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August 26, 2003

JOHN H. BROADLEY

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W. Suite 700
Washington, D.C. 20423-0001

208787



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

Dear Mr. Williams:

Enclosed for filing in the captioned case is an original and ten copies of CHELSEA PROPERTIES OWNERS BRIEF ON THE AVAILABILITY OF THE TRAILS ACT IN ADVERSE ABANDONMENT PROCEEDINGS. Please file stamp the extra copy of the document and return it with our messenger.

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Yours very truly,

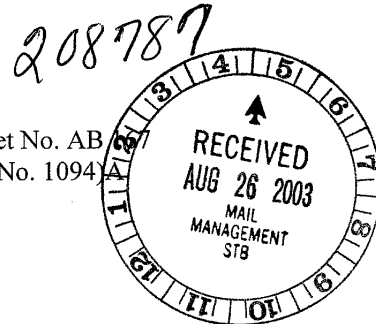
John Broadley
John Broadley

cc: All counsel
w/enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

_____)
Chelsea Property Owners -- Abandonment --)
Portion of the Consolidated Rail Corporation's)
West 30th Street Secondary Track in New York, NY)
_____)

Docket No. AB
(Sub-No. 1094)



**CHELSEA PROPERTY OWNERS BRIEF ON THE AVAILABILITY
OF THE TRAILS ACT IN ADVERSE ABANDONMENT PROCEEDINGS**

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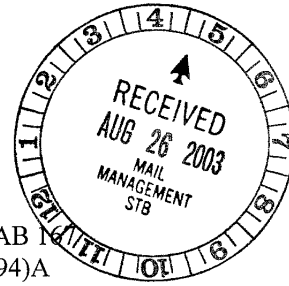
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CHELSEA PROPERTY OWNERS

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Dated: August 26, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**



_____)
Chelsea Property Owners -- Abandonment --)
Portion of the Consolidated Rail Corporation's)
West 30th Street Secondary Track in New York, NY)
_____)
_____)

Docket No. AB 1
(Sub-No. 1094)A

**CHELSEA PROPERTY OWNERS BRIEF ON THE AVAILABILITY
OF THE TRAILS ACT IN ADVERSE ABANDONMENT PROCEEDINGS**

The Board has asked the parties to brief the issue of whether the Trails Act can be used in an adverse abandonment proceeding. Chelsea Property Owners ("CPO") contends that the Trails Act is not available in adverse abandonment proceedings, or if it is available, the Board must conduct a case-by-case assessment to determine whether the circumstances are such that application of the Trails Act in the case would be consistent with Congressional purposes of preserving railroad rights-of-way where there is a prospect of future restoration to rail use.

If the railroads were to convert this proceeding into a voluntary abandonment of the Highline, which they could do either by filing an application or, more expeditiously, by filing a notice of exempt abandonment for a line that has obviously been out of service for longer than two years, *see* 49 CFR 1152.50(b)¹, they could, of course, in those circumstances enter into a Trails Act agreement with the City without facing the difficulties and uncertainties presented by an attempt to use the Trails Act in the entirely different circumstances of an adverse abandonment.

¹ 49 CFR 1152.50(b) provides:

An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years

BACKGROUND

As the Board is aware, the Highline was built in the early 1930's to remove rail tracks from the city streets, primarily 10th Avenue in Manhattan. The decline of manufacturing in Manhattan after World War II led to a steady decline of traffic on the line until 1982 when the last traffic moved. The line is located on an elevated structure which in turn occupies easements on and over the route of the right-of-way. In the twenty years since rail service stopped on the line, the structure has deteriorated and the entire Highline has become a blight on the neighborhoods through which it passes and an obstacle to economic development. To remove the burden of the Highline structure from their properties and to permit economic development of the lower west side of Manhattan, Chelsea Property Owners ("CPO"), an organization of property owners whose properties are burdened by the Highline's easements of support and occupancy, brought an adverse abandonment case in the Commission seeking abandonment of the Highline.²

Because of the lack of shipper demand for rail service and because of the adverse economic impact of the presence of the structure, the Commission approved its abandonment in 1992, subject, however, to the condition that CPO indemnify the railroads from the costs of removal of the Highline exceeding \$7 million. *Chelsea Property Owners -- Abandonment -- Conrail's West 30th Street Secondary*, 8 I.C.C.2d 773, 791 (1992), *aff'd sub nom. Consolidated Rail Corporation v. Interstate Commerce Commission*, 29 F.3d 706 (D.C. Cir. 1994) ("*Chelsea Property Owners*"). In 2001 CPO, the railroads, the City of New York, and other interested parties reached an agreement ("*Settlement Agreement*") which would permit CPO to meet the Board's indemnity condition and

² CPO contends that once the Highline is abandoned, the railroads are obligated to remove the structure. This obligation arises either pursuant to the terms of their easements, or pursuant to New York law.

permit demolition of the Highline. The City of New York, having undergone a change in management, now seeks to enter into a Trails Act agreement with the railroads which will permit the City to acquire the Highline and convert the elevated structure into a New York City version of the Promenade Plantée in Paris. The issue the Board has asked the parties to brief is whether the Trails Act is available in an adverse abandonment proceeding.

There is no clear answer to the Board's question in the text of the Trails Act, in its legislative history, or in the case law. The Board will have to answer the question by looking at the purposes of the adverse abandonment process and of the Trails Act amendments, and decide whether the Trails Act should apply in all adverse abandonments, in no adverse abandonments, or whether in adverse abandonment cases the Board must examine the facts on a case-by-case basis to determine whether application of the Trails Act is within the scope of the objectives Congress intended it to serve.

A. The Interests Of The Railroad In An Adverse Abandonment Are Radically Different From Those In a Conventional Abandonment.

In a conventional abandonment, the railroad has an economic interest in eliminating its common carrier obligation and removing the line from the national rail system and the Board's jurisdiction. The railroad can look forward to elimination of the out of pocket costs of providing service on the line, elimination of maintenance costs, elimination of real estate tax costs, and to realization of any values that might inhere in the track and in the right-of-way. The *conventional abandonment* is in the railroad's economic interest otherwise it would not undertake the burden and expense of seeking regulatory approval.

In an adverse abandonment, on the other hand, the railroad has an economic interest in the line remaining part of the national rail system and subject to the Board's jurisdiction. This economic interest rarely consists of a desire to continue providing rail service to shippers on the line. In the typical adverse abandonment case there is no shipper demand for rail service, so the railroad's common carrier obligation is not a burden and it suffers no out-of-pocket losses on providing service. See e.g. *Modern Handcraft, Inc. -- Abandonment in Jackson County, MO.*, 363 I.C.C. 969 (1981) (line out of service for 12 years), *Chelsea Property Owners*, 8 I.C.C. 2d 773 (1992) (line out of service for 10 years). Where the railroad and the shippers on the line want to continue rail operations, the prospects for a successful adverse abandonment are slim in any event. See e.g. *Western Stock Show Association -- Abandonment Exemption-- Denver, CO.*, AB 452 (Sub-No. 1X) (July 3, 1996), 1996 WL 366394 (I.C.C.) at pp. 14-15. The precise nature and extent of the railroad's economic interest in retaining the line in the national rail system requires a consideration of each adverse abandonment on a case-by-case basis.

In this case, however, the nature of the railroads' economic interest in the Highline remaining part of the national rail system is plain and was recognized by the Commission in 1992 (*Chelsea Property Owners*, 8 I.C.C.2d at 792):

Conrail argues that because of demolition costs and abandonment authorization would further aggravate its already revenue inadequate position. Although this argument is irrelevant to whether there is a need and opportunity for continued rail service, it clearly is a significant if not the primary reason for Conrail's opposition to this abandonment application.

If the Highline were to be removed from the national rail system with a clean, unconditioned abandonment order, the railroads would face claims that they were obligated to

remove the Highline structure, an obligation that could be extremely expensive depending upon the extent of that obligation.³ In 1992 the railroads succeeded in persuading the Commission to keep the line part of the national rail system and to retain jurisdiction over it, notwithstanding the public convenience and necessity did not require its use as a rail line, unless CPO indemnified them against removal costs exceeding \$7 million, *Chelsea Property Owners*, 8 I.C.C. 2d 773, 794 (1992):

We find:

(1) The present and future public convenience and necessity permit abandonment of the described line of railroad, subject (1) to . . . ; and (2) to the condition that applicants post a surety bond, or similar security, as described above.

While the Commission's September 16, 1992 decision provided a vehicle by which the property owners could extract the line from the Board's jurisdiction and from the national rail system, it otherwise kept the line in the national rail system and continued Board jurisdiction, shielding the railroads from obligations under the easements and/or state law.

B. The Adverse Abandonment Process Was Developed to Deal with Problems Presented When Railroads Had Economic Interests Dictating Retention of a Line Not Needed for Rail Service in the National Rail System.

Section 402 of the Transportation Act of 1920 required Commission approval before a railroad could construct or abandon rail lines. 41 Stat. 477, February 28, 1920.⁴ It quickly

³ Likely the key factor in the cost of removal is the extent to which the footings sunk deep into the ground underneath the Highline's supporting columns must be removed.

⁴ This section of the Transportation Act added sections 1(18) - 1(22) to the Interstate Commerce Act. Those sections have subsequently been modified and codified in part as the present sections 10901 (dealing with line construction and extension) and 10903 (dealing with abandonment and discontinuance) of title 49, United States Code.

became apparent that the requirement for prior Commission approval presented an obstacle to state and local authorities in dealing with the railroads, and provided the railroads with a weapon either to frustrate state and local authority plans entirely, or to increase the cost of such plans by giving the railroads a “hold-up” ability. If the state or local authority wanted to acquire property being used as a rail line, it found the requirement of prior Commission approval for abandonment a roadblock to a condemnation under state law. Similarly, if the state or local authority wanted to require the railroad to construct a line, it found a similar roadblock in the requirement for prior Commission approval. The problem came to a head when the City of Los Angeles sought to require the railroads to construct a single union station for passengers, to construct necessary new lines into the new station, and to abandon existing lines in the city streets. See *Railroad Commission of California v. Southern Pac. Co.*, 264 U.S. 331 (1924).

Seven years later in *Atchison T. & S.F. Ry. v. Railroad Com'n*, 283 U.S. 380 (1931), the Court held that where the *city of Los Angeles*, an interested non-railroad party, had obtained prior Commission approval for construction and abandonment of certain lines, and for the construction of a union station in Los Angeles, all without the consent of the railroads, orders of the Railroad Commission of California directing the railroads to build the new union station and the new lines into it and to abandon existing lines in the city streets (all consistent with the previous approval the Commission had given to the city of Los Angeles) were enforceable against the railroads. The Interstate Commerce Act permitted interested non-railroad parties to seek both abandonment and construction authority, thus preventing the railroads from hiding behind Commission jurisdiction if the Commission found the abandonment and/or construction consistent with the requirements of the Interstate Commerce Act.

In *Thompson v. Texas Mexican RR Co.*, 328 U.S. 134 (1946), a case involving the discontinuance of trackage rights operations, the Court reiterated this doctrine and made it clear that (*id.* at 145):

There is no requirement in s 1(18) that the application [to the Commission] be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers 'who have a proper interest in the subject-matter' may take the initiative. [FN8] See Atchison, T. & S.F. Ry. Co. v. Railroad Commission, 283 U.S. 380, 393, 394, 51 S.Ct. 553, 556, 557, 75 L.Ed. 1128. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern Ry. Co. Abandonment*, 166 I.C.C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient.

The Commission followed the guidance of the Court in permitting adverse abandonments, recognizing that the purpose of an adverse abandonment is to avoid the situation where the railroad uses the Commission's jurisdiction over the line to prevent action under state law where the line is not required for interstate commerce. In *Modern Handcraft, Inc. -- Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981), the Commission stated:

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. We will not allow our 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. Where as here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a state condemnation.

Adverse abandonments, thus, are designed to remove the shield of Board jurisdiction from the railroads when that shield is used in their own economic interest, not in furtherance of the

public interest in rail service in interstate commerce. Here, the City contends that in enacting the Trails Act Congress provided to the railroads a trump card which, when played, would keep the line in the national rail system, notwithstanding other interests and needs for the property, and notwithstanding that the railroads' objectives are the furtherance of their own parochial economic interests, not rail transportation in interstate commerce. Neither the Trails Act nor its legislative history provides support for the City's contention.

C. A Railroad Cannot Use the Trails Act to Frustrate an Adverse Abandonment Proceeding Where There Is No Prospect of the Restoration of Rail Service on the Line.

The 1983 Trails Act amendments which added 16 U.S.C. 1247(d) dealing with railroad rights-of-way were intended to preserve established railroad rights-of-way for future reactivation of rail service. The legislation did this by providing *to the railroad* an option to enter into a Trails Act agreement with a state, political subdivision, or qualified private organization, to permit *interim* use of the right-of-way as a trail while retaining the line in the national rail system subject to Board jurisdiction. If the agreement meets the requirements of the statute, two effects follow: (i) the use of the right-of-way for trail use will not be considered to be an abandonment of rail use (thus, preserving any easement rights forming the right of way), and (ii) the Commission can not issue an abandonment or discontinuance order inconsistent with or disruptive of trail use. These purposes appear on the face of the amendment (emphasis added):

... Consistent with the purposes of that Act, and *in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service*, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, *if such interim use is subject to restoration or*

reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. [paragraph broken for clarity]

If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and ***shall not permit abandonment or discontinuance inconsistent or disruptive of such use.***

Significantly, Congress did not ***require*** the preservation of all rail rights-of-way, nor did it confer on the Commission or on any third party the right to ***require*** the railroad to enter into a Trails Act agreement. Whether to do so is entirely within the discretion of the railroad. In *Rail Abandonments -- Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 596 (1986) (*Rail Abandonments*) the Commission held:

The major issue is whether the amendment gives the Commission the power to condemn right-of-way; that is, to take property for public use for just compensation. We conclude that it does not.

The Commission's interpretation on this point was affirmed in *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 702 (D.C. Cir. 1988).

A second significant point is that Congress's objective was not to preserve all railroad rights-of-way, but only to preserve established rights-of-way for future reactivation of rail service. Implicit in this language and in the language of the amendments dealing with "interim" trail use of the right-of-way is an expectation that there be some prospect of a future rail use of the right-of-way. Persons challenging the 1983 amendments argued that the Congressional reference to reactivation

of the line for future rail use was a pretext, and that where a railroad had gone to the trouble and expense of seeking abandonment of the line, there was no prospect that rail service would ever be restored on the right-of-way. In *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988), in reviewing the Commission's regulations implementing the 1983 Trails Act amendments, the court responded to that argument stating (850 F.2d 707):

Quite apart from the Rules, however, Congress specifically identified rail banking as a goal in the text of § 8(d). [FN18] Moreover, and contrary to Beres's suggestion, there is at least some experience showing that a railroad that enters into an agreement for interim trail use may in fact intend to resume service in the foreseeable future. In *Chicago & North Western Transp. Co.--Abandonment Exemption--Guthrie and Dallas Counties, IA*, ICC No. AB-1 (Sub. No. 192X) (served May 20, 1987), for example, the Commission authorized interim trail use on a right-of-way that was adjacent to the site of a proposed coal-fired power station, reasonably projecting that if the power station were built, rail service would be reactivated in order to haul coal. We therefore decline to find that rail banking is necessarily a "fiction."

In its Policy Statement responding to the DC Circuit's remand in *National Wildlife Federation*, the Commission also addressed the pretext issue (*Rail Abandonments -- Use of Right-of-Way as Trails*, 5 I.C.C. 2d 370, 374-375):

Congress did not distinguish between short- and long-term rail banking, and, therefore, we do not believe that specific contingency plans for reactivation of a line are necessary to justify retention of a potentially valuable national asset. In any event, the fact that the railroad agrees to trail use is indication in and of itself that the corridor may be valuable in the future for transportation.

The case that Congress clearly seems to have been focusing on was the one the Board typically encounters under the Trails Act. A line has become an economic burden to the railroad which then seeks to abandon it. The railroad's property interest in the right-of-way is entirely (or

almost entirely) a connected series of easements for rail use which, either by their terms or under generally applicable state property law, will terminate once rail operations are abandoned. Under such circumstances, the railroad has an economic interest in abandoning the line, and has no parochial economic interest in entering into a Trails Act agreement in order to retain the line as part of the national rail system. In the conventional case, the railroad's willingness to enter into a Trails Act agreement provides some evidence that the right-of-way in question is appropriate for preservation for possible restoration of rail service. In a very real sense, therefore, by making the Trails Act voluntary on the part of the railroad, Congress provided a filter limiting the application of the Trails Act to those rights-of-way where there is some evidence of possible restoration for future rail use.

In an adverse abandonment, that filter does not work. Just as in the case of a conventional abandonment, in order to grant an adverse abandonment the Board must find that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. 10903(d). Thus, the line subject to adverse abandonment is not required to provide rail service and, typically, has not been used for that purpose for many years. Nevertheless, the railroad owning the line has an economic incentive in keeping it as part of the national rail system and subject to Board jurisdiction that transcends the rail service economics of the line. In such a case, the railroad's willingness to enter into a Trails Act agreement keeping the line part of the national rail system and subject to the Board's jurisdiction says nothing about the railroad's evaluation of the possibility the line may be restored to rail service in the future. Instead, it speaks only to the parochial interest that the railroad was pursuing in keeping an otherwise unneeded line subject to Board jurisdiction. If the railroad can enter into a Trails Act agreement in

an adverse abandonment proceeding, the railroad can frustrate the purpose of the adverse abandonment and further those parochial interest that the adverse abandonment procedure was specifically designed to defeat without necessarily furthering the interests Congress anted to advance by enacting the 1983 Trails Act amendments. CPO submits that Congress did not intend to provide the railroads this type of trump card where competing interests seek to free a line from Board jurisdiction.

D. The Circumstances in this Case Demonstrate to a Certainty That There Is No Prospect of Ever Restoring Rail Service on the Highline.

If the Board concludes that the circumstances of the 1983 Trails Act amendments do not permit an unequivocal conclusion that Congress did not intend it to be available in any adverse abandonment case, the Board should examine the unique facts of each case where a Trails Act agreement is sought to ensure that the line in question is the type of line that Congress intended to be subject to the Trails Act. A review of the facts of this case demonstrates unequivocally, indeed to a moral certainty, that there is no prospect of ever restoring rail service on the Highline.

The last shipper used the Highline over twenty years ago. Most, if not all, of the former shippers have now left the area. Not only have the former shippers disappeared, where redevelopment has taken place their commercial and industrial premises have been replaced with or converted into apartments, condominiums, shopping areas, and galleries, none of which has any prospect of developing a need for rail freight service. All parties to this proceeding agree that such redevelopment and conversion will continue in the lower west side of Manhattan formerly served by the Highline. Restoration of rail service would require extensive and expensive renovation of the Highline to make is structurally sound enough to bear the stresses of rail operations.

Indeed, eleven years ago the railroads presented to the Commission what must certainly have been their “best shot” at demonstrating the possibility of future rail service on the Highline -- transportation of garbage out of Manhattan. The Commission analyzed the economics of that “best shot” in depth and stated (*Chelsea Property Owners*, 8 I.C.C.2d at 789):

[W]e conclude that the proposed waste haulage project is infeasible and that there is essentially no possibility of restoring service on the Highline. The Highline has lost its traffic base and has been out of service for at least 10 years.

* * *

Our economic feasibility analysis further demonstrates the speculative nature of the project. If we were to accept Conrail’s \$34 million demolition projection and give it full weight as an avoidable cost of providing rail service, it is not clear that even this large a subsidy would be sufficient to make the project economically feasible. On the other hand, it is clear that if we require CPO to indemnify Conrail for all demolition costs in excess of \$7 million, the waste haulage project is economically infeasible.

The passage of eleven years has not changed that picture to enhance the prospect of restoration of rail service to the Highline.

Typically, it is the state and local authorities that seek an adverse abandonment to make a line susceptible to condemnation for non-rail uses. In this case, the only partner on the horizon willing to enter into a Trails Act agreement with the railroads for the Highline is the city of New York, the entity that wishes to put the property to non-rail use. The City’s economic interest in and plans for the Highline shed light on the question the Board has asked.

At the July 24 public hearing, the Chairman asked representatives of the City what difference the Board’s action here would make to the City’s plans for the Highline. The City did not answer the question. The Board should have no doubt that the City’s ability to acquire the Highline

and convert it into a version of the Promenade Plantée *does not depend on the availability or non-availability of the Trails Act*. All that is necessary for the City to undertake this project is that the Board free the Highline from Board jurisdiction by granting an abandonment. Once an abandonment becomes final, the City can then acquire the Highline structure and the necessary support and occupancy easements from the railroads and the property owners respectively.⁵ *Hayfield Northern Railroad Co. v. Chicago and Northwestern Transportation Co.*, 468 U.S. 622 (1984). If it cannot reach an agreement with the railroads and the property owners, the City undoubtedly has the power to condemn the necessary property interests. In either case, however, the City would be required to compensate the property owners for the diminution in value of their properties resulting from the newly acquired or condemned easements.

The City, however, would prefer to acquire the Highline structure and easements by entering into a “Trails Act agreement” with the railroads. Such an agreement would have several effects: (i) it would suspend the railroads’ common carrier obligation; (ii) it would free the railroads of the burden of maintaining the Highline structure, paying taxes on it, and bearing the risk of liability; (iii) it would preserve the existing rail use easements notwithstanding an abandonment in fact has taken place and notwithstanding conversion of the Highline to non-rail use; (iv) of greatest interest to the railroads, it would retain the Highline in the national rail system subject to the Board’s jurisdiction, thus not triggering the railroads’ obligation under the easements and/or state law to

⁵ If the Highline is abandoned, the easements for rail use held by the railroads would terminate and the City would condemn new easements, largely identical in scope to the present easements, although for support of and occupancy by a structure to be used as a park, not a rail line.

remove the Highline; and (v) it would permit the City to acquire the existing easements from the railroads and shift the cost of paying for them to the federal taxpayers.⁶

The City, thus, is not only the only partner on the horizon, it is a willing partner for the railroads in using to Trails Act to retain the Highline in the national rail system. By acquiring the Highline under a Trails Act agreement the City shifts to the federal taxpayer the obligation to pay the property owners for their easements. *See Preseault v. I.C.C.*, 494 U.S. 1 (1990). Congress's purpose in enacting the 1983 amendments to the Trails Act was to preserve railroad right-of-way where there is a prospect for restoration to rail use in the future, not as a vehicle for freeing railroads of their obligations to remove unsightly and dangerous structures, nor as a vehicle for shifting to the federal taxpayer the City's land acquisition costs.

⁶ There is always the possibility that in the future the City might do something with the Highline that would result in its being finally abandoned and triggering the railroads' obligation to remove the structure. The railroads are insisting, as a condition to entering into a Trails Act agreement, that the City and the State indemnify the railroads at least to the degree that they railroads are indemnified in the Settlement Agreement, i.e. to the extent that removal costs exceed \$7 million. *See* the January 13, 2003 Reply of Consolidated Rail Corporation to the Pleading Filed December 17, 2002 by the City of New York, where Conrail stated at p. 4:

Finally, Conrail wishes to emphasize that the City is not the first to suggest the possibility of a CITU for the Highline. The railroad parties have consistently made clear that they have no interest in negotiating any Trails Act use of the Highline unless Conrail receives the same insulation against all potential liability that is provided by the Settlement Agreement that CPO has already negotiated.

CSX concurred in this position in its January 13, 2003 Reply of CSX Corporation and CSX Transportation, Inc. to the December 17, 2002, Pleading filed by the City of New York at p. 3:

... That proposal, of course, as noted above, cannot be implemented in any event without the concurrence of the railroad interests, and that concurrence, as Conrail has indicated and as CSX agrees, would not be given without a full protection of the interests of the railroad interests in respect of liabilities arising from the continued physical existence of the Highline, its use, and all related matters.

Where there is a prospect for future rail use of the right-of-way, of course, Congress made the decision to preserve the rail use easements while interim use is made of the right-of-way as a trail. This necessarily has the effect of shifting some land acquisition costs to the federal taxpayer. What is lacking in the case of the Highline, however, is the predicate fact that there is no prospect of restoration of the line to future rail use. It is transparently obvious upon inspection of the Highline and the areas through which it passes in Manhattan that rail freight service will never be restored.

Moreover, the City's own plans for the Highline put to rest any doubt that might remain. The City proposes to convert the Highline into a New York version of the Promenade Plantée in Paris at a cost that CPO has estimated (exclusive of the cost of acquisition of the easements) at upwards of \$200 million. *CPO February 27, 2003 Letter, Memorandum of Doug Sarini*. Moreover, the City has told the International Olympic Committee in its application for the 2012 summer Olympic Games that it plans to build an 80,000 seat stadium occupying part of the Highline's current right-of-way over the 30th Street Yards.⁷ [CITE] It would be irresponsible for the City to invest such enormous amounts of money in building facilities on a right-of-way where there is even the most remote possibility of the restoration of rail use. Restoration of rail use would require the removal of all the Promenade Plantée facilities the City constructs on the Highline right-of-way and likely some substantial part of the facilities associated with the planned stadium.

CONCLUSION

⁷ In its representation of the proposed stadium to the Board at the public hearing on July 24, 2003, the City has reoriented the proposed stadium from a north-south orientation to an east-west orientation to accommodate a relocated Highline right-of-way around the southern, western and northern perimeter of the stadium. The City did not disclose whether the proposed users of the new stadium (primarily the New York Jets) have agreed to the new orientation.

The regulatory agencies and the courts developed the adverse abandonment process to ensure that railroads could not use the shield of Board jurisdiction over lines not needed for rail service to frustrate legitimate interests of public and private entities. There is no evidence that in enacting the 1983 Trails Act amendments giving the railroads the right to enter into Trails Act agreements Congress intended to deal them a trump card to preclude the accomplishment of the objects being served by the adverse abandonment process. Accordingly, the Board can and should hold that the Trails Act is not available to the railroads as a matter of law in adverse abandonment proceedings.

Unlike the case of a conventional abandonment, the Board cannot presume that, because the railroad in an adverse abandonment proceeding is prepared to enter into a Trails Act agreement, the right-of-way is potentially subject to restoration of rail service and, therefore, that rail banking is not a pretext. The railroad's incentives to enter into such an agreement will be driven by entirely different considerations than in an ordinary abandonment, and in most cases will have nothing to do with the potential future need for restoration of rail service on the line. In order to accomplish Congress's purpose in preserving rights-of-way *where there is some prospect of a future resumption of rail service*, the Board should examine this issue directly in response to Trails Act requests in adverse abandonment proceedings, and not rely on presumptions that are unwarranted under the unique circumstances of such an abandonment.

Examination of the record in this case demonstrates as clearly as is humanly possible that there is no prospect now or at any time in the future that the Highline will be subject to a restoration of rail service. Current and likely future economic facts and the City's plans for the

Highline once it obtains it are totally inconsistent with even a remote prospect of restoration of rail service. The Board should find that applying the Trails Act to the Highline under such circumstances would be inconsistent with Congressional intent to apply the Trails Act to lines where there is some prospect of restoration of rail service.

Respectfully submitted,

CHELSEA PROPERTY OWNERS

By: John Broadley
One of its attorneys.

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Dated: August 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2003 I served a copy of the foregoing CHELSEA PROPERTY OWNERS BRIEF ON THE AVAILABILITY OF THE TRAILS ACT IN ADVERSE ABANDONMENT PROCEEDINGS on all parties to this proceeding by causing copies thereof to be deposited in the United States mails, postage prepaid, addressed to counsel for such parties listed on the attached sheet.

John Bradley

Dated: August 26, 2003

