

LAW OFFICE

MCLEOD, WATKINSON & MILLER

MICHAEL R. MCLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
ALEX MENENDEZ
PAUL D. SMOLINSKY

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

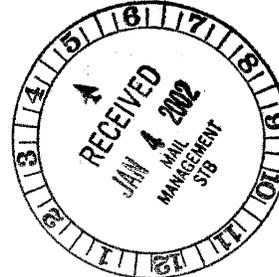
KATHRYN A. KLEIMAN*
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

January 4, 2002

204303

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



Re: *New York City Economic Development Corporation, Acting on Behalf of the City of New York, New York - - Adverse Abandonment of Rail Line and Facilities Operated by the New York Cross Harbor Railroad, Inc. in Brooklyn, New York, Docket No. AB No. 596*

Dear Sir:

I am enclosing for filing in the above referenced matter 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 Motion Of New York Cross Harbor Railroad To Reject The Notice Of Intent, Adverse Abandonment Application, And Supplement To Application, for filing in the above-referenced proceeding. I am also enclosing a 3.5" diskette with this information included.

In addition, I have enclosed one additional copy of this document which I ask you to date stamp and return to our messenger.

Thank you very much.

ENTERED
Office of the Secretary

JAN 07 2002

Part of
Public Record

Very truly yours,

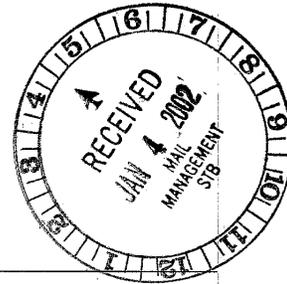
Charles A. Spitulnik

cc: John D. Heffner, Esquire

204303

Before the
Surface Transportation Board

Docket AB-No. 596



**REPLY OF NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK ---
ADVERSE ABANDONMENT OF RAIL LINE AND FACILITIES OPERATED
BY THE NEW YORK CROSS HARBOR RAILROAD, INC.
IN BROOKLYN, NEW YORK**

**REPLY OF NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK TO
MOTION OF NEW YORK CROSS HARBOR RAILROAD TO REJECT THE NOTICE
OF INTENT, ADVERSE ABANDONMENT APPLICATION, AND
SUPPLEMENT TO APPLICATION**

CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
(202) 842-2345

Counsel for New York City Economic
Development Corporation, Acting on Behalf
of the City of New York, New York

ENTERED
Office of the Secretary

JAN 07 2002

Part of
Public Record

Dated: January 4, 2002

**Before the
Surface Transportation Board**

Docket AB-No. 596

**NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, ACTING ON
BEHALF OF THE CITY OF NEW YORK, NEW YORK ---
ADVERSE ABANDONMENT OF RAIL LINE AND FACILITIES OPERATED
BY THE NEW YORK CROSS HARBOR RAILROAD, INC.
IN BROOKLYN, NEW YORK**

**REPLY OF NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK TO
MOTION OF NEW YORK CROSS HARBOR RAILROAD TO REJECT THE NOTICE
OF INTENT, ADVERSE ABANDONMENT APPLICATION, AND
SUPPLEMENT TO APPLICATION**

New York City Economic Development Corporation, acting on behalf of the City of New York, New York (“NYCEDC”), through counsel files this Reply in opposition to the Motion of New York Cross Harbor Railroad (“NYCH”) To Reject The Notice Of Intent, Adverse Abandonment Application, and Supplement To Application (“Motion to Reject”). In support of its opposition, NYCEDC states the following:

I. Introduction

As NYCH correctly points out, this proceeding involves the efforts of NYCEDC to evict NYCH from a railroad it has operated for the past 18 years. Notwithstanding its attempts to shift the focus from the real issue – i.e., NYCH’s conduct in the management of that property and in the operation of that railroad – NYCH has failed to identify any reason for this Board to reject

NYCEDC's application.¹ Moreover, NYCH has waived any objection it had to NYCEDC's Notice of Intent filed on November 2, 2001 ("Notice of Intent") because it failed to file any motion with respect to that Notice within the time prescribed by the regulations. The Notice of Intent, NYCEDC's Application for Adverse Abandonment ("Abandonment Application") and NYCEDC's Supplement to its Application for Adverse Abandonment ("Abandonment Supplement") substantially comply with this Board's regulations regarding notice, form and content. As a result, NYCH's Motion to Reject should be denied. *See* 49 U.S.C. 1152.24 (e)(1).

II. NYCH has waived any objections to the service of NYCEDC Notice of Intent.

The Board's rules establish a time frame for parties to reply, object or file motions with respect to any pleading. NYCH let that time elapse, at least with respect to NYCEDC's Notice of Intent, and the sections of its Motion that address that Notice should be rejected as untimely.

49 C.F.R. 1104.13 (a) states in pertinent part: "A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided." The Notice of Intent in this matter was filed and served on November 2, 2001. On November 23, 2001, NYCH filed its Reply to NYCEDC Petition for Waivers. NYCH did not file a motion, reply or any other pleading with respect to the Notice of Intent at that time. On December 17, 2001, forty-four (44) days after the Notice of Intent was filed, NYCH filed its Motion to Reject.² NYCH's Motion as it pertains to the Notice of Intent, comes too late.

¹ The Board served a Notice in this proceeding on December 21, 2001 pursuant to 49 C.F.R. §1152.24(e)(2). By serving this Notice, this Board appears to have concluded that the application is substantially complete. However, to ensure the existence of a complete record, NYCEDC is hereby responding to the NYCH's Motion.

² Despite the fact that the Motion to Reject is well outside the twenty day window provided by the regulations, NYCH has not sought leave from the Board or an extension of time to file the Motion to Reject.

NYCH was required to file any motion, reply or any other pleading with respect to the Notice of Intent on or before November 23, 2001. NYCH failed to do so. Consequently, NYCH waived the right to assert any objections it may have to the Notice of Intent, including the service issues it now raises in NYCH's Motion to Reject with respect to the Notice of Intent.

III. NYCEDC's Application substantially conforms with the applicable Regulations and NYCH's Motion should be denied.

The regulations permit the Board to accept an application that substantially complies with the applicable notice and content requirements. 49 C.F.R. §1152.24(e)(1). The errors in NYCEDC's application and notice, as supplemented, that NYCH has identified are either inaccurately described or, if they have occurred, do not present substantial non-compliance. As a result, NYCH's Motion should be denied in its entirety.

A. The Publication of the Notice of Intent Was Proper.

NYCEDC properly published the Notice of Intent on the appropriate days as described in the regulations. 49 C.F.R. § 1152.20 (b)(4) states:

Applicant must publish its Notice of Intent at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the involved line is located.

As NYCH acknowledges, NYCEDC published the Notice of Intent on November 23rd, November 28th, and December 2nd of 2001. According to Webster's *Ninth New Collegiate Dictionary* (published in 1984) at p. 1182, Sunday is the first day of the calendar week. Monday is the second day. *Id.* at 765. The regulations NYCH cites do not purport to change the dictionary definition of a week, and do not include the refinement (which NYCH's interpretation would add) that says that the first week begins on the date of first publication.

Examining the applicable regulations in light of the common meaning of the words used there produces the conclusion that NYCEDC's publication complies fully. The November 23rd publication falls within the week of Sunday, November 18th ("Week 1"). The November 28th publication falls within the week of Sunday, November 25th ("Week 2"). The December 2nd publication falls within the week of Sunday, December 2nd ("Week 3"). Week 1, Week 2 and Week 3 are consecutive weeks. Thus, despite NYCH's argument to the contrary, NYCEDC has complied with the requirements of 49 C.F.R. § 1152.20 (b)(4).

B. NYCEDC's Service of the Application Was Sufficient to Comply With The Regulations.

NYCH argues that NYCEDC failed to properly "file, publish, and serve" its Notice of Intent. Putting aside NYCH's waiver of this argument by its failure to timely file a motion with respect to the Notice (*see* Section II, *supra*), this argument does not justify rejection of the Application.

The only deficiency that NYCH has accurately cited with respect to service of the Notice is the fact of service via First Class Mail rather than Certified Mail on the Governor of New York. NYCH has not identified any prejudice to any party from this inadvertent omission. Indeed, the Governor was subsequently been served by 1st Class Mail with a copy of the Application for Adverse Abandonment in accordance with 49 C.F.R. §1152.24(c), and has not subsequently objected to the prior service method or stated that his office did not have notice that this proceeding was coming in sufficient time to address the issues it raises. The deficiency NYCH cites has not caused any prejudice to any party and does not rise to the level of substantial non-compliance that would justify rejection of the Application.

NYCH argues that NYCEDC "does not appear to have served copies of NYCH itself (as opposed to its counsel) and more seriously, does not appeared (sic) to have served copies of its

Application on NYCH's customers." Review of the Certificate of Service and the Supplemental Certificate of Service prepared and filed by NYCEDC in this proceeding demonstrates that NYCEDC has complied fully with the regulations.

Both 49 C.F.R. §1152.24 and 49 C.F.R. §1104.12 (a) govern Service of the Application. The former requires NYCEDC to serve the application on this Board, the Governor of the State and the designated state agency of New York State. The certificate of service filed with the application shows that this was accomplished on the date the application was filed. The regulations require service of the Notice of Intent on significant users of the line (49 C.F.R. §1152.20(a)(2)(i), and the Supplemental Certificate of Service filed in this proceeding on November 6, 2001, demonstrates that NYCEDC has complied with that requirement.³ The regulations place the onus on these users to request a copy of the application if they want it, and on NYCEDC to provide anyone who makes such a request with a copy by 1st Class Mail. 49 C.F.R. §1152.24(c), (d). No user has requested a copy, but if any do make such a request, NYCEDC will happily provide them with one.

49 C.F.R. §1104.12 (a) states that:

Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding. Service on the parties should be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy shall be served on each party. **If service is made on the Board in person, and personal service on other parties is not feasible; service should be made by first-class or express mail. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service on the party.**

³ NYCEDC based its assumption about significant users on information that NYCH has provided to NYCEDC in other contexts about its business in the cross-harbor float operation.

(Emphasis added). The Certificate of Service shows that NYCEDC served both NYCH and its counsel with the Application and the accompanying Memorandum in Support thereof via first class mail. Because the office of NYCH is in New York, service upon NYCH itself by personal service (the methodology used to file the Application with the Board) was not feasible since counsel for NYCEDC is in Washington, D.C. This service complies with the requirements under the regulations. Service upon counsel for NYCH by mail rather than by personal service does not present a substantial non-conformance with the regulations, especially where counsel has demonstrated that he has received the application and begun preparing a response to it.⁴

C. NYCEDC's Filing of the Affidavit of Publication Substantially Complies with the Applicable Regulations.

NYCH argues that because the Abandonment Application was not filed with an Affidavit of Publication the entire application should be rejected. Again the regulation state that an Application for Abandonment must "substantially conform" with the regulations. *See* 49 U.S.C. § 1152.24 (e)(1-2). If the purpose of the Affidavit is to allow this Board to ensure that the necessary publication has occurred, then NYCEDC has accomplished that objective by filing of the Affidavit of Publication on December 10, 2001. The Affidavit was filed after the Application itself because delivery problems prevented the Affidavit from arriving in time to file it with the Application. Rather than delay the filing of the entire Application, NYCEDC chose to file the Application (along with a request for a one-day extension of the time for filing)⁵ instead of waiting even more time for the proof of publication to arrive.

⁴ If, in fact, counsel for NYCH requires three extra days to prepare responses to the application in view of the service by mail rather than by hand delivery, NYCEDC will not object to any such extension of the time for filing replies to the application that the Board set in the Notice served on December 21, 2001.

⁵ In the December 21 Notice in this proceeding, the Board granted the request for an extension of the time for filing the Application, noting that no party is prejudiced by the addition of the extra day.

D. NYCEDC has provided the information required by the Board's Decision with Respect to the Petition for Waivers.

Contrary to NYCH's argument, NYCEDC has provided all information required by the Board's regulations and by the decision on NYCEDC's Petition for Waivers. NYCH may not like the information that NYCEDC has provided, and may wish for NYCEDC to provide more details, but the required information is in the documents NYCEDC has filed.

NYCH argues that a response to 49 C.F.R. 1152.22 (e)(3) relating to "a general description of alternate sources of transportation available" is not provided. NYCH should review the Application and the Memorandum, since NYCEDC's submission makes it clear that the two are integrally related and complementary. NYCEDC filed the Application and Memorandum on December 4, 2001. In that initial application, NYCEDC addresses the alternate route issue by referencing the 65th Street rail yard and the float bridge at that location. *See Memorandum in Support of Application for Adverse Abandonment* at p. 4. *See also Id.* at note 3. Thereafter, NYCEDC received the Board's ruling on its Petition for Waivers. Based in part on that ruling NYCEDC filed a Supplement to the Application for Abandonment and specifically included a response to 49 C.F.R. 1152.22 (e)(3). Again, NYCH may not like the information, or may wish to ask NYCEDC to provide more, but NYCH can not be heard to argue that NYCEDC has not substantially conformed to the requirements of the regulations.

E. NYCEDC's Supplement is a Proper and Properly Served Pleading.

NYCH offers this Board with a choice - - an easy choice, but a choice nonetheless. On the one hand, the Board can treat the Supplement that NYCEDC filed as an attempt to provide as complete a record as possible, one that addressed information required as a result of the Decision on the Petition for Waivers and provided the publication information that

was not available a few days earlier when the Application was filed. On the other hand, the Board can accept NYCH's invitation to require repeated re-starts of the clock for abandonment applications by requiring an applicant who discovers an omission to go back to square one each time. The former choice supports the goal of permitting development of a complete record in a timely and efficient way. The addition of information to a docket can be addressed by adding, if necessary, additional time to respond to that information. The latter choice would breed confusion, not orderly handling of matters presented to the Board.

NYCEDC's Supplement to the Application is a properly filed pleading. It was filed, in part, based on the fact that NYCEDC did not receive the Board's ruling on its Petition for Waivers until *after* it had filed the Abandonment Application. The Supplement to the Application responds to issues raised by the Board and is a proper pleading and should not be stricken. The issues about service of this Supplement that NYCH attempts to raise are the same as the issues addressed previously, and provide no basis to strike the Supplement or to otherwise grant NYCH's Motion.

F. The Board has Properly Granted NYCEDC's Request for Extension of Time.

The Board has already granted NYCEDC's request for an extension of time because no party will be prejudiced by the one-day extension. NYCEDC raises this issue here only for the purpose of correcting one fairly important factual misstatement made by NYCH.

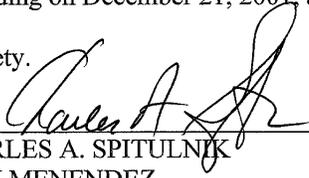
NYCH contends that NYCEDC in was two days late in filing its Application for Abandonment because the Application for Abandonment was filed on December 4th and it should have been filed on December 2nd, thirty (30) days after the filing of the Notice of Intent, which took place on November 2nd. While, NYCH accurately indicates that December 2nd is

thirty (30) days from November 2nd, it fails to recognize that December 2nd was a Sunday.⁶

Under the Board's rules "the last day of the period is included unless it is Saturday, Sunday or a legal holiday in the District of Columbia, in which event the period runs until the end of the next day which is not a Saturday, Sunday or holiday." 49 C.F.R. §1104.7(a). Thus, the Application was due to be filed on December 3rd and NYCEDC properly requested only a one (1) day extension of time.

III. CONCLUSION

Counsel for NYCEDC admits, as we must, that the Application for Adverse Abandonment and the process used to serve it and the Notice of Intent that preceded it included minor errors. However, as the foregoing review of the errors cited by NYCH makes clear, the Application and related documents substantially conform to the Board's regulations. The Board has acknowledged this by issuing the Notice in this proceeding on December 21, 2001, and, accordingly, NYCH's Motion should be denied in its entirety.



CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
202/842-2345

Counsel for New York City Economic
Development Corporation, Acting on Behalf
of the City of New York, New York

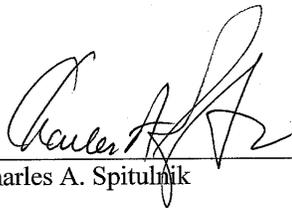
Dated: January 4, 2002

⁶ NYCH has made a similar error in computing the date for providing responses to discovery it has served on NYCEDC. In NYCH's First Set of Interrogatories and Requests for Admissions, served on December 21, 2001, counsel for NYCH has instructed NYCEDC to provide responses by "no later than January 5, 2001 [sic]". Since January 5, 2002 falls on a Saturday, NYCEDC will endeavor to provide responses to NYCH's discovery on or as soon as possible after Monday, January 7, 2002.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing REPLY OF NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK TO MOTION OF NEW YORK CROSS HARBOR RAILROAD TO REJECT THE NOTICE OF INTENT, ADVERSE ABANDONMENT APPLICATION, AND SUPPLEMENT TO APPLICATION, to be served by hand delivery upon John Heffner, Esquire, counsel for New York Cross Harbor Railroad, Inc., and by first class mail with postage prepaid and properly addressed on all other parties of record on the STB's Service List in this proceeding.

Dated this 4th day of January, 2002.



Charles A. Spitulnik