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LAW OFFICE

McLEOD, WATKINSON & MILLER

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***

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, D.C. 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

KATHRYN A. KLEIMAN*
OF COUNSEL
(*Admitted in Virginia only)
ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

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

May 23, 2003

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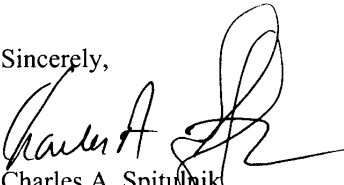
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Docket No. AB-No. 596; *New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad In Brooklyn, New York*

Dear Sir:

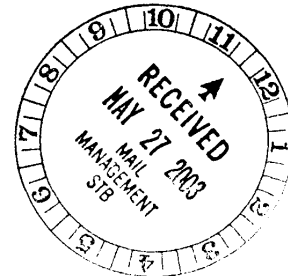
I am enclosing an original and ten (10) copies of the Reply of the New York City Economic Development Corporation, Acting on Behalf of the City of New York, New York to Petition of the New York Cross Harbor Railroad For Stay Pending Judicial Review in the above referenced matter. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5- inch diskette with this document.

Sincerely,


Charles A. Spitulnik

Enclosures

cc: Beryl Gordon, Esquire
All Parties of Record



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-No. 596

**NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION --
ADVERSE ABANDONMENT --
NEW YORK CROSS HARBOR RAILROAD, INC.
IN BROOKLYN, NEW YORK**

**REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NY
TO PETITION OF THE NEW YORK CROSS HARBOR RAILROAD
FOR STAY PENDING JUDICIAL REVIEW**

Communications with respect to this document
should be addressed to:

Charles A. Spitulnik
Alex Menendez
McLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

Attorneys for New York City Economic
Development Corporation

Dated: May 23, 2003



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FOR STAY PENDING JUDICIAL REVIEW**

The New York City Economic Development Corporation (“EDC”), acting on behalf of the City of New York, NY, (the “City”), hereby submits this Reply in opposition to the Petition of the New York Cross Harbor Railroad (“NYCH”) for Stay Pending Judicial Review, filed on May 16, 2003 (the “Stay Petition”).¹ NYCH fails to satisfy the criteria for a Stay and its Petition should be denied. The support for NYCH’s request by the Shipper Protestants, expressed in the letter from their counsel, dated May 16, 2003, does not alter the validity - - both legal and factual - - of the Board’s conclusion in the decision served in this proceeding on May 12, 2003 (the “*May 12 Decision*”) that the public convenience and necessity no longer require the presence of NYCH as a rail carrier in this market.

¹ According to §49 C.F.R. §1115.5(a), EDC’s Reply was due to be filed on Wednesday, May 21, 2003. EDC has filed a Petition for an extension of the time for filing this Reply, seeking an extension through and including today. This Reply is filed today in anticipation of a favorable ruling on that Petition.

INTRODUCTION

As a preliminary matter, NYCH's attempt to introduce new evidence in this proceeding is improper. The record in this proceeding is complete and has been for many months. The information contained in the Verified Statement of Howard Samuelson is not new nor was it unavailable at any stage in this proceeding when NYCH might have sought leave to supplement the record to bring new evidence that was not previously available. The argument contained in Mr. Samuelson's statement concerning the availability of rail transportation alternatives is not only belied by this Board's own conclusions in previous proceedings, but is inappropriate for introduction by the railroad at this time. Surely this is not the first opportunity that either NYCH or the shippers has had in this proceeding to address the availability and suitability of other rail transportation alternatives. The shippers have not explained how the rail transportation alternatives that are available to them do not meet their needs. Mr. Samuelson's explanation of the inadequacies of transportation alternatives might be suitable for a marketing brochure, touting the advantages of his company's service, but is not suitable for introduction as a factual statement upon which this Board should rely, particularly this long after the record in this proceeding has closed.

Aside from questioning the validity of the 1600 carloads of overhead traffic cited by NYCH in the Stay Petition, a number that finds no factual support in the record of this proceeding², EDC will not belabor the facts that brought it to the conclusion that the public interest of the City as a whole is best served by securing the right to exercise its rights as owner of the facilities that are the subject of this proceeding and evict this tenant. The record of this

² The Joint Protest of American Warehouse, et al., filed in this proceeding on January 18, 2001, included a reference to "well over 1000 carloads". *Id.* at 1. EDC's reply to that Protest questioned the continuing validity of that number. Even that number, however, does not approach the optimistic (and unsubstantiated) "1600 carloads" cited by NYCH in the Stay Petition.

proceeding stands on its own and supports without reservation this Board's decision to grant the Application for Adverse Abandonment. NYCH has not satisfied the conditions for issuance of a stay, and has not asked this Board to reopen the record or its decision to permit the introduction of evidence that would support a decision other than the one the Board announced at the voting conference on May 9 and in the written decision served on May 12. The Stay Petition should be denied.

ARGUMENT

NYCH HAS NOT DEMONSTRATED THAT A STAY IS JUSTIFIED AND THE PETITION FOR A STAY SHOULD BE DENIED

The four-part test for granting a stay is well established. A party seeking a stay pending appeal must demonstrate:

- That it has a strong likelihood of prevailing on the merits;
- That in the absence of a stay it will be irreparably harmed;
- That other parties will not be irreparably harmed by the issuance of the stay; and
- That the public interest supports it.

Va. Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 821 (D.C. Cir. 1958). *See W.M.A.T.C. v.*

Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1971). NYCH satisfies none of the criteria.

1. **NYCH Does Not Show a Substantial Likelihood of Success on the Merits of a Petition for Review.**

This Board's role when acting on EDC's Application for Adverse Abandonment was to determine wherein lies the public interest, and then act upon that determination. In the *May 12 Decision*, this Board did exactly what the statute requires. A conclusion about the public interest requires this Board to balance competing interests. The *May 12 Decision* took into account the interests of the people of the City as expressed by the City's government, as well as

the interests of one carrier by railroad and the seven businesses located along the lines of that carrier. NYCH may disagree with the balance struck by the Board, but it has not shown in the Stay Petition and can not show upon judicial review, that the *May 12 Decision* is not entitled to the deference typically granted an administrative agency's interpretation of its own statute, is wrong as a matter of law, or is inconsistent with the evidence introduced in this proceeding. No stay should issue without such a showing.

To succeed in a Petition for Review of the *May 12 Decision*, NYCH will have to convince a court that the Board's decision finds no support in the governing statute and in the evidence in the record. The Supreme Court has stated that if a choice made by an administrative agency "... represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, ...[a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 845, 104 S.Ct. 2778, 2783(1984), quoting *United States v. Shimer*, 367 U.S. 374 (1961). NYCH will not be able to meet that burden if it seeks review of the Board's decision here.

Because the Board reached a different conclusion here than it has reached in other adverse abandonment cases, including the recent decision in STB Docket No. AB 33 (Sub- No. 183), *Salt Lake City Corp. - - Adverse Abandonment - - In Salt Lake City, UT, slip op.* (Service Date March 8, 2002), NYCH leaps to the conclusion that the decision here must be incorrect. NYCH leaps too far, too fast.

The Board is compelled to base its decision in each case on the record presented. In an adverse abandonment proceeding, the Board has acknowledged that

The function of our exclusive and plenary jurisdiction over an abandonment is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.

STB Docket No. AB-31 (Sub-No. 38), *CSX Corp., et al. -- Adverse Abandonment*

Application--Canadian National Railway Company, et al., Service Date Feb. 1, 2002.

In this case, the record supports the Board's decision. The abandonment is not unnecessary - - it is required, as the record developed here reflects, to remove a tenant that has continuously demonstrated that it does not deserve the protection of the shield that is provided by this Board's jurisdiction, and whose presence and conduct stand in the way of permitting the City to use this property to its best advantage.

In the Stay Petition, NYCH cites the two principal explanations advanced by EDC for seeking to remove NYCH's authority to operate at the 51st Street facility. In short, those two bases are: (1) NYCH has been a difficult tenant and has worn out its welcome at 51st Street for all of the reasons recited in EDC's pleadings in this case; and (2) EDC envisions a better use for the facility than allowing it to continue to be abused by its current occupant, and has begun to make plans for developing the property in a way that it could not as long as the property is occupied by a tenant like NYCH that has treated both the property and the landlord with the disrespect that the record in this case describes. NYCH says that the City can't have it both ways. *Stay Petition* at 5. When the two issues are not mutually inconsistent, why not?

The problem with NYCH's argument is that it assumes that only EDC has a burden of proof here. Not so. EDC has demonstrated two substantial bases for eliminating NYCH's right to operate at the 51st Street facility, and has asked this Board to remove the shield that its plenary jurisdiction erects around NYCH's operation there. Has NYCH shown in the record of this proceeding that eliminating its franchise to operate and abuse the facility at 51st Street will

preclude the shippers near that facility who currently receive direct rail service from receiving such service, either via the nearby 65th Street facility or otherwise? No. In fact, as EDC explains further below, this Board took great pains 5 years ago to ensure that shippers on the east side of New York harbor, have competitive rail service options available to them. EDC's conclusory statements about that service do not refute the fact that such service exists for the benefit of these shippers.

Has NYCH shown that the City's plans for development at the 51st Street facility would preclude the operation of a float there by a worthy tenant and reliable operator? No. Has NYCH provided unrefuted support for the argument that its interests and those of the seven shippers that support its continued operation at 51st Street outweigh the legitimate public interests EDC has articulated as the basis for seeking the Adverse Abandonment in the first instance? No. Is there some disagreement about the merits of the relief that EDC seeks? Yes, but the fact that such disagreement between EDC and NYCH exists does not mean that EDC has not satisfied its burden of proving that the public convenience and necessity no longer supports permitting NYCH to operate over a portion of its system. NYCH is not likely to succeed on the merits of a Petition for Review, and its request for a stay should be denied.

2. NYCH Has Shown No Irreparable Harm.

Both the shippers and NYCH have alternatives here, and NYCH has not demonstrated that any other conclusion is correct. NYCH may not like it that the City is requiring NYCH to go through the Vendex process before the City can or will negotiate an agreement for the use of the 65th Street facility, but that is part of the process for contracting with the City. As of today, NYCH can cite no statement from the City that would suggest that it will not under any circumstances be granted access to the 65th Street facility.

Even if no agreement about the use of the float bridges at 65th Street ever comes to fruition, NYCH has not shown that the shippers have no meaningful rail service alternatives. The conclusory allegations in Mr. Samuelson's statement, without more, provide no substitute for the careful analysis undertaken by this Board recently that led to the presence of two rail carriers who can provide a link to the rest of the rail network for shippers via the rail line on the east side of the Hudson River. *See CSX Corp., et al. – Control and Operating Leases/Agreements – Conrail, Inc.*, 3 STB 196 (1998). The Board specifically rejected a request by Congressman Nadler and others to make the NYCH facilities part of a solution to the need for competitive rail service on the east side of the Hudson River. *Id.* at 279. Instead, this Board imposed as a condition of its approval of the acquisition of Conrail by CSX Corporation and Norfolk Southern Corporation, a requirement that CSX negotiate a trackage or haulage agreement with Canadian Pacific for service down the east side of the River into New York City from Albany to Fresh Pond. *Id.* at 283. Absent testimony from shippers that this alternative rail route is not adequate or appropriate to meet their needs if the float option across the harbor becomes unavailable, there is no showing of irreparable harm to the shipping public.

3. The City Will Be Harmed by the Issuance of a Stay.

At the request of NYCH, this Board's resolution of the issues presented in this proceeding has been delayed far beyond the abeyance period to which the City agreed in March 2002. Now, having received a decision that provides some measure of certainty and will permit it to move forward with plans for this site, EDC faces still more delay if the Stay petition is granted. Each day of delay means increased and unnecessary cost and expenditure of tax payer funds that could be used for other pressing public projects and increased uncertainty for the City

as it attempts to address the variety of issues it faces. The City will be irreparably harmed and no stay should be issued.

4. The STB Already Concluded That the Public Interest Lies in Proceeding with the Adverse Abandonment.

The *May 12 Decision* includes an assessment of the public interest. The Board determined, correctly, that on balance the public's interest would best be served by granting the relief the City requested in the Application for Adverse Abandonment. NYCH correctly points out in its Stay Petition "the Board must balance various competing interests including those of the City, the railroad [NYCH], and the shippers." See *Stay Petition* at p. 9. NYCH then goes on to ignore the competing interests of all the parties and argues that the only relevant interest are those of NYCH and the shippers by stating that "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."³ *Id.* at 10. However, as the Board noted "the property is owned by the City, which as a government entity represents **all of its citizens, not just the businesses that uses NYCH's services.**" See *May 12 Decision* at p. 6 (emphasis added). Simply put, the Board properly addressed and balanced the competing interests of all parties and the Stay Petition provides no basis for alteration of the conclusion it reached in the *May 12 Decision*. The Stay should be denied.

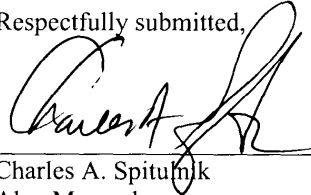
CONCLUSION

The time has come for NYCH to accept the consequences of its past actions and to face the reality that this Board has reached the conclusion that the public convenience and necessity no longer require or justify NYCH's operation at the 51st Street facility. NYCH has shown no basis for this Board to stay the effective date of its decision approving EDC's Application for

³ As noted earlier in this Reply, NYCH continues to make conclusory allegations and has failed to demonstrate that the shippers have no meaningful rail service alternatives.

Adverse Abandonment, and NYCH's Petition for Stay for the *May 12 Decision* should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik
Alex Menendez
McLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

Attorneys for New York City Economic
Development Corporation

Dated: May 23, 2003

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of May 2003, caused copies of the Reply of the New York City Economic Development Corporation, Acting on Behalf of the City of New York, New York to Petition of the New York Cross Harbor Railroad For Stay Pending Judicial Review, to be served by hand delivery to all Parties of Record with counsel in Washington, D.C. and by first class mail, postage prepaid upon all Parties of Record.


Charles A. Spitulnik