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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35819

**BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC—
PETITION FOR DECLARATORY ORDER**

EXPEDITED HANDLING REQUESTED

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Brookhaven Rail Terminal (“BRT”) and Brookhaven Rail, LLC, a Class III rail carrier (“Brookhaven Rail”)(collectively, “Petitioners”), petition the Surface Transportation Board (“Board”) pursuant to the Board’s authority under 5 U.S.C. § 554(e), 49 U.S.C. § 721(a) and 49 C.F.R § 1117.1, to enter a declaratory order that:

(1) Railroad track that BRT is constructing on property adjacent to BRT’s existing rail facilities in the Town of Brookhaven, New York (“Town”), constitutes a “spur, industrial, team, switching, or side track” within the scope of 49 U.S.C. § 10906, and is under the exclusive jurisdiction of the Board;

(2) BRT’s construction of said track and Brookhaven Rail’s transportation operations thereon are exempt from the Board’s licensing and economic regulation, either as a spur or as an ancillary expansion of BRT’s existing rail transportation facilities, and are not subject to environmental review by the Board under the National Environmental Policy Act (“NEPA”); and

(3) Petitioners’ construction of and operations on said track are under the exclusive jurisdiction of the Board, and regulation by the Town, and that of other state and local bodies, of BRT’s construction of said rail track, and Brookhaven Rail’s operation thereon, including but not limited to a stop work order and other efforts to regulate, limit or prohibit site grading required for rail track construction, are preempted by federal law and the Board’s exclusive jurisdiction.

Petitioners request the Board's expedited consideration of and decision on this Petition. The matters raised herein are directly relevant to litigation between Petitioners and the Town pending in the United States District Court for the Eastern District of New York, and the Board's expedited decision would facilitate resolution of that matter. As discussed *infra* 13-14, both parties have agreed in that litigation to each request the Board's expedited determination of the issues raised herein, and to pursue and cooperate with such steps necessary for expedited consideration as the Board may require to obtain the earliest possible Board decision on the Petition.

I. PRELIMINARY STATEMENT

BRT is a railroad transloading facility located in Yaphank, Long Island, New York. Brookhaven Rail provides rail carrier and transloading services at BRT, principally switching activities and the marshalling and receipt of freight rolling stock at BRT for transportation over the rail lines of the Long Island Railroad ("LIRR").¹ Freight rail services are provided to BRT and Brookhaven Rail over LIRR lines by the New York & Atlantic Railway Company ("NY&A"), a Class III rail carrier, which interchanges with Brookhaven Rail upon arrival of the switch lead at BRT.

In the Board's decision in *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, the Board exempted Petitioner's construction and operation of rail lines and related rail facilities from the prior approval requirements of 49 U.S.C.

¹ Oakland Transportation Holdings LLC owns all of the equity interests in Brookhaven Rail (formerly known as US Rail New York, LLC), pursuant to a control exemption approved by the Board in *Nevada 5, Inc. and Oakland Transportation Holdings LLC—Control Exemption—GTR Leasing LLC and US Rail Holdings LLC*, STB Finance Docket No. 35635 (STB served June 15, 2012). See also, *Gabriel D. Hall – Corporate Family Transaction Exemption – U S Rail New York, LLC and U S Rail Corporation*, STB Finance Docket No. 35458 (STB served Jan. 7, 2011). BRT is the trade name for Brookhaven Terminal Operations, LLC.

§ 10901, subject to specified environmental mitigation requirements. STB Finance Docket No. 35141, slip op. at 8 (STB served Sept. 9, 2010)(“2010 Decision”). BRT commenced rail and terminal operations on September 2, 2011. Because the NY&A, under a contract with the LIRR, holds the exclusive franchise to provide freight rail service over LIRR lines, Brookhaven Rail’s rail carrier operations are limited to BRT’s transloading and terminal operations; Brookhaven Rail does not (and cannot) provide short or long-haul service over LIRR lines.

BRT has had a profoundly beneficial impact on consumers, markets and transportation on Long Island, reducing the delivered cost of commodities such as lumber and flour, and reducing truck traffic in the congested New York metropolitan area. BRT currently serves eleven major customers, the largest of which is The Home Depot, and in 2014 has been averaging 130 rail cars per month. For example, in 2014 BRT has been handling more than 100 total loads (train cars, some inbound trucking, transfer, warehousing and then outbound short haul truck) for The Home Depot *per week*, directly contributing to a marked decrease in prices on eastern Long Island for certain retail items such as 4X4 lumber products. In like manner, a number of large scale commercial bakeries have begun to obtain IB flour via rail and BRT, reducing their transportation costs, permitting them to purchase materials from a wider range of suppliers, and shifting that traffic, previously delivered entirely by truck, to rail. In fact, recently, BRT transloaded approximately 9 million pounds of flour in a month, its highest month to date.

BRT also recently added Culpeper Wood Products as a customer, which has already shipping more than 1,000 tons of wood products from Fredericksburg, Va. to BRT. This traffic previously moved from Virginia to Nassau and Suffolk counties entirely via truck; thus, at a conversion rate of 5 trucks to 1 rail car, more than 50 truck trips have been diverted from the New York metropolitan area road system (and the heavily congested Long Island Expressway

specifically) to rail by this customer alone. For all commodities, BRT estimates that it has handled via rail more than the equivalent of 7,500 trucks since 2012.

Thus, many of the very benefits identified by the Board in its 2010 Decision, such as reduction of shipper reliance on truck transportation and alleviation of highway congestion in the New York City metropolitan area, 2010 Decision, slip op. at 4, have been realized. Indeed, BRT's impact on the community has been so positive that the New York State Department of Transportation ("NYSDOT") has awarded BRT a \$2.5 million grant award to help BRT's expansion.

BRT's existing rail line and facilities occupy essentially BRT's entire original 28-acre site, which is referred to in this Petition and identified on the site map at Exhibit 1 as "Parcel A."² Because the success of BRT's operations have brought it close to capacity, *infra* 10, BRT has undertaken to construct an additional spur track on properties immediately adjacent to its existing facility and rail line on Parcel A, properties referred to in this Petition and in Exhibit 1 as "Parcel B" (19.3 acres) and "Parcel C" (73.7 acres).³ The Parcel B and C expansion will be supported in part by the NYSDOT grant, which constitutes approximately 52% of the projected cost of BRT's next phase of track construction, as part of the planned expansion on those parcels. The spur line will support rail transloading and terminal facilities that are planned for Parcels B and C. Brookhaven Rail will provide rail carrier service over the spur line, in conjunction with, and as an extension of, its existing service on Parcel A.

² Exhibit 1 is entitled Brookhaven Rail Terminal, Lot B and C Base Plan, dated January 15, 2014, prepared by AECOM. It is referred to herein as either Exhibit 1, or the "BRT Site Plan."

³ Presciently, the Board anticipated more than three years ago in its 2010 Decision that BRT's rail operations and facilities would occupy the entire 28-acre site, *id.*, slip op. at 5, n.5.

Notwithstanding BRT's many benefits to Long Island consumers, retailers and wholesalers, the financial support of the NYSDOT, and the clear need for expanded rail terminal service on Long Island, the Town has undertaken actions to resist and thwart BRT's construction of the spur and expansion. These actions include issuing a stop work order in March 2014 directed at Petitioners' work on Parcels B and C (ostensibly limited to non-railroad activities but directly impacting rail construction), and recently seeking injunctive relief in the United States District Court for the Eastern District of New York to halt grading and rail track construction on Parcels B and C.⁴ The Town also filed a motion with the Board seeking to reopen the 2010 Decision, in which the Town questioned whether the rail track under construction constitutes a spur within the meaning of Section 10906, and seeking to have the Board undertake environmental regulation of the track construction and operations.⁵

⁴ As discussed *infra* 12, the Town initially brought an action in New York state court that Petitioners, pursuant to a stipulation with the Town on April 9, 2014, removed to the United States District Court in the Eastern District of New York, Case No. 2:14-cv-02286-LDW-AKT. Under the terms of the stipulation, the Town agreed to suspend the stop work order that Petitioners challenged, and Petitioners agreed they would file a petition at the Board addressing the instant issues, *infra* 13-14. Thereafter, on April 23, 2014, Petitioners were advised by counsel for the Town that the Town objected to BRT's AECOM Rail Subgrade Preparation Plan for the spur track and intended to file a motion for a temporary restraining order and preliminary injunction seeking to halt grading for the rail track.

The AECOM Rail Subgrade Preparation Plan, dated April 1, 2014, provided at Exhibit 2, was drawn from Exhibit 1, which was prepared by AECOM on January 15, 2014, then revised on April 1, 2014, and further revised April 16, 2014. Exhibit 2 is the April 16th revised version. It will be referred to herein as Exhibit 2 or the "AECOM Rail Subgrade Plan."

⁵ STB Finance Docket No. 35141, Motion To Reopen (filed March 14, 2014). On April 3, 2014, Petitioners timely replied to the Town's motion, asking the Board to dismiss the motion as the Town had not met the standard to reopen, and showing they were not in violation of the 2010 Settlement as the Town alleged. Petitioners also indicated in their reply that they intended to initiate a separate proceeding requesting the Board enter a declaratory order that the Town's regulation of rail construction and operations on Parcels B and C is preempted by federal law. The Board has not yet ruled on that motion.

Accordingly, Petitioners seek a declaratory order from the Board to establish that BRT's rail track under construction on Parcels B and C is a spur and within the exclusive jurisdiction of the Board, and that construction of and rail operations on the spur track are exempt from the Board's licensing and economic regulation and Board environmental review under NEPA. Additionally, in view of the Town's renewed assertion of regulatory authority over rail track construction and operations, Petitioners seek a declaratory order that, irrespective of whether the rail track is or is not a spur, state, Town and other local regulation of Petitioners' construction of and rail transportation operations on the new rail track is preempted by federal law and this Board's exclusive jurisdiction.

II. FACTUAL BACKGROUND

A. History Of The Brookhaven Rail Terminal

For contextual purposes, a background of Petitioners, their rail operations, the history of the development of BRT and recent events is provided below. The parties are introduced below, in the chronological order in which each became involved.

1. Sills Road Realty LLC And The Rail Transloading Facility

Sills Road Realty LLC ("Sills Road") is a New York limited liability company, comprised of five equal members, including Suffolk & Southern Rail Road LLC ("Suffolk & Southern").⁶ Sills Road was formed in 2006 by a producer and users of crushed stone to develop a rail transloading facility on Long Island that would economically meet the needs of its members for the transportation of stone and other construction materials, as well as to serve the broader Long Island market for such products. To provide adequate facilities for these activities,

⁶ Suffolk & Southern was initially formed to become the common rail carrier for the rail transloading facility, but never obtained such status.

in May 2007, Sills Road purchased the 28-acre tract of land in Yaphank, New York, to build BRT, now known as “Parcel A.”

In 2007, Sills Road and U S Rail Corporation (“US Rail”), a Class III railroad, entered into a thirty-year lease and operating agreement. Under the agreement, US Rail leased the 28-acre Parcel A property from Sills Road to construct and operate BRT on Parcel A.

For the construction of BRT, US Rail hired Adjo Contracting Corporation (“Adjo”), a New York corporation, to serve as the general contractor to grade and excavate the Parcel A site. Watral Brothers, Inc. (“Watral”) and Pratt Brothers, Inc. (“Pratt”) are both New York corporations that subcontracted with Adjo to perform related construction activities at the Parcel A site.

2. First Federal Lawsuit And Settlement

In October 2007, the Town issued Appearance Tickets to Sills Road, Suffolk & Southern, Adjo, Watral, and Pratt for alleged violations of the Town’s zoning ordinances. In November 2007, Sills Road, Suffolk & Southern, US Rail, Adjo, Watral and Pratt (collectively, “BRT Litigants”) filed a lawsuit against the Town, Case No. 2:07-cv-04584-TCP-ETB, in the United States District Court for the Eastern District of New York (the “First Federal Lawsuit”) to enjoin the Town’s actions and to obtain damages. On June 30, 2009, U.S. District Court Judge Thomas C. Platt entered an Order denying the BRT Litigants’ motion for preliminary injunction. Federal Lawsuit, Dkt. 31, Order.

The parties subsequently settled the First Federal Lawsuit, and on April 22, 2010, Judge Platt entered an Order that contained the terms of a stipulated settlement agreement between the

Town and the Original BRT Litigants (“2010 Stipulation of Settlement”).⁷ The 2010 Stipulation of Settlement restricts the definition of the “Project” to Parcel A alone (the only parcel at issue in that proceeding), defining it as “the construction and operation of a rail terminal located on Sills Road in Yaphank, New York . . . on a 28 acre property owned by [Sills Road].” *Id.* The 2010 Stipulation of Settlement contains a series of requirements that the parties agreed to abide by with respect to the Project. *Id.*, p. 1.

The parties agreed that the Project would be constructed consistent with the site plan attached thereto (the “Reference Site Plan”). The parties further agreed that the Project would be constructed pursuant to the “Applicable Standards” defined as: “(i) those provisions of the Town Code of the Town of Brookhaven and the Code of Suffolk County set forth in the Reference Site Plan and (ii) all applicable federal standards.” 2010 Stipulation of Settlement, ¶ 2. The 2010 Stipulation of Settlement further provides: “No additional approval of the Town or any agency or department thereof shall be required to construct or operate the Project as contemplated by the Reference Site Plan unless, as set forth in paragraph [11]⁸ below, the Project is found not to be subject to STB jurisdiction.” *Id.* Of course, the Board found the Project subject to STB jurisdiction later in 2010, and specifically incorporated the 2010 Stipulation of Settlement, 2010 Decision.

The 2010 Stipulation of Settlement required the BRT Litigants, excluding US Rail, to collectively pay the Town \$1 million, payable in installments, for public improvements. *Id.* at ¶

⁷ US Rail filed the 2010 Stipulation of Settlement with the Board on April 26, 2010, 2010 Decision, slip op. at 2.

⁸ The 2010 Stipulation of Settlement contains a typographical error in that it improperly cites to “paragraph 10” (which relates to the delivery of “covenants and restrictions with respect to the setbacks and vegetation requirements reflected in the Reference Site Plan . . .”) instead of paragraph 11 (which relates to STB jurisdiction). 2010 Stipulation of Settlement, ¶ 2.

4. To date, the Town has already received more than \$450,000 from the BRT Litigants. The Town, for its part, was required, *inter alia*, to dismiss all outstanding Appearance Tickets with prejudice and withdraw all stop work orders, which it did. *Id.* at ¶ 8.

3. BRT Obtained STB Exemption

While the First Federal Lawsuit was pending, on August 7, 2008, US Rail filed a petition with the Board under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10901 to construct and operate BRT on Parcel A. *See*, 2010 Decision. On September 7, 2010, after completing a Draft Environmental Assessment (“Draft EA”), receiving comments from numerous public officials, issuing a Final Environmental Assessment (“Final EA”) and incorporating the 2010 Stipulation of Settlement into its Order, the Board granted US Rail’s petition for exemption from the provisions of 49 U.S.C. § 10901, authorizing the construction and operation of BRT on Parcel A. *Id.*⁹

B. Current Operations And Planned Expansion Of BRT

Since September 2011, BRT has operated as a railroad facility.¹⁰ Brookhaven Rail and BRT’s current major rail customers include The Home Depot, Safety Kleen, Wenner Bread, one of the largest bakeries on Long Island, and Renewable Energy Group, Inc., a leading North American biodiesel producer and distributor. As explained *supra* 2, because the NY&A holds the exclusive franchise from the LIRR to provide freight rail service over LIRR lines,

⁹ The Final EA notes that the U.S. Environmental Protection Agency concurred with the finding of the Board’s Section of Environmental Analysis that there would be no significant environmental impacts from the project.

¹⁰ Brookhaven Rail, a lessee on Parcels A, B, and C, quotes, invoices and bills shippers, subject to Brookhaven Rail Terms & Conditions and Tariff, which are posted on BRT’s webpage (BHR Tariff 9200 and BHR Rules of Service). BRT is marketed by Brookhaven Rail exclusively; and Brookhaven Rail exclusively provides the transloading services to shippers. Line haul services is provided by the NY&A over LIRR tracks.

Brookhaven Rail conducts rail carrier operations *only* on BRT tracks, and line haul services are provided exclusively by NY&A.¹¹

Due to the strong growth in traffic, BRT's track and facilities on Parcel A are near capacity. Referring to Exhibit 1, the three (3) main spur tracks branching immediately from the LIRR (referred to as BRT Tracks 1, 2 and 3, Track 1 the closest to the LIRR and Parcel B), are the arrival, departure and runner tracks. Track 1 is the arrival track, Track 2 is the departure track and Track 3 is the runner track (used for NY&A to bring their engines back through to couple the engines on Track 2, perform brake tests as required by Federal Railroad Administration rules, and then depart on the westbound trip back to NY&A's yard at Fresh Pond, New York). These tracks are taxed at near full capacity handling BRT's current traffic.

The other four (4) tracks (each approximately 1100 track feet) are stub end tracks, and run almost parallel to the LIRR/NY&A main line track, Exhibit 1. The tracks are identified 4 through 7, in order running from south to north. Track 4 is used for unloading of flour cars and for storage of the next flour cars to be unloaded. Track 5 is used for overflow storage of cars going to other BRT customers. Track 6 is used for bio-diesel and houses the portable steaming unit for heating the bio-diesel, and used for additional flour deliveries when needed. Track 7 is the miscellaneous track used to service traffic for Safety Kleen, 84 Lumber, Triangle Building Products, Eastern Wholesale Fence, and Culpeper Wood. These tracks are also at close to full capacity handling BRT's current traffic.

The track branching from Track 3 is the transload track that goes through The Home Depot warehouse building. There is also a short stub track, originally designed to house the locomotive power, but as a result of high demand for track space, this track is now being used to

¹¹ A copy of the LIRR-NY&A contract is provided at Exhibit 3.

unload The Home Depot wood products that do not require indoor storage. Thus, to handle a major new customer would require additional track capacity, and if warehouse or storage capacity were required, construction of additional warehouse or storage capacity.

Anticipating strong traffic growth, in 2011 and 2012, Petitioners gained the right to control additional property immediately adjacent to the rail terminal, Parcel B, and then BRT purchased Parcel C. Also, BRT also obtained and holds a permanent easement on Parcel B for the property on which rail track will be laid on that parcel. On June 29, 2012, BRT sent the Town notice that it would commence construction of the additional tracks extending from Parcel A to Parcels B and C. (June 29, 2012 Letter from J. Pratt to M. Miner.) The notice provided: “Since the expansion is clearly ancillary to the operation of the line of rail authorized by the [STB], the construction, and operation, qualifies under 49 USC 10906 as excepted from the need for further authorization.”¹²

On Parcels B and C, Brookhaven Rail is working to lay the spur track (and prepare related construction areas) to support transloading and terminal facilities to be constructed either for its own use or that of rail customers. As can be seen on Exhibit 1, Parcel B and Parcel C adjoin Parcel A and the existing BRT rail terminal, Exhibit 1, and the spur track BRT is constructing on Parcels B and C will extend from the *existing* BRT spur track and rail yard on Parcel A, and utilize the same main line switch and interchange with the NY&A and the LIRR.¹³

¹² By letter dated July 3, 2012, Matthew Miner, the Town’s Chief of Operations, responded to BRT’s notice. (July 3, 2012 Letter from M. Miner to J. Pratt). Mr. Miner acknowledged that the construction on Parcels B and C is *not* subject to state and local regulation and is pre-empted by federal law: “As long as the work relates to the construction and operation of the rail line, it would appear that Brookhaven’s authority is limited as its Town Code and New York State law would be superseded by Federal law.” *Id.*

¹³ In various filings, the Town has alleged that construction of the spur is a pretext for BRT to engage in “sand-mining” on Parcels B and C. Contrary to the Town’s allegations, BRT

The spur will encircle Parcels B and C, essentially forming a racetrack configuration around the parcels.¹⁴ In the 2014 Stipulation, Petitioners and the Town agreed that the track would have a set-back of 100 feet and that sand removal, excavation, and grading on the track foot-print area that is incidental to the construction of the spur on Parcels B and C could continue pending submission and resolution of this Petition.¹⁵ As with Parcel A, rail operations of the spur on Parcels B and C will be controlled and operated by Brookhaven Rail as part of the same railroad transload facility, BRT.

C. The Town’s Lawsuit, “Stop Work” Order, And Second Federal Lawsuit

On March 11, 2014, almost two years after Petitioners gave notice of their plan to construct and operate a spur line on Parcels B and C, the Town filed suit against Petitioners in the Supreme Court of the State of New York, County of Suffolk, alleging that Petitioners violated certain state and local ordinances, and breached the 2010 Stipulation of Settlement, and seeking declaratory, injunctive and monetary relief. The Town also served BRT with a “stop work” order dated March 12, 2014, which, on its face, only applies to Parcel B. (March 12, 2014 Stop Work Order, Exhibit 4.) The stop work order provides: “Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees,

is grading the rail right of way in accord with the AECOM Rail Subgrade Plan, Exhibit 2, a plan developed by AECOM, a national, well-established engineering firm with considerable rail experience. BRT is grading, and intends to grade, to construct the spur consistent with the AECOM Rail Subgrade Plan, which establishes target site elevations realistic for expected needs, rail and rail transportation-related operational requirements and safety. Also contrary to other Town claims, BRT has not laid track directly under the Long Island Power Authority (“LIPA”) power lines without proper authorization. BRT purchased two permanent easements from LIPA that expressly authorize BRT to construct rail and truck access infrastructure between Parcels A and B.

¹⁴ Exhibits 1 and 2.

¹⁵ See Stipulation, *infra* Exhibit 5, and discussion *infra* 13-14.

excavating and removing excavated materials] regarding any matter not pertaining to railroad construction.” *Id.*¹⁶

On April 9, 2014, Petitioners and other parties filed a Notice of Removal with the United States District Court for the Eastern District of New York, removing the Town’s state court lawsuit to federal court (“Second Federal Lawsuit”). Petitioners attached to the Notice of Removal a stipulation among the parties, including the Town, dated April 9, 2014.¹⁷ Among the terms in the 2014 Stipulation are: (1) the Town consented to removal of the Town’s state court lawsuit to federal court, discontinuance of the state court proceeding, and agreed not to seek a remand to state court (while preserving the Town’s objections to various preemption claims); and (2) the Town agreed to not enforce the stop work order to the extent the stop work order concerned “excavation of sand, removal of fill, and grading which is incidental to the construction of additional railway track upon Parcels B and C (the “Track Construction”) as are depicted on a Site Plan to be negotiated and agreed upon between the parties within ten (10) business days (the “Town Consent”).” 2014 Stipulation, at ¶¶ 2, 7.

As part of the 2014 Stipulation, Petitioners agreed to file a petition for declaratory order with the Board addressing the instant issues and requesting expedited Board consideration, and the parties agreed to cooperate in an expedited Board consideration. *Id.* at ¶ 6. Expedited consideration was also an element of the Town Consent to its partial non-enforcement of the stop

¹⁶ While on its face the stop work order is limited to matters “not pertaining to railroad construction[,]” in fact, the Town has insisted that the stop work order does apply to all rail track construction and related excavation and site work on Parcels B and C. *See* discussion *infra* 36-39.

¹⁷ The stipulation was initially part of the state court lawsuit, and then filed in the Second Federal Lawsuit with the removal. It is provided at Exhibit 5, and referred to herein as the 2014 Stipulation.

work order, as the Town insisted that the Town Consent would last only for the period of the *earlier* of the expiration of 60 days from April 9, 2014, or a Board decision on the instant petition for declaratory order. *Id.* at ¶ 7. Thus, absent a Board decision by June 9 (or some other action), the Town contends enforcement of its stop work order to stop construction of BRT's rail track on Parcels B and C is appropriate.

Petitioners provided the Town with the April 1, 2014 version of the AECOM Rail Subgrading Plan at Exhibit 2 on April 2, 2014, a week before the 2014 Stipulation was entered. Petitioners' engineers met on April 15, 2014 with third-party engineers hired by the Town's litigation counsel in the Second Federal Lawsuit as part of the negotiations specifically provided for in paragraph 7 of the 2014 Stipulation to determine the width of the grading for the rail track. Subsequent to those discussions, on April 16, 2014, Petitioners' engineers provided the Town with a revised version of the AECOM Rail Subgrading Plan.

Rather than negotiate in good faith, as anticipated by the 2014 Stipulation, the Town waited until April 23, 2014, the last day of the ten (10) business day negotiation period, and rejected outright all submitted versions of the AECOM Rail Subgrading Plan without explanation or detail as to the issues to which the Town objected.¹⁸ As a result, the Town Consent in the Stipulation has been terminated, thereby re-imposing the stop work order as to rail track construction. Additionally, on April 25, 2014, the Town filed a motion for a temporary

¹⁸ Nor did the Town explain why, having had the AECOM Rail Subgrading Plan since April 2, it did not raise its objections prior to entering into the 2014 Stipulation on April 9, 2014.

restraining order and preliminary injunction in federal court seeking to halt construction of the rail track.¹⁹

III. DISCUSSION

A. The Railroad Track BRT Is Constructing On Parcels B And C, Adjacent To BRT's Existing Rail Facilities, Constitutes A Spur Track Within The Meaning Of 49 U.S.C. § 10906

1. The Railroad Track BRT Is Constructing On Parcels B And C Constitutes A Spur Track Within The Meaning Of 49 U.S.C. § 10906

a. Spur Defined – Fact-Specific Test Based On Three Factors

As Section 102 of the Interstate Commerce Commission Termination Act (“ICCTA”), Pub. L. 104-88, 109 Stat. 803 (adding, in relevant part, 49 U.S.C. § 10906, 109 Stat. at 827-28), and other sections of 49 U.S.C. do not define the term “spur track” (nor, for that matter, other terms relevant here such as “line of railroad,” “rail line extension” or “additional railroad line”), the Board (and its predecessor, the Interstate Commerce Commission (“I.C.C.”)) and federal courts have developed over the decades a case-by-case, fact-specific approach to determining whether an extension of rail track constitutes a spur (versus a “line of railroad” or “additional railroad line”). *The New York Economic Development Corporation – Petition for Declaratory Order*, STB Finance Docket No. 34429, slip op. at p. 6 (STB served July 15, 2004)(“NYCEDC”)(“ . . . there is no single test for determining whether a particular track segment is a ‘line of railroad’ or is instead simply a spur. Rather, the [Board] and the courts have adopted a case-by-case, fact-specific approach to make this determination.”), *citing Chicago and North Western Transportation Company – Abandonment Exemption – In McHenry*

¹⁹ The Town filed an Order To Show Cause For Preliminary Injunction And Temporary Restraining Order in the Second Federal Lawsuit, and noticed the motion for argument before the Court for April 28, 2014.

County, IL, 3 I.C.C.2d 366, 367 (1987), *rev'd on other grounds sub nom. Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir 1989).²⁰

Thus, whether a track constitutes a spur turns on three factors developed by the courts and the Board: the “intended use” of the track, the track’s physical characteristics, and the “purpose and effect” of the track. *See Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 278 (1926)(“Texas & Pacific”); *Nicholson v. Interstate Commerce Com.*, 711 F.2d 364, 367-68 (D.C. Cir. 1983)(focus on track and physical characteristics, not label or cost of track), *cert. denied* 464 U.S. 1056 (1984); *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942, 17 L. Ed. 2d 873, 87 S. Ct. 974 (1967); *Indiana Rail Road Company – Petition for Declaratory Order*, STB Finance Docket No. 35181, slip op. at p. 2 (STB served April 15, 2009)(“Indiana Rail Road”)(“The determination of whether a particular track segment is a ‘railroad line’ requiring Board authorization under 49 U.S.C. § 10901(a) or an exempt spur turns on the intended use of the track segment.”), *citing Nicholson*, 711 F.2d at 368; *NYCEDC*, slip op. at pp. 5-7; *see also United Transp. Union-Illinois Legislative Bd. v. S.T.B.*, 169 F.3d 474, 477-78 (7th Cir. 1999); *Hughes v. Consol-Penn Coal Company*, 945 F.2d 594, 612-13 (3rd Cir. 1991).

As to the “intended use” test, the Board and federal courts hold that a spur is used for the “. . . loading, reloading, storing, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee.” *Nicholson*, 711 F.2d at n.11, *quoting New Orleans Terminal Co.*, 366 F.2d at 165-66; *see also, Marion & E.R.R. Co. v. Missouri Pac. R.R. Co.*, 318 Ill. 436, 443 (Ill. 1925)(“Marion”); *NYCEDC*, slip op. at p. 6. In *Nicholson*, the D.C. Circuit saw

²⁰ The distinction is of import here, of course, because a spur track is exempt from Board economic and environmental regulation, 49 U.S.C. § 10906, *see infra* 27, while a “line of railroad” or “additional railroad line” would be subject to Board regulation.

the “intended use” of a spur as flowing from the distinction between, on the one hand, “. . . lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel. . .” (subject to Board regulation under 49 U.S.C. § 10901(a)), and on the other hand, “. . . all that mass of ‘tracks’ (as distinguished from ‘lines’) naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with and incidental to, but not actually and directly used for, such transportation service . . .” (exempt from Board regulation). 711 F.2d at 367-368, *quoting Detroit & M. Ry. v. Boyne City, G. & A.R.R.*, 286 F. 540, 546 (E.D. Mich. 1923); *see also NYCEDC*, slip op. at 6 (determining that the track was a spur because its intended use was to switch and shuttle cars for pickup and delivery, and for the breaking up and reassembling of trains).

As to the test of the “physical characteristics” of a spur, the Board examines: (1) the length of the track; (2) how many shippers the track will serve; (3) if the track will be stub-ended; (4) whether the shipper is located at the end of the track (indicating that the purpose of the track is to reach that shipper’s facility rather than a broader market); (5) whether there is regularly scheduled service or not; and (6) who owns and maintains the track. *NYCEDC*, slip op. at pp. 6-7 (determining that the track was a spur because the track would be 1.3 miles long, would be built predominantly for the purpose of serving one-shipper located at the end of the track, would be stub-ended, would not invade new territory or the territory of another railroad carrier, service would be provided on an as-needed basis, and the shipper would own and maintain the track).

Turning finally to the “purpose and effect” test, the United States Supreme Court has found the “purpose and effect” of a spur is “. . . to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same

territory and similarly situated are entitled to like service from the carrier.” *Texas & Pacific*, 270 U.S. at 278; *see also Pennsylvania Railroad Co. v. Reading Co.*, 132 F.Supp. 616 (D. Pa. 1955)(holding track to be a spur because it improved facilities required by shippers already served by carrier; track did not invade territory of another carrier), *aff’d* 226 F.2d 958 (3d Cir. 1955); *Indiana Rail Road*, slip op. at p. 2 (holding track was a spur because it improved facilities required by existing customer, would not invade territory of another carrier, and carrier had historically served the area the track would occupy). By contrast, a railroad *line’s* “purpose and effect” is to extend the carrier’s line into new territory the carrier did not previously serve, or to invade a territory served by another carrier. *Texas & Pacific*, 270 U.S. at 278; *see also NYCEDC*, slip op. at pp. 5-6.²¹

²¹ The Board and federal courts have also held that a spur’s “purpose and effect” is to increase carrier capacity, provide expanded services to existing customers, and make services more efficient, while a railroad line enables a carrier to serve new industries and customers or to penetrate and invade a new market. *Compare City of Stafford v. Southern Pacific Transportation Company*, STB Finance Docket No. 32395 (ICC served Nov. 8, 1994), *aff’d sub nom. City of Stafford v. I.C.C.*, 69 F.3d 535 (5th Cir. 1995)(track held to be spur although 12.9 miles long, as it would improve carrier’s operating efficiency and capacity, and no new territory or shippers served by track); *Hughes v. Consol-Penn Coal Company*, 945 F.2d 594 (3rd Cir. 1991)(holding track to be spur despite 14.5 miles long, because local, wholly intra-state, functioned to unload and transfer shipments, and only one carrier used track); *Missouri Pacific Railroad Co. & Southern Pacific Transportation Co. – Construction & Operation Exemption – Avondale, LA*, STB Finance Docket No. 33123 (STB served July 11, 1997)(deciding tracks were spurs because would not invade new territory and would result in increase in the carrier efficiency), *with Colorado & Wyoming Railway Co. v. Colorado & Southern Railway Co.*, 469 F.2d 483, 486 (10th Cir. 1972)(affirming track was a railroad line because built through new territory to serve new customer); *Union P. R. Co. v. Denver & R. G. W. R. Co.*, 198 F.2d 854 (10th Cir. 1952)(track a railroad line because invaded new territory not previously or presently served by carrier); *Marion*, 318 Ill. at 443-44 (holding new track a railroad line because track would afford rail service in direct competition with another carrier in area).

b. BRT's Railroad Track On Parcels B And C Is Patently A Spur Track Under Section 10906, And Not A Line of Railroad

Petitioners' rail track construction and planned operations on Parcels B and C readily meet each of the three factors of the test for a spur track; thus, no matter what the approach, the rail track will be a spur track under 49 U.S.C. § 10906, and not a line of railroad. First, as explained above, Brookhaven Rail's Class III rail carrier operations are limited to serving BRT, because NY&A holds the exclusive franchise to provide line-haul freight rail service over LIRR lines, Exhibit 3. Thus, Brookhaven Rail cannot currently provide short or long-haul rail common carrier services over LIRR lines, but rather is limited to interlining with the NY&A (and NY&A has no incentive to change that situation). Consequently, by virtue of the LIRR-NY&A contract, Brookhaven Rail's operations are, and absent a change in the LIRR-NY&A contract, will be, solely those of a terminal operator at BRT, limited to the loading, reloading, storing, and switching of train cars incidental to the receipt and delivery of shipments, using additional spur tracks to those already on Parcel A.

Limited as they are to services at BRT, Petitioners' "intended use" for the new track is, by definition, restricted to loading, reloading, storing, and switching of cars incidental to the receipt and delivery of customers shipments – uses that squarely – if not classically – fit within the "intended use" factor of a spur. *E.g., Nicholson; NYCEDC*. Indeed, it is hard to see how the new track could be anything but a spur.

Second, the physical characteristics of the new track are squarely consistent with those of a spur, and not a "rail line extension" or an "additional railroad line." The length of the track (approximately 12,500 feet) is *far* shorter than comparable tracks found to be spurs, the track will be a stub-ended loop, with the transloading and terminal facilities located along the stub end of the track, the service on the track will be limited to those transloading and terminal services,

and the track will be owned by the owners and operators of the transloading and terminal facilities – BRT and Brookhaven Rail. *E.g.*, *City of Stafford v. I.C.C.* (12.9 mile track held to be spur); *Hughes v. Consol-Penn Coal Company* (14.5 mile track held to be spur); *NYCEDC* (multiple factors supporting spur conclusion).

Third, BRT’s new track also squarely accords with the “purpose and effect” of a spur, as the new track will expand, improve, and increase the *capacity* of Petitioners’ Board-authorized *existing* Parcel A spur and spur/branch tracks, and transloading and terminal facilities and services, thereby improving those service to BRT’s current customers, and similarly situated new rail customers in the *same* Long Island regional market historically served by BRT since 2012, and the enhanced transloading and terminal services will not penetrate or invade new regional markets, nor invade another rail carrier’s established territory. *E.g.*, *Texas & Pacific*, 270 U.S. at 278, *Indiana Rail Road*, slip op. at p. 2; and cases cited *supra* n. 21. Indeed, as explained above, with Petitioners limited to transloading and terminal services, they cannot penetrate or invade new regional rail markets or territories.

i. BRT’s New Track Has The Use and Purpose Of A Spur

As show on Exhibits 1 and 2, Petitioners intend to use the proposed track on Parcels B and C for the same purposes as their current spur and spur/branch tracks on Parcel A – loading, reloading, storing, and switching of rail cars incidental to the receipt and delivery of shipments for existing and similarly situated customers in the same regional market now served by BRT’s existing terminal facilities. Moreover, given the NY&A monopoly on line-haul service over LIRR tracks, Exhibit 3, those are the only functions that the new track could serve, thus, by definition, the track can *only* be a spur. *See Nicholson; NYCEDC*. In essence, BRT’s current Parcel A configuration is a set of spur, spur/branch and side tracks off of the LIRR/NY&A’s

mainline track, and the tracks on Parcels B and C will be additional spur and spur/branch tracks from the spur track (Track 1) on Parcel A that switches to the LIRR mainline.

As shown on Exhibits 1 and 2, the track will extend from BRT's existing rail yard on Parcel A and mostly encircle Parcels B and C, essentially in the shape of a racecar track. *Id.* Brookhaven Rail trains will enter and exit the new track *using BRT's same spur line off* of the LIRR that is now used by BRT to serve Parcel A (Track 1), switching with the NY&A largely at BRT's yard on Parcel A, and then onto and off-of the spur. Exhibits 1 and 2, lower left-hand corners.²²

Train cars will load and unload shipments into/from storage and transloading facilities planned for both Parcels B and C, thereby increasing BRT's overall transloading/terminal capacity. The additional spur will support additional transloading/terminal facilities that BRT anticipates building on those parcels for itself or its customers, such as The Home Depot, including warehouses, cold/dry storage buildings, and salt storage facilities, and possibly a propane transfer station and a transloading facility. Additionally, the additional spur will be used as a track for the storing and switching of cars on and off of the LIRR's main line of through transportation.

The short track length, approximately 12,500 feet, and racetrack configuration of the spur, surrounding the transloading and terminal facilities, are entirely consistent with those uses and purposes. Indeed, they demonstrate conclusively that the new track is intended for the loading, reloading, storing, and switching of rail cars incidental to the receipt and delivery of the shipments, and with the short length, racetrack configuration and bar on Brookhaven Rail

²² While NY&A has the exclusive franchise over LIRR lines, Brookhaven Rail has the exclusive right to handle railcar placement and movements inside the confines of BRT's terminal. Thus, NY&A could not serve the customers now served by BRT without having the interchange agreement with Brookhaven Rail.

providing line haul services, they could hardly be used as a “line of railroad” or “additional railroad line” for continuous transportation by through, full trains between different points of shipment.

The new track will also enhance capacity for the Parcel A facility, as the new track can be used to store more rail cars than currently available at BRT’s existing facilities on Parcel A. Due to BRT’s success in serving the Long Island economy, its current facilities on Parcel A are such that having additional rail storage capacity will be a major assist, and provide needed new capacity.²³

ii. BRT’s New Track Has The Physical Characteristics Of A Spur

The new track is also consistent with the physical characteristics of a spur. The track will be short in length, approximately 12,500 feet, fewer than 2.5 miles,²⁴ far shorter than the spur finding in *City of Stafford v. I.C.C.* (12.9 mile track spur) and *Hughes v. Consol-Penn Coal Company* (14.5 mile track spur), and not substantially longer than that approved in *NYCEDC*, slip op. at pp. 6-7 (1.3 miles track spur). The loop configuration, beginning at the same point of entry on Parcel A as the existing spur track, and then encircling Parcels B and C, ending at almost the very point the track started, near the Petitioners’ own rail yard on Parcel A, demonstrates the track is designed to serve BRT transloading and terminal customers, as that configuration does not result in new point-to-point service and could hardly be used to penetrate new territory, or invade the territory of another rail carrier (even if Brookhaven Rail could provide line haul service, which it cannot, Exhibit 3). *Id.*

²³ Even if BRT’s new track were not a spur, for the reasons discussed at length, *infra* 28-30, the new track would constitute an expansion of ancillary track and facilities exempt from Board licensing and economic regulation, because the new track will not permit Brookhaven Rail to invade another carrier’s market.

²⁴ See Exhibits 1 and 2.

Additionally, service on the track will be used on the same as-needed basis as the track on Parcel A, rather than on a regular schedule (more consistent with track used for the continuous through transportation of rail cars). *NYCEDC*, slip op. at 6-7 (service only on as-needed basis indicates a spur). Furthermore, that the track is to be installed over track and LIPA permanent easements held by BRT that burden Parcels B and C, and Petitioners' status as BRT operator on Parcels A, B and C, conclusively show that the track is a BRT spur.

iii. BRT's New Track Meets The Purpose And Effect Of A Spur

Finally, BRT's new track meets the "purpose and effect" of a spur as the track will expand, improve, and increase the capacity and efficiency of the Petitioners' existing, and Board-approved railroad facilities and services, and will be limited to transloading and terminal services. *Supra* 17-18; *see Texas & Pacific; City of Stafford v. Southern Pacific Transportation Company* (track held to be spur as it would improve carrier's operating efficiency and capacity, no new territory or shippers served by track); *Hughes v. Consol-Penn Coal Company* (track held to be spur because local, wholly intra-state, functioned to unload and transfer shipments, only one carrier used track); *Missouri Pacific Railroad Co. & Southern Pacific Transportation Co. – Construction & Operation Exemption – Avondale, LA* (tracks held as spurs because would not invade new territory and would increase the carrier's efficiency).

The short track length and loop configuration, *supra* 22, are directly consistent with those purposes, and inconsistent with a purpose or effect to enter new regional service territories, invade existing rail carrier markets, or divert revenues from another rail carrier. In fact, the outcome will be exactly to the contrary, as the direct and certain impact of BRT's expansion will be to *increase* freight rail traffic over the NY&A, Brookhaven Rail's connecting rail carrier,

thereby increasing NY&A freight revenues.²⁵ Moreover, because NY&A holds the monopoly on line haul service over LIRR lines, essentially the sole purpose and effect of the new track is that of a spur.²⁶

To be sure, BRT's expansion *will* divert traffic from truck to rail, with the concomitant reduction of 18-wheeler truck traffic on Long Island and in the New York metropolitan area, *see supra* 3-4 (7,500 truck equivalent reduction from existing BRT service), and lower prices for commodities and consumer goods in Long Island markets. *Id.* But *no* case has found those benefits to be inconsistent with a new terminal track being a spur.

iv. The Town's Contentions Challenging The Spur Demonstrate BRT's New Track Is, In Fact, A Spur

²⁵ For that very reason, NY&A has voiced support for BRT's expansion. Obviously, considering that NY&A holds the monopoly on line-haul service over LIRR lines, NY&A can only benefit from BRT's expansion, as NY&A gets increased freight traffic from the expansion while incurring no cost to enhance the terminal facilities necessary to load, unload and stage that traffic. Norfolk Southern and CSX have also indicated support for the BRT expansion (as they stand to gain long-haul line traffic from BRT's growth), and Providence & Worcester has indicated its support relative to additional traffic of construction aggregate.

²⁶ Today, by virtue of the Board's 2010 Decision, BRT is expressly authorized by the Board to provide rail carrier transportation services in the New York regional market, and it serves that market with NY&A, and interchanges *all* of Brookhaven Rail's rail traffic with NY&A. BRT and Brookhaven will continue to do so as additional traffic is generated by the track BRT is constructing on Parcels B and C, and the facilities that will follow.

Therefore, today's situation is a polar opposite from that before the Board in 2007 in *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC*, STB Finance Docket No. 35036, slip op. at p. 4, 5 (STB served Nov. 16, 2007)(track not a spur because failed “purpose and effect” test of a spur, as “proposed construction and operations will be located hundreds of miles from US Rail's existing operations in Ohio”; ancillary spur track must be ancillary to operations of the carrier that proposes to operate over it), and in *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC*, STB Finance Docket No. 35036 (STB served Dec. 20, 2007), in which the NY&A opposed US Rail becoming a carrier in the regional market. Today, Brookhaven Rail is a Board-authorized carrier in the same regional market as NY&A, interchanges its traffic with NY&A, and BRT's new track is supported by NY&A and will be ancillary to BRT and Brookhaven Rail's operations.

As noted above, in the Second Federal Lawsuit, the Town has sought injunctive relief seeking to halt grading necessary for construction of BRT's new track, *supra* 13. In papers filed therein, after all but conceding that Petitioners' legal analysis of the tests to establish that a track is a spur is correct, Second Federal Lawsuit, *Memorandum In Support Of Town Of Brookhaven's Motion For Preliminary Injunction Pursuant to Fed. R. Civ. 65* ("Town PI Mem."), at 18-20, the Town argues that BRT's new track is not spur. *Id.* at 21-23. In relevant part, the Town contends BRT's new track is not a spur because the track will "extend into an industrial plant not previously served by the railroad, even though the rail line already served the 'immediately adjacent area,'" *citing New York Central R. Co. v. Norfolk & W. Ry. Co.*, 214 F. Supp. 549 (D. C. W.Va. 1963)(*sic*)("New York Central"). *Id.* at 21.

The Town's description of the case, however, does not accurately reflect the District Court's holding in *New York Central*, and when properly considered, *New York Central* supports Petitioners' position that a track is properly deemed a spur when it does not invade an area adequately served by, directly compete with, or divert revenues from another carrier. In *New York Central*, both carriers, New York Central Railroad Company ("New York Central") and Norfolk & Western Railway ("Norfolk & Western"), had tracks adjacent to a Union Carbide Metals Company plant, but for 40 years *only* New York Central had served the Union Carbide plant. When Norfolk & Western proposed a new "spur" track to start service to the Union Carbide plant, New York Central challenged the move, contending that the proposed track would extend Norfolk & Western into New York Central's territory, and was being built solely to serve Union Carbide, as the track could not serve any other customers. (Union Carbide supported Norfolk & Western's track construction because it offered lower rates than New York Central's.

In holding that the track was not a spur and therefore subject to I.C.C. authority, the court said that the “purpose and effect” of Norfolk & Western’s track was “. . . to extend the defendant’s operations into an area not previously served by it which is immediately adjacent to and presently served by the New York Central’s line.” 214 F. Supp. at 554. The court emphasized that Norfolk & Western’s track would invade an area currently adequately served by, divert revenues from, and directly compete with New York Central. Thus, *New York Central* does *not* stand for the proposition cited by the Town in Town PI Mem. (*i.e.*, new service to an industrial plant is not a spur), but rather stands for the unremarkable proposition that track that invades another carrier’s territory, etc. is not a spur, but a new line of railroad. As Petitioners have shown, when track does not have those “purpose and effects,” it is properly a spur. *Supra* 23-24. As this is the Town’s lead contention on this point, it is apparent that the Town can muster no valid support for its proposition that BRT’s new track is not a spur.²⁷

The Town makes a similar error in another argument that BRT’s new track is not a spur because it will help serve a new geographic area (which area the Town conveniently does not identify), and will provide different services than those on which the 2010 Decision was based. *Id.* at 21-22. Of course, in the instant case, Petitioners will not be serving a new geographic market nor invading another carrier’s territory, as explained *supra* 22-23. Moreover, the Town misses the mark in comparing Petitioners’ anticipated new services against those discussed in the 2010 Decision. The relevant comparison, if one is relevant at all here, is with Petitioners’ *current*

²⁷ Even the “immediate adjacent” point in the *New York Central* case that is so emphasized by the Town in its memorandum, Town PI Mem. at 21, is also misapplied. In the *New York Central* case the “immediate adjacent” term referred not to the same carrier’s territory (as is the case with BRT’s property), but to the *competing* carrier’s service territory.

transloading and terminal services, and those will be, in the main, comparable to those provided on Parcel A.²⁸

B. BRT's Construction Of The Railroad Track On Parcels B and C, And Brookhaven Rail's Operation Thereon, Are Exempt From Board Licensing Authority, And Thus From Board Economic And Environmental Regulation

1. BRT's New Track, Considered As A Spur Or Side Track, Is Exempt From Board Licensing And Economic Regulation

Although Congress expressly gave the Board exclusive jurisdiction over the construction and operation of spur, industrial, team, switching, or side tracks, 49 U.S. C. § 10501(b)(2),²⁹ in the ICCTA, Congress expressly exempted those tracks entirely from the Board's 49 U.S.C. Chapter 109 licensing authority and economic regulation: "The Board does not have authority under *this chapter* over construction, acquisition, operation, abandonment, or discontinuance of *spur, industrial, team, switching, or side tracks.*" 49 U.S.C. § 10906 (emphasis added); *Friends of the Aquifer et. al. Decision*, STB Finance Docket No. 33966, slip op. at p. 4, n.7 (STB served August 15, 2001); *see also Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718 (D.C. Cir. 1996). The Board has long held that ". . . the law explicitly provides that a license is not required to construct 'spur,' 'industrial,' or 'switching' tracks . . ." *E.g., Fletcher Granite Company LLC*, STB Finance Docket No. 34020, slip op. at p. 4; *Friends of the Aquifer et. al. Decision*, slip op. at p. 6; *NYCEDC*, slip op. at pp. 7-8; *Joint Petition for Declaratory Order –*

²⁸ The Town advances a similar makeweight argument that treating BRT's new track as a spur would be an "absurd" application of 49 U.S.C. § 10906, because it would have new track service new facilities that are themselves not "integrally related to transportation." Town PI Mem., at 22-23. Again the Town conflates the applicable concepts. The "integrally related" test applies to facilities that a rail carrier contends are exempt from Board regulation because the facilities are, in fact, rail transportation facilities. Rail track, by definition, is always integrally related to rail transportation, and there is no requirement that a spur must serve only other rail-transport facilities; spur tracks routinely serve shipper facilities that are not themselves integrally related to transportation.

²⁹ *See also*, 49 U.S.C. §§ 10102(6) and 10102(9).

Boston and Maine Corporation and Town of Ayer, STB Finance Docket No. 33971, 5 S.T.B. 500, 503, fn.14 (April 30, 2001).³⁰

2. BRT's New Track, Considered As An Ancillary Expansion Of BRT's Existing Facilities, Is Also Exempt From Board Licensing And Economic Regulation

In like manner, while ancillary rail transportation facilities are also under the exclusive jurisdiction of the Board, 49 U.S.C. § 10501(b)(2), *e.g.*, *Friends of the Aquifer*, slip op. at pp. 6-7 and cases cited therein (discussed in the context of breadth of federal preemption under 49 U.S.C. § 10501(b)), the Board has also repeatedly held that, similar to the ICCTA's exclusion of spur track from the Board's licensing and regulatory authority, a railroad also does not have to obtain Board authorization to expand its existing facilities: “. . . there is no statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets.” *Friends of the Aquifer*, slip op. at p. 6, *citing Nicholson*, 711 F.2d at 368-70; *see also Green Mountain Railroad Corp. – Petition for Declaratory Order*, STB Finance Docket No. 34052, slip. Op. at pp. 4-5 (STB served May 28, 2002); *North San Diego County Transit Development Board – Petition for Declaratory Order*, STB Finance Docket No. 34111, 6 S.T.B. 331, 338 (STB served August 19, 2002).³¹

As noted, the key point in determining whether an “expansion of existing facilities” falls within or without the Board's regulatory authority is whether the project will allow the carrier to invade or penetrate a new market. *See Texas & Pacific*, 270 U.S. at 278; *Nicholson*, 711 F.2d at

³⁰ The Town itself concedes that spur tracks are exempt from “STB approval” under 49 U.S.C. § 10906. Town PI Mem., at 18.

³¹ The Town cannot contest these points, as it cites *Friends of the Aquifer* and *Nicholson* with approval. Town PI Mem., at 18-19, 21.

368-70; *Friends of the Aquifer*, slip op. at pp. 6-7. A railroad project is an “expansion of existing facilities” when the expanded facilities do not enable the railroad to compete in new territories that it had not previously served. See *Texas & Pacific*, 270 U.S. at 278; *Nicholson*, 711 F.2d at 368-70; *Friends of the Aquifer*, slip op. at pp. 6-7. As discussed at length, *supra* 22-24, BRT’s new track does not permit Brookhaven Rail to invade or penetrate a new market.

The Board’s unanimous decision in *Friends of the Aquifer*, led by Chairman Linda Morgan, is especially illustrative as to the instant case. In that decision, the Board considered whether the Burlington Northern and Santa Fe Railway Company’s (“BNSF”) construction of a refueling terminal facility, next to a rail corridor where the carrier’s lines converged, was subject to Board regulation as a “new construction” or exempt from Board regulatory authority as an “expansion of existing facilities.” *Friends of the Aquifer*, slip op. pp. 1-2, 6-7. BNSF’s proposed facility construction featured a tank farm consisting of two 250,000-gallon storage tanks for diesel fuel, a 20,000-gallon storage tank for bulk lube oil, a 27,000-gallon ground waste oil storage tank, and a 210,000-gallon industrial waste water storage tank, all of which would be above ground. *Id.*, slip op. at p. 2.

The Board held that its regulatory authority triggers when a railroad project meets the United States Supreme Court’s “invade new territory” test in *Texas & Pacific*, *id.*, slip op. at p. 7, and denied the petition because the BNSF’s proposed facility would support its existing railroad operations and was in the same geographic market as its existing rail operations, and would not allow BNSF to invade new territory or compete in territories that it had not previously served. *Id.* BRT presents an identical “no new market situation,” and compared with the major facilities

there were the subject of the *Friends of the Aquifer* case, is only installing rail track at this point.³²

Consequently, BRT's new track on Parcels B and C, considered as a spur track, *supra* 19-24, or even as a side track to the spur tracks on Parcel A, is simultaneously under the Board's exclusive jurisdiction, *infra* 31-32, 35-36, yet exempt from Board licensing and economic regulation, *infra* 30-31. Moreover, even should the Board not find BRT's new track to be a spur or side track, the new track is most certainly an expansion of BRT's existing, Board-authorized rail transportation facilities and operation, and the same result pertains. *Supra* 28-29.³³

3. As BRT's New Track Is Exempt From Board Licensing And Economic Regulation, It Is Also Not Subject To Environmental Review Under NEPA

Because railroad construction and operation of spur and side tracks, and expansion of existing ancillary railroad facilities, are all exempt from Board licensing and economic regulation, they are concomitantly not subject to an environmental review by the Board under NEPA, as where “. . . no license is required, there is no environmental review conducted by the

³² At some future point, Petitioners, their rail customers or others will construct transportation-related facilities on Parcels B and C, as noted *supra* 21. At this point, however, only construction and operation of the new track to serve those facilities is before the Board for consideration in this Petition. Whether those facilities will constitute *rail transportation-related* facilities subject to the Board's jurisdiction remains to be determined, depending on the facilities' actual uses and ownership/lease arrangements.

³³ Of course, while the Board does not have licensing authority to regulate those railroad activities, the federal preemption provision of 49 U.S.C. § 10501 still applies and preempts state and local regulation. *Grafton & Upton Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35779, slip op. at p. 5 *citing* *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642(2d Cir. Vt. 2005); *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189-90; *Ayer*, 5 S.T.B. at 506-07; *Fletcher Granite*, slip op. at p. 4; *Friends of the Aquifer*, slip op. at p. 6.

Board.” *Fletcher Granite Company*, slip op. at p. 4; *Friends of the Aquifer*, slip op. at p. 6(“Where no license is required, there is no environmental review by the Board.”); *see also NYCEDC*, slip op. at pp. 7-8; *Ayer*, 5 S.T.B. at 503, fn. 14.

C. State And Local Regulation Of BRT’s Construction Of, And Brookhaven Rail’s Operations On, The Railroad Track On Parcels B And C Is Preempted By Federal Law And The Board’s Exclusive Jurisdiction

1. Congress Granted The Board Exclusive Jurisdiction Over Railroad Transportation Generally, And Over Spur Tracks And Rail Facilities Specifically

The ICCTA expressly provides, as a general matter, that the Board has exclusive jurisdiction over “transportation by rail carrier,” 49 U.S.C. §§ 10501(a)(1) and (b)(1) and (b)(2). A railroad’s activities are subject to the Board’s exclusive jurisdiction when falling within the definitions of “railroad” and “transportation,” and are performed by, or under the auspices of, a “rail carrier.” 49 U.S.C. § 10501; *see also Town of Babylon & Pinelawn Cemetery – Petition for Declaratory Order*, STB Finance Docket No. 35057, slip op. at p. 4 (STB served Feb. 1, 2008)(“Town of Babylon”). The ICCTA’s definition of a “rail carrier” is “a person providing common carrier railroad transportation for compensation” 49 U.S.C. § 10102(5).

In like manner, the ICCTA specifically defines “railroad” to encompass a spur, track, switch, terminal, terminal facility, freight depot, yard, or ground that is used or necessary for transportation, 49 U.S.C. § 10102(6), and defines “transportation” as any facility, property, yard, or structure related to the movement of property by rail and the services related to that movement including the storage, receipt, delivery, and interchange of property, 49 U.S.C. § 10102(9). *See also Grafton & Upton*, slip op. at p. 4; *Boston & Maine Corp. & Springfield Terminal Railroad Co. – Petition for Declaratory Order*, STB Finance Docket No. 35749, slip op. at p. 3 (STB served July 19, 2013)(“Boston & Maine”).

Leaving no doubt as to the Board's exclusive jurisdiction over spur tracks and rail facilities, Congress also specifically provided that the construction and operation of spur tracks and railroad facilities are within the exclusive jurisdiction of the Board. 49 U.S.C. § 10501 (b)(2)(Board's exclusive jurisdiction covers "the construction, acquisition, operation . . . of spur, industrial, team, switching, or side tracks, or facilities . . .") Thus, it is beyond cavil that rail transportation generally, and spur tracks and rail facilities specifically, fall within the exclusive jurisdiction of the Board.

2. Federal Preemption Of State And Local Regulation Of Railroad Transportation Under The Exclusive Jurisdiction Of The Board

As a companion to the Board's exclusive jurisdiction, Congress also included in the ICCTA an express Federal preemption provision that precludes regulation by state and local laws of railroad activities that are subject to the Board's exclusive jurisdiction: ". . . the remedies provided under this part with respect to *regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*" 49 U.S.C. § 10501(b) (emphasis added); *see also N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007)("Jackson"); *Adrian & Blissfield R.R. Co. V. Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008)("Adrian"); *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999)("City of Auburn"); *Grafton & Upton*, slip op. at p. 4; *Boston & Maine*, slip op. at p. 3; *Town of Babylon*, slip op. at p. 3.

Federal courts have consistently held that a plain reading of 49 U.S.C. § 10501 evidences Congress' intent that the Board has exclusive jurisdiction over "railroad transportation" and that state and local regulation is preempted by federal law. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641-44(2d. Cir. Vt. 2005)("Green Mountain"); *City of Auburn*, 154 F.3d at 1029-32; *Adrian*, 550 F.3d at 539-40. For example, in *Green Mountain*, the United States Court of

Appeals for the Second Circuit held that the plain language of the ICCTA conveyed exclusive jurisdiction to the Board over the railroad's construction of transloading and storage facilities, and that state and local regulation in the form of permit requirements were preempted. 404 F.3d at 641-45. In a similar view, in the *City of Auburn* decision, the United States Court of Appeals for the Ninth Circuit stated that because of the broad preemptive scope of the ICCTA, state and local economic and environmental regulation of a railroad is federally preempted when preventing the carrier from constructing or operating a railroad line. 154 F.3d at 1029-31.

Consistent with the broad preemptive scope of the ICCTA being keyed to the Board's jurisdiction, federal courts have also deferred to the Board's determination as to the extent state and local regulation is preempted, because the Board is both authorized by Congress to administer the ICCTA and uniquely qualified to determine what regulations should be preempted. *Adrian*, 550 F.3d at 539 quoting *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) and *Green Mountain*, 404 F.3d at 642.

In interpreting the reach of federal preemption under 49 U.S.C. § 10501, the Board and federal courts identify two types of preemption: (1) categorical preemption; and (2) as applied preemption. *Grafton & Upton*, slip op. at 4; see also *Adrian*, 550 F.3d at 540; *New Orleans & Gulf Coast v. Barrois*, 533 F.3d 321, 332 (5th Cir. La. 2008) ("Barrois"); *Jackson*, 500 F.3d at 253-55. State and local regulations that are categorically preempted are those regulations that intrude into matters directly regulated by the Board, such as railroad construction, operation, and services. *Grafton & Upton*, slip op. at p. 4; *Boston & Maine*, slip op. at p. 3; *Green Mountain*, 404 F.3d at 643. Categorical preemption prevents states and localities from imposing requirements that could be used to deny a rail carrier's ability to conduct or use its property for rail operations, or to interfere with railroad facilities that are an integral part of rail

transportation. *Grafton & Upton*, slip op. at pp. 4-6 (deciding that local environmental and land use regulations, and permit requirements regarding the railroad's construction and operation of an additional rail yard and storage tracks were categorically preempted); *Boston & Maine*, slip op. at 3-5 (deciding that a local zoning decision prohibiting all rail traffic to a warehouse in the town was preempted).

According to the Board and federal courts, in addition to those state and local regulations categorically preempted, other state and local regulations are preempted when their application to a railroad's activities may reasonably be said to have the effect of managing or governing rail transportation. *Grafton & Upton*, slip op. at -5; *see also Adrian*, 550 F.3d at 540-41; *Boston & Maine*, slip op. at p. 3 *quoting Jackson*, 500 F.3d at 252-53; *Barrois*, 533 F.3d at 332. Thus, while federal law may permit continued application of laws having only a remote or incidental effect on rail transportation, state and local laws and regulations that unreasonably burden or interfere with railroad transportation, and those that discriminate against railroads – and thus interstate commerce – are preempted. *See Grafton & Upton*, slip op. pp. at 4-5; *CSX Transp. Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, slip op. at p. 9-10 (STB served March 14, 2005) (“CSX”); *Adrian*, 550 F.3d at 540-42; *Green Mountain*, 404 F.3d at 641-43; *Jackson*, 500 F.3d at 253-54.

A state or local regulation is unreasonably burdensome when the substance of the regulation is such that the railroad cannot carry out its business in a sensible fashion and the regulation is not settled or definite enough to avoid open-ended delays. *Adrian*, 550 F.3d at 540-41 *quoting Jackson*, 500 F.3d at 253-54. To qualify as a non-discriminatory regulation, a state or

local regulation must address state concerns generally, without specifically targeting the railroad industry. *Id.*³⁴

3. The Construction And Operation Of A Railroad Spur, And Railroad Track, Facilities And Operations Generally, Are Under The Exclusive Jurisdiction Of The Board

As explained in detail *supra* 11-12, 21-23 and shown on Exhibits 1 and 2, BRT's new track will extend from its existing rail yard on Parcel A and encircle Parcels B and C. The ICCTA plainly and explicitly states that the Board has exclusive jurisdiction over the construction and operation of spur, industrial, team switching, or side tracks, and railroad facilities. 49 U.S.C. § 10501(b)(2). Thus, Petitioners' construction of a spur track on Parcels B and C is clearly under the exclusive jurisdiction of the Board.

Even were BRT's new track not a spur (which it certainly is), the construction and operation thereof would still be under the Board's exclusive jurisdiction because the project falls under the definition of "railroad" and "transportation," and will be performed by a "rail carrier." 49 U.S.C. § 10501. Petitioners' construction of the track, and expansion onto Parcels B and C, are expressly included in the ICCTA's definition of "railroad." 49 U.S.C. § 10102(6). In addition, Petitioners' railroad project on Parcels B and C clearly meets the ICCTA's broad definition of "transportation" because the track will be used in the movement of property by rail and will provide services related to that movement through the storage, receipt, delivery and

³⁴ The Board's decision *Grafton & Upton* noted that it has been found to be reasonable for states and localities to request that rail carriers: (1) share their plans with the community when the carrier is undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when constructing railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. *Grafton & Upton*, slip op. at p. 5; *Ayer*, 5 S.T.B. at 511.

interchange of shipments at the expanded facilities to be constructed on Parcels B and C. 49 U.S.C. § 10102(9). Finally, the railroad projects on Parcels B and C will be operated by Brookhaven Rail, a Class III rail carrier possessing Board exemption authorization to provide rail carrier services in the relevant market.

4. As Construction And Operation Of A Spur, And Expansion Of Existing Railroad Facilities, Are Under The Exclusive Jurisdiction Of The Board, State And Local Regulations Are Preempted By Federal Law

As BRT's construction and operation of the new track on Parcels B and C are under the exclusive jurisdiction of the Board, *supra* 31-32, state and local regulation thereof is preempted by federal law. The Board and federal courts have consistently and definitively decided that a plain reading of 49 U.S.C. § 10501(b) shows Congress' intent that regulation of railroad transportation is performed at the federal level, and not by states or localities. *City of Auburn*, 154 F.3d 1029-30; *Green Mountain*, 404 F.3d at 641-42; *Grafton & Upton*, slip op. at p. 4; *Boston & Maine*, slip op. at p. 3; *Town of Babylon*, slip op. at p. 3-4.

Therefore, the Town's "stop work" order as it applies to BRT's new track on Parcels B and C is categorically preempted because the Town is attempting to regulate directly BRT's railroad activities on Parcels B and C, which are under the exclusive jurisdiction of the Board according to 49 U.S.C. § 10501. *See also Grafton & Upton*, slip op. at p. 4; *Boston & Maine*, slip op. at p. 3. The Town's "stop work" order is effectively denying Petitioners the ability to construct rail track on Parcels B and C for rail operations, rail track that is integral to conducting Petitioners' railroad transportation services. BRT's existing rail operations on Parcel A are close to capacity, *supra* 10-11, and the Petitioners' construction of the track on Parcels B and C is of fundamental importance to rail transportation and Petitioners' ability to serve their customers' needs. Through the issuance of the "stop work" order to stop grading activities for track

construction on Parcels B and C, the Town is directly regulating, and even prohibiting, rail transportation under the exclusive jurisdiction of the Board. As the Board decided in similar situations in *Grafton & Upton* and *Boston & Maine*, the Town's regulation is categorically preempted.³⁵

The Town's regulation is also preempted as applied to the Petitioners' railroad activities on Parcels B and C because the regulation unreasonably burdens and interferes with interstate commerce and discriminates against Petitioners. As in *Green Mountain*, the Town's regulation as applied unduly interferes with, and unreasonably burdens, both interstate commerce and Petitioners' rail transportation activities by halting grading operations integral to construction of railroad track. 404 F.3d 642-44 (holding that the town's pre-construction permit was preempted because it unduly interfered with interstate commerce by denying the carrier the ability to construct railroad facilities and conduct railroad operations). By prohibiting the grading integral to the construction of rail track on Parcels B and C, the Town is significantly interfering with Brookhaven Rail's ability to do business as a rail carrier. Proper grading for rail track is critical for proper, efficient and, of course, safe train operations, for which *the railroad*, and *not* the Town, is responsible. Accordingly, a railroad, commensurate with those responsibilities, must have virtual plenary authority over rail track grading, as the railroad, a common carrier, is liable for adverse outcomes related to defective, inefficient or unsafe track grading.³⁶

³⁵ The Town essentially admits that, if BRT's track is deemed a spur, the Board has exclusive jurisdiction, and that the Town's regulation is preempted, Town PI Mem., at 26-29, as the Town argues only that such preemption does not also apply to facilities unless they are "integrally related" to rail operations. Of course, rail track, if it is viewed as a "facility," is integrally related to rail operations, and beyond that, no facility issues are presented by the instant Petition.

³⁶ The Town's complaint as to the track grading plan appears to be, at bottom, a contention that Petitioners should use a "cut and fill" approach, rather than excavation and

Moreover, the Town's "stop work" order is unreasonably burdensome because it does not have a settled or definite end date and will effectively cause open-ended delays of the railroad construction on Parcels B and C, keeping Petitioners' business in a perpetual state of uncertainty. *Adrian*, 550 F.3d at 540-41; *Jackson*, 500 F.3d at 254.

Finally, while the Town retains limited authority under its police powers, the stop work order here is preempted as it is far afield from the exercising of police powers, as it forecloses and unduly restricts Petitioners ability to conduct its railroad operations on Parcels B and C, unreasonably burdening interstate commerce.³⁷ In fact, Town representatives have admitted as much, acknowledging federal preemption of the Town's regulation of grading.³⁸

In summary, the Town's regulation of rail track grading is categorically preempted because it attempts to directly regulate Petitioners' construction and operation of track and

removal. Town PI Mem., at 12-15. That type of decision, fundamental to proper track grading and railroad economics, is clearly preempted by federal law; otherwise, states and localities would be the economic regulators of railroad, not the Board.

³⁷ Petitioners have kept the Town informed regarding their railroad projects on Parcels B and C since 2012, *supra* 11, and commissioned an independent environmental review of the rail and related plans for Parcels B and C that was completed in February 2014, Gannett Fleming, Inc., Brookhaven Rail Terminal, Proposed Expansion (Parcels B and C), Environmental Overview. The environmental overview concluded that the principal concern would be storm water detention/retention and the need for spill control management and countermeasures for on-site fuel storage. *Id.* at 4. There were no other material environmental concerns implicated by the proposed track grading plan on Parcels B and C, and this review was subsequently provided to the Town (which predictably responded that the study is of little merit). Petitioners also hosted a meeting at their BRT facilities on August 5, 2013, attended by officials from the Town and Suffolk County, members of the New York Congressional delegation, New York State Assembly officials, and the news media, during which BRT's operations on Parcel A were toured, and Long Island rail freight issues were discussed.

³⁸ July 3, 2012 Letter from M. Miner to J. Pratt. The Town essentially concedes this point as well in Town PI Mem., at 25-26, where it makes mention that its police powers are not preempted so long as they do not unreasonably interfere with railroad operation, but then presents no argument as to why its stop work order seeking to halt grading for BRT's new track, and thus track construction itself, is not an unreasonable interference with railroad operations. In fact, the stop work order is exactly that, as explained above.

railroad facilities on Parcels B and C, under the exclusive jurisdiction of the Board. The Town's regulation is also preempted as applied because it unduly interferes with and unreasonably burdens Petitioners' railroad transportation business and interstate commerce.

IV. CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Board enter a declaratory order that:

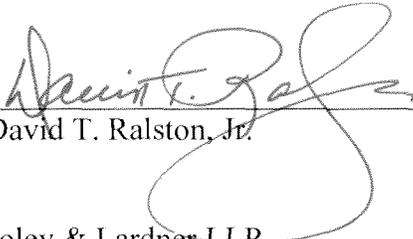
(1) The railroad track that BRT is constructing on Parcels B and C constitutes a "spur, industrial, team, switching, or side track" within the scope of 49 U.S.C. § 10906 and under the exclusive jurisdiction of the Board;

(2) BRT's construction of said track and Brookhaven Rail's transportation operations thereon are exempt from the Board's licensing and economic regulation, either as a spur or as an ancillary expansion of BRT's existing rail transportation facilities, and are not subject to environmental review under NEPA; and

(3) Petitioners' construction of and operations on said track are under the exclusive jurisdiction of the Board, and regulation by the Town, and that of other state and local bodies, of BRT's construction of said rail track, and Brookhaven Rail's operation thereon, including but not limited to a stop work order and other efforts to regulate, limit or prohibit site grading required for rail track construction, are preempted by federal law and the Board's exclusive jurisdiction.

Respectfully submitted,

***Brookhaven Rail Terminal and Brookhaven
Rail, LLC***

By: 
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dralston@foley.com

***Counsel for Brookhaven Rail Terminal and
Brookhaven Rail, LLC***

Dated: April 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, I caused to be served Brookhaven Rail Terminal's and Brookhaven Rail's Petition for Declaratory Order, by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

TO: Judah Serfaty, Esq.
Rosenberg Calica & Birney LLP
100 Garden City Plaza, Suite 408
Garden City, NY 11530

U S Rail New York LLC
205 Sills Road
Yaphank, NY 11980

NYS Dept of Transportation
50 Wolf Road
Albany, NY 12232
Attn: Robert A. Rybak, Esq.

James H.M. Savage, Esq.
1750 K Street, N.W., Suite 350
Washington, D.C. 20006

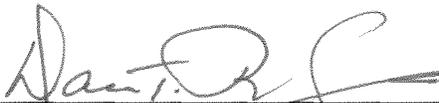
Lyngard Knutson, Esq.
Region 2 E.P.A.
290 Broadway, 25th Floor
New York, NY 10007

NYS Dept. of Environmental Conservation
New York Natural Heritage Program
Albany, NY 12233-4757
Attn: Tara Seoane

Field Office Supervisor U.S. Fish and Wildlife Service
Long Island Field Office
3 Old Barto Road
Brookhaven, NY 11719
Attn: David A. Stilwell

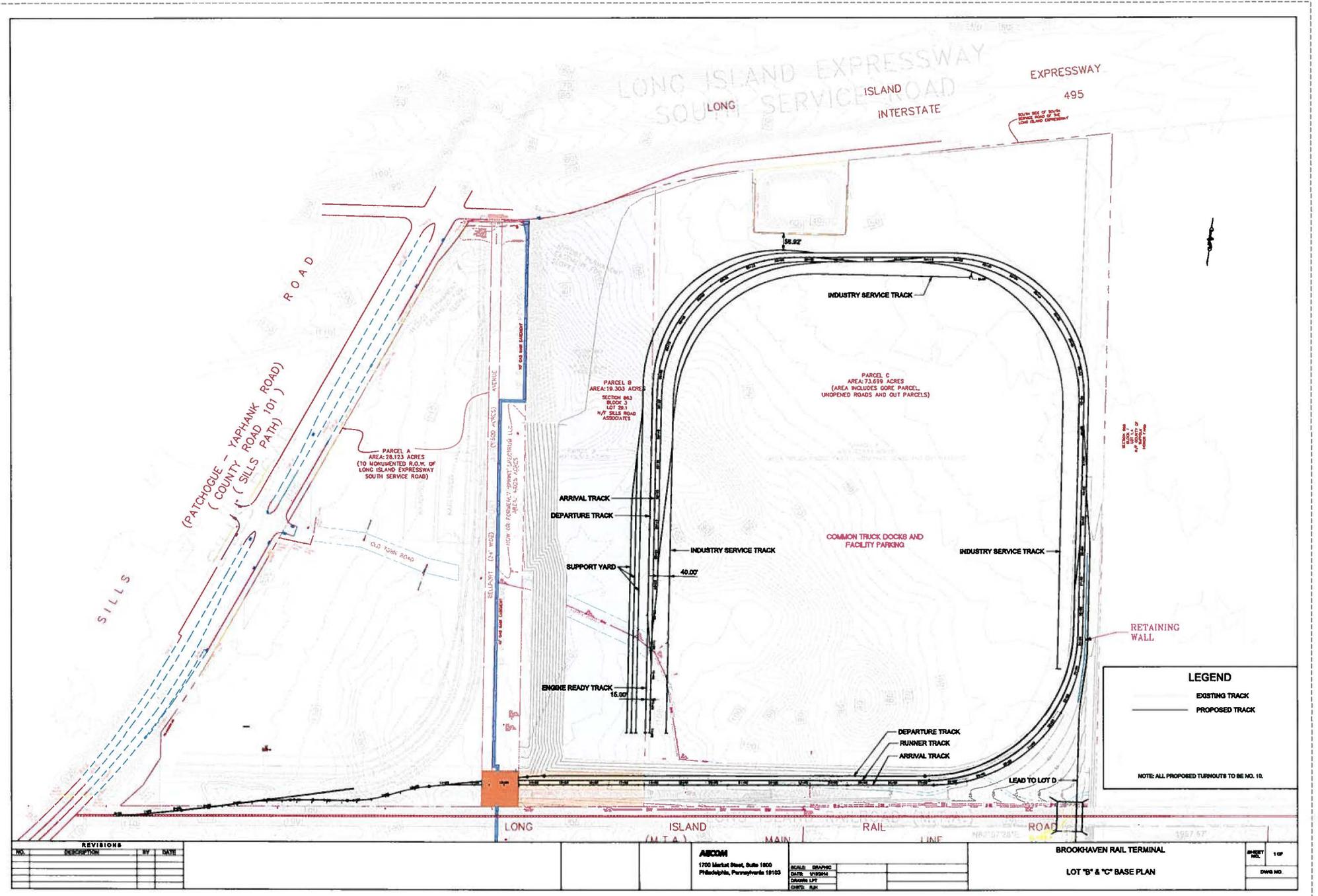
MTA Long Island Rail Road
Jamaica Station
Jamaica, NY 11435-4380
Attn: Helena E. Williams

New York & Atlantic Railway
68-01 Otto Road
Glendale, NY 11385
Attn: Paul Victor



David T. Ralston, Jr.
*Counsel for Brookhaven Rail Terminal
and Brookhaven Rail, LLC*

EXHIBIT 1



REVISIONS			
NO.	DESCRIPTION	BY	DATE

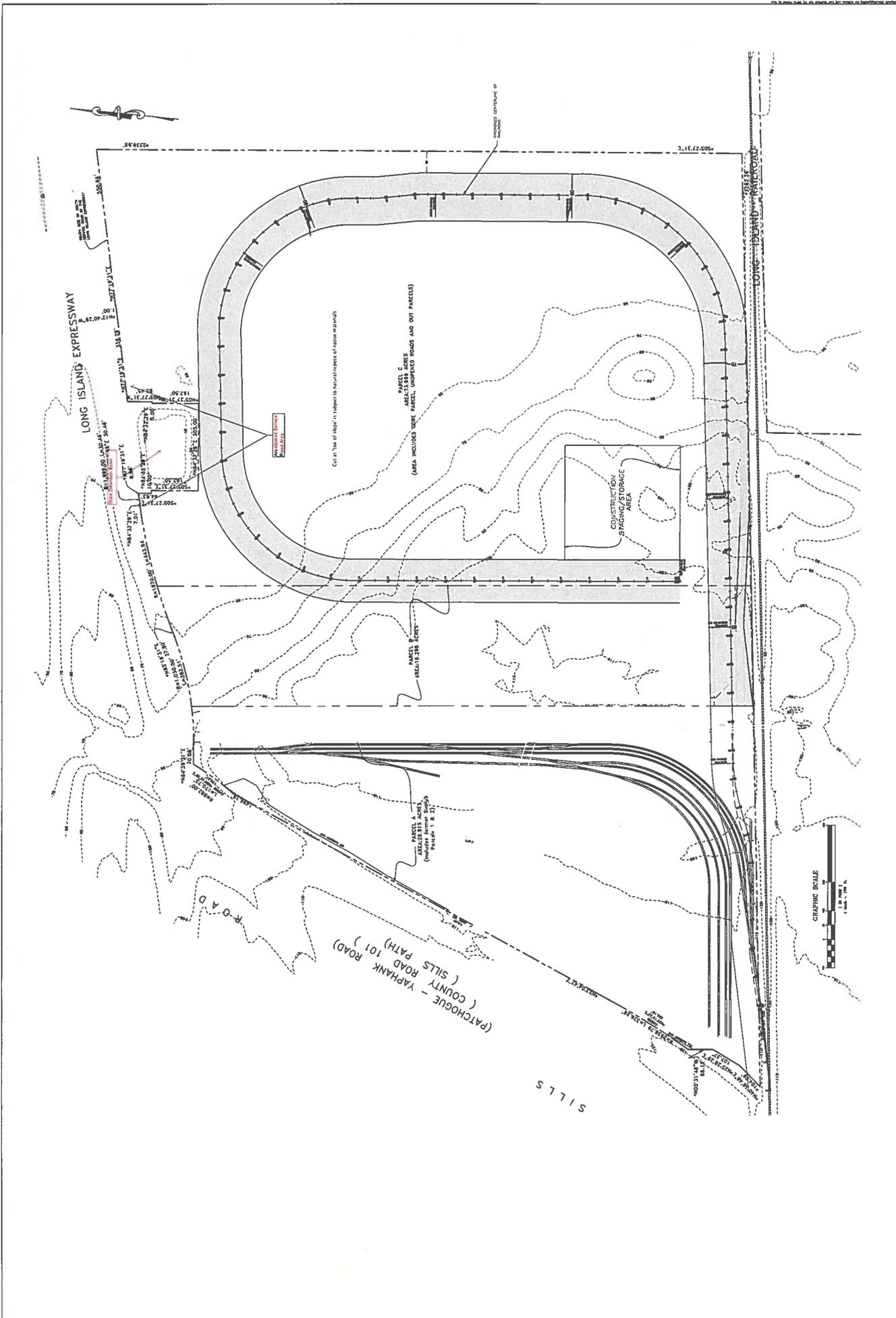
ASCOM
 1700 Market Street, Suite 1800
 Philadelphia, Pennsylvania 19103

SCALE: GRAPHIC
 DATE: 01/29/04
 DRAWING: LPT
 CHECK: RAC

BROOKHAVEN RAIL TERMINAL
LOT "B" & "C" BASE PLAN

SHEET NO. 1 OF 1
 DWG NO.

EXHIBIT 2



RAIL STORAGE PREPARATION PLAN
 BROOKMAN'S RAIL TERMINAL
 YAPHANK, NEW YORK

BOYDE GROUP
 175 East 42nd Street
 New York, NY 10017
 Tel: 212 692-1000
 Fax: 212 692-1001
 www.boydegroup.com

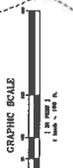
DATE: 11/18/10
 SHEET: 1 OF 1

REFERENCES

- 1. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 2. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 3. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 4. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 5. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 6. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 7. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 8. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 9. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10
- 10. BOYDE GROUP, "RAIL STORAGE PREPARATION PLAN", 11/18/10

LEGEND

- PROPERTY LINE
- - - - - EASEMENT CORNER
- - - - - PROPERTY CORNER
- NO. 10000 CONTOUR



(PATCOQUE - YAPHANK ROAD)
 (COUNTRY ROAD 101)
 (SILLS PATH)

SILLS

EXHIBIT 3

TRANSFER AGREEMENT

BETWEEN

THE LONG ISLAND RAIL ROAD COMPANY

AND

SOUTHERN EMPIRE STATE RAILROAD COMPANY

Dated as of November 18, 1996

MTA/LIRR00623

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MTA/LIRR00624

TRANSFER AGREEMENT
BETWEEN
THE LONG ISLAND RAIL ROAD COMPANY
AND
SOUTHERN EMPIRE STATE RAILROAD COMPANY

This Transfer Agreement is made as of this 18th day of November, 1996, by and between THE LONG ISLAND RAIL ROAD COMPANY, a New York State public benefit corporation, Jamaica Station, Jamaica, New York 11435, (including its successors, the "LIRR") and SOUTHERN EMPIRE STATE RAILROAD COMPANY, a Delaware corporation, (including its successors and permitted assigns, the "Freight Operator").

WITNESSETH:

WHEREAS, the LIRR owns and operates rail freight facilities serving a diversified customer base in the Long Island region;

WHEREAS, the LIRR issued a Request for Proposals ("RFP") for privatization of its freight services;

WHEREAS, Anacostia & Pacific Company, Inc., in contemplation of establishing a Freight Operator, submitted a proposal,

WHEREAS, the Freight Operator submitted a proposal in response to the RFP and a final proposal in response to the LIRR's Request for Best and Final Offers (collectively the "Proposals"); and

WHEREAS, this transaction is intended and should be construed as the LIRR entirely ceasing its operations

relating to the transportation of freight (other than as a customer) and granting the right to the Freight Operator to own, conduct and operate such freight operations on an exclusive basis on and with certain property retained by the LIRR; and,

WHEREAS, the parties wish to establish the terms and conditions upon which the freight services shall be owned and operated by the Freight Operator.

NOW, THEREFORE, in consideration of the benefits accruing to each of the parties as recited to herein, the parties do mutually agree hereto as follows:

ARTICLE 1: AGREEMENT AND DEFINITIONS

1.1 The Agreement

1.1.1 The agreement between the parties consists of this Transfer Agreement, which includes Exhibits 1 through 16 hereto, and documents specifically incorporated herein by reference (collectively, this "Agreement"). The Request for Proposals, the Request for Best and Final Offers and the Proposals are expressly superseded by this Agreement and shall be of no force or effect.

1.1.2 Each of the parties represents and warrants that it will perform in accordance with the terms and conditions of this Agreement.

1.1.3 This Agreement contains the entire understanding between the Freight Operator and the LIRR with respect to the Freight Operations. The parties are not bound by any written or oral statement or representation which is not expressly part of this Agreement. Any waivers, modifications or changes to this Agreement shall not be binding on either party unless set forth in a writing duly executed by both the Freight Operator and the LIRR.

1.1.4 (a) This Agreement is binding upon the Freight Operator upon its execution, but shall be null and void ab initio if (i) the LIRR fails to satisfy the requirements of clause (b) (4) within sixty (60) days of the Freight Operator's execution of this Agreement or such greater period as the Freight Operator, in its sole discretion, shall determine or (ii) the Freight Operator fails to satisfy the requirements of clause (b) (ii) within sixty (60) days of the LIRR's execution of this Agreement or such greater period as the LIRR, in its sole discretion, shall determine.

(b) The later of the dates on which the following requirements are satisfied shall be deemed the "Effective Date":

(i) The LIRR obtains the approval of the Board of Directors of the MTA and thereafter executes this Agreement; or

(ii) The Freight Operator secures approval or exemption for the transactions contemplated by this Agreement from the STB consistent with Article 12.1 hereof.

This Agreement shall be null and void in the event any labor protective provisions are imposed by the STB unless the parties otherwise agree or a party agrees to pay the cost associated with such labor protective provisions.

1.1.5 The Freight Operator shall commence the Freight Operations on or before April 1, 1997, provided that such date shall be extended in the event of the occurrence of an Event of Force Majeure or the existence of an injunction or order prohibiting or delaying such commencement, by the number of days of the duration of such Event of Force Majeure, injunction or order or such other period as may be mutually agreed upon by the parties, and shall continue the Freight Operations throughout the term of this Agreement (including the Extension Period, if applicable) except as otherwise provided herein. Such date on which the Freight Operator commences operations hereunder shall be referred to herein as the "Commencement Date."

1.1.6 The obligations of the Freight Operator hereunder are subject to the condition that on the date the Freight Operator is to commence operations pursuant to Section 1.1.5 there has been no material adverse change in the Freight Premises since September 16,

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume of 13,600 carloads at \$517 per carload shall be deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 Definitions

- 1.2.1 Unless otherwise noted, the following definitions shall apply throughout this Agreement:
- 1.2.2 "AAR" means the Association of American Railroads.
- 1.2.3 "AAR Office Manual" means the Office Manual of the AAR Interchange Rules, adopted by the AAR, Operations and Maintenance Department, Technical Services Division, as amended from time to time.
- 1.2.4 "Abatement Period" means, (a) for any Annual Fee Period two separate periods of at least ten consecutive days; provided that for purposes of this clause (a) if the second of such periods straddles two Annual Fee Periods such period shall nevertheless

be deemed an Abatement Period, (b) a single period of 20 consecutive days or (c) for any Annual Fee Period an aggregate of at least 45 full calendar days whether or not consecutive. It is understood that (i) only days on which the Freight Operator is unable to provide service which it otherwise would have provided shall be counted for purposes of clause (c) and (ii) none of the periods referred to in clause (a), (b) or (c) shall be included in more than one Abatement Period.

- 1.2.5 "Accident/Incident" means an event or situation related to the Freight Operations that (1) results in personal injury, property damage or a derailment on the Operating Premises, or (2) is required to be reported to the FRA pursuant to the rules and regulations of the FRA.
- 1.2.6 "Annual Fee" means the fee described in Article 4.1.1(c) hereof.
- 1.2.7 "Annual Fee Period" means the one year period commencing on the Commencement Date and ending on the day before the anniversary of the Commencement Date and each subsequent one-year period through the termination of this Agreement.
- 1.2.8 "Business Plan" means the Business Plan for the five-year period commencing on the Commencement Date submitted by Freight Operator in connection with this Agreement and a copy of which has been executed by the parties.

1.2.9 "Capital Expenditures" means expenditures (excluding expenditures for maintenance), in excess of \$25,000 for improvements or additions to the Freight Premises or Freight Rolling Stock (it being understood that multiple improvements or additions to a single facility may be aggregated and additions of multiple "units" of a single type of Rolling Stock may be aggregated for purposes of the foregoing) that will extend or have a useful life, respectively, greater than one year, including, without limitation, amounts paid out for new buildings, rail facilities or structures, Freight Rolling Stock, or for permanent improvements or additions made to increase the value of the Freight Premises or Freight Rolling Stock. Capital Expenditures shall include the cost of assets acquired under capital leases.

1.2.10 "Capital Improvements" means any improvements made to the Freight Premises, with Capital Expenditures, including, without limitation, improvements or additions made with Capital Expenditures to Freight Rolling Stock, capital leases undertaken by the Freight Operator and improvements or additions made to the Freight Premises by customers of the Freight Operator.

1.2.11 "Car Miles" means the distance traveled (using LIRR timetable miles) by a "unit" of Freight Rolling Stock, whether loaded or empty, over the Joint Use Premises or the Passenger Premises.

1.2.12 "Class I Upgrade" means the improvements necessary to upgrade the Freight Premises, or any part thereof, to meet Class I track standards promulgated by the FRA.

1.2.13 "Clearance Point" means the location established by the LIRR near the switch where two tracks converge at which Freight Rolling Stock will foul the Joint Use Premises or the Passenger Premises. The Clearance Point will be 14.5 feet from the center line of the nearest track on the Joint Use Premises or the Passenger Premises, unless a different distance is or has been established by the LIRR in its sole discretion.

1.2.14 "Commencement Date" means the date defined in Article 1.1.5 hereof.

1.2.15 "Company Traffic" means freight shipments where the LIRR is the consignee or consignor.

1.2.16 "Concession Fee" means the fee described in Article 4.1.1(d) hereof.

1.2.17 "Condemnation" means the taking of all or any part of the Operating Premises for any public or quasi-public use under the right of eminent domain.

1.2.18 "DOT" means the United States Department of Transportation or any successor agency performing the same or similar functions.

MTA/LIRR00631

MTA/LIRR00632

1.2.19 "Effective Date" is defined in Article 1.1.4(b) hereof.

1.2.20 "Employee" means an officer, director, agent, employee, or contractor of either of the parties while engaged in any activity related to the Agreement.

1.2.21 "Equitable Abatement" shall mean an amount which is equal to the lesser of (a) the Freight Operator's damages related to the underlying condition(s) in respect of which such amounts is being determined and (b) the amount obtained by dividing the Annual Fee by 365 and multiplying such number by the number of days during which such underlying condition(s) persisted. Notwithstanding any provisions herein, in no event shall the sum of all Equitable Abatements with respect to all Abatement Periods occurring in any particular Annual Fee Period exceed the Annual Fee for such Annual Fee Period. In the event any Abatement Period described in clause (a) or (b) of the definition of the term "Abatement Period" falls within more than one Annual Fee Period, the Equitable Abatement in respect thereof shall be allocated pro rata between such Annual Fee Periods on the basis of the number of days of such Abatement Period falling in such Annual Fee Periods for purposes of the foregoing.

1.2.22 "Event of Force Majeure" means any of the following acts, events or circumstances: (a) storms, (b) lightning, (c) floods, (d) fires, (e) epidemics, (f)

earthquakes, (g) quarantine, (f) blockade, (g) strikes, walkouts, lockouts or labor disputes, (h) actions by any governmental agency (other than the LIRR, the MTA or any other governmental agency controlled by the MTA) that have the effect of delaying or materially impeding the Freight Operations, (i) war, (j) insurrection or civil strife, (k) sabotage, (l) explosion, (m) other acts, events or circumstances, whether of the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or entity not a party hereto, but only to the extent that such acts, events or circumstances are beyond the reasonable control of the affected party.

1.2.23 "Extension Period" is defined in Article 2.2.1 hereof.

1.2.24 "FRA" means the Federal Railroad Administration and any successor agency performing the same or similar functions.

1.2.25 "Final Termination Date" is defined in Article 14.2 hereof.

1.2.26 "Freight Operations" means all operations related to the movement of freight by rail (other than Company Traffic) on the Operating Premises, including, without limitation, the storage, warehousing, transloading of freight moved by rail and the storage of equipment used for transporting freight by rail.

1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.

1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.

1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.

1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

in effect from time to time, (v) "Petroleum" as defined in N.Y. Environmental Conservation Law § 15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, (vi) asbestos and (vii) polychlorinated biphenyls.

1.2.31 "Initial Expiration Date" is defined in Article 2.1 hereof.

1.2.32 "Interchange Rules" means the Interchange Rules included in the AAR Office Manual (or any successor manual).

1.2.33 "Joint Use Premises" means real property, including right-of-way, tracks, appurtenances, buildings, facilities, any other physical plants and improvements thereto used for both Passenger Operations and Freight Operations. Joint Use Premises shall include only the properties identified in Exhibit 2 hereto.

1.2.34 "Light Engines" means one or more locomotive units not coupled to cars or passenger coaches.

1.2.35 "LIRR Operating Rules" means all rules, requirements and procedures governing operations or activities on or about the Joint Use Premises and Passenger Premises, including the dispatching, movement and placement of Rolling Stock and the use and operation of infrastructure components and systems as outlined or incorporated by reference in the LIRR's "Rules of

the Operating Departments," as such may be modified from time to time and/or amended by periodic General Orders, Special Instructions or General Notices.

1.2.36 "LIRR Safety Rules" means the rules, requirements and procedures established by the LIRR governing the safety of its operations, employees and customers on or about the Joint Use Premises and the Passenger Premises, as such may be modified from time to time, including, without limitation, any Roadworker Safety Rules that may be adopted.

1.2.37 "Loss or Damage" means all claims, liabilities, costs and expenses of every kind or nature, including amounts paid under any State or Federal compensation law, and costs and attorneys fees incurred in the investigation, defense, or settlement of any actual or threatened legal proceeding related to personal injury or property loss or damage (including environmental loss or damage) arising under or related to this Agreement. Property loss or damage includes loss or damage to real property and improvements thereon, and personal property of either party or third persons. Personal injury includes injury to or illness or death of persons including employees of either party, invitees, licensees, and trespassers.

1.2.38 "MTA" means the New York State Metropolitan Transportation Authority and its affiliates and subsidiaries or any successor agency.

1.2.39 "Operating Premises" means the "Freight Premises" and the "Joint Use Premises."

1.2.40 "Operating Windows" means the blocks of time between passenger trains (loaded or empty) and on-going construction work (both maintenance and capital) during which freight trains can operate on the Joint Use Premises. It is understood that Operating Windows may be modified by the LIRR due to operating exigencies and changes to the LIRR's schedules.

1.2.41 "Passenger Operations" means all operations related to the transportation of persons by rail.

1.2.42 "Passenger Premises" means all property, including rights-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used for Passenger Operations that are not included in the Freight Premises or Joint Use Premises.

1.2.43 "Private Freight Siding" means a rail facility, including track and appurtenances thereto, owned by a freight customer. All such rail facilities are identified on Exhibit 3 hereto.

1.2.44 "Renewal Fee" means the fee described in Article 2.2.2.

1.2.45 "Renewal Notice" means the notice to extend the Agreement as more fully described in Article 2.2.1(e).

1.2.46 "Rolling Stock" means a railroad car, locomotive, caboose, intermodel car, inspection car, passenger coach, cab car, bogie, wrecking equipment, work equipment and any other form of equipment with wheels operated on railroad track. Each of the foregoing will constitute a "unit" of Rolling Stock (it being understood that, with respect to any multiplatform car, each platform shall be considered a "unit").

1.2.47 "Sidetrack" means all track on the Freight Premises side of a Clearance Point of a Freight Switch that is used for switching freight cars and equipment to and from freight customer facilities or Team Track.

1.2.48 "STB" means the United States Surface Transportation Board or any successor agency performing the same or similar functions.

1.2.49 "Switch Maintenance Fee" is defined in Article 4.1.1(b) hereof.

1.2.50 "Team Track" means a rail facility, included in the Freight Premises, that is available for use by multiple rail customers for loading and unloading merchandise from Freight Rolling Stock. The Team Tracks are identified on Exhibit 1 hereof.

1.2.51 "Trackage Fee" is defined in Article 4.1.1(a) hereof.

1.3 All adjustments for inflation contained in this Agreement shall be based on the Indices of Railroad Material Prices and Wage Rates for Eastern Class I

Railroads (material prices, wage rates and supplements combined, excluding fuel) or, in the event such indices are discontinued, the Indices of Railroad Material Prices and Wage Rates for all Class I Railroads (material prices, wage rates and supplements combined, excluding fuel). If both such indices are discontinued then all adjustments for inflation contained in this Agreement shall be based on the Composite Implicit Price Deflator published by the Bureau of Economic Analysis, U.S. Department of Commerce or any successor agency.

ARTICLE 2: TERM AND RENEWAL

2.1 Term

Unless otherwise terminated as provided for in this Agreement, this Agreement shall remain in effect from and after the Effective Date through the twentieth anniversary of the Commencement Date (the "Initial Expiration Date").

2.2 Renewal

2.2.1 In the event the Freight Operator meets the following conditions, this Agreement may be renewed at the Freight Operator's option for a term of 10 years (the "Extension Period"), to commence on the Initial Expiration Date:

(a) The Freight Operator is not in material breach of any term(s) of this Agreement.

(b) The Freight Operator's safety record based on the average annual FRA-reportable accidents per 200,000 man hours or, if unavailable, other comparable measure, for the three (3) year period preceding the date of the Renewal Notice is equal to or better than the national industry average for Class C freight railroads for the same period or in the event that a national industry average for Class C freight railroads is not ascertainable such other comparable index as may be available. For purposes of this clause, accidents caused primarily by the LIRR shall be excluded from the Freight Operator's safety record; provided that such accident has been previously determined to be caused primarily by the LIRR.

(c) The annual average of freight carload volume (measured in terms of loaded "units" of Rolling Stock consisting of railroad cars and intermodal cars) transported in the Freight Operations for the three (3) year period preceding the date of the Renewal Notice shall be at least 24,474 carloads, or the percentage increase of the carload volume for the twelve calendar months preceding the Commencement Date to the carload volume for the twelve calendar months preceding the Renewal Date shall be more than 125% of the percentage increase achieved by the Eastern Class I Railroads for the corresponding periods; provided that if no such statistic is available

then the percentage increase achieved by all Class I Railroads nationwide shall be used.

(d) In respect of Capital Improvements for the period from the Commencement Date to the date of the Renewal Notice, the Freight Operator has invested or has caused to be invested in the aggregate at least \$14,468,920.

(e) The Freight Operator gives notice in writing to the LIRR of its intent to renew the Agreement (the "Renewal Notice") no sooner than 13 years, but prior to 18 years, after the Commencement Date.

2.2.2 The terms and conditions of this Agreement shall remain in full force and effect during the Extension Period except for the following:

(a) The Freight Operator shall pay to the LIRR a Renewal Fee of \$3,040,550 at the commencement of the Extension Period, and ten equal annual installments of \$1,268,865 each on each anniversary of the commencement of the Extension Period.

(b) Capital Expenditures during the Extension Period shall be at least 50% above the amount proposed in the Business Plan, indexed for inflation to the end of the twenty (20) year term of the Agreement using the methodology and indices described in Article 4.2.

2.2.3 Notwithstanding any provisions herein, nothing shall prevent the parties from negotiating any renewals for a term no greater than ten (10) years.

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.

3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.

3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

facilities constructed by the Freight Operator hereunder, improvements made thereon or improvements made to existing premises by the Freight Operator shall be made in compliance with applicable building codes and other regulations, and shall be owned by the LIRR as part of the Freight Premises.

3.2 Assignment of Contracts

3.2.1 The LIRR hereby assigns and the Freight Operator (a) hereby accepts all existing tariffs, customer contracts, leases, real estate agreements, side track agreements and other agreements applicable to the LIRR's existing Freight Operations and (b) shall have the right, from time to time, to take any lawful action to modify such contracts and agreements. Notwithstanding the foregoing, if any customer contracts, leases or real estate agreements (i) are not set forth on Exhibits 12 and 13 hereto or were not disclosed or made available to the Freight Operator during the Freight Operator's due diligence, (ii) are required to be assumed or otherwise performed by the Freight Operator and (iii) as a result, have a material adverse effect on the Business Plan, then the Freight Operator shall receive an Equitable Abatement in connection with such contracts and agreements.

3.2.2 In the event that the excavation spoils from the water supply shaft that is being created in the area known as Maspeth Yard and is the subject of an easement granted by The Long Island Rail Road Company

to the City of New York Department of General Services commencing on September 1, 1992 pursuant to a Purchase Option Agreement dated August 26, 1992, are not moved from the area by rail as required by Section 5 of the Terms and Conditions of that Agreement, except due to force majeure, the LIRR shall, at the request of the Freight Operator, promptly use good faith efforts to negotiate the "significantly higher compensation" referred to in said Section 5 and shall promptly pay to the Freight Operator from the additional compensation, if any, received the lesser of (i) the full amount of such additional compensation, if any, or (ii) 50% of the difference between \$5.4 million and the revenues collected by the Freight Operator for movement of such material.

3.3 Limitations on Grant

3.3.1 The Freight Operator's right to conduct Freight Operations over the Joint Use Premises is subject to the LIRR's management, direction, dispatching, operation and control as set forth in this Agreement.

3.3.2 The grant of rights in Article 3.1 specifically excludes all of the following:

- (a) Any right to control, direct or interfere with the LIRR's Passenger Operations on the Operating Premises or the Passenger Premises.

- (b) Any subsurface or air rights in or associated with the Freight Premises or elsewhere in or associated with the Operating Premises, which subsurface and air rights shall remain with the LIRR.
- (c) All utility occupancies currently located on the Freight Premises, including, but not limited to, The Buckeye Pipeline and all easements and reservations of record. To the extent any such utility has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.
- (d) Any rights to property encumbered by encroachments, tenants, licensees, squatters or other occupancies currently on the Freight Premises. There shall be no obligation on the part of the LIRR to take any action to remove the same except that the LIRR shall continue to pursue litigation pending on the Effective Date and the LIRR shall take actions to remove any encroachment that arose after September 16, 1996 and is existing on the Commencement Date that prevents the movement of Rolling Stock on lines being actively used immediately before the Commencement Date in connection with Freight Operations on the Freight Premises; provided that, encroachment in this sentence shall mean a permanent structure and provided, further that the Freight Operator shall inform the LIRR of

includes on street

any such encroachments within 30 days after the Commencement Date; provided, however, that the Freight Operator (at its own expense) may on the LIRR's behalf take lawful action to remove any such occupancy which was not granted or approved by the LIRR or its predecessors in title. At the Freight Operator's request the LIRR, to the extent applicable, shall, at the expense of the Freight Operator, cooperate with the Freight Operator in connection therewith.

(e) Any right to use or permit others to use the Freight Premises for purposes not directly related to Freight Operations. Without limiting the generality of the foregoing, the Freight Operator shall not use or permit the use of the Operating Premises for:

- (i) Tenancies not directly related to the Freight Operations;
- (ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and
- (iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations.

Notwithstanding the foregoing, with respect to clause (i), the Freight Operator shall be permitted, with the prior consent of the LIRR, to use or permit the use of the Freight Premises for the purposes stated; provided that any contracts entered into with third parties in connection therewith are on terms no less favorable than could be obtained with an unaffiliated third party and that any revenues received therefrom shall be shared equally by the parties hereto.

The parties acknowledge and agree that in the case of clause (iii) above, (x) TDI has the exclusive right to install and maintain billboards on the Freight Premises, (y) no new billboards shall be installed on the Freight Premises without the prior written consent of the Freight Operator and (z) the Freight Operator shall permit TDI to have access to the Freight Premises, upon reasonable notice to the Freight Operator and at reasonable times, for the purpose of maintaining or removing any billboard. To the extent TDI has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(f) The Freight Operator may not lease, license or otherwise assign any portion of the Operating Premises to any person for any purpose except by written consent of the LIRR which may be granted in the sole discretion of the LIRR; provided, however, that the Freight Operator may, without the prior written consent of the LIRR, lease or license portions of the Freight Premises to

shippers or others directly involved in the furtherance of Freight Operations on the Freight Premises (other than any such lease or license that has the effect, individually or taken together with all other leases or licenses, of causing all or a substantial portion of the Freight Operations to be conducted directly by any person or entity other than the Freight Operator), which shall be subordinate and subject to the terms and conditions of this Agreement. The LIRR shall receive prior written notice of any and all such agreements. Such leases and licenses, if any, shall provide for insurance and indemnification of the LIRR and its affiliates (including any government or governmental agency) to the same extent as provided under this Agreement. Such leases and licenses, if any, shall not relieve the Freight Operator of any obligations or duties imposed on it by this Agreement.

- (g) Any use of the name The Long Island Rail Road Company or LIRR or any name derived therefrom or confusingly similar thereto, without the prior written consent of the LIRR; provided that the Freight Operator may use any other name with the words "the", "railroad" or "company". The Freight Operator agrees not to hold itself out as (a) having a common identity with the LIRR or any of its affiliates (including any government or governmental agency) or (b) acting as the LIRR's agent.

- (h) Any title or estate in the ownership of the Freight Premises, any other part of the Operating Premises or the Passenger Premises.

- (i) The right to conduct Passenger Operations.

3.3.3 The LIRR retains the right to use or to allow third parties to use the Freight Premises to construct, inspect, repair and maintain bridges, culverts and other structures (including structures in connection with the utilization by the LIRR of its subsurface or air rights hereunder) or construct utilities with reasonable prior written notice to the Freight Operator, provided however that any such use shall not materially interfere with the Freight Operations. The Freight Operator, upon receipt of prior written notice from the LIRR, will cooperate, without any cost to the Freight Operator; in allowing the LIRR to effectuate or permit any work described in this Article 3.3.3. Any indemnification or release by any third party to the LIRR with respect to the above shall, by its terms, also inure to the benefit of the Freight Operator.

3.3.4 Upon reasonable prior notice to the Freight Operator, the LIRR shall have the right to permit construction of a highway in conjunction with the Freight Premises on the Bay Ridge Branch from the 65th Street Yard (First Avenue) in Brooklyn to the connection with Conrail at Fresh Pond for mitigating the highway traffic congestion through Brooklyn and Queens during and after completion of the Gowanus Expressway

reconstruction and rehabilitation project. In such event, the Freight Operator will be entitled to receive from the LIRR damages as described in the next sentence. Damages means 50% of the revenues received during the twelve months preceding delivery of the aforementioned notice from customers that can no longer be served by rail due to such project multiplied by twice the number of years and fractional portions thereof of such period of interference. In addition, the LIRR shall, without duplication, indemnify the Freight Operator for any Loss or Damage in connection therewith. If the Freight Operator resumes Freight Operations after completion of this construction project, the Freight Operator shall be subject to certain scheduling limitations as to joint use to be agreed upon in writing. The LIRR shall use reasonable efforts to have the project work performed in a manner to minimize disruptions to the Freight Operations.

3.3.5 The following provisions apply to a portion of the Freight Premises known as Yard A and described more fully in Exhibit 5 hereto:

- (a) The LIRR reserves the right to take exclusive possession of part or all of Yard A in the event it is needed to be used as part of the Passenger Operations, for expansion of Passenger Operations, or for any regional transportation plan. Subject to the last paragraph of this Article 3.3.5, the LIRR shall only exercise this right upon not less than six months prior.

written notice to the Freight Operator and, in any event, only after December 31, 2001.

- (b) The parties agree to negotiate, in good faith, mutually acceptable arrangements with the goal of avoiding additional cost or loss of operations by the Freight Operator in connection with any taking described in clause (a) above, including without limitation, the construction at the sole cost of the LIRR of freight facilities, which shall then become part of the Freight Premises, to handle the average daily volume of traffic handled in the Yard A facilities taken possession of by the LIRR under Article 3.3.5(a) hereof in the twelve (12) months preceding the time when the LIRR takes possession under said Article 3.3.5(a), all of which is subject to availability of an alternative site and capital funds.
- (c) Should the Parties be unable to reach a mutually acceptable agreement as described in 3.3.5(b) hereof, the LIRR will reduce the Annual Fee for the balance of the term by an amount equal to the increased operational cost and lost profits associated with any taking described in clause (a) above, but in no event shall such amount exceed 25% of the Annual Fee. In the year in which the LIRR so takes possession, the Annual Fee will be prorated on a daily basis and reduced for the balance of the year, following the date of such possession in accordance with

the preceding sentence. In addition, to the extent the Freight Operator has made any Capital Improvements to Yard A, the Freight Operator shall receive from the LIRR the unamortized cost of such improvements; provided that such amortization shall be based on a useful life of seven years.

The foregoing provisions of this Article 3.3.5 shall not apply to the property identified in Exhibit 14, which property the LIRR shall be allowed to take any time after the Commencement Date without any compensation to the Freight Operator.

3.3.6 After giving notice of proposed construction under any provision of this Section 3.3, LIRR representatives shall meet with Freight Operator representatives to review the details of the construction project, including but not limited to work plans and schedules. If the construction project, in Freight Operator's sole opinion, requires flagmen or other personnel for safety or operational considerations, Freight Operator will assign personnel to the project at LIRR's sole expense.

3.3.7 The LIRR may, in respect of the Freight Premises, have its own systematic and periodic program of environmental auditing or a documented, systematic practice regarding its due diligence in preventing, detecting or correcting violations as defined in the Environmental Protection Agency Policy regarding

incentives for self-policing dated December 18, 1995 (or any successor thereto, as announced and in effect from time to time); and the Freight Operator shall provide access to its facilities, records and documents, and make available upon reasonable request such staff as may be necessary for the LIRR to conduct such a program or practice; provided, however, that the LIRR shall provide the Freight Operator with a copy of the written procedures or guidelines under which it conducts the program or practice, and shall conduct a review not more frequently than semi-annually at any facility. Upon preparation of a written report as a result of the audit or practice, the LIRR shall provide the Freight Operator with a copy of the report, and the Freight Operator, within 30 days thereafter shall provide any response or other comment on the recommendations or other materials presented in the report. The Freight Operator understands and agrees that the LIRR may operate such a program or practice for the LIRR's benefit, and the Freight Operator shall not be entitled to rely upon the results thereof for any purpose, except with the express written consent of the LIRR.

3.3.8 The LIRR retains the right of access to and exclusive use of the basement communications room in the LIC Freight Building at 21st Street and Jackson Avenue. The LIRR retains the right of access to such basement communications room on an ongoing basis for its own and NYNEX personnel, and for LIRR highway vehicles to enter and park in the parking lot outside the

building. Notwithstanding the foregoing, (i) LIRR shall be solely responsible for the maintenance and security of the basement communications room in the LIC Freight Building, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the basement communications room (except to the extent caused by the gross negligence, recklessness or willful or wanton misconduct of the Freight Operator).

3.3.9 The LIRR retains the right of access to and exclusive use of the property identified in Exhibit 15 that is located underneath the 21st Street Bridge and extends westward into the culvert between the concrete walls, Tracks 1 through 8 (identified in Exhibit 14 of the Transfer Agreement) in Yard A and the ground storage area in Maspeth Yard (Exhibit 16) from April 1997 through December 1998. The LIRR retains the right of access to these facilities for its own personnel and such contractor(s) as may be designated by the LIRR and where necessary, using LIRR crews and equipment. The Freight Operator will also make available to LIRR the western portion of the salt track in Arch Street Yard and Track 5 in Maspeth (identified in Exhibit 15, which is not part of the Freight Premises), on an as-needed basis as determined by LIRR for loading and unloading cars of Company Traffic consistent with the need of the Freight Operator. Movement of LIRR crews and equipment within Yard A, the Arch Street Yard and Maspeth Yard will be coordinated by the Freight Operator. Notwithstanding the foregoing, (i) LIRR

shall be solely responsible for the maintenance and security of the property described in Exhibit 15, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the property described in Exhibit 15 (except to the extent caused by the gross negligence, recklessness, or willful or wanton misconduct of the Freight Operator).

3.4 Additions to Freight Premises

3.4.1 In the event that the LIRR, in its sole discretion, determines that any portion of the Joint Use Premises which is necessary for the Freight Operations is no longer necessary in connection with its Passenger Operations or other public use, and therefore determines to abandon such portion, the Freight Operator shall have the option to accept such portion as an addition to the Freight Premises, and such portion shall be treated as Freight Premises thereafter and in any event shall no longer be treated as Joint Use Premises.

3.5 Reversion of Freight Premises to the LIRR Under Certain Circumstances

3.5.1 The Freight Operator may, by written notice to the LIRR, designate a portion or portions of the Freight Premises as being unnecessary in connection with the Freight Operations. At the option of the LIRR, such portions of the Freight Premises may revert to the LIRR's control and become a part of the Passenger Premises upon 30 days prior written notice to the Freight Operator; provided however, that (i) if any such portion that reverts to the LIRR includes any part of the right-of-way or an appurtenance associated with any tracks in the Freight Premises, such portion that reverts to the LIRR shall also include such tracks and (ii) in no event shall there revert to the LIRR any tracks or facilities that are only accessible through the Freight Premises. If the LIRR does not elect to have any such portion revert to its control (i) such portion shall remain as part of the Freight Premises and (ii) with respect to any such portion which is only accessible through the Freight Premises, the Freight Operator, with the consent of the LIRR (which consent shall not be unreasonably withheld), may remove and sell the rail and associated track materials thereon in accordance with Article 3.6.5(iii).

3.5.2 At any time during the notice period described in Article 3.5.1 hereof, the Freight Operator may reclaim such portion or portions of the Freight Premises by withdrawing the designation described in

Article 3.5.1 hereof.

3.5.3 In the event of a reversion hereunder, there shall be no reduction in the Annual Fee.

3.6 Condition of Freight Premises

3.6.1 The Freight Operator acknowledges that it has conducted due diligence to its satisfaction prior to signing this Agreement.

3.6.2 The LIRR has conducted an environmental audit dated July 12, 1996, which was made available for the Freight Operator's review.

3.6.3 The Freight Operator acknowledges and agrees that the Freight Premises are being transferred hereunder on an "as is/where is" basis and the Freight Operator shall, subject to the provisions of Article 8.4 hereof, be responsible for the condition of the Freight Premises as of the Commencement Date.

3.6.4 The Freight Operator is prohibited from selling, salvaging, demolishing or removing any part of the Freight Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of the LIRR.

3.6.5 Notwithstanding any provision herein to the contrary: (i) the Freight Operator may, upon prior written notification to the LIRR, salvage and sell all surplus track materials stored on the right-of-way

within the Freight Premises, provided, that the net proceeds from any sale shall be shared equally by the Freight Operator and the LIRR; (ii) the Freight Operator may replace any part of the Freight Premises with parts of equal or greater quality and the proceeds from the sale of such replaced parts shall accrue to the Freight Operator; and (iii) net profits, if any, from the sale of any materials with the consent of the LIRR pursuant to Article 3.5.1 hereof shall be shared equally by the Freight Operator and the LIRR.

3.7 Freight Switches

- 3.7.1 Exhibit 6 hereto sets forth a list of Active Freight Switches, all of which have been classified as either Category A, Category B or Category C Freight Switches. Except as set forth below, the classification of a Freight Switch shall not change prior to the termination of this Agreement, including any Extension Period.
- 3.7.2 All Category C Freight Switches existing on the Effective Date shall automatically become Category B Freight Switches eighteen (18) months after the Commencement Date, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.
- 3.7.3 Any Freight Switch that, after the Commencement Date, is (i) installed, including by way of replacement (other than when replacing a Category A Switch, which

replacement switch shall also be a Category A Switch) or (ii) newly activated, shall, after such installation or activation, be classified as a Category B Freight Switch, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

- 3.7.4 During the first eighteen (18) months after the Commencement Date, the Freight Operator may activate any Freight Switch identified in Exhibit 7 hereto, by providing thirty (30) days written notice to the LIRR. The LIRR shall, within a reasonable period of time, activate any such Freight Switch requested to be added, provided that, for each Freight Switch activated, the Freight Operator will be charged the cost to activate such Freight Switch.
- 3.7.5 After eighteen (18) months from the Commencement Date, the Freight Operator shall give at least thirty (30) days prior written notice to deactivate a Freight Switch. The monthly Switch Maintenance Fee shall be reduced accordingly following the lapse of such thirty (30) day period. The LIRR, at its sole option, may remove at any time after eighteen (18) months after the Commencement Date those Freight Switches identified in Exhibits 6 or 7 which are deactivated or are not activated by the Freight Operator during this period.
- 3.7.6 To install a new Freight Switch at any time, or to activate a Freight Switch in place after eighteen (18) months from the Commencement Date, the Freight

Operator shall make such request in writing to the LIRR, and follow the procedures outlined in Exhibit 8 hereto.

3.7.7 (a) The LIRR shall replace or rehabilitate, at its cost, any Category A Freight Switch that is in need of replacement or rehabilitation upon request of the Freight Operator or if the LIRR elects to replace or rehabilitate such Freight Switch.

(b) The LIRR shall replace or rehabilitate, at the Freight Operator's cost, any Category B or Category C Freight Switch that is, or is estimated to be within one (1) year of the date of notice set forth in this Article 3.7.7, in need of replacement or rehabilitation, provided that (i) the LIRR has furnished to the Freight Operator written notice that includes the cost of and schedule for such replacement or rehabilitation at least 120 days prior to the proposed date of initiating such replacement or rehabilitation (provided, that the LIRR shall not be obligated to furnish such notice in emergencies which affect the safety of Passenger Operations on the Joint Use Premises) and (ii) within 60 days after receipt of such notice, the Freight Operator has not notified the LIRR in writing that such Freight Switch should be deactivated rather than replaced or rehabilitated. Upon receipt of any such notice requesting deactivation, the LIRR may, but shall not be obligated to, deactivate the relevant Freight Switch immediately. Nothing set forth in this clause (b) shall preclude the LIRR from replacing or

rehabilitating a Category B or Category C Freight Switch, at its own election, at the LIRR's expense.

(c) The LIRR's obligation to repair Category C Freight Switches during the first 18 months shall be limited to repairs costing in the aggregate for any single switch no more than \$15,000. In the event the aggregate cost is projected to exceed \$15,000, the LIRR shall furnish notice to the Freight Operator of the required repairs and the associated cost. Within 30 days of such notice, the Freight Operator shall by written notice to the LIRR elect to (i) pay for that portion of the costs related to such repair which exceed \$15,000 or (ii) deactivate the switch.

3.7.8 In connection with customers for which Category B or Category C Freight Switches are used, the Freight Operator shall continue to serve such customers for at least 18 months from the Commencement Date unless (i) a customer refuses to accept the same price and terms existing on the day prior to the Commencement Date or (ii) the Freight Operator elects to have the Freight Switch deactivated under Article 3.7.7 hereof.

ARTICLE 4: COMPENSATION

4.1 Compensation

4.1.1 The Freight Operator shall pay to the LIRR during the term of this Agreement, the following sums:

- (a) A Trackage Fee of \$0.25 per Car Mile.
- (b) (i) A Switch Maintenance Fee for each Category A Freight Switch equal to \$785 per month for each month or portion thereof;
- (ii) A Switch Maintenance Fee for each Category B Freight Switch equal to \$495 per month for each month or portion thereof during which such Freight Switch is activated; and
- (iii) A Switch Maintenance Fee, per month, for each Category C Freight Switch equal to 10% of the monthly revenues net of allowances of the Freight Operator attributable to the freight carload volume passing over such Freight Switch during such month for each month or portion thereof during which such Freight Switch is activated, but in no event shall the Switch Maintenance Fee for a Category C Freight Switch exceed \$495 per month.
- (c) An Annual Fee for the term of this Agreement as set forth below on the Commencement Date and on each anniversary of the Commencement Date:

Commencement Date	\$200,000
1st through 4th Anniversaries	\$200,000 on each anniversary
5th and 6th Anniversaries	\$400,000 on each anniversary
7th, 8th and 9th Anniversaries	\$600,000 on each anniversary

10th through 19th Anniversaries \$800,000 on each anniversary

- (d) A Concession Fee in the amount of \$1,100,000, \$250,000 of which shall be paid on the Effective Date and \$850,000 of which shall be paid on the Commencement Date.

4.1.2 The fees in Article 4.1.1 (a) and (b) shall be calculated for each month and paid not later than the 30th day of the following month.

4.1.3 The LIRR shall not share in the rail line-haul revenues derived by the Freight Operator in connection with the Freight Operations.

4.1.4 If any payment under this Agreement is due on a LIRR holiday, Saturday or Sunday, the fees in Articles 4.1.1 (a), (b) and (c) shall be paid on the first business day following the holiday, Saturday or Sunday.

4.2 Adjustment of Fees

The fees described in Articles 4.1.1(a) and (b) shall be subject to an adjustment (up or down) effective each January 1, commencing with January 1, 1998, based on the relationship of the AAR (or successor organization) Indices of Railroad Material Prices and Wage Rates for Railroads of Class I, Eastern District (material prices, wage rates and supplement combined, excluding fuel) published in the preceding July 1 to such indices published on July 1, 1996. In the event

that these indices are discontinued, the adjustment will be based on the Composite Implicit Price Deflator published by Bureau of Economic Analysis, U.S. Department of Commerce, or any successor organization.

4.3 Late Payment Penalty

If the Freight Operator fails to pay the LIRR on the due dates specified in Article 4.1 hereof, it will pay the LIRR interest on the payments due, from the due date to the date of payment, at a monthly rate of 1%; compounded monthly. For invoices rendered by the LIRR or the Freight Operator for services rendered to the other party, other than those included in Article 4.1 hereof, a 1% late charge will be included for each month or part thereof if no payment is received within 30 days of the receipt of invoice.

Notwithstanding the foregoing, all late charges payable by the LIRR hereunder will be in compliance with the Prompt Payment Act.

4.4 Billing

4.4.1 No invoices for the fees in Articles 4.1.1 will be issued by the LIRR. The Freight Operator will submit all payments in respect thereof to the LIRR together with the supporting documentation outlined in Article 4.5.1 hereof.

4.4.2 For services provided by the Freight Operator to the LIRR, the Freight Operator will invoice as follows:

- (a) For repairs performed on LIRR equipment, the Freight Operator will bill the LIRR at car repair billing rates included in the latest edition of the AAR Office Manual.
- (b) For car hire and freight loss and damage on freight shipments settled with foreign line railroads on account of LIRR Company Traffic moving in foreign line cars, the Freight Operator will bill the LIRR the actual car hire or freight loss and damage, as the case may be, paid or payable to foreign lines on account of the LIRR, increased by 5% to cover administrative costs incurred by the Freight Operator;
- (c) For services performed by the Freight Operator for the LIRR not included in Articles 4.4.2(a) and (b) hereof, the services will be billed at the Freight Operator's direct labor and material prices, increased for applicable overheads as set forth in the Freight Operator's then current schedule of rates;
- (d) For all services performed by the LIRR for the Freight Operator, the services will be billed at the LIRR's direct labor rates and materials prices, increased for applicable overheads as set forth in the then current LIRR schedule of rates.

4.5 Payment Documentation

4.5.1 The following documentation is required:

- (a) The monthly payment for the Trackage Fee hereof shall be supported by detailed written documentation showing the basis for the fee. At a minimum, the documentation shall include the month of payment, the owner and the number of the Freight Rolling Stock, origin and destination on the Joint Use Premises, miles traveled on the Joint Use Premises and total fees accrued for each unit of Freight Rolling Stock. The total Car Miles and fees shall be aggregated for the month.
- (b) The Switch Maintenance Fee described in Article 4.1.1(b) hereof shall be supported by a written statement from the Freight Operator showing the category (A, B or C) and location of the specific switches for which the fee is being paid, and the payment month.
- (c) For all other invoices tendered by each party to the other party, the invoice shall be accompanied by detailed written documentation to support the charges therein.

4.5.2 Each party shall make available to representatives of the other party, during normal business hours, all relevant work and materials, books, records, correspondence, disks, instructions, working papers,

plans, drawings, specifications, receipts, vouchers and memoranda of every description (collectively, the "Information") pertaining to payments under this Agreement and supporting any charges billed to the other party. The parties, at their own expense, shall preserve such of their own documents for a period of one year or such longer period required under state or federal laws and regulations. Each party agrees that all Information provided or made available to it by the other shall not be disclosed to any person other than such party's officers, directors, attorneys or other agents as necessary in connection with performing its obligations under this Agreement or as it may be legally compelled. In the event that any party is legally compelled to disclose any Information such party shall give the other party sufficient notice to allow such party to seek an injunction or other remedy. Each party shall be liable for any disclosures made by their officers, directors, attorneys or other agents to the extent such disclosures violate this Article 4.5.2.

4.6 Payment Address

4.6.1 All invoices by the Freight Operator to the LIRR shall be directed to:

Manager-Accounts Receivable
Mail Code: 1443
Long Island Rail Road
146-01 Archer Avenue
Jamaica, NY 11435

or at such other location as the LIRR may from time to time designate by written notice.

4.6.2 All payments by the Freight Operator to the LIRR shall be directed to:

Treasurer
Mail Code: 1431
Long Island Rail Road
146-01 Archer Avenue
Jamaica, NY 11435

or at such other location as the LIRR may from time to time designate by written notice.

4.6.3 All payments between the parties will be paid in lawful money of the United States.

4.6.4 All invoices and payments by the LIRR to the Freight Operator shall be directed to:

Southern Empire State Railroad Company
c/o Anacostia & Pacific Company, Inc.
405 Lexington Avenue, 50th Fl.
New York, NY 10174

or at such other location as the Freight Operator may from time to time designate by written notice.

4.6.5 The parties shall not delay payment of any bill because of errors or disputed items, but shall make payment subject to subsequent adjustment. The parties need not honor any exception to an invoice if it is delivered after the expiration of eighteen (18) months from the last day of the calendar month during which such invoice is rendered. Neither party shall render an invoice later than eighteen (18) months (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or

liability, after the amount is settled, or the liability is established, whichever occurs first. This provision shall not limit the retroactive adjustment of billing made pursuant to an exception taken to original accounting by or under authority of the United States Department of Transportation, MTA Auditor General and other regulatory agencies or retroactive adjustment of wage rates and settlement of wage claims subject to any applicable statute of limitations.

4.6.6 The parties shall keep, and cause each subcontractor/supplier to keep, records and books of account, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature incurred in connection with this Agreement.

ARTICLE 5: MAINTENANCE

5.1 Maintenance of Freight Premises

5.1.1 Unless waived in writing by the LIRR, the Freight Operator, at its sole cost and expense, shall maintain the Freight Premises in a state of reasonable repair for their intended use. All tracks in the Freight Premises will be maintained to at least FRA Class I standards, except those tracks identified in Exhibit 9 hereto, as (i) Inactive, which shall be maintained in a condition equal to or better than that prevailing on the Commencement Date, and (ii) O.O.S. (Out of Service) which shall be

maintained in a condition that does not create a hazard.

5.1.2 The Freight Operator will be responsible for all arrangements with third parties concerning existing and future Team Tracks and Private Freight Sidings, including their use and maintenance.

5.1.3 The Freight Operator will be responsible for the inspection of all Private Freight Sidings in use or planned to be used and will use reasonable best efforts to ensure that such facilities are maintained in a safe and operable condition. Before any inactive Private Freight Siding is activated, the Freight Operator will inspect the siding and ensure that it is in a condition to permit safe operations.

5.2 Maintenance of Bridges

5.2.1 Notwithstanding anything in Article 5.1 to the contrary, the LIRR or other agencies currently responsible for the maintenance and repair of the framework and abutments of any bridge structures (other than any culverts or viaducts) carrying any highways over or under the railroad or carrying railroad over or under another railroad or carrying railroad over water, in each case in the Freight Premises, shall continue to be so responsible unless any Loss or Damage is caused by the Freight Operator (except by the Freight Operator's normal use) in which case the Freight Operator shall be responsible for repairing same but shall not be responsible for

maintaining same after such repairs. The LIRR's responsibility hereunder is subject to the availability and allocation of funding for major bridge repair/reconstruction work. Nothing herein shall be construed as imposing on the LIRR a greater responsibility than that required by law or any limitation on the LIRR's discretion in determining the order of priority of capital projects as between those affecting any Operating Premises and Passenger Premises.

5.2.2 If the condition of any bridge in the Freight Premises results in unsafe or impassable conditions that prevent use of a part of the Freight Premises for any period equal to an Abatement Period, then the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee; provided, however that this clause shall not apply to any condition which is caused use by the Freight Operator (except by the Freight Operator's normal use).

5.2.3 Upon reasonable prior notice to the Freight Operator the LIRR and its contractors shall have the right to enter the Freight Premises for the purpose of inspections, maintenance and repair in connection with its obligations under this Article.

5.2.4 The Freight Operator's obligation to maintain the Freight Premises shall continue until such time as a reversion of such property to the LIRR or a termination of this Agreement occurs.

5.3 Maintenance of Joint Use Premises

5.3.1 Except as otherwise specifically provided in the Agreement, the LIRR at its own expense shall maintain and repair the Joint Use Premises in a manner that allows it to conduct Passenger Operations and that allows the Freight Operator to conduct Freight Operations in the manner conducted on the Effective Date. Any maintenance and repairs by the LIRR, requested by the Freight Operator, that allow the Freight Operator to conduct Freight Operations other than in the manner conducted on the Effective Date shall only be performed under Article 5.3.2 hereof.

5.3.2 In the event the LIRR, in its sole discretion, agrees to make changes to the Joint Use Premises at the request of the Freight Operator, the Freight Operator will (a) pay for the cost of these changes in accordance with Article 4.4 and (b) will bear all of the incremental costs necessary to maintain the same in a state of good repair as reasonably required by the LIRR.

5.3.3 The LIRR may make or cause to be made any improvements to the Joint Use Premises that the LIRR deems necessary or desirable to the Joint Use Premises except that the LIRR shall maintain clearances in existence on the Effective Date.

5.3.4 Notwithstanding the foregoing, the LIRR may impose temporary clearance, speed or operating restrictions as may be necessary in connection with construction,

rehabilitation or repair projects or other operating emergencies.

5.3.5 The LIRR does not guarantee the condition of the Joint Use Premises or that the Freight Operations will not be interrupted. If, as a result of LIRR action under Article 5.3.1, 5.3.3 or 5.3.4 hereof, the whole or any part or parts of the Joint Use Premises becomes unusable for Freight Operations for a period equal to an Abatement Period, the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee (other than as a result of the occurrence of an Event of Force Majeure).

ARTICLE 6: MANAGEMENT, DIRECTION, DISPATCHING,
OPERATION AND CONTROL

6.1 Abandonment of Operations

To the extent legally required, the Freight Operator must obtain permission of the STB for any abandonment of any service or operations prior to such abandonment, or obtain an exemption from abandonment in respect thereof and shall furnish the LIRR with prior written notice of any request therefor, as well as notice of receipt of any such permission. In the event the Freight Operator fails or ceases to provide freight services, the responsibility for any abandonment proceeding before the STB in respect thereof shall be borne by the Freight Operator. The LIRR reserves the right, at its option, to participate in any such proceeding, provided that the

LIRR shall not oppose the Freight Operator in such proceeding. The abandonment of any service or operations shall not affect whether any property is or is not included as part of the Freight Premises.

6.2 Switching and Dispatching

6.2.1 In connection with the grant of rights delineated in Article 3 hereof, the Freight Operator shall perform all switching movements over the Freight Premises.

6.2.2 The LIRR shall perform all dispatching and direct all train and switching movements over the Joint Use Premises under the direction of the Chief Transportation Officer of the LIRR. The LIRR shall dispatch trains of the LIRR and the Freight Operator consistent with the priority of passenger trains, and availability of Operating Windows and with the Freight Operator's ability to provide reasonably consistent services to its freight customers.

6.3 Priority of Passenger Operations Over the Joint Use Premises

6.3.1 The Passenger Operations shall have priority over all Freight Operations conducted over the Joint Use Premises.

6.3.2 Each party shall make good faith efforts to cooperate with the other to establish schedules and to conduct operations in a manner that, consistent with the priority for Passenger Operations and the Freight

Operator's ability to provide reasonably consistent freight services to its customers, minimizes interference or conflict with operations of each other on the Joint Use Premises.

6.3.3 Notwithstanding the foregoing, the Freight Operator shall only conduct operations over the Joint Use Premises during the Operating Windows available for freight trains.

6.4 Cost of Operations

6.4.1 Each party shall be responsible for furnishing, at its own expense, all labor, fuel, materials and equipment necessary for the operation of its own Rolling Stock over the Joint Use Premises.

6.4.2 In the event a party furnishes labor, fuel, materials or equipment to the other party, the recipient shall reimburse the party furnishing same for its costs thereof. Billing and payment shall be in accordance with Article 4.4 hereof.

6.5 Communications

6.5.1 Freight Operator, at its expense, shall install and maintain upon the Freight Rolling Stock such equipment, radios, or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of the LIRR, for operation of Rolling Stock upon the Joint Use Premises. In exercising its reasonable judgment under this Article 6.5.1, the

LIRR shall apply the same standards to the Freight Operations that are applied to the Passenger Operations.

6.5.2 The Freight Operator must provide and maintain radio equipment in connection with the Freight Operations over the Joint Use Premises and shall use the same frequencies that are used by the LIRR in the Passenger Operations.

6.5.3 The Freight Operator must provide, maintain and use radio equipment compatible with, and capable of, communicating with the LIRR's dispatchers, movement bureau, towers and crews. The LIRR shall notify the Freight Operator prior to the adoption of new communication or signalling systems to be employed on the Joint Use Premises.

6.5.4 In the event the LIRR elects to use a radio frequency unavailable on the Freight Operator radios, then the Freight Operator shall be responsible for supplying new communication equipment or making modifications or additions to the Freight Operator's existing communication equipment necessary for the Freight Operator engineers to communicate with the LIRR's dispatcher, movement bureau, towers and crews; provided, however, that prior to making such election, the LIRR shall provide the Freight Operator with notice such that the Freight Operator shall have a reasonable period of time in which to procure such new equipment or make such modifications or additions.

6.5.5 The Freight Operator shall ensure that all of its locomotives used on the Joint Use Premises are compatible with the LIRR's signal and communications systems and automatic speed control system, as the same may be modified from time to time.

6.5.6 The Freight Operator shall undertake to satisfy its obligation(s) under this Article 6.5 within a reasonable time after the LIRR notifies the Freight Operator of any condition which gives rise to such obligation.

6.5.7 The Freight Operator shall, as soon as is reasonably practicable, obtain its own radio frequency for communication within the Freight Premises. Until such condition is satisfied, the LIRR agrees to make available its channels for use by the Freight Operator; provided the Freight Operator shall use reasonable efforts to avoid undue interference with the LIRR's communications in the Passenger Operations.

6.6 Compliance with LIRR Rules

Freight Operations on the Joint Use Premises shall at all times be conducted in accordance with LIRR Operating Rules and LIRR Safety Rules, which LIRR shall provide to the Freight Operator in advance of the date they become effective, including amendments thereto.

6.7 Payment of Third Party Charges

6.7.1 The Freight Operator shall be responsible for the reporting and payment of any mileage, per diem, use, or rental charges arising from the Freight Operations including those incurred in connection with movements of Freight Rolling Stock over the Joint Use Premises. No car hire or rental will be payable by the LIRR for movement of freight cars and other Freight Rolling Stock over the Joint Use or Passenger Premises, except that the LIRR shall be responsible for any car hire charges arising from Company Traffic.

6.7.2 The Freight Operator will settle all car hire with foreign line railroads for movement of Company Traffic in foreign line cars, on the Operating Premises. The Freight Operator will bill the LIRR for all such payments made to foreign line railroads, in accordance with Article 4.4.2 hereof.

6.7.3 The Freight Operator shall be responsible for settlement of all interline freight revenues, collection of all freight accounts receivables and other revenues, and payment of all freight expenses and invoices.

6.7.4 It shall be the right and responsibility of the LIRR to collect all revenues and to pay all expenses referred to in Article 6.7.1, 6.7.2 and 6.7.3 on all Freight Rolling Stock interchanged with Conrail ("CR") or New York Cross Harbor ("NYCH") and the Freight

Operations up to the day immediately preceding the Commencement Date. The Freight Operator will have the right and responsibility to collect all revenues and to pay all expenses referred to in Article 6.7.1, 6.7.2 and 6.7.3 on all Freight Rolling Stock interchanged with CR or NYCH and the Freight Operations on or after the Commencement Date.

6.8 Flagging

In the event the Freight Operator engages in any activity in the vicinity of the Joint Use Premises or the Passenger Premises which, in the reasonable judgment of the LIRR, poses a material risk of fouling tracks in said premises, LIRR may assign flag and other protective personnel and the Freight Operator shall pay the LIRR's cost for same as provided for in Article 4.4 hereof.

ARTICLE 7: FREIGHT OPERATOR'S EMPLOYEES

7.1 Qualifications of Freight Operator's Employees

7.1.1 Except as otherwise specifically provided in this Agreement, the Freight Operator shall have sole discretion to select Employees for Freight Operations.

7.1.2 The Freight Operator shall only use for its Freight Operations qualified individuals who are fit for duty

and who meet the applicable requirements, if any, of any regulatory agencies.

7.1.3 All Employees of the Freight Operator engaged in train and engine service on or along the Joint Use Premises shall be qualified under the LIRR's Operating Rules, as well as those promulgated by the AAR, the FRA and other applicable regulatory agencies, all to the same extent as LIRR Employees, including being subject to periodic examinations. Engine service personnel employed by the Freight Operator on Joint Use Premises shall also be certified in accordance with regulations promulgated by the FRA to the same extent as LIRR Employees.

7.1.4 The Freight Operator shall make such arrangements with the LIRR as the LIRR may reasonably require to have all of the Freight Operator's Employees who shall operate its Freight Rolling Stock over the Joint Use Premises qualified for operation thereunder.

7.1.5 The Freight Operator shall pay, in accordance with Article 4.4 hereof, the cost of any training required for compliance with Article 7.1.3 hereof.

7.1.6 The Freight Operator will ensure that its Employees, agents and contractors comply with all laws and regulations promulgated by the FRA, the DOT, the STB, the AAR, and other regulatory and administrative agencies, including regulations relating to

drug/alcohol testing, equipment safety, Hazardous Materials, etc.

7.2 Removal of Freight Operator's Employees

7.2.1 The LIRR may, in its sole discretion, direct the Freight Operator to temporarily or permanently remove an Employee from service on the Joint Use Premises for a significant safety violation and may require that such Employee be precluded from the Joint Use Premises, notwithstanding any determination under Article 7.2.2 hereof.

7.2.2 In the event a directive to remove an Employee is found to be wrongful under any applicable collective bargaining agreement between the Freight Operator and the union representing such Employee or, in the absence of such a collective bargaining agreement, under the dispute resolution procedure of Article 15.2, the LIRR will be obligated to compensate the Freight Operator solely for the additional wages, if any, incurred in connection with relieving such Employee from duty for a period not to exceed one year.

7.3 Hiring of Former Freight Operator Employees

7.3.1 To the extent permitted by law, the LIRR will not, within a period of one year after their employment with the Freight Operator is terminated, hire any train and engine personnel of the Freight Operator

who voluntarily leave the employment of the Freight Operator.

ARTICLE 8: HAZARDOUS MATERIALS

8.1 Transportation of Hazardous Materials

8.1.1 Provided the Freight Operator complies with all applicable federal, and, to the extent not preempted, state and local laws, rules and regulations governing the transportation of Hazardous Materials, the Freight Operator may transport or permit to be transported Hazardous Materials over the Operating Premises.

8.1.2 Notwithstanding the foregoing, Freight Operator must notify the LIRR Movement Bureau prior to transporting any Hazardous Materials over the Joint Use Premises.

8.2 Release of Hazardous Material

8.2.1 In the event of any release of Hazardous Materials occurring on any segment of the Operating Premises from Freight Rolling Stock or freight facilities and regardless of the cause of such release, the Freight Operator at its sole expense shall immediately:

(a) Make any and all reports required by federal, state or local authorities;

(b) Advise both the owner/shipper and the LIRR of the Hazardous Materials in the release and their location;

(c) Arrange for and perform or cause the performance of any appropriate response action in connection with any release of Hazardous Materials from the Operating Premises, in accordance with all federal, state, or local laws, rules or regulatory requirements.

8.2.2 The LIRR may have representatives at the scene of the release to observe and provide information and recommendations concerning any response action effort and may perform such post-response testing as it may deem reasonably necessary to test the adequacy of the response action.

8.2.3 If (i) the Freight Operator fails to undertake an appropriate response action immediately on Joint Use Premises or to undertake prompt and appropriate follow-up measures, and if any such failure impacts the Passenger Operations, or violates federal, state or local laws, rules or regulations, or (ii) any LIRR labor agreement precludes the use of a third-party or the Freight Operator's labor to conduct the response action on the Joint Use Premises, then the LIRR may perform the response action or such follow-up measures at the Freight Operator's expense. In such event the Freight Operator shall remain liable to the LIRR for all Loss or Damage caused by the release. The LIRR shall consult with the Freight Operator in

connection with any such response action and follow-up measures and shall provide documentation regarding the adequacy of the response action and follow-up measures. Notwithstanding any provision herein to the contrary, the Freight Operator shall be liable to the LIRR for lost revenues only to the extent the Freight Operator's insurance covers such claims.

8.3 Transfer of Hazardous Materials

If Hazardous Materials must be transferred to undamaged Rolling Stock, the Freight Operator shall perform the transfer, which shall be in compliance with applicable laws and regulations relating to safety and the environment; provided, however, that if the Hazardous Materials are in damaged cars that are blocking the Joint Use Premises or Passenger Premises, the LIRR, at its option and after notification to the Freight Operator, may transfer the Hazardous Materials and the Freight Operator shall pay all costs and expenses of such transfer in accordance with Articles 4.4.1 and 4.5.1, except to the extent the incident necessitating the transfer arises out of the gross negligence, recklessness or willful or wanton misconduct of the LIRR.

8.4 Response to Environmental Obligations

(a) The Freight Operator shall at all times protect and hold the LIRR (and its employees, officers, directors and agents) harmless of, from and against any and all kinds of claims (whether in

tort, contract or otherwise), demands, damages, losses, liabilities, costs or expenses (including, but not limited to costs of removal, response or remediation, or fines or penalties, either civil or criminal) which may arise or be claimed to arise, from (i) violations occurring on or after the Commencement Date through the date of termination of this Agreement, of any requirement under applicable law, ordinance or governmental rule, regulation or order caused or committed by Freight Operator, its agents, contractors, employees, licensees or others acting under its control or on its behalf; or (ii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials related to or arising from the conduct of the Freight Operations or caused by an Employee of the Freight Operator occurring on or after the Commencement Date through the date of termination of this Agreement.

(b) The LIRR shall at all times protect and hold the Freight Operator (and its employees, officers, directors and agents) harmless of, from and against any and all kinds of claims (whether in tort, contract or otherwise), demands, damages, losses, liabilities, costs or expenses (including, but not limited to, costs of removal, response or remediation, or fines or penalties, either civil or criminal) which may arise or be claimed to arise from (i) violations

of any requirement under applicable law, ordinance or governmental rule, regulation or order caused or committed by the LIRR, its agents, contractors, employees, licensees or others acting under its control or on its behalf; (ii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials released from the Freight Premises and/or the Joint Use Premises occurring prior to the Commencement Date or after the termination of this Agreement; and (iii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials other than related to Freight Operations or operations otherwise not under the control of the LIRR.

(c) The Freight Operator shall provide written notice to the LIRR of the receipt by the Freight Operator of any notice of any claim or threatened claim, and provide to the LIRR a copy of the notice, any additional or other documents provided by the person making the claim, and any response to the claim by the Freight Operator.

(d) For any claim under subparagraph (a) of this Article 8.4, the Freight Operator shall have the sole duty to defend or respond to any claim, and to take all actions required by applicable law, ordinance or governmental rule, regulation or

order to respond to any such claim or the events leading to such a claim, all at its sole and exclusive cost. The Freight Operator shall promptly provide the LIRR with a copy of all studies, expert reports, and other documents related to such claim, and shall consult with the LIRR concerning any response. The LIRR may, at its own expense, be represented in a proceeding related to the claim by counsel or other representative, and the Freight Operator (and its agents, consultants and counsel) shall cooperate with the LIRR regarding such participation.

(e) For any claim under subparagraph (b) of this Article 8.4, the LIRR shall have the duty to defend or respond to any claim, and to take any action required by applicable law, ordinance or governmental rule, regulation or order to respond to the claim or the events leading up to such claim, provided, however, that the Freight Operator shall provide the LIRR with access to the facilities and records necessary to respond, and shall cooperate in all respects with the LIRR in responding to the claim.

(f) For purposes of this Article 8.4, it shall be presumed that any claim, notice of which is received on or after the seven year anniversary of the Commencement Date, arises under subparagraph (a), unless the Freight Operator demonstrates that the claim arises under

subparagraph (b). Notwithstanding the foregoing, no presumption shall apply in respect of underground storage tanks, if any, that as of the Commencement Date are located on the Freight Premises. For any claim which the claimant, or either party, asserts is within the time periods of both subparagraph (a) and (b) of this Article 8.4, the parties shall cooperate in responding to the claim, until such time as the issue of the application of subparagraph (a) or (b) or the allocation of responsibility to either party is resolved by agreement of the parties, the dispute resolution mechanism provided in Article 15.2 hereof, or by order of a court or other government authority with jurisdiction.

- (g) To the degree response to any claim or event under this Article 8.4 requires the construction or operation of any facility to remediate the presence of Hazardous Materials, no such facility shall be constructed by the Freight Operator without the prior written consent of the LIRR (which consent shall not be unreasonably withheld). The LIRR may, as part of its response under subparagraph (b) construct and operate such facilities as may be required, provided that such facilities do not unreasonably interfere with the Freight Operations.

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ARTICLE 9: DISABLED EQUIPMENT

9.1 Disabled Freight Rolling Stock

9.1.1 The Freight Operator shall maintain its Freight Rolling Stock used on the Joint Use Premises in reasonable repair for the intended use.

9.1.2 If any Freight Rolling Stock becomes stalled and unable to proceed, or is unable to maintain the speed required by the LIRR on the Joint Use Premises or the Passenger Premises, or, if in an emergency a crippled or otherwise defective Freight Rolling Stock is set out on the Joint Use Premises or the Passenger Premises, the LIRR shall have the option to furnish motive power or such other assistance as may be necessary to haul, help, or push such train or equipment or to move it off the Joint Use or the Passenger Premises, and Freight Operator shall pay the LIRR for the cost of rendering any such assistance in accordance with Article 4.4.2 hereof.

9.1.3 If it is necessary that any Freight Rolling Stock be set out on the Joint Use Premises or the Passenger Premises, it shall be promptly repaired and picked up by the Freight Operator.

9.2 Locomotive/Equipment Assistance

Either party may request assistance or Rolling Stock from the other party. In the event any party agrees to provide such assistance or Rolling Stock to the

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other party, the assisting party shall charge the other party (i) the rate described in Exhibit 11 for locomotives and (ii) in accordance with Article 4.4.2 hereof for other Rolling Stock or assistance.

9.3 Repairs Performed by LIRR

9.3.1 In the event the LIRR performs repairs to Freight Rolling Stock as specifically permitted under the terms of this Agreement, the LIRR shall prepare and submit invoices directly to the Freight Operator, which will be paid by the Freight Operator in accordance with this Agreement. It shall be the responsibility of the Freight Operator to collect payments from the car owner owing in respect of "car owner responsibility items" as determined under the AAR Office Manual and the LIRR shall prepare and submit billing directly to and collect from the Freight Operator payments for handling "line responsibility items" as determined under the AAR Office Manual.

9.3.2 Repairs to cabooses shall be billed at the car repair billing rates set forth in the latest edition of the AAR Office Manual. Repairs to locomotives shall be billed as provided for in Article 4.4.2 hereof.

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ARTICLE 10: LIABILITY, INDEMNIFICATION AND CASUALTY

10.1 Liability of the Parties

Except where otherwise specifically provided in the Agreement, all Loss or Damage occurring on: (i) the Passenger Premises shall be borne entirely by the LIRR, and; (ii) the Freight Premises shall be borne entirely by the Freight Operator other than (a) injuries to employees of the LIRR, property loss or damage and environmental pollution occurring by reason of the LIRR's exercise of its rights under Article 13.2.1 or 13.2.5 if such injury loss or damage or pollution was caused by the LIRR's actions, and; (iii) the Joint Use Premises shall be borne by the parties as follows:

- (a) The LIRR shall be responsible for Loss or Damage in connection with personal injuries to the LIRR Employees, Loss or Damage in connection with damage to the LIRR Rolling Stock and its contents, and facilities;
- (b) the Freight Operator shall be responsible for Loss or Damage in connection with personal injuries to Freight Operator Employees, and Loss or Damage in connection with damage to Freight Rolling Stock and its contents, and facilities.

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10.2 Exceptions to Liability

10.2.1 Liability under Article 10.1 hereof shall not apply where the Loss or Damage results from an Accident/Incident involving:

- (a) The gross negligence, recklessness or willful or wanton misconduct of the party (including its Employees and subsidiaries and affiliated companies and agencies) who would not have been liable had Article 10.1 hereof been applicable;
- (b) Hazardous Material so long as such Hazardous Material is materially involved in causing or increasing the Loss or Damage resulting from such Accident/Incident;
- (c) The Rolling Stock of either party and a third party (pedestrian, vehicular, or other property damage; for purposes hereof pedestrian shall not include passengers or persons waiting to board a passenger train);
- (d) A derailment or work a party performs for the benefit of the other party; or
- (e) Either party's failure to observe any of the LIRR Operating Rules or LIRR Safety Rules, including clearance restrictions.

(f) Liabilities to the extent arising out of any Accident/Incidents that occurred prior to the Effective Date.

Notwithstanding anything herein to the contrary, neither party shall be liable for any punitive damages assessed against the other party, its Employees or its agents.

10.2.2 In the event the exceptions to liability described in Article 10.2.1 hereof apply or a situation occurs which is not covered by Article 10.1 hereof (other than any situation which is addressed in Article 8), the rules of ordinary negligence and liability shall be applicable; provided, that the LIRR shall be liable for (a) injuries to passengers for that amount of Loss or Damage, if any, in excess of the amounts set forth in Section 11.1(b) hereof, and (b) liabilities set forth in Section 10.2.1(f) hereof.

10.2.3 (a) With respect to liability which has been allocated to a party by the provisions of this Article 10, such party shall be responsible for all related Loss or Damage and shall defend, indemnify and hold harmless the other party (including officers, agents, employees, and subsidiaries and affiliated companies or agencies of the other party) against and from any and all Loss or Damage arising from or pertaining to such claims.

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(b) In the event that any indemnified party is made a defendant in or party to any claim, instituted by any third party for Loss or Damage, or otherwise receives any demand from any third party for Loss or Damage, the indemnified party (referred in this clause (b) as the "notifying party") shall give the indemnifying party prompt notice thereof. The failure to give such notice shall not affect whether an indemnifying party is liable for reimbursement unless the indemnifying party is materially prejudiced thereby. The indemnifying party shall be entitled to contest and defend such claim; provided, that the indemnifying party (i) diligently contests and defends such claim in accordance with this article, and (ii) acknowledges in writing that it is obligated to provide indemnification with respect to such claim. Notice of the intention so to contest and defend shall be given by the indemnifying party to the notifying party within 20 business days after the notifying party's notice of such claim (but, in all events, at least 5 business days prior to the date that an answer to such claim is due to be filed, if any). Such contest and defense shall be conducted by attorneys reasonably acceptable to the indemnified party employed by the indemnifying party. The notifying party shall be entitled at any time, at its own cost and expense (which expense shall not constitute a Loss or Damage unless the notifying party reasonably determines that the

indemnifying party is not adequately representing or, because of a conflict of interest, may not adequately represent, the interests of the indemnified parties, and only to the extent that such expenses are reasonable), to participate in such contest and defense and to be represented by attorneys of its own choosing. If the notifying party elects to participate in such defense, the notifying party will cooperate with the indemnifying party in the conduct of such defense but the indemnifying party shall control the defense (other than in the case of the circumstances described in the parenthetical contained in the immediately preceding sentence). Neither the notifying party nor the indemnifying party may concede, settle or compromise any claim without the consent of the other party, which consent will not be unreasonably withheld. Notwithstanding the foregoing, if the indemnifying party fails to acknowledge in writing its obligation to provide indemnification in respect of such claim, then the notifying party alone shall be entitled to contest, defend and settle such claim in the first instance (in which case, expenses incurred in connection therewith shall constitute a Loss or Damage) and, only if the notifying party chooses not to contest, defend or settle such claim, the indemnifying party shall then have the right to contest and defend (but not settle) such claim.

The provisions of this Article 10 are not intended to, and shall not, confer benefits upon any person not a party to this Agreement (other than the right of officers, agents, employees, subsidiaries and affiliates of a party hereto to be indemnified as described above).

ARTICLE 11: INSURANCE

11.1 Required Insurance

At its sole cost and expense, the Freight Operator will procure and maintain, during the period of this Agreement, and for all of its Freight Operations hereunder, the insurance set forth below:

- (a) New York State Workers Compensation & Employers Liability Insurance or Federal Employer's Liability Act Coverage - as required by law. FELA coverage may be self-insured with proof of financial competency.
- (b) Commercial General Liability Insurance, providing limits of \$25,000,000 per occurrence (with no less than \$50,000,000 annual aggregate) and including the following coverages:
Bodily Injury or Death; Property Damage;
Independent Contractors Coverage; Personal Injury; Contractual Liability; Products & Completed Operations; Broad Form Property Damage; Sudden & Accidental (caused by seepage, pollution and contamination). Contractual

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Liability Exclusion, applicable to work to be performed within 50 feet of railroad tracks, must be voided. "Additional Insured" endorsement shall name: the LIRR and MTA; provided, that the Freight Operator shall be permitted to self insure up to \$500,000 subject to the annual delivery to the LIRR of a certificate of the Freight Operator's chief financial officer certifying as to the Freight Operator's ability to satisfy such deductible.

- (c) Property Insurance, covering the property owned by the LIRR in the Freight Operator's care, custody and control, in an amount equal to the replacement cost, of like kind or quality, thereof, insuring against risk of loss. The policy should provide for a limit of no less than \$25 million, subject to a deductible of not more than \$500,000. Said policy must be endorsed to include the LIRR and the MTA as additional insureds. Losses are to be adjusted with the LIRR as its interest appears.

11.2 Form of Insurance

All insurance must be written in a form by an insurer reasonably satisfactory to the LIRR. Among other things, the Freight Operator shall furnish to the MTA/LIRR Risk Manager, seven days before the Commencement Date, the certificates of insurance evidencing policies listed in Articles 11.1(a)-(c) hereof, using the Railroad Insurance Certificate

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form. These policies shall provide that thirty (30) days advance notification shall be given in writing to the LIRR of any material change, a failure to renew or cancellation of the policy.

11.3 Freight Operator Invitees

In addition to the specific requirements of this Article, in the event the Freight Operator shall require any insurance from any of its invitees of any nature, it shall require that the LIRR be an additional named insured on such policies.

11.4 Force Account Insurance

In the event any party shall perform any work on behalf of the other party, the party performing such work may procure and maintain, force account insurance until such work has been completed at the other party's expense. The policy will provide a combined single limit of \$5,000,000 per occurrence covering the liability of the performing party under the Federal Employer's Liability Act and similar statutes for the protection of employees for injuries to or death of its employees engaged in the work. The limit of coverage may be changed from time to time by the performing party at its discretion.

11.5 Additional Named Insured

In the event any party hereunder shall require any insurance from a party to any of its contracts with

respect to the Operating Premises, it shall require that the other party hereunder be an additional named insured on such policies to the extent actions under any such contracts could affect such other party or property for which such other party is responsible, provided that such requirement does not involve any additional cost.

11.6 No Modification

Nothing in this Article 11 shall be deemed or construed to modify the obligations imposed by Article 10 hereof.

11.7 Review of Insurance

The parties agree to review every three years, the form and content of any insurance required hereunder in light of the then current insurance market, the cost of required insurance, inflation and the continued appropriateness of any coverage limits to avoid inequitable results to any party.

ARTICLE 12: GOVERNMENTAL APPROVAL

12.1 Governmental Approval

The Freight Operator shall, at its own cost and expense, initiate by appropriate notice, application or petition and thereafter diligently and in good faith prosecute proceedings for the procurement of all necessary and appropriate consents, approvals, or

authorizations (or exemptions therefrom) from any governmental agency for the sanction of this Agreement and the Freight Operations to be carried on by the Freight Operator hereunder. The Freight Operator shall deliver such notice, application or petition to the LIRR, for its comments thereon in order to facilitate such filings or approvals, within three (3) days after the LIRR's execution of this Agreement. The Freight Operator shall submit such notice, application or petition to the applicable governmental agency within seven (7) days of receipt of such comments or if the LIRR has no comments, promptly following notice thereof. The Freight Operator shall diligently make and pursue such applications and petitions before the STB. The LIRR shall assist and support said applications or petitions and shall furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. The Freight Operator and the LIRR agree to cooperate fully to procure all such necessary consents, approvals, or authorizations.

ARTICLE 13: LIRR COMPANY TRAFFIC - USE OF FREIGHT PREMISES

13.1 Interchange Track

The Freight Operator shall on the Commencement Date designate a track in Fresh Pond Yard which shall serve as the Interchange Track for Company Traffic.

13.2 Company Traffic

13.2.1 Upon verbal consent of the Freight Operator (which consent shall not be unreasonably withheld), the LIRR shall have the right to enter the Freight Premises with its Employees, Rolling Stock and vehicles for the purpose of interchanging or receiving Company Traffic, including the right to enter Fresh Pond Yard with trucks for the purpose of transloading Company Traffic, which may include temporary storage of material on the ground at Fresh Pond Yard. The LIRR shall not unreasonably interfere in the Freight Operator's operations and shall not compete with the Freight Operator's exclusive right to conduct the Freight Operations pursuant to this Agreement. The Freight Operator shall not have any obligation to provide train services for the LIRR. The Freight Operator shall inspect and repair all Rolling Stock and vehicles prior to departure from the Freight Premises in accordance with FRA and AAR rules and regulations in connection with this Article 13.2.1.

13.2.2 Upon reasonable notice, the Freight Operator shall allow the LIRR to enter upon that portion of the Freight Premises consisting of sidings, team tracks or tracks accessible from the Joint Use Premises or Passenger Premises and to utilize the same to store Rolling Stock and other equipment which travels on rails, trucks and other vehicles, material used in maintenance or construction projects or debris resulting from the same. If as a result of the LIRR's actions pursuant to the foregoing, the whole

or any part or parts of the Freight Premises becomes unusable for Freight Operations for a period equal to an Abatement Period, the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee (other than as a result of the occurrence of an Event of Force Majeure).

- 13.2.3 The Freight Operator shall impose no freight, demurrage or other charges on Company Traffic pursuant to this Article 13.2.
- 13.2.4 The Freight Operator shall settle all car hire and freight loss and damage charges on freight shipments with foreign line railroads on behalf of the LIRR relating to Company Traffic. The LIRR shall be responsible for and shall pay all car hire and freight loss and damage charges on freight shipments to the Freight Operator in connection with transportation of Company Traffic in accordance with Article 4.4.2 hereof. The Freight Operator shall have no responsibility for freight loss and damage to such Company Traffic on the Freight Premises other than as a result of its or its Employees' gross negligence or willful misconduct.
- 13.2.5 In the event that Rolling Stock transporting Company Traffic should become disabled or crippled, the Freight Operator shall, at the LIRR's request, do any of the following:

(a) Perform expedited repairs on such equipment;

- (b) Allow the LIRR to make such repairs or cause them to be made; or
- (c) Allow the LIRR to enter upon the Freight Premises with the Freight Operator's permission, at such times and with such frequency which will not unreasonably interfere with the Freight Operations or with its Rolling Stock or other equipment and vehicles, for the purpose of moving or repairing the disabled equipment; provided, however, in such case, the LIRR shall be liable for any damage to Freight Rolling Stock or the Freight Premises resulting from such movement.

ARTICLE 14: TERMINATION

14.1 Termination for Default

- 14.1.1 The occurrence of any of the following shall constitute a material breach of this Agreement by the Freight Operator:
- (a) The Freight Operator fails to make a payment pursuant to Article 4.1.1 or to make any other payments, which other payments, singly or in the aggregate, exceed \$50,000, to the LIRR within one-hundred twenty (120) days of when it is due;
- (b) The Freight Operator fails to comply in all material respects with any applicable federal, state or local safety standards and regulations,

any environmental laws and regulations and, in regard to the Joint Use Premises, the LIRR Operating Rules which failure shall, singly or in the aggregate, cause a significant hazard or danger to the public or the Employees or property of the LIRR;

- (c) The Freight Operator fails to maintain in all material respects the Freight Operations in accordance with its annual safety plan, a copy of which shall be delivered to the LIRR for its files promptly after it is approved as described in the next sentence. The Freight Operator's obligation hereunder shall require a licensed safety engineer to approve the safety plan and certify as to the Freight Operator's compliance therewith annually;
- (d) The Freight Operator fails to commence the Freight Operations in compliance with Article 1.1.5 hereof;
- (e) The Freight Operator abandons the Freight Operations or any part thereof without meeting applicable requirements of this Agreement;
- (f) The Freight Operator unnecessarily or willfully interferes with the Passenger Operations;
- (g) The Freight Operator makes an assignment of the Freight Operations or this Agreement to another without the LIRR's prior written consent, or an

assignment of this Agreement for the benefit of its creditors;

- (h) The Freight Operator fails to make good faith efforts to develop and expand the freight business. For purposes of this provision, commencing with the end of the first year of this Agreement and for the next four ensuing years, the Freight Operator shall be conclusively presumed to have exercised good faith if it achieves freight carload volume of 80% or greater of the freight carload volume projected in the Business Plan;
- (i) The Freight Operator fails to maintain a drug testing program, including random testing as required by the FRA or any other authority with jurisdiction; or
- (j) The Freight Operator becomes insolvent or any bankruptcy, insolvency, reorganization or receivership or similar proceeding is commenced against the Freight Operator and is not stayed, discharged or vacated for a period of more than 30 days or the Freight Operator commences a voluntary case or proceeding within the meaning of any applicable bankruptcy or similar law.

14.1.2 The Freight Operator will be in default if it fails to cure a material breach as defined in Article 14.1.1 hereof within ninety (90) days after a written notice of default is given to the Freight Operator,

except such ninety (90) days period shall be modified in the following circumstances:

- (a) if such default cannot be cured within said ninety (90) days due to circumstances beyond the Freight Operator's control, the Freight Operator shall be given a reasonable additional time provided the additional time does not create a significant safety or operational risk as determined by the LIRR;
- (b) in the event of a significant safety or operational emergency as determined by the LIRR, a reasonable shorter period of time within which to cure the default may be specified in the notice of default; or
- (c) where a specific time is provided in Article 14.1.1 hereof.

14.1.3 The LIRR shall have the right to terminate, within three (3) years following the Commencement Date (other than with regard to Article 20.12 hereof, for which there shall be no time limitation) this Agreement, upon notice to the Freight Operator specifying that the Freight Operator misrepresented any material fact or submitted false and materially misleading information in its Proposals, or that the Freight Operator made a material misrepresentation in connection with Article 20.12 or 20.15 hereof. Said termination will not be subject to the cure provisions in Article 14.1.2 hereof.

14.1.4 If the LIRR terminates this Agreement under this Article 14.1, then, subject to Article 14.2.3 hereof, the Freight Operator shall, subject to applicable law, immediately cease performing all obligations under this Agreement upon the termination date specified in the notice of termination.

14.2 LIRR Remedies

14.2.1 On the Final Termination Date, the Freight Operator shall be obligated to pay the LIRR its damages, the amount of which shall, in the absence of mutual agreement between the parties, be determined pursuant to Article 15.2 hereof. "Final Termination Date" shall mean the date specified in the Termination Notice, or, if such termination is disputed, the date of a final determination in accordance with Article 15 hereof.

14.2.2 The failure of the LIRR to give notice of a default to terminate this Agreement in the event a default is not cured in a timely manner or to terminate under this Article 14.2, shall not constitute a waiver by the LIRR of any right afforded to it under this Article, nor shall any such failure constitute an approval of or acquiescence in any default, except as may be specifically agreed to in writing.

14.2.3 The provisions of this Article are in addition to and not a limitation of any other right or remedy the LIRR may have under this Agreement, at law or in equity, or otherwise.

14.3 Termination by Freight Operator

14.3.1 The Freight Operator shall have the right to terminate the Agreement upon the occurrence and during the continuation of any of the following:

- (a) A breach by the LIRR of any of its obligations hereunder, which breach is reasonably expected to cause a material adverse effect on the financial performance of the Freight Operations;
- (b) A taking by the LIRR under clause 3.3.5(a) which significantly impairs the financial performance of the Freight Operations and the remedies provided for in clause 3.3.5(c) are materially inadequate; or
- (c) The remedy of Equitable Abatement under Article 3.2, 5.2.2, or 5.3.5 is materially inadequate.

14.3.2 For termination under Article 14.3.1, the Freight Operator must provide the LIRR with written notice of its election to terminate with supporting documentation establishing the conditions that exist which afford the Freight Operator the right to terminate. The notice shall provide the termination date shall be at least ninety (90) days from the date of notice.

14.3.3 The sole remedy of the Freight Operator upon termination of this Agreement by the Freight Operator

shall be to receive Termination Payments under Article 14.4.

14.4 Termination Payments

Within a reasonable time after termination of all Freight Operations in accordance with Article 14, the LIRR shall pay the Freight Operator against a written invoice furnished to the LIRR by the Freight Operator specifying the following:

- (a) The pro rated portion of the Annual Fee or the Renewal Fee, as the case may be, for the period covered by such Fee which has not yet elapsed;
- (b) A pro rated portion of the Concession Fee equal to the Concession Fee multiplied by a fraction the numerator of which is the number of years remaining to the end of the Agreement term, and the denominator of which is twenty; and
- (c) To the extent the Freight Operator has made any Capital Improvements related to real property, the unamortized cost of such improvements; based on a useful life not to exceed seven years; provided that the Freight Operator shall, unless otherwise instructed by the LIRR, transfer to the LIRR all valid right, title and interest in and to the asset as to which such payment is made (including the asset that is the subject of any relevant capital leases (free and clear of any liens or other encumbrances).

14.5 Reconciliation of Payments

Upon termination of this Agreement by any party pursuant to this Article 14, the parties shall reconcile all amounts due to each other and any amounts owed shall be paid by such party.

14.6 Continued Operation

14.6.1 In the event this Agreement is terminated by either party, the parties shall continue to perform in accordance with this Agreement until such parties agree or a final determination as to such termination is made pursuant to Article 15.2 hereof.

14.6.2 A termination under this Agreement shall in no way affect the obligations or rights of the Freight Operator or the LIRR which have accrued prior to such termination, or affect or impair the right of the LIRR to pursue any other remedy for the breach of this Agreement.

14.6.3 Subject to Article 14.6.1 hereof, upon termination of this Agreement pursuant to Article 2 or Article 14 hereof:

- (a) the Freight Operator shall be deemed to have relinquished, abandoned, surrendered, and renounced any and all rights possessed to operate over that part of the Operating Premises to which such termination applies (subject to obtaining any necessary regulatory approvals or

exemptions, it being understood that the Freight Operator shall take any and all actions necessary to obtain such approvals or exemptions and the LIRR shall, to the extent requested by the Freight Operator cooperate in such efforts (at no expense to the LIRR);

- (b) the Freight Operator shall release and discharge the LIRR from all obligations, claims, demands, causes of action, or suits which the Freight Operator might have, or which might subsequently accrue to the Freight Operator growing out of or in any manner connected with, directly or indirectly, the obligations under this Agreement. However, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by the Freight Operator shall not affect any of the rights, liabilities and obligations of either the LIRR or the Freight Operator which may have accrued prior to such termination or partial termination; and

- (c) the LIRR shall, as soon as reasonably practicable identify a successor operator for the Freight Premises.

ARTICLE 15: LIRR RIGHT OF SELF HELP; DISPUTE RESOLUTION PROCEDURES, REMEDIES, COMPLIANCE WITH LAW, VENUE AND APPLICABLE LAW

15.1 LIRR Right of Self Help

15.1.1 In the event the Freight Operator fails to perform or provide for the performance of its duties or responsibilities provided for in this Agreement that pose a safety risk or interfere with the LIRR's Passenger Operations, the LIRR may by written notification to the Freight Operator request adequate assurances that the Freight Operator will perform or provide for the performance of those duties and responsibilities. In the event that the Freight Operator fails to provide such adequate assurances or fails thereafter to perform the duties or responsibilities within a time that prevents an immediate safety risk or an immediate risk of interference with Passenger Operations, then the LIRR shall be entitled to discharge such duties and responsibilities at the sole cost and expense of the Freight Operator until such time as the Freight Operator assumes responsibility for discharging its duties and responsibilities.

15.1.2 The LIRR shall promptly notify the Freight Operator of any work performed or expenses incurred under authority of this Article.

15.1.3 Failure of the LIRR to notify the Freight Operator of any such remedial action within sixty (60) days shall

constitute a waiver of any right of compensation for such action.

15.1.4 If the LIRR performs or fulfills the Freight Operator's duties or responsibilities of the Freight Operator through a remedial action under authority of this Article, and that remedial action is not challenged by the Freight Operator within a reasonable time by notice to the LIRR, then the Freight Operator shall pay the LIRR the costs of such action in accordance with Article 4.4.2 hereof. If a remedial action by the LIRR under this Article is challenged in a timely manner, then the Freight Operator shall be required to bear all costs of the remedial action, including but not limited to legal fees and expenses, only if and when that remedial action is ultimately finally determined (by arbitration pursuant to Article 15.2 hereof) to have been justified.

15.2 Arbitration

15.2.1 The parties agree to negotiate in good faith to resolve any and all disputes or claims arising under or with respect to this Agreement. If any dispute or claim is not resolved by mutual agreement, it will be resolved pursuant to the following procedure:

Any dispute or claim arising under or with respect to this Agreement will be settled by arbitration. The party requesting arbitration shall serve upon the other party notice

demanding arbitration with the name and address of the arbitrator appointed by it and describing the issue or issues to be arbitrated; the other party shall, within twenty (20) days after receipt of that notice, appoint an arbitrator and notify the first party of the arbitrator's name and address and of any other issue or issues to be arbitrated. The two arbitrators so named shall appoint a third arbitrator within a period of thirty (30) days after the first party receives notice of appointment of the second arbitrator. If the party upon which demand for arbitration is served fails to appoint an arbitrator within twenty (20) days, or if the two arbitrators so named fail to appoint a third arbitrator within thirty (30) days, then the party demanding the arbitration in the first case and either party in the second case, may apply to an appropriate court to appoint an arbitrator; and in the case of a party failing to appoint an arbitrator, the party demanding arbitration may at the same time also request the court to appoint the third arbitrator. The decision or award of any two of the arbitrators will be final and binding upon the parties subject to the standards of review of the Federal Rules of Civil Procedure. The arbitrators will have the discretion to impose the cost of the arbitration upon the losing party or divide it between the parties on any terms which they deem equitable; each party, though will bear its own legal fees including

any fees with respect to Article 10. Any decision or award rendered by the arbitrators may be entered as a judgment or order in any court having jurisdiction.

15.2.2 Any party seeking relief under this Article 15.2 shall promptly notify the other party upon becoming aware of the event underlying the claim in order that the other party is not materially prejudiced thereby, whether by substantially increased damages or otherwise. Failure to provide notice in a timely manner as specified by this Article 15.2.2 shall constitute a waiver of such claim, and the claim shall be void. Notwithstanding anything to the contrary, any party disputing termination under Article 14 hereof shall serve notice of demand for arbitration within 30 days of the notice of the event causing the dispute.

15.2.3 Parties may offer such evidence as is relevant and material to the dispute in accordance with the Federal Rules of Civil Procedure Rules 26-38, and Federal Rules of Evidence Rules 103-1103, and shall produce such evidence as the arbitrators may deem necessary to an understanding and determination of the dispute.

15.2.4 Until the arbitrators shall issue the decision or award upon any question submitted for arbitration, performance under this Agreement shall continue in the manner and form existing prior to the rise of such question; provided, however, that in the event

the question submitted for arbitration relates to safety or operations, then the performance of the Freight Operator shall be altered to conform with the discretion of the LIRR pending the issuance of such decision or award and in the event the Freight Operator prevails in the arbitration, the LIRR shall pay to the Freight Operator any cost incurred by the Freight Operator arising out of such conformity. After delivery of such decision or award, each party shall forthwith comply with said decision or award immediately after receiving it.

15.3 Compliance with Governmental Requirements

15.3.1 (a) Both parties shall comply with all laws and ordinances and governmental rules, regulations and orders now or at any time during the term of this Agreement which as a matter of law are applicable to such party. Subject to Article 3 hereof, the Freight Operator shall make any and all structural and non-structural improvements, alterations or repairs of the Freight Premises that may be required at any time hereafter by any such present or future law, rule, regulation, requirement, order or direction.

(b) Any fueling facility used on the Freight Premises shall be equipped with automatic shut-off fueling nozzles and overfill catch basins with associated oil/water separators.

(c) The Freight Operator shall inspect all Rolling Stock and trains prior to their departure from the Freight Premises to the Joint Use or Passenger Premises to ensure compliance with FRA and AAR rules and regulations, and the LIRR Operating Rules. The Freight Operator will keep records of all such inspections and the Freight Operator will dispatch Freight Rolling Stock on freight trains over the Joint Use Premises only if all relevant FRA and AAR rules and regulations and LIRR's Operating Rules are satisfied.

15.3.2 The Freight Operator shall, at its own expense, procure from all governmental authorities having jurisdiction over the operations of the Freight Operator hereunder and shall maintain in full force and effect throughout the term of this Agreement all licenses, certificates, permits or other authorization which may be necessary for the conduct of such operations.

15.3.3 The obligation of the Freight Operator to comply with governmental requirements is provided herein for the purpose of assuring proper safeguards for the protection of persons and property on the Freight Premises and the Joint Use Premises. Such provision is not to be construed as a submission by the LIRR to the application to itself of such requirements or any of them.

15.3.4 The Freight Operator shall during the term of this Agreement, for the LIRR's information, deliver to the LIRR promptly after receipt of any notice, warning, violation, order to comply or other document in respect of the enforcement of any laws, ordinances, and governmental rules, regulations and orders, a true copy of the same.

15.3.5 The Freight Operator shall furnish to the LIRR on an annual basis copies of any studies or tests conducted to achieve or determine compliance with laws, ordinances and governmental rules, regulations and orders during the term of this Agreement.

15.3.6 The Freight Operator shall have such time within which to comply with the aforesaid laws, ordinances, rules and regulations as the authorities enforcing the same shall allow.

15.3.7 The parties agree that this Agreement is governed by the laws of the State of New York except to the extent that federal law preempts New York law. The exclusive legal venue for any litigation arising under this Agreement shall lie in the United States District Court for the Southern or Eastern District of New York. The provisions of this Agreement shall be construed and interpreted in accordance with the law of the State of New York, including for the purpose of choice of law, as though all acts and omissions related to this Agreement occurred in New York.

ARTICLE 16: CONDEMNATION

16.1 If a Condemnation shall occur, this Transfer Agreement shall not terminate or be otherwise affected thereby except that the Operating Premises which are affected thereby shall, from and after the date title shall vest in the condemning authority and subject to the provisions of Section 16.2 hereof, no longer be subject to this Transfer Agreement.

16.2 The LIRR shall be entitled to receive the entire award or payment in connection with any taking of the Operating Premises without deduction for any estate vested in the Freight Operator by this Transfer Agreement or any assignment, lease or other conveyance of the Operating Premises effected pursuant to a Condemnation thereof. The Freight Operator hereby expressly assigns to the LIRR all of its right, title and interest in and to every such award or payment. The Freight Operator shall be entitled to claim and receive any award or payment from the condemning authority expressly granted for the taking of the Freight Operator's property, the interruption of its business or the cost to procure substitute premises or facilities, but only if such award or payment shall be made in addition to the LIRR's award and if the Freight Operator's claim does not adversely affect or result in any reduction of the LIRR's award or interfere with the prosecution of a claim for the taking by the LIRR. If the Freight Operator intervenes in a condemnation proceeding in which the LIRR is a party, the LIRR and the LIRR's

legal counsel shall manage and control the proceeding for the LIRR and the Freight Operator in good faith.

**ARTICLE 17: PROHIBITION AGAINST LIENS;
PAYMENT OF TAXES AND ASSESSMENTS**

17.1 Prohibition on Liens

The Freight Operator shall not create, suffer, or otherwise permit any mechanic's, materialman's or similar lien (other than any lien in favor of the LIRR or the MTA) (hereinafter referred to as "Charge") to be filed against any or all of the Operating Premises, for any reason, subsequent to the date of this Agreement; provided that this clause shall not apply to any liens in favor of the LIRR or the MTA. However, in such event, the Freight Operator against whom such a Charge was asserted and filed shall cause same to be discharged of record within thirty days after the date of filing of the same. If the Freight Operator shall fail to discharge such Charge within such period, then, in addition to the other rights of the parties herein contained, the LIRR may, but shall not be obligated to, discharge the same by paying the amount claimed to be due upon ascertaining that same constitutes a valid charge. Any amount so paid, and all costs and expenses including reasonable attorneys' fee, incurred by the LIRR in making such payment shall be repaid by the Freight Operator against whom the Charge was originally asserted and filed. Notwithstanding the foregoing, however, the Freight

Operator shall have the right to contest any such Charge, provided that within twenty (20) days after any such Charge is filed, the Freight Operator shall give notice to the LIRR of its intention to contest such Charge, such notice to specify the amount of the Charge to be contested, and provided further that the Freight Operator shall proceed to contest the validity or amount of such Charge by appropriate legal proceedings when and if same are filed. Assuming such notice has been given, the LIRR may not pay, remove, or otherwise proceed to discharge any such Charge, provided that any legal proceedings resulting therefrom shall be prosecuted with due diligence and dispatch on the part of the Freight Operator against whom the Charge was asserted and filed, and provided further that the Freight Operator shall forever protect, indemnify, defend, and save harmless the LIRR from any matters arising therefrom, including without limitation the principal amount of the Charge and all costs and expenses arising out of such proceeding.

17.2 Prohibition on Security Interests

The Freight Operator shall not pledge as security for any loan any of the assets or interests in the Freight Premises.

17.3 Payment of Taxes and Assessments

The Freight Operator shall promptly pay applicable ad valorem property taxes and assessments, if any,

license fees and any other taxes, charges, assessments or fees properly levied or assessed against the Freight Operator by virtue of the Freight Operator conducting the Freight Operations subject to the Freight Operator's right to contest same as provided by law.

17.4 No Payment in Lieu of Taxes

In the event that the Freight Operator is able to avoid any taxes by virtue of the LIRR's statutory exemptions or status as a governmental entity, the LIRR represents that it shall not seek to obtain from the Freight Operator any payment in lieu of taxes.

ARTICLE 18: ACCIDENTS/INCIDENTS, CRIMES AND
LOSS OR DAMAGE TO PROPERTY

18.1 Reporting of Accident/Incidents

18.1.1 In addition to notifying the appropriate police and other agencies, the Freight Operator shall promptly report to the LIRR Movement Bureau any Accident/Incident or crime which arises in connection with the Operating Premises. In addition, in the event of an Accident/Incident involving Freight Rolling Stock or Employees on the Joint Use Premises, the Freight Operator will submit to the LIRR's Safety Department:

- (a) LIRR Form AR-1, Initial Report of Employee Accident/Incident or Form 3B, Non-employee Accident/Incident Report, as applicable.
- (b) LIRR Form AR-20 - Employee Accident-Injury Report, and/or Form 1A - Supervisor's Report of Employee Accident/Incident, as applicable.

These submissions will be made in accordance with the LIRR's procedures contained in the LIRR Safety Rules or the LIRR's "Corporate Employee Safety Policy and Procedures," including any amendments thereto. The LIRR shall notify the Freight Operator of any Accident/Incident or crime which arises in connection with the Operating Premises to the extent that such Accident/Incident or crime materially impacts the Freight Operations.

18.1.2 The Freight Operator and the LIRR will comply with all rules and regulations issued by the FRA and other agencies concerning the reporting of Accidents/Incidents.

18.2 Investigation of Accidents/Incidents on Joint Use Premises

18.2.1 All Accidents/Incidents on the Joint Use Premises, involving Freight Rolling Stock or Employees will be investigated immediately in accordance with the LIRR's "Corporate Employee Safety Policy and Procedures" and any amendments thereto, unless, by mutual agreement between the parties, alternative investigation procedures are established in writing.

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18.2.2 All Accidents/Incidents on Joint Use Premises involving Freight Rolling Stock or Employees will be investigated by a committee, chaired by an LIRR Transportation supervisor. In addition, upon the request of the LIRR, such committee shall be limited to three representatives of the Freight Operator.

Notwithstanding the foregoing, the Freight Operator may, at its own expense, conduct its own independent investigation of any Accident/Incident occurring on the Joint Use Premises involving employees or equipment of the Freight Operator; provided that the Freight Operator shall not interfere with any operations (including Passenger Operations) thereon and the LIRR shall not be obligated to assist or cooperate with the Freight Operator with such investigation.

ARTICLE 19: SALE OR TRANSFER OF OPERATING PREMISES

19.1 Sale or Transfer of Operating Premises

19.1.1 The Operating Premises may be sold, assigned or otherwise transferred, in whole or in part, at any time by the LIRR. The Freight Operator shall be provided with written notice, at such time notice of sale is published, and written notice of the successful bidder, if any, and prospective date of closing of any such sale, assignment or transfer. The LIRR's rights and obligation under this Agreement may be assigned, in whole or in part in connection with such sale, transfer or assignment in accordance

with Article 19.1.2. hereof; provided that any sale, transfer or assignment by the LIRR hereunder shall not relieve the LIRR of any of its obligations under this Agreement. No amendment or modification of this Agreement shall be made by the Freight Operator and such assignee or transferee without the consent of the LIRR.

19.1.2 In the event of any sale, assignment or transfer of the Operating Premises, the LIRR shall include and require, as a condition of sale, assignment or transfer that the purchaser, transferee or assignee:

- (a) assume all of the rights and duties and obligations of the LIRR, hereunder;
- (b) ratify and confirm to Freight Operator that such assignee shall fully and completely abide by the terms and provisions hereof; and
- (c) shall take subject to the rights, duties and obligations of the Freight Operator.

ARTICLE 20: MISCELLANEOUS PROVISIONS

20.1 No Assurances as to Volume

The Freight Operator acknowledges and agrees that the LIRR has not made any representations or assurances with respect to the volume of business which the Freight Operator will or may have in the exercise of the rights granted herein during the term of this

Agreement. Except as otherwise expressly provided for in this Agreement, the LIRR shall not be responsible for damages, nor shall there be any diminution of payments due from the Freight Operator under this Agreement, for or on account of any decrease in the volume of the Freight Operator's business or any change in the Freight Operator's expenses.

20.2 No Police Protection

The LIRR shall have no obligation to provide police protection or security services on the Operating Premises. The Freight Operator acknowledges that the LIRR shall have no special duty to provide such police protection or security. Nothing in the foregoing shall be construed to limit any right LIRR police, investigators or other law enforcement persons may otherwise have to enter the Freight Premises at any time for official purposes in the exercise of their public duties, including but not limited to investigations, searches, inspections and examinations.

Nothing in this Article 20.2 shall prevent the Freight Operator from obtaining police protection or private security services on the Freight Premises.

20.3 Assignments of Receivables

Either party hereto may assign any receivables due them under this Agreement, provided, however, such

assignments shall not relieve the assignor of any rights or obligations under this Agreement.

20.4 Binding Effect

Subject to the specific restrictions and limitations set forth in other provisions herein, this Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective successors, lessees, assign, grantees, and legal representatives, but no sale, assignment, mortgage, grant, or lease by the Freight Operator of any interest or right given it under this Agreement shall be valid or binding without the prior written consent of the LIRR.

Nothing in this Agreement shall be construed as licensing or authorizing any party hereunder to use any trademark, trade name, symbol, copyright or service mark belonging to the other party or its affiliates without the prior written consent of such party. Each party agrees to defend, indemnify and hold the other party and its Employees, and affiliates against any loss or liability resulting from the wrongful use or appropriation of any such trademark, trade name, symbol, copyright or service mark referred to above.

20.5 Beneficiaries

This Agreement and each and every provision hereof is for the exclusive benefit of the LIRR and the Freight Operator and not for the benefit of any third party.

Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against either of the Parties hereto.

20.6 Waivers

No consent or waiver, express or implied, by either party to or of any breach or default by the other party in the performance by such other party of its obligations hereunder, shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such party hereunder. Failure on the part of any party to complain of any act or failure to act of any other party or to declare such other party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party or parties of their or its right hereunder.

20.7 Notices

Except for payments to be made by the Freight Operator in accordance with Article 4 above, all notices, demands, requests, submissions, or other communications which are required to be served pursuant to this Agreement shall be in writing and shall be deemed to have been properly served when mailed by first class mail, postage prepaid, facsimile, overnight hand delivery or other courier service addressed: (a) in the case of the LIRR, to

the President, with a copy to the General Counsel, in each case at Jamaica Station, Jamaica, New York 11435; and (b) in the case of the Freight Operator, Southern Empire State Railroad Company, c/o Anacostia & Pacific Company, Inc., 405 Lexington Avenue, 50th Floor, New York, NY 10174. Each party may designate by notice in writing a substitute party or a new address to which any notices, demands, requests, submissions, or communications shall thereafter be served.

20.8 Severability

If any covenant or provision of this Agreement, or any application thereof, shall be invalid or unenforceable, the remainder of this Agreement, and any other application of such covenant or provision, shall not be affected thereby. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision.

20.9 Headings

All headings and titles in this Agreement are for purposes of identification and convenience only and shall not affect any construction or interpretation of this Agreement.

20.10 No Discrimination

Freight Operator covenants that it will not violate any laws concerning discrimination, including but not

limited to Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, as amended, Americans With Disabilities Act, Section 1981 of the Civil Rights Act of 1870, Section 1983 or 1985 of the Civil Rights Act of 1871, Equal Pay Act, Executive Order 11246, Rehabilitation Act of 1993, Vietnam-Era Veterans' Readjustment Assistance Act, Immigration Reform and Control Act of 1985, the New York State Human Rights Law, the New York City Human Rights or Civil Rights Law, Executive Order 50 or any other federal, state or local laws, statutes, regulations, ordinances or orders concerning discrimination (the "Discrimination Laws"). Freight Operator further covenants to require any subcontractor to comply with the Discrimination Laws.

20.11 Entire Agreement

This Agreement (including the exhibits referred to in this Agreement, which are incorporated in and constitute a part of this Agreement) sets forth the entire understanding of the parties and supersedes all prior and contemporaneous oral or written agreements and understandings with respect to the subject matter. This Agreement may not be amended or modified except by a writing signed by the parties.

20.12 Conflict of Interest: Public Officers Law

20.12.1 The Freight Operator represents to the best of its knowledge that:

(a) No officer, director, employee, agent, or other contractor of the MTA, or its respective affiliates and subsidiaries (collectively the "Authorities") or a member of the immediate family or household of any of the aforesaid has directly or indirectly received or been promised any form of benefit, payment or compensation, whether tangible or not, in connection with the grant of this Agreement;

(b) This Agreement is entered into by the Freight Operator without any connection to any other entity or person making a proposal for the same purpose, and without collusion, fraud or conflict of interest. No elected or appointed officer or official, director, employee, agent or other contractor of the Authorities, the City or State of New York, the Counties of Nassau or Suffolk, or local units of government and districts within such jurisdictions (including elected and appointed members of the legislative and executive branches of government), or a member of the immediate family or Household of any of the aforesaid:

(i) is interested on behalf of or through the Freight Operator directly or indirectly in any manner whatsoever in the execution or the performance of this Agreement, or in the services, supplies or work, to which this Agreement relates or in any portion of the revenues; or

(ii) is an employee, agent, advisor, or consultant to the Freight Operator or, to the best of the Freight Operator's knowledge, any subcontractor or supplier to the Freight Operator.

20.12.2 As an exception to the above, the Authorities, in their sole discretion, may consent in writing to waive this provision with respect to an individual or entity if the Authorities are provided with a written request for such waiver, in advance, which identifies all of the individuals and entities involved and sets forth in detail the nature of the relationship and why it would not constitute a conflict of interest.

20.12.3 Neither the Freight Operator nor any officer, director, employee, agency, parent, subsidiary, or affiliate of the Freight Operator shall have an interest which is in conflict with the Freight Operator's faithful performance of its obligations under this Agreement, provided that the Authorities, in their sole discretion, may consent in writing to such a relationship, provided the Freight Operator provides the Authorities with a written notice, in advance, which identifies all the individuals and entities involved and set forth in detail the nature of the relationship and why it is in the Authorities best interest to consent to such relationship.

20.12.4 The provisions of this Article are supplemental to, not in lieu of, all applicable laws, rules and regulations with respect to conflict of interest. In the event there is a difference between the standards applicable under this Agreement and those provided by statute, the stricter standard shall apply.

20.12.5 In the event the Freight Operator has no prior knowledge of a conflict of interest as set forth above and acquires information which may indicate that there may be an actual or apparent violation of any of the above, the Freight Operator shall promptly bring such information to the attention of the LIRR. The Freight Operator shall thereafter cooperate with the Authorities' review and investigation of such information, and comply with the instructions the Freight Operator receives from the LIRR in regard to remedying the situation.

20.12.6 No employee of the LIRR or the MTA who at any time during his or her employment with the LIRR or the MTA, was directly concerned with the selection process in connection with this Agreement, personally participated in the selection process in connection with this Agreement, or had this Agreement under his or her active consideration, shall have any interest, direct or indirect, in this Agreement, the performance hereof, the Freight Operations or the Freight Operator. The Freight Operator

shall not employ any such individual to work in the Freight Operations for a period of two (2) years after employment with the LIRR or the MTA has been terminated, unless such individual is exempt from the Public Officers Law. Moreover, the Freight Operator shall not employ any individual in the Freight Operations who, at any time during his or her employment with the LIRR or the MTA, was directly concerned with the selection process in connection with this Agreement, personally participated in the selection process in connection with this Agreement, or had this Agreement under his or her active consideration.

20.13 Survival

Notwithstanding anything herein to the contrary, Article 10 shall survive the expiration or any other termination of this Agreement.

20.14 Assignability

Subject to Article 19.1 hereof, the rights and obligations under this Agreement may not be assigned by a party hereto without the consent of the other party; provided that the Freight Operator may assign its rights and obligations hereunder prior to the Effective Date to an entity, directly or indirectly owned or controlled by or under direct or indirect common control with the Freight Operator.

20.15 Representation and Warranties

20.15.1 The parties hereby represent and warrant to the other, as of the date hereof and of the Commencement Date, as follows:

- (a) such party is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation; and
- (b) such party has all necessary corporate power and authority to execute, deliver and perform its obligations under this Agreement and this Agreement shall be enforceable against it in accordance with its terms.

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20.15.2 The LIRR hereby represents and warrants to the Freight Operator that the grant of rights and other assets by the LIRR to the Freight Operator provides the Freight Operator with sufficient rights to conduct the Freight Operations in a manner substantially similar to that conducted by the LIRR on the Effective Date, subject to the expiration of customer and other contracts that do not extend past the Commencement Date and subject to the requirements of Article 15.3 hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate and have caused their corporate seals to be hereunto affixed the day and year first written below.

THE LONG ISLAND RAIL ROAD
COMPANY

By: Thomas F. Prendergast
President

Date: 11/17/96

SOUTHERN EMPIRE STATE RAILROAD
COMPANY

By: R. L. McCaffrey, Jr.
Print Name: R. L. McCaffrey, Jr.

Title: President

Date: 15 November 1996

Corporate Acknowledgments

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

On the 15th day of November, 1996, before me personally came R. Lawrence McCaffrey, Jr., to me known and who being by me duly sworn, did depose and say: that he resides at Brooklyn, New York; that he is the President of SOUTHERN EMPIRE STATE RAILROAD COMPANY, the corporation described herein and which executed the foregoing instrument; he signed his name thereto by like order.

Barbara J. Christopoulos
Notary Public

(Affix Notary Stamp)

BARBARA J. CHRISTOPOULOS
NOTARY PUBLIC, State of New York
No. 41-4800716, Queens County
Commission Expires Sept. 30, 1997

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MTA/LIRR00737

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

On the 19TH day of NOVEMBER, 1996,
before me personally came Thomas P. Prendergast, to me known
and who being by me duly sworn, did depose and say: that he
has an office at Jamaica Station, Jamaica, New York; that he
is the President of THE LONG ISLAND RAIL ROAD COMPANY, the
corporation described herein and which executed the
foregoing instrument; that he signed his name thereto by
order of the Board of said corporation.

Mary A. Allocca
Notary Public

MARY A. ALLOCCA
NOTARY PUBLIC, State of New York
No. 4582505
Qualified in Nassau County
Commission Expires November 30, 1997

MTA/LIRR00739

LIST OF EXHIBITS

- Exhibit 1 Freight Premises
- Exhibit 2 Joint Use Premises
- Exhibit 3 Private Freight Sidings
- Exhibit 4 [Intentionally Omitted]
- Exhibit 5 Description of Yard A
- Exhibit 6 Active Freight Switches
- Exhibit 7 Inactive Freight Switches
- Exhibit 8 Procedures for Installation of new Freight Switch
- Exhibit 9 Condition of Tracks on Freight Premises
- Exhibit 10 [Intentionally Omitted]
- Exhibit 11 Equipment/Locomotive Rental Rates
- Exhibit 12 Customer and Equipment Contracts
- Exhibit 13 Freight Property Rental Agreements Rail Use
- Exhibit 14 Yard A Tracks to Revert to the LIRR
- Exhibit 15 Property at Arch Street Yard to be Used for Tie Storage
- Exhibit 16 Maspeth Yard Schematic

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EXHIBIT 4



Town of Brookhaven
Long Island
Attorney's Office

STOP WORK ORDER

Subject Premises/Property: SCTM# 0200-663.00-03.00-029.001 Sills Expressway Associates

Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees, excavating and removing excavated materials] regarding any matter not pertaining to railroad construction.

Investigator: B Tohill Shield: #130 Date: 3/12/2014

DO NOT REMOVE THIS PLACARD

Department of Law
One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6500 • Fax (631) 698-4489 • Fax (631) 451-6505
www.brookhaven.org

Litigation papers are NOT to be served by FAX except by express prior written permission

EXHIBIT 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

TOWN OF BROOKHAVEN,

Plaintiffs,

Index No.: 061613-2014
(current caption)

-against-

SILLS ROAD REALTY LLC d/b/a
BROOKHAVEN RAIL TERMINAL, SUFFOLK &
SOUTHERN RAIL ROAD LLC, U S RAIL
CORPORATION, U S RAIL NEW YORK LLC,
BROOKHAVEN RAIL LLC, ADJO
CONTRACTING CORP., WATRAL BROTHERS,
INC., and PRATT BROTHERS, INC.,

STIPULATION

Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Index No.: 2014-061613
(amended caption)

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN
RAIL LLC f/k/a U S RAIL NEW YORK LLC,
BROOKHAVEN TERMINAL OPERATIONS
LLC, OAKLAND TRANSPORTATION
HOLDINGS LLC, SILLS EXPRESSWAY
ASSOCIATES, WATRAL BROTHERS, INC., and
PRATT BROTHERS, INC.,

Defendants.

-----X

RECITALS:

A. The Town of Brookhaven commenced the within action against the defendants enumerated in the “current caption” above by filing a Summons and Complaint on March 11, 2014 (“State Court Action”);

B. The State Court Action concerns, inter alia, a rail facility currently operated by certain of the defendants on a 28 acre parcel located on Sills Road, Yaphank, Town of Brookhaven, New York ("Parcel A"), and certain activities being undertaken by certain of the defendants upon an adjacent parcel of approximately 93 acres to the east of Parcel A ("Parcels B and C");

C. Defendants Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Watral Brothers, Inc., Pratt Brothers, Inc. and affiliated parties, Oakland Transportation Holdings LLC and Brookhaven Terminal Operations (collectively, the "BRT Defendants"), have advised the Town of certain changes in the ownership, operation and control of the railway facilities at issue in the Action which render it appropriate to discontinue the Town's claims against certain parties, to add certain parties, and to redesignate or rename certain parties;

D. The BRT Defendants further contend that this State Court Action is required to be removed to the United States District Court for the Eastern District of New York ("EDNY") upon claims of federal pre-emption under 28 U.S.C. § 1441 (the "Pre-Emption Claim");

E. The Town, which disputes and does not acknowledge the Pre-Emption Claim, agrees that the State Court Action may properly be brought in the EDNY because a certain Stipulation of Settlement was entered into and "so ordered" by the EDNY under CV 07-4584 (the "Federal Action"), because the State Court Action, inter alia, alleges violations of such Stipulation, and because the EDNY reserved jurisdiction to enforce the prior Stipulation (the "Prior Federal Action");

F. The Town has further filed an application before the United States Surface Transportation Board ("STB") to reopen and obtain certain relief from the STB respecting the

railroad facilities at issue on Parcels A, B and C under STB F.D. No. 35141 (the "STB Proceeding").

G. The parties otherwise agree and consent to certain other matters set forth below, reserving all other rights, claims and defenses.

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned parties by the undersigned counsel of record as follows:

1. The Town shall file a Supplemental and Amended Summons (exhibit A) and Amended Complaint (exhibit B) promptly following the execution of this Stipulation (the "Amended State Court Pleading").

2. Within the time limited by 28 U.S.C. § 1446, the BRT Defendants shall file a Petition for the removal of the State Court Action to the EDNY (the "Removal") and the Town consents to such Removal and will not seek to remand the Action to the State Court provided that such consent to the Removal does not and shall not be deemed to constitute the Town's consent to or acknowledgment of the Pre-Emption Claim.

3. The BRT Defendants (specifically excluding Sills Expressway Associates) hereby appear in the State Court Action by their undersigned counsel, Foley & Lardner LLP, accept service of the original State Court Complaint and the proposed Supplemental and Amended Summons and Amended State Court Pleading (exhibits A and B), and consent to and acknowledge personal jurisdiction on behalf of the BRT Defendants.

4. The BRT Defendants represent and warrant that Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations, Sills Road Realty LLC, and Sills Expressway Associates collectively constitute all of the owners and leasehold interests with respect to Parcels A, B and C, that Oakland Transportation Holdings LLC owns 100% of the

interest in Brookhaven Rail LLC, and that the BRT Defendants have assumed all obligations in connection with the 2010 Stipulation in the Prior Federal Action

5. In consideration thereof, the Town has agreed to and does hereby gives notice that it discontinues pursuant to CPLR 3217(a) its claims against Suffolk and Southern Railroad LLC, U S Rail Corporation and Adjo Contracting Corp. and does hereby redesignate original defendants U S Rail New York LLC and Brookhaven Rail LLC as Brookhaven Rail LLC f/k/a U S Rail New York LLC and does hereby redesignate Sills Road Realty LLC d/b/a Brookhaven Rail Terminal as Sills Road Realty LLC.

6. The BRT Defendants contend that the current and anticipated development at Parcels B and C (the "Disputed Construction") shall be treated as a "spur, industrial, team, switching or side track" within the meaning of 49 U.S.C. § 10906, contend that such ancillary "spur" is subject to Federal Pre-Emption which limits the Town's jurisdiction and control respecting Parcels B and C, and agree to seek an expedited determination of these issues before the U.S. Surface Transportation Board (the "Board") (the "Ancillary Spur Claims"). Without limitation, Brookhaven Rail, LLC and Brookhaven Terminal Operations, LLC d/b/a Brookhaven Rail Terminal agree that they shall promptly file a Petition for Declaratory Order with the Board to address issues of Pre-Emption and the Ancillary Spur Claims (*i.e.*, whether the additional track to be installed by BRT constitutes a "spur, industrial, team, switching or side track" within the scope of 49 U.S.C. § 10906) ("STB Declaratory Petition"). The parties agree that they will each request an expedited Final Determination by the Board of the Ancillary Spur Claims pursuant to the STB Declaratory Petition, and pursue and cooperate with such expedited proceedings before the Board as the Board may direct to obtain the earliest possible Final Determination of the Ancillary Spur Claims.

7. The Town has previously issued a certain Stop Work Order (the "SWO") and certain Notices of the violations (the "Violations") respecting the Disputed Construction on Parcels B and C. Without construing the SWO as either prohibiting or allowing same, the parties agree that for a period of 60 days from the date of this Stipulation, or such sooner time as the STB shall render a determination upon the Ancillary Spur Claims, the Town will withdraw, without prejudice, so much of the SWO and Violations which are deemed to prohibit so much of the Disputed Construction which concerns excavation, removal of fill, and grading which is incidental to the construction of additional railway track upon Parcels B and C (the "Track Construction") as are depicted in a Site Plan to be negotiated and agreed upon between the parties within ten (10) business days (the "Town Consent"). The Town will also adjourn the Violations without prejudice for the same period of time.

8. The Town Consent is strictly limited to such excavation, removal of fill and grading which is actually and reasonably required for the purpose of the aforesaid Track Construction, and the Town specifically objects to and continues its objection to any further excavation, removal of fill, grading, or other Disputed Construction upon any other portion of Parcels B and C.

9. The Town Consent is entered into without prejudice and with a full reservation of all other rights, claims, contentions and defenses of all parties. In the event a dispute shall arise concerning the Town Consent and the extent of the Disputed Construction, the Town shall be authorized to reissue a SWO and Violations (a "Construction Dispute"), and the parties agree that the Construction Dispute shall or may be determined before such a forum (whether the EDNY, the STB, or further State Court proceedings) as may be determined to be available by law. Without prejudice to the BRT Defendants' positions with respect to the scope of Pre-

Emption, the BRT Defendants agree to promptly and without delay keep the Town fully informed and apprised of the Track Construction including by providing such Site Plans, grading plans, fill removal reports, measurements (including by means of a photogrammetric survey to be commissioned by the BRT Defendants within ten (10) business days) elevations, and other information and data which the Town Engineer or its Consultant may reasonably require and shall permit representatives of the Town the right to make periodic inspections of Parcels B and C upon reasonable advance notice, subject only to the limitation that such inspections shall not unreasonably interfere with the Track Construction.

10. The parties consent to expedited discovery under Rule 26 of the Fed.R.Civ.P. in respect of the State Court Action to be removed to EDNY and agree that a Rule 26(f) conference shall occur on April 24, 2014 following such removal.

11. Except as provided above, all rights, claims, defenses, remedies, and contentions of all parties in respect of the State Court Action, the Prior Federal Action and the Removed Action be and the same hereby are otherwise fully reserved.

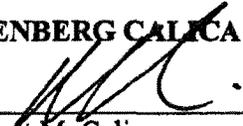
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12. This Stipulation may be executed in counterparts and by telecopier or fax, each of which shall be deemed to constitute a duplicate original hereof.

Dated: April 9, 2014

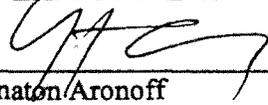
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