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Office of Proceedings

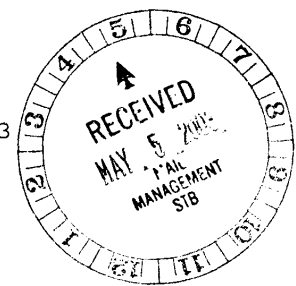
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May 5, 2003

BY HAND

Part of
Public Record

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 May 2, 2003, scheduling a voting conference in the above-captioned proceeding. NYCH respectfully requests that the Board defer a vote for sixty (60) days and order the parties to commence and conclude negotiations during that period and, upon petition by either party, set terms and conditions for the use of the float bridge facility located at 65th Street in Brooklyn, NY, if the parties are unable to reach an agreement on their own.

This proceeding concerns an adverse application filed by the City of New York through its Economic Development Corporation ("NYCEDC") for abandonment of railroad trackage and car float facilities in Brooklyn commonly known as the 51st Street Yard. NYCEDC owns these facilities and leases them to NYCH to permit it to float freight cars between this facility and NYCH's own car float facility in Greenville, NJ, where it interchanges with both CSX Transportation ("CSX") and Norfolk Southern Railroad ("NS"). This facility is important to NYCH in two respects, it permits NYCH to serve certain local customers along the Brooklyn waterfront and it permits rail customers on Long Island served by the New York & Atlantic Railway ("NY&A") to enjoy access to NS through NYCH. Should this application be granted, these local

customers would lose all rail service and customers on Long Island would lose the competitive rail service gained as a result of the acquisition and partition of Conrail by NS and CSX.

NYCEDC's stated rationale for terminating NYCH's operations at the 51st Street facility is that NYCH has not been a good "corporate citizen" because of alleged environmental dumping, violations of city fire codes (specifically a nonexistent sprinkler system in a building NYCH leases from the NYCEDC), and "concerns" about NYCH's financial condition. See, Declaration of Seth O. Kaye dated Dec. 3, 2001, and submitted with the City's Application for Abandonment. NYCH has previously responded to each of these allegations.¹ The fact is that current NYCH management does not condone actions of former management and is attempting to put behind it those actions. See, presentation at the East of the Hudson Committee meeting by NYCH President Wayne Eastman attached hereto. Upon receipt of abandonment approval by the STB, NYCEDC has stated that it would seek to evict NYCH from this city-owned property.

As the Board will recall, back on March 21, 2002, NYCEDC and NYCH jointly asked the Board to hold these proceedings in abeyance for 60 days to facilitate negotiations.² On October 21, 2002, NYCEDC wrote the Board asking it to move forward with its consideration of the merits of this proceeding, implying that NYCH had in some undocumented way been dilatory. NYCH responded by letter dated November 12, attaching correspondence between the parties dated from July 18, 2002, through September 30, 2002, documenting numerous efforts to initiate negotiations.

Then, on December 27, 2002, the Board issued a decision finding reasonable NYCH's request to hold the proceeding in abeyance for some additional time. That decision held the proceeding in abeyance until January 31, 2003, and ordered both parties to notify the Board of the status of their discussions at that time.

Since then, NYCH has done everything requested of it by

¹ The City has yet to bring to trial its lawsuit on the alleged dumping of hazardous matter. Regarding the sprinkler system, NYCH desires to satisfy city fire codes but sees no point to making any expensive repairs until it is assured the use of this property. Finally, as to its financial condition, NYCH has been current in all of its obligations to the City and has achieved an operating profit.

² NYCH's efforts to begin those negotiations promptly are documented in its letter to the Board dated November 12, 2002.

NYCEDC and in the very order it demanded. It has negotiated and signed agreements with CP Rail giving it access to the 65th Street Yard and with NY&A for interchange of traffic. It has obtained insurance coverage required by CP Rail in the amount of \$25 million, far in excess of coverage normally required by class I railroads for their connecting short line railroads. It repeatedly asked NYCEDC to schedule negotiations for access to the city-owned float bridge facilities at 65th Street Yard.

Recently, by letter dated April 10, 2003, copy attached, NYCEDC's counsel then surprised NYCH with another request: that NYCH undergo a new Vendex³ approval process.⁴

NYCEDC counsel's statement in that letter -- that NYCEDC has stressed for some time the need for the completion of the Vendex process -- is a half truth. Throughout these proceedings, NYCEDC has repeatedly offered NYCH the use the 65th Street facilities only conditioned upon it reaching an agreement with the operator of that property [CP Rail]. See, e.g. NYCEDC's Environmental Report at pages 4, 5, 7, and 8:

"The most likely possible change in current operations, described below, will be the transfer of NYCH's operation in Brooklyn from the current facilities at 51st Street that are the subject of this application to the nearby 65th Street Yard once NYCH has finalized an arrangement with the operator of that facility." ...NYCH will continue to have the right and ability to operate on the tracks in 1st Avenue, 41st Street and 2nd Avenue that are included in its current operation."

"The agreement [operator agreement between CPR and NYCEDC] will give open, nonexclusive access to the aforementioned float bridges and yards. NYCH will have an alternative landing site that allows connection to its current rail rights of way and destination points."

³ Vendex refers to an application and approval process used by the City of New York to screen licensees and contractors before they can use city-owned facilities. The Vendex approval process typically takes about eight weeks.

⁴ In response to the City's request, NYCH submitted its new Vendex application on April 14, 2003.

In its Memorandum accompanying the Application, NYCEDC stated at page 4:

"NYCEDC, however, is ensuring that NYCH will have the opportunity to negotiate an agreement to utilize the float bridge with tracks at the City's 65th Street rail yard upon completion of the new agreement with the designated operator of that facility."

Once again, in its letter to NYCH's counsel dated August 22, 2002, NYCEDC stated,

"Once NYCH has demonstrated to NYCEDC that it will have facilities or operations available at 65th Street, NYCEDC will be willing to engage in discussions about the terms for use of the float bridges." ⁵

None of these documents contain any reference to a Vendex requirement. Indeed, NYCH had as recently as October 2000, submitted a Vendex application in connection with its RFP to operate the 65th Street Yard. NYCEDC selected CP Rail's bid over that of others. NYCH was never been advised that its Vendex application was unsatisfactory. It is NYCH's understanding that a Vendex "approval" is good for three years.

NYCEDC's counsel suggests in his April 10 letter that NYCEDC has "stressed for some time" the need for completion of the Vendex process. While the documents cited in his letter do contain references to the Vendex process, that letter for the first time elevates to a level of a negotiating precondition NYCEDC's demand that NYCH submit a new Vendex application.

Not once during NYCH's numerous efforts to engage NYCEDC in negotiations has the City ever stated that a new Vendex application would be required. Indeed, the City's position has been exactly as stated in its counsel's January 9, 2003, letter to the undersigned, "NYCEDC will enter those negotiations once NYCH demonstrates that it has signed an agreement with CP Rail (or NY&A, as appropriate) that will permit NYCH to operate in that yard."

⁵ To which NYCH's counsel replied in an email dated Sept. 26, 2002, "[p]lease advise me as to the next step. We're ready to proceed. John." Copy attached.

NYCH has satisfied every condition requested of it. It has been ready, willing and able to commence negotiations with the City for some period of time. There is no reason why the parties could not have reached an agreement subject only to an update of NYCH's prior Vendex approval or why these processes could not have moved forward simultaneously.

For NYCEDC to now insist that it is unwilling to commence negotiations because of a need for NYCH to obtain a new Vendex approval at this late hour represents bad faith bargaining which the Board should not condone.

Throughout the stewardship of former Chairman Linda Morgan, the Board has, to its credit, encouraged problem resolution through private sector negotiations. It should do so here by deferring a resolution of this proceeding until completion of the Vendex process and an opportunity for negotiation of a contract. Because NYCH is concerned that NYCEDC will simply use any additional time the Board orders for further delay, NYCH asks that the Board order the parties to begin negotiations promptly and, if, after the passage of 60 days, no agreement has been reached, the Board would, upon petition by either party, set terms and conditions for the use of this rail facility.

Please date stamp and return one copy of this letter for my records.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal line extending to the right.

John D. Heffner

Enclosures

cc: All parties

Presentation by Wayne Eastman at the East of the Hudson
Committee
Several years ago, rail advocates who believed rail access east of the Hudson was vital to the region; mustered support... got several million dollars funding and built 2 new float bridges at 65th street Brooklyn, at a price tag of between \$14 and \$20 million. I am sure we do not need to discuss the many many reasons why rail service east of the Hudson is necessary to the growth of the city and the region, for that is why you are all here. The logic and reasoning that helped with the economic feasibility of the float bridges project a few years ago, is the same logic and reasoning being used today to consider the cross-harbor tunnel project that is near and dear to many of your hearts.

Common business sense and business logic would have been to have an operator ready to utilize the new float bridge facility upon completion. But that was not the case. An RFP for operation of the 65th street yard, including operating the new float bridges was put out in late 2000, over a year after the float bridges were completed. Two companies bid on the RFP, but only one company, the NYCH RR could do all of the things asked for in the RFP. But we were not awarded the operating rights. Rather, the Canadian Pacific Railroad was awarded the operating rights, but they did not want to nor had to use the float bridges. By the time the CP completed negotiations and began using the yard, the float bridges were over two years old, and still never used, and no user in sight.

Today the float bridges have been completed over 3 years and to this date not one single rail car has ever been loaded on them. This multi million-dollar project built with all the good intentions you all believe in...sit idle... rusting.

The past 6-9 months the New York Cross Harbor has been experiencing problems with our pontoon in Brooklyn. This is an old antiquated device that has long passed its useful life. But, it is the vital link that allows us to float cars. Two times it has sunk and we were able to get it up in relatively a short time. At each of these occurrences, we asked for emergency use of the new bridges to facilitate cross-harbor rail traffic, and each time we were denied. Our pleading to get whatever needed to be done to get us to 65th street went unanswered.

Approximately 10 weeks ago the pontoon sunk again as I reported at our last meeting. This time the pontoon separated from the rail structure and could not be raised as before, although we tried. The last time we met, I asked for a quick resolve to whatever needed to be done to get us to 65th street and a few of you echoed agreement. Today 6-7 weeks later we still do not have access to the new bridges.

Rail traffic to and from the region has been severely damaged, as can be attested to by the other rail officials at this table and for no reason. All of the beliefs asported about the necessity of east of the Hudson rail service appears to be merely talk and a topic to spend millions of dollars for consultants to study. For if rail service to the New York region east

of the Hudson was truly important, this situation would not have been allowed to become what it did. What is so upsetting is that we could be floating to the new bridges today, last month or 3 years ago...that's why they were built.

The NYCH RR does not have a very reputable past. Since the new management team took over 2 and ½ years ago, we have done a great deal righting the wrongs of the past management. We are committed to doing more, and we will do more as we can. But, the past sins of the company are irrelevant to this discussion. The NYCH RR was the only entity that floated cars across the New York Harbor when the new float bridges were contemplated, studied, validified and built. Everyone knew this, it is no surprise. We still are the only entity that floats railcars today. Who did everyone think was going to use these bridges?

This is not a NYCH RR issue; it is a New York region transportation issue. The float bridges were built with 20 million tax dollars to facilitate safe, efficient and reliable rail transportation to the region. Why aren't they being used for that purpose?

I admit that I am very impassioned about this topic, and get quite excited. I have been in the railroad business over 32 years. I have been responsible for running very large operations and multi million dollar budgets. I have a degree in economics and an MBA and I teach college economics. I cannot understand nor explain the economic rationalization that this situation presents. And I doubt if anyone can.

If you really think about this, and care anything about east of the Hudson rail service, you should be outraged. Some of you in this room probably had something to do with the 65th street project. Did you think it would come out like this, a \$20 million project completed that everyone thought was a great idea for the region, approved, built and now sitting idle, rusting for over 3 years. This should never have been allowed to occur ...and should not be allowed to continue. If it were the desire of the powers to be to use this facility, it would have begun operation 3 years ago, not 6 months from now. This is unconscionable and should be embarrassing. What next? A \$7 billion dollar rail tunnel?

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April 10, 2003

BY MESSENGER

John D. Heffner, Esquire
1920 N Street, N.W.
Suite 900
Washington, D.C. 20036

Re: New York Cross Harbor Railroad

Dear John:

As you know, New York Cross Harbor Railroad must complete the New York City Vendex process before we can reach an agreement for use of the 65th Street Float Bridge. You will recall that NYCEDC has stressed for some time the need for the completion of this process (e.g., NYCEDC Response to Interrogatory No. 10 in NYCH First Set of Interrogatories, served in STB Docket AB-No. 596 on January 15, 2002; Letter to Hon. Vernon Williams, dated November 14, 2002 at page 2; Status Report of NYCEDC filed on January 31, 2003).

I am enclosing with this letter the Vendex forms (and instructions for their completion) for NYCH, its parent and their three respective principal operating officers. Prompt completion of these forms will permit the staff of NYCEDC and other responsible City agencies to complete their review and any necessary investigation. As you know, if in the course of this investigation, EDC concludes that NYCH is a non-responsible contracting party or other derogatory information is found that would make it inappropriate for EDC to enter into a contract with NYCH, then EDC will not be able to reach an agreement.

If you have any questions, please let me know and I will seek responses promptly from the staff and counsel at EDC.

Sincerely,



Charles A. Spitulnik

McLEOD, WATKINSON & MILLER

Letter to John Heffner, Esquire
April 10, 2003
Page 2

Enclosures: A Vendor's Guide to Vendex (1 copy)
Principal Questionnaire (3 copies)
Business Entity Questionnaire (2 copies)

Subject: RE: 65th Street Access

Date: Thu, 26 Sep 2002 17:47:40 -0400

From: "Chuck Spitulnik" <cspitulnik@mwmlaw.com>

To: "John D. Heffner" <j.heffner@verizon.net>

Many thanks. I look forward to seeing the agreement. I will review this with my cl

-----Original Message-----

From: John D. Heffner [mailto:j.heffner@verizon.net]

Sent: Thursday, September 26, 2002 5:16 PM

To: Chuck Spitulnik; r_w_bridges@hotmail.com

Subject: 65th Street Access

Chuck, I discussed our conversation with my client. I understand that a meeting took place this past Monday with someone named Alice from EDC. CP Rail, NY&A, and NYCH all attended the meeting. All three railroads agreed that NYCH presently has the right to access the 65th Street facility under an Operating Agreement between Apple Industrial Development Corp., D&H Railway, and Canadian Pacific Railway. That agreement requires CP as the operator to designate and maintain a track for rail access for users of the Transfer Bridges [NYCH is the only present operator of the transfer bridges] to facilitate equal commercial access for cross-harbor railcar float operators and requires CP as the operator to structure its yard operations to facilitate equal commercial access for all rail operators, to interchange equipment and traffic with all connecting carriers, and so forth. CP interprets this agreement as giving NYCH access and NY&A agreed and all parties told that to Alice. I am faxing a copy for your information.

Please advise me as to the next step. We're ready to proceed. John