

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34824

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

**OPPOSITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ON BEHALF
OF THE CITY OF NEW YORK, NY
TO PETITION FOR STAY**

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Dated: January 3, 2008

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The New York City Economic Development Corporation (“EDC”) and the City of New York, NY (the “City”) (collectively referred to as “City Parties”) file this opposition to the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. (collectively, “Petitioners”) for Stay.¹ Petitioners have not satisfied the criteria for a stay. Instead, this Petition for Stay is yet another in a string of attempts by Petitioners to continue to use this Board’s processes as a way to delay the termination of their unlawful occupation of property belonging to the City. The Board should not countenance this misuse of its processes and should deny the request for a stay promptly. In support of its opposition to the Petition, the City Parties state the following:

¹ The City Parties are today submitting a Motion for Leave to File this Opposition, time for filing having otherwise expired. This Opposition is submitted in anticipation of a favorable ruling on that Motion.

SUMMARY

The Board has issued two decisions in this proceeding in response to Petitioners' request for a Declaratory Order. Both decisions, one issued on August 11, 2006 (the "*August 2006 Decision*") and a second on December 11, 2007 in response to a Petition to Reopen (the "*December 2007 Decision*") correctly declined the Petitioners' invitation to this Board to insert itself into a matter that is not subject to the Board's jurisdiction. Now, having been unsuccessful on the merits twice, the Petitioners re-submit the same arguments relying on assertions of fact that have no basis in the record² and legal arguments that have been rejected by this Board twice in this proceeding.

In this proceeding, Petitioners appear to assert that the City, as the landowner of the 65th Street Rail Yard, cannot require Petitioners to pay a commercially reasonable rate for the land they currently occupy because that would interfere with their ability to receive rail service from the New York & Atlantic ("NY&A"), the railroad that serves that facility. Petitioners overlook the uncontradicted testimony in this proceeding, from NY&A itself, that the City Parties are not in any way interfering with the ability of any railroad to serve the 65th Street Rail Yard. The Board has correctly determined – twice – that the City Parties have not yet interfered and to date have taken no action that gives the Board any reason to believe that the City Parties have an intention to interfere with NY&A's ability to provide rail service if they pursue an eviction of

² The City Parties have previously refuted, both in this proceeding and in several other fora, the mischaracterization of facts that Petitioners have presented. Because the facts do not support the relief they seek, Petitioners have chosen to fabricate allegations in the hopes of buttressing a nonetheless unsuccessful attempt – so far – to have this Board insert itself into a dispute that is at its core a dispute between a landowner and an unlawful occupant of that land, a dispute that is subject to state law even on the facts that Petitioners have created. Without reciting an entire litany of the false statements, because the City Parties have addressed them before, the City Parties do however wish to emphasize that the unfounded allegation that CP's termination of its agreement with the City was due to "the City's onerous restrictions on its operations" (*see* Petition for Stay at 2) finds no support in any statement anywhere in any forum by CP.

Petitioners or require Petitioners to pay commercially reasonable use and occupancy fees. In fact, the Board has confirmed – twice - that the 65th Street Rail Yard has continued to receive uninterrupted rail service and can continue to receive uninterrupted rail service irrespective of whether Petitioners remain there. Petitioners have not shown, and can not show, that they are likely to succeed on the merits of their appeal, have not shown that the public interest is served by allowing an unlawful squatter to remain on City-owned property without paying commercially reasonable rent or usage charges for that occupancy, have not shown that they will be irreparably harmed (that is, harmed in a way that can not be remedied through the payment of money damages) by the denial of the stay, or that other parties will be harmed if a stay is not issued. Having failed to meet the criteria for eligibility for a stay, the Board should promptly deny Petitioners request for a stay pending the outcome of the appeal of the *August 2006 Decision* and the *December 2007 Decision*.

BACKGROUND FACTS

EDC and the City adopt and incorporate by reference the background facts identified in the *Opposition of The New York City Economic Development Corporation on Behalf of The City of New York, To Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order* filed in this matter on February 15, 2006.

LEGAL STANDARD

A petition for stay requires a demonstration: (1) that petitioner is likely to prevail on the merits; (2) that petitioner will be irreparably harmed in the absence of a stay; (3) that issuance of a stay would substantially harm other parties; and (4) that issuance of a stay would be in the public interest. *F.D. 33877, Illinois Central R. Co. -- Construction and Operation Exemption -- In East Baton Rouge Parish, LA, slip op.* (Service Date February 20, 2002), citing *Washington*

Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. *Id.* Petitioners have not carried that burden here and the request for a stay should be denied.

ARGUMENT

I. **PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS FOR A STAY PENDING APPEAL.**

A. **Petitioners have not shown, and can not show, likelihood of success on the merits.**

The Board in this matter correctly determined and articulated - twice - that it need not determine whether the City is a rail carrier, that the City Parties have not interfered with any railroad's ability to fulfill its common carrier obligation to provide shipping services to the Petitioners, and that the services Petitioner provides are not integrally related to rail service. The reason that the Board has concluded - twice - that it need not determine whether the City is a rail carrier is because, notwithstanding Petitioners' creative arguments, there has been no abandonment of rail service, and will be no abandonment - *de facto* or otherwise - of rail service at the 65th Street Rail Yard. NY&A operates trains at that facility today, and will operate them tomorrow. When the City Parties select a new operator, as a result of the RFP the City Parties have issued for a new operator of rail service at that facility, that operator will operate trains at that facility.

Contrary to Petitioners' arguments, no abandonment is going to occur here. An abandonment occurs under 49 U.S.C. §10903 when rail service ceases. No cessation will occur. All that will occur, when the Petitioners are evicted from property they currently have no right to occupy, is that a lawful occupant of the premises will have the ability to receive rail service

there. This Board has already addressed Petitioners' misplaced reliance on the Supreme Court's decision in *U.S. v. Baltimore & O. R. Co.*, 333 U.S. 169 (1948). As the City Parties have previously explained, in *B&O*, the property owner charged the railroad a fee that made the provision of service impractical. Here, NY&A – the only railroad that currently uses the track – continues to have the unimpeded ability to provide that service. NY&A's charges to Petitioners bear no relation to the rent that the City seeks to charge Petitioners. The pertinent legal authorities as well as the facts confirm that the *B&O* decision does not stand for the proposition that the City Parties can not charge commercially reasonable use and occupancy fees for occupation of property they own and that Petitioners want to use to position themselves to receive direct rail service.

A cursory review of the language of the statute confirms that Petitioners have no likelihood of success on the merits of their claim. The statute states the following:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to--

- (A) abandon any part of its railroad lines; or
- (B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

49 U.S.C. §10903(a)(1). Reading the statute confirms that even if Petitioners were correct about the City Parties' status as a rail carrier, which of course they are not, nothing is happening here that falls within the ambit of the statute. Abandonment, as used in the statute, implies a cessation of rail operations. Are rail operations going to cease on the tracks that currently serve the facility unlawfully occupied by Petitioners? No. Will the rail carrier that currently operates on those tracks continue using them to serve whoever occupies the space now unlawfully occupied by

Petitioners? Yes, unless EDC selects a new operator for the 65th Street Rail Yard, at which time that railroad will assume the responsibility for serving those tracks. Will a discontinuance, as that term is used in section (a)(1)(B), occur? No, because NY&A, the rail carrier that currently uses the tracks at the 65th Street Rail Yard, will continue using them.

Petitioners may once have had the right to occupy a portion of the land to which they now claim entitlement but, as the agreements and affidavits that have previously been introduced in this proceeding show, that right ceased upon the expiration of the term of the agreement with CP Rail, the previous operator of the rail facilities on this property. As this Board has correctly determined in the *August 2006 Decision*:

Petitioners are merely using the City's property to transload cargo. They are simply rail customers. They have presented no argument or evidence that would justify treating them differently than any other non-rail carrier lessor or occupant of rail property, or anyone that desires rail service, for that matter. Indeed, Petitioners' reasoning would have us entitle any person to occupy property of another merely because that property has access to rail service. This we cannot do.

August 2006 Decision at 6. This Board has acknowledged that Petitioners' argument, if successful, would give any company in the United States that did not wish to pay for its own property a claim to a right to enter any rail yard whether owned by a carrier or by a shipper that receives direct rail service and establish an enterprise there, over the objection of the owner of that rail yard, simply because the intruding company would be able to receive rail service at that location. This Board has correctly concluded that, although certain state laws are preempted by operation of 49 U.S.C. §§10501(b) and 11321, nothing in its governing statute gives it this authority to trample on the legitimate property rights of railroads or other owners of property served by railroads in the manner that Petitioners have argued.

The Board's conclusions relating to its lack of jurisdiction over the dispute that Petitioners have attempted to create are consistent with Board precedent (*e.g.*, STB F.D. No. 34444, *Town of Milford, MA – Petition for Declaratory Order, slip op.*, (Service Date August 12, 2005)) and with the decision of the U.S. Court of Appeals for the Third and Fifth Circuits in *Hi Tech Trans, LLC, et al. v. New Jersey*, 382 F.3d 295 (3d Cir. 2004) and *Florida East Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). Because Petitioners have not shown and can not show any likelihood of success on the merits of their appeal of the *August 2006 Decision* or the *December 2007 Decision*, the request for a stay pending appeal should be denied.

B. Petitioners will not suffer irreparable harm in the absence of a stay.

Unsubstantiated allegations of dire economic consequences do not prove irreparable harm. The D. C. Circuit, in *Virginia Petroleum Jobbers, supra*, stated the following with respect to this prong of the four part test:

Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.

Virginia Petroleum Jobbers, 259 F.2d at 925.

Even if Petitioners had offered proof of their assertions, they have not proven that “adequate compensatory relief will not be available at a later date”. *Id.* Nor have they proven why the City of New York should be responsible for subsidizing their use and occupancy fees or transportation costs, both legitimate expense of businesses City-wide and across the nation,

where other businesses must find a way to bear those costs as part of their ongoing operations. Moreover, because this Board's rejection – twice – of the same arguments presented as justification for a stay confirms that there is virtually no likelihood of success on the merits, Petitioners also have not made a case where their insufficient showing of injury nonetheless permits the Board to issue a stay. Because Petitioners have failed to satisfy the requirement of proving irreparable harm, as well as all of the other criteria for a stay, the Board should deny their petition.

C. Issuance of a stay will harm the City Parties.

The City Parties' attempts to find an operator for the 65th Street Rail Yard, and a contractor to manage the non-rail real estate at that facility, continue to be hampered by the presence of an unlawful occupant of a portion of that property. As both Ms. Alice Cheng and Ms. Joan McDonald have testified before this Board and in the various courts through which Petitioners have dragged the City Parties, the City continues to lose money because of the uncertainty presented by the continued litigation over Petitioners' claims of federal preemption. Contrary to the Petitioners' unfounded speculation about the City Parties' intent, speculation that has been disproved repeatedly before this Board, the City wants to develop the 65th Street Rail Yard for ongoing rail use. Verified testimony (as opposed to the Petitioners' self-serving conjecture) in this proceeding confirms that the City Parties want to find an operator of the rail facilities and a manager of the real estate who will find users that want access to rail service and are willing to pay commercially reasonable rents.

Petitioners object to their eviction, alleging that the City wants to eliminate rail service at this facility. Yet the evidence here confirms that all the City wants to do is find a way to allow rail service at this facility to continue, with an operator and tenants who will provide the City of

New York and the taxpayers to whom the City officials are responsible with appropriate compensation for use of facilities and return on the investment they have made. Each day of delay in the implementation of the Board's decision causes further harm to the interests of the City Parties. The stay should be denied.

D. Issuing a stay would be directly contrary to the public interest.

The public interest will be served here by allowing the City Parties to enforce the law and stop an unlawful occupant from occupying land that the City Parties want to devote to rail service while receiving commercially reasonable compensation for use of the asset. There is no credible argument that allowing an unlawful occupant to stay beyond the expiration of the agreement that allowed it to occupy a portion of the space on which it now squats, and that has expanded the space it occupies beyond even that to which it had a right (now expired) to use, is consistent with the public interest. The City Parties acknowledge the importance of preserving rail facilities in the New York metropolitan area. That is precisely what they are trying to accomplish. The public interest is hardly served by permitting continued occupation of City property by entities that are causing the City Parties to expend resources on litigation over the unlawful occupation of that property.

CONCLUSION

The Petitioners' argument in this proceeding attempts to turn the law on its head. While it is the case that the statute requires rail carriers to provide rail service upon reasonable request, which incorporates the concept of reasonable compensation for that service, it is not the case that the statute compels owners of property that have access to direct rail service to allow others to enter that property and remain there and even expand their facilities without paying a commercially reasonable compensation for their use of that property. This Board has twice

rejected the Petitioners' requests to issue a ruling that, if issued, would be directly contrary to Board precedent and that would have no foundation in any statute or any judicial or administrative agency decision or any public policy articulated by any public body anywhere. The Board has recognized from the start that the Petitioners are not really concerned with the interruption of rail service, stating the following:

Petitioners' concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard, against the will of the owner, is being interrupted. In any case, the City is not interfering with rail service, directly or indirectly, by using state or local laws to evict a non-carrier occupant over whose activities the Board has no jurisdiction.

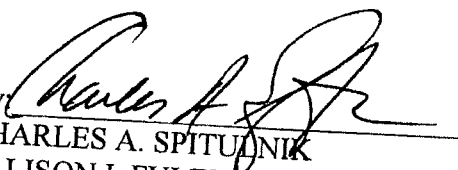
August 2006 Decision at p. 5.

The City Parties, in other words, are attempting to enforce the law, and the Petitioners continue to flout it. Just as this Board has twice declined Petitioners' invitation to issue a

declaratory order that would have no foundation in law or public policy, it should also deny the request for a stay of the implementation of the most recent decision.

Dated: January 3, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

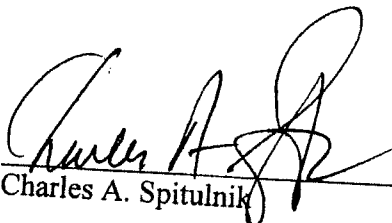
I hereby certify that on this 3rd day of January, 2008 a copy of the foregoing Opposition of the New York City Economic Development Corporation on behalf of the City of New York, NY to Petition For Stay was served by first class mail, postage prepaid, upon the following:

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