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Mailing Address: 7 Monmouth Road, Oakhurst, N.J. 07755-1656 Office: (732) 222-4327
E-mail: tomislavneuman@aol.com

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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: NOTICE OF APPEAL

Finance Docket No. 34606 *Forty Plus Foundation /
Manhattan Central Railway Systems, LLC, - Feeder
Railroad Development Application - Portion of the
Consolidated Rail Corporation's West 30TH Street
Secondary Track in New York, NY [ie: Highline]*

Dear Secretary Williams;

Enclosed for filing with the Board in the above-captioned proceeding is an original and ten (10) copies of the Petition of the **FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC [MCRS]**; in the above referenced matter.

NOTICE OF APPEAL OF THE BOARD'S REJECTION OF MCRS' FEEDERLINE APPLICATION

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and returning it in the self addressed, stamped envelope provided.

Respectfully submitted,

Tomislav R. Neuman,
Executive Director

**FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC**

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Office of Proceedings

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Enclosures

cc: All Parties of Record

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SURFACE TRANSPORTATION BOARD

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



Docket No. FD 34606

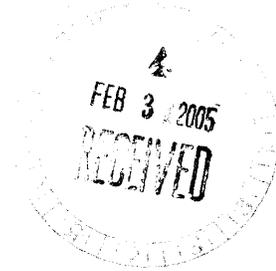
**NOTICE OF APPEAL
OF THE BOARD'S REJECTION OF
MCRS' FEEDERLINE APPLICATION**

**FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC
Tomislav R. Neuman,
Executive Director
7 MONMOUTH ROAD
SUITE #1
OAKHURST, NJ 07755
TEL: (732) 222-4327
FAX: (732) 222-4758
E-MAIL: tomislavneuman@aol.com**

Dated: February 2, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Docket No. FD 34606



NOTICE OF APPEAL
OF THE BOARD'S REJECTION OF
MCRS' FEEDERLINE APPLICATION

PETITIONER, FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC, ["MCRS"] a party to this proceeding pursuant to 49 C.F.R. § 1115.1(c), and on behalf of the public convenience and necessity respectfully requests leave to file this NOTICE OF APPEAL to address the DIRECTOR OF PROCEEDINGS recent January 24th, 2005 decision (the *Jan. 24 Decision*) to reject FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC FEEDERLINE APPLICATION.

In that decision, the DIRECTOR accepted the FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC -- FEEDERLINE APPLICATION under 49 U.S.C. § 10907 and 49 C.F.R. Part 1151 to acquire the CONSOLIDATED RAIL CORPORATION (CONRAIL) AND CSX CORPORATION AND CSX TRANSPORTATION, INC. (collectively, "CSX") a 1.45 – mile rail line (the "*Highline*") that runs over an elevated viaduct at milepost 9.35 between 34th Street and Gansevoort Street milepost 10.47 in Manhattan in New York, NY. *Forty Plus Foundation / Manhattan Central Railway Systems, LLC – Feeder Line Acquisition – The Manhattan Highline*, Finance Docket No. 34606.

BACKGROUND

Subsequent to the CONRAIL acquisition, MCRS and CSX negotiations progressed until an understandable interruption as a result of 9/11, in which tragically CSX lost their WORLD TRADE CENTER offices, and our own facilities adjacent to "ground zero" were unusable -- this tragedy, in addition to ancillary events contributed to serious impediments that by 2002, CSX effected by recent events insisted that MCRS deal directly with the STB regarding our interest to acquire the *Highline*.

Subsequently, as a result of the anticipated STB July, 2003 public hearing in NYC, CSX publicly repeated their demand that "*the STB decide the future of the Highline*". As a result, Board Chairman Nober, specifically requested timely "Briefs" from all parties to be submitted to his attention in order to expedite a finding on "*what the Board should do regarding the Highline*". MCRS, upon submitting it's brief, fully expecting a prompt and unambiguous STB position -- but has since learned that virtually all other parties have dramatically altered their stated positions, leaving MCRS as the consistent and only party willing to preserve and reactivate an intact Highline!

MCRS continued to patiently await the BOARD'S response to its "Brief" -- unfortunately, now over 1½ years later, still inexplicably no response has come forth regarding the outcome of the Briefs filed in 2003(?). The BOARD should take note that this *inaction* has produced a frustrating and debilitating consequence -- in particular it has endowed CSX (and the CITY) with an nifty *raison d'être* to delay and circumvent providing vital information to MCRS, necessary to "complete" this application to the DIRECTORS satisfaction.

With still no determination of MCRS' (or any) submitted brief for guidance, plus the BOARD'S finding last year [2004] that a intended OFA was essentially *dissolved* in this case due to elapse statues (which would also govern the availability of a CITU) -- aside from the ICC's "conditional abandonment", the BOARD is aware that in the alternative, Feederline Applications by design are adversarial procedures, in which the lack of cooperation from Class I owning railroads are virtually the guaranteed response towards an applicant. This instance is no exception. To facilitate the exchange of information and

documentation, BOARD rules provide for discovery of necessary information from CSX, but only after an Application has been accepted or deemed incomplete, See 49 C.F.R. Parts 1151.2 (d)(1) and request for discovery under 49 C.F.R. Part 1114. As repeated in previous MCRS filings -- due to the incessant abeyances granted, CSX and The CITY conveniently insisted they could not cooperate with MCRS as a result of the abeyance(s) "restrictions" or, they where awaiting CHAIRMAN NOBER'S decision on the pending Briefs, plus CSX repeated insistence that the STB "*must make all determinations concerning the future of the Highline*". In light of these never ending "contrived" impediments, it should be somewhat more comprehensible to the BOARD as to why the "incomplete" nature of MCRS submitted application. Respectfully the BOARD should be sensitive to an applicant complying with all stated BOARD regulations and protocols who has become the injured party as a result of a defiant "sellers" (ironically, one who emphatically wishes to rid itself of this line) premeditated lack of cooperation. This uncooperative conduct unarguably would result in the appearance of a "*sketchy operating plan*" or a reticent submission of "*contracts, affidavits or other verifications identifying shippers that desire service*".

MCRS, pursuant to 49 C.F.R. 1151.2(d)(1), respectfully request that the BOARD finds this application "incomplete" and allow MCRS to correspondingly file a request for discovery under 49 C.F.R. 1114 to obtain needed information from CSX, in order for MCRS to specifically address the DIRECTORS reasonable concerns regarding "future operations" to confirm that applicant is "*a financially responsible person*" under 49 U.S.C. §10907(a). MCRS urges the BOARD to conclude that as a result of the impediments listed, the *Jan. 24 Decision* is a clear error of judgment and will result in manifest injustice. This APPEAL is consistent with the public interest and will not prejudice any party.

DISCUSSION

PETITIONER'S FEEDER RAILROAD DEVELOPMENT APPLICATION, [FD 34606] ("APPLICATION") before this BOARD designed to purchase the "*Highline*" -- a 1.45 mile elevated line of railroad located on the west side of Manhattan, a line with a long and tortured history that has been the subject of litigation before this BOARD for over 20 years. MCRS began to negotiate the sale of the *Highline*, originally under

the ownership of CONRAIL, who offered to voluntarily sell this line to MCRS. During the course of these negotiations, there was an unanticipated interruption, resulting in the subsequent purchase of all CONRAIL assets by NORFOLK SOUTHERN ("NS") and CSX CORPORATION ("CSX"). MCRS' negotiations were unfortunately held in abeyance until the consummation of the sale between CONRAIL, NS and CSX.

CONRAIL management (prior to the pending sale) in December 1998, kindly brokered the introduction between CSX management and MCRS with a recommendation to sell the *Highline* to MCRS. Productive negotiations continued designed to acquire the *Highline* from CSX, plus in light of the readily acknowledged negative valuation of the Line, MCRS introduced an innovative proposition of which CSX became particularly captivated with -- that a considerable tax windfall could be derived if CSX donated the Line to a 501(c)(3) charitable institution such as FORTY PLUS. As previously mentioned, 9/11 interrupted all negotiations plus an ensuing alteration in CSX executive management, subsequently CSX informed MCRS that in light of the "*novel legal issues*" surrounding the *Highline*, CSX was now reticent to make any decision as to the disposition of the *Highline* and directed MCRS to pursue the acquisition of the *Highline* directly with the STB. Upon subsequent meetings with CSX representatives, who voiced growing frustration and perplexity for lack of rail access to NYC (due to changing economic circumstances and greater demand for rail access into Manhattan) urged MCRS to file an application under the FEEDER RAILROAD DEVELOPMENT PROGRAM to affect the transfer of ownership and subsequent reactivation of this historic "*life line of NYC*".

Furthermore, on behalf of the public convenience and necessity, BOARD policy encourages feeder line applications and 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 (MCRS) 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).

ARGUMENT

1. **THE FEEDERLINE APPLICATION FORMAT DID NOT NECESSITATE DISCLOSURE OF CONFIDENTIAL NEGOTIATIONS AND SHOULD THEREFORE PERMIT THE “COMPLETION” AND CONSEQUENT SUBMISSION OF DEEMED “INCOMPLETE” SEGMENTS**

The DIRECTOR’S decision to reject MCRS APPLICATION appears to have been unduly influenced, in view of the liberal references citing a January 13, 2005 “REPLY” from the CITY OF NEW YORK (“CITY”) – which argued that “*MCRS’s application is incomplete and should be rejected, for failure to*”;

“...describe[ed] no specific traffic or traffic volumes that it seeks to carry and has named no shippers that want to move any traffic.”. (See the Jan. 24 Decision pg. 3)

PETITIONER notes that the CITY’S filings in this matter engender significant confusion to the public as to who may in fact be the present owner of the *Highline*. The CITY’S “REPLY” does not apply here, as the BOARD is aware, the CITY has had ample opportunity over the past two decades to secure this property but has intentionally failed to do so and with dubious rational -- currently the CITY may wish to *envision* itself as the possessor of this Line, but to date CSX/Conrail still maintains custody.

At this juncture, 49 CFR § 1104.8 provides that the BOARD may order that “*any redundant, irrelevant, immaterial, impertinent or scandalous matter be stricken from any document*”. This clearly disqualifies third parties that are not principles of this line from submitting superfluous “REPLY’S” designed to undermine the credibility of PETITIONER’S FEEDER RAILROAD DEVELOPMENT APPLICATION before the BOARD. the recent filing of PETITIONER’S APPLICATION, [FD 34606] on behalf of the public convenience and necessity is intended to conclude in PETITIONER’S imminent acquisition resulting in the vital reactivation of rail services on the *Highline plus* guarantee the connection to the national rail system – in which BOARD policy encourages Feederline applications and has a statutory duty to preserve and promote continued rail service, that, under STB regulations would preclude “*non-owners*” or “*third parties*” from interfering with the BOARD’S FEEDER RAILROAD DEVELOPMENT APPLICATION

procedures. PETITIONER, respectfully points out to the BOARD that the CITY'S "REPLY", is not within the public interests.

As the BOARD is aware, the FEEDERLINE APPLICATION does not specifically require the disclosure of prospective shippers and/or confidential negotiations that would jeopardize shippers or investors pending commitments. The disclosure of MCRS' affiliation with the highly respected MORRISTOWN & ERIE RR, (M&E) (as the Application requirements are fashioned) would appear sufficient under most criteria to support an initial threshold of financial integrity of the application. In view of M&E's esteemed standing with the Board and its impressive economic history including numerous prominent shipper relationships, M&E has an unblemished and stellar track record of managing previous abandonment candidate rail lines brought back to prosperous health, this is testament to the commitment that MCRS has made to assure the future and continuing success of this Line.

Historically, OFA and Feederline Applications commonly had ongoing or relatively recent traffic volumes, and applicants were generally rejected by the BOARD for their inability to agree or satisfy the actual purchase price of a given Line -- in this instance there is no concerns from any party that MCRS can not satisfy that requirement. In addition the financing available for the rehabilitation of rail lines such as the *Highline* and the borough of Manhattan in particular, is well documented in the numerous federal, State and local Rail Industry financing programs, which, with the affiliation of M&E and other serious investors, the ability to support this *miniscule* 1.45 mile line in the heart of Manhattan -- is a task of no difficulty at all for the next three years. Consequently, MCRS' ability to assure this BOARD that adequate transportation will be provided over this line for three years satisfies our final requirement that we are in fact a financially responsible person under 49 U.S.C. 10907(a)(2).

The unfortunate lack of present shippers is based solely on the fact that the line was unavailable for shipping due to the deleterious re-routing of the Line and the arguably conscious delay in reconnecting the line to the national rail system after the JAVITS CENTER was completed -- along with the accompanying uncertainty caused by the incessant legal wrangling over the past 20+ years. Presently,

due to changing economic, technology and transportation circumstances, over the past several years have underscored the importance of a direct rail link into Manhattan, which elevates the feasibility for economic success of this line geometrically over all historic projections.

In light of the unfortunate vague (and now exposed) misleading lack of clarity provided to prospective applicants within the format of the BOARDS FEEDERLINE APPLICATION, the BOARD should consider that as a consequence of this confusion that this FEEDERLINE APPLICATION is in fact complete as the application directions are currently fashioned! *But*, respectfully, if deemed incomplete, in light of the previously documented lack of respond to the submitted "Briefs" and subsequent absence of BOARD guidance plus lack of cooperation on the part of CSX -- the BOARD should allow MCRS a reasonable amount of time to properly complete its Application. The parties here have waited 20+ years for a resolution of this line. A reasonable amount of time to provide the parties, the BOARD and the public with another highly viable option to reactivate this line, and service the community plus create indisputable employment opportunities, is in the public interests.

2. ABANDONMENT AND/OR DEMOLITION ARE NOT VIABLE OPTIONS
WITHIN THE PUBLIC INTERESTS

The DIRECTOR notes that;

"The easements pursuant to which the owners of the Highline may operate require the owner to absorb the cost of demolishing the viaduct when the easements terminate. Chelsea, 8 I.C.C.2d at 775. Consequently, if MCRS were to seek the abandonment of the Highline in the future, there is no evidence that it would have the resources to fund a multi-million dollar demolition." (See the Jan. 24 Decision pg. 4)

The BOARD is well aware, within any active railroad -- "abandonment" is not a viable option, and therefore there would be no need to fund a non-existent demolition of the Line. The only reason the **Highline** became inactive is directly related to the interruption of service caused by the re-routing of the line to accommodate the JAVITS CENTER construction, who arguably breeched their agreement with CONRAIL by evading the timely reconnection of the line.

In the unlikely event that one "were to seek the abandonment of the Highline..." the I.C.C. ruling caps the railroads liability at \$7 Million -- and, as presently vigorously demonstrated -- the CITY has

publicly stated it's willingness to commit over **\$40 Million** (at last count), for any rehabilitation or future rails-to-trails program on this Line, of which MCRS' rehabilitation program coincidentally would also be eligible for these funds. In the event at some future date that the Line was to be considered for abandonment, it would be safe from all demolition liability due to this generous *largess* from the City!

Subsequently, a successful operating rail line, would most likely result in the dismissal of the I.C.C.'s "*conditional abandonment*", therefore, this is largely a speculative and non-issue that should not be held against MCRS' APPLICATION. In addition, this concern should be more properly addressed by the owning railroad, whom to date has never raised this as an issue with MCRS -- since the reactivation of rail service would obviously void any demolition trepidation.

Pursuant to 49 C.F.R. § 1115.2 (b)(2), the Boards rules provide that;

"A revised application may be submitted, incorporating portions of the prior application by reference."

MCRS endeavored to assure the BOARD that the affiliation with M&E and proper business management dictates that sufficient success and insurance will be secured against all future business related contingencies and all concerns and liabilities will be properly addressed and satisfied upon consummation of the sale of this Line with the owners.

3. APPLICANT CAN ESTABLISH THAT IT IS A FINANCIALLY RESPONSIBLE PERSON

MCRS conscientiously, and in cooperation with M&E management and legal staff, diligently worked to properly satisfy the requirements within the STB Application, as the "*format*" was interpreted, to the best of our ability. The "points" that the DIRECTOR identified as incomplete within the *Jan. 24th Decision*, where not clearly articulated within the application -- while the stated "incomplete" documentation exist, it was unfortunately not clearly understood as required (?) to be provided by applicant at the time of the APPLICATIONS submission.

Had the APPLICATION specifically directed applicants to identify shippers and all financial resources -- be advised, as a result of obstructive and questionable conduct by third party efforts to undermine MCRS interest, applicant would most assuredly comply in addition also file a "MOTION FOR A

PROTECTIVE ORDER” in conjunction with MCRS’ APPLICATION, designed to shield the interests of both applicant and supporters of the rehabilitation and reactivation of the *Highline*. These precautions are not uncommon in adversarial filings and would, under the circumstances surrounding *this Line*, be unwise not to employ such protective options in this filing. As a result of the confusion created by the unfortunate design of the application which format essentially discourages the implementation of the aforementioned *options prior* to BOARD acceptance of the Application -- the BOARD should allow applicant the opportunity to demonstrate that MCRS is in fact a *financially responsible person* under 49 U.S.C. § 10907(a) - this is consistent with the public interest and will not prejudice any party.

In addition – the DIRECTOR made reference to the CITY’S January 13th, 2005 “REPLY”, of a duplicitous and erroneous issue, regarding a dubious November 23, 2004 letter from CONRAIL and CSX -- apparently addressing a *chimerical financial offering* within MCRS’s October 26, 2004 “NOTICE OF INTENT TO FILE A FEEDERLINE APPLICATION”. Please be advised, that to date, Applicant has never requested nor suggested any financial support from CONRAIL or CSX. It appears that a MCRS’ charitable offering of “payment” for the Line was calculatingly misconstrued as a request for “*financial support*” – when just the contrary. Under IRS rules for charitable 501(c)(3) donations, it is an extraordinarily generous incentive for the outright purchase of the Line (only valued at a nominal \$10.00), which coincidentally flawlessly complies with CSX corporately stated mission* to support respected charitable institutions such as MCRS. This extraordinary offering to CSX as the very privileged recipient, generates an astonishing windfall plus, benevolently assures continual employment and enhances the quality of life within our community – respectfully, unavailable in any other proposal before the BOARD.

*** CSX Corporation in Communities**

“At CSX Corporation, we’re deeply committed to working with and assisting the communities through which we move. As good neighbors, we seek to support the efforts of our many employee-volunteers who contribute time and talent to local organizations. At the same time, we support a wide variety of regional and national organizations dedicated to improving the health, safety and well being of our nation’s citizens. CSX gives to organizations that serve the neighborhoods in which we are located and that are supported by our employees. Our goal is to make the life better in the communities we serve and to contribute funds at the grassroots level, targeted at local needs.” (See: <http://www.csx.com>)

Furthermore, the BOARD should be appraised that CSX has essentially *commandeered* this “disputed” (and virtually identical) offering which MCRS originally proposed during negotiations in 1998. In the interim, CSX has demanded comparable terms within both an aborted CPO “*Settlement Agreement*” (Aug 14, 2002, STB ID# 206035), and more recently -- with the CITY and “*Friends*” diaphanous CITU posturing. Obviously, CSX’ November 23, 2004 “*letter*” in essence is a contradiction and CSX has clearly demonstrated that it is more than willing to accept the purchase scenarios from others that MCRS illustrated within our Application offering extremely attractive benefits at the disbursement of MCRS.

CONCLUSION

Pursuant to 49 C.F.R. § 1115.2 (b)(2);

“The Board, through the Director of the Office of Proceedings, will reject an incomplete application by serving a decision no later than 30 days after the application is filed. The decision will explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference.”

The *Jan. 24th Decision* is in clear error of judgment and will result in manifest injustice. The above statute provides for an automatic “appeal” for any applicant to submit “*a revised application*” to rectify any stated deficiencies. With regards to the rarity of a Feederline Application it should be reasonable and in the public’s interest for the BOARD to amend the applications rules to include a much clearer outline illustrating required documentation needed to be submitted by an applicant, in order to avoid the very same confusion that resulted in this applicant’s preliminary rejection.

This Application format did not specifically or clearly demand that an applicant provide *explicit* shippers, financing or volume beyond what was filed on December 30th, 2004 with the BOARD. The Application’s flawed design resulted in the submission of an “incomplete” application, and it would be in the public interests to allow Applicant to submit a completed application.

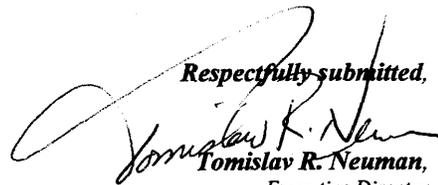
In addition, the CITY’S Jan. 13, 2005 “REPLY” is not in the public interests, The CITY’S putative “REPLY” finds no home in this BOARD’S regulations for the CITY has failed to show PETITIONER’S

APPLICATION might cause any harm to the public interest or could prejudice any party including the CITY, the RAILROADS or other third parties, in addition to the CITY'S obvious lack of standing and is not the party of pertinent interest in this APPLICATION. Additionally, CSX, as the owner of the Highline, has directed MCRS to file this Feederline Application to comply with CSX's consistent demand that "*the BOARD make the final decision as to the future of the Highline*".

MCRS respectfully requests that the BOARD reverse the Jan. 24th Decision, or at the very least allow MCRS the opportunity to provide a "complete" Application with documentation clearly illustrating its ability; "*to cover the expenses associated with providing rail service over the line for the first 3 years of operation.*"

For the reasons discussed above -- in addition, BOARD policy encourages Feeder line applications and has a statutory duty to preserve and promote continued rail service, good cause exists for granting this appeal. In light of the long and tortured history of this Line, Applicant respectfully requests that the full BOARD review and render the decision upon receipt of Applicants' "completed" Application. It is consistent with the public interest and will not prejudice any party.

Respectfully submitted,



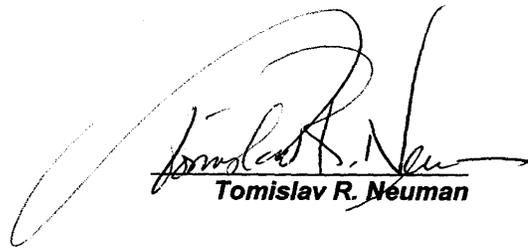
Tomislav R. Neuman,
Executive Director

FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC
7 MONMOUTH ROAD SUITE 1
OAKHURST, N.J. 07755
TELEPHONE: (732) 222-4327
FACSIMILE: (732)222-4758
E-MAIL: tomislavneuman@aol.com

Dated: February 2, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2005, copies of the forgoing NOTICE OF APPEAL OF THE BOARDS REJECTION OF MCRS' FEEDERLINE APPLICATION of the FORTY PLUS FOUNDATION & MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC was served by first-class mail, postage prepaid, or (hand-delivery), upon all required parties of record.


Tomislav R. Neuman