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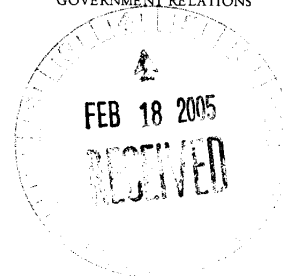
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February 18, 2005

213358



Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: Forty Plus Foundation/Manhattan Central Railway Systems, LLC - - Feeder
Line Application - - New York, NY, Finance Docket No. 34606**

Dear Sir:

I am enclosing an original and ten (10) copies of the Reply of the City of New York, NY to Appeal of Forty Plus Foundation and Manhattan Central Railway Systems, LLC in the above referenced case. Please date stamp the extra copy of this document and return to our messenger. In addition, we are enclosing a 3.5 inch diskette with this document.

Please let me know if you have any questions.

Sincerely,

Charles A. Spitulnik

Enclosure

cc: Joseph H. Dettmar, Esquire
All Parties of Record

213358

FEB 18 2005
RECEIVED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34606

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

ENTERED
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**REPLY OF
THE CITY OF NEW YORK, NY
TO
APPEAL OF FORTY PLUS FOUNDATION AND
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC**

The City of New York, NY (“the City”) hereby submits its reply to the Notice of Appeal of the Board’s Rejection of MCRS’ Feeder Line Application submitted to this Board by Forty Plus Foundation and Manhattan Central Railway Systems, LLC (“Forty Plus”) on February 2, 2005 but not accepted for filing until February 8, 2005 (the “Forty Plus Appeal”). The Forty Plus Appeal presents no basis for altering the previous rejection of the Feeder Line Application because it is incomplete, and the Board should promptly deny the appeal.

BACKGROUND

In a decision served in this proceeding on January 25, 2005 (the “*January 25 Decision*”), this Board¹ rejected the application filed by Forty Plus Foundation/Manhattan Central Railway Systems, LLC (the “Forty Plus Application”) under the Feeder Railroad Development Program. The Board concluded that MCRS had “failed to establish that it is a financially responsible person able to cover the expenses associated with providing rail service over the line for the first 3 years of operation.” *January 25 Decision* at 4-5. The Board presented two main bases for its

¹ The decision was issued on behalf of the Board by the Director of the Office of Proceedings acting pursuant to authority delegated by the Board.

conclusion: (1) although Forty Plus had referred to several potential sources of income, “[t]he mere existence of those programs does not present a committed source of funds for Manhattan Central Railway System (“MCRS”), and MCRS has failed to show that funding would be likely for its proposal,” *id.* at 4; and (2) the operating plan that Forty Plus presented was “sketchy at best”, failing to provide any “contracts, affidavits or other verification to support its contention that there are shippers along the Highline that currently desire service.” *Id.* The Board also noted that Forty Plus had failed to demonstrate that it has the financial means to comply with the requirements of the relevant easements that could require an abandoning owner to demolish the viaducts when the easements terminate. *Id.*

Forty Plus filed an appeal. Because it has not satisfied the criteria for an appeal, and has not provided any information that would give the Board a reason to alter its earlier conclusion, the appeal should be rejected.

ARGUMENT

I. THE REJECTION OF THE FORTY PLUS APPLICATION WAS NEITHER AN ERROR OF JUDGMENT NOR AN ACTION THAT CREATED MANIFEST INJUSTICE

The Board’s regulations specify the two unusual circumstances in which this Board will grant appeals of decisions made by employees acting pursuant to authority delegated by the Board, and the Forty Plus Appeal satisfies neither of them. Because the *January 25 Decision* was manifestly correct and not an error in judgment on the part of the Director of the Office of Proceedings, and because there is no manifest injustice created by putting Forty Plus to the task of satisfying the Board’s regulations, the appeal should be denied.

The regulations specify that appeals from decisions of employees acting under authority delegated to them pursuant to 49 C.F.R. § 1011.6 will be acted upon by the entire Board. 49 C.F.R. § 1115.1(c). Further,

Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

Id. No exceptional circumstances exist here.

The *January 25 Decision* reported on the Director's review of the Forty Plus Application for compliance with the basic requirements of the regulations in Part 1151. That *Decision* concluded, with good reason, that the Application did not justify a finding that Forty Plus and/or MCRS is a "financially responsible person" as defined in the applicable regulations. This is no error in judgment - - it represents an accurate assessment of an application that is long on conjecture and hypothesis, but short on facts.

Moreover, there is no "manifest injustice." The concept of manifest injustice is difficult to define - as with obscenity, a decision maker is expected to recognize it when he or she sees it. One court, recognizing that difficulty has said that manifest injustice occurs where a decision is "dead wrong". *Niagara Mohawk Power Corp., et al. v. Stone & Webster Engineering Corp., et al.*, 1992 U.S. Dist. Lexus 7721 at *63 (Docket No. 88-CV-819, S.D.N.Y. 1992) (citing *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989), where the Court said that "to be clearly erroneous a decision must ... strike us as wrong with the force of a five week old, unrefrigerated dead fish.") Where a party elects to pursue a course of action, and could have taken steps to avoid the consequences of that pursuit but chooses not to, the consequence of that choice cannot be considered to create "manifest injustice". See, e.g., *Ciralsky v. C.I.A.*, 355 F.3d 661, 665 (D.C. Cir. 2004).

Here, Forty Plus elected to submit an application that provides no facts that would allow the Board to reach a conclusion that it or MCRS is a “financially responsible person”. It submitted a letter of support from the Morristown and Erie Railroad (“M&E”), but provided no factual statement of the extent of M&E’s willingness to provide financial support to the operating venture. The startling suggestion by Forty Plus that the regulations did not provide sufficient explanation that facts rather than rhetoric are required does not provide a valid justification for failing to comply with the basic evidentiary requirements of 49 C.F.R. Part 1151. Having realized a result - - the rejection of its application as incomplete - - that is a logical consequence of its decision to provide conjecture rather than verifiable facts, the Director’s decision cannot be said to have created a manifest injustice.

II. THE FORTY PLUS APPEAL INCLUDES A HOST OF INACCURATE STATEMENTS.

In an attempt to clarify the record, and to respond to the numerous misstatements or errors in the Forty Plus Appeal, the City in this section will set forth the statements to which a response or a correction is required, and will then present the response or correction.

1. Statement: “In that decision, the Director accepted the Forty Plus Foundation/Manhattan Central Railway Systems, LLC – Feederline Application ...” Forty Plus Appeal at page 3 of 14.

Response: The *January 25 Decision* represents a rejection, not an acceptance of the Application. Although the pleading may have been accepted for filing in the docket upon the belated payment of a filing fee, the *Decision* specifically rejects the Application as incomplete.

2. Statement: “... the Board’s finding last year [2004] that a [sic] intended OFA was essentially *dissolved* in this case due to elapse [sic] statutes (which would also govern the availability of a CITU) ...” Forty Plus Appeal at page 4 of 14.

Response: The Board denied, not dissolved, the Forty Plus request for an extension of the period prescribed in the regulations for filing an OFA, finding that the time for filing an OFA “has long expired.” STB Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners - - Abandonment - - Portion of the Consolidated Rail Corp.’s West 30th Street Secondary Track in New York, NY, slip op.* Decision (Service Date August 13, 2004) at 3. The regulations that govern a CITU specifically contemplate submission of late filed trail use statements. 49 C.F.R. §1152.29(b)(3). The regulations that govern Offers of Financial Assistance are quite specific, on the other hand, that the application/offer must be submitted by no later than 10 days after the Board issues an order approving a proposed abandonment. 49 C.F.R. §§1152.26(a), 1152.27 (c)(1)(B).

3. Statement: “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.” Forty Plus Appeal at pages 4-5 of 14.

Response: This is not correct. The regulations require an applicant to acknowledge at the time that it files its application that the document is incomplete and to submit a discovery request at the same time that it submits the incomplete document. *See* 49 C.F.R. §1151.2(d). The problem for Forty Plus here, moreover, is that the information it requires to submit a complete application is not in the hands of the railroads. If Forty Plus requires information about the cost of rehabilitation, the sources and availability of funds to complete that work, and the likely shippers who will use this line, that information is not “primarily or exclusively within the personal knowledge of the owning carrier.” *Id.* To the best of the City’s knowledge, neither CSX nor Conrail has operated a train over this line for over 20 years, neither carrier has sought to bring traffic to the line, and neither carrier has prepared a recent estimate of the cost of

rehabilitation of the line to the extent that would be required to permit resumption of rail service.

Forty Plus and MCRS, as the proponents here, have the burden of compiling that information.

4. Statement: “In light of these contrived impediments This uncooperative conduct arguably 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*”. Forty Plus Application at page 5 of 14 (emphasis in original).

Response: Forty Plus cannot lay the blame for its incomplete application at the feet of any entity other than itself. Forty Plus, not the railroads, has described a universe of shippers that are awaiting return of rail service on this corridor. Forty Plus, not the railroads, envisions an operating scenario to serve these shippers that involves the use of imaginative new technology. The regulations quite specifically require the submission of a host of information “in the form of verified statements.” 49 C.F.R. §1151.3(a). The Board’s decision to reject the application because it provides virtually none of that information was correct.

5. Statement: “MCRS, pursuant to 49 C.F.R. 1151.2(d)(1), respectfully request [sic] that the Board finds this application “incomplete” and allow MCRS to corresponding file a request for discovery under 49 C.F.R. 1114 to obtain needed information from CSX”

Response: The *January 25 Decision* already grants the first part of this request. With respect to the second, Forty Plus must comply with the regulations and prepare an application to the best of its ability, omitting but seeking discovery only of that information that is “primarily or exclusively within the personal knowledge of the owning carrier.” 49 C.F.R. §1151.2(d)(1). To date, Forty Plus has identified no such information. If it had, no further approval from this Board is required.

6. Statement: “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 continue rail services where a carrier (**MCRS**) has expressed a desire to continue or establish operations and has taken reasonable steps to acquire traffic.”

Forty Plus Appeal at pages 6-7 of 14 (emphasis in original).

Response: The Board’s responsibility to permit an offeror to purchase a line slated for abandonment and preserve rail service is triggered when the offeror demonstrates that it is a financially responsible person. As previously noted, Forty Plus has failed to do that. Furthermore, if Forty Plus or MCRS has taken “reasonable steps to acquire traffic”, Forty Plus has not shared any of the information about those steps with this Board or the public.

7. Statement: “...[T]he 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*.” Forty Plus Appeal at page 7 of 14.

Response: To clarify Forty Plus’s confusion, the City is well aware that the Railroads are at this time the title holders to the easements and other interests in property that underlie the current rail infrastructure, and that other individuals or other entities own the underlying fee with respect to the properties that are burdened by those easements. The City is aggressively pursuing protection of the interests of its citizens in bringing to fruition a plan that will provide those citizens with a recreational trail and other amenities, while at the same time preserving the rail corridor for potential restoration in the future. The applicable regulations require notice to County and State governments where the line is located, *see* 49 C.F.R. §1151.2(a)(3), (4), and the City is in the same position as those governmental entities. That is, the notice is required to allow the governments to assert the interests of the public within their jurisdictions, and the City

is playing that role here. This is the City's opportunity to assert that interest – failure to do so at this stage would prevent it from participating in future proceedings where its interests might be affected. *See Baros, et al. v. Texas Mexican Ry. Co.*, Docket No. 03-41646, ___ F.3d ___, 2005 U.S. App. LEXIS 2495 at *31 (5th Cir., Feb. 9, 2005) (“It is incumbent upon an interested person to act affirmatively to protect himself in administrative proceedings and ... such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated.”)

8. Statement: “...Board policy encourages Feederline applications and has a statutory duty to 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.” Forty Plus Appeal at pages 7-8 of 14 (emphasis in original).

Response: There are no regulations that preclude interested persons from participating in Feeder Line cases. To the contrary, and as is the case in all STB proceedings, the Board’s regulations encourage participation by all persons with an interest in a matter in order to ensure that the Board hears comments from all persons affected by a proposed transaction.

9. Statement: “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.” Forty Plus Appeal at page 8 of 14 (emphasis in original).

Response: The regulations speak for themselves. The information that Forty Plus provided in its application does not, as the Director found in the *January 25 Decision*, provide sufficient information to support a finding that applicant is a financially responsible person. As the City has noted in its reply to the Forty Plus Application, M&E states that it will “collaborate

with your company to reactivate” the High Line, but the letter includes no indication that M&E will underwrite any portion of the cost of rehabilitating, operating or maintaining the railroad.

10. Statement: “...the ability to support this *miniscule* 1.45 line in the heart of Manhattan - - is a task of no difficulty at all for the next three years.” Forty Plus Appeal at page 8 of 14 (emphasis in original).

Response: There is no way to confirm or disagree with this statement because Forty Plus has provided no verified estimate of the rehabilitation cost or of the sources of funds to accomplish that rehabilitation. There is no projection of traffic volumes or of ongoing maintenance costs. As a result there is no projection of the level and cost of maintenance that will be required to support that operation. That being absent, there is also no explanation of the source of funds to accomplish that operating support. The regulations require verified facts. The Forty Plus Application provided none and its rejection was correct.

11. Statement: “The unfortunate lack of present shippers ...” Page 8 of 14.

Response: The regulations do not focus solely on present shippers. Forty Plus in its initial application attempts to create the impression that the shipping public is clamoring for return of this line to service, now, and that shippers will appear. The regulations look for a factual explanation of how the operations will be conducted and sustained for three years. The *January 25 Decision* correctly notes the absence of that explanation.

12. Statement: “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.” Forty Plus Appeal at page 9 of 14 (emphasis in original).

Response: There is nothing ambiguous, vague or misleading about the Board's regulations. They require facts to be included in verified statements (49 C.F.R. §1151.3(a)). They require that the applicant demonstrate - - it is true that the regulations do not say that facts rather than hypothetical scenarios are required, but demonstrate is commonly understood to mean prove using facts² - - that the applicant can both pay for the line and cover expenses associated with providing service over the line. *Id.* They require an operating plan. *Id.* at §1151.3(a)(7). An operating plan describes the proposed operation. A carrier typically proposes to construct an operation based on traffic it expects to move. The projection of traffic to be moved is based most often on an understanding of demand for services and/or arrangements with customers to ship or receive goods via rail. Forty Plus has provided no facts to support any of these requirements, and the Director was understandably reluctant to accept rhetoric in lieu of facts as satisfying the requirements of the regulations.

13. Statement: "... the Board should allow MCRS a reasonable amount of time to properly complete its application." Forty Plus Appeal at page 9 of 14.

Response: Forty Plus has had over twenty years.

14. Statement: "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." Forty Plus Appeal at page 9 of 14.

Response: To the contrary, abandonment is always an option upon satisfaction of the requirements of 49 U.S.C. §10903. As the related proceeding in Docket AB-167 (Sub-No. 1094)A demonstrates, that abandonment could occur at the behest of either the railroad or of other interested parties. Because abandonment could occur, whether voluntarily or involuntarily,

² According to Webster's New Collegiate Dictionary (1981 ed.), "demonstrate" means "1. to show clearly; 2(a) to prove or make clear by reasoning or evidence; (b) to illustrate and explain esp. with many examples ..."

at any time after a feeder line applicant would acquire the line, the Board is correctly concerned about any applicant's ability to sustain the burden of ownership of the easement, which could include demolition of the structure in the event of termination of the easement as a result of an abandonment.

15. Statement: "... the ICC ruling caps the railroad's liability at \$7 Million."

Response: The 1992 decision caps Conrail's liability at \$7 million. That proceeding involves a proposed adverse abandonment of Conrail's operating authority on this line. The \$7 million grew out of the position of the proponent of that abandonment that the demolition costs would not exceed \$7 million. An abandonment of the interests of a successful feederline applicant would trigger a different proceeding altogether and that \$7 million cap on Conrail's liability would have no relevance whatsoever in a future proceeding involving different parties altogether.

16. Statement: "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!" Forty Plus Appeal at page 10 of 14.

Response: The City has made no offer to commit any funds to support a demolition or a rehabilitation program that Forty Plus or MCRS might imagine would be the recipient of City funds. The City is committed to using its resources to support the transformation of the line that is the subject of this application to recreational and other uses within the context of a Certificate of Interim Trail Use. Lest there be any misunderstanding, there is no reason for this Board to assume that this statement has any element of truth in any respect.

17. Statement: "**Applicant can establish that it is a financially responsible person.**" Forty Plus Appeal at page 10 of 14.

Response: The regulations at 49 C.F.R. Part 1151 inform an applicant as to the facts that are required to prove that it is financially responsible. Forty Plus has not satisfied those requirements. Nothing prevents Forty Plus from gathering and presenting the information it needs to demonstrate its own financial fitness and capacity to sustain an operation for the three-year period required by the applicable regulations.

18. Statement: "Furthermore, the Board should be appraised [sic] that CSX has essentially *commandeered* this "disputed" ...disbursement of MCRS." Forty Plus Application at page 12 of 14 (emphasis in original).

Response: Forty Plus seems to be suggesting that CSX is obligated to offer the same arrangement to Forty Plus as it made in the proposed settlement agreement that was submitted in Docket No. AB 167 (Sub-No. 1094)A. CSX is under no such obligation.

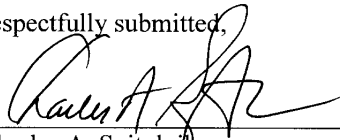
CONCLUSION

Forty Plus has filed an appeal where none was needed. If it wishes to file an application that complies with the Board's regulations, providing facts that address the informational requirements in Part 1151, then it is free to do so. If its goal is to convince this Board that the City has no standing to object to its proposal, it cannot succeed. The City has a clear interest in the outcome of this proceeding and has a right and an obligation to comment at every stage of the proceedings to ensure that its interests are protected. The City clearly has an interest - - its request for a CITU in Docket No. AB No. 167 (Sub-No. 1094)A would be directly and adversely affected by the approval of the application here. Just as the City demonstrated in its response to the Forty Plus Application that there is no substance to the Forty Plus/MCRS proposal, there is no substance either to this purported Appeal. There is no showing of material error - - if anything, the appeal does no more than confirm the Director's statement that Forty Plus and

MCRS have not demonstrated the presence in this proceeding of a financially responsible applicant. There is no showing of manifest injustice. The only injustice here is that Forty Plus is continuing to waste this Board's time and resources and abusing its processes by filing repeated dilatory and unfounded pleadings.

WHEREFORE, and in view of all of the foregoing and of the City's Reply to the Forty Plus Application, the City respectfully requests that the Forty Plus Appeal be denied.

Respectfully submitted,



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Dated: February 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2005, I served a copy of the foregoing
REPLY OF THE CITY OF NEW YORK, NY TO APPEAL OF FORTY PLUS
FOUNDATION/MANHATTAN CENTRAIL RAILWAY SYSTEMS, LLC, by first class mail,
postage prepaid, on:

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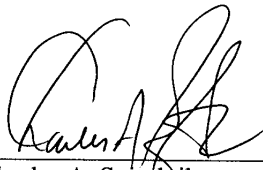
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