

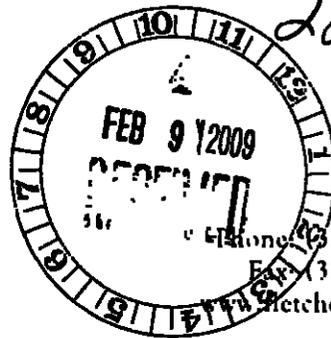
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February 6, 2009



VIA OVERNIGHT DELIVERY

Ms Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings

FEB - 9 2009

Part of
Public Record

Re Finance Docket No. 35057

Dear Secretary Quinlan:

Attached for filing in the above-captioned proceedings is the original and ten copies **New York & Atlantic Railway Company's Response to the Town of Babylon and Pinelawn Cemetery's Letter of January 20, 2009**, dated February 6, 2008. Please note that we attempted unsuccessfully to file this Response electronically, but encountered problems with the STB website.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. I enclose a self-addressed stamped envelope for your convenience in returning a stamped copy of the Response.

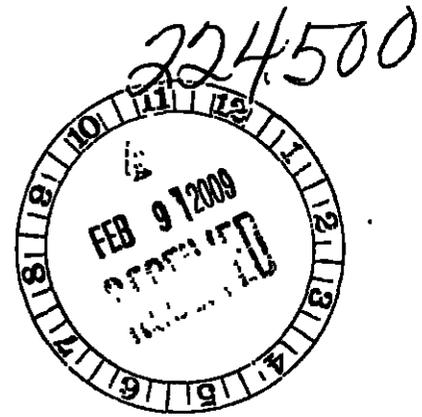
Respectfully submitted,

A handwritten signature in black ink that reads "Ronald A. Lane".

Ronald A. Lane
Attorney for New York & Atlantic Railway
Company

RAL:dg
Enclosures
cc: Parties on Certificate of Service

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35057

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
RESPONSE TO TOWN OF BABYLON AND PINELAWN CEMETERY'S
LETTER OF JANUARY 20, 2009**

**ENTERED
Office of Proceedings**

FEB - 9 2009

**Part of
Public Record**

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***Attorney for Respondent
The New York & Atlantic Railway Company***

February 6, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
RESPONSE TO TOWN OF BABYLON AND PINELAWN CEMETERY'S
LETTER OF JANUARY 20, 2009**

New York and Atlantic Railway Company (NYA)¹ responds to the letter from counsel for the petitioners dated January 20, and filed in this docket on January 21, 2009.

I. PETITIONERS' LETTER IS AN IMPERMISSIBLE REPLY TO A REPLY

Petitioners filed their petition to reopen this docket on December 18, 2008. NYA and Coastal Distribution filed their reply to that petition on January 7, 2009. Now petitioners have filed a reply to respondents' reply. This Board's rules expressly provide: "A reply to a reply is not permitted." 49 C.F.R. § 1104.13. The impermissible reply to a reply should be stricken.

In the event this Board decides to consider petitioners' reply to a reply, then NYA respectfully requests that the Board also consider the following responses:

II. THE BOARD'S NOTICE OF PROPOSED RULEMAKING DOES NOT ENLARGE THE BOARD'S JURISDICTION

Babylon places great reliance on the Board's Notice of Proposed Rulemaking dated January 14, 2009 concerning this subject, *Solid Waste Rail Transfer Facilities*, STB Ex Parte No. 684. However, the Board's publication of a Notice of Proposed Rulemaking does not affect the

¹ This pleading is filed by New York and Atlantic Railway Company for New York and Atlantic Railway Company, but Coastal Distribution LLC concurs in the views expressed.

Board's jurisdiction under the Clean Railroads Act of 2008. Despite the moniker adopted by Babylon -- "CRA Decision" -- the Notice of Proposed Rulemaking did not "decide" anything. Under the Administrative Procedure Act, this Notice of Proposed Rulemaking is merely notice to the public that the Board is considering adoption of a regulation. It invites public comment prior to adopting a final regulation. The NPR is not even a final agency action.

The jurisdiction of the Surface Transportation Board under the Clean Railroads Act is established by Congress, and the NPR or even a subsequent final rule can neither add nor detract from the jurisdiction granted by Congress. Therefore, what this Board may have said or not said in this preliminary document provides no basis for interpreting the statute.

III. THIS BOARD LACKS JURISDICTION OVER THIS DOCKET

Babylon's argument for this Board's continued authority over this case misses the point. No one here is claiming that this Board's September 26 Order was not appealable. If there were such an issue, the Board or the petitioners would have moved to dismiss the pending appeal. The question here is, "After an appeal has been properly taken, does the STB have the authority to change its previous ruling?" The answer is, "No."

IV. THE BOARD'S EXPERTISE AND AUTHORITY IS NOT IMPLICATED HERE

The Clean Railroads Act limits the Board's role to determining whether State or local land use regulations unduly interfere with or discriminate against railroad operations -- upon the petition of a State Governor for an existing facility or a railroad or operator who wants to build a new transloading facility. Congress clearly intended that the Surface Transportation Board will not be involved in waste transload issues, unless and until a dispute is brought to the Board as provided in the statute. The Board's proposed regulations likewise contemplate that when a

petition for a land use exemption is filed with the Board, the Board at that time will determine whether the facility is subject to the Board's jurisdiction under the statute.

The Governor of New York has not invoked this Board's jurisdiction. Neither New York and Atlantic Railway Company nor Coastal Distribution LLC on behalf of NYA has invoked this Board's jurisdiction. Nothing in the Act suggests that Congress intended that this Board should act as a gatekeeper to make anticipatory, threshold decisions about the applicability of the statute to a particular facility until such time as the Board's jurisdiction may be properly invoked. Gratuitous advice by this Board about the coverage of the new Act, in the absence of the preconditions definitively spelled out in the statute, would fly in the face of the careful delineation of Board authority established by Congress. Unless the Board's intervention is requested by a Governor or a railroad, the interpretation of the Clean Railroads Act is left to the judicial branch, and no specialized knowledge of the railroad industry is required to ascertain Congress' intent in enacting that legislation.

V. NYA HAS STEADFASTLY COMPLIED WITH APPLICABLE LAW

The freight franchise of the Long Island Railroad is unlike any other rail operation in the country. Because of the dense urban development and the lack of major industry on Long Island, the only significant outbound traffic is waste. The C&D debris moving through Farmingdale is the single largest traffic source for NYA, and the railroad will not abandon service to that sector or to other inbound bulk commodities. Farmingdale is the only facility on its rail line available to NYA that is suitable for bulk loading and unloading. NYA has consistently sought an operator to load and unload cars at Farmingdale to realize the potential for that site. Since bulk material handling is not a "core strength" of NYA, the railroad has preferred to retain a qualified and experienced contract operator to assure that the facility is safely and effectively operated.

Despite its initial lack of concern about the loading shed, the Town of Babylon has doggedly sought to enforce a laughable “residential” zoning restriction in the heart of a square mile commercial/industrial area. To avoid that zoning requirement, the railroad has repeatedly adjusted its arrangements to attempt to comply with the ephemeral and evolving legal standards for preemption of such zoning at a transload facility. However, NYA has steadfastly assured that the Farmingdale facility meets all health, safety and sanitary standards. There has never been any complaint about the actual operation of the facility – only its location, a location that has been providing continuous rail freight transloading services for over 100 years. Now the New York State Department of Environmental Conservation has entered into a Consent Order allowing the facility to temporarily continue operations, and the process for issuance of a formal waste transfer station permit is well under way. Meanwhile three successive New York Governors (from both political parties) have taken action to block Babylon’s quest to force the closing of the Farmingdale facility from Albany – each time finding that operation of the facility is in the public interest.

This is no rogue garbage facility. It is not a “dirty” railroad. Rather, the Farmingdale transload facility is clean and safe. What is more, the facility is critically important to the New York & Atlantic Railway. NYA would prefer to continue to contract with an experienced, skilled materials handling operator. However, if it is the only way to prevent Babylon from zoning the facility out of town and out of business, NYA will hire its own employees to perform the exact same function that Coastal Distribution performs today, with more expertise. While NYA would gladly meet any reasonable standards the STB established to extend preemption to a facility operated by its contractor, no such standards have been established, and we could only guess what the Board might approve. In any event, Congress has now intervened to establish a

different regulatory scheme. NYA and the Farmingdale facility are in full compliance with the Clean Railroads Act.

VI. THE CLEAN RAILROADS ACT DOES APPLY TO THE FARMINGDALE FACILITY

Respondents have not heretofore addressed the merits of the question that Babylon poses and then argues to this Board, because we believe that question should and will be resolved by the District Court for the Eastern District of New York. However, the Board's motion to hold in abeyance the proceedings in the Court of Appeals for the District of Columbia suggests that the Board may address the merits of Babylon's claim that the Farmingdale facility is not subject to the Clean Railroads Act. In the event that this Board determines to reopen this docket and address the merits of Babylon's argument without providing any further opportunity for NYA to submit evidence and arguments, we submit the attached Opposition to Babylon's claims.

By submitting this Opposition, NYA does not waive its position that this Board should refrain from reopening this docket, nor does NYA acquiesce in the Board's previous decisions in this docket. Regardless of this Board's opinion, the Court of Appeals will ultimately determine whether the Board's earlier decisions are wrong, and the District Court will ultimately decide whether the new statute applies to the Farmingdale facility.

CONCLUSION

The Board should exercise its discretion to deny Petitioners request to reopen this docket. In the alternative, if the Board does reopen, it should deny the relief requested because the Clean Railroads Act applies to the Farmingdale solid waste rail transfer facility.

Dated: February 6, 2009

Respectfully submitted,

By: /s/Ronald A. Lane

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NYA OPPOSITION TO MERITS OF PETITIONERS' POSITION

The Farmingdale Yard Facility Is Covered By The Clean Railroads Act

The following arguments are submitted in the event that the Board both accepts Babylon's motion to reopen this docket and addresses the merits of Babylon's claims that the Farmingdale facility lies outside the ambit of the Clean Railroads Act. By submitting this statement, NYA does not waive its position that this Board lacks jurisdiction over this docket and over this subject, nor does NYA waive any objection to further proceedings herein. The following arguments have been presented to the district court, and Babylon has already responded to these arguments in the material it has unilaterally submitted to this Board.

I. THIS DISPUTE IS LIMITED TO THE ENFORCEABILITY OF A LOCAL ZONING RESTRICTION

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 (submitted with Respondent's reply to Motion to Reopen) ¶ 4. In fact, consistent with and subsequent to enactment of the Clean Railroads Act, New York State Department of Environmental Conservation ("DEC") has inspected the facility, and found no violations of the New York Environmental Conservation Law or the DEC's substantive 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.

II. THE CLEAN RAILROADS ACT PREEMPTS LOCAL ZONING ORDINANCES AT EXISTING OPERATIONS

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 DEC 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 entered into an Order On Consent establishing those requirements, and the permit application process is well underway.

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 it down. 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 political 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.

III. THE FARMINGDALE FACILITY IS COVERED BY THE CLEAN RAILROADS ACT

Babylon claims that the STB's previous decisions, predating the Clean Railroads Act, remove this facility from the reach of the new law. That reading of the new law is incorrect.

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 straddling a section of tracks, where railcars can be placed for loading and unloading, is where solid waste, as a commodity to be transported for a charge, is transferred.

A. Owned By A Rail Carrier

The entire Farmingdale Yard and specifically the improvements erected at that yard are “owned” by the Long Island Railroad.¹ Pinelawn points out that it is the fee holder of the real estate, but that fee is subject to two extraordinarily long term leases to the Long Island Railroad dating from 1904 and extending with renewal to 2103. Even at the conclusion of the leases almost a century from now, Pinelawn will not have the right to evict Long Island Railroad if the property is still in railroad use. *See Thompson v Texas Mexican Ry Co.*, 328 U.S 134 (1946) For at least another 95 years, and sufficient for the purpose of both State permitting and the Clean Railroads Act, the Farmingdale facility is “owned by” a railroad carrier. The Farmingdale transload facility falls within the plain meaning of the words used by Congress.

B. Operated On Behalf Of A Rail Carrier

The Farmingdale facility is also operated “by or on behalf of a rail carrier”: New York and Atlantic Railway Company and/or Coastal Distribution LLC.²

Both the 2004 Transload Operations Agreement and the October 2008 Amendment specifically state in the Whereas clauses that Coastal is “operating on behalf of” NYA. The public “holding out” in the form of tariffs, signage, and transportation documents all reflect that the facility is operated “on behalf of” NYA. The sole function performed at Farmingdale Yard is

¹ Section 3.1.3 of the Transfer agreement provides:

The Freight Operator may, at its sole risk and expense, construct or relocate freight related facilities and infrastructures (such as transloading facilities, ...) within the Freight Premises All such facilities ... shall be owned by the LIRR as part of the Freight Premises.

² Contrary to the Board's January Decision, SlipOp p.4 and note 10, Respondents assuredly do contend, alternatively, that Coastal Distribution is a “carrier.” If Coastal is not holding out its services to the public as an agent of NYA, then it must be holding those services out to the public itself. With respect to C&D debris, Coastal accepts waste from any and all sources, and for a fee loads that waste into railcars as the first and necessary step in interstate rail transportation. With respect to bricks, poles, wallboard, and other bulk material, Coastal unloads railcars for delivery to other consignees for a fee paid by NYA.

loading and unloading rail cars for rail transportation over NYA. If the facility were not being operated on behalf of NYA, it would be used to transload trucks, or only transload waste generated by a particular shipper, or conduct other activities unrelated to rail transportation over NYA, or in some other way perform functions that did not inure to the immediate benefit of NYA.

The Farmingdale Yard is both "owned by" and "operated by or on behalf of" a railroad within the meaning of the Clean Railroads Act.

C. This Board's Prior Decisions Do Not Remove Farmingdale Yard From The Scope Of The Clean Railroads Act

Babylon argues that the Clean Railroads Act is not applicable to Farmingdale Yard because this Board's January and September, 2008 decisions held that Coastal was not an agent of NYA. Babylon's argument is invalid

1. This Board's Decisions Were Wrongly Decided

NYA respectfully believes that the Board's January and September, 2008 decisions were wrongly decided, and with Coastal Distribution it has petitioned the District of Columbia Circuit Court of Appeals to overturn those decisions *New York & Atlantic Railway Company v Surface Transportation Board*, No. 08-1335. That appeal is pending, and if the Court of Appeals overturns the Board's decisions, Babylon's argument will necessarily be rejected as well.

2. This Board Construed A Different Statute with Different Definitions

The January and September, 2008 decisions construed section 10501(b) of ICCTA, but petitioners now seek a construction of the Clean Railroads Act, a statute that was not even enacted until after the September decision³ The Surface Transportation Board did not have

³ The language of the statute was still in flux even until the Railroad Safety Act was passed by an overwhelming majority vote of the Congress on October 6, 2008 -- twelve days *after* the Board's refusal to reconsider its earlier decision.

before it and could not have addressed any question about the applicability of the Clean Railroads Act. Consequently the Board's decisions cannot directly determine any question under the new statute.

Petitioners urge the Board to equate the language of the Clean Railroads Act with the language (and the gloss thereon) of Section 10501(b). Babylon argues that because the Board found (erroneously we contend) that the Farmingdale transload was not operated "by railroad," that the facility *ipso facto* is not "operated by or on behalf of" a railroad. A simple comparison of the statutory language reveals the fallacy of this position. Congress enacted a patently broader definition of a solid waste rail transfer facility than the language narrowly construed by this Board in its prior decisions. In this new definition, Congress explicitly broadened the scope of a solid waste rail transfer facility beyond facilities operated "by railroad" to include also facilities operated "on behalf of" a railroad. This Board previously decided (erroneously) that Farmingdale Yard was not operated "by railroad," but the Board has never considered whether it was operated "on behalf of" a railroad. By equating the two definitions, Babylon would have the STB read the phrase "on behalf of" out of the Clean Railroads Act.

This Board's previous decisions (erroneously, we contend) focused on whether Coastal is an "agent" or is "acting under the auspices of," NYA, and on NYA's "degree of involvement." Those concepts relate to the degree of control exercised by NYA, and which this Board deemed to be insufficient to constitute transportation "by railroad" for STB jurisdiction. But there is no implication of control in the phrase "on behalf of." Webster's Third International Dictionary definition of "behalf" [on/in behalf of:] is "in the interest of: as the representative of: for the benefit of." Unabridged, Third Edition, 2002. These concepts are wholly unrelated to: "under the control of" a carrier. NYA knows of no authority to support Babylon's suggestion that the language "operating on behalf of" is the legal equivalent of "agent" or "acting under the auspices

of" a rail carrier. Certainly there is no legal requirement of minimal involvement in the activities of a person who acts in the interest of, or as the representative of, or for the benefit of a principal.

In the face of decisions very narrowly construing transportation "by railroad" by the Third Circuit, *Hi Tech Trans LLC v New Jersey*, 382 F 3d 295 (3rd Cir. 2004), and by this Board, e.g., *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA*, STB Finance Docket No. 34797 (served July 10, 2007), Congress subsequently chose to use much broader language in defining a solid waste rail transfer facility for purposes of the Clean Railroads Act. Congress did not use the statutory words "by railroad" or the gloss on those words "under the auspices of" or "under the control of" or "with the involvement of" a railroad. Rather Congress' language of "by or on behalf of" evinces its intent to sweep broadly to reach all solid waste transloading facilities on railroads, without limitations based on the contractual relationships or other distinctions developed with regard to the prior jurisdictional reach of the STB. Senator Lautenberger, sponsor and drafter of the legislation, described its scope this way:

States are granted the permanent right to enforce their public health and safety and environmental laws at facilities that handle solid waste, regardless if they are located on a railroad.

Senator Lautenberger Press Release, attached. (emph. added). The broadened definition is exactly the same as NYA and Coastal expressed in a Whereas clause in the 2004 Operations Agreement: "WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on Railroad's behalf." Congress rejected a narrow definition in establishing the scope of the definition of a solid waste rail transfer facility and adopted exactly the language that NYA and Coastal set down in their agreement four years earlier.

Congress' explicit definition of a "solid waste rail transfer facility," contained in a comprehensive regulatory structure dealing specifically with loading rail cars for solid waste

transportation, is different and broader than its general definition of the Board's jurisdiction. The STB's prior decisions regarding its former jurisdiction over a facility operated "by railroad" cannot limit the application of the new statute which affirmatively allocates federal and state authority over not only facilities operated "by a railroad" but also over facilities operated "on behalf of" a railroad. Congress plainly intended to put to rest the hyper-technical distinction that Babylon continues to pursue.

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. For the Board to engraft additional qualifications on the Congressional scheme would compound the error of the January and October decisions and fly in the face of Congress' attempt to prescribe the regulatory regime for facilities where solid waste is loaded or unloaded in rail cars.

3. *The Parties Addressed The Board's Concerns By Revising Their Relationship*

NYA has tried to assure that its transload operation is conducted by skilled and effective personnel, while keeping its relationship with its operator within the Board's jurisdiction. Following the Board's *Hi-Tech* decision, *Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ*, STB Finance Docket No. 34192(Sub-No.1) (served Aug.14, 2003), NY A and Coastal terminated their "lease" and executed an agreement that more accurately reflected their actual relationship. Following this Board's September Decision, the parties thoroughly revised their underlying relationship to address the Board's concerns. Attached hereto is a comparison of the Revised Agreement to the 2004 Agreement addressed by this Board that reflects the degree of changes in the relationship. The principle changes are summarized below:

(a) Agency and Authority To Bind Are Confirmed. New section 1.01 confirms that Coastal is the railroad's agent and has authority to bind the railroad as provided in the amended agreement. It also confirms that the railroad remains responsible for fulfilling its

common carrier obligations. Section 2.01 requires that all transportation documents produced by Coastal reflect that Coastal is acting as agent for NYA, and section 2.02 emphasizes that when Coastal collects charges from customers, it does so as agent for NYA and subsequent interline carriers. A Whereas clause continues to recite the parties intent that the facility be operated “for and on behalf of” NYA.

(b) Fulfillment of Common Carrier Obligations. New sections 1.02 and 1.05(a) confirm that Coastal must accept commodities tendered at the facility for any and all NYA customers who reasonably request service to access the national railroad system, assuring that Coastal acts in discharge of NYA’s common carrier obligation, not solely for its own account.

(c) Expanded Control of Operations. Section 1.03 further expands the explicit authority of NYA to control operations at the facility.

(d) Ownership of Assets. The amended agreement clarifies that despite confusing language in the earlier agreement, Coastal does not own any interest in the improvements it financed. The Transfer Agreement, §3 1.3, with Long Island Railroad provides that all improvements become the property of LIRR and therefore NYA has the exclusive right to possess the loading facility during the term of the Transfer Agreement. Section 1.04 recognizes that the structure is and has been NYA’s and Long Island Railroad’s structure. The inconsistent language in sections 4.02(a) and 4.01(h) has been deleted. Also, the exclusivity of Coastal’s use of the facility, which is necessitated by its small size and the volume of material handled, is limited. (It is neither safe nor effective to have more than one operator simultaneously working in the facility) The parties agreed in section 1.13 that NYA itself can use the facility at night. Also, Coastal is no longer required to supply cars for loading, old section 1.07.

(e) Setting Fees. The parties agreed in section 3.01 that NYA will set the Transloading Fees, and those fees will apply for all NYA customers. Although Coastal retains that Fee, it still must pay NYA \$20/car as a Usage Charge for the use of the facility.

(f) Money Handling For outbound moves, Coastal collects all transportation charges and remits NYA's usage fee to NYA and remits the balance to the interline carrier (who pays NYA its division). Section 3.01. For inbound moves, NYA collects its division and pays Coastal its Transloading Fee less NYA's Usage Charge.

(g) Indemnity. The parties revised the indemnification provisions of the agreement such that each party simply indemnifies the other for the party's own negligence or misconduct.

The Board previously expressed concern that NYA was not holding out the Farmingdale facility to the public. The parties have now addressed that concern. Numerous consignees from among the shipping public (unrelated to Coastal) have in fact used the Farmingdale facility for unloading bulk materials and similar cargos. (See color photos of bricks, telephone poles, wallboard in the record.) NYA holds out to the public the transloading facility at Farmingdale through its "tariffs" on its website. NYA has now explicitly required Coastal Distribution to load and unload C&D and other freight for any NYA customer on the same terms as anyone else and as set by NYA. NYA has been and still is holding out the transloading service to the public for a charge.

NYA has now expressly affirmed that it retains full liability for the operations at Farmingdale. NYA has insisted on these changes in an attempt to meet this Board's concerns about the agreement.

With these revisions, it can no longer be said that Coastal is not acting as an agent or under the auspices of NYA, or that NYA's level of involvement with Coastal's transloading is insufficient to make Coastal's activities an integral part of NYA's provision of transportation by

rail carrier. Of sole importance here, however, the relationship between New York and Atlantic Railway Company and Coastal Distribution demonstrates that the Farmingdale facility is "operated by or on behalf of" NYA. Because it is both "owned" by and operated by or on behalf of a rail carrier, the Farmingdale transload facility is a "solid waste rail transfer facility" within the meaning of the Clean Railroads Act.

CONCLUSION

If this Board takes it upon itself to address the question unilaterally posed by Babylon and Pinelawn, instead of allowing the judiciary to resolve this matter, then the Board should opine that the Farmingdale facility is covered by the Clean Railroads Act of 2008.

Dated: February 6, 2009

Respectfully submitted,

By. /s/Ronald A. Lane

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*Attorney for Respondent
The New York & Atlantic Railway Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2009, I have caused to be electronically filed with the Surface Transportation Board the foregoing **RESPONSE TO TOWN OF BABYLON'S AND PINELAWN CEMETERY'S LETTER OF JANUARY 20, 2009** and have served a true and correct copy thereof upon the following parties:

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via deposit in the United States Mail chute located at 29 North Wacker Drive, Chicago, Illinois, with proper postage prepaid.

/s/Ronald A. Lane

Newsroom: Press Releases

Press Release of Senator Lautenberg

Legislation Requiring Clean Up Of Rail Solid Waste Sites Becomes Law

Lautenberg Menendez, Pallone Lead Effort to Close Dangerous Environmental Loophole

Contact: Lautenberg Press Office 202 224 3224
Monday, October 20, 2008

NEWARK, N J – Last week, legislation authored by U S Sen Frank R Lautenberg (D-NJ) to allow states to regulate solid waste processing facilities along rail lines was enacted into law. The law closes a federal loophole that prohibited states from enforcing environmental, health and safety regulations at these rail sites. The bill, the *Clean Railroads Act of 2008*, was included in a larger package of rail legislation signed by the President. It was cosponsored by Sen Robert Menendez (D-NJ) and championed in the House of Representatives by Rep Frank Pallone (D-NJ-06).

"Our law will save our backyards from becoming junkyards for industry. This is a major victory for New Jersey—it will allow our communities to protect residents from fire hazards and pollution caused by waste on rail sites," Sen Lautenberg said. **"I am proud we permanently opened the door for New Jersey to clean up this waste."**

Sen Menendez said, **"New Jersey is now back in charge of this New Jersey issue, just as it should be. When it comes to safety, health, environmental and waste transportation issues, we cannot allow the bureaucracy of Washington trump the well being of our citizens. This is an important achievement for our health and our environment."**

"This new law sends a strong message that Washington is no longer going to allow the Surface Transportation Board to be the sole regulator of waste transfer facilities," Rep Pallone said. **"Thanks to this law, state and local governments will now have the authority to protect their communities and the environment by regulating these facilities that have flown under the radar for too long."**

This federal loophole has allowed railroad companies to pile trash, largely consisting of construction debris, at times two stories high. These hazards represent serious health, safety and environmental risks to residents who live near these sites, including groundwater contamination and fires.

Courts and federal agencies have ruled against New Jersey's regulators when trying to enforce the state's public health, safety and environmental standards on rail sites. These rulings preserved the federal loophole by basically protecting the federal Surface Transportation Board (STB) as the only agency that can oversee rail waste sites, however, the STB does not actively regulate them. No federal safety or environmental standards exist for these sites and the agency has no inspectors. In fact, the STB has prevented any state from regulating rail solid waste sites within their borders.

The new law will ensure that New Jersey Department of Environmental Protection has the authority and leverage to oversee these waste sites.

Under the *Clean Railroads Act of 2008*

- States are granted the permanent right to enforce their public health and safety and environmental laws at facilities that handle solid waste, regardless if they are located on a railroad.
- The STB may continue to site railroad facilities in order to maintain a unified interstate railroad system of transportation, but may not allow the operation or creation of a rail solid waste transfer site in environmentally-sensitive areas, including the Pinelands National Reserve or in protected areas of New Jersey's Highlands region, and
 - Existing facilities will be required to come into compliance with applicable state laws within 90 days.

There are 9 existing sites in New Jersey

- North Bergen, Hudson County (4),
 - Paterson, Passaic County,
 - Newark, Essex County,
 - Passaic, Passaic County,
- Pleasantville City, Atlantic County, and
 - Hainesport, Burlington County

And at least seven more have been proposed in the State

- Paterson, Passaic County,
- North Bergen, Hudson County (2)
- Winslow Township, Gloucester County,
 - Red Bank, Monmouth County,
 - Freehold, Monmouth County, and
 - Mullica Township, Atlantic County

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

TRANSLOAD FACILITY OPERATIONS AGREEMENT

This ~~TRANSLOAD FACILITY OPERATIONS AGREEMENT, TRANSLOAD FACILITY OPERATIONS AGREEMENT~~, effective as of ~~October 1, 2008, August 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, 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, 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, WHEREAS~~, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

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

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

~~WHEREAS, WHEREAS~~, the services rendered by COASTAL to any Customer shall be limited to providing transloading services between rail and truck and rail for solid waste and bulk such non-hazardous freight (as may be agreed upon as provided herein, such freight being referred to generally as "Commodities"), and contracting for transportation on behalf of Railroad with customers of Railroad in the discharge of RAILROAD's common carrier obligations, this agreement.

AGREEMENT

NOW, THEREFORE, 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~~ shall, and shall continue to have the exclusive right to, transload Commodities between trucks and rail cars at the Facility, for and on behalf of RAILROAD. ~~Railroad~~, pursuant to the terms of this Agreement COASTAL will provide this service to any. This right and obligation shall not be construed as a property interest in the Yard or the Facility, and is subordinate and all Customers of RAILROAD who reasonably request this service, either at subject in all respects to the terms and conditions of the request of the Customer or at the request of RAILROAD. ~~Transfer Agreement.~~

1.03-1-02 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 operations. RAILROAD shall have the right to renew 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.

1.041-03 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, ~~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.

~~1.051.04~~ Rail Service: Railroad shall provide reasonable rail service to the Facility.

~~1.05~~ Custody of Lading and Equipment: RAILROAD's responsibility and inability 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 all Customers of the RAILROAD requiring such service to access the national railroad system. Such services shall include only those Commodities, commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD and 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 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, of RAILROAD upon notice from Railroad.

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

~~_____~~(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not provided owned by RAILROAD) reasonably necessary to conduct 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 consent prior to bringing any such equipment 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 Yard.~~

~~(d) Facility. Unless RAILROAD otherwise consents 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 on route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.~~

~~(e) 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 and Maintenance: RAILROAD will remain responsible for the inspection and maintenance of all tracks within the Facility, 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. 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, No Selection of Landfill: In the event that the Commodities include solid waste ~~construction and demolition debris~~ neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall ~~assume, participate in, or take any obligation, active interest in, the site selection for the storage or disposal of any the materials transported hereunder. RAILROAD shall have no obligation with regard to disposition of Commodities tendered to it for transportation other than to deliver them# to the consignee or to another railroad for interchange. To the extent that COASTAL may enter into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not accept solid waste Commodities for shipment without having obtained both a copy of a~~ 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 for the it or any Customer enters into with a destination disposal facility obligating the said destination disposal facility to accept the landfill or treatment site prior to shipping Commodities, and visual confirmation to that the Commodities comply with any specifications set forth in said contract. landfill or treatment site.~~

1.10. ~~Commodities~~Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any ~~Commodities~~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, ~~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~~ 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: ~~Because it is neither feasible nor safe to have more than one operator~~ So long as the terms of this Agreement remain in a single shed, using a single scale, loading railcars on a single track, effect, 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) (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. ~~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 clearly and specifically state that RAILROAD does not take title to any Commodities.

~~(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 collective any fees or charges on its own behalf under any Disposal Agreements.~~

2.02. Billing and Collection. Unless otherwise directed by RAILROAD, COASTAL, as collection agent for RAILROAD, COASTAL 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 Loading Fees (as defined below) for loading or unloading services, rendered to the

~~Customer by COASTAL. COASTAL shall make such payments remit to RAILROAD within two business days of clearance of funds in COASTAL'S account 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. 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 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 charge a Loading Fee ("Loading 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, which fee shall be sufficient in addition to the rail freight transportation charge otherwise payable 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 RAILROAD for loaded freight car movements.

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

3.03 Payment. All invoices and/or Usage 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, at its sole cost and expense, obtain any applicable required permits, approvals, licenses, waivers, consents or other governmental authority required to conduct transload operations at 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 such any additional 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, ~~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) If COASTAL fails to take action required under this agreement (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/or the 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~~ 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~~ 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. 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. ~~Initial Term.~~ The Agreement shall expire on October 1, 2017; ~~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 transload 3,200 carloads in any Contract Year, ~~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 October 1, 2017 ~~the first anniversary of the Effective Date~~, unless COASTAL is in material breach of this agreement. ~~In Provided however, in no event will this agreement be renewed or extended to apply after the expiration, termination or non-renewal of the Transfer Agreement, March 31, 2017.~~

~~5.03~~ 5.04 Dangerous or Unlawful Condition: Notwithstanding section ~~5.02~~ 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.

~~5.04~~ 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, except those obligations already accrued at the time of termination, shall immediately cease. ~~—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 ~~indemnifies, 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 Coastal's negligence ~~the condition, existence, use or misconduct, 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 the negligence stored at the Facility and including the loss or misconduct of Coastal's 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 or agents, 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 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.

7.027-01 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.

7.037-02 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**

7.047-03 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.

7.057-04 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.

7.067-05 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.

7.077-06 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.

~~7.08 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.~~ ~~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 operation of the Facility ~~subject matter hereof~~ in any way. However, the letter agreement entered into by the parties ~~in on June, 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.

~~7.097-08~~ Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

~~7.107-09~~ 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.

~~7.117-10~~ 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.

~~7.127-11~~ 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: _____

By: _____

Its: Member

Its: President