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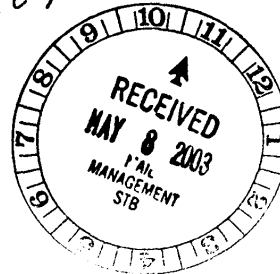
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GOVERNMENT RELATIONS

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Office of Proceedings
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Part of
Public Record

May 7, 2003



VIA FACSIMILIE AND HAND DELIVERY

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

Re: Docket No. 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*

Dear Sir:

The New York City Economic Development Corporation, acting on behalf of the City of New York, New York ("EDC"), through counsel hereby replies in opposition to yet another request from the New York Cross Harbor Railroad ("NYCH") for yet another delay in this proceeding. This time, NYCH's request comes in a letter dated May 5, 2003 asking this Board to defer a vote for sixty days on the above-referenced matter and for an order directing 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, New York, if the parties are unable to reach an agreement on their own ("NYCH Extension Request").

EDC submits this opposition with full recognition of the conflict that the presence of NYCH continues to create. On the one hand, EDC has been and remains committed to preservation and enhancement of opportunities and means of moving rail traffic to and from the east side of New York Harbor while decreasing truck traffic on the region's congested highways and bridges. On the other hand, EDC has no interest in placing control of any of its rail-related facilities in the hands of an entity that is not a worthy steward of them. The record of this proceeding, which EDC does not propose to belabor unnecessarily, justifies its cautious approach to permitting NYCH to waltz freely into a new, expensive facility when NYCH has demonstrated an unwillingness or inability to care either for the facilities it now leases from the City or for its own property (the float bridges) that are located at the 51st Street Yard.

In response to the rhetoric and allegations contained in the NYCH Extension Request, three points bear emphasis.

1. EDC has consistently promised that it would provide NYCH with the opportunity to seek access to the 65th Street Yard and float bridges, but has never promised unconditionally that such access would be available.
2. Notwithstanding NYCH's surprising assertions to the contrary, EDC has consistently held satisfactory completion of the Vendex process to be an absolute pre-condition to its negotiation of an agreement for use of these float bridges.
3. NYCH has no basis, on the record of this proceeding or otherwise, to ask this Board to order EDC to grant access to the float bridges at 65th Street.

NYCH's most recent request is proof of the adage that no good deed goes unpunished. Little did EDC know when it agreed in March 2002, in an attempt to reach a settlement of the issues in an act of good faith, to ask the Board to hold this proceeding in abeyance, the matters would go on for so long. Now, over one year later NYCH continues to treat EDC's promise that it would attempt to permit NYCH to have an opportunity to contract to use the 65th Street float bridges as a promise of an entitlement to use those bridges. NYCH overstates the position that EDC has consistently articulated.

NYC has consistently advised NYCH, CP Rail and NY&A, and this Board that NYCH would be granted the right to use the 65th Street facility, but only after it had made an arrangement with CP Rail and/or NY&A for use of the 65th Street Yard ("65th Street Operations Agreement"). Now over one year later, NYCH has finally reached that agreement. Throughout that year of waiting for NYCH to accomplish this, EDC has been quite consistent in telling NYCH the next steps. Specifically, EDC has continually maintained that NYCH must complete the New York City Vendex process ("Vendex Process") before an agreement for use of the 65th Street Facility can be reached. The only way this requirement can be a surprise to NYCH, as the NYCH Extension Request suggests, would be if NYCH has not been paying attention.

As early as January 15, 2002 in EDC Response to Interrogatory No. 10 in NYCH First Set of Interrogatories, served in STB Docket AB-No. 596, NYC stated as follows:

Interrogatory No. 10:

Regarding EDC's statement that it is ensuring that NYCH will have the opportunity to negotiate an arrangement to utilize the float bridge and tracks at the City's 65th Street rail yard upon completion of the new agreement with the designated operator of that facility, please describe in detail the nature of those arrangements and the steps required for NYCH to be able to initiate service.

RESPONSE:

EDC, on behalf of the City of New York, will oversee the use, operation and maintenance of the float bridges at the 65th Street Rail Yard. **These float bridges will be open to all users at a nominal fee, subject to evidence of adequate insurance and approval of the City's standard VENDEX application.** NYCH should contact EDC to commence the process required for use of the float bridges.

The Agreement with the new operator of the 65th Street Rail Yard has not yet been finalized, and the terms and conditions of the use of the tracks in that Rail Yard by parties other than the operator have not yet been finalized. When the final terms and conditions have been finalized EDC will advise NYCH of the steps required for NYCH to be able to initiate service.

(emphasis added). On November 14, 2002 in a letter to Hon. Vernon Williams, EDC stated:

EDC wants to make sure that NYCH has access to the 65th Street Yard before it expends the City's resources negotiating an agreement or managing the **Vendex process** that all contractors with the City or any of its agencies must complete.

(emphasis added.) On January 31, 2003 in a Status Report filed with the Board EDC stated:

EDC wants to make sure that NYCH has access to the 65th Street Yard before it expends the City's resources negotiating an agreement or managing the **Vendex process** that all contractors with the City or any of its agencies must complete. NYCH's inability to secure a written agreement for use of the 65th Street Yard during these many months suggests that the City's caution in this regard is well founded.

(emphasis added.) In fact, Wayne Eastman the current President of NYCH has expressly acknowledged that he was aware of the need to complete the Vendex Process before negotiation of an agreement for use of the float bridges could be reached at least six months ago. In an e-mail message to Kate Ascher and Alice Cheng at EDC on April 25, 2003, Mr. Eastman stated:

Now we are being told by your lawyer that the EDC will not even negotiate an agreement for the use of the bridges until the Vendex process has been completed, which could take 6-8 weeks. **Well over 6 months ago I attempted to get Seth Kaye to do these various agreements, (CP, NYA, Vendex, EDC) at the same time and was told No....** had to be one after the other
....

(emphasis added). A copy of the E-mail transmission is attached hereto as Exhibit A.

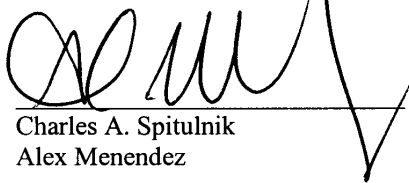
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NYCH's prior submission in October 2000 of a Vendex form in response to a previous RFP does not guarantee a pass in this process. NYCH was not the successful bidder on the prior contract and at that time there was no investigation of NYCH conducted, nor was a response to NYCH's submission completed. Furthermore, NYCH continually points out that "current NYCH management does not condone actions of former management and is attempting to put behind it those actions." See *NYCH Extension Request* at p. 2. The Vendex Process will allow EDC to determine and NYCH to establish whether or not, in fact, NYCH's prior history is a thing of the past and if it meets the City's contracting requirements.

One other point bears emphasis. As part of the NYCH Extension Request, NYCH seeks an "order directing 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 65th Street Yard. NYCH has not even begun to make the showing required for such an order. In order for the Board to have jurisdiction to accomplish this, NYCH would need to be seeking use of property or facilities "owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part." The 65th Street Yard might meet that requirement since, although owned by New York City, it has been licensed to CP Rail for use in interstate commerce. The 65th Street float bridges, however, have not. They are owned by the City, as an open public facility, but as yet are licensed to no one, and they have yet to be used in interstate commerce since no party has yet secured the right to use them. The City is not "a rail carrier providing transportation subject to the jurisdiction of the Board under this part" and no such rail carrier has the right or obligation to provide service over these float bridges. NYCH can not reach out and take them just because they are there and because it has decided it likes better the idea of using someone else's equipment rather than caring for and relying on its own. These public use float bridges are facilities that the City can, if it wishes, choose to lease or license to a carrier and thus hold them out and dedicate them for use in interstate commerce. Until that occurs, this Board could not order their use by NYCH.

NYCH has abused its tenancy at 51st Street Rail Yard for many years, as evidenced by the facts and argument brought to this Board in this Proceeding. Now, NYCH attempts to seek a further delay. This Board should tolerate no more from NYCH. The Board should proceed to determine, as it is now scheduled to do, the outcome of EDC's application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", with a long, sweeping horizontal line extending to the right.

Charles A. Spitulnik
Alex Menendez

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

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May 7, 2003
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cc: Hon. Vernon Williams (10 copies)
John Heffner, Esquire
Troy Garris, Esquire
Barry McGrath, Esquire
Robert LaPalme, Esquire

EXHIBIT A

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

From: EastmanRTS@aol.com [mailto:EastmanRTS@aol.com]

Sent: Friday, April 25, 2003 2:54 PM

To: Kate Ascher; Alice Cheng

Subject: (no subject)

Mrs. Ascher

Mrs Cheng

NYCEDC

Attached is a copy of an email I sent to the Norfolk Southern Railroad which is self explanatory. Although the pontoon at this writing is up and we believe we will be able to float cars on Monday, this is only very very tenuous at best. Pontoon may stay up a day, a week or possibly a month...we don't know. The problem has not alleviated.

Now we are being told by your lawyer that the EDC will not even negotiate an agreement for the use of the bridges until the Vendex process has been completed, which could take 6-8 weeks. Well over 6 months ago I attempted to get Seth Kaye to do these various agreements, (CP, NYA, Vendex, NYCEDC) at the same time and was told No.... had to be one after the other and thus we still sit not being able to use the float bridges, and no date in sight. It still amazes me to see \$20 million facility sitting idle month after month, and no one cares.

I did not receive a response to an email I sent several days ago. Again I ask for a quick reslove to this situation and ask for a timeline that you feel will be realistic.

Wayne Eastman

President

NYCH RR