

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

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

**REPLY OF CHELSEA PROPERTY OWNERS TO
FRIENDS OF THE HIGH LINE'S STATEMENT
REGARDING THE STATUS OF ITS PETITION TO REOPEN**

On January 6, 2005 Friends of the High Line ("FHL") filed a paper with the Board which purports to be a "Statement" in which it asks the Board to hold in abeyance FHL's petition to reopen the 1992 abandonment decision in this case for further consideration of environmental and historic preservation issues. FHL seeks to hold its petition to reopen in abeyance until the Board vacates a CITU issued to the City of New York ("City"), at which time FHL believes it would be ripe for determination.

1. CPO has a right to reply to FHL's "Statement"

Notwithstanding FHL's characterization of its January 6 filing as a "Statement," it is in substance a petition seeking relief in the form of an order holding in abeyance FHL's pending petition to reopen the abandonment. CPO has a right to reply to such a petition regardless of the name FHL attaches to it. 49 CFR 1104.13 provides that a party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board. FHL's "Statement" seeking to hold in abeyance its petition to reopen is, in substance, if not in form, such a pleading. This is CPO's reply.

2. History of FHL's involvement in this matter

On August 16, 2002, FHL filed a petition to reopen the abandonment that the Board had conditionally approved in September 1992. FHL's petition to reopen argued that the National Environmental Policy Act required further environmental analysis, and that the Historic Preservation Act required further analysis of the impact of abandonment on structures eligible for inclusion on the National Register of Historic places. On September 23, 2003, CPO filed a comprehensive reply to FHL's petition to reopen demonstrating (i) that FHL had not met the procedural pre-conditions for reopening a matter that had been settled by a Board order 10 years before, and (ii) that if the Board reached the merits of the petition to reopen, FHL's arguments for reopening on environmental and historic preservation grounds failed completely.

On December 17, 2002, the City filed a request for issuance of a CITU. Shortly thereafter, on January 10, 2003, FHL filed a letter expressing support for the City's request, stating that "if the City is able to obtain and implement a satisfactory agreement on trail use, this could make it unnecessary to decide the issues raised in Friends' Petition to Reopen. . . ." FHL suggested that the Board may wish "to suspend consideration of the Petition to Reopen while the City, the railroad, and other appropriate parties pursue further negotiations." On January 23, 2003, CPO filed a letter opposing FHL's request to hold its petition to reopen in abeyance, pointing out that:

FHL'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. In its Petition to Reopen FHL alleged that the passage of ten years since the Board's September 16, 1992 decision authorizing abandonment has raised new or changed environmental and historic preservation issues that the Board needs

to revisit. According to FHL, however, these environmental and historic preservation issues will disappear if Conrail and the City enter into a Trails Act agreement leading to the rehabilitation of the Highline structure and its conversion into a North American Promenade Plantée.

The environmental and historic preservation issues raised by FHL in its Petition to Reopen will not *disappear* if Conrail and the City enter into a Trails Act agreement *because they never existed in the first place. . . .*

FHL has now filed a somewhat more formal request that its petition to reopen be held in abeyance, to spring back to life if the City's request for a CITU (FHL Statement at 4) "does not ultimately result in railbanking and preservation of the High Line, and if abandonment and demolition of the High Line structure once again becomes a possibility." FHL goes on to ask that "should railbanking fail or terminate, the parties . . . receive notice and Friends . . . be permitted to update, renew, and re-serve the Petition [to Reopen], as necessary."

3. FHL's reasons for holding its petition to reopen in abeyance are without merit.

FHL's petition to reopen does not meet the Board's criteria for reopening an administratively final matter. As CPO demonstrated in its September 23, 2002 reply, FHL established neither material error in the Board's September 1992 abandonment decision, nor did it present new evidence nor show that there were substantially changed circumstances. *See* 49 CFR 1115.4; 49 CFR 1152.25(e)(4). The ICC weighed the environmental and historic preservation consequences of abandonment of the Highline in 1992 and determined that its abandonment was consistent with the public convenience and necessity, and that environmental and historic preservation impacts (if any) did not warrant denial of the abandonment or the imposition of additional conditions. As nothing material has changed in the interim that affects the validity of

the ICC's decision, the Board should find that FHL's petition to reopen does not meet the criteria of 49 CFR 1115.4 and 49 CFR 1152.25(e)(4) and deny reopening. No purpose is served by retaining on the Board's docket indefinitely a petition to reopen which on its face does not meet the Board's reopening criteria.

FHL seeks to find an obligation under the environmental laws to perform further environmental review. Specifically, FHL cites *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), for the proposition that federal law imposes on the Board "a continuing duty to gather and evaluate new information relevant to the environmental impacts of its action. . . ." FHL provides only a partial quotation that avoids the key issue -- how much and what type of new information warrants further environmental review. In fact, the court of appeals said (*id.*):

We start with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. *See* 42 U.S.C. 4332(2)(A),(B); *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976); *Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 917-18 (D.C. Cir. 1975).

This does not mean, however, that supplementation is required whenever new information becomes available.

The court in *Warm Springs* answered the question of the type of new information that warrants further environmental proceedings by pointing to the then existing Corps of Engineers' regulations that required a supplemental EIS if the EIS "becomes deficient because certain environmental effects of the project were not discussed. . . ." The court also pointed to the then effective CEQ guidelines which required supplementation "[i]f the final environmental statement previously filed clearly failed to comply with the requirements of NEPA . . . or if there has been a major change in the plan of development or method of operation of the proposed action" In

Warm Springs the new information that came to the Corps's attention which warranted a supplemental EIS was a draft report to the US Geologic Survey that raised the possibility that a geological fault might give rise to an earthquake of magnitude 8.1 on the Richter scale, not one of magnitude 6.6 on the Richter scale on which the original EIS had been prepared. A magnitude 8.1 quake is many times greater than a magnitude 6.6 quake. The significance of the issue is immediately recognized when one considers that the project in question in *Warm Springs* was the construction of an earth-filled dam and a 3000 acre lake only 6 miles from the fault in question.

More recently, in *City of Olmstead Falls v. Federal Aviation Administration*, 292 F.3d 261 (D.C. Cir. 2002), the court considered the same question -- what type of new information warrants further environmental work? In responding to an argument by the City of Olmstead Falls that supplemental environmental work was required the court stated (*id.* at 274):

Petitioner contends that the claims it makes demonstrate that there are "significant new circumstances or information relevant to environmental concerns" that require a supplemental EIS. 49 CFR 1502.9(c)(1)(ii). . . . The City argues that these "new circumstances" are especially significant where, as here, they go directly to non-compliance with the purpose and substantive requirements of the Clean Air Act and the Clean Water Act.

As respondents point out, much of what Olmstead Fall dubs "new" is not. It was all known to the FAA prior to the issuance of the Record of Decision. A supplemental EIS is only required where new information "provides a *seriously* different picture of the environmental landscape." E.G. *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (emphasis in original).

Just as in *Olmstead Falls*, most of the information that FHL has brought to the Board's attention is not "new." As CPO pointed out in its reply to the petition to reopen, any new information does not provide a different picture of the environmental landscape than existed when

the ICC made its administratively final decision authorizing abandonment in September 1992. It follows, of course, that FHL has not brought to the attention of the Board new information that *provides a seriously different picture of the environmental landscape*. In the absence of new information of that quality, the environmental laws do not require further environmental analysis by the Board.

4. The factual and legal premises for FHL's request are mistaken.

The factual and legal premises that FHL's advances for its request are mistaken. FHL views its petition to reopen as directed only to environmental and historic preservation issues resulting from the *demolition* of the Highline. According to FHL, if the Highline is successfully railbanked *demolition will not take place* and FHL's fears of environmental and historic preservation consequences will not be realized and the Board need not address the concerns FHL expressed in its petition to reopen. *See* FHL Statement at 4 and 5.

FHL's factual premise that the issuance of a CITU and railbanking the Highline will not result in its demolition is plainly mistaken. The City's plans clearly contemplate the demolition of the Highline viaduct north of 30th Street, and the support of the Jacob K. Javits Convention Center for the issuance of a CITU is plainly premised on the expeditious demolition of that portion of the Highline. In a letter dated October 13, 2004 from Elizabeth Bradford, General Counsel of the New York Convention Center Operating Corporation, to the Board, filed with the Board by the City on January 7, 2005, Ms. Bradford states:

We support the railroad's planned contribution of the Highline structure and easements to the City and ESDC, and the City's planned conversion of the Highline to public use, provided that negotiations currently underway yield an appropriate agreement permitting

demolition of the Highline structure over the Javits Center property in order to facilitate its planned development.

The record in this case shows that if the Board issues a CITU as the City has requested, the Highline north of 30th Street will be demolished, thus the factual premise underlying FHL's request to hold the petition to reopen in abeyance is simply incorrect. A substantial portion of the Highline will be demolished if a CITU is issued and the agreements between the City and the New York State agencies, including the Javits Center, are implemented.

Similarly, FHL's legal premise is mistaken. FHL contends that if a CITU were granted, a trails act agreement entered into and then vacated by the Board, it would have to file a petition to reopen and a stay petition before the abandonment was consummated, and in any event within 15 days after the abandonment decision was served, citing 49 CFR 1152.25(e)(2)(i). FHL suggests that its petition to reopen should be "left on the books" to permit it to avoid having to act in the narrow window permitted by the statute and the Board's regulations for seeking a stay and reopening of an abandonment decision. FHL is proceeding on a mistaken view of post-CITU procedures. Indeed, the Board's post-CITU procedures make it clear that, in this case, neither a stay nor a petition to reopen could be considered at that time.¹

First, the Board's regulations make it clear that any petition for a stay of an abandonment decision must be filed before the abandonment or discontinuance authorization becomes final. 49 CFR 1152.25(e)(7)(ii) provides as follows:

A petition to reopen an administratively final action may be accompanied by a petition for a stay of the effectiveness of the

¹ CPO addresses this point, not because it bears directly on the merits of FHL's request to hold the petition to reopen in abeyance, but because its failure to address the point may be viewed at some future time as acquiescence in FHL's erroneous view of the law.

abandonment or discontinuance. As provided in paragraph (e)(2) of this section, a petition to reopen must be accompanied by a stay request if the party wishes the Board to have the opportunity to consider the petition to reopen before the abandonment becomes final.

The regulation leaves no doubt that any stay pending decision on a petition to reopen must be filed *before the abandonment decision becomes final*. In the event that a person seeks a stay pending judicial review, the regulations similarly make clear that a stay petition must be filed “not less than 15 days prior to the effective date of the abandonment authorization.” 49 CFR 1152.25(e)(7)(iii).

The Board’s trail use regulations, however, provide that (49 CFR 1152.29(c)(2)):

The CITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the CITU and request that it be vacated on a specified date. The Board will reopen the abandonment proceeding, vacate the CITU, *and issue a decision permitting immediate abandonment for the involved portion of the right-of-way*. Copies of the decision will be sent to:

- (i) the abandonment applicant;
- (ii) the owner of the right-of-way; and
- (iii) the current trail user.²

Under the CITU regulations an abandonment decision issued after a trail operator surrenders its CITU for cancellation permits immediate abandonment, effectively cutting off any right of FHL (or any other party) to seek a stay of the abandonment.

The Board’s regulations clearly contemplate that once a trail use has ended, the CITU has been canceled and an immediate abandonment authorized, the Highline will be finally abandoned -- the abandonment will be immediately consummated. This is not unreasonable as, during the

² This section of the Board’s regulations makes clear that notice of the vacation of a CITU and the issuance of an abandonment order need not be given to other parties to the prior abandonment proceeding.

period in which the line is subject to trail use and the CITU is effective, the railroad is authorized to discontinue service, cancel its tariffs, and salvage track and materials, consistent with interim trail use and rail banking. One or more of these actions would, in the absence of the CITU, constitute the consummation of an abandonment. *Compare* 49 CFR 1152.29(c)(1) with 49 CFR 1152.29(e)(2). Once the Highline is subject to trail use under an agreement with a trail operator and actions are taken that, but for the CITU would constitute consummation of an abandonment, termination of trail use and the issuance of an immediately effective abandonment order effectively consummates the abandonment leaving the Board with no further opportunity to consider the matter.³

CONCLUSION

FHL contends that the ICC's abandonment decision in this case is flawed because it did not adequately consider environmental and historic preservation issues, including issues that have arisen since September 1992. FHL's petition to reopen must be either denied or granted now. Contrary to FHL's assumptions, issuance of a CITU will not prevent demolition of a substantial portion of the Highline, and there will be no opportunity to consider the petition to reopen if trail use is terminated pursuant to the Board's regulations.

For the reasons set forth in CPO's September 23, 2002 reply, FHL has not satisfied the criteria for reopening the September 1992 abandonment decision, and on the merits FHL has made no showing warranting further environmental or historic preservation consideration either under the Board's precedents or under the environmental and historic preservation laws.

³ The Board's regulations require *a railroad* that receives abandonment authority from the Board to give notice of the consummation of the abandonment. 49 CFR 1152.29(e)(2). This requirement, by its terms, does not apply to a person who obtains adverse abandonment authority from the Board.

Accordingly, CPO respectfully requests that the Board deny FHL's request to hold its petition to reopen in abeyance, and consider and deny FHL's petition to reopen.

Respectfully submitted,

CHELSEA PROPERTY OWNERS

By: /S/ John H. Broadley⁴
 One of its attorneys

John Broadley
DC Bar No. 238089
John H. Broadley & Associates, P.C.
1054 31st Street NW, Suite 200
Washington, D.C. 20007
Tel. 202-333-6025
Fax 202-333-5685
E-mail: jbroadley@alum.mit.edu

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⁴ Document filed electronically

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2005 I served copies of the foregoing REPLY OF CHELSEA PROPERTY OWNERS TO FRIENDS OF THE HIGH LINE'S STATEMENT REGARDING THE STATUS OF ITS PETITION TO REOPEN on all parties to this proceeding by depositing copies thereof in the United States mail, postage prepaid, addressed to counsel for the parties on the attached sheets.

/S/ John H. Broadley⁵

Dated: January 19, 2005

⁵ Document filed electronically

Elizabeth Bradford
New York Convention Center Development Corp.
655 West 34th Street
New York, NY 10001-1188

John F. Guinan
New York Department of Transportation
Albany, NY 12232

Robert M. Jenkins
Mayer Brown Rowe & Maw
1909 K Street NW
Washington, D.C. 20006-1101

Adrian Steel, Jr.
Mayer Brown Rowe & Maw
1909 K Street NW
Washington, D.C. 20006-1101

Denis G. Lyons
Arnold & Porter
555 Twelfth Street NW, Suite 940
Washington, D.C. 20004-1206

Anthony P. Semancik
Metropolitan Transportation Authority
347 Madison Avenue
New York, NY 10017-3706

Carolyn F. Corwin
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue NW
Washington, D.C. 20004

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, D.C. 20001-1401

Charles Chotkowski
P.O. Box 320079
Fairfield, CT 06825-0079

Scott N. Stone
Patton Boggs
2550 M Street, N.W.
Washington, D.C. 20037

Frederic Bell
AIA New York Chapter
200 Lexington Avenue
New York, NY 10016

Andrew Berman
232 East 11th Street
New York, NY 10003

Jeffrey R. Ciabotti
1100 Seventeenth Street NW
10th Floor
Washington, D.C. 20036

Mary Habstritt
40 West 77th Street, #17B
New York, NY 10024

Walter Mankoff
City of New York
330 West 42nd Street
26th Floor
New York, NY 10036

Kimberly Miller
457 Madison Avenue
New York, NY 10002

Hon. Jerrold Nadler
U.S. House of Representatives
Washington, D.C. 20515

Tomislav R. Neuman
Manhattan Central Railway System LLC
7 Monmouth Road, Suite #1
Oakhurst, NJ 07755-1656

Christine C. Quinn
Council of City of New York, 3rd District
224 West 3rd Street
Suite 1206
New York, NY 10001

Frank Emile III Sanchis
457 Madison Avenue
New York, NY 10022

Susan Sands
325 Bleeker Street
New York, NY 10014

Ethel Sheffer
232 East 11th Street
New York, NY 10003

Anne-Brigitte Siris
Real Estate Brokerage and Consulting
404 Park Avenue South
New York, NY 10016-8403

Mary Gabrielle Sprague
Arnold & Porter
555 12th Street, NW
Suite 940
Washington, D.C. 20004-1206

Ronald Adams
31 Bank Street, Suite 3R
New York, NY 10014

Hon. George E. Pataki
Governor of New York
State Capitol
Albany, NY 12224