

ORIGINAL

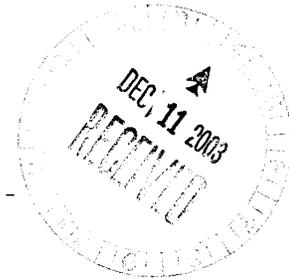
209602

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

STB FINANCE DOCKET NO. 34442

MARITIME RAIL, LLC
-- LEASE AND OPERATION EXEMPTION --
MEADOWS INDUSTRIAL TRACKS



REPLY TO PETITION TO REJECT
AND COMMENTS OF MARITIME RAIL, LLC

ENTERED
Office of Proceedings

DEC 12 2003

Part of
Public Record

Submitted by:

John D. Heffner
JohnD. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Counsel for Maritime
Rail, LLC

ORIGINAL

Dated: December 11, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34442

MARITIME RAIL, LLC
-- LEASE AND OPERATION EXEMPTION --
MEADOWS INDUSTRIAL TRACKS

REPLY TO PETITION TO REJECT
AND COMMENTS OF MARITIME RAIL, INC.

INTRODUCTION

On November 25, 2003, Maritime Rail, LLC ("Maritime") filed a notice with the Board pursuant to 49 U.S.C. 10901 and 49 CFR 1150.31 for an exemption to lease and operate a line of railroad approximately 2,500 feet long located on the South Kearney Peninsula in the Town of Kearney, Hudson County, NJ. By decision served December 1, 2003, and with Maritime's concurrence, the Board extended the effective date of this exemption until December 9, 2003, in response to concerns expressed by the New Jersey Department of Environmental Protection ("NJDEP") in its request for a temporary stay. Thereafter, New Jersey Rail Carrier LLC ("New Jersey Rail" or "Petitioner") filed a Petition to Reject Maritime's exemption notice and the Board issued a second decision dated December 8 seeking certain additional information and setting December 11 as the deadline for that submission. Maritime submits this filing

DEC 11 2003
RECEIVED

ENTERED
Office of Proceedings

DEC 12 2003

Part of
Public Record

in response to that decision.

THE DECEMBER 8 DECISION

The Board seeks Maritime's response to the following:

1. Maritime should clarify precisely how the Exhibit A-1 map (which shows tracks #1, #2, #3, and #4) ties in with the Exhibit A map;
2. Maritime should also clarify whether 2,500 track feet is the distance of all four tracks (#1, #2, #3, and #4) or only the first three tracks (#1, #2, and #3);
3. And Maritime Rail may also offer any other clarifications that may be suggested by the remarks made in New Jersey Rail's rejection petition.

In an effort to respond to the Board's inquiry and to resolve other questions that may arise, Maritime submits the verified statement of its member, William A. Hooton as Exhibit A to this filing. It also attaches as Exhibits B and B-1 maps to illustrate the subject rail lines.

ARGUMENT

Apparently feeling its competitive position threatened by Maritime, New Jersey Rail urges the Board to reject Maritime Rail's exemption claiming that it contains false and misleading information and is therefore void *ab initio*. New Jersey Rail has

not satisfied the Board's oft-stated standard for rejecting and/or revoking exemption notices and its request for relief should be denied.

Maritime Rail seeks to exempt its proposed operation under the "class exemption" regulations originally promulgated by the Board's predecessor, the former Interstate Commerce Commission in 1985, Ex Parte No. 392, Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985). In adopting that class exemption, the ICC ruled that transactions involving the acquisition and/or operation by start up "noncarriers", primarily class III railroads, should be exempt from the formal authorization provisions of 49 U.S.C. 10901 because these transactions generally satisfy one or more of the rail transportation policy goals of the Interstate Commerce Act and are either matters of limited scope test and/or will not result in an abuse of market power under 49 U.S.C. 10505(a) [now 49 U.S.C. 10502(a)]. The ICC and now the Board reserved the power to revoke an exemption (or reject an exemption request before it becomes effective) if regulation is required to carry out the Act's rail transportation policy. But the party seeking either revocation or rejection has the burden of proof and petitions to revoke (or reject) must be "based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted." Moreover, the ICC's and now the Board's

rationale for interpreting Section 10505 [now 10502] applies equally to both the granting and revocation of an exemption. Cf., Minnesota Comm. Ry., Inc.-Trackage Exempt.-BN RR CO., 8 I.C.C. 31, 35, 36 (1991). At no point in its three page filing does Petitioner even claim that Maritime fails the statutory test for an exemption under section 10502 or state that its operation should be regulated. Nor Petitioner does urge that Maritime's exemption request should be denied because it has in some way abused the Board's exemption procedures as a "sham transaction." Id. at 37. While New Jersey Rail claims that Maritime's notice should be rejected for containing false and misleading information, it does not indicate in what manner the notice is deceptive.

Rather, the gist of Petitioner's argument is that Maritime's notice should be rejected because it failed to supply information on the following points:

1. Details of an agreement. As Petitioner knows, the Board's regulations merely require the applicant to indicate that an agreement has been reached or when an agreement will be reached. As the Board stated in FD No. 34085, Keokuk Junction Railway Co.-Acquisition and Operation Exemption -West End of Toledo, Peoria & Western Railway Corporation (slip op. served August 23, 2001), "[t]he Board's authority to exempt acquisitions is merely permissive. Permitting the exemption to become

effective will not alter any rights to the line that the parties currently have. Rather, it merely allows parties to exercise rights under the governing federal statute [footnote omitted] to acquire and operate trackage if they are otherwise lawfully able to acquire them. The Board's exemption of an acquisition neither adjudicates property rights nor confers involuntary trackage rights over the line that is the subject of the exemption. Id. at 2. In response to that provision, Maritime stated that it is negotiating with BASF and Jon-Jac to lease the underlying right of way. In its supporting letter, BASF stated that "...it anticipates leasing appropriate rights of way over the property, land and facilities to Maritime Rail for the installation and operation of the railroad." As Mr. Hooton indicates in his statement, Maritime will tender letters from both BASF and Jon-Jac indicating more specifically when it anticipates entering into property leases with these parties.

2. Mileposts. Maritime has not provided milepost information for a very simple reason, none exist. The trackage which Maritime proposes to operate is currently an under utilized industrial spur without mileposts. As the Board knows, many such tracks lack mileposts. But the real significance of the "no milepost" argument is the allegation that Maritime will need to use right of way on the former Columbia Terminals property leased by New Jersey Rail or trackage of Consolidated Rail Corporation

("Conrail") required to serve Veckridge Chemical. In fact, Maritime does not plan to operate over the Columbia Terminals property and will interchange its freight with Conrail at the property line where Conrail's right of way begins. Maritime has initiated discussions with Conrail leading to establishing interchange and other operating arrangements.

3. Brief summary. Petitioner's last objection is that Maritime's transaction summary is deficient because Maritime (1) does not have an existing traffic base, (2) its traffic is based upon a contract which BASF hopes to secure, (3) the turnout required to serve BASF has yet to be constructed, (4) the traffic destinations, consignees, and volumes are unknown, and (5) there is no crane for transferring inbound containers from barges to rail cars. In Octoraro Ry., Inc.-Operation-Southeastern Pennsylvania, 363 I.C.C. 991, 997-9 (1981), the ICC recognized early on in the development of the current short line railroad movement, that many start up short lines are based upon long range customer plans which are necessarily uncertain or even speculative and may require substantial restoration before a line can become operational. See, Ex Parte No. 392, Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, supra, At 817. In fact, New Jersey Rail will not be satisfied until Maritime satisfies its desire for a full character and financial fitness screening, a requirement the ICC specifically rejected when it

adopted the class exemption regulation. This information goes well beyond what the Board requires in a notice of exemption, and even beyond what the ICC historically required of new short line railroad ventures. Nevertheless, in an effort to give the Board as much information as possible, Maritime has arranged for Mr. Hooten to address these points in his statement.

CONCLUSION

Accordingly, Maritime requests that the Board deny New Jersey Rail's Petition to Reject and allow the exemption to become effective on January 9, 2004, once Maritime satisfies the concerns of the New Jersey Department of Environmental Protection.

Respectfully submitted,



John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 253-4180

By its Counsel

Dated: December 11, 2003

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have transmitted a copy of the foregoing "Reply to Petition to Reject" by hand to Fritz R. Kahn, counsel for New Jersey Rail, and by fax and first class mail to Edward Greenberg, counsel for the New Jersey Department of Environmental Protection, this 11th day of December 2003.

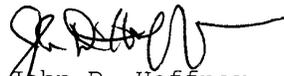

John D. Heffner

EXHIBIT A

**VERIFIED STATEMENT
OF
WILLIAM A. HOOTON**

William A. Hooton, being duly sworn, deposes and states as follows:

1. My name is William A. Hooton. My office address is 505 Milltown Rd, North Brunswick, NJ 08902. I appear here on behalf of Maritime Rail, LLC ("Maritime") for whom I serve as Member and Director of Business Development. My duties for Maritime include identifying and qualifying suitable properties for the development of barge and rail services and identifying and qualifying customers for those services. In addition, I represent Maritime Rail in their dealings with governmental agencies. Prior to assuming that position, I was VP and COO of FTZ of Orange, Ltd (1993 -2001); prior to that, President of the Bridgeport Foreign Trade Zone Development Corporation (1987-1993); and prior to that, I was Managing Director of Overocean Transport Corporation, an NVOCC (1984-1987).
2. I have read the Board's decision dated December 8, 2003, in STB Finance Docket No. 34442, entitled Maritime Rail, LLC-Lease And Operation Exemption-Meadows Industrial Tracks and am familiar with the facts and authorized to make this statement. The Board seeks Maritime's clarification on the following two matters: (1) how the Exhibit A-1 map (which shows tracks #1, #2, #3, and #4) ties in with the Exhibit A map and (2) whether 2,500 track feet refers to the distance of all four tracks or just the first three tracks (marked #1, #2, and #3). Finally, the Board's decision asks Maritime to offer any additional clarifications that may be suggested by remarks made in the rejection petition filed by New Jersey Rail, LLC ("New Jersey Rail"). I have been asked by my Counsel to prepare an answer on behalf of Maritime.

3. With respect to the Board's first question, I am submitting as ~~Exhibit B~~ ^{Exhibits B and B-1} a new map which shows the relationship between the tracks depicted in the maps previously furnished as Exhibits A and A-1 to the original notice of exemption filing. The Meadows Industrial Track #1 (a/k/a Central Avenue Branch) is a short branch line which comes out of the Conrail Meadows Yard in South Kearney, NJ, at the point shown by the arrow and proceeds in a first in a westerly direction before making a right turn due south and parallel to Central Avenue in the map attached to my statement as Exhibit B-1. This track then passes under the Pulaski Highway (marked as route I-9) on map B-1. Two blocks south of Lincoln Highway (marked truck route I-9) the Meadows Industrial track #1 curves to the right near the property of Columbia Terminals. It then connects with several other tracks to the left. One of these tracks goes through a gate and makes a left turn and then a right turn before heading west. At this point the Meadows Industrial track connects with another track, which proceeds east past the facilities of Veckridge ^{Conrail} Chemical (an occasional customer which receives one to two carloads per month) and then into a gate onto the property identified as Columbia Terminal Southside. If I were standing on the track next to Veckridge Chemical at the point of switch with the Meadows Industrial Track #1 facing west, I would notice that the Meadows Industrial Track #1 divides into three tracks. It is these tracks plus one additional track curving towards the bottom of the page by the word "BASF" (which needs to be rebuilt) which constitute the tracks to be leased and operated by Maritime. Of these track #1 (identified on map A-1 submitted with the notice of exemption as the "car loading track" is an extension of the Meadows Industrial Track #1), track #2 is identified on that map as the "10-car storage track", and track #3 is identified on that map as the "10-car capacity track for holding empties while loads are pulled." Contrary to Maritime's previous representations, all of these tracks lie on the property of Jac-Jon Associates. Finally, the

track (track #4), which curves, to the South lies on BASF property. This track has been paved over and needs to be rebuilt.

4. The Board has also asked whether the total distance involved -- 2,500 track feet -- includes tracks #1-4 or just tracks #1-3. The 2,500 feet distance just refers to the first three tracks (#1-3). Track #4, once rebuilt, will add an additional 1,000 feet of distance. There are no mileposts for this trackage, as is commonly the case with industrial and switch tracks. However, once these tracks are in service, Maritime will operate them as a "line of railroad", originating and receiving freight tracks for interchange with Conrail.
5. Maritime Rail has verbal agreements with both BASF and Jac-Jon Properties for the use of their properties in relation to this proposed rail development. Maritime Rail has ~~and~~ presented a support letter from BASF indicating its intent to lease right of way and facilities to Maritime. Maritime anticipates receiving a similar letter from Jac-Jon Properties within 30 days and will present that letter when received. The individual who heads Jac-Jon Properties is currently on vacation and the Board's expedited schedule make it difficult to present this material today. Maritime anticipates obtaining a deed of easement and/or a lease for the proposed rail activities with Jac-Jon Properties and BASF within 90 days.
6. Our petition and our operations do not require or anticipate leasing land and/or track from Conrail nor will Maritime operate on tracks extending over Columbia Terminal's property leased by New Jersey Rail Carrier, LLC. Rather, Maritime will have an interchange agreement with Conrail. The interchange of railcars will effectively take place at the property cut line on the Jac- Jon property. Our engine(s) will operate on the Jac-Jon/BASF side of the cut line only. Conrail will operate as it presently does over the Meadows Industrial Track #1 to serve us and other customers, including the adjacent and active Veckridge Chemical facility.

7. These rail assets and services are being developed and this exemption is being requested in direct response to the expressed needs of BASF and its tenant BioEarth. These companies – Maritime’s initial customers-- are partnering to develop a state of the art soil and sediment cleaning facility and beneficial use materials manufacturing facility at their site. Soil cleaning activities have been ongoing at the site for the past two years. Sediment cleaning activities will begin in 2004. BioEarth is presently bidding on a 75,000 yard ‘Sediment Cleaning Demonstration Project’ sponsored by the EPA and the New Jersey DOT Maritime Division. Their process is one of five out of four hundred that have been selected, tested and certified by the EPA, the Army Corps of Engineers and the State of New Jersey, after three years of trials. The NJDOT Pilot Project is scheduled to commence in the second quarter of 2004. The initial transportation needs for this project will require the use of approximately three hundred rail cars during over nine months.
8. If the technology and the site prove viable at a commercial scale, it is anticipated that up to 1,000,000 yards of port dredge material per year for the next ten years will transit the site and be redistributed by rail. If the process and logistics prove successful, it will greatly facilitate the critically important NY/NJ Port Deepening Project sponsored by the Army Corps of Engineers and the PA of NY/NJ. BioEarth has contracted with Maritime Rail to provide the rail and logistics services necessary to develop and sustain these projects. To successfully bid on the Demonstration Project and to cost effectively move cleaned product off the site without increasing truck traffic on already congested metropolitan highways will require the development and operation of the rail infrastructure and services anticipated in this petition.
9. Further and as a consequence of Maritime’s relationship with other existing short line railroads and transload facilities on the West Coast and in the Mid-West (Stockton

Transmodal in Stockton, Ca. and Riverport Railroad in Savanna, Il., respectively), Maritime has contingent commitments (contingent upon Maritime demonstrating the existence of and capacity for a 'food grade' rail transload facility in Northern New Jersey), to serve their customer's business needs. Additionally, Maritime has identified and qualified commercial demand for a rail/barge feeder service from Northern New Jersey to New England through the port of New London. The development of these services will support the expressed goals of the Port Authority of NY/NJ and the goals of the State of New Jersey as identified in the State's 'Port Way Project'. Maritime has invited the direct participation of the Town of Kearny and River Terminal, which owns over four hundred acres of contiguous property on the South Kearny peninsula, in the development of Maritime's rail and barge intermodal assets and services. The agreed goal is to reconfigure the rail infrastructure and services on the peninsula to maximize benefit and utility not only for Maritime, BioEarth and BASF but also for the other businesses, industries and property assets on the peninsula. The ultimate size, configuration and use of Maritime's rail infrastructure and services will be determined by the extent and success of these developments. However, there is already an immediate, clear and demonstrable demand for the 'exempted' rail services for which we are petitioning. There is a reasonable likelihood that that demand and use will increase exponentially in the not far distant future.

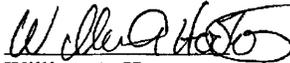
10. Before concluding, I wish to comment on New Jersey Rail's interest in this matter. It is my understanding that New Jersey Rail seeks to establish itself as a new short line railroad to serve customers located inside the adjacent Columbia Terminal facility. Although I am not intimately familiar with their plans, it is my understanding that New Jersey Rail initially seeks to haul bio-solids, waste matter. I want to distinguish Maritime's business goals from those of New Jersey Rail. Maritime's initial traffic will

be cleaned dredge sediment, not bio-solids. Maritime has no interest in handling bio-solids. Longer term, Maritime seeks to develop rail-barge traffic including intermodal containers moving by ocean or along the East Coast. To the best of my knowledge, this is not a type of traffic contemplated by the principals of New Jersey Rail.

VERIFICATION

I, William A. Hooton, Member of Maritime, LLC, declares under penalty of perjury, under the laws of the United States of America, that the above statement is true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of Maritime Rail, LLC.

Dated at Orange County, NY, this 11th day of December 2003


William A. Hooton

LENORE PRIVETT
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01P6809088
QUALIFIED IN SULLIVAN COUNTY
COMMISSION EXPIRES - MAY 16, 2006

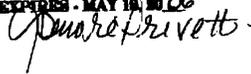
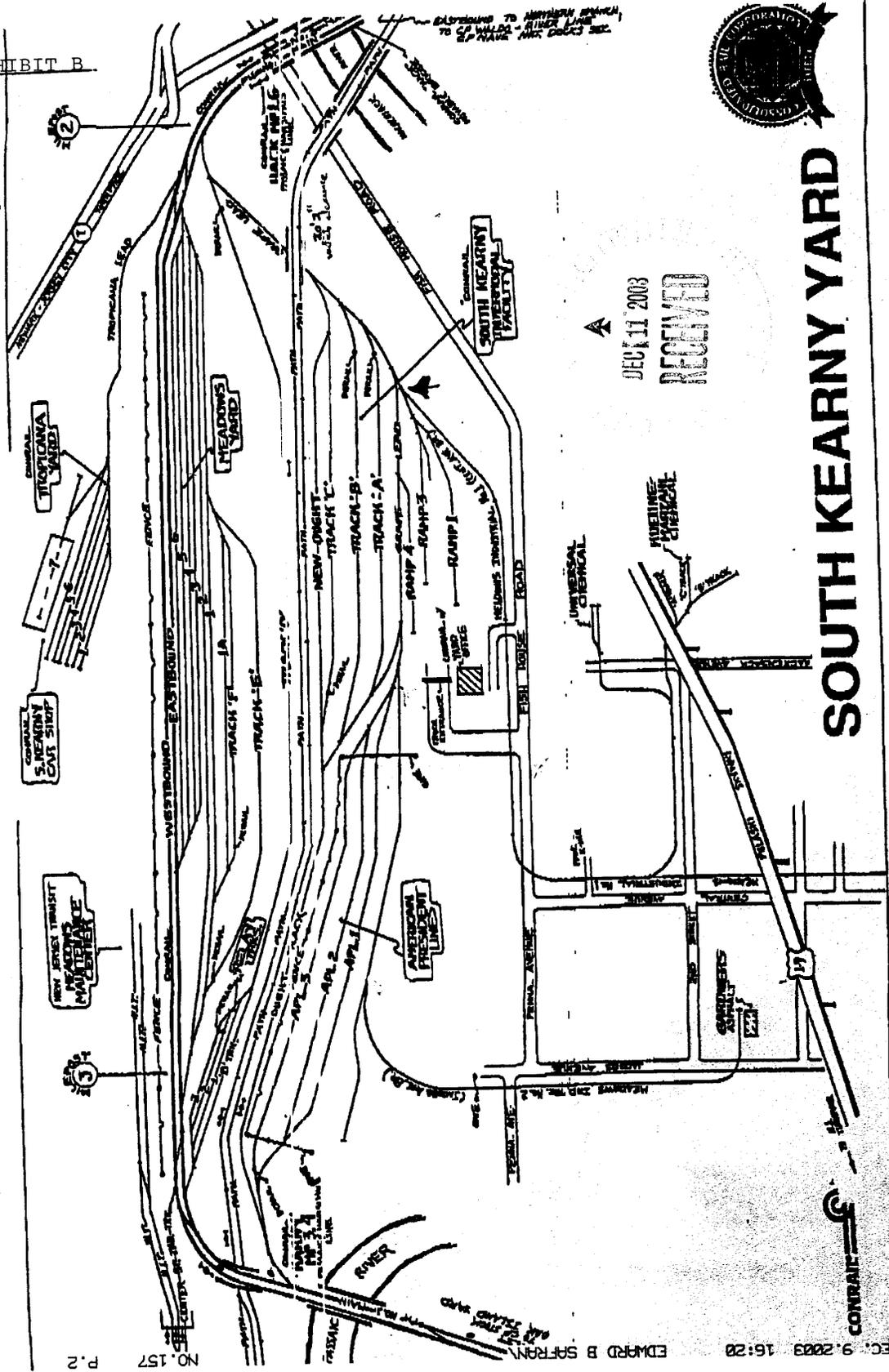
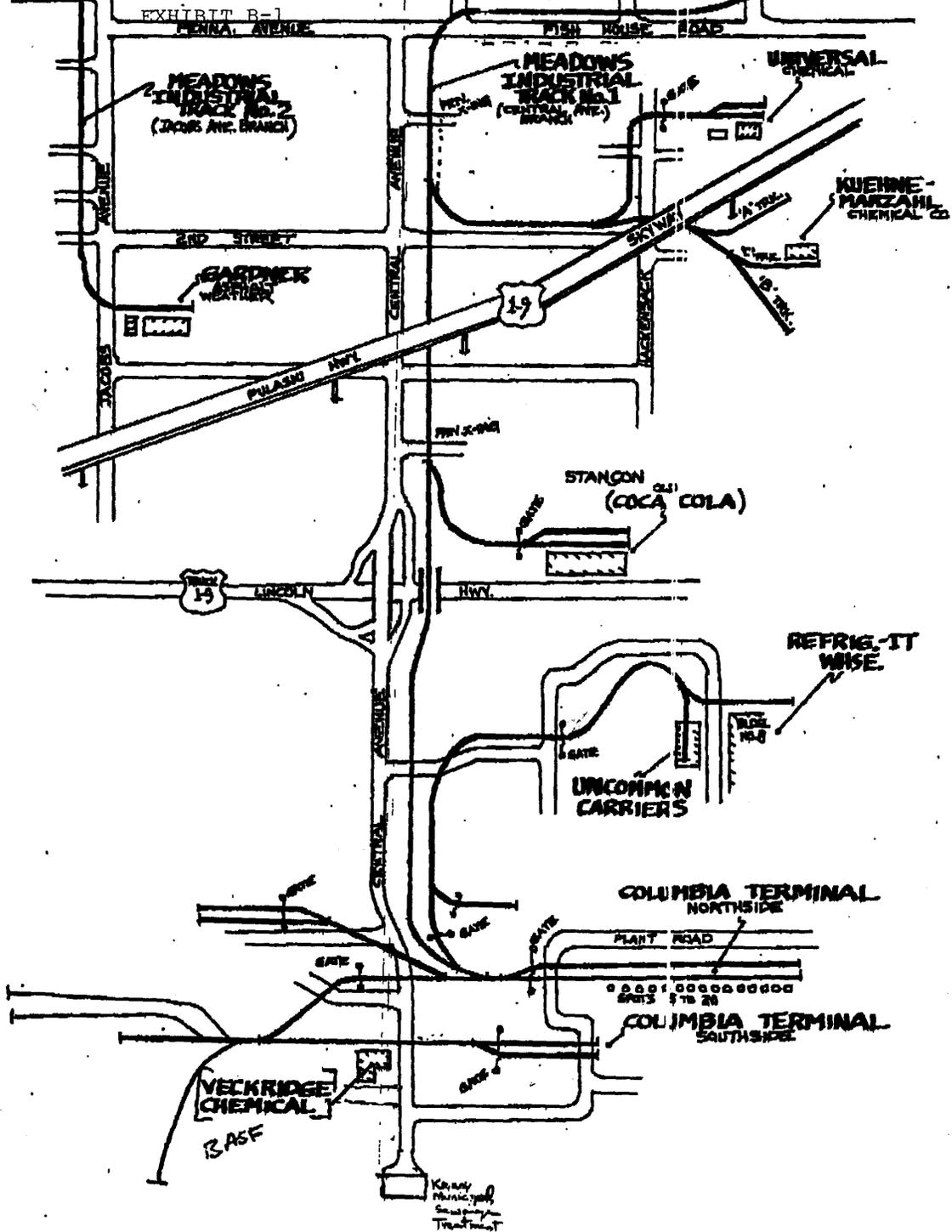


EXHIBIT B



SOUTH KEARNEY YARD

DEC 11 2003
RECEIVED



MEADOWS INDUSTRIAL TRACKS

