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January 21, 2015

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By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 35873, *Norfolk Southern Railway Company -- Acquisition and Operation -- Certain Rail Lines of The Delaware and Hudson Railway Company, Inc.*

Dear Ms. Brown:

Hereby transmitted is an Objections and Request for Condition for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for CNJ Rail Corporation

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cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY)
COMPANY -- ACQUISITION AND) FINANCE DOCKET
OPERATION -- CERTAIN RAIL LINES) NO. 35873
OF THE DELAWARE AND HUDSON)
RAILWAY COMPANY, INC.)

OBJECTIONS AND REQUEST FOR CONDITION

CNJ RAIL CORPORATION
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DATE FILED: January 21, 2015

BEFORE THE
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COMPANY -- ACQUISITION AND)	FINANCE DOCKET
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OBJECTIONS AND REQUEST FOR CONDITION

Pursuant to the procedural schedule attached as Appendix A to the Board's decision served December 16, 2014, as modified by the Board's decision served January 14, 2015, CNJ Rail Corporation (CNJ) hereby files Objections to the Application and a Request for Condition if the Application is approved.

CNJ's pleading is supported by the following:

Appendix 1 - Verified Statement of Michael A. Nelson, a Transportation Consultant with extensive experience before the Board in merger and acquisition proceedings.

Appendix 2 - Verified Statement of Eric Strohmeyer, Vice President and Chief Operating Officer of CNJ.

The identity and interest of CNJ in the subject matter of this proceeding are explained in Mr. Strohmeyer's Statement, Appendix 2.

FILING IS UNDER PROTEST

CNJ's pleading is filed under protest because objectors and parties seeking conditions have not been given sufficient time to make their case. The procedural schedule is unreasonably skewed in favor of Applicants. It was fundamentally unfair for the Board to refuse to grant the modest 15-day extension requested by CNJ.

As amended by the Board's decision served January 14, 2015, the procedural schedule provided 36 days for filing objections and requests for conditions (from December 16, 2014 to January 21, 2015). However, in the real world, that time was materially lessened by the intervention of the Christmas-New Year Holiday Season, which is now essentially a two-week period during which virtually no work is accomplished because of vacations and out-of-town family activities. In reality, CNJ has had approximately 21 days to prepare its case.

In contrast, the procedural schedule provides for 69 days for Applicants to file rebuttal (from January 21, 2015 to March 31, 2015). It is not reasonable, nor procedurally fair, for the Board to provide more than three times the amount of time for Applicants to file rebuttal than for objectors and those seeking conditions to file their case-in-chief, especially in that procedural schedules invariably provide considerably more time for filing a case-in-chief than for filing rebuttal.

In its decision served January 14, 2015, at page 3, the Board attempted to justify denial of the modest extension requested by CNJ by noting that CNJ was aware of the Application on December 8, 2014, which is eight days before the procedural schedule was issued. That does not begin to justify the lopsided procedural advantage in favor of Applicants. If filing times were to be measured from December 8, 2014, objectors and those requesting conditions would have been provided 44 days, less Christmas-New Year down time, resulting in about 30 days, for filing a case-in-chief vis-a-vis 69 days for Applicants' rebuttal unaffected by any material Holiday Season. The procedural advantage in favor of Applicants is stark and unjustified under either scenario.

The only other purported justification for the Board's denial of the modest extension is that "CNJ has provided no evidence that it will suffer actual harm if the comment deadline in this proceeding is not extended to January 30, 2015" (decision served January 14, 2015 at 3). On the contrary, the actual harm to CNJ was evident: i.e., the requirement to review and prepare a response to a 175-page Application and 40-page supplement in an inadequate time frame during the midst of the Christmas-New Year Holiday Season.

CNJ continues to object to unfair procedure in this proceeding and files this pleading under continuing protest.

I. OBJECTIONS

1. The Application Should Have Been Rejected As Incomplete

It is provided in 49 U.S.C. § 11325(a) that "if the application is incomplete, the Board shall reject it..." The Board found that the application is complete (decision served Dec. 16, 2014 at 2). That finding is materially erroneous in at least two respects.

A. The Application Is Not Complete Because It Does Not Contain Directly Related Applications For Authority To Discontinue D&H Trackage Rights

D&H has trackage rights over NS as follows:

- (1) from Lehigh, PA to Allentown-Bethlehem, PA
- (2) between Allentown-Bethlehem, PA and Oak Island, (Newark), NJ
- (3) between Sunbury, PA and Harrisburg, PA
- (4) between Harrisburg, Reading, and Philadelphia, PA
- (5) between Harrisburg, PA and the Washington, DC area

It is acknowledged in the Application that D&H will seek authority to discontinue its trackage rights over NS (decision served Dec. 16, 2014 at 3-4, "Applicant does expect D&H will

be filing for authority to discontinue trackage rights over certain NSR lines...[footnote omitted]”). Those trackage rights are an *integral part of D&H’s rail system*. Most of D&H’s trackage rights were conferred by the United States Railway Association under the Final System Plan (FSP) to provide viable competition for Conrail in the Northeast. Discontinuance of those trackage rights would thus result in a substantial lessening of competition and creation of an monopoly in the New Jersey - Northeast Pennsylvania region of the United States, within the meaning of those terms in 49 U.S.C. § 11324(d)(1).

D&H itself acknowledged as much in *Canadian Pacific Ltd. -- Pur. & Trackage -- D&H Ry. Co.*, 7 ICC 2d 95 (1990) at 118 (emphasis added):

“..The trackage rights outlined under this sub-number constitute almost 40% of the entire D&H system and *applicants state that the acquisition of these rights is an integral part of the transaction*. Most of these trackage rights agreements were entered into pursuant to the FSP (Final System Plan) as a means of *preserving D&H’s role as the sole competitor to Conrail in certain areas of the Northeast...*”

“...D&H is the only single-system alternative to Conrail in most of the major markets of the Northeast and the trackage rights are already in place and were originally provided to preserve or foster competition with Conrail in the Northeastern United States...*We find that these trackage rights currently held by D&H continue to be in the public interest as a means of providing viable competition for Conrail in the Northeast*, just as they were when the FSP was formulated...Accordingly, our approval here requires transfer of D&H’s FSP...rights, regardless of any language contained in the agreements implementing those requirements purporting to limit transferability...”

Inasmuch as at that time the trackage rights derived from the FSP constituted more than 40 percent of the entire D&H, those trackage rights today surely constitute a much greater percentage of D&H lines other than those to be retained by CP. Those trackage rights continue to provide the sole competitive alternative to NS, as successor of Conrail, over trackage between Oak Island (Newark), NJ and points in Northeast Pennsylvania. CSX is not a competitive factor

between Oak Island and Northeast Pennsylvania. (VS Strohmeyer, Appdx. 2; VS Nelson, Appdx. 1).

In view of the integral relationship between D&H's owned lines and its trackage rights, a rational determination of the competitive effect of NS's acquisition of D&H's South Lines cannot be made without consideration of the competitive effect of discontinuance of D&H's trackage rights derived from the FSP. Even more so than in the case cited above, those trackage rights are an integral part of D&H's South Lines. That being the case, 49 C.F.R. § 1180.4(c)(2)(vi) required that applications for discontinuance of D&H's FSP trackage rights be included in the Application for acquisition of D&H's owned South Lines. ("Applicant shall file concurrently all directly related applications, e.g. those seeking authority to...abandon rail lines...etc."). Because that was not done, the Application was not complete and, as such, it was required to be rejected under 49 U.S.C. § 11325(a). (See VS Nelson, Appdx. 1). See, also, Comments and Request for Conditions of the New York State Department of Transportation filed on January 15, 2015 at 6-7, Condition 2^{1/}.

There is nothing to the contrary in the Application. There is no evidentiary support in the Application, nor any credibility, for the contention that discontinuance of D&H's FSP

^{1/} CNJ does not agree with New York DOT that the defect in the Application might be cured if at a later point in this proceeding, D&H were to file applications or requests for exemption for authority to discontinue trackage rights. First, exemption procedure would be wholly inappropriate for a matter of such serious competitive importance. Secondly, a filing by D&H after the date for public comments had passed would unjustifiably prevent or severely limit evidence responsive to the discontinuance applications. The discontinuance applications were required to have been filed as an element of Applicants' case-in-chief. See *Malone Freight Lines, Inc. v. United States*, 204 F. Supp. 745, at 755 (ND Ala, SD, 1962) ("...such evidence was not in rebuttal of any facts appearing in any statements but served merely to aid plaintiff's case in chief after its deficiencies had been pointed out by protestants . Under the Commission's General Rules of Practice (footnote omitted), it was proper to strike such evidence.")

trackage rights would not be caused by NS's acquisition of D&H's South Lines, and thus need not be considered in this proceeding (Application at 27-28, n. 4). That contention rests on a much-too-hard-to-swallow predicate that during the course of negotiations for NS's acquisition of D&H's South Lines, D&H suddenly and coincidentally "determined that its trackage rights on certain NS lines are not economically justified and should be discontinued" (*id* at 27). The Application neither identifies the "certain NS lines" referred to, nor attempts to support that allegation with evidence. Instead, interested persons would be required to wait until subsequent proceedings on discontinuance for any such evidence (*id* at 27, n. 4, "*As will be set forth in D&H's request for the discontinuance of trackage rights, D&H's trackage rights operations are not economically justified*"), while Applicants inconsistently ask the Board to base *current findings* on those unsupported allegations. It would be clearly erroneous for the Board to do so. See VS Nelson, Appdx. 1.

Discontinuance of D&H's FSP trackage rights will occur if NS acquires D&H's owned South Lines, not because they are uneconomic, but instead because in that event those trackage rights would not have independent utility and value. Ironically, the Application lends support to that contention in stating that "once NS acquires the D&H South Lines, D&H will no longer physically connect with those trackage rights" (Application at 28). That is another way of stating that without D&H's owned South Lines, D&H's FSP trackage rights would not have independent utility and value. The same is true regarding the statement in the Application that "if the Transaction is denied, D&H may decide not to exercise its permissive authority to discontinue its trackage rights" (*id* at 28, n. 4). That shows unmistakably that there is an essential connection between D&H's owned South Lines and its FSP trackage rights. As the ICC

put it when CP acquired D&H's rail lines, D&H's trackage rights are an "integral part" of the D&H system. *See* VS Nelson, Appdx. 1.

It is *not* true, as alleged in note 3 on page 10 of the Application, that "the competitive...analysis contained within this Application...accounts for the impact of the D&H discontinuances..." That contention is *not* substantiated by the unsupported, conclusory statements of Witness Grimm. (VS Grimm at 8, 10; Application at 90, 92). The contention is thoroughly refuted in the testimony of CNJ Witness Nelson (Appdx. 1 at 3-6).

Witness Grimm's statements are contrary to D&H's own view of the competitive effect of its trackage rights and to the competitive basis on which the FSP conferred those trackage rights on D&H. The overriding point is that the competitive effect of discontinuance of D&H's trackage rights cannot be determined without consideration of applications for such discontinuances in which the trackage rights agreements themselves and all other aspects of the trackage rights would be available for analysis (VS Nelson, Appdx. 1). Applicants failed to file such applications.

There is no legal basis for a contention that discontinuance of D&H's FSP trackage rights need not be considered in this proceeding because interested persons can seek protection in future Board proceedings if and when D&H files applications for authority to discontinue its trackage rights. As practical and legal matter, NS's acquisition of D&H's owned South Lines would foreordain approval of discontinuance of D&H's FSP trackage rights because those trackage rights would have no independent utility and value if NS were to acquire D&H's South Lines. If discontinuance of those trackage rights were to be authorized, interested persons would *not* be able to acquire those trackage rights for reinstatement of rail service because offer-of-

financial-assistance (OFA) provisions for mandatory sale of rail lines are not available in discontinuance of trackage rights proceedings. Thus, acquisition of D&H's FSP trackage rights for reinstatement of rail service must be implemented by means of a condition in this proceeding, or such trackage rights will not be able to be acquired at all.

There is a comedic aspect to Applicants' contention that applications for discontinuance of D&H trackage rights are not required to be filed as part of the Application on the theory that D&H is not an applicant. In a statement filed with the Board on December 24, 2014, D&H stated unequivocally that as the transferor in a minor proceeding, it *is* an applicant within the meaning of 49 C.F.R. § 1180.3(a)(1). Only two weeks later, D&H turned around and claimed that it is not an applicant, and that to the extent that it might be considered to be an applicant under Board rules, it is not an applicant from which information is normally required. (Statement filed on January 7, 2015.)

Regardless of that puzzling behavior, D&H is an applicant as an initiator of the Application. It is provided in 49 C.F.R. § 1180.3(a) that "(t)he term *applicant* means the parties initiating a transaction." Note use of the plural "parties." Thus under Board rules, applicant status is not based on the entity first listed in the caption of the proceeding, nor on the entity that transmitted an application to the Board, nor on who is transferor or transferee. Instead, the regulation recognizes that both the transferor and the transferee have contracted for the transaction, and in that sense both initiate the application. Accordingly, D&H is every bit as much an initiator of the Application as NS, and thus is every bit as much an applicant as NS.

Even if that were not the case, 49 C.F.R. 1180.3(a)(1) did not preclude D&H from filing, nor does it now preclude D&H from being required to file discontinuance applications

where, as here, consideration of the effect of such discontinuances is essential to determination of the competitive effect of the transaction.

In summary:

- (1) D&H's FSP trackage rights are an integral part of its rail system, much more so than for other major rail carriers.
- (2) Those trackage rights were conferred on D&H in the FSP in the public interest to provide competition to Conrail at points in the New Jersey and Northeast Pennsylvania markets.
- (3) Those trackage rights continue to provide a competitive alternative to NS, as successor of Conrail, in Northeastern markets. CSX is not a competitive factor between Oak Island and Northeast Pennsylvania.
- (4) D&H's FSP trackage rights would have no independent utility and value if NS were to acquire South Lines trackage owned by D&H.
- (5) Applicants acknowledge that D&H will seek Board authority to discontinue its FSP trackage rights.
- (6) The competitive effect of NS's acquisition of D&H's South Lines cannot rationally be determined without determination of the competitive effect of discontinuance of D&H's integrally-related FSP trackage rights.
- (7) The competitive effect of discontinuance of D&H's FSP trackage rights cannot be determined in this proceeding unless directly related applications for discontinuance of such trackage rights are included in the Application, enabling

essential review of the agreements covering such trackage rights and all other relevant material relating to discontinuance of rail service.

- (8) Applicants failed to include such directly related applications for discontinuance of D&H trackage rights in the Application.
- (9) In view of that failure, the Application was not complete, necessitating its rejection under 49 U.S.C. § 11325(a).

B. The Application Is Not Complete Because It Does Not Contain A Directly Related Application For Authority For Assignment Of D&H Trackage Rights To NS

It is stated at page 28 of the Application, note 25, that NS will seek Board authority for assignment to NS of D&H's trackage rights over Reading, Blue Mountain & Northern Railroad Co. (RBMN) between Lehigh, PA and Taylor, PA.^{2/} It is provided in 49 C.F.R. § 1180.4(c)(2)(vi) that "Applicant shall file concurrently all directly related applications, e.g., those seeking authority to...acquire trackage rights..." NS would acquire trackage rights between Lehigh and Dupont no less effectively by means of assignment of such rights from D&H as by an initial grant of such trackage rights. Acquisition of trackage rights was appropriately treated as directly related to CP's acquisition of D&H rail lines in *Canadian Pacific, Ltd. - Pur. & Trackage - D&H Ry. Co., supra*, 7 ICC 2d at 117-120.

By reasons of the foregoing, Applicants were required to include in the Application a related application for authority for assignment of such trackage rights. No such application was

^{2/} The end-point of those trackage rights is Dupont, PA, not Taylor, PA. NS has limited trackage rights over RBMN between Lehigh and Dupont. See Docket No. F.D. 34225, filed on July 5, 2005. NS wants use of D&H's trackage rights, which are not so limited.

included in the Application. That being the case, the Application was not complete and was required to be rejected under 49 U.S.C. § 11325(a). *See, also*, comments of New York DOT.

There is no occasion for CNJ to respond to a purported justification for omission of that directly related application because the Application does not contain any such purported justification. It would be too late for Applicants to provide a purported justification or to file a related application in rebuttal because that would insulate any such filing from response by CNJ and others. *See, Malone Freight Lines, Inc. v. United States, supra*, 204 F. Supp. 745 at 755. Accordingly, the identified omission requires rejection of the Application.

2. The Board Materially Erred By Failing To Treat The Date Of Filing Of The Application As The Date On Which Supplemental Matter Was Filed

The Application was filed on November 17, 2014. On December 8, 2014, Applicants filed a supplement consisting of 40 pages of statements of shippers, rail carriers and a governmental agency in support of the Application. Instead of treating the Application as effectively filed on the latter date, the Board accepted the supplemental material as if it had been filed on the date that the Application was filed. That was procedural error that deprived objectors and parties requesting conditions of adequate time to prepare and file their case.

It is provided in 49 C.F.R. § 1180.4(c)(6)(iv) that “(a)ll filing...requirements of these procedures must be complied with when filing the application.” That is a particular expression of the fundamental principle that inasmuch as an applicant has had unlimited time to prepare and file the application, the applicant must include its entire case-in-chief when it files its application, not thereafter.

Practitioners before the Board are painfully familiar with the Board's consistent implementation of that principle by treating an application or other pleading as filed *on the date that supplemental material is filed*, not retroactively to the date of filing of the Application. The Board consistently takes that action despite desperate pleas by practitioners of a need for expedition. The Board did not do so here, treating the 40-page later-filed supplement as filed on the date of the Application.

That was serious procedural error. The cited regulation and the Board's consistent implementation thereof apply to NS and D&H no less than to any other party. Thus, the Application should have been deemed to have been filed on December 8, 2014 when the extensive supplemental material was filed.

The Board's error prejudiced objectors and parties requesting conditions. Those entities had 21 less days to review and rebut the supplemental material than they would have had if the Board's regulation and consistent implementation thereof had been applied.³⁷ The procedural schedule should have been based on the later filing date of the supplemental material rather than the filing date of the Application, providing additional time for review and rebuttal of the extensive supplemental material.

3. The Board Did Not Comply With Statutory Notice Requirements

³⁷ If the Application were correctly deemed to have been filed on December 8, 2014, publication of notice of filing of the Application in the *Federal Register* would have occurred 30 days later, on January 7, 2015. The procedural schedule would have been based on that later date.

It is required by 49 U.S.C. § 11325(a) that the Board publish notice of an Application filed under 49 U.S.C. § 11324 in the *Federal Register* by the end of the 30th day after the Application was filed with the Board. The Application in this proceeding was filed on November 17, 2014. Consequently, the statute required that the notice of the Application be published in the *Federal Register* by the end of the 30th day thereafter, i.e., by December 17, 2014. Notice of the Application was not published in the *Federal Register* until December 22, 2014. 79 F.R. 76446 (Dec. 22, 2014). That action violated the plain terms of the governing statute.

Federal Register notice is constructive notice to alert the public at large that a particular administrative action is proposed to take place. *Federal Register* notice is distinct from actual notice. Thus, failure to provide statutorily-required *Federal Register* notice invalidates agency action taken without such timely notice, even if some interested persons may have had actual notice of such action.

The Board's contention, that failure to timely publish notice in the *Federal Register* provides no basis for rejecting the Application (decision served January 14, 2015 at 2), would deprive the statutory provision of any meaning. Courts strongly disfavor such interpretations. Subsection (a) of 49 U.S.C. § 11325(a), in which the *Federal Register* requirement appears, deals with rejection of applications. It is statutorily consistent to conclude that failure to timely provide notice in the *Federal Register* requires rejection of an application.

Clearly irrelevant to resolution of the issue are that CNJ had actual notice of filing of the Application, and that notice of filing of the Application was posted on the Board's website (decision served January 14, 2015 at 2). The statute requires timely *Federal Register* notice

directed at the general public, not indirect notice from a Board decision on a website with which many in the transportation community and others in the general public are not familiar.

4. Insufficient Time Was Allowed For Filing Of Notices Of Intent To Participate In The Proceeding

On December 22, 2014, notice of filing of the Application was published in the *Federal Register*. The procedural schedule required that notices of intent to participate in the proceeding be filed by December 29, 2014, only seven days after *Federal Register* publication. The Application is 175 pages in length, supplemented by an additional 40 pages. Persons were required to review that complex and lengthy material during the midst of the Christmas-New Year Holiday Season and determine, in only seven days, whether to participate in the proceeding. That abbreviated and Holiday-shortened time was so unreasonably short as to violate procedural due process of law.

It is no answer to contend, as did the Board in the decision served on January 14, 2015 at 2, that CNJ timely filed a notice of intent to participate and that the Board will consider late-filed notices of intent to participate. Members of the public having an interest in the subject matter of the proceeding, but not being made aware of it until after the 7-day period, or being unable to determine whether or not to participate before expiration of that period, may well have reasonably concluded that the deadline for filing notices of intent to participate means what it says, i.e., that notices of intent to participate filed after the deadline will not be considered. Therefore, the unreasonably abbreviated time for filing notices of intent to participate may well have resulted in nonparticipation by members of the public who have a legitimate interest in the

proceeding. The procedural due process rights of those persons were violated by the Board's failure to provide a reasonable time for filing notices of intent to participate.

5. The Board Materially Erred In Failing To Determine That The Transaction Is Significant

CP and D&H acknowledged that the transaction whereby CP acquired the D&H system was significant, viz, *Canadian Pacific, Ltd. - Pur. & Trackage - D&H Ry. Co., supra*, 7 ICC 2d at 112:

“The pre-filing notice served June 25, 1990, describes this transaction as ‘significant’ under 49 C.F.R. § 1180.2(b), since it involves CP, a Class I railroad, and D&H, a Class II railroad, and involves a major market extension...”

The proposed NS acquisition of D&H rail lines is no less of a significant transaction today in that it involves NS, a Class I railroad, and D&H, a Class II railroad, and involves a major market extension in which NS would eliminate competition between New Jersey and Northeast Pennsylvania.

Applicants point to 49 C.F.R. § 1180.2(b) that provides that a transaction is not significant if a determination can be made either that the transaction clearly will not have any anti-competitive effects or that any anti-competitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

That stringent standard does not stem from the terms of 49 U.S.C. § 11325, which, in subsections (a)(2) and (c), defines significant transactions only as “having regional or national transportation significance.” As recognized when CP acquired D&H's rail lines, NS's

acquisition of D&H's South Lines has regional transportation significance in the Northeast.

Even if 49 U.S.C. § 1180.2(b) were governing, a rational determination cannot be made that the transaction clearly will not have any anti-competitive effects or that any anti-competitive effects will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs without consideration of the competitive effects of discontinuance of D&H's FSP trackage rights. (VS Nelson, Appdx. 1). That being the case, the Board should have found that the transaction is significant.

II. REQUEST FOR CONDITION

It is provided in 49 U.S.C. § 11324(c) that (emphasis added):

"...The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated..."

Thus conditions to alleviate anti-competitive effects are highly remedial and, as such, are to be liberally imposed.

CNJ seeks a condition to any approval of the Application requiring assignment to CNJ of D&H's trackage rights over NS between Oak Island (Newark), NJ and Easton, PA,^{4/} coupled with a grant of overhead trackage rights to CNJ over NS between Easton and point of connection

^{4/} Trackage rights between Oak Island and Easton are encompassed within D&H's trackage rights between Oak Island and Allentown-Bethlehem. CNJ would accept assignment of the entire Oak Island-Allentown, Bethlehem trackage rights agreement if it is not practical to extract trackage rights between Oak Island and Easton from that agreement.

to Delaware-Lackawanna RR, Inc. (DL) at or near Portland, PA (also known as Slateford Jct., PA). Alternatively, CNJ seeks a condition requiring assignment to CNJ of D&H's trackage rights over NS between Oak Island and point of connection to Reading, Blue Mountain & Northern Railroad Company (RBMN) at or near Lehigh, PA.

The Board has authority to require assignment of trackage rights in a rail line acquisition proceeding regardless of terms in a trackage right agreement that prohibit or limit such assignment. *Canadian Pacific Ltd. - Pur. & Trackage - D&H Ry. Co., supra*, 7 ICC 2d at 112. *The public interest requires that the requested condition be imposed in order to replicate the competition with NS provided by D&H between Oak Island and Northeast Pennsylvania that otherwise would be lost if NS were to acquire D&H's South Lines and D&H were to discontinue its trackage rights.* *Id.*, at 118; VS Nelson, Appdx. 1 at 6-7.

Reference is made to the attached verified statements of Witness Nelson, Strohmeyer, and Milano for detailed support of the condition sought by CNJ. CNJ responds here to several egregious misstatements and misleading statements in the Application.

It is misleadingly stated at page 28 of the Application that D&H's trackage rights between Oak Island and Allentown-Bethlehem have not been used since June, 2012. As explained in the Verified Statements of Messrs. Strohmeyer and Milano, that nonuse has not been attributable to an absence of demand for rail service between those points, but instead is the result of CP's decision to cause D&H to discontinue shipments to and from Oak Island after CP's lessee of the Oak Island facility declared bankruptcy in 2012. If Applicants believe that there will be little or no demand for rail transportation to and from Oak Island, they should not fear competition from CNJ between Oak Island and Northeast Pennsylvania.

Equally misleading is Applicants' contention that CSX provides intramodal competition to NS and D&H at Oak Island. As explained by Witness Strohmeier, CSX is not a competitive factor on rail shipments between Oak Island and Northeast Pennsylvania. Only NS and D&H have routes between those points. CSX's rail operations over other routes to and from Oak Island have no relevance in this proceeding.

Applicants have challenged the standing of Mr. Strohmeier and CNJ to participate in this proceeding, and have questioned the background and qualifications of Mr. Strohmeier to operate a rail line. The Board does not require that those who seek to participate in agency proceedings demonstrate standing. *San Jacinto Construction - Build Out Bayport Loop*, 7 STB 21, note 3 (2003). Mr. Strohmeier's 25 years of active involvement in the rail industry in a variety of senior management positions and in consulting assignments provides the experience and capability that Applicants' claim to be lacking.

If, as appears to be the case, NS believes that CNJ is too inexperienced and/or poorly managed to provide effective competition on shipments between Oak Island and Northeast Pennsylvania, there would be no need for NS to oppose the condition sought by CNJ.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Application should be denied. If the Application is approved, a condition should be imposed requiring that CNJ be assigned D&H's trackage rights over NS between Oak Island (Newark), NJ and Easton, PA, (*see*, note 4, *supra*), coupled with a grant of overhead trackage rights over NS between Easton and point of connection to DL at or near Portland, PA (also known as Slateford Jct., PA). Alternatively, a condition should be imposed requiring assignment to CNJ of D&H's trackage rights over NS between Oak Island and point of connection to RBMN at or near Lehighon, PA.

Respectfully submitted,

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Thomas F. McFarland

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DATE FILED: January 21, 2015

FINANCE DOCKET NO. 35873

APPENDIX 1

VERIFIED STATEMENT

OF

MICHAEL A. NELSON

Verified Statement of Michael A. Nelson

Qualifications

My name is Michael A. Nelson. I am an independent transportation systems analyst and have conducted, directed or participated in numerous consulting assignments and research projects in the general field of transportation. My office is in Dalton, Massachusetts.

I have 36 years of experience in matters related to railroad competition and regulation. During the past 31 years I have provided testimony before this Board and its predecessor regarding a wide range of railroad issues. Of particular relevance to this statement, I performed and submitted studies of rail traffic movement data (from the Rail Waybill Sample and/or carrier traffic files) to identify potential competitive problem flows in several railroad merger and acquisition proceedings, including the following:

- Docket No. FD 30400 (SP/Santa Fe merger)
- Docket No. FD 30800 (UP acquisition of MKT)
- Docket No. FD 32000 (SP/DRGW merger)
- Docket No. FD 31505 (RGI acquisition of Soo Kansas City - Chicago line)
- Docket No. FD 31522 (RGI acquisition of CM&W St. Louis - Chicago line)
- Docket No. FD 32133 (UP acquisition of CNW)

From this work I am intimately familiar with the type of competition study upon which NS attempts to rely in this proceeding. More recently, I have contributed to written comments submitted in several proceedings, and provided oral testimony at the March 2014 public hearing in Docket No. EP 711 (revised competitive switching rules), all pertaining to the attainment of Class I railroad revenue adequacy and the implications of that attainment for rail regulatory practices.

I received my bachelor's degree from the Massachusetts Institute of Technology in 1977. In 1978, I received two master's degrees from MIT, one in Civil Engineering (Transportation Systems) and one from the Alfred P. Sloan School of Management, with concentrations in economics, operations research, transportation systems analysis and public sector management. Prior to February 1984 I was a Senior Research Associate at Charles River Associates, an economic consulting firm.

Introduction and Summary

I have been asked by CNJ Rail Corporation ("CNJ") to assess and describe the adverse competitive effects of the proposed NS-DH transaction, including discontinuance of DH's existing trackage rights over NS that DH uses or could use to move rail traffic within the region directly affected by the transaction south of Schenectady, NY. In this context, I also discuss CNJ's request for a limited transfer of DH's existing trackage rights to enable CNJ to replicate the competition DH currently could provide for movement of substantial volumes of municipal solid waste (MSW) from Oak Island Yard (Newark, NJ) to the Keystone Sanitary Landfill, a recently expanded and permitted modern facility for processing and managing such waste located in Dunmore, PA.

My testimony begins with consideration of broad public interest concerns raised by the NS application, particularly those arising from statements NS makes regarding the prospective discontinuance by DH of its trackage rights. Those statements appear to be internally inconsistent, and raise more questions than they answer regarding the role of the discontinuances in the transaction.

I then review the testimony of NS witness Grimm, including the methodology he used to identify competitive problems, and to reach his conclusion that there effectively are none. I find that his methodology fails to follow the standards and precedents he cites, and fails to even consider a large category of competitive harms that the Board has acknowledged. As a result, his conclusion that the transaction is harmless is unfounded, and the Board has no basis for believing that the transaction would produce no harms, or that the harms produced would be small relative to the benefits achieved. Indeed, from public sources the Board can easily see that the number of rail shippers facing 2-to-1 reductions in their competitive options is in the hundreds, and the quantity of rail traffic they represent is in the tens of thousands of carloads annually. The NS claim that this transaction has benign competitive consequences is a fallacy.

I then discuss some of the specific harms to shippers that can be anticipated from the losses of competitive options threatened by the proposed transaction. I describe further how these harms cannot be justified from a public interest perspective given the fact that the Class I rail industry now has achieved "revenue adequacy", and that the statutory deference the railroads in the past have enjoyed pursuant to Section 10704(a)(2) no longer permits the Board to excuse the imposition of competitive harms on shippers in furtherance of carrier financial performance.

Finally, I discuss the condition requested by CNJ, and conclude that it reasonably replicates the response DH could/should be making to compete for the subject movement. While this will result in the movement of CNJ traffic over some NS trackage, the burden on NS should be no greater than that imposed by DH's current competitive capabilities. From these considerations, I conclude that the Board should approve the condition.

Discontinuance of Trackage Rights

The application includes various statements regarding the linkage (or lack thereof) between the application and the discontinuance of DH's existing trackage rights. On their face, these statements appear to be inconsistent with each other, and call into question the legitimacy of various aspects of the application.

NS first states that DH has concluded its trackage rights operations are noneconomic, so the Board should not view the discontinuance of the trackage rights as an integral part of the transaction.¹ In the same footnote, however, NS states that if the transaction is denied DH may elect not to discontinue its trackage rights. If NS is aware that DH may be linking its position on discontinuance to the proposed transaction in this way, it is difficult to escape the conclusion that NS's statements to the contrary are misleading.

¹ Application at pages 27-28, footnote 24.

Of equal or greater concern are NS's statements regarding the process through which DH reached the conclusion that its trackage rights are noneconomic, and the inconsistency of NS's characterizations with known facts. NS claims that DH only determined during its negotiations with NS that DH's trackage rights were noneconomic.² Given that such rights generally have been in place for over 3 decades - including more than 2 decades under CP ownership – it strains the laws of probability to try to imagine that CP randomly happened to reach this conclusion at the exact same time that NS was offering – in exchange for a fraction of DH assets - more than 8 times the amount CP had paid for the entire DH. While NS portrays this as a wild coincidence, the same outcome would occur if DH perceived that it needed to discontinue the competition associated with the trackage rights in order to get the full \$217 million from the line sale. In this scenario, what NS calls “noneconomic” is simply a determination by DH that it would prefer to take the money from NS rather than continue to compete.

NS tries to reinforce its “coincidence” explanation by characterizing DH's role as having “dwindled” and the traffic it serves as having decreased,³ but this is flatly contradicted by readily available evidence. As discussed further below, the shortlines that interchange with DH via its trackage rights report substantial volumes and volume growth. Indeed, several of those shortlines traverse the Marcellus Shale, and report booming growth in rail traffic related to energy development there. If DH traffic from its shortline partners is “dwindling”, it is because DH hasn't been effective at keeping pace in these growing markets, and not because of any shortage of available traffic.

Even away from the Marcellus Shale, there has not been any known “dwindling” of the quantity of MSW generated in the NYC/Newark megalopolis that potentially could move over CP/DH via Oak Island Yard. Again, the evidence suggests that CP/DH's wounds have been self-inflicted, as CP has twice failed to protect its Oak Island MSW business against failures on the part of its lessees (Hi-Tech Trans, TLA), leading to service interruptions and volume reductions.

In short, the Board has before it a transaction in which NS proposes to pay CP a huge premium over the price it paid for the assets at issue. While the Sunbury Line undoubtedly has operational value to NS, the Board has no way to conclude reliably that the purchase price being paid does not reflect a payment by NS to CP to relinquish its claims on shale-related and other traffic growth that CP/DH has been ineffective in pursuing. Under Sections 10101(9) and 10704(a)(2) CP is supposed to be held to a standard of efficient management. Neither CP nor NS is entitled to profit from CP's failure to meet this standard, or to extinguish the competition that could and would be provided under efficient management.

Grimm Study

NS offers a study performed by its witness Grimm to support its position that the competitive consequences of the transaction are benign. Professor Grimm presents a discussion of different ways rail shippers may benefit from intramodal rail competition, but the actual analysis he presents is misleading and incomplete, and does not support the proposition for which it has been cited. It is misleading because Professor Grimm references the Board's established standard of preserving or

² Application at page 27.

³ Application at page 13.

enhancing competition in merger and acquisition procedures, but then applies a made-up standard of identifying “2-1 reductions in commodity flows between BEA pairs” that does not and cannot identify the competitive harms posed by the proposed transaction. Professor Grimm’s standard is an ad hoc combination of two different standards – market analysis and 2-to-1 analysis - that have been applied in past merger and acquisition analyses. The practice of analyzing “markets” - defined according to the commodity transported and the geographical area of origin and/or destination - was commonplace in the first 10-15 years of merger activity under the Staggers Act and paralleled to some extent the Merger Guidelines applied by the U.S. Department of Justice in analyzing the potential anticompetitive effects of proposed mergers in other industries. While the presence of interline movements in the rail industry poses some computational issues – which Professor Grimm properly references and describes – the general idea is to find markets where the increase in concentration caused by a given transaction produces a likelihood of harmful impacts on the price/service characteristics of the transportation options available to shippers. Importantly, this standard may identify harm in markets that do not entail 2-1 reductions if the increases in concentration are sufficiently large.

In contrast, the “2-to-1” standard has been applied more recently by the Board, most notably in the context of the mergers that reduced the numbers of large Class I railroads in the east and west from 3-to-2. To the best of my knowledge, the Board has applied the 2-to-1 standard only to individual points, and not to flows as Professor Grimm has done. This difference is essential because applying the standard to individual points protects shipper facilities that rely on a type of competition that the Board has recognized but that Professor Grimm inexplicably has overlooked. “Source competition” results from the availability to shippers of alternative sources for their inputs or outlets for their products. When a shipper has access to 2 railroads (through direct service, reciprocal switching or other means), the ability of a shipper to use a source on “Carrier B” can effectively constrain price/service performance by “Carrier A” even when Carriers A and B do not compete directly on either of the individual point-to-point movements. Even after the Board began using the 2-to-1 standard in the mid-1990’s, it affirmed the importance of preserving source competition in merger and acquisition transactions.⁴ Professor Grimm has no basis for leaving this type of competition out of his analysis.⁵

Even a cursory examination of a map clarifies the “see no evil” nature of Professor Grimm’s analysis. It is not a secret that there is very little overlap between the service areas of the CP and NS systems. This contrasts with the situations prevailing in the SP/ATSF and UP/SP mergers cited by Professor Grimm, where common points between the subject carriers were plentiful and dispersed, and it was reasonable to expect harms to materialize in area-to-area flows. Even in those situations, source competition analyses focusing on movements into or out of a given area were also needed to protect against competitive harms. By limiting his analysis to BEA-to-BEA flows, Professor Grimm studied the flows that

⁴ Docket No. EP 582 (Sub-No. 1), Major Rail Consolidation Procedures, decision served June 11, 2001 at page 19.

⁵ To be clear, Professor Grimm mentions “geographic competition” in his text (Application at page 89) and shows an example in his Exhibit 3 (Application at page 97). The concept he describes is similar to what I refer to as source competition, though in his description it is limited for unexplained reasons to locations that are served by a single railroad. Although Professor Grimm appears to describe a limited version of the source competition concept, he makes no tabulations that would show competition to/from individual points (as opposed to O-D pairs), and therefore omits source competition impacts from his tabulations and reported findings.

are unlikely to exhibit harm here, and avoided studying the flows where competitive problems are most likely to be found.

More generally, the type of analysis performed by Professor Grimm assumes, implicitly if not explicitly, that traffic moving in a given year reflects and represents the competitive significance and effectiveness of alternative routes. However, there are many circumstances in which this may not be a good assumption, and cause the type of analysis performed by Professor Grimm to overlook adverse competitive impacts:

- Contracts and contestability - In a given period of analysis the movement of a given commodity to/from a given facility may be governed by a contract under which it moves entirely on a single route. More generally, the presence of one or more alternative service options may produce competitiveness in pricing and service even if the traffic data for a given period do not show movement via competing routes;
- Facility operations - In a given period of analysis, the operations of a given facility may be different from "normal", so traffic records may not reflect the competitive influence of different routes. For example, commodity flows to/from given facilities may be interrupted by events like industrial accidents, closures for maintenance and/or technological upgrades, etc.;
- New traffic – By definition, traffic that arises or may arise in the future after the time period of a traffic data analysis will not be addressed in the analysis; and,
- Data coding issues – The ways information is recorded in the Carload Waybill Sample and/or internal carrier records may not be consistent with the requirements of the competitive analysis. For example, coding of "Rule 11" moves may reflect the endpoints of the route segment to which a (partial) rate applies, rather than the O and D of the entire movement. Likewise, to the extent that O/D information for intermodal traffic reflects the locations of the origin and destination ramps (i.e., rather than the true endpoints of the movement), a computer program may fail to properly match traffic records according to the geographic criteria being used in the competitive analysis (e.g., BEA's).

Due to all of the above considerations, blind adherence to Professor Grimm's methodology is virtually certain to overlook real-world losses of competition. Although Professor Grimm portrays this as a benign transaction, the application itself identifies a list of shortline railroads whose shippers currently have available an ability to move traffic via NS or DH that will be lost as a result of the transaction.⁶ Readily available public data show that the number of shippers served by these shortlines, who effectively will experience 2-to-1 reductions in alternative rail carriers, is over 150, and that they account for close to 60,000 or more rail carloads annually.⁷

⁶ Application at Volume II, page 114. DH will retain a limited future ability to serve traffic involving these shortlines that moves to/from points beyond Schenectady, NY. For all other movements these shortlines will become functionally captive to NS as existing contracts and commitments expire.

⁷ See Exhibit 1.

In light of the foregoing, Professor Grimm's conclusion that the transaction is harmless is demonstrably erroneous, and the Board has no basis for believing that the transaction would produce no harms, or that the harms produced would be small relative to the benefits achieved.

Competitive Harms

Shippers who lose competitive options as a result of the proposed transaction may experience any number of specific harms, including the following:

- Higher rates
- Inadequate service
- Diminished access to preferred sources/destinations
- Longer cycle times (and correspondingly increased rolling stock needs, if applicable)
- Increased buffer stock requirements and costs

It is supremely ironic for CP to have any involvement in a transaction that extinguishes transportation alternatives for shippers. CP's poor service performance is a central focus of STB Docket No. EP 724, United States Rail Service Issues, and the statutes plainly rely on the availability of alternative routings to remedy service problems.⁸ The statutes also memorialize the role of alternative routings in promoting efficiency,⁹ a major determinant of the long-term health and competitiveness of the rail industry.

Such harms cannot be justified from a public interest perspective given the fact that the Class I rail industry now has achieved "revenue adequacy". Oral testimony I provided at the Board's March 2014 public hearing in Docket No. EP 711 (revised competitive switching rules) demonstrated that the Class I railroads as a group had satisfied the Board's standard for revenue adequacy since at least 2011.¹⁰ As a result, the statutory deference the railroads in the past have enjoyed pursuant to Section 10704(a)(2) no longer permits the Board to excuse the imposition of competitive harms on shippers in furtherance of carrier financial performance.

CNJ Requested Condition

Conceptually, CNJ seeks to replicate the response DH could/should be making to compete for the movement of MSW from Oak Island Yard to the Keystone Sanitary Landfill in Dunmore, PA. Historically, it is understood that DH would move such traffic from Oak Island to Lehigh, PA via trackage rights it holds over NS, thence to the vicinity of Taylor Yard via trackage rights it holds over RBMN, and finally to Dunmore via interchange with DL. However, as rail service providers adjust to the approaching prospect of NS operation and ownership of the Sunbury Line, it is becoming apparent that the emphasis NS is expected to place on the fluidity of operations for its traffic may conflict with a strict replication of the method DH would be expected to use for the Dunmore movement. Specifically, it is understood that access to facilities in/near Taylor Yard is likely to become problematic, as evidenced by the recent cancellation of an interchange agreement between shortline carriers serving the area around Taylor

⁸ See Sections 10705(a)(2)(C), 11123(a)(1) and 11123(a)(3).

⁹ See Section 10705(a)(2)(C).

¹⁰ NS individually has met the same standard for the same time period.

Yard. While difficulty in reaching DL might normally lead to consideration of extended drayage to bypass DL, it is understood that options for loading/unloading the Dunmore trains at or near Taylor Yard have also dried up.

CNJ's plan to replicate the competitive role of DH is consistent with the public interest and warrants the Board's support. However, CNJ also is mindful of the ways the priorities of NS may differ from those of DH in the operation of the Sunbury Line. In lieu of seeking Board orders to adopt DH's trackage rights over NS and RBMN via Lehighton, and to compel RBMN/DL interchange (or loading/unloading of Dunmore trains at/near Taylor Yard), CNJ would accept alternative logistics that would be less burdensome on NS, provided they did not sacrifice the competitiveness of the route. As a specific alternative, CNJ notes the availability of an alternative on-branch to DL from NS at Slateford Jct. This would place the Dunmore trains on an NS branch line north of Easton, PA, and avoid use of NS trackage between Easton and Lehighton as well as the need for an RBMN-DL interchange. CNJ understands that it might require a run-around or other maneuver to orient the train properly for the movement north of Easton, and CNJ would be prepared to cooperate with NS as needed to implement a mutually-acceptable approach. With such cooperation, the movement of CNJ traffic over NS trackage would produce a burden on NS no greater than that imposed by DH's current competitive capabilities. From these considerations, I conclude that the Board should approve the condition.

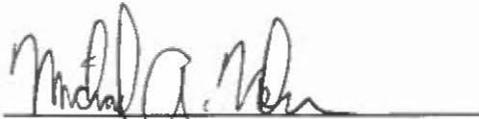
Exhibit 1

Approximate Numbers of Shippers and Annual Carloads Exposed to 2-1 Reduction on NS/DH-Served Shortlines

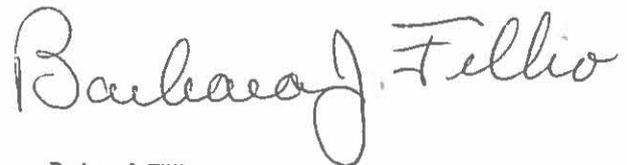
Shortline	# Shippers	Annual Carloads	Source
Reading Blue Mountain Railroad	50	24,365	http://www.rbmrr.com/happenings/2015/1/9/reading-and-northern-posts-record-volumes-for-2014
Lycoming Valley Railroad	41	17,938	http://www.nshr.com/links/RailBk2014_RevwCover.pdf)
North Shore Railroad	12	1,485	"
Shamokin Valley Railroad	6	150	"
Nittany and Bald Eagle Railroad	17	6,758	"
Union County Railroad	0	0	Operated by North Shore Railroad; separate data not found.
Delaware Lackawanna Railroad	25	6418	http://www.rochester-railfan.net/d-l.htm ; see also http://www.gvtrail.com/dl.php
Luzerne and Susquehanna Railroad	0	2200	http://www.lsy.net/ ; number of customers not found.
Philadelphia Bethlehem and New England Railroad	0	0	Separate data not found.
Total	151	59,314	

VERIFICATION

I, Michael A. Nelson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.


Michael A. Nelson

Executed on JAN, 15, 2015


Barbara J. Fillio
Notary Public
My Commission Expires
September 22, 2017



FINANCE DOCKET NO. 35873

APPENDIX 2

**VERIFIED STATEMENT
OF
ERIC S. STROHMEYER**

VERIFIED STATEMENT

Of

ERIC S. STROHMEYER

My name is Eric S. Strohmeyer. I am a citizen of the United States. I am over the age of 18. I am qualified and authorized to make this statement. I am aware that this statement is made under penalty of perjury and that all of the following facts are true to the best of my knowledge and belief.

I am the Vice President and Chief Operating Officer at CNJ Rail Corporation ("CNJ"). I've held this position since the formation of CNJ in 2004. CNJ's main office is located at 81 Century Lane in Watchung, NJ. My responsibilities include all matters related to CNJ's operations. I also am responsible for all strategic planning for CNJ and its affiliated organizations.

I have been actively involved in the railroad industry since 1989. I have worked for a number of Class III rail carriers in a variety of capacities from senior-level management to outside consulting positions. From 2000 to the present, I have been involved in a number of efforts to preserve or restore common carrier rail service over under-utilized rail corridors.

A number of previous career positions have provided me with additional work experience relevant to CNJ's request for a remedial condition in this proceeding. Throughout most of the 1990's, I worked in a number of different positions for intermodal related organizations; either for non-asset based intermodal marketing companies ("IMC"), or asset based intermodal motor carriers. As a result of my personal experience in the field, I'm intricately aware of what is required to operate a containerized intermodal service.

I have been asked:

- To provide the Board with an explanation regarding rail traffic levels out of D&H's Oak Island terminal from 2012 to the present,
- To briefly describe why CSX Transportation is non-competitive in the northern New Jersey to northeastern Pennsylvania rail corridor,
- To briefly describe CNJ's proposed operations in the event the Board grants the request for remedial conditions; and
- To briefly outline additional opportunities for rail traffic between northern New Jersey and northeastern Pennsylvania.

This verified statement is being submitted to the Board to directly support CNJ's request for a remedial condition. It is also being provided to directly refute some of the erroneous allegations set forth by Norfolk Southern Railway Company ("NS") which challenge CNJ's motives and interests in this proceeding.

For the better part of nearly 2 ½ years, CNJ Rail has been actively working on a project to return direct rail service to the D&H's Oak Island Terminal located in Newark, NJ. As the CNJ employee most responsible for spearheading this project, I have been intricately involved in this project from its onset in 2012 to the present. I am therefore qualified to make this statement in support of CNJ's request for a remedial condition.

I. Rail traffic to/from Oak Island yard – 2012 to present

From its takeover of the "D&H South Lines" in 1991 until 2012, CP Rail provided rail service from its Oak Island terminal, located in Newark, NJ. The terminal has belonged to the CP/D&H ("CP/DH") since it was awarded to D&H pursuant to the USRA's Final System Plan ("FSP"). For many years, CP/DH used the yard as a COFC/TOFC terminal. For much of the 1990's and early 2000's, CP/DH offered intermodal shipping options to a wide variety of destinations.

CP/DH also provided terminal space and trans-loading services for a variety of bulk commodities as well. In approximately 2005, CP/DH opened a waste transfer station in a portion

of the yard¹. The transfer station was operated by the CP/DH in conjunction with a company called Trans-Load America, Inc. ("TLA"). At approximately the same period in time, CP/DH terminated their intermodal services to and from Oak Island. This left the transfer of construction and demolition debris ("C&D") as the sole remaining business at the yard.

In 2012, CNJ learned that CP/DH had terminated service into and out of the Oak Island terminal. CNJ was perplexed by the news reports it received, since it was well known to us and others that CP/DH had a significant waste contract which provided CP/DH with substantial business.

Shortly after learning about the cessation of CP/DH service, CNJ began to make inquiries into the reason for the sudden termination of service. It was learned that TLA, CP/DH's contract operator of the transfer station, had filed for bankruptcy protection². Realizing that an opportunity might exist for a new operator for the facility, CNJ contacted TLA's Trustee, inquiring into the nature of the bankruptcy and formally expressing an interest in acquiring whatever viable assets might remain³.

Upon receiving extensive⁴ due diligence material from the Trustee's agent, CNJ investigated to determine what caused the bankruptcy. We also began to research whether there was anything left worth salvaging. The due diligence material revealed to us that of all of TLA's facilities, only the Oak Island facility and a facility in Connecticut were operating in the black. Documents revealed that over expansion and ill-advised investments in new technologies led to the corporate-level financial woes that caused TLA's collapse.

¹ This trans-load operation may have actually begun in 2002. The operation was formerly known as Hi-Tech Trans. According to records supplied by the Trustee of TransLoad America Inc., Hi-Tech appears to have been reorganized in 2005. It became a part of TransLoad America, Inc. It was during this time that documents begin to indicate that TransLoad America is performing tasks as an agent for CP/DH.

² See: *TransLoad America, Inc. – (Debtor)* Case No.: 12-25696 (RG)
United States Bankruptcy Court for the District of New Jersey (Newark, NJ)

³ See: Exhibit #1 – Initial correspondence between Eric S. Strohmeyer and Daniel Stolz Esq. regarding TLA

⁴ So as to not burden the record with unnecessary detail, CNJ is attaching just one of the inventory lists which identify a portion of the documents CNJ has received and reviewed relevant to the TLA bankruptcy (See Exhibit #2). The due diligence material supplied by the Trustee was extensive.

Although operation of the Oak Island facility was basically suspended during the lengthy period of the bankruptcy, the absence of rail traffic during this period reflected only this exogenous problem, and not any underlying adverse trend or problem in the market for transportation of C&D out of the NYC/Newark region, or the ability of CP/DH to offer rail services that compete effectively in that market.

Of particular note, one of the more relevant documents to this proceeding which we discovered in the due diligence material was the contract⁵ between the Delaware and Hudson Railway and the Union County Utilities Authority. The contract clearly showed that the disposal contract was between the CP/DH and the authority.

A careful review of the document further revealed that under Article 7 of the contract, "service was not to be interrupted or abandoned" by CP/DH. Since neither DH nor its parent CP were bankrupt (only TLA was seeking protection), it was quite apparent to CNJ that CP/DH itself was probably in breach of its contract to the public.

Based on our conclusion from the due diligence material that the Oak Island operation itself is viable and profitable, CNJ began our efforts to attempt to secure the Oak Island terminal and work with CP/DH to reactivate rail service to this facility. All the members of our team contributed to this company effort.

II. Loss of effective competition and CSX connections

As set forth in Mr. Nelson's verified statement, the result of the approval of this transaction, without the Board imposing remedial conditions on the transaction, will effectively result in the loss of competition to a very substantial number of shippers and volume of traffic. What has bothered CNJ from the outset of this proceeding is the way the NS application, and to some extent the fast track schedule adopted by the Board, appears to have glossed over the substantial adverse effects the transaction would have on shippers.

To the extent that the Board has relied on the general proposition that the split of Conrail by NS has produced 2-railroad competition in this region, such reliance would be unfounded for the traffic CNJ is discussing. For the movement from Oak Island to the Keystone Landfill, the

⁵ A copy of the contract is provided as a courtesy to the Board. (See Exhibit# 3)

simple fact is that CSX not only provides no single-line service between these two points, but also does not even offer a connection to the Delaware - Lackawanna Railroad ("DL"), the short line that serves the Landfill.⁶ More generally, CSX's route structure does not provide direct connections to any of the short lines covered in Mr. Nelson's tabulation, which NS itself states can interline traffic only with NS and CP/DH.

For CSX to participate competitively in such traffic, interchange with CP/DH would be required (e.g., via Philadelphia, Buffalo, Newark or Alexandria, VA). In this light, it can be seen that CSX is not a relevant direct competitive factor for the movement at issue for CNJ, and that the Keystone Landfill movement in fact represents only one of numerous flows in the "South Lines" area that will lose actual or potential competition as a result of the proposed transaction.

III. CNJ Rail Operations

Should the Board decide that CNJ's request for remedial conditions, CNJ expects to operate in a manner that is analogous to CP/DH's longstanding practices, and replicates the current ability of CP/DH to compete for movements between Oak Island and shippers/receivers on short lines losing competitive service between NS and CP/DH. The Oak Island terminal will be the primary base of operations for CNJ.

CNJ expects to restore intermodal transfer operations at Oak Island. This would include reinstallation of an appropriate yard office, truck processing facilities, as well as acquiring appropriate container transfer equipment for the yard. CNJ eventually expects to provide a full array of terminal services to support its COFC services.

CNJ projects that its initial rail service between Oak Island and DL will operate 5-6 days per week, with one train per day in each direction. CNJ expects that the initial train size will be between 10-15 cars per train and will quickly grow to an average of 20-25 cars per train by the end of the first full calendar year in operation.

⁶ See, for example, <http://www.csx.com/index.cfm/customers/short-line-partners/short-line-directory/alphabetical/?state=PA&stlabel=Pennsylvania>.

As discussed further by Mr. Nelson, it is understood that CP/DH would move such traffic from Oak Island to DL using trackage rights it currently holds over NS and RBMN via Lehighton, PA and the Taylor Yard area. However, upon consummation of the proposed transaction, NS is expected to place a high priority on the fluidity of operations for its traffic moving via the Taylor Yard area (and elsewhere on the acquired line), which would conflict with a strict replication of the method CP/DH would be expected to use for the Dunmore movement.

In lieu of a strict replication, CNJ would accept – and indeed prefers – “moving the gateway” so that CNJ’s trains to/from DL move via Slateford Jct. This would avoid use of NS trackage between Easton and Lehighton, particularly operational challenges in the area of the Allentown yard, and also avoid the need for an RBMN-DL interchange in the vicinity of Taylor Yard. CNJ would cooperate with NS on any legitimate logistical issues associated with implementing such a gateway change, which we believe would be beneficial to NS as well as to CNJ.

Use of the Slateford Jct. interchange as the interchange point for traffic moving to the DL actually produces another operational benefit. The alignment of the rail spur leading to the Landfill is oriented in the direction of Slateford Jct. CNJ believes that there will be certain operational benefits for the DL by using the Slateford Jct. interchange.

CNJ understands that the Landfill owner has so far spent close to one million dollars to date to rehabilitate the right-of-way of the spur track leading into the landfill, and the rail needed to relay the spur track is on the ground awaiting installation to enable the spur to reconnect to DL as it did before.

Future capabilities sought by CNJ include the ability to: (1) interchange railcars with CSX at Oak Island yard; and, (2) recreate CP/DH’s current actual and potential competition for other short line traffic losing competition between NS and CP/DH traffic and moving to, from or through Oak Island yard. The CP/DH terminal at Oak Island actually occupies a small portion of Consolidated Rail Corporation’s (“Conrail”) much larger Oak Island Yard, which is the main classification yard for both CSX and NS in the CR Shared Asset Area’s North Jersey Terminal District. Newark/Oak Island is understood to be one of at least 4 gateways CP/DH

currently may use as a bridge carrier to make competition from CSX available to short line customers also served by NS.

CNJ's requests would at least preserve a portion of the actual or potential competition being lost by shippers who currently enjoy competition between NS and CP/DH on movements involving adversely affected short lines. Given the opportunity to step into CP/DH's shoes for such movements, CNJ will apply its resources to develop operations that provide effective competition while minimizing interference with NS, as we already have done for the Allegro movement.

IV. Potential new rail traffic

CNJ also is very confident that additional rail traffic will move between Oak Island yard and the captive short lines. For example, with containerized MSW traffic (COFC) expected to move at least 5 days per week on a regular schedule, shippers on the DL will have the continuing option for consistent, reliable service between those two points. As such, it is anticipated that shippers would embrace the alternative route for other freight traffic.

CNJ would also expect to be able to procure traffic from the other short line connections, and a number of candidate movements have been identified. Should the Board grant CNJ's request for a remedial condition, we will pursue those opportunities with the vigor and resourcefulness a competitor should bring.

VERIFICATION

State of New Jersey

|

STB Docket# FD 35873

|

Township of Warren

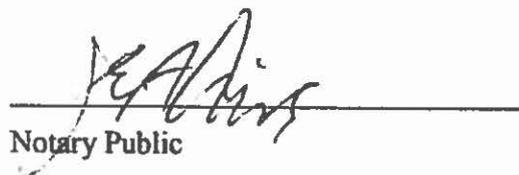
|

I, Eric S. Strohmeyer, being duly sworn according to law, hereby depose and state that I am the Vice President and Chief Operating Officer of CNJ Rail Corporation; that I am authorized to make this verification; that I have read the foregoing document, and know that the facts asserted therein are true and accurate as stated to the best of my personal knowledge, information and belief.



Eric S. Strohmeyer

Subscribed to and sworn to be me, a Notary Public, in and for the Township of Warren, County of Somerset, State of New Jersey, this 20 day of January, 2015.



Notary Public

My commission expires on:

JAMES CICCONE
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 3, 2016

**Verified Statement
of
Eric S. Strohmeyer**

Exhibit # 1

CNJ Rail Corporation

81 Century Lane - Watchung, New Jersey 08812
(908) 361 - 2435

August 6th, 2012

Daniel M. Stolz, Esq.
Wasserman, Jurista & Stolz
225 Millburn Avenue #207
Millburn, New Jersey 07041

Re: TransLoad America Inc. (debtor) Case # 12 - 25696 RG

Dear Mr. Stolz,

In mid July, I spoke with you regarding certain assets of a company called TransLoad America Inc. (TransLoad). In that conversation you indicated you were counsel to the court-appointed Trustee of Transload and that I should direct all correspondence to you regarding our interest in those assets. Per our conversation, please accept this letter as our written initial expression of interest in acquiring whatever rights and interests that may be available that TransLoad America possessed in the Canadian Pacific rail yard in Newark NJ.

Since we are beginning our own due diligence with regards to making a *bona fide* offer for those assets, we would like the right to engage in certain discussions with the following parties: the trustee (through your office), the Canadian Pacific Railroad, and the New Jersey Dept. of Environmental Protection. In addition, we would also like to speak with the former terminal manager of the Newark facility.

We understand that as Trustee, the Trustee must make his best effort to secure the highest possible value in the sale of any remaining assets for the benefit of the creditors. While at first glance, the idea of allowing potential bidders to talk with one another might seem counter-intuitive to that objective, CNJ Rail Corporation believes, given the unique relationships that will be needed to make the sale of the asset possible, it might actually lead to a higher price for the benefit of the bankruptcy estate. Therefore, if possible, we would also like the ability to hold discussions with any other potential bidder who also has an interest in the facility.

Please find our company contact information at the top of this letter. We'll provide whatever additional information you may want upon request. We look forward to working with you in the future.

On behalf of CNJ Rail Corporation,

Sincerely,



Eric S. Strohmeyer
Vice President, COO
Tel: (908) 361 - 2435
Email: ESStrohmeyer@yahoo.com

WASSERMAN, JURISTA & STOLZ
ATTORNEYS AT LAW



A PROFESSIONAL CORPORATION

ROBERT B. WASSERMAN
STEVEN Z. JURISTA
DANIEL M. STOLZ
LEONARD C. WALCZYK
MICHAEL McLAUGHLIN**
SCOTT S. REVER**
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****ALSO MEMBER OF PA BAR**
*** ALSO MEMBER OF NY BAR**

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OF COUNSEL

STUART M. BROWN
KENNETH L. MOSKOWITZ*
NORMAN D. KALLEN

EMAIL: DSTOLZ@WJSLAW.COM

August 7, 2012

Via e-mail esstrohmeier@yahoo.com

Eric S. Strohmeier, Esq.
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 08812

In re: Transload America, Inc.
Case No.: 12-25696(RG)
Our File No.: 7947

Dear Mr. Strohmeier:

I am in receipt of your letter of August 6, 2012. The Trustee is retaining the GA Keane Realty Advisors, LLC to assist the Trustee for the sale of the assets of Transload America/Transload Newark. I have forwarded your information to Harold Bordwin of GA Keane, who would be assembling due diligence material and setting up a solicitation process. You may contact Mr. Bordwin at 646-381-9201, should you wish to express further interest.

Very truly yours,
WASSERMAN, JURISTA & STOLZ, PC

DANIEL M. STOLZ

DMS:bt
Enclosure

cc: Harold Bordwin (via e-mail hbordwin@greatamerican.com)
Robert B. Wasserman, Esq.

**Verified Statement
of
Eric S. Strohmeyer**

Exhibit # 2

#	Bookmark Name	Summary of Document	Location
1	Application for Certificate of Public Convenience and Necessity Letter & Revised Rider 03-18-11	Slight contact changes to employees w/ admin responsibility in Rider 2	TLA Newark LLC – Agreements 1.pdf
2	Approved Solid Waste Transporter License 02-10-11	Conditional solid waste transporter license dated 2/8/11. Must be renewed annually.	TLA Newark LLC – Agreements 1.pdf
3	Application for Certificate of Public Convenience and Necessity 10-10-08	Signed application for Solid Waste Facility Certificate TLA Newark LLC Signed by: Marlene Wheaton on 10/10/08	TLA Newark LLC – Agreements 1.pdf
4	Rider 1 - Admin Consent Order 09-12-08	Rider 1 to application: Admin consent executed on 09/12/08: <ul style="list-style-type: none"> • an interstate rail carrier • leases and operates property located at 91 A Bay Avenue (Block 223 Lots 6E & 7E; Block 5084 Lot 70; Block 5088 Lots 60 & 74, Blocks 129, 130 & 131), Newark, NJ • Discusses history, violations, bids, contracts, approvals, issues, etc. • Signed by NJDEP, Delaware & Hudson Railway Company, TLA Newark, Transload, Hi Tech Trans, David Stoller. 	TLA Newark LLC – Agreements 1.pdf
5	Rider 2 - Employees with Admin Responsibility	Rider 2 to application: <ul style="list-style-type: none"> • Employee list. See “#1” for updated list. 	TLA Newark LLC – Agreements 1.pdf
6	Rider 3 - Certificate of Formation / Certificate of Authority to do Business in NJ	Rider 3 to application: <ul style="list-style-type: none"> • Certificate of formation of TLA Newark dated 03/03/05 • Applicable until 03/03/25 • Executed by Linda Robison • Copy of certificate of authority 	TLA Newark LLC – Agreements 1.pdf
7	Rider 4 - Stockholder Information	Rider 4 to application: <ul style="list-style-type: none"> • Two stockholders listed: • Plainfield Direct Inc – 48.97% • David C. Stoller – 22.90% 	TLA Newark LLC – Agreements 1.pdf
8	Rider 5 - Tariff for Transfer/Materials Recovery Facility	Rider 5 to application: <ul style="list-style-type: none"> • Copies of Solid Waste Disposal Tariff agreement • Between TLA Newark & NJDEP 	TLA Newark LLC – Agreements 1.pdf

		<ul style="list-style-type: none"> • Peak rates range from \$144-172.87 • (no signature provided) 	
9	Rider 6 - Experience	<p>Rider 6 to application:</p> <ul style="list-style-type: none"> • Experience of David Stoller, Jane Witheridge, Marlene Wheaton and Vincent Puma 	TLA Newark LLC – Agreements 1.pdf
10	Rider 7 - Equipment and Related Agreements	<p>Rider 7 to application:</p> <ul style="list-style-type: none"> • Security Agreements for equipment 10/25/05, 12/03/05, 10/24/05, 5/24/06, between TLA & Foley Incorporated. • Guaranty's of payments, equipment invoices, purchase orders • Equipment lease between TLA and Trackmobile, Inc. • List of leased assets (tabbed for reference) 	TLA Newark LLC – Agreements 1.pdf
11	Rider 7 - Railcar Lease Agreement 2008	<p>Rider 7 to application (continued):</p> <ul style="list-style-type: none"> • Railcar Lease Agreement between TLA Rail Logistics and TLA Newark • Units: 188 • Commencement: October 2008 • Per Unit Rental: \$650/month • Unsigned agreements 	TLA Newark LLC – Agreements 1.pdf
12	Rider 8 - Certificate of Insurance	<p>Rider 8 to application:</p> <ul style="list-style-type: none"> • Unsigned draft solid waste facility permit • Initial permit requirements report 	TLA Newark LLC – Agreements 1.pdf
13	Rider 9 - Statement of Financial Condition	<p>Rider 9 to application:</p> <ul style="list-style-type: none"> • 12 month year comparison ending 8/31/08 • Balance sheet as of 12/31/08 	TLA Newark LLC – Agreements 1.pdf
14	IRS Confirmation Letter 03-09-05	TLA Newark Federal Tax/Employer ID: 20-2462595 as of 03/09/05	TLA Newark LLC – Agreements 2.pdf
15	Certificate of Formation of TLA Newark LLC 03-03-05	<ul style="list-style-type: none"> • Certificate of formation of TLA Newark dated 03/03/05 • Applicable until 03/03/25 • Executed by Linda Robison 	TLA Newark LLC – Agreements 2.pdf
16	Operating Agreement of TLA Newark LLC 08-03-07	Operating Agreement of TLA Newark, executed by David Stoller as of 08/03/07	TLA Newark LLC – Agreements 2.pdf
17	Operating Agreement of TLA Newark LLC 09-26-05	Operating Agreement of TLA Newark (draft), unsigned.	TLA Newark LLC – Agreements 2.pdf
18	TLA Newark LLC Action by Sole Member w/o a Meeting 08-03-07	Action by sole member w/ o meeting – appointment of officers, executed by David Stoller as of 08/03/07	TLA Newark LLC – Agreements 2.pdf

19	Ex. A - Operating Agreement of TLA Newark LLC 08-03-07	Operating Agreement of TLA Newark, executed by David Stoller as of 08/03/07	TLA Newark LLC – Agreements 2.pdf
20	TLA Newark LLC Action by Sole Member w/o a Meeting 09-08-08	Action by sole member w/ o meeting – appointment of officers, executed by David Stoller as of 09/08/08	TLA Newark LLC – Agreements 2.pdf
21	Agreement to Provide Solid Waste Disposal Services - Canadian Pacific Railway 11-09-06	Agreement to provide solid waste disposal services between Union Counties Authority and Delaware and Hudson Railway Company / Canadian Pacific Railway.	TLA Newark LLC – Agreements 2.pdf & TLA Newark LLC – Agreements 3.pdf
22	Equipment Maintenance Agreement - Professional Fleet Management 07-01-08	Agreement between Professional Fleet Management, Inc & Transload effective 07/01/08. Annual rate for maintenance is \$234,000. Executed by client & service provider.	TLA Newark LLC – Agreements 3.pdf
23	Waste Services Agreement - Canadian Pacific Railway	Waste Services Agreement between TLA Newark & Canadian Pacific Railway, unsigned, not completed/filled in.	TLA Newark LLC – Agreements 3.pdf
24	Metal Recycling Agreement - Canadian Pacific Railway - 01-2009	Metal Recycling Agreement between TLA Newark and American Recycling LLC as of 01/2009. Agreement is for 1 year and will automatically renew. Unsigned.	TLA Newark LLC – Agreements 3.pdf
25	Tire Recycling Agreement - Canadian Pacific Railway 01-2009	Tire Recycling Agreement between TLA Newark and Nacerima Industries as of 01/2009. Agreement is for 1 year and will automatically renew. Unsigned.	TLA Newark LLC – Agreements 3.pdf
26	Transportation and Disposal Agreement - Canadian Pacific Railway 01-2009	Transportation Disposal Agreement between TLA Newark and Rovic Transportation as of 01/2009. Agreement is for 1 year and will automatically renew. Unsigned.	TLA Newark LLC – Agreements 3.pdf
27	Waste Disposal Agreement - Standard Environmental Services, Inc 07-2005	Waste Disposal Agreement between Transload America and Standard Environmental Services, Inc. as of 07/2005. Agreement for 5.5 years ending on 12/31/10. Executed by Transload & Standard Environmental.	TLA Newark LLC – Agreements 3.pdf
28	Corrugated Recycling Agreement - Canadian Pacific Railway - 01-2009	Corrugated Recycling Agreement between TLA Newark and Direct Recycling as of 01/2009. Agreement is for 1 year and will automatically renew. Unsigned.	TLA Newark LLC – Agreements 3.pdf
29	Assignment of	Assignment of Asset Purchase Agreement.	TLA Newark LLC –

	Asset Purchase Agreement 05-28-04	HIT assigned to TLA Newark. Executed by Delaware and Hudson Railway Company & Hi Tech/Transload America	Agreements 3.pdf
30	Partnership Agreement - Environmental Rail Solutions	Partnership Agreement between Transload & Environmental Rail Solutions. Unsigned, not completed/filled in.	TLA Newark LLC – Agreements 3.pdf
31	Amended Transload Facility Operations Agreement 12-2005	Amended Transload Facility Operations Agreement as of 12/2005 between Delaware Hudson Railway and Transload. Unsigned.	TLA Newark LLC – Agreements 3.pdf
32	Waste Disposal Agreement 03-25-05	Waste Disposal Agreement between TLA Newark and Central Waste, Inc. as of 03/04/05. Agreement is for 5 years, ending on 01/01/11	TLA Newark LLC – Agreements 3.pdf
33		<p>Certificate of Public Convenience</p> <ul style="list-style-type: none"> • Signed by Deborah Pinto Chief of Bureau of Solid Waste Compliance and Enforcement • Dated 12/11/11 <p>DEP Letter</p> <ul style="list-style-type: none"> • Facility license has been issued to operate a solid waste transfer station and material recovery facility • Signed by Deborah Pinto • Dated 12/1/11 <p>Solid Waste Facility Permit</p> <ul style="list-style-type: none"> • Unsigned <p>Initial Permit Requirements Report DEP Application Order of Approval</p> <ul style="list-style-type: none"> • Signed by Deborah Pinto • Dated 12/21/11 	TLA Newark LLC – Agreements 4.pdf
34	Transload Organizational Chart	Transload America Inc. – Organizational Chart as of 9/28/07	Transload America Inc. – Organizational Chart as of 9/28/07.pdf
35	Transload Corporate Family	Transload America corporate family overview w/ contact names.	Corporate Family – Sept 2008.ppt
36	Business Week Co. Overview	Summary of Transload’s business and key executives	Article – Transload – Businessweek Co. Overview.pdf
37	Energy Exec Article	Summary of Transload’s business	Article - Transload – Energy Exec Jan09 .pdf
38	Previous Book 2008	<p>This document is from a book that Shar found from an investment banking firm back in 2008:</p> <p>Compliance and Legal Requirements List TLA Newark summary flyer Capex detail 2008</p>	TLA Newark – Book Provided by Shari, 2008.pdf

		Asset Value Report 2008 Depreciation Summary Report 2008	
39	David Stoller Deposition	Deposition of David Stoller with regards to Transload (includes all companies, including TLA Newark) None of the TLA entities ever owned railcars	Transload American Inc. - Transcript of David Stoller.pdf
40	Docket - Brundige Landfill	Docket - Brundige Landfill	Docket/Docket - Brundige Landfill.pdf
41	Docket - TLA Brundage	Docket - TLA Brundage	Docket/Docket - TLA Brundage.pdf
42	Docket - TLA Newark	Docket - TLA Newark	Docket/Docket - TLA Newark.pdf
43	Docket - Transload America Bankruptcy Schedules	Docket - Transload America Bankruptcy Schedules	Docket/Docket - Transload America Bankruptcy Schedules.pdf
44	Docket - Verdant Tech	Docket - Verdant Tech	Docket/Docket - Verdant Tech.pdf
45	Docket - Transload - Schedules NJ	Docket - Transload - Schedules NJ	Docket/Docket - Transload - Schedules NJ.pdf
46	Financial Statements - June 2010	Financial Statements - June 2010	Financials/Transload - Consolidated Financial Statements - June 2010.pdf
47	Financial Statements - May 2011	Financial Statements - May 2011	Financials/Transload - Consolidated Financial Statements - May 2011.pdf

Verified Statement
of
Eric S. Strohmeyer

Exhibit # 3

**AGREEMENT TO PROVIDE SOLID WASTE DISPOSAL SERVICES
FOR ACCEPTABLE WASTE**

By and Between

**DELAWARE AND HUDSON RAILWAY COMPANY, INC.
d/b/a
CANADIAN PACIFIC RAILWAY**

and

UNION COUNTY UTILITIES AUTHORITY

Dated: November 9, 2006

INDEX

ARTICLE 1 DEFINITIONS	1
ARTICLE 2 CONTRACT REQUIREMENT SUMMARY	5
ARTICLE 3 CONTRACTOR'S OBLIGATIONS	6
ARTICLE 4 INSURANCE	6
ARTICLE 5 TITLES	8
ARTICLE 6 OPERATIONAL RECORDS	8
ARTICLE 7 SERVICE NOT TO BE INTERRUPTED OR ABANDONED	9
ARTICLE 8 INSPECTION	9
ARTICLE 9 CONTRACT DOCUMENTS	9
ARTICLE 10 SCHEDULE AND TIME FOR INITIATION OF SERVICES	9
ARTICLE 11 DAMAGES FOR DELAY	10
ARTICLE 12 COMPENSATION TO BE PAID CONTRACTOR FOR DISPOSAL OF ALL SOLID WASTE	10
ARTICLE 13 CONSENT OF SURETY; CONSENT OF BANK	10
ARTICLE 14 PERFORMANCE BOND; LETTER OF CREDIT; OR PERFORMANCE GUARANTY EXECUTED BY A PUBLIC TAXING AUTHORITY	10
ARTICLE 15 LAWS AND ORDINANCES	11
ARTICLE 16 INVOICES AND PAYMENT	11
ARTICLE 17 QUANTITY GUARANTEES	12
ARTICLE 18 INADVERTENT DELIVERIES OF UNACCEPTABLE WASTE	12

**AGREEMENT TO PROVIDE SOLID WASTE DISPOSAL SERVICES
BY AND BETWEEN
Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway
AND THE UNION COUNTY UTILITIES AUTHORITY**

This Agreement made and entered into the ^{9th} day of NOVEM 2006 and between THE UNION COUNTY UTILITIES AUTHORITY, a public body corporate and politic of the State of New Jersey (the "UCUA" or the "Authority") and Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway (the "Contractor"). In consideration of the mutual covenants, considerations and promises contained herein, the parties hereto intending to be bound hereby agree as follows:

**ARTICLE 1
DEFINITIONS**

Words and terms that are used as defined terms herein, but which are not otherwise defined in this Disposal Services Agreement, shall (unless the context clearly requires otherwise) have the meanings that are ascribed to such terms in the Bid Specifications.

"Acceptable Waste" means, the non-recycled portion of Solid Waste generated within the County comprised of LD. Type 13 . Bulky Waste, LD. Type 13C . Construction and Demolition Debris, I.D. Type 23 . Vegetative Waste, and I.D. Type 27 . Dry Industrial Waste; as defined by N.J.A.C. 7:26-2.13(g).

In no event shall Acceptable Waste include the following waste types: I.D. Type 10 - Municipal Waste (household, commercial and institutional), I.D. Type 12- Dry Sewage Sludge, and I.D. Type 25- Animal and Food Processing Waste, LD. Type 27A . Dry Industrial Waste, LD. Type 72 . Bulk liquids and semi-liquids, I.D. Type 73 - Septage Tank Cleanout Waste, I.D. Type 74 - Liquid Sewage Sludge, as defined by N.J.A.C. 7:26-2.13, any Hazardous Waste, infectious, and pathological hospital wastes, and any prohibited, waste types under Applicable Laws.

"Act" means the Municipal and County Utilities Authorities Law, constituting Chapter 183 of the Pamphlet Laws of 1957, of the State of New Jersey and the acts amendatory thereof and supplemental thereto.

"Applicable Law" refers to any permits, licenses or approvals, and any statute, law, constitution, charter, ordinance, resolution, judgment, order, decree, rule, regulation, directive, standard or similarly binding authority, which shall be enacted, adopted, promulgated, issued or enforced by a Governmental Body relating to the Contractor(s), the UCUA or the Facilities.

"Authority" or "UCUA" refers to the Union County Utilities Authority, the implementing agency for the Union County District Solid Waste Management Plan.

"Bid" - refers to a Bidder's submission to the Authority in response to these Bid Specifications with respect to the provision of Disposal Services as described in the Bid Specifications, including all technical, legal, financial information, all General Bid Submittal Forms

(Appendix A), all Cost and Other Bid Forms (Appendix B), the executed Disposal Services Agreement (Appendix C), and any and all information required to be submitted in accordance herewith.

"Bid Specifications" - refers to these Bid Specifications for the provision of Disposal Services and includes all of the Bid Documents described in Section 1.1.3 hereof, which Bid Specifications may be amended or modified from time to time in accordance with the Local Public Contracts Law prior to the date established for the submission of Bids.

"Bidder" - refers to any firm(s) or public body(ies) that submit(s) a Bid in response to these Bid Specifications.

"Commencement Date" means the date that the Contractor(s) shall commence provision of the Disposal Services. Unless otherwise notified in writing by the UCUA, the Commencement Date is expected to occur on July 1, 2007.

"Contract Date" - refers to the date of execution of the Disposal Services Agreement by the Successful Bidder(s) and the Authority.

"Contract Documents" means the Disposal Services Agreement along with the following supplementary documents that were required to be included or submitted as part of the Bid pursuant to the provisions of the Bid Specifications:

- Notice to Bidders
- Information to Bidders and Appendices
- Bidder's Information/Cover Letter
- Cost Proposal Forms
- Bid Security or Bid Bond
- Consent of Surety or Consent of Bank
- Ownership Disclosure Statement
- Non-Collusion Affidavit
- Consent to Investigation
- Statement of Relevant Experience
- Performance Bond or Performance Letter of Credit
- Insurance Certificates
- Equipment Certification, if applicable

"Contractor" means the Successful Bidder(s), or its successor and assigns, that is selected by the UCUA to execute the Disposal Services Agreement and who will provide such Disposal Services, in accordance with the appropriate terms thereof.

"County" means the County of Union, New Jersey.

"DEP", "NJDEP" or the "Department" means the New Jersey Department of Environmental Protection, or any successor agency.

"Disposal Facility(ies)" refers to the permitted sanitary Landfill, Transfer Station or other solid waste facility, designated by the Contractor in its Bid, for the disposal of Acceptable Waste, and any residue therefrom.

"Disposal Services" refers, collectively, to the services required to be performed by the Contractor(s) pursuant to the Disposal Services Agreement and the Bid Specifications in connection with the disposal of Acceptable Waste, and any residue therefrom.

"Disposal Services Agreement" refers to the "Agreement to Provide Solid Waste Disposal Services" executed or to be executed by and between the Authority and the Contractor, setting forth the terms and conditions relating to the disposal of Acceptable Waste at the Disposal Facility(ies) proposed by the Contractor.

"Event of Default" means the non-performance of the Contractor under the terms of the Disposal Services Agreement.

"Facilities" means the Disposal Facility(ies), including transfer station(s) and transporter(s) in the event that the Contractor elects to provide such services, designated by the Contractor to be utilized under and in accordance with the Disposal Services Agreement.

"Freeholders" refers to the Union County Board of Chosen Freeholders.

"Governmental Body" means, as appropriate, any one or several of, any Court of competent jurisdiction, the United States of America, the State of New Jersey and any state in which the Facilities are located or which validly exerts appropriate jurisdiction over the Contractor or its activities relating to the Facilities; or any agency, authority, regulatory body or subdivision of any of the above as may have jurisdiction over or power and authority to regulate the Authority, the Contractor, and the disposal, transfer or transport of Acceptable Waste, or the Facilities.

"Guarantor" means either a parent corporation, joint venture partner or other third-party, its successors and assigns, who assumes joint and several liability for the Contractor, and who in each case guarantees performance of the obligations of the Contractor under the terms of the Disposal Services Agreement.

"Guarantor Agreement" refers to the agreement executed by the Guarantor pursuant to which the Guarantor has guaranteed the performance by the Contractor of each of the Contractor's obligations to the Authority under the terms of the Disposal Services Agreement.

"Hazardous Waste" means (1) any waste, material, or substance which, by reason of its composition or characteristic, is regulated as a toxic or hazardous waste or substance under, without limitation, (a) the Solid Waste Disposal Act, 42 U.S.C.A. 6901, et seq., as replaced or amended from

time to time, and the rules, regulations and written policies or written guidelines promulgated thereunder, (b) the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the regulations thereunder, including N.J.A.C. 7:26-8.1 et seq., as replaced or amended from time to time, and the rules, regulations and written policies or written guidelines promulgated thereunder, and (c) the Toxic Substances Control Act, 15 U.S.C. ' 260 et seq., as replaced or amended from time to time, and the rules, regulations and written policies and written guidelines promulgated thereunder, or any other laws of similar purpose or effect, and such policies or regulations thereunder, or under any other relevant federal or state law as replaced or amended from time to time, and the rules, regulations, written policies or written guidelines promulgated thereunder, or (2) radioactive material which is source, special nuclear or by-products material within the meaning of the Atomic Energy Act of 1954 as replaced or amended from time to time, and the rules, regulations and written policies or written guidelines promulgated thereunder, or (3) any other waste, material or substance which any Governmental Body having appropriate jurisdiction shall determine from time to time is harmful, toxic, hazardous or dangerous, or otherwise ineligible for delivery to the Facilities, as the case may be, other than those permitted for disposal of hazardous wastes; or (4) all material defined as hazardous by the Resource Conservation and Recovery Act of 1976, or the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as replaced or amended from time to time, and the rules, regulations and written policies and written guidelines promulgated thereunder.

"Landfill" or "Landfills" means any and all portions of the permitted landfill(s) that are designated by the Contractor as a Disposal Facility(ies) for disposal of Acceptable Waste, pursuant to and in accordance with the terms of the Disposal Services Agreement and any residue therefrom.

"Local Public Contracts Law" means the New Jersey Local Public Contracts Law, constituting Chapter 198 of the Pamphlet Laws of 1971, of the State of New Jersey and the acts amendatory thereof and supplemental thereto.

"Per Ton Unit Price" means the price per Ton to be paid to the Contractor for each ton of Acceptable Waste delivered to the Facility(ies) for disposal pursuant to the Disposal Services Agreement.

"Recyclable Materials" means those materials that would otherwise become solid waste and may be collected, separated or processed and returned to the economic mainstream in the form of raw materials or products pursuant to the Union County District Recycling Plan and Section 3 of P.L. 1987, C.102.

"Residue" means the solid wastes remaining after receipt and processing at the Contractor's Facility(ies) that require disposal and/or recycling in accordance with Applicable Laws.

"Term" means the period commencing on July 1, 2007, of either (i) approximately three (3) years, through and including, June 30, 2010; or (ii) five (5) years, through and including, June 30, 2012, unless earlier terminated pursuant to these Bid Specifications or the Disposal Services Agreement.

"tpd" means Tons per day.

"tpy" means Tons per year.

"Ton" means a short ton of 2000 pounds.

"Transfer Station" - refers to a transfer station, located within thirty (30) road miles of the Union Resource Recovery Facility, that is utilized by or intended, during the Term of the Disposal Services Agreement, to be utilized by, the Contractor, for the provision of Disposal Services in accordance with the Disposal Services Agreement.

"Transfer Station(s) Receiving Times" means the permitted operating hours at the Transfer Station(s) during which Acceptable Waste may be delivered for processing and loading into trailers or containers for transportation to the Disposal Facility(ies).

"Transporter" means the entity that will transport the Acceptable Waste from the Transfer Station(s) to the Disposal Facility(ies) on behalf of the Successful Bidder(s), in accordance with its Bid.

"Type 13 Solid Waste" or "Solid Waste Type 13" means that solid waste as defined in N.J.A.C. 7:26-2.13, and refers to bulky waste: large items of waste material, such as appliances and furniture. All references to Type 13 Solid Waste shall include Type 13C, as defined in N.J.A.C. 7:26-2.13, construction and demolition waste.

"Type 23 Solid Waste" or "Solid Waste Type 23" means that solid waste as defined in N.J.A.C. 7:26-2.13 as vegetative waste: waste materials from any farms, plant nurseries and greenhouses that are produced from the raising of plants. This waste includes such crop residues as plant stalks, hulls, leaves and tree wastes processed through a wood chipper. Also included are non-crop residues such as leaves, grass clippings, tree parts, shrubbery and garden wastes. Type 23 Solid Waste shall not include yard waste as described in the Union County District Solid Waste Management Plan.

"Type 27 Solid Waste" or "Solid Waste Type 27" means that waste as defined in N.J.A.C. 7:26-2.13 as dry industrial waste: waste materials resulting from manufacturing, industrial and research and development processes and operations, and which are not hazardous in accordance with the standards and procedures set forth in N.J.A.C. 7:26G. Also included are nonhazardous oil spill cleanup waste, dry nonhazardous pesticides, dry nonhazardous chemical waste, and residue from the operations of a scrap metal shredding facility.

"Unacceptable Waste" means any material that is not Acceptable Waste.

"USEPA" or "EPA" refers to the United States Environmental Protection Agency, or any successor agency.

**ARTICLE 2
CONTRACT REQUIREMENT SUMMARY**

The Contractor, under this Disposal Services Agreement, will provide Disposal Services for the disposal of _____ Tons of Acceptable Waste within the County. The Contractor will perform all services in accordance with all contents of this Disposal Services Agreement, the Bid Specifications, including Notice to Bidders, Bidder's Information/Cover Letter, Cost Proposal, Bid Security or Bid Bond, Consent of Surety or Consent of Bank, Performance Bond or Performance Letter of Credit or Performance Guaranty, Ownership Disclosure Statement, Non-Collusion Affidavit, Consent to Investigation, Statement of Relevant Experience, Insurance Certificates, Special Provisions, Performance Specifications, Technical Proposal, Equipment Certification, all Appendices and Addenda related to the Bid Specifications for Disposal Services for the disposal of _____ tons of Acceptable Waste generated within the County.

**ARTICLE 3
CONTRACTOR'S OBLIGATIONS**

The work to be done under the Disposal Services Agreement is indicated in the Contract Documents, which include all of the Bid Specifications for the disposal of Acceptable Waste. The Contractor shall furnish and/or obtain all labor, materials, plans, tools, supplies, equipment, transportation, appliances, licenses, permits, and other facilities and things necessary or proper for or incidental to dispose of Acceptable Waste and shall provide the Disposal Services in the manner and within the time required in the Contract Documents at the prices bid, agreed upon, and fixed thereof.

**ARTICLE 4
INSURANCE**

The Contractor and any of the Contractor's subcontractors, prior to the Contract Date, shall provide at its own expense, the following insurance, together with evidence of such insurance as stated below. Sixty (60) days prior to cancellation or material change or notice of non-renewal or material change in the policies, the Contractor and/or the subcontractor shall give notice to the UCUA, by registered mail, return receipt requested, for all of the following stated insurance policies. The Certificate of Insurance shall state:

"Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will mail sixty (60) days written notice to the Certificate holder named to the left."

All notices shall name the Contractor or subcontractor and identify the Disposal Services Agreement. All policies shall be endorsed naming the UCUA as additional insureds. All policies shall require that the insured will pay all defense claims and any judgments entered herein. It is expected that all policies will be issued on an occurrence basis. The UCUA may waive or modify any requirement stated herein if the UCUA, in its sole judgment and discretion, deems it would be in its best interest to do so.

(A) WORKERS' COMPENSATION

The Contractor and/or subcontractor shall obtain Standard Workers' Compensation Insurance indemnifying the Contractor and/or subcontractor and the UCUA against any loss arising from liability or injuries sustained by any and all agents, servants or employees of the Contractor and/or subcontractor who shall be entitled to compensation under the Workers' Compensation Law of the State of New Jersey. If the Contractor and/or subcontractor are incorporated outside of the State of New Jersey then said policy must include "Other States Endorsements".

(B) GENERAL LIABILITY

The Contractor and/or subcontractor shall obtain Comprehensive General Liability Insurance on an "occurrence" form with a ONE MILLION DOLLARS (\$1,000,000) combined single limit of liability per occurrence and a THREE MILLION DOLLARS (\$3,000,000) annual aggregate. The Policy shall include the Board Form Endorsement if written on a 1973 Occurrence Form. If written on a 1990 Simplified Occurrence Form, the Policy will contain no endorsements that would limit or eliminate the coverage provided by the ISO version without endorsements and will include ISO Form CG 25 03 11 85. Amendment - Aggregate Limits of Insurance (per Project).

(C) AUTOMOBILE LIABILITY

The Contractor and/or subcontractor shall obtain Automobile Liability Insurance with a minimum combined single limit of liability of one million dollars (\$1,000,000) per accident. Said Policy must include coverage for owned, non-owned and hired autos. The Policy must also have an MCS-90 endorsement, a true copy of which must be filed with the UCUA. The Contractor and/or subcontractor shall respond to environmental liability while used motor oil is in transit from a collection site to the Contractor's and/or subcontractor's ultimate designation. The policy must provide for the defense of the first named insured, as well as, the UCUA and the County each of whom are to be endorsed to the policy as additional insured.

(D) DISABILITY

The Contractor and/or subcontractor shall provide proof of compliance with the Disability Benefits Law.

(E) OPTIONAL LIMITS

Excess or umbrella Liability Policy (to respond in excess of the commercial general liability, employers liability and commercial automobile liability policies) at limits of \$5,000,000, \$5,000,000 and \$5,000,000 combined single limits per occurrence.

(F) POLLUTION LIABILITY COVERAGE

The Successful Bidder(s) shall provide pollution liability coverage in the amount of \$5,000,000 per occurrence and \$10,000,000 annually in the aggregate.

(G) POLICY CHANGES

If at any time any of the foregoing policies shall be or become unsatisfactory to the UCUA, as to form or substance, or if a company issuing any such policy shall be or become unsatisfactory to the UCUA, the Contractor and/or subcontractor shall, upon notice to that effect from the UCUA, within thirty (30) days obtain a new policy, submit the same Authority for approval and submit a Certificate hereof as hereinabove provided. Upon failure of the Contractor to furnish, deliver and maintain such insurance as above provided, this Disposal Services Agreement, at the election of the UCUA, may be forthwith declared suspended, discontinued or terminated. Failure of the Contractor and/or subcontractor to take out and/or maintain or the taking out and/or maintenance of any required insurance, shall not relieve the Contractor and/or subcontractor of any liability under the Disposal Services Agreement. All policies required above shall contain a sixty (60) day notice of cancellation and/or of non-renewal and shall require the insured to notify the UCUA of its intent to either cancel or not to renew immediately.

(H) INSURANCE COMPANIES

The Contractor and/or subcontractor shall use an Insurance Company(ies) that has (have) an A.M. Best Company rating of at least AX. The UCUA, in its sole judgment and discretion, if it considers it appropriate to do so, may allow the Contractor and/or subcontractor to use an insurance company(ies) that is (who are) authorized to underwrite insurance risks for the specific line(s) of coverage by the Department of Insurance of the State of New Jersey.

(I) HOLD HARMLESS PROVISION

Contractual Liability Insurance: The Contractor and/or subcontractor shall be required to agree to indemnify, defend, and hold harmless the UCUA, its commissioners, consultants, and its respective officers, agents, contractors, subcontractors, servants and employees, from and against any and all claims, demands, suits, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including attorney's fees, because of bodily injury, sickness, disease or death, sustained by any person or persons or injury or damages to, or destruction of, any property directly or indirectly arising out of, relating to, or in connection with the work, whether or not due or claimed to be due, in whole or in part, to the active, passive or concurrent negligence or fault of the Contractor and/or subcontractor, its officers, agents, servants, or employees and/or any other person or persons and whether or not such claims, demands, suits or proceedings are just, unjust, groundless, false, or fraudulent.

The Contractor and/or subcontractor shall furnish evidence to the UCUA that with respect to accomplishing the work in the Disposal Services Agreement, that it carries said Contractual Liability Insurance in the amounts specified in Paragraph B above.

ARTICLE 5 TITLES

Titles, subtitles, headings, running headlines, tables of contents, and indices are introduced merely for convenience, and shall not be taken as part of this the Disposal Services Agreement.

ARTICLE 6 OPERATIONAL RECORDS

The Contractor shall maintain complete operational records covering all the operations and performance activities under the Disposal Services Agreement. The Contractor shall submit, at the end of each month, operational statistical reports and detailed performance information to the UCUA, as required pursuant to the Bid Specifications, including hours of operation, amount of solid waste received at the Disposal Facility(ies) under the terms of this Disposal Services Agreement, accident and personal injury reports, plus additional information as requested by the UCUA.

ARTICLE 7 SERVICE NOT TO BE INTERRUPTED OR ABANDONED

There shall be no interruption in the services to be rendered and the work to be performed by the Contractor except such as is due to acts of God; fire; earthquake, landslides, hurricanes, tornadoes, severe weather, partial or entire failure of utilities; a flood greater than the regional one hundred (100) year flood; war, blockade, insurrection, riot or civil disturbance, acts of a public enemy; blockage of access to the Facilities; labor strike or interruption other than by Contractor; extortion, sabotage or similar occurrence; any exercise of the power of eminent domain, condemnation or other taking by the action of any Governmental Body on behalf of any public, quasi-public or private entity; any act of a Governmental Body; or a change in law.

ARTICLE 8 INSPECTION

All of the work under the Disposal Services Agreement shall be subject to inspection of the UCUA, or its designated representatives, for the purposes of determining compliance with the provisions of the Disposal Services Agreement. Authorized representatives of the UCUA shall be permitted access at all reasonable times to all portions of the work during operations and at all reasonable times after the Commencement Date.

**ARTICLE 9
CONTRACT DOCUMENTS**

It is understood that all the terms, provisions, conditions and obligations set forth in the Bid Specifications, including Notice to Bidders, Bidder's Information/Cover Letter, Cost Proposal, Bid Security or Bid Bond, Consent of Surety or Consent of Bank, Performance Bond or Performance Letter of Credit or Performance Guaranty, Ownership Disclosure Statement, Non-Collusion Affidavit, Consent to Investigation, Statement of Relevant Experience, Insurance Certificates, Special Provisions, Performance Specifications, Technical Proposal, Equipment Certification, Appendices, together with any Addenda to any of the foregoing, shall constitute a part of this Disposal Services Agreement and are to have the same force and effect as if set forth specifically and at length herein.

**ARTICLE 10
SCHEDULE AND TIME FOR INITIATION OF SERVICES**

Time is an essential element of the Disposal Services Agreement. The Contractor shall receive all Acceptable Waste generated within Union County as provided in the Disposal Services Agreement. While the Term of the Disposal Services Agreement shall not commence until receipt of all regulatory approvals, the Contractor shall be prepared to commence the performance of Disposal Services pursuant to the Disposal Services Agreement on July 1, 2007.

**ARTICLE 11
DAMAGES FOR DELAY**

There shall be no damages for delay to the Contractor for acts by the UCUA. The Contractor shall be prepared to commence the performance of Disposal Services pursuant to the Disposal Services Agreement on July 1, 2007.

**ARTICLE 12
COMPENSATION TO BE PAID CONTRACTOR
FOR DISPOSAL OF ALL SOLID WASTE**

In consideration of the faithful performance of this Disposal Services Agreement by the Contractor, the UCUA will pay the Contractor for the number of tons of solid waste that the UCUA causes to be disposed of each month, at the Unit Charge set forth in Schedule 1 attached hereto.

**ARTICLE 13
CONSENT OF SURETY; CONSENT OF BANK**

The Contractor has furnished to the UCUA a (i) Consent of Surety, or a (ii) Consent of Bank, indicating that such Surety or Bank will provide the performance bond, or performance letter of credit, as appropriate, in the form provided in Form A-10 or A-12, as appropriate, upon the issuance of a notice to proceed to the Contractor by the UCUA. Such Consent of Surety or Consent of Bank,

as appropriate, shall provide that such Surety or Bank unconditionally agrees that its Consent shall remain effective for the Term of the Disposal Services Agreement, or until such Surety or Bank issues a performance letter of credit or performance bond, as appropriate.

ARTICLE 14
PERFORMANCE BOND; LETTER OF CREDIT; OR PERFORMANCE
GUARANTY EXECUTED BY A PUBLIC TAXING AUTHORITY

The Contractor shall furnish to the UCUA a (i) performance letter of credit, (ii) performance bond, or (iii) if the Contractor is a public body, performance guaranty executed by Public Taxing Authority (as defined in Section 4 of the Bid Specifications) for the faithful performance of services required by this Disposal Services Agreement in the amount of [\$ 1,375,000.00].

Such performance letter of credit, performance bond or performance guaranty shall be submitted to the UCUA upon the issuance of a notice to proceed by the UCUA. The UCUA shall retain the Contractor's Bid Bond or Bid Security until the issuance of a notice to proceed and receipt by the UCUA of the Contractor's performance letter of credit, performance bond, or performance guaranty. Such performance letter of credit, performance bond or performance guaranty shall remain in effect for the Term of the Disposal Services Agreement.

The terms of such performance letter of credit, performance bond or performance guaranty shall be as set forth in the Bid Specifications. The form of the performance letter of credit, performance bond or performance guaranty shall be agreed to at the time of signing this Disposal Services Agreement.

It is further mutually agreed between the parties hereto that if at any time after the notice to proceed is issued, the UCUA deems the surety or sureties upon such form of letter of credit or bond to be unsatisfactory or if for any reason such letter of credit, performance bond or performance guaranty ceases to be adequate to cover the performance of work, the Contractor shall, within seven (7) days after the receipt of notice from the UCUA to do so, furnish an additional form of letter of credit, performance bond, or performance guaranty in such form and amount, and with such surety or sureties or guarantor(s) as appropriate, as shall be satisfactory to the UCUA. Failure to comply with the terms of this Article will constitute breach of contract on the part of the Contractor.

ARTICLE 15
LAWS AND ORDINANCES

All federal, state and local laws, statutes, and ordinances, and all rules, regulations, methods and procedures of all governmental boards, bureaus, offices, commissions, and other agents shall be observed by the Contractor as far as they apply.

**ARTICLE 16
INVOICES AND PAYMENT**

By the end of business on the third business day of each month during the term of the Disposal Services Agreement, the Contractor shall submit to the Authority an invoice for services performed in the month preceding. After certification by the proper Authority personnel, the Authority shall approve a payment of bills at its regularly scheduled monthly meeting, and a check may issue by the Friday following said approval of bills. Each invoice shall identify the number of tons of Acceptable Waste disposed of on each day of the billing period. In the event that the Authority disputes an invoice in whole or in part, it shall remit the undisputed portion pending resolution of such dispute. All payments to be made by the Authority hereunder are subject to the availability and annual appropriation of funds pursuant to and as required by N.J.S.A. 40A:11-5.

The UCUA does not and will not warrant or guarantee the amount or composition of Acceptable Waste to be available for the provision of Disposal Services hereunder. Nothing contained herein or in any of the bid documents shall be construed to guarantee or warrant such amounts or composition. Tonnage amounts set forth herein constitute either historic flow rates or estimates of future flow rates and may not be indicative of actual flow rates to be experienced in the future. Additionally, the UCUA cannot and does not warrant or guarantee that a Notice to Proceed under the Disposal Services Agreement will be issued and that the Contractor will be called upon to perform any services for which it would be entitled to compensation.

**ARTICLE 17
QUANTITY GUARANTEES**

The Contractor is capable of accepting and processing not less than the following peak rates in order to properly dispose of Acceptable Waste in accordance with this Disposal Services Agreement:

46,000 Tons per month
12,000 Tons per week
2000 Tons per day

**ARTICLE 18
INADVERTENT DELIVERIES OF UNACCEPTABLE WASTE**

The UCUA shall use all reasonable efforts to deliver, or cause to be delivered, only Acceptable Waste to the Facilities. However, the parties hereby agree that any inadvertent deliveries of Unacceptable Waste to the Facilities shall not constitute a breach of the UCUA's obligations hereunder. The Contractor shall have the responsibility to inspect all vehicles delivering waste to the Facilities in accordance with the waste inspection plan for the Facilities. In the event any waste delivered to the Facilities is identified by the Contractor as Unacceptable Waste, the Contractor shall

reload the Unacceptable Waste on to a vehicle supplied by the entity that delivered the Unacceptable Waste to the Facilities and shall notify the UCUA immediately of the attempted delivery of Unacceptable Waste. In the event that Unacceptable Waste is accepted by the Contractor, and unable to be reloaded on to a vehicle supplied by the entity that delivered the Unacceptable Waste, the Contractor shall be solely responsible for the costs associated with the handling, transportation, and disposal of such Unacceptable Waste.

ARTICLE 19 TERM

The Term shall be based upon the Contractor's Bid and the contract award by the UCUA, and shall begin on the Commencement Date and be either (i) three years, through, and including, June 30, 2010; or (ii) five (5) years, through and including, June 30, 2012, unless earlier terminated pursuant to these Bid Specifications or the Disposal Services Agreement.

ARTICLE 20 EVENTS OF DEFAULT AND TERMINATION OF CONTRACT

1. EVENTS OF DEFAULT BY CONTRACTOR

The following shall constitute Events of Default on the part of the Contractor:

- a. Failure of the Contractor to perform in a timely manner any obligation under this Disposal Services Agreement, such as, but not limited to, failure to correct any operation in violation of environmental standards or permits, refusals or failures to supply proper materials; failure to properly maintain the facilities; failure to make or cause to be made prompt payment for materials or labor; and violation of laws, ordinances, rules, regulations, or the permits; or orders of any public authority having jurisdiction over the disposal operations; or the Contractor's obligations under this Disposal Services Agreement.
- b. Failure of the Contractor to meet the obligations to accept solid waste as specified in this Disposal Services Agreement.
- c. Failure of the Contractor to dispose of all solid waste that it receives in accordance with the Applicable Law.
- d. Failure to pay the penalties for nonperformance as specified in this Disposal Services Agreement.
- e. (i) The Contractor's being or becoming insolvent or bankrupt or ceasing to pay its debts as they mature or making an arrangement with or for the benefit of its creditors or the appointment of a receiver, trustee, or liquidator for a substantial part of its property, or (ii) a bankruptcy, winding up, reorganization, insolvency, arrangement or

similar proceeding instituted by or against the Contractor under the laws of any jurisdiction, which proceeding has not been dismissed within thirty (30) days, or (iii) any action or answer by the Contractor approving of, consenting to, or acquiescing in, any such proceeding, or (iv) the levy of any distress, execution or attachment upon the property of the Contractor which shall substantially interfere with its performance hereunder.

- f. Failure of the Contractor to comply with the schedule and time for initiation of services specified in this Disposal Services Agreement.
 - g. Failure to maintain, without notification or restriction, Disposal Facility(ies) capable of providing all of the required Disposal Services.
2. **Termination of Agreement by the UCUA.** If the Contractor shall default in the performance of any of the terms, conditions, and provisions of the Disposal Services Agreement, then and in that event, the UCUA may notify, in writing, the Contractor and its surety to remedy its neglect or default and require the said Contractor to comply with the terms, conditions, and provisions of the Disposal Services Agreement that it is violating. If the said notification be without effect forty-eight (48) hours after the delivery thereof or twenty-four (24) hours when, in the opinion of the UCUA, immediate action is necessary to safeguard life, property or the health, safety and welfare of the public, then and in that event the UCUA shall have the right to declare the Contractor in default, and to notify the Contractor to discontinue the work or any part thereof under the Disposal Services Agreement.

In the event that the amount of solid waste to be transferred, transported and delivered to the Disposal Facility(ies) is reduced or eliminated as a result of the Authority's inability to direct waste through a mandatory wasteflow system, the Authority hereby reserves the right, in its sole discretion, to terminate the Disposal Services Agreement upon sixty (60) days written notice to the Contractor.

3. **Force Majeure.** Neither party shall be responsible for any delays, losses, damages, or failures of performance of any of its obligations under this Disposal Services Agreement when such delays, losses, damages, or failures are due to an Act of God; act of fire, earthquake, landslides, hurricanes, tornadoes, severe weather; partial or entire failure of utilities; a flood greater than the regional one hundred year flood; war, blockade, insurrection, riot or civil disturbance, acts of public enemy; blockage of access to the landfill; labor strike or interruption, other than by Contractor, extortion, sabotage or similar occurrence; any exercise of power of eminent domain, condemnation or other taking by the action of any governmental body on behalf of any public, quasi-public or governmental body; or a change in law.
4. **Suspension of Operations.** In the event that either the UCUA or the Contractor's performance under this Disposal Services Agreement is prohibited or suspended in any way

by the action, ordinance, decision, requirements, order, decree or judgment, of any governmental entity, public authority or court, the UCUA will be under no obligation to make any payment to the Contractor during such period of prohibition or suspension; provided, however, that either party may terminate the Disposal Services Agreement after the ninetieth (90th) consecutive day of prohibition or suspension by notice in writing to the other party to be effective upon receipt. In the event of the removal of the prohibition or suspension prior to such termination, the parties will be obligated to resume performance under this Disposal Services Agreement.

5. **Additional Remedies.** In the case of default by the Contractor, the remedies herein provided shall be in addition to and not in substitution of the rights and remedies that would otherwise be vested in the UCUA, all of which rights and remedies are specifically reserved. The failure of the UCUA to exercise any of the remedies herein provided shall not preclude the resort to any other appropriate remedy.

The use of specific remedies herein provided shall not prevent subsequent or concurrent resort to any other remedy that by law or equity would be vested in the UCUA for recovery of damages or otherwise, in the event of default of the Contractor. The Contractor shall pay to the UCUA on demand all loss, expense, cost or damage suffered or incurred by it by reason of any default.

ARTICLE 21 AFFIRMATIVE ACTION

Pursuant to P.L. 1975, C. 127 (N.J.A.C. 17:27), during the performance of this Disposal Services Agreement, the Contractor agrees as follows:

The Contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the public agency compliance officer setting forth provisions of this non-discrimination clause.

The Contractor or subcontractor, where applicable, will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation.

The Contractor or subcontractor, where applicable, will send to each labor union or representative or workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer advising the labor union or

workers' representative of the Contractor's commitments under this act and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

The Contractor or subcontractor, where applicable, agrees to comply with the regulations promulgated by the Treasurer pursuant to P.L. 1975, c. 127, as amended and supplemented from time to time and the Americans with Disabilities Act.

The Contractor or subcontractor agrees to attempt in good faith to employ minority and female workers consistent with the applicable county employment goals prescribed by N.J.A.C. 17:27-5.2 promulgated by the Treasurer pursuant to P.L. 1975, c. 127, as amended and supplemented from time to time or in accordance with a binding determination of the applicable county employment goals determined by the Affirmative Action Office pursuant to N.J.A.C. 17:27-5.2 promulgated by the Treasurer pursuant to P.L. 1975, c. 127, as amended and supplemented from time to time.

The Contractor or subcontractor agrees to inform in writing appropriate recruitment agencies in the area, including employment agencies, placement bureaus, colleges, universities, labor unions, that it does not discriminate on the basis of age, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices.

The Contractor or subcontractor agrees to revise any of its testing procedures, if necessary, to assure that all personnel testing conforms with the principles of job-related testing, as established by the statutes and court decisions of the State of New Jersey and as established by applicable Federal law and applicable Federal court decisions.

The Contractor or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, creed, color, national origin, ancestry, marital status, sex, affectional and sexual orientation, and conform with the applicable employment goals, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions.

The Contractor and its subcontractors shall furnish such reports or other documents to the Affirmative Action Office as may be requested by the office from time to time in order to carry out the purposes of these regulations, and public agencies shall furnish such information as may be requested by the Affirmative Action Office for conducting a compliance investigation pursuant to Subchapter 10 of the Administrative Code (N.J.A.C. 17:27).

ARTICLE 22 INDEMNIFICATION

The Contractor for itself, its successors, assigns, heirs, executors, and administrators, shall indemnify, save harmless and defend the UCUA, Union County and their respective officials, officers, members, employees, consultants and agents (the "UCUA Indemnified Parties") from and against any and all liabilities, claims, penalties, forfeitures, suits and the costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorneys' fees), which the UCUA Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of death or bodily injuries to any person, destruction or damage to any property, contamination of or adverse effects on the environment, or any violation of governmental laws, regulations or orders caused, in whole or in part, by the Contractor's performance or failure to perform its obligations under the provisions of this Disposal Services Agreement or by any negligent or willful act or

omission of the Contractor, its agents, representatives, members, employees or subcontractors in the performance of this Disposal Services Agreement, or on account of the use of patented appliances, products, processes, constructions, designs or methods, or the infringement of any patent, trademark or copyright, and the Contractor shall pay all royalties, charges and penalties which may become due or payable by reason of such use or infringement. Upon request by the UCUA, the Contractor shall pay all royalties, charges and penalties that may become due or payable by reason of such use or infringement. Upon request by the UCUA, the Contractor shall submit evidence of the full payment of such royalties, charges and penalties, or in lieu thereof the Contractor shall give such security, as required by the UCUA, as necessary to indemnify, defend, and save harmless the UCUA, and all its respective officers and employees, as aforesaid.

ARTICLE 23 SUITS AND CLAIMS

It is understood and agreed that the Contractor shall be deemed and considered an independent Contractor in respect to the work covered by this Disposal Services Agreement, and shall assume all risks and responsibility for casualties of every description in connection with the work that can be attributed either directly or indirectly to the Contractor and in the operation of the Disposal Facilities. It is not the intention of this Disposal Services Agreement or of anything herein provided to confer a third party beneficiary right of action upon any person whatever and nothing hereinbefore or hereinafter set forth shall be construed so as to confer upon any person other than the UCUA, a right of action either under this Disposal Services Agreement or in any manner whatsoever.

ARTICLE 24 ASSIGNMENT

Neither the UCUA nor the Contractor shall assign this Disposal Services Agreement or any monies coming due hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld. The parties hereto bind themselves, their heirs, administrators, successors, and assigns for the faithful performance of this Disposal Services Agreement.

ARTICLE 25 AUDIT OF BOOKS

The UCUA may annually audit the Contractor's books, records, and other data relating to obligations under this Disposal Services Agreement. Such audits shall be at the expense of the UCUA. Contractor shall provide all such books, records and other related data to the UCUA as reasonably requested.

ARTICLE 26
EXECUTION OF AGREEMENT

IN WITNESS WHEREOF, the parties hereto have executed this Disposal Services Agreement with their respective seals on the day and date above written in five [5] counterparts, each of which shall without proof or accounting for the other counterparts, be deemed an original contract.

ATTEST: Delaware and Hudson Railway Company, Inc.
d/b/a Canadian Pacific Railway

By: Marlene P. Wheaton - Corporate Controller /
Treasurer
TLA-Newark, LLC
d/b/a TransLoad America
acting on behalf of Delaware and Hudson
Railway Company, Inc. d/b/a Canadian Pacific
Railway as its authorized agent and contractor

Marlene P. Wheaton

Name: Marlene P. Wheaton

Title: Corporate Controller / Treasurer

ATTEST:

Assistant Secretary

Kutley

(CORPORATE SEAL)

ATTEST: THE UNION COUNTY UTILITIES AUTHORITY

By: Lisa Miskiewicz

By:

SK Garg

Title: Deputy Clerk

Title:

Sunil K. Garg, Ph.D., Esq.
Executive Director

NOTE: If the Contractor is a corporation, foreign or domestic, the Disposal Services Agreement shall be signed by the President or Vice President, attested by the Secretary or Assistant Secretary and the corporate seal or a facsimile thereof affixed. If the Contractor is a partnership, the Disposal Services Agreement shall be signed in the partnership name by one of the partners, with indication that he is a General Partner.

LISA MISKIEWICZ
NOTARY PUBLIC OF NEW JERSEY
Commission Expires June 12, 2007
L.D. # 2288655

SCHEDULE 1

**COST PROPOSAL FOR PROVISION OF DISPOSAL SERVICES
FOR ACCEPTABLE WASTE**

The undersigned Bidder hereby proposes to comply with all the requirements and perform all the work described in the Bid Specifications and other Contract Documents contained herein for the prices set for the below.

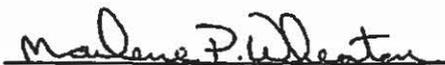
<u>Term</u>	<u>Unit Charge (\$/Ton)</u>
3 Years	Refer back to Form B-1
5 Years	

The Unit Chare shall include the cost of disposal and/or recycling residue and all host community benefits that the Disposal Facility(ies) is obligated to, or will in the future agree to pay, or is otherwise required to pay to the jurisdiction where the Disposal Facility(ies) is located, in accordance with N.J.S.A. 13:1E-28.1, or other applicable law. For the purpose of this paragraph, "all Acceptable Waste" means a maximum of 150,000 Tons Annually.

THE AUTHORITY DOES NOT WARRANT OR GUARANTEE THE AMOUNT OR COMPOSITION OF ACCEPTABLE WASTE TO BE AVAILABLE FOR DISPOSAL.

Delaware and Hudson Railway Company, Inc.
d/b/a Canadian Pacific Railway

By: **Marlene P. Wheaton – Corporate Controller / Treasurer**
TLA-Newark, LLC
d/b/a TransLoad America
acting on behalf of Delaware and Hudson Railway Company,
Inc. d/b/a Canadian Pacific Railway as its authorized agent
and contractor



Name: **Marlene P. Wheaton**
Title: **Corporate Controller / Treasurer**
Address: **76 South Orange Avenue, Suite 208**
South Orange, NJ 07079

ALL BIDDERS MUST COMPLETE SECTION I, BELOW.

SECTION I

DISPOSAL FACILITY(IES)*

1. Identify the Disposal Facility(ies) which Bidder proposes to utilize in providing Disposal Services to the Authority in accordance with the Bid Specifications:

Name of Facility: CP Rail Carrier Facility

Address of Facility: 91 A Bay Avenue
Newark, NJ 07105

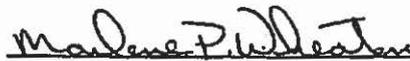
2. The amount of Acceptable Waste, in Tons, for which Bidder proposes to provide Disposal Services to the Authority at the Disposal Facility(ies) identified in Paragraph 1, above:

Yearly: 150,000 Tons

3. The distance of the Disposal Facility(ies) (identified in this Section I) from the Union County Resource Recovery Facility, Rahway, New Jersey is 12.25 road miles.

**Delaware and Hudson Railway Company, Inc.
d/b/a Canadian Pacific Railway**

By: **Marlene P. Wheaton – Corporate Controller / Treasurer
TLA-Newark, LLC
d/b/a TransLoad America
acting on behalf of Delaware and Hudson Railway Company,
Inc. d/b/a Canadian Pacific Railway as its authorized agent
and contractor**

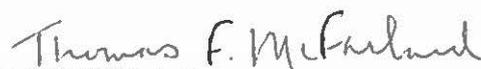


Name: **Marlene P. Wheaton**
Title: **Corporate Controller / Treasurer**
Address: **76 South Orange Avenue, Suite 208
South Orange, NJ 07079**

*In the event that Bidder proposes to provide more than one Disposal Facility, Bidder must complete Section I for each proposed Disposal Facility.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2015, I served the foregoing Objections and Request for Condition by e-mail on William A. Mullins, Esq. at *wmullins@bakerandmiller.com*, and on Mr. Mullins and all other parties of record on the service list by first-class, U.S. mail, postage prepaid.



Thomas F. McFarland