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June 11, 2014

236176
236178
ENTERED
Office of Proceedings
June 12, 2014
Part of
Public Record

VIA FEDERAL EXPRESS

Surface Transportation Board
395 E Street, SW
Washington DC 20423

EMERGENCY APPLICATION TO KEEP OPEN/REOPEN PROCEEDINGS

- Re: (1) Brookhaven Rail Terminal and Brookhaven Rail, LLC,
STB F.D. No. 35819

(2) U S Rail Corporation–Brookhaven Rail Terminal,
STB F.D. No. 35141

Dear Members of the Board:

We are attorneys for the Town of Brookhaven, New York (“Town”), which is the Respondent in STB Finance Docket No. 35819, and also which seeks to “reopen” the Board’s prior Orders and Determination in STB Finance Docket No. 35141.

The Town files this letter as an **Emergency Application** to keep open (and to reopen) the Record in STB Finance Docket No. 35819, pending the prompt filing of further, formal submissions by the Town. The Town’s forthcoming formal submissions will demonstrate that Brookhaven Rail Terminal and Brookhaven Rail LLC (collectively, “BRT”) have made materially false representations both to the STB in its filings herein, and to the United States District Court for the Eastern District of New York (Case No. 14-CV-02286) [Hon. Gary R. Brown, Magistrate Judge] in a related injunction proceeding before the District Court. Specifically, when charged by the Town with interfering with electrical utility electric and gas lines, BRT falsely claimed, under oath, in both proceedings that it “holds an easement for the property on which track will be laid [and] purchased two permanent easements from the Long Island Power Authority (“LIPA”) that expressly authorize BRT to construct rail and truck access infrastructure between Parcels A and B [the 93 acre property which BRT claims constitutes a railway “spur”]”. See, Reply of BRT dated April 3, 2014 under Finance Docket No. 35141, pp.

8 and 10; Declaration of [BRT Chief Financial Officer] Daniel K. Miller dated May 5, 2014, pars. 19 and 24; and in Mr. Miller's recent testimony before the District Court on May 20, 2014, stating "*we had to secure two easements from LIPA, across LIPA's property*" (Tr. 327)¹.

We learned today from LIPA itself (through PSEG, which operates LIPA, Long Island's principal electrical utility serving nearly 2.8 million people), that BRT possess no such easement from LIPA. According to three separate "*Notice of Cease and Desist-LIPA Owned Land-Sills Road, Yaphank, New York*" sent by LIPA/PSEG to the owners and operators of BRT (see Cease and Desist letters each dated June 10, 2014, collectively, Exhibit A hereto), LIPA states that:

"Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing in these areas may result in injury or death."

We likewise learned today from yet another Cease and Desist letter sent to BRT's legal counsel, Foley & Lardner, LLP, by the Long Island Railroad Division of the Metropolitan Transit Authority ("LIRR") that BRT "*has encroached upon, and may have engaged in sand mining on MTA Long Island Railroad ("LIRR") property*", and that the LIRR demands that BRT "*cease and desist from any further encroachment and/or mining on LIRR property*" (see attached letter of LIRR dated June 11, 2014, Exhibit B hereto).

We were also served today by BRT's counsel with a "*Motion to Close the Record and Enter Decision*" dated June 9, 2014 (the "Motion"), which Motion seeks to have the Board "*close the record and enter a decision with respect to STB Finance Docket No. 35819, based*

¹ In the same filings, BRT and Mr. Miller stated:

"Contrary to the Town's claims, BRT has not laid track directly under the Long Island Power Authority ("LIPA") power lines without proper authorization."

All of the foregoing documents are already before the Board upon the Town's Supplemental filings here.

Surface Transportation Board

June 11, 2014

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upon the pleadings and record as of this date, June 9, 2014". As a consequence, this letter constitutes the Town's **Emergency Application** to keep the Record before the Board open until such time as the Town can obtain, in evidentiary form suitable for filing with the Board, appropriate opposing submissions (including the possible intervention by, or joinder in the Town's claims by LIPA and/or the LIRR).

We further note that we are providing a copy of this letter to Hon. Gary R. Brown, Magistrate Judge of the United States District Court before whom the related injunction proceedings are pending, since the Town will also promptly apply to the United States District Court to reopen the Hearing Record of the injunction proceedings before the District Court upon the same grounds.

We thank the Board for its attention and courtesy.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP


Robert M. Calica

RMC:ds

cc: Hon. Gary R. Brown, U.S.M.J. (*via ECF and Federal Express w/ attachments*)
Foley & Lardner, LLP
Yonaton Aronoff, Esq. (*via e-mail and first class mail w/ attachments*)
Farrell Fritz P.C.
Kevin P. Mulry, Esq. (*via e-mail and first class mail w/ attachments*)

Attachments: Exhibits A and B

EXHIBIT A



Real Estate Services
175 East Old Country Road
Hicksville, New York 11801
516.545.5074
Linda.E.DeSantis@j.pseg.com

June 10, 2014

Sills Road Realty LLC
d/b/a Brookhaven Rail Terminal
485 Underhill Boulevard, Suite 103
Syosset, NY 11791

(via overnight service)

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Sir/Madam:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

Furthermore, Long Island Electric Utility Servco LLC (Servco), as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA will hold you responsible for not only the damage to the LIPA Parcel and LIPA's property located thereon as a result of such continued use/interference, but also for any personal injury and/or economic losses, as a direct or indirect result of such use/interference, including without limitation loss of electric service to LIPA's customers. This letter is sent without prejudice to any rights or remedies that Servco and/or LIPA may have with respect to this matter, including equitable relief and/or monetary damages.

Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.


Linda E. DeSantis
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz
Christopher Kent, Farrell Fritz



Real Estate Services
175 East Old Country Road
Hicksville, New York 11801
516.545.5074
Linda.E.DeSantis@pseg.com

June 10, 2014

Andrew Kauffman (*via overnight mail*)
US Rail Corporation
7846 W. Central Avenue
Toledo, OH 43617

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Mr. Kauffman;

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

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Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

A handwritten signature in black ink that reads "Linda E. DeSantis".

Linda E. DeSantis
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz
Christopher Kent, Farrell Fritz



Real Estate Services
175 East Old County Road
Hicksville, New York 11801
516 545 5074
Linda.E.DeSantis@pseg.com

June 10, 2014

Suffolk & Southern Rail Road LLC
485 Underhill Boulevard
Suite 103
Syosset, NY 11791

RE: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Sir/Madam:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

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Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.

A handwritten signature in cursive script, appearing to read "Linda E. DeSantis".

Linda E. DeSantis
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz
Christopher Kent, Farrell Fritz



Real Estate Services
175 East Old Country Road
Hicksville, New York 11801
516 545 5074
Linda.E.DeSantis@pseg.com

June 10, 2014

Ron Cohen *(via overnight service)*
Brookhaven Rail Terminal
205 Sills Road
Yaphank, NY 11980

Re: Notice of Cease and Desist – LIPA owned land – Sills Road, Yaphank, New York

Dear Mr. Cohen:

Let this letter serve as formal notice to **immediately** cease all unauthorized Brookhaven Rail Terminal activities within the Long Island Lighting Company's owned parcel (LIPA Parcels 226, 253, 254) located in Yaphank, New York.

As of this date, we have been notified that Brookhaven Rail Terminal and its agents have trespassed onto the LIPA owned property and have illegally disturbed and removed large portions of our property's topography and compromised the adjacent high voltage electrical transmission and distribution system as well.

Please be aware that our properties in the existing condition are unsafe since our electrical equipment and facilities have been tampered with, continued trespassing on these areas may result in injury or death.

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Please confirm in writing within three (3) days of this date that you will accede to the above demands at the address listed above.


Linda E. DeSantis
Senior Real Estate Representative

cc: Peter Curry, Farrell Fritz
Christopher Kent, Farrell Fritz

EXHIBIT B



Direct Dial: (718) 558-8264

**Via email (dralston@foley.com)
and first class mail**

June 11, 2014

David T. Ralston, Jr., Esq.
Foley & Lardner LLP
3000 K Street NW
Suite 600
Washington, DC 20007-5109

Re: Encroachment on LIRR right of way

Dear Mr. Ralston:

It has come to our attention that your client, Brookhaven Rail Terminal ("BRT"), has encroached upon and may have engaged in sand mining on MTA Long Island Rail Road ("LIRR") property. This encroachment and possible mining, which is south of BRT's facility in Yaphank, includes but is not necessarily limited to BRT's placement of a fence, signs, and sand on the LIRR's right of way. At some locations, BRT's fence is more than 20 feet within the LIRR's property line. (Please see attached pictures.)

BRT is advised to cease and desist from any further encroachment and/or mining on LIRR property. BRT should also contact Donna Dill (Telephone 718-558-3218) in the LIRR's Engineering Department within three business days of the date of this letter to discuss the necessary procedures for BRT to remove the items (including but not limited to the fence, signs, and sand) that are currently on LIRR property. Should BRT fail to do so, the LIRR will be required to take appropriate action at BRT's expense.

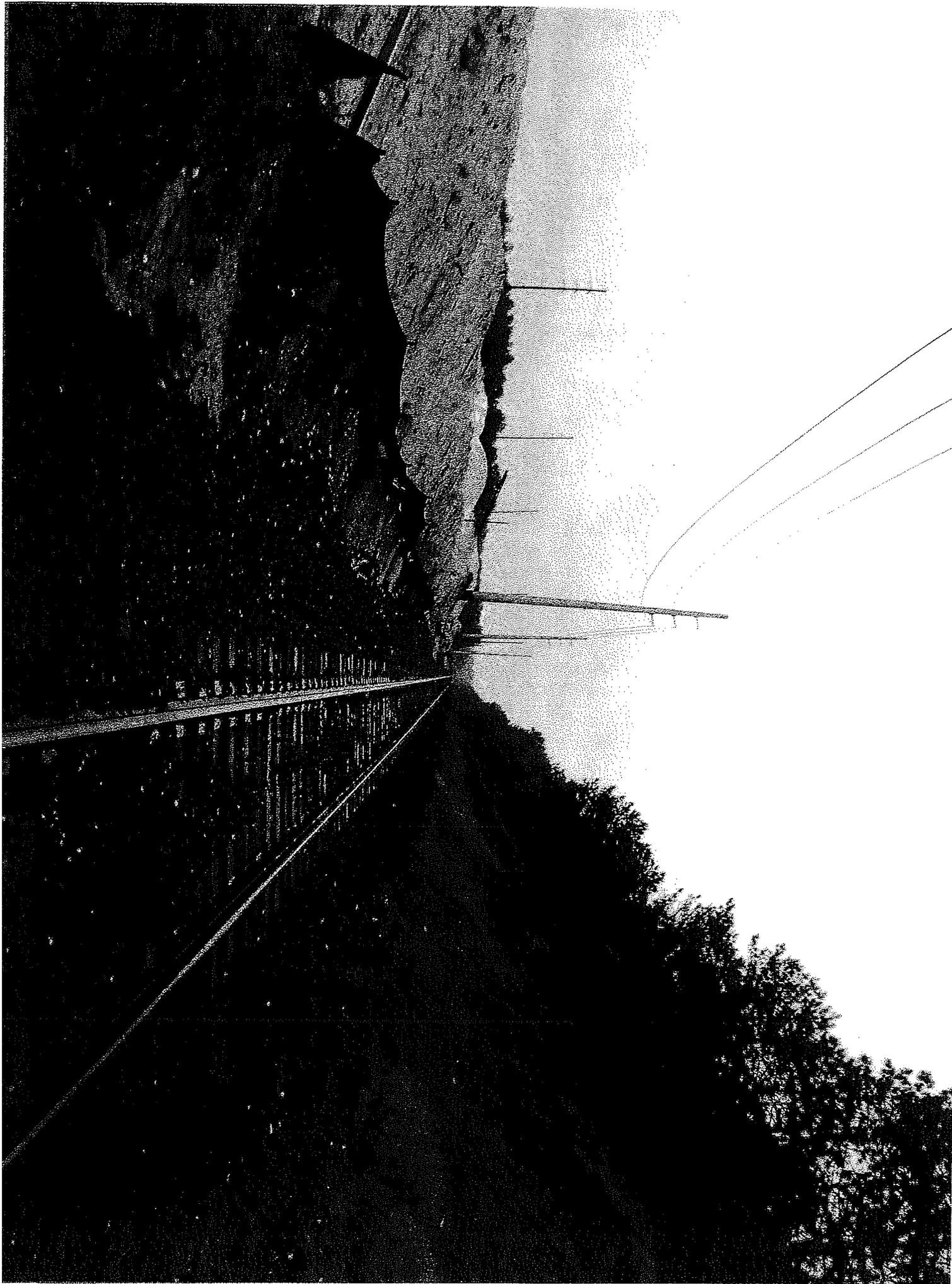
Should you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard L. Gans", with a stylized flourish at the end.

Richard L. Gans
Vice President/General Counsel & Secretary

cc: Glenn M. Greenberg
Hector Garcia









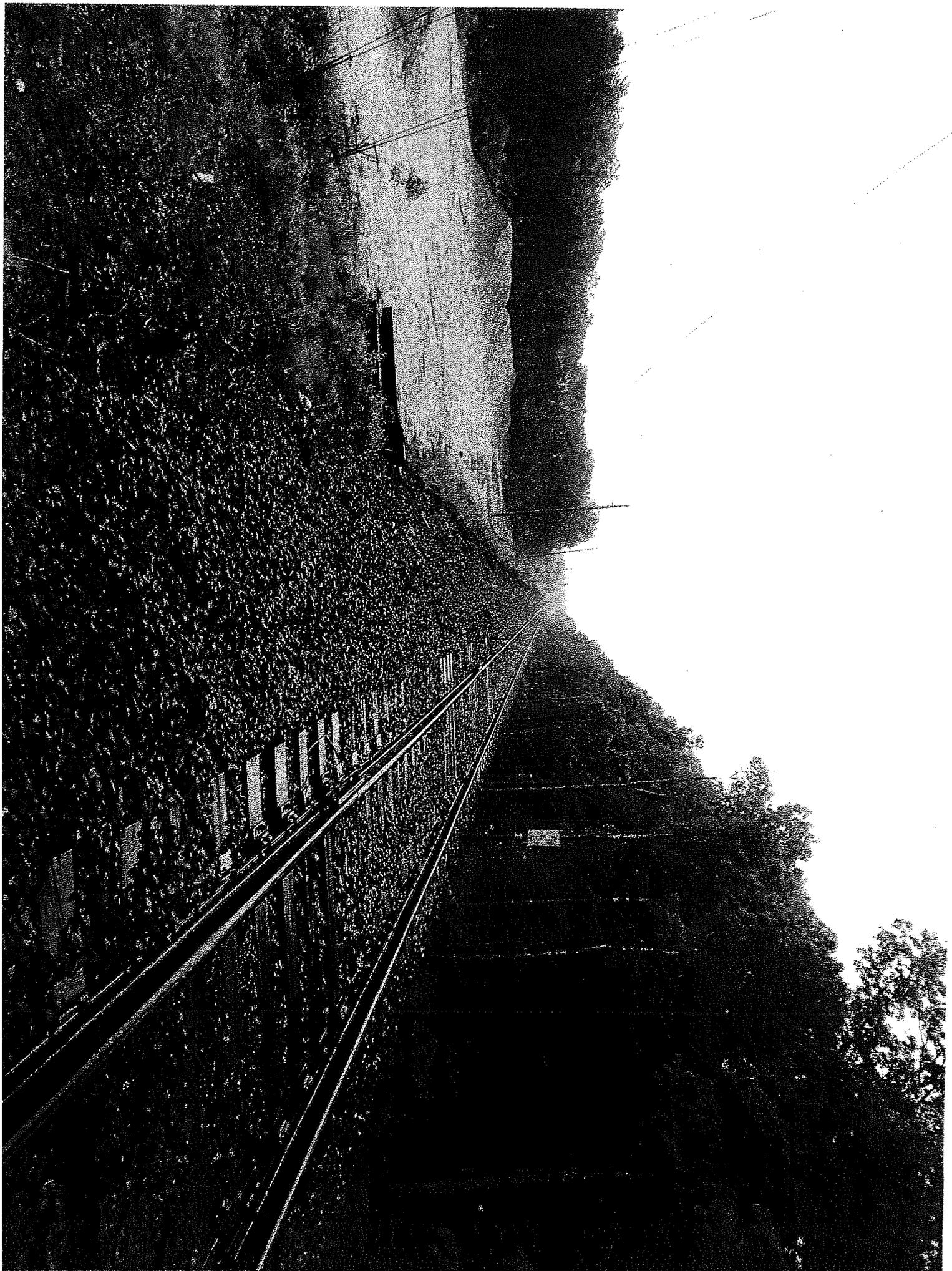
POSTED
NO TRESPASSING
PRIVATE PROPERTY
NO VEHICLES

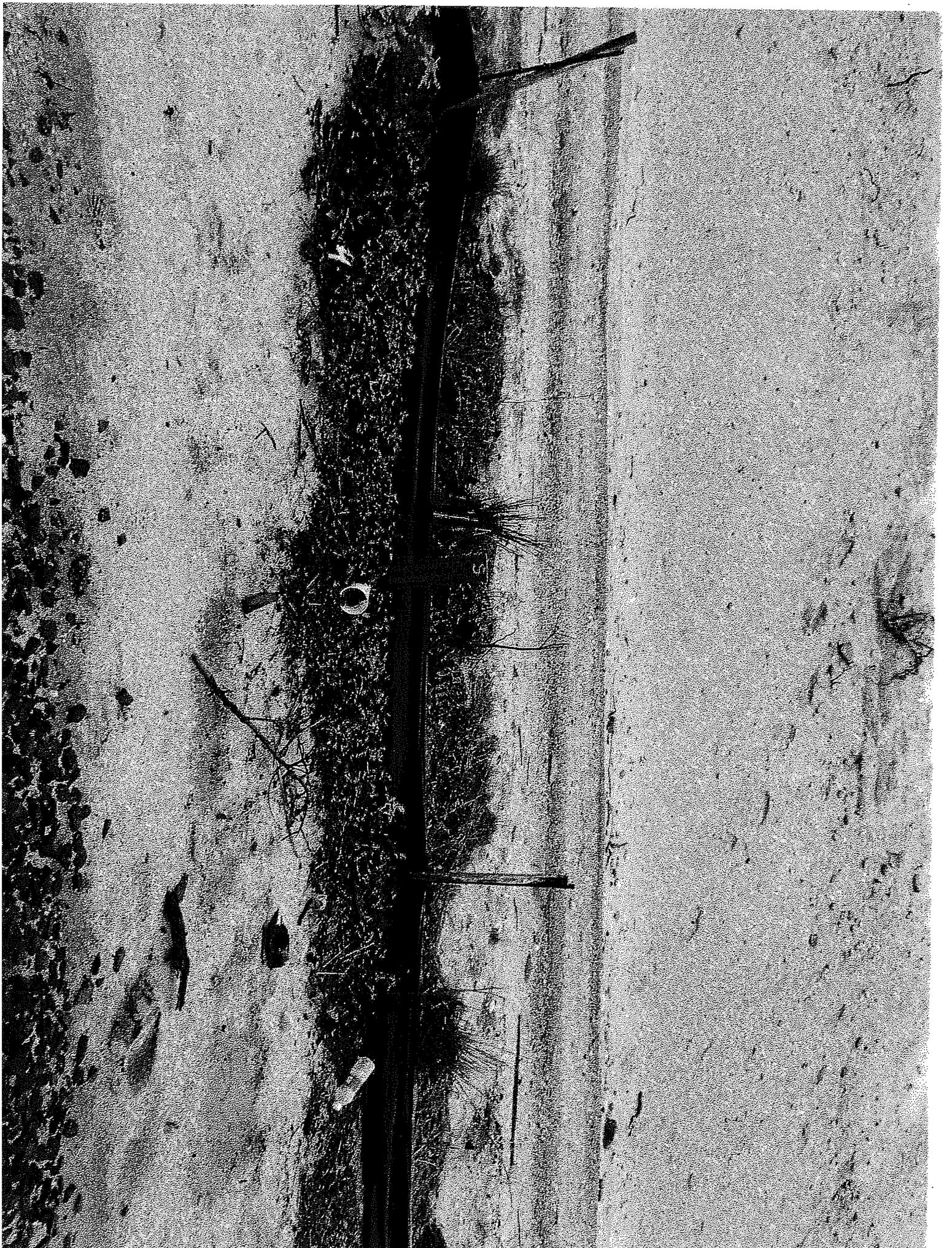
GLOW













LONG ISLAND
RAILROAD

UNDERGROUND
CABLE
ROAD



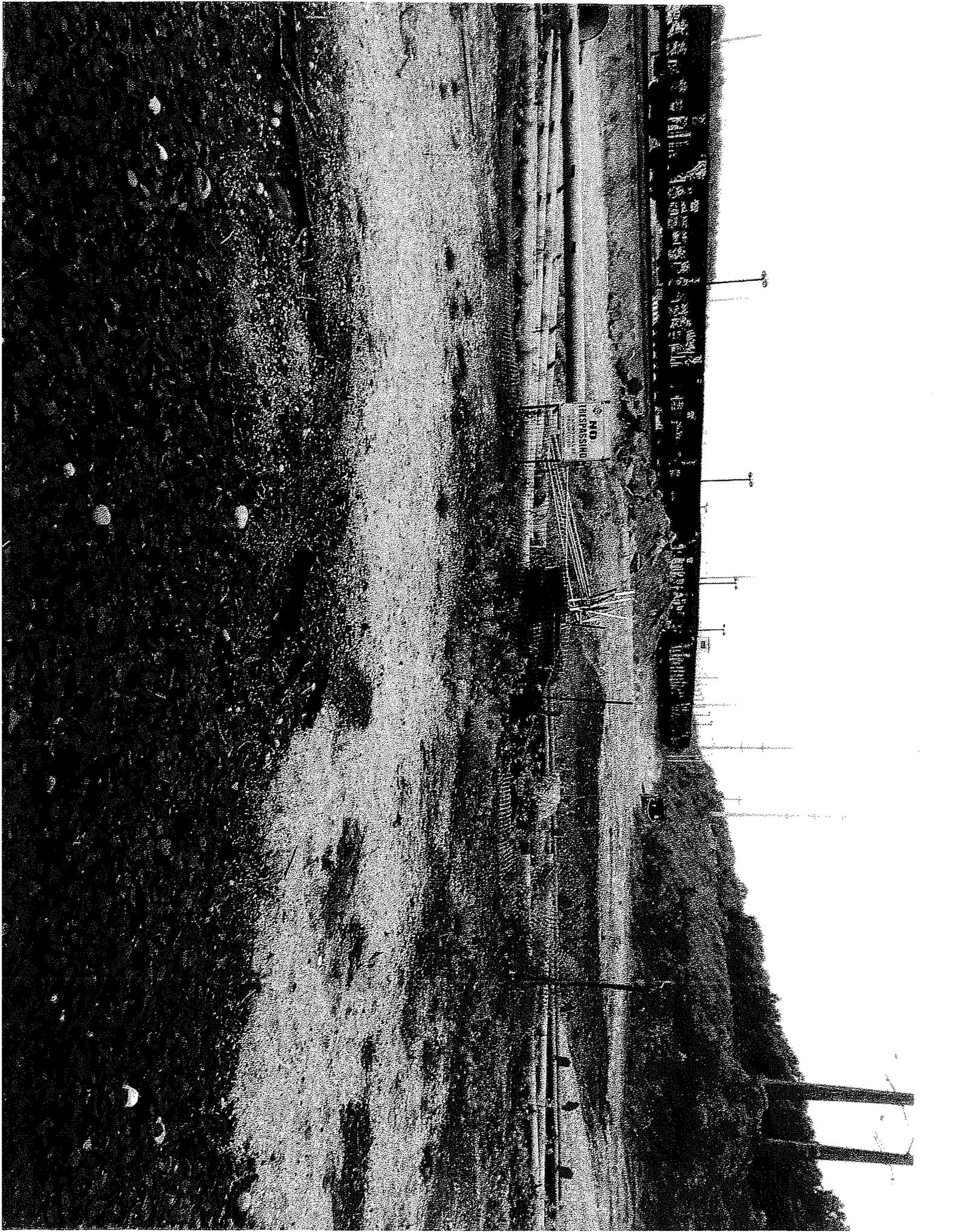
UPPER
DOWNHILL
SIDE

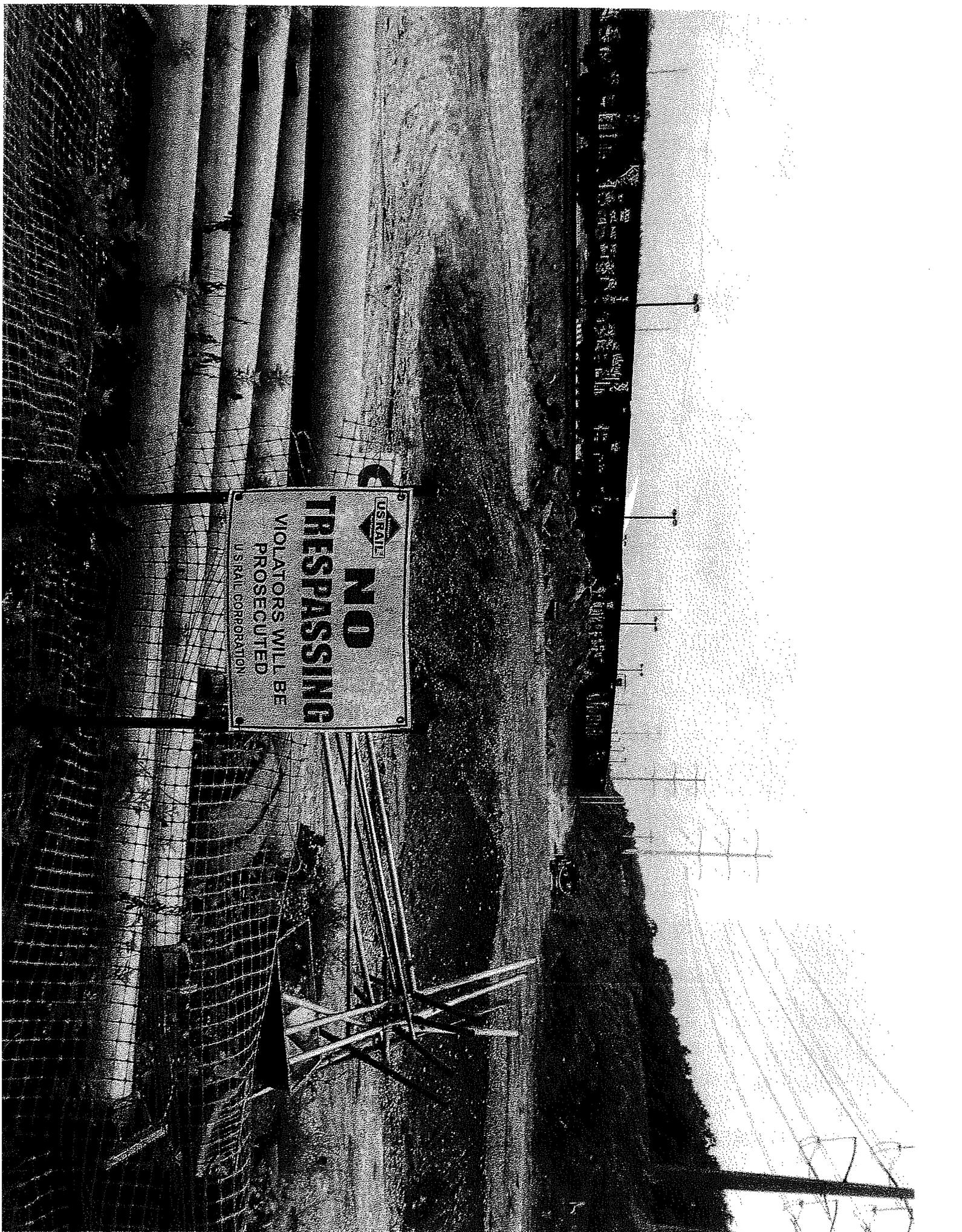
IN THIS
DIRECTION

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S







U.S. MAIL CORPORATION
NO TRESPASSING
VIOLATORS WILL BE
PROSECUTED
U.S. MAIL CORPORATION

BRT
Burlington Rapid Transit
POSTED
NO TRESPASSING
VIOLATORS WILL BE
PROSECUTED
THIS MESSAGE IS FOR INFORMATION ONLY



CERTIFICATE OF SERVICE

I, JUDAH SERFATY, hereby certify that on the 11th day of June, 2014, I caused to be served the within **EMERGENCY APPLICATION TO KEEP OPEN/REOPEN PROCEEDINGS** upon the attorneys/parties by Emailing same to their email addresses and by electronically filing same with the Surface Transportation Board:

TO: Vanessa L. Miller, Esq.
Foley & Lardner LLP
Attorneys for U S Rail Corporation & Brookhaven Rail Terminal (in F.D. No. 35141)
and for Brookhaven Rail Terminal and Brookhaven Rail, LLC (in F.D. No. 35819)
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and Brookhaven Rail, LLC (in F.D. No. 35819)
3000 K Street, N.W., 6th Floor
Washington, D.C. 20007
dralston@foley.com

Dated: June 11, 2014



JUDAH SERFATY