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215958

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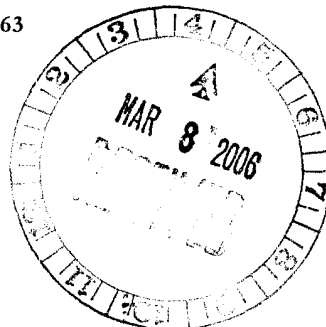
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March 8, 2006

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

ENTERED
Office of Proceedings

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Public Record

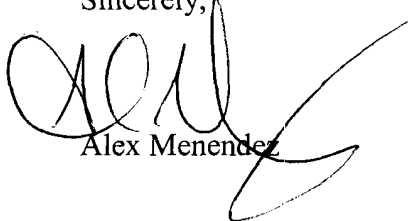
Re: *Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State
Transportation Inc. For Declaratory Order*; Finance & Commerce Docket No. 34824

Dear Sir:

I am enclosing an original and ten copies of the Reply of the New York City Economic Development Corporation and the City of New York to Request of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Leave to File a Reply in the above referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Thank you for your attention to this matter.

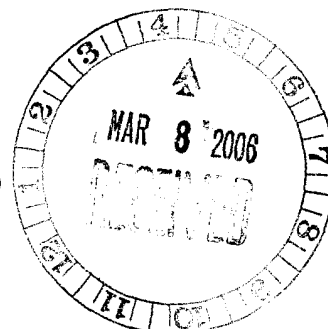
Sincerely,



Alex Menendez

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**Finance Docket No. 34824
PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-
STATE TRANSPORTATION INC. FOR DECLARATORY ORDER**

**REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
AND THE CITY OF NEW YORK
TO REQUEST OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-
STATE TRANSPORTATION INC. FOR LEAVE TO FILE A REPLY**

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Counsel for the New York City Economic
Development Corporation and the
City of New York

Dated: March 8, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 34824
PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-
STATE TRANSPORTATION INC. FOR DECLARATORY ORDER**

**REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
AND THE CITY OF NEW YORK
TO REQUEST OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-
STATE TRANSPORTATION INC. FOR LEAVE TO FILE A REPLY**

The New York City Economic Development Corporation ("EDC") and the City of New York ("NYC") (collectively, "City Parties") hereby file this response in opposition to the Request of Petitioners Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. ("Petitioners") for Leave to File a Reply to their petition. Petitioners are seeking to supplement the record and introduce new evidence that has no relationship to the question presented by the Petition, and the Request should be denied.

The question in this proceeding is whether either of the Petitioners is a common carrier providing transportation that is subject to the jurisdiction of this Board. Petitioners seek the protection afforded common carriers by the Interstate Commerce Commission Termination Act ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified* at 49 U.S.C. § 10101 *et seq.* to prevent the City Parties from maintaining a state court action to remove them from land owned by NYC. However, as the City Parties have explained previously in this proceeding, Petitioners are not common carriers providing transportation subject to this Board's jurisdiction. Therefore the ICCTA does not preempt the City Parties state law claims.

Yet, Petitioners continue to try to clutter the record and divert this Board's attention from that question by making baseless accusations about the City Parties' alleged attempts to cause an abandonment of rail service at the 65th Street facility where Petitioners remain despite the expiration of any right they may have once had to occupy those premises. The City Parties have previously confirmed in the sworn statement of Joan McDonald that NYC has no intention of causing the abandonment of rail service at 65th Street. The photographs that the Petitioners have submitted neither demonstrate that rail service can not continue at 65th Street, nor have any relation to the question of whether Petitioners' activities at 65th Street permit them to flout state law and remain on property they have no legal right to occupy.¹

Moreover, Petitioners attempt to re-argue the same points that Petitioners raised in their Petition. Petitioners can not argue that the City Parties raised any point or argument in their Response to the Petition for a Declaratory Order that was not a direct response to the Petitioners' arguments. Absent that, there is no basis for introducing new authority not previously cited or for re-arguing the same points that have been presented at some length in the Petition. The Board's rules do not permit a reply to reply, 49 C.F.R. § 1104.13(c), except when the reply presents arguments on points not raised in the initial pleading or where fairness and the interest

¹ If the Board elects to grant the Petitioners' Request and allow the supplemental evidence to become part of the record of this proceeding, the City Parties request an opportunity to submit supplemental evidence to further refute the unfounded allegations contained in Petitioners' reply. That supplemental evidence will demonstrate that the issue Petitioners raise concerning the "wall of waste" at the 65th Street facility occurred when New York and Atlantic Railroad ("NY&A") was doing tie replacement work at the yard, (which, contrary to Plaintiffs' allegations, indicates an intent to enhance not reduce the quality of rail service). Specifically, the "wall of waste" was at the 65th Street facility for approximately three (3) months while NY&A was doing the tie replacement work. Furthermore, the "wall of waste" never blocked the tracks at any time and was removed in one weekend by NY&A at the request of EDC.

of having a complete record justify permitting a reply. See STB Finance Docket No. 34429, *The New York City Economic Development Corporation--Petition for Declaratory Order*, 2004 STB LEXIS 7 (Service Date: January 8, 2004); STB Finance Docket No. 34734 and 34735, *Northeast Interchange Railway, LLC -- Lease and Operation Exemption -- Line in Croton-On-Hudson, NY; Gordon Reger -- Continuance in Control Exemption -- Northeast Interchange Railway, LLC*, 2005 STB LEXIS 556 (Service Date: November 18, 2005)

None of those circumstances apply here. The photographs Petitioners have submitted are not relevant to the question of whether Petitioners are a common carrier and therefore, whether federal preemption prevents the City Parties from maintaining an action in state court to remove Petitioners from the 65th Street Yard. The newly cited cases are not necessary to allow the development of a complete record because they do not bear at all on the Petitioners' activities or status. Moreover, if they were truly relevant to the matter before the Board, they could have and should have been presented as part of the Petition.

WHEREFORE, and in view of all of the foregoing, the City Parties respectfully ask this Board to deny the Petitioners' Request for leave to file a Reply.

Dated: March 8, 2006

Respectfully submitted,

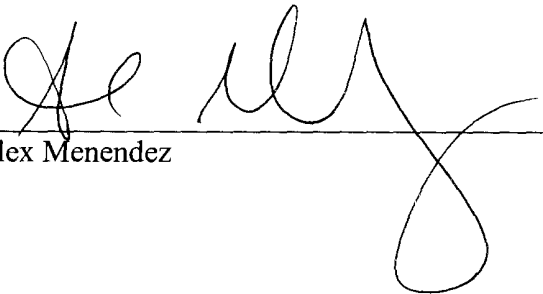
By: 
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Counsel for the New York City Economic
Development Corporation and the
City of New York

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2006, a copy of the foregoing REPLY OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND THE CITY OF NEW YORK TO REQUEST OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR LEAVE TO FILE A REPLY was served by first class mail, postage prepaid, upon the following:

John F. McHugh, Esquire
Attorney at Law
6 Water Street, Suite 401
New York, NY 10004



A handwritten signature in black ink, appearing to read 'Alex Menendez', is written over a horizontal line. The signature is stylized with a large loop at the end.

Alex Menendez