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June 23, 2003

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

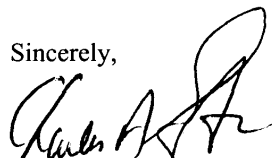
Re: Docket No. AB No. 596; *New York City Economic Development Corporation –
Adverse Abandonment – New York Cross Harbor Railroad In Brooklyn, New York*

Dear Sir:

I am enclosing an original and ten (10) copies of the Reply of 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 Reconsideration in the above-referenced proceeding. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5" diskette with this document.

Thank you very much.

Sincerely,


Charles A. Spitulnik

Enclosures

cc: Beryl Gordon, Esquire
All Parties of Record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-No. 596

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

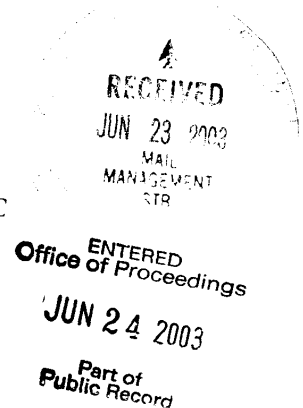
**REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NY
TO PETITION OF THE NEW YORK CROSS HARBOR RAILROAD
FOR RECONSIDERATION**

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Attorneys for New York City Economic
Development Corporation

Dated: June 23, 2003



**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 RECONSIDERATION**

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 Reconsideration, filed on June 2, 2003 (the "Petition"). NYCH has submitted no new evidence and has demonstrated no material error in the Board's decision granting EDC's and the City's Application for Adverse Abandonment. The Petition should be denied.

I. INTRODUCTION

NYCH has a permit from the City to use facilities on the Brooklyn waterfront. These facilities have been referred to at various times and in various places in this proceeding as the Bush Terminal Rail Yard, the 1st Avenue Rail Yard and the 51st Street Rail Yard (hereinafter "51st Street Rail Yard"). The City owns the underlying real estate in the 51st Street Rail Yard. NYCH has the right and obligation to provide freight service over the tracks and float bridges

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there.¹ NYCH and EDC, which manages the property for the City, have for several years had a contentious landlord-tenant relationship. NYCH has not only failed to properly maintain the City's property, it has neglected its own equipment and let the float bridges and barges it needs to run its cross harbor float operation fall into a serious state of disrepair.

NYCH's conduct at the property it was permitted to use by the City at the 51st Street Rail Yard has culminated in three legal/administrative proceedings: a) a summary proceeding in the Civil Court of the City of New York seeking a judgement of possession and warrant of eviction based on termination of the permit; b) litigation in which EDC alleges dumping of hazardous materials and other environmental violations at that facility and seeks restitution for its remediation costs; and c) this adverse abandonment proceeding ("Abandonment Proceeding").

EDC began the Abandonment Proceeding on November 2, 2001. By February of 2002, the issues relating to the Abandonment Proceeding had been fully briefed and the matter was ripe for resolution by the Surface Transportation Board ("the Board" or "STB"). On May 12, 2003, after a series of abeyances, which lasted well over one year, the Board served a decision in this case ("*May 12 Decision*") granting EDC's application for the adverse abandonment of tracks and facilities at the 51st Street Rail Yard. On May 16, 2003, NYCH petitioned the Board to stay its Decision pursuant to 49 CFR 1115.5(a), to which the City responded. On June 2, 2003, NYCH filed its Petition. On June 10, 2003 the Board issued a stay of the Decision until it has "an opportunity to address the issues raised in NYCH's petition for reconsideration." *See New York City Economic Development Corporation – Adverse Abandonment – New York Cross Harbor Railroad, Inc.*, STB Docket No. AB 596 (Served June 10, 2003).

¹ ICC F.D. No. 30183, *New York Cross Harbor R. Terminal Corp. – Exemption for Operation and Issuance of Securities, slip op* (Service Date July 15, 1983).

II. SUMMARY OF ARGUMENT

To succeed in its Petition, NYCH must demonstrate that the Board's decision finds no support in the governing statute and in the evidence in the record, or must show that new evidence or changed circumstances require a different outcome. The Verified Statement of Howard Samuelson, attached to the *Petition*, presents a rehash of the same unproven statements that NYCH presented already in this proceeding. It does not constitute "new evidence or changed circumstances", and will not be addressed further in this Reply. In this case, the record supports the Board's decision. The abandonment is required, as the record below 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.

NYCH alleges that the *May 12 Decision* involves material error in the following respects. First, NYCH says that the Board committed material error in granting this application by allegedly reversing without explanation a long line of STB and Interstate Commerce Commission ("ICC") precedent denying adverse abandonment requests for actively used lines. This position is misguided. The Board did not depart from established precedent, it followed the rules. 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, undertaking a balance of 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 its Petition, 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.

Second, NYCH contends that the Board "abdicated its statutory public convenience and necessity duty to weigh the needs of the shipping public against the City's unexplained desire to eliminate these rail facilities" by granting this "adverse abandonment application over vigorous shipper and NYCH opposition." NYCH's argument is, once again, misplaced. The Board clearly articulated that it balanced "the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce" and it found in this instance that abandonment was warranted. Finally, NYCH argues that the Board's conclusions regarding traffic and the impact on the shippers constitutes material error insofar as they are contrary to and unsupported by the record. Despite this contention, the record supports the Board's findings that "there is relatively little traffic on this line" and that "these shippers will continue to have transportation options." NYCH's Petition is without merit and should be denied.

III. ARGUMENT

A. The Decision is Consistent With, Not a Reversal of a Long Line of STB and ICC Precedent.

1. The Board's Decision Correctly Determines that the Public Convenience and Necessity Require or Permit the Abandonment.

The Board applied the same legal standard in this case that it has applied in every adverse abandonment proceeding. NYCH does not care for the conclusion the Board reached at the conclusion of that analysis, so it argues that "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." *Petition* at 3. The argument

suggests that that precedent mandates that the determining factor in the analysis is whether a carrier is operating on a line when determining whether a request for adverse abandonment should be approved. NYCH then argues that because it was operating on the line at issue the Board departed from established precedent by granting this adverse abandonment. This reading of the applicable precedent is overly simplistic.

The statutory standard governing any application to abandon a line of railroad, including an adverse abandonment, is whether the present or future public convenience and necessity require or permit the proposed abandonment. 49 U.S.C. § 10903(d). The Board recently explained this standard, along with the implications of approval of an abandonment, as follows:

In 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. [cite omitted]

Salt Lake City - Adverse Abandonment - In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) at p. 5, 6, and 10 (Served March 8, 2002) (“*Salt Lake City*”). The Board must look to all factors that relate to whether the public convenience and necessity require or permit the abandonment, not solely whether there is a carrier operating on a line. The analysis requires a balancing of multiple factors:

In implementing this standard, we balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce.

Id. at 5.

In this case, the Board thoroughly² reviewed all the facts and determined, under the well-established public convenience and necessity doctrine, that in this instance in view of these

² NYCH, in its Petition, states that the Board rushed to judgment in this matter. *See Petition* at p. 5. NYCH’s assertion is somewhat surprising given that this matter was filed in November of 2001 and ready for resolution in February of 2002, but the Board did not render a decision until May of 2003, having held the proceeding in abeyance for an extended period, largely at NYCH’s own request, for more than 1 year.

specific facts, the public convenience and necessity mandated that the adverse abandonment be granted. The Board made specific factual determinations that balanced the public convenience and necessity analysis in favor of granting the adverse abandonment, finding that:

- This property is owned by the City, which as a government entity represents all of its citizens, not just the businesses that use NYCH's services.
- The City has concluded that this property should be put to other public uses, and the Board should not in this instance block the City from using its property as it wishes absent an overriding need for the rail service.
- There is relatively little traffic on this line.
- As to that traffic, the record shows that the shippers will continue to have transportation options.
- Alternate routing exists for NYCH traffic moving between New Jersey and Brooklyn.
- Traffic can be interchanged at Fresh Pond Junction, in Queens County, NY, then moved by CSX Transportation, Inc., via the Hudson Division to or from its Selkirk yard near Albany, NY.
- Because NYCH is continuing to pursue use of the 65th Street facility, another floatbridge operation may be available.

See May 12 Decision at 7. Based on these factors the Board struck a balance, finding that "there is no overriding public need for this rail service and our jurisdiction therefore should not be a bar to the City's attempt to evict a tenant that it deems to be troublesome and devote the property to another public use." *Id.*

2. The Case Law Cited by NYCH Demonstrates that the Board has not Departed from Established Precedent.

NYCH would have this Board believe that the presence of an active operator on the line precludes the approval of an adverse abandonment. The three cases cited to support the proposition that "[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" do not support this argument. NYCH argues that the Board, in this action, has departed from established precedent. Nonsense.

A review of the cases NYCH cites, *Salt Lake City; The Western Stock Show Association – Abandonment Exemption – In Denver, CO*, 1 S.T.B. 113 (1996) (“*Western Stock*”); and STB Docket No. AB-103 (Sub-No. 14), *The Kansas City Southern Ry. Co. – Adverse Discontinuance Application – A Line of Arkansas and Missouri Railroad Co.* (served March 26, 1999) (“*Kansas City Southern*”), confirms that the Board has not departed from established precedent. Contrary to NYCH’s argument, they demonstrate that the Board has consistently analyzed the public convenience and necessity in abandonment cases, and that it has applied that same standard here, albeit with a different outcome than has resulted in the past.

In *Salt Lake City*, the Board stated:

The statutory standard governing any application to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. 49 U.S.C. 10903(e). **In implementing this standard, we balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce.**

Id. at 5. (emphasis added). In making the required assessment, it considered:

- The fact that the railroad was operating over the Line.
- The impact on rail traffic relating to the alternative routes that the railroad could use, and specifically that the line that sought to be abandoned was going to be used by the railroad to relieve bottlenecks and congestion.³
- The impact of the traffic and line given its proximity to houses and schools.⁴
- The traffic concerns relating to the delay of emergency vehicles, interference with public bus routes, and longer commute times for motorists.
- The impact on the quality of life in the surrounding community as it relates to the noise and vibrations from trains passing close to houses and schools, and assert that property values will drop or have already dropped in anticipation of UP's resumption of service over the Line.
- The Line's potential negative impact on the environment, including neighborhood parks and trails, and the possibility of hazardous materials accidents.

In balancing all these points the Board stated that:

³ The railroad had submitted evidence supporting the benefits of using the Line to increase velocity, reduce congestion, and increase capacity on its main lines through the Salt Lake City area.

⁴ The railroad submitted evidence that that the line at issue posed no unusual safety hazards not normally associated with rail lines in populated areas.

We have weighed the safety, traffic and quality of life concerns raised by the community and find that they do not outweigh the overriding Federal interest in maintaining this Line as part of the interstate rail network. Rail operations were previously conducted on the Line, and the Line was never authorized to be abandoned. Thus, as discussed above, UP's reactivation - which it can undertake without our approval - will merely continue rail operations by UP on the same line. While the community's concerns are understandable, they are not unique to this Line. Similar concerns are shared by communities on other rail lines throughout the nation. UP also has worked with the community to ameliorate problems associated with the reactivation, and we encourage UP to continue to do so.

*Id.*⁵ Thus, it is clear in *Salt Lake City* that the Board did not deny the adverse abandonment simply because the railroad was operating over the line, but rather because it weighed and balanced the community concerns against “overriding Federal interest in maintaining this Line as part of the interstate rail network.” *Id.* In the instant action the Board “weighed the ... concerns raised by the community” but found that they did “outweigh the overriding Federal interest in maintaining this Line as part of the interstate rail network.” The differing outcome does not represent a departure from precedent, but rather the application of the well-established legal doctrine to a completely distinct set of facts and circumstances.

In *Western Stock* the Board used the same statutory standard and determined based on the required balancing analysis that the adverse discontinuance with respect to one of the carriers in the proceeding should be denied. The Board assessed the present or future public convenience and necessity, but it did not just look solely at whether a “carrier was operating over the line.” It considered:

- That the railroad was actively operating over the subject lines.
- That the railroad was operating at a profit.
- That a discontinuance would deny the carrier the opportunity to develop additional freight traffic for movement over the subject lines.
- That discontinuance would jeopardize its ability to continue to provide service to

⁵ Unlike UP in *Salt Lake City*, in the instant action the major problems arise from NYCH's failure to work with the City, and to in fact disclaim financial responsibility for the actions the company has undertaken in the past.

shippers in its only other division.

- That shippers submitted evidence supporting continued operations.
- That shippers expressed a willingness to modify their schedules.
- The harm suffered by the petitioner seeking the adverse discontinuance
- The fact that the petitioner had agreed to grant the railroad trackage rights for no compensation.
- The contention by the petitioner that the railroad was not carrying insurance sufficient to protect petitioner in the event a claimant wins a judgment against petitioner for a rail accident occurring on its property.

Id. In *Western Stock*, the Board found that the petitioner failed to demonstrate that the carrier's operations were endangering the public or violating a duty to it. In fact, the Board found that the record did not establish that continued operations would impose a burden on any of the affected parties and denied the application. *Id.* The Board did not deny the adverse abandonment simply because the railroad was operating over the line, but rather it balanced the interests of all parties, just as the Board has done with respect to EDC's Application. Again, the differing outcomes do not suggest a departure from precedent, but rather the application of the well-established doctrine to a completely distinct set of facts and circumstances.

In *Kansas City Southern* the Board once again applied the statutory standard that governs abandonment or discontinuance of service, *i.e.*, whether the present or future public convenience and necessity permit the proposed action. *Kansas City Southern at 6.* Furthermore, the Board stated that "in making the finding, the Board shall consider whether the discontinuance will have a serious, adverse impact on rural and community development." *Id.* The Board also considered "in implementing the statutory standard" . . . "the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the line, and on the public." *Id. citing Jacksonville Port Authority-- Adverse Discontinuance--In Duval County, FL, STB Docket No. AB-469 (STB served July 17, 1996).*

In *Kansas City Southern*, unlike in the instant action, the party seeking discontinuance was a railroad.⁶ The evidence demonstrated:

- That there was substantial overhead traffic moving over the line.
- That many of the overhead shippers strenuously objected to the discontinuance.
- That the shippers argue that the discontinuance would reduce competition.
- That transit times and resultant costs would be increased.
- That the railroad seeking the discontinuance would be able to control the rates on all movements across an interchange.
- That overhead shippers could lose routing options and have less efficient, more costly service.
- That in terms of operational efficiency, the railroad did not show that there are any public benefits associated with its proposal to substitute itself as an interchange carrier.
- In fact, the railroad admitted that termination of the involved trackage rights will make the handling of trains "somewhat less efficient" due to the fact that "all interline service is somewhat less efficient than single-line service."

The Board, after considering the arguments and the facts presented in the record, concluded that the applicant railroad had not presented credible evidence to merit discontinuance of the trackage rights at issue. Once again the Board did not deny the adverse abandonment simply because the subject railroad was operating over the line, but rather it balanced the interests of all parties and the public in general. Once again, this is exactly what the Board has done with respect to NYCH. The Board's decision in this case simply reflects the outcome of the application of the well-established doctrine to a completely distinct set of facts and circumstances.

B. If the *May 12 Decision* Represents a Change in Policy, the Board has Adequately Explained the Reasons for Its Decision.

For all the reasons described in Section A, above, the *May 12 Decision* does not represent a departure from precedent. However, even if, as NYCH argues, that *Decision* does represent

⁶ The railroad seeking the discontinuance was a Class III rail carrier operating rail line acquired from the former Burlington Northern Railroad Company. That acquisition had been subject to bridge trackage rights granted to the Kansas City Southern Railway, whose rights the Class III was attempting to extinguish.

such a change EDC submits that this Board has provided adequate rationale for its action.

It is well-settled that Board make may make policy in common law fashion, and therefore may unmake it in the same fashion; however, it may not make major policy changes by pure fiat, with no explanation of why the change is consistent with the statute. *State of Illinois v. I.C.C.*, 772 F.2d 1341, 1349 (7th Cir. 1984) *citing Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08, 93 S.Ct. 2367, 2374-2375, 37 L.Ed.2d 350 (1973); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir.1974); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983). Furthermore, “the standard of public convenience and necessity is **sufficiently flexible** to allow a reasonable ICC at one time to think that it ought to take into account system profitability and at another time to think it ought not to, **but if it is to change course so completely it must give a reason why;**” *Id. citing* 5 U.S.C. § 706(2)(A) (emphasis added); *Missouri-Kan.- Tex. R.R. v. United States*, 632 F.2d 392, 399-400 (5th Cir.1980).

The Board did “give a reason why” here. The Board emphasized that the City is the owner of this property and that the City has an obligation to all of its citizens, not just the companies that currently receive service from NYCH. The Board looked at the relatively small traffic volumes and at the statements in the record that the shippers will continue to have transportation options. *See May 12 Decision* at 7. It explained the basis for its *Decision*. As a result, even if NYCH is correct (which EDC does not concede is the case), the Board “gave a reason why” it was reaching a different outcome than it has in the past. The Board has satisfied its statutory duty in every respect and there is no reason to grant the *Petition*.

C. The Record Demonstrates that EDC has Met Its Statutory Burden of Proof.

NYCH alleges that EDC fails to meet its statutory burden of proof because it does not state the basis for its abandonment. *Petition* at p. 6. NYCH complains because EDC advances two allegedly inconsistent explanations 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. Again, as EDC stated in its Reply to NYCH's Petition for Stay Pending Judicial Review in this proceeding, 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. It presents conclusory allegations from one of its officers but no testimony at this point from the shippers themselves. 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. NYCH's 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.

Furthermore, NYCH states that "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." *Id.* at 7. NYCH states that "this distinction is critical because the STB and the ICC have consistently granted adverse discontinuance requests involving "unworthy" contract operators" but "[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." NYCH then argues that "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 without explanation fused two different types of adverse termination requests."

However, the problem with NYCH's argument is that there is only one "statutory standard governing abandonment or discontinuance of operations" and that is "whether the

present or future public convenience and necessity require or permit the proposed discontinuance.” See *Kansas City Southern Railway, supra*. No case, statute or regulation supports NYCH’s assertion that two different standards exist.

NYCH also argues that EDC fails to carry its burden of proof because EDC’s premises its abandonment request on unproven allegations related to events that predated NYCH’s current management and that have not been tried, let alone, proven in any court of law or other forum. Once again, NYCH misses the point. The Board does not rest its decision solely on those allegations. It balances the City’s interests as property owner and as representative of the interests of all of its citizens, against the interests of NYCH and the seven shippers it serves directly. The record in this proceeding sufficiently sets forth the evidence necessary to support EDC’s case for abandonment as evidenced by the facts set forth in the *May 12 Decision*.

D. NYCH Provides no Basis for Its Assertions that the Board’s Decision is Erroneous.

1. The Board’s Findings on Traffic Levels and Shipper Transportation Options are Supported by the Record.

Despite NYCH’s contention that the Board acted “cavalierly” the record supports the Board’s findings that “there is relatively little traffic on this line” and that “these shippers will continue to have transportation options.” For example, with respect to the volume of traffic, the verified statement of Seth O. Kaye, submitted as part of *NYCEDC’s Reply to Protest of New York Cross Harbor Railroad and Joint Protest of Local Shippers* (“VS Kaye”) demonstrates that the volume of traffic on this line is far less than NYCH describes. VS Kaye at ¶¶ 8-20.⁷ Until recently, one shipper, American Warehousing, Inc. (“AWI”) accounted for the vast majority of the traffic moved by NYCH in Brooklyn. Now, however, the termination of AWI’s lease at the Southern Brooklyn Marine Warehouses (“SBM Warehouses”) will dramatically decrease the

⁷ A copy of VS Kaye is attached hereto as Exhibit A for the Board’s convenience.

number carloads that travel over the First Avenue rail line. Specifically, AWI's lease has ended and AWI is no longer occupying or using the SBM Warehouses and thus no longer sending its 976 carloads of traffic on the First Avenue rail line. Therefore, the record demonstrates that the individual company thru-put volume on the NYCH rail line by companies decreased from 1117 cars annually to approximately 141 cars. Clearly, this supports the Board's finding that "there is relatively little traffic on this line."

Notwithstanding NYCH's startling contention that the Board is "clueless" on the issue of transportation options, the record demonstrates that "these shippers will continue to have transportation options." First, Mr. Kaye's statement demonstrates that there are other options available as follows:

22. Dorann Resources, Ltd. ("Dorann") and Cropsey Scrap Iron and Metal Corp. ("Cropsey") both allege they would be harmed by this abandonment. Dorann and Cropsey currently truck their material to the First Avenue Rail Yard. **It would be substantially similar for Dorann and Cropsey to truck their respective materials to the 65th Street Rail Yard. In fact, it is actually a shorter distance for Cropsey to truck its material to the 65th Street Rail Yard (5.29 miles) than to the First Avenue Rail Yard (5.75 miles). With respect to Dorann the distance to the 65th Street Yard of 3.2 miles is only slightly longer than the distance to the First Avenue Rail Yard, which is 2.66 miles.**

VS Kaye at ¶ 22 (emphasis added).⁸

Second, NYCH's allegation that this abandonment "makes a mockery" of the Board's decision in *CSX Corp. et al. - Control Conrail, Inc. et al.*, 3 S.T.B. 196 (1998) is simply wrong. The Board in that decision undertook a careful analysis that led it to mandate the presence of two rail carriers who can provide a link to the rest of the rail network to shippers via the rail line on the east side of the Hudson River. 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

⁸ For those shippers who allege that their business requires direct rail service, EDC is continuing to assist them in securing reliable operators for, or other appropriate alternatives to, the current NYCH service.

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. The *May 12 Decision* does not make a “mockery” of the Board’s Conrail Decision, as NYCH suggests, but rather it demonstrates that the Board believes the transportation alternatives created by that decision can serve their intended purpose.

NYCH also asserts that the Board “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.” *Petition* at p. 11. Furthermore, NYCH asserts states that “while NYCH has conscientiously sought the use of that facility, the Board’s expectation that such access is assured is material error.” The Board does not go where NYCH accuses it of going. What the Board did say is the following, a statement that finds support in the record:

Moreover, because NYCH is continuing to pursue use of 65th Street Facility, another floatbridge operation **may be available**.

May 12 Decision at 7. (emphasis added). NYCH may not like it that the City is requiring NYCH to go through the Vendex background check 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. The Board’s language makes clear that NYCH’s allegation that the *Decision* includes a material error with respect to the assessment of the situation at the 65th Street Facility is unfounded.

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. Ultimately the record clearly demonstrates that both the shippers and NYCH have alternatives here, and NYCH has not demonstrated that any other conclusion is correct.

2. The Precedent Cited by the Board Supports the Board's Decision in this Matter.

NYCH contends that of the six cases the Board cites in the May 12 *Decision* none support the result reached by the Board. Once again NYCH is incorrect. All the decisions cited by the Board stand for the proposition for which they are cited.

- The Board cites three cases, *Western Stock Show Assn.—Aban. Exemption—in Denver, CO*, 1 S.T.B. 113 (1996) and *Chelsea Property Owners - Aban. - The Consol. R. Corp.*, 8 I.C.C.2d 773 (1992), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994) and *Modern Handcraft, Inc.—Abandonment*, 363 I.C.C. 969 (1981) for the proposition that “on occasion, a noncarrier will seek, and a rail carrier will oppose, an abandonment under 49 U.S.C. § 10903. Each of those cases includes the language to which the Board referred.⁹
- The Board cites *CSX Corp. et al. - Adverse Abandonment Application - Canadian National Railway Company et al.*, STB Docket No. AB-31 (Sub-No. 38) (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

⁹ Furthermore, NYCH refers to the case of *Western Stock*, *supra*, and points out that: “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 carloads insufficient. *Petition* at 12. However, as demonstrated by VS Kaye the traffic decreased from 1117 cars annually to approximately 141 cars, which is less than the 327 cited in the *Western Stock* decision.

interest exists. The cited case includes the language to which the Board referred in the *May 12 Decision*.

- The Board cites *City of Cherokee v. ICC*, 727 F.2d 748 (8th Cir. 1994) for the proposition that Congress left it to the Board to balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally. The case supports that proposition. That balance is precisely what the Board undertook here.
- The Board cites *Norfolk & W. Ry. Co. - Aband. Exem. - Cinn. Hamilton County, OH*, 3 S.T.B. 110 (1992) for the proposition that the Board will not block the City from using its property as it wishes absent an overriding need for rail service. This case stands for that proposition.

3. The Board Balanced the Competing Interests Correctly.

The Board properly addressed and balanced the competing interests of all parties and the *Petition* fails to establish a basis for alteration of the conclusion the Board reached in the *May 12 Decision*. NYCH asserts that “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.” Thus, “by granting the City’s request ‘hook, line, and sinker’ instead of weighing the conflicting interests of rail shippers against those of the City, the Board has not only abdicated its statutory responsibilities. It has exceeded its statutory authority.” This argument has no merit.

The Board did weigh the conflicting interests. In its decision the Board states that in coming to the conclusions it did it “balanced the competing benefits and burdens of

abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally.” *May 12 Decision* at 6, citing *City of Cherokee v. I.C.C.*, 727 F.2d 748 (8th Cir. 1984). The *May 12 Decision* includes an assessment of the public interest, and 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. For example, 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 6 (emphasis added). NYCH’s argument on this point has no merit and provides no basis for reconsideration of the *May 12 Decision*.

E. The Labor Protective Conditions Imposed by the Board are Proper.

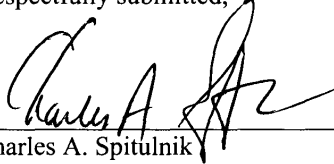
In granting NYCEDC’s request, the Board conditioned its approval on the imposition of labor protective conditions in *Oregon Short Line R. Co.- Abandonment-Goshen*, 360 I.C.C. 91 (1979). The Board has no choice. The statute mandates the imposition of these labor protective conditions. See 49 U.S.C. § 10903 (b)(2).

NYCH cannot cry foul over the Board’s compliance with its statutory mandate. NYCH argues that “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.” *Petition* at 14. Simply put, if NYCH had acted as a responsible corporate citizen and not driven the City to conclude that NYCH is no longer a proper steward of this property, NYCH might not be in this position. In other words, any “penalty” NYCH feels it is receiving is a direct result of its own action. By imposing these conditions on NYCH, the Board has complied with its statutory authority.

IV. CONCLUSION

In view of all of the foregoing and of the evidence and argument submitted previously by EDC in the record of this proceeding, EDC respectfully submits that the NYCH Petition for Reconsideration should be denied.

Respectfully submitted,

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

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Dated: June 23, 2003

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of June 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 Reconsideration, 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