

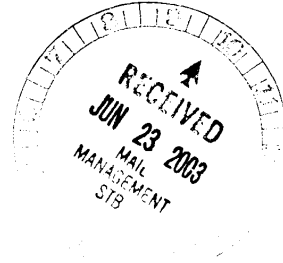
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THOMAS F. McFARLAND

June 20, 2003



By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply To Petition For Reconsideration Of Decision Served May 12, 2003, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

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Public Record

Very truly yours,

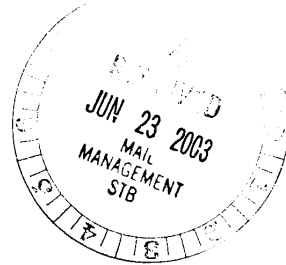
Tom McFarland

Thomas F. McFarland

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BEFORE THE
SURFACE TRANSPORTATION BOARD

NEW YORK CITY ECONOMIC	)	
DEVELOPMENT CORPORATION --	)	DOCKET NO.
ADVERSE ABANDONMENT -- NEW	)	AB-596
YORK CROSS HARBOR RAILROAD,	)	
INC., IN NEW YORK, NY	)	



REPLY TO PETITION FOR RECONSIDERATION
OF DECISION SERVED MAY 12, 2003

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MIDWOOD LUMBER & MILLWORK, INC.
1169 Coney Island Avenue
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DORANN RESOURCES, LTD.
163 Sixth Street
Brooklyn, NY 11215

Shipper Protestants

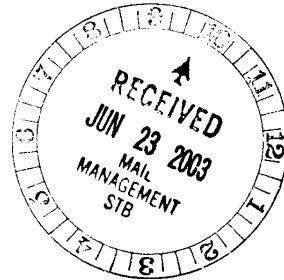
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DATE FILED: June 23, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

NEW YORK CITY ECONOMIC	)	
DEVELOPMENT CORPORATION --	)	DOCKET NO.
ADVERSE ABANDONMENT -- NEW	)	AB-596
YORK CROSS HARBOR RAILROAD,	)	
INC., IN NEW YORK, NY	)	



REPLY TO PETITION FOR RECONSIDERATION
OF DECISION SERVED MAY 12, 2003

Pursuant to 49 C.F.R. § 1104.13(a), the Shipper Protestants identified on the cover page hereby reply to a Petition for Reconsideration filed by New York Cross Harbor Railroad (NYCH) on June 2, 2003.

**I. THE FINDING OF NO OVERRIDING PUBLIC NEED IS NOT
ADEQUATELY EXPLAINED NOR SUPPORTED**

A critical finding in support of the decision is that “there is no overriding public need for this rail service” (decision at 7). That finding is based on the following subsidiary findings (*id*):

- (1) there is relatively little traffic on the line;
- (2) shippers will continue to have transportation options, as pointed out by NYCEDC;
- (3) there is an alternate route for Brooklyn-New Jersey traffic via CSXT at Fresh Pond Junction to and from its Selkirk Yard near Albany, NY; and
- (4) another floatbridge operation may be available via 65th Street.

The finding regarding public need is not adequately explained nor supported because those subsidiary findings are not adequately explained nor supported.

The Board’s finding that there is “relatively little” traffic on the line is meaningless because the Board did not identify a standard for comparison (i.e., little traffic in relation to what

standard?). According to NYCEDC Witness Kaye, there are a total of approximately 1,117 cars of originated or terminated traffic on the line per year, or nearly 100 cars per month. (Reply to Protests, VS Kaye at 4). That is significant traffic for only 3.97 miles of rail line. (Application at 5). Even eliminating the traffic of the largest shipper on the line, who may discontinue use of the line independently of the proposed abandonment, there are approximately 141 cars of originated or terminated traffic on the line per year, according to Mr. Kaye (*id.*, 1,117 cars minus 976 cars of the largest shipper). That, too, is significant traffic for only 3.97 miles of rail line (141 cars ÷ 3.97 miles = 35+ cars per mile).

The Board's finding that shippers will continue to have transportation options is accurate only as to the three shippers addressed in NYCEDC's evidence, i.e., American Warehouse, Cropsey, and Dorann. (Reply to Protests, VS Kaye at 4-5). That finding is not accurate as to the other four shippers -- Davidson Pipe, Franklin Poly, Interdynamics and Midwood Lumber. Each of those shippers would lose direct rail service if the line were to be abandoned. (Joint Protest of Shipper Protestants, Tabs 3-6; Petition for Stay, VS Samuelson, Paragraph 3 and location maps). Any alternative transportation for those shippers would involve significant additional costs for all-truck or truck-rail transloading service. Those added costs would be especially harmful because they would not be borne by competitors of those shippers in the New York City area who would continue to have direct rail service. (Joint Protest of Shipper Protestants, Tabs 3-6). If the phrase alternative transportation is to have any meaning, it must be interpreted to include transportation that is both logistically and economically feasible. *Georgia Public Serv. Comm'n v. United States*, 704 F.2d 538, 545 (11th Cir. 1983). Using that appropriate standard, there is no

support for the Board's finding that the four shippers identified above will continue to have transportation options.

For the same reason, the alternative all-rail route via Fresh Pond Junction and Selkirk Yard identified by the Board would not be an adequate alternative for those shippers. The added costs for trucking and transloading to or from railcars would significantly harm the competitive position of those shippers vis-a-vis area shippers served directly by rail. Moreover, that alternative rail route is extremely circuitous, highly congested and would involve an additional rail carrier (New York & Atlantic Railroad) in the routing. (Petition for Stay, VS Samuelson, Paragraphs 4 and 5).

It is speculative whether rail-floatbridge service via 65th Street will become available to NYCH shippers who would continue to be served by rail. But even if that were to come to pass, it would not be an economically feasible alternative for the four shippers identified above, who would incur additional trucking and transloading costs if they were to use that service.

As in *Busboom Grain Co., Inc. v. ICC*, 856 F.2d 790, 795 (7th Cir. 1988), the Board's discussion of public need for NYCH's service is "entirely unsatisfactory." Here, as in that case, the Board's findings on alternative transportation are "not adequately supported or explained." (*Id.* at 796).

II. THE BOARD'S DECISION CONSTITUTES AN UNEXPLAINED DEPARTURE FROM PRIOR NORMS

It is essential to correctly characterize the effect of this proposed abandonment on the shipping public because there are different lines of decisions in adverse abandonment cases depending on that effect. NYCEDC has characterized the purpose of the abandonment as

eviction of a lessee-rail operator who is not complying with its lease of the rail property. (Decision at 5). There is a line of decisions in which adverse discontinuance of service is liberally permitted where the owner of a rail line proposes to replace an existing rail operator who has failed to comply with terms of an agreement for operating the line. *See, e.g., Fore River RR Corp. - Discon. Exempt. - Norfolk County, MA*, 8 I.C.C.2d 307, 310-311 (1992); *Tacoma Eastern Ry. Co. - Adverse Discon. of Oper. App. - a Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA*, 1998 STB LEXIS 790 at *16-18, STB Docket No. AB-548, decision served Oct. 16, 1998; and *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, 1992 ICC LEXIS 224 at *13-17, ICC Docket No. AB-379X, decision served Nov. 4, 1992.

Here, however, NYCEDC does not propose to replace NYCH with another operator of the rail line. NYCEDC has sought an abandonment of the rail line, not a discontinuance of service. Here, unlike the cases cited above, shippers on the rail line would lose direct rail service. Here, unlike those cases, shippers on the rail line oppose the proposed abandonment. It is apparent that the line of cases identified above does not apply to the circumstances of the present case.

Here, NYCEDC intends to make nonrail use of the rail line if the adverse abandonment were to be granted. As proposed, future rail-carfloat operations would be performed at a different location -- the City's 65th Street rail-carfloat facilities. The existing rail-carfloat facilities would be redeveloped in an undefined nonrail manner. (Decision at 5).

An entirely distinct line of cases governs that scenario. Prior to the present case, the Board and its predecessor had never granted an adverse abandonment when the rail carrier was

operating over the line; adverse abandonment applications are generally denied if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. *Western Stock Show Assn. - Aban. Exemption in Denver, CO*, 1 S.T.B. 113, 134-136 (1996); *Salt Lake City Corp. - Adverse Aban. - in Salt Lake City, UT*, 2002 STB LEXIS 150 at *16, STB Docket No. AB-33 (Sub-No. 183), decision served March 8, 2002; *City of Colorado Springs, et al. - Pet. for Declar. Order - Aband. Determination*, 1989 ICC LEXIS 78 at *13-17, ICC Finance Docket No. 31271, decision served March 22, 1989; and *Wisconsin Dept. of Transp. - Aband. Exempt.*, 1988 ICC LEXIS 359 at *10-15, ICC Finance Docket No. 31303, decision served Nov. 23, 1988.

It is not possible to reconcile the Board's decision in the present case with that line of decisions. NYCH was operating over the rail line when the adverse abandonment application was filed, and continues to do so at present. There is more than a potential for continued rail operations -- there is a significant existing rail traffic base being served by the existing rail operator. NYCH has taken reasonable steps to attract traffic, as evidenced by that significant existing rail traffic base. Every rail shipper on the line opposes the proposed abandonment. So does NYCH. The present case thus fits squarely within the above line of decisions.

The Board can depart from the norm represented by that line of cases, but if it does so it must acknowledge that it is adopting a new policy and provide a rational basis therefor so that a reviewing court can determine whether the new policy is consistent with the agency's statutory mandate. See, e.g., *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 57 (1983). The Board did neither here.

At the bottom of page 6 of the decision, the Board cited *Norfolk & W. Ry. Co. - Aban. Exem. - Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998), for the proposition that the Board will not block a municipality from making a nonrail use of property formerly devoted to rail use absent an overriding need for the rail service. That decision did not involve an adverse abandonment or discontinuance.^{1/} The Board found no overriding public need in that case primarily on the bases that the track had not been used for more than 11 years, and no shipper would lose rail service as a result of the abandonment (at 119). The present case involves a much different situation of a rail line under current active use, where four shippers would lose direct rail service as a result of abandonment. The cited decision in no way supports the Board's action here.

In footnote 14 on page 7 of the decision, the Board cited three decisions for the proposition that where warranted, abandonments have been granted where there is some traffic on the line. Suffice it to say that none of those decisions involved an adverse abandonment where the rail carrier was operating over the line. Those decisions provide no support for the Board's action here.

It has been shown in Part I of this Reply that the finding of no overriding public need in the paragraph at the top of page 7 is not adequately explained nor supported. Consequently, that finding cannot provide rational support for the Board's action here.

Heretofore, in determining whether there is an overriding public need for the rail service at issue, the Board has credited evidence provided by opposing shippers despite challenges as to

^{1/} Perhaps the Board meant to cite *Grand Trunk W. RR - Adverse Discon. of Trackage Rights*, 3 S.T.B. 124 (1998), a companion case that did involve adverse discontinuance. The facts on public need in the two decisions are essentially the same.

traffic volume and transportation options. That is most evident in *Western Stock Show Assn. - Aban. Exemption in Denver, CO, supra*, viz. (1 S.T.B. at 135):

Next, shippers that DTRC is serving on both corridors have submitted evidence supporting continued operations. They express satisfaction with the service they have been receiving, promise continuing and increasing use of the carrier, and complain of the expense and unsuitability of the alternative of motor carrier service. Shippers even express a willingness to modify their schedules so as not to interfere with WSSA's annual stock shows. WSSA disparages the shipper evidence, questioning volume figures and commending motor carrier service as a viable option. The facts remain, however that shippers have submitted statements claiming that they would be harmed by a discontinuance. None has come before us supporting the adverse discontinuance application.

Here, in contrast, the effect of the Board's decision is to establish a new test for overriding public need based on some ill-defined minimum quantity of rail traffic and an unspecified quality of transportation options. As held in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., supra*, that change in policy cannot be lawfully effectuated without an acknowledgment that it is being undertaken, and a rational explanation to show that the new policy is consistent with the Board's statutory mandate. The Board's decision is arbitrary, capricious and otherwise contrary to law because the Board failed to satisfy either of those requirements.^{2/}

^{2/} Shipper Protestants believe that a standard for determination of overriding public need for rail service based on a minimum traffic volume and degree of shipper harm cannot be reconciled with the Board's duty under 49 U.S.C. § 10903 to provide the public with a degree of protection against unnecessary discontinuance of available rail service, nor with the national rail policy of 49 U.S.C. § 10101(4) in favor of continuation of a sound rail transportation system to meet the needs of the public.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should find on reconsideration that the finding of no overriding public need in the decision served May 12, 2003, is not adequately explained nor supported, and that the decision is arbitrary, capricious and otherwise contrary to law because it constitutes an unacknowledged and unexplained departure from prior norms. On reconsideration, the Board should find that there is a legitimate public need for the rail service at issue, and that the application for adverse abandonment should be denied.

Respectfully submitted,

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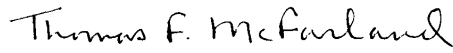
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Attorney for Shipper Protestants

DATE FILED: June 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2003, I served the foregoing document, Reply To Petition For Reconsideration Of Decision Served May 12, 2003, on Charles A. Spitulnik, McLeod, Watkinson & Miller, One Massachusetts Avenue, N.W., Suite 800, Washington, DC 20001 and John D. Heffner, 1920 N Street, N.W., Suite 800, Washington, DC 20036, by UPS overnight mail.



Thomas F. McFarland