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SERVICE DATE - AUGUST 13, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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

Decided: August 11, 2004

In a decision served on October 7, 2003, the Board granted the joint request of the City of New York (the City) and Chelsea Property Owners (CPO) to hold this proceeding in abeyance until January 5, 2004, to permit the parties to engage in settlement discussions that could lead to the execution of a trail use agreement. At the City’s request, the Board, in a decision served on January 7, 2004, continued this proceeding in abeyance until April 5, 2004.

Forty Plus Foundation (Forty Plus) and Manhattan Central Railway Systems, LLC (MCRS) appealed the October 7 abeyance decision, arguing that it is contrary to the public interest because it would further contribute to a potentially great waste of resources and perpetuate “the current state of limbo” surrounding the proceeding. They claimed that the proceeding effectively has been held in abeyance since 1992 when the Interstate Commerce Commission (ICC) at CPO’s request agreed to withdraw its jurisdiction over the Highline.¹ Forty Plus and MCRS requested that the October 7 decision be revoked and that a decision leading to the reactivation of the Highline as a Class III shortline railroad be issued. The Board, in a decision served on March 15, 2004, denied the appeal of the October 7 decision and affirmed the January 7 decision. In its decision, the Board expressed its preference for the private resolution of disputes and observed that Forty Plus had failed to show that it had been prevented “from pursuing efforts directed at restoring service over the Highline.”

On April 2, 2004, Forty Plus and MCRS jointly filed a notice of intent to file an Offer of Financial Assistance (OFA) to acquire the Highline. They request that Consolidated Rail Corporation (Conrail) and CSX Transportation, Inc. (CSXT) provide the minimum purchase price and additional information and that the period for submitting OFAs be tolled an additional 30 days to permit MCRS to analyze the information and submit an OFA. See 49 CFR 1152.27. Conrail and CPO, respectively, filed replies on April 7 and 9, 2004, and the City filed a request for leave to reply and a reply on April 26, 2004.

¹ Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773 (1992) (Chelsea), aff’d sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

Before acting on the request of Forty Plus and MCRS to toll the period for submitting OFAs, the Board granted a request of the City to continue this proceeding in abeyance to July 5, 2004. In that decision, the Board stated that it would address in a separate decision the request of Forty Plus and MCRS.

On July 6, 2004, the City filed a further request to continue this proceeding in abeyance through and including September 30, 2004. The City states that dramatic progress has been made between and among the various parties but that the resolution of all outstanding issues in an orderly manner is not expected until September 2004 and may not be achieved before November 2004. According to the City, Friends of the High Line, CSXT, and Conrail do not object to continuing this proceeding in abeyance. Additionally, on July 7, 2004, CPO submitted to the Board a statement indicating its support of the City's request for an extension.

The request of Forty Plus and MCRS to toll the period for submitting OFAs will be denied, and the request of the City to continue this proceeding in abeyance for an additional 90 days will be granted.

DISCUSSION AND CONCLUSIONS

The request to toll the time period for submitting OFAs lacks merit. The time to file OFAs in this adverse abandonment proceeding has long expired. Consistent with the statute, former 49 U.S.C. 10905 [now 49 U.S.C. 10904], and regulations, 49 CFR 1152.27(c)(1), the Chelsea decision specifically provided that OFAs to allow rail service to continue had to be received within the 10-day period after September 16, 1992, the day the decision was served and Federal Register notice published.

An OFA to purchase the Highline was filed jointly by Cross Harbor Railroad Terminal Corporation (Cross Harbor) and CH Partners (CH) within the 10-day period after September 16, 1992. The ICC rejected the OFA by notice served on October 1, 1992, and explained in its decision, which was served on December 9, 1992, that Cross Harbor and CH had failed to demonstrate that they were financially responsible or that their OFA was for continuing rail service. Cross Harbor and CH subsequently petitioned to reopen the rejection decision, arguing that it contained material error. They also sought reopening to submit new evidence and evidence of changed circumstances, which they claimed would demonstrate that they were financially responsible and that their offer was for continuing rail service. The ICC, in a decision served on July 22, 1993, at 4, dismissed their claims of material error and denied their request to reopen the record stating as to the latter:

Offerors' request to be allowed to come forward with new evidence to perfect their OFA at this late date ignores the fact that the entire scheme of statutory deadlines associated with abandonments and OFAs was intended by Congress to "[protect] carriers from protracted legal proceedings." Stagers Rail Act of 1980,

H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). These deadlines were designed to ensure that railroads would be able to dispose of their property expeditiously and by a date certain. Potential offerors were given only 10 days to file an OFA, and we were given 5 days to rule on them. Barring any extenuating circumstances, to reopen an OFA decision based on allegations of new evidence and changed circumstances would violate the entire thrust of the statutory scheme. Aside from the inevitable delay, it would give potential offerors the opportunity to pursue an OFA well after their due date.

More recently, the Board denied a petition to reopen an abandonment exemption to permit the late filing of an OFA to purchase a line. The petitioner claimed materially and substantially changed circumstances, asserting that the economy of the region had stabilized sufficiently to support rail operations over the line that was the subject of the abandonment exemption. Citing the July 22, 1993 decision in Chelsea, the Board stated that “[t]here is no precedent to entertain an OFA filed 4½ years after its due date, and to do so plainly would be inconsistent with the Congressional intent . . . [t]he parties, however, are free to negotiate a voluntary agreement for continued rail service outside the OFA process.” See Idaho Northern & Pacific Railroad Company– Abandonment Exemption–in Wallowa and Union Counties, OR, Docket No. AB-433X (STB served Dec. 13, 2001) at 4.

The request by Forty Plus and MCRS to toll the time period for submitting OFAs will be denied. Forty Plus and MCRS remain free, however, to negotiate with Conrail and the City for the line’s sale outside the context of the OFA statute. Because the OFA process is no longer available, the City’s request to continue this proceeding in abeyance through and including September 30, 2004, will be granted. As noted in the March 15 decision, the Board favors the private resolution of disputes whenever possible and has actively encouraged the parties to negotiate a settlement here. The Board is encouraged that the parties are negotiating in good faith and urges them to redouble their efforts to resolve this protracted dispute.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City’s request for leave to file a reply is granted.
2. The request of Forty Plus and MCRS to toll the time period for submitting OFAs is denied.
3. This proceeding will continue in abeyance for an additional 90 days through and including September 30, 2004.

4. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary