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

November 30, 2006



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

Re. Tri-State Brick and Stone of New York Inc. et al. Petition for a
Declaratory Order, Petition to Reopen
FD 34824_0

Dear Secretary Williams:

Enclosed please find the original and ten copies of my comments on the petition
to reopen and ten copies of the certificate of service.

Thank you for your attention to this matter.

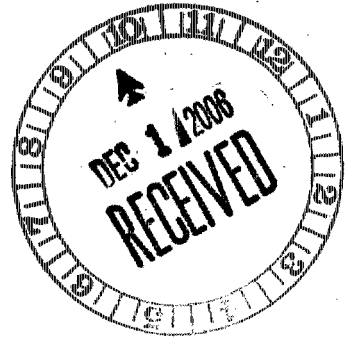
Sincerely,

JERROLD NADLER
Member of Congress

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Office of Proceedings

DEC 1 - 2006

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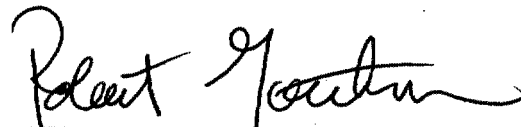
DECLARATION OF SERVICE

I, Robert M. Gottheim declare that on the 30th day of November 2006 that I served a true copy of these comments upon:

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

by Federal Express.

Dated, New York, N.Y.
November 30, 2006


Robert M. Gottheim

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 a Declaratory Order

PETITION TO REOPEN

COMMENTS OF JERROLD NADLER, MEMBER OF CONGRESS



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I represent the people of a significant part of the City of New York, including a major part of Brooklyn, the Borough involved in this matter. I am a ranking member of the Transportation and Infrastructure Committee of The House of Representatives. My obligations are broader than those of a private litigant as 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.

I agree with the petitioner as to the basis upon which this matter should be reopened and the decision of August 11, 2006 reconsidered due to material errors of law and fact.

In its decision, the Board mischaracterized the relief Tri-State was seeking and then determined that the board did not have jurisdiction over the price imposed on a shipper by a rail land owner for access to rail line haul services as that access was, in fact, a transloading operation conducted by the shipper. But access to rail service is, in fact, part of that service. A denial of access, either by erecting a fence or by imposing unreasonable terms and conditions, is a constructive adverse abandonment of that service.

The record submitted previously establishes that the City of New York has very few freight rail facilities still operable and it has extremely few places where access by shippers to those limited services is physically possible. At issue is a public freight terminal owned by the City and devoted to the provision of access to rail freight services. Upon the unlawful withdrawal of the initial common carrier from its service obligation at that terminal, the City is here attempting to recover the lands in question so that it may earn commercial level rents from those lands notwithstanding its continuing to allow a successor rail common carrier to run on the tracks within the terminal. Rail use of land is among the lowest paying uses known. The imposition of commercial level rents, therefore, prevents access to rail services, rendering the fact that a common carrier railway can still access the tracks on the property irrelevant. Where service to the public is not feasible due to the unreasonable terms and conditions imposed on railway land use, this Board must act to preserve active rail service, and it has the jurisdiction to do so.

This issue is critical. I have been involved in advocating improved rail freight access for this City and its Eastern Suburbs and Southern New England since 1979. Shipper access to the national rail system is the major transportation issue in the entire East of Hudson half of the New York Metropolitan region. Therefore, I have personal knowledge of many of the facts relating to this property and the material issue in question in this petition; the ability of the City of New York, by its agent EDC, to manage transportation assets in a manner consistent with the public convenience and necessity, i.e., solving the problem of access.

As a result of my mandate as representative of this constituency, when this case was first before the Board, I intervened to ask that the Board designate the City to be 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 (FFAP) (emphasis added) which was originally adopted in 1979 and has yet to produce any significant public benefit, largely due to the type of governmental mismanagement now before the Board.

BACKGROUND

The FFAP was instituted in 1979 and was financed by two state transportation bond issues. It was a program of rail line improvements to allow "full sized" modern rail equipment (as that term was interpreted in 1979) into the City and onto Long Island to provide this region's shippers with access to modern rail freight services. Actual street to rail access was to be at two terminals, Harlem River Yard in the Bronx and this Yard at 65th Street in Bay Ridge, Brooklyn. Both were on rail terminal lands of the former New York, New Haven and Hartford Railroad and were to be rebuilt to be Trailer On Flatcar (TOFC) intermodal facilities with appropriate connections to the Hudson Division and thus, to the national railway system to the west.

The Harlem River Yard has been leased to an industrial park developer for 99 years and is, for all intents and purposes, no longer available for use by the public to access rail services.

The development of 65th Street Yard, while part of the FFAP, was delegated to the City, which owned the property. It reconstructed the Yard, which had been dismantled by the Penn Central Railroad in the late 1960's. Historically, from World War I until the mid 1960's, the Yard had been the major trunk line rail link between New

England and east of Hudson New York and the rest of the nation. This link was provided by the car float facility located on the property, through which entire trains were interchanged by water between the New York New Haven and Hartford Railroad and the Pennsylvania Railroad via its float terminal in Greenville, Jersey City, New Jersey. Well over ten hundred car freight trains a day moved over this interchange in each direction as late as the 1960's.

Since acquisition by the City, the intention at all times was to rebuild the Yard to restore the cross-harbor floats as well as to provide a public rail terminal adjacent to the active Brooklyn Waterfront. In pursuit of this goal a new float bridge was installed by the City in the late 1990's, and, in the early 1980's, platforms for TOFC service and the loading dock now used by Tri-State were built. But all of these facilities remained idle until Tri-State began transloading there in the summer of 2002. The float bridge and TOFC terminal still remain idle.

After 2002, the yard was to be operated by the Canadian Pacific Railroad Company. But actual service to the yard was provided by the New York & Atlantic Railroad (NY&A), which had acquired the freight operations of the Long Island Railroad in 1997. As was stated by Fred Krebs, the president of the NY&A in the affidavit previously filed in this matter, almost all of the huge increases in traffic NY&A has achieved since it took over that service was achieved through the use of transload facilities, such as those here in issue. Most shippers in this City and on Long Island do not have sidings. Of greatest concern to me however is that Mr. Krebs asserts that his company has reached the limit of its ability to serve additional non siding shippers as, other than 65th Street, all other public facilities are fully utilized. Therefore, the case at

bar involves the continued rail use of the last terminal remaining from the Full Freight Access Program as well as the only remaining public terminal facility capable of attracting new traffic to the nation's railroad system within the City of New York. Thus, this matter involves far more than Tri-State's immediate problem.

Prior to Tri-State's operation, this property, despite a huge investment in facilities by the taxpayers of this State, lay fallow for over a quarter century due to precisely the type of issue which is now before the Board - the City's insistence on unreasonable terms as the basis for any use of the property. Indeed, here the City's terms, high fees charged on one hand, and restrictions on the type of cargos the railroad could handle at the yard, on the hours of access and even on the numbers of trucks which could get into the yard per day on the other, drove the Canadian Pacific Railroad from the property. New York & Atlantic is still operating the property, but it has not been charged any fees for that right to date. Instead, the City seeks unreasonable fees from shippers to avoid the scrutiny of the Board. By denuding the NY&A of traffic, the EDC can cause the abandonment of service, a result it was not able to achieve elsewhere on the Brooklyn Waterfront by seeking an adverse abandonment directly, See: New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.3d 1177 (D.C. Cir. 2004).

THE BOARD'S PRIOR DECISION IGNORED EDC'S ASSERTION OF THE RIGHT TO CONTROL RAIL OPERATIONS.

The Board has a standard procedure for reviewing the terms of agreements relating to the operation of rail services. An agreement will not be approved where the land owner retains control of the land use to the extent of controlling rail services. Here,

not only did neither the Canadian Pacific Railroad nor the EDC submit their operating agreement for Board approval, the Board, on this petition ignored its review process completely, allowing the EDC to evade the effect of that agreement on EDC's status before the Board.

Well-settled law supports Tri-State's argument that, as a shipper, it is entitled to demand service on reasonable terms from EDC in its contractually imposed role as a rail common carrier. By ignoring the agreement's several clauses by which EDC maintains control, the Board's decision committed a material error of law.

In its 2002 Operating Agreement (the Agreement) with the EDC, the Canadian Pacific Railroad, (CPR) was required to operate the 65th Street Yard as a public freight facility.

The purpose of this Agreement is to grant the right to the Operator to conduct and operate such freight operations on a non-exclusive basis for the purpose of promoting the transportation of freight at the Premises and providing equal commercial access to other companies that desire to utilize the freight facilities at the Premises.

(Agreement, Exhibit A to the original petition page 1)

These purposes are similar in intent to those stated by the City of Galveston, Texas when it conveyed lands to Collis P. Huntington, to maintain facilities to serve railroad customers in that city, See Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911). In that instance the Supreme Court found that Huntington's successor, the Southern Pacific Terminal Company, was rendered subject to the jurisdiction of the Interstate Commerce Commission by that mandate, i.e. to maintain facilities for the use of railroad shippers. The ICC had entertained complaints by shippers that the Terminal Company had granted one shipper a preference by leasing a

wharf on which that shipper then processed cotton seed cake from seed received by rail and, after processing, re-shipped it by sea. Thus, contrary to the conclusion by the Board stated in its August 11 decision, the ICC did have jurisdiction over a complaint by non-carrier shippers as to the terms and conditions imposed by a non-carrier terminal owner on the use of rail terminal facilities. I note that no language in the Interstate Commerce Commission Termination Act or any other law, removed such jurisdiction from this Board and, indeed, the Act expanded that jurisdiction significantly.

Under the terms of the Agreement, the “freight operations” of the CPR were to include “all operations related to ordinary line hauling services, **transloading facilities** handling, ...**providing terminal access** and required handling equipment,... **actual transfer of product from Rolling Stock to trucks,,**” [Exhibit A, Article 1.01 (q)] (emphasis added). Thus, access and the provision of facilities for access is specifically defined as “Freight Operations” in the Operating Agreement. Indeed the Yard was to serve “...industries that rely on trucks to transport goods from the rail site ...; so the proposed **transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction** over "rail transportation." Green Mountain R.R. Corp. v. Vermont, 404 F. 3d 638, 466 (2d Cir. 2005)(emphasis added).

Access is impossible without the ability to be on the land and to use the facilities located on the land, including the holding of goods between modes. Therefore, the Board's determination that it had no jurisdiction over these activities as they are those of the shipper rather than those of the railroad, where, as here, these activities are access, is

contrary to well-established law, see: Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946).

Articles 2.04, and 4 of the Agreement impose multiple limitations on CPR's rights, all of which limited its ability to provide those services. The agreement limits the types of cargos CPR can handle and even the number and timing of truck trips into and out of the facility. Article 7.03 also allows the EDC to terminate the agreement on any default by CPR and the Agreement's term is in any event for just three years. These conditions have proved fatal to the CPR's efforts to provide the services mandated by the Operating Agreement at 65th Street.

Incredibly, the August 11, 2006 decision simply ignored the terms of the Agreement, deciding that it had no jurisdiction over this matter as Tri-State is not a rail carrier. That determination is absolutely inconsistent with well-settled law. Shippers have always had the right to challenge rates imposed by rail carriers and here it is clear that, due to the lack of any similar facility, EDC has market dominance over which the Board has a specific statutory mandate and thus, jurisdiction, 42 U.S.C. §10707. Indeed, this section covers cumulative charges by multiple rail carriers for transportation and for the use of facilities and equipment, 42 U.S.C. §.10706 (2)(A), precisely the situation in issue here.

As I argued previously, in Wisconsin Department of Transportation, FD_34764_0, (December, 2005) this Board advised that State petitioner that any exercise of control over the operations of a rail carrier by a land owner would be unlawful unless the land owner were itself a rail carrier. As I further argued, EDC here is seeking to enforce precisely the type of contract clause that this Board had informed the Wisconsin

DOT would be unlawful if it wished to avoid becoming a common carrier. In Wisconsin, the Board cited the line of cases following State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, Finance Docket No. 31847, served May 24, 1991. State of Maine established the principal that a governmental entity which acquires an active rail line, would not be deemed a carrier only where a common carrier retained full authority to operate the rail line. In Wisconsin, this Board explained that several clauses of the contract with a rail carrier restricted the ability of that carrier to provide rail service until relieved of that obligation by the Board, and, therefore, placed the owner outside the protection of State of Maine and its progeny. The Board's advice was as follows:

...“[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.

(Note that the Agreement at bar calls for a single three year term with just two possible one year renewals, [Exhibit A, Article II. §2.01]).

...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.

EDC's actions here seek to recover the side tracks and loading docks needed to conduct the transloading operations of the rail carrier, See Exhibit A Article 1 (q).

The Board's decision that it had no jurisdiction as Tri State was not a rail carrier is also incomprehensible in light of the purpose of the State of Maine line of cases. In Southern Pacific Transp. Co.—Abandonment, 9 I.C.C.2d 385, 387-388 (1993), the ICC explained that the reason a non rail carrier can not control rail operations is to preserve the right of shippers to protest any curtailment of such service before the Board:

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.

Indeed, the mandate of this Board is to protect the shipping public's right of access to rail services, See: New York Cross Harbor R.R. v. Surface Transp. Bd. 374 F.3d 1177, 1186 (DC Cir 2004).

The Board's August 11, 2006 decision appears to abrogate this responsibility entirely. EDC is seeking to force the constructive abandonment of the Yard by assessing unreasonable terms for that use from shippers. Under those terms the use of the Yard by shippers is economically impossible. No less an authority than the Supreme Court ruled that a rail land owner may not impose charges for land use by a common carrier which have the effect of barring that use, United States v. B. & O. R. Co., 333 U.S. 169, 173, 175-7 (1948). This is precisely the situation Tri-State brought before this Board here. It is irrelevant whether the property owner seeks the excessive fee from the carrier or

directly from the shipper. The effect is the same, allowing the land owner to control the use, which it cannot do if it is not a common carrier subject to the Board's authority.

Indeed, as in fact recognized in the Agreement, the rail common carrier providing service at the Yard must "...furnish reasonable trackage facilities and means to serve the consignees at the particular station as measured by the volume of business handled in and out of the station. Each consignee and shipper at the station is entitled to the service which reasonable facilities ought to afford him." St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959). The EDC's actions here remove that ability from the carrier and are unlawful. Therefore, the August 11, 2006 decision should be reversed.

POLICY

It is the policy of the State of New York and of the United States to maintain a transportation system which serves the public. To assure that such a system is maintained and that its services are available to the public, Congress gave this Board exclusive jurisdiction over the nation's railway system and all services performed upon that system and ancillary to it. It is clear from the Agreement that EDC has devoted this land to railroad use and that, therefore, this terminal is within the Board's jurisdiction, New York City Economic Development Corp-Petition for Declaratory Order, FD_34429 (July 15, 2004).

This City's management of this Yard by EDC and its predecessor has kept the yard from serving the public for most of the time the City has owned it. The City simply does not understand the economics of railway services, or the necessary services which must be included in line haul service into a major population center with very limited rail

assets, See: Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954). Meyers v. Jay Street Connecting Railroad, 262 F. 2d 676, 678, (2d Cir. 1959).

The Board was created by Congress to have the expertise to assure the achievement of the public convenience and necessity. Whereas EDC is interested only in maximizing the financial return from the City owned assets with which it has been charged, the Board must view all actions in the context of their effect on the national interest as balanced against the particular local interests in issue.

The Board's August 11, 2006 decision not only ignored settled law and the relief the petitioner was actually seeking, deciding the matter on grounds which were not before the Board, but also abrogated its responsibility by, for the first time in the long history of the Interstate Commerce Act and its successors, allowing a non-rail carrier land owner to control the rail services operating on that land. As a substantial portion of the nation's rail system operates on easements, the precedent does not serve the national interest. Under this decision, land owners could impose tolls on shippers whose cargo passes over their lands, as neither the shipper nor the landowner is a railroad. Land owners could impose a toll on access to team tracks or simply bar access to any truck not owned or leased by a railway directly. The decision is completely incompatible with the Act, and ignores all precedent.

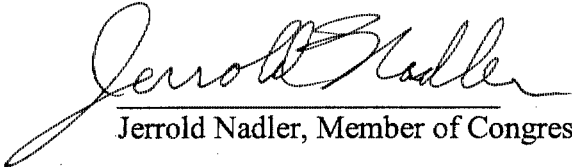
In this instance, the decision of the Board will close the last public terminal in New York City. It will immediately place 3000 heavy trucks a year on the highways. It will bar any increase in rail use by this City's shippers.

CONCLUSION

The decision of August 11, 2006 is simply incomprehensible in view of well-settled law. It is an extremely dangerous precedent, and is contrary to the intent of Congress. It is material error and must be reversed.

Dated, New York, N. Y.
November 30, 2006

Respectfully Submitted



Handwritten signature of Jerrold Nadler in cursive script.

Jerrold Nadler, Member of Congress