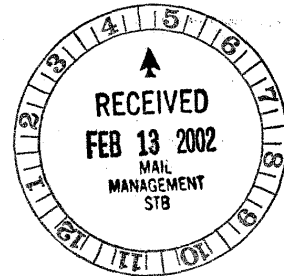


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BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

STB Docket AB-No. 596



NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, ACTING ON
BEHALF OF THE CITY OF NEW YORK, NEW YORK ---
ADVERSE ABANDONMENT OF RAIL LINE AND FACILITIES
OPERATED BY THE NEW YORK CROSS HARBOR RAILROAD, INC.
IN BROOKLYN, NEW YORK

MOTION TO STRIKE
SUBMITTED BY THE
NEW YORK CROSS HARBOR RAILROAD

ENTERED
Office of the Secretary

FEB 14 2002

Part of
Public Record

Respectfully submitted,

John D. Heffner
555 Twelfth Street, N.W.
Suite 950N
Washington, D.C. 20004
(202) 737-4335
Its Counsel

Dated: February 13, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket AB-No. 596

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, ACTING ON
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I. INTRODUCTION

On February 4, 2001, the New York City Economic Development Corporation, acting on behalf of the City of New York, New York ("NYCEDC") submitted its Reply to Protest¹ responding to the protests previously filed by New York Cross Harbor Railroad ("NYCH") and a consortium of seven on-line NYCH customers (the "Local Shippers").² NYCH moves to strike as new

¹ Hereafter the "Reply"

² American Warehouse, Inc., Davidson Pipe Supply Co. Inc., Interdynamics, Inc., Dorann Resources, LTD., Cropsey Scrap Iron & Metal Corp., Franklin Poly Corp., and Midwood Lumber & Millwork Inc.

matter portions of the evidence and argument submitted by NYCEDC in the body of its Reply.

II. BACKGROUND

On December 4, 2001, NYCEDC originally filed its application to abandon railroad tracks and facilities owned by NYCEDC and operated under lease by NYCH. These tracks and facilities include the Bush Terminal Yards and the float bridge facility and related tracks ("the 51st Street Float Bridge") located at the Harborside Industrial Center. The Board issued an order setting the procedural schedule with protests due January 18, 2002, and any reply to protest(s) due February 4, 2002. NYCH and the Local Shippers vehemently protested NYCEDC's application. NYCEDC filed a Reply to which this Motion is directed.

Briefly, NYCEDC asserted in support of its application that NYCH had failed in its responsibilities as a corporate citizen and NYCEDC's railroad tenant in three specific respects. First, NYCEDC alleged that NYCH had polluted the railroad right of way by dumping carcinogenic substances and allowing waste oils to seep into the ground at or near its engine maintenance facility. Second, NYCEDC failed to maintain a functioning sprinkler system in its office building in violation of New York City's fire codes. Finally, NYCEDC alleged that NYCH had failed to pay rent to NYCEDC in the past and, despite the fact that NYCH was now current in its financial obligations to NYCEDC, NYCEDC

feared that NYCH might fall behind again in its obligations at some, unspecified future date. See, Notice of Intent at 3-4; Memorandum in Support of Application at 2, 3, 5-9, including attached Declaration of Seth Kaye. NYCEDC cited no other practices by NYCH in support of its efforts to remove NYCH from the premises.

III.

ARGUMENT

After conceding that several of NYCH's assertions were indeed correct,³ NYCEDC used its Reply to introduce evidence on two points never raised before in these proceedings. Specifically, NYCEDC alleges at numerous places in the argument portion of its Reply and the accompanying Verified Statement of NYCEDC witness Seth Kaye that NYCH has failed to maintain properly the tracks and facilities it leases from NYCEDC.⁴ As the direct result of that alleged failure, NYCEDC claims that the 51st Street Float Bridge is now in a significant state of

³ Among others, NYCEDC stated that it "does not deny that it plans to 'redevelop and expand marine terminals and reconfigure the subject rail facilities to accommodate those changes.'" Reply at 2. Also NYCEDC as much as concedes that NYCH lacks the right to use the 65th Street Rail Yard and float bridges and to use a connecting track operated by the New York & Atlantic Railway to reach the 65th Street Yard. NYCEDC states that it will "encourage" the Delaware & Hudson Railway Company, Inc., and the New York & Atlantic Railway to grant NYCH access on "commercially reasonable terms." Reply at 4-5.

⁴ NYCEDC has not only failed to date to raise the issue of maintenance. It sought a waiver from providing information regarding the level of maintenance in its application. See, Application at 5.

disrepair and the cost of rehabilitation may be prohibitive. Reply at 6, 7, 11, and 12; Kaye VS, para. 4. Moreover, NYCEDC introduced and discussed for the first time a May 23, 2001, memorandum⁵ from Turner Construction Company to NYCEDC's Jack Powers indicating that NYCH has placed on the right of way an unauthorized and allegedly unsafe unloading platform. Reply at 11; Kaye VS, para. 5; Exhibit 2.

The Board's "case in chief" policy and past precedent requires that applicants submit all available pertinent information with their application. Therefore, the Board should reject NYCEDC's eleventh hour efforts to introduce new evidence. The Board has consistently held that it will not allow a party to introduce in its reply material which is neither responsive to the issues raised nor the evidence presented previously. See, STB Docket No. AB-441 (Sub-No. 2X), SWKR Operating Co.-- Abandonment Exemption--In Cochise County, AZ (served Nov. 12, 1997).

Neither NYCEDC nor NYCH has to date made an issue of track and facility maintenance or the placement of unauthorized unloading structures on the premises. Inasmuch as NYCEDC claims that NYCH has failed to maintain the leased tracks and facilities for some period of time and the Turner memorandum dates back to May 23, 2001, before the date of NYCEDC's application, there is

⁵ Identified as Exhibit 2 to NYCEDC's Reply.

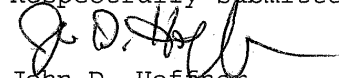
no reason why these materials could not have been submitted with NYCEDC's application. Failure to do so until this late date prejudices NYCH, by depriving it of its right to respond. Accordingly, the Board should strike all references to and testimony about NYCH's alleged poor maintenance and the unloading structure identified in the Turner memorandum and accompanying photographs.

IV.

CONCLUSION

NYCH respectfully requests that the Board strike from the record in this proceeding as unacceptable new evidence all references to track and facility maintenance, the Turner Memorandum dated May 23, 2001, and placement of unauthorized unloading structures.

Respectfully submitted,

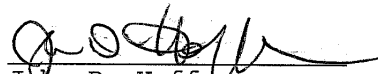


John D. Heffner
555 Twelfth Street, N.W.
Suite 950N
Washington, D.C. 20004
(202) 737-4335
Its Counsel

Dated: February 13, 2002

CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that I have this 13th day of February 2002 mailed a copy of the foregoing Motion to Strike of New York Cross Harbor Railroad to all parties in this proceeding by first class United States mail and fax transmission.


John D. Heffner