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February 10, 2003

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

207198

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 an original and ten (10) copies of The City of New York's Motion to Strike Chelsea Property Owners' Letter Dated January 23, 2003 for filing in the above-referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5" diskette is enclosed with this document.

Sincerely,

Charles A. Spitulnik

Charles A. Spitulnik

cc: All persons on attached service list

BEFORE THE
SURFACE TRANSPORTATION BOARD

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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

THE CITY OF NEW YORK'S MOTION TO STRIKE CHELSEA PROPERTY OWNERS' LETTER DATED JANUARY 23, 2003

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THE CITY OF NEW YORK

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Dated: February 10, 2003

BEFORE THE

SURFACE TRANSPORTATION BOARD

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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

THE CITY OF NEW YORK'S MOTION TO STRIKE CHELSEA PROPERTY OWNERS' LETTER DATED JANUARY 23, 2003

The City of New York (the "City"), through counsel moves to strike Chelsea Property Owners' Letter dated January 23, 2003 filed in this proceeding. The letter is an improper reply to a reply, and raises matters that Chelsea Property Owners ("CPO") could have raised but chose not to in earlier pleadings filed in this proceeding. In support of this Motion to Strike, the City states the following:

I. BACKGROUND FACTS

On December 17, 2002 the City filed A Request for Issuance of a Certificate of Interim Trail Use ("City's CITU"). On January 10, 2003 the Friends of the Highline, Inc. ("FOHL") filed a letter in responding to the City's CITU ("FOHL Letter").[1] On January 13, 2003 the Chelsea Property Owners ("CPO") filed its Reply to the City's CITU ("CPO CITU Reply"). On January 23, 2003 CPO filed a letter replying to the FOHL Letter ("CPO Reply Letter").

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1 The Certificate of Service for the FOHL Letter indicates that it was served either by hand or first class mail on the parties.

II. ARGUMENT

The CPO Reply Letter is an improper reply to a reply. 49 C.F.R. 1104.13 (c); *see also J. Alan Co., Inc., et al. v. United Parcel Service, Inc.*, 1989 WL 237899 (I.C.C. 1989) (replies to replies are not permitted under the (former) ICC's rules). Specifically, the CPO Reply Letter states that it is "in response to" the FOHL Letter. The FOHL Letter is two paragraphs long and essentially states that FOHL "endorses the efforts of the City of New York to obtain an agreement for trail use of the High Line" and the "Board may wish to suspend consideration of the [FOHL] Petition to Reopen while the City, the railroad, and other appropriate parties pursue further negotiations."

The CPO Reply Letter, which is three pages long, purports to respond to the FOHL Letter but, in fact, raises new arguments, allegations and material.[2] Specifically, the CPO Reply Letter raises the following issues improperly:

- CPO alleges that FOHL acted in bad faith by claiming that "FOHL's assertion that consideration of the Petition to Reopen may be unnecessary if the City can negotiate a Trails Act agreement is a tacit acknowledgment that it filed its Petition *for tactical purposes seeking delay, and not because of any real concern with environmental or historic preservation issues resulting from abandonment of the Highline*" (emphasis added). This is an issue that should have been raised, if at all, in response to FOHL's Petition. CPO filed its Reply to that Petition on September 23, 2002 and included no evidence with respect to this point.

2 CPO also continues to raise issues relating to the prejudice the railroads will suffer in these proceedings. The City respectfully contends that to the extent that the railroads believe they will be prejudiced they have highly effective and competent counsel to convey and argue those points.

- That "the City may not be able or prepared to meet those [indemnity] conditions and the negotiations between the City and the railroads will collapse." The same is true here, that is, that CPO could have but did not raise this issue in a timely way in its response to the City's request for a CITU.

These points do not respond to the FOHL Letter because the FOHL Letter does not raise these or any other new issues, but rather constitute an improper effort by CPO to raise, argue and put forth new issues that it could have raised earlier but did not. The untimely submission of the CPO Reply Letter deprives the other parties in this proceeding of the ability to respond to the arguments, allegations and material raised. Simply put, CPO should have raised these issues in its response to the City's CITU. CPO failed to do so. Moreover, if CPO wished to file a reply to a reply it should have sought leave from the Board, via motion that explains why no party would be prejudiced, to do so. CPO could not make such a showing in this instance, because its submission includes new allegations and arguments to which the parties should have had an opportunity to respond.

II. CONCLUSION

This Board should strike the CPO Reply Letter as an improper reply to a reply under 49 C.F.R. 1104.13(c) as it inappropriately raises new arguments, allegations and material.

Respectfully submitted,

THE CITY OF NEW YORK

By: Charles A. Spitulnik /JTG

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Dated: February 10, 2003

Certificate of Service

I, Charles A. Spitulnik, certify that on the 10th day of February, 2003, I caused a copy of the foregoing THE CITY OF NEW YORK'S MOTION TO STRIKE CHELSEA PROPERTY OWNERS' LETTER DATED JANUARY 23, 2003 to be served by first class mail and hand delivered on the parties listed below.

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Dated: February 10, 2003

Alex Menendez