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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-596

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

Decided: August 27, 2003

In a decision served on May 12, 2003 (May 12 decision), the Board granted the adverse abandonment application filed by the New York City Economic Development Corporation (NYCEDC) on behalf of the City of New York (the City). The May 12 decision authorizes the abandonment of the tracks and facilities at the Bush Terminal Yards (a/k/a “First Avenue Yards”) and the 51st Street floatbridge and related tracks at the Harborside Industrial Center (a/k/a “Brooklyn Army Terminal”) (jointly the tracks and facilities), in Brooklyn, Kings County, NY. The tracks and facilities are owned by the City and leased to the New York Cross Harbor Railroad (NYCH), which operates over them.¹ The June 11, 2003 effective date of the May 12 decision was postponed in a decision served on June 10, 2003 (June 10 decision), pending administrative review of NYCH’s

¹ NYCH’s predecessor in interest was authorized to conduct common carrier operations over the City-owned tracks and facilities involved here (as well as certain other related tracks and facilities) by the Board’s predecessor agency, the Interstate Commerce Commission, in New York Cross Harbor Railroad Terminal Corp.— Exemption for Operation and Issuance of Securities, Finance Docket No. 30183, et al. (ICC served July 15, 1983).

petition for reconsideration filed on June 2, 2003.² NYCEDC filed a reply to the petition for reconsideration on June 23, 2003. The shippers in this proceeding³ also filed a reply on June 23, 2003.⁴

On June 26, 2003, NYCH filed a motion to strike, as new evidence, NYCEDC's assertion in its June 23, 2003 reply that Warehouse will no longer be using the tracks and facilities. In the alternative, NYCH requests leave to supplement the record with information about new shippers and its continued relationship with Warehouse. On July 2, 2003, NYCEDC filed a reply to NYCH's June 26, 2003 motion and a cross motion to strike, as new evidence, statements by NYCH in its motion regarding Warehouse and new shippers. The information provided in NYCEDC's June 23, 2003 reply is not new and had been previously asserted in the Verified Statement of Seth O. Kaye that was attached to NYCEDC's reply to the protests for the adverse abandonment filed on February 4, 2002. Therefore, NYCH's motion to strike will be denied. So that NYCH will not be prejudiced, and for a more complete record, its statements contained in its June 26, 2003 motion with regard to Warehouse will be considered and NYCEDC's cross motion to strike will be denied. However, NYCH's request to supplement the record with additional filings will not be granted. At some point, the record must close. The Board has sufficient information on the record now to decide the petition for reconsideration.

DISCUSSION AND CONCLUSIONS

A. The Petition For Reconsideration.

² The postponement was for housekeeping purposes only, to permit the orderly consideration of the arguments raised in NYCH's petition for reconsideration. The June 10 decision did not rule on NYCH's petition for stay pending judicial review, filed on May 16, 2003, which will be addressed in this decision.

³ The shippers are: American Warehouse, Inc. (Warehouse); Cropsey Scrap Iron and Metal Corp. (Cropsey); Davidson Pipe Supply Co. (Davidson); Dorann Resources Ltd. (Dorann); Franklin Poly Corp. (Franklin); Interdynamics Inc. (Interdynamics); and Midwood Lumber and Millwork, Inc. (Midwood).

⁴ On August 22, 2003, Congressman Jerrold Nadler, both as a U.S. Representative from the City of New York and as the co-chairman of the East of Hudson Rail Freight Task Force, submitted a letter urging that the proceeding be stayed without regard to the outcome of judicial review and suggesting that another operator be assigned at least temporarily if the NYCH operations at issue in this proceeding are to be abandoned.

Under 49 CFR 1115.3, a petition for reconsideration of a decision of the entire Board will be granted only if the petitioner shows that: (1) the prior action will be affected materially because of new evidence or changed circumstances; or (2) the prior action involves material error. NYCH maintains that the May 12 decision contains material error, asserting that the Board: (1) failed to follow its own precedent in adverse abandonment proceedings, including holding the City to the burden of proof required in such proceedings; (2) failed to weigh the shipping public's needs for service against the City's need to eliminate the tracks and facilities; (3) erred in concluding that there was minimal traffic on the line and that the shippers had other transportation options; and (4) penalized NYCH by imposing labor protective conditions. For the reasons stated below, there was no material error in the May 12 decision.

In an adverse abandonment proceeding, the noncarrier third-party applicant has the burden of showing that the public convenience and necessity require or permit the abandonment. See Chelsea Property Owners — Aban. — The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff'd sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). In making this determination, the Board weighs the relative burdens that continuing or ceasing rail service would have on all of the potentially affected interests, including the railroad, the owners of the property (if different from the carrier), shippers, the national rail network, and the broader public. See related cases Norfolk & W. Ry. Co. — Aban. Exem. — Cinn., Hamilton County, OH, 3 S.T.B. 110 (1998), and Grand Trunk W.R.R. — Adverse Discon. of Trackage Rights, 3 S.T.B. 124 (1998). In this case, after balancing the competing interests, the Board concluded that NYCEDC had met its burden of demonstrating that the public interest does not require that rail service continue over the tracks and facilities at issue. Because these tracks and facilities are not heavily used by local traffic (overhead traffic can be rerouted over other rail lines) and the affected shippers will continue to have transportation options, the Board determined that the City should be allowed to put its property to other public uses.⁵

NYCH and the affected shippers argue that the Board's May 12 decision is inconsistent with precedent and improperly analyzes the transportation options available to the affected shippers.⁶

⁵ NYCH is the only party with a common carrier obligation with regard to the tracks and facilities. If the City takes steps to remove NYCH from its property and devote the property to other public purposes related to its plans to redevelop the waterfront area, no party would be authorized to operate over the tracks and facilities in interstate commerce. If at some point in the future, after the redevelopment of the waterfront area, the need for common carrier rail service arises, the City or a new operator would need to seek authority from the Board to provide that service.

⁶ NYCH also argues that the Board misapplied the burden of proof. But the May 12 decision did not put the burden of proof on NYCH, as NYCH asserts. Rather, it found that the City had met its
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Specifically, NYCH argues that, in contrast to other cases in which adverse abandonment authority has been granted, there is active rail traffic here. But the presence of active traffic does not preclude a carrier itself from obtaining abandonment authority,⁷ and the statutory standard for authorizing an abandonment, the public convenience and necessity test of 49 U.S.C. 10903, as well as the interests to be considered, as discussed above, are the same in all abandonment cases, whether adverse or not. While prior adverse abandonment applications that have been granted have involved lines over which no traffic moved, that does not mean that adverse abandonments may not be granted where there is some traffic. The weighing of the relevant interests is an inherently fact-specific process, and there is no impediment to authorizing an adverse abandonment of an active line where, as here, the situation warrants such action.

NYCH also argues that the interests of the shippers on the line were not properly considered. This is not the case. While the Board recognized that certain shippers could suffer some hardship if this abandonment authority were granted,⁸ it was satisfied that the shippers would continue to have shipping options. In place of NYCH's rail and floatbridge service, the shippers can truck their shipments to or from nearby transload facilities, from which they would have access to another floatbridge service that may become available, or to a rail route to New Jersey that, although longer in distance, would avoid the additional transloading and barge/tugboat movement that is necessarily associated with floatbridge service.⁹

Additionally, NYCH and the affected shippers argue that the Board did not address in sufficient detail the traffic of each of the seven affected shippers and simply concluded that traffic was minimal and the shippers had other transportation options. On the contrary, the Board took into account who these shippers are, how much they ship, and what their transportation alternatives are. As detailed in NYCEDC's February 4, 2002 reply to the protests, and affirmed in the shippers' June 23, 2003 reply to the petition for reconsideration, Warehouse was by far the largest of the shippers, having shipped 976 carloads via NYCH's First Avenue line in the year 2000 (out of a total of 1,117 annual carloads on the First Avenue line). However, Warehouse no longer uses the three warehouses at the South Brooklyn Marine Terminal that had been the source of its carloads that moved over NYCH's First

⁶(...continued)

burden of showing that the abandonment would be consistent with the public interest.

⁷ See May 12 decision at 7 n.14.

⁸ As noted, NYCH's overhead traffic can be rerouted; thus, the interests of the overhead traffic shippers did not warrant denying the abandonment request.

⁹ Indeed, some shippers may be able to meet many of their shipping needs with trucks alone.

Avenue line.¹⁰ Moreover, Warehouse can receive floatcar service at its current facility and consequently may discontinue use of the tracks and facilities regardless of the outcome of this proceeding.¹¹ NYCH acknowledges that it now transports cars for Warehouse by loading them onto barges and moving them directly to Warehouse's facility.¹² Because NYCH is now handling Warehouse's cars by this direct barge routing, it is not using the tracks and facilities being authorized for abandonment. This information supports the conclusion that this shipper has viable transportation alternatives.¹³

Two of the other shippers — Cropsey and Dorann — likewise are not directly served by NYCH. Their rail shipments, which together total 60 carloads per year over NYCH (20 carloads a year for Cropsey and 40 for Dorann),¹⁴ are already trucked (Cropsey approximately 3 miles, Dorann approximately 2 miles) to reach a transload facility of NYCH.¹⁵ The trucks that Cropsey and Dorann are already using can be used to reach another rail transload facility or the shippers' ultimate destinations.

The remaining four shippers are now served directly by NYCH. In the verified statements attached to their January 18, 2002 joint protest, the shippers stated: Davidson received 15-20 carloads of pipe per year by rail; Franklin received approximately 20 carloads of plastic pellets per year by rail; Interdynamics received approximately 25-35 carloads of R134A (a refrigerant) per year by rail; and Midwood received 11 carloads of lumber and plywood by rail in 2000, and is now on a pace to receive 20-30 carloads per year. Together, these four businesses account for only 80-105 carloads of traffic per year. While these shippers assert that use of trucks would be economically infeasible, even for transloading their freight, they offered no support to substantiate these claims and

¹⁰ See V.S. Kaye, attached to NYCEDC's February 4, 2002 reply to the protests.

¹¹ See Shippers' June 23, 2003 reply to the petition for reconsideration.

¹² See NYCH's June 26, 2003 motion to strike.

¹³ NYCH suggests (NYCH's June 26 motion to strike at 2-3) that it could not economically continue this direct barge handling of Warehouse's traffic if its trans-Hudson car float operation is discontinued. But it provides no support for this assertion.

¹⁴ See Shippers' January 18, 2002 joint protest.

¹⁵ See V.S. Kaye, attached to NYCEDC's February 4, 2002 reply to the protests.

there is no reason to believe that these transportation alternatives, although they may be somewhat less convenient and/or more costly, would not meet these shippers' needs.¹⁶

Because the shippers located along the tracks and facilities at issue have other transportation options, and the line's overhead rail traffic can be rerouted, the Board reasonably concluded that there is not an overriding need for rail service here. Accordingly, the City should not be foreclosed from putting the property that it owns to other public uses.

Finally, NYCH argues that the Board is penalizing it twice by forcing it to surrender its franchise and by requiring it to pay labor protection to five adversely affected employees. The Board is statutorily obligated to impose labor protective conditions in an abandonment application proceeding. As a regulated carrier, NYCH has always known that if its line were ever to be abandoned, it would be required to provide labor protection to its employees adversely affected by such an action. Moreover, as a tenant on someone else's property, NYCH also knew that there was always the possibility that it might be required to vacate the property, and that it would be required, based on the long-standing statutory requirement, to provide labor protection to its employees in such a situation. Therefore, the imposition of employee protective conditions was foreseeable, and reasonable under the circumstances.

B. The Petition For Stay.

Because the June 10 decision was only a housekeeping stay, NYCH's request for stay pending judicial review will be addressed. In considering whether to stay a Board decision pending judicial review, the following factors must be considered: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether the public interest would be served by granting or denying the stay. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

¹⁶ Indeed, rail transportation of lumber and plywood (Midwood's traffic) has been exempted from regulation, pursuant to 49 U.S.C. 10502 (formerly 49 U.S.C. 10505), due to the suitability and widespread availability of truck competition for movement of these commodities. See Rail Exemption — Lumber or Wood Products, 7 I.C.C.2d 673 (1991); 49 CFR 1039.11.

Here, while NYCH is not likely to prevail on the merits, the other factors weigh in favor of a stay.¹⁷ Accordingly, a stay pending judicial review will be granted.

In the typical carrier-initiated abandonment proceeding, requests for stay pending judicial review are generally denied. That is because, were the carrier to remove the track prior to the completion of judicial review, it would do so at its own peril; if the agency's decision is set aside, the carrier would have to promptly restore the line and recommence rail service over it. See Busboom Grain Co. Inc. v. I.C.C., 830 F.2d 74, 75-76 (7th Cir. 1987). In this case, however, attempts to restore the status quo ante would be complicated considerably by the competing interests and postures of the owner (the City) and operator (NYCH) of the tracks and facilities at issue here. The City has made clear both its intention to remove NYCH from the property and its desire to be free to dismantle the tracks and facilities when the Board's decision becomes effective, so that the City may proceed with its plans for redevelopment of the property. Thus, should NYCH prevail on judicial review, it could be extremely difficult to later "unscramble the egg" and promptly restore rail service. Under these unusual circumstances, it would not be in the public interest to allow a situation in which the City could have the tracks and facilities removed before the process of judicial review has been completed.

A stay would also preserve the status quo for NYCH and the affected shippers during the pendency of judicial review proceedings, thereby avoiding any disruption to their current operations that would be needless if the Board's decision were not to withstand judicial review. Nor would a stay irreparably harm the City. The City, while eager to remove NYCH from the tracks and facilities as soon as possible, should also have an interest in an orderly process and in avoiding the difficult-to-remedy situation that could result if the Board's decision is later overturned by a reviewing court. Furthermore, during this period, the parties may be able to reach agreement resolving some of their differences, most notably, access for NYCH to the 65th Street floatbridge facility.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹⁷ The Board and the courts have issued stays, when appropriate, even where it was unlikely that petitioners would prevail on the merits. In West Texas Utilities Co. v. Burlington Northern Railroad Co., STB Docket No. 41191 (STB served June 25, 1996), for example, the Board stayed a rate prescription pending judicial review, notwithstanding the Board's confidence that its decision would be upheld on the merits — as it ultimately was, in Burlington Northern R. Co. v. Surface Transp. Bd., 114 F.3d 206 (D.C. Cir. 1997) — because the railroad would have no way to recover lost revenues if the order directing the railroad to reduce its rates were to be overturned. See also Cuomo v. United States Nuclear Regulatory Com'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

It is ordered:

1. NYCH's motion to strike is denied.
2. NYCEDC's cross motion to strike is denied.
3. NYCH's petition for reconsideration is denied.
4. The petition for stay pending judicial review is granted.
5. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary