Board plainly has the authority to continue the procedural schedule if it concludes that doing so is in the public's best interest. The Board's authority to manage its docket enables it to take steps to ensure that it can proceed to a decision competently and on a fully developed record. In the past the Board has exercised its authority to adjudicate *open ended* unsubstantiated requests for postponements based on uncertainties created by competing interests to control the outcome of rail lines.

The Board may have unwittingly abdicated its statutory public convenience and necessity duty to weigh the needs of the shipping public against *the City* and *CPO's* unexplained desire to abolish this rail

facilities original function. Finally, in implementing this standard, the Board, and the ICC before it, balanced the potential harm to shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. The Board (and the ICC before it) has emphasized that “third party” applicants such as “*the City*” and “*CPO*” here has the burden to establish that the public convenience and necessity require or permit any abandonment or discontinuance. The agency then has a statutory duty to preserve and promote continued rail service and to provide the public with a degree of protection against unnecessary discontinuance, cessation, interruption, or obstruction of rail service. See e.g., Western Stock Show Association, supra, 2 S.T.B. at 131; Salt Lake, supra, slip op. at 6. Although impediments to State and local government projects are entitled to some weight, agency precedent clearly states that those interests **are subordinate** to its statutory duty to preserve and promote continued rail service where a carrier has expressed a desire to continue or establish operations and has taken reasonable steps to acquire traffic. Chelsea Property Owners – Aban. – The Consol. R. Corp. supra. 8 I.C.C. 2d 773, 778-9 (1992).

Historically, ConRail had conscientiously encouraged serious parties interested in continuing rail service on the “*Highline*”, fully recognizing that predecessor management plus the tumultuous upheaval within the Railroad industry 20+ years previous resulted in unprecedented numbers of rail company bankruptcies (and the creation of ConRail) which were the primary cause for the faltering productivity of the “*Highline*” and not market conditions -- this encouragement ultimately attracted **MCRS’** participation.

When CSX ultimately purchased the “*Highline*” from ConRail, this action further confirmed the precedent that a carrier could in fact acquire this rail line with no impediments and establish rail service if it so desired. Subsequently, during our own ongoing discussions with ConRail and CSX management, they both made it clear that rail service could most certainly be re-established but would in all probability not generate sufficient revenues within a traditional Class I economic model to retain it in active service. CSX further reiterated their intense reservations as to how [CSX] to minimize any liabilities associated

with liquidating the “*Highline*” in light of the ICC’s historic conditional abandonment ruling. Therefore, both ConRail and CSX management have not only uncompromisingly solicited the STB’s full participation and guidance but have clearly stated their wishes regarding any further delays, in their recent August 26th, 2003 brief (docket # 208785);

[Page # 1, 1st paragraph] “... *ConRail takes no position on this novel legal issue, other than to encourage the Board to decide the issues as soon as reasonably possible. Conrail and CSX Corporation and CSX Transportation, Inc. (“CSX”) have spent millions of dollars in maintenance expenses, property and other taxes, and counsel and consulting fees in connection with the Highline since the railroads’ efforts to reach a Settlement Agreement began over four years ago. Additional delay in resolving the disposition for the Highline will impose substantial additional costs on the railroads.”*

[Page # 2, 1st paragraph] “...*there is no point in the Board addressing the City’s most recent request to extend from 180 to 270 days the period for negotiation of a trail use agreement after issuance of a CITU.*”

[Page # 4, 2nd paragraph] “*Conrail and CSX have devoted enormous time and expense to the matter of the Highline. We have worked hard to try to accommodate the interests of as many parties as possible, but the current state of limbo should not be allowed to continue. Once again, Conrail encourages the Board to move forward as rapidly as reasonably possible to decide the motions before it.”*

Because *the City* and *CPO* not only failed to articulate their pending “co-operative” plan for this rail line, as a reminder, they both have independently stated during the July 24th, 2003 public hearing their ambiguity on how they intend to consummate their specific objectives. The Board is obligated to weigh the interests of Petitioners’ proposal for the continuation of rail service against demolition or CITU. By granting *the City’s* and *CPO’s* abeyance instead of weighing their conflicting interests towards Petitioner’s motion versus those of *the City/CPO*, the Board may have innocently abdicated its statutory responsibly which may now result in the irretrievable loss of the nascent momentum focused on a constructive resolution of the “*Highline’s*” future.

Both “*the City*” and “*CPO*” have it wholly within their control to effectuate their transaction(s) following the Boards decision, which may in fact be rendered moot, pending a favorable verdict by the Board of Petitioners’ motion. Both *the City* and *CPO* have historically stated that active rail service on the “*Highline*” would be reason enough to desist their efforts for demolition or alternative usage [CITU]

and the lack of rail service has been the only rational for challenging the continued existence of the “Highline”. Requests resulting in delays of this proceeding would not be in the public’s best interests. As explained above “*the Parties*” simply offered a nebulous “*status report*”;

“... At the end of the requested ninety-day period, CPO and the City will report to this Board on the status of their negotiations”

and rests upon future vague contingencies dealing with non rail usage that if past performance is any indication may not occur. If those contingencies may or may not materialize the postponement can not be in the public interest because it would further contribute to potentially a great waste of resources and perpetuate “*the current state of limbo*” ConRail & CSX management have clearly pleaded with the Board to help them avoid. In addition, the requested abeyance before the Board is subject to contingencies that are beyond the control of the STB, the Applicants, and all parties.

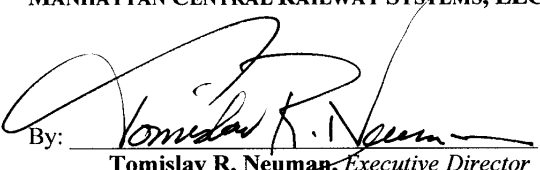
Under current circumstances we view that this case has been in a “*de facto 14+ year abeyance*” far too long, and the unfortunate [*un*] - timely notification “oversight” by *the City & CPO*, to exercise common professional courtesy by excluding targeted parties in discussions that directly affect the parties, but has been compounded by the lack of any reasonable opportunity to respond to their requests/motions that directly influence the public’s interests. We feel it is in both the public’s and the Board’s best interest to re-examine the manner and purpose in which this specific request was presented to the Board and finally rescind the decision as expeditiously as it was originally granted. We oppose any further extensions and respectfully request an immediate decision concerning the reactivation of this line as a Class III, shortline.

III SUMMARY:

WHEREFORE, and in view of all of the foregoing, **MCRS** respectfully requests under 49 CFR 1115.3 (a) the Board will entertain a petition for reconsideration of an action where "... (s) *the prior action involves material error.*" Agency precedent clearly states that demolition or alternative usages such as CITU are subordinate to the Board's statutory duty to preserve and promote continued rail service where a carrier [Petitioner] has expressed a desire to resume rail operations -- therefore issues subordinate to continued rail service on this line do not meet the standard required for an abeyance in this instance.

Respectfully, the October 6th, 2003 Decision is regrettably replete with error, since the reactivation of rail service on this line is the Board's statutory duty -- the continuation of rail service can not possibly result in any harm or foul to all effected parties since all contiguous property owners deeds clearly stipulates the right for the "*Highline*" easements to exist for active rail service and the major component of a CITU is the exploitation of the line for future rail service. The Board must focus its attention on the real prospects of continuing rail service presently and not at some tenuous future date and grant **MCRS's** petition, correct these errors, and deny *the City* and *CPO* their requested 90 day abeyance.

Respectfully submitted,
**THE FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC**

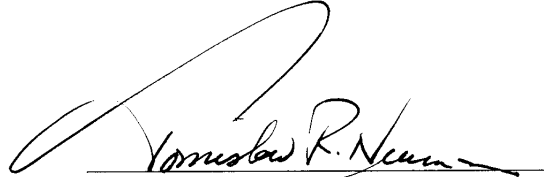
By: 

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Dated: October 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2003, copies of the forgoing Appeal of the Forty Plus Foundation & Manhattan Central Railway Systems, LLC for reconsideration of the decision granted for a 90 day Abeyance, served October 6th, 2003 in the above referenced matter, hereby appealed by the Forty Plus Foundation & Manhattan Central Railway Systems, LLC to be served by first-class mail, postage prepaid, or (hand-delivery), upon all interested parties of record.



Tomislav R. Neuman
Tomislav R. Neuman