35204 SERVICE DATE – JUNE 13, 2005
EB

This decision will be printed in the bound volumes of the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-167 (Sub-No. 1094)A[1]

CHELSEA PROPERTY OWNERS—ABANDONMENT—PORTION OF THE CONSOLIDATED RAIL CORPORATION'S WEST 30TH STREET SECONDARY TRACK IN NEW YORK, NY

STB Finance Docket No. 34606

FORTY PLUS FOUNDATION/MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC—FEEDER LINE ACQUISITION—THE MANHATTAN HIGHLINE

Decided: June 10, 2005

The Surface Transportation Board issues a Certificate of Interim Trail Use or Abandonment for the Highline in New York, NY.

BACKGROUND

The Board's predecessor, the Interstate Commerce Commission (ICC), authorized the abandonment of the Highline, a 1.45-mile elevated rail line owned by Consolidated Rail Corporation (Conrail) in the Borough of Manhattan, New York, NY,[2] subject to conditions, in a

[1] These proceedings are not consolidated, but are factually related. A single decision is being issued for administrative convenience.

[2] The Highline is a segment of Conrail's West 30th Street Secondary Track. Built in the 1930's, the Highline rises from grade level on steel columns near the corner of 34th Street and Eleventh Avenue just to the north of the Caemmerrer Yard (Yard), formerly known as the 30th Street Freight Yard; loops around the Yard's perimeter before turning south at 30th Street near Tenth Avenue; and extends south on a steel and concrete viaduct mostly to the west of Tenth Avenue until terminating at Gansevoort Street in Lower Manhattan. For a history of the Highline see Chelsea Property Owners—Aban.—The Consol. R. Corp., 7 I.C.C.2d 991, 992-94 (1991) (Chelsea I).

decision served on September 16, 1992.[3] The abandonment authorization resulted from an "adverse abandonment" application filed by Chelsea Property Owners (CPO), a group of land owners seeking to redevelop the real estate occupied by the Highline. CPO asked for the abandonment authority to remove the Board's plenary jurisdiction over the rail line and thereby permit CPO to pursue condemnation of the property underlying the Highline.

Conrail operated over the Highline viaduct pursuant to easements whose termination provisions require Conrail to absorb the cost of demolishing the viaduct. An abandonment constitutes termination under the easements. Based on CPO's representation that demolition expenses would not exceed $7 million, the ICC conditioned the abandonment authorization on CPO agreeing to indemnify Conrail for all demolition costs in excess of $7 million by posting an appropriate surety bond or similar security. See Chelsea II, 8 I.C.C.2d at 792 and 794. On judicial review, the court upheld the ICC's grant of adverse abandonment authority and found the ICC's imposition of the surety bond condition proper. See Conrail.

Following an earlier unsuccessful effort to satisfy the ICC's outstanding indemnification condition (see STB decision served July 14, 1999), CPO in August 2002 filed a motion asking the Board to find that an agreement it had negotiated with the involved railroad and government interests,[4] entitled "Agreement for Voluntary Abandonment and for Charitable Contribution" (2002 Agreement), satisfied the outstanding indemnification condition. CPO further asked the Board to authorize the Highline's abandonment. Friends of the High Line, Inc. (Friends), a coalition of local residents, businesses, and civic groups that was formed to preserve the Highline, filed a petition in August 2002 to reopen Chelsea II to conduct additional historic and environmental review. Friends requested leave to exceed the page limitation in 49 CFR 1152.25(e)(3). CPO did not object, but requested similar relief for its reply. Both requests will be granted.

In December 2002, the city of New York (the City) reversed its position on the 2002 Agreement. Instead of supporting CPO's efforts to have the Highline condemned and

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

[4] The railroad interests include Conrail; New York Central Lines LLC (NYCL), a limited liability company wholly owned by Conrail and the successor to Conrail's property interests in the Highline; CSX Corporation, part owner of, and asset manager for, Conrail; and CSX Transportation, Inc., a wholly owned subsidiary of CSX Corporation and the operator of the Highline along with NYCL. CSX Corporation and CSX Transportation, Inc. will be jointly referred to as CSX. The government interests include the city of New York, New York City Economic Development Corporation, Metropolitan Transportation Authority, New York Convention Center Development Corporation, and Triborough Bridge and Tunnel Authority.

dismantled, the City decided to support Friends' efforts to preserve the Highline. Specifically, the City filed a reply in opposition to CPO's motion and asked the Board to accept a late-filed request for issuance of a Certificate of Interim Trail Use or Abandonment (CITU) permitting rail banking/interim trail use under 16 U.S.C. 1247(d) (Trails Act). As required by 49 CFR 1152.29(a), the City agreed to assume responsibility for the property for the duration of the interim trail use and acknowledged that its use of the right-of-way would be subject to possible future reconstruction and reactivation for rail service.

In July 2003, the Board held a hearing in Manhattan on the various pending motions and petitions and invited the parties to file briefs on whether CITUs may be issued in adverse abandonment proceedings. The Board granted the joint request of the City and CPO to hold this proceeding in abeyance in October 2003, and at their request continued the proceeding in abeyance through September 2004 to permit them to engage in negotiations.

In September 2004, the City joined by New York State Urban Development Corporation d/b/a Empire State Development Corporation (ESDC), which expects to be a joint and several holder of the CITU and a party to any final trail use agreement, Conrail, and CSX stated that they were negotiating an arrangement under the Trails Act and jointly requested the issuance of a CITU (joint request).

In December 2004, CPO withdrew its opposition to issuance of a CITU. However, 511 West 23rd Street Associates, LLC (511 Associates), the owner of an improved commercial lot encumbered by the Highline, filed a motion for leave to intervene and a statement in opposition to the joint request. 511 Associates also asked for leave to supplement its statement in opposition. Both requests were granted in a decision served on January 13, 2005. Also in December 2004, Forty Plus Foundation, a not-for-profit employment support organization, and Manhattan Central Railway Systems, L.L.C., described as a Class III shortline railroad (collectively referred to as Forty Plus or appellant), jointly moved to dismiss the joint request.

In January 2005, Friends filed a statement in support of the joint request and also a request to hold its petition to reopen in abeyance if a CITU is issued. CPO filed a reply. In February 2005, 511 Associates filed its supplemental statement, and the City filed a reply. Then, on May 17, 511 Associates withdrew its objections to a CITU, with prejudice, leaving Forty Plus as the only opponent to the joint request.

DISCUSSION AND CONCLUSIONS

Forty Plus argues that the joint request should be dismissed because its plan to acquire and reactivate the Highline, pursuant to the feeder line application it filed in December 2004, if granted, would take precedence over the instant request for a CITU. Forty Plus also contends that the joint request should be dismissed, arguing that the Trails Act does not apply to adverse abandonments; that the City's CITU request and plans to redevelop the Highline reflect poor judgment; are inconsistent with a return to rail use; and will result in severing the High Line

from the national rail system; and that the City has engaged in questionable ethical conduct and has discriminated against Forty Plus by excluding it from discussions and negotiations relating to the Highline.

Feeder Line Application

On December 30, 2004, Forty Plus filed an application under the Feeder Railroad Development Program at 49 U.S.C. 10907, to acquire the Highline. In a decision served January 25, 2005, in STB Finance Docket No. 34606, the Board, through the Director of the Office of Proceedings, rejected Forty Plus' application because it did not contain the information required by the feeder line procedures at 49 CFR 1151.3. The Director determined that Forty Plus did not show that it is a financially responsible person as required by 49 U.S.C. 10907(a) and 49 CFR 1151.3(a)(3), because Forty Plus failed to establish its ability to cover the expenses associated with providing rail service over the line for the first 3 years of operation. On February 3, 2005, Forty Plus appealed the Director's decision. The City filed a reply on February 18, 2005.

On appeal, Forty Plus maintains that the Director's decision was a clear error of judgment and will result in manifest injustice. Appellant asks the Board to allow it another opportunity to demonstrate that it is financially responsible. Forty Plus gives two explanations for its lack of evidence regarding financial responsibility. First, Forty Plus alleges that CSX has been uncooperative in providing it with information that is essential to the application. Second, Forty Plus contends that the Board's feeder line regulations are vague, misleading, and fail to articulate specifically what documentation is required in a feeder line application. Forty Plus also argues that the evidence it did provide, particularly evidence of its affiliation with the Morristown & Erie Railway Inc. (M&E) and the availability of numerous loans and grant programs, should be sufficient to establish its financial responsibility. Forty Plus asks the Board to reverse the Director's decision or, alternatively, to allow it to conduct discovery to obtain information from CSX and to then submit a "complete" application.

The City replies that the Director acted properly by finding that Forty Plus did not show that it was financially responsible and by rejecting Forty Plus' application. The City contends that Forty Plus' appeal has provided no basis for the Board to overturn or modify the earlier decision. Specifically, the City argues that Forty Plus has not satisfied the criteria for an appeal, which is granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice. The City asserts that there was no error in judgment here, because the Director's decision was an accurate assessment of the application, and no manifest injustice, because the application failed to establish Forty Plus' financial responsibility.

Forty Plus' arguments are unpersuasive. There is no evidence that CSX is withholding, or even that it possesses, information that appellant could obtain through discovery to help establish the prerequisite to a feeder line proposal—the financial responsibility of Forty Plus. Given the fact that this line has long been authorized for abandonment and has not been operated

for many years, CSX would not be in a better position than Forty Plus to determine what would be needed to make the line operable. Nor would CSX have any information about Forty Plus' financial resources.

There is likewise no merit to Forty Plus' argument that it is incapable of complying with the Board's feeder line regulations. Appellant argues that the regulations are ambiguous, vague, and misleading. But there is nothing ambiguous, vague, or misleading about the Board's regulations. They require facts to be included in verified statements (49 CFR 1151.3(a)). They require that the applicant demonstrate that it can both pay for the line and cover expenses associated with providing service over the line. Id. They require an operating plan describing the proposed operation. Id. at section 1151.3(a)(7). As the Director found, Forty Plus has failed to meet these requirements here.

In its appeal, Forty Plus merely reiterates the statements from its application regarding financial responsibility, maintaining that Forty Plus' affiliation with M&E is sufficient to meet the financial responsibility requirement and that, with the existence of available programs for grants and loans, it would easily be able to fund operations. As explained by the Director, however, appellant itself asserts that it would cost $10 million to restore the track structure to Class 1 track condition and $50,000 per month for the first 12 months to operate the line. Appellant also estimates the cost of rehabilitating the line and operating it for 3 years to be $30 million. Forty Plus did not show that it has any committed source of funds, either from M&E or from anyone else, to meet these substantial costs. Nor did it show that it has any resources of its own to rehabilitate and operate the Highline. Appellant has presented no new evidence that would justify reversing the Director's determination that, given the history of this line and all of the other circumstances presented here, Forty Plus has failed to show that it is a financially responsible person able to cover the costs associated with providing rail service over the line for the first 3 years of operation.

We must also reject Forty Plus' claim that it is entitled under our rules at 49 CFR 1151.2(d)(2) to now seek discovery from CSX and file a revised, complete application. Because the information omitted from the application goes to the heart of what is required in feeder line cases (funding sources, operating plan, etc.) and is in appellant's possession rather than CSX's, the application is defective because it is lacking the basic requirements of a feeder line application. See, e.g., Glenwood and Southern Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, Finance Docket No. 32613 (ICC served Mar. 9, 1995). Consequently, appellant will not be permitted to revise its initial filing in the STB Finance Docket No. 34606 proceeding.

In sum, Forty Plus has not met the criteria set out at 49 CFR 1115.2(b) for our granting this appeal. Forty Plus can point to no necessary finding of fact by the Director that was omitted, erroneous, or unsupported by the record. Moreover, there is no evidence that the Director's legal conclusions or findings were contrary to law, Board precedent, or policy. To the contrary, the decision accurately assessed the evidence Forty Plus provided and came to a correct legal

conclusion. Moreover, the decision did not involve an important question of law, policy, or discretion that was without governing precedent. Lastly, there is no evidence of prejudicial procedural error here. Forty Plus submitted a defective application, which the Director properly rejected. For these reasons, we will affirm the Director's decision rejecting Forty Plus' application and deny Forty Plus' appeal.

We will address below all of Forty Plus' other arguments against invocation of the Trails Act, even though Forty Plus may not have an interest in the disposition of the Highline now that its competing proposal for future use—the feeder line proposal—has been rejected.

Trails Act

Forty Plus challenges the requested issuance of a CITU under the Trails Act on several grounds. The Trails Act "is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." Preseault v. I.C.C., 494 U.S. 1, 5 (1990) (Preseault). Under the Trails Act, the Board must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail user agrees to assume full managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails-to-Trails v. S.T.B., 267 F.3d 1144, 1149-50 (D.C. Cir. 2001) (CART). The statute expressly provides that "if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes . . . as an abandonment . . . ." 16 U.S.C. 1247(d). Instead, the right-of-way is "rail banked," which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider) may reassert control over the right-of-way to restore service on the line in the future. See Birt v. Surface Transp. Bd., 90 F.3d 580, 583 (D.C. Cir. 1996); Iowa Power—Const. Exempt.—Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990); 49 CFR 1152.29.

The Board's role under the Trails Act is limited and ministerial. See CART; Goos v. I.C.C., 911 F.2d 1283 (8th Cir. 1990) (Goos). Our only responsibility when a request for a CITU is filed is to confirm that the trail user agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. 16 U.S.C. 1247(d); 49 CFR 1152.29(a)(3). We do not decide whether interim trail use is desirable for a particular line and do not analyze, approve, set the terms of—or even require that parties submit to the Board—their trail use agreements. We cannot impose an interim trail use arrangement upon an unwilling railroad or a reluctant trail user; such arrangements must be voluntary. National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988).

Moreover, we play no part in the parties' negotiations. We are not involved in the type, level, or condition of the trail. Nor are we authorized to regulate activities over the actual trail, and there is no time limit governing when a trail must be developed. See Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty

Counties, GA, Docket No. AB-389 (Sub-No. 1X) (STB served May 16, 2003) (Georgia Great Southern) at 5-6, reconsideration denied (STB served Feb. 2, 2004). We have authority to revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e., the Trails Act was not available or the trail user is not meeting its financial obligations for the property and its use as a trail). See Jost v. Surface Transp. Bd., 194 F.3d 79, 89-90 (D.C. Cir. 1999); Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, Docket No. AB-290 (Sub-No. 168X) (STB served May 4, 2005) (Kokomo).

Forty Plus questions the City's judgment in seeking a CITU and in planning to redevelop the Highline. But, as noted, our role in administering the Trails Act is ministerial. See CART; Goos; Georgia Great Southern at 5-6. Under the Trails Act, we do not decide whether interim trail use is desirable for a particular line. Our discretion is limited to confirming that the statute has been properly invoked and that the statutory requirements regarding rail banking and the trail user's assumption of financial and managerial responsibility are met. See, e.g., Iowa Southern R. Co.—Exemption—Abandonment, 5 I.C.C.2d 496, 503 (1989), aff'd, Goos. When section 1247(d) is properly invoked, we must issue a CITU.

And while we favor the private resolution of disputes through voluntary negotiations between all interested parties wherever possible, we cannot compel railroads or prospective trail users to negotiate with each other or with other parties such as Forty Plus. Nor can we find ethical misconduct or discrimination such as would justify denial or dismissal of the CITU request based on the fact that Forty Plus' plan for the Highline's future differs from the City's or because Forty Plus believes it was not adequately consulted about the City's plans.

Applicability of the Trails Act to Adverse Abandonments. Referring to the pleadings CPO filed before withdrawing its opposition to the issuance of a CITU, Forty Plus contends that the Trails Act does not apply to adverse abandonments.[5] Forty Plus argues that the purpose of the third party adverse abandonment is to prevent railroads from using the Board's jurisdiction to avoid state law actions where rail lines are no longer required for interstate commerce.[6] If the Trails Act were to apply to adverse abandonments, Forty Plus argues, railroads would be able to enter into trail use agreements to preserve the Board's jurisdiction over rail lines and thus shield the underlying rights-of-way that are no longer needed for rail service from the ordinary processes of state law.

[5] See CPO Reply to the City's Petition to Late File a Request for Issuance of a CITU and Brief on the Availability of the Trails Act in Adverse Abandonment Proceedings. Because CPO has withdrawn these arguments, and because Forty Plus has stated that it adopts them, we will refer to them as the arguments of Forty Plus.

[6] See Conrail, 29 F.3d at 708-09; and Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981).

Alternatively, Forty Plus argues that if the Trails Act were applicable to adverse abandonments the Board should assess in each instance whether its application would be consistent with the Congressional purpose of preserving railroad rights-of-way. Because a railroad would be able to frustrate the adverse abandonment process by invoking the Trails Act, Forty Plus argues that there must be some evidence that the future restoration of rail service is a possibility for the Trails Act to apply to adverse abandonments.

We conclude, however, that recent developments make it clear that the issuance of a CITU in this proceeding will not frustrate the adverse abandonment process. As discussed above, the adverse abandonment applicant, CPO, now agrees to the issuance of a CITU. It is not apparent how the adverse abandonment process could be thwarted by the issuance of a CITU when the third-party abandonment applicant, the railroad, and the prospective trail user all concur in the request for a CITU.

Given this change in circumstances, we need not decide whether the Trails Act applies to lines that are the subject of adverse abandonments. The posture of this proceeding at this point is not materially different from other cases where trail conditions have been imposed. See, e.g., Preseault (interim trail use permitted in a proceeding that began as an adverse abandonment proceeding brought by landowners of a line that had not been used for some time, but evolved into a joint request by the railroad and the state for authority to discontinue rail service and transfer the right-of-way to a potential trail user); The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389, et al. (STB served May 13, 1998) (abandonment exemption reinstated by Board with a new petitioner and docket number to give effect to the intent of the parties). Although CPO initiated this proceeding as an adverse abandonment, its adversarial nature has ended because of the trail use agreement that has been negotiated with CPO and the railroads. Accordingly, interim trail use in this proceeding should now be viewed as a voluntary arrangement between the necessary parties (the railroad and the trail user), and the issuance of a CITU will simply give effect to their intent.

Statutory Requirements for Interim Trail Use. Forty Plus argues that the issuance of a CITU would be inconsistent with the Trails Act objective of preserving railroad rights-of-way for potential future rail use. Specifically, Forty Plus asserts that the City's plans to redevelop the Highline and surrounding area, including its plan to build a stadium over the Yard, would result in permanently severing the Highline from the national rail system. This, Forty Plus argues, would make the future restoration of rail service a physical impossibility and as a result would remove the Highline from the Board's jurisdiction. Even if the Highline is not severed from the national rail system, Forty Plus claims that the future restoration of rail service along the Highline would be a practical impossibility in view of the structural changes the City intends to make.

We disagree. First, the City and ESDC have satisfied the statutory requirements related to rail banking by acknowledging that interim trail use would be subject to the future restoration of rail service at any time. Given the Board's limited ministerial role, this is all that is required for a prospective trail user to satisfy the rail banking requirement of 16 U.S.C. 1247(d) and 49 CFR 1152.29(a). See Preseault, 494 U.S. at 19.

Second, Forty Plus' allegations that the projects planned for this property would make the restoration of rail service impossible are premature and speculative. Forty Plus acknowledges that the City's redevelopment plans are not final. Moreover, it is not clear that the City's plans, if implemented, would sever the Highline from the national rail system. While Conrail sold the portion of the West 30th Street Secondary Track north of 34th Street to the National Railroad Passenger Corporation (Amtrak) to facilitate the rerouting of Amtrak trains in the 1980's, Conrail retained a perpetual easement to operate over the conveyed line. See Chelsea I, 7 I.C.C.2d at 1017 and 1024. The City has made assurances that it will retain the easements necessary to enable the Highline to connect with the national rail system. See Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA, Docket No. AB-389 (Sub-No. 1X) (STB served Apr. 16, 1999).

If the City's final redevelopment plans should call for structural changes that would make it more difficult or expensive to restore active freight operations to the Highline, the City has provided assurances that its plans would not make the reinstatement of rail service physically impossible. As noted above, any interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service. If and when the railroad or another authorized operator wishes to restore rail service to all or part of a rail banked line, it has the right to do so and the trail user must step aside. See 16 U.S.C. 1247(d); 49 CFR 1152.29(a); Georgia Great Southern. In that event, the burden would be on the City to take "whatever corrective actions are necessary to permit the reinstitution of freight service." See The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company—Abandonment and Discontinuance of Service—in Montgomery County, MD, and the District of Columbia, Docket No. AB-19 (Sub-No. 112) (ICC served Mar. 2, 1990) at 2-3.

Issuance of a CITU. In sum, we conclude that Forty Plus has failed to show that the Trails Act should not be available here. Consistent with the Trails Act requirements, the City and ESDC state that they are prepared to assume full responsibility for the management of, for any legal liability arising out of the transfer or use of, and for the payment of all taxes that may be levied or assessed against the Highline right-of-way. Moreover, they acknowledge that their use of the right-of-way is subject to their continuing to meet the statutory responsibilities for trail use and providing for possible future reconstruction and reactivation of the right-of-way for rail service.

Although the City's request for a CITU was filed late, we will accept it. The Board's practice is to accept trail use requests as long as the Board retains jurisdiction and the carrier is

willing to enter into negotiations. See, e.g., Kokomo. As in any Trails Act proceeding, we must issue a CITU here because the joint trail users have submitted the statement of willingness required by 16 U.S.C. 1247(d) and 49 CFR 1152.29(a)—thereby satisfying the statutory requirements—and the railroads are willing to negotiate. The parties may negotiate a final Trails Act agreement during the 180-day period prescribed below. If an agreement is executed, interim trail use may be implemented. Use of the right-of-way for trail use purposes is subject to restoration for railroad purposes. See 49 CFR 1152.29(c)(1).

When issuing a CITU, we normally specify the procedures a railroad must follow to consummate abandonment in the event trail use terminates. Given the unusual nature of this proceeding, the standard language would be inappropriate here. The parties have submitted a copy of their proposed Trails Act agreement, see The City's Reply to Associates, Exhibit 4, which specifies what would be required of the parties if interim trail use were to terminate without a restoration of rail service (the railroads filing for abandonment authority and the payment by the trail users of the demolition costs). We have reviewed these voluntarily negotiated terms and see no reason not to accept them.

Friends' Petition to Reopen

Finally, Friends asks that its petition to reopen be held in abeyance, and not be dismissed, if a CITU is issued. It acknowledges that there will be no need to address the environmental and historic issues related to demolition that it raised in its petition because the issuance of a CITU, if followed by the execution of a Trails Act agreement, would result in the preservation of the Highline. But Friends is concerned that it might have little time to raise these environmental and historic issues in the event a Trails Act agreement is not executed or interim trail use ceases without the restoration of rail service and an abandonment is authorized.

Friends has not shown that it would not have adequate time to update and file a new petition to reopen. Our rules are construed liberally in the interest of securing the just determination of the issues presented. See 49 CFR 1100.3. In any event, mere speculation over what may never transpire does not establish a reasonable basis for keeping proceedings open indefinitely. Friends' request to hold its petition to reopen in abeyance will be denied and the petition to reopen will be dismissed as moot.

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

It is ordered:

1. The requests by Friends and CPO to exceed the page limitation in 49 CFR 1152.25(e)(3) are granted.

2. The City's late-filed request for a CITU is accepted.

3. Forty Plus' appeal of the Director's decision served January 25, 2005, is denied.

4. Forty Plus' motion to dismiss the joint request for a CITU is denied.

5. Friends' request to hold its petition to reopen in abeyance is denied, and the petition to reopen is dismissed.

6. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

7. Interim trail use/rail banking is subject to the future restoration of rail service and to the trail users' continuing to meet the financial obligations for the right-of-way.

8. If interim trail use is implemented and subsequently the trail users intend to terminate trail use, they must send the Board a copy of this decision and certificate and request that it be vacated on a specified date. The provisions of the parties' trail use agreement regarding abandonment authority from the Board and the assumption of liability for demolition costs will govern subsequent abandonment proceedings involving the Highline.

9. If a final agreement for rail banking/interim trail use/ is reached by the 180th day after service of this decision and certificate, interim trail use may be implemented.

10. This decision will be effective on July 13, 2005.

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

Vernon A. Williams
Secretary