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April 18, 2006

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

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Via Federal Express

Re: Tri-State Brick and Stone of New York Inc. et al. Petition for a
Declaratory Order
FD 34824

Honorable Sir:

Enclosed please find for filing the original and ten copies of the Petitioners' response to the New York City Economic Development Corporation and the City of New York's motion for expedited consideration as well as a 3 1/2 " disk with this response in Microsoft Word.

Thank you for your attention to this matter.

Very truly yours,

John F. McHugh

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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET 34824

PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-
STATE TRANSPORTATION INC. FOR A DECLARATORY ORDER

VERIFIED RESPONSE OF PETITIONER TRI-STATE BRICK AND STONE OF NEW
YORK INC. AND TRI-STATE TRANSPORTATION TO THE MOTION OF THE
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND THE CITY
OF NEW YORK FOR EXPEDITED CONSIDERATION

Respondent has moved for expedited consideration of Tri-States' this Petition for a Declaratory Order. Respondents, claim that the petitioners' non-exclusive use of the 65th Street Rail Yard, (the Yard) to access the common carrier services of the New York & Atlantic Railroad (NY&A) is obstructing Respondents' efforts to obtain a commercial rent tenant for the Yard. It is submitted that the Respondents have no right to the high rents they claim this petition is delaying and therefore the motion has stated no valid basis for expedited consideration.

Respondents are the New York City Economic Development Corporation, the agent for the City of New York and that City, a municipal landowner. They assert that they have the right to terminate petitioners' access to the common carrier services rendered by the NY&A at the Yard. The Respondents admit that NY&A has the right to provide rail services at the 65th Street Yard, as successor to the Canadian Pacific Railroad, which was initially, granted that right by the City, including the use of all the facilities at the Yard. While asserting that the grant had a termination date that has passed, Respondents claim that the City has no desire to terminate the rail use of the yard.

That admission combined with Respondents' assertion on this motion of the right to terminate the petitioners' use of rail transloading facilities at the Yard so that the City can seek a more lucrative use, renders the City a rail common carrier with all attendant obligations, including being subject to the exclusive jurisdiction of the Surface Transportation Board.

In Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (Dec. 2, 2005) (Wisconsin) the Board explained that a state agency's contractual right to terminate use of a government owned rail line, by a rail common carrier, as well as its right to terminate the railroad's use of side tracks and associated lands is control over the operations of a common carrier and such control renders the land owner a common carrier with all the rights and obligations that entails. Respondent's status as a rail common carrier is well established by its argument that it may terminate rail use by petitioners, rail customers that are admittedly being actively served by a rail carrier, which has no desire to terminate that service. Addressing precisely this retained governmental landowner's right to terminate or restrict service the Board's predecessor, the Interstate Commerce Commission, concluded:

...the rights that LACTC has acquired are so extensive that LACTC necessarily incurs an obligation to exercise these rights as a common carrier in the absence of abandonment or exemption authority from this agency...

As discussed in our prior decision, the test of whether an entity acquiring railroad assets is subject to 49 U.S.C. § 10901 is whether it is acquiring sufficient power over the operation of these assets to justify finding the transaction to be an acquisition of a "railroad line" under § 10901(a)(3). There is a spectrum of cases ranging from cases like Finance Docket 31847 et al., State Of Maine, Department Of Transportation--Acquisition And Operation Exemption--Maine Central Railroad Company (unprinted), served May 24, 1991, where the purchasing State acquired minimal operational power over the lines, to cases like Finance Docket

No. 30816(A), City Of Austin, TX--Acquisition-- Southern Pacific Transportation Company (unprinted), served November 4, 1986, where the City acquired all transportation operational rights from the selling carrier before a transfer to an operator. Thus, the greater the control by the buyer, the more likely the entity is subject to regulation under § 10901.

In this case, LACTC is acquiring substantial power over the lines, and SP is retaining very little power. We are particularly impressed with two significant differences with State Of Maine, *supra*. First, LACTC can effectively force SP to curtail its freight service as passenger service expands, and freight shippers would have no recourse against LACTC if LACTC were found not to acquire a common carrier obligation.

Southern Pacific Transp. Co.—Abandonment, 9 I.C.C.2d 385, 387-388 (1993); Also see ex: Central Puget Sound Regional Transit Authority-Acquisition Exemption-BNSF Railway Company, FD_34747 (November 17, 2005)(Board approval is not required where a rail line is acquired by a non-carrier where the non-carrier will have no right to interfere with the rail carriers' operations). The Respondents' position here as well as the history of their assertion of control of and obstruction of rail service which is fully established on this record, places the Respondents firmly within the definition of a rail common carrier as reviewed by the Board in Wisconsin, *supra* and defined in Southern Pacific, *supra*.

Here, the Respondents seek to rush the termination of the City's common carrier obligation as they claim that this Petition is interfering with their ability to attract a "fair market value" tenant for this property. This assertion of the necessity for expedition in fact establishes that there is no injury Respondents could lawfully claim due to delay. Commercial rents available from non rail uses provide no basis for establishing the usage value of lands devoted to railroad services as railroad lands cannot be devoted to any other purpose, See: CSX Corporation and CSX Transportation Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating

Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation FD 33399, footnote 17 (December 18, 1998)(Respondent was a party to this action arguing that compensation for Canadian Pacific's use of CSX owned facilities be set to encourage rail use), See St. Louis S.W. Ry. Compensation -- Trackage Rights, 1 I.C.C.2d 776, 786 (1984) (SSW Compensation I); 4 I.C.C.2d 668 (1988) (SSW Compensation II); 5 I.C.C.2d 525 (1989); 8 I.C.C.2d 80 (1991); 8 I.C.C.2d 213 (1991). User charges must be based upon the land's value as a going concern rail facility as that is the only use to which such lands can be applied. The going concern value of the facilities in issue has been found to be an appropriate method of valuation. See Consolidated Rock Products v. DuBois, 312 U.S. 510, 526 (1941). The "going concern value," the "commercial value of property consists in the expectation of income from it." Galveston, H. & S. A. Ry. v. Texas, 210 U.S. 217, 226 (1908). Further, however, the Respondent cites no specific rail customer that seeks rail access at 65th Street and thus, establishes no urgency.

Arguing that the Respondents' goal is to abandon the rail use due to the low rents involved, the Petition includes, as Exhibit F, the affidavit of Joan McDonald, dated September 21, 2005, in which she explained that the City was seeking to terminate petitioners transloading operation so Respondents could lease this land for commercial purposes at a rental of \$2.25 per square foot annually. These rents are 2,004% of the user fees for the railroad use set in petitioner's agreement with Canadian Pacific. To show that such rent could be obtained, Ms. McDonald appended two agreements, an occupancy agreement for equipment storage related to a road construction project and one for an automobile repair facility. Ms. McDonald emphasized that those tenants were paying rent far in excess of that provided in the Tri-State agreement in issue here (See Exhibit J

to the Petition ¶¶ 36 and 37). However, Ms. McDonald failed then as now to note that Tri-State does not have an exclusive right to use any land, it has only a right to access rail services and to transload materials received by rail onto trucks for on-carriage. She made it very clear then as now that the Respondents seek to convert these railroad lands in whole or in part to non-rail uses to make more money. Termination of rail services so that the carrier or landowner can make more money is not sufficient grounds for termination of common carrier rail service. See: General Foods v. Baker, 451 F. Supp. 873, 875 (D. Md. 1978); Ethan Allen, Inc. v. Maine Cent. R.R. Co., 431 F. Supp. 740, 743, (D. Vt. 1977)(railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable).

Petitioners' use of the Yard is non-exclusive. Petitioners must accommodate any other entity seeking to access NY&A services at the Yard. Petitioner must also make room for patrons of any other rail carrier that gains access to the Yard. In addition, the petitioners use a small portion of the Yard. A vast section of the Yard is now covered by construction and demolition debris admittedly placed there daily by the Respondent City. Therefore, the Respondents' claim that the petitioner is obstructing its efforts to allow increased access to rail service are inconsistent with Respondents' own actions as well as with the legal obligations of the parties as set forth in the applicable agreements.

As William B. Galligan states in his declaration dated January 12, 2006, submitted in support of the Petition (Galligan), the Yard was developed by the City to be a public rail terminal beginning in the 1970's. (Galligan ¶9). Indeed, diagrams of the Yard attached by the Respondents to their agreements show the concrete loading dock that the petitioner is now using as well as a TOFC terminal area, both indicative of the

design of the Yard as a public rail terminal (see Site Plan, 65th St. Rail Yard, Exhibit A to Exhibit A to the affidavit of Joan McDonald, supra, page 25 of the Occupancy Permit of JLIIV Enterprises). Despite the amount of taxpayer money invested in tracks, platforms and float bridges, the Canadian Pacific Railroad was the first rail carrier to gain the right to use the terminal, that in 2002, and Tri-State is the first and only rail service customer to be allowed to use the facility, itself removing 300,000 tons of freight a year from the highway system.

Tri-State placed its faith in the intention of the City to finally use this land as intended, to provide public access to rail service id ¶ 11. As Mr. Galligan also points out that the City's policy of retaining control over access to the facility and of setting terms and conditions for use, terms which were beyond the realistic ability of rail services to accommodate or carry, caused this facility to lie fallow for all of that time and caused the failure of the efforts of Canadian Pacific to successfully market its rail transportation services via this facility, id ¶ 13.

It is impossible to believe that after thirty years of growing grass on this expensive taxpayer created rail terminal, the City is suddenly in a hurry. It is certainly not in a hurry to develop rail service. It is clearly in a hurry to wrest this land from the control of the Board so that it can be devoted to other far more profitable uses. The affidavit of Fred L. Krebs, the President of the NY&A, sworn to on December 2, 2005 (Krebs) is affixed to the Petition. Mr. Krebs confirms that the NY&A has no alternative terminal space available to accommodate Tri-State or any other Brooklyn shipper that could benefit from the use of rail services, Krebs ¶ 11. Thus, the Respondents' haste is to be allowed to reverse the course the City of New York set in the 1970's. Where as here,

that step will severely cripple any increase in rail freight service to a major city in the face of numerous reports and studies done in the last quarter century which all found that a major increase in rail access is critical (Galligan ¶ 21), that step is absolutely irrational and is contrary to the public interest.

The City of New York made this land a critical part of the nation's rail transportation system in 2002 (See Galligan ¶¶ 14-16), reserving the control which renders the City far more than a mere land owner, but indeed a common carrier by rail, Wisconsin, supra. However, this facility has been under the jurisdiction of the Board far longer, from the 1970's when the City began construction of rail facilities on this property with the specific goal of including these lands and facilities in the national rail system, New York City Economic Development Corp-Petition for Declaratory Order, FD_34429 (July 15, 2004) (development of rail facilities by the City of New York, a non-rail carrier, intending them to be included in the national rail network in the future, places the lands and facilities thereon within the exclusive jurisdiction of the Surface Transportation Board and therefore they are not subject to State laws or regulations).

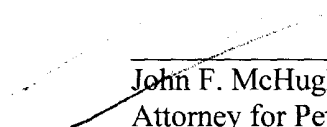
While it is always difficult to argue against expedited consideration, the issues raised by this Petition are of national significance; to wit, may a municipal rail facility owner scrap its rail development program to pursue a narrower but more remunerative short-term goal, forcing constructive abandonment of common carrier freight service in the process. The consequences of Respondent's actions, permanently barring Brooklyn's economy from access to rail transportation with all of the crippling economic and environmental effects that entails, do not allow for haste. Indeed, nation-wide, rail lands in urban areas are at risk at a time when access to rail service is increasingly critical to

reduction of dependence on trucking precisely in these crowded places where over dependence on the highway mode is most destructive to the public health.

Respondents' motion is not supported by evidence in this record. Respondents' motion should be denied.

Dated, New York, N.Y.
April 18, 2006

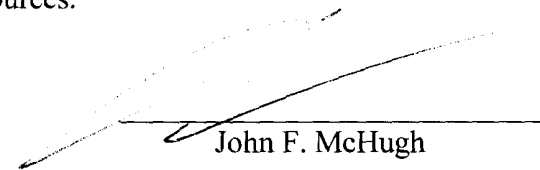
Respectfully submitted,



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VERIFICATION

John F. McHugh, at New York, N.Y. on this 18th day of April, 2006 verifies under penalty of perjury pursuant to 28 U.S.C. §1746 that he is the attorney for the Petitioners and as such and otherwise is fully familiar with the facts a referred to above and that the facts stated are correct to the best of his own knowledge or belief or such assertions are based upon the documents referred to as sources.



John F. McHugh

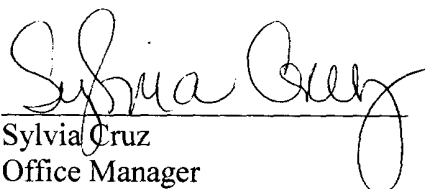
DECLARATION OF SERVICE

Sylvia Cruz declares that on this 18th day of April, 2006 that she served a true copy of this reply to the Respondents motion for expedited consideration upon:

Charles A. Spitulnik, Esq
Alex Menendez, Esq.
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by Federal Express.

Dated, New York, N.Y.
April 18, 2006


Sylvia Cruz
Office Manager
John F. McHugh, Esq.