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**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**

**VERIFIED MOTION OF THE NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION AND THE CITY OF NEW YORK FOR EXPEDITED
CONSIDERATION**

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City of New York

Dated: April 12, 2006

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The New York City Economic Development Corporation ("EDC") and the City of New York ("NYC") pursuant to the 49 C.F.R. §1117.1 files this Motion for Expedited Consideration ("Motion") of the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order ("Petition") and states the following in support thereof:

ARGUMENT

I. Expedited Consideration is necessary because Tri-State's ongoing actions adversely impact NYC's and others' use of the 65th Street Rail Yard.

Not only is Tri-State unlawfully occupying property at 65th Street and claiming that its rights as a user of rail service preempt the application of New York State law, it has expanded the property it uses and occupies from that which it occupied under color of the agreement with CP that Tri-State asserts gave it the right to occupy the premises in the first instance.¹ Tri-State's

¹ EDC and NYC have stated in their Opposition to the Petition that "Tri-State is now using an additional approximately 1.4 acres of the Premises to, among other things, warehouse bricks and other materials." See *Opposition of New York City Economic Development Corporation and the City of New York, NY to the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order* ("Opposition Petition") at p. 8.

actions are preventing NYC from using its property and from making arrangements with others who seek access to the property in order to be close to the rail service that continues to operate and will continue to operate at that site for the foreseeable futures. NYC and EDC are asking this Board for expeditious resolution of the issues raised here in order to permit NYC to protect its rights and interests as the property owner from the intrusive and unlawful acts of Tri-State.

NYC is seeking to recover from Tri-State possession of certain real property more particularly described as the 65th Street Rail Yard, which is owned by NYC and located west of 2nd Avenue, proximate to the area from 63rd Street to 65th Street, Bay Ridge, New York, identified on the Kings County Tax Map as Block 5804, Lot 2, and Block 5806, Lot 2 ("65th Street Rail Yard"). Tri-State gained access to the 65th Street Rail Yard pursuant to an Ancillary Agreement it entered into with Canadian Pacific Railroad ("CP"), and its subsidiary, Delaware and Hudson Railway Company, Inc. ("D&H"). The term of the Ancillary Agreement commenced on June 18, 2002, and terminated on February 28, 2005, unless sooner terminated by certain provisions in the Ancillary Agreement.² See *Petition* at Exhibit B. Pursuant to the Ancillary Agreement, Tri-State was entitled to use a defined portion of the 65th Street Rail Yard ("Tri-State Contract Area") for its operations.

After the Ancillary Agreement terminated, NYC served a notice to quit on Tri-State, before commencing an action in state court to remove it from the 65th Street Rail Yard. Tri-State

² In its earlier pleadings in this proceeding, NYC and EDC have explained that Tri-State's right to occupy the Tri-State Contract Area at the 65th Street Rail Yard was terminated prior to February 28, 2005 because Canadian Pacific terminated the Original Operating Agreement which, by force and effect, terminated the Tri-State Ancillary Agreement because CP was no longer providing service on the Premises. See *Opposition Petition* at p. 16. That is, by the terms of its agreement with CP, Tri-State's right to occupy was co-terminus with the Original Operating Agreement.

then commenced an action in the United States District Court for the Southern District of New York styled *Tri-State Brick and Stone of New York Inc., v. New York City Economic Development Corporation et al.*, Civil Action No. 05-7561 ("Federal Court Action") in which they sought, among other things, preliminary injunctive relief to prevent the NYC from removing Tri-State from the 65th Street Rail Yard. The Federal Court denied Tri-State's request for a preliminary injunction and Tri-State filed this Petition with the Board.

NYC and EDC seek expedited consideration of the Petition due to the fact that Tri-State continues to occupy NYC-owned property, and it has expanded its use of the 65th Street Rail Yard beyond the Tri-State Contract Area. Tri-State's expanded use has prevented the NYC from pursuing and securing tenants who are willing to pay market value for the property at the 65th Street Rail Yard. This in turn has severely hamstrung NYC's efforts to develop the 65th Street Rail Yard and by extension it has impeded NYC's efforts to develop and expand rail service at the 65th Street Rail Yard. The issues raised by Tri-State in this proceeding are preventing NYC from seeking appropriate remedies in the state court.

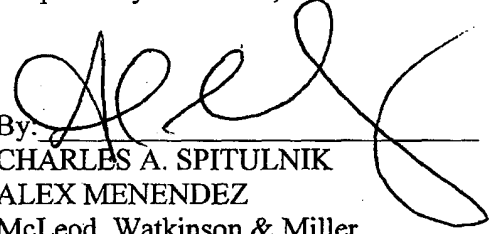
Consequently, an expedited decision by the Board on the issues raised in this proceeding will allow: 1) the parties to determine the rights of, and remedies available to, the parties *vis a vis* the 65th Street Rail Yard; and 2) NYC to develop the 65th Street Rail Yard and the rail service at the 65th Street Rail Yard by allowing the City to confirm what property is available to lease or license at the 65th Street Rail Yard to tenants or licensees in need of rail service.

CONCLUSION

WHEREFORE, EDC and NYC respectfully request that this Board consider the issues raised in Petitioners' request for Declaratory Order on an expedited basis.

Dated: April 12, 2006

Respectfully submitted,

By: 

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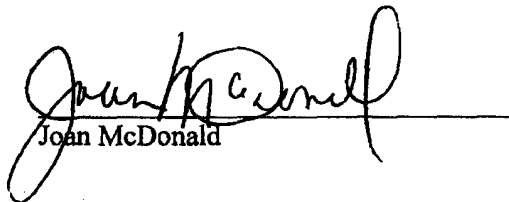
Email. cspitulnik@mwmlaw.com

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

VERIFICATION

City of New York)
) ss:
State of New York)

Joan McDonald makes the following oath and says that she is Senior Vice President of the Defendant New York City Economic Development Corporation ("NYCEDC"), that she has been authorized by NYCEDC to verify the facts stated in the foregoing Motion of The New York City Economic Development Corporation and the City of New York for Expedited Consideration of the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order, that she has carefully examined all of the statements in the foregoing Opposition, that she has knowledge of the facts and matters relied upon in the Opposition, and that all factual statements and representations set forth therein are true and correct to the best of her knowledge, information and belief.


Joan McDonald

Subscribed and sworn to *April*
before me this 12th day of ~~March~~, 2006.


Notary Public *Commissioner of Deeds*

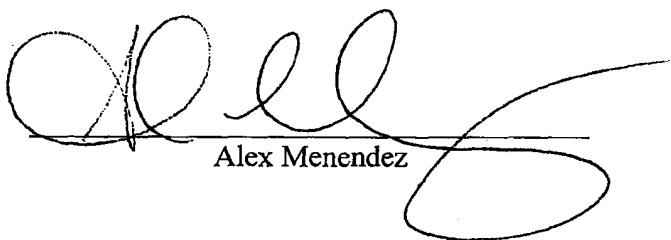
My Commission Expires: *October 1, 2007*

JUDITH A. CAPOLONGO
Commissioner of Deeds, City of New York
No. 5-1425
Cert. Filed in New York County
Commission Expires October ~~20~~ *1, 2007*

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2006, a copy of the foregoing Motion for Expedited Consideration Opposition of the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order 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



Alex Menendez