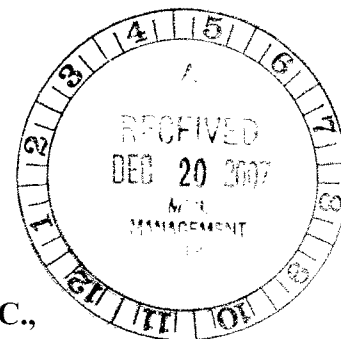


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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34824

TRI-STATE BRICK AND STONE OF NEW YORK, INC.,
AND TRI-STATE TRANSPORTATION, INC.,
PETITION FOR A DECLARATORY ORDER



PETITION FOR STAY

ORIGINAL

Respectfully submitted,

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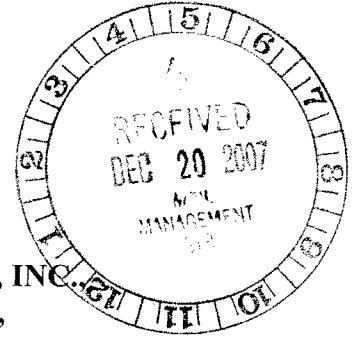
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Dated: December 20, 2007

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SURFACE TRANSPORTATION BOARD**

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AND TRI-STATE TRANSPORTATION, INC.,
PETITION FOR A DECLARATORY ORDER**



PETITION FOR STAY

Pursuant to 49 CFR 1115.5 Petitioners Tri-State Brick and Stone of New York, Inc. (“Tri-State Brick”), and Tri-State Transportation, Inc. (“Tri-State Transportation”),¹ seek a stay of the Board’s decision served December 11, 2007, pending judicial review.

BACKGROUND

By now the Board is well familiar with this long running dispute, so the facts will only be repeated as necessary for an understanding of this proceeding.

The City of New York² owns an *unabandoned* rail-served marine terminal known as the 65th Street Rail Yard,³ with a line of railroad extending about 2,000 feet in the Bay Ridge Section of Brooklyn, NY. Petitioners maintain that the City is a rail carrier by reason of its ownership of and substantial control over that terminal and the line of railroad serving it. Petitioners have a nonexclusive right to operate a transload facility inside the Rail Yard.⁴

Seeking to activate the Rail Yard, the City granted the Canadian Pacific Railway Company (“CP”) a license to provide service. Pursuant to a

¹ Petitioners are two affiliates collectively referred to as “Petitioners” or “Tri-State”
² through the New York City Economic Development Corporation

³ Hereafter identified as the “Rail Yard”

⁴ Tri-State is the only rail customer located in the Rail Yard where it receives about 300 cars of inbound product currently handled in interstate commerce by the New York & Atlantic Railway (“NY&A”). Its corporate affiliate, Tri-State Transportation, operates the transload facility.

series of agreements, CP commenced service at the Rail Yard including service to Petitioners in 2002.⁵ Citing insufficient business, high expenses, and the City's onerous restrictions on its operations, CP prematurely terminated its agreements with the City a couple of years later. NY&A informally agreed to provide a replacement service in its own right at the Rail Yard, including service to Tri-State.⁶ Upon termination of CP's service, the City sent Tri-State a "notice to quit" in September 2005 demanding that it vacate the Rail Yard or agree to pay vastly increased user charges, rising over 3200% from \$1,394 per month to \$44,921.25, amounting to \$1,796.85 per car. Petition for Declaratory Order at 3. By evicting Tri-State, the City could put its property to more lucrative commercial uses.⁷

Upon receiving the City's "Notice to Quit," Tri-State sought an injunction against the City in Federal Court for the Southern District of New York.⁸ Tri-State then petitioned the Board for declaratory relief on January 17, 2006, pursuant to the Court's recommendation that Petitioners seek a ruling as to the scope of the Board's jurisdiction and ability to grant relief. Contrary to the Board's misperception, Petitioners did not ask

⁵ The agreements included an "Operating Agreement" with the City allowing CP to utilize the entire parcel of land including the yard and all facilities thereon to serve customers such as Tri-State; a "Haulage Agreement" with the NY&A allowing it to extend its service from Fresh Pond in Queens to the Rail Yard in Brooklyn, with NY&A as its agent to haul CP's traffic to that yard in NY&A's trains; and an "Ancillary Agreement" providing Tri-State with line haul rail service and the non-exclusive use of 4.1 acres of land within the Rail Yard for receipt of shipments and transloading operations. The Ancillary Agreement was co-extensive with the Operating Agreement.

⁶ NY&A stated that it has no "formal" right to serve the Rail Yard that it is serving at the "sufferance" of the City. Krebs Declaration at ¶10.

⁷ More specifically, the City claimed that Petitioners' refusal to vacate the Rail Yard was preventing the City from using its property and making arrangements with others who seek to use the property to be closer to rail service. However, the evidence attached to City official Joan MacDonald's testimony indicated that neither of the two tenants the City sought to attract to the site or the adjacent Brooklyn Army Terminal required rail service. See, Affidavit of Joan McDonald filed in the civil litigation Tri-State instituted in federal court in New York to enjoin the eviction, paras. 35-36 and attached materials.

⁸ That proceeding is docketed Tri-state Brick and Stone of New York Inc. v. New York City Economic Development Corporation, et al, CA No. 05-7561 (hereafter "the civil litigation").

for a ruling that Tri-State Transportation was a railroad or that the actions of the City were preempted by 49 U.S.C. 10502. Rather they asked the Board to find that “(1) *they are entitled to receive rail service at the 65th Street rail (sic) Yard in Brooklyn, NY,*” and (2) “*that all terms and conditions of that service, including any land use charges payable to the land owner, are to be set, in the absence of a private agreement, by the Surface Transportation Board.*” [emphasis supplied]. Petition for Declaratory Relief at 1.

On August 11, 2006, the Board⁹ issued a decision declining Petitioners’ declaratory order request and Petitioners sought reopening pursuant to 49 CFR 1115.4 on the grounds of material error and changed circumstances.¹⁰ On December 11, 2007, the Board issued its decision denying Petitioners’ request superficially reasoning that this matter is a “simple landlord-tenant dispute.”

ARGUMENT

The Board’s Rules of Practice provide that any party may petition for a stay of agency action pending judicial review. 49 CFR 1115.5(a). Petitioners expect to seek judicial review of the Board’s decision and file this stay request as a prerequisite to seeking a stay from the appropriate United States Court of Appeals as well. Petitioners maintain that the December 11 Decision is materially wrong and inflicts irreparable injury upon Petitioners without any corresponding harm to other parties. The Board will grant a stay in a proceeding where (a) there is a substantial likelihood that the movant will prevail on the merits, (b) the movant will be irreparably harmed absent the stay, (c) the stay would harm other parties, and (d) issuance of a stay is in the public interest.

⁹ Consisting of just then Chairman Douglas Buttrey and then Vice Chairman Mulvey

¹⁰ Petitioners also asserted that the appointment of Charles Nottingham as a new Chairman was a change in circumstances.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

1. There is a substantial likelihood that Petitioners will prevail on the merits.

First, Tri-State regards as error the Board's continued refusal to find that the City is a rail carrier, pursuant to 49 U.S.C. 10101(6)(c), by virtue of its ownership and control of an unabandoned rail-served marine terminal and a 2,000 foot actively used line of railroad. Without citing any authority, the Board blithely stated that determination is "not relevant to the issues that are properly before the Board." December 11 Decision at 3. In the Board's view, if the City is not a rail carrier, the Board is without jurisdiction and, therefore, has no ability to grant relief. Moreover, the Board's failure to find that the City as the owner of an actively used line of railroad over which it exercises control is not a rail carrier defies both reality and longstanding precedent.¹¹

The Rail Yard was historically part of a through line of railroad (known as the Bay Ridge Branch) between New England and points south and west connecting the former New Haven and Pennsylvania Railroads by car float across New York Harbor. Tri-State understands and asks the Board to take official notice of the fact that the City

¹¹ Petitioners direct the Board's attention to pictures of the rail float and terminal facilities depicted in the NYA/LIRR Bay Ridge Branch Virtual Tour at <http://www.oldnyc.com/bayridge/contents/bayridge.html>. The STB and the ICC before it have long held that the railroad owner of an actively used segment of railroad has a "residual common carrier obligation" with respect to that track. Jackson County Port Authority – Construction Exemption – Pascagoula, MS, Finance Docket No. 31536 (served August 21, 1990) at note 1; Groome & Associates, Inc. And Lee K Groome v. Greenville County Economic Development Corporation, STB Docket No. 42087, slip op. served July 27, 2005 at 6, 10 (holding that a common carrier obligation attaches when someone acquires an active, unabandoned rail line to be operated by someone else). In precedent beginning with State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, Finance Docket No. 31847, served May 24, 1991, the Interstate Commerce Commission and now the Board have held that they will not regard a public agency that acquires an active rail line as a rail carrier where a railroad retains (or acquires) an exclusive, permanent easement and the transaction is structured so that the owning agency has no control over the railroad's common carrier operations.

acquired and rehabilitated at great expense the subject Rail Yard and its rail-served marine terminal facilities for the purpose of reactivating a through rail route linking Long Island with the rest of the country. Rail-served marine terminal facilities used for transferring freight between water and rail carriers constitute lines of railroad subject to ICC and now Board jurisdiction. United Transportation Union v. Bessemer and Lake Erie Railroad Company and Pittsburgh and Conneaut Dock Co., 342 I.C.C. 849 (1974), 1974 ICC Lexis 66; Florida East Coast Railway Company, Petition for Declaratory Order, 360 I.C.C. 272 (1979). 1979 Lexis 73. Although the car float facility at the Rail Yard is not currently being used, these facilities are intended for interstate rail transportation. The December 11 Decision does not address these arguments.

Moreover, the Board did not address Petitioners' arguments that the City's control over these facilities is so substantial as to render it a rail carrier. Petitioners included a copy of the Operating Agreement with its declaratory relief request and cited numerous provisions to show the significant control the City retained over CP's operations.¹² See, Verified Response of Petitioners to Motion of the City for Expedited Consideration at 2-3. Petitioners then carefully reviewed the provisions of this Agreement in accordance with agency precedent involving the public acquisition and ownership of rail lines.¹³ The reader can only conclude that the Board in its rush to judgment never even bothered to examine the Operating Agreement. Because the Agreement vested the City with such

¹² For example, Sections 4.09 and 4.10 forbade CP from handling various types of traffic including trash and hazardous materials in and out of the Rail Yard except with the City's approval and section 2.04(c) restricted the hours during which trucking companies could enter or leave the facility. Section 9.10 forbade CP from assigning its rights to another party except with the City's consent and allowing the City to terminate the Agreement under those circumstances. Petitioners identified numerous other provisions demonstrating that the City's control constrained CP's ability to operate and solicit traffic.

¹³ Citing cases such as Wisconsin Department of Transportation – Petition for Declaratory Order, STB Finance Docket No. 34764 (December 2, 2005), Southern Pacific Transp. Co.—Abandonment, 9 I.C.C.2d 385, 387-388 (1993), and Central Puget Sound Regional Transit Authority-Acquisition Exemption-BNSF Railway Company, STB Finance Docket No. 34747 (November 17, 2005).

significant control over CP's [and presumably now NY&A's] operations, the City is a rail carrier and for the Board to rule that it cannot prevent the City from taking actions that interfere with common carrier rail service over the line is an arbitrary and capricious decision that a Court would likely overturn.

Second, an appellate court would likely find that the Board's failure to regard the exorbitant fees charged by the City for Tri-State's use of the Rail Yard as an economic blockade that amounted to a *de facto* abandonment of rail service both ignores the law and defies reality. The City would have the Board believe that it has done nothing to interfere with NY&A's service. Aside from the extensive control the City exercises over the rail service, its attempts to evict Petitioners and alternatively erect economic barriers that are so high as to discourage a customer from using the service are just as much interference as the removal of facilities needed to permit the delivery of shipments to the consignee. The Board's conclusion to the contrary flies in the face of the Supreme Court's bellwether decision in United States v. B. & O. R. Co., 333 U.S. 169, 173, 175-7 (1948).¹⁴ That case establishes that the Board has jurisdiction over the subject track and may act to prevent a violation of the Act that interfered with the flow of commerce. *Id.* at 176. Moreover, the Board's ruling contradicts precedent on the customer's right to insist on rail service under reasonable terms and the carrier's duty to provide that service on reasonable request. St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959).¹⁵ The Board kisses off Tri-State's arguments stating that

¹⁴ Holding that the Interstate Commerce Commission could forbid the noncarrier owner of an active segment of track operated by an interstate rail carrier as part of its line from effectively regulating the commodities the railroad transports over the line by charging the carrier an exorbitant amount for the use of the line.

¹⁵ Where the Court observed that each consignee and shipper at the station are entitled to the service which reasonable facilities ought to afford.

Petitioners' reliance on B&O is "misplaced," noting that the fees are imposed on Tri-State not NY&A. The Board's hyper technical reading of this case misses the point. As with the shipper in B&O, Petitioners here are being denied service by the property owner's actions.

By seeking to evict Petitioners or, alternatively, increasing Petitioners' use charges, the City has effectively raised their rates to such an exorbitant level that they cannot accept delivery of the shipments consigned to them. If the practical result of the City's actions is to deprive the Petitioners of access to NY&A so that it can no longer serve them, is that not tantamount to an unauthorized *de facto* abandonment? The Board's refusal to protect Tri-States' access to rail by asserting that Petitioners have no right to relief is contrary to well settled precedent. See, Groome & Associates, Inc. And Lee K Groome v. Greenville County Economic Development Corporation, supra.

Third, equally faulty is the Board's conclusion that it cannot grant relief because it believes the services that Tri-State provides the public are neither those of a rail carrier nor "integrally related" to rail. In so ruling, the Board blindly maintains that the City has not taken any action to interfere with the service rendered by NY&A. While the Board concedes that Tri-State's transloading activities constitute "transportation," it declines to grant relief because Tri-State is "simply a rail customer using the City's property." The Board ignores the significance of the fact that this property was ceded to the railroad to provide precisely the rail services Tri-State seeks to preserve.

But the Board's reasoning also ignores the unique facts of rail service to the New York Metropolitan Area. Tri-State and Congressman Nadler had asserted that facilities for handling rail freight in the New York Area are an extremely scarce asset citing the

Supreme Court's ruling in Sec'y of Agriculture v. United States, 347 U.S. 645 (1954) and testimony of NY&A President Fred Krebs. Petition for Declaratory Relief at 13; Krebs Declaration at ¶6, 10-12. It is this scarcity that renders the services Tri-States' services "integrally related" to those of a rail carrier. Again, the Board missed the point.

The fact that the I.C.C. Termination Act does not contain a specific remedy for this situation does not preclude the Board from crafting an appropriate form of relief. Nor does the fact that Tri-State is not a railroad prevent the Board from granting relief where appropriate. See, Southern Pacific Transp. Co.—Abandonment, 9 I.C.C.2d 385, 387-388 (1993).¹⁶ The Board has acted consistently in the past on petitions from shippers to prevent violations of the Act and protect the free flow of commerce¹⁷ and has the discretion to take actions that are "legitimate, reasonable, and direct[ly] adjunct to its explicit statutory power."¹⁸ Petitioners had originally asked the Board to grant relief in the form of a trackage rights fee.¹⁹ An appellate court would find that the Board erred by failing to devise an appropriate remedy for the City's actions.

¹⁶ The ICC characterized as unlawful the ability of a transit agency owner of a rail line to curtail freight services as it denied shippers access to the Board to protest such loss of service.

¹⁷ See, PYCO Industries, Inc.—Feeder Line Application, et al, STB Finance Docket No. 34890 (slip op. at 6, served Aug. 3, 2006), (voiding the sale of a short piece of railroad owned by the incumbent carrier that was subject of a feeder application by a shipper where the transaction was intended to frustrate the purposes of the statute); and Railroad Ventures, Inc.—Acquisition and Operation Exemption—Youngstown & Southern Railroad Company, STB Finance Docket No. 33385 (STB served Oct. 4, 2000), aff'd, Railroad Ventures, Inc. v. STB, 299 F.3d 523, 561 (6th Cir. 2003), (voiding a contract entered into by the abandoning railroad to obstruct efforts to restore service by the entity acquiring the line through a an offer of financial assistance).

¹⁸ I.C.C. v. American Trucking Assns., Inc., 467 U.S. 354, 366, 104 S.Ct. 2458, 2464 (1994); American Trucking Assns. V. U.S., 344 U.S. 298, 310 (1953) (indicating that Congress expected administrative agencies to come up with creative solutions inasmuch as the legislature could not have conceived of every possible evil to be corrected).

¹⁹ Although the Board's governing statute and regulations do not specifically address the situation at hand, precedent for going concern compensation for the use of one carrier's track and facilities by another carrier suggests an appropriate method of compensation. See, e.g., North Carolina Railroad Company—Petition to Set Trackage and Other Terms and Conditions, Et Al, STB Finance Docket No. 33134, served May 29, 1997.

2. Petitioners will be irreparably harmed absent a stay.

Absent a stay, the City of New York will be able to prosecute its pending eviction action against Tri-State in the New York City landlord and tenant court.²⁰ As a result, Tri-State will be put out of business. As Tri-State and NY&A's Fred Krebs have stated, no suitable alternate locations exist on Long Island. Similarly, due to an absence of rail freight facilities on Manhattan, in the Bronx, on Staten Island, or in suburban Westchester County, Tri-State cannot simply move its facilities to those locations. The practical effect of the Board's decision is to force Tri-State out of business. At best, it may find alternate facilities in other states to serve the New York market. Assuming that such a relocation is possible, it would entail additional trucking of freight with attendant increases in noise and pollution in an existing nonattainment area.

3. Issuance of a stay will not harm any other parties.

Issuance of a stay will not harm the City of New York, the only other affected party, because a stay will merely continue the *status quo* that has existed for the past few years. A stay will not impede the City's efforts to find a new rail carrier to serve the Rail Yard, to initiate through service to New Jersey using this yard as part of the route, or to redevelop this property for continued rail service. In fact, Tri-State's business will provide any new carrier to operate in the Rail Yard an additional 300 cars of revenue.²¹

4. Whether issuance of the stay is in the public interest.

²⁰ That action is presently on hold until after January 1, 2008.

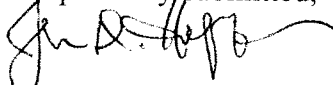
²¹ Petitioners understand that NY&A decided not to bid to operate the Rail Yard. Petitioners believe that New York & New Jersey Railroad is the only carrier that has submitted a bid in response to the City's RFP. New York & New Jersey has advised Petitioners that it is willing to serve them.

That the issuance of a stay is in the public interest belies the obvious. In 1954, the Supreme Court recognized the scarcity of rail facilities in the New York Metropolitan Area. See, Sec'y of Agriculture v. United States, 347 U.S. 645 (1954). That scarcity has only increased during the past 44 years. Any ruling that reverses that scarcity is necessarily in the public interest.

CONCLUSION

Tri-State respectfully urges the Board to stay its December 11 Decision pending judicial review.

Respectfully submitted,



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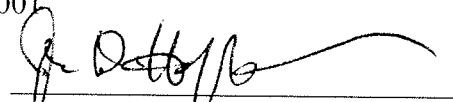
Dated: December 20, 2007

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the foregoing "Petition for Stay" of Tri-State Brick and Stone of New York, Inc., and Tri-State Transportation, Inc., was served on December 20, 2007, by email transmission, and on December 21, 2007, by first class United States mail on:

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