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THOMAS F. MCFARLAND



January 17, 2002

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

ENTERED
Office of the Secretary

JAN 18 2002

Part of
Public Record

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 Joint Protest, 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.

Very truly yours,

Tom McFarland

Thomas F. McFarland

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Office of the Secretary

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ORIGINAL

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)	



JOINT PROTEST

AMERICAN WAREHOUSE, INC.
70 Hamilton Avenue
Brooklyn, NY 11201

CROPSEY SCRAP IRON & METAL CORP.
2994 Cropsey Avenue
Brooklyn, NY 11214

DAVIDSON PIPE SUPPLY CO., INC.
5002 Second Avenue
Brooklyn, NY 11232

FRANKLIN POLY CORP.
4601 Second Avenue
Brooklyn, NY 11232

INTERDYNAMICS, INC.
80 Thirty-Ninth Street
Brooklyn, NY 11232

MIDWOOD LUMBER & MILLWORK, INC.
1169 Coney Island Avenue
Brooklyn, NY 11230

DORANN RESOURCES, LTD.
163 Sixth Street
Brooklyn, NY 11215

Protestants

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THOMAS F. McFARLAND
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208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1194
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Attorney for Protestants

DATE FILED: January 18, 2001

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)

JOINT PROTEST

Pursuant to the Board's procedural decision served December 21, 2001, the seven companies listed on the cover page, referred to collectively as the Local Brooklyn Shippers, hereby jointly submit this Protest of the Application for Adverse Abandonment (Application) filed by New York City Economic Development Corporation (EDC) on December 4, 2001.

INTRODUCTION

Each of the Local Brooklyn Shippers originates or terminates shipments by rail on New York Cross Harbor Railroad, Inc. (NY Cross Harbor) at or near the Brooklyn, NY waterfront. Collectively, the Local Brooklyn Shippers accounted for well over 1,000 carloads of local traffic on NY Cross Harbor in the year 2000 (*see* Appendices 1-7). Each of the Local Brooklyn Shippers would be seriously harmed if NY Cross Harbor's rail trackage and service were to be abandoned and discontinued as a result of EDC's Application. Consequently, the Local Brooklyn Shippers have joined in filing this Protest of that Application.

ADVERSE IMPACT OF ABANDONMENT ON LOCAL SHIPPERS

Each of the Local Brooklyn Shippers has submitted a verified statement attesting to its reliance on NY Cross Harbor for efficient and economical rail service, and to the serious harm that would be suffered if that rail service were to be terminated. Those verified statements are

attached as appendices to this Protest as follows:

Appendix #	Affiant	Company	Commodity by Rail
1	Sabato F. Catucci	American Warehouse, Inc.	Cocoa beans, outbound; lumber, inbound
2	Lawrence Petrosino	Cropsey Scrap Iron & Metal Corp.	Scrap metal, outbound
3	Peter Davidson	Davidson Pipe Supply Co., Inc.	Steel pipe, inbound
4	Zvi Peretz	Franklin Poly Corp.	Plastic pellets, inbound
5	Ira Trachtenberg	Interdynamics, Inc.	Refrigerants, inbound
6	Alex Motovich	Midwood Lumber & Millwork, Inc.	Lumber & plywood, inbound
7	Louis Petrosino	Dorann Resources, Ltd.	Scrap metal, outbound

The verified statements establish that abandonment would have a serious adverse impact on the Local Brooklyn Shippers and on community development at the Brooklyn waterfront. That adverse impact would not be alleviated by the availability of the 65th Street rail yard for carfloat traffic across the New York's Upper Bay. Five of the seven companies that make up the Local Brooklyn Shippers are served directly by NY Cross Harbor at their places of business (all except the two scrap metal shippers). If NY Cross Harbor's rail service were to be lost, those shippers would have to truck their commodities to or from the 65th Street yard in order to continue to use rail carfloat service. That would involve added costs for trucking, transloading and for loss of product during extra handling (shrinkage). Those added costs would significantly harm the competitive position of those shippers in relation to shippers in the New York City area

that would continue to have direct rail service at their places of business. The largest local shipper on NY Cross Harbor, American Warehouse, Inc., would not be able to continue in business if its direct rail service were to be lost. (Appdx. 1 at 1).

ARGUMENT

An adverse or involuntary abandonment, like any other abandonment, is not to be authorized unless the Board finds that the present or future public convenience and necessity require or permit the abandonment. See 49 U.S.C. § 10903(d). In implementing that standard, the Board considers 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 rail line, and on the public. *The Kansas City Southern Ry. Co. -- Adverse Discont. Application -- a Line of Arkansas and Missouri R. Co.*, 1999 STB LEXIS 179, STB Docket No. AB-103 (Sub-No. 14), decision served March 26, 1999 (not printed), at 6. As the moving party, the City has the burden of proof to establish that public convenience and necessity permit the proposed abandonment. *Ibid.*

There are two distinct lines of decision in involuntary abandonment proceedings. In one, discontinuance of rail service is usually authorized where the owner of a rail line seeks to replace the current rail line operator with another after a lease, trackage rights or operating agreement for the rail line has expired or been lawfully terminated. See, e.g., *Fore River R.R. Corp. - Discon. Exempt. - Norfolk County, MA*, 8 I.C.C.2d 307 (1992); *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, 1992 ICC LEXIS 224, ICC Docket No. AB-379X, decision served Nov. 4, 1992 (not printed); and *Tacoma Eastern Ry. Co. - Adverse Discon. of Operations Applic. - a Line of the City of Tacoma, in Pierce, Thurston and Lewis*

Counties, WA, 1998 STB LEXIS 790, STB Docket No. AB-548, decision served Oct. 16, 1998 (not printed).

The discontinuance authority granted in those cases is permissive. Such authority does not require the current rail operator to stop operating over the line. However, such authority removes the Board's exclusive and plenary jurisdiction as an obstacle to termination of the current operator's service, enabling the parties to undertake other remedies under State law to remove that operator from the line. *Grand Trunk W. RR - Adverse Discon. of Trackage Rights*, 3 STB 124, 127 (1998), and cases there cited.

In the second line of decisions, adverse abandonment normally is denied where abandonment is sought in order to remove an impediment to a State or local governmental project; where shipper opposition establishes that there is a potential for continued rail operations; and where the rail carrier has taken reasonable steps to attract traffic. See, e.g., *Western Stock Show Assn. - Aban. Exemption - in Denver, CO*, 1 S.T.B. 113, 134-136 (1996); *City of Colorado Springs, et al. - Petition for Declar. Order - Aband. Determination*, 1989 ICC LEXIS 78 at 14-17, ICC Finance Docket No. 31271, decision served March 31, 1989; and *Wisconsin Dept. of Transp. - Abandonment Exemption*, 1988 ICC LEXIS 359 at 11-15, ICC Finance Docket No. 31303, decision served Nov. 23, 1988.

The present case clearly falls within the second line of decisions. EDC apparently seeks involuntary abandonment and discontinuance of NY Cross Harbor's rail service in order to require use of car-float bridges at the 65th Street Yard. (Appdx. 1 at 2). EDC does not intend to replace NY Cross Harbor with another operator of the trackage. The unified opposition of the Local Brooklyn Shippers and NY Cross Harbor to the proposed abandonment demonstrates that

there is a need for continued rail operations, and that NY Cross Harbor has taken reasonable steps to attract traffic. Indeed, more than 1,000 local carloads moved over the trackage in a recent year. Abandonment would have a serious adverse impact on the Local Brooklyn Shippers, especially on those whose competitive position would be harmed by loss of direct rail service that would continue to be available to their competitors. The heaviest user of the rail service would not be able to stay in business. (*Id.* at 1).

In those circumstances, the proposed adverse abandonment is not permitted by public convenience and necessity because the harm to NY Cross Harbor, the Local Brooklyn Shippers and their suppliers and customers that would result from cessation of rail service outweighs the harm to EDC that would result from continuation of such service. As the ICC said in *Chelsea Property Owners - Aban. - The Consol. R. Corp.*, 8 I.C.C.2d 773 (1992), at 779:

The impediments to State and local government projects, although entitled to some weight, are nevertheless required to give way to our statutory duty to preserve and promote continued rail service, where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic (citations omitted).

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CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, EDC's adverse abandonment application should be denied. The Local Brooklyn Shippers respectfully request that the Board issue a decision to that effect.

Respectfully submitted,

AMERICAN WAREHOUSE, INC.
70 Hamilton Avenue
Brooklyn, NY 11201

CROPSEY SCRAP IRON & METAL CORP.
2994 Cropsey Avenue
Brooklyn, NY 11214

DAVIDSON PIPE SUPPLY CO., INC.
5002 Second Avenue
Brooklyn, NY 11232

FRANKLIN POLY CORP.
4601 Second Avenue
Brooklyn, NY 11232

INTERDYNAMICS, INC.
80 Thirty-Ninth Street
Brooklyn, NY 11232

MIDWOOD LUMBER & MILLWORK, INC.
1169 Coney Island Avenue
Brooklyn, NY 11230

DORANN RESOURCES, LTD.
163 Sixth Street
Brooklyn, NY 11215

Protestants

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1194
(312) 236-0204

Attorney for Protestants

DATE FILED: January 18, 2001

VERIFIED STATEMENT OF SABATO F. CATUCCI

My name is Sabato F. Catucci. I am Chief Executive Officer of American Warehouse, Inc. My business address is 70 Hamilton Avenue, Brooklyn, NY 11201.

American Warehouse is the largest importer of cocoa beans in the United States. We unload cocoa beans from ocean vessels into our warehouse on the Brooklyn waterfront. Our warehouse is served directly by rail trackage operated by New York Cross Harbor Railroad, Inc. (NY Cross Harbor). NY Cross Harbor transports cocoa beans by car-float across New York Bay and thence by rail to connections with major rail carriers in New Jersey. The cocoa beans are transported by rail long distances primarily to Hershey Chocolate Company at Hershey, PA and California, and to other chocolate makers in the West and Midwest. American Warehouse also receives lumber from Canada by means of NY Cross Harbor's rail and car-float service.

American Warehouse relies on NY Cross Harbor to provide transportation for large volumes of traffic. In 2000, American Warehouse shipped and received a total of 976 carloads in NY Cross Harbor's rail service.

Efficient and economical rail service is essential for the success of American Warehouse's business. It would be cost-prohibitive to transport cocoa beans and lumber long distances by truck. Transloading of those commodities from truck to rail is not practical, nor economic. Transloading involves substantial additional costs for trucking, handling and loss of product. Trucking to railroads in New York City and New Jersey is extremely difficult due to traffic congestion. American Warehouse would not be able to continue in business if the direct rail service provided by NY Cross Harbor were to be lost.

The City of New York owns a rail yard at 65th Street in Brooklyn. The City has contracted with Canadian Pacific Rail System to provide rail and car-float service at the 65th Street Yard. The City has put in two new car-float bridges at 65th Street. The City's application for involuntary abandonment of NY Cross Harbor's trackage is designed to pave the way for use of those float bridges at 65th Street. It is not in the City's interest for shippers and receivers to continue to use the car-float facilities at Bush Terminal presently used by NY Cross Harbor. That is what motivated this application for involuntary abandonment.

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

SABATO F. CATUCCI, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.

Sabato F. Catucci
SABATO F. CATUCCI

SUBSCRIBED AND SWORN to
before me this 10th day
of January, 2002

Alfonsina Rodriguez
Notary Public

ALFONSINA RODRIGUEZ
Notary Public, State of New York
No. 01426087771
Qualified in Queens County
Commission Expires 11-03-2002

VERIFIED STATEMENT OF LAWRENCE PETROSINO

My name is Lawrence Petrosino. I am Vice President of Cropsey Scrap Iron and Metal Corp. (Cropsey). My business address is 2994 Cropsey Avenue, Brooklyn, NY 11214.

Cropsey uses the rail service of New York Cross Harbor Railroad, Inc. (NY Cross Harbor) for outbound shipments of scrap. We truck the scrap approximately three miles from our yard to NY Cross Harbor's yard on the Brooklyn waterfront. The scrap is loaded by crane into railcars. NY Cross Harbor transports the scrap by car-float across Upper Bay to its yard in Jersey City, NJ. NY Cross Harbor connects with major rail carriers who transport the scrap to our customers primarily in Pennsylvania, with a lesser volume going to North Carolina. We ship about 20 carloads of scrap per year via NY Cross Harbor.

Cropsey is opposed to the effort of the City of New York to force abandonment and discontinuance of NY Cross Harbor's rail service. Our costs would increase substantially if we have to truck scrap to Pennsylvania and North Carolina. I understand that the City of New York has suggested that shippers could use car-float service to be provided by Canadian Pacific Railway at a yard to be opened at 65th Street in Brooklyn. However, the costs and quality of service associated with that transportation are not known. I do not believe that Canadian Pacific has a yard on the Jersey waterfront capable of handling car-float traffic. If Canadian Pacific would have to use NY Cross Harbor's Jersey City yard, service and rates would not be likely to be as favorable as at present. That would result in significant harm to Cropsey.

VERIFIED STATEMENT OF PETER DAVIDSON

My name is Peter Davidson. I am Chief Executive Officer of Davidson Pipe Supply Co., Inc. (Davidson Pipe). Davidson Pipe's place of business is located at 5002 Second Avenue, Brooklyn, NY 11232, on the Brooklyn waterfront.

Davidson Pipe is submitting this statement in opposition to an application filed by the New York City Economic Development Corporation that seeks to force the New York Cross Harbor Railroad, Inc. (NY Cross Harbor) to abandon its trackage and discontinue rail service at the Brooklyn waterfront. We are opposed to that application because Davidson Pipe relies on NY Cross Harbor to provide needed rail service, and because loss of that rail service would have a serious adverse effect on Davidson Pipe.

Davidson Pipe's place of business is served directly by trackage of NY Cross Harbor. Davidson Pipe receives steel pipe by rail at that location that NY Cross Harbor floats across Upper Bay from its yard in Jersey City, NJ. Davidson Pipe receives 15-20 carloads of such pipe per year by rail. The majority of that pipe originates at Camanche, IA. Some also originates at Cleveland, OH and Pittsburgh, PA.

Loss of NY Cross Harbor's rail service would harm Davidson Pipe in the form of increased costs and decline in quality of transportation service. It would be economically prohibitive to receive steel pipe by truck all the way from Iowa. There would be a material increase in cost to receive that pipe in rail-truck transloading service. That increased cost would result in serious competitive harm to Davidson Pipe in relation to pipe suppliers in New Jersey, who would continue to have direct rail service available. The need for truck delivery would

adversely affect service quality because truck transportation is difficult in the congested New York City area.

Davidson Pipe stores pipe in NY Cross Harbor's yard due to lack of sufficient storage space at its own place of business. Davidson Pipe would be very seriously harmed, to the point of threatening its ability to stay in business, if the proposed abandonment were to prevent continued storage of that pipe in the rail yard.

NY Cross Harbor is doing a good job of providing rail service to shippers along the Brooklyn waterfront. The Surface Transportation Board should allow NY Cross Harbor to continue to do so by denying the application for adverse abandonment and discontinuance.

VERIFIED STATEMENT OF ZVI PERETZ

My name is Zvi Peretz. I am employed by Franklin Poly Corp. (Franklin). My business address is 4601 Second Avenue, Brooklyn, NY 11232.

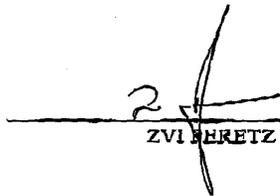
Franklin is a manufacturer of plastic bags. In the course of its business, Franklin receives plastic pellets in rail covered hopper cars. The plastic pellets originate primarily in Texas and Louisiana. The New York Cross Harbor Railroad, Inc. (NY Cross Harbor) transports those pellets by car-float from Jersey City, NJ over New York to the Brooklyn waterfront, and then by rail directly to our plant. We receive approximately 20 carloads of plastic pellets per year by rail.

Franklin is opposed to the City of New York's application for involuntary abandonment and discontinuance of NY Cross Harbor's rail service. If NY Cross Harbor were to be unable to provide direct rail service, Franklin would have to receive its pellets by truck or in rail-truck transfer service. Either of those means of transportation would result in substantially increased costs for Franklin. That would seriously harm Franklin and its ability to compete with plastic bag manufacturers who would continue to have rail service.

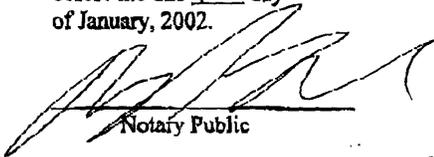
VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ZVI PERETZ, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.


ZVI PERETZ

SUBSCRIBED AND SWORN to
before me this 14 day
of January, 2002.


Notary Public

Leahid Reytman
Notary Public, State of New York
No. D1RE5073858
Qualified in Kings County
Commission Expires March 3, 2003

VERIFIED STATEMENT OF IRA M. TRACHTENBERG

My name is Ira M. Trachtenberg. I am employed by Interdynamics, Inc. My business address is 80 Thirty-Ninth Street, Brooklyn, NY 11232.

Interdynamics is submitting this statement in opposition to the attempt by the City of New York to force New York Cross Harbor Railroad, Inc. (NY Cross Harbor) to abandon its trackage and discontinue rail service at the Brooklyn waterfront. Interdynamics relies on NY Cross Harbor for efficient and economical rail service. Loss of that service would seriously harm Interdynamics.

Interdynamics receives direct rail service from NY Cross Harbor for receipt of R134A, a refrigerant. That commodity is shipped in liquid form in rail tank cars. It originates at distant locations in Illinois, Texas and Louisiana. Interdynamics receives approximately 25 to 35 carloads of refrigerants per year by rail.

Refrigerants cannot be trucked economically from Illinois, Texas or Louisiana to Brooklyn. The extra costs associated with receiving refrigerants in rail-truck service would make Interdynamics non-competitive with refrigerant packers in New Jersey, who would continue to have direct rail service available. In addition, service to Interdynamics would suffer because transloading and trucking would take place in the congested New York City area.

Interdynamics urges the Surface Transportation Board to deny the City's application for involuntary abandonment, thereby allowing NY Cross Harbor to continue providing high-quality rail service to Brooklyn shippers.

VERIFIED STATEMENT OF ALEX MOTOVICH

My name is Alex Motovich. I am Vice President of Midwood Lumber and Millwork, Inc. (Midwood). My business address is 1169 Coney Island Avenue, Brooklyn, NY 11230.

Midwood operates a warehouse on First Avenue at the Brooklyn waterfront that is served directly by railroad trackage operated by New York Cross Harbor Railroad, Inc. (NY Cross Harbor). Midwood receives lumber and plywood by rail at that location. Those rail shipments originate generally in the western United States and Canada. NY Cross Harbor transports those shipments from its yard in Jersey City, NJ to Brooklyn using car-floats across the Upper Bay. Midwood's use of rail service is increasing. Whereas Midwood received 11 carloads by rail in 2000, it is now on a pace to receive 20 to 30 carloads per year by rail.

Midwood is opposed to the proposal by the City of New York that NY Cross Harbor's rail trackage and service at the Brooklyn waterfront be abandoned and discontinued. NY Cross Harbor has provided economic rail transportation for Midwood in a satisfactory manner. If NY Cross Harbor's rail service were to be lost, Midwood would have to purchase lumber and plywood for truck delivery at considerably higher cost. That would have a significant adverse effect on Midwood.

VERIFIED STATEMENT OF LOUIS F. PETROSINO

My name is Louis F. Petrosino. I am General Manager of Dorann Resources, Ltd. (Dorann). My business address is 163 Sixth Street, Brooklyn, NY 11215.

Dorann is submitting this statement in opposition to the City of New York's attempt to oust New York Cross Harbor Railroad, Inc. (NY Cross Harbor) from the Brooklyn waterfront. Dorann relies on NY Cross Harbor for efficient transportation service. Dorann would be harmed if it were to lose NY Cross Harbor's service.

Dorann originates shipments of cast iron scrap from its yard in Brooklyn. The scrap is trucked approximately two miles to the First Avenue Yard in Brooklyn, where it is loaded into rail cars. NY Cross Harbor transports the cars in its car-float service across Gowanus (Upper) Bay and thence by rail to connection with major rail carriers in New Jersey. The scrap is primarily destined to points in North Carolina, South Carolina and Alabama. Dorann shipped 40 carloads of scrap via NY Cross Harbor in 2001.

Dorann would be seriously harmed if NY Cross Harbor were to be prevented from transporting its scrap shipments to the South. Truck transportation would be cost-prohibitive for those shipments. The extra costs associated with trucking and transloading at points more distant from Dorann's yard would make Dorann non-competitive with scrap companies in the New York City area located more strategically in relation to rail trackage.

The City has suggested that shippers could use rail cross-harbor service by means of a rail-served facility on the Brooklyn waterfront at 65th Street. However, the service and rates available for that service have not been made public. It is likely that service via the 65th Street facility will concentrate on lumber shipments to the detriment of other commodities. In contrast,

the First Avenue facility is open to all commodities equally, and NY Cross Harbor's favorable service and rates are well-known to Dorann.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document, Joint Protest, on Charles A. Spitulnik and Alex Menendez, McLeod, Watkinson & Miller, One Massachusetts Avenue, N.W., Suite 800, Washington, DC 20001 and on John D. Heffner, 555 Twelfth Street, N.W., Suite 950N, Washington, DC 20004, by UPS overnight mail on January 17, 2002.

Thomas F. McFarland

Thomas F. McFarland