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**TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE**

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HIGHWAYS AND TRANSIT

RAILROADS

ASSISTANT WHIP



Congress of the United States
House of Representatives
Washington, DC 20515

JERROLD NADLER

8TH DISTRICT, NEW YORK

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April 21, 2006

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

216332



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 an application to
intervene by the Hon. Jerrold Nadler, Member of Congress, as well as a 3 ½ " disk with
this application in Microsoft Word.

Thank you for your attention to this matter.

Sincerely,

Jerrold Nadler
Member of Congress

DECLARATION OF SERVICE

I, Daniel Penchina, declare that on this 21st day of April, 2006 that I
served a true copy of this reply to this Application for intervene upon:

Charles A. Spitulnik, Esq
Alex Menendez, Esq.
McLeod, Watson & Miller
One Massachusetts Avenue, NW
Washington D.C. 20001-1401

by hand.



Daniel Penchina

Dated, Washington, D.C.
April 21, 2006

ENTERED
Office of Proceedings
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Public Record

216332

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

APPLICATION OF THE HON. JERROLD NADLER, REPRESENTATIVE OF THE
EIGHTH CONGRESSIONAL DISTRICT, NEW YORK. TO INTERVENE AND
RESPOND TO THE MOTION OF THE NEW YORK CITY ECONOMIC
DEVELOPMENT CORPORATION AND THE CITY OF NEW YORK FOR
EXPEDITED CONSIDERATION OF THE PETITION AND TO SEEK A
DECLARATION THAT THE CITY OF NEW YORK IS A COMMON CARRIER BY
RAIL WITH REGARD TO THE 65TH STREET RAIL YARD, BROOKLYN, NEW
YORK

I am the Representative of the Eighth Congressional District of New York, which includes the 65th Street Rail Yard, the subject of this action. I seek to intervene at this late date due to the motion made by the City of New York for expedited consideration of this Petition for a Declaratory Order. In all likelihood, the City is seeking to consummate one or more transactions that will see this property permanently removed from the nation's railway network. The City's motion must be denied. I further urge the Board to declare that the City of New York is a Common Carrier by Rail at the 65th Street Rail Yard. That declaration is required to serve the Public Convenience and Necessity.

In addition to representing my district, whose residents will benefit from the use of this terminal as a public rail freight terminal, I seek to intervene, as I have been involved in transportation advocacy in the State and City of New York since 1979 and in Congress since 1992. I am also the co-chairman of the East of Hudson Rail Freight Task

Force, a creation of a settlement agreement between Norfolk Southern, CSX Transportation and a 24 Member Congressional Delegation. The Delegation had sought the inclusion of the 65th Street Yard, the New York Cross Harbor Railroad and the Bay Ridge Line and such additional trackage as was necessary to interchange with the Providence and Worcester Railway within the Conrail Shares Assets system created within 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.

I am familiar with the specific history of this property and its role in rail redevelopment for the additional reason that I was in the New York State Assembly for sixteen years, including most of the 1970's, when the programs at issue here were formulated and approved by New York State, and in the 1970's and 80's, when the bond issues which funded these programs were authorized and approved by the voters.

The 65th Street Rail Yard, a rail terminal since the 1870's, was redeveloped as a full service public rail terminal by the City of New York beginning in the late 1970's. That redevelopment was a part of the New York State Department of Transportation's Full Freight Access Program. Construction of the facilities on the 65th Street Yard that are the subject of the petition was funded largely by New York State Transportation Bonds specifically approved by the State's voters to provide the City of New York's population with access to modern rail freight services. Those facilities included transload facilities for highway trailers and containers and general cargo such as that handled by the Tri-State petitioners.

Unfortunately, the Full Freight Access Program took years to get as far along as it has today. With each change in administration in Albany and in this City, the priority of the project changed. The prior City administration, the Giuliani administration, appreciated the significance of rail freight service and its positive effects on the economy and on the environment. It was that administration which negotiated the Operating Agreement with the Canadian Pacific Railroad¹, under which this facility was added to the Nation's rail network, and the line haul service of the Canadian Pacific Railroad was extended from Fresh Pond Junction in Queens County to Bay Ridge in Kings County, i.e. to the Brooklyn Waterfront, an area formerly served only by the New York Cross Harbor Railroad². This Operating Agreement provided customers in the City of New York with direct access to the rail services of that carrier. Its services prior to that agreement were limited to overhead trackage rights to Fresh Pond, which is only an interchange with the New York & Atlantic Railroad. This agreement was, therefore, a significant extension of the railroad's lines into a market it previously could not serve directly.

The Giuliani Administration conducted two studies that covered an analysis of the potential of the 65th Street Yard. Both related to the construction of a rail freight tunnel across the harbor. While both studies found that such a tunnel would provide more public benefits than any other transportation project being considered in the New York Metropolitan Region, both studies also reviewed potential traffic to be generated by the 65th Street yard, if properly managed as part of an alternative restoration of reliable float service across the harbor (even in the absence of construction of a cross harbor tunnel).

¹ The agreement was signed in March of 2002 but has been negotiated and fully agreed to before the Administrations changed.

² Which provided haulage service for the Norfolk Southern Railroad as well as provided its own service.

The car float system, prior to the mid 1960's, had connected this City and New England to rail facilities in New Jersey. Each such study³ concluded that significant benefits would result from restoration of reliable float service.

With the change of City administrations, freight transportation seems no longer to be an administration priority. Indeed, the respondent seems to be targeting all city-owned freight terminal facilities for destruction. In quick succession, it attempted to adversely abandon the New York Cross-Harbor Railroad, it has ordered the closing of the only maritime terminal in Brooklyn as of the end of its current lease, in March, 2007, and it seeks here to isolate the New York and Atlantic Railroad's freight services from access to the public.

I have read the Petitioner's reply to this motion for expedited consideration. I can confirm the fact that the City has exercised its control of access to the 65th Street Yard to cripple Canadian Pacific's efforts to serve the public via that facility. The Respondent leased a section of the adjacent Brooklyn Army Terminal to a day care center. As a direct result, it forbids any activity at the 65th Street Yard that would increase truck traffic through the Army Terminal. In Section 2.04 (c) (iv) of the Operating Agreement⁴, it retained authority to restrict that access. Although a direct access roadway has always been a part of the development plan for the 65th Street Yard, that roadway has not been provided. Thus, the City's ability to ban increased truck traffic through the Army Terminal has frozen the use of the 65th Street Yard at the level of traffic generated by Tri-State Brick. No other use has been allowed other than the City's own use. The short term of the Canadian Pacific's Operating Agreement (See Article III and article VII) also

³ As have many other studies of the problem presented by the gap in the national rail system caused by the lack of a rail crossing of the Hudson River south of the Selkirk bridge 120 miles north of this City.

⁴ The Operating Agreement is appended as Exhibit A to the Petition.

crippled efforts to gain patrons at the yard. No shipper with a continuous need for transportation services can opt to use a facility that may be closed in three or fewer years.

The City has placed its rail facilities under the jurisdiction of the Surface Transportation Board where that suited its purposes, New York City Economic Development Corp-Petition for Declaratory Order, FD_34429 (July 15, 2004). In that action, it sought the protection of the Board's authority over its construction of rail facilities on Staten Island that were designed to connect a City-owned waste transfer facility to the national railway system in New Jersey. The state environmental agencies of New Jersey and New York objected because the facility, including its rail lines and the attendant traffic, had not been subjected to the environmental review required by the laws of both states. The Board ruled that facilities built by the City of New York, with the intention of adding them to the nation's rail network, were rail facilities and were under the exclusive jurisdiction of the Surface Transportation Board.

At the 65th Street Yard, the City of New York has not only built such facilities, it has added them to the nation's transportation system, and now seeks to control access to the transportation services of a common carrier which the City admits has the right and obligation to provide common carrier services at that location until relieved of that obligation by the Surface Transportation Board. Yet the City here claims the right to control public access to, as well as to the extent of, that rail service.

Based upon the Board's recent decision in Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (Dec. 2, 2005) and upon the terms of the Operating Agreement entered into by the City with the Canadian Pacific Railroad, I ask the Board to declare the City to be a Common Carrier by

Rail at the 65th Street Rail Yard. The City correctly claims here that the Operating Agreement has expired by its terms (See Operating Agreement Article III). The City also claims the right to bar the Tri-State petitioners from the use of the Yard's transloading facilities.

In the Wisconsin case, the Board held that the rights retained by the Wisconsin Department of Transportation -- to terminate rail use of the facility, or to reduce rail use by denying use of sidings and adjacent lands -- compelled the Board to recognize the Department's status as a common carrier by rail. The contractual rights retained by the City here -- to terminate the lease at the end of a term and to control access to the site -- are identical to the rights retained in the Wisconsin case, and should have the same effect.

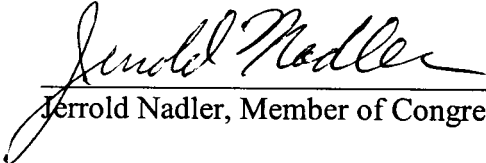
The history of the Full Freight Access Program is argument enough for Board jurisdiction over these facilities. The Legislature and the taxpayers who voted for the bond issues in question sought to permanently solve the rail access problems of this City. Due to the priorities of the various administrations since 1982, the promise of that project has remained largely unfulfilled. The Harlem River Yard, which was to be the keystone of the project, was intended to be a major intermodal terminal with a capacity of nearly 300,000 lifts per year located at the very center of the City's highway network. This facility, which is one of the few locations in the City of New York suitable for TOFC-COFC use, is now a waste-transfer station.

Now, apparently, the 65th Street Yard is to suffer a similar fate. Rather than reduce truck traffic and create jobs, the Yard, and the entire benefit of a rail development that has been in progress since 1978, is to be lost, as the City seeks commercial rent for a

facility that was supposed to be a rail terminal. So the City will now have zero sites suitable for use as a TOFC-COFC terminal.

Congress gave the Board exclusive jurisdiction over everything having to do with rail services for a reason. We need a stable and complete national railway system. That system is for the benefit of the public as a whole. Such a system cannot be managed, even partially, by public officials whose priorities and understanding of commerce vary vastly from administration to administration or from day to day. In this action, I ask the Board to place the only public rail terminal that remains of the Full Freight Access Program, and the only public rail terminal in Kings County (by itself, the nation's third largest city), the 65th Street Yard, within the full control of this Board to protect it from diversion to non-rail purposes or from being otherwise rendered useless by the City's mercurial policies.

I declare under penalty of perjury at New York, N.Y. this 21th Day of April, 2006 that the forgoing is true to the best of my knowledge and belief.



Jerrold Nadler, Member of Congress