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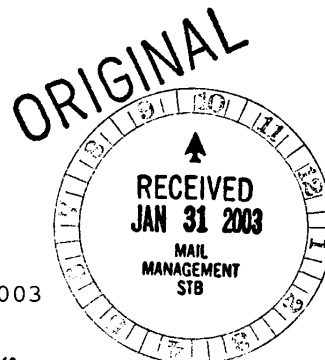
THE LAW OFFICES OF  
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Office of Proceedings

JAN 31 2003

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January 31, 2003

BY HAND

207142

Hon. Vernon A. Williams  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

RE: Docket No. AB-596, New York City Economic Development Corporation - Adverse Abandonment - New York Cross Harbor Railroad, Inc.

Dear Secretary Williams:

I am writing on behalf of the New York Cross Harbor Railroad ("NYCH") in connection with the Board's decision served Dec. 27, 2002, in the above-captioned proceeding. There the Board found reasonable NYCH's request to hold these proceedings in abeyance to facilitate negotiations. It ordered that the proceedings be held in abeyance for 30 days, until January 31, 2003<sup>1</sup> and directed the parties to provide the Board with a written status report on this matter on that date. NYCH submits this letter in response to the Board's order and asks the Board to appoint a neutral mediator to facilitate a prompt resolution of these discussions. In that vein, NYCH suggests the Board appoint Melvin Clemens or someone from his office to serve in the role.

Despite the ample record presented so far in this case, NYCH believes a short discussion of recent events would be helpful. As the Board will recall, NYCEDC originally filed its Adverse Abandonment Application on December 4, 2001. While it sought the abandonment of NYCH's operations at the First Avenue Yard and the Brooklyn Army Terminal (including the use of float bridges there to enable it to move rail traffic across New York Harbor between Brooklyn and Greenville, NJ), it stated that NYCH would have the

<sup>1</sup> NYCH has sought a 60 day postponement.

opportunity to use a replacement float bridge at the City-owned 65<sup>th</sup> Street Yards. Specifically, NYCEDC advised the Board that it "is ensuring that NYCH will have the opportunity to negotiate an arrangement to utilize the float bridge with tracks at the City's 65<sup>th</sup> Street rail yard upon completion of the new agreement with the designated operator of that facility." See, Memorandum in Support of Application for Adverse Abandonment at page 4, attached as Exhibit A hereto. And, NYCEDC repeated its willingness to negotiate as recently as October 21, 2002, when NYCEDC asked the Board to move forward with its consideration of the merits of this proceeding stating:

NYCEDC was attempting to facilitate the negotiation of an agreement among NYCH, CP Rail or the New York & Atlantic Railroad Company ("NY&A") regarding NYCH's use of the newly refurbished 65<sup>th</sup> Street Rail Yard in Brooklyn, New York. Once NYCH has worked out an agreement with NY&A for handling the traffic that NYCH brings to that facility, then NYCEDC would be willing to make an arrangement with NYCH for use of the float bridges at the 65<sup>th</sup> Street facility. See, October 21, 2002, letter to Vernon A. Williams, attached as Exhibit B.

Accordingly, NYCH was shocked to read in NYCEDC's October 21, 2002, letter that NYCEDC believes that NYCH has been dilatory in its efforts to negotiate access rights to that facility and that the Board should promptly issue a ruling.

On November 12, 2002, NYCH replied to NYCEDC's request that the Board, in NYCEDC's words, "move forward with consideration of the merits of this proceeding. NYCH advised the Board of its efforts to date to obtain draft agreements from CP Rail (to whom NYCEDC had delegated the responsibility for operation and management of the 65<sup>th</sup> Street Yard) and NY&A which operates that facility for CP. Since then, on December 5, 2002, CP Rail presented NYCH with what NYCH considers an unacceptable draft operating agreement. A copy of the email message transmitting that draft agreement is attached to this letter as Exhibit C. The principal differences between the parties include the amount of insurance required, the allocation of liabilities, and the amount and type of traffic which NYCH would be allowed to handle. NYCH submits that the Board would find these terms more onerous than those commonly found in standard industry agreements. CP Rail has told NYCH that it has inserted these provisions at the behest of NYCEDC. The bottom line is that further negotiations will be required before NYCH could sign such an agreement.

On January 9, 2003, NYCEDC wrote the undersigned counsel for NYCH to advise that NYCEDC "remains...willing to negotiate with

[NYCH]." NYCEDC further informed NYCH that any agreement for NYCH's use of the 65<sup>th</sup> Street Yard is a matter to be resolved between NYCH and CP Rail and/or NY&A. If NYCH wishes to use the 65<sup>th</sup> Street float bridges, NYCEDC stated its willingness to negotiate an agreement for the use of those facilities once NYCH demonstrates that it has signed an agreement with CP Rail (or NY&A as appropriate) to permit NYCH operations in that yard. But, NYCEDC added gratuitously, that there is no basis for commencing such negotiations until NYCH reaches an agreement with CP Rail and/or NY&A.

The simple fact of the matter is that NYCH has tried consistently over the past 10 months to move negotiations along. It has been met with a combination of silence, resistance, and intransigence. While it believes that it should be able to resolve access issues with CP Rail and NY&A, those discussions will take time, certainly more time than that provided by the Board's recent January 31 deadline. Even once NYCH signs agreements with CP Rail and NY&A, NYCH must still negotiate an agreement for use of the float bridges with NYCEDC. NYCH cannot begin to estimate how long that will take. If recent experiences are any indication, that process could take weeks or even months.

It is for these reasons that NYCH asks the Board to continue to hold these proceedings in abeyance and, in the interest of a speedy resolution, to take a role in resolving this dispute by appointing a neutral mediator. NYCH appreciates the interest the Board has taken in this matter so far.

Please stamp and return one copy of this letter for our files.

Sincerely yours,

  
John D. Heffner

Enclosures

cc: David Konschnik, Esq.  
Mr. Melvin Clemens  
All parties  
Barry McGrath, Esq.  
Mr. Ronald Bridges  
Mr. Wayne Eastman  
Darryl Caplan, Esq.

EXHIBIT A

EXHIBIT

A

Before the  
Surface Transportation Board

Docket AB-No. 596

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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

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MEMORANDUM IN SUPPORT OF APPLICATION FOR ADVERSE ABANDONMENT

---

CHARLES A. SPITULNIK  
ALEX MENENDEZ  
McLeod, Watkinson & Miller  
One Massachusetts Avenue, NW  
Suite 800  
Washington, DC 20001  
(202) 842-2345

Counsel for New York City Economic  
Development Corporation, Acting on Behalf  
of the City of New York, New York

Dated: December 4, 2001

connects with Conrail ("Cross Harbor Railroad Operation"). Beginning in 1992, the NYCEDC assumed management of NYCH occupancy permit on behalf of the New York City's Department of Business Services, which had assumed management of the NYCH's lease from the Department of Ports and Terminals.

NYCH is currently conducting the Cross Harbor Railroad Operation. NYCH operates this service pursuant to authority received from the Interstate Commerce Commission ("ICC") in

~~ICC D. No. 30183, New York Cross Harbor Railroad Operation, Abandonment and~~

~~and NYCH has made significant efforts to work with~~

~~NYCEDC to resolve the outstanding issues and to provide a mutually satisfactory~~

however, NYCH has left NYCEDC with no choice but to attempt to evict NYCH from the Tracks and Facilities.

~~NYCEDC has been unable to reach an agreement with NYCH regarding the~~

~~eviction of NYCH from the Tracks and Facilities and the resulting~~

#### I. Applicable Law

An adverse abandonment is applicable to a situation where the public convenience and necessity do not justify continued operations over a line, and where, as a result, the Board's jurisdiction therefore should not impede State action with respect to that line. *See Modern Handcraft, Inc. - Abandonment*, 363 I.C.C. 69 (1981). In other words, applicants in adverse abandonment proceedings are subject to the same legal standard that applies to ordinary abandonment under 49 U.S.C. § 10903 *et seq.* That is, the present or future public convenience

<sup>3</sup> In addition to the Tracks and Facilities that are the subject of this Petition, NYCH operates on tracks in the street on 2nd Avenue between 29th and 41st Streets, on 41st Street between 1st and 2nd Avenue, and on 1st Avenue between 41st and 43rd Streets and between 51st and 58th Streets, as well as tracks that extend from the 51st Street Yard to the connection with the line now operated by the New York and Atlantic Railway on behalf of the Long Island Rail Road at 65th Street, all in Brooklyn, NY. This Petition for Adverse Abandonment will not affect NYCH's authority to continue providing that service.

EXHIBIT B

EXHIBIT

B

MICHAEL R. McLEOD  
WAYNE R. WATKINSON  
MARC E. MILLER  
RICHARD T. ROSSIER  
CHARLES A. SPITULNIK  
RICHARD PASCO  
ALEX MENENDEZ  
ELIZABETH A. HAWS\*\*  
AMY B. JONES\*\*\*

(\*\*Admitted in Ohio only)  
(\*\*\*Admitted in New York only)

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KATHRYN A. KLEIMAN\*  
OF COUNSEL

(\*Admitted in Virginia only)

ROBERT RANDALL GREEN  
LAURA L. PHELPS  
GOVERNMENT RELATIONS

October 21, 2002

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

Re: Docket No. AB 596, *New York City Economic Development Corporation*  
– *Adverse Abandonment – New York Cross Harbor Railroad, Inc.*

Dear Sir:

The purpose of this letter is two-fold: 1) to follow up on the March 20, 2002 letter to Mr. David Konschnik ("Abeyance Request") in the above referenced proceeding; and 2) to ask the Board to move forward with its consideration of the merits of this proceeding.

New York City Economic Development Corporation (acting on behalf of the City of New York, New York) ("NYCEDC") and New York Cross Harbor Railroad, Inc. ("NYCH") (collectively "the Parties") submitted the Abeyance Request to the Board on March 20, 2002. We asked the Board to hold this proceeding in abeyance to give the parties and other railroads an opportunity to engage in discussions about potential solutions to the issues raised here. NYCEDC was attempting to facilitate the negotiation of an agreement among NYCH, CP Rail or the New York & Atlantic Railroad Company ("NY&A") regarding NYCH's use of the newly refurbished 65<sup>th</sup> Street Rail Yard in Brooklyn, New York. Once NYCH has worked out an agreement with NY&A for handling the traffic that NYCH brings to that facility, then NYCEDC would be willing to make an arrangement with NYCH for use of the float bridges at the 65<sup>th</sup> Street facility.

NYCH's continuing access to alternative facilities on the Brooklyn waterfront is not, of course, a necessary precondition to this Board's approval of the relief NYCEDC seeks in this proceeding. As NYCEDC stated in its Reply to the Protest of NYCH and the Joint Protest of Local Shippers, filed on February 4, 2002 in this proceeding, "[n]one of the shippers who have participated here have explained why using any of the other carriers that currently serve the region on the east side of the harbor, which include CP,

Honorable Vernon A. Williams  
October 21, 2002  
Page 2

NY&A and CSX Transportation, Inc., would not provide an adequate alternative to NYCH service." *Id.* at 12.

Indeed, NYCH's conduct in recent months underscores the rationale that NYCH has presented to this Board for securing revocation of NYCH's operating rights at the facilities that are the subject of this proceeding. Despite repeated requests for payment, NYCH has not paid NYCEDC the franchise fee of \$2200 per month it is obligated to pay for use of these facilities since June. The City of New York cannot be required to continue hosting a railroad that regularly shirks its responsibilities – both fiscal and environmental. Once this Board removes the Certificate of Public Convenience & Necessity with respect to the facilities that are the subject of this proceeding, NYCEDC can allow the proceedings it has begun in the New York State courts to evict NYCH from the premises to continue.

NYCEDC has waited patiently for seven (7) months since the Abeyance Request for NYCH to reach an agreement or to provide some evidence that it has made progress towards an agreement with either CP or NY&A. No such agreement exists as of this date. Instead, NYCH continues the pattern of behavior that brought NYCEDC to commence this proceeding in the first instance. Accordingly, NYCEDC respectfully requests that the Board no longer hold this proceeding in abeyance and proceed with issuing a ruling in the matter. The matter has been fully briefed and is ready for resolution.

I am enclosing an additional copy of this letter, which I would ask you to date stamp and return to our messenger. Thank you for your attention to this matter.

Sincerely,



Charles A. Spitulnik

cc: All parties

EXHIBIT C

EXHIBIT

C

**Subject: CPR/NYCH Track Use Agreement**

**Date:** Thu, 5 Dec 2002 08:00:48 -0600

**From:** "McGrath, Barry" <barry.mcgrath@leonard.com>

**To:** <j.heffner@verizon.net>

John, attached is the signature ready 65th Street Yard track use agreement with exhibits which will permit NYCH to reach the NYA interchange. I ask that you print out two counterparts, have them both signed by the appropriate NYCH official, and send them to:

C. E. Hubbard  
Manager - Interline Agreements  
Canadian Pacific Railway  
401 - 9th Avenue SW  
Calgary, AB Canada T2P4Z4

Chuck will then have them signed by the authorized CPR person and return one of the executed counterparts to whoever you designate.

Note that the attached Ex 1, a print of the subject track, does not have the track marked in red as called for by the agreement. Please advise to whom we should send paper copies of the print with the track appropriately colored for inclusion with the signed agreement.

Thanks

Barry McGrath  
Leonard, Street and Deinard, PA  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
Phone: 612-335-1931  
Fax: 612-335-1657

barry.mcgrath@leonard.com

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The Burlington Northern and Santa Fe Railway Company  
Common Carrier Pricing Authority BNSF 90040-A  
Supplement No.4

**Effective Date:** January 1, 2003.

**Expiration Date:** Effective until superceded or cancelled.

**Commodity:** Raw coal used for steam purposes, as described in Standard Transportation Commodity Code Tariff ("STCC") 6001 series, with a STCC number of 11-211 series, 11-212 series and 11-221 series (including bituminous, sub-bituminous and lignite), not including beneficiated, enhanced, processed or synthetic coal ("Coal"). Coal treated with additives used exclusively for dust control or for protection against freezing shall not be considered "beneficiated, enhanced or processed".

**Origins:** 1. Lee Ranch Mine, NM ("LRM")  
2. Spring Creek Mine, (Nerco Jct.), MT ("SCM")

**Destinations:** 1. Coronado Generating Station located near St. John's, AZ ("Coronado")  
2. Cholla Generating Station located near Joseph City, AZ ("Cholla")

**Route:** BNSF direct.

**Shipper:** The Party tendering Coal for movement under this publication.

**Freight Rates:** Weights stated in terms of Net Tons (2,000 pounds). Rates stated in U.S. Dollars Per Net Ton Coal:

| Origin | Destination | Min Weight Per Carload | Shipper Provided Private Railcars | BNSF Provided Railcars |
|--------|-------------|------------------------|-----------------------------------|------------------------|
| LRM    | Coronado    | 95 Net Tons            | \$7.65                            | \$8.69                 |
|        |             | 119 Net Tons           | \$7.52                            | \$8.56                 |
| LRM    | Cholla      | 95 Net Tons            | ...                               | \$8.75                 |
|        |             | 116 Net Tons           | ...                               | \$8.62                 |
| SCM    | Cholla      | 116 Net Tons           | ...                               | \$19.87                |

**Fuel Surcharge Application:** Freight Rates herein shall be subject to fuel cost recovery surcharges, if any, applied by BNSF as specified by BNSF Rules 6100 series.

**Trainload and Railcar Weights:** Weight shall be determined at Origin by Shipper, its agent, or the Coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the Origin scales. Minimum Weight per Trainload shall be the product of the applicable Minimum Weight per Carload times the Minimum Tender. Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater. For trains consisting of BNSF provided Railcars, in the event BNSF furnishes fewer than the Minimum Tender specified herein, Minimum Weight per Trainload shall be reduced by the applicable Minimum Weight per Carload for each BNSF provided railcar not furnished which results in a train of less than Minimum Tender.