

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket AB-No. 596

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
- ADVERSE ABANDONMENT - NEW YORK CROSS HARBOR RAILROAD
IN BROOKLYN, NY

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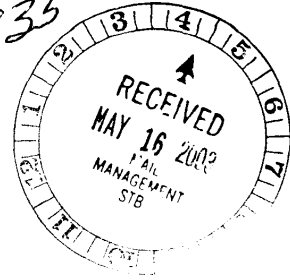
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PETITION OF THE NEW YORK CROSS HARBOR RAILROAD
FOR STAY PENDING JUDICIAL REVIEW

Respectfully submitted,

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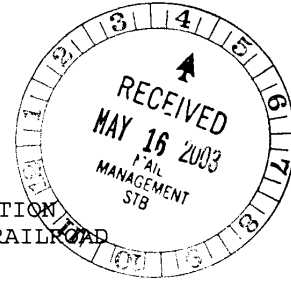
Dated: May 16, 2003



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I.

INTRODUCTION

On May 12, 2003, the Surface Transportation Board ("the Board" or "STB") served a decision ("the Decision") granting the New York City Economic Development Corporation's¹ application for the adverse abandonment of tracks and facilities at the Bush Terminal Yards ("First Avenue Yards") and the 51st Street floatbridge and related tracks at the Harborside Industrial Center ("Brooklyn Army Terminal") in Brooklyn, Kings County, NY. Pursuant to 49 CFR 1115.5(a), New York Cross Harbor Railroad ("NYCH") seeks a stay pending judicial review.

II.

STATEMENT OF FACTS

Originally established in 1983,² NYCH is a class III short line railroad which moves freight by rail and barge between its yard and float bridge facilities in Greenville, Jersey City, NJ, and the subject NYCEDC-owned facilities in Brooklyn, NY. NYCH connects at Greenville with the Conrail Shared Asset Operation and, through it, with Norfolk Southern Railroad ("NS") and CSX Transportation ("CSXT").

¹ hereafter "NYCEDC" or "the City."

² NYCH acquired the assets and operations of the former Brooklyn Eastern District Terminal Railroad and the New York Dock Railway.

NYCH uses the subject Brooklyn facilities to reach 8 customers³ for whom it provides local freight service.⁴ NYCH's trackage also connects with the New York & Atlantic Railway ("NY&A"), another short line railroad serving freight customers on Long Island.

NYCH provides three services. First, it serves customers located at its Greenville (NJ) facility, who will be unaffected by this abandonment. Second, it serves the local Brooklyn customers, most of whom use NYCH to float freight cars⁵ to or from New Jersey for interline service with either NS or CSXT. Finally, NYCH handles about 1600 car loads of overhead traffic moving between NY&A-served Long Island points and the rest of the country interchanged at Greenville with NS. Granting this abandonment will terminate these two services.

The NYCEDC filed the subject application on December 3, 2001, in connection with civil litigation instituted in the New York Courts to evict NYCH from city-owned rail facilities and trackage along the Brooklyn waterfront.⁶ NYCH and the 7 Brooklyn rail customers then served by it filed protests.⁷

³ NYCH has one new customer, East Peak Trading Company, not reflected in its Protest.

⁴ The map submitted with the Statement of NYCH Vice President and General Manager Howard Samelson shows the trackage providing access to these customers.

⁵ One customer, American Warehouse, Inc., can receive freight at its facility by rail siding or rail cars floated directly to its facility on barges.

⁶ In support of its request, the City variously asserted that NYCH had been an "unworthy" and financially weak tenant and that it wanted to redevelop the subject property in some unspecified manner.

⁷ There NYCH disputed these allegations, noting that the City's environmental abuse litigation has been pending for four years. It recounted its difficulties in resolving the fire code violations with the City and cited its improved financial condition.

III.
ARGUMENT

The standard for granting a stay of an administrative proceeding is the same as that employed by the Federal Courts. The moving party must demonstrate: (1) that it has a strong likelihood of prevailing on the merits; (2) that it will be irreparably harmed in the absence of a stay; (3) that other parties will not be substantially harmed by a stay; and (4) that the public interest supports granting the stay. Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1971); Norfolk Southern Railway Company -- Abandonment Exemption -- Between Red Bay and Haleyville, AL in Franklin, Marion and Winston Counties, AL, Docket No. AB-290 (Sub-No. 123X) (May 27, 1993). NYCH meets these requirements.

A. Likelihood of Prevailing On The Merits

There is a substantial likelihood that an appellate court will grant NYCH's appeal. The Decision ignores a long line of STB and Interstate Commerce Commission ("ICC") precedent which squarely places the burden of proof in an adverse abandonment proceeding on the applicant, here the NYCEDC. See, e.g., STB Docket AB-33, Salt Lake City - Adverse Abandonment - In Salt Lake City, UT (served March 8, 2002) (hereafter cited as Salt Lake) where the Board stated,

[i]n adverse abandonment cases, where a noncarrier applicant seeks abandonment of a line of railroad over the objection of the railroad, the noncarrier applicant, in this case the City, has the burden of establishing that the PC&N require or permit the abandonment. See Chelsea Property Owners-Aban.-The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992) (Chelsea), aff'd sub nom. Consolidated Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994). If we find that it does, our

exclusive and plenary jurisdiction is removed, thereby enabling the parties to undertake other legal remedies to compel the carrier to leave the line and allow the property to be used for other purposes. See Modern Handcraft, Inc.-Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft).

Furthermore, the burden to show that the PC&N require or permit abandonment here is on the City, not on UP, and the City's attempt to shift that burden to the railroad is contrary to the statute and the case law interpreting it. Id. at 5, 6, and 10.

In its rush to judgement the Board not only fails to discuss applicant's burden of proof. It omits any reference to that burden and several recent STB cases on this very point.⁸ Like the applicant city in Salt Lake, New York City has failed to show how the public convenience and necessity require or permit the abandonment. NYCEDC's application does not clearly state the basis for the abandonment. On the one hand, NYCEDC's application refers to an attached Memorandum of Support [hereafter "the Memorandum"], stating at page 2-3:

"[t]he Board should grant NYCEDC's application for abandonment because: 1) NYCH has caused significant environmental damage, has violated state and federal law, and has abused the public trust by neglecting its financial obligations to the NYCEDC and creating a hazardous and dangerous condition; and 2) the public interest lies in not permitting NYCH to continue to operate and use the rail and marine service that utilizes rail tracks and terminal facilities owned by the City of New York in Brooklyn."

The accompanying Declaration of NYCEDC's Seth O. Kaye dated December 3, 2001, also cites the same matters as the sole bases for relief. But the accompanying Environmental Report tells a different story:

Once the abandonment is complete and NYCH is no longer using the facilities, NYCEDC and

⁸ and cases cited in footnote 11, infra.

other agencies of the New York City and New York State Governments will continue their current plans for redevelopment of the Brooklyn waterfront.

...
[i]t is expected that the site will continue to be used for rail purposes, particularly to interface with the planned redevelopment and expansion of adjacent maritime terminals to further promote water-to-rail movement of cargo and economic revitalization of the Brooklyn waterfront.⁹

The City can't have it both ways. Either the STB is faced with a situation where the existing contract operator should be evicted and replaced with a more worthy operator or the abandonment should be granted to permit the property to be used for some unidentified "higher" public use. This distinction is critical because the STB and the ICC have consistently granted adverse discontinuance requests involving unsatisfactory contract operators.¹⁰ Conversely, in the STB's own words, "[n]either the Board, nor the Interstate Commerce Commission before it, has ever granted an adverse abandonment when the carrier was operating over the line." Salt Lake at 5,6, and 8.¹¹

For the Board to grant the City's application and find that this property should be put to some other unidentified uses does not meet applicant's burden of proof. Likewise, pinning the City's abandonment application on mere allegations of events that predated NYCH's current

⁹ At pages 4-5 of the Environmental Report.

¹⁰ See, e.g., Jacksonville Port Authority-Adverse Discontinuance of Operations Application-In Duval County, FL, STB Docket No. AB-469 (served July 17, 1996) and Tacoma Eastern Railway Company-Adverse Discontinuance of Operations Application-a Line of City of Tacoma, in Pierce, Thurston, and Lewis Counties, WA (STB Docket No. AB-548 (served Oct. 16, 1998).

¹¹ Accord, The Western Stock Show Association-Abandonment Exemption-In Denver, CO, 1 S.T.B. 113 (1996); STB Docket No. AB-103, (Sub-No. 14), The Kansas City Southern Railway Company-Adverse Discontinuance Application-A Line of Arkansas And Missouri Railroad Company (served March 26, 1999).

management¹² and that have not been tried, let alone, proven in any court of law or other forum¹³ does not satisfy that burden.

By granting this application over the vehement opposition of both NYCH and 7 protesting on-line customers shipping over 1100 car loads per year of traffic, the Board is departing without a reasoned explanation from a long line of precedent holding that it denies adverse abandonment requests for actively used lines. The Board's failure to explain this apparent change in policy is arbitrary and capricious. See, e.g., Wisconsin Cent. Ltd. v. Surface Transp. Bd., 112 F.3d 881 (7th Cir. 1997) and cases cited therein at 887.

Moreover, a court would find that the Board failed to meet its statutory public convenience and necessity obligation to weigh the City's desire to use this property for other public purposes against the needs of the shipping public. Instead, the Board merely concluded that the public interest does not require continued service ¹⁴because, in its words, "this property should be put to other public uses, and we will not block the City from using its property as it wishes absent an overriding need for the rail service." Decision at 6.

Finally, a court would likely regard the Board's cavalier findings that "[t]here is relatively little traffic on this line" and that "these shippers will continue to have transportation options" as contrary to the record. NYCH and its protesting shippers had

¹² As noted in NYCH's prior submissions, current management assumed control in September 2000.

¹³ NYCH management has been attempting to resolve these matters through negotiations with City officials but, as yet, to no avail. And even the City admits that NYCH is current in its rental obligations. Memorandum at 9.

¹⁴ The Decision at page 7.

previously testified that abandonment of this trackage would cut off certain shippers¹⁵ from all rail service.¹⁶ Moreover, one shipper, Interdynamics, had previously testified that it would be severely harmed because its commodity - freon - is dependent upon rail transportation and cannot economically be transported by truck. Two other shippers - American Warehouse, Inc., and Davidson Pipe Supply Company, Inc. - indicated that the economic harm of the abandonment could be so severe as to force them to close their businesses. Clearly, the Board's conclusion that "there is no overriding public need for this rail service" flies in the face of ICC and judicial precedent holding that the ICC [and the Board] must consider the impact of an abandonment on the line's customers. Cf., Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295, 310-313 (D.C. Cir. 1983).¹⁷

The Board's statement that these shippers have other transportation options shows the depths of the Board's cluelessness. The STB erroneously treats NYCEDC's offer to enter into negotiations with NYCH for the use of the 65th Street Rail Yard and float bridges as tantamount to granting NYCH access to those facilities. But, as the City has pointed out in its May 7, 2003 submission:

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

¹⁵ Davidson Pipe Supply, Inc., Interdynamics, Inc., Dorann Resources, Ltd., Cropsey Scrap Iron & Metal Corp., Franklin Poly Corp., Midwood Lumber & Millwork, Inc., and East Peak Trading Company.

¹⁶ See, the attached statement of NYCH Vice President and General Manager Howard Samelson and that of Ronald W. Bridges submitted with NYCH's Protest.

¹⁷ Where the Court indicated that the ICC must weigh the economic impact of a merger or an abandonment on shippers who use the railroad.

[emphasis supplied]. At page 2.

In fact, if the Board were to read that letter, it would learn that NYCH must first pass the City's VENDEX seal of approval process in order to even be allowed to sit at the negotiating table. So far, NYCH's can't even get its calls to NYCEDC returned, let alone schedule a negotiation. While NYCH has conscientiously sought the use of that facility, the Board's expectation that such access is assured is error likely to be recognized on appeal. Even if the abandonment does not sever the protesting shippers' physical connection to the CSX interchange at Fresh Pond, the commercial and operational realities of a routing via Selkirk destroy this "transportation option."¹⁸

B. That Petitioner Will Be Irreparably Harmed Absent A Stay.

Should this application be granted, NYCH will to terminate its rail barge service across New York Harbor, severing the link between Brooklyn with New Jersey and the connections to NS and CSXT. While NYCH will continue its financially successful service to Jersey City customers, a critical link in the area's rail service will be forever cut. Both NYCH and NY&A's Long Island customers will be irreparably harmed by the loss of this growing, profitable overhead traffic interchanged with NS. NYCH's Brooklyn customers will permanently lose all rail service. These customers are the real victims here.

Should the City eventually grant NYCH access to its 65th Street Yard, NYCH would be able to continue handling the NY&A-NS interline traffic. But the City appears to be in no hurry to grant NYCH that

¹⁸ See, the statements of Howard Samelson attached hereto and that of Ronald W. Bridges submitted with NYCH's Protest.

access. The City could grant NY&A access to the 65th Street Yard float bridges; however, NY&A would have to construct new float bridge facilities in New Jersey or obtain access to NYCH's facilities there.

The Board's reference to a "transportation option" in the form of a CSXT/Selkirk routing entirely misses the mark. That routing does not afford customers on Long Island effective competitive access to NS for the economic reasons discussed in Mr. Samelson's statement. This abandonment makes a mockery of the Board's decision dividing Conrail,¹⁹ widely praised for restoring competition in the Northeast.

C. Other Parties Will Not Substantially Be Harmed By The Stay.

Granting this stay for the pendency of NYCH's reconsideration request will not harm the only other affected party, NYCEDC. Rather it will merely maintain a little longer the status quo. This proceeding has been pending in its current form since December 3, 2001, and the City's civil litigation against NYCH has been pending even longer. If the City's true agenda is reconfiguring rail lines along the Brooklyn Waterfront to permit redevelopment of that property and more efficient transportation service, NYCH is willing and eager to work with NYCEDC towards a common goal. Likewise, NYCH's current management is anxious to resolve other longstanding issues with the City. Granting this stay will encourage resolution by negotiation.

D. The Public Interest Supports A Grant Of This Stay.

In determining whether or not to grant this abandonment, the Board must balance various competing interests including those of the City, the railroad [NYCH], and the shippers. To do so, it balances the

¹⁹ CSX Corp. Et Al.-Control-Conrail, Inc. Et Al., 3 S.T.B. 196 (1998).

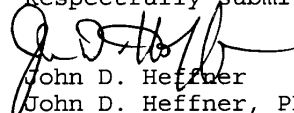
interests of all affected parties, rather than those of just one party. Cf., City of Cherokee v. I.C.C., 727 F.2d 748 (8th Cir. 1984). Here the public interest lies in preserving rail service for customers who would otherwise lose that service and either be forced to use motor carrier service, move, or be put out of business entirely. Several of NYCH's customers have testified that they would face increased transportation costs, likely resulting in increased prices for their products. To the extent these customers might be forced to replace rail with truck service, the City would face increased traffic congestion, air pollution, and energy consumption. And to the extent that a customer like Interdynamics was forced to move or close its doors, the economy would suffer through lost sales, lower tax revenues, and unemployment. Finally, for Long Island customers, a granting of NYCEDC's application would result in lost rail competition, an important public interest goal of the Conrail case.

IV.

CONCLUSION

The Decision should be stayed pending judicial review.

Respectfully submitted,


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Counsel for New York
Cross Harbor Railroad

Dated: May 16, 2003

VERIFIED STATEMENT
OF
HOWARD SAMELSON

Howard Samelson, being duly sworn, deposes and states as follows:

1. My name is Howard Samelson. My business address is 6 Linden Ave., Jersey City, NJ, 07305. For the past 13 months I have been employed as Vice President and General Manager of the New York Cross Harbor Railroad ("NYCH"). In that capacity I am intimately familiar with the railroad's operations, customers, markets, and railroad connections. I submit this statement in support of the Petition for Stay filed by NYCH with the federal Surface Transportation Board.
2. The Board in its decision approving the adverse abandonment of facilities owned by the New York City Economic Development Corporation and leased to NYCH believes that the railroad's shippers "will continue to have transportation options..." The Board's conclusion is erroneous for the following two reasons.
3. While two scrap customers truck their product to NYCH's Brooklyn Yard for transloading to rail and could use an alternate facility in Brooklyn if one exists, the maps which I have prepared and attached to this statement depict the location of each of NYCH's Brooklyn customers with no transportation options. As you can see from the map, each of these customers is served by a siding which comes off

rail trackage connecting to the yards subject to abandonment here. In other words, if the City exercises the authority granted by the Board and removes that trackage, these customers will lose their connections to the national rail system and hence their rail service. So even if NYCH or any other carrier obtains access to the 65th Street Yard or facilities, they will be unable to reach and serve these customers.

4. Moreover, even if the Brooklyn customers could retain service via Fresh Pond, the Board's statement about transportation alternatives on this route is wrong. Customer access to CSX is more fiction, than fact. CSX access would require that the traffic be interchanged with another short line railroad, the New York & Atlantic ("NY&A") which would move the traffic between Brooklyn and Fresh Pond, a distance of about 10 miles. Then CSX would have to haul this traffic another 140 miles north on a busy passenger line with limited windows for freight operations through the congested Selkirk Yard near Albany. Southbound traffic would then move back to Jersey City on CSX's congested River Line.
5. Operationally this move would be a nightmare, requiring 300 unnecessary route miles and two to three additional days of transit time. The additional expense associated with this move would discourage the use of rail on southbound CSX traffic and would eliminate any possibility of interchanging freight with Norfolk Southern Railroad. In fact, the

difficulties associated with this move have led CSX to route traffic to or from the Brooklyn customers via NYCH's car float rather than through Selkirk.

VERIFICATION

STATE OF *New Jersey*
CITY OF *Bayonne* SS

Howard Samelson, being duly sworn according to law, hereby deposes and states that he is authorized to make the Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information and belief.



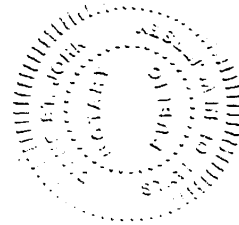
Subscribed and sworn to before me, a Notary Public, in and for the City of *Bayonne* in the State of *New Jersey*, this *16* day of *May*, 2003

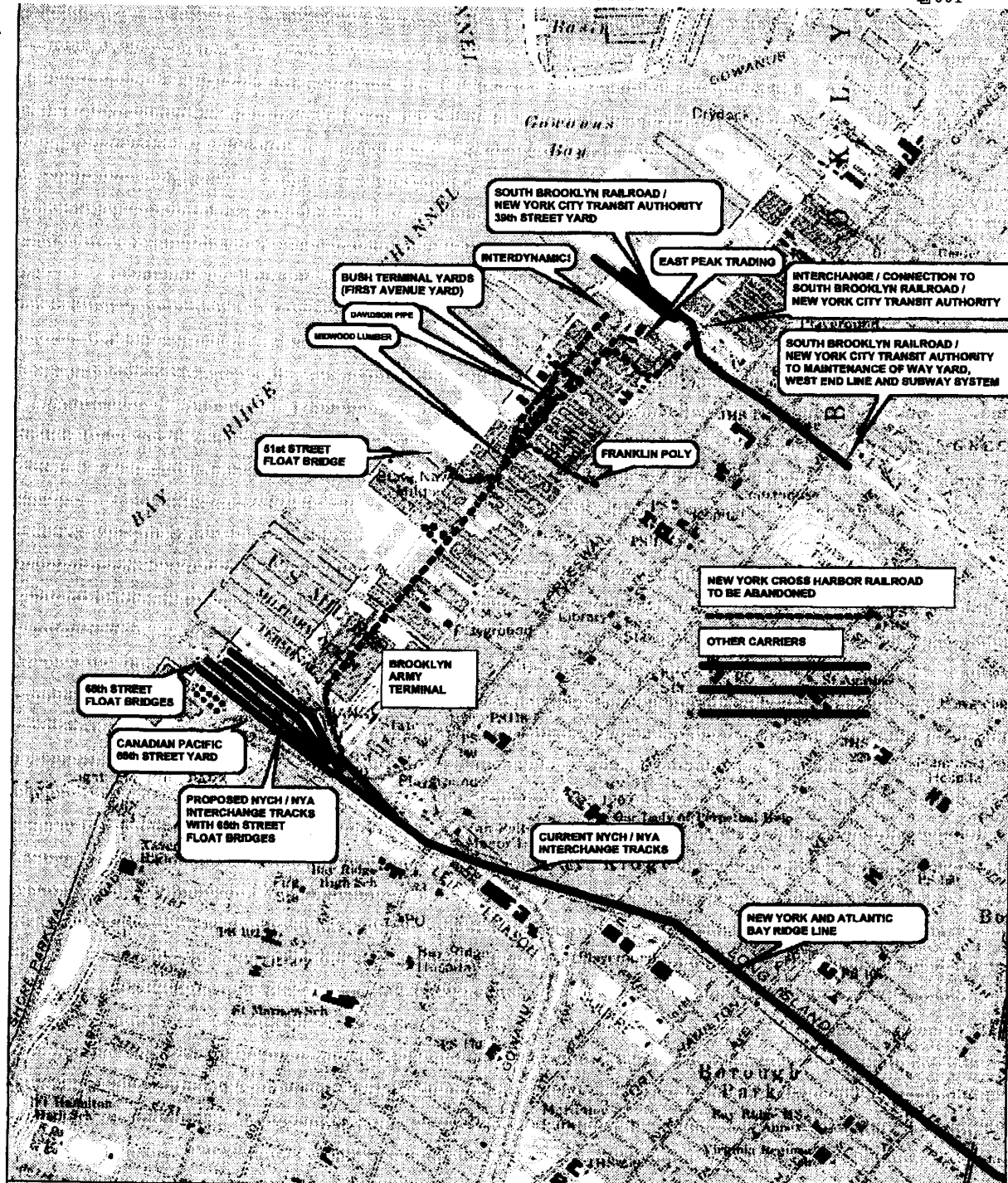
D. St. John
Notary Public

My Commission expires:

10/22/2007

DIANE ST. JOHN
Notary Public State of New Jersey
I.D. #2203211
My Commission Expires 10/22/2007





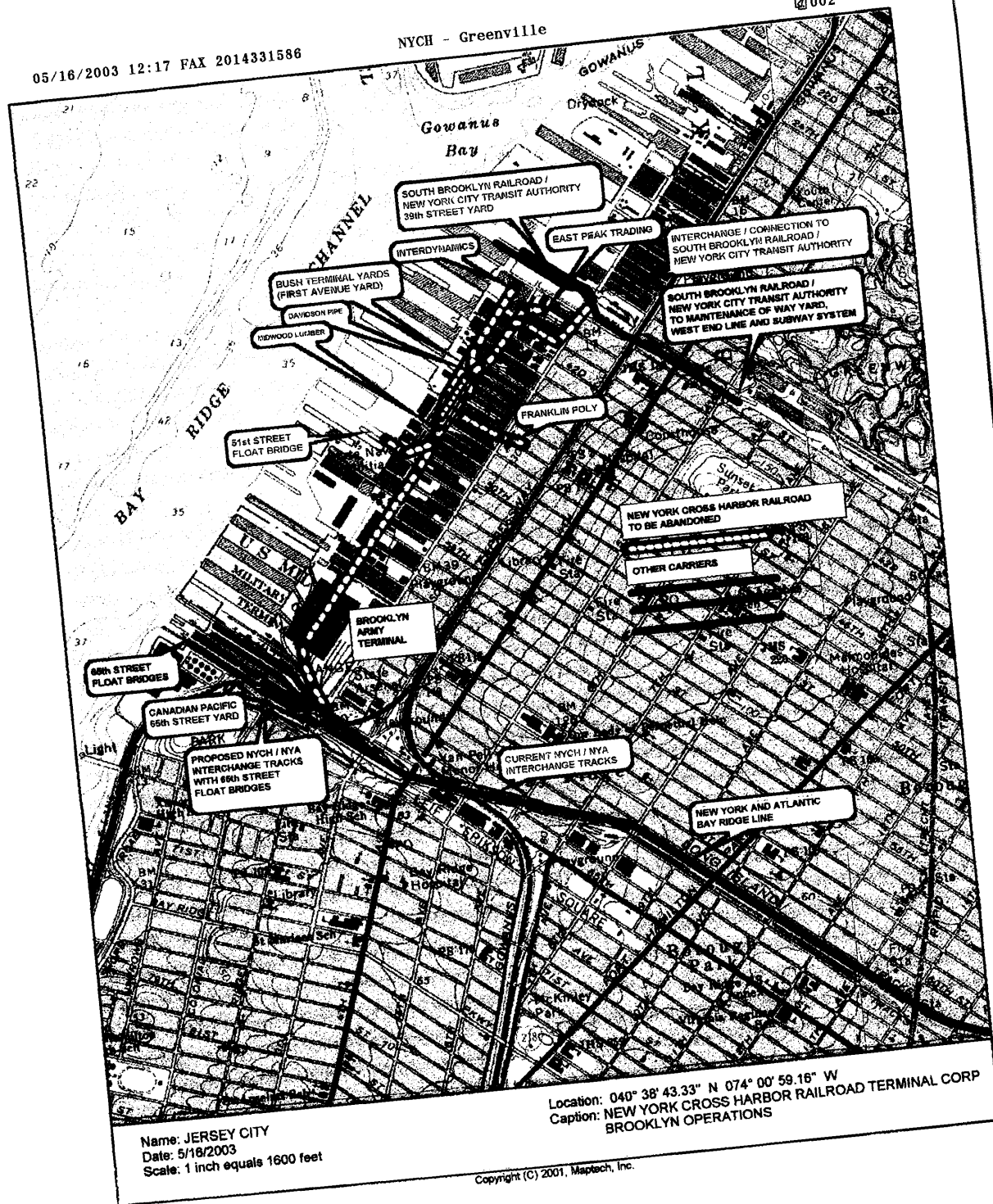
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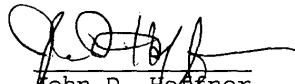
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Date: 5/16/2003
Scale: 1 inch equals 1600 feet

Location: 040° 38' 43.33" N 074° 00' 59.16" W
Caption: NEW YORK CROSS HARBOR RAILROAD TERMINAL CORP
BROOKLYN OPERATIONS

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CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that I have this 16th day of May 2003, served a copy of the foregoing Petition for Stay Pending Judicial Review by New York Cross Railroad on all parties in this proceeding by fax transmission and first class mail.


John D. Heffner