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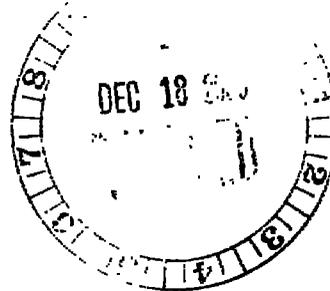
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**SURFACE
TRANSPORTATION BOARD**

December 17, 2008

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VIA FEDEX

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

FILED FOR WAIVER

Re: Town of Babylon and Pinelawn Cemetery – Petition to Reopen this Docket and
Confirm that the Board’s Prior Decisions Remain Valid and Enforceable
Finance Docket No. 35057

Dear Secretary Quinlan:

Enclosed for filing are the original and ten copies of the Petition of the Town of Babylon and Pinelawn Cemetery to Reopen this Docket and Confirm that the Board’s Prior Decisions Remain Valid and Enforceable. A compact disk containing an electronic version of the Petition is also enclosed.

In addition, enclosed is our check for \$200 for the filing fee. Although the filing fee is subject to waiver under 49 CFR § 1002.2(e)(1) since the Town of Babylon is a local government entity, we are nevertheless remitting it in order to ensure that the Petition is accepted for filing at this time.

A Certificate of Service is attached to the Petition. Copies of the Petition and this cover letter have been mailed to counsel for New York and Atlantic Railway Company and Coastal Distribution, LLC.

If you have any questions or require any other information, please let me know.

Respectfully,

Fran M. Jacobs

Fran M. Jacobs

Enclosures

cc: Parties on Certificate of Service (w/encls.)
Howard M. Miller, Esq.

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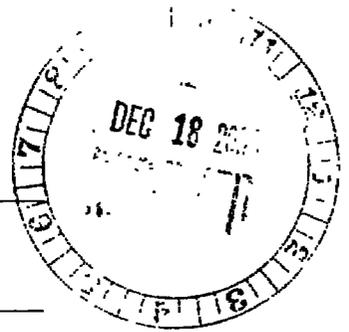
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35057



224715

PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETERY
TO REOPEN THIS DOCKET AND CONFIRM THAT THE BOARD'S
PRIOR DECISIONS REMAIN VALID AND ENFORCEABLE

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DEC 18 2008

SURFACE
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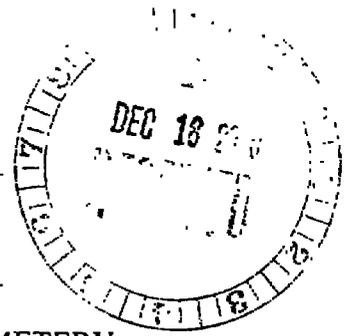
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December 17, 2008

Attorneys for Pinelawn Cemetery

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35057



PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETERY
TO REOPEN THIS DOCKET AND CONFIRM THAT THE BOARD'S
PRIOR DECISIONS REMAIN VALID AND ENFORCEABLE

Nature of the Proceeding

The Board has now ruled -- twice -- that the solid waste transfer facility operated by Coastal Distribution LLC ("Coastal") in Farmingdale, New York (the "Farmingdale Facility") is subject to state and local regulation because it does not constitute transportation by or on behalf of a rail carrier and therefore is not entitled to federal preemption. Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Finance Docket No. 35057, 2008 STB LEXIS 58, 2008 STB LEXIS 499 (February 1, 2008 and September 26, 2008).

Less than two months after the Board issued the more recent of its two rulings, Coastal submitted papers in the parties' related federal litigation (the "Federal Action") in which it represented that, as the result of an amendment to the Interstate Commerce Commission Termination Act ("ICCTA"), which became effective on October 16, 2008 (the "2008 Act"), the Board "no longer has jurisdiction over the Farmingdale facility, and Babylon is precluded from enforcing its zoning ordinance."¹ Coastal further represented in the Federal Action that, based on the 2008 Act, "today the STB would not have jurisdiction to entertain the declaratory judgment petition that was brought by Babylon in the first place." (Ex. A at p. 15.) And, while arguing that the 2008 Act divested the Board of jurisdiction to decide whether a non-rail carrier

¹ A copy of Coastal's submission, which was filed jointly with New York and Atlantic Railway Company, is annexed as Exhibit A hereto; see pp. 1-2.

is operating a solid waste facility on behalf of a rail carrier, Coastal claimed that, after the Board's September 26, 2008 decision and before the 2008 Act was adopted, it modified its agreement with New York and Atlantic Railway ("NYAR") and thereby rendered the Board's two prior decisions in this matter academic.

In view of the claim made by Coastal and NYAR in the Federal Action that the Board's recent determination that the Town of Babylon (the "Town") can regulate the Farmingdale Facility is no longer valid and should be disregarded, a new controversy has arisen. Accordingly, the Town and Pinelawn Cemetery ("Pinelawn") ask that this docket be reopened so that the Board can remove any uncertainty about the effect of its prior declaratory orders and about the effect of the 2008 Act on the Town's authority to regulate the Farmingdale Facility.

Background

Since the Board is already familiar with the record in this matter, the facts will only be recited here to the extent that they are relevant to this petition.

A. Coastal and NYAR Have a History of Making Cosmetic Changes in Their Arrangement

On March 22, 2002, NYAR entered into a sublease with Coastal (the "Sublease") for the area now occupied by the Farmingdale Facility.² The Sublease gave Coastal the right to the "exclusive use" of the property for \$2,000 per month for a period of five years. It also gave Coastal the right to make improvements at its sole expense "with no right of reimbursement of

² A copy of the Sublease, which is entitled "Lease," is annexed hereto as Exhibit B. The Sublease was superseded by another sublease, also entitled "Lease," dated July 11, 2002, a copy of which is annexed hereto as Exhibit C. The two subleases do not differ materially. NYAR itself subleases the property from the Long Island Railroad. Pinelawn is the fee owner of the property.

any kind.” (Ex. B ¶ C(2).) At the end of the term, Coastal had the right under the Sublease “to remove all of its structures and other material and equipment” (Id. at ¶ C(8).)

After the Sublease was signed, Coastal began building the three-sided structure that houses its solid waste transfer facility. According to one of Coastal’s principals, the company spent “several million dollars” on the Farmingdale Facility.³ No part of this expense was borne by NYAR which merely provides freight services to Coastal.

In March 2004, while the Farmingdale Facility was still in the process of being built, the Town issued a stop work order to Coastal. When the stop work order was issued, the Board had already rendered its decision in Hi Tech Trans., LLC, STB Finance Docket No. 34192, 2003 STB LEXIS 475 (Aug. 14, 2003), where it held that a business which was not itself licensed as a rail carrier could not claim that its activities were exempt from state and local regulation under ICCTA simply because it had arranged to conduct those activities on property leased from a rail carrier. Since the arrangement between Coastal and NYAR was virtually indistinguishable from the relationship between the transfer station operator and the rail carrier in Hi Tech, Coastal and NYAR apparently realized that they would not be able to use the Sublease to argue that Coastal’s operation was within the Board’s exclusive jurisdiction and that the Town was preempted from regulating it. They therefore recast their agreement.

Five months after the stop work order was issued, the Sublease was replaced with what Coastal and NYAR called a Transload Facility Operations Agreement (the “Operations

³ Excerpts from the testimony given by Coastal’s principal in the federal action entitled Coastal Distribution LLC v. Town of Babylon are annexed hereto as Exhibit D. (See pp. 194-195.)

Agreement”).⁴ The Operations Agreement was designed to make Coastal’s relationship with NYAR look different from Hi Tech’s relationship with the rail carrier from which it leased railroad property. But the changes Coastal and NYAR made were all superficial. Although the Operations Agreement named Coastal as NYAR’s “agent,” it did not give NYAR any control over Coastal’s operation. The Operations Agreement also left the economics of the arrangement between Coastal and NYAR the same as they had been under the Sublease. It did not provide for NYAR to compensate Coastal for the millions of dollars Coastal had spent building the Farmingdale Facility, and Coastal alone remained responsible for the cost of conducting operations there. NYAR received the same fee from Coastal, but the fee was given a different name; in lieu of paying \$24,000 per year in the form of rent, the Operations Agreement required Coastal to pay NYAR the same \$24,000 per year as a “usage fee” of \$20 per rail car for 1,200 cars. (Ex. B at ¶ C(1); Ex. E at ¶ 3.02.)

The Operations Agreement did not give NYAR any share in the profits generated by the Farmingdale Facility. Even though Coastal was ostensibly operating the Farmingdale Facility on NYAR’s “behalf” under the Operations Agreement, Coastal set and collected the fee for loading waste, and it alone kept the loading fee.

Moreover, in the Operations Agreement, NYAR disclaimed liability for Coastal’s conduct, and Coastal agreed to indemnify NYAR. (Ex. E at ¶ 6.01; see also ¶ 1.05.)

⁴ (A copy of the Operations Agreement is annexed hereto as Exhibit E; see ¶ 1.05(d).)

B. The Zoning Board of Appeals Found that the Farmingdale Facility Was Outside the Board's Jurisdiction

After the stop work order was issued, Coastal and NYAR blocked the Town from enforcing it by filing an appeal with the Town's Zoning Board of Appeals (the "ZBA").⁵ The appeal was premised on the argument that the Farmingdale Facility was subject to the Board's exclusive jurisdiction and that the Town was therefore precluded from regulating it.

Following a series of evidentiary hearings, the ZBA found that, because Coastal is "controlling the operation of the site," Coastal's use of the Farmingdale Facility did not constitute "'transportation by rail carrier' so as to come within the Surface Transportation Board's jurisdiction pursuant to the ICC Termination Act." (ZBA Decision at pp. 12, 16.) In reaching this conclusion, the ZBA noted that

Coastal is marketing the site, erecting structures that it requires on the site and repairs tracks at the site, not New York and Atlantic, who is the party actually certified as a railroad. Coastal is fundamentally operating independently of the railroad.

(ZBA Decision at p. 16; emphasis added.)

After losing before the ZBA, Coastal and NYAR commenced the Federal Action. They sought a preliminary injunction barring the Town from regulating the Farmingdale Facility, arguing, as they had before the ZBA, that Coastal's operation was subject to federal preemption under ICCTA and was within the Board's exclusive jurisdiction. The district court ruled in Coastal's favor based on its belief that "the likelihood is high that Coastal is a rail carrier for purposes of ICCTA," and that its activities were subject to the Board's exclusive jurisdiction.

⁵ Once an appeal to the ZBA was filed, it operated to stay enforcement of the stop work order.

Coastal Distribution, LLC v. Town of Babylon, 2006 U.S. Dist. LEXIS 8400, at *28 (E.D.N.Y. Jan. 31, 2006).

On appeal, the Court of Appeals for the Second Circuit affirmed the grant of preliminary injunctive relief, but modified the order to permit the parties to file a petition for declaratory relief by the Board which it described as “the tribunal best equipped to decide the issues of federal transportation policy implicated here.” Coastal Distribution, LLC v. Town of Babylon, 216 Fed. Appx. 97, 100 2d Cir. 2007).

C. The Proceedings Before the Board

Although the Second Circuit’s decision allowed any of the parties to file a petition for declaratory relief with the Board, Coastal and NYAR – who had claimed they were within the Board’s exclusive jurisdiction – did not do so. On July 5, 2007, the Town and Pinelawn therefore filed their own petition with the Board seeking a determination that Coastal’s activities did not qualify for preemption under 49 U.S.C. § 10501(b) and were fully subject to local regulation by the Town. In opposition to the petition, Coastal and NYAR put before the Board the entire record in the Federal Action.

Based on the same record that had been considered by the district court and the Second Circuit, the Board reached the opposite conclusion. In a decision served on February 1, 2008 (the “February 2008 Decision”), the Board ruled:

based on the evidence before us here, Coastal is offering its own services to customers directly, and NYAR’s involvement essentially is limited to transporting cars to and from the facility. Because Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has assumed no liability or responsibility for Coastal’s transloading activities, NYAR’s level of involvement with Coastal’s transloading operations at the Farmingdale Yard is insufficient to make Coastal’s activities an integral part of NYAR’s provision of transportation by “rail carrier.” Thus, the Board does not have

jurisdiction over Coastal's activities and the Federal preemption in section 10501(b) does not apply.

(February 2008 Decision at p. 6; emphasis added.)

After the Board ruled against them, Coastal and NYAR filed petitions for judicial review with the United States Court of Appeals for the District of Columbia Circuit. The petitions were ultimately dismissed for lack of jurisdiction because the February 2008 Decision was rendered non-final when Coastal and NYAR asked the Board to dismiss the declaratory order petition and to reconsider. In support of their petition for reconsideration, one of the arguments Coastal and NYAR made was that the Board had misapprehended the meaning of 49 U.S.C. § 10501(b), which they claimed gave the Board exclusive jurisdiction over the construction of rail facilities – without regard to who operates them.

On September 26, 2008, the Board issued a decision (the “September 2008 Decision”) denying both the motion to dismiss and petition for reconsideration. With respect to the argument that 49 U.S.C. § 10501(b) gave the Board jurisdiction over rail facilities, no matter who operated them, the Board gave the following reason for rejecting it:

while section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over “transportation by rail carrier.” Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute “transportation” and must be performed by, or under the auspices of, a “rail carrier.” For an activity to be subject to the agency's jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not just one as suggested by NYAR. The Board reasonably applied the record evidence in this case to its existing precedent to conclude that Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation.

(September 2008 Decision at p. 5; emphasis added and citation omitted.)

The Board thus ruled in both the February 2008 and September 2008 Decisions that the Farmingdale Facility was not entitled to federal preemption under ICCTA and was subject to state and local regulation.

D. Coastal and NYAR Made Another Belated and Cosmetic Attempt to Make Their Arrangement Look Different

At some point after the Board rendered its September 2008 Decision, Coastal and NYAR say they “agreed to modify their roles and responsibilities at the Farmingdale Facility to meet the specific shortcomings perceived by the Board.” (Ex. A at p. 15.) It is not clear when the “modification” occurred. The amended agreement (the “Amended Agreement”) that was provided to the Town and Pinelawn is dated “as of October 1, 2008,” and no documentation has been produced showing the date on which it was actually executed.⁶ The signatures on the Amended Agreement, unlike those on the Operations Agreement, are not dated. It is therefore possible that the Amended Agreement was not signed until after October 16, 2008, the date on which the 2008 Act became effective. But, no matter when it was signed, the Amended Agreement does not change the Operations Agreement in any meaningful respect.

In its February 2008 Decision, the Board pointed out that, under the Operations Agreement:

Coastal exercises almost total control over the activities of the facility. For example, Coastal has the exclusive right to conduct transloading operations on the property. Coastal built the facility and, pursuant to the Operations Agreement, is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. Coastal also performs the marketing activities for the operations at the facility and provides and maintains all rail cars. Coastal is entitled to charge a loading fee for its transloading services, a fee which is in addition to the rail freight transportation charge payable to the railroad and over

⁶ A copy of the Amended Agreement is annexed hereto as Exhibit F.

which NYAR has no control. And for the use of the facility, Coastal pays NYAR a usage fee of \$20 per loaded rail car (inbound or outbound).

Moreover, Coastal, not NYAR, conducts all customer negotiations and bills and collects the loading fee from its customers separately from the transportation charges, which are collected by the connecting Class I carrier (CSX Transportation, Inc.).

(February 2008 Decision at p. 5.)

The Amended Agreement contains nothing which would cause the Board to change any of these conclusions. While Coastal and NYAR represented to the district court that, “[u]nder the amended agreement, NYAR sets the transloading fees, retains additional liability and assumes a greater role in the operation of the facility” (Ex. A at p. 15), the actual terms of the Amended Agreement do not support their position. Far from setting the loading fee that Coastal collects, NYAR is only authorized under paragraph 3.01 of the Amended Agreement to adjust the fee “at Coastal’s request or with Coastal’s consent.” (Ex. F at ¶ 3.01.) The loading fee must be sufficient to cover Coastal’s expenses, give Coastal a reasonable return on its investment, and provide Coastal with a reasonable profit. (Ibid.) Thus, Coastal not only retains the entire loading fee under the Amended Agreement, just as it did under the Operations Agreement, it effectively continues to set the fee; NYAR is not empowered to do anything about the loading fee unless Coastal requests or consents to an adjustment.

Moreover, Coastal remains “solely responsible for necessary repairs, maintenance and upkeep of the Facility.” (Ex. F at ¶ 4.02(b).) And NYAR, which made no investment in the Farmingdale Facility, has not agreed to shoulder any part of the millions of dollars it cost to build and equip the Farmingdale Facility.

Coastal and NYAR are also mistaken that the Amended Agreement changes NYAR’s liability for Coastal’s conduct. In the February 2008 Decision, the Board noted that the

Operations Agreement “provides that Coastal must maintain liability insurance executed in favor of NYAR” (February 2008 Decision at p. 5.) Coastal must do the same thing under the Amended Agreement. (Ex. F at ¶ 4.03.) Coastal is also obligated under the Amended Agreement to indemnify NYAR “against any and all claims and liability caused by, arising out of, or resulting in any manner from Coastal’s negligence or misconduct, or the negligence or misconduct of Coastal’s employees or agents.” (Ex. F at ¶ 6.01.) Thus, NYAR still has no liability for the negligent or wrongful acts of Coastal or its employees.

Finally, the Amended Agreement does not give NYAR a greater role in the operation of the Farmingdale Facility. Under both the Operations Agreement and the Amended Agreement, Coastal alone provides transloading services; it alone loads and unloads commodities; and it alone bills customers for its loading services. (Ex. F at ¶¶ 1.02; 1.05(a); and 2.02.) Thus, while Coastal and NYAR may have reworked some of the language of the Operations Agreement in the Amended Agreement, their relationship is unchanged in any material respect.

E. The New Proceedings in the Federal Action

Once the Board issued its September 2008 Decision, the Town and Pinelawn moved in the Federal Action to vacate the preliminary injunction which prohibited the Town from regulating the Farmingdale Facility.⁷ The preliminary injunction had been granted because the district court believed that “Coastal is likely a rail carrier and is under the exclusive jurisdiction of the ICCTA.” Coastal Distribution, LLC v. Town of Babylon, *supra*, 2006 U.S. Dist. LEXIS 8400, at **26-27. Since the Board’s February 2008 and September 2008 Decisions establish that Coastal is not within the Board’s exclusive jurisdiction and is fully subject to state and local

⁷ A copy of the Memorandum of Law that the Town and Pinelawn submitted in support of their motion to vacate is annexed hereto as Exhibit G.

regulation, there was no basis for the district court's finding that Coastal could show a likelihood of success on the merits of its preemption claim. The Town and Pinelawn therefore asked the district court to vacate the preliminary injunction.

Coastal and NYAR opposed the motion to vacate, arguing that the Board "no longer has jurisdiction over the Farmingdale facility" and that the Town is now "precluded" from regulating the Facility. (Ex. A at pp. 1-2.) Although their logic is not easy to follow, they appear to contend that (1) the 2008 Act somehow expanded the Board's jurisdiction to include the Farmingdale Facility and (2) the Amended Agreement differs from the Operations Agreement, gives NYAR control over Coastal's operations at the Farmingdale Facility, and establishes that Coastal is operating the Farmingdale Facility on NYAR's behalf. Coastal and NYAR are wrong in both respects.

The 2008 Act, which became effective on October 16, 2008, did not change 49 U.S.C. § 10501(a)(1) or (b) – which specifies the extent of the Board's exclusive jurisdiction – nor did it expand the Board's jurisdiction to cover anything other than transportation by rail carrier. On the contrary, the 2008 Act was designed to close the loophole that had existed under ICCTA and allowed rail carriers to claim that, because they were exclusively within the Board's jurisdiction, they could operate solid waste transfer facilities free from local, state, or other federal regulation. To this end, the 2008 Act removes solid waste rail transfer facilities from the Board's jurisdiction except for certain limited purposes.

Coastal and NYAR seem to think that, by providing a definition of "solid waste rail transfer facility," the 2008 Act expanded, and then immediately restricted, the Board's jurisdiction. It did not. To be subject to the Board's jurisdiction and to qualify for federal preemption under 49 U.S.C. § 10501(b), "the activities at issue must be transportation, and that

transportation must be performed by, or under the auspices of, a ‘rail carrier.’” (February 2008 Decision at p. 4.) The 2008 Act adds a new subparagraph (c)(2) to 49 U.S.C. § 10501, which carves out solid waste rail transfer facilities from the jurisdiction the Board would otherwise have; it does not enlarge the Board’s jurisdiction to cover anything not covered by 49 U.S.C. § 10501(b). A solid waste rail transfer facility must therefore be something that would constitute transportation by or on behalf of a rail carrier under 49 U.S.C. § 10501(b). If an operation did not constitute transportation by or on behalf of a rail carrier, it would not have been within the STB’s jurisdiction, and there would have been no reason to adopt 49 U.S.C. § 10501(c)(2) of the 2008 Act to exclude it.

Contrary to the suggestion made by Coastal and NYAR, the definition of “solid waste rail transfer facility in 49 U.S.C. § 10908(e)(1)(H) does not bring within the Board’s jurisdiction solid waste transfer facilities that, like the Farmingdale Facility, were never subject to the Board’s jurisdiction to begin with. As defined in the 2008 Act, a “solid waste rail transfer facility” is “the portion of a facility owned or operated by or on behalf of a rail carrier . . . where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of the original shipping containers.” 49 U.S.C. § 10908(e)(1)(H). Although Coastal and NYAR contend that the Farmingdale Facility fits within this definition, they are mistaken. In their gloss on the term “solid waste rail transfer facility,” Coastal and NYAR say that, because NYAR operates the railyard in which the Farmingdale Facility is located, it automatically follows that the Farmingdale Facility is a solid waste rail transfer facility. But the definition does not refer to the operator of the railyard; it refers to the portion of the facility owned or operated by or on behalf of a rail carrier in which solid waste is handled.

The term “facility” refers to a structure. Island Park, LLC v. CSX Transportation, Inc., 2007 U.S. Dist. LEXIS 46608, at *35 (N.D.N.Y. June 26, 2007) (“the courts that have addressed the meaning of ‘facility’ for purposes of ICCTA consistently construe it to mean buildings or other structures that house equipment and systems related to railroad operation”). NYAR does not own any part of the Farmingdale Facility – the structure in which solid waste is handled. Indeed, NYAR does not even own the railyard; Pinelawn does. And the Board has held that the Farmingdale Facility – the actual solid waste facility – is not operated by or on behalf of NYAR. Since the Farmingdale Facility is not owned or operated by or on behalf of NYAR, it is not a solid waste rail transfer facility. Accordingly, the 2008 Act has no relevance to the Farmingdale Facility.

While the 2008 Act would have removed the Farmingdale Facility from the Board’s exclusive jurisdiction had the Board found that Coastal was operating the Farmingdale Facility as NYAR’s agent, the Board made no such finding. Instead, it found that the Farmingdale Facility was not within its jurisdiction because it was not operated by or on behalf of a rail carrier. The 2008 Act is inapplicable to solid waste transfer facilities like Coastal’s which were never within the Board’s jurisdiction. Non-rail solid waste transfer facilities like the Farmingdale Facility were subject to state and local regulation prior to the adoption of the 2008 Act (September 2008 Decision at p. 1), and they remain subject to state and local regulation now that the 2008 Act has been adopted.

In the face of the Board’s holding on September 26, 2008 that it did not have jurisdiction over the Farmingdale Facility, it is difficult to see how Coastal and NYAR can assert that, as a result of the 2008 Act’s adoption on October 16, 2008, the Board “no longer has jurisdiction over the Farmingdale facility.” (Ex. A at pp. 1-2.) Since the Board had no jurisdiction over the

Farmingdale Facility prior to October 16, 2008, the Board did not thereafter cease to have jurisdiction.

As for the argument that the Board's February 2008 and September 2008 Decisions are no longer applicable because Coastal and NYAR entered into the Amended Agreement, it, too, is mistaken. The Amended Agreement contains nothing which should cause the Board to change its conclusion that "Coastal is offering its services to customers directly, and NYAR's involvement essentially is limited to transporting cars to and from the facility." (Feb. 2008 Decision at p. 6.) The Board's conclusion was based on its findings that (1) Coastal had the exclusive right to conduct transloading operations; (2) Coastal built the Farmingdale Facility and is responsible for all repairs, maintenance and upkeep; (3) Coastal charges a loading fee which is unrelated to the rail freight transportation charge payable to NYAR, and over which NYAR has no control; and (4) Coastal has to maintain liability insurance for the benefit of NYAR and to indemnify NYAR for claims arising out of Coastal's use of the premises. (Feb. 2008 Decision at p. 5.) Despite making some cosmetic changes, the Amended Agreement does not change any of the substantive provisions. Under the Amended Agreement, Coastal still has the exclusive right to conduct transloading operations (Ex. F at ¶ 1.13); Coastal still built the Farmingdale Facility at its own expense and is still responsible for its maintenance (Id. at ¶¶ 1.05(d), 4.02(b)); Coastal still sets and collects the loading fee (Id. at ¶ 3.01); and Coastal still has to obtain insurance for NYAR's benefit and to indemnify NYAR (Id. at ¶¶ 4.02, 6.01).

Coastal and NYAR appear to have gone to the trouble of executing the Amended Agreement in the mistaken belief that it would enable them to claim that the Farmingdale Facility was an "existing facility" under the 2008 Act, 49 U.S.C. § 10908(b), and was therefore entitled to the special treatment due solid waste rail transfer facilities which were already

operating on October 16, 2008⁸. But, while Coastal may have been operating the Farmingdale Facility on October 16, 2008, it was not operating a solid waste rail transfer facility at that time – and, under the Amended Agreement, is not now operating one.

Finally, there is no basis for the improbable claim made by Coastal and NYAR that the 2008 Act stripped the Board of jurisdiction to decide whether a solid waste transfer facility is operated by or on behalf of a rail carrier. For a solid waste transfer facility to be subject to treatment under 49 U.S.C. §§ 10908 and 10909 of ICCTA, as amended by the 2008 Act, the facility must be a solid waste rail transfer facility – one that would otherwise have been under the Board’s jurisdiction. The Board must necessarily have jurisdiction to determine whether a particular solid waste transfer facility is a solid waste rail transfer facility because, for example, 49 U.S.C. § 10909 empowers the Board to issue land use exemptions for solid waste rail transfer facilities if it finds that state, local, or municipal regulations unreasonably burden intrastate transportation by rail. The Board has no such power with respect to solid waste transfer facilities that are not operated by or on behalf of rail carriers.

Coastal and NYAR obviously do not want the Board to decide whether anything has occurred which affects the validity of its prior declaratory orders. But neither the 2008 Act nor the Amended Agreement in any way invalidates either of those orders, and the Board should therefore make clear that they should be enforced.

⁸ In furtherance of their plan to transform the Farmingdale Facility from a facility which was outside the Board’s jurisdiction and fully subject to local regulation on September 26, 2008, into an “existing facility” which was a “solid waste rail transfer facility” covered by the 2008 Act on October 16, 2008, Coastal and NYAR entered into an Order on Consent with the New York State Department of Environmental Conservation. The Order on Consent is predicated on the same misconceptions about the effect of the 2008 Act that permeate the papers Coastal and NYAR submitted in opposition to the motion to vacate. Thus, the Order on Consent erroneously treats the Farmingdale Facility as if it were a “solid waste rail transfer facility,” which is not the case. (See Exhibit H hereto at ¶¶ 5-7.)

CONCLUSION

While Coastal and NYAR may be unhappy with the Board's conclusion that Coastal is not operating the Farmingdale Facility of behalf of a rail carrier, they cannot avoid the effect of that conclusion by trying to persuade a different forum that they have addressed the Board's concerns or that the Board's decisions have been rendered moot. It is respectfully submitted that, because Coastal and NYAR have tried to create uncertainty about the continued validity of the February 2008 and September 2008 Decisions, the Board should reopen this docket and issue a declaratory order confirming that the February 2008 and September 2008 Decisions remain effective and that under the 2008 Act, the Farmingdale Facility, as a non-rail solid waste transfer facility, is fully subject to local regulation.

Dated: New York, New York
December 17, 2008

Respectfully Submitted,

BOND SCHOENECK & KING, PLLC

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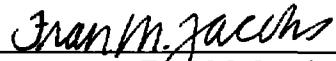
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Attorneys for Pinelawn Cemetery

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition and Exhibits were served on
December 17, 2008 by FedEx on the following parties and their counsel:

FLETCHER & SIPPEL LLC
29 North Wacker Drive, Suite 920
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Fran M. Jacobs

EXHIBIT A

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**COASTAL DISTRIBUTION, LLC, AND THE
NEW YORK AND ATLANTIC RAILWAY
COMPANY,**

Plaintiffs,

No. CV 05-2032

v.

**Seybert, J.
Boyle, M.**

**THE TOWN OF BABYLON, A MUNICIPAL
CORPORATION, THE TOWN OF BABYLON
BOARD OF ZONING APPEALS, AND PETER
CASSERLY, AS COMMISSIONER OF
PLANNING AND DEVELOPMENT OF THE
TOWN OF BABYLON,**

Defendants,

and

PINELAWN CEMETERY CORPORATION,

Intervenor/Defendant.

**OPPOSITION TO BABYLON'S MOTION TO
VACATE PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs New York and Atlantic Railway Company (NYA) and Coastal Distribution, LLC (Coastal) oppose Babylon's motion to vacate the preliminary injunction. Babylon's motion is entirely based on the argument that plaintiffs are now, by virtue of the recent decision of the Surface Transportation Board (STB), no longer likely to succeed on the merits in this action. Babylon is wrong for at least four separate reasons:

First, since this injunction was entered, Congress has amended the Interstate Commerce Commission Termination Act, 49 U.S.C. §§10501, *et seq.*(ICCTA) which specifically addresses the situation in this case. As amended, effective October 16, 2008, the STB no longer has

jurisdiction over the Farmingdale facility, and Babylon is precluded from enforcing its zoning ordinance. The Farmingdale facility is in full compliance with the amended conditions of ICCTA, because Coastal has entered into an Order on Consent with the New York State Department of Environmental Conservation (NYSDEC), which grants Coastal temporary authority to operate the solid waste rail transfer facility at Farmingdale in compliance with the substantive requirements of State waste handling laws and establishes a schedule for the application and issuance of the State waste transfer permit.

Second, even under New York law, Babylon is statutorily precluded from exercising any zoning authority over Metropolitan Transportation Authority (MTA) property, including the Farmingdale rail yard.

Third, as concluded by Magistrate Judge Boyle, Babylon is equitably estopped from proceeding against plaintiffs.

Fourth, NYA and Coastal have altered their roles and obligations at the Farmingdale yard to meet the peculiar (and erroneous) requirements of the STB.

Moreover, the public interest continues to tilt strongly in favor of maintaining the injunction. Babylon's motion should be denied.

PROCEDURAL BACKGROUND

In April 2005 plaintiffs filed suit seeking an injunction preventing Babylon from attempting to enforce a "Stop Work Order" issued by one of its building inspectors and approved by its Zoning Board of Appeals. The Stop Work Order was directed at a nearly completed shed being erected by plaintiffs at the Farmingdale railroad yard for the purpose of transloading freight between rail cars and trucks. In January 2006, following an evidentiary hearing before Magistrate Boyle, this Court issued the requested preliminary injunction. On defendants' appeal,

the Second Circuit affirmed but modified the injunction to clarify that the injunction did not prevent Babylon from seeking the opinion of the STB. Coastal Distribution, LLC v. Town of Babylon, 216 Fed.Appx. 97 (2nd Cir. 2007).

Thereafter, Babylon requested a declaratory order from the STB. The Board issued such an order on February 1, 2008 determining that Babylon's zoning ordinance was not preempted by the STB's jurisdiction over railroads because Coastal was not subject to the Board's jurisdiction. Plaintiffs filed a petition for review of the STB decision in the Court of Appeals for the District of Columbia, No. 08-1048, and also filed a request to reopen and to reconsider with the STB. The appeal was dismissed without objection of the plaintiffs, as being premature in view of the motion to reopen and reconsider.

On September 26, 2008, the STB denied the motions and reaffirmed its prior decision. Plaintiffs again filed a petition for review with the District of Columbia Circuit Court, No. 08-1335, which still pends.

Babylon has now filed a motion to this Court to vacate the outstanding preliminary injunction, the motion to which this pleading responds. In the interim, Congress passed the "Clean Railroads Act of 2008," H.R. 2095, Pub.L. _____, specifically addressing the extent to which state laws govern the operation of "solid waste rail transfer facilities" and the degree to which federal transportation interests displace state and local land use laws.

Plaintiffs have now filed a motion for leave to amend their complaint to conform to today's facts and a cross-motion to enter a permanent injunction preventing Babylon from attempting to enforce its zoning ordinances against the solid waste rail transfer facility at Farmingdale. This memorandum and the accompanying Affidavit of Bruce A. Lieberman are

submitted in support of plaintiffs' motions as well as in opposition to Babylon's motion to dismiss.

ARGUMENT

I. THE CLEAN RAILROAD ACT OF 2008 PREEMPTS BABYLON'S ATTEMPT TO ENFORCE ITZ ZONING ORDINANCE.

A. The Clean Railroads Act

The Clean Railroads Act of 2008 is set forth in Title VI of the Railroad Safety Act of 2008, Pub.L. ____ ; H.R. 2095. The new act amends 49 U.S.C. §10501(c)(2), the jurisdiction provision of the Interstate Commerce Commission Termination Act, to eliminate STB jurisdiction over any "solid waste rail transfer facility," except as provided by two new sections added to ICCTA. The new §10908(a) provides:

(a) IN GENERAL.—Each solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility ... that is not owned or operated by or on behalf of a rail carrier, except as provided in section 10909 of this chapter.

With this enactment, Congress plugged any loophole that arguably would have allowed solid waste rail transfer facilities to endanger the public health and welfare. In addition, new section 10908(b) sets forth a transition schedule for existing facilities: the facility must comply with all regulations other than permit requirements within 90 days, and unless it has already obtained any required permit, the facility must apply for such permits within 180 days. The Farmingdale facility has been formally inspected (it had been informally inspected numerous times) by the DEC, and has already entered into a Consent Order allowing the facility to operate pending issuance of a full permit. See discussion at p.9-10, *infra*. Plaintiffs have nearly completed the

DEC permit application and will file that application prior February 1, 2009, well in advance of the 180 days allowed in the federal statute. *Id.*

The Clean Railroads Act expressly excepts from the State permit requirement any "siting permit for the facility:"

(B) SITING PERMITS AND REQUIREMENTS. --A solid waste rail transfer facility operating as of the date of enactment of the Clean Railroads Act of 2008 that does not possess a State siting permit required pursuant to subsection (a) as of such date of enactment shall not be required to possess any siting permit to continue to operate or comply with any State land use requirements. The Governor of a State in which the facility is located, or his or her designee, may petition the Board to require the facility to apply for a land-use exemption pursuant to section 10909 of this chapter. The Board shall accept the petition, and the facility shall be required to have a Board-issued land-use exemption in order to continue to operate, pursuant to section 10909 of this chapter.

H.R. 2095, section 603, enacting section 10908(b)(2)(B)(emph. added). Congress has specifically determined that unless a State Governor petitions the STB, existing solid waste rail transfer facilities are not required to possess any siting permit. Congress also addressed the problem of parochial local interests like Babylon's by completely preempting local ordinances:

(3) STATE REQUIREMENTS.--In this section the term 'State requirements' does not include the laws, regulations, ordinances, orders, or other requirements of a political subdivision of a State, including a locality or municipality, unless a State expressly delegates such authority to such political subdivision.

Id. at §10908(e)(3). Stated simply, the operation of solid waste rail transfer facilities has been removed from the STB's jurisdiction, and instead those facilities are required to comply with State and Federal (but not municipal) pollution, environmental and public health and safety laws including permit requirements, but existing facilities are not required to obtain land-use permits -- unless the Governor requests that a land-use permit be required, and the STB concurs. For "new" facilities, those not operating on the date of enactment, compliance with local or

municipal requirements like Babylon's is not required unless the Governor expressly delegates his/her authority to that locality or municipality.

Section 604 of the Clean Railroads Act enacts a new §10909, which sets out procedures and standards to be applied by the STB in determining whether a particular solid waste rail transfer facility should be subject to a State, local or municipal requirement "affecting the siting of such facility." With respect to existing facilities at which the State Governor has petitioned the STB to apply State or local land-use regulations, the statute requires,

(e) EXISTING FACILITIES.--Upon the granting of [a] petition from the State in which a solid waste rail transfer facility is operating as of the date of enactment of the Clean Railroads Act of 2008 by the Board, the facility shall submit a complete application for a siting permit to the Board pursuant to the procedures issued pursuant to subsection (b). No State may enforce a law, regulation, order, or other requirement affecting the siting of a facility that is operating as of the date of enactment of the Clean Railroads Act of 2008 until the Board has approved or denied a permit pursuant to subsection (c).

H.R. 2095, §604, enacting 49 U.S.C. §10909(e)(emph. added). In short, Congress has provided a federal remedy for States, municipalities and localities to enforce their land-use regulations against already operating solid waste rail transfer facilities. That remedy can only be invoked by the Governor of the State involved. Upon a Governor's petition, the facility must seek a siting permit from the Board, and the Board then must apply the procedures and standards prescribed by Congress to determine whether and to what extent the STB should require compliance with land-use restrictions.

The Clean Railroads Act of 2008, as a part of the Railroad Safety Enhancement Act, H.R. 2095, was signed by the President and became effective October 16, 2008.

**B. Babylon's Enforcement Efforts Are Preempted By
The Clean Railroads Act of 2008**

Babylon's enforcement efforts are in furtherance of its zoning ordinance and nothing else. No complaint has ever been made about the operations or condition of the Farmingdale facility. Lieberman Affidavit, ¶4. In fact, consistent with and subsequent to the Clean Railroads Act, NYSDEC has inspected the facility, and found no violations of the New York Environmental Conservation Law or the NYSDEC's regulations. Lieberman Affidavit, Attachment A. Despite Babylon's rhetoric, no question of pollution, environmental protection or public health and safety has ever been claimed in this case. Babylon simply seeks to shut down the Farmingdale rail transfer facility as a non-conforming use under its zoning ordinance.

The Clean Railroads Act relieves the courts and the STB from wrestling with murky issues of federal preemption of solid waste rail transfer facilities and substitutes a bright-line of demarcation. Congress has almost totally removed such facilities from the STB's jurisdiction, except for two narrowly defined circumstances: If a State Governor requests application of land-use restrictions to a pre-existing operation, or if a railroad seeks exemption from land use restrictions for a new operation. In those two situations, the STB must determine the extent to which the land-use restrictions should apply to the facility.

Consistent with the other provisions of the Clean Railroads Act and New York law, NYA and Coastal have been complying with all the substantive requirements for solid waste transfer facilities. Prior to the passage of the new Act, NYA, Coastal and the NYSDEC were in discussions regarding the operation of the Farmingdale facility and a schedule of compliance pending application for, and issuance of, a State solid waste transfer facility permit. The parties have now entered into an Order On Consent establishing those requirements. Plaintiffs are

preparing a "Part 360 permit" application to the NYSDEC and will submit the application on or before February 1, 2009. Lieberman Affidavit, ¶11.

Although the solid waste transfer facility at Farmingdale is under the jurisdiction of, subject to and in full compliance with the new statute, Babylon persists in trying to shut down the facility. Babylon's attempt to enforce its zoning law is expressly barred by 49 U.S.C. §§10908(b)(2)(B), 10908(e)(3) and §10909(e). Babylon's remedy has been prescribed by Congress: it must request the Governor of New York to file a petition with the STB, and the STB can then decide whether Babylon's zoning law meets the criteria for enforcing a municipal siting law and shutting down the Farmingdale Yard solid waste rail transfer facility. The Governor of New York has not filed any petition with the STB and is not likely to do so in the foreseeable future. To the contrary, the last three Governors, a different individual in each of the last three years, and representing both major parties, have vetoed Babylon's legislative attempt to force the MTA to oust the Farmingdale transfer operation. All three have stated that continued operation of the Farmingdale facility, with its concomitant reduction in highway truck traffic, pollution and energy consumption, is in the State's public interest. Lieberman Affidavit, Exhibits C1, C2 and C3.

C. The Farmingdale Facility Is Covered by the Clean Railroads Act

Babylon's letter to this Court dated October 12, 2008 claims that the STB's previous decisions, predating the Clean Railroads Act, somehow remove this facility from the reach of the new law. That reading is desperately hypertechnical and incorrect.

First, the new statute provides that "solid waste rail transfer facility,"

(i) means the portion of a facility owned or operated by or on behalf of a rail carrier... where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed,

disposed of, or transferred, when the activity takes place outside of original shipping containers

§10908(e)(1)(H). The structure at Farmingdale that encloses the concrete pad on which C&D debris is dropped from trucks and loaded into rail cars is precisely the portion of Farmingdale Rail Yard that is the subject of this case. Babylon and Pinelawn Cemetery have never claimed that Farmingdale Yard, which has been operated as a railroad yard for over a century, is not a railroad facility operated by NYA. The structure straddles one of the tracks, so that railcars can be placed where they are loaded. The Farmingdale transload facility falls within the plain meaning of the words used by Congress.

The second reason that the previous STB decisions do not remove this facility from the purview of the Clean Railroads Act is that the Surface Transportation Board did not have before it and could not have addressed any question about the applicability of the Clean Railroads Act. The statute couldn't possibly have been foreseen when the STB made its first (in our view, erroneous) determination at the end of January 2008. To the contrary, the language of the statute was still in flux even until the Railroad Safety Act was enabled by an overwhelming majority vote of the Congress on October 6, 2008 -- twelve days *after* the Board's refusal to reconsider its earlier decision.

Further, the decision of the STB held (erroneously) that Coastal's activity at Farmingdale Yard fell outside of the STB's jurisdiction as it existed at the time, and therefore ICCTA did not preempt application of Babylon's zoning ordinance. The STB's prior determination regarding its former jurisdiction over an operator has nothing to do with the application of the new statute which definitively withdraws STB jurisdiction over rail solid waste rail transfer facilities, for both the rail carrier and those operating on behalf of the rail carrier. The only distinction drawn by Congress among solid waste rail transfer facilities is whether it was "*operating* as of such date

of enactment.” Section 10908(b)(1). Obviously, the transfer facility at Farmingdale Yard was operating on October 16, 2008, as it has been since 1904, and with the current structure and operator since 2004, continuously operating since July 2004. Congress plainly intended to put to rest the debate that Babylon invites this Court to entertain. Congress dictated that State and federal pollution abatement, environmental protection and health and safety laws apply without regard to the facility or its operator; but that zoning laws do not apply to “grandfathered” facilities already in operation, while zoning laws do apply to new operations -- both being subject to a procedure and standards for the STB to determine otherwise.

The prior STB decisions, as well as this Court’s decisions and that of the Second Circuit, dealt with the extent to which the STB umbrella of federal preemption extended to agents and those acting “under the auspices of” rail carriers. The STB decided that the umbrella did not reach Coastal. The previous scope of STB jurisdiction and concomitant federal preemption is now entirely irrelevant, and the STB’s opinion on that subject cannot modify Congress’ subsequent and comprehensive limitation of the STB’s jurisdiction. Indeed, even if the STB had previously ruled that Coastal was subject to the Board’s jurisdiction and preempted from the application of Babylon’s zoning ordinance, Coastal would still be required to comply with the provisions of the new act.

Congress has exercised its authority to specify what laws do and what laws do not apply at Farmingdale. Babylon’s zoning law falls into the latter category. Injunctive relief against Babylon’s enforcement of its zoning law is required by the Clean Railroads Act.

II. NEW YORK STATE LAW PRECLUDES BABYLON FROM EXERCISING AUTHORITY OVER THE FARMINGDALE FACILITY

Babylon's quixotic campaign to shut down the transloading facility continues. However, those efforts must be enjoined because even if there were no federal issues involved, Babylon is precluded by New York State law from exercising zoning authority over MTA property.

The Farmingdale facility is located on two parcels of real property leased to the Long Island Railroad for 99 years in 1904 and 1905 respectively. Those leases were renewed 2004.¹

The Long Island Railroad was acquired by the MTA in 1959 and the MTA was created pursuant to Title 11 of the Public Authorities Law. Section 1266 of that Law precludes local control of any of any MTA facilities or interests as follows:

8. ... Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority and its subsidiaries, ... or any of their activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority or its subsidiaries, ... shall not be applicable to the activities or operations of the authority and its subsidiaries, ... or the facilities of the authority and its subsidiaries, ... except such facilities that are devoted to purposes other than transportation or transit purposes. (Emphasis added.)

Any doubt that the Farmingdale facility is an MTA facility is put to rest by the extremely broad definition of a rail facility in the Public Authorities Law, §1261(c):

...terminals, storage yards, ...yards, ... and other real estate or personally used or held for or incidental to the operation ... of any railroad operating or to operate between points within the district or pursuant to joint service arrangements, including but not limited to buildings, structures, and areas notwithstanding that portions thereof may not be devoted to any railroad purpose other than the production of revenues available for the costs and expenses of all or any facilities of the authority.

¹ Pinelawn Cemetery's challenge to the renewal of one of the parcels is discussed below, p. 12, *infra*.

Similarly, § 1261(d), in relevant part, defines Real Property to include:

...lands, structures, franchises and interests in land, waters, lands under water, riparian rights and air rights and any and all things and rights included within said term and includes not only fees simple absolute but also any and all lesser interests including but not limited to easements, rights of way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms for years and liens thereon by way of judgments, mortgages or otherwise.

Similarly, §1261 14 defines Transportation facility, in relevant part, to include:

... any ... railroad,...and any person, firm, partnership, association or corporation which owns, leases or operates any such facility or any other facility used for service in the transportation of passengers, United States mail or personal property as a common carrier for hire and any portion thereof and the rights, leaseholds or other interest therein together with routes, tracks, extensions, connections, ... warehouses, yards, storage yards, ... terminals ... and other related facilities thereof, the devices, appurtenances, and equipment thereof ... used or useful therefor or in connection therewith.

The laws of the State of New York preclude the Town of Babylon from exercising any authority within the Farmingdale Yard or over the solid waste rail transfer facility within. See People v. Long Island R. R., 90 Misc.2d 269, 397 N.Y.S.2d 846, *aff'd* 41 N.Y.2d 1039, 396 N.Y.S.2d 179 (1976)(Suffolk County sanitary code not enforceable against Long Island RR.)

Pinelawn has previously claimed that the Farmingdale Yard, or portions of it are no longer MTA property based on Pinelawn's challenge to the validity of the renewal of one lease. The issue of the validity of renewal is pending before Judge Costello in the Supreme Court of Suffolk County. No. 04-8599. However even if there were some problem with the renewal, federal law dictates that rail possession and use of this land must continue unless and until the STB grants an abandonment petition. Consolidated Rail Corp. v. ICC, 29 F.3d 706, 709 (D.C. Cir. 1994).² No

² Accord, In re New York & A. Ry. and Southwest Produce, Ltd. v. Metropolitan Transit A., 823 N.Y.S.2d 88(Second Dept. 2006);, Twin State Railroad Company—Abandonment Exemption—In Caledonia And Essex Counties, VT, Surface Transportation Board Docket No. AB-862X (STB November 17, 2005), City Of Peoria And The Village Of Peoria Heights, Il--

abandonment petition has ever been filed for MTA's transportation facilities at the Farmingdale Yard. This yard must remain railroad property of the MTA, under "sublease" to NYA.

III. BABYLON IS EQUITABLY ESTOPPED FROM ASSERTING JURISDICTION OVER THE FARMINGDALE FACILITY

The doctrine of equitable estoppel applies, "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice." Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 668(1976); Gorman v. Town of Huntington, 47 A.D.3d 30,844N.Y.S.2d 421, 427-28 (2007); Sagevick v. Sanchez, 228 A.D.2d 488, 489, 644 N.Y.S.2d 318.

The Town's conduct requires that it be estopped from proceeding against Coastal and NYA. Magistrate Judge Boyle found that:

...it is undisputed that Coastal made repeated requests to comply with any applicable Town provisions, only to be told that none apply. The Town so stated in writing. I further note that the facility here had been operating for many years as a transload facility, prior to Coastal's involvement, with no objections from the defendants. (Tr. at 40.) Moreover, this property has been in continuous use by the Long Island Railroad pursuant to 99 year leases, recently renewed among the parties. There is no evidence that at any time in the past the Town of Babylon attempted to exercise any jurisdiction over the property.

The Town unequivocally expressed no regulatory interest in the operations of the Farmingdale facility. The plaintiffs went ahead and made substantial improvements to the site. The plaintiffs have relied on the oral and written disclaimer of jurisdiction by Town officials to their extreme detriment. Therefore, I find that the Town should be equitably estopped from asserting any jurisdiction (assuming *arguendo* that such jurisdiction exists) over the Farmingdale facility at this time.

Adverse Discontinuance--Pioneer Industrial Railway Company Docket No. AB_878_0 (STB August 10, 2005). Jacksonville Port Authority—Adverse Discontinuance—in Duval County, FL, Docket No. AB-469 (STB served July 17, 1996), citing Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

The record amply supports the Magistrate Judge's determination. On numerous occasions in 2002 and 2003, before any construction work started on the Farmingdale Facility, the plaintiffs approached the Town of Babylon seeking its advice as to the use of and design of the facility. In each instance the Town declined to assist or to give any opinion, asserting that it did not have jurisdiction over anything to be built on or any activity to be conducted on MTA property. This culminated On August 8, 2003 when the Town wrote to Coastal's architect, refusing to review or accept Coastal's facility plans for filing, restating that the town had no jurisdiction over Coastal's proposed terminal, Coastal Exhibit 2 A-1060, Rutigliano, tr. 152 line 23-tr. 153 line 6. Therefore, the Town of Babylon was well aware of and acknowledged the limits of its jurisdiction over this facility before the defendant's adopted their litigation position.

Likewise, on October 23, 2003 Pinelawn presented Coastal with a copy of a renewal and reinstatement of the leases of the facility to LIRR, stating that any issue as to the right of the railroad to continue its use of these lands had been resolved, Coastal Exhibit 3, Rutigliano, tr. 152 line 24, tr. 153 line 2, tr. 154 lines 4-20. At that meeting Pinelawn was informed of plaintiffs' plans for the Farmingdale Facility and was asked for any input or if it had any concerns. It did not. Thus, Pinelawn also misled the plaintiff's into moving forward with the construction of the facility.

After the Town's acknowledgment that it lacked jurisdiction and the cemetery's misrepresentation that it had no objection to the plans, plaintiffs began construction of the current facility. Only after that facility was 99% complete was the Stop Work Order served.

Pinelawn admitted in open Court that it conspired with Town officials to issue that order as part of its effort to recover the Farmingdale facility for its own use. See statement of Mark A. Cuthbertson, Esq. tr. 13 line 16-tr. 14 line 20. Notwithstanding the Town's understanding that it

had no jurisdiction over the operations or facilities at the Farmingdale Facility, the Town of Babylon issued the Stop Work Order on March 29, 2004. Rutigliano tr. 158 line 24- tr. 159 line 3.

IV. THE STB'S DECISIONS ARE NO LONGER APPLICABLE BECAUSE THE PARTIES RESTRUCTURED THEIR RELATIONSHIP TO MEET THE STB'S CONCERNS

NYA and Coastal disagree strongly with the decisions and orders of the STB regarding Coastal's historical status as a contract operator for NYA, and have petitioned the Court of Appeals for the District of Columbia for review of the STB's actions. New York & Atlantic Ry. v. Surface Transp. Bd., D.C. Cir. 08-1335. Meanwhile, without knowing exactly what the final language of the new legislation would be, and fully anticipating that Babylon would renew its efforts to shut down the facility, NYA and Coastal agreed to modify their roles and responsibilities at the Farmingdale facility to meet the specific shortcomings perceived by the Board. Exhibit D to the Lieberman affidavit is a copy of the Amended Transload Operations Agreement. Under the amended agreement, NYA sets the transloading fees, retains additional liability and assumes a greater role in the operation of the facility.

As a consequence of this modification, Coastal's current operation of NYA's Farmingdale facility comports with the Board's final divination of the extent of its jurisdiction -- under the pre-amendment ICCTA. However, today the STB would not have jurisdiction to entertain the declaratory judgment petition that was brought by Babylon in the first place.

V. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF ENJOINING BABYLON'S ENFORCEMENT EFFORTS

This Court and the Second Circuit previously recognized that in the absence of an injunction, the transloading business at Farmingdale would be in jeopardy, risking substantial

irreparable injury to the plaintiffs. The Office of Passenger and Freight of the New York Department of Transportation said it supported the establishment of at Farmingdale of a construction materials transload facility “as a strategy for reducing truck traffic in the New York City (NYC)/Long Island Area.” Coastal Ex.1 at the 2005 hearing. Three successive Governors (Pataki, Spitzer and Paterson) for three years in a row have blocked Babylon’s backdoor effort to shut down this facility with veto messages recounting the public interest in removing truck traffic from New York highways. Their affirmative action to veto bills was premised in part on the public interest of removing trucks from the highways. Lieberman affidavit attachments C1, C2, and C3. Additionally, the Farmingdale solid waste rail transfer facility operates without complaint and in full compliance with the substantive requirements of the New York Environmental Conservation Law. Notwithstanding the meaningless Zoning Code designation as “residential, in an industrial area, where the adjacent land uses include cemeteries (North and Southeast) an environmental waste processor and a tractor trailer trucking operation (West) and the Republic Regional Airport (Southwest), continued operation, -- in conformance with NYSDEC regulations and in compliance with the Clean Railroads Act of 2008 -- of a C&D solid waste rail transfer facility at Farmingdale is in the public interest.

This Court previously found:

[T]he sole public interest at issue here is the highway and road congestion that would dramatically increase if this Court did not enjoin the Town. If this Court does not enjoin the Town from enforcing the Stop Work Order, Plaintiffs' clients would have to transport its freight and other materials via truck on already-congested highways. This flies in the face of the very reason New York State privatized rail freight in the first place. The Governor wanted to decrease the number of trucks on the roads and place that traffic on underutilized rails. (Tr. 28.) Without an injunction, hundreds of trucks will be forced onto the Long Island Expressway and other already-congested highways and roads. (Tr. 73.) Therefore, this Court serves the public interest of minimizing highway congestion due to

trucks by preliminarily enjoining the Town from enforcing the Stop Work Order.

Order of January 31, 2006, at p.10 (emphasis added). The Second Circuit Court of Appeals agreed. Nothing about this aspect of the case has changed, making this the law of the case. In any event, this Court's understanding of the public interest remains correct today.

CONCLUSION

For the foregoing reasons, Babylon's motion to vacate the preliminary injunction should be denied.

Dated: November 14, 2008

Respectfully submitted,

/s/John F. McHugh
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CERTIFICATE OF SERVICE

I, Ronald A. Lane, attorney for New York and Atlantic Railway Company, hereby certify that on this 14th day of November, 2008, I have caused a true and correct copy of the foregoing **Plaintiffs' Opposition to Babylon's Motion to Vacate Preliminary Injunction** to be filed via the ECF system for the United States District Court for the Eastern District of New York, which provided notice to the following ECF-registered participants:

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/s/Ronald A. Lane

EXHIBIT B

LEASE AGREEMENT: FARMINGDALE - 1 - ADDENDUM

March 22, 2002

Mr. Joseph Rutigliano
Mr. Martin Sternberg
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542

Dear Joe and Marty:

As you now realize, the Long Island Rail Road (LIRR) is occupying a portion of the Premises that New York & Atlantic Railway Company (NYA) intends to lease to Coastal Distribution, LLC (Lessee) in Farmingdale, NY (Premises) as more specifically stated in Lease Agreement FARMINGDALE -1 (Agreement). NYA feels that the LIRR has no right to occupy this portion of the Premises and is going to pursue dialogue with the LIRR to force LIRR to vacate this portion of the Premises. It is understood between NYA and Lessee that signing the Agreement will help Lessee in their efforts to market the Premises and will serve as an important document for NYA to present to LIRR in our upcoming dialogue. NYA is agreeable to signing the Agreement with Coastal under two conditions:

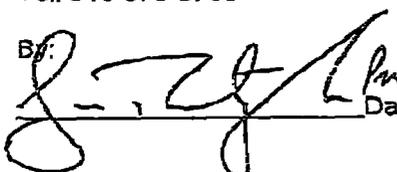
- 1) Lessee agrees that it shall not hold NYA responsible in any way should LIRR not vacate the Premises in a way that allows Lessee to begin to operate, including the possibility of legal action against NYA. Further, Lessee shall not make any commitments to their clientele that, should the Premises not be utilized by Lessee, would force Lessee's clientele to seek legal action against NYA.
- 2) Lessee agrees that ninety (90) days after the signing date of the Agreement, if Lessee has still not affected a Commencement Date, the Agreement shall terminate immediately.

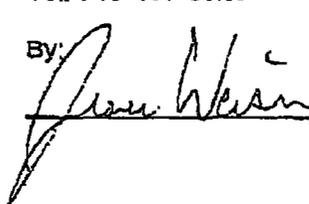
All back rent shall be reimbursed to Lessee by NYA should LIRR not vacate Premises in a timely manner and therefore cause Agreement to terminate as more specifically stated in section 2) herein.

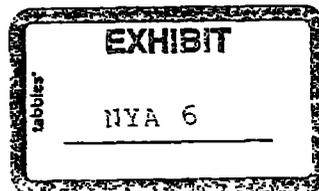
AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By:  Date 3/22/02

By:  Date 3/22/02



LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 22nd day of March, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. **Premises.** NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. **NYA Warranties.** NYA warrants it is the owner (or agent for the owner) of the Premises that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted.

C. **Agreements.** It is mutually agreed by and between the parties hereto as follows:

1. **Rent.** The rate for Lessee's use of the Premises as provided herein shall be \$2,000.00 per month, payable in advance, as provided in section C.14 hereof.
2. **Improvements.** Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.
3. **Term.** This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on March 3rd, 2002 then the initial term shall end on March 2nd, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that:
 - I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.
 - II. Lessee has not been in any material breach of any of the provisions of this Agreement.
 - III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.
4. **Damage Vandalism Graffiti, etc.** NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.
5. **Indemnification.** Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any

and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

- I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;
- II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and
- III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:
- I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee.
 - II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
 - III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:
 - Coverage A – Statutory Policy form
 - Coverage B – Employer's Liability
 - Bodily Injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
 - IV. Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

- V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).
- VI. All of Lessee's insurance shall be primary insurance with respect to the additional insureds and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.
8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.
9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.
10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules and instructions from NYA personnel.
11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises the security of the railcars and their contents shall remain with Lessee.
12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.1 hereof.
13. Termination.
- I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of

the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.

- ii. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.
- iii. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.i hereof are not met.

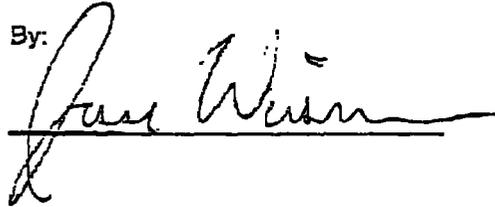
14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof, and submitted payment of Two Thousand and ~~xx~~100 Dollars (\$2,000.00) to NYA for the first month's rent. All subsequent monthly rent is due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: 

By: 

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: March 22, 2002

DATED: March 22, 2002

EXHIBIT C

TOWN
B.LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be \$2,000.00 per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:
 - a. Lessee will make \$115,000 in funds available to NYA

NYA will contribute the following to achieve a \$65,000 payment to Lessee, which is equal to one-half of total funds required.
 - b. NYA will add \$15,000 to figure in "1-a" above, and submit funds to the LIRR in the amount of \$130,000.
 - c. NYA will rebate Lessee in the amount of \$10 per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of \$25,000 has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.
 - d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of \$1000 per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.
2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.
3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). --The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that:

- I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.
 - II. Lessee has not been in any material breach of any of the provisions of this Agreement.
 - III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.
4. Damage, Vandalism, Graffiti, etc. NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.
5. Indemnification. Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:
- I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;
 - II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and
 - III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance: Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:
- I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not

the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee.

- II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer’s Liability

 - Bodily Injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- IV. Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.
- V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker’s Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker’s Compensation).
- VI. All of Lessee’s insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA’s request Lessee’s certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee’s insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA’s rights or remedies nor to eliminate or effect Lessee’s obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.
8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

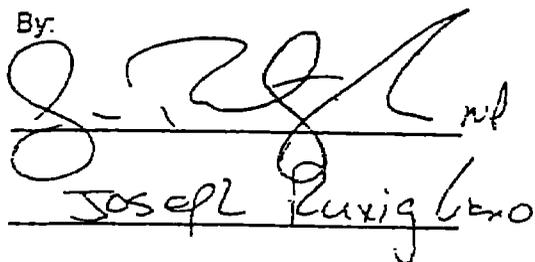
9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.
 10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules, and instructions from NYA personnel.
 11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.
 12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.1 hereof.
 13. Termination.
 - i. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.
 - ii. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.
 - iii. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.1 hereof are not met.
 14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof. All rental payments are due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.
-

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

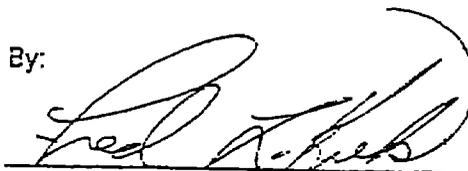
Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By:



Joseph Luxigleno

By:



Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed I.D.#: 13-3925500

DATED: July 11, 2002

DATED: July 11, 2002

EXHIBIT D

Krebs - Recross/McHugh

1 DIRECT EXAMINATION

2 BY MR. MCHUGH:

3 Q Good afternoon, Mr. Rutigliano.

4 A Good afternoon.

5 Q Could you tell us if you are presently employed, sir?

6 A Yes, I am.

7 Q What do you do?

8 A I'm a member of Coastal Distribution.

9 Q What is your role in Coastal Distribution?

10 A Managing member.

11 Q How long have you been with Coastal?

12 A Since 2001, its formation.

13 Q Were you present when it was formed?

14 A Yes.

15 Q Could you tell us why it was formed?

16 A Coastal Distribution was formed to better utilize the
17 rail links between Upstate New York and Downstate.

18 Q Could you please tell us how that came about, sir?

19 A Back in 2000, Coastal Distribution was not formed, of
20 course, but there was an individual, my associate,
21 Mr. Martin Sternberg back in 2000 was contacted or called
22 from representative of Canadian Pacific Rail. Canadian
23 Pacific Rail at the time was working along with New York
24 State DOT office of freight rail transportation and
25 Mr. Jack Guinan.

Rutigliano - Cross/Cuthbertson

1 C&D movement, moving the materials across the state.

2 Q When it comes to the contracts you negotiate for
3 Coastal for construction and demolition, you know the
4 process of negotiating the contracts. You've done that
5 before, correct?

6 A Yes.

7 Q Okay. And you know how to make a profit for your
8 business as well?

9 THE COURT: Counsel, let's get to the point.

10 MR. CUTHBERTSON: Your Honor, my point is that
11 Mr. Rutigliano --

12 THE COURT: Your question.

13 BY MR. CUTHBERTSON:

14 Q And your partner, Mr. Sternberg, has experience as
15 well in this area; is that correct?

16 A Yes, Mr. Sternberg actually created a rail yard, and
17 it survives today, and it's a very successful operation.

18 Q Okay. I believe you testified that you have invested
19 millions of dollars in the Farmingdale facility; is that
20 correct?

21 A Millions of dollars, yes, with the equipment, the
22 rail cars and the structures, on several different ways.
23 One, of course, is a credit line, another is casual
24 financing, GE, several creditors that we are responsible
25 for, but it is several million dollars.

Rutigliano - Cross/Cuthbertson

1 Q Approximately, do you have a ballpark of millions?

2 A Three, approaching four.

3 THE COURT: Are you Mr. Guinan?

4 MR. CUTHBERTSON: No, Mr. Cuthbertson, your
5 Honor.

6 THE COURT: I'm a little bit concerned here.

7 You were permitted to intervene in this case, yet
8 you take no unique position. What that alerts me to,
9 perhaps you are using this proceeding for purposes of
10 discovery in your state proceeding, and that troubles me.
11 So if you have issues as far as the issues here, it also
12 surprises me that you take a lead with regard to this
13 witness.

14 MR. CUTHBERTSON: Your Honor --

15 THE COURT: So my advice to you is if you want to
16 cross-examine this witness, let's get to the point and
17 make your questions very relevant to the issues in this
18 case because I don't want to -- I will not duplicate and
19 hear the same questions from the counsel.

20 MR. CUTHBERTSON: Okay.

21 THE COURT: You are piggybacking on all the
22 issues of the Town, you are not setting forth any unique
23 issues of your own, and that is what bothers me.

24 MR. CUTHBERTSON: With all due respect, we
25 intervened in this proceeding --

EXHIBIT E

Jan
7/11
5-6

TRANSLOAD FACILITY OPERATIONS AGREEMENT

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of August 5-6, 2004, is made and entered into by and between New York & Atlantic Railway Company ("Railroad"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("Coastal").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the "Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:

ARTICLE I – TRANSLOADING OPERATIONS

1.01. COASTAL Transloading Services. COASTAL shall, and shall have the exclusive right to, transload Commodities between trucks and rail cars at the Facility, for and on behalf of Railroad, pursuant to the terms of this Agreement. This right and obligation shall not be construed as a property interest in the Yard or the Facility, and is subordinate and subject in all respects to the terms and conditions of the Transfer Agreement.

1.02. RAILROAD Control of Operations. RAILROAD shall control all aspects of the Facility's transloading operations. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.03. RAILROAD Obligations. RAILROAD shall provide the existing Facility, AS IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard so long as such change does not unreasonably interfere with COASTAL'S operations. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown, provided however, that COASTAL does not waive or relinquish any rights it may have against RAILROAD under the Lease as a result of or arising from the claim of Pinelawn Cemetery to property rights in the Yard as are, or may be, alleged in Pinelawn Cemetery v. Coastal Distribution, LLC, et al., County of Suffolk No. 04-8599. Any such claim shall survive this agreement and the cancellation of that Lease contained herein.

1.04 Rail Service: Railroad shall provide reasonable rail service to the Facility.

1.05 Custody of Lading and Equipment: RAILROAD'S responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD'S locomotive at the Facility, and the RAILROAD'S responsibility and liability is resumed when the cars are coupled to RAILROAD'S locomotive.

1.04. COASTAL Obligations.

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for Customers of the RAILROAD. Such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD which approval will not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligation of RAILROAD upon notice from Railroad.

(b) COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD as to all Customers, COASTAL employees and visitors at the Yard. Railroad may

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Costal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

- (a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.
- (c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.
- (d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

customers of the facility on terms applicable to such shipments in railroad-supplied equipment.

- (e) Equipment Availability: RAILROAD will provide storage for empty COASTAL equipment not to exceed 50 rail cars at no cost to COASTAL.

1.07. Track Inspection: RAILROAD will remain responsible for the inspection of all tracks within the facility. Coastal will make such repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations. Should Coastal fail to make necessary repairs RAILROAD will close the track in question until such repair is made.

1.07. Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped.

1.08. Loading and Unloading of Lading:

- (a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.
- (b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. No Selection of Landfill: In the event the Commodities include construction and demolition debris neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall participate in, or take any active interest in, the site selection for the storage or disposal of the materials transported hereunder. RAILROAD shall have no obligation with regard to disposition of Commodities tendered to it for transportation other than to deliver it to the consignee or to

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

- (a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:
 - (1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and
 - (2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.
- (b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:
 - (1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and
 - (2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

1.13 Exclusive Use: So long as the terms of this Agreement remain in effect, RAILROAD shall not authorize any other party to conduct transloading activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. COASTAL shall advise RAILROAD from time to time of the names of the COASTAL officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement.

(b) All Transport Documentation shall be on a form approved in writing by RAILROAD and shall specifically state that neither RAILROAD nor COASTAL shall take title to any Commodities and that RAILROAD shall not, under any circumstances, be responsible or liable for disposal of Commodities. COASTAL may enter into separate agreements (collectively, "Disposal Agreements") in its own name with Customers whereby COASTAL shall be responsible to such Customer for obtaining the disposal of COMMODITIES. In entering into and performing any Disposal Agreements, COASTAL shall not make any statement or take any action or fail to take any action that suggests that RAILROAD is in any way participating in or approving any Disposal Agreement of disposal arrangement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement. Coastal shall separately invoice and collect any fees or charges on its own behalf under any Disposal Agreements.

2.02. Billing and Collection. COASTAL shall promptly bill and collect from Customers all Loading Fees (as defined below) for loading or unloading services rendered to the Customer by COASTAL. COASTAL shall remit to RAILROAD within two business days of clearance of funds by COASTAL'S bank such portion of the Loading Fees for RAILROAD'S corresponding Usage Fee (as defined below). COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement, amounts billed and funds received. Loaded freight transportation charges will be collected by the Class I carrier unless otherwise provided by applicable transportation contract or tariff.

ARTICLE III –LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for performing the transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge otherwise payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility and in recognition of the previous contributions to construction of the Facility by the parties, a usage fee (the "Usage Fee") of twenty dollars (\$20) per loaded rail car (inbound or outbound). The Usage Fee for each loaded car in excess of 1,200 in any contract year (as determined by the anniversary of the effective date) shall be reduced to five dollars (\$5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

- (a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.
- (b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.
- (c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.
- (d) COASTAL shall, at its sole cost and expense, obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining any additional permits, authority or exemptions in the name of RAILROAD.

- (e) Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in COASTAL'S permits or as the result of COASTAL's failure to obtain or comply with same, COASTAL shall defend, indemnify and hold RAILROAD harmless from any and all costs, including attorney's fees.
- (f) COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.
- (g) COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.
- (h) COASTAL covenants that as of the Effective Date of this agreement, the Facility has been constructed and operated in compliance with (i) any applicable laws and regulations, and (ii) all buildings on the premises were built and all buildings to be built will comply with all requirements of the LIRR as may be imposed under the Transfer Agreement and with any applicable standards contained in any building and or fire codes and any other standard, law or regulation, except to the extent that RAILROAD and COASTAL agree such standards are not applicable. COASTAL covenants that it will maintain the Facility in compliance with such requirements during the term of this agreement. If COASTAL fails to take action within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

- (a) COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and The Long Island Railroad; and 5) not to permit waste of the Facility. Notwithstanding the foregoing, unless COASTAL is in material breach of this agreement, upon the termination of this agreement COASTAL may elect, subject to requirements of the Transfer Agreement, to remove any improvements made at its own cost and leave the premises in its pre July 11, 2002 condition.
- (b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.

- (c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.
- (d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

- (a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.
- (b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- (c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:
 - Coverage A – Statutory Policy form**
 - Coverage B – Employer's Liability**
 - Bodily injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- (d) Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Coastal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).
- (e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD'S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

not serve to waive or limit RAILROAD'S rights or remedies nor to eliminate or effect COASTAL'S obligations, waivers or liabilities under this contract.

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall obtain and pay for all utility charges for the Facility. COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Initial Term. The Agreement shall expire on the date five years after the effective date of this agreement (the "Initial Term"); provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

- (a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;
- (b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or
- (c) The Facility fails to meet the following minimum volume levels during the respective contract years (measured from the anniversaries of the effective date):
 - (i) 1200 carloads in the first contract year,
 - (ii) 1800 carloads in the second contract year,
 - (iii) 2400 carloads in the third contract year, and
 - (iv) 3200 carloads in the fourth and all subsequent contract years.

5.02. Renewal: The parties agree to discuss renewal terms for this agreement on and after the first anniversary of the Effective Date, unless COASTAL is in material breach of this agreement. Provided however, in no event will this agreement be renewed or extended to apply after March 31, 2017.

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI - INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

- (a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;
- (b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and
- (c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

ARTICLE VII – MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.01 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.02 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

Fred L. Krebs, President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.05 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.06 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.07 Complete Agreement. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the subject matter hereof in any way. However, the letter agreement entered into by the parties on June __, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.08 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.09 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.10 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.11 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

COASTAL DISTRIBUTION, LLC

NEW YORK & ATLANTIC
RAILROAD CO. INC.

By: [Signature]
Its: Manager
Date 8/5/04

By: [Signature]
Its: PRESIDENT
Date: 8/5/04

EXHIBIT F

**TRANSLOAD FACILITY OPERATIONS AGREEMENT
AS AMENDED, EFFECTIVE OCTOBER 1, 2008**

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of October 1, 2008, is made and entered into by and between New York & Atlantic Railway Company ("RAILROAD"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("COASTAL").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the "Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's agent, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services rendered by COASTAL to any Customer shall be limited to providing transloading services between truck and rail for solid waste and bulk freight ("Commodities"), and contracting for transportation on behalf of Railroad with customers of Railroad in the discharge of RAILROAD's common carrier obligations.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:



ARTICLE I – TRANSLOADING OPERATIONS

1.01. **COASTAL Authority.** RAILROAD confirms the appointment of COASTAL as agent of RAILROAD and re-authorizes COASTAL to take the following actions on behalf of RAILROAD with full authority to bind RAILROAD for the acts of COASTAL taken within the scope of that authority. Pursuant to this agency, RAILROAD shall remain in all respects responsible to third parties for meeting and discharging RAILROAD's common carrier obligations.

1.02 **COASTAL Transloading Services.** COASTAL has and shall continue to transload Commodities between trucks and rail cars at the Facility, for and on behalf of RAILROAD, pursuant to the terms of this Agreement. COASTAL will provide this service to any and all Customers of RAILROAD who reasonably request this service, either at the request of the Customer or at the request of RAILROAD.

1.03. **RAILROAD Control of Operations.** RAILROAD shall control all aspects of the Facility's transloading operations, including, without limitation, Commodities handled, methods used to receive and transload Commodities, hours of operation, and traffic patterns and rules to be followed by Customers gaining access to and within the Yard. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.04 **RAILROAD Obligations.** RAILROAD shall provide the existing Facility, AS IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown.

1.05 **COASTAL Obligations.**

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for all Customers of the RAILROAD requiring such service to access the national railroad system. Such services shall include only those Commodities, movements and equipment approved by RAILROAD and COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligations of RAILROAD, upon notice upon instruction from RAILROAD. COASTAL will perform all services in a good and workmanlike manner, in full compliance with RAILROAD operating and safety rules and all applicable laws, regulations and rules established by any governmental authority having jurisdiction.

(b) COASTAL shall apply and enforce RAILROAD's rules, regulations and directions with respect to RAILROAD Customers, COASTAL employees, visitors and other persons entering the Yard. COASTAL shall comply with any and all applicable health, safety, pollution and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional equipment (not provided by RAILROAD) reasonably necessary to conduct transloading operations at the Facility. COASTAL shall obtain RAILROAD's consent prior to bringing any such equipment to the Yard.

(d) Unless RAILROAD otherwise consents to the contrary, any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06 Track Inspection and Maintenance: RAILROAD will remain responsible for the inspection and maintenance of all tracks within the Facility. .

1.07 Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped. COASTAL shall maintain records identifying the carloads of Commodities delivered and loaded for each Customer. Whenever COASTAL consolidates less than carload quantities of Commodities delivered by multiple shippers into unified loads, rendering it impractical to identify each shipper's Commodities, COASTAL will retain a list of those shippers and the quantities tendered for shipment that are contained in each block of cars shipped..

1.08 Loading and Unloading of Lading:

- (a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.
- (b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. Solid Waste Commodities: In the event that the Commodities include solid waste neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall assume any obligation for the storage or disposal of any Commodities tendered other than to deliver them to the consignee or to another railroad for interchange. COASTAL may not accept solid waste Commodities for shipment without having obtained both a copy of a contract for the destination disposal facility obligating the said destination disposal facility to accept the Commodities, and visual confirmation that the Commodities comply with any specifications set forth in said contract.

1.10. Commodities and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any Commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities transloaded by COASTAL, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

- (a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement,
- (b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes.

1.13 Exclusive Use: Because it is neither feasible nor safe to have more than one operator in a single shed, using a single scale, loading railcars on a single track, RAILROAD shall not authorize any other party to conduct transload activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf during normal work hours.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. Shipments consolidated pursuant to section 1.09 will list "Coastal as agent for New York & Atlantic Railroad" as the shipper on bills of lading and a list of shippers shall be maintained by COASTAL by block of cars shipped each day.

(b) All Transport Documentation shall clearly and specifically state that RAILROAD does not take title to any Commodities.

2.02. Billing and Collection. Unless otherwise directed by RAILROAD, COASTAL, as collection agent for RAILROAD, shall promptly bill and collect from RAILROAD's outbound Customers all transportation charges. For inbound shipments, Coastal shall bill and collect RAILROAD's Transloading fee. COASTAL shall promptly remit sums due RAILROAD and all interline carriers for providing transloading and other rail transportation services. COASTAL shall make such payments within two business days of clearance of funds in COASTAL'S account. COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement..

ARTICLE III –LOADING FEES

3.01. Rates and Fees. For and as its sole compensation for performing the transloading services for RAILROAD, COASTAL shall be entitled to collect and retain RAILROAD's fee for such services ("Transloading Fee"), as set forth in Attachment A hereto RAILROAD from time to time shall adjust the Transloading Fee at Coastal's request or with Coastal's consent. The Transloading Fee shall be sufficient to pay all operating expenses, a reasonable return on COASTAL's investment in materials handling equipment and other assets, and a reasonable profit margin. The Transloading fee will be posted by RAILROAD at the Facility and shall be quoted and collected from all RAILROAD's customers using the Facility. RAILROAD, and COASTAL on behalf of Railroad, will quote and collect only the specified Transload Fee for providing such service

3.02 Remittances: COASTAL shall pay to RAILROAD a Usage Charge consisting of twenty dollars (\$20) per railcar for each of the first 1,200 railcars loaded or unloaded in each twelve month period commencing August 5th ("Contract Year"). The Usage Charge for each loaded railcar in excess of 1,200 in any Contract Year (as determined by the anniversary of the effective date) shall be five dollars (\$5).

3.03 Payment. All invoices and/or fees charged to, or by, or payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

- (a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.
- (b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.
- (c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.
- (d) COASTAL, and RAILROAD, shall obtain any permits, approvals, licenses, waivers, consents or other governmental authority required to conduct transload operations at the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining such permits, approvals, licenses, waivers, consents, authority or exemptions in the name of RAILROAD.
- (e) Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in RAILROAD's or COASTAL'S permits or as the result of either RAILROAD's or COASTAL's failure to obtain or comply with same, RAILROAD and COASTAL shall jointly defend such action.
- (f) COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.
- (g) COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.
- (h) If COASTAL fails to take action required under this agreement within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

- (a) COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to

immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and/or the Long Island Railroad; and 5) not to permit waste of the Facility.

- (b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.
- (c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.
- (d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

- (a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.
- (b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- (c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:
 - Coverage A – Statutory Policy form**
 - Coverage B – Employer's Liability**
 - Bodily injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- (d) Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Coastal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also

be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

- (e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD'S request Coastal's certificates of insurance shall reflect the foregoing primary aspect).

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall pay for all utility charges for the Facility. Except as otherwise set forth herein, COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Term. The Agreement shall expire on October 1, 2017; provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

- (a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;
- (b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or
- (c) The Facility fails to transload 3,200 carloads in any Contract Year.

5.02 Renewal: The parties agree to discuss renewal terms for this agreement on and after October 1, 2017 unless COASTAL is in material breach of this agreement. In no event will this agreement be renewed or extended to apply after the expiration, termination or non-renewal of the Transfer Agreement.

5.03 Dangerous or Unlawful Condition: Notwithstanding section 5.02 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and

absolute discretion, may immediately prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.04 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other, except those obligations already accrued at the time of termination, shall immediately cease.

ARTICLE VI – INDEMNIFICATION

6.01 Indemnification. Coastal, hereby indemnifies RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from Coastal's negligence or misconduct, or the negligence or misconduct of Coastal's employees or agents. , Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own negligence or misconduct..

ARTICLE VI – MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.02 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.03 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.04 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days,

then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.05 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.06 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.07 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.08 Complete Agreement. This Agreement is not a transportation agreement and the terms and conditions of any transportation of any Commodity to or from the Facility is governed by applicable tariff or transportation contract. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the operation of the Facility in any way. However, the letter agreement entered into by the parties in June, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.09 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.10 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.11 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.12 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

COASTAL DISTRIBUTION, LLC

**NEW YORK & ATLANTIC
RAILROAD CO. INC.**

By: _____

By: _____

Its: Member

Its: President

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COASTAL DISTRIBUTION, LLC

NEW YORK & ATLANTIC RAILROAD CO. INC.

By: _____

By: Paul M. Veta

Its: Member

Its: President

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COASTAL DISTRIBUTION, LLC

By: 

Its: Member

NEW YORK & ATLANTIC
RAILROAD CO. INC.

By: _____

Its: President

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
COASTAL DISTRIBUTION, LLC. et al., : 05 Civ. 02032 (JS) (ETB)
 :
 Plaintiffs, :
 :
 -against- :
 :
 THE TOWN OF BABYLON, et al., :
 :
 Defendants. :
-----X

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO VACATE PRELIMINARY INJUNCTION ORDER

BOND SCHOENECK & KING, PLLC
1399 Franklin Avenue
Garden City, NY 11530
(516) 267-6300
Attorneys for Defendant The Town of Babylon

DUANE MORRIS LLP
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New York, NY 10036-4086
(212) 692-1000
Attorneys for Intervenor-Defendant
Pinelawn Cemetery

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Preliminary Statement	1
Procedural Background.....	5
ARGUMENT - SINCE PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS, THEY ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF....	10
CONCLUSION	15

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<u>A. Nelson & Co. Ltd. v. Ellon USA, Inc.</u> , 1996 U.S. Dist. LEXIS 7479 (S.D.N.Y. May 30, 1996)	12, 13
<u>Chariot Plastics, Inc. v. United States</u> , 28 F. Supp. 2d 874 (S.D.N.Y. 1998)	14
<u>Coastal Distribution, LLC v. Town of Babylon</u> , 2006 U.S. Dist. LEXIS 8400 (E.D.N.Y. Jan. 31, 2006)	2, 3, 6, 7, 11
<u>Coastal Distribution, LLC v. Town of Babylon</u> , 216 Fed. Appx. 97 (2d Cir. 2007)	2, 3, 7, 9
<u>Forest City Daly Hous., Inc. v. Town of North Hempstead</u> , 175 F.3d 144 (2d Cir. 1999)	11
<u>Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.</u> , 74 F.R.D. 621 (S.D.N.Y. 1977)	12
<u>Huron Holding Corp. v. Lincoln Mine Operating Co.</u> , 312 U.S. 183, 61 S.Ct. 513 (1941)	14
<u>International Dairy Foods Ass'n v. Amestoy</u> , 92 F.3d 67 (2d Cir. 1996)	11
<u>Museum Boutique Intercontinental, Ltd. v. Picasso</u> , 880 F. Supp. 153 (S.D.N.Y. 1995)	12
<u>Person v. New York State Bd. of Elections</u> , 467 F.3d 141 (2d Cir. 2006)	11
<u>Raitport v. Commercial Banks Located Within This Dist. As a Class</u> , 391 F. Supp. 584 (S.D.N.Y. 1975)	14
<u>Sierra Club v. U.S. Army Corps of Engineers</u> , 732 F.2d 253 (2d Cir. 1984)	12
<u>U.S. Information Sys., Inc. v. Ibew Local Union No. 3</u> , 2008 U.S. Dist. LEXIS 66759 (S.D.N.Y. Sept. 2, 2008)	14
<u>Ulico Casualty Co. v. Professional Indemnity Agency, Inc.</u> , 1999 U.S. Dist. LEXIS 8591 (D.D.C. May 5, 1999)	13

Zervos v. Verizon N.Y., Inc.,
252 F.3d 163 (2d Cir. 2001). vacated on other grounds, 277 F.3d 635 (2d Cir. 2002)..... 11

Statutes

28 U.S.C. § 2343 9
49 U.S.C. § 10501(b).....2, 3, 12
49 C.F.R. § 1115.5.....9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
COASTAL DISTRIBUTION, LLC, et al., : 05 Civ. 02032 (JS) (ETB)
 :
 Plaintiffs, :
 :
 -against- :
 :
 THE TOWN OF BABYLON, et al., :
 :
 Defendants. :
-----X

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO VACATE PRELIMINARY INJUNCTION ORDER

Preliminary Statement

This memorandum is submitted on behalf of defendant Town of Babylon (the "Town") and intervenor-defendant Pinelawn Cemetery ("Pinelawn") in support of their motion to vacate the preliminary injunction granted by this Court (Seybert, U.S.D.J.) on January 31, 2006, which bars the Town from regulating the construction and demolition debris transload facility that plaintiff Coastal Distribution, LLC ("Coastal") operates on property owned by Pinelawn (the "Farmingdale Property") and leased by plaintiff New York and Atlantic Railway Company ("NYAR").¹

The Court granted Plaintiffs' application for a preliminary injunction based on its belief that "the likelihood is high that Coastal is a rail carrier for purposes of ICCTA [the Interstate Commerce Commission Termination Act]." and that Coastal's activities are therefore subject to the exclusive jurisdiction of the Surface Transportation Board (the "STB"). Coastal Distribution, LLC v. Town of Babylon, 2006 U.S. Dist. LEXIS 8400, at *28 (E.D.N.Y. Jan. 31, 2006), aff'd in

¹ The Town and Pinelawn are together referred to as "Defendants." Coastal and NYAR are together referred to as "Plaintiffs."

part and modified in part, 216 Fed. Appx. 97 (2d Cir. 2007). In the nearly three years since the Court issued its preliminary injunction order, there have been a number of developments which establish that the Court should have reached the opposite conclusion and denied Plaintiffs' application.

On February 6, 2007, the Second Circuit ruled on Defendants' appeal from the Court's preliminary injunction order. Although the Second Circuit found that the evidence was sufficient "to support a finding of likelihood of success at the preliminary injunction stage." Id., 216 Fed. Appx. at 101 (emphasis added), it nevertheless modified the injunction to permit the parties "to immediately seek review before the STB, which is the tribunal best equipped to decide the issues of federal transportation policy implicated here." Id., 216 Fed. Appx. at 100 (emphasis added). Neither Coastal nor NYAR took advantage of this opportunity to obtain a definitive ruling on the preemption issue from the STB – the agency that Plaintiffs themselves had contended had exclusive jurisdiction over them. Instead, when Plaintiffs failed to seek STB review, the Town and Pinelawn filed a petition with the STB asking for a declaratory order that Coastal's transloading facility did not qualify for federal preemption under 49 U.S.C. § 10501(b).

By order dated January 31, 2008, the STB granted Defendants' petition and found that it did not have jurisdiction over Coastal's operations because

the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent or under the auspices of NYAR. . . . [T]here is no evidence that NYAR has ever quoted rates or charged compensation for use of Coastal's transloading facility or that NYAR is holding out Coastal's transloading services as part of the common carrier services that NYAR offers to the public. Rather, based on the evidence before us here, Coastal is offering its own services to customers directly, and NYAR's involvement essentially is limited to transporting cars to and from the facility. Because Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has assumed

no liability or responsibility for Coastal's transloading activities. NYAR's level of involvement with Coastal's transloading operations at the Farmingdale Yard is insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by "rail carrier." Thus, the Board does not have jurisdiction over Coastal's activities, and the Federal preemption in section 10501(b) does not apply.

(A copy of the STB's January 31, 2008 decision is annexed as Exhibit A to the accompanying affidavit of Howard M. Miller, the "Miller Aff.": emphasis added.)

Thus, when this Court found, for purposes of Plaintiffs' preliminary injunction motion, that "Coastal is likely a rail carrier and is under the exclusive jurisdiction of the ICCTA," Coastal Distribution v. Town of Babylon, *supra*, 2006 U.S. Dist. LEXIS 8400, at *26-27, it was mistaken. The STB actually concluded that Coastal's activities "are not being performed by, or under the control of, a rail carrier." and are not subject to federal preemption. (See Ex. A to Miller Aff. at p. 6 n. 13.)

From the time that Coastal began to build its facility on the Farmingdale Property in 2004, Plaintiffs have done everything they could to avoid STB scrutiny – while at the same time claiming that Coastal's facility was within the STB's exclusive jurisdiction and could only be regulated by the STB. After the STB ruled against them earlier this year, Plaintiffs continued to forum shop. Although they could have appealed the STB's decision to the Second Circuit, which was already familiar with this case, Plaintiffs apparently were not optimistic about their prospects of challenging the STB's determination before the court that had authorized the parties to seek review by the STB because it regarded the STB as the tribunal best equipped to decide the case. Plaintiffs therefore appealed the STB's decision to the District of Columbia Circuit – not the Second Circuit. And, despite the Second Circuit's description of the STB as "uniquely qualified to determine whether state law should be preempted by the Termination Act," Coastal Distribution v. Town of Babylon, *supra*, 216 Fed. Appx. at 103 (citation omitted). Plaintiffs sent

this Court a letter on February 25, 2008 telling it that it should “no longer defer to the STB” and should itself “proceed to resolve the legal issues in this case.” (See letter from NYAR’s counsel, dated February 25, 2008; ECF Doc. No. 81, p. 2.)

Once the STB ruled on their petition, the Town and Pinelawn advised this Court that they would seek to vacate the preliminary injunction. (See ECF Doc. No. 78.) In response, Plaintiffs asked the STB to reconsider its decision and to dismiss the proceeding Defendants commenced – a procedural maneuver that Plaintiffs then claimed rendered the STB’s initial ruling non-final. Plaintiffs’ STB application was just denied. In a decision dated September 24, 2008 and served on September 26, 2008, the STB held:

The Board reasonably applied the record evidence in this case to its existing precedent to conclude that Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation. Simply put, where, as here, a non-rail carrier is operating a transload facility for its own benefit, it is not subject to the Board’s jurisdiction.

(A copy of the STB’s decision denying Plaintiffs’ Petition for Reconsideration is annexed as Exhibit C to the Miller Aff.; see pp. 5-6.)

Following their receipt of the STB’s most recent decision, Plaintiffs notified the Court that they were considering whether to appeal. (See Letter from NYAR’s counsel, dated September 29, 2008; ECF Doc. No. 88.) But whether or not Coastal and NYAR file an appeal, the preliminary injunction should be vacated. The STB’s determination is now binding, and it establishes that Plaintiffs have no likelihood of success on the merits of their claim that Coastal’s operation is within the STB’s exclusive jurisdiction and exempt from state and local regulation.

For the past four years, Coastal has been able to operate its transload facility free from regulation by any local, state, or even federal authority. There is no legal basis for allowing it to continue to do so. Where, as in this case, the party seeking preliminary injunctive relief cannot

show a likelihood of success on the merits. it is not entitled to a preliminary injunction.

Accordingly, based on Plaintiffs' inability to satisfy one of the requirements for a preliminary injunction – a likelihood of success on the merits – the preliminary injunction order entered on January 31, 2006 should be vacated in all respects.

Procedural Background

On March 29, 2004, the Town issued a stop work order to Coastal because Coastal was building a structure on the Farmingdale Property without a permit. In response to the stop work order, Coastal could have filed a petition with the STB seeking a declaratory order that the STB had exclusive jurisdiction over the matter, and it could then have required the Town to defer to the STB's determination. But Coastal apparently anticipated that the STB would rule against it and steered clear of the STB. Rather than ask the STB to rule on the jurisdictional issue, Coastal chose to appeal the issuance of the stop work order to the Town's Zoning Board of Appeals (the "ZBA"). In the meantime, Coastal finished building and began operating its transload facility.

The ZBA conducted two days of public hearings. At the hearings, Coastal claimed that it was exempt from state and local regulation because it was acting as NYAR's agent and therefore fell within the STB's exclusive jurisdiction. The ZBA rejected Coastal's argument. It issued a written decision in which it concluded that Coastal's operation did not constitute "'transportation by rail carrier' so as to come within the Surface Transportation Board's jurisdiction pursuant to the ICC Termination Act." (See Ex. D to Miller Aff. at p. 12.) Among other things, the ZBA found that Coastal – and not NYAR – "is controlling the operation of the site." (Id. at p. 16.)

The ZBA also found:

Coastal is marketing the site, erecting structures that it requires on the site and repairing tracks at the site, not New York and Atlantic,

who is the party actually certified as a Railroad. Coastal is fundamentally operating independently of the Railroad.

(See Ex. D to Miller Aff. at p. 16; emphasis added.)

On April 26, 2005, a week after the ZBA denied Coastal's application, Plaintiffs commenced this action. While Plaintiffs could have filed an Article 78 proceeding in state court challenging the ZBA's decision, they made a tactical decision to start over again by filing this case in federal court. When Plaintiffs filed their complaint, they also moved for a preliminary injunction, arguing, as they had before the ZBA, that the Town's regulatory authority over Coastal's operation was preempted by ICCTA. (See, for example, ECF Doc. No. 3, pp. 4-9, 63.)

An evidentiary hearing was held on Plaintiffs' preliminary injunction application before Magistrate Judge Boyle who recommended that the application be granted. In analyzing the evidence presented at the hearing and adopting the Magistrate Judge's Report and Recommendation, the Court pointed out that, "[w]hile the likelihood is high that Coastal is a rail carrier for purposes of ICCTA, . . . certain facts support Defendants' position that Coastal is not a rail carrier." Coastal Distribution v. Town of Babylon, supra, 2006 U.S. Dist. LEXIS 8400, at *28. Although the Court noted that "certainly, Coastal may find it in its best interest to apply to the STB for licensing or an exemption from licensing," Ibid., the Court did not consider why Coastal repeatedly failed to ask the STB to clarify its status. Then, after stating that the Court "need not find with 'absolute certainty' that Coastal is a rail carrier under ICCTA" and only had to "find . . . that Plaintiffs have more than a 'fifty percent' chance of success on the merits of their claims," Ibid., the Court ruled that "Plaintiffs have met their burden of probable success on the merits and injunctive relief is warranted." Id. at 29.

On appeal, the Second Circuit affirmed the grant of preliminary injunctive relief, but modified the preliminary injunction order to "allow either party to file a petition to the STB for a

declaratory judgment as to whether the operations at issue in this case are within the STB's jurisdiction." Coastal Distribution v. Town of Babylon, *supra*, 216 Fed. Appx. at 103.

The Town and Pinelawn filed a petition with the STB. Neither Coastal nor NYAR filed its own petition for declaratory relief – even though both claimed that Coastal's facility was within the STB's exclusive jurisdiction. In opposition to Defendants' petition, Coastal and NYAR did, however, submit the entire 1,229-page record from the hearings in this Court. (See Ex. B to Miller Aff.) The STB thus had before it everything this Court considered when the Court concluded that "Coastal is likely a rail carrier and is under the exclusive jurisdiction of ICCTA." Coastal Distribution v. Town of Babylon, *supra*, 2006 U.S. Dist. LEXIS 8400, at *26-27.

Based on the same evidence that was presented to this Court, the STB reached the opposite conclusion – and agreed with the ZBA. Thus, unlike the Court which found that "Coastal's transloading operations are integral to NY's railroad transportation services." *Id.*, at *27-28, the STB (like the ZBA) found that "NYAR's level of involvement with Coastal's transloading operations at the Farmingdale Yard is insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by 'rail carrier.'" (See Ex. A to Miller Aff. at p. 6.) And, in contrast to this Court's conclusion that "[t]he Coastal-NYA operations agreement at issue in this case does not essentially eliminate the railroad's involvement in and responsibility for the operation of the Farmingdale facility," Coastal Distribution v. Town of Babylon, *supra*, 2006 U.S. Dist. LEXIS 8400, at *19, the STB concluded (as had the ZBA):

Based on all of the information provided by the parties, we find that the facts of this case fail to establish that Coastal's activities are being offered by NYAR or through Coastal as NYAR's agent or contract operator. While the Operations Agreement includes a statement providing that NYAR "shall control all aspects of the Facility's transloading operations," the

agreement, when considered in its entirety, shows that NYAR has essentially no involvement in the operations at the facility. Under the parties' agreement, NYAR's responsibility and liability for the cars ends when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to NYAR's locomotive. Coastal exercises almost total control over the activities of the facility. For example, Coastal has the exclusive right to conduct transloading operations on the property. Coastal built the facility and, pursuant to the Operations Agreement, is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. Coastal also performs the marketing activities for the operations at the facility and provides and maintains all rail cars. Coastal is entitled to charge a loading fee for its transloading services, a fee which is in addition to the rail freight transportation charge payable to the railroad and over which NYAR has no control. And for use of the facility, Coastal pays NYAR a usage fee of \$20 per loaded rail car (inbound or outbound).

Moreover, Coastal, not NYAR, conducts all customer negotiations and bills and collects the loading fee from customers separately from the transportation charges, which are collected by the connecting Class I carrier (CSX Transportation, Inc.). In fact, Coastal may enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which NYAR disclaims any liability. Finally, the parties' agreement provides that Coastal must maintain liability insurance executed in favor of NYAR and that Coastal agrees to indemnify NYAR for all claims and liability arising out of Coastal's use of the premises.

In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent or under the auspices of NYAR.

(See Ex. A to Miller Aff. at pp. 5-6; emphasis added.)

On February 4, 2008, Defendants advised the Court of the STB's decision and explained that the preliminary injunction should be vacated based on the STB's determination that Coastal was not a rail carrier and was not entitled to federal preemption under ICCTA. (ECF Doc. No. 78.) A few days later, Plaintiffs sent the Court a letter of their own. Without even bothering to dispute that the STB's ruling established that they had no likelihood of success on the merits and

therefore could not make one of the showings required to be entitled to preliminary injunctive relief, Plaintiffs simply (a) stated that the STB was wrong about its own jurisdiction, (b) announced that they were going to appeal to the District of Columbia Court of Appeals, and (c) asked the Court to continue the status quo pending appeal because, in their view, Defendants would not be prejudiced. (ECF Doc. No. 79.)

Plaintiffs did not explain why they had filed a Notice of Appeal to the District of Columbia Circuit, rather than to the Second Circuit which had specifically authorized the parties in this case to seek a declaratory order from the STB because the STB was, in the Second Circuit's view, the "tribunal best equipped to decide the issues of federal transportation policy implicated here."² Coastal Distribution v. Town of Babylon, *supra*, 216 Fed. Appx. at 100. Nor did Plaintiffs explain why, if they had grounds for staying the effect of the STB's order, they had not applied to either the STB or the District of Columbia Circuit for a stay pending appeal, and were instead asking this Court for a stay.³ In keeping with the strategy Plaintiffs have pursued from the outset, they are continuing to do their best to keep this case away from the tribunals most familiar with the issues.

Plaintiffs managed to stop the STB's order from taking effect by filing an application with the STB for reconsideration or dismissal on the grounds that the STB had given pretextual reasons for its decision, that new evidence existed, and that other evidence had been overlooked. (See ECF Doc. No. 84.) They then claimed that their motion for reconsideration rendered the STB's initial decision non-final and abandoned their appeal. Ibid. Rather than debate the

² Under 28 U.S.C. § 2343, venue of an appeal from an STB order is proper in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

³ The STB has the power under 49 C.F.R. § 1115.5 to issue a stay pending judicial review.

finality issue, the Town and Pinelawn agreed to wait to make their motion to vacate this Court's preliminary injunction order until after the STB ruled on Plaintiffs' request for reconsideration. (See ECF Doc. No. 85.) The STB has now done so.

In its most recent decision, the STB specifically found that it had not overlooked any evidence in reaching its conclusion that Coastal's operation was not subject to federal preemption. Thus, the STB wrote:

[Plaintiffs] charge that the Board was wrong in its determination that Coastal is not acting as NYAR's agent. But the Board carefully considered the agency issue in the February 2008 Decision, and petitioners' arguments on reconsideration merely rehash their earlier arguments and provide no basis for us to hold differently here.

(See Ex. C to Miller Aff. at p. 6.)

Based on the STB's conclusion that "Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation" (Ex. C to Miller Aff. at p. 5), Plaintiffs cannot establish a likelihood of success on their claim that Coastal's operation is entitled to federal preemption and is not subject to state or local regulation. Accordingly, the preliminary injunction barring the Town from regulating Coastal's facility should be vacated.

ARGUMENT

SINCE PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS, THEY ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

The usual formulation of the test for preliminary injunctive relief is that the movant must prove "(1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its

favor.” Forest City Daly Hous., Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999). But, as this Court recognized, where the movant seeks to enjoin “government action taken in the public interest pursuant to a . . . regulatory scheme, the less demanding ‘fair ground for litigation’ standard is inapplicable, and therefore a ‘likelihood of success’ must be shown.” Coastal Distribution v. Town of Babylon, 2006 U.S. Dist. LEXIS 8400, at *6-7. Accord International Dairy Foods Ass’n v. Amestoy, supra, 92 F.3d 67, 70 (2d Cir. 1996); Forest City Daly Hous., Inc., supra, 175 F.3d at 152 (more stringent likelihood of success standard is applicable where claim related to town’s denial of building permit based on town’s zoning plan).

Since Plaintiffs were attempting to enjoin governmental action in this case, they had to satisfy the higher standard of likelihood of success. In light of the STB’s decision, Plaintiffs have no likelihood of success on the merits of their claim. Indeed, not only are Plaintiffs not entitled to preliminary injunctive relief, they do not even have a viable claim.

An application for a preliminary injunction must be denied where, as in this case, the movant cannot make the requisite showing of likelihood of success – even if the movant would suffer irreparable harm in the absence of an injunction. Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 172-173 (2d Cir. 2001), vacated on other grounds, 277 F.3d 635 (2d Cir. 2002) (because movant failed to show any likelihood of success, he “was not entitled to a preliminary injunction even if its non-issuance would irreparably injure him”) (emphasis added); see also Person v. New York State Bd. of Elections, 467 F.3d 141, 142 (2d Cir. 2006) (denial of preliminary injunction was proper “[b]ecause we find that Person has no likelihood of success on the merits”).

Plaintiffs moved for a preliminary injunction on the theory that ICCTA barred the Town from regulating Coastal’s operation. Under ICCTA, the STB has exclusive jurisdiction over

“transportation by rail carriers.” and the STB’s exclusive jurisdiction generally preempts state and local regulation of rail operations. 49 U.S.C. § 10501(b). According to the STB, “to be subject to the Board’s jurisdiction and qualify for Federal preemption under section 10501(b), the activities at issue must be transportation and that transportation must be performed by, or under the auspices of, a ‘rail carrier.’” (Ex. A to Miller Aff. at p. 4.)

In order to establish a likelihood of success on their preemption claim, Plaintiffs therefore had to show that Coastal qualified for treatment as a rail carrier or acted under the auspices of a rail carrier. While the Court initially found that Coastal was “likely” a rail carrier, the STB – the agency with expertise in this area – concluded otherwise. Based on its analysis of the very same evidence that this Court considered, the STB found that “the Board does not have jurisdiction over Coastal’s activities, and the Federal preemption in section 10501(b) does not apply.” (Ex. A to Miller Aff. at p. 6.) That finding disposes of Plaintiffs’ claim that the Town cannot regulate Coastal because Coastal is within the STB’s exclusive jurisdiction.

A court has the inherent power to modify its own preliminary injunction order. Sierra Club v. U.S. Army Corps of Engineers, 732 F.2d 253, 256 (2d Cir. 1984) (“A trial court’s power to modify, like the power over all its orders, is inherent”); A. Nelson & Co. Ltd. v. Ellon USA, Inc., 1996 U.S. Dist. LEXIS 7479, at *3 (S.D.N.Y. May 30, 1996) (“court has the power to vacate its own [preliminary] injunction in the event that such an order is warranted by equitable considerations”) (citation omitted); Museum Boutique Intercontinental, Ltd. v. Picasso, 880 F. Supp. 153, 161 (S.D.N.Y. 1995) (same); Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd., 74 F.R.D. 621, 623 (S.D.N.Y. 1977) (“Court will entertain the application [to vacate a preliminary injunction] under its continuing plenary power over its interlocutory orders, under which the

Court is not bound by Rule 60(b)(5)'s strict standard of 'changed circumstances' in reconsidering the earlier order but may in its discretion apply general equitable principles").

The test of whether a preliminary injunction should be vacated is the same as the test for granting a preliminary injunction in the first place. As the court explained in Museum Boutique Intercontinental, Ltd., *supra*, 880 F. Supp. at 161:

In this Circuit, when modifying or vacating a preliminary injunction, a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place.

(Citations omitted.)

Accord A. Nelson Co. Ltd., *supra*, 1996 U.S. Dist. LEXIS 7479, at *2 ("court may vacate a preliminary injunction with the same discretion it exercised in granting the decree in the first place").

Where the rationale for granting a preliminary injunction is no longer valid, the injunction should be vacated. For this reason, the court vacated its preliminary injunction in Ulico Casualty Co. v. Professional Indemnity Agency, Inc., 1999 U.S. Dist. LEXIS 8591 (D.D.C. May 5, 1999), where circumstances changed after the injunction was granted and the injunction ceased to serve its intended purpose. The court in Ulico Casualty Co. explained (1999 U.S. Dist. LEXIS 8591, at *26):

Although the explicit rationale behind the preliminary injunction was to preserve the status quo pending arbitration, the underlying purpose of the preliminary injunction was to prevent [defendant] from unfairly interfering with Ulico's renewal of its customer's insurance policies. Because all of Ulico's customer policies that [defendant] underwrote have expired, the Court finds that its original rationale for granting the preliminary injunction no longer exists. Thus, the Court will grant [defendant's] Motion to Vacate the Preliminary Injunction.

(Emphasis added.)

Similarly, in this case, the original rationale for granting Plaintiffs' motion for a preliminary injunction – that Coastal's operation was within the STB's exclusive jurisdiction and could not be regulated by state or local governments – is no longer valid. Since the STB has now issued orders which conclusively determine that Coastal is not subject to its jurisdiction and that federal preemption is inapplicable, the rationale underlying the injunction has been removed. The preliminary injunction should therefore be vacated, and the Town should be free to regulate Coastal.

Even if Plaintiffs decide to go forward with an appeal from the STB's determination, this Court's preliminary injunction order would still have to be vacated now. The pendency of an appeal does not nullify the effect of a final determination. Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S.Ct. 513, 515 (1941) ("in the federal courts, the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not – until and unless reversed – detract from its decisiveness and finality"); U.S. Information Sys., Inc. v. Ibew Local Union No. 3, 2008 U.S. Dist. LEXIS 66759, at *13 (S.D.N.Y. Sept. 2, 2008) ("Even when an appeal is pending, the final judgment being appealed has preclusive effect"); Chariot Plastics, Inc. v. United States, 28 F. Supp. 2d 874, 881 (S.D.N.Y. 1998) ("res judicata and collateral estoppel apply once final judgment is entered in a case, even while an appeal from that judgment is pending"); Raitport v. Commercial Banks Located Within This Dist. As a Class, 391 F. Supp. 584, 586 (S.D.N.Y. 1975) ("Although it is not clear whether plaintiff has filed a timely notice of appeal from Judge Knapp's [summary judgment] decision, pendency of an appeal does not detract from the finality of the judgment").

In this case, the STB has made a final determination that Coastal is not a rail carrier and not subject to federal preemption. Based on the STB's determination of this issue, Plaintiffs

EXHIBIT H

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X
In the matter of an existing rail-haul solid waste management facility that pursuant to a decision of the federal Surface Transportation Board (Docket No. 35057) is required to submit to the New York State Department of Environmental Conservation an application for a permit to operate a solid waste management facility by

ORDER ON CONSENT

COASTAL DISTRIBUTION, LLC

File No. R1-20080308-84

(Suffolk County)

Respondent.

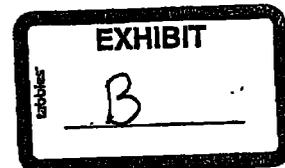
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WHEREAS:

1. COASTAL DISTRIBUTION, LLC (hereinafter referred to as the "RESPONDENT;") is a domestic business limited liability company duly authorized to conduct business in the State of New York, and retains an interest in the real property located at 1633 New Highway, in Farmingdale, Town of Babylon, County of Suffolk, State of New York, which is owned by the Pinelawn Cemetery (hereinafter the "Site"). In 1904, Pinelawn Cemetery leased the Site to the Long Island Railroad ("LIRR"), and the Site remains under lease to the Metropolitan Transit Authority (hereinafter the "MTA"), the successor in interest to, and the parent of LIRR until 2102. In 1997, New York Atlantic Railway Company acquired all freight operations from LIRR/MTA and, thereafter, entered into an agreement with the RESPONDENT; and

2. The New York State Department of Environmental Conservation (hereinafter referred to as the "DEC" or "the Department") is an executive department of the State of New York with jurisdiction over the environmental policy and laws of this state, pursuant to, *inter alia*, the Environmental Conservation Law (hereinafter referred to as the "ECL") §3-0301. In particular, DEC has jurisdiction over solid waste in the State of New York, pursuant to Articles 27 and 71 of the ECL; and

3. Pursuant to a decision dated January 31, 2008, by the federal Surface Transportation Board (Docket No. 35057), the Department has determined that the RESPONDENT must submit an application for a permit to operate a solid waste management facility, and that during the interim period the Department shall allow the RESPONDENT to temporarily continue to operate its solid waste rail transfer facility with the understanding that



the RESPONDENT shall comply with all applicable solid waste law, Article 27 of the ECL, and its implementing regulations found in Part 360 of Title Six of New York Compilation of Codes, Rules and Regulations (hereinafter "6 NYCRR"); and

4. Prior to the decision of the Surface Transportation Board, the Department had made a determination that the Department was preempted from regulating RESPONDENT'S activities and operations by federal law, the Interstate Commerce Commission Termination Act and could not require the Respondent to obtain a permit to operate a solid waste management facility; and

5. Effective October 16, 2008 the "Clean Railroads Act of 2008"¹ (the "Act") was enacted requiring each solid waste rail transfer facility to comply with all applicable Federal and State requirements preventing the abatement of pollution, protection of the environment and public health and safety, to the same extent as required for any similar solid waste management facility.

6. The Act defines a solid waste rail transfer facility to be the portion of the facility owned or operated by or on behalf of a rail carrier, where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers.

7. The Act further provides that a solid waste rail transfer facility operating as of the date of enactment of the Act has 180 days to submit, in good faith, a complete application for all required State permits, except siting permits, to the appropriate permitting agency and shall be allowed to continue to operate the facility until the permitting agency has either approved or denied the permit(s).

8. The RESPONDENT desires to enter into the within Order with the Department for the purpose of establishing temporary authority to operate a solid waste rail transfer facility at the Site, to apply for a Permit to Operate, to address operational and recordkeeping requirements that may affect the operations, activities and environmental compliance at the Site, and to otherwise comply with the provisions of the ECL and the Act.

WHEREAS, the Department has determined that it is in the public interest to enter into this Order and to have the RESPONDENT submit an application for a Permit to Operate a solid waste rail transfer facility;

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Schedule of Compliance

¹ H.R. 2095, Sec 601 et seq.

A. Submission of Annual Report for 2007. Within 30 days of the effective date of this Order, the RESPONDENT agrees to submit an annual report (Transfer Station Annual Report - DEC form) to the Department's Central Office and Region One Solid Waste Engineer for solid waste received during the year 2007. The report must contain the total amount of waste received by weight or volume, compiled by waste type, the total quantity of waste received during each quarter of 2007, the origin of the waste, and the destination of the waste.

B. Submission of Permit to Operate a Solid Waste Management Facility. Within 90 days from the effective date of this order, the RESPONDENT agrees to submit a complete Part 360 Permit Application to the Department's Region One Division of Environmental Permit Administrator. The submission must include a statement from the leaseholder, Metropolitan Transit Authority that provides an explanation of the RESPONDENT'S property rights.

C. Until issuance of a Part 360 Permit to Operate a solid waste rail transfer facility, the RESPONDENT agrees to comply with all applicable solid waste laws pursuant to Article 27 of the ECL, and its implementing regulations pursuant to Part 360 of 6 NYCRR.

D. Should circumstances arise that prevent Respondent from being granted a Part 360 permit by November 1, 2009, provided the Department has determined that the Part 360 Permit Application is complete, an extension of time to continue operating shall be granted, provided the Respondent is diligently participating in the permit review process.

II. Civil Penalty.

A. With respect to the continuing violation of operating a solid waste management facility without a permit from January 31, 2008, the Department hereby assesses against RESPONDENT a civil penalty in the amount of TEN THOUSAND (\$10,000) DOLLARS, however, RESPONDENT'S obligation to pay such assessed penalty is hereby SUSPENDED until such time as the Department determines that RESPONDENT has violated any term or condition of this Order.

B. In the event that RESPONDENT shall be required to pay the assessed civil penalty, Respondent shall do so by paying the \$10,000 to the Department in the form of a certified check or money order only, on or before such date as the Department may determine such penalty to be due and owing, but in no event shall that date be less than 30 calendar days after the date of the Department's determination that RESPONDENT shall have violated this Order; and by submitting the payment to the Department at the following address:

New York State Department of Environmental Conservation
Region 1
50 Circle Road
Stony Brook University
Stony Brook, New York 11790-3409

ATTN: Vernon G. Rail
Regional Attorney

DEC File No.: R1-20080308-84

C. The civil penalty assessed under this paragraph of this Order shall not discharge RESPONDENT from the obligation to comply with any of the provisions, terms, and conditions established under this Order.

III. Failure to Comply. RESPONDENT'S failure to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and shall be deemed to be a violation of both this Order and the ECL.

III. Reservation of Rights. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or her designee, including, but not limited to, nor exemplified by, the rights to recover natural resources damages and to exercise any summary abatement powers or authorities with respect to any party, including RESPONDENT.

IV. Termination and Reservation of Rights.

A. This Order on Consent, shall be deemed completely satisfied and shall terminate when each of the following conditions has been fully satisfied: (1) DEC's written verification of timely completion of the compliance actions required by Paragraph I above; and (2) Respondent is issued, a Part 360 permit to operate a solid waste rail facility.

B. Upon the completion of the compliance items set forth in Paragraph I, and the issuance of a Part 360 permit, DEC shall release RESPONDENT from further liability for penalties under the ECL arising from the violations set forth above. However, nothing herein shall be construed as a release or waiver by DEC of its rights to: (1) seek injunctive relief to abate any violation of law or this Order; (2) seek stipulated penalties and entry of judgment as provided in this Order; (3) seek penalties and other relief for any violations not set forth in this Order or its Appendices; (4) reallege the violations listed in this Order to obtain injunctive relief or damages in support of natural resource

damage claims; (5) seek to modify, suspend, or revoke any DEC-issued permit; (6) seek any applicable criminal sanctions against RESPONDENT or any other party; or (7) seek issuance by the Commissioner or his duly authorized representative, of a summary abatement Order against RESPONDENT. In addition, DEC reserves all such rights as it has to require RESPONDENT to take any additional measures required to protect human health or the environment.

V. Indemnification. RESPONDENT shall indemnify and hold harmless the Department, the State of New York, their representatives, employees and agents for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by RESPONDENT, their directors, officers, employees, servants, agents, successors or assigns.

VI. Binding Effect. The provisions of this Order shall inure to the benefit of be binding upon the Department and RESPONDENT and their successors and assigns.

VII. Submittals

Any and all communications or submittals that are required by this Order shall be sent to the Department at the following address:

Syed Rahman, P.E.
Regional Solid Waste Engineer
New York State Department of Environmental Conservation- Region 1
Stony Brook University
50 Circle Road
Stony Brook, NY 11790-3409

VIII. Modification. In those instances in which RESPONDENT desires that any of the provisions, terms or conditions of this Order be changed, each shall make written application, setting forth the grounds for the relief sought, to the Commissioner, c/o the Regional Attorney, 50 Circle Road, Stony Brook University, Stony Brook, New York 11790. No change or modification to this Order shall become effective except as specifically set forth in writing and approved by the Commissioner or the Commissioner's designee.

IX. Future Compliance. RESPONDENT shall conduct all activities and operations at Site in strict conformance with federal and New York State solid waste laws and regulations. For the purpose of ensuring compliance with this Order, duly authorized representatives of this Department shall be permitted access to the subject Site during reasonable hours, in order to inspect and/or require such tests as may be deemed necessary to determine the status of RESPONDENT'S compliance herewith.

- X. Unforeseen Events. RESPONDENT shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or other relief, if RESPONDENT cannot comply with any requirements of the provisions hereof because of an Act of God, war, riot, or other catastrophe as to which negligence or willful misconduct on the part of Respondent was not foreseen or a proximate cause, provided however, that the RESPONDENT shall immediately notify the Department in writing, when they obtain knowledge of any such condition and shall request an appropriate extension or modification of the provisions hereof. RESPONDENT will adopt all reasonable measures to prevent or minimize any delay.
- XI. Entire Agreement. The provisions of this Order, including Appendix A, constitute the complete and entire Order issued to RESPONDENT. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by RESPONDENT shall be construed as relieving RESPONDENT of their respective obligations to obtain such formal approvals as may be required by this Order.
- XII. Effective Date. The effective date of this Order shall be the date upon which it is signed by the Commissioner or the Commissioner's designee on behalf of the Department.

Stony Brook, New York

Dated: November 9, 2008

ALEXANDER B. GRANNIS
Commissioner of the New York State
Department of Environmental Conservation

By: 

PETER A. SCULLY
Regional Director

