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SERVICE DATE – LATE RELEASE FEBRUARY 12, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34824

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

Decided: February 12, 2008

This decision denies a petition filed by Tri-State Brick and Stone of New York, Inc. (Tri-State Brick and Stone), and Tri-State Transportation, Inc. (Tri-State Transportation) (collectively, Petitioners), seeking a stay of the decision in this proceeding served on December 11, 2007 (December 2007 Decision) pending judicial review.

BACKGROUND

Tri-State Transportation operates a transload facility in the 65th Street Rail Yard located in Brooklyn, New York (Yard), which is owned by the City of New York (City). The New York and Atlantic Railroad (NY&A) provides rail service to the Yard, and Tri-State Transportation transfers materials used by its sister company, Tri-State Brick and Stone, from truck to rail service. Petitioners lease the transload facility from the City and pay rent for use of the City's property. The City's potential eviction of Petitioners unless they pay substantially higher rent for using the property led Petitioners to seek a declaratory order that the City's actions amount to a denial of rail service that Petitioners are entitled to receive under the Interstate Commerce Act. In a decision served on August 11, 2006 (August 2006 Decision), the Board concluded that it does not have jurisdiction over Petitioners' transloading activities within the Yard. Accordingly, the Board denied Petitioners' request.

Petitioners sought judicial review of the August 2006 Decision in the United States Court of Appeals.<sup>1</sup> Thereafter, Petitioners also asked the Board to reopen the August 2006 Decision under 49 U.S.C. 722(c) based on material error and changed circumstances. In the December 2007 Decision, the Board denied the request to reopen its prior decision. On December 20, 2007, Petitioners filed a petition for a stay of the December 2007 Decision pending judicial review. On January 3, 2008, the City replied in opposition to the stay request.<sup>2</sup>

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<sup>1</sup> Tri-State Brick and Stone of New York, Inc. v. STB, No. 06-1334, D.C. Cir., filed Sept. 22, 2006.

<sup>2</sup> The City filed its reply 6 days out-of-time under the Board's rules at 49 CFR 1115.5(a), due to the illness of counsel. The City's unopposed motion to file out of time for good cause will be granted.

## DISCUSSION AND CONCLUSIONS

An interested party seeking a stay of a Board decision must establish that: (1) it will suffer irreparable harm in the absence of a stay; (2) there is a strong likelihood that it will prevail on the merits; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports granting the stay. 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). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Petitioners argue that they have satisfied the criteria for a stay. However, as discussed below, none of their arguments are persuasive.

Irreparable Injury

A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay.<sup>3</sup> The harm that Petitioners assert here is that, without a stay, the City will be able to prosecute its pending action in the Supreme Court for Kings County, New York (the State Court) to evict them from the Yard. The petition does not provide any information about the State Court case. However, the docket entries in the State Court proceeding are a matter of public record. A review shows that, in a decision issued October 23, 2007, which denied the City's motion for partial summary judgment and refused to give the City possession of the property occupied by Petitioners, the State Court indicated that it was prepared to stay enforcement of any judgment it might issue in favor of the City until judicial review of the Board's August 2006 Decision is complete.<sup>4</sup> Moreover, Petitioners have failed to explain how a stay of the December 2007 Decision, in which the Board simply declined to reopen its August 2006 Decision, would provide any relief. The August 2006 Decision on the merits is the administratively final action of the Board in this proceeding under 49 CFR 1115.4, and that decision has not been stayed pending judicial review. Finally, Petitioners have not shown why any damage to their business from the actions of the City could not be redressed by monetary damages if the State Court ultimately finds that the City acted unlawfully. In short, the record does not support Petitioners' claim of irreparable injury.

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<sup>3</sup> See, e.g., Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985); Suffolk & Southern Rail Road LLC—Lease and Operation Exemption—Sills Road Realty, LLC, STB Finance Docket No. 35036, slip op. at 6 (STB served Dec. 20, 2007).

<sup>4</sup> City of New York v. Tri-State Brick and Stone of New York, Inc., No. 29811/06, N.Y. Sup. Ct. Trial Div., Kings. County, Slip Copy at 4, 17 Misc.3d 1117(A), 2007 WL 3086523 (N.Y. Supp.), 2007 N.Y. Slip Op. 52050(U).

### Likelihood of Prevailing on the Merits

Petitioners claim that they are likely to prevail on the merits in the judicial review proceeding because the Board erred in the previous decisions. The alleged errors are: (1) the failure to treat the City as a rail common carrier; (2) the failure to treat the increase in rent the City seeks to charge Petitioners as a de facto abandonment of rail service; and (3) the determination that the Board does not have jurisdiction over Petitioners' activities in the Yard.

Petitioners have not offered any information to support these claims that was not presented in their original petition for a declaratory order or their petition to reopen the August 2006 Decision. The Board has already considered and rejected these arguments in its previous decisions in this case. It is not the purpose the stay provision at 49 CFR 1115.5 to afford yet another bite at the apple.

In any event, Petitioners have not shown any likelihood of success on the merits on judicial review. NY&A is the entity that provides rail transportation to Petitioners, and NY&A does so in its own right, not on behalf of the City. NY&A continues to serve Petitioners at the Yard, and the City has not interfered with NY&A's ability to provide common carrier service.<sup>5</sup> Moreover, as discussed in the December 2007 Decision, even if Petitioners could establish that the City has a residual common carrier obligation to provide service at the Yard, that would not, standing alone, give the Board jurisdiction over the terms and conditions of the lease between the City and Tri-State Transportation.<sup>6</sup> While Tri-State Transportation's transloading activities constitute "transportation" as broadly defined in 49 U.S.C. 10102(9)(B), those activities do not bring Petitioners under the Board's jurisdiction because Petitioners are simply railroad customers using the City's property to transload cargo. The Board has consistently held that it does not have jurisdiction over noncarriers such as Tri-State Transportation that operate facilities within rail yards.<sup>7</sup> In short, the facts here do not give rise to a de facto abandonment claim. This is simply a landlord-tenant dispute.

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<sup>5</sup> No concerns have been raised about NY&A's rates, charges or service.

<sup>6</sup> See Manufacturers Ry. Co. v. U.S., 246 U.S. 457, 496 (1918) (Railroad's status as a common carrier does not necessarily impress all of its property with a public service obligation). Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367, 1377-79 (S.D. Fla. 2000), aff'd, 266 F.3d 1324 (11th Cir. 2001) (Lessee's operation of aggregate distribution center on property that railroad leased to it did not amount to "rail transportation" covered by 49 U.S.C. 10501(b)(2) where lessee unloaded railroad's cars at leased property and arranged for movement of its aggregate to its customers).

<sup>7</sup> See December 2007 Decision, slip op. at 3-4.

Harm to Other Parties

Petitioners claim that the City would not be harmed by a stay. Although it does not appear that the City would be harmed by a stay, the absence of harm to others is not an independent ground for a stay. This factor only becomes significant if the party moving for the stay has demonstrated irreparable injury and some likelihood of success on the merits. Petitioners have demonstrated neither.

Public Interest Considerations

Finally, Petitioners assert that issuance of a stay is in the public interest due to the scarcity of rail facilities in the New York metropolitan area. However, as noted above, Petitioners continue to have rail service, and there is no reason to believe that the State Court will award the City possession of the property used by Tri-State Transportation's transloading operations prior to the completion of judicial review of the August 2006 Decision. Accordingly, the public interest does not warrant a stay.

In sum, Petitioners have failed to establish that a stay is warranted. Accordingly, their request will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term "solid waste" is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

It is ordered:

1. The City's motion for leave to late-file its response to the petition for stay is granted.
2. The petition for stay is denied.

3. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Anne K. Quinlan  
Acting Secretary