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August 26, 2003

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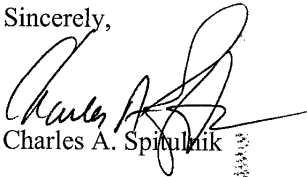
Re: Docket No. AB 167 (Sub-No. 1094)A; *Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*

Dear Sir:

I am enclosing for filing an original and ten copies of the Brief of the City of New York, NY in Response to Order Dated July 28, 2003 in this proceeding. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5 inch diskette with this document.

Thank you.

Sincerely,


Charles A. Spitulnik

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Enclosures

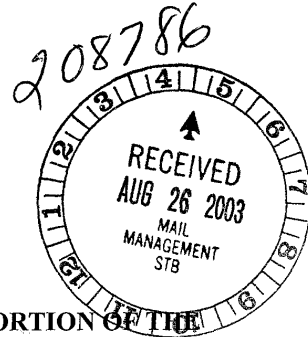
cc: All Parties of Record

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**

**BRIEF OF CITY OF NEW YORK, NY IN RESPONSE TO
ORDER DATED JULY 28, 2003**



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Public Record

At the hearing in this matter held on July 24, 2003, and in a subsequent order served on July 28, 2003, the Board directed the parties to submit briefs that address the issue of whether the Board may issue a certificate of interim trail use ("CITU") under 49 CFR § 1152.29 in an adverse abandonment proceeding. The City of New York, NY (the "City") hereby submits its brief in response. The City respectfully submits that the short answer to the Board's question for reasons explained more fully below, is "yes".

A. Nothing in the Rails-to-Trails Act or any applicable STB Regulations suggests that a CITU is not available in Adverse Abandonment Proceedings

The trail agreement the City has requested is subject to and authorized by 16 U.S.C. §1247(d) ("Rails-to-Trails Act") and by this Board's regulations at 49 C.F.R. §1152.29. The statute, its legislative history and the applicable regulations confirm that the City is on the right track to seek a CITU here. The arguments previously submitted by Chelsea Property Owners

(“CPO”) that a CITU is not available and the Rails-to-Trails Act is inapplicable because this is an adverse abandonment proceeding¹ have no basis in law or fact.

The statute provides as follows:

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. 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. 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.

16 U.S.C. § 1247(d). The statute was added in 1983² after the Interstate Commerce Commission (“I.C.C.”) had already been addressing cases brought as “adverse abandonment” proceedings,

¹ CPO initially made this argument in *Chelsea Property Owners Reply to the Petition of the City of New York to Late File a Request for Issuance of a Certificate of Interim Trail Use* filed in this proceeding on January 13, 2003 (“*CPO Reply to CITU Request*”).

² Pub. L. 98-11, National Trails System Act of 1983, § 208(d) 97 Stat. 42, 48 (March 28, 1983).

that is, those like the instant case that were commenced by a party other than the rail carrier whose line was involved. *E.g., Modern Handcraft, Inc. – Abandonment in Jackson Co., MO*, 363 I.C.C. 969 (1981). Congress made no distinction in the last sentence of the new section 1247(d) when it enjoined the I.C.C. (and now the STB) from permitting abandonment or discontinuance in situations where “a State, political subdivision, or qualified private organization” is willing to agree to assume the listed liabilities and obligations with respect to the line.

An examination of the legislative history of the Rails to Trails Act confirms that Congress intended no prohibition on the use of a CITU in an adverse abandonment proceeding. Moreover, it demonstrates that the basic criteria for use of a CITU are (1) the existence of a rail corridor that is not at present necessary for active rail service and (2) a willingness on the part of the proponent of a trail to assume liabilities related to it. There is no requirement that the proponent demonstrate any likelihood that rail service will in fact be restored. The House Committee Report describes the purpose of and philosophy behind the Rails-to-Trails Act as follows:

Section 208 amends section 8 of the act to encourage the development of additional trails in conjunction with the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976. This reflects the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way, which are not immediately necessary for active service, can be utilized for trail purposes. This appears to be true despite the fact that these efforts have also been 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.

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should

eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment. If interim use of an established railroad right-of-way consistent with the national trails system act is feasible, and if a state, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way-- that is, to save and hold the railroad harmless from all of these duties and responsibilities-- then the route will not be ordered abandoned.

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. This provision will assist recreation users by providing opportunities for trail use on an interim basis where such situation exists.

H.R. REP. 98-28 at 10 (1983), *reprinted in* 1983 U.S.C.C.A.N. 112, 121.

This clarifies that goal here was to serve the competing interests of (a) preserving rights-of-way and (b) protecting the railroads from liability on corridors they may not be using to provide rail service while a trail is in place on that corridor. It also confirms that, as the STB's rules reflect, the Rails-to-Trails potential should be considered prior to the issuance of any abandonment certificates. Again, there is no distinction between regular or adverse abandonments. Congress recognized that "the concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." *Id.*

Review of the statute and its legislative history compels the conclusion that the previous statement of CPO that "a limitation on the railroad's ability to enter into a Trails Act agreement in an adverse abandonment proceeding would not frustrate an overreaching Congressional

purpose” is simply wrong.³ Limiting the use of a CITU would absolutely contravene the clearly stated Congressional goal of preserving rail corridors as long as the railroads will be protected from taxes and other liabilities. Issuing a CITU in this instance would advance and promote Congress’ objective *vi- a-vis* the abandonment process as expressed in the Rails-to-Trails Act.

B. The Board’s Rules Make a CITU Available in an Adverse Abandonment Proceeding

The full panoply of the Board’s abandonment regulations, 49 C.F.R. Part 1152, apply in adverse abandonment proceedings. The only times that those rules, requirements and procedures do not apply arises when an applicant specifically seeks waiver of them. While CPO has argued that the CITU procedure is not applicable, it has neither sought a waiver of the Trail Use procedure set out in 49 C.F.R. § 1152.29, nor has it made any showing of good cause why that procedure should be waived. Without that, the CITU process remains available in this case.

The Board has consistently stated that statutory standard of 49 U.S.C. § 10903 and the regulations promulgated to implement it, 49 C.F.R. Part 1152, apply to adverse abandonment cases. *E.g., Salt Lake City Corp. – Adverse Abandonment –In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), *slip op.*, Service Date March 8, 2002 (“*Salt Lake City Corp.*”); *CSX Corp., et al. – Adverse Abandonment Application – Canadian National Ry. Co. et al.*, STB Docket No. AB-31 (Sub-No. 38), *slip op.* Service Date Feb. 1, 2002 (“*CSX Corp.*”); *City of Rochelle, IL – Adverse Discontinuance Rochelle Railroad Company*, STB Docket AB-549, *slip op.* Service Date May 27, 1999. In adverse abandonment cases, just like in any other case under these regulations, the party that brings the application bears the burden of proving that the public convenience and necessity no longer justifies that continued operation. *Salt Lake City Corp.* at

³ *CPO Reply to CITU Request* at p. 12.

4⁴. Where an applicant in an adverse abandonment case seeks waiver of some or all of the abandonment regulations, the Board will entertain those requests on a case-by-case basis. In other words, the Board has consistently held that the abandonment regulations apply fully in adverse abandonment cases.

In *East St. Louis Junction Railroad Company – Adverse Abandonment – In St. Clair County, Il.* STB Docket No. AB-838, consolidated with *Union Pacific R. Co. – Adverse Discontinuance -- In St. Clair County, Il.*, STB Docket No. AB—33 (Sub-No. 199)) Service Date June 30, 2003 (“*East St. Louis*”) the Illinois Department of Transportation (“IDOT”) filed exemption and waiver requests in an adverse abandonment proceeding. Specifically, IDOT asked “for exemptions from various statutory provisions governing rail line abandonments, and for waiver of several of the Board's related regulations.” In addressing the applicability and waiver of the regulations in that adverse abandonment proceeding the Board stated:

Like the ICC, the Board ordinarily would reject an abandonment application that does not substantially conform to the requirements of 49 CFR 1152 Subpart C. However, in appropriate instances, particularly involving adverse applications, the Board will waive inapplicable and unneeded provisions.

East St. Louis at p. 3. The Board specifically stated the following:

⁴ CPO has argued that the purpose of an adverse abandonment is to “avoid the situation where the railroad uses ICC’s jurisdiction to prevent action under state law where the line is not required for interstate commerce.” See *CPO Reply to CITU Request* at p. 10. This argument is incorrect. Contrary to CPO’s contention, it is well-settled that the purpose of an adverse abandonment, like any other abandonment is to determine “whether the present or future public convenience and necessity require or permit the proposed abandonment” (“the PCN Determination”) 49 U.S.C. 10903(e); see also *Salt Lake City Corp.* at p. 4. In making the PCN determination the Board would consider as a factor the issues relating to whether the “a railroad uses ICC’s jurisdiction to prevent action under state law.” However, this is not the only factor to consider, nor is it the primary factor. The Board is also required to balance a number of factors. See *Salt Lake City Corp. supra*.

We were given jurisdiction over the subject provision effective with the enactment of section 208 of the National Trails System Act Amendments of 1983, Pub. Law 98-11. There is nothing in the statute or the related legislative history indicating that Congress intended for the new law to be used to trump our longstanding third-party abandonment process.

Id. That “third-party abandonment process” requires the application of the abandonment regulations to adverse abandonment proceedings unless a party seeks a waiver of those regulations. That is what IDOT did in *East St. Louis*, and the Board appropriately considered the request for waivers.⁵ *Id.* In other words, the Board did not find that because this was a “third-party” or adverse abandonment preceding the trail-use provisions of abandonment regulations did not apply. Rather, the Board assumed, as it should absent a specific Congressional mandate to the contrary, that the regulations were applicable and it considered the waiver requests on a case-by-case basis depending on the circumstances surrounding the particular case. *See also CSX Corp* (the Board considered the application of public use and trail use and granted an exemption from 49 U.S.C. §10905, and as a result stated that public use and trail use were not considerations in that particular proceeding and that it would also not entertain any potential offers of financial assistance).

C. Conclusion

Until the abandonment regulations are waived, they govern the procedural and evidentiary requirements in either an abandonment or adverse abandonment proceeding. Nowhere in the legislative history or language of the applicable statute, the express language of the applicable regulations, or in the applicable precedent has Congress, this Board, or any court

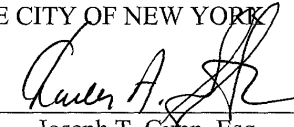
⁵ In *East St. Louis* the IDOT sought a waiver of , among other regulations, 49 C.F.R. § 1152.29 (trail use/rail banking).

drawn a distinction, either expressly or implicitly, between abandonment proceedings brought by the railroad and adverse abandonment proceedings brought by a third party, with respect to the application of the Rails-to-Trails Act. In view of the foregoing, it remains clear that the CITU process applies and is available to proponents of a prospective trail in the context of an adverse abandonment proceeding.

WHEREFORE, the City respectfully requests the Board to issue an order confirming that a CITU is available in the context of an adverse abandonment proceeding, and authorizing the railroad, the City and other interested parties to commence negotiation of such a Trail use Agreement promptly.

Respectfully submitted,

THE CITY OF NEW YORK

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Dated: August 26, 2003

Certificate of Service

I certify that on this 26th day of August 2003, I caused a copy of the foregoing Brief of the City of New York, New York in Response to Order Dated July 28, 2003 to be served by first class mail (or hand delivery for those parties with counsel in Washington, DC) on the parties listed below.

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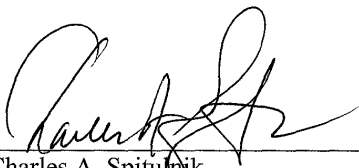
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