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JOHN D. HEFFNER, PLLC

1920 N St., N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3939

j.heffner@verizon.net



BY HAND

June 2, 2003

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20423-0001

**RE: STB Docket No. AB-596, New York City Economic
Development Corporation - Adverse Abandonment -
New York Cross Harbor Railroad in Brooklyn, NY**

Dear Mr. Williams:

I am enclosing an original and ten copies of a Petition for Reconsideration for filing in the above-captioned proceeding. Inasmuch as this filing would have been due yesterday Sunday June 1, 20 days after the service of the appealed from decision, I have confirmed with Julia Farr, Esq., of the Board's staff that filing this Petition today June 2 is timely under the Board's rules.

Also please find enclosed a copy of the Petition on a computer disk formatted in wordperfect 8.0 as well as a filing fee check for \$150. Please date stamp and return for my records one copy of this letter and Petition.

Sincerely yours,


John D. Heffner

cc: All parties
Wayne A. Eastman
Ronald W. Bridges

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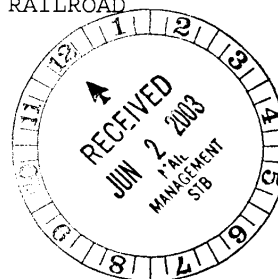
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BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

STB Docket AB-No. 596

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



ORIGINAL

PETITION FOR RECONSIDERATION
OF THE NEW YORK CROSS HARBOR RAILROAD

Respectfully submitted,

ORIGINAL

John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180
Counsel for New York
Cross Harbor Railroad

Dated: June 2, 2003

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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



**PETITION FOR RECONSIDERATION
OF NEW YORK CROSS HARBOR RAILROAD**

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 float bridge and related tracks at the Harborside Industrial Center ("Brooklyn Army Terminal") in Brooklyn, Kings County, NY. On May 16, 2003, NYCH petitioned the Board to stay its Decision pursuant to 49 CFR 1115.5(a), to which the City responded. NYCH now seeks reconsideration of the Decision under 49 CFR 1115.3(a).

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

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.

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").

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

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. NYCH respectfully requests that the Board receive this statement into evidence.

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.

Brooklyn waterfront.⁶ NYCH and the 7 Brooklyn rail customers then served by it filed protests.⁷

III.

SUMMARY

Under 49 CFR 1115.3(a) the Board will entertain a petition for reconsideration of an action other than an initial decision where "... (2) the prior action involves material error." This Decision is so replete with error that the Board should grant NYCH's Petition, correct these errors, and deny the City's adverse abandonment application.

The Decision involves material error in the following respects. First, in granting this application the Board committed material error by reversing without explanation a long line of STB and Interstate Commerce Commission ("ICC") precedent denying adverse abandonment requests for actively used lines. And by granting this adverse abandonment without the City meeting its required burden of proof, the Board again committed material error. While administrative agencies can depart from established precedent, they must explain their change in policy. The Board's failure to do so is arbitrary and capricious. Second, granting this adverse abandonment application over vigorous shipper and NYCH opposition, the Board abdicated its statutory public convenience and necessity duty to weigh the needs of the shipping

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.

public against the City's unexplained desire to eliminate these rail facilities. Finally, the Board's twin conclusions that "there is relatively little traffic on this line" and that the "shippers will continue to have transportation options" constitutes material error insofar as they are contrary to and unsupported by the record.

IV.

ARGUMENT

A. The STB Failed To Follow Adverse Abandonment Precedent And Failed To Explain Its Departure From Precedent

The Board's most egregious error is its failure to follow established precedent or to provide a reasoned explanation for its departure from that precedent. 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. In fact, the Board's decision goes so far as to ignore a statement in its recent March 8, 2002 ruling in Salt Lake City - Adverse Abandonment - In Salt Lake City, UT (hereafter cited as Salt Lake)⁸, "[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." 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.

⁸

STB Docket No. AB-33.

Similarly, the Board's failure to hold the City to the burden of proof required of an adverse abandonment applicant and then to grant the City's application despite an absence of proof is material error. STB and ICC precedent squarely place the burden of proof in an adverse abandonment proceeding on the applicant, here the NYCEDC. See, Salt Lake, supra, 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. ICC, 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.⁹ 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. And like the applicant city in Salt Lake, NYCEDC would shift that burden to NYCH contrary to the statute and the

⁹ and cases cited in footnote 11, infra.

case law.¹⁰

NYCEDC's application fails to meet its statutory burden of proof because it 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 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

¹⁰ In its reply to NYCH's Stay Petition, NYCEDC states curiously, "[t]he problem with NYCH's argument is that it assumes that only EDC has a burden of proof here. Not so." NYCEDC Reply at 6. The Board's ruling in Salt Lake expressly refutes that statement.

revitalization of the Brooklyn waterfront.¹¹

NYCEDC's Stay Reply rationalizes the City's disjointed justification for its adverse abandonment with the cavalier statement "[w]hen the two issues are not mutually inconsistent, why not." Stay Reply at 6.

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 "unworthy" contract operators.¹² Conversely, as noted earlier, STB has held, "[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 8.¹³ By granting this adverse abandonment using the precedent applicable to the removal of unsatisfactory carriers rather than the elimination of unwanted railroad facilities, the STB has

¹¹ At pages 4-5 of the Environmental Report.

¹² 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)).

¹³ 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).

without explanation "fused" two different types of adverse termination requests.

The Board's willingness to grant this abandonment despite NYCEDC's failure to carry its burden of proof is another example of material error. To the extent the City premises its abandonment request on unproven allegations of events that predated NYCH's current management¹⁴ and that have not been tried, let alone, proven in any court of law or other forum,¹⁵ it has not satisfied its burden of proof. Likewise, the City has not carried its burden to the extent the it cites unidentified public uses as an alternative basis for its abandonment request.

B. The Board Erred In Failing To Weigh The Shipping Public's Needs For Service Against The City's Desire To Eliminate These Rail Facilities.

The statutory standard governing all requests for abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed action. 49 U.S.C. 10903(a). In implementing this standard, the Board, and the ICC before it, balance the potential harm to affected shippers and communities against the present and future burden that continued operations would impose on the railroad and on interstate commerce. The Board (and the ICC before it) have

¹⁴ As noted in NYCH's prior submissions, current management assumed control in September 2000.

¹⁵ 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.

emphasized that "third party" applicants such as the City here have the burden to establish that the public convenience and necessity require or permit the abandonment or discontinuance. The agency then has a statutory duty to preserve and promote continued rail service and to provide the public with a degree of protection against unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See, e.g., Western Stock Show Association, supra, 1 S.T.B. at 131; Salt Lake, supra, slip op. at 6. Although impediments to State and local government projects are entitled to some weight, agency precedent clearly states that those interests are subordinate to its statutory duty to preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. Chelsea Property Owners - Aban. - The Consol. R. Corp. supra, 8 I.C.C.2d 773, 778-9 (1992).

Because the City failed to articulate its plan for these facilities, the Board could not weigh the needs of shippers for continued rail service against the allegedly higher public interest. By granting the City's request "hook, line, and sinker" instead of weighing the conflicting interests of rail shippers against those of the City,¹⁶ the Board has not only

¹⁶ Instead of weighing these competing interests, the Board cryptically concluded that the public interest does not require continued service because, 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

abdicated its statutory responsibilities. It has exceeded its statutory authority.

C. The Board's Findings On Traffic Levels And Shipper Transportation Options Are Contrary To And Unsupported By The Record.

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" are contrary to and unsupported in the record. NYCH and its protesting shippers had previously testified that abandonment of this trackage would cut off certain shippers¹⁷ from all rail service. 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

service." Decision at 6.

¹⁷ 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.

F.2d 295, 310-313 (D.C. Cir. 1983).¹⁸

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 [emphasis supplied]. At page 2.¹⁹

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 material error. Even if the abandonment does not sever the protesting shippers' physical connection to the CSX interchange at Fresh Pond, the

¹⁸ Where the Court indicated that the ICC must weigh the economic impact of a merger or an abandonment on shippers who use the railroad.

¹⁹ Backpedaling, NYCEDC states in its Stay Reply that "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." Stay Reply at 7.

commercial and operational realities of a routing via Selkirk destroy this "transportation option."²⁰

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,²¹ widely praised for restoring competition in the Northeast.

D. The Precedent Cited By The Board Is Either Distinguishable, Irrelevant, Or Supports NYCH's Position

The Decision cites to six cases to support its result. Not one involves these facts or supports the Board's result here. At the beginning of its Discussions and Conclusions Section, the Board cites three adverse abandonment cases. In Western Stock Show, supra, the Board denied an adverse abandonment request where the application was vigorously opposed by the railroad and at least one of the shippers. Significantly, the ICC found that the 327 car loads handled for five shippers in 1994 was sufficient traffic to warrant a continuation of the railroad's service. By contrast, the Board found NYCH's 1100 car loads insufficient. Chelsea, supra, involved a plan by Conrail to

²⁰ See, the statements of Howard Samelson attached hereto and that of Ronald W. Bridges submitted with NYCH's Protest.

²¹ CSX Corp. Et Al.-Control-Conrail, Inc. Et Al., 3 S.T.B. 196 (1998).

reinstate freight service over a long out of service line on the West Side of Manhattan. While the ICC noted there that the line's present unprofitability is "not a major consideration," it granted the application because of the lack of any present service and the infeasibility of Conrail's proposed waste hauling operation. Id. at 778 and 791. Finally, Modern Handcraft,²² probably the lead decision on adverse termination requests, involved a line that had been out of service for 12 years and had been turned into a parking lot. Neither of these latter two cases involved an active rail line and vigorous shipper opposition.

The Board then went on to cite STB Docket No. AB-31 (Sub-No. 38), CSX Corp. and CSX Transportation, Inc.-Adverse Abandonment Application-Canadian National Railway Company and Grand Trunk Western Railroad, Inc. (served Feb. 1, 2002) for the proposition that it would not allow STB jurisdiction to be used to shield a carrier from the legitimate processes of state law where no overriding Federal interest exists. But CSX involved the adverse discontinuance of trackage rights by the Grand Trunk Western Railroad (GTW) over a CSX line where GTW had not used those rights in some 5 years, no shipper protested CSX's application, and GTW's proposed use of that line would present congestion and

²² Cited as Modern Handcraft, Inc. - Adverse Abandonment, 363 I.C.C. 969 (1981).

service problems for CSX. Again, the instant proceeding does not involve these facts.

Of the two remaining cases cited in the Decision, City of Cherokee v. ICC, 727 F.2d 748 (8th Cir. 1994), did not involve an adverse termination request and Norfolk & W. Ry. Co.-Aband. Exem.-Cinn. Hamilton County, OH, 3 S.T.B. 110 (1998) presented another case of an out of service line.²³

E. The Labor Protective Conditions Imposed
By The Board Unfairly Penalize NYCH

In granting NYCEDC's request, the Board conditioned its approval on the imposition of labor protective conditions in Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979). The practical effect of this ruling is to saddle NYCH with expensive protective conditions for the 5 employees who would lose their jobs as a result of the City's unjustified and uncalled for actions. In imposing such a condition, the Board is penalizing NYCH twice, by forcing it to surrender its franchise and by requiring it to pay labor protection to adversely affected employees through no fault of its own. By imposing these conditions on NYCH, the Board has exceeded its statutory authority.

²³ The line had not only been out of service for at least two years but there were no shippers on the line and no prospect of locating any, the line was not required for overhead use, and the right of way was required for a longstanding and very detailed plan to redevelop Cincinnati's Riverfront area. Id. at 112.

V.

CONCLUSION

Simply stated, the Decision represents material error. It contains faulty reasoning, misapplication of precedent, and findings and conclusions contrary to or unsupported by the record. The Board is compelled to grant this Petition for Reconsideration and deny the abandonment.

Respectfully submitted,



John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Counsel for New York
Cross Harbor Railroad

Dated: June 2, 2003

VERIFIED STATEMENT
OF
HOWARD SAMELSON

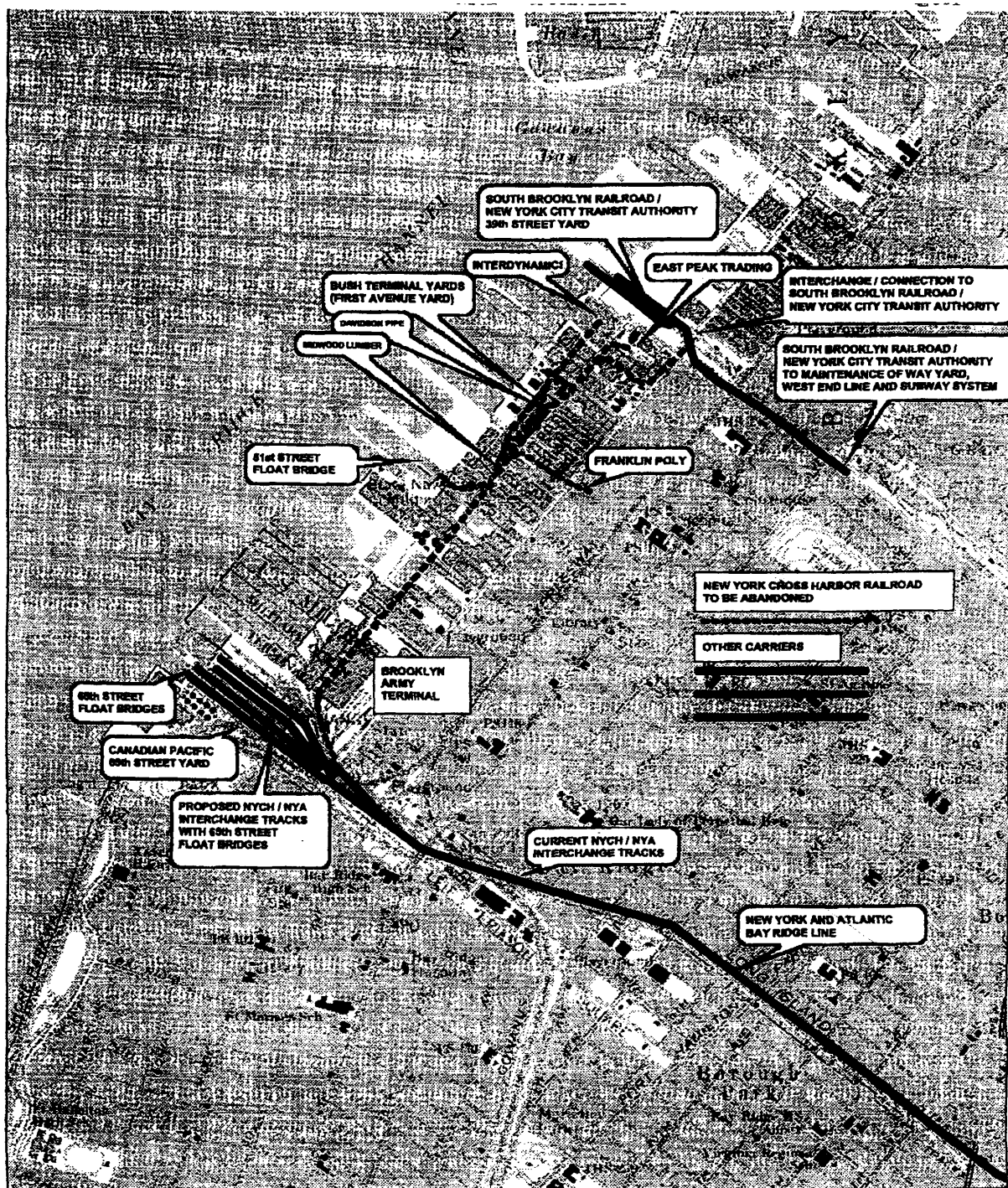
Howard Samelson, being duly sworn, deposes and states as follows:

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.

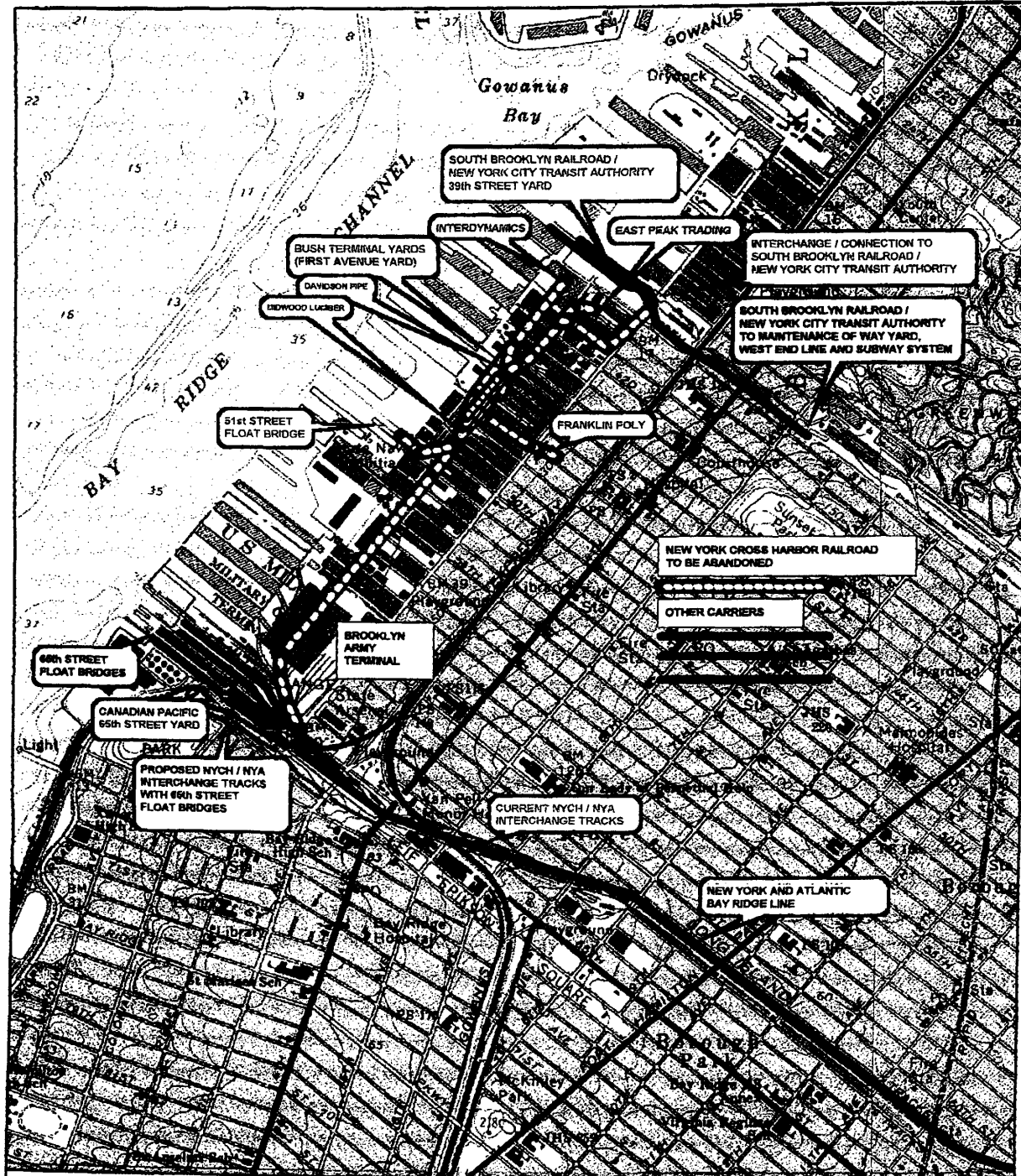
4. Moreover, even if the Brooklyn customers could retain service via Fresh Pond, the Board's statement about transportation alternatives on this route is wrong. Customer access to CSX is more fiction, than fact. CSX access would require that the traffic be interchanged with another short line railroad, 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.



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

Location: 040° 38' 47.43" N 074° 01' 06.91" W
 Caption: NEW YORK CROSS HARBOR RAILROAD TERMINAL CORP
 BROOKLYN OPERATIONS



Name: JERSEY CITY
 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

CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that I have this 2nd day of June 2003, served a copy of the foregoing Petition for Reconsideration by New York Cross Railroad on all parties in this proceeding by fax transmission and first class mail.


John D. Heffner