

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

REPLY

ENTERED
Office of Proceedings

MAY 12 2006

Part of
Public Record

Unlike the Tri-State petitioners who have interests limited to protecting their business, I am represent the people of a large part of the City of New York, including a major part of Brooklyn. My obligations are broader. I seek to solve the problem caused by the City's management of its rail assets, not merely to deal with its effect on one rail customer. The additional relief I have asked the Board to provide is to designate the City a Common Carrier. This would allow the public to insist on access to rail freight service at the 65th Street Yard on reasonable terms, finally fulfilling a part of the goal of New York State's Full Freight Access Program.

The respondent complains of my reliance on the Wisconsin Department of Transportation, FD_34764_0, (December, 2005). The Wisconsin Department of Transportation did not wish to become a common carrier by rail. It did wish to acquire the right of way of a rail line. It submitted the purchase agreement to the Board and

sought a declaratory order that the agreement did not render the Department a common carrier. As I stated in my application, the Board cited three clauses of that contract, relevant to the discussion here, which would, if not revised, require the Department to seek authority as a common carrier:

... "[WSOR] shall have the right to renew this Agreement for successive additional ten (10) year periods." This appears inconsistent with the "perpetual easement to operate the line" that WisDOT describes in its petition and which the agency cited in State of Maine as a predicate to assuring that control over rail operations vests in the operator, not the owner of the right-of-way.

... WisDOT would retain the right to review WSOR's continued use of sidetracks "... and Land 16.5 feet from the center line on each side of the sidetrack." It is unclear what this right of review would entail and what limits it might impose on WSOR's operations.

... "... , [WRRTC] reserves to WisDOT, itself and the governmental entities along the Rail Line the right to do such planning and to provide for relocation of facilities, including Improved Property and the elimination of certain trackage, buildings and other facilities, in order to carry out the determinations arrived at from such planning." It is unclear what these planning operations would entail, and to what extent the ability to relocate facilities and eliminate trackage, buildings and other facilities might affect rail operations.

The Board advised the Department of these problems in the form of a request for additional information. That request was an invitation for the Department to revise its agreements to remove retained rights which could only be exercised by a common carrier subject to further approval by the Board.

Here, the City of New York did not submit its Operating Agreement with Canadian Pacific for approval by the Board. Now it asserts that:

1. Tri-States' rights have terminated as the CP operating agreement to which they were tied has terminated.
2. The City has the right to control the use of the sidings Tri-State is using.

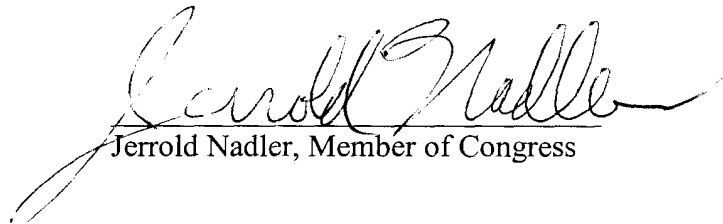
3. The City has the right to control the use of the land, which was part of the rail terminal, which was the subject of the Operating Agreement.

The Wisconsin DOT revised its contract to eliminate the rights the Board objected to. Here, the City seeks to enforce nearly identical rights. Therefore, pursuant to the explanation set forth by the Board in Wisconsin, The City of New York should be deemed a common carrier.

The City has submitted sworn statements as to its intent to use this land for rail purposes. It pointedly has not identified a specific "rail" use for this land, an unknown use which now compels its motion for expedited consideration. This void in the City's sworn statements is despite the fact that a request for proposals was issued in 2005. There has been no notice of a successful response. The City is dumping material on the land.

If the City seeks to devote this land to rail service, it should not object to being designated a common carrier by rail so that its obligation to provide service on reasonable terms to all who need it is made clear.

I declare under penalty of perjury this 8th day of May, 2006 that the foregoing is correct to the best of my knowledge and belief.



Jerrold Nadler, Member of Congress