

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-596

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION – ADVERSE  
ABANDONMENT – NEW YORK CROSS HARBOR RAILROAD, INC.

Decided: December 3, 2001

By petition filed on November 2, 2001, New York City Economic Development Corporation (NYCEDC), acting on behalf of the City of New York, NY (City), seeks waiver of certain regulations requiring the filing of specific information for an “adverse” abandonment application that it intends to file.

NYCEDC indicates that it intends to ask the Board to find that the public interest is no longer served by New York Cross Harbor Railroad’s (NYCH) use of the railroad tracks and terminal facilities at the “Bush Terminal Yards” (a/k/a “First Avenue Yards”) and the floatbridge and related tracks at the Harborside Industrial Center (a/k/a “Brooklyn Army Terminal”), (collectively the tracks and facilities), both of which the City owns.

NYCEDC seeks waiver from the requirements of several of the Board’s abandonment regulations. Specifically, it seeks waiver from 49 CFR 1152.10-14 and 1152.24(e)(1) pertaining to system diagram maps (SDM). With the exception of 49 CFR 1152.20(a)(1) and (2), (b)(1),(2), and (3) and (c),<sup>1</sup> it seeks waiver of the remaining required information and/or procedures in 49 CFR 1152.20, pertaining to its Notice of Intent.<sup>2</sup> NYCEDC also seeks a waiver of certain filing and service of application requirements in 49 CFR 1152.24(c) (to the extent they require NYCEDC to make information available at agency stations) and (f).<sup>3</sup>

Pursuant to the pre-filing notice requirements of 49 CFR 1152.20(a)(1) and (2) and 1152.20(b)(1), which NYCEDC did not ask the Board to waive, NYCEDC is serving copies of

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<sup>1</sup> NYCEDC states that the Notice of Intent contains the information and/or complies with these pre-filing notice requirements.

<sup>2</sup> NYCEDC also seeks a waiver of 49 CFR 1152.21, which is the “Form of Notice.” NYCEDC, however, filed a Notice of Intent that substantially comports with this regulation. Therefore, a waiver of this regulation is unnecessary and will not be granted.

<sup>3</sup> In addition, NYCEDC seeks a waiver of 49 CFR 1152.29(e)(2), which is cross referenced in 49 CFR 1152.24(f). Both sections relate to the Board’s notice of consummation requirement.

its pre-filing notice, the waiver petition and the application on NYCH, the shippers served by the line and other parties listed in 49 CFR 1152.20(a)(2).

As far as the contents of the abandonment application are concerned, NYCEDC seeks a waiver in part of 49 CFR 1152.22 and a waiver 49 CFR part 1152 subpart D. NYCEDC states that, other than the information requested in 49 CFR 1152.22(a)(1) through (4), and (6) through (8), which it can provide,<sup>4</sup> the information identified in this section is either unavailable to NYCEDC or irrelevant with respect to NYCEDC's adverse abandonment application.

In a reply filed on November 21, 2001, NYCH states that certain of the waivers requested by NYCEDC appear to be appropriate for an adverse abandonment, while others are not. NYCH argues that NYCEDC's petition should be denied with regard to its request for waiver of the requirements in 49 CFR 1152.10 - 14, 49 CFR 1152.24(e)(1), 49 CFR 1152.20, 49 CFR 1152.21, 49 CFR 1152.22, and 49 CFR part 1152 subpart D. NYCH asserts that, because the City owns the tracks and facilities, NYCEDC can comply with these requirements and should be required to do so.

#### DISCUSSION AND CONCLUSIONS

Prospective applicants, prior to filing an application, may seek an advance waiver of required information that is unavailable or not necessary or useful in analysis of the proposal.

In appropriate instances, such as situations involving adverse applications, the Board and its predecessor agency, the Interstate Commerce Commission, have waived inapplicable and unneeded portions of the abandonment regulations.<sup>5</sup> NYCEDC correctly argues that many of the cited requirements seek information that it does not possess or that is not relevant to its adverse abandonment application. While waiver of certain information required by the Board's regulations is appropriate here, NYCH has nonetheless raised valid objections to some of the waiver requests.

Waiver of the information required for an abandonment application by 49 CFR 1152.22 (other than what NYCEDC has agreed to provide and subsections (e), (f), (i), and (j) discussed infra) is clearly warranted. Much of this information is unavailable or irrelevant in an adverse abandonment application.

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<sup>4</sup> NYCEDC states that, if the requested waivers are granted, it plans to include this information in its application as well as the limited service information and revenue data which NYCH has provided to it, the name of each station on the line (if any), and a draft Federal Register notice.

<sup>5</sup> See Napa Valley Wine Train, Inc. – Adverse Abandonment – In Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein.

A waiver from 49 CFR 1152.10-14 and 1152.24(e)(1), pertaining to SDMs and from CFR 1152.20(a)(3), which pertains to posting notice requirements, will be granted. Compliance with these requirements is not feasible by a third-party applicant. Furthermore, NYCEDC has agreed to comply with the pre-filing notice requirements of 49 CFR 1152.20(a)(1) and (2) and 1152.20(b)(1) and to serve copies of its pre-filing notice, the waiver petition and the application on NYCH, shippers, and other parties listed in 49 CFR 1152.20(a)(2). However, we agree with NYCH that the regulation at 49 CFR 1152.20(a)(4), which pertains to publishing requirements, should be met here so that NYCH and other potential parties with legitimate interests in the proposal can be apprised of the status of the line. A waiver of the requirement in 49 CFR 1152.24(c) to make the abandonment application available at agency stations (if any) will be granted.

As to the rural and community impact requirement of 49 CFR 1152.22(e), NYCEDC should comply with (e)(3) which requires a general description of the alternate sources of transportation available<sup>6</sup> and (e)(4) as the City owns the subject tracks and facilities.<sup>7</sup> Additionally, NYCEDC seeks a waiver of 49 CFR 1152.22(f), which is the environmental and historical reporting requirements. NYCEDC, however, filed a combined environmental and historical report on November 13, 2001, with the Board. Therefore, a waiver of this regulation is unnecessary and will not be granted. NYCEDC must also comply with the requirements of 49 CFR 1152.22(i) (Federal Register notice) and (j) (verification).

The abandonment consummation notification requirements in 49 CFR 1152.24(f), as well as the 1-year authorization limit in 1152.29(e)(2) are not appropriate because they presuppose control over the consummation once the Board's decision is issued. That is not the case in a third party abandonment, because the applicant must usually invoke state law to obtain control of the property. Accordingly, these waivers will be granted.

A waiver is granted from the requirements of 49 CFR 1152.36. Apart from that section, 49 CFR part 1152 Subpart D does not impose independent requirements on an applicant. Accordingly, no waiver is necessary.

It is ordered:

1. NYCEDC's petition for waiver is granted in part and denied in part as described above.

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<sup>6</sup> The City has ensured that NYCH will have the opportunity to negotiate an arrangement to utilize the float bridge with tracks at the City's 65th Street rail yard once NYCH has completed an agreement with the designated operator of that facility.

<sup>7</sup> Contrary to NYCH's suggestion, mere ownership of the facilities does not imply that City is able to comply with the remaining requirements as to which NYCH opposes waiver.

2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary