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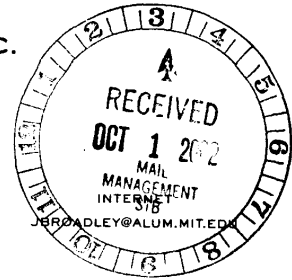
LAW OFFICES

JOHN H. BROADLEY & ASSOCIATES, P.C.

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October 1, 2002

JOHN H. BROADLEY

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street NW, Suite 700
Washington, D.C. 20423-0001

Re: Finance Docket No. 34259, Chelsea Property Owners -- Petition for a
Declaratory Order

Dear Mr. Williams:

Enclosed please find for filing an original and ten copies of Chelsea Property Owners Petition for a Declaratory Order, a Memorandum in Support, the Verified Statement of Mr. Jerry Gottesman, and a check in the amount of \$1400.00 payable to the Surface Transportation Board as a filing fee. Please file stamp the additional copy of the papers and return it with our messenger.

The issues raised in the Petition for a Declaratory Order are related to matters involved in AB-167 (Sub-No. 1094)(A). Accordingly, I have taken the liberty of serving a copy of the Petition, the Memorandum in Support, and the Verified Statement on the parties to that proceeding.

ENTERED
Office of Proceedings

OCT 02 2002

Part of
Public Record

Yours very truly,

John Broadley

cc: All counsel AB-167 (Sub-No. 1094)A

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FILED

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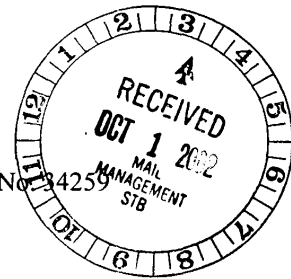
SURFACE
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BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Chelsea Property Owners -- Petition
for a Declaratory Order

Finance Docket No. 34259



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**CHELSEA PROPERTY OWNERS
PETITION FOR A DECLARATORY ORDER**

Part of
Public Record

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, Chelsea Property Owners petitions the Board for the issuance of a declaratory order resolving certain issues relating to the Consolidated Rail Corporation's ("Conrail's") West 30th Street Secondary Track in New York City, referred to hereinafter as the "Highline."

JURISDICTION

1. The Board has jurisdiction to issue declaratory orders pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721.

BACKGROUND

2. Chelsea Property Owners ("CPO") is an unincorporated association of property owners on the lower west side of Manhattan.

3. In 1989 CPO filed an adverse abandonment proceeding, AB-167 (Sub-No. 1094)A, *Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corporation West 30th Street Secondary Track, New York, NY*, (the "Abandonment Proceeding") seeking a mandatory adverse abandonment of Conrail's West 30th Street Secondary Track in New York City. The Abandonment Proceeding is pending before the Board.

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4. Today the Highline begins in the south at Gansevoort Street on the lower west side of Manhattan and proceeds on an elevated structure northerly on the east side of Tenth Avenue, crossing to the west side at 17th Street. North of 17th Street the Highline continues north on an elevated structure that is mid-block approximately 100 feet west of the westerly line of Tenth Avenue. At 30th Street the Highline and its elevated structure turn west along the north side of 30th Street and proceed to Twelfth Avenue where the line turns north and begins to descend. At 33rd Street the Highline and its elevated structure turn northeast and complete the descent to grade at 34th Street where the Highline connects with the Amtrak cutting. A map of the Highline is attached hereto as Exhibit No. 1.

5. The Highline is built on an elevated structure that in turn is built on rail use easements obtained from the underlying property owners in the late 1920's. Under the terms of the easements and/or under New York law, once the Highline is abandoned, the rail use easements terminate and Conrail will be obligated to remove the elevated structure from the property of the underlying owners.

6. On September 16, 1992 the Interstate Commerce Commission issued a decision in the Abandonment Proceeding, 8 I.C.C. 2nd 773 (1992), approving the abandonment subject to the condition that CPO post a surety bond to protect Conrail from liability from demolition and other costs of removing the Highline in excess of \$7 million.

7. In 2001 CPO reached an agreement ("Settlement Agreement") with Conrail and affiliated railroads, and with the City of New York ("City") and others, regarding the terms and conditions under which the Highline will be demolished, and providing financial

protection to Conrail and the affiliated railroads in accordance with the Commission's surety bond condition. The City signed the Settlement Agreement in 2001.

8. On August 14, 2002 CPO filed a motion in the Abandonment Proceeding asking the Board to determine that the Settlement Agreement satisfied the surety bond condition of the September 16, 1992 Decision.

9. On August 16, 2002 Friends of the High Line ("FHL") filed a Petition to Reopen the Abandonment Proceeding to reconsider historic preservation and environmental issues.

10. On September 19, 2002 the City filed a motion in the Abandonment Proceeding asking for an enlargement of time to December 17, 2002 in which to reply to CPO's motion for approval of the Settlement Agreement and to FHL's Petition to Reopen, asserting that it needed the extra time to consider studies regarding the feasibility and financial implications of reuse of the Highline and to formulate its position on the two matters.

**THE REASONS THE BOARD SHOULD INSTITUTE
A DECLARATORY ORDER PROCEEDING**

11. A dispute has arisen between CPO and the City regarding the scope of the Board's jurisdiction under the Interstate Commerce Act and the Trails Act. This dispute threatens to undermine the progress made to date in the Abandonment Proceeding and in the Settlement Agreement to resolve the issues raised by the Highline. The dispute also puts at risk the City's bid to be the United States candidate city to host the 2012 Olympics which is premised on an incorrect view of the scope of the Board's jurisdiction.

12. CPO has brought this Petition for a Declaratory Order to obtain from the Board a definitive determination of the jurisdictional issue which will provide a basis for CPO

and the City to continue their negotiations to resolve issues relating to the future of the Highline. Without a definitive resolution of the jurisdictional issues, it is unlikely that CPO and the City can resolve their differences as those differences are fundamentally intertwined with the differing views the parties have on the scope of the Board's jurisdiction.

THE DISPUTE TO BE RESOLVED

13. Representatives of CPO and the City have met on many occasions to resolve differences regarding the future of the Highline. In recent months, however, the City has propounded a position on the jurisdiction of the Board under the Interstate Commerce Act and the Trails Act that CPO believes is at odds with the law.

14. On September 23, 2002 representatives of CPO met with the Deputy Mayor of the City of New York, Daniel Doctoroff, and Laurie Blatchford to discuss the City's plans with respect to the Highline. At that meeting the Deputy Mayor outlined the City's position and the legal basis on which it is evaluating options for the Highline. This meeting crystallized the differing views of the jurisdictional issue and demonstrated to CPO that further progress was dependent upon a definitive resolution of the issue.

15. According to the Deputy Mayor, the City's position is unequivocally that "everyone wants the Highline north of 30th Street to be demolished." The City, through "New York 2012," has submitted to the United States Olympic Committee a bid to be the United States candidate city to host the 2012 Olympic games. That bid commits the City to the construction of an 86,000 seat Olympic stadium over the rail yards between 30th and 34th Streets, which will require the abandonment and demolition the Highline in that location. Such an abandonment and

demolition will sever the portion of the Highline south of 30th Street from any connection with the national rail system.

16. According to the Deputy Mayor, the City is at the same time considering whether to support preservation of the Highline south of 30th Street for reuse using the mechanism of the Trails Act, 16 U.S.C. 1247(d), and a trail use agreement with Conrail.

17. According to the Deputy Mayor, the City believes that the Highline structure and its easements can be preserved south of 30th Street by negotiating a trail use agreement with Conrail pursuant to the Trails Act, 16 U.S.C. 1247(d), notwithstanding the abandonment and demolition of the Highline north of 30th Street.

18. The abandonment and demolition of the Highline north of 30th Street will sever the Highline south of 30th Street from the national rail system.

19. The Surface Transportation Board does not have jurisdiction over lines that are not connected to the national rail system. Therefore, severance of the Highline south of 30th Street from the national rail system would result in its *de facto* abandonment and preclude the issuance of a Certificate of Interim Trail Use ("CITU") to the City or anyone else for that part of the line and preclude the negotiation of a Trails Act Agreement with Conrail.

20. The City is also considering an alternative approach under which it would request a CITU and would negotiate a Trails Act Agreement for the entire Highline, both south of 30th Street and north of 30th Street.

21. The City contends that, consistent with the terms of such a CITU and pursuant to a Trails Act Agreement, it could then demolish the Highline north of 30th Street and construct an 86,000 seat Olympic stadium on the Highline's right-of-way.

22. No alternative right-of-way is available to carry the Highline from its elevated structure at 30th Street and Tenth Avenue down to grade level at 34th Street where it enters the Amtrak cut which is the Highline's connection with the national rail system.

23. CPO requests the Board to resolve the following issues:

A. Would the Board retain jurisdiction over the Highline south of 30th Street if the portion of the Highline north of 30th Street is abandoned under 49 U.S.C. 10903, and such abandonment deprives the southern part of the line of any connection with the national rail system?

B. Would the demolition of the Highline structure north of 30th Street and the construction on the Highline right-of-way of an 86,000 seat Olympic be consistent with a Certificate of Interim Trail Use issued with respect to that portion of the Highline?

REQUEST FOR RELIEF

CPO respectfully requests the following relief:

1. That the Board institute a declaratory order proceeding to resolve the issues presented above;

2. That the Board make all parties to the Abandonment Proceeding parties to the Declaratory Order Proceeding; and

3. That the Board establish an expedited procedural schedule for resolution of the issues raised in the declaratory order proceeding.

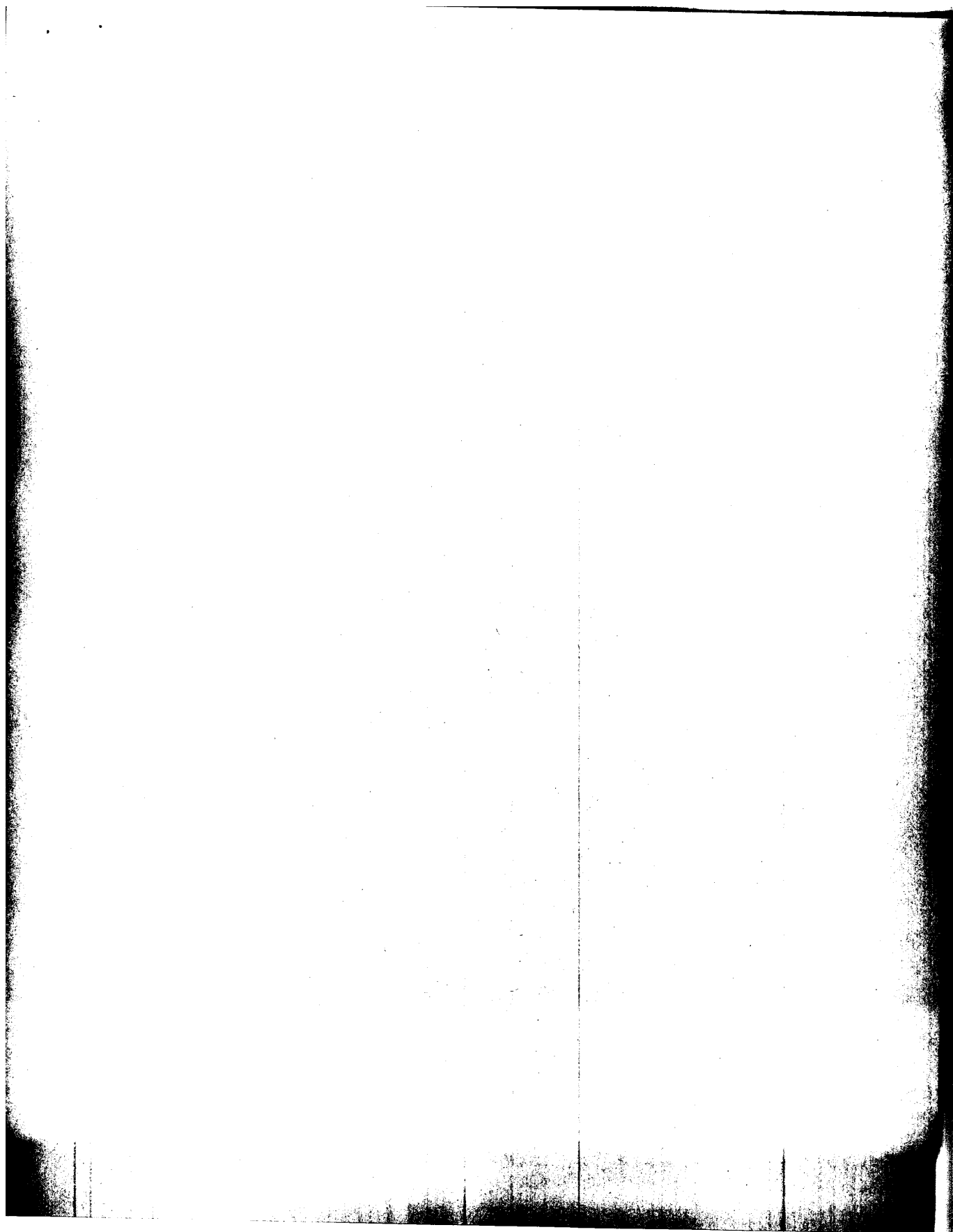
Respectfully submitted,

CHELSEA PROPERTY OWNERS

By: John Broadley
One of its attorneys

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Dated: October 1, 2002



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

Chelsea Property Owners -- Petition
for a Declaratory Order

Finance Docket No. 34259

**MEMORANDUM OF CHELSEA PROPERTY OWNERS IN
SUPPORT OF ITS PETITION FOR A DECLARATORY ORDER**

Chelsea Property Owners ("CPO") has filed a Petition for a Declaratory Order asking to Board to rule on two related questions:

A. Whether the Board would retain jurisdiction over the portion of Consolidated Rail Corporation's West 30th Street Secondary Track (hereinafter the "Highline") which lies south of West 30th Street in Manhattan if the portion of the line north of 30th Street were abandoned under 49 U.S.C. 10903, it being understood that such abandonment would sever the portion of the line south of 30th Street from the remainder of the national rail system; and

B. Whether, if the Board issued a certificate of interim trail use ("CITU") to the City of New York (the "City"), and the City entered into an agreement with Conrail pursuant to the Trails Act (16 U.S.C. 1247(d)), the City could, consistent with the CITU and the Trails Act, demolish the Highline elevated structure north of 30th Street and construct on the right-of-way an 86,000 seat Olympic stadium.

I. JURISDICTION

There is no doubt as to the Board's jurisdiction to entertain a petition for a declaratory order.. The Administrative Procedure Act, 5 U.S.C. 554(e), authorizes an agency, in its discretion, to issue declaratory orders to eliminate a controversy or remove uncertainty. The

Board has authority under 49 U.S.C. 721 to conduct such a proceeding. *Rymes Heating Oils, Inc. -- Petition for Declaratory Order*, STB Finance Docket No. 34098, 2001 STB Lexis 987 (Dec. 31, 2001).

II. THE PETITION SEEKS RESOLUTION OF A LIVE CONTROVERSY WITHIN THE BOARD'S JURISDICTION WHOSE EARLY RESOLUTION WOULD BE IN THE PUBLIC INTEREST.

Issues regarding the Highline have been before the Board and its predecessor for almost 20 years. The Board has authorized the abandonment of the Highline subject to a surety bond condition to protect Conrail against removal and restoration costs exceeding \$7 million. CPO has reached an agreement with Conrail and affiliated railroads, with the City of New York, and with the MTA which has been incorporated into the Settlement Agreement presented to the Board on August 14, 2002. Conrail and the affiliated railroads have represented to the Board that, if implemented, the Settlement Agreement will meet the surety conditions imposed by the Board at the request of Conrail. The City signed the Settlement Agreement in December 2001.

Demolition of the Highline north of West 30th Street is critical to the City because it has submitted a bid to the United States Olympic Committee to be the United States candidate city to host the 2012 Olympic games. As part of that bid the City has committed itself to the construction of an 86,000 seat Olympic stadium over the 30th Street Rail Yards in a configuration that will require the demolition of the Highline between 30th Street and 34th Street.

The City has become convinced that it can demolish the Highline between 30th Street and 34th Street and at the same time obtain from the Board a CITU and from Conrail a Trails Act agreement that will preserve the Highline and the easements on which the Highline structure is located, south of 30th Street, notwithstanding the severance of that part of the

Highline from the national rail system by the demolition of the northern part of the line. CPO believes that the City's view of the scope of the Board's jurisdiction is mistaken, and that once the Highline south of 30th Street is severed from the national rail system by the demolition of the northern part of the line, the Board will lose jurisdiction over the southern part and with it the ability to issue a CITU. CPO has been unable to persuade the City that this is the state of the law. As a result, the City is now reconsidering its position regarding the part of the Highline south of 30th Street, a reconsideration which may lead the City to breach the Settlement Agreement and unnecessarily prolong the present controversy regarding the Highline.

CPO believes it is in the public interest for the Board to resolve the issues presented in CPO's Petition by the issuance of a declaratory order. The Board's resolution of the legal issues raised in the Petition for a Declaratory Order will facilitate the voluntary resolution of other issues between CPO and the City by agreement. At present, the difference between CPO and the City in their view of the jurisdiction of the Board is an impediment to further progress which the Board can and should remove by the issuance of a declaratory order.

III. THE BOARD'S JURISDICTION DOES NOT EXTEND TO LINES THAT ARE NOT CONNECTED TO THE NATIONAL RAIL SYSTEM.

The abandonment of the Highline north of 30th Street and the construction of an Olympic stadium on the Highline's right-of-way will sever the Highline south of 30th Street from the national rail system. Under such circumstances, the Board will lose jurisdiction over the line which will be *de facto* and *de jure* abandoned and the rail use easements on which the Highline structure is built will terminate pursuant to their terms and/or pursuant to New York law. Under

such circumstances neither the City nor anyone else could obtain from the Board a CITU for the southern portion of the Highline which would preserve the easements pursuant to the Trails Act.¹

In *RLTD Railway Corp. -- Abandonment Exemption -- Leelanau County*, 2 STB 685 (1997) the Board stated that:

It is well settled that neither the ICC nor the Board has jurisdiction over lines that are not linked to and part of the interstate rail system. n.21 See e.g. *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir. 1982). Thus, once the Leelanau Line was severed from the interstate rail network, there was both a de facto and de jure abandonment of that line, and the ICC lost jurisdiction over the property.

The Board's construction of the scope of its jurisdiction and the effect on its jurisdiction of severance of a line from the interstate rail network was affirmed in *RLTD Railway Corp. v. Surface Transportation Board*, 166 F.3d 808, 813 (6th Cir. 1999), where the court held:

The STB's interpretation of the interplay between its responsibilities under the Trails Act and its jurisdiction under 49 U.S.C. 10501 is reasonable. Although the parties cite to no case that deals specifically with a track that has fallen outside the STB's jurisdiction because it has been severed from the national transportation system in some manner other than abandonment, once a line of track has been properly abandoned, the STB loses jurisdiction and cannot issue a trail condition. See *Becker v. STB*, . . . 132 F.3d 60, 62-63 (D.C. Cir. 1997). It is reasonable for the STB to conclude that it loses jurisdiction when a track is no longer part of the interstate rail network and may not issue a trail condition unless it determines that the "over-riding interests of

¹ This is not to say that the City cannot proceed with any plans it has in mind for the Highline south of 30th Street. The City has ample authority to condemn the necessary property interests to accomplish public purposes, provided it meets the compensation requirements of the Fourteenth Amendment. The significant point is that so long as it maintains its plan to sever the Highline at 30th Street, either by construction of an Olympic stadium or another development over the 30th Street yards, the City cannot, *as a matter of law*, use the Trails Act to acquire the Highline south of 30th Street.

interstate commerce require" assumption of jurisdiction. *See Kalo Brick & Tile, 450 U.S. at 320.*

* * *

. . . Here, the Leelanau Line is not presently part of the interstate rail system. Giving due deference to the STB's interpretation of its empowering statute, we cannot say that the STB erred in its judgment that it loses jurisdiction over a line once it becomes severed from the interstate rail system so that it may not issue a trail condition.

Thus, if the Highline south of 30th Street were severed from the national rail system by abandonment and demolition of the line north of 30th Street as the City proposes, the Board would lose jurisdiction over it and the line would be *defacto* and *de jure* abandoned.

IV. THE CONSTRUCTION OF AN 86,000 SEAT OLYMPIC STADIUM ON THE HIGHLINE RIGHT OF WAY WOULD NOT BE CONSISTENT WITH THE TRAILS ACT.

One alternative to the legal abandonment of the Highline north of 30th Street that the City is considering is to seek the issuance of a CITU for the entire Highline both south and north of 30th Street and then to proceed to demolish the Highline structure north of 30th Street and build an Olympic stadium on the right-of-way. As the Board will recognize, however, this approach is entirely inconsistent with the objectives of the Trails Act and would require the conversion of the CITU into an abandonment order.

The principal objective of the Trails Act is to preserve existing railroad corridors for restoration of rail service in the future while permitting interim trail use of the right-of-way. Specifically, the Trails Act provides that (16 U.S.C. 1247(d)) (emphasis added):

. . . interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with this chapter, *if such interim use is subject to restoration or reconstruction for railroad purposes*, such interim use shall not be treated, for purposes of any law or rule of law as

an abandonment of the use of such right-of-way for railroad purposes. . . .

The Trails Act thus retains the right-of-way as part of the interstate rail system, while permitting its interim use as a trail. In its regulations the Board has spelled out what actions the railroad may take with respect to the line pursuant to the authority of the Trails Act that would otherwise be precluded by the railroad's common carrier obligation. Specifically, the regulations provide (49 CFR 1152.29(c):

(1) . . . the Board will issue a CITU to the railroad and to the interim trail user for that portion of the right-of-way to be covered by the agreement. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking

(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 railroad can thus take up the rail and other track materials, it can permit the use of the right-of-way as a trail, and it can convey the right-of-way to a person for trail use who agrees to undertake financial and managerial responsibility for it and who recognizes that the right-of-way is subject to restoration of rail service. Nothing in the Trails Act or in the STB's regulations authorizes either the railroad or an acquirer of the line under the Trails Act to impose any impediment to the resumption of rail service on the line other than that necessarily inherent in the termination of trail use and the restoration of the track structure itself.

In its decision adopting the railbanking regulations, the Interstate Commerce Commission addressed the use that can be made of right-of-way subject to a CITU (*Rail Abandonments -- Use of Rights-of-Way as Trails*, 2 I.C.C. 2nd 591 (1986)) (emphasis added):

[W]e see no reason why the development of non-trail activities or structures on or around the right-of-way should be restricted, as long as they are consistent with interim trail use, rail banking, and future restoration of rail service ***Any facility necessary to maintain the integrity of the corridor and rail bank must be preserved consistent with the purposes of the amendment.***

It is difficult to find any argument to support of the proposition that the demolition of the Highline's elevated structure and the construction of an 86,000 seat Olympic stadium across its right-of-way would be consistent with future restoration of rail service on that line.² Where a corridor is on an elevated structure as is the Highline, that structure clearly qualifies as a "facility necessary to maintain the integrity of the corridor" and must be preserved.

Moreover, the construction of an Olympic stadium obstructing the right-of-way would be inconsistent with use of that part of the Highline as a trail and would itself be a termination of trail use requiring the City to surrender its CITU for cancellation. See 49 CFR 1152.29(c)(2). The Commission recognized that a right-of-way preserved under the Trails Act may be used for public purposes *in addition* to its use as a trail, see *Baltimore & O. R.R. -- Abandonment and Discontinuance of Service in Montgomery County, MD*, ICC Docket No. AB-19 (Sub-No. 112) (February 22, 1990) (use of right-of-way for light rail in addition to trail purposes is not inconsistent with the Trails Act.) Neither the Board nor the Commission has ever sanctioned the use of a right-of-way or a portion of a right-of-way for a purpose that is totally inconsistent with and precludes its use as a trail, such as the construction of a stadium.

² The City's plans for an Olympic stadium are clearly shown by Mr. Sarini's Verified Statement, Exhibit 6, p. 41. The Olympic stadium effectively fills the area where the Highline now makes its loop and descent. Mr. Sarini's Verified Statement is Exhibit A to CPO's Opposition to FHL's Petition to Reopen.

The Board's approach to the issue of the uses that can be made of a right-of-way for which a CITU has been issued is entirely consistent with its views of the obligation of owners of rail lines. The owner of a line of railroad is subject to a common carrier obligation and cannot willfully take any action with respect to the line that would interfere with the railroad's ability to meet its common carrier obligation. *See Maine Dept. of Trans. -- Acquisition Exemption -- Maine Central Railroad*, 8 I.C.C.2d 835 (1991). In the case of a railbanked line, the CITU authorizes the railroad to take certain limited actions which, in the absence of the CITU, would be inconsistent with its common carrier obligations, such as the removal of rail, ties and materials from the line. The CITU does not authorize the railroad or any successor to take actions that would preclude restoration of rail service, for the good reason that the right-of-way remains subject to restoration of the common carrier obligation.

The demolition of a four-block segment of the Highline north of 30th Street and the construction on the right-of-way of an 86,000 seat Olympic stadium obstructing the entire right-of-way would effectively preclude restoration of rail service on the line and thus would be inconsistent with both the residual common carrier obligation on the line and with railbanking. It is not within the scope of actions permitted by a CITU.

V. THE HIGHLINE FACILITY CANNOT FEASIBLY BE RELOCATED NORTH OF 30TH STREET.

One alternative the City is considering is to provide an "alternate facility" to carry the Highline from its elevated point at 30th Street and Tenth Avenue to the 34th Street Amtrak cutting which is at grade. A railroad and the entity wishing to build on the right-of-way can relocate the right-of-way, essentially providing the railroad with an alternate route. If this is done without effect on shippers, it does not need STB approval. *See City of Detroit v. Canadian*

National Railway, 9 I.C.C. 2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. I.C.C.*, 59 F.3d 1514 (D.C. Cir. 1995).

The City is not considering the actual purchase and construction of an alternate right of way, but a "promise" that in the future, if rail service is to be restored, it will provide a right-of-way necessary to connect the Highline to the national rail system. As a general matter the Board has not accepted promises to create rights-of-way in the future as equivalent to having such rights-of-way in place now, even where there may be a contractual right to do so, or the power to do so through eminent domain. In *RLTD Railway Corp. -- Abdt Exemption -- Leelanau County*, 2 STB 685 (1997) the Board expressly rejected basing its continued jurisdiction over a severed rail line on future conduct:

It would be inappropriate for us to assert continuing jurisdiction over the property based on the mere physical possibility that an intermodal terminal could someday be constructed on it. n.22
n.22 If we were to assert jurisdiction on such a remote possibility, there could never be any single-state segments that would not be subject to our jurisdiction, and the jurisdictional limitations of 49 U.S.C. 10907(a) and (b)(1) of the Interstate Commerce Act and sections 10906 and 10501(a)(2)(A) of the ICCTA would be rendered a nullity.

Moreover, permitting the City to demolish the Highline north of 30th Street and to maintain the remaining line's connection with the national rail system through a promise to provide a right-of-way and rebuild a structure at some time in the future is inconsistent with cases dealing with a railroad's obligation to maintain its ability to provide common carrier rail service. Those cases require the railroad to retain a current permanent and unconditional easement to access, maintain, operate and renew the line, *Maine DOT, supra*, they do not permit even a limited intrusion on the ability of the railroad to perform rail service.

A similar argument was made in *RLTD Ry.* The Board's decision was affirmed by the court of appeals (*RLTD Ry. Corp. v. Surface Transportation Board*, 166 F.3d 808, 813 (6th Cir. 1999)):

Alternatively petitioners argue that the STB erred in its judgment that the Leelanau Line was severed from the interstate rail system. They claim that RLTD has the power of eminent domain under Michigan law, so when the need arises, the connection to the interstate line may be had. However, as the STB noted in its October Decision, if it assumed jurisdiction on such a basis "there could never be any single-state segments that would *not* be subject to [STB] jurisdiction, and the jurisdiction limitations" discussed above would never come into play. . . . The STB found as a jurisdictional fact that the Leelanau Line was outside its jurisdiction, and the court must sustain this finding so long as there is "substantial evidence" to support it. . . . Substantial evidence supports the STB's determination.

The City could, of course, provide a substitute facility to carry the Highline from its elevated position at 30th Street and Tenth Avenue to grade level at 34th Street where the Highline enters the Amtrak cutting. The facility would have to be a true alternative that would permit restoration of rail service reasonably comparable to that of which the present structure is capable.

There is little doubt that FHL will argue that such a substitute facility is both feasible and achievable. CPO respectfully requests that the Board require FHL to demonstrate the specifics of such a substitute facility and to provide some expert opinion of its feasibility. If FHL could propose such an alternative, it would be the first to do so in the face of four prior planning studies over the last 15 years for the development of the West Side Yards, all of which contemplated the demolition of the Highline without any substitute facility.

The first such plan was the Master Plan for the Caemmerer West Side Yard prepared in August 1989 for the Metropolitan Transportation Authority by a team led by Beyer Blinder Belle, the architect who are now on the team preparing the Friends feasibility study that the City is now awaiting. This plan specifically required demolition of the Highline. This plan was explained in the affidavit of Robert Paley, the MTA Project Coordinator on that project, in the original abandonment application submitted to the ICC on October 27, 1989, Mr. Paley noted that "the Highline poses a major structural barrier to MTA's development plans", he further noted that "the Highline is not compatible with MTA's proposed uses for the former Metal Purchasing Building." Finally, Mr. Paley concluded that "[I]n sum, if the Highline is not removed, MTA will not be able to develop the site to its full potential". Interestingly, neither Beyer Blinder Belle nor the MTA were able to propose a feasible alternative which permitted the Highline to be relocated but instead the MTA resorted to 15 years of litigation and participated in negotiating the current Voluntary Abandonment Agreement because it saw no other alternative for the development of its site.

The second study was done by the New York City Planning Department entitled the West Side Transitway Study which also found that the use of the Highline for future mass transit development was not feasible. The third study, also done by the City Planning Department in 2001 for the Development of the Far West Side does not include the Highline at all.

Finally, the New York 2012 study specifically shows the 86,000 seat Olympic stadium over the current easement area. A close examination of the site plan yields no readily ascertainable substitute facility for the Highline. In fact, it shows a beautiful development with

no sign of the Highline and no possible area where the elevated Highline platform at 30th Street could be brought to grade at 34th Street to connect up with the national rail system.

CPO is not arrogant enough to say that since we cannot see an alternative that one does not exist. We can say, however, that since none of the planners in the past could conceive of a feasible alternative, the existence of such an alternative would have to be proven with some certainty. We have attached hereto the Verified Statement of Jerry Gottesman, Chairman of Edison Properties, LLC, who outlines in more detail the serious impediments to the provision of a substitute facility connecting the Highline at 30th Street and Tenth Avenue with the national rail system at the Amtrak 34th Street cutting.

CONCLUSION

For the foregoing reasons the Board should grant CPO's Petition for a Declaratory Order and initiate a proceeding to resolve the issues raised therein.

Respectfully submitted,

CHELSEA PROPERTY OWNERS

By: John Bradley
One of its attorneys

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Fax 202-333-5685

Dated: October 1, 2002

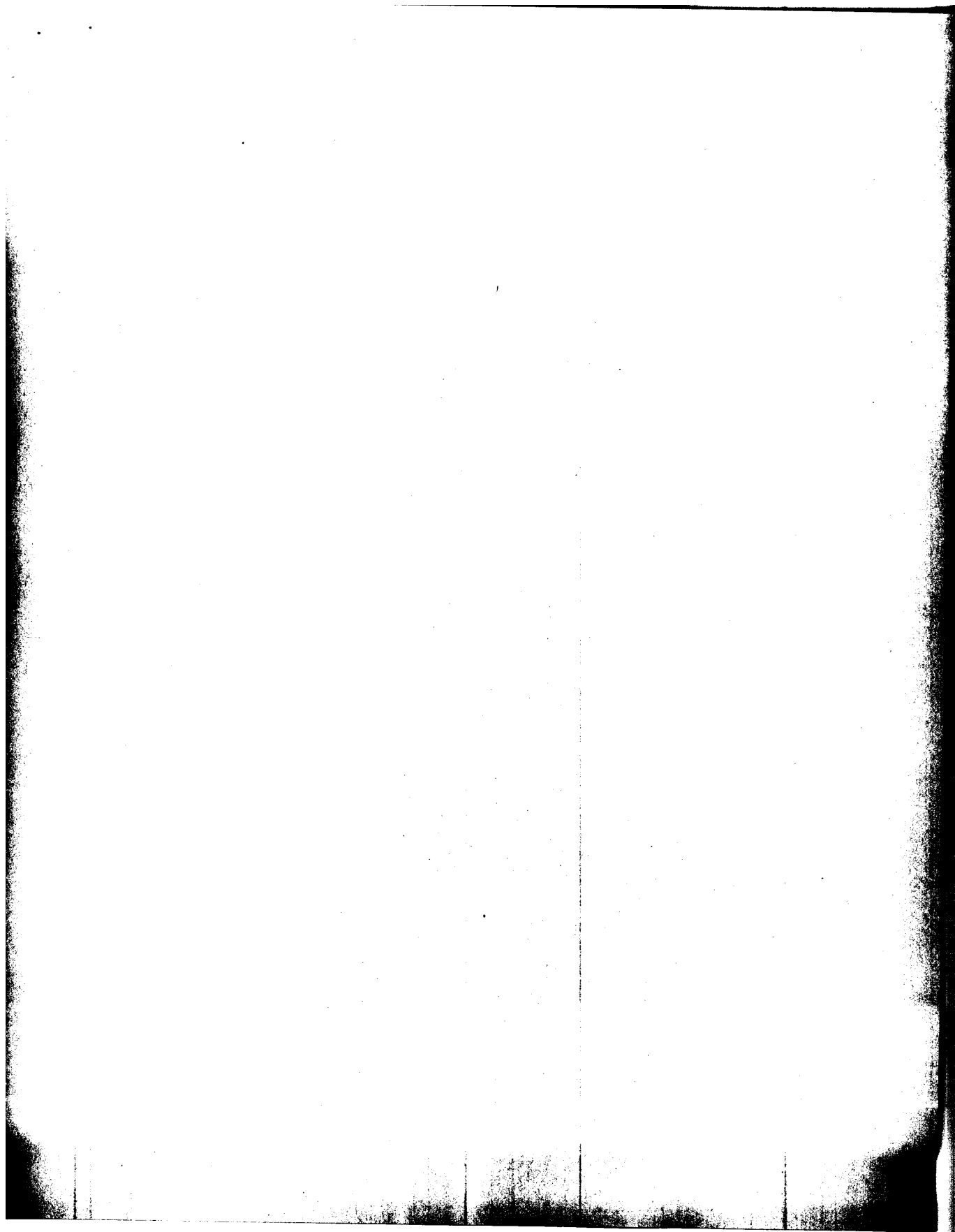
CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2002 I served a copy of the foregoing PETITION FOR A DECLARATORY ORDER and MEMORANDUM IN SUPPORT OF PETITION FOR DECLARATORY ORDER on the parties to AB-167 (Sub-No. 1094)A, *Chelsea Property Owners -- Abandonment -- Portion of Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* and on Friends of the Highline by causing a copy thereof to be deposited in the United States mails, postage prepaid, addressed to counsel for such parties listed below:

Counsel	Represents
Elizabeth Bradford 655 West 34 th Street New York, NY 10001-1188	(NYCCDC)
John F. Guinan New York Department of Transportation Albany, NY 12232	(NYDOT)
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Gail Rubin 100 Church Street Room 3-158 New York, NY 10007	(City of New York)
Anthony P. Semancik 347 Madison Avenue New York, NY 10017-3706	(MTA)
Kimberly Egan Covington & Burling 1201 Pennsylvania Avenue NW Washington, D.C. 20004	(FHL)

Dated: October 1, 2002





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

Chelsea Property Owners Association -- Petition
for a Declaratory Order

)
) Finance Docket No. 34259
)
)

VERIFIED STATEMENT OF JERRY GOTTESMAN

I am Jerry Gottesman, Chairman of Edison Properties, LLC, and a founder of Chelsea Property Owners, an association of property owners affected by the Highline on the West Side of Manhattan. On September 23, 2002, I attended a meeting with Deputy Mayor Dan Doctoroff and Senior Policy Advisor, Laurie Blatchford, in which the Deputy Mayor acknowledged that everyone wants the Highline removed between 30th Street and 34th Street. The Deputy Mayor did not seem to understand the practical difficulties in maintaining a connection to the national rail system.

1. I am submitting this Verified Statement to explain to the Board some of the obstacles to finding and constructing an alternate facility to the Highline to connect the portion of the Highline south of 30th Street in Manhattan to the national rail system at the Amtrak cutting at 34th Street. For either the City of New York (the "City") or for Friends of the Highline ("FHL") those obstacles would be formidable.

2. The first problem is that neither the City nor FHL owns any of the property through which a reconstructed Highline would operate. The land between 33rd Street and 34th Street is owned by the Jacob Javits Convention Center, and the land between 30th Street and 33rd Street is owned by the Metropolitan Transportation Authority ("MTA"), both agencies

controlled by the State of New York. The Convention Center portion of the property is the site of its marshalling yards, which it wants to expand into a permanent resource building. The Convention Center is a signatory to the Settlement Agreement and has no interest in allowing the existing Highline to remain or some new alternative being built to adversely affect its own plans for a new building.

3. The MTA portion of the site contains the Caemmerer Yards of the Long Island Railroad, a major operating facility which the MTA seeks to expand on to land it already owns but has not yet developed on the south side of the site adjoining 30th Street. According to the MTA's Master Plan for the Caemmerer Yards, the present rail yard was built anticipating a platform above the track level. This has consequences for safety, productivity, ventilation, fire protection, smoke exhaust and lighting. It will be so complicated providing these resources that fitting a Highline connection into the space below the platform would be impossible.

4. Over the years, I have reviewed the MTA's submissions favoring abandonment. The MTA's conclusion is that the elevation of the entire platform would have to be increased, destroying the platform's connection with the surrounding streets. Based on the stated requirements of the developments proposed for the Convention Center and MTA sites, it would be extremely difficult and expensive to design a rail route through the 30 foot grade difference (from the Highline elevation at 30th Street to grade at 34th Street and Eleventh Avenue) and all of the conflicting demands of the platform over the MTA yards and the Convention Center's new building. In my opinion, designing and building a Highline replacement route through two other major developments, when there is little likelihood that there will ever be train traffic on the route, will never be approved considering the expense and design complications for the other facilities.

5. The attitude of the two State agencies that own the vast area between 30th Street and 34th Street to retention of the Highline is illustrated by the fact that no development proposal since 1989 has included retention of the Highline. In the past fifteen years there have been two concrete proposals for development of this land, and the Highline has been included in neither. The first such plan was the MTA's Master Plan for the Caemmerer West Side Yard, the second is the present Olympic stadium proposal made by New York 2012. I will discuss these two plans in more detail below.

6. In addition to the two development plans, there have been two other studies of this area, the City Planning Department's Transitway Study and the City Planning Department's Far West Side Study. Excerpts from both were included in CPO's Reply to FHL's Petition to Reopen the abandonment proceeding, AB-167 (Sub-No. 1094)A. The Transitway study found no feasible transit use for the Highline, and the Far West Side Study did not see a role for the Highline as contributing to the development of the Far West Side -- it didn't mention the Highline at all.

7. The MTA's Master Plan for the Caemmerer West Side Yard is particularly important. On October 27, 1989, CPO submitted the Verified Statement of Robert Paley, the Project Coordinator for MTA's Master Plan, in support of its abandonment petition for the Highline. Several sections of Mr. Paley's Verified Statement are worth quoting as they illustrate the interests of MTA, which are the same today as they were in 1989:

(7) In addition, since the completion of City Planning's Transitway Study, MTA has finished work on a Master Plan for the expansion and development of its Caemmerer Yard property between 10th and 12th Avenues and 30th and 33rd Streets. A copy of MTA's Master Plan is submitted herewith as Exhibit 3. The chief function of the Caemmerer Yard is to store and maintain passenger cars used on the LIRR. However, the Yard also was specifically designed to accommodate air rights development over it. MTA's

Master Plan proposes a mixed use development that will achieve a broad range of public benefits including new housing, parks and waterfront recreation

(8) The Highline, which traverses much of the perimeter of the Yard, poses a major structural barrier to MTA's development plans. With the Highline in place, the platform over the Yard on which the new improvements will be build, and the supports for the platform would have to be constructed around the Highline in a manner that would inefficiently utilize space, limit the range of potential development options, and greatly increase construction costs. The platform decking would have to be constructed at an elevation at least thirty feet higher than would be required if the Highline were removed. Consequently, there would be a severe grade separation between the platform and both the existing street pattern and the planned pedestrian esplanade along the Hudson River, a severe negative impact from an urban planning as well as a construction cost and marketing perspective. . . .

(11) Finally, the Highline is not compatible with MTA's proposed uses for the former Metal Purchasing Building, a large former warehouse building situated on nearly the entire length of West 30th Street between 10th and 11th Avenues. The Highline runs over and through this building. Using its eminent domain powers, MTA acquired the building (exclusive of the Highline) All of MTA's long term transportation and development plans for the Metal Purchasing site, including the potential use of the site for a new commuter bus storage and maintenance depot, require that both the building and the Highline be demolished and removed. Thus, the expansion and development of all portions of Caemmerer Yard for railroad and other transportation-related purposes necessitate elimination of the Highline.

(12) In sum, if the Highline is not removed, MTA will not be able to develop the site to its full potential, and the development will be more costly, less marketable, and less attractive from a planning perspective, thereby reducing substantially the project's revenues that MTA will use to support mass transit under its state legislative directive. . . .

8. The New York 2012 proposal for an 86,000 seat Olympic Stadium does not include the Highline. In CPO's Reply to FHL's Petition to Reopen the Abandonment, we attached a section of New York's application to the United States Olympic Committee. *See*

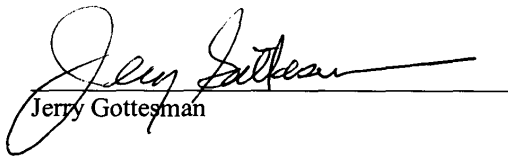
Sarini V.S. Exhibit 6. The design of the Stadium is shown on Page 41 and the cross-section on Page 42. I have attached as Exhibit 1 to this Verified Statement an enlargement of the cross-section of the Stadium. It is clear from Exhibit 1 that the rail yard is at the lowest level, with a stadium level just above. The Highline is gone. Any attempt to construct the Olympic Stadium

over the present Highline structure would require raising the platform and the level of the football field by at least 30 feet with all the adverse consequences on cost and alignment with local streets discussed by Mr. Paley in his 1989 Verified Statement. The plans for the Olympic stadium submitted to the USOC presuppose the Highline is demolished.

9. Because none of the four concepts for the use of the land between 30th Street and 34th Street provided for a connection of the Highline south of 30th Street to the national rail system, and because the owners of the property north of 30th Street have no interest in retaining or replacing the Highline, there is no realistic alternative facility which would connect the Highline south of 30th Street to the national rail system thus retaining its eligibility for the issuance of a certificate of interim trail use. As a result, the Board should issue a declaratory judgment as requested by CPO.

DECLARATION UNDER 28 U.S.C. 1621

I, Jerry Gottesman, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on September 30, 2002.


Jerry Gottesman

Olympic Stadium: Cross-Section

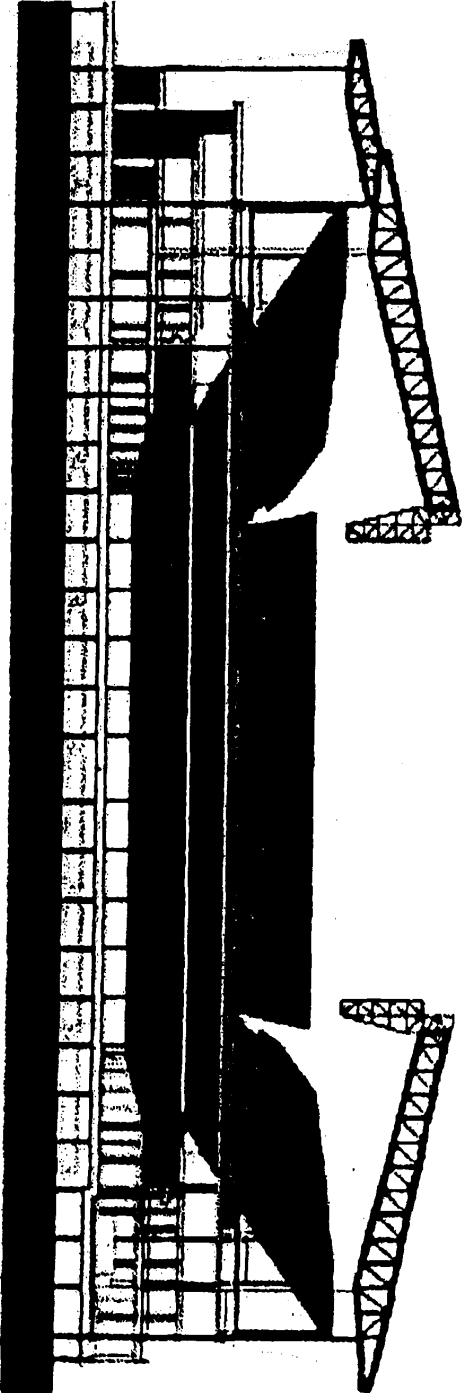


Exhibit No. 1

Cross section of the Olympic Stadium. The roof, as shown, covers the seats but leaves the entire track open to the sky. The railway

is shown at the lowest level, with the football field just above. The Olympic track is above the football field, and seating begins at the

athletics field level. Olympic Family (press box levels are shown at the middle and upper concourses.

Cross-Section

-  Competition Area
-  Athletes
-  Olympic Family/MP
-  Media
-  Spectators