

**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
THE PETITION OF THE HON. JERROLD NADLER**

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Dated: May 5, 2006

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I. Introduction

The questions before the Board in this proceeding are whether Petitioners Tri-State Brick and Stone and Tri-State Transportation are carriers that provide transportation subject to the jurisdiction of this Board, and if so, whether their unlawful occupancy of land owned by the City of New York is protected by the umbrella of this Board's jurisdiction. The "Petition of the Hon. Jerrold Nadler Seeking 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 ("Congressman's Petition") presents questions that are not relevant to the issues presented in this proceeding.. The Congressman's Petition is based on erroneous information about the intentions of the City of New York ("City") *vis a vis* the 65th Street Rail Yard. In addition, the cases the Congressman cites do not support the conclusion he has asked this Board to reach. The City respectfully requests that this Board reject the Congressman's petition, and instead issue an order declaring that: neither of the Tri-State Petitioners are carriers providing transportation subject to this Board's jurisdiction; and that as a result, the City may exercise its rights under state law with respect to this property.

II. Argument

The Tri-State Petitioners are not common carriers providing transportation subject to the jurisdiction of the Board, and thus the Board's federal preemptive cloak does not protect them from the City's efforts to evict them from the 65th Street Rail Yard. That is the issue before the Board in the instant action. The City is also not a common carrier. If the Board were to initiate a proceeding to address that question, as the Congressman's Petition suggests, the Board would confirm that the City is not a common carrier. However, that question is not pertinent to the issue that is before this Board in this proceeding, and the City submits that if it needs to be addressed at all, it should be in a separate proceeding so that the resolution of the issues before the Board here need not be prolonged further.

The Congressman argues that the City and the New York City Economic Development Corporation ("EDC") (collectively "Respondents") are impeding, hindering and/or obstructing the continuation of rail service at the 65th Street Rail Yard.¹ Based on this allegation, the Congressman asserts that the Board's jurisdiction prevents the City from evicting the Petitioners from the 65th Street Rail Yard. In support, the Congressman argues that the City is seeking to eliminate the use of the 65th Street Rail Yard as a rail terminal. There is no evidence to support this contention.²

The Congressman argues that the elimination of rail service is the obvious goal of the Respondents because Respondents seek fair market rent from Petitioners, who have been occupying the Premises free of charge for well over a year. This is simply not true. The City has

¹ As has been set forth in these proceedings, New York & Atlantic Railroad ("NY&A") is the railroad that currently services the 65th Street Rail Yard.

² The Congressman cites the fact that because the Respondents "leased a section of the adjacent Brooklyn Army Terminal to a day care center" they are attempting to eliminate rail service to the 65th Street Rail Yard. *See Congressman's Petition* at p. 4. The Congressman's conclusion is incorrect. As the Congressman notes the day care center is in a building that is adjacent to the 65th Street Rail Yard. It was created to provide day care options for the employees of the Brooklyn Army Terminal, not as part of a systematic plan to eliminate rail service in the area.

consistently stated through sworn testimony in this proceeding (as well as in a related case in Federal Court) that it does not plan to eliminate the use of the 65th Street Rail Yard as a rail terminal, nor is there any intention to prevent the NY&A from providing rail service to the 65th Street Rail Yard.

The Congressman's Petition introduces no evidence that refutes the sworn testimony of EDC officials on this point. Instead, the Congressman's Petition attempts to shift the focus of this proceeding to a claim that the City is a common carrier. Specifically, the Congressman argues that the City is a rail carrier because it has asserted control over the rail service provided by the common carrier to the 65th Street Rail Yard. [?]

The Congressman argues that the City is intent on obstructing or discontinuing rail service at the 65th Street Rail Yard. Based on this line of reasoning the Congressman concludes that Petitioners are shielded from state property law and that they should be able to remain at the 65th Street Rail Yard. This logic does not follow either from the facts before the Board or from this Board's precedent. . The facts in this record establish that the Respondents are not now and do not have any intention of eliminating or even reducing rail service to the 65th Street Rail Yard. The City's declarations on this point stand unrefuted. The City has also been quite clear that it intends to pursue the removal of the Petitioners from the 65th Street Rail Yard because they are illegally occupying property owned by the City.

The Congressman contends that because Respondents own the land at the 65th Street Rail Yard, the Respondents are common carriers and thus subject to 49 U.S.C. § 11704.³ In support,

³ Section 11704 provides:

(a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part [49 U.S.C. §§ 10101 et seq.] does not obey an order of the Board, except an order for the payment of money, may bring a civil action in a United States District Court to enforce that order under this subsection.

the Congressman cites *Wisconsin Department of Transportation – Petition for Declaratory Order*, STB Finance Docket No. 34764 (Dec. 2, 2005) (“*WDOT Petition Decision I*”). The Congressman’s reliance on *WDOT Petition Decision I* is misplaced.

In *WDOT Petition Decision I*, the Wisconsin Department of Transportation (“WDOT”) requested a declaratory order stating that the Board did not have jurisdiction over its planned purchase of a rail line. *Id.* at 3. The WDOT sought to buy the rail line from Wisconsin & Southern Railroad Co. (“WSOR”). The rail line ran 32.5 miles. *Id.* WDOT asserted that WSOR granted it an option to purchase the rail line but not the common carrier authority to provide freight rail service. *Id.* In its petition, WDOT stated that it has structured this transaction to ensure that it would not assume any common carrier liability by providing that WSOR would continue to operate the railroad on the line pursuant to a perpetual easement from WDOT. *Id.*

The Board in *WDOT Petition Decision I* did not hold that WDOT was a common carrier. In addressing issues it found in the draft operating agreement governing the transaction between WDOT and WSOR the Board stated that “additional information is needed before the Board can reach a determination on WisDOT’s request for a declaratory order.” *Id.* at 6. Thereafter, in its subsequent decision, *Wisconsin Department of Transportation – Petition for Declaratory Order*, STB Finance Docket No. 34764 (February 6, 2006) (“*WDOT Petition Decision II*”), the Board addressed changes the parties had made to the documents discussed in the earlier decision. The Board specifically found that “the state entity acquired the property but the common carrier obligation resided with another entity.” *Id.* at pp. 5-7 (emphasis added). One concern remained, and the Board asked the parties to address it. Thereafter, in *Wisconsin Department of Transportation – Petition for Declaratory Order*, STB Finance Docket No. 34764 (March 13,

If the City or EDC were rail carriers, this statute might have some relevance. Because neither of them is a rail carrier, the statute has no application here.

2006) (“*WDOT Petition Decision III*”), the Board found that WDOT had addressed all the concerns raised *vis a vis* the operating agreement and held that:

Therefore, we find that WisDOT has satisfied the condition imposed in our February 6 decision, and the declaratory order, finding that no Board authorization for WisDOT's planned purchase of the Waterloo Spur is required, will now be made effective.

Id. at 3. Therefore, nowhere in *WDOT Petition Decision I*, *WDOT Petition Decision II* or *WDOT Petition Decision III* (collectively the “WDOT Decisions”) did the Board find that WDOT as a state agency was recognized as a common carrier.

Moreover, even if WDOT was deemed to have been a common carrier, the facts in the WDOT Decisions are easily distinguishable from the instant action. The WDOT Decisions related to a state agency that was contracting directly with a railroad to purchase a rail line. In the instant action, the City seeks to evict an entity that is not a rail carrier from its property.

Other key distinctions between the WDOT Decisions and the instant action include:

- There are no facts that establish that the City is attempting to assert control over a rail carrier;
- This proceeding does not involve an operating agreement that would provide or potentially provide the City with the ability to control or assert control over rail service at the 65th Street Yard;
- Petitioners, unlike the WSOR in the WDOT Decisions, are not rail carriers and do not provide transportation subject to the jurisdiction of the Board⁴;
- There are no facts that establish that Respondents are common carriers; and

⁴ As previously established in this proceeding Petitioner Tri-State’s business entails the delivery of unique building products to the construction industry and Petitioner Tri-State Transportation’s business consists solely of transloading freight between rail cars and trucks. Neither operates as a rail carrier providing transportation subject to the jurisdiction of the Board.

- There are no facts that support Petitioners' allegations that the Respondents are trying to terminate the use of 65th Street Rail Yard by the railroad that currently serves it.

The WDOT Decisions have no relevance to these proceedings.

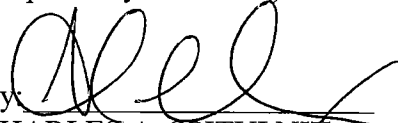
The Board should not accept the Congressman's petition to address an issue that is not pertinent to this proceeding, in which the Petitioners are attempting to improperly invoke the Board's jurisdiction to block the Respondents legitimate efforts to evict the Petitioners, who are not rail carriers, from Respondents' property. Based on the facts in the instant action and on applicable precedent (*Hi Tech Trans, LLC et al. v. State of New Jersey et al.*, 382 F.3d 295 (3rd Cir. 2004)) Petitioners are not rail carriers, and therefore the Board has no jurisdiction over this dispute.

III. Conclusion

The Congressman's contentions raise issues that are irrelevant to the instant action. Based on the facts in this proceeding the Board should deny the Congressman's request to declare that the City is a common carrier.

Dated: May 5, 2006

Respectfully submitted,

By 

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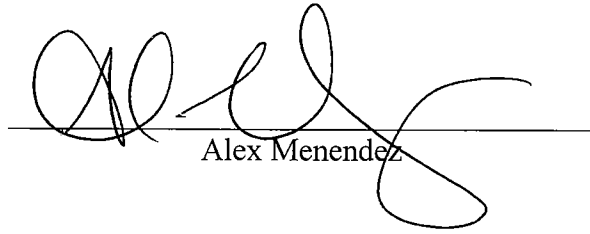
Counsel for the New York City Economic
Development Corporation and the City of
New York

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2006, a copy of the foregoing REPLY OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND THE CITY OF NEW YORK TO THE PETITION OF THE HON. JERROLD NADLER, was served by first class mail, postage prepaid, upon the following:

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Hon. Jerold Nadler
2334 Rayburn House Office Building
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Alex Menendez

ND: 4811-3483-6480,