

JUDICIARY COMMITTEE

SUBCOMMITTEES:

RANKING MEMBER

CONSTITUTION

COMMERCIAL AND
ADMINISTRATIVE LAW

**TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE**

SUBCOMMITTEES:

HIGHWAYS AND TRANSIT

RAILROADS

ASSISTANT WHIP



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

218329

December 21, 2006

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

Via Federal Express

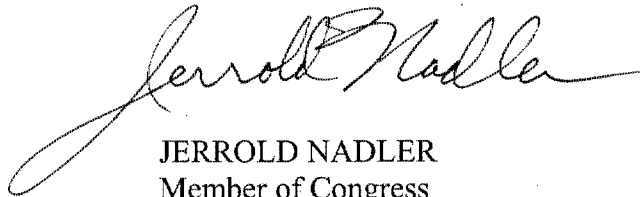
Re. Tri-State Brick and Stone of New York Inc. et al. Petition for a
Declaratory Order, Petition to Reopen
FD 34824

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

JERROLD NADLER

8TH DISTRICT, NEW YORK

REPLY TO:

□ WASHINGTON OFFICE:
2334 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5635

□ DISTRICT OFFICE:
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SUITE 669
NEW YORK, NY 10014
(212) 367-7350

□ DISTRICT OFFICE:
445 NEPTUNE AVENUE
BROOKLYN, NY 11224
(718) 373-3198

Web: <http://www.house.gov/nadler>



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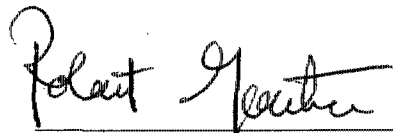
DECLARATION OF SERVICE

I, Robert M. Gottheim declare that on the 21st day of December 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.
December 21, 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

REPLY OF JERROLD NADLER, MEMBER OF CONGRESS, TO THE MOTION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION FOR
LEAVE TO FILE A REPLY

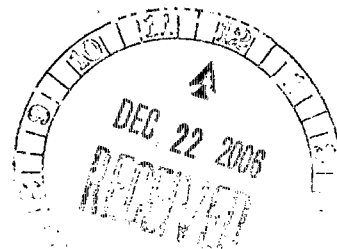
Jerrold Nadler, Member of Congress, responds to the motion of the New York
City Economic Development Corporation (Respondent) as follows:

The motion is improper. My comments were filed in support of the Petitioner's
motion to re-open. I agree with the petitioner that the decision of the Board in this matter
is in gross error as it is contrary to well-settled law. I need not file a separate petition, as
I did previously, as I am not asking to expand on the relief the petitioner is now seeking;
i.e., to have the City of New York Economic Development Corporation and its
subsidiary, Apple Industrial Development Corp., declared a common carrier by rail as to
its (their) control of the 65th Street Yard and thus subject to the Board's jurisdiction, and
for a further determination that the Board has jurisdiction over a petition by a shipper
seeking relief from an unreasonable practice by a carrier including anyone who, by
retained control of rail property, interferes with the provision of common carrier rail
service.

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I commented here and petitioned previously to emphasize that the issues placed before the Board are critical. Access to rail service is scarce in the City of New York and elsewhere in urban America. The financial return from other uses means that rail lands are under constant threat of diversion to other uses, as has happened to several other terminal facilities in New York. Only by the Board's retention of its full jurisdiction over such lands can they be protected from conversion to non-rail uses.

Under numerous terms of its Operating Agreement with the Canadian Pacific Railroad (Delaware and Hudson Railroad), the New York City Economic Development Corporation is a common carrier by railroad, based upon well-settled law, and as such it must provide transportation services to all who seek it on reasonable terms. The Board, therefore, has jurisdiction over a petition by any shipper that asserts that the Respondent seeks to impose unreasonable terms on access to transportation services that utilize its rail dedicated lands. Those are the simple but important issues before the Board.

The specific issue presented by Tri-State is no different than where a landowner rips up tracks or spikes a switch in order to bar a competitor or other shipper from access to rail services.

In its proposed reply, the Respondent asserts that my statements of fact are not supported by submissions in the record. I have thirty years experience with these issues including being a member of the Transportation and Infrastructure Committee of the House of Representatives since 1992. I am a senior member of the Railroad Subcommittee and of the Subcommittee on Highways, Mass Transit and Pipelines. Prior to being elected to Congress, I served as chairman of the Corporations and Authorities Committee of the New York State Assembly with jurisdiction over the authorities which

own and/or operate most of the metropolitan region's rail system East of the Hudson, south of Poughkeepsie and West of New Haven and Montauk Point. I am also the co-chairman of the East of Hudson Rail Freight Service Task Force, which currently deals with the day-to-day issues related to providing freight service in that region. I have, probably, more personal experience with the issues relating to rail transportation in the New York City Metropolitan Area than anyone else in New York government as of this moment. Also, as the Respondent is well aware, I participated in the events I referred to, either directly or as a legislator whose committee responsibilities made it necessary to keep himself fully apprised of these events and their historical background.

For the purposes of deciding this petition, which seeks to designate the Respondent as a rail carrier, the facts as established by the Operating Agreement are more than sufficient. The Board, within an appropriate proceeding, must then determine the issue of the fair price the Respondent may charge for the use of its rail transportation facilities and services. Absent an agreement between the parties, the appropriate fees must then be determined by the Board based upon the value of the land for rail purposes under the formula established by this Board's prior decisions.¹

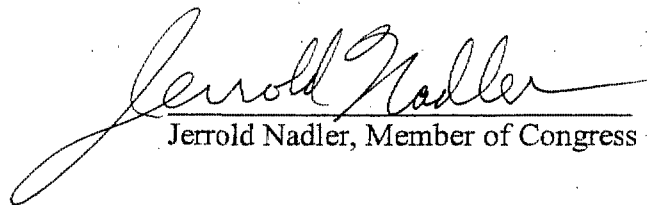
The need to assure that the price of freight services is reasonable and that the resulting income is fairly allocated among the service providers is an additional reason to require that all involved in the provision of such services, including a landowner which retains control of rail operations on its property, are within the jurisdiction of the Board.

¹ See ex: 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 33388 (Sub-No. 69)(109) (December 18, 1998) (footnote 17) (value of rail New York City land used for rail purposes set at 8.97 times the annual before tax revenue earned from the rail operation conducted using those facilities) and the use charge is then set based upon that value, see ex: 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 33388 (Sub-No. 69)(123) May 18, 1999 pg. 11 of 22.

Respondent may not deny access to rail services by demanding a financial return from the land that rail services cannot support. If it seeks such a return, it must file a petition to abandon the rail use of the land, a petition which is not before the Board and which the Respondent says it does not intend to file.

Therefore, the Respondent's motion to reply should be denied, the Petition to reopen should be granted and the decision of August 11, 2006 should be reversed.

Dated, New York, N.Y.
December 20, 2006



Handwritten signature of Jerrold Nadler in cursive script, written over a horizontal line.

Jerrold Nadler, Member of Congress